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Dehradun Law Review

A Journal of
Law College Dehradun
Uttarakhand

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EDITORIAL

It gives us immense pleasure that on the occasion of Law Day 2010, we are coming up with the second issue of Dehradun Law Review. 26th November is celebrated as Law Day every year and the journal on this occasion is an endeavour to make the day meaningful for the students and faculty members of Law College Dehradun. It is to our satisfaction, that the journal is gradually taking its desired shape as was visualized at the time of its launching. Combination of wall Journal, web Journal and book Journal remains a unique feature of the journal. The abstracts of the articles are placed on the wall of the college whereas the complete journal is available on the web site of the college and it is placed in the library in book form. 'Know Your Legal Luminaries' is a special feature of this journal, wherein, every issue will contain biographical notes on two eminent personalities who are regarded pioneers among thinkers, philosophers and jurists.

Revolutionary changes are taking place in the legal education of the country. These are evidently good signs for the future of the profession. In my stint of nine years in this college, I see a discernible difference in the qualititative aspect of the students taking admission in law. Now a considerable number of students are taking up study of law as their first choice. Active participation of students in the moot court competitions, Para- legal activities and debates has become the order of the day. Institutions imparting legal education need to provide infrastructure and facilities to the students to facilitate these activities. Above all I feel we need to provide them a platform to polish their research and creative aptitude. A law journal of the college with active participation of faculty members as well as students may well serve

this end.

Delay in the justice delivery system and pendency of cases has reached an alarmingly critical stage and is on the verge of paralyzing our judicial machinery. Frustration is writ large on the faces of clients in the courts. People of the country are gradually losing faith in the efficiency of the justice delivery system. However it is imperative to note, that speedy disposal of cases and delivery of quality justice top the priority list of the agenda of the Apex Court as well as High Courts of the country. Keeping this in view, articles on this topic were invited from the students. This issue contains well researched articles from students as well as faculty members. Justice V R Krishana Iyer, a living legend in the legal world and Jeremy Bentham, the founder of Utilitarianism, is regarded as one of the greatest philosophers, jurists, social reformers and activists the world has ever produced. Available information on both these personalities is also reproduced in brief.

We are thankful to all the contributors whose valuable support has greatly contributed to the successful launching of the present issue. We look forward to more productive articles in the forthcoming issues.

God speed!

- Dr. RAJESH BAHUGUNA

EDITOR-IN-CHIEF

Dehradun Law Review

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KNOW YOUR LEGAL LUMINARIES

DISCLAIMER

The college, editors, publisher and printers do not owe any responsibility for the views expressed by the contributors and for their errors, if any, in the information contained in the Journal.

WRITS : MODE OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS

Dr. Poonam Rawat*

Introduction

There has been tremendous expansion in the administrative process. This is natural in a welfare state as a welfare state is basically an administrative state. So expansion in the administrative power is a consequence of the concept of welfare state. All legal power, according to H.W.R. Wade, 'as opposed to duty, is inevitably discretionary to a greater or lesser extent…' Therefore, in order to maintain rule of law it is absolutely necessary to control this discretionary element in the administrative power. Justice Douglas of the U.S. Supreme Court has rightly remarked that it is the majesty of the administrative law that it has been able to control absolute discretion on the part of the government or any ruler or official because absolute

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discretion is a ruthless master. It is more destructive of freedom than any of man's inventions.

Therefore, the judicial control over the administrative action becomes imperative. There are two types of remedies against the administrative wrongs – private law remedy of suit and judicial review through writs. Civil law remedy could be effective if the procedure is simple cheap and expeditious, which is not so in India. Therefore, this remedy is not effective against the administration. There is tremendous scope for this remedy in administrative matters since it lies at the door-step of a litigant. It is the public law remedy of judicial review through writs which is very effective and expeditious, though it is costly as only High Courts and the Supreme Court have the power to issue these writs.

The power of judicial review is a supervisory power and not a normal appellate power against the decisions of administrative authorities. The recurring theme of the apex court's decision relating to nature and scope of judicial review is that it is limited to consideration of legality of decision making process and not legality of order per se. That mere possibility of another view cannot be a ground of interference.

Powers of the Supreme Court

The Power of judicial review is a constitutional power since it is the Constitution which invests these powers in the Supreme Court and the High Courts in the States. So far the Supreme

Court is concerned the relevant Articles are 32 with Articles 12 and 13 and Article 136. Article 32 empowers the Supreme Court to issue directions, orders or writs (which are specifically mentioned therein) for the enforcement of fundamental rights. What is unique about Article 32 is that the right to move the Supreme Court under this Article is itself a Fundamental Right. Thus the Supreme Court is made guarantor or protector of the fundamental rights. Dr. Ambedkar called it the soul of the Constitution. The Supreme Court has further expanded the scope of this Article even in cases where no fundamental right is involved. In *Jhumman Singh v. CBI* [1], it was held that where a person manipulated facts in order to get a decree by a court to defeat the ends of justice, in such a situation petition was held to be maintainable under Article 32. Though Article 32 is called cornerstone of the democratic edifice, it becomes inconvenient for the Supreme Court to entertain petitions under original jurisdiction since it could overload the court. Therefore, sometimes the Supreme Court suggests that the petitioner should first approach the High Court under Article 226 before coming to the Supreme Court under Article 32.

Article 136-A Special Power of Judicial Review

Under Article 136, the Supreme Court may grant special leave to appeal against any decision of a Tribunal. What is a Tribunal is not defined, but the Supreme Court has interpreted

1. 1995 (3) SCC 420. Also see M.C.Mehta v. Union of India, A.I.R 1987, SC 965

it in a liberal way. A tribunal is a body or authority which is vested, with judicial power to adjudicate on question' of law or fact, affecting the rights of citizens in a judicial manner. Such authorities or bodies must have been constituted by the state and vested with judicial as distinguished from administrative or executive functions.

Article 136 does not confer a right of appeal as such but a discretionary power on the Supreme Court to grant special leave to appeal. The Supreme Court has held that even in cases where special leave is granted, the discretionary power continues to remain with the court even at the stage when the appeal comes up for hearing. Generally, the court does not, grant special leave to appeal, unless it is shown that exceptional and special circumstance exist, that substantial and grave injustice has been done and the case in question presents sufficient gravity to warrant a review of the decision appealed against. It confers a very wide discretion on the Supreme Court to be exercised for satisfying the demands of justice.

In *Bharat Coking Coal Co. v. Karam Chand Thapar* [2], the Supreme Court held, Article 136 "has been engrafted by the founding fathers of the Constitution for the purpose of avoiding mischief of injustice on the wrong assumption of law. The justice delivery system of the country prompts this court to interfere under Article 136 of the Constitution when the need of the society stands established and the judgment, if left outstanding, would

2. 2003(1)SCC 6.

not only create prejudice but would have otherwise adverse effect upon the society."

Powers of the High Courts

Article 226 clause (1) empowers the High Courts in the States or Union Territories to issue to any person or authority including any Government within their territories, directions, orders or writs for the enforcement of the fundamental rights or for any other purpose.

The power of judicial review of the High Court under Article 226 is wider than that of the Supreme Court under Article 32 of the Constitution. The expression 'for any other purpose' enables the High Court to exercise their power of judicial review for the enforcement of ordinary legal rights which are not fundamental rights. High Court can issue a writ to a person or authority not only when it is within the territorial jurisdiction of the court but also when it is outside its jurisdiction provided the cause of action wholly or partly arises within its territorial jurisdiction. This power of the High Court under Article 226 is concurrent with the power of the Supreme Court under Article 32 of the Constitution.

Article 227 clause (1) confers the power of 'superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. However, this power does not extend, like Article 136, over any court or tribunal constituted under any law relating to the Armed Forces.

This power is in addition to the power conferred upon the High Court under Article 226 which is of a judicial nature. Is this power of superintendence, administrative or judicial? Under the Government of India Act, 1935 this power extended only to the courts and was of administrative nature only. Under the Constitution it is extended to the tribunals and section 224 clause (2) of the Government Of India Act, 1935, which made it of administrative nature, was not retained in Article 227. Therefore, the power of superintendence under Article 227 is of an administrative as well as judicial nature. The parameters of this power are well settled and it is exercised on the same grounds as the power of judicial review. They are:

(i) It can be exercised even in those cases where no appeal or revision lies to the High Court;

(ii) The power should not ordinarily be exercised if any other remedy is available even if it involved inconvenience or delay.

(iii)The power is available where there is want or excess of jurisdiction, failure to exercise jurisdiction violation of principles of natural justice and error of law apparent on the face of the record;

(iv) In the exercise of this power the High Court does not act as appellate tribunal.

(v) It does not invest the High Court with an unlimited prerogative to interfere in cases where wrong decisions have been arrived at by judicial or quasi-judicial tribunals on

questions of law or fact. There has to be grave miscarriage of justice or flagrant violation of law calling for interference.

Tribunal under Article 227 has the same meaning as under Article 136 for the Supreme Court. In *Surya Dev Rai v. Ram Chander Rai*[3], the Supreme Court held that the purpose underlying vesting of this jurisdiction under Article 227 is "paving the path of justice and removing its obstacles therein."

Thus a very wide discretionary power is provided to the High Courts under articles 226 and 227. However, it must be exercised according to the principles of judicial review.

REMEDIES OF JUDICIAL REVIEW

Writs

The Supreme Court under Article 32 and the High Courts under Article 226 are vested with the powers to issue directions, orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, which ever may be appropriate in the case. A brief explanation of these remedies is appropriate here.

(i) Writ of Certiorari

The term of the old writ was that of a royal demand to be informed (certiorari) of some matter, and in early times it was used for many different purposes. It became a general remedy

3. A.I.R 2003 SC 3044; Also see Shiv Shakti Cooperative Housing Society, Nagpur v. M.S Swaraj Developers A.I.R 2003 SC 2434.

to bring up for review in the court of Kings Bench any decision or order of an inferior tribunal or administrative body. In the modern times the scope of certiorari was laid down in the Electricity Commissioner's case by Lord Atkin which is classical and approved in many English and Indian decisions. Lord Atkin said:

Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority, they are subjected to the controlling jurisdiction of the Kings Bench Division exercised in these writs.

According to the above statement the conditions are –

(i) body of persons having legal authority to determine question;

(ii) the determination must affect the rights of subjects;

(iii) having the duty to act judicially;

(iv) act in excess of their legal authority.

