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PHILOSOPHICAL ANALYSIS OF INDIAN LEGAL SYSTEM

MURALIKRISHNAN O. K.

**Thesis
submitted to the University of Calicut
for the Degree of
DOCTOR OF PHILOSOPHY IN PHILOSOPHY**

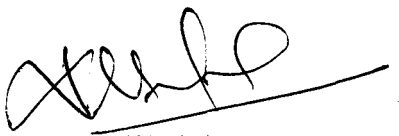
**DEPARTMENT OF PHILOSOPHY
UNIVERSITY OF CALICUT**

2006

DECLARATION

I, O.K. Muralikrishnan, declare this thesis philosophical Analysis of Indian Legal System has not been submitted by me for the award of a degree or a recognition before.

C.U. Campus,
14.06.2006.



O.K. Muralikrishnan

Dr. P.V. UNNIKRISHNAN

Head of the Department
Department of Philosophy
University of Calicut

CERTIFICATE

I, P.V. Unnikrishnan, do hereby certify that this thesis **PHILOSOPHICAL ANALYSIS OF INDIAN LEGAL SYSTEM** submitted for the Degree of Doctor of Philosophy in Philosophy is a record of bonafide study and research carried out by **Mr. Muralikrishnan O. K.**, under my supervision and guidance. The project has not been submitted by him for the award of a Degree, Diploma, Title or Recognition before.

C.U. Campus,
14.06.2006.



Dr. P.V. Unnikrishnan
(Supervising Teacher)

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O.K. MURALI KRISHNAN

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INTRODUCTION

The existing profile of Indian legal system is the product of a series of socio-cultural and political interaction that range over a considerable span of time. A philosophical study of the evolution of such a legal system would thus require an in depth analysis of the culture, society and polity which has worked as the background for such an evolution. The study is based on philosophical formulations of various philosophical schools which influenced the evolution of our society and it's culture. The contribution of Indian as well as western thoughts which paved the basis of our legal system can be used as a background material.

From a broader perspective it may be observed that the Indian legal system is a joint product of the traditional Indian culture, Indian polity and the European modes and all that have influenced India at various stages of its development. This is well evident not only from the fact that the Indian constitution is not an original work (it has borrowed freely from the different available models) but also from the fact that India had a turbulent history which does not help the consolidation of any particular culture. The culture that was much dependent on the old agrarian mode of production and slow growth of industry, handicrafts etc was seriously tampered by the consolidation of British hold over India (by the British preferential tariffs and

fiscal policies). However, the renaissance that followed and which continued during the struggle for independence almost substituted the old model with a new one. This was because of the dominant culture that emerged could not co-exist with the new conditions of the society. Indian polity, which was on the threshold of modernity had not yet freed itself from the anchors of tradition and was still trying to assimilate the democratic perceptions. On the other hand, some of the well-developed modernized European models were perceived as the ideal legal system for a democratic nation. After independence, the international movements had not contributed much towards evolving an Indian legal system. A detailed analysis of some of the aspects of the legal system would easily reveal that the philosophical foregroundings on which these were structured have almost become obsolete and counter productive in a social sense. The dialectical interactions between a population and their legal systems need to be defined within the Indian context.

Every legal system has its own philosophical foundations. This can clearly be seen when the sources of various laws are studied. Customs and conventions, rituals, taboos, legislations and judicial precedents are the main sources of law. Among those given above, rituals and customs, which are the integral part of every culture, stands as the main source of law. Custom is an important stage among the three, in the development of morality. Other two is

the level of instinct and the level of conscience.¹ In the stage of custom man considers to be right those forms of conduct which are approved by the standards or customary modes of behavior of the social group to which he belongs. In this level the bad action is the action that is 'not done' and the good action is the action that has been 'always done'. The importance of this is suggested by the effect that it has had on our ethical terminology. The word 'mores' meaning habits or customs² and the name ethics itself comes as a secondary. We can distinguish between customs that are actually practiced by the majority of a society and customs that are approved by the majority for we realize that the majority may see the better and follow the worse. At the level of custom, however, this distinction is not consciously made; what is done is what ought to be done, and the ways in which their ancestors actually lived are the ways approved by the living generation.

More over, every culture, which leads a society in to a particular ritual, has its philosophical background. The dominant ideology of a state also plays a vital role in framing its laws. In a class society, the legal system has a two-fold function. First its has to thwart the attempts for a social reconstruction and secondly it has to contain all such attempts within its premises.

As a country which accommodates various cultural, religious, political and ideological diversities, the philosophical background of Indian legal

¹ An Introduction to ethics, William Lillie, Allied Publishers, New Delhi, 1967 p.51.

system has always drawn a special attraction from the lawmakers. British rulers made their laws in accordance with the interests of the pressure groups which stood aside with their ruling class. It is a wonder, that a single legal system is governing this country of vast diversity for many years.

Fast changing social circumstances and social values reflect in our culture, politics and administration of justice. Social change influences political and philosophical ideologies and vice versa. The political structure of a society has an important role in law making. After independence a number of social welfare legislations³ have evolved and it caused a number of substantial changes in our social system and social philosophy. Many discrepancies were corrected by the legislature itself. For example the abolition of privy purse⁴ and other special privileges of ex-rulers of princely states (By amendment to constitution) which was believed to be their natural right shows the dominance of a more democratic ideology over a less developed one.

² William Lilly p.56.

³ The Kerala Land Reforms Act,1963(Act 1 of 1964), which included in the Ninth Schedule to the Constitution.

⁴ This amendment was made for the purpose of abolition of privy purses which was being paid to former Rulers pursuant to the agreement reached between Union of India and the rulers of the former princely states at the time of merger, consequent on the judgment of the Supreme Court in *Madhav Rao Scindia V Union of India* (AIR 1973, SC 1461) declaring the executive orders de recognizing Rulers which had the effect of depriving their privy purses and other privileges invalid. (M.Ramajois, p.365)

Human rights protection is the prime consideration of the present day legislation in many of the European countries. However, Indian penal code contains much that is believed to be inconsistent with the developing concept of human dignity and it is much worse in practice. Many of the theories of ethics and morality, which suggests punishment, lost their relevance in the present era. However, the same continues without much change in our codes. The fight between what is established and what newly evolves is seen in many of the tussles between judiciary and legislature and consequent amendments to constitution. The objective of the present study is to point out the specific point of law making in India and arrive at a philosophical conclusion about these social phenomena. As it proceeds the study might have to focus on a specific topic and bring a larger perspective in to it with a view to arrive at conclusions. The study would involve a detailed analysis of Indian society, culture, polity and the philosophical background behind the process of evolution of laws. It will have to focus on the changing profile of the Indian legal systems to arrive at the underlying parameters that support the evolution.

PHILOSOPHY AND THE SOCIAL SCIENCES

Philosophical aspects of man's social life is an important area of social science. This is due to the recent developments in socio-scientific and socio-philosophic disciplines in the modern academic scenario. All endeavors to

find out the unique methods and functions of social philosophy as distinguished from those of the social sciences like politics, law, sociology etc will enrich both the areas. The functions and methodological distinction between social philosophy and social sciences does not effect the inter-link between these schools. This is because their reference to the main subject is the social man. Here the social surroundings which mould the behavior of man is as important as his natural or biological environment. The becoming of man depends on the life of other human beings around him. What enables a man to identify himself as a human being is in principle identical with what enables him to identify other human beings. Man is man in relation to other human beings.

It is clear that the material to be dealt by social philosophers and social scientists is one and the same. Even in the work of classical philosophers like Plato, Aristotle etc. we can find the synthesis of the scientific and philosophical dimensions of the theories of man as a social being. The human sciences of Psychology, Sociology, Anthropology- afford us with invariable and ever growing material dealing with the behaviour of Individual and collective man and with the basic components of human life and civilisation. This is an immense help in our effort to penetrate the world of man. But all this material and this immense treasure of facts would be of no avail if it were not interpreted, so as to enlighten us on what man is. It is up to the philosopher to undertake this task of interpretation.

We find how the facts of social sciences are important in deriving a distinct concept which is to be done by the philosopher. Here an important point is that social sciences in general make an objective study of the various expressions of the human social life. For example the psychologist focuses his attention on the behaviour of man in his social contexts. The interest of the sociologist is in the objective categories of social phenomenon such as associations, social organisations and institutions. Hence we can say that the studies offered by social sciences are basically concerned with what is 'given' about social reality. But the function of Philosophy in this context is different from that of social sciences in as much as it inquires in to 'what ought to be'. Approach in social science is in general descriptive where as social philosophy essentially follows the prescriptive method. Sociologists, Political scientist etc concentrate on the actual where as social philosophers, though interested in the actual, endeavours to bring out the ideal. As the task of the social philosopher is to find out 'what ought to be' this school can be used to find out the new methods in various social subjects. By using the tool formulated by social philosophy the present system of law, politics, culture etc can be analysed. Such an analysis leads to inevitable changes in evaluation the social sciences. The task of social philosophy in suggesting what ought to be is relevant in making progressive changes to social structure whether the structure is one based on written laws or on customs.

ROOTS OF LAW – SOCIOLOGY AND PSYCHOLOGY

Every society develops its own values, habits and institutions. Any violation of these institutional values or laws or principles leads to internal discord within the society. The internal discord or unpleasant feelings arise because of man's strong social impulse, the social conditioning from childhood and the power of suggestion by the group which largely determines the content of individual consciousness. The antipathy of the group against deviation is an emotional out break involved in the conditions of social selection and survival.

Psycho-analysis⁵, a modern school of psychology emphasizes the significance of the instincts of aggression, destruction or death in the human individual that are ambivalent with the instincts of life, love and restitution. An individual's primal hostility and revenge against the parents in infancy express themselves in aggression against the group or the whole community, which controls, stimulates and aggravates such revenge. Here the individual obtains a profound satisfaction from his obedience to his conscience as well as the legal and moral order that represent the super ego⁶ and by which he

⁵ Developed by Sigmund Freud ;1856-1939, this type of therapy is known for long term treatment, typically several times per week, where the unresolved issues from the individual's childhood are analyzed and resolved. These issues are considered to be primarily unconscious in nature and are kept from consciousness through a complex defense system.- (Allpsych online,2006 may 12,<<http://allpsych.com/dictionary/p.html>>).

⁶ In Psychoanalytical theory, the part of the personality that represents the conscience- *ibid*.

recognises himself through the sense of guilt and remorse with the objects of his love.

The prime biological function that law takes is then to internalise social norms and prohibitions and to assimilate them in the self as the super ego. The urge to confession that is universally met with in offenders signifies that the super ego comes to assert itself and that the offender who fears the possibility of losing his love object hopes to regain it by confession. The offender feels the unconscious urge to confession so as to restore him self to the group against which he has committed his aggression. Thus confession or self-censure is the first step towards the reconciliation of the ego with the norms and standards of society that the law stands for.

W.I. Thomas (**William Isaac Thomas** (1863-1947), was an American sociologist. He is noted for his pioneering work on the sociology of migration on which he co-operated with Florian Znaniecki, and for his formulation of what became known as the Thomas theorem, a fundamental law of sociology: "If men define situations as real they are real in their consequences",⁷ gives a large number of instances of the offenders resort to confession and his confident anticipation of salvation in primitive society. He observes

"the development of confession as pattern of control is associated with the concept that conscience is a symptom of

⁷ [Thomas, William I.; Thomas, Dorothy: *The Child in America* (Alfred Knopf, 1929, 2nd ed., p. 572)]

spiritual displeasure of the violation of taboos and is an anticipation of spiritual punishment. Disasters will further happen to the whole group if the individual offenders are not regulated and this regulation consists of purification. This may be in the form of a physical purgation through an emetic, but usually the verbal confession is a purification and sometimes the confession of an evil practice say destructive magic may be all that the society requires". This point is referred to by Persons in a comparison of 'Zunni and Aztect practices'.⁸

Confession and clearing of conscience are first steps in the restoration of the offenders mental equilibrium. These are associated with the assertion of super ego. Law functions as much by bringing the ego⁹ under the surveillance and judgement of the super ego that represents conscience or the social norms as through the threat of an physical punishment. Another point to be noted is that law, in performing its functions, sometimes effect too severe repression of mans libidinal and aggressive tendencies in order to socialise him. This provokes in him the desire to 'get even' rage and destructiveness – crime and social deviation in all its forms that as Freud observes, gives mental relief.

At the same time in the process of the minds maturation and socialisation develops the normal super ego and accepts the punishment of law within his own self with profound delight, derived from the satisfaction of the fundamental unconscious tendencies of love, reparation and restitution that are ambivalent with hatred and aggression. In the community

⁸ Cited in R.K.Mukharjee, 1965, p.296.

⁹ (In Psychoanalytical theory, the part of the personality which maintains a balance between our impulses (id) and our conscience –superego- Allpsych online,2006 may 12,<<http://allpsych.com/dictionary/p.html>>)

consciousness due to social discussion it is the desire for self censure, a reparation and creation that reconcile the guilty person through the feeling of shame and remorse, with those objects threatened by his dangerous aggression and hatred, and underlies the sentiment of justice for the reparation of any breach of custom and social habit or the violation of the social or moral order. Modern psychology shows that man's fundamental tendencies are blended with one another in an intimate way and some are in the foreground and others in the background of consciousness. In the manifestations of law and punishment there is the play of the unconscious tendencies of remorse, restitution and self-censure in the libido.¹⁰

As the enactment of various laws depends up on the sociological and psychological aspects of man and his society the study regarding the socio-psychological basis of law is also important. More over such a study will expose more clearly how the system is to be changed according to modern life.

¹⁰ Sigmund Freud's terminology of sexual energy or sexual drive, *Ibid.*

CHAPTER 1

EVOLUTION OF LAW FROM THE PRIMITIVE STATE TO MODERN SOCIETY

“The virtues in the state were the qualities of the citizen, as such, considered as playing the special part in society for which he was qualified by the predominance in his nature of the philosophic, the pugnacious, or the commercial spirit. But all three elements exist in every individual, who is thus a replica of a society in miniature” Plato ¹

Modern man lives in an organised political society. Such societies are constituted with a definite territory which is called a state. At the time of formation of such states, whether old, tribal or modern maintenance of peace and order were considered as the main functions. Defence against aggression from outside was another duty of the sovereign state. For that purpose might of the entire society had to be consolidated and the organisation claimed absolute authority over its population. The sovereign head is supposed to exercise efficient control over the people and to resist any intrusion thereon. There were also established courts, which were given the authority to settle the disputes between individuals and groups within and outside state. Head of the state had the authority to make laws on any matter and such authority was unquestionable.

¹ The Republic of Plato-Trans. by Francis Macdonald Cornford, Oxford University Press, London, 1975 p.139

These mode of approach towards law and justice in the medieval period were ideologically determined by socio-economic considerations, though not as the result of the knowledge of such ideological background. Even the lawyers and jurists thought it that self contained in the social system. During this period law was not deemed to have any relation with social ideology or to put it otherwise, law was not consciously looked up on as a tool to serve the needs of the entire polity. Justice, hence have no relation with socio-economic interests. So there was no reflection on social or economic justice. This state of affairs reached a climax with the dawn on the 19th century that is before the industrial Revolution. The expansion of commerce and industry during the industrial revolution brought a drastic change in the socio-economic conditions in Europe and outside. Capitalists increased their production through textile mills and factories. Exploitation of the workers or proletariat was a natural corollary of this situation. The domination and oppression by a few over the large working class brought forth powerful critics like Marx, who made political and philosophical treatises for justice in economic and social aspects. In such a situation, agitations emerged from proletarian ideologies and its outcome on society compelled sovereign powers to change their view about the functions of state. As the plea for social justice on economic interests gained strength, subsequently the state became more and more involved in the socio-economic life of the people. Concept of sovereignty also changed and it came to be recognized that the ultimate

authority in the state rested with the people who were therefore entitled to set laws for common observance in the state. In the changed outlook law was no more a command of a superior to his subjects. It became an instrument of social peace and social progress and one developed by the people for themselves. Representatives of the people began to meet from time to time to formulate laws. It was realised that law cannot afford to ignore the rational struggle in social life.

At present enactments are made in all societies to protect workmen against the dangers of modern industrial work, to protect the public against the risks of modern traffic, to protect consumers against dangers of mass production irrespective of any evil intent, or negligence on the part of the particular employer, or producer respectively.

The standardisation of industry, business and employment, the growing predominance of collective bargaining, the development of transport and media of communications, the increase of public welfare and above all the growth of state controlled economy tending towards socialism etc brought forth a new social order that demanded a new technique in the legal system. The expansion of state-control over more and more matters that were formerly left to private concern necessitated a rapid change in public law also. As law becomes multifarious and complex it developed a professional technique. The effectiveness of law thus depends upon the system, which

innovates new specialised areas and modification according to the social needs.

DEVELOPMENT OF THE INDIAN LEGAL SYSTEM

Just as in the case of the ancient European societies, ancient India also seems to have had no organised system of judicial disposal of disputes. The administration of justice was a private affair settled by fight and might. But later it came to be administered by well-settled organs of the society such as 'Sabha', 'Samiti' etc mentioned in ancient scriptures. Though such bodies were essentially for tribal governance they also handled the task of jurisprudence. The function of the tribal head (King) vis-à-vis the disposal of justice has been dealt with in ancient treatise on law like that of Manu, Narada and also in Mahabharatha. According to Mahabharatha the king who is the one who dispenses justice should not deviate from the path of truth and also he should be a cultured person with an intellectual bent of mind. The Naradiya Dharma sastra says

“Judicial procedure has been instituted for the protection of human race, as safeguard of law and order to take from kings the responsibility for crimes committed in their kingdom when humanity was strictly virtuous and veracious. There existed no quarrels, hatred or selfishness. Virtue having become extinct from them, judicial proceedings have to be established and the king having privilege of inflicting punishment has been instituted the judge of lawsuits”.²

² Agarwala, 1993, p.3.

It was the king's duty to punish the lawbreakers and ensure what conditions were conducive for the smooth functioning of the society. Fear of punishment compelled the people to honour the rights of others. Every person had the right to receive justice and it was the state, which delivered it to him. The legal systems which then existed gave no power of legislation to the king. It was believed that a king should decide cases according to the rules of sastras. In the absence of a provision in a text he should follow the usual practice or tradition. King should never act according to his own fiat. Such an action on the part of the King causes danger to him and brings ruin to the people. The king was only an upholder and promulgator of law and the administrator of justice. King presided over the highest court of the state but his duties were performed as prescribed in the law books known as codes.

The concept of 'rta' (the existence of an order in nature) which was originated and developed in Vedic age, led to an establishment of social order in nature, culminating in the development of law for regulating human relations. The thought that individual members of the society must get justice according to law of the land, and that their rights must be safeguarded resulted in introducing a system of judiciary. It was through the state that justice could be dispensed to the society and dispensing justice thus becomes the most important function of the king. In such a system the conception of state and legal system are intimately linked. The state was the authority to implement law and the authority to give impartial justice to the people. The gradual

development of the system to an elaborated and refined one took place with the help of various contributors and lawgivers. The major stages of development are traced as the Vedic i.e. the Pre-Mourya, Maurya and Post-Mourya (i.e.Gupta) periods. The state of affairs in the pre-Maurya periods is often traced in the Vedas, Upanishads, Jatakas etc. At that time jurisprudence or the legal systems (Vyavahara dharmasastra) was embedded in Dharma as propounded in the Vedas, puranas, smritis and other works on the topic.

Dharma is a Sanskrit expression of the widest import. There is no corresponding word for Dharma in other languages and even in Sanskrit it is interpreted in many different shades of meanings. The word can at best be explained rather than being defined. The word Dharma has a wide verity of meanings and a discussion of a few of them would enable us to understand the width of the expression. It is used to denote justice. What is right in a given circumstance moral, religious pious or righteous conduct, being helpful to living beings, giving charity or alms, natural qualities, characteristics and inherent properties of living beings, duty, law and usage or custom having the force of law and also a valid Raja shasana (Royal edict) all these were understood by dharma.

In Mahabharatha there is a situation that , on being questioned by Yudhishtira about the meaning and scope of Dharma, Bhishma states it is most difficult to deliver Dharma, Dharma has been explained to be that which

helps the upliftment of living beings. Therefore that which ensures welfare (of living beings) is strictly Dharma. The learned Rishis have declared that which sustains is Dharma”.

In Taittiriyanopanishad Dharma is explained as follows.

“Dharma constitutes the foundation of all affairs in the world. People respect those who adheres to Dharma. Dharma insulates man against sinful thoughts and actions. Every thing in the world is founded on Dharma.³

Based on the principles of Upanishads and other Vedic texts Shastras and Smriti played a vital role in the judicial sphere. They also increased the judicial power of the king. However references in the Rigveda on the powers of the king shows that early Vedic kings in return to tax paid to him (Mostly through voluntary offerings) conducted the judicial functions of the society. Hence maintenance of law and order, though of a primitive nature, was within the duties or powers of a king. Since polity was tribal, correspondingly, the administration of law and order and jurisprudence as a whole was fairly simple when compared to later standards.

JURISPRUDENCE AS EXPOUNDED IN KAUTILYAS ARTHASASTRA

The Judicial system in the early period was more or less determined by Royal legislation. The socio-economic and political aspects of the evolution

³ Cited in Ramajois, 1989, Vol. 1, p.32.

of a democratic tribal polity into a monarchic one is not intended here. The reasons for codification were

- (i) To preserve the king's person and his rights
- (ii) To ensure the benefit of good governance and
- (iii) To prescribe punishments for such crimes which were not included in the texts.

Arthashastra as it exists today is believed to have been primarily a work of Kautilya with later interpolations. However it is believed that the text reflects the Mauryan epoch of jurisprudence though it is not a text on the history of Mauryan polity. 'Arthashastra' is basically a text on statecraft and it includes an elaborated legal code. It provides for the safeguard of life and property of citizens against encroachment, defamation, assault and attempts on life and property as well as the assaults on the liberty of a person and atrocities from the part of Government officials. Kautilya's conception of law, though stringent was comprehensive and all embracing in its structure and content. According to him law is the eternal order, it was justice and duty. Danda or punishment is the tool for governance of the state. Laws were made to synchronise with the needs of the people and their economic conditions. Kautilya said, "law is a royal command enforced by sanction and the regulating factor of all kinds of human activities". The Mauryan judicial

system continued without change till the death of Bindusara.⁴ Significant administrative changes were introduced during the period of Ashoka. The changes included new judicial officers as well as extension of their duties. Ashoka's edicts contain glimpses of the jurisprudence of his period, which is by and large in coherence with Kautilyas views. Jurisprudence as a whole had consolidated in to a codified form by the end of the ancient period though the same was not very rigid in nature.

NATURE OF LAW IN THE MEDIEVAL PERIOD

With the establishment of Slave Dynasty⁵ in Delhi by Qutb-din-aibak there began the infiltration of Islamic jurisprudence in to Indian legal system. The sources of Islamic law are the Quran and Sunnah.⁶ Quran is the holy book. Prophet is also considered the best interpreter of Quran. There are two other sources, which developed in order to meet the needs of expanding Muslim society. They were

1. Ajma (Consensus of opinion among those who were learned in Quran)

⁴ (**Bindusara** was the second Mauryan emperor (297 - c.272 BC) after Chandragupta Maurya- Wikipedia The free encyclopedia 2006 may23, <http://en.wikipedia.org/wiki/Bindusara>)

⁵ dynastyThe **Slave dynasty** served as the first Sultans of Delhi in India from 1206 to 1290. The founder of the dynasty, Qutb-ud-din Aybak, was a Turkish ex-slave of the Aybak tribe who rose to command the armies and administer the territory of Muhammad Ghori in India- Wikipedia The free encyclopedia 2006 may23, <http://en.wikipedia.org/wiki/>

⁶ In Islam, the Arabic word sunnah has come to denote the way Prophet Muhammad , the Messenger of Allah, lived his life. The Sunnah is the second source of Islamic jurisprudence, the first being the Quran- University of Southern California, USC-MSA Compendium of Muslim Texts,2006 May 23, <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/>

2. Qiyas (Analogical reasoning having due regard to the teachings of Mohammed)

In the mean while divergent opinion taken on various provisions of Quran by eminent Muslim jurists caused the emergence of four well developed branches of Muslim law. They were

1. Hanafi school founded by Abu Hanifa (699-767 AD).
2. Malika school founded by Malik Ibn Aus (713-793AD)
3. The shafi school Muhammad ibu Idris ash –Shafii (767-820 AD) and
4. Hanbali school based on the teachings of Ahmed Ibn Hanbal (780-855 AD).⁷

Among these schools Hanafi school became very popular in many countries including India. Shafi School also succeeded in finding its followers in India.

Muslim law became the law enforceable in India with the establishment of Slave dynasty. The law covered various subjects such as inheritance, gifts, marriage, divorce, wakfs (Pious endowments with reference to the subject matter of trusts) etc which constituted the personal civil law governing the Muslims and also the Muslim criminal law which described the offences punishable and also the penalties for various offences. During the Medieval period the Muslim civil law was embraced by the state. This was to

⁷ Rama Jois 1990, p.9.

some extent made enforceable during the British rule and the same continues to be in force by virtue of Art 372 of the constitution

Art.372- Continuance in force of existing laws and their adaptation.—(1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(3) Nothing in clause (2) shall be deemed—

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.⁸

It was in force prior to the commencement of the constitution and subject to the provisions of legislation enacted by the appropriate legislators.

Muslim criminal law came to be enforced for the purpose of administration of criminal justice. During the Mughal period this law continued to be in force in all areas ruled by the Muslim rulers. Particularly it continued for over hundred years after the taking over of these areas by the British. Aurangzeb⁹ entrusted the preparation of a comprehensive digest of Muslim criminal law to eminent Muslim theologians. This was titled as Fatwa-I-almagiri. The Muslim criminal jurisprudence treated criminal law as a branch of private law than as a part of public law. The principle governing the law was more in the nature of providing relief to the person injured (as in civil matters) rather than to impose penalty for the offence committed. To a certain extent crimes against God were treated as offences against public; moral, and other offences were treated as offences against individuals. Though for the offences against individual the state imposed penalty, still the purpose was only to secure relief to the aggrieved rather than safeguarding the

⁸ Constitution of India, Eastern Book Company, Lucknow, 1980 p.149),

⁹ Aurangzeb (1618-1707), was the ruler of the Mughal Empire from 1658 until 1707)

interest of the society. It was for the private person to move to the state machinery against such offences and the state could not suo-moto cognise at the same.

Offences like murder etc which are treated by modern law as severe crime was treated as an offence against the individual where as drinking wine was considered as an offence against the society and therefore it was treated as a public wrong. The law which prevailed in that period which vested in the heir of the murdered person to initiate action against the murderer and the provision to have the matter compromised was illogical, unreasonable and was had serious consequences such as promoting the commission of such offences.

MUGHAL JURISPRUDENCE

The development of Mughal legal system can be divided into three distinct periods.

- a. The period preceding the reign of Akbar (1542-1605)
- b. The period of Akbars rule
- c. Post- Akbar period till the British rule.

As strict Islamic law was found inadequate for the needs of an expanding and mixed society, consensus was added as another source for law. Prior to Akbar's reign traditional Muslim law was applied even in matters of

judicial procedure. Difficulties in the implementation of this method led to the gradual realisation of its inadequacy and consequently compromises and relaxation were made in its administration.

However real change came during the reign of Akbar when he substantially repealed discriminatory laws that were against non-Muslims. He established a uniform system of justice for all though this was partly reversed by his successors. Administration of justice in the Mughal period was quick and inexpensive. Adjudication was largely based on the facts in hand. Emperor was easily accessible to the poor and hence corruption was less in the field of justice. Such quick dispensation of justice seems to be barbaric from the modern point of view but the same was a definite advance over the previous systems in so far as a strict adherence to impartiality was expected from the judge. The whole system was by and large impartial, prompt, inexpensive and popular

JURISPRUDENCE DURING THE COLONIAL PERIOD

Even after establishing important trading centres in Bombay, Calcutta and Madras during the seventeenth century the British East India Company by and large remained as merchants who obeyed the Indian authority. However the British subjects were subjected to their own laws which were administered by their officers. In 1601 the first charter was granted by Queen Elizabeth 1 which conferred up on the company the right to make reasonable laws as well

as to execute those laws. This included punishment for non-conformity to the laws.

In 1618, Sir Thomas Roe who was the ambassador of James I to the Mughal court formally secured the privilege of allowing the English residents to approach their own officers for adjudication of cases arising among them. This was done during the reign of Jahangir (1569-1627). Charter of 1661 issued during the period of Charles II empowered the governor –in council of the company to act as judge for the disputes arising within their jurisdiction. Then came the charter of 1683 which gave the company full power to make peace and war. This charter also provided for establishing a court of judicature to be held at such place or places as the company might direct. In 1726 the crown by letters patent established mayors courts on English pattern at Madras, Bombay and Fort William (Calcutta). The courts had the power to hear all the civil suits and other similar disputes. In 1753 by letters patent ‘courts of request’ were established at each of the three presidencies for the determination suits in which the amount involved did not exceed RS 20.[Agarwala,1993 .P.36]

In 1675, after the battle of Buxar, East India Company got territorial sovereignty and Sir Robert Clive succeeded in obtaining the right of Diwani over Bengal, Bihar and Orissa from the then ruler Shah Alam. However the Nizamath or criminal jurisdiction remained with the Nawab at Murshidabad.

The Company was to collect revenue, maintain the army and to administer the civil justice. However the company kept away from interfering in the civil laws mainly due to the lack of knowledge about the state of affairs, except for the purpose of revenue administration. The courts mainly followed the Islamic criminal laws.

The jurisdiction of the Mayor's courts and other crown courts in Calcutta did not cover Europeans who lived outside the cities concerned. However the regulating act passed in 1773 provided for the establishment of a Supreme Court at Fort William, Calcutta as the Supreme Court of judicature. They had full civil, criminal and ecclesiastical jurisdiction and were empowered to administer English law to all British subjects and persons in the employment of the Company situated everywhere. At Madras and Bombay Mayors courts based on the British Municipal Model existed till 1797 till they were replaced by Recorders courts, subject to the same limitations as were imposed on the supreme court at Fort William by the act 1781. The system of civil courts established by Lord Cornwallis in Bengal was adopted in Madras presidency in 1802. By regulation III of 1807 the governor ceased to be judge. In 1826 the village heads were appointed as Munsiffs. In 1843 the provincial courts of appeal were abolished and new zilla courts were established. The plan adopted by Warren Hastings with regard to the administration of criminal justice was the retention of Mohammedan law and tribunals under the general control of the Nawab but subject to the superintendence by the

company's government. In 1861 Indian high courts Act was passed to establish, by letters of Patent, three high courts at Madras, Bombay and Fort William. As part of the unification process regarding the criminal justice code of criminal procedure was enacted in 1872.

The legal system introduced by the British was more based on suitability to local conditions as seemed fit by them than on theoretical reasonableness. It was by nature defective and with the raise of National movement the resistance to the glaring defects of British jurisprudence grew stronger. One of the early demands of the Indian National Congress was the separation of judicial function from the Executive power. However the system was continued since it served the colonial interests.

Legal system in the British period was moulded more or less in the British pattern but with a general purport to serve the Interests of the British Capital in India. It was by and large oppressive and biased. Establishment of various courts and the concentration of power on the courts had two main aims

1. To take over the judicial power from the existing rulers and religious heads.
2. To enact and codify rules in such a manner as to help the British sovereign to spread its power all over India.

On attaining these aims the British sovereign began to make laws which were not in contradiction with the Indian sentiments. This change was very much evident after the revolt of 1857.

Codification of laws in India

Though British Government gradually imposed their judicial system in India, discrepancy in the application of a foreign law upon the Indian people remained. The position in India in the beginning of the Nineteenth century was as follows.

- (a) There was Hindu Law, which included smritis commentaries and digests and in addition to it usages and custom which had to be applied to Hindus on several areas.
- (b) Muslim law and usage which was applicable to Mohammedans
- (c) English common law and statutes the application of which was more difficult.
- (d) Charters and Letters of patents which made provisions regarding the application of various laws.
- (e) Regulations made by local Governments on various topics some of which were applicable to presidency towns, other applicable generally to all the areas.

- (f) There were several circulars and orders issued by Nizamat Adalats and Diwani Adalats. (In British India Company's governor WARREN HASTINGS bestowed magisterial power on the collectors and appointed native judicial officers called *sadar amin* in the district civil courts. Sadar Dewani Adalat initially constituted with the governor general and members of his council and subsequently with experienced senior English officers, heard appeals from the decisions of the district or divisional civil courts Sadar Nizamat Adalat constituted with the self same judges of Sadar Dewani Adalat heard appeals from circuit courts of sessions).
- (g) Judges made laws giving conflicting interpretations and applying different laws to different classes of persons applying the principles of justice equity and Good conscience.¹⁰

Due to the influence of Bentham, who gave theoretical and practical support to the codification of laws, Britain made initiation towards codification. Like wise the famous jurists in Britain pointed out the necessity of codification of law in India. The jurist Libretto said that India has been the most successful field of English codification.¹¹

¹⁰ M.Rama Jois, 1990, p.63.

¹¹ Sir Courtney Ilbert 1901, p.129

While moving a resolution in connection with the renewal of the charter of the company in 1833 Charles Grant quoted the following view expressed by the judges of the supreme court at Calcutta in their letter to Governor General of Calcutta about the state of law in Bengal.

“In this state of circumstances no one can pronounce an opinion or form a judgment disputed right of persons respecting may not be raised by those who may choose to call it in question: for very few of the public or persons in office, at home not even the law officer can be expressed to have so comprehensive and clear a view of the present Indian system, as to know readily and familiarly the bearings of each part of it on the rest. There are English Acts of parliament, specially provided for India, and others of which it is doubtful whether they apply to India wholly or in part or not at all. There is the English common law and constitution, of which the application is in many respects still more obscure and perplexed; Mohammedan law and usage; Hindu law, usage and scripture, charters and letters patent of the crown; Regulations of the Government, some made declaredly under Acts of parliament particularly authorizing them, and others which are founded as some say, on the general power of government entrusted to the company by parliament; and as others assert on their rights as successors of the old native Government. Some Regulations require registry in the supreme court; others do not; some have effect generally Throughout India, others from the Nizamat Adalat, and from the Dewani Adalat; treaties of the crown, treaties of the Indian government besides inferences drawn at pleasure from the application of the 'droit public' and the law of nations of Europe, to a state of circumstances which will justify almost any constructions of it, or qualification as its force.”¹²

According to him Indian legal system had the following three defects

- (a) in the laws

¹² Cited in M.Rama Jois, 1990, p.63.

- (b) in the authority making the laws and
- (c) in the manner of enforcing the laws.

Moreover in the course of debate on the charter Bill of 1833 McCauley forcefully brought out the utter confusion and multiplicity of laws prevailing in India and the risk involved in relying upon the opinion of Pandits for the interpretation of Hindu Law, and upon the Kazis for the interpretation of Muslim law. The Act of 1833 was enacted incorporating provisions to enable codification. In the charter provisions were made for the establishment of an All India legislature having legislative authority through out British India and for the creation of a new office of a law member and for the appointment of law commission. According to the charter, first law commission was appointed in 1835. McCauley, who was a member of the House of Commons and a Barrister, was appointed as the chairman. He continued upon 1837 and the commission worked till 1843. The most significant contribution of the first law commission was the preparation of Indian penal code for purpose of codification of penal law in India and the Lex Loci Report on the question of law applicable to persons other than Hindus and Muslims. There is reasonable back ground behind the Lex Loci report. At that time there were several set of laws governing the same subject matter depending upon religion or nationality of the parties concerned i.e., Hindu Law for Hindus, Muslim Law for Muslims, and the English law for the British. On the basis of Justice, Equity and Good conscience the courts were given discretion to mould and

apply legal principles taken from any system of law having regard to the facts and circumstances of the case. There was no 'Law of the land' applicable to all the persons except for well-defined classes like Hindus and Muslims. The position of the resultant groups was extremely anomalous as the law applicable differed from person to persons depending upon his religion or nationality. After two years of appointment, law commission's attention was drawn to the uncertainty about the law applicable to those who were neither Hindus nor Muslims. The commission submitted Che Lex Loci (Law of the Land) report on the question, in which the recommendation was made to declare law of England as the law of land even outside the three presidency Towns. The commission stressed the need of there being a law of land and further opined that English Law could be the obvious choice for that purpose.

The Lex Loci was meant for the inhabitants in India and not to Hindus and Muslims so long as they remain in the respective religion. The subject matter of Lex Loci Report and the draft act were full of complications and was likely to affect large sections of the people, the report was sent for eliciting the opinion from all the local Governments, the supreme courts, sadar Adalats and other officers of experience as the as the Government did not like to proceed in haste. The policy underlying the report was to have a law at least common to all the inhabitants except Hindus and Muslims. The report received support as well as criticism. There was criticism against the assumption made by it that English Law was already being administered by

the Adalats in Moffussil. After seeing the stiff resistance to it the Government thought it was provident to defer action on the Lex Loci Report. However a portion of the draft Lex Loc Act, contained in clauses 10,11 and 12 for dealing with the problems of native converts was accepted and legislation was put through in the form of caste Disabilities Removal Act, 1850. But Maddock, a member of the council, opposed the passing of the Act.

A quote:

"Although the proposed law propounds a principles which theoretically must be admitted as just that us, that no man shall suffer loss or injury on account of his religion, it is regarded by the Hindus as partial and unjust because it will operate only in one direction, and in favour of those who leave the religion of their forefathers to embrace the religion of those who make the law, and in reality, though in the case of converts from Hinduism to Christianity, for neither Mohammedans nor Christians can become Hindus and we rarely hear the former becoming Christians".¹³

The second Law Commission

In exercise of the powers created under the charter Act of 1853 the second law commission was appointed in England. The commission submitted two reports in which importance was given to the reconstruction of courts and judicial Administration. Moreover, the commission expressed it's view against the codification of Hindu Law and Mohammadean Law.

¹³ M.P. Jain, 1966, p.633.

According to the commission both the laws were routed in the respective religion and beliefs and that any attempt to codify these laws were likely to injure the religious sentiments of these classes and would be met with resentment. But minority in the commission expressed their dissent. They were in favour of having Lex Loci as applicable to all persons. But the recommendation of the majority laid the firm foundation in the process of codification of law in India. The commission's cautioning against any attempt to codify Hindu and Mohammedan law was also accepted and scrupulously followed.

Commencing from the period when the Charter Act of 1833 was enacted the question of codification of law had been under the active consideration of the British Government. The British received a rude shock in the form of the revolt of 1857, which had 'the fear of loss of religion' by the Indians as one of its main causes. On account of this the British took over the affairs of the Government of India. In such a situation quick actions were taken and the following laws were passed by the Indian legislature.

- (1) The code of civil procedure Act, VII of 1859
- (2) The Limitation Act, Act X of 1859
- (3) The Indian Penal code 1860
- (4) The code of criminal procedure 1861.

These laws were made applicable to all persons and were a great advance on the laws preceding them, though there were some defects inherent in them.

In 1861 the Third Law commission was appointed. The commission was directed to frame a body of substantive law using, the law of England as the basis, which should become the law for India on that particular subject. There were also a direction to consider and report on such other matters relating to the reformation of laws of India as might be referred to them by the secretary of the state. The commission drafted and submitted seven reports regarding various laws.

First report is regarding the law of succession, and it was enacted with certain codification into Indian succession Act 1865. The commission based the draft of succession Act on the law of succession in England; But there were certain deviations like the distinction maintained in English law by providing two systems of law of succession that is one for immovable and another for moveable was not adopted. The Act was to apply generally for all testamentary and intestate succession except Hindus, Buddhists and Mohammedans. Sikhs and Jains were included in the term Hindu.

In the Second report, which was submitted in 1866, the commission incorporated the draft of the law of contract. This draft included the provisions covering sale of moveable property; partnership and indemnity and

guarantee though the bill was sent to India in 1867 but because of the delay in enacting it the Law Commission send protest letter and registration.

The British administration in India which was by the by the time permitted to make it's own decision introduced the Indian contract Bill in 1871 and this became the Indian contract Act of 1872. Two related Acts were passed after the enactment of contract Act. They are Indian sale of good Act (1930) and Indian partnership Act (1932).

The commission in 1867 submitted third report containing the law of negotiable Instruments, which was approved in 1881 by fourth law commission and enacted as the negotiable instruments Act 1881.

In the same year commission also submitted its Fourth report on law of specific performance and this was enacted as the specific relief Act in 1871.

The Law regarding the Evidence was uncertain during the period. The supreme courts at Bombay Madras and Calcutta and also the earlier records courts at Bombay and Madras followed the English law of Evidence. But the situation in the Moffussil was uncertain, they were not found to apply the English law of Evidence but they had the discretion to apply the same if the same were found to be just and equitable. Some customary laws of were also considered.

The Privy Council observed into the difficulties in enactment of British laws and stated:

"It is perfectly manifest that the practitioners and the judges of the native courts in the East India have not that intimate acquaintance with the principles which govern the reception of evidence in our tribunals; we must look to the essentials of justice of the case, and not hastily reject any evidence because it may be accordant with our own practice".¹⁴

In the fifth report law commission codified the law of evidence on 3rd August 1869. As the bill was found to be incomplete the law member James Stephen prepared a new Bill. It was presented to legislative council in 1871 and was enacted in 1872. The sixth report the commission dealt with the law on Transfer of property. The main object of the law was to regulate by law the transfer of property between living persons and to bring it into harmony with these rules regulating the devolution of property on death. It was not immediately made into an Act. It went before the Fourth Law Commission for revision.

According to the fourth law commission

"The function of the bill was to strip the English Law of all that was local or historical and to mould the residue into a shape in which it should be suitable for Indian population and could easily be administered by non professional judges. Read with the contract Act, this bill conveys almost the whole of the ground which could be profitably occupied law relating to transfer inter vivos of interest in property and for the convenience of the practitioners it could hardly be enacted in a more accessible form."¹⁵

¹⁴ Cited in M. Rama Jois, 1990, p.76.

¹⁵ M.P.Jain, 1996, P 676-677.

Though the criminal Procedure code was already been enacted in 1861, the commission in its seventh Report recommended the revision of the code. The 1861 Act was replaced by Act of 1872. But this Act did not apply to the presidency Towns viz, to High courts in their original jurisdiction of Bombay, Madras and Calcutta in 1876 secretary of State for India instructed the Government of India to revise the Act and to evolve a complete criminal procedure code. Whitley Stokes undertook this task and due to his effort the criminal procedure code of 1882 was enacted.

Several laws were enacted covering important branches of law. Still there remained certain branches of law which required codification. The fourth law commission which was appointed in 1879 did some more work on this direction which resulted in the enactment of negotiable instruments Act in 1881 and the act on Trust and Transfer of property and Easements in 1882. Though the Indian civil wrongs Bill' was also prepared it was not enacted. Fourth law Commission was the last to be appointed in British India. McCauley who headed and inspired the First Law commission in 1833 initiated the process of codification. This process continued till 15th November 1879 on which date the last commission submitted its report. On the whole the conclusion is irresistible that codification has been proved to be very much beneficial to the Indian people. With regard to benefits of codification Stephens said.