The most controversial condition was the requirement of acting judicially. It was interpreted as an additional requirement apart from affecting the rights by Lord Hewert in R. v. Legislative Com [4]. etc. This was confirmed by the Privy Council in *Nakkuda Ali case*[5]. Our courts also adopted this interpretation. In England this confusion was cleared by Lord Reid in the landmark decision of *Ridge v. Baldwin*[6]. Lord Reid reinterpreted Atkin LJ's words about the duty to act judicially. Accordingly it was not additional

4. 1928 (1) KB 411.
5. 1951 AC 66.
6. 1964 AC 40.

condition but a qualification of the earlier condition. Therefore, acting judicially means acting fairly where the determination affects a person's rights. This interpretation has extended the writ to administrative actions also which of course affect his rights.

In *A.K.Kraipak v. Union of India*[7], the Supreme Court accepted Lord Reid's interpretation and held that distinction between quasi-judicial and administrative has become thin but it is not completely obliterated for other purposes. Therefore, since Kraipak a new trend has emerged in the expanding horizon of the writ of certiorari in India to control the administrative actions. It applies not only to legal authority but also to any agency or instrumentality of the state who acts arbitrarily in violation of law or Constitution. The broad grounds for issuing the writ are:

(i) Lack or excess of jurisdiction

(ii) Violation of the principles of natural justice.

(iii) Error of law apparent on the face of the records.

The last ground 'error of law apparent on the face' has become redundant in English law since the decision of the House of Lords in Anisminic Ltd. v. Foreign Compensation Commissioner[8], where the Court (Lord Reid), brought all errors of law under the jurisdictional law. This position is now confirmed after some controversy in the earlier stages after the

7. AIR 1970 SC 150.
8. 1969 (2AC) 147.

decision in the Anisminic case. In India, our courts are still hesitant in this regard. The ground of 'error of law apparent on the face' is still being employed for certiorari. It is hoped that our courts will also follow the broad principle of 'jurisdiction law' as laid down in Anisminic case.

Thus the writ of certiorari is an important remedy to quash a decision of any court, tribunal or administrative authority if it acted ultra vires their powers.

(ii) Writ of Prohibition

In the same manner Electricity Commission case[9] Lord Atkin LJ said:

"I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters, which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction."

In *Hari Vishnu Kamath v. S. Ahmad Ishaque*[10], the Supreme Court said: Both the writs of prohibition and certiorari have for their object the restraining of inferior courts from exceeding their jurisdiction and they could be issued not merely to court but to authorities exercising judicial or quasi-judicial functions.

Since these decisions the scope of prohibition has expanded

9. 1924 (1KB) 171.
10. A.I.R 1955 SC 233.

and it lies against the administrative authorities also. Lord Denning said, "It is available to prohibit administrative authorities from exceeding their powers or misusing them. In particular, it can prohibit a licensing authority. from making rules or granting licenses which permit conduct which is contrary to law" [11]. In India, prohibition is issued to protect the individual from arbitrary administrative actions.

It is an efficacious and speedy remedy where a person does not desire any other relief except to stop the administrative agency. An alternative remedy does not bar the issue of this writ. It can be issued even when the matter is decided to stop the authority from enforcing its decision. If the lack of jurisdiction is patent, the writ is issued as a writ of right.

(iii) Writ of Mandamus

The prerogative remedy of mandamus has long provided the normal means enforcing the performance of public duties by public authorities of all kinds. While certiorari and prohibition deal with wrongful action, mandamus deals with wrongful inaction. These prerogative remedies, thus, together cover the field of governmental powers and duties.

Mandamus is issued only when a legal duty is imposed on a public authority in the performance of which the petitioner has a legal right [12]. Mandamus would also lie when there is a failure to perform a mandatory duty. The petitioner must show that he

11. RV.G.L.C Ex.t.Blackburn 1976 1WLR 550.
12. G.B Reddy v. ICR Institute 2003, SC 1764.

has made a demand to enforce that duty and the demand was refused.

Mandamus will not lie when the duty is merely discretionary. In *State of M.P. v. Mandawara* [13], the Supreme Court held that granting of Dearness Allowance is discretionary for the Government and it cannot be compelled by mandamus to grant the same. However, the court may issue a writ of mandamus where the public authority has failed to exercise or has wrongfully exercised discretion conferred on it by a statute or has exercised such discretion mala fide or on irrelevant considerations.

The writ of mandamus is issued against any court, tribunal or administrative authority. The Supreme Court has developed a new concept of continuing Mandamus by issuing directions from time to time and keep the matter pending, requiring the agencies to report the progress of investigation so that monitoring by the court could ensure continuance of the investigation [14].

(iv) Writ of Habeas Corpus

It is a process by which a person, who is confined without legal justification may secure a release from his confinement. The writ is an order issued by the High Court calling upon the person by whom a prisoner is alleged to be kept in confinement to bring him before the Court to let the Court know on what ground the prisoner is confined. However, the production of the body

13. A.I.R 1954 SC 93.
14. Vinnet Narayan v. Union of India A.I.R 1998 SC 2684.

of the person alleged to be unlawfully detained is not essential in modern times[15].

The rule of standing is relaxed in habeas corpus petition which can be made by any person on behalf of the prisoners but not an utter stranger. Application for habeas corpus has to be accompanied by an affidavit stating the nature and circumstances of the restraint. If the court is satisfied that there is prima facie case, it issues a *rule nisi* requiring the opposite party to show cause, on a day specified, why an order granting the writ should not be made. After hearing the parties, the court may make the *rule nisi* absolute or it may discharge it as the case may be.

The writ of habeas corpus has assumed great importance in the administrative process as wide powers of detention are conferred on the administrative authorities in the modern times. The fundamental right to personal liberty as a human right has further enhanced the importance of this remedy. The grounds of habeas corpus are the same grounds of judicial review based on ultra vires doctrine. So if the detention powers are used mala fide or based on irrelevant or extraneous considerations or are used in violation of statutory provisions, the writ of habeas corpus will issue to quash such a detention. There is no need for a separate certiorari.

The writ of habeas corpus is issued against any order of detention by any authority including the Speaker of Parliament or State Assemblies [16]. However, no writ of habeas corpus will

15. Kanu Sanyal v. D.M Darjelling A.I.R 1973 SC 2684.
16. Ganpati v. Masi Nafisul Hasan A.I.R 1954 SC 636.

lie in regard to a person who is undergoing imprisonment on a sentence of a court in a criminal trial even on the ground of erroneousness of conviction [17].

Before Constitution (44th Amendment) Act, 1978, enforcement of the writ of habeas Corpus was liable to be suspended. The Supreme Court in the habeas corpus case[18] held that no person could have any locus standi to move the court to challenge the legality of an order of his detention on any grounds. This was challenged on limited grounds before this decision. This was the most unfortunate decision of the apex court. It utterly failed to protect the life and liberty of the people when it was most needed. Therefore, by the 44th amendment, now the enforcement of the writ of habeas corpus cannot be suspended during Emergency under Article 352.

The scope of the writ has been further expanded by the Supreme Court by prohibiting torture or inhuman treatment while in detention in a prison by the prison authorities. In this respect the law is more advance in India than prevailing in England where detention conditions cannot be challenged by habeas corpus.

(v) Writ of Quo Warranto

The writ of quo warranto is issued against the holder of a public office calling upon him to show with what authority he holds that office. It is issued against the usurper of an office.

17. Janardan Reddy v. State of Hyderabad A.I.R 1951 SC 217.
18. ADM Jabalpur v. Shivkant Shukla.

The object is to confer jurisdiction upon the judiciary to control the executive action in making appointments to public offices and also to protect the public from usurpers of public offices.

The law of standing is relaxed so that any member of the public can challenge the action by this writ [19].

The following conditions apply:

(i) The office in question must be a public office.

(ii) The office must be substantive in character.

(iii) The holder must not be legally qualified to hold the office or to remain in the office .

(iv) The person must be holding the office when the writ is heard.

The writ will not lie in respect of an office of a private nature. The writ is discretionary in nature and the court may refuse to grant it.

What are the consequences of granting of the writ? Will the actions of usurper become null and void *ab initio*? It will depend upon the nature of disqualification. If the disqualification is of technical nature, the acts will not be null and void and the principle of de facto office will be applied to save such actions. However, where defect in the qualification is fatal, then everything done by him will be null and void. The benefit of the colour of office will not be available.

19. S.N Srivistav v. State of U.P A.I.R 2003 All 259.

(vi) Directions and Orders

The powers conferred by Articles 32 and 226 are very wide. Supreme Court observed that, "In view of the express provision in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English Law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges…., so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matters of granting such writs in English law [20]." This is the meaning of the wide phraseology 'the writs in the nature of' should be understood. The courts have been very liberal in this regard. It is the duty of the court to provide appropriate remedy to the petitioner. A petition will not be thrown out on procedural and technical defects. However, broad principles must be followed. Apart from these writs, the court can issue any directions or orders to supplement the writs, for examples, declaratory orders or injunctions in the same petitions. In fact declaratory orders are the appropriate remedy for setting aside an ultra vires rule or legislative measure and not the writ of certiorari which is appropriate for quashing a determination or decision of a body or authority. In Prabodh Verma v. State of U.P., the Supreme Court deprecated the slipshod drafting of a writ petition asking for certiorari to quash a legislative measure. Proper pleading rules must be followed since ill-drafted pleading results in wastage of precious time of

20. T.C Bassapa v. T. Nagappa A.I.R 1954 SC 440.

the court.[21]

The power of issuing directions or orders is frequently used to provide relief to the parties and monitor the implementation of the decision of the court[22].

Conclusion

The objective of the judicial review is to enforce the rule of law which is the basis of constitutional and administrative law. The power of judicial review in India is rooted in the Constitution. This is expressly conferred on the Supreme Court and the High Courts under Articles 32,136 and 226,227 respectively.

The power of judicial review is exercised through writs. The five writs are specifically mentioned in Articles 32 and 226. Our courts are not bound by the technicalities of the English practice; only broad principles should be observed in their application. The scope of these writs has expanded in recent times. It is now available in administrative actions also.

The courts can supplement these writs with any other orders and directions depending upon the facts and circumstances of the case. For example, it can grant injunction or stay order or declaration in suitable cases.