"The best illustration of the advantages of this state of things is supplied by the Indian Penal code do not hesitate to say and I speak with much experience of the subject that a young man of good capacity would get a far better and more scientific notion of criminal law in general and of the Indian criminal in particular from a week's study of the penal code than he could get from any amount of study of such book as Rosco's criminal pleading, Archibold's criminal practice or even Russel or crimes. The penal code might be improved in several important particulars both in substance and form, but no one who has not professional acquaintance with the difficulties of the English criminal Law, can possibly Measure the importance of the improvement which it has effected.¹⁶

Though the codification took place in several branches of law the whole area of substantive law could not be covered during the British period some of the important branch of law which was not covered was the law of civil wrong or torts. Another which remained unlauded was the proposal to prepare a civil code in which all the acts should form chapters.

¹⁶ Cited in M.Rama Jois. 1990, p.84.

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CHAPTER 2

INDIAN LEGAL SYSTEM – CONSTITUTION, LAWS AND JUDICIAL ADMINISTRATION

“I feel that it (Indian Constitution) is workable, it is flexible and it is strong enough to hold the country together both in peace time and in war time. Indeed, if I may say so, if things go wrong under the new constitution, the reason will not be what we had a bad constitution, what we will have to say is the Man was vile...” B.R. Ambedkar¹

A study of Indian Legal system includes the study of the Indian constitution, enacted laws and the study of judicial Administration. The three inevitable parts of our nation namely legislature, executive and judiciary contribute to the legal system. Here the constitution is the source, guideline, and also the limitation of our legislation, Executive is the implementing body of the laws. Finally judiciary is the supreme body which helps judicial administration and guides both executive and legislature by interpreting laws. Judiciary also add among the laws by various decisions as judicial precedents. As the prime source, the study of the constitution includes the short history of its enactment, philosophical aspects, and amendments which took place after its enactment on being passed by the parliament to make its provision to suit the changing social and political atmosphere.

¹Mohandass Namishray, Caste and Race Comparative Study of B.R. Ambedkar And Martin Luther King, Rawat Publications, New Delhi, 2003, p.212

Constitution of India

"In a democratic country like India which is governed by a written constitution, supremacy can be legitimately claimed only by the constitution. It is the constitution which is paramount, which is law of laws, which confers on Parliament and the state legislatures the executive and the judiciary their respective powers, assigns to them their respective functions and prescribes limitations within which the said powers and functions can be legitimately discharged".²

The constitution of India is the founding stone of the present Indian legal system. Though major criminal and civil laws were enacted before independence any law enacted after 26th January 1950 is within the scope of the constitution. As the administrative system of India after Independence is based on the provisions in the constitution, any change taking place in the constitution has utmost importance. Moreover the amendments in the constitution in turn are the reflection of changing values in the society and in the political sphere. After decades of struggle and sacrifice, the historic event of Independence came on the midnight of 19th August 1947. At that time every member of the constituent Assembly took a pledge that

"At this solemn moment when the people of India, through suffering and sacrifices have secured freedom, 'as a member of the constituent, Assembly of India, do dedicate myself in all humility to the sacrifice of India and her people to the end that this ancient land attain her rightful and honoured place in the world and make her full and willing contribution to the promotion of world peace and the welfare of mankind".³

² Justice Galen Dragadkar, cited in M.Rama Jois, 1990, p.348.

³ Shiva Rao, 1966, p.558, Vol 1.

Moreover the constitution as a whole and its provisions in special is in accordance with the true spirit of the speech delivered by Jawaharlal Nehru at the time of independence. He said:

"Long years ago we made a tryst with destiny, and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially. At the stroke of the midnight hour, when the world sleeps, India will awake to life and freedom. A moment comes, which comes out rarely in history, when we step out from the old to the new, when an age ends, and when the soul of nation, long suppressed find utterance. It is fitting that at this solemn moment we take the pledge of dedication to the service of India and her people and to the still larger cause of humanity".⁴

Apart from the contributions given by constituent Assembly⁵ Indian constitution was the result of invaluable work of drafting committee containing seven members including Dr. B.R. Ambedkar as the chairman of the drafting committee. In order to assist the drafting committee constituent Assembly constituted Twenty-one committees on various issues. They are

⁴ Shiva Rao, 1966, p. 114.

⁵ Dr. Rajendra Prasad was the President of the Constituent Assembly, and would later become the first President of India. The Assembly, much like the modern Parliament system, was divided into committees and sub-committees to deal with specific branches of government. Dr. B.R. Ambedkar served as the Chairman of the Drafting Committee, responsible for writing the Constitution. India's political leaders such as Jawaharlal Nehru, Sardar Patel, Purushottam Das Tandon and others were all members of this Assembly. It first met on December 9, 1946 in Delhi, while India was still under British rule. It originally included the provinces that now compose Pakistan, and the representation of the princely states of India. The Assembly approved the Constitution on January 26, 1949, making it official. On January 26, 1950, the Constitution took effect - a day now commemorated as **Republic Day** nationwide. (Wikipedia, The free encyclopedia 2006may 14, http://en.wikipedia.org/wiki/Constituent_Assembly_of_India)

- (I) Committee on the Rules of procedure
- (II) Steering committee
- (III) Finance and staff Committee
- (IV) Credentials committee
- (V) House committee
- (VI) Order of Business committee
- (VII) Adhoc committee on the National Flag
- (IX) State Committee
- (X) Advisory Committee on Fundamental rights, Minorities and tribal and excluded areas
- (XI) Minorities sub committee
- (XII) Fundamental rights sub committee
- (XIII) North-East Frontier Tribal Areas and Assam excluded and partially excluded Areas Sub Committee.
- (XIV) Excluded and partially Excluded Areas (other than in Assam) subcommittee
- (XV) Union powers committee
- (XVI) Union constitution committee
- (XVII) Ad hoc committee on the supreme court
- (XVIII) Provincial constitution committee
- (XIX) Committee on chief commissioners princes

(XX) Expert committee on the financial provision of the union constitution

(XXI) Linguistic provinces commission.

Session of the Constitution Assembly commenced on 15th November 1948 and was concluded on October 17, 1949. A large number of amendment proposals came before the Drafting committee and some of them were adopted. Final committee submitted before the president of the Assembly the draft containing 391 articles and 8 schedules.

The Draft constitution was submitted to the president of the Assembly on November 3 1949. Some more amendments were also considered thereafter. The constitution was adopted by the constituent assembly on the 26th day of November 1949. On 26th January 1950 constitution of India came into force.

Features of Indian constitution

Any discussion on the constitution and its amendments is incomplete without a discussion of its basic features. Though it has been prepared after studying all the known constitutions in the world and also by absorbing valuable provisions embodied in them, Indian constitution has an outstanding characters of it's own. To quote Dr. B.R.Ambdekar:

"One likes to ask whether there can be anything new in a constitution framed at this hour in the history of the world. More than hundred years have rolled when the first written constitution was drafted. It has been followed by many other

countries reducing their constitutions to writing . . . Given these facts all constitutions in their main provisions must look similar. The only new things if there be any, in a constitution framed so late in the day are in variations made to remove the faults and to accommodate it to the needs of the country".⁶

At the time of drafting and enactment many political thinkers and politicians apprehended that it would be unworkable. Many others criticised that it was going to become a slavish imitation of the west. But the past fifty year showed it's potential and strength though it needs necessary modification from time to time. It was also a fact that many of the original features of the constitution have been substantially modified by the 54 amendments which have been made up to 1986. Among these amendments 42nd Amendment Act, as modified by the 43rd and 44th Amendment Acts, has practically recast the constitution in vital respects.

During this period 30 Articles have been added to the constitution.

They are

1. Article 31A - Saving laws providing for acquisition of estates
2. Article 31-B validation of certain Act and regulations
3. Article 31-C saving of laws effect to certain directive principles.
4. Article 39-A equal justice and free legal aid
5. Article 43-A participation of workers in Management of industries

⁶ Cited in D D Basu, 1993, p. 30.

6. Article 48-A protection and improvement of environment and safeguarding of forests and wild life.
7. Article 51-A Fundamental duties
8. Article 134-A certificate for appeal to the Supreme Court
9. Article 139-A Transfer of certain cases
10. Article 224-A Appointments of retired judges at sitting of High courts.
11. Article 233-A validation of appointment of, and judgement etc delivered by certain District judges.
12. Article 239-A special provisions with respect to Delhi.
13. Article 239-AB provision in case of failure of constitutional machinery
14. Article 244-A formation of autonomous state comprising certain tribal areas in Assam and creation of local legislature or council of Ministers or both therefore.
15. Article 258-A power of the state to entrust functions to the union.
16. Article 300A persons not to be deprived of property save by authority of law
17. Article 312A power of Parliament to vary or revoke conditions of service of officers certain services.
18. Article 323 A Administrative tribunals
19. Article 323-B tribunals for other matters
20. Article 350-A facilities for instruction in mother tongue at primary stage.

21. Article 350B- special officer for linguistic minorities
22. Article 361-A protection of publication of proceedings of parliament and state legislatures.
23. Article 371-A special provision with respect to the state of Nagaland.
24. Article 371-A special provision with respect to the state of Assam.
25. Article 371 C special provision with respect to the state of Manipur
26. Article 371 D. Special provision with respect to the state of Andhra Pradesh.
27. Article 371 E. Establishment of central university in Andhra Pradesh
28. Article 371 F special provisions with respect to the state of Sikkim.
29. Article 371.G. Special provision with respect to the state of Mizoram
30. Article 378A- special provision as to duration of Andhra Pradesh, legislative Assembly.
31. Article 239A- creation of local Legislature or council of Ministers of both for certain union territories.

In the same period a number of articles were also omitted.

The major features adopted by the constitution from other constitutions were-

- A Fundamental Rights - American Constitution
- B Parliamentary system of Government - United Kingdom
- C Directive principles of state policy - Eire

D Provision relating to emergency - German Reich and also from government of India Act 1935

Apart from these our constitution includes modified result of judicial decisions from various comparable provisions. This helps to minimise litigation and uncertainty. As the critiques of the constitutions feared that the constitution might be perverted, the form of administration was also provided in the constitution. This was done by following and reproducing Government of India Act 1935. Ambedkar also remained this by saying "it is perfectly possible to pervert the constitution without changing the form of administration".⁷ There was a solid reason of adopting lengthy and detailed provisions of the Act of, 1935 to the constitution, the reason is that the people were familiar with the existing system.

Moreover the contributions from Government of India Act which in itself, is a bulky, are expanded the volume of the constitution. Another reason is that in order to avoid all defects and loop holes that might be anticipated in the light of other constitutions, makers included all relevant and progressive portions from various constitutions as we stated earlier. Even the list of fundamental Rights is bulkier than elsewhere because the framers of the constitution had to include novel matters owing to the peculiar problems of our country e.g. preventive detention, untouchability.

⁷ Cited in D.D. Basu, 1999; p.31.

Another outstanding character of our constitution is its flexibility. While American constitution requires ratification of 75% of states for an amendment, the major amendment, the major amendments in our constitution requires ratification of the 50% of states. Some of the amendment did not need any ratification at all. Union parliament has the power to amend the constitution by special majority, which is not less than 2/3 of the members of each house present and voting, which again must be a majority of the total membership of the House. In addition to this feature parliament has the power to alter or modify many of the provisions of the constitution by a simple majority, with a condition that such changes shall not be deemed to be amendments of the constitution. Parliament has also given the power to supplement the provisions of the constitution by legislation. This will help the parliament to modify various laws according to the exigencies of time without having resort to constitutional amendment Prof Wheare in his book modern constitutions refers this system by saying "This variety in the amending process is wise but is rarely found".⁸

Jawaharlal Nehru also supports this flexible character of the constitution when he says:

"While we want this constitution to be as solid and permanent as we can make it there is no permanence in constitutions. There should be certain flexibility. If you make anything rigid and permanent, you stop the nation's

⁸ Cited in DD Basu, 1993; p. 35.

growth, the growth of a living, vital organic people . . . In any event one would not make this constitution as rigid that it cannot be adapted to changing conditions. When the world is a turmoil and we are passing through a very swift, period of transition, what we may do to day may not be wholly capable tomorrow.”⁹

The feature of flexibility itself, is the main reason of seventy-nine amendments made in the provisions within fifty years. During the first thirty-six years of working it has been amended fifty four times. Vital changes have been effected by the first, fourth, twenty fourth, thirty ninth, forty second and forty fourth amendments to the constitution.

Another special character of our constitution is the enforceability of fundamental of rights through High courts and supreme courts. In the Part III of our constitution there are six fundamental rights. 'Article 19 says all citizens shall have the right.

- (a) to freedom of speech and expression
- (b) to assemble peaceably and without arms
- (c) to form associations and unions
- (d) to move freely throughout the territory of India
- (e) to reside and settle in any part of the territory of India
- (f) to practice any profession or to carry on any occupation trade or business.¹⁰

⁹ Cited in DD Basu, 1993; p.35.

¹⁰ Paras Divan, 1984; p.26.

Among these 19(e) is inserted by the constitution forty fourth Amendment Act 1978 and sub clause (f) is omitted by the same Act. Any citizen can approach the Supreme Court as stated in Article 32 and the High court as stated in Article 226 to enforce the fundamental rights. This can be done through the writs namely habeas corpus, mandamus, prohibition, and certiorari. Any law or executive order which offends against the fundamental right is liable to be declared void by the Supreme Court or the High court. These provisions were criticized by some of the English jurists who commented that such provision would make our constitution a lawyer's paradise. To quote Sir Ivor

"Though no English lawyer would have thought of putting the prerogative writs into a constitution, the constituent assembly did so . . . these various factors have given India a most complicated constitution. Those of us who claim to be constitutional lawyers can look with equanimity on this exclamation of our profession. But constitutions are intended to enable the process of Government to work smoothly, not to provide fees for constitutional lawyers. The more numerous the briefs the more difficult the process of government becomes India has perhaps placed too much faith in us".¹¹

But D.D. Basu observes that these observations are a result of the failure to appreciate the very foundation of the Indian constitution. He also says that Sir Ivor omitted to point out that the fathers of the Indian

¹¹ D.D. Basu, 1993, p.167.

constitution preferred the American, doctrine of limited government' to the English doctrine of Parliamentary sovereignty.¹²

Indian constitution also assures an independent judiciary with the power of judicial review. But there is no judicial supremacy as like that of American system. But the various provisions in Article 125 - 147 ensure security of tenure and salary. Moreover the Legislative power regarding the constitution and organisation of, the Supreme Court and the high court vested us the parliament. And the lower judiciary is place under the exclusive control of the high courts also. A balanced position between Parliamentary Sovereignty and written constitution with provision for judicial review is a unique achievement of the framers of our constitution. Here the comparison of English constitution which cannot nullify any Act of parliament is quite different. In such a situation the constitution has assigned no limits to the authority of parliament. A law may be unjust and contrary to the principles of sound government. But, parliament is not controlled in its discretion and when it errors can be corrected only by itself.

But in the case of USA judiciary has assumed supremacy under its powers of interpretation of the constitution to such an extent as to deserve the epithet of the safety valve or balance wheel of the constitution. Comparing with the constitutions of USA and Britain character of Indian constitution is

¹² DD Basu, 1993; p.36.

well balanced. The theory underlying our constitution is that we adopt a method between American system of judicial supremacy and the English principle of Parliamentary supremacy. It gave the judiciary the power to declare a law as unconstitutional. At the same time judiciary is deprived from making judicial review of the wisdom of legislative policy. The special character of our constitution in this regard is observed by Nehru.

"No supreme court, no judiciary can stand in judgement over the sovereign will of parliament, representing the will of the entire community. It can pull up that sovereign will if it goes wrong, but in the ultimate analysis where the future of the community is concerned, no judiciary can come in this way . . . ultimately the fact remains that the legislature must be supreme and must not be interfere with by the courts of law in such measures as social reform".¹³

Moreover the declaration of fundamental right which balances between supremacy of the constitution and sovereignty of the legislature shows another feature of our constitution. But it is to be noted that the guarantee of individual Rights in the constitution has been very carefully balanced with the need for the security of the state itself. Universal Adult suffrage as provided in Article 126 is considered as an important characteristics of our constitution. In Article 326 says

"The election to the house of the people and to legislative Assembly of every state shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than (eighteen years) of age on such date as may be fixed in that behalf by or under any law made by

¹³ Cited in DD Basu, 1993; p.39.

the appropriate legislature and is not otherwise disqualified under this constitution or any law made by the appropriate Legislature on the ground of non - residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election."¹⁴

This Article ensures voting right to every citizen irrespective of sex, property, taxation or the like . . . The scope of this provision is wider than in England or the United States. After the commencement of the constitution the election held in 1952 showed the fruitfulness of this Article. In the election 180 million people were enrolled as voters and not less than 88 million voters exercised their franchise.

Above all the most outstanding feature of constitution is its supremacy of over the three organs of the state. In ancient Indian jurisprudence also 'Raja dharma' is supreme. The executive and the judiciary are bound by the provisions contained therein and are required to function within the four corners of the provisions. This feature was explained by Dr. S. Radhakrishnan in his speech made in the constituent Assembly on January 26 1947 supporting the objectives Resolution made moved by Jawaharlal Nehru. He said

"Dharmam Kshatrasya Kshatram"

Dharma, righteousness is the King of Kings.

¹⁴ P.N. Bakshi, 2000; p.233.

It is the ruler of both the people and the rulers themselves it is the sovereignty of the law we have asserted".¹⁵

While explaining the restrictive clauses continued in Article 368 emphasised the supremacy of the constitution by saying.

"The constitution is a fundamental document. It is a document which defines the position and power of the three organs of the state i.e. the executive, the judiciary and the legislature. It also defines the powers of the executive and the powers of the legislature as against the citizens, as we have done in our chapter dealing with fundamental rights. In fact, the purpose of a constitution is merely to create the organs of the state out to limit their authority, because, if no limitation was imposed upon the authority of organs there will be complete tyranny and complete oppression. The legislature may be free to frame any law; the executive may be free to take any decision and the Supreme Court may be free to give any interpretation of the law. It would result in utter chaos".¹⁶

In the case of 'Shyam sunder Gupta' V/s Union of India Supreme court refers, the legislative competence of parliament and the powers under this article which cannot be challenged in the court, by saying that

"The legislative competency of parliament must not and should not be interfered with by the High court at a stage when the constitution sixty fourth Amendment Bill 1989 is under it's active consideration. The court must not create a constitutional crisis by passing any order which may affect the smooth functioning of parliament. The court had not hesitation to hold that the bill, presently before parliament, if enacted and enforced and there after if it affects the federal structure and the frame work of the constitution then only the

¹⁵ Shiva Rao, 1966, p.15.

¹⁶ Cited in Rama Jois, 1990; p.34.

vires of the same can certainly be legislative competence of parliament and that application of the constituent power under Art 368 of the constitution, in the High court, at this stage. No cause of action arises until the Bill is enacted into the constitution sixty fourth Amendment Act its enforcement by notification is made and till such period the doctrine of *brutum fulmen*' (i.e., threat to which effect cannot be given) prevails".¹⁷

The above-mentioned features of the constitution is inevitable the system of democracy existing in the country now. Though the need of codification in the constitution are rising from various corners, it is not safe to alter its above-mentioned features. In the case of *Golak Nath* culminating with *Keshavanandabharathi's* case supreme court affirmed that there are certain basic feature of the constitution which were immune from the power of amendment conferred by Art 368.¹⁸

Philosophical implications of Indian Constitution

The nutshell of the philosophy of our constitution is embodied in its preamble. By the amendment, made in the year of 1976 one more feature was added which nourished the constitution with a greater consideration for the poor population. The preamble says "we the people of India, having solemnly resolved to constitute India into a sovereign socialist secular, democratic Republic and to secure to all its citizens Justice social, economic and political, Liberty of thought, expression, belief, faith, and worship;

¹⁷ *Syam Sunder Gupta Vs Union of India* cal.64; p.74 –75.

¹⁸ *Kesavananda Bharathi V/s Union of India*, AIR 1973, SC.1461.

Equality of status and of opportunity and to promote among them all: Fraternity assuring the dignity of the individual and the unity and integrity of the nation. In our constituent Assembly this twenty sixth day of November 1949, do hereby adopt, enact and give to ourselves this constitution.”

To understand the philosophy underlying the constitution; the historic objectives Resolution of Pundit Nehru, which was adopted by the constituent Assembly on January 22, 1947 and which inspired the shaping of the constitution through all its subsequent stages is to be noted.

"This constituent Assembly declares its firm and solemn resolve to proclaim India as an independent Sovereign Republic and to draw up for her future governance a constitution.

- (1) Wherein the territories that now comprise British India, the territories that now form the Indian states and such other parts of India as are outside British India and the states as well as such other territories as are willing to be constituted into the independent sovereign India, shall be a union of them all and
- (2) Wherein the said territories whether with their present boundaries or with such others as may be determined by the constituent Assembly and thereafter according to the law of the constitution, shall possess and return the status of autonomous units, together with residuary powers, and exercise all powers and functions of Government and

administration, save and except, such powers and functions as are vested in our assigned to the union, or as are inherent or implied in the union of resulting there from and

- (3) Wherein all power and authority of the sovereign independent India its constituent parts and origins of Government are derived from the people and
- (4) Wherein shall be guaranteed and secured to all the people of India Justice, social, economic and political; equality of status of opportunity; and before the law; freedom of thought, expression belief, faith, worship, vocation, association and action, subject to law and public morality; and
- (5) Wherein adequate safeguards shall be provided for minorities backward and tribal areas and depressed and other backward classes; and
- (6) Wherein shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea and air according to justice and the law of civilized nations: and
- (7) The ancient land attain its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind

Jawaharlal Nehru referred the aforesaid resolution as something more than a resolution, but declaration, a firm resolve, a pledge an undertaking and for all of, Indians a dedication.

The contents of constitution is not a mere product of constituent Assembly and drafting committee chaired by Dr. B.R. Ambedkar, but is the historical out come of the freedom struggle, based on non violence and also based on the plans and ideas of Indian National Congress which was the vanguard of freedom struggle. Prior to independence Nehru, as the leader of national movement said that the National Congress stands for independence and democratic state. It has purposed that the constitution of free India must be framed without outside informs by a constituent Assembly on the basis of adult practice.

Above all, the makers of constitution were influenced by Gandhiji who was the soul of freedom struggle as well as the spiritual leader of India. Matters relating to secularism, freedom of religious worship, equal distribution of resources, sovereignty is all the influence of Gandhi an philosophy upon our constitution

The words selected and used in the preamble is not a decoration to the constitution. It constitutes the soul of the constitution and it in its true meaning governs the rule of Independent India with an utmost consideration to the people.

For example the democratic republic, which preamble envisages is democratic not only from the political but also from the social standpoint. According to the leaders of the Independence movement democracy is not only a style of political administration but also a life style. So India's concept of democratic republic is a democratic society infused with the spirit of justice, liberty, equality and fraternity.

As a form of government, the democracy, which is envisaged, is of course, a representative democracy and there are in our constitution no agencies of direct control by the people such as referendum or initiative. The people of India are to exercise their sovereignty through a parliament, at the centre and a legislative in each state, which is to be elected on adult franchise and to which the real executive namely, the council of Ministers shall be responsible. Though there shall be an elected President at the head of the state, he cannot exercise any political function without the advice of the council of Ministers, which is collectively responsible to the people's representatives. An exception for this is the functions, which the Governor is authorised by the constitution itself to discharge in his discretion or on his Individual responsibility. Indian constitution holds out equality to all the citizens in the matters of choice of their representatives, who are to run the governmental machinery.

The concept of democratic republic emphasise on more in the term political justice. 'The preamble says ". . . to secure all it is citizens justice social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity . . ."¹⁹ This ideal can be best explained with reference to the adoption of universal adult suffrage and the complete equality between the sexes not only before law but also in the political sphere. In order to ensure the political justice held out by the preamble it was essential that every person in the territory of India, irrespective of his proprietary or educational claims, should be allowed to participate in the political system like any other person. Universal adult, suffrage, without any qualification, was adopted with this object in view.

Equal opportunity to men and woman, irrespective of their caste and creed, in the matter of public employment is also implied in the concept of justice in the Preamble. The treatment of the minority even apart from the constitutional safeguards clearly brings out that the philosophy underlying the constitution has not been overlooked by those in power. We can see that the members of the Muslim community are, as a rule being included in the councils of Ministers of the union as well as the states, in the Supreme Court, and even in Diplomatic missions, without any constitutional reservation in that behalf. After considering such features of our political administrative system it can be said that Indian constitution promises not only political but

¹⁹ Constitution of India, Eastern Book Company, 1980 p.1.

also social democracy. Dr. Ambedkar pointed out in his concluding speech in the constituent assembly that political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity, which are not to be treated as separate items in trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality; equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity.

The concept of Democracy apart from the previous periods include economic justice also. The directive principles envisages the way through which this ideal is to be satisfied. Thus the directive principles explain the concept of economic justice in the preamble. About the concept of economic democracy, Nehru, in 1956 in his inaugural address in the seminar on parliamentary Democracy, said

“Democracy has been spoken of chiefly in the past as political democracy, roughly represented by every person having a vote. But a vote by itself does not represent very much to a person who is down and out, to a person, let us say, who is starving or hungry. Political democracy, by itself, is not enough except that it may be used to obtain a gradually increasing measure of economic democracy, equality and the spread of good things of life to others and removal of gross inequalities”.²⁰

²⁰ D.D. Basu, 1999, p.24.

Every member of the community requires certain minimal rights. Without such right, which are essential for a free and civilized existence, democracy cannot be established. The preamble mentions these essential individual rights as 'freedom of thought expression, belief, faith and worship and these are guaranteed by all the authorities of the state as per part III of the constitution. (Art 19, 25-28), These are also included in the Directive principles (Article 31C) and in the fundamental duties introduced by the 42nd Amendment 1976. Equality in the wider sense reaching the whole area of social life is ensured in the body of the constitution by various articles. This is done by making illegal, all discriminations by the state between citizen and citizen; simply on the ground of religion, sex or place of birth (Article 15). In Article 15 C2) entry to the public places is thrown open to all citizens. And the equality is ensured also by abolishing untouchability (Article 17); by abolishing titles of honour (Article 18); by offering equality of opportunity in matters relating to employment under the state (Article 16); by guaranteeing equality before law and equal protection of the laws, (Article 14). The assurance of universal adult Franchise (Article 326) by reiterating that no person shall be either excluded from the general electoral roll is also a provision created for equality. 42nd Amendment Act 1976 the word socialism was inserted into the Preamble. This historical amendment and the insertion of these words with great philosophical significance add more clearly to the

economic, political and social justice envisaged in the Preamble. But it is to be noted that the socialism envisaged by the Indian constitution is not the usual scheme of state socialism, which involves nationalisation of all means of production, and the abolition of private property.

The abolition of private property is not intended by the concept of socialism embedded in Indian constitution. But it seeks to put under restraints the private capital so that it may be used in the interests of the nation, which includes the upliftment of poor. Against the total nationalisation of all property and industry the policy stand for a mixed economy, but aims at offering equal opportunity to all and the abolition of vested interests. But the constitutional obligation to pay compensation to the private owner for state acquisition has been taken away by repealing Art 31 by the constitution 44th Amendment Act, 1978.

Among the people of India, professing numerous faiths, unity and fraternity has been sought to be achieved by enshrining the ideal of a secular state. The term 'secular state' means that state protects all religions equally and does not itself uphold any religion as the state religion. By the 42nd Amendment Act 1976 the word secular was inserted in the preamble. More over the liberty of belief, faith, and worship promised in the preamble is implemented by incorporating the fundamental rights of all citizens relating to freedom of religion in Article 18-29. The contents of these Articles guarantee each individual the freedom to profess, practice and propagate religion and

assure strict impartiality on the part of the state and its institutions towards all religious.

Fraternity can be ensured only by assuring dignity of each of its citizens. In the preamble the dignity of individual is guaranteed. Constitution seeks to achieve this by equal fundamental rights to each individual. He can enforce his minimal rights in a court of law also. Article 32 and 226 assures this by the provision of writs.

The philosophy of our constitution and in special the preamble has been further highlighted by emphasising that each individual shall not only have the fundamental rights in part III of the constitution to ensure his liberty of expression faith and worship, equality of opportunity and the like, but also corresponding fundamental duty, such as to uphold that sovereignty, unity and integrity of the nation, to maintain secularism and the common brotherhood amongst all the people of India. This has been done by inserting Art 51 A laying down ten fundamental duties.

On an analysis of the philosophy of social and economic democracy embedded in the constitution, it can be seen that it incorporated the dreams of the father of our nation. Gandhiji said that an India in which the poorest, shall feel that it is their country in whose making they have an effective voice . . . an India in which all communities shall live in perfect harmony, there can be room in such an India for the curse of untouchability or the curse of intoxicating drinks and drugs. Women will enjoy the same rights as man.

CHAPTER 3

SOCIETY LAW, AND JUSTICE

“People think it is in their power to act unjustly, and therefore that it is easy to be a just man. But it isn't. It is easy, and in their power, to go to bed with their neighbours' wife or to strike the man next door or to pass money across the table. But to do these things in a certain manner is neither easy nor in their power. And they think the just man is none the less able to act unjustly, because the just man is equally or even more able to commit acts of this kind” Aristotle¹

The word justice has been derived from the Greek word *Dikaisune*. It is a wider term than the word of justice. Plato also used this term in a wider sense. His concept of Justice is closely related to morality. “It is the disposition which makes a man refrain from an act recommended by desire or by his apparent interest, though obedience to a belief that he ought not to perform it”.² According to Plato Justice is the real principle of social life and that is why ‘The Republic’ is also known as a treatise concerning Justice. It's aim was to subordinate a true conception of justice for the false views which common error and sophistic teaching had contrived to spread. As Barker puts it, “ Whether he is combating the theory of the sophists, or seeking to reform

¹ Aristotle, Nicomachean Ethics V 9, 1137a 4-9

² M.B.Foster , Masters of political thought from Plato to Machiawelly-quoted by N. Jayapalan, Comprehensive study of Plato, Atlantic Publishers and Distributors, New Delhi, 2002 p.35.

the actual practice of society, justice in the hinge of Plato's thought , and the text of his discourse".³

Justice is the cornerstone of Plato's Ideal state. To him a state was ideal if justice reigns supreme in it. The philosopher ruler knows what is justice in an appropriate manner. According to him unity and harmony prevail in the state because of justice and is inseparable from his ideal state. Justice of the state is the citizen's sense of duty.

Justice is the basic principle of every legal system and also it should be the guiding principle of all social institutions. According to John Rawls "justice is the first virtue of all social institutions , as truth is of systems of thought. A theory however is elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well arranged must be reformed or abolished if they are unjust."⁴ In a society there are some restrictions founded on justice, which cannot be violated in the name of personal freedom. In a just society the liberties of equal citizenship are taken as settled. Moreover the rights secured by justice are not subject to political bargaining. But in certain occasions society may permit an erroneous law. This may be because of the absence of a better one. The state may tolerate an injustice only when it is necessary to avoid an even

³ E.Barker,Greek Political theory-Plato and his Predecessors; quoted by N. Jayapalan, Comprehensive study of Plato, Atlantic Publishers and Distributors, New Delhi,2002 p.35)

⁴ Rawls, p.3.

greater one. For the same reason Rawls observes “being first virtues of human activities, truth and justice are uncompromising”.⁵ It is important to note the role of justice in a society. A society is more or less a self sufficient group of persons. Their relations to one another are based on certain rules of conduct which is binding the group. The individuals for the most part act in accordance with them. Though the society is a group established for mutual advantage, it is also marked by conflict as well as by an identity of interests. The conflict of interests are there because persons included in the group were different. Though the collaboration produces greater benefits, each prefer larger to a lesser share. For these reasons a set of principle is needed for the smooth functioning of the group. It is required for underwriting an agreement on the proper distributive share. For the same reason it is said that “a society is well-ordered when it is not only deigned to advance the good of it’s members but when it is also effectively regulated by a public conception of justice. That is, it is a society which (1) every one accepts and knows that the others accept the same principles of justice, and (2) the basic social institutions generally known to satisfy these principles.”⁶

If man stick on to excessive demands on one another, it will very difficult to reach a common point of view from which their claims may be adjudicated. At the same time if there is a general desire for justice, it will

⁵ Rawls, p.4.

⁶ Rawls, p.5.

limit the pursuit of other ends. So a public conception of justice as constituting the fundamental charter of a well ordered human association is a necessity.

But the existing societies are not well ordered in this sense. Thus it seems natural to think of the concept of justice as distinct from the various conceptions of justice as being specified by the role which these different sets of principles, these different conceptions, have in common.⁷

A standard of agreement in conceptions of justice is however not the only prerequisite for a viable human community. There are other basic social problems, particularly those of coordination, efficiency, and stability. In addition to that scheme of social co-operation must be stable. It must be more or less regularly complied with and its basic rules willingly acted upon. Now it is clear that these problems are connected with that of justice. So we cannot in general assess a conception of justice by its distributive role alone, however useful this role may be in identifying the concept of justice. For the same reason Rawls says "we cannot into account its wider connections; for even though justice has a certain priority, being the most important virtue of institutions, it is still true that, other things equal, one conception of justice is preferable to another when its broader consequences are more desirable."⁸

⁷ H.L.A. Hart, *The concept of law*, Oxford the Clarendon Press, pp155-159.

⁸ Rawls p.6.

The primary subject of justice is the basic structure of society .i.e. the method in which major social institutions distribute fundamental rights and duties and determine the division of advantages from social co-operation. The protection of monogamous family, private property, competitive markets, together with ensuring of freedom of thought and liberty of conscience are examples of major institutions. The basic structure is the primary subject of justice because its effect are so profound and present from the start. This structure contains various social positions and that men born into different positions have different expectations of life determined, in part by the political system as well as by economic and social circumstances. There are inequalities, presumably inevitable in the basic structure of any society, to which the principles of social justice must in the first instance apply. These principles regulate the choice of political set up and the main elements of the economic and social system. Thus the justice of a social scheme depends essentially on how fundamental rights and duties are assigned and on the economic opportunities and social conditions in the various sectors of society.

While following these arguments it is still confusing to examine the principles of justice that would regulate a well ordered society. Every one is presumed to act justly and to do his part in upholding just institutions . According to David Hume though justice may be the cautious, jealous virtue ,

we can still ask what a perfectly just society would like.⁹ For Aristotle justice have a sense of refraining from pleonexia, that is from gaining some advantage for oneself by seizing what belongs to another , his property ,his reward , his office , and the like , or by denying a person that which is due to him, the fulfillment of a promise , the repayment of debt ,the showing of proper respect, and so on.¹⁰

Justice as fairness

The guiding principle of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept on an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements ; they specify the kinds of social co-operation that can be entered into and the forms of government that can be established. John Rawls considers this way of regarding the principles of justice as justice as fairness.¹¹ If men who engage in social co-operation choose, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits. They are supposed to decide how they are to regulate the claims against one

⁹ L.A. Selby-Begge, *An Enquiry concerning the principles of morals* ,Sec III part I, Oxford, 1902, p.184.

¹⁰ See W.F.R. Hardie, *Aristotle's Ethical theory*, oxford, the Clarendon Press, 1968, ch.X.

¹¹ Rawls p.11.

another and what is to be the foundation charter of their society. Each person must decide by rational reflection what constitutes his good. Likewise the group of persons must decide once for all what is to count among them as just and unjust. The choice a rational man would make in this situation of equal liberty, assuming for the present that this choice problem has a solution, which determines the principles of justice.

The primary subject of the principles of social justice is the basic structure of society, the arrangement of the major social institutions into one scheme of co-operation. We have seen that these principles are to govern the assignment of rights and duties in these institutions and they are to determine the appropriate distribution of the benefits and burdens of social life. Here John Rawls warns that the principles of justice for institutions must not be confused with the principles which apply to individuals and their actions in particular circumstances. These two kinds of principles apply to different subjects and must be discussed separately.¹² An institution here means a public system of rules which defines offices and positions with their rights and duties, powers and immunities and the like. These rules specify certain forms of actions as permissible, others as forbidden; and they provide for certain penalties and defenses and so on, when violations occur. Games and rituals, trials and parliaments, markets and systems of property are the examples of institutions.

¹² Rawls, p.55.

When the actions specify by an institution are regularly carried out in accordance with a public understanding , the institution can be said as existing at a certain time and place. Here the actions are taking place following the system of rules defining the institution. Thus parliamentary institutions are defined by a certain system of rules. These rules enumerate certain forms of action ranging from holding a session of parliament to taking a bill to raising a point of order. Various kinds of general norms are organized into a coherent scheme. A parliamentary institution exists at a certain time and place when certain and place when certain people perform the appropriate actions, engage in these activities in the required way, with a reciprocal recognition of one another's understanding that their conduct accords with the rules they are to comply with.¹³

An institution and its basic social structure, is a public system of rules. Which means that, everyone engaged in it knows what he would know if these rules and his participation in the activity they define were the result of an agreement. A person taking part in an institution knows what the rules demand of him and of the others. He also knows that the others know this and so on. To be sure , this conditions are not always fulfilled in the case of actual institutions, but it is a reasonable simplified assumption. The principles of justice apply to social arrangements understood to be public in this sense. The

¹³ H.L.A. Hart, *The conception of Law* ,Oxford, the Clarendon Press, 1961, pp109-114.

rules of a certain subpart of an institution are known only to those belonging to it, we may assume that there is an understanding that those in this part can make rules for themselves as long as these rules are designed to achieve ends generally accepted and others not adversely effected. The publicity of the rules of an institution insures that those engaged in it know what limitation on conduct to expect of one another and what kinds of actions are permissible. There is a common basis for determining mutual expectations.

In a well-ordered society one effectively regulated by a shared conception of justice, there is also a public understanding as to what is just and unjust. It can be assumed that the principles of justice are chosen subject to the knowledge that they are to be public.¹⁴

Democracy is the appropriate political atmosphere to foster laws which ensures justice. Socio -Political basis of the democratic system itself gives prominence to the principle –justice for all; i.e ensuring justice to everybody irrespective of their economic and social status. But in India, one cannot say that the legal system stands for justice irrespective of economical/social status of the people.

In India there are adequate laws and there is also a machinery to implement them. However denial of justice is a reality. Economic and Social backwardness is the main reason behind it. Delay in ensuring justice through

¹⁴ Rawls,p.56.

judicial proceedings will also result in denial of justice. Former chief justice P.N.Bhagavathi in his Law Day speech in 1985 said

“I am pained to observe that the judicial system in the country is almost on the verge of collapse. Our judicial system is crashing under the weight of arrears. It is trite saying that justice delayed is justice denied. We often utter this platitudinous phrase to express our indignation at the delay in disposal of cases but this indignation is only at an intellectual and years to get justice. They have to pass through in our own courts have to wait patiently for years and years to get justice. They have to pass through the labyrinth of one court to another until their patience gets exhausted and they give up hope in utter despair... The only persons who benefit by the delay in our courts are the dishonest who can with impunity avoid carrying out their legal obligations for years and each affluent person who obtains orders and stays or injunctions against government and the public authorities and then continues to enjoy the benefit of such stay or injunction for years, often at the cost of public interest.”¹⁵

In India giving justice only means enacting laws and ruling according to them. Apart from this nobody is concerned about changing socio-political situation. Laws which were enacted beyond 50 or 100 years is inefficient to manage the prevailing situation. Judicial administration is also more or less primitive. Society is fast changing; at the same time exploitation against weaker section is increasing. Economic changes which are seemingly beneficial to the society exploit the poor. Political, administrative systems also favor the people who have power and money. Here the concept of injustice is to be redefined. Redefining the ‘injustice’ in a particular society is

¹⁵ B.R. Agarwala, *our Judiciary*, National Book Trust India, New delhi, 1993 pp.198-199.

the task of the persons formulating philosophical principles. Socio- Political situations and ethical norms prevailing in the society should also be considered. In order to keep pace with fast changing social structure post modern concepts should also be applied in the field of legal philosophy.

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CHAPTER 4

INDIAN CONSTITUTION, HUMAN RIGHTS AND GANDHIJI

“The fundamental objection surely is that a right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognises individual liberty as a value. For the extension of the utilitarian principle that coercion may be used to protect men from harm, so as to include their protection from this form of distress, cannot stop there. H.L.A.Hart, Law¹

Development of the theory and practice of human rights

The doctrine of human rights rests upon a particularly fundamental philosophical claim: that there exists a rationally identifiable moral order, an order whose legitimacy precedes contingent social and historical conditions and applies to all human beings everywhere and at all times. Accordingly moral beliefs and concepts are capable of being objectively validated as fundamentally and universally true. The contemporary doctrine of human rights is one of a number of universalist moral perspectives. The origins and development of the theory of human rights is inextricably tied up with the development of moral universalism. The history of the philosophical development of human rights is punctuated by a number of specific moral

¹ H.L.A.Hart, Law, Liberty and Morality, Stanford: Stanford University Press, 1963
p.9

doctrines which though not themselves full, and adequate expressions of human rights, have nevertheless provided a number of philosophical prerequisites for the contemporary doctrine. These include a view of morality and justice as emanating from some pre-social domain, the identification of which provides the basis for distinguishing between 'true' and merely 'conventional' moral principles and beliefs. The essential prerequisites for a defense of human rights also include a conception of the individual as the bearer of certain 'natural' rights and a particular view of the inherent and equal moral worth of each rational individual.

Human Rights Movement: Early Political, Religious, and Philosophical Sources

The concept of human rights has existed under several names in European thought for many centuries, at least since the time of King John of England. After the king violated a number of ancient laws and customs by which England had been governed, his subjects forced him to sign the Magna Carta, (also called Magna Carta Libertatum, was an English charter originally issued in 1215. Magna Carta is the most significant early influence on the long historical process that led to the rule of constitutional law today. Magna Carta was originally created because of disagreements between the Pope, King John and his English barons about the rights of the King. Magna Carta required the king to renounce certain rights, respect certain legal procedures

and accept that *the will of the king could be bound by law*) or Great Charter, which enumerates a number of what later came to be known as human rights. Among them were the right of the church to be free from governmental interference, the rights of all free citizens to own and inherit property and be free from excessive taxes. It established the right of widows who owned property to choose not to remarry, and established principles of due process and equality before the law. It also contained provisions forbidding bribery and official misconduct. Political and religious traditions in other parts of the world also proclaimed what have come to be called human rights, calling on rulers to rule justly and compassionately, and delineating limits on their power over the lives, property, and activities of their citizens.

In eighteenth and nineteenth centuries in Europe several philosophers proposed the concept of "natural rights," rights belonging to a person by nature and because he was a human being, not by virtue of his citizenship in a particular country or membership in a particular religious or ethnic group. This concept was vigorously debated and rejected by some philosophers as baseless. Others saw it as a formulation of the underlying principle on which all ideas of citizens' rights and political and religious liberty were based.

In the late 1700s two revolutions occurred which drew heavily on this concept. In 1776 most of the British colonies in North America proclaimed their independence from the British Empire in a document which still stirs

feelings, and debate, the U.S. Declaration of Independence. In 1789 the people of France overthrew their monarchy and established the first French Republic. Out of the revolution came the "Declaration of the Rights of Man."

The term natural rights eventually fell into disfavor, but the concept of universal rights took root. Philosophers such as Thomas Paine, John Stuart Mill, and Henry David Thoreau expanded the concept. Thoreau is the first philosopher to use the term, "human rights", and does so in his treatise, *Civil Disobedience*. This work has been extremely influential on individuals as different as Leo Tolstoy, Mahatma Gandhi, and Martin Luther King. Gandhi and King, in particular, developed their ideas on non-violent resistance to unethical government actions from this work. Other early proponents of human rights were English philosopher John Stuart Mill, in his *Essay on Liberty*, and American political theorist Thomas Paine in his essay, *The Rights of Man*.