21. (1984) 4SCC 251.
22. See B.K Basu v. State of West Bengal A.I.R 1997 SC 610, Vishakha v. State of Rajasthan 1997 SC 3011.

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JUSTICE: AN EXCLUSIVE RESERVE FOR THE ELITE

Vibhuti Bahuguna*

Introduction

Aristotle, the renounced philosopher, warned the society in 4th century which has its relevance even in this new millennium. He said, "Man perfected by society is the best of all animals; he is the most terrible of all when he lives without law, and without justice." In normal parlance justice means what is just and fair. Meaning of justice in this sense has always been changing with time, place and circumstances. What is just and fair today may or may not be same tomorrow and the vice versa. For this reason no précise definition of justice which is universally acceptable and applicable for all time and places, is feasible. The dictionary meaning of the term justice is an act of rendering what is right and equitable towards one who has suffered a wrong. However, in a judicial sense, justice is exact conformity to some obligatory law. All human actions are just or unjust as they are in conformity

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with or in opposition to the law[1]. It is thus the virtue of being just and fair. While talking of its purpose, not only the plaintiff and defendant but whole of the subject matter of the suit and all person affected thereby is taken into consideration. The Court has to see the entire pattern of things from a detached height and make up its mind whether it will be for the greater good of everybody and everything concerned, that it should intervene and take upon itself the burden of trying the suit. Thus it could be said that judiciary is the last hope of the common man to get justice.

Whenever we think about a word it creates an image in our mind about that particular word so is about justice. The image created about it is its symbol, which is popularly known as "symbol of justice". It is one of the most fascinating things; often hold our attention, when we see it in the premises of the Courts or in the chamber of lawyers or judges. The symbol – a common representation of justice is a blindfolded woman holding a set of scales. It is said that it is the symbol of the goddess of Justice. The Roman goddess of justice was called "Justitia" and was often portrayed as evenly balancing both scales and a sword and wearing a blindfold. She was sometimes portrayed holding the fasces (a bundle of rods around an axe symbolizing judicial authority) in one hand and a flame in the other (symbolizing truth).

History of Goddess of justice may be traced back to the

[1] K.J. Aiyar's Judicial Dictitionary twelfth edition The Law Book Company (P) Ltd. PP 699-700

ancient Greeks. The goddess of justice was known as 'Themis', originally the organizer of the "communal affairs of humans, particularly assemblies". Themis was the personification of justice, the goddess of wisdom and good counsel and the interpreter of the gods' will. Her ability to foresee the future enabled her to become one of the oracles at Delphi, which in turn led to her establishment as the goddess of divine justice. Classical representations of Themis did not show her blindfolded (because of her talent for prophecy, she had no need to be blinded) nor was she holding a sword (because she represented common consent, not coercion). According to some sources, she was the daughter of Uranus (Heaven) and Gaea (Earth). She maintained order and supervised ceremonies.

She was a giver of oracles and one legend relates that she once owned the oracle at Delphi but later gave it to Apollo. She was and still is represented as a woman of sober appearance carrying the scales of justice and a sword as a symbol of justice enforcement.

Affordable justice, the perception

"Injustice anywhere is a threat to justice everywhere." said Martin Luther King. Author in this quotation takes justice in wider sense so as to include it in every aspect of life. However, this research scholar focuses on the justice which one is supposed to get through court of law. For justice to be meaningful it needs to be accessible and affordable for the common man. In this

context justice may be said to be accessible when it is given timely, effectively and at the same time affordable for everyone. According to Justice A.R. Lakshman, the chairman of 18th Law Commission of India, the traditional concept of "access to justice" as understood by common man is access to courts of law. For a common man a court is the place where justice is meted out to him/her. But the courts have become inaccessible due to various barriers such as poverty, social and political backwardness, illiteracy, ignorance, procedural formalities and the like.[2]

One is pushed to look at it from the present look of things in the judicial system. The judicial process has always been seen as an exclusive reserve of the elite. It is said that the judiciary is the last hope of the common man. But how close or affordable is the judicial process to the common man? In some countries, one would be pushed to think that the woman was blindfolded not to see what is happening at all or that her scale had been removed because dispensation of justice seemed to favour the elite and left little or no hope for the common man. In those places the common man cannot afford the legal fees of learned gentlemen and the elite who can get best-learned ladies or gentlemen win most of their suits. The imprisonment, options of fine or bail conditions for the common man most of the time looks absurd. A man who cannot afford three square meals will get a sentence with conditions he cannot meet even if he has to

[2] Justice A.R. Lakshmanan, "Justice for all" Nyaya Deep, Vol. VII, issue 3, July 2006. PP 45

sell all his possessions.

To get justice through courts one must go through the complex and costly procedures involved in litigation. One has to bear the cost of litigation including court fee, stamp duties etc and of course the lawyers' fee. Thus, here the question arises a poor man who is hardly able to feed himself, how will he be able to afford justice or obtain legal redressal for a wrong done to him through courts. Further illiteracy and abject poverty prevails in most of the parts of India. Therefore they are totally ignorant about the court procedures and will be terrified and confused when faced with the judicial machinery. Thus most of the citizens of India are not in a position to enforce their rights, constitutional or legal, which in effect generates inequality contrary to the guarantees of Part III of the Constitution.

In this context, it will be appropriate to quote Justice V.R. Krishna Iyer, "India's poverty asphyxiated, down-trodden masses seek justice from an exotic, expensive, unapproachable system which responds even on holidays at home at odd hours if the patricians move its jurisdiction. But when the little Indian languishing in injustice pleads, he is in an ever lengthening queue. And the impatient judge complains of backlog when the poor worker or landless agrestic or pro bono litigant lands up in court and heedlessly dismisses his prayer. "What man is there of you, whom if his son ask bread, will give him a stone?" judges, in their hurry, sometimes do. Again, judges are rated as the cream of the elite and yet must repeat: "Ye are the salt of the earth: but

if the salt has lost his savour, wherewith shall it be salted?" Did not some leading lawyers complain to the Supreme Court about invidious discrimination between those with clout and the daridra narayanas in the urgency of hearing cases?"[3]

Constitutional Provisions to Secure Justice

The objectives enshrined in the Preamble of the Constitution inter alia include justice- social, economic and political. To implement it in letter and spirit a detailed provision in the name of social and economic Charter has been provided under Part IV of the Constitution[4]. The concept of justice provided under Article 38 has explained by giving wide interpretation by the Hon'ble Supreme Court of India, "The concept of 'social justice' consists of diverse principles essential for orderly growth and development of personality of every citizen. "Social justice" is then an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic devise to mitigate the sufferings of the poor, weak, dalits tribals and deprived sections of the society and so elevate

[3] Justice V.R. Krishna Iyer, "Access To Justice", B.R. Publishing Corporation, PP 90-91

[4.] Article 38. State to secure a social order for the promotion of welfare of the people.1[(1)) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.2[(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.]

them to the level of equality to live a life with dignity of person. Social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc., from handicaps, penury, to ward off distress and to make their life livable, for greater good of the society at large. The aim of social justice is to attain substantial degree of social, economic and political equality which is the legitimate expectation and constitutional goal. In a developing society like ours, where there is vast gap of inequality in status and of opportunity, law is a catalyst, rub icon to the poor etc. to reach the ladder of social justice. The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets of human activity. The concept of social justice enables equality to flavor and enliven the practical content of life. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality."[5]

Article 39A provides for equal justice and free legal aid. It says to provide free legal aid by suitable legislation or by schemes or in any other way so that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.[6] While deciding on the issue of free legal aid at the

[5] Air India Statutory Corporation v. United Labour Union, AIR 1997 SC 645.

[6] 39A. Equal justice and free legal aid.-The State shall secure that the operation of the legal system promotes justice, in on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

state cost the Supreme Court held that free legal aid at the state cost is the fundamental right of a person accused of an offence and this right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. In this case the appellant was tried and sentenced to two years imprisonment under Section 506 read with Section 34, IPC. He was not represented at the trial by any lawyer for reason of his inability to afford legal representation. The High Court held that the trial was not vitiated since no application was made by him. But Supreme Court set aside the conviction on the ground that he was not provided legal aid at the trial which was violative of Article 21 of the Constitution.[7] According to Justice V.R. Krishna Iyer to provide free legal aid at the cost of state is the state's duty and not Government's charity.

Article 21 of the Constitution provide for the protection of life and personal liberty. The scope of this fundamental right has been widened by the judicial pronouncement so as to include within the ambit of fundamental right *inter alia* right to free legal aid as well as right to speedy trial. Accordingly absence of free legal aid when required and delay in speedy justice violates Article 21.

What makes the justice unaffordable?

It is accepted unanimously among the people that by and large justice has become unaffordable. Before we discuss various

[7] Suk Das v. Union Territory of Arunachal Pradesh, (1986) 25 SCC 401.

factors responsible for this, it is pertinent to mention that the word affordable should not be given literal meaning but it should be given wide interpretation so as to include all the circumstances responsible for making justice delayed or denied because in one sense justice delayed is also justice denied. Following are some of the factors responsible for making the justice unaffordable.

Corruption – Corruption in judicial system prevails right from top to bottom. To make matters worse, professional ethics among lawyers are virtually nonexistent. A lawyer accepting money from both sides in a case is no longer news. Often, lawyers prefer adjournments of cases since each additional day of hearings fetches them money. Corruption is not limited to lawyers, however; they are just one component of a large machine. Therefore due to this corruption, the haves could easily turn the decision on their side. Even if a judge is not corrupt, a case could still be stalled due to the corrupt court staff. Officers ranging from the court registrar to the process server demand and accept bribes. It is almost impossible for papers to be processed in the court registry unless the court staffs are paid bribes. Judges are often aware of corruption, but they never initiate action against their own staff. Corruption is omnipresent, from the lowest court to the Supreme Court. The only difference is the amount of money demanded and paid. Even some judges are corrupt.

Over-loaded judicial system- The second problem that stares us all is that of mounting arrears resulting in inordinate delay in

dispensation of justice is our over-loaded judicial system as it suffers from manpower shortage, infrastructural constraints and procedural delays. Whatever may be the reason but it has been great concern of the apex court. In a recent matter decided by Hon'ble Supreme Court very interesting fact came into light. In the year 1947 a case was registered for the recovery of sum of Rs. 7000 and there was an order for attachment before judgment of the dry fish of the defendant. A third party claimed ownership of the dry fish and he applied for realize of attachment order. It took 60 years to reach the case before Hon'ble Supreme Court and finally on 23rd August, 2007 the case was decided. Court ordered that entire property which is the subject matter of this litigation may be divided in equal shares between the two shares. Half share should be given to the appellants and the other half given to the respondents. The matter didn't end here but to decide which part should go to the appellants and which part should go to the respondents, the apex court directed District Magistrate of Kanyakumari to decide himself or by the additional District Judge nominated by him. It also ordered that it would be opened for either of the party to approach this court for further clarification. Before parting this case court has given remarks coupled with warning. It said, "We saw in the media news of lynching of suspected thieves in Bihar's Vaishali district, the gunning down of an undertrial prisoner outside Patna City Civil Court and other incidents where people had taken law into their own hands. This is obviously because many people have started

thinking that justice will not be done in the courts due to the delay in Court proceedings. This indeed an alarming state of affairs and we once again request the concerned authority to do the needful in the matter urgently before the situation goes totally out of control."[8]

As far as pendency of cases in Supreme Court is concerned it has never been with the same pace.[9] In 1950, the pendency in the Supreme Court was 771 cases. By 1978, pendency was 23,092 and in 1983 pendency crossed 1, 00,000. On 31 December 1991, the number of cases pending before the Supreme Court was 1, 34,221. Then this number was substantially reduced to 19,806 in 1998 and it was 21,715 at the end of 2001. Since those days of reduction, the pendency has increased by between 13% and 15% every year and has more than doubled. The pending cases as close on 30th June, 2010 are 57,065.[10]

When one looks into the figures of High Courts, one should say a few words about old cases, often used anecdotally to drive home the point that the speed of dispute resolution in India is inordinately slow. The pendency in High Courts was 1.48 million in 1987. Pendency increased to 2.651 million in January 1994, 2.981 million in January 1996, 3.181 million in January 1998,

[8] Moses Wilson and others v. Kasturiba and others, AIR 2008 SC 379. And Vakil Parsad Sing v. State of Bihar AIR 2009 SC 1823.

[9] Refer the variations in the graph in appendix A to this Paper.

[10] The monthly statement of pending cases for the month of June, 2010 placed on the website of the Supreme Court of India.

3.365 million in January 2000, 3.557 million in January 2001 and 3.743 million in December 2007.[11]

As far as lower courts in India are concerned the age-specific data of pending cases no longer being available. Data from the late-1990s show that 31% of civil cases in Lower Courts are more than 3-years old and a comparable figure is 25% for criminal cases. On an average, across High Courts and Lower Courts, probably around 15% of cases are more than 3-years old and around 0.5% are more than 10-years old. Though High Courts, and their jurisdictions, vary widely, on an average, such old cases number between 7,000 and 8,000 for every High Court jurisdiction.[12]

Problem of cost and price- Today the scale of the judiciary seems to be tilted or swayed towards the elite. Lawyers, as a class, have little interest in speedy justice especially if they are paid by the hour or by the day. The longer it takes for a case to be settled, the larger the amount in fees and expenses that they can bill their client. This cost in itself can be a deterrent to small companies and individuals who are put off pursuing their legal rights simply because they cannot afford such protection. Thus it could be said that now you could only seek justice if you had a deep pocket. Stressing on the need to make legal services affordable to all, President of India, Pratibha Patil, today asked

[11] Refer the variations in the tabular form placed as appendix A to this on the website of the Supreme Court of India.

[11] Refer the variations in the graph in appendix A to this Paper

[12] The financial express of Mon, 26 Jul 2010

the lawyers to ensure that high costs do not act as a barrier to seek justice."Affordability of legal services is an issue on which there should be constant focus in legal circles, so that the right to judicial opportunity is not compromised due to high costs," Patil said. “Court fees and high lawyer's fees are impinging on the decision to opt for a legal remedy”.[13] The legitimate expectation of every consumer of the system is to obtain swift justice. There is an intimate link between speed and expense. More time consumed in court necessarily results in more expenses to the litigant. One should always remember what Warren Burger C.J. of the US Supreme Court, reminded us while campaigning for systematic reform that, “People come to believe that inefficiency and delay will drain even a just judgment of its value.”[14]

Suggestions to make Justice Affordable

At the outset it is desirable to think that which organ of the government needs to be reformed. Is it only judiciary to be blamed and to be reformed or the entire machinery responsible for making, implementing as well as adjudicating law? According to Justice B.N. Aggarwal, “Questions on the credibility of judiciary to deal with the mounting arrears of cases, delay in disposal and high cost of obtaining justice are still being raised,

[13] Address by Her Excellence, the President of India, Mrs. Pratibha Patil at Kochi on Monday, December 28, 2009, in Kochi

[14] Justice V.R. Krishna Iyer, “Access To Justice”, B.R. Publishing Corporation, P 92

but to blame the judiciary alone for its wrong as other limbs of the State need also play their role in solving this problem. But those who say that justice delivery system is on the verge of collapse make such statements by looking at the overflowing dockets only without peeping into the real scenario. These are the people who need to be told that influx of cases is also a sign of faith reposed by the people in the administration of justice and it is that faith which, inter alia, is one of the reasons for docket explosion. It is a matter of satisfaction that the public at large continues to hold our judicial institutions by and large in high esteem despite their shortcomings and handicaps."[15]

Considerable amount of ink has been flown by the jurists, legal scholars and law reformers to suggest legal reforms to make justice accelerated and affordable. The first time in the year 1924 ranking committee was constituted to report on pending cases, followed by the High Court arrear committee in the year 1949. In the year 1950 UP Judicial Reform Committee submitted its report on the ways to reduce backlogs. Not only this series of reports submitted by the Law Commission of India in particular 14th, 27th, 41st, 54th, 58th, 77th, 80th, 90th, 114th and 139th are full of suggestions for the judicial reforms. Time and again Supreme Court of India has also given guidelines to make the justice affordable. Right to a speedy trial is a fundamental right implicit in the guarantee of right to personal

[15] Justice B.N. Aggarwal, "Pendency of Cases and Speedy Justice", Lecture Series, 2004 by the Supreme Court Bar Association.

liberty enshrined in Article 21 of the Constitution.[16] Keeping into view these suggestions and guidelines put forward by eminent persons through the above quoted reports and also on the basis of guidelines given by Supreme Court, this researcher sums up following suggestive measures to make the justice affordable.

I. Grant of adjournment- There must be maximum utilisation of the court working hours. The judges must be punctual and lawyers must not ask for adjournments, unless it is absolutely necessary. While granting adjournment the provisions of Order 17 of the Civil Procedure Code must be followed in letter and spirit.[17]

II. Use of technology to reduce backlog- In every Court there are so many cases where same point of law is involved and one judgment can decide all these cases at a time. Clubbing of these cases may reduce backlog. Similarly, in old cases many of them may have lost their value and may be listed and decided separately. Disposal of interlocutory applications filed even after disposal of the main case may be made very easy with the help of latest technology.

III. Judgment in reasonable time- There must be some reasonable time fixed to decide a criminal as well as civil case and judges must adhere to it. In this way guidelines of the apex court may be strictly followed. [18]

[16] Hussainara Khatoon v. Home Secretary, State of Bihar, AIR 1979, SC 1369.

[17] Order 17, Rule 1(2) of Civil Procedure Court, 1908 (Refer Appendix B)

[18] Anil Rai v State of Bihar, (2001) 7 SCC 318

IV. Certainty in judgments- Vague and uncertain judgments always give rise to further litigation. In this sense a judgment must be clearly decisive and free from ambiguity so as to need no interpretation and no further litigation. According to Lord Macaulay, "Our principle is simply this – Uniformity when you can have it, diversity when you must have it, in all cases, certainty".

V. Enhancement of working period- It has been strongly recommended from all the corners that vacations of judicial officers in general and higher judiciary in particular may be curtailed by at least 10 to 15 days and at and the same time routine working hours may be extended by at least half-an hour.[19]

VI.Promotion of written arguments- It is seen that lawyers sometime waste valuable time of the court in prolix and repetitive arguments. It must be discouraged and maximum time limit for the written arguments should be fixed in every case followed by submission of written arguments compulsorily in every case. However additional time may be permitted by the court in the matters where complicated questions of law or interpretation of Constitution are involved.

VII. Strike in the Courts to be taken as professional misconduct- Strike is a tool in the hand of a person to forcibly submit his demands. But when it is applied in the Court where matters of life, liberty inheritance or so on are involved, it gives

[19] Justice Asok Kumar Ganguly, a Supreme Court Judge, 'Judicial Reforms', Halsbury's Law Monthly of November 2008

only frustration in general and makes justice unaffordable for poor. Hence without second thought strike in the courts must be banned and is to be taken as profession misconduct under the Advocates Act, 1961.

VIII. For the litigants- In number of cases litigants themselves are responsible to be trapped in avoidable litigation. It is in particular in these cases where one is opting for court to kill ones ego and starts litigation to start another litigation. To overcome this problem nationwide awareness campaign in this pattern was launch by Dainik Jagran newspaper in the name of JAN JAGRAN in July, 2010. Years before Abraham Lincoln said, "Discharge Litigation, Persuade your neighbours to compromise wherever you can. Point to them how the nominal winner is often a real loser- in fees, expenses and wastage of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will be business enough."[20]

IX.Resolution of disputes through ADR mechanism- It is a proven fact that ADR techniques have been successful in accelerating and making justice affordable all over the world. Arbitration, mediation, conciliation and negotiation have already been established through legislation in number countries of the world. Concept like plea bargaining has become part of life in United State of America. In our country Govt. is the largest litigant and pays crores of rupees as fees to lawyers every year. Awareness for the ADR options amongst the general public must

[20] Quoted by Justice Jitender N. Bhatt in 'Round Table Justice through Lok Adalats(people's court): vibrant ADR in India', Gujarat Law Herald 2001(3).

be done at government level and at the same time it should be compulsory for pre-litigation in general for the public and in particular for the government.

X. Legislation to resort ADR mechanism- We have provisions for implementation of ADR in the statutes like Arbitration and Conciliation Act,1996, Legal Services Authority Act, 1987, Code of Civil Procedure, 1908, Hindu Marriage Act,1955, Family Court Act,1984, Criminal Procedure Code, 1973 (plea bargaining) etc. . If these provisions are implemented in letter and spirit, it will definitely reduce the backlog and in turn make the justice affordable for everyone.