The contemporary significance of human rights

Human rights have been defined as 'basic moral guarantees that people in all countries and cultures allegedly have simply because they are people. Calling these guarantees "rights" suggests that they attach to particular individuals who can invoke them, that they are of high priority, and that compliance with them is mandatory rather than discretionary. Human rights are frequently held to be universal in the sense that all people have and should

enjoy them, and to be independent in the sense that they exist and are available as standards of justification and criticism whether or not they are recognized and implemented by the legal system or officials of a country. The moral doctrine of human rights aims at identifying the fundamental prerequisites for each human being leading a minimally good life. Human rights aim to identify both the necessary negative and positive prerequisites for leading a minimally good life, such as rights against torture and rights to health care. This aspiration has been enshrined in various declarations and legal conventions issued during the past fifty years, initiated by the Universal Declaration of Human Rights –1948² and perpetuated by, most importantly, the European Convention on Human Rights –1954³ and the International Covenant on Civil and Economic Rights-1966.⁴

Together these three documents form the centrepiece of a moral doctrine that many consider to be capable of providing the contemporary geopolitical order with what amounts to an international bill of rights. However, the doctrine of human rights does not aim to be a fully comprehensive moral doctrine. An appeal to human rights does not provide us with a fully comprehensive account of morality per se. For example Human rights do not

² The Universal Declaration of Human Rights, Office of High commissioner for Human Rights,2006 April 19,<http://www.un.org/Overview/rights.html>)

³ Office of High commissioner for Human Rights,2006 April 19, <http://www.hri.org/docs/ECHR50.html>

⁴ Office of High commissioner for Human Rights,2006 April 19, <http://www.ohchr.org/english/law/cescr.htm>)

provide us with criteria for answering such questions as whether telling lies is inherently immoral, or what the extent of one's moral obligations to friends and lovers ought to be? What human rights do primarily aim to identify is the basis for determining the shape, content, and scope of fundamental, public moral norms. Human rights aim to secure for individuals the necessary conditions for leading a minimally good life. Public authorities, both national and international, are identified as typically best placed to secure these conditions and so, the doctrine of human rights has become, for many, a first part of moral call for determining the basic moral guarantees all of us have a right to expect, both of one another but also, primarily, of those national and international institutions capable of directly affecting our most important interests.

The doctrine of human rights aspires to provide the contemporary, allegedly post-ideological, geo-political order with a common framework for determining the basic economic, political, and social conditions required for all individuals to lead a minimally good life. While the practical efficacy of promoting and protecting human rights is significantly aided by individual nation-states' legally recognizing the doctrine, the ultimate validity of human rights is characteristically thought of as not conditional upon such recognition. The moral justification of human rights is thought to precede considerations of strict national sovereignty. An underlying aspiration of the doctrine of human rights is to provide a set of legitimate criteria to which all

nation-states should adhere. Appeals to national sovereignty should not provide a legitimate means for nation-states to permanently opt out of their fundamental human rights-based commitments. Thus, the doctrine of human rights is ideally placed to provide individuals with a powerful means for morally auditing the legitimacy of those contemporary national and international forms of political and economic authority which confront us and which claim jurisdiction over us. This is no small measure of the contemporary moral and political significance of the doctrine of human rights. For many of its most strident supporters, the doctrine of human rights aims to provide a fundamentally legitimate moral basis for regulating the contemporary geo-political order.⁵

Human Rights and Indian Philosophy

The concept of Human Rights as we consider today is not a concern for Indian philosophy. We can see principles favoring human rights aspects in some of the texts. But this was not the position in most of the texts. The then existing society was not actually aware of the human rights, which is equally applicable to everybody. It was the time, the cast system prevailed in its original rigidity.

The Laws were not equally applicable to all. In a society, which is mainly divided in to four Sections as-Brhmana, Kshatriya, Vysia, Sudra;

⁵ Nickel, James. Making sense of Human rights: Philosophical Reflections on the Universal Declaration of Human rights, Berkely; University of California Press, 1983 p18.

Brahmanas were considered as the top in the hierarchy. At that time all Laws were in favor of them. For eg. Manusmriti says to keep off literate sudra. Moreover advocating dharma was considered as a crime ,if done by sudra.

According to Manusmriti

*“ Dharmopadesam darpena
vipranamasya kurvatha
thaptamasechayeth thylam
vakthre srothre cha parthiva ”*⁶

Which means, Sudra who is advocating dharma with ego to the brahmana is to be convicted by pouring hot oil into the mouth and ear. Moreover the same crime attracted different punishments to different classes.

Sudras were not even considered as human beings. Untouchability is the main example of human rights violation at that time. Each class should stay certain distances from its upper layer.

GANDHIAN PHILOSOPHY AND HUMAN RIGHTS

Mahathma Gandhi was a religious humanist who stood for truth and justice as a great defender and promoter of human rights. For Gandhi, all men are brothers and God is the father of all. According to Gandhi all have basic right for equality, human fraternity and freedom as the children of the

⁶ Manusmriti, Mathrubhumi books, Kozhikode p.362.

god. That is why as early as in 1893, Gandhi fought against the violations of the basic human rights.

Gandhi defended the value and worth of every person, and asserted the potentialities and responsibilities of man as individual and social being. Every person possesses an eternal soul and therefore should be treated with due respect. "Man alone is made in the image of God. That some of us do not recognize that status of ours, makes no difference except that then we do not get the benefit of the status".⁷

Gandhi's doctrine of equality was a corollary of his belief in the spiritual essence of all human beings-men and women. He did not endorse any discrimination between man and woman. "We have to realize equality in the midst of apparent external inequality. Assumption of by any person over any other is a sin against God and Man."⁸ Gandhi claimed for all men and women fair and equal access to economic, social, educational and cultural benefits as well as to public offices and political institutions. The satyagraha in South Africa was a crusade for social equality. Gandhi's ideas regarding a classless society have found a prominent place in India's Constitution. Article 15 of the constitution declares that the state shall not discriminate against anyone on the ground of religion, caste, sex, descent, place of birth etc.⁹

⁷ Collected works of Mahatma Gandhi, XXX1, p101 Govt. of India 1958-1984.

⁸ CWMG, Vol. XLVI, p.302.

⁹ Constitution of India, Eastern Book Company, Lucknow, 1980 p.5,

Thus “equality in the eye of law”¹⁰ is affirmed. One of the monumental achievements of Mahathma Gandhi is the removal of untouchability. In the Indian society untouchability was one of the several forms of human rights violation. Untouchability was abolished by Article 17 of the Indian Constitution¹¹ and the practice of it became punishable. Untouchability Act of 1957 gave more particulars about the offences in this regard and fixed penalties for them.

The Mahathma unhesitatingly stood for the equality of women with men. He was uncompromising in the matter of women’s rights. The process of emancipation of women in India has been accelerated through education. Gandhi tried to enlighten the womenfolk and free from the chains that held them subject to the power and arrogance of men; he guided the women of India to the fast track of emancipation. The legal and customary status of women was bad throughout the country and needed radical change. There was always one argument or other to keep women slaves of men or make them object of man’s lust. Women were in the condition somewhat of the slave of old who did not know that she could or even had to be free. “By sheer of a vicious custom, even the most ignorant and worthless men have been enjoying a superiority over women which they do not deserve and ought not

¹⁰ CWMG, LXVIII, p.90.

¹¹ “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law- Constitution of India, Eastern Book Company, Lucknow, 1980 p.6.

to have."¹² Man and women are fundamentally the same and basically equal." The soul in both is the same. The two live the same life, have the same feelings. Each is a compliment of the other. The one cannot live without the other's active help".¹³ Gandhi decried the wrongs done to women in the name of law, tradition or religion. "Legislation has been mostly the handiwork of man; and man has not always been fair and discriminate in performing that self-appointed task; the largest part of our effort in promoting the regeneration of women should be directed towards removing those blemishes which are represented in our Shastras as the necessary and ingrained characteristics of women"¹⁴

The legal status of equality has been established through several acts. In 1955 the Hindu Marriage Act was passed. It is one of the important Acts in favour of women. After the enactment divorce proceedings can be begun by women. Monogamy has been enforced . In 1956 the Hindu Succession Act gave women rights to inherit money and property. The widow has become the full heir of her husband and guardian of her children.

All should have equal rights

"So long as a person ,whether man or women ,... is oppressed and does not enjoy equal rights with other citizens of the country ,we cannot

¹² CWMG, Vol.XIV, p. 205.

¹³ CWMG, Vol.LXXI p.207.

¹⁴ M.K.Gandhi, Women and social injustice, p.p.3-4,Ahmedabad-1947

enjoy the freedom”.¹⁵ Gandhi’s doctrine of equality was a corollary of his belief in the spiritual essence of all human beings-men and women. “We have to realize equality in the midst of apparent external reality. Assumption of superiority by any person over any other is a sin against God and Man”.¹⁶

The essence of Gandhian philosophy is that Man’s dignity does not originate from his caste or class ,career or success. Gandhi attacked the unfounded theory of cast or race superiority and said “A civilized race coming into contact with a savage one owes it the latter to raise it to the own level”.¹⁷ Gandhi was liberal enough to co-operate with agnostics and atheists in order to safeguard human dignity and to promote authentic humanization. And it is the respect of for this dignity that gives birth to their effective protection. According to Gandhi, more important than things and possessions is man himself .

He published in young India of October 22,1925 a list of seven social evils: Wealth without work, pleasure without conscience knowledge without character, commerce without morality science without humanity politics without principle and worship without sacrifice. People need to know these not merely through the intellect “but know them through the heart so as to avoid them”.¹⁸

¹⁵ Selected WMG, Vol VI ,p-315, Allahabad.

¹⁶ CWMG, Vol.XLVI, p.302.

¹⁷ Selected works of Mahathma Gandhi, Vol.IV, p.30.

¹⁸ CWMG,Vol. XXVIII, p.365.

Gandhi regarded the restoration of the rights of the dispossessed – be they peasants, villagers, scavengers, minorities or immigrants – as an indispensable condition for the establishment of *Ramarajya* – the Kingdom of god – in the world. Justice is devotion to the cause of the oppressed and underdeveloped. His identification with the lowliest and the despised was clear proof of his dedication to their cause. He was a lawyer who was not satisfied with ‘legal justice’. “...It is possible that proceedings may be legal which are by no means just”.¹⁹

He sought a radical solution to violations of human rights. When he was physically attacked out of racial prejudice, he did not immediately and directly go to court to get the aggressor punished; rather he aimed at eradicating the racial prejudice itself. Such was his approach to poverty. Liberal capitalism assumed that if capital is allowed to make large profits, then the benefits of the economic growth would automatically trickle down to the poorest levels of society. But this assumption contradicts reality. Gandhi’s objective was to discover the roots and causes of poverty and to find out “remedies to vindicate fundamental equality”.²⁰

¹⁹ SWMG, Vol. XLV, p.339.

²⁰ CWMG, Vol. XLV, p.339.

UNIVERSAL DECLARATION OF HUMAN RIGHTS AND GANDHIAN PHILOSOPHY

On 10th December 1948 United Nations pronounced International Human Rights Declaration. Gandhi was not a participant of in the sessions of the Human Rights Commission of the U N or in the General Assembly sessions. We cannot speak of any direct influence from him on the formulation of the Universal Declaration of Human Rights. But by 1940 he had become an internationally well known figure and the impact of his words and ideas was felt over the world.

His efforts and arguments to promote and defend human rights were widely known. Gandhi was asked by Julian Huxely, the then Director General of UNESCO to give his opinion concerning the project of Universal Declaration of Human Rights. His reply was very brief as he had no time for a long and studied comment. Insistence on fulfilling one's duties was the main point therein. He disclosed that he had learned one precious thing from his illiterate but wise mother, i.e, rights derive from duties as well.²¹ The right of one person invokes the obligation of others to recognize and respect it. Article 29 of the Universal Declaration refers to duties. UNESCO gathered into a book the views or texts which exercised some moral influence on the experts who drafted the declaration. Gandhi's short comment has been given

²¹ CWMG, Vol. LXXXIX, pp.346-347.

the pride of place as the first article in this volume. There were different types of humanism that influenced the commission on human rights. Gandhi stood for the ideal of brotherhood and sisterhood of all humanity. The first article of the Universal Declaration reflects exactly what Gandhi stood and worked for: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.²²

India has no prominent heritage regarding the principle of Human Rights. As stated earlier the concept is something new , while comparing with the history of Indian philosophy. Later various renaissance movement emerged in India which has some significance with that of human rights. The principles of Gandhiji, the ideological as well as social resistance initiated by Sree Narayana Guru can be described as the foundation stones of Human Rights movements in India. The fight against Sathi (the system of burning wife along with the body of her deceased husband – the concept was that she is voluntarily submitting to the flames) lead by Rajaram Mohan Roy and the social agitations for widow remarriage can also be considered as the movements for human dignity ; which is the basis of human Rights.

The cast system and it's heinous practice is the worst example of Human rights violation in India. In south India Sree Narayana fought against

²² Office of the Commissioner of Human Rights, 2006 May, 25 <http://www.unhchr.ch/udhr/lang/eng.htm>

this. According to him “Whatever may be the language, etc – because they belong all to the same kind of creation , there is no harm at all in their dining together or having marital relations with one another”.²³

Gandhian Philosophy even stood as a guidance to the world scenario of Human Rights. For the same reason UNESCO requested Gandhiji to send his opinion, in a view to include his ideas in the project of Universal Declaration of Human Rights.

The legal development regarding Human Rights in India reached only upto the enactment of The Protection of Human Rights Act-1993 and formation of National, State Human Rights Commissions. There are certain sections in the Indian Penal Code which is to be changed or modified with reference to the human Rights principles. Criminal Procedure Code is another example. The social perspectives of early Victorian stage is reflected in these enactments. Death penalty is a prominent example, which is to be deleted in the light of present Human Rights Concepts. It is a violation of human rights primarily in the light of Article 3 and 5 of Universal Declaration of Human Rights 1948

²³ Nataraja Guru, Life and teachings of Narayana Guru ,East West University Publication , Fern Hill , 1990, p.13.

Nataraja Guru (P. Natarajan) was a direct disciple of Narayana Guru, a great sage and social reformer of India. Nataraja Guru founded *Narayana Gurukulam*, a world-wide contemplative community based on the teachings of Narayanaguru. He translated into English and wrote commentaries on all the major works of Narayana Guru.

Article 3

“Everyone has the right to life, liberty and security of person”

Article 5.

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²⁴

PRINCIPLES OF HUMAN RIGHTS IN CONSTITUTION AND INTERNATIONAL HUMAN RIGHTS DECLARATION

The concept of Human Rights is novel as it reflects the basic moral principles. The principle of Natural justice is also embodied in it. It is a fact that colonial laws stood only for penalising against crimes. It also kept vigilance against breach of contracts. Human rights is not a concern the colonial law makers. Even natural justice principles was defined with the tune of the state and also for the benefit of upper class. But modern law tried to be progressive. There are a number of reasons for this change. The first and second world wars changed the outlook of the rulers. The miseries of the war victims open the eye of politicians. Many political thinkers and social organisations pointed out violation of human rights during the war. The emergence of United Nations paved way to an organised movement towards Human Rights. The International Human Rights Declaration made a new era in this scenario. On 10th December 1948 United Nations pronounced an

²⁴ Office of the Commissioner of Human Rights, 2006 May, 25 <http://www.unhchr.ch/udhr/lang/eng.htm>)

International Human Rights Declaration which includes 30 sections. The situation which compelled the UN to pronounce such a declaration was the massacre done by the Nazis against Jews .Between 1936 to 1945 about 60 lakh of Jews were killed by Hitler. More over Second World War was also a warfront against Human Rights and democracy.

Preamble to The Human Rights Declaration itself shows the aim and purpose of the document. These can be read as follows:

Whereas 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.

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

Whereas it is essential to promote the development of friendly relations between *nations*.

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of

the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.

Now, therefore, the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the people of Member States themselves and among the peoples of territories under their jurisdiction.²⁵

Indian Constitution and Human Rights

Indian constitution which came into force on 26th January 1950 shows an eager consideration towards Human Rights. The makers of the constitution

²⁵ Office of the Commissioner of Human Rights, 2006 May, 25 <http://www.unhchr.ch/udhr/lang/eng.htm>.

adopted a number of principles from various sources. Normally the concept of modern political thinkers and legal philosophers might have influenced them.

Examining various articles of the Declaration with the articles of our constitution we can find essence of Human Rights Declaration in our constitution .

Article 1 of the Declaration directs-

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article-7 says

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.²⁶

Article 14 of the constitution ensures-

The state shall not deny to any person equality before the laws within the territory of India.²⁷

Other articles of Declaration and corresponding articles of the constitution were given below:

Declaration-Art 2

²⁶ Office of the Commissioner of Human Rights, 2006 May, 25 <http://www.unhcr.ch/udhr/lang/eng.htm>)

²⁷ Constitution of India, Eastern Book Company, Lucknow. 1980 p.5.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.²⁸

Const.-Article 15(1)

The state shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.²⁹

²⁸ Office of the Commissioner of Human Rights, 2006May, 25 <http://www.unhcr.ch/udhr/lang/eng.htm>

²⁹ Constitution of India, Eastern Book Company, Lucknow. 1980 p.5.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

Declaration-Art 3

Everyone has the right to life, liberty and security of person. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 4-

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.³⁰

Corresponding articles in the constitutions are

Art 21

*Protection of life and personal liberty.- No person shall be deprived of his life or personal liberty except according to procedure established by law.*³¹

Article-23

Prohibition of traffic in human beings and forced labour.-

(1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.³²

³⁰ Office of the Commissioner of Human Rights, 2006 May, 25 <http://www.unhchr.ch/udhr/lang/eng.htm>

³¹ Constitution of India, Eastern Book Company, Lucknow. 1980 p.8.

³² Ibid p.9.

Article 20 of the constitution states

Article-20. Protection in respect of conviction for offences.- (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. (2) No person shall be prosecuted and punished for the same offence more than once. (3) No person accused of any offence shall be compelled to be a witness against himself.³³

The essence of Article 20 of the constitution could be read in the articles 11,6,of the Declaration.

They are

Article 11.

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

³³ Constitution of India, Eastern Book Company, Lucknow. 1980 p.7.

Article-6

NB 4962

Everyone has the right to recognition everywhere as a person before the law.

Important articles of Indian constitution Article-32&226 have close similarity to the Article 8 of the Declaration.

Decl. 8-"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."³⁴

Corresponding articles ensures-

Art-32

Remedies for enforcement of rights conferred by this part-

- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
- (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of
- (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

³⁴ Office of the Commissioner of Human Rights, 2006 May, 25 <http://www.unhchr.ch/udhr/lang/eng.htm>

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.³⁵

Article 226 of Constitution ensures similar rights-

Power of High Courts to issue certain writs. -

(1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings

³⁵ Constitution of India, Eastern Book Company, Lucknow. 1980 p.13-14.

relating to, a petition under clause (1), without-

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4)] The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.³⁶

Illegal arrest and detention are the evil parts the state. Advocates of the Human Rights are always keeping vigilance against these vices. Sections 9&10 of Declaration directs certain guidelines –

³⁶ Constitution of India, Eastern Book Company, Lucknow. 1980 p.76-77

Article.9-

No one shall be subjected to arbitrary arrest, detention or exile.

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.³⁷

Articles 22 and 39a are equivalent contribution in The Constitution.

39(a) Equal Justice and Free Legal aid

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.³⁸

Art-22. Protection against arrest and detention in certain cases

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

³⁷ Office of the Commissioner of Human Rights, 2006 may, 25 <http://www.unhchr.ch/udhr/lang/eng.htm>

³⁸ Constitution of India, Eastern Book Company, Lucknow. 1980 p. 16.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply-

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless-

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).³⁹

³⁹ Constitution of India, Eastern Book Company, Lucknow. 1980 p.8-9.

These are the main Articles of International Human Rights Declaration and corresponding Articles of Indian Constitution which shows a give and take relationship. The legal system of a country draw ample materials for it's development not only from the social setup of it's own but also from relevant international covenants. As stated earlier Indian Constitution is an example for this. Here the International Human Rights Declaration is an essence noble principles and humanitarian philosophies selected from the entire world. Various theories relating Justice and Humanism inspired the articles.

The declaration came into force on 1948 and nearly 48 years elapsed. Philosophical and legal outlook were apparently changed. Amendments are necessary in the Declaration. Eco-Feminist political theories developed in the recent years should be considered while defining Human Rights. There need change in Human Rights protection laws. Articles in the constitution without humanitarian face should also be changed.

CHAPTER 5

PUNISHMENT IN INDIAN LEGAL SYSTEM

“Contemporary society had significantly humanized the forms of punishment by abandoning the savage corporal brutality that prevailed in the bad old days, in favor of the hidden concrete-and-steel carceral system of the modern era”

Michel Foucault¹

Philosophy behind punishment

Though endowed with conscience, human's basic nature is that of an animal. Sometimes his bestial element overpowers the conscience and he violates the rules of the society. This will disturb the organized society and if allowed would end in the collapse of its setup. Hence to reduce such trends the concept of punishment has been evolved.

The concept of punishment defeats all attempts for a clear and precise definition.

In Halsburys Law of England, the object of punishment is state as follows:

“The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender

¹ Michel Foucault, , *Discipline and Punish: The Birth of the Prison*, Pantheon, New York, 1977

for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like-offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law".²

Plato was of the opinion that punishment was warranted only on the assumption that virtue must be taught. No one reproves another for a harm which has to be fallen him naturally or accidentally.