Conclusion

It is a proven fact and can be seen in every aspect of practical life that gradually and slowly justice is becoming unaffordable for a common man. As discussed the word unaffordable needs to be interpreted broadly so as to include all the hurdles in the way of obtaining justice. It is not only affordability in the sense of financial resources but also other disabilities like lack of awareness among the people, honour litigations put forward just to kill the ego, inadequate technical knowledge amongst judges, advocates and court staff, incompetency of legal professionals and so on. Now all these disabilities making the justice unaffordable is only for the have-nots and not for haves. For this it is not only the judiciary to be blamed and need reformation because it is only one organ of the system. Democracy becomes

meaningful when all the four organs including media are in coordination, cooperation and have the will to work together for the common cause. We should always remember what Earl Warren reminded the world in last century, "It is the spirit and not the form of law that keeps justice alive." The duty of the State does not end with enactment of laws. The statutory provisions designed to bring about social justice have to be supported by a system that enforces the rights and obligations thereby created. Democratic polity, like Indian states, rests on the principle of separation of powers. Each organ has its own set of duties to perform. But, in fact, the end of all activities of each of the organ is to secure justice and wellbeing for its people. Alexander Hamilton aptly put this in following words, "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." The symbol of justice should represent justice in our nation and not portray the judicial system as an exclusive reserve of the elite. Let equity, justice and rule of law prevail here in India!

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THE DYNAMICS OF INCREASING LITIGATION COSTS: AN INDIAN PERSPECTIVE

Kartikeya Sharma*

Introduction

"Let a lawsuit enter a household and rest assured, even the one who wins shall have lost everything." So goes an anecdote passed on through generations of people who have borne the brunt of the tedious and, almost always, expensive procedure of fighting a case in a court of law.

The problem of expensive litigation is one that has been around since the time litigation itself began. The relationship between the cost involved in the process of litigation and the actual worth of the case involved is one that has been subject to scrutiny since time immemorial. In a way, people have grown accustomed to using the word 'expenses' and 'lawsuit' in a

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synonymous way. Generations of exploitative practices on the part of legal professionals are primarily to be blamed for this attitude of resentment the masses harbour towards the due process of law.

Generally speaking in a broad sense, there are various factors that cause the costs of the price of litigation to go to heights where an average citizen would not even dare to imagine. The factors which are responsible for the increased cost of litigation in our country are both direct and indirect in nature in that certain situations are easier to understand in context of the problem under scrutiny while others require a more precise knowledge of law to ascertain the extent to which it affects the matter at our hands.

We shall now look at some of the major factors that contribute to the increased cost of litigation in our country and how they are related in a way to each other as well:

Causes of Increasing Costs of Litigation:

1. Prevalence of Legal Ignorance: This is one of the leading reasons why the common man has developed an attitude that borders on utter disgust when it comes to matters of legal proceedings. The average Indian is nowhere near fluent in the matters of general legal knowledge that affects his day to day life. It is the harsh truth that the majority of the population of our country is not completely aware of the concept of the

personal rights and liberties that have been guaranteed to them by the Constitution of India. An ignorant person is more likely to be swindled by the many opportunists that our system generates. It is equally deplorable to note here that we mention the general public as being ignorant but all the while we tend to overlook the fact that there exists a large population of advocates that fall well below the standard of an advocate as envisaged by our Constitution framers. At this point in our opening stance it is imperative to address the fact that the issue of ignorance in relation to legal aspects extends from the general populace of our country to the qualified elite who are entrusted with the task of upholding the provisions as laid down in our Constitution. The existence of institutions that award degrees not on the basis of merit but on the sole basis of monetary value is rather disheartening and one might lose hope to learn that the future of the legal system rests partly on such individuals. A sparsely aware advocate might take longer to help his client than an otherwise more aware advocate, and the longer the proceedings for a lawsuit are extended, the longer the client has to incur expenditures.

2. Unnecessary Litigation and Problem of Pendency: Though this is a problem that deserves mention as a different topic altogether, it is nonetheless related to the problem of increasing the costs of litigation. The courts in our country currently face the monumental task of clearing up a colossal amount of cases that have accumulated over the years since we gained our

Independence. The figures are shocking to say the least and a number of factors ranging from inadequate infrastructure at the lower levels to acute shortage of judges are the reasons why India has a backlog of almost impossible cases. Once a case gets registered and the proceedings begin, the wheels of the litigation chariot lurch into motion ever so slowly. They carry the weight of only a specified number of cases after which the system grinds to a halt. Only when older cases are decided do the newer cases stand a chance of being resolved and decided. This directly implies that the longer the problem of pendency remains, the more expensive it is for a person to keep pursuing his dream of justice in a court of law.

3. Redundant Formalities and Inefficient system: Another great barrier that comes in the way of a person and the timely justice he deserves is the long list of formalities he has to endure before his case is finally heard in a court. Ranging from small court fees to the attendance required on the part of the litigants, there are a remarkably high number of formalities that a person must observe if he wishes to stand a chance of being heard, let alone provided justice. This is a fact that the Indian Judicial system is known for the efficient and timely manner with which it deals with the winding up of a case, albeit in a negative sense of the word. One fact can firmly be established even when looking from a general perspective that the Indian judicial system is ridden with numerous inefficiencies and endless loopholes that make the issues of speedy justice almost unheard of for a

majority of the populace. The client on the other hand is the one who has to bear all the expenses while the proceedings go on. He is the one who is responsible to feed unscrupulous bribes to any official who threatens to impede the process of his attainment of 'justice'. This is again an important point that needs some further looking into. The fact is that the judicial machinery is, as has been stated earlier, suspended in a state of partial immobility and all it takes is a minute omission or petty mistake on the part of the person fighting for justice to bring things to a complete standstill. The system gives refuge to a vast number of people who in the guise of a legal beneficiary can extract money from poor litigants who are none the wiser. For anyone with even basic legal knowledge, it is rather easy to get extensions on court dates and even go so far as manipulate court proceedings. Many cases have been witness to the counsel of either party being involved in unhealthy practices. It is extremely rare for someone to go through the entire machinery of the courts without having to bribe an official or two. The fact that legal professionals in our country are paid rather paltry amounts as remuneration in comparisons to their Western counterparts is also responsible for this behaviour on the part of the officials involved. Insufficient pay scales in accordance with the posts of judges, a dearth of good advocates and the endless opportunities to mislead the client are the reasons why the cost of litigation has artificially gone up. The inefficient structure of the system and the dependence on a multitude of legal formalities

means that the time of the trial goes on increasing and that the cost incurred by the person fighting for his right takes a sharp turn in the upward direction.

4. Improper framing of charges: Another practical problem that is responsible for the unnecessary elongation in the duration of the litigation process is the improper framing of charges on the part of the authorities who are responsible for the initial stages of the investigation and legal proceedings. Formative evidence in the early phases of the case history is many a time over looked, manipulated or sometimes completely not paid heed to. Witnesses are not questioned thoroughly or the FIR may be lacking precision in reporting. All these factors are responsible for the incorrect charges to be levelled against either of the two parties. This is related to our problem of increased costs because this can result in two things. Firstly, it may be the reason why a certain someone has been asked to continue on with proceedings for a period longer than would have been otherwise required had the correct charges been levelled. It may also entail the court to penalise someone on the lines of the wrong provisions and that may again lead to increased costs for the already burdened persons involved. This issue is not just for highly technical cases but for rather open and shut cases as well. The prime example is the latest case related to 'suspect' caste killings in the village of Khairlangi. There was enough evidence to invoke the Prevention of Atrocities Act (1989). Four members of a family were publicly humiliated and lynched. They were

profusely abused based on their caste and members of the family were hunted down and killed. Two females and two males were the victim of this sadistic act. Neither the Prevention of Atrocities Act nor Sec 354 of the IPC were invoked. The authorities claimed that benefit of doubt be given to the accused for various reasons and the killings were termed as something other than caste related killings. This is to support the point that improper framing of charges is also a prevalent practice that impedes the timely deliverance of justice and quintessentially questions the actual 'cost' of justice.

5. Absence of Settlement Culture & Alternate Dispute Settlement: This particular point is a custom predominantly followed in the western world which has only just begun to emerge in India as a means to reach a mutual understanding without the unnecessary involvement of a court and the usual proceedings that leave both parties in a weaker financial state than when they started and all the more dissatisfied. Alternate Dispute Settlements are most popular in matrimony cases as well as property disputes or other cases relating to family issues where it is possible for the parties to converge and have a healthy discussion that may further lead to a harmonious settlement. ADR's are a less time consuming way of settling disputes for the main reason that they do not involve the usual routine visits to the courts and are easily negotiable. As stated earlier, the time it takes to settle a dispute is directly related to the costs incurred by the parties striving to seek justice. The prevalence

of this method might be beneficial in two ways. Firstly, it shall directly reduce the financial burden on the parties involved and helps them to reach a mutually agreed upon compensatory settlement. Secondly, it reduces the burden on the courts and the judiciary thereby not adding to the backlog of already existing cases and thus helping in alleviating a certain amount of stress on the judicial machinery. The relation between the issue of pending cases and increased costs has also been attempted to be clarified earlier.

6. No laws for regulating fees of professionals: It is interesting to note a certain point before we delve deeper into this particular issue. The costs involved in the litigation process are varied. They differ from the court fees to the expense of filing and the cost of the counsel employed by the person seeking justice. The startling fact is that while the court fees and the other charges relating to the proceedings of the court are compulsory and non-negotiable, they form only a small portion of the actual costs a person has to bear. Mostly it is the fees of the counsel that makes litigition so costly. It is all the more astounding that there exists no law or provision which aims at regulating or capping in any way the fees charged by the lawyer employed by someone. The Indian Advocates Act goes a long way in describing the qualification required for an advocate and also mentions the proper code of conduct. But it does not in any manner put a restriction on the fees charges by the same. The closest provision that prevents the advocate from exploiting the client is the one

which states that the advocate shall not be party to any gains monetary or otherwise resulting from the victory of his client. But again, the upper limit is not fixed. The absence of any law or provision to control the fee structure of advocates has been the reason why some advocates charge astronomical amounts. The tragic part is that when it comes to fighting for justice, the common man is helpless and has to seek professional help from registered advocates. Since there are no rules to oblige the advocate to adjust his fee structure in any manner, the unfortunate client has to somehow manage to pay the fees. This is the scene throughout the country where even mediocre and sub-standard advocates have begun indiscriminately exploiting the masses on the pretext of providing justice.

Repercussions of Increased Costs for Providing Justice:

1. Masses lose faith in the system: The most apparent fallout of the problem of expensive litigation is that the masses begin to lose faith in the judiciary. They begin to question the relevance of such an elaborate Constitution. The trust of the masses is important for any public institution because it is for the public and eventually the common man that these public institutions have been put in place. The judiciary is no different. Though it is the only non-elected part of the government and the offices of the judges are immune from public opinion to a large extent in comparison to the executive and the legislature, it exists to uphold the laws meant to better govern these people and protect

their rights. If the judiciary is the one that is responsible for the disease rather than the cure, then the people take no time in labelling the judicial set up as a set up meant only to exploit and demean the masses from behind a curtain of red-tapism and constitutional jargon understood by a privileged few.

2. Essence of the Judiciary is lost: In the prolonged abuse of the common man and the unrelenting pursuit of ill-gained wealth on the part of the legal fraternity, somewhere down the line the very essence of the judiciary is diluted beyond recognition. The motive and the purpose why the judiciary was setup, why it was conferred with such intense discretionary powers and why it was kept aloof from the dirty game of politics seems to have very little meaning when the same judiciary who was to undertake the task of protecting the common Indian citizen from the evils of society is itself a perpetuating factor for the malpractices that plague society. When judges stoop down and accept bribes or when an advocate manipulates evidence, the spirit with which this almost revered institution was setup becomes polluted. It is a serious issue that affects the rationale behind the morals and the ethics which the judicial system guarantees to every man, woman and child of India. The judiciary is the means through which a true democracy can reach down to the lowest levels of society. So in retrospect, it is all the more important for the judiciary to uphold the values, virtues and morals that it so vehemently should protect. It should be a beacon that lights the way to better ethical and social standards in the

society and not bring darkness into the lives of those who sacrifice and toil for justice in the corridors of courthouses.

The Government's Attempts:

It would not be a fair evaluation of the topic if we were to perceive this issue as merely a lost cause and a one-sided story. Though the dangers of the prevailing conditions are ominous to say the least, it would not be out of place to highlight a few points that can be efficiently utilised by all those who seek justice. These points are basically mechanisms that exist today and can prove highly useful in providing high quality and reasonable justice to the people who need it the most.

1. Fast track courts: There has been a lot of debate on the functioning of the fast track courts which have been a recent introduction into the legislative sphere. This is a new concept that evolved out of the need to provide basic, affordable and legitimate hearing to people who cannot afford to toil for years on end with no concrete consequences. Fast track courts have been highly successful and have gone a long way in relieving the higher judicial bodies of a portion of their original workload. Only recently it was announced that the fast track courts would be given a stimulus to encourage them to maintain their performance. Fast track courts have been able to efficiently reduce the litigation costs owing to the fact that they address one of the basic flaws that cause the cost of litigation to increase.

They reduce the redundancy and the lapses caused due to large time gaps in between judicial proceedings. They focus on quick and transparent judgements that save the person from repeated attempts at seeking justice. Decisions are given in a fraction of the time that it would take a conventional set up to do the same. These courts have been a real support system in providing affordable and timely justice.

2. Consumer oriented mechanisms: The Indian Judicial system has also been responsible for setting up of Consumer Courts throughout the country. With the increasingly important role of the consumer in today's society, the judicial system has come up with a specialised kind of court which is consumer oriented. These courts are easily accessible to the common man and remove the hindrances that otherwise plague the market in an economy where unfair trade practices and competition between rival production houses have resulted in the consumer being duped time and again.

3. RTI and PIL: The most innovative and radical changes have been brought about in the contemporary period with the introduction of the Right to Information Act and the Public Interest Litigation. These are mechanisms through which an individual can approach the judiciary directly and ask for information and remedies. RTI is a method through which any citizen of India can seek information on any matter, except matters relating to national security, and it is the duty of the authorities mentioned to provide the fullest information to the

best of their abilities. This is helpful because a person is likely to be satisfied with the information he desires and would eventually dissuade him from taking unnecessary legal action and add to the already gigantic heap of cases waiting to be heard. So in a way the person seeking information is satisfied while another frivolous litigation is avoided. PIL along with Class Action is an adopted approach adapted to Indian requirements. PIL is unique in the way that it loosens the stance of the court on the requirements of locus standi. These two methods enable an informed and concerned citizen to observe and act from a distance and not get involved.

4. Legal Services Authorities Act, 1987: This has proved to be the silver lining in the system which seeks to especially protect and preserve the rights of those individuals who are unable or less able to defend their rights in a court of law. It is specifically aimed at those sections of the society which may be easy targets for exploitative agents like corrupt officials and advocates. The main thrust of this act is that it shall provide free legal support to those persons who are unable to afford it. They shall be duly represented and the fees of the counsel shall be paid by the Legal Committee for as long as the proceedings go on. This goes a long way in supporting the underprivileged classes and affirms their faith in their government. It also adds to the bulwark of the image of the state as a welfare state. The poor, handicapped, women, mentally unstable and other less fortunate sects are supported by this act. It has also led to significant

reduction of spending on the part of the people pursuing litigation and the time taken to reach a decision has also reduced.

Ground realities:

The ground reality is that even though we have the longest and the most comprehensive constitution in the world, there are still innumerable loopholes through which scheming agents have found ways to exploit the general masses and abuse the legal position they enjoy. People have been known to sell off their ancestral property, land and family jewels in order to pay for the litigation costs. Some of these sacrifices have gone in vain and their records have been lost in the endless number of files that accumulate day by day in the courthouses of our country.

The present scenario is such that the litigation procedure is being viewed as nothing more than legal conundrum where so called experts argue about provisions unknown to the common man and decide upon facts which may or may not be present. Dates are extended mercilessly and the burden is always on the poor litigants. The process of appearing in courts and eventually winning a case is now out of the reach of an average hard-working Indian citizen because he simply cannot afford the charges of fighting for something that should rightfully be his. It would not be too blatant to say that justice belongs to those who can afford it. Only the rich and the influential get to enjoy the privileges so clearly mentioned in the Constitution.

The Way Forward:

"Injustice anywhere is a threat to Justice everywhere." Only an enlightened society can be a progressive society. The way forward from the present fix that we have found ourselves to be in should be through a multidimensional approach:

1. Educate the masses: This should be the main focus of the administration and leading legal authorities in the country. The level of awareness of the people should be addressed with paramount care and utmost caution. Legal camps as have been undertaken by various educational institutions are a prime example. The people need to wake up from this condition of apathy that so shockingly has numbed their minds. When the people are better informed about their rights and duties, they are more likely to take informed decisions. They will less likely be tricked into paying colossal sums of money to conniving advocates. Citizens shall be aware of the procedures regarding litigation and shall be safeguarded against unnecessary expenditure.

2. Control on the court fee and regulation of advocate fees: Both the court fees and the fees of the advocates should be subject to regulation and scrutiny. In matters pertaining to the court fees, too little a fee amount should be discouraged. The fees should be high enough to dissuade the practice of frivolous litigation and low enough to facilitate the weaker sections of the society to seek legal help. Advocates' fees should be

controlled beyond a certain point. This would ensure that the citizens of the country are ensured of sound legal counsel.

Conclusion

From the above account it would seem obvious that the conditions surrounding a typical litigation process are not the most encouraging at this point of time. Though, from the recent developments in the area it is evident that the administration is trying hard to amend the past mistakes and focus on a brighter future. We as members of the legal fraternity have the responsibility of bringing about the change that we want to see.

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CORPORATE GOVERNANCE IN INDIA

Priya Sharma*

A corporation is a congregation of various stakeholders, namely, customers, employees, investors, vendor partners, government and society. A corporation should be fair and transparent to its stakeholders in all its transactions. This has become imperative in today's globalized business world where corporations need to access global pools of capital, need to attract and retain the best human capital from various parts of the world, need to partner with vendors on mega collaborations and need to live in harmony with the community. Unless a corporation embraces and demonstrates ethical conduct, it will not be able to succeed.

Corporate governance is the set of processes, customs, policies, laws, and institutions affecting the way a corporation or company is directed, administered or controlled. Corporate governance also includes the relationships among the many

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stakeholders involved and the goals for which the corporation is governed.

Corporate Governance is the system by which companies are directed and managed. It influences how the objectives of the company are set and achieved, how risk is monitored and assessed and how performance is optimized. Sound Corporate Governance is, therefore, critical to enhance and retain investor's trust.

Definition of Corporate Governance

Report of SEBI Committee (India) on Corporate Governance defines corporate governance as "the acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders. It is about commitment to values, about ethical business conduct and about making a distinction between personal & corporate funds in the management of a company."[1]

The OECD provides the most authoritative functional definition of corporate governance: "Corporate governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as the board, managers,

[1] N. R Narayana Murthy, "Report of the SEBI Committee on Corporate Governance." p.5, http://www.sebi.gov.in/commreport/corpgov.pdf. last visited on 14.10.2010.

shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objectives are set, and the means of attaining those objectives and monitoring performance."[2]

History of Corporate Governance in India: A Background

The history of the development of Indian corporate laws has been marked by interesting contrasts. At independence, India inherited one of the world's poorest economies but one which had a factory sector accounting for a tenth of the national product; four functioning stock markets with clearly defined rules governing listing, trading and settlements; a well-developed equity culture if only among the urban rich; and a banking system replete with well-developed lending norms and recovery procedures.[3] In terms of corporate laws and financial system, therefore, India emerged far better endowed than most other colonies.

The years since liberalization, have witnessed wide-ranging changes in both laws and regulations driving corporate governance as well as general consciousness about it. Perhaps the single most important development in the field of corporate governance and investor protection in India has been the

[2] http://www.ccg.uts.edu.au/corporate_governance.htm last visited on 14.10.2010.