People are however, wrathful and reprovng where they suffer harm at the hands of another without any manner of justification for such reprehensible conduct of the other. That seemed to be the idea of punishment. No rational man, undertakes to punish in order to avenge himself for a past offence since he cannot undo what was done. The object in punishing must therefore be both reformation and by necessary implication a conclusion must be drawn to the effect that virtue can be produced by training.³

Jurists, right from the time of Aquinas, have always considered the concept of justice by making a distinction between corrective justice and distributive justice. Infact this concept was borrowed by Aquinas from

² Halsbury's Law of England-Fourth edition-Voll,p.288 quoted in Criminal trial justice by Prof A Lakksmikanth & Dr.J Krishnakumari p.57Alt publications 2003

³ Laws 934.A-B,quoted in 'Legal Philosophy from Plato to Hegel'-by H.Cairns – 1949 pp60-70,John Hopkins Press ,Baltimore

Aristotle. Aquinas felt that three conditions must be fulfilled for a judgment to be an act of justice. First, it must proceed from the inclination of justice. Secondly, it must be pronounced according to the Right ruling of prudence or in accordance with that intellectual discernment which perceives the golden mean of moral virtue and the way to rescue the mean.⁴

Kenny says, crime is a wrong whose sanction is punitive and in no way remissible by the crown alone if remissible at all. O. Garofallo developed a concept of the natural crime and defined it as a violation of the prevalent sentiments of pity and probity.⁵ The various definitions have been given above only to highlight the problems faced by jurists and sociologists in defining crime. It is interesting to note that the Indian Penal Code does not even attempt to define the word 'crime' and in fact it avoids the very word and uses the term 'Offence'. The Supreme Court Of India, in Ram Narayan's Case stated "the object of punishment of an accused found guilty in progressive civilized societies is to impress on the guilty party that commission of crimes does not pay and that it is both against his individual interest and also against larger interest of society to which he belongs".⁶

⁴ Cited by Cairns: Legal Philosophy from Plato Hegel-pp.196-197,1949. John Hopkins Press, Baltimore.

⁵ Cited in Sutherland -Principles of Criminology ,Time India Press-Sixth Edition, p.15 1968.

⁶ 2 S.C.C. 86(91),1973.

To be effective as a deterrent to crime, punishment should be prompt and applied to all alike for similar crimes. “ It is not cruelty or severity that renders punishment as an effective deterrent, but rather it’s certainty.”⁷

It could be suggested, that the accused should be tried as speedy as possible in order to reduce to a minimum the time that elapses between the commission of the crime and it’s punishment. This will produce a more lasting effect and tend to strengthen the association between crime and punishment. Many criminologists have opined that the sought for connection between crime and punishment can be made more impressive where it is possible to make the punishment analogous to crime. It is the strength of the association of crime and punishment that is believed to be most effective deterrent. Hence it is true to say with all emphasis that the punishments that are severe, cruel and inhuman do not prevent crime. As a matter of fact it could be argued that extremely severe penalties actually encourage persons to commit crime.

As punishment becomes more cruel and more severe, the minds of men grow more hardened and callous. In every calculation of the excess of evil over good, it is necessary to include the certainty of the penalty and the denial of the expected advantage produced by the crime.

⁷ Punishment and severity and certainty, Journal of Criminology and Criminal Law and Police Science; Vol.63. quoted in Criminal trial justice by Prof A Lakshmikanth & Dr.J Krishnakumari p.65Alt Publications 2003

Theories of punishment

In order to prevent persons from upsetting the balance, the state might take either preventive or corrective action. The former is based on the principle “prevention is better than cure” Chanakya who wrote a broad guidelines for rulers says that “Na dandadakaryani kurvathi”. That means: due to fear of the punishment rod, people do not do things which should not be done.⁸

It can be seen that the various theories of punishment have been advocated keeping in mind the objects that authors felt were attributable to the punishment .Sir Henry Maine observed, “all theories of punishment have more or less , broken down, and we are at sea as to the first principles”.⁹

In view of the absolute uncertainty as to the basis of punishment, all that could be done is to study various theories of punishment and critical review the purposes which they seem to emphasise.

Although traditionally the theories of punishment are considered separately, in practice they are not as easily drawn. This is particularly the case with the utilitarian theories of punishment: deterrence and rehabilitation. Utilitarianism arose in the eighteenth century and was originally addressed to

⁸V.K.Subrahmanyam, Maxims of Chanakya, Abhinav Publications, New Delhi,1980. p.30.

⁹Speeches by Henry Maine-1854;pp.123 quoted in Criminal trial justice by Prof A Laksmikanth & Dr.J Krishnakumari p.66 Alt publications 2003.

social policy as a basis for penal reform and legislation. In the twentieth century it is still probably the most influential philosophy, at least in the penal sphere, and utilitarian principles largely determine present penal policy.

Retributive Theory:

This theory is based on the principle that evil for evil. It means an act of inflicting injury in return of injury. Since the adoption of the code of Hamurabi the principle of 'an eye for an eye and tooth for a tooth' has been accepted as a principle of punishment where wrongdoer merited punishment. According to Dr. Edwig the retributive theory of punishment involves two main concepts: (1) It is an end in itself that the guilty should suffer the pain (2) The primary justification of punishment is always to be found in the fact that an offence has been committed which deserves punishment not in any future advantages to be gained by its infliction whether for society or for the offender as an individual.¹⁰

The utilitarian theories are forward looking; they are concerned with the consequences of punishment rather than the wrong done, which, being in the past, cannot be altered. A retributive theory, on the other hand, sees the primary justification in the fact that an offence has been committed which deserves the punishment of the offender. As Kant argues in a famous passage:

¹⁰ Longford, The idea of punishment, 32, 1661-Quoted by Prof. S.N.Dhyani, Jurisprudence and Indian Legal Theory, Central Law agency, Allahabad, 1999, p-166.

“Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else He must first of all be found to be deserving of punishment before any consideration is given of the utility of this punishment for himself or his fellow citizens.”¹¹

According to Kant retribution or retaliation gratifies the human instinct of revenge. So he supports the theory on grounds of human revenge. “Thine eye shall not pity, but life shall go for life, eye for eye, tooth for tooth, hand for hand, and foot for foot”.¹² According to this view it is right and proper that evil should be returned for evil and that a man as he deals with others so should himself be dealt with. Bentham also envisaged the necessity of retributive punishment and equated the ‘pleasure of vengeance’ with ‘honey dropping from the lion’s mouth’. In India too the supreme Court has applied Retributive theory of punishment while awarding capital punishment by postulating the doctrine of ‘rare of the rarest’ to justify retribution, vengeance or revenge on the person causing injury. Indeed the death penalty serves the

¹¹ Bottoms, A.E. & Preston. R.H. (eds.) *The Coming of the Penal Crisis: a criminological and theological exploration*, Edinburgh: Scottish Academic Press, 1980 p.62.

¹² S.N.Dhyani, p.166.

two purposes – it satisfies the instinct of retribution as well as works as a deterrent to like minded criminals.¹³

The Law commission in 1967 had also suggested that time is not ripe for the abolition of capital punishment as it fulfills the society's sense of justice against the criminal as it abhors heinous crimes and rudely shock it's conscience.

According to Supreme Court "Punishment must also respond to society's cry for justice against the criminal. While considering the punishment to be given to the accused, the court should be alive not only to the right of the criminal to be awarded just and fair punishment by administering justice tempered with mercy as the criminal may deserve, but also to the rights of the victims of the crime to have the assailant appropriately punished and the society's reasonable expectation from the court for the appropriate deterrent punishment conforming to the gravity of the offence and consistent with public abhorrence for heinous crime committed by the accused".¹⁴

According to Justice V.R.Krishna Iyer " the retributive theory has had it's day and no longer valid. Deterrence and reformation are the primary social goals which make deprivation of life and liberty as penal panacea".¹⁵

¹³ Jagmohan Singh v State of U. P., A.I.R 1973 S C 947.

¹⁴ Surja Ram v State of Rajasthan ,A I R, 1997 S C 18& 19.

¹⁵ Rajendra prasad v State of U.P., A.I.R 1973 S C 916; see also Jagmohan Singh v State of U.P ., A.I.R1973 S C 947.

While considering the related discussions regarding the significance of deterrence we can see that it is contrary to modern principles of methods and civilized way of life. The methods of penal servitudes , hard labour is opposed to the theory and philosophy of religion , piety and humanity. It is on account of this reason that capital punishment is being abolished in many civilized countries. Salmond says that retribution is in itself not a remedy for the mischief of the offence but an aggravation of it. It involves pain and suffering and is offensive to the consideration of humanity.¹⁶

Deterrent theory

The deterrence theory of punishment emphasize the necessity of protecting society for so treating the prisoners that others will be deterred from breaking the law. The evil doer is made an example and a warning to the like minded with him. It also aims at checking of the recurrence of crimes again and against the society. Thus the deterrence theory becomes an instrument of social reform. It provides citizen an object lesson. In this spirit an English judge interpreted this theory 'Man , thou are not to be hanged for stealing a horse , but that horses may not be stolen". The basis principles behind this method is to protect the society rather than reform him or prevent him from committing crimes. It can be said to be a self-defence of society

¹⁶ Quoted by Prof. S.N.Dhyani, Jurisprudence and Indian Legal Theory, Central Law agency, Allahabad, 1999. p.168.

against the crimes. Plato, the Sophists, Fichte and Bentham were the adherents of this theory. J. Bentham, as the founder of this theory, states:

“General prevention ought to be the chief end of punishment as its real justification. If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would only be only adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent but also to all those who may have the same motives and opportunities for entering upon it, we perceive that punishment inflicted on the individual becomes a source of security for all. That punishment which considered in itself appeared base and repugnant to all generous sentiments is elevated to the first rank of benefits when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety”.¹⁷

Bentham's theory was based on a hedonistic conception of man and that man as such would be deterred from crime if punishment was applied swiftly, certainly, and severely. But being aware that punishment is an evil, he says,

¹⁷ Honderich, T., *Punishment the supposed justification*, Harmondsworth: Pelican Books Ltd, 1984 p.51.

If the evil of punishment exceed the evil of the offence, the punishment will be unprofitable; he will have purchased exemption from one evil at the expense of another.¹⁸

Recently India witnessed increasing incidents of criminality due to dowry-deaths, bride burning, murder of children to extract ransom, rape and ragging etc. For the same reason the Supreme court of India has adopted deterrent theory of punishment. The court upheld the conviction for the mother in law for murder by way of bride burning of her daughter in law. It declared " It would be a travesty of justice if sympathy is shown when cruel act like bride burning is committed. It is rather strange that the mother in law who herself is women should resort to killing another women. The language Deterrence must speak in that it may be a conscious reminder to the society. Undue sympathy would be harmful to the cause of justice. It may even undermine the confidence in the efficacy of law. Mere fact that the accused , mother in law , has spent more than a decade in jail cannot be ground to show any leniency.¹⁹

Basically the criminal law is not concerned with reform or social protection but with preventing of the individual from committing a crime. Hence punishment is not motivated by considerations of social protection but from the point of prevention of wrong doer from committing crimes.

¹⁸ Honderich, T., *Punishment the supposed justification*, Harmondsworth: Pelican Books Ltd, 1984 p.59.

¹⁹ Paniben v State of Gujarat, A.I.R , 1992, SC 1817.

Justice Holmes in his *Common Law* debunks deterrent theory of punishment as immoral in as much as it gives 'no measure of punishment except the law giver's subjective opinion.....It is said to conflict with the sense of justice that the members of such communities have equal rights of life, liberty and personal security.'²⁰

Preventive theory

According to this theory the main object of punishment is to prevent the wrong doer of his power and capacity of inflicting injuries or committing repeatedly crimes against the individuals by way of disabling him or by way of detention or imprisonment. According to Salmond it's primary is to deter by fear and secondary purpose is to prevent a repetition wrong doing by disablements of the offender.²¹

In India Criminal procedure Code and Indian Penal Code contains provisions contain provisions concerning punishment of attempts and conspiracies to commit crime. Thus detention ,deportation, imprisonment, exile, disablement and death penalty are the chief modes of preventive punishment by which the wrong doer is removed from the scene.

²⁰ Quoted by Prof. S.N. Dhyani, Jurisprudence and Indian Legal Theory, Central Law agency, Allahabad, 1999. p.169.

²¹ Salmond, Jurisprudence.iii,1957- Quoted by Prof. S.N. Dhyani, Jurisprudence and Indian Legal Theory, Central Law agency, Allahabad, 1999. p.169.

Preventive theory of punishment has great utility for India in the prevailing law and order situation against extremists, terrorists, secessionists, drug peddlers, smugglers, underworld armed gangs of mafias, criminals and communalists etc. Who cannot be controlled or reformed by soft and curative methods.

Highlighting the purpose of preventive punishment the Supreme Court declared “there can be no gainsaying that freedom of individual must yield to the security of the state. The right of preventive detention of the individuals in the interest of security of the state in various situations ... has been upheld by the court. The action of the state, however , must be right ,just and fair. The state terrorism would only provide legitimacy to terrorism. That the terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the violation of his human rights except in a manner permitted by law...”²²

Preventive theory is sometimes considered immoral because it overlooks the ill desert of the wrong doing , and furnishes no measure of the amount of punishment , except the law givers’ subjective opinion in regard to the sufficiency of the amount of preventing suffering. According to Kant “it treats man as a thing not as a an end in himself”. Moreover it is said to conflict with the sense of justice and violates the fundamental principle of all

²² D.K.Basu v State of West Bengal, AIR 1997 SC 3669.

free communities, that the members of such communities have equal rights to life, liberty and the personal security.

REFORMATIVE THEORY

The Reformatory theory of punishment which is as old as Plato, is said to be the soul of criminal justice; is the art of recovering the soul of the man smeared by crime. This must be achieved by the sentencing process and the prison treatment. This constructive objective of the punishment is central to the penal policy. The essence of the theory is that crime like other diseases is to be diagnosed and treated. By this way state can make the criminal a useful citizen.

Victor Hugo remarks "We should look upon the crime as a disease. Evil will be treated in charity instead of anger. The change will be simple and sublime. The cross shall displace the scaffold."²³

Likewise Aristotle considered punishment as a sort of medicine. But some medicines are ratrogenic and induce new disease. Gandhiji also said likewise; 'hate the sin and not the sinner' which should be the guide in the administration of criminal justice. According to Gandhiji the outlook of the jail staff should be that of the physicians in a hospital. They were to help them to regain their mental health and not harass them in any way. Progressive criminologists approves the view and describe this as the right panacea and

²³ Anoted from Holmes, common law,43-43(1940).

key to the delinquency –to not only reform the delinquents but also a solution to many complex social issues by salvaging them for society.

In this context eminent judge V.R Krishna Iyer's remarks has it's importance: "A holistic view of sentencing and finer perception of the effect of imprisonment give short shift to the draconian severity and self defeating....Perhaps the time has come for Indian criminologists to rely more on *Patnjali Sutra* as a scientific curative for crimogenic factors than on the blind jail term set out in the Penal Code and that may be why western researchers are now seeking Indian Yogic ways of normalizing the individual and the group."²⁴

Krishna Iyer focuses on certain elemental factors which are of great significance for criminological thoughts particularly so far as our country is concerned to him the Gandhian diagnosis is the key to the pathology of delinquency and therapeutic role of punishment. The spirit of correctional philosophy in criminology is rightly described by Krishna Iyer, "If every saint has past , every sinner has a future and it is the role of the law to remind both of this (indeed) the technology of rehabilitation is the key to the manifestation of the divinity of man"²⁵

²⁴ Quoted by Prof. S.N.Dhyani, Jurisprudence and Indian Legal Theory, Central Law agency, Allahabad, 1999. p.172.

²⁵ Quoted from In the matter of: P.R.E. of wages of labour, AIR 1983 Ker 261 at 266

In fact the Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political rights ,1966 contain the essence of penological approach of the modern civilized communities.

The main defect of reformatory theory is that it can be applicable to minor offence. It cannot be applicable to serious crimes like murder or with regard to habitual criminals. Moreover it is criticized as contrary to the principles of natural justice. The aggrieved may not be rewarded but the guilty person must not go unpunished. It also cannot be applicable to professional or habitual criminals .Oppenheimer says: “ It robs punishments of it’s sting . the criminals looked upon as an object of pity, not of hatred and punishments becomes the work of charity”.²⁶

PENAL CODE IN INDIA WITH REFERENCE TO INDIAN PHILOSOPHY

In ancient India rulers administered the law and punished their subjects according to the directions written in Smritis. Chanakya in his writings made a number of remarks regarding punishment. According to him there should be rules for punishment to control the people.

Sarvo dandajitho loko

Durlabho hi shuchirnara

²⁶ Oppenheimer, Rationale of punishment,245- Quoted by Prof. S.N.Dhyani, Jurisprudence and Indian Legal Theory, Central Law agency,Allahabad,1999. p.175

Dandasya hi bhayath

Sarvam jagth bhogaya kalpeth

That means: people are controlled by punishment, the intrinsically pure man is rare. Out of fear of punishment the world enjoys blessings.²⁷

He also points out that without proper law and regulations the situation will be like the “survival only of the strongest”.

Apraneethohi danda

Matsyanyayamudbhavayathi

means : if no punishment is given the law of fishes(strong swallowing the weak) is created.²⁸ He further says that only through punishment there should be discipline in the society.

Vinayamoolo danda

Pranabhootham yogaksemavaha

i.e. punishment, the root of discipline is the source of prosperity for the people.²⁹

Suvinhathapraneetho hi

Danda praja darmartha kamairyojathi

²⁷ Maxims of Chanakya, V.K. Subrahmanian, Abhinav Publications, New delhi, 1980, p.106

²⁸ Maxims of Chanakya, p.162.

²⁹ Maxims of Chanakya, p.162.

i.e. punishment meted out after due consideration keeps the people attached to righteousness and to tasks conducive to material wealth and enjoyment.

Manusmrithi is one of the authoritative books in that time. In chapter 8 of Manusmrithi describes certain rules to administer justice. Punishments for various crimes were suggested in the chapter. There are similarities between our present penal laws, but dissimilarities are more. At that time punishments were prescribed by Purohiths. The implementation was done by rulers. Manusmrithi stood as guideline for the Purohiths. There were clear influence castism in prescribing punishments. The same crime attracted different punishments for people from different castes. Severe punishments were imposed on lower caste people. Even the case of theft is punished with death penalty

For eg.

*“Dhnyam Dasabhya: kumbasyo
harathobyadhikam vadha:
seshepyeka dasagunam
dapyasthyasya cha thaddhanam”³⁰*

This means: Those who stole more than 10 pots of cereal is to be punished with death and fined an amount equal to 11 times of the cereal. And it is to be paid to the owner.

³⁰ Manusmrithi, Mathrubhumi books, 19---, p.371.

Indian Penal Code suggests seven years imprisonment for rape, which may be increased upto life sentence according to circumstances. But Manusmrithi suggests capital punishment for the same.

“yuo kamam dooshayeth kanyam

sa sadyo vadhamarhathi”³¹

Which means : Those who molest girl without her consent is to be punished with death.

According to Indian penal Code section 497 sexual intercourse with the wife of another person is an offence punishable with five years imprisonment or fine. In such cases women shall not be punishable as an abettor. But according to manusmrithi Intercourse with others husband and wife is considered as severe crime which attracts capital punishment.

Indian Penal Code

Our Penal Code is modelled on the Indian Penal Code, which was introduced in the Legislative Council in 1836. The author of this legislation was Thomas Babington Macaulay, who was the first Law Member of the Legislative Council who believed that law reform in general, and codification in particular should be animated by the principle; uniformity where you can have it; diversity where you must have it; but in all cases certainty. The substantive criminal law of India is mainly contained in the Indian Penal

³¹ Manusmrithi, Mathrubhumi books, 19---, p.379.

Code. The code measures the gravity of violation by the seriousness of the crime and its general effect upon the public tranquility, whatever be the object of theory of punishment. The measure of guilt is, therefore, the measure of punishment. The law indicates the gravity of the act by the maximum penalty provided for its punishment and courts will have to consider how far the crime committed falls short of the maximum punishment and what, if any, are the extenuating circumstances justifying the adoption of a lower punishment, than the maximum provided.

Sections 53 to 75 of Chapter III of Indian Penal code laid down the general provisions relating to punishments. Sections 53 enumerates several types of punishment that can be imposed on a convicted criminal viz., death, imprisonment, forfeiture of property and fine. There is a marked change in the outlook of Indian Criminal Justice System both legislative and judicial, after the end of the colonial rule. This can be seen from the change brought out to section 367 of Criminal Procedure Code 1898 in omitting sub section 367 under Amendment Act 26 of 1952. As per provisions of sub section (5) of sections 367 when an offence is punishable with death sentence and a sentence other than the death is passed, the court shall in its judgment state the reasons for imposing lesser penalty. After omitting this sub section, now the courts shall state the reasons in judgment for passing capital punishment and not for imposing lesser sentence. Where life imprisonment and penalty of death are prescribed as alternative sentences, imposition of life imprisonment

of life imprisonment has become the rule and capital punishment is the exception to be resorted to for the reasons to be stated[(section 354(3) of Criminal Procedure Code 1973]

Even prior to the above stated amendment Where-under sub section (5) of section was omitted, there was marked change in the judicial perception regarding the imposition of the maximum sentence prescribed. Supreme court of India , while dealing with a case of murder, in Aftah Ahmed Khan's case held " it seems to us desirable as a matter of convention though not as a matter of strict liability that ordinarily the extreme penalty should not be imposed".³²

The same trend is being continued , and there is a marked change in the judicial trends and a new trend is set in by the Apex Court from Ediga Anamma's case.³³ The Supreme Court in Rajendra Prasad's case held "the retributive theory has it's day and is no longer valid .Deterrence and reformation are the primary social goals which make deprivation of life and liberty reasonable as penal penacea".³⁴

A five judge bench of the Apex Court accepted the deterrence as one of the accepted, valid punitive component in "Sunil Bhatra's case."³⁵ Supreme court in Mohammad Giasuddin's case found that the crime is a pathological

³² A.I.R. 1954 S C. 436,

³³ A.I.R. 1974 S.C.799.