[3] Rajesh Chakrabarti, 'Corporate Governance in India – Evolution and Challenges'. http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN023826.pdf, last visited on 4.10.2010.

establishment of the Securities and Exchange Board of India (SEBI) in 1992 and its gradual empowerment since then.[4] Established primarily to regulate and monitor stock trading, it has played a crucial role in establishing the basic minimum ground rules of corporate conduct in the country.

Concerns about corporate governance in India were, however, largely triggered by a spate of crises in the early 90's – the Harshad Mehta stock market scam of 1992 followed by incidents of companies allotting preferential shares to their promoters at deeply discounted prices as well as those of companies simply disappearing with investors' money.

Corporate governance in India is evident from the various legal and regulatory frameworks and Committees set relating to corporate functioning comprising of the following[5]:

- The Companies Act, 1956
- Monopolies and Restrictive Trade Practices Act, 1969 (replaced by new Competition Law)
- Foreign Exchange Management Act, 2000
- Securities and Exchange Board of India Act, 1992
- Securities Contract Regulation Act, 1956
- The Depositories Act, 1996
- Arbitration and Conciliation Act, 1996
- SEBI Code on Corporate Governance

[4] Ibid.

[5] http://www.ss-associates.com/CORPORATEGOVERNANCEININDIA.pdf last visited on 15.10.2010.

Apart from these Acts many committees have been set up over the years to legislate the concept called 'corporate governance'.

1) Desirable Code of Corporate Governance (1998)

Corporate governance has been a buzzword in India since 1998. On account of the interest generated by Cadbury Committee Report (1992) in UK corporate governance initiatives in India began in 1998 with the Desirable Code of Corporate Governance – a voluntary code published by the Confederation of Indian Industry (CII), and the first formal regulatory framework for listed companies specifically for corporate governance, established by the SEBI.[6] The CII Code on corporate governance recommended that the key information to be reported, listed companies to have audit committees, corporate to give a statement on value addition, consolidation of accounts to be optional. Main emphasis was on transparency.

2) Committee on Corporate Governance under the Chairmanship of Shri Kumar Mangalam Birla (1999).

The Kumar Mangalam Committee made mandatory and non-mandatory recommendations. Based on the recommendations of the Committee, the SEBI had specified principles of Corporate Governance and introduced a new clause 49 in the Listing agreement of the Stock Exchanges in the year 2000.

[6] Supra Note 1, last visited on 15.10.2010.

3) Naresh Chandra Committee (2002)

The Enron debacle in July 2002, involving the hand-in-glove relationship between the auditor and the corporate client and various other scams in the United States, and the consequent enactment of the stringent Sarbanes – Oxley Act in the United States were some important factors, which led the Indian government to wake up. The Department of Company Affairs in the Ministry of Finance on 21 August 2002, appointed a high level committee, popularly known as the Naresh Chandra Committee, to examine various corporate governance issues and to recommend changes in the diverse areas involving the auditor-client relationships and the role of independent directors.

The Committee submitted its Report on 23 December 2002. Naresh Chandra Committee recommendations relate to the Auditor-Company relationship and the role of Auditors. Report of the SEBI Committee on Corporate Governance recommended that the mandatory recommendations on matters of disclosure of contingent liabilities, CEO/CFO Certification, definition of Independent Director, independence of Audit Committee and independent director exemptions in the report of the Naresh Chandra Committee, relating to corporate governance, be implemented by SEBI.

4) Committee on Corporate Governance under the Chairmanship of Shri N. R. Narayana Murthy (2002)

Narayana Murthy Committee recommendations to clause 49

of the Listing Agreement, include role of Audit Committee, Related party transactions, Risk management, compensation to Non-Executive Directors, Whistle Blower Policy, Affairs of Subsidiary Companies, Analyst Reports and other non-mandatory recommendations.

Corporate Governance under Clause 49 of the Listing Agreement

Clause 49 of the Listing Agreement, which deals with Corporate Governance norms that a listed entity should follow, was first introduced in the financial year 2000-01 based on recommendations of Kumar Mangalam Birla committee. After these recommendations were in place for about two years, SEBI, in order to evaluate the adequacy of the existing practices and to further improve the existing practices set up a committee under the Chairmanship of Mr Narayana Murthy during 2002-03.

The Murthy committee, after holding three meetings, had submitted the draft recommendations on corporate governance norms.[7] After deliberations, SEBI accepted the recommendations in August 2003 and asked the Stock Exchanges to revise Clause 49 of the Listing Agreement based on Murthy committee recommendations. This led to widespread protests and representations from the Industry thereby forcing the Murthy committee to meet again to consider the objections. The committee, thereafter, considerably revised the earlier

[7] Supra Note 1, last visited on 16.10.2010.

recommendations and the same was put up on SEBI website on 15th December 2003 for public comments. It was only on 29th October 2004 that SEBI finally announced revised Clause 49, which had to be implemented by the end of financial year 2004-05. These revised recommendations have also considerably diluted the original Murthy Committee recommendations.

Areas where major changes were made include:

- Independence of Directors
- Whistle Blower policy
- Performance evaluation of nonexecutive directors
- Mandatory training of non-executive directors, etc.

Failure to comply with clause 49 (corporate governance) of SEBI's listing agreement is punishable with imprisonment of up to 10 years or a fine of up to Rs 25 crore or both. Besides, stock exchanges can suspend the dealing/trading of securities.

With over 6000 listed companies, monitoring and enforcement are significant challenges in the immediate term. While SEBI's ultimate sanction in cases of serial non-compliance is delisting, this is unpopular as delisting penalises the non-controlling dispersed shareholders and closes their exit options. Hence, SEBI has tended to enforce the recommendations through dialog and in some cases monetary penalties.[8]

[8] For example in September 2007, SEBI imposed monetary penalties on 20 companies which did not comply with Clause 49 (The Economic Times, 2007). The identity of these 20 companies were however, not disclosed. Rounding up 20 companies for disciplinary action seems to be a small step compared to the perceived number of non-compliant companies remaining to be acted against.

Corporate Governance under Companies Act, 1956

The Companies Act, 1956 is the central legislation in India that empowers the Central Government to regulate the formation, financing, functioning and winding up of companies. It applies to whole of India and to all types of companies.[9]

The Companies Act, 1956 has elaborate provisions relating to the Governance of Companies, which deals with management and administration of companies. It contains special provisions with respect to the accounts and audit, director's remuneration, other financial and nonfinancial disclosures, corporate democracy, prevention of mismanagement, etc.

- **Disclosures on Remuneration of Directors**

The specific disclosures on the remuneration of directors regarding all elements of remuneration package of all the directors should be made as a part of Corporate Governance. Section 299 of the Act requires every director of a company to make disclosure, at the Board meeting, of the nature of his concern or interest in a contract or arrangement (present or proposed) entered by or on behalf of the company.[10] The company is also required to record such transactions in the Register of Contract under section 301 of the Act.

- **Requirements of the Audit Committee**

Audit Committee has a critical role to play in ensuring the

[9] http://business.gov.in/corporate_governance/companies_laws.php last visited on 6.10.2010.

[10] http://www.iiaindia.org/docs/companies%20act%20proviso%20on%20CG.doc. last visited on 16.10.2010.

integrity of financial management of the company. This Committee add assurance to the shareholders that the auditors, who act on their behalf, are in a position to safeguard their interests. Besides the requirements of Clause 49, section 292A of the Act requires every public having paid up capital of Rs 5 crores or more shall constitute a committee of the board to be known as Audit Committee.[11]

As per the Act, the committee shall consist of at least three directors; two-third of the total strength shall be directors other than managing or whole time directors. The Annual Report of the company shall disclose the composition of the Audit Committee.[12]

If the default is made in complying with the said provision of the Act, then the company and every officer in default shall be punishable with imprisonment for a term extending to a year or with fine up to Rs 50000 or both.

- **Number of Directorships Restricted**

Sections 275, 276 and 277 have been amended to provide that no person shall hold office as director in more than 15 companies (excluding private company, unlimited company, etc., as defined in section 278) instead of 20 companies. This shall enable the director concerned to devote more time to the affairs

[11] Supra Note 10.

[12] The recommendations of the committee on any matter relating to financial anagement including Audit Report, shall be binding on the board. In case board does not accept the recommendations so made, the committee shall record the reasons thereof, which should be communicated to the shareholders, probably through the Corporate Governance Report.

of company in which he is a director.[13]

- **Corporate Democracy**

Wider participation by the shareholders in the decision-making process is a pre-condition for democratizing corporate bodies. Due to geographical distance or other practical problems, a substantially large number of shareholders cannot attend the general meetings. To overcome these obstacles and pave way for introduction of real corporate democracy, section 192A of the Act and the Companies (Passing of Resolution by Postal allot), Rules provides for certain resolutions to be approved and passed by the shareholders through postal ballots.

- **Appointment of Nominee Director by Small Shareholders**

Section 252 has been amended to provide that a public company having paid-up capital of Rs. 5 crore or more and one thousand or more small shareholders can elect a director by small shareholders. "Small shareholders" means a shareholder holding shares of nominal value of Rs. 20,000 or less in a company.[14] However, this provision is not mandatory and small shareholders have option to elect a person as their representative for appointment as director on the Board of such company.

- **Directors' Responsibility Statement**

Sub-section (2AA) in section 217A has provided that the Board's report shall include a directors' responsibility statement

[13] http://articles.manupatra.com/PopOpenArticle.aspx?ID=729b115f-d9c6-44ea-be22- b00d73f61f0d&txtsearch=C.M.%20Bindal* last visited on 17.10.2010.
[14] Supra Note 9, last visited on 17.10.2010.

with respect to applicable accounting standards having been followed, consistent application of accounting policies selected so as to give a true and fair view of state of affairs and of the profit and loss of the company, maintenance of adequate accounting records with proper care for safeguarding assets of company and to prevent and detect fraud and other irregularities, and the preparation of annual accounts on a going concern basis.

Conclusion

With the recent spate of corporate scandals and the subsequent interest in corporate governance, a plethora of corporate governance norms and standards have sprouted around the globe. After the Satyam Scandal, corporate governance, which is the system that helps firms control and direct operations, is in the spotlight as key parts of the governance framework such as audit and finance functions have failed to check the promoter-driven agendas.

Corporate governance extends beyond corporate law. Its objective is not mere fulfilment of legal requirements but ensuring commitment on managing transparentcy for maximising shareholder values. As competition increases, technology pronounces the deal of distance and speeds up communication, environment also changes. In this dynamic environment, the systems of Corporate Governance also need to evolve, upgrade in time with the rapidly changing economic and industrial climate of the country.