³⁴ 1979 Cr.L.J 792(815).

³⁵ A.I.R. 1978 S.C 1675

aberration that a criminal can ordinarily be redeemed, that the state has to rehabilitate rather than revenge.³⁶

The Supreme Court in Maru Ram's Case Observed that " the rehabilitation and reformation of the criminal has the main component of the penal policy as social defence."³⁷ Though the Supreme Court is advocating time and again the need for reformation of the criminal and his restoration to the society, the court also stressed the need of to employ the punishment as deterrent and as a public denunciation. This stand is evident from the verdict of the supreme court in Bachan Singh's case While retaining the death penalty though limiting it to "rarest of rare cases"(A.I.R 1980 S C 898).This is more evident from the fact that Justice V.R.Krishna Iyer himself recommended for the retention of the death penalty in certain classes of cases.

Since there is lack of scientific evidence to support, theories of rehabilitation are largely speculative. But it has been influential in the development of modern penology. Similarly Justice A.D. Khosla and Justice S.M.Fazal Ali in Maru Ram's case while passing concurrent but separate judgments disagreed with the majority opinion delivered by Justice V.R.Krishna Iyer that the main object of every punishment must be reformation of the offender and that the other objects of punishment must be relegated to the back ground and be brought into play only incidentally.

³⁶ A.I.R. 1977 S C 1626.

³⁷ A.I.R 1980 S C 2147

Supreme Court in Maru Ram's case and also several other decisions stressed the need of reparation or the restoration of the loss, of healing the injury of the victim as part of punitive exercise. The court has evolved a multiple sentencing approach for the sentence to be meaningful and to serve its object as a social defence. The Apex court maintaining the severity of punishment where ever it is necessary, considering the gravity of crime and the circumstances in which it is committed and there by upholding the deterrence retribution as the justification for the punishment.

Supreme court is liberal in admitting the offenders to probation and is showing indulgence and modifying the sentence and framing guidelines for the execution of sentence where ever possible and permissible to reform the offender and to restore the society and there by to achieve the ultimate object of sentence. Thus the Penological approach of the Indian Judiciary, is in the words of Apex court itself, tiarsh and humane.³⁸

In the common interest of all members of society , crimes should not be allowed to be committed and that crimes should be prevented. It becomes necessary, therefore to provide legislators with means to achieve these objectives. The goals or objectives can be attained by the enlightened utilization of punishment which should be inflicted measures commensurate

³⁸ Shiva Mohan Singh's case, A.I.R. 1977 S.C. 949.

with the effects of the crime is to societal welfare and existence, the more severe the punishment inflicted should be.

A study of the classification of crimes indicates three categories of crimes based on varying degrees of injury to society, the first category consists of crimes considered to be injurious to the very existence or stability of society. Crimes such as high treason , or acts of an individual against the state or its representatives are considered to be most serious since such crimes threaten the existence or well being of all members of society. Second, in seriousness and in importance are crimes that injure the life, limb and property of individuals. Third category of crimes are those that are disruptive of public peace and tranquility, such as riots, rabble rousing , inciting disorder etc. These categories of crimes , as indicated are considered to represent different degrees of harm to society and to its members. Such crimes should carry different penalties whose severity would differ as the seriousness of the crime differs.

The main purpose of punishment is not to torment offenders nor to undo a crime already committed. It is rather to prevent offenders from doing further harm to society and to prevent others from committing crimes. Punishment is thus looked upon as an educative process and the types of punishments selected and how they are imposed should always receive serious consideration so as to make the greatest impact and the most enduring

impression upon all members of society, while inflicting the least pain on the body of the offender.

Penal laws to be Changed to the need of time

The committee on Criminal Justice Reforms (CJRC) set up by the Government conducted a three day seminar on economic crimes at the Indira Gandhi Institute of Development Research, Mumbai, between March 22 and 24, 2000. The seminar, organised in collaboration with the National University of Juridical Sciences, Kolkata, was attended by seasoned professionals in banking, finance and capital markets besides eminent jurists and senior officers of the investigating agencies.

It was held in the background of the proven inability of the existing criminal justice system to cope with the vastly changing environment, which has rendered the legal regulation of offences against property particularly daunting. Technological developments have compounded the difficulties. As Mr. N. R. Madhav Menon, CJRC member and an eminent legal teacher, put it: "Traditional concepts of theft, misappropriation and cheating are inadequate to comprehend the newer varieties of crimes. Special laws have been enacted to define new crimes outside the Indian Penal Code (IPC). Changes in procedure and evidence were introduced from time to time creating a jurisprudence different in many ways from the conventional approach to crime and criminal justice. For all that, however, the changes in

the legal framework have not been sufficient to bring about the desirable changes in the regulation and punishment of economic crimes. Nor have they been able to check the frequency and intensity of such crimes."

One important recommendation of the seminar relates to the enactment of a new "Economic Offences Code" which will "identify, segregate, classify and consolidate" what are called serious economic crimes now spread over 30 or more economic criminal statutes and the IPC. By bundling them into one comprehensive legislation, a new code called the Indian Economic Offences Code can have a re look at some of the grave offences and remove legal gaps as well as ambiguity in identifying and prosecuting them. The need for a central enforcement agency to investigate and prosecute specified economic crimes was voiced at the seminar.

Recent economic crimes have exposed the vulnerability of the mainline financial regulators such as the SEBI and the RBI. Even the special legislation that has created fast track procedures (special courts, confining the appellate procedures to the Supreme Court), has not lessened the delay in prosecuting the accused. It is imperative to develop and foster expertise in the newer areas in finance, accounting and so on. Investigative agencies have been hard put to identify the nature of the crime and have not exactly fared well when seen in the context of the long delays and the meagre rate of conviction in most economic crimes. (Conviction rate in certain serious crimes has been as low

as 5 to 10 per cent). With growing globalisation, domestic liberalisation, the enactment of intellectual property rights and the widespread use of E-commerce, there has to be a pro active approach to tackle the "newer" crimes. The need for regulatory agencies to work in tandem with a rejuvenated criminal justice system has never been more keenly felt. Institutional building is a must and without it criminal justice system however refined cannot by itself deliver.

Law regarding sexuality

Penal Code embodied the moral standards and social perspectives of an early Victorian age. There are several profound changes in contemporary mores and values relating to gender equality, which must be reflected in law. The first development relates to the growing global consciousness with regard to the phenomenon of violence against women and the need for international and domestic action to address the causes and consequence of such violence.

The second relates to the growing sensitivity to the reproductive health rights of women and the right of an individual to have control over and to decide freely on matters related to her body and to her sexuality. A related concern to the health risks to which women are subjected are unsafe abortions. A third development relates to the need to be responsive to the alarming incidence of sexual exploitation of children, including the phenomenon of child pornography. Finally, there is a need for the law not to

discriminate and punitively deal with persons with different sexual preferences, and to move away from puritanical attempts by the law to legislate morality.

Our law relating to abortion is in urgent need of reform. There is no other aspect of our criminal law that is so discriminatory in its impact on different social classes. The more affluent social classes are able to have recourse to a simple surgical procedure performed by an experienced practitioner to terminate an unwanted pregnancy. The predicament of the poor and the unmarried, who have to turn to illegal abortion clinics or quacks, is deplorable.

One of the important changes introduced by the law is the creation of the new offence of sexual harassment. Sexual harassment in the workplace and elsewhere has become an increasingly important issue on the agenda of the women's movement. Several legal scholars have struggled to frame an adequate definition of sexual harassment, having regard to the diverse behavior for which regulation is ordinarily sought. There are two important ingredients. First, it is conduct that is unwanted by the recipient - in other words, unwelcome sexual attention. Second, it is conduct that, from the recipient's point of view, is offensive or threatening. The German Penal Code and the Penal Code of Denmark have focused on contexts of subordination or financial dependence where authority is abused to extract sexual favours.

In India Visaka case made land mark judgment referring sexual exploitation in working places. In 1997, the Supreme Court delivered the judgment on sexual harassment in work places in "Visakha vs. State of Rajasthan".³⁹ In this case, the Supreme Court expressed grave concern over the fact that there is no legislation to protect victims. Relying on the International Convention for Elimination of Discrimination Against Women (CEDAW), the Supreme Court used a set of guidelines to be followed by all institutions until a law is enacted. The Apex Court directed that all institutions should set up complaint mechanisms to deal with complaints of sexual harassment at work places. This should consist of a committee headed by a woman. The majority of members should be women. In order to ensure an unbiased enquiry, the Court directed that the committee should consist of an NGO member with expertise in women's issues because in most cases, the accused is likely to be a person in authority. The Court also held that, apart from holding such behaviour as misconduct and taking disciplinary action, the complaints mechanism should provide for a complete solution to the problem. It held that transferring the woman complainant or the delinquent employee, if the complainant so desired, counseling and awarding compensation should be provided. After the Supreme Court judgment in Maneka Gandhi's case in 1978, this was a quantum leap in expanding the principle of fairness in procedure. In this case, for the first time, the apex court expanded the scope of

³⁹ (1997) 6 SCC 241).

Article 14 of the constitution, which guaranteed equality before law, and equal protection of law. The Court observed that the right to equality would also include the right not to be treated in an arbitrary manner.

New Legislation

Law relating to rape and sexual assault have remained more or less unchanged since the introduction of the IPC in 1860. It was only in 1983 that some amendments to the rape law was made. Now for the first time, a piece of legislation covering some aspect of sexual assault against women and minors made through the The Criminal Law Amendment Bill.

The practice of capital punishment, or a state-sanctioned death penalty for certain crimes, appears to be as ancient as history. The Code of Hammurabi, discovered only in AD 1902 but estimated to have been promulgated between 2100 and 1700 BC, was the first systematic attempt to foster disinterested, impartial state governance -- at least as the concept was understood in the Mesopotamian context, which fused autocracy, patriarchy, and theocracy. The Code deals extensively with property and agricultural rights and military obligations, all of which function at the king's pleasure. Men are required to serve in the armed forces, and disloyal refusal inheres in death and deprivation of property. Military expeditions appear to lie exclusively at royal discretion, for repeated references are made to the fact that soldiers may be obliged to fight, in person, on the king's behalf. Military

misfortune in general belongs to the king, not his subjects. Thus military officers may not hire mercenary soldiers to fight in their place, and the penalty for a commander who attempts to do so is death.

In ancient India death penalty was common in the administration of law and order. The code, which was followed by rulers in the case of punishments, like Manusmriti advice capital punishment even for small offences. Chanakya the author of Arthashastra also recommends severe punishment like death sentence for crimes. According to him such punishment is necessary to maintain law and order in a country.

Arguments against death penalty

The common argument is that death penalty is killing. All killing is wrong, therefore the death penalty is wrong. The death penalty is a violation of human rights primarily Article 3 and Article 5 of the Universal Declaration of Human Rights. Some assert that it violates the "natural rights" as laid out by John Locke .

The death penalty is not a deterrent; in the recent studies do not support the view that capital punishment acts as a deterrent. . It is also argued that anyone who would be deterred by the death penalty would already have been deterred by life in prison, and people that are not deterred by that would not be stopped by any punishment. This argument is typically supported by claims that those states that have implemented the death penalty recently have

not had a reduction of violent crime. A stronger variant of this argument suggests that criminals who believe they will face the death penalty are more likely to use violence or murder to avoid capture, and that therefore the death penalty might theoretically even increase the rate of violent crime.

- The death penalty is unnecessary. This view, espoused by Pope John Paul II, an outspoken critic of capital punishment, holds that modern prisons are secure enough to reliably protect society from further harm by death row prisoners, whereas in centuries past, life imprisonment may not have been feasible. Therefore, the death penalty serves no purpose to society and violates the sanctity of human life. And also it is argued the death penalty brutalises society, by sending out the message that killing people is the right thing to do in some circumstances.

The death penalty can be turned into a lethal act of revenge by all those involved. Some view the executioners as the 'Law's Hitman' it also allows citizens to feel as though they are not morally incriminated by supporting death, because it is death for a "just cause". This psychologically creates a false reality where they are in no ways responsible for a killing. The victim of execution becomes a scapegoat for the overall problem of violent crime.

Death penalty is often justified on the ground that it will have deterrent effect on crime. However, such claims of deterrence are without any empirical support. Criminological studies have shown that capital punishment does not

deter criminal behavior. It precluded rehabilitation of human beings and is opposite of true atonement. Again, like all other forms of punishments, the error of judgement cannot be ruled out in the case of death penalty. Judicial error is always possible. In such cases, death penalty is an unpardonable crime committed against the society.

After examining all available information in 1968, the United Nations Consultative Group on the Prevention of Crime and Treatment of Offenders summarised the situation in the following terms :-

where it is used, capital punishment is increasingly a discretionary rather than a mandatory sanction. The Consultative Group also noted that a number of countries had abolished capital punishment for humanitarian reasons, irrespective of any possible deterrent effect it might be thought to have."⁴⁰

In India, despite the ruling of the Apex Court, that death penalty may be imposed in the "rarest of the rare" cases, it extends to a wide range of offences. The Government of India in practice has applied the death penalty to a wide range of offences. Under the Indian Penal Code, death penalty can be applied for murder (section 302 of IPC), dacoity with murder (IPC 396), for abetting the suicide of a child or insane person (IPC 305), for waging war against the Government (IPC 121), for abetting mutiny by a member of the Armed Forces (IPC 131). Death sentences may also be imposed for a number of offences committed by members of the Armed Forces under the Army Act,

⁴⁰ Sanker Sen, Criminal Intelligence Digest, JAN-2000 ISSUE, Death penalty in India.

1950 , the air Force Act, 1950 and the Navy Act, 1956. In 1987, the Government of India passed the Commission of Sati (Prevention) Act, 1987, which applied the death penalty to individuals convicted of abetting a successful Sati.

The death penalty as provided under section 302 of the penal code read with section 354 sub section(3) of the Cr.P.C does not subserve any legitimate end of punishment. It leaves entirely to the discretion of the court whether to impose death sentence or to award only life imprisonment to an accused convicted of the offence of murder. According to section 302 of IPC

“Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine”.⁴¹

In the case of death sentence the direction is that the court shall point out special reasons for the judgment. Sub section 3 of section 354 says “When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgement shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence”.

Supreme Court suggests:

"it would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now and only special reasons, that is to

⁴¹ Vijay Malik, Criminal Manual, Eastern Book Company, Lucknow, 1999, part II, p.78.

say, special facts and circumstances in a given case, will warrant the passing of the death sentence".⁴²

Section 302 of IPC does not lay down any standards or principles to guide the discretion of the court in the matter of death penalty. The critical choice between physical liquidation and life long incarceration is left to the discretion of the court and no legislative light is shed as to how this deadly discretion is to be exercised.

In the case of section 354 Of Cr.P.C also there is no legislative guidance for providing special reasons. "It is left to the Judge to grope in the dark for himself and in the exercise of his unguided and unfettered discretion decide what reasons may be considered as 'special reasons' justifying award of death penalty and whether in a given case any such special reasons exist which should persuade the court to depart from the normal rule and inflict penalty of the accused. There is no legislative policy or principle to guide the court in exercising its discretion of the court is bound to vary from judge to judge."⁴³

Analysis of death penalty with reference to Constitution

It is not mere a legalistic problem which can be answered definitively by the application of logical reasoning but it is a problem, which raises

⁴² Balwant Singh v State of Punjab(1976) 1 SCC425.

⁴³ Prof. A. Lakshminath & Dr. J.Krishna Kumari, Criminal Trial and Justice, Alt Publication Hyderabad,2003 p.164.

profound social and moral issues and the answer must therefore necessarily depend on the judicial philosophy of the judge. This would be in case of any problem of constitutional interpretation where the constitutional conundrum is enmeshed in complex social and moral issues defying a formalistic judicial attitude.

That is the reason why in some countries like the United States like and Canada where there is power of judicial review, there has been judicial disagreement on the constitutionality of death penalty. On an issue like this, as pointed out by David Panick in his book on 'Judicial Review of the Death Penalty', judicial conclusion emanate from the judicial philosophy of those who sit in judgment and not from the languages of the constitutional significance, the judges must take care to see that they are guided by objective factors to the maximum possible extent.

The culture and methods of the nation as gathered from it's history ,its tradition and its literature would clearly be relevant factors in adjudging the constitutionality of death penalty and so would the ideals and values embodied in the constitution which lays down the basic framework of the social and political structure of the of the country, and which sets out the objectives and goals to be pursued by the people in a common endeavour to secure happiness and welfare of every member of the society. Justice

V.R.Krishna Iyer said “judicial dispensers do not believe like caveman but breathe the fresh air of finer culture”.⁴⁴

There is reason why, in adjudication upon the constitutional validity of death penalty. Judges should not obtain assistance from the writings of men like Dickens, Tolstoy, Dosoyevsky, Kowster and Camus or from the investigation of social scientists or moral philosophers in deciding the circumstances in which and the reasons why the death penalty could be seen as arbitrary or a denial of equal protection.

It may be pointed out that our constitution is a unique document, it is not a mere pedantic legal text but it embodies certain human values cherished principles and spiritual norms and recognizes and upholds the dignity of man. It accepts the individual as the focal point of all development and regards his material, moral and spiritual development as the chief concern of its various provisions.. It does not treat the individual as a cog in the mighty of all-powerful machine of the state but places him at the centre of the constitutional scheme and focuses on the fullest development of his personality.

The Preamble makes it clear that the Constitution is intended to secure to every citizen social, economic and political justice equality of status and opportunity and to promote fraternity assuring the dignity of the individual. The Fundamental Rights lay down limitations on the power of the legislature

⁴⁴ Dalbir singhVs State of Punjab, 1979 3 SCR 1059:AIR 1979 SC 1384.

and the executive with a view to protecting the citizen basic human rights which are enforceable against the state in a court of law. The Directive Principles of state policy also emphasise the dignity of the individual and the worth of the human person by obligating the state to take various measures for the purpose of securing and protecting a social, economical and political, shall inform all the institutions of national life. What is the concept of social and economic justice which the founding father's had in mind is also elaborated in the various Articles setting out the Directive principles of state policy. But all these provisions enacted for the purpose ensuring the dignity of the individual and providing for his material moral and spiritual development would be meaningless and ineffectual unless there is rule of law to invest them with life and force.

Defining penal laws and implementing them is an important process in the administration of justice. Ensuring justice impartially to each person in a society is a tedious task. As the people include individuals with various character, any act of a person may cause a situation which may infringe the rights of another. The human instinct is to live according to his pleasures. Moreover hurdles in the life also tempt a person to deviate from public order. In a modern society men have higher needs, where primitive men were satisfied by fulfilling his primary need only. Modern era open it's doors towards infinite possibilities and lifestyles. Invasion of consumerism and the situation of decreasing moral values toppled over the social relations. Crime

rate is increasing year by year. Tendency to evade laws and regulations is also at its peak. Here the administration of criminal justice poses a big task. The existing government has an important task to renew the penal laws and to enact new one.

For example Cyber crime is a new development where our penal laws show their helplessness. The Administration of criminal law should also be competent one to manage the situation. There should be more action needed on the part of the rulers. The initiative to start Fast track courts and utilization of provisions regarding special courts are examples. The Criminal Law Amendment Bill is also another landmark. However there are arguments change in the penal code. Not mere administrative but ideological perspectives should be changed.

The question of ethical validity of an act always changed according to the socio-political transformation. Citing an example, protest against the ruler is a serious crime in ancient time, but now the penal laws considering it not at all a serious issue. Another debate which is going on is that about some sections in the IPC which penalizes the homosexual relation. Western community already approved the Lesbianism and homosexuality. For the same reason one of the main demands of the campaign for the rights of sexual minorities in India has been the repeal of section 377 of the IPC, which criminalizes sodomy. According to them, in India historically same sex

relationships were by and large tolerated. Influenced by the Victorian campaigns for sexual purity the British tried to change Indian marital, sexual and familial arrangements, which they saw as primitive.

But the government has argued that section 377 has been used to deal with cases of child abuse and for complementing rape laws. Another argument of the government is that “law does not run separately from society” and when Section 377 was brought under the statute; it “responded to the values and mores of the Indian society”.

The controversy cited above is not a single event. There are increasing incidents of conflicts between changing morality and existing laws, which analysis of public morals in the light of changing values is a necessity.

CHAPTER 6

LAW RELATING WOMEN

“Oh God who does not exist, You hate women
otherwise you'd have made them different”
Edna O'Brien¹

Legislation aimed to benefit women was not a concern for ancient times. The society revolved around male population. More over the puranas and Smritis which put guidelines for the social life also neglected the women. As the male dominated society had no consideration to females, the laws of the time reflected the view.

Women in Vedas and Upanishads

Among the Upanishads Isovasya, Kena, Mandookya does not refer the male-female status. Swethaswatharopanishath says that soul has no sexual differences. In Katopanishad Yamadharma offers Nachikethas beautiful ladies as gift. Thythreeyopanishad recommends the male to marry suitable lady and have children. Prasnopanishad says about sexual relationship with women and procuring good children. Women carefully treats the soul of husband which is transcended into her womb-(Aithereyopanishad). Men pours the semen, producing out of the cereal into the women to produce children (Mundakopanishad). Bruhadaranyakopanishad took an entirely anti feminist

¹ In Girls In Their Married Bliss

stand and says “if women does not agree with man for procuring children, man can beat her for the purpose”.

According to Manusmrithi chapter 3,5,9 rules relating to marriage and duties of women are described. Manu considered women as another object ‘which’ can be donated. According to him she can be gifted, purchased and has no right to express opinion in her marriage. In his Sthreedharma he instructs that women should not act according to her will during the period of teenage, young age and in older age. Wife as a women should obey the husband who is a male. Manu was against widow remarriage. But he recommends the remarriage of a widower. In chapter 9 (Dampatheedharma) Manu declares his resentment regarding the freedom of women.