WOMEN RIGHTS VIS-À-VIS HUMAN RIGHTS

Puja Jaiswal*

1. Introduction to the concept of Human rights

Human Rights means certain rights which are considered to be very basic for an individual's full physical, mental and spiritual development. It refer to the “basic rights and freedoms to which all humans are entitled”. These are the rights that every human being automatically qualifies for at birth. They cannot be denied because of the colour, of one's skin, religion, age or other personal factors. Human Rights are those irreducible minima, which belong to every member of the human race when pitted against the State or other public authorities or group and gangs and other oppressive communi-ties. Being a member of the human family he has the right to be treated as human once he/she takes birth or is alive in the womb with a potential title to personhood. Evolution of Human Rights after all depends on evolution of mankind.

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The concept of Human Rights, though very old, got an impetus only after the adoption of the *United Nations Charter* in1945 and the *Universal Declaration of Human Rights* in 1948. The Universal Declaration recalls that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Human Rights is a dynamic concept and endeavours to adapt itself to the needs of the day. Further, Human Rights attain new dimensions and connotations with the march of the society. That is why the definition and understanding of the term depends much upon the social, economic, cultural, -civil and political conditions and opinions prevailing in a given society at a given time. -These developments also give rise to further aspirations of the people to be able to exercise their rights of equality and justice in its finer aspects.

But in all societies, women do not enjoy these rights to their full extent. This is due to gender inequality, direct and indirect discrimination, coercion and violence. While both women and men suffer from specific human rights abuses, much of their experience of human rights is gendered. The women are abused and experience torture, imprisonment, slavery, displacement, discrimination and other violations, simply for fact that they are female.

2. International Norms and Human Rights of Women

For a long time the Human Rights discourses were gender blind and almost ignored the fair sex because men alone participated in public life and therefore were supposed to bear the brunt of the State oppression, so did not spell out women's rights as human rights. From the Magna Carta in 1215 to American Constitution in 1789, the Human Rights did not recognize the special needs of the women. The women faced flagrant abuses everyday, every hour, in every region in the world. The human rights of women were being abused with impunity, they face discrimination and deprivation of her fundamental rights in every walk of her life. It was the *Universal Declaration on Human Rights* in 1948, which for the first time recognized women's rights as human rights. One of the great milestones in the protection of women's human rights was the adoption by the United Nations General Assembly in December 1979 of the *UN Convention On Elimination of All Forms of Discrimination against Women (CEDAW)*, The Convention laid the foundation and universal standard for women's equal enjoyment without discrimination of civil, political, economic, social, and cultural rights. The CEDAW provides that women be given rights equal to those of men.

Subsequent approval of new UN treaties, declarations, and mechanisms had advanced the recognition and protection of women's human rights. Since 1979 many organizations have emerged throughout the United States and around the globe to

promote awareness of women's human rights and to advocate for their defense.

The World Conference of Human Rights (1993) at Vienna, which was one of the main turning points in women's rights for the first time, recognized the gender-based violence against women, In public and private life 'as a human rights concern. The Vienna Declaration specifically condemned gender based violence and all forms of sexual harassment and exploitation. The conference concluded that:

"Human rights of women and of the girl child are inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil economic and cultural life at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community". The Conference urged upon governments, institutions, inter governmental and non-governmental organizations to intensity their efforts for protection and promotion of human rights of women, and the girl child.

The subsequent UN Conference and regional meetings, especially the *Fourth World Conference on Women held in Beijing* the September 1995 concluded that issues critical to the future well being of the women of the world in terms of resources development, protection of environment, establishment of peace, improvements of health and education depend on the adjustment of the status of women. For this it suggested a multi pronged,

integrated approach.

Therefore the global framework of Universal Human Rights has provided legitimacy to all those working towards equal rights for women and has given them tools by specifying the nature, meaning, content and implications of Human Rights of Women.

3. Violence against Women is a Human Rights Issue

According to a leading lawyer, Catherine MacKinnon, Professor of Law, University of Machigan:

"Human rights principles are based on experience, but the experiences have not been those of women. What most often happens to women escapes the human rights net. Whether in peacetime or in war, at home or abroad, in private or in public, by or side or by the other side, man's inhumanity to woman is ignored."

Gender based violence is a form of discrimination which seriously inhibit women's ability to enjoy rights and freedoms on the basis of equality with men. Therefore efforts have been made at the International level to prohibit violence against women and sex discrimination, which was first, incorporated in the *U.N. Charter of 1945 and later reiterated in the Universal Declaration of Human Rights of 1948. The International Covenant on Civil and Political Rights and The International Covenant on Economic, Social and Cultural Rights,* 1966 guarantees equal protection of the law to both sexes.

Convention on Elimination of Discrimination Against Women,1981 specifically states that *"for the purpose of present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective their martial status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civic or any other field."*

From these words if interpreted logically many aspects of domestic violence can be derived. The words like *distinction, restriction, nullifying the recognition, enjoyment* and *exercise* make a complete sketch of violence against women in the line of discrimination.

The Declaration on Violence against Women, 1993, is a mile stone for the countries for enacting laws on domestic violence. *"Violence against Women" is defined as 'any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life'*. Article 2 of this Convention further goes on to explain the forms in which violence is manifested. The Article states that *"violence against women"* shall be understood to encompass:

(a) physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female

children with household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) physical, sexual and psychological violence occurring within the general occurring community including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) physical, sexual and psychological violence perpetuated or condoned by the perpetuated State, wherever it occurs.

The three parts definition by the Convention focuses on all the aspects of violence against women. This clearly takes into account domestic violence or violence against women in intimate relationships as an inherent issue that needs to be addressed as a human rights violation.

Thus, 'women rights' refers to those rights that have been recognized by the global community and protected by international legal instruments for improving the condition of the women and making women feel that they are humans and not a commodity. This concept of women's human rights has opened the way for women around the world to ask hard questions about the official inattention and general indifference to the widespread discrimination and violence that women experience everyday.

4. Conclusion

Thus, in all societies, women do not enjoy these rights to their full extent. This is due to gender inequality, direct and indirect discrimination, and coercion or violence. While both women and men suffer from specific human rights abuses, much of their experience of human rights is gendered. This is, the way in which women are abused and experience torture, imprisonment slavery, displacement, discrimination and other violations are often specifically shaped by the fact of being female.

So, do you think that women rights are different from human rights? The answer is “no” as what we term as women rights are basically the human rights of a women. These rights are necessary for the respectable living of the women. Some say that women are given additional rights in terms of women rights but that is not the case. What we categorize as “women rights” are indeed the “human rights of women”. 'Women's rights' are nothing but a recognition of 'women's human rights' because the women and girl child face additional human rights violation solely or primarily because of their sex.

The time has come to protect the human rights of women, to raise our voices against the discrimination of women. To conclude, I would like to quote the preamble of *Convention on the Elimination of All Forms of Discrimination against Women*, which states that

"The full and complete development of a country, the welfare of the world and the cause of peace required the maximum participation of women on equal terms with men in all fields."

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KNOW YOUR LEGAL LUMINARIES

JUSTICE V.R. KRISHNA IYER

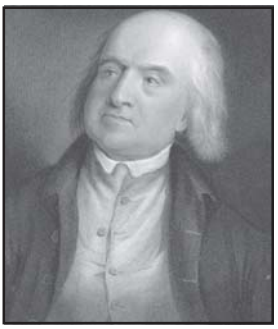
Justice V.R. Krishna Iyer born on 15th November 1915, in Northern Kerala and educated in Annamalai and Madras universities, practiced law and defended peasants and workers against the exploitation of the feudal lords who had the tacit support of the British colonial regime.

In 1956, Mr. Iyer was elected initially to Madras Legislative Assembly and later, after reorganization of the states, to the Kerala assembly where he was chosen as Minister-in -charge of important portfolios like Home ,Law, social welfare and irrigation.

Leaving the treasury bench, he rose to the top at the Kerala Bar and was elevated to the bench in 1968. His lawyering years made him a dauntless advocate with crimson commitment. He became the member of Law Commission of India two years later. In 1973, the Supreme Court of India beckoned him where he played an important role in an era of judicial activism, public interest litigation,affirmative action through courts and a wide ranging exercise of judicial review for which Indian judiciary is being hailed throughout the world today. By interpreting Article 21 of the Indian Constitution, Justice Iyer's bench directed the state to provide free legal services to accused persons in custody. The Reformative theory, in contrast to deterrence theory, became deep-rooted in the criminal justice system in the wake of landmark rulings of Justice Iyer. He also imposed stern conditionalities making the death penalty a sentence of rarity.

Mr. Justice Iyer is the author of numerous books and has penned innumerable articles and is a leading member of several social organizations and professional bodies. He is the only surviving Indian legal legend and Judge on whom three doctoral thesis have been written by scholars in three different universities.

JEREMY BENTHAM



Jeremy Bentham, the founder of Utilitarianism combined throughout his active life the careers of a philosopher, a jurist and that of a social reformer and an activist. He was born on February 15, 1748 in London in a prosperous middle class family. His father Jermiah Bentham ensured a thorough education for his son making the latter's childhood monotonous and gloomy. Bentham started to learn Latin at the age of three and went to Queen's college, Oxford at the age of 12, learning to dislike, rebuke, suspect and hate everything that was ancient or traditional, both in ideas and institutions. He received the degree of law from the prestigious Lincoln's Inn. Though trained to be a lawyer, he gave up the practice of law in order to examine the basis of law and pursue legal reforms. His utilitarian philosophy based on the principle of the "greatest good of greatest number" was aimed "at rearing the fabric of felicity by the hands of reason and law." He championed reforms of prison, legislation and Parliament, and stressed the need for a new Penal Code of England.

Bentham is best known for his advocacy of utilitarianism, for the concept of animal rights and his opposition to the idea of natural rights. His position included arguments in favour of individual and economic freedom, the separation of church and state, freedom of expression, equal rights for women, the end of slavery, the abolition of physical punishment, the right to divorce, free trade, usury and the decriminalization of homosexuality.

He died at the ripe age of 84 in 1832, when his fame was at its highest. His first published work was "Fragments on Government" and the greatest upon which his fame rested is the "Introduction to the Principles of morals and legislation".