"Pitha rakshati koumare bhartha rakshathi youvane

rakshanthi sthavire puthra na sthree swathanthryamarhathi"²

Arthasathra also considers women as an object ‘which’ is to be gifted. Moreover son is given prominence over daughter. Koutilya consider marriage as an exchange where women have no prominence. In chapter 11- Sankhavrutham koutilya advise to influence leaders by using beautiful ladies. Women can be used to make split among sena leaders which will help to win the battle.

² Manusmrithi, Mathrubhumi Books, Kozhikode.

Chanakya is of the opinion that ,women should be submissive to men.

“Bharthruvahavarthini bharya”

*Means – She who remains submissive to the husband is the wife.*³

Chanakya considered women as inferior category.

He says-

1. *“Sthreeshu kinchidapi na viswaseth”*-One should not trust women at all.⁴

2. *“Alohamayam nigadam kalathram”* - A wife is non metallic shackle.⁵

3. *“Na samadhi stheeshu lokanhatha cha”*-women should not have either composure or knowledge of the world.⁶

4. *“Sthreenam bhooshanam lajja”*-Modesty is the ornament of women.⁷

Classics

Great classics of ancient India also viewed women inferior to men.

Kunthi, Gandhari and Droupathi were the three main women characters in Mahabharatha. We can see that they were lived within the value limit of men.

Kunthi was compelled to give up his child (Karnan) to pretend as virgin

³ V.K. Subrahmnian, Maxims of Chanakya, Abhinav publications, New Delhi, 1980, p.59.

⁴ Maxims of Chanakya,p.61.

⁵ Maxims of Chanakya,p.61.

⁶ Maxims of Chanakya,p.61.

⁷ Maxims of Chanakya,p.62.

Gandhari decided to be blind only because her husband (Dhrutharashtra) is a blind man. Droupathi had to accept four brothers of Arjuna instead of his sincere love towards Arjuna.

Buddhism

Buddhism also did not consider women equal to men. Buddha himself gave up his family life. He had the opinion that a married person could not attain Nirvana. Buddha was reluctant to give women entry into his Viharas. Later his favorite disciple Ananda compelled him to change his mind. He was of the opinion that the presence of women will destroy Viharas life. The guidelines Buddha put forward certain rules for admitting Bhikshunis (Female monk).

They are :

1. Bhikshunis should respect all Bhikshus (male monks)
2. Bhikshunis should not act without the direction of the group.
3. Bhikshuni should not curse a Bhikshu
4. Bhikshuni is not eligible to give advice to a Bhikshu.⁸

Buddha was of the opinion that among the seven types of wives, a servant is best. "One resembles a murderer, the second a robber, the third a mistress,

⁸ A group of writers, Buddhism Philosophy and History, Kerala Bhasha Institute, 1973, P.57.

the fourth a mother, the fifth a sister, the sixth a friend and the seventh a servant".⁹

Jainism

Since from the time of Parswanathan women did the religious rituals.¹⁰ But Digambaras believed that women get perfection only through the rebirth as men. But swethambaras had the opinion that women will get Moksha without the rebirth. They points out the example of Malli, the lady who became the 19th Theerthankara of Jainas.¹¹

But both the Swethambaras and Digambaras are of the same opinion that Men will be a better Monk than a women. Some of the chapters in their religious texts were not recommended for the women. They believed that women had no mental courage to study the same. It was also said that a male monk who studied for three years had the ability to become a Guru of a female monk of having experience of 30 years.¹²

The concept of women in Christianity

Bible put forward a philosophy based on Father-Son concepts. There is no prominence for motherhood or mother-son relation. The presence of girl or

⁹ Pruthi Raj and Bela Ram Sharma, 1994, Encyclopedia of women, Armol Publication Pvt. Ltd, Delhi, p.263.

¹⁰ Pruthi, p.158.

¹¹ Pruthi 1994: p.158.

¹² Pruthi 1994:159.

sister is namesake. The principle that women is made from the bone of man itself created a secondary image to women. Moreover women got an image that , she was responsible for losing heaven. According to bible men equals human. No prominence is given to women. According to old testament, the portions beware of bad women,¹³ faithfulness in wedlock¹⁴ advices men to escape from the trap of women. According to Samuel duty of women is to bring food and prepare it in the early morning.¹⁵ In a letter to Korinthoses (New testament), Paulose says after the death of husband the life of a widow is good for women.¹⁶

Islam and women

According to Quoran also women is made of men's bone. For the same reason Islam consider women inferior to man. In Quoran chapter four-Annisa au, 24 surathannur refers to women and their status. According to the text daughter's claim in property is half of a son.¹⁷ Men has the right to beat the women who is not obedient towards his advices. Hadeeses also admits the right of a man to use power against women in case of disobedience. Bukhari

¹³ Bible, KCBC Bible commission Kochi, Pastoral orientation center ,1987 p. 640.

¹⁴ Ibid.p.642.

¹⁵ Ibid. p.663.

¹⁶ Ibid., p.185.

¹⁷ Quoran ,translated by a group of wriers,Current books, Kottayam, 4.11.

muslim joint Hadees says that hell is full of women who showed disobedience against men.¹⁸ Fikh Hussuna treats women as an instrument for enjoyment.¹⁹

While passing through most of the religious texts we can see that women enjoyed secondary status only. Such a social situation influenced customs and conventions prevailed at that time. Right of the women over the property of her family property is limited. Marital rights were also less.

Widow Remarriage

The problem of widow in India is a prominent example for the denial of justice to the women. While widow suffers fulmination from the society widower did not face any such discrimination. Conventional society considers widow as bad omen and keep away them from pleasant occasions like marriage. Moreover proprietary rights were deprived from the widows without any reason which is against the principles of social justice. While considering the system prevail in other religion Hindu community is more cruel towards them; mainly in the case of remarriage.

Widow remarriage is not allowed in most of the Hindu communities. Although a man may grieve for his deceased wife, a widow may face not only a personal loss but a major restructuring of her life. Becoming a widow in

¹⁸ (Faizy Ebrahim Puthoor ,Bukhari Muslim Samyukta Hadees Paribhasha, Bayaniyya Book stall,Parappanangadi,1988 p.165.

¹⁹ (Sabib sayyed , Fikh Hussuna ,Islamic publishing House, Kozhikode,1992, p.15)

India is not a benign or neutral event. A man's death, particularly if it occurs when he is young, may be attributed to ill fortune brought upon him by his wife, possibly because of her sins in a past life. In traditional Hindu society, widows are treated as social pariahs. They are not welcome to participate in family functions and their mere presence is considered inauspicious.

With the death of her husband, a woman's auspicious wifehood ends, and she is plunged into dreaded widowhood. The very word *widow* is used as an epithet. As a widow, a woman is devoid of reason to adorn herself. If she follows tradition, she may shave her head, shed her jewelry, and wear only plain white or dark clothing. Widows of low-ranking groups have always been allowed to remarry, but widows of high rank have been expected to remain unmarried and chaste until death. In earlier times, for child brides married to older men and widowed young, these strictures caused great hardship and inspired reform movements in some parts of the country. The taboo on widow remarriage stems from man's desire to monopolize all the good things in life.

In the past, the ultimate rejection of widowhood occurred in the burning of the Hindu widow on her husband's funeral pyre, a practice known as 'Sati' (meaning, literally, true or virtuous one). Women who so perished in the funeral flames were posthumously adulated, and even in the late twentieth century are worshiped at memorial tablets and temples erected in their honor.

In western India, Rajput lineages proudly point to satis in their history. Sati was never widespread, and it has been illegal since 1829, but a few cases of sati still occur in India every year. In choosing to die with her husband, a woman evinces great merit and power and is considered able to bring boons to her husband's patrilineage and to others who honor her. Thus, through her meritorious death, a widow avoids disdain and achieves glory, not only for herself, but for all of her kin as well.

By restricting widow remarriage, high-status groups limit restructuring of the lineage on the death of a male member. An unmarried widow remains a member of her husband's lineage, with no competing ties to other groups of in-laws. Her rights to her husband's property, traditionally limited though they are to management rather than outright inheritance, remain uncomplicated by remarriage to a man from another lineage. It is among lower-ranking groups with lesser amounts of property and prestige that widow remarriage is most frequent.

Property Rights of Widows in Hindu community

Although the Hindu Succession Act 1969 made women eligible to inherit equally with men and some individual states have legislated equality provisions into inheritance law widows are mostly deprived of their legal rights. Local interpretations of the custom of the caste determine whether or not a widow will be granted some permanent or temporary share of the joint

family's land or property. In rural India land ownership tends to engender the bitterest family disputes - never more intense than when a husband dies. A full account of land inheritance in India would have to distinguish between 1) traditional law 2) modern law, and 3) actual practice.

The inheritance rights of the majority of Indian rural widows are governed by actual practice. Practice can differ from village to village, even in the same region and among the same caste. Patrilocal residence and patrilineal inheritance (the wife goes to live in her husband's village; only males can inherit) is a fundamental source of the poverty and marginalization of Indian widows. Patrilineal inheritance effectively denies widows inheritance rights over their father's property, and their customary and legal rights over their husband's share of family property are often violated. An Indian wife becomes the property of her in-laws family, and when her husband dies they can decide what to give her and how to treat her. Having broken all intimate ties with her birth family, when her husband dies a widow has no freedom to "return" to the parental home, or to her brothers. She remains in her husband's village whether or not her owned land or property.

If there is land, under most caste codes the widow should be allotted some for her needs, but she is not given ownership rights; she cannot mortgage, sell or gift it away. She only has the "use" and very limited rights.

If she marries away "going *for nata*", has no children, is judged to behave badly, she may be sent away.

The fact is that limited as they are, the accepted property rights of widows are often violated in practice. In a study in 1994, 30% of the widows in a study reported serious conflicts over inheritance, land, property, and residence. Conflicts often ended in violence.

Conflicts over land and property are often so bad that brothers-in-law force the widow to leave the village. Conflicts are usually of two types: the brothers-in-law insist on sharecropping or managing the widow's land themselves, or they simply deprive her of her share (often rationalizing their claim by arguing that they spent money on her husband's funeral or on her children's maintenance; they might even bring up the dowry question and say that money was owed). Even if she owns land, she may have no access to wells, ploughs and bullocks.. In their attempts to gain control of land and property, the brothers-in-law may (often abetted by their wives) harass, persecute, beat and torture and even arrange the murder of the widow. Long after the abolition of Sati, there continue to be reported cases of women being forced to kill themselves on the death of their husband, in order for relatives to seize her inheritance.

Cultural, Social and Emotional Deprivation

Along with economic deprivation, when a woman becomes a widow, stringent moral code is imposed on her, whereby her emotional and physical needs are not taken care of. When the husband is alive she is supposed to deck herself in colorful attire, wear ornaments, wear flowers, put *sindoor* and *kumkum*. But after the death of her husband she is doomed to live a life without any of these adornments. Widows are expected to remain in mourning during the remaining part of her life. She is disfigured to the extent of shaving off her hair and wearing white sari. The explanation given to such an act is that the widow should not induce carnal pleasures in another man. She is expected to remain inside the home and is allowed to perform personal *pujas* only. She is forbidden to take part in any joyful occasion or to attend any family festival because her very presence would be considered as an evil omen.

The patriarchal nature of Indian society vests all economic and social powers in a man. In the name of religion males perpetuate innumerable atrocities against their woman. Even a tottering old man tries to marry after his wife dies. But a young woman rendered a widow is barred from marrying even if she is only in her teens. She has to control her emotions and feelings and live like a recluse all her life and die as a widow. This rule that widow should not remarry is even more atrocious than that of '*Sati*', as *sati* at least

puts an end to her tragedy immediately. But if the widow is living, her life is socially, culturally and emotionally dead. She has to live all her life facing the slings and arrows of society as a widow. The laws of the religion, as interpreted by the men in the society, prohibit a widow from remarrying even if she has never experienced the pleasures of a married life.

Higher the caste, more likely the widow remarriage is forbidden. Though remarriage is not forbidden in the religious books as stated earlier that the Rigveda has a direct connotation on widow remarriage, which is conveniently not read by the religious leaders. Hence even the poorest Brahmin feels indignant at the very suggestion of widow remarriage. The overall probability that a widow will remarry is quite low, perhaps of the order of 15 to 20 percent in India as a whole.

There are exceptions. A child widow or a young childless widow may usually remarry. If the widow is very young, her parents may arrange another marriage for her. If they are poor and cannot afford another dowry, the second marriage is often full of problems - the husband may be an elderly widower, a divorcee, or sick and handicapped. In some castes *leviratic* marriage is practiced; the widow is taken by a brother. In some areas of Indian society, a widow chooses not to re-marry but is forced to live with the younger/youngest brother of her deceased husband for "protection", a crime which condemns her to a lifetime of repeated rape.

There is an emerging trend towards prohibiting and discouraging remarriage even in the lower and middle castes as a means of achieving higher social status but most widows interviewed do not wish to remarry. They fear ill treatment in a new family, especially abuse of their children. The common restrictions on residence, ownership, remarriage and employment place a widow in the most economic, social and physically vulnerable group of women within a given population. A survey highlighted the health problems of the widows. About 45 per cent of the elderly widows suffered from chronic health problems in both rural and urban areas. The percentage of physical immobility due to chronic illness and old age was found to be consistently higher for women than men in all states of the country. The older widows in India today face situations of poverty, malnutrition, poor health care, physical overwork and unhealthy work environments in their younger years. It is estimated that nearly 50 per cent of the population of the elderly widows in this country, are in need of some form of supportive services.

A study conducted by 'The Guild of Service' supported by National Commission For Women, observed piteous atmosphere in which widows were living. Some of the findings were given below (Studies based on the widows living in Varanasi and Vrindavan).

- 1.Economic deprivation and insecurity.
- 2.Restricted mobility due to ill-health.

- 3.Physical insecurity.
- 4.Reduction in dignity and self-esteem.
- 5.Loneliness due to rejection.
- 5.Lack of meaningful occupation and leisure activities.
- 6.Lack of protective supportive shelter. (Published in Commonwealth Human news letter)

While analyzing the situation prevail in other religions Muslim and Christian women also suffer the disasters of personal laws. Two important examples are Mary Roy case and shah Bano case .

The judgement of the Supreme Court of India in favour of Mary Roy²⁰ and others is another instance where anomalies in the law, detrimental to women, in this case some sections of the Indian Christian community in certain parts of Kerala and the Kanyakumari district of Tamil Nadu, have been acknowledged and rectified. The Act challenged was the Travancore Christian Succession Act 1092 (1916). Under this Act, in a case of intestate (without a will) property the daughter was entitled to only a fourth of the son's share of the estate or Rs. 5000, customarily meant for Streedhana, whichever was less. Though this was supposed to constitute the law for intestate succession among Christians as the name implies, it excluded Protestants and Catholics living in some districts and taluks of the State among whom their

²⁰ 1994 4 SCC (Jour) 9

customary law of equal sharing of property obtained. Similarly, in the neighbouring State of Cochin the restriction on the daughter's share was to a third of the son's share. The section of Christians affected were the Syrian Christians, Jacobites and the members of Mar Thoma Church. The anomaly can be appreciated that whereas, for example, if they lived in the neighbouring state of Tamil Nadu the women of these communities would be entitled to share the estate equally with their brothers, in their natal place, they had to accept only a proportionate share. The Indian Succession Act 1925 provided a uniform succession law to all except Hindus, Sikhs, Jains, Buddhists and Muslims and for equality in the sharing of intestate property. Furthermore with the amalgamation of the erstwhile princely States with the Union of India, the 1951 Part States (Laws) Act provided for the extension of certain laws of the Indian Union to the amalgamating States. Under this Act the Travancore Cochin Christian Succession Act of 1916 and 1921 would have been considered automatically repealed.

The controversy, however, arose because the former Travancore Cochin and the Madras High Courts held that despite the passage of the 1951 Part B States (Laws) Act, Christian women of the above communities could not claim to be governed by the more liberal Indian Succession Act. The Supreme Court's verdict was that "..... on the coming into force of the Part B States (Laws) Act 1951, the Travancore Cochin Succession Act stood repealed and Chapter 11 of Part V of the Indian Succession Act 1925 became

applicable, and intestate succession to the property of members of the Indian Christian community in the territories of the erstwhile State of Travancore was thereafter governed by Chapter II of Part V of the Indian Succession Act, 1925". This ruling rightly places Christian women of Kerala on par with the men of the community in respect of inheritance of intestate property. They will now be governed like all other Christians by the Indian Succession Act, 1925.

While this is no doubt welcome, the judgment of the Supreme Court sadly does not refer to the vital grounds mentioned in the petition, where the Travancore Christian Succession Act violates the Constitutional guarantees under the Section - Fundamental Rights. These are Article 14 "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India"²¹ and Article 15(1). "The State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them"²², and the Directives of State Policy as laid down in Article 44 that "the State shall endeavor to secure for the citizen a uniform civil code throughout the territory of India".²³

Shah Bano, a 62 year old Muslim woman and mother of five from Indore, Madhya Pradesh, was divorced by her husband in 1978. The Muslim

²¹ Constitution of India, Eastern Book Company, 1980 p.5

²² *Ibid* p.5

²³ *Ibid* P. 17

family law (marriage, gifts, inheritance, adoption and a few other civil laws are under the purview of personal laws in India - they are different for Christians, Muslims and Hindus) allows the husband to do this without his wife's consent. Shah Bano, because she had no means to support herself and her children, approached the courts for securing maintenance from her husband. The case reached the Supreme Court of India, the Court invoked Section 125 of Code of Criminal Procedure, which applies to everyone regardless of caste, creed, or religion.²⁴ It ruled that Shah Bano be given maintenance money, similar to alimony. But due to the wide protest from the part of muslim religious organisations government passed an act that nullified the Supreme Court's judgment in the Shah Bano case. This act upheld the Muslim Personal Law(1986) and writ as excerpted below:

"Every application by a divorced woman under section 125... of the Code of Criminal Procedure, 1973, pending before a magistrate on the commencement of this Act shall, notwithstanding anything contained in that code... be disposed of by such magistrate in accordance with the provisions of this Act."²⁵

The Government with its absolute majority passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 to dilute the secular judgment of

²⁴ AIR 1985 SC 945

²⁵ India Law Info.com, 2006may 25,

http://www.indialawinfo.com/bareacts/muspro.html#_Toc498331481.

the Supreme Court. The Statement of Objects and Reasons of this Act (i.e. the objective of the Act) needs a mention. According to the stated objects of the Act, where a Muslim divorced woman is unable to maintain herself after the period of iddat, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law...But where a divorced woman has no relatives or such relatives..has no enough means to pay the maintenance the magistrate would order the State Waqf Board to pay the maintenance. The 'liability' of husband to pay the maintenance was thus restricted to the period of the iddat only.

But the legal experts and major social organizations criticized the act as impractical in its expectation that parents, brothers and other relatives will shoulder the responsibility for a divorced woman's and her children's maintenance. According to them such an expectation reflects utter lack of awareness of establishment trends in the structure, values and obligations of families in India, irrespective of communities.

As is well known among the poor who form the majority of the population - families are in no position to support even unmarried daughters or sisters. Exposures of questionable 'marriages' of young Muslim girls to foreign tourists, by poor families, of continued 'sale' of young women of different communities, and the high incidence of suicides, and destitution

among poor Muslim women after Talaq, provide substantial evidence of the inability of their parents or other relatives to provide maintenance.

More impracticable, unrealistic and unjust is the expectation that a divorced woman will sue her parents/other relatives to obtain maintenance. It is an unfortunate fact of life that the inheritance right of daughters to their fathers' property generally remain unimplemented because most women find it inadvisable to sue their brothers.

Still more unrealistic, and undesirable, is the expectation of the Wakf Boards undertaking the responsibility of maintenance. Apart from their financial position reported as most inadequate even to carry out their existing functions, making divorced women dependent on these bodies for their survival would open the floodgates for corruption and exploitation of the worst kind. Instead of acknowledging and strengthening women's rights, human dignity and progressive secular values as the most powerful forces for national integration and development, the Government thus submitted itself with an irrational minority of the community, whose demands cannot be substantiated either by objective religious authority, or the process of legislative adaptation of Koranic Law in leading Muslim countries.

The complex ways in which the position of women is structured make it impossible for collective women's action to make patriarchies the specific target of attack or reform. Patriarchies function with and alongside other

forms of stratification which are called simultaneously into question when any serious campaign for social transformation is mounted. Legal solutions to pervasive gender discriminations therefore must take into account the ways in which such discrimination receives meaning in and through other structures of Indian society.

The forms of discrimination faced by Indian women as they have discussed above are not only a feature of Indian social structures, but ironically , are supported by the ambiguities of the legal –juridical framework. Indian constitution has assured women an enviable degree of equality in it's guarantee of equality as a fundamental right. Thus Article 15 which deals with prohibition of discrimination says “the state shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them”

Yet within the constitution itself what has been given with one hand has been taken with the other, thus Article 25(1) which protects the right to freedom of religion:

“subject to the public order, morality and health and to the provisions of this part all persons are equally entitle to the freedom of conscience and the right freely to profess, practice and propagate religion”

On the face of it article 25 does not appear to contradict the Article on fundamental rights listed in part III of the constitution. yet in the name of

freedom of religion, which leaves personal laws strictly alone, women are discriminated against in the most fundamental ways: large sections of women are denied equal rights to property, to rights within the family, to maintenance, to divorce, guardianship and adoption. Whatever the intentions of the framers and interpreters of personal law may be, the affect of such laws is the subordination of women in all spheres that they corner. Here the remarks of Upendra Bakshi, in a discussion of the state of legal status of India, is relevant-

“...legal history is typically conceived in India as a history of the growth of judicature and the too at the level of normative law minutiae having no redeeming social significance ... a social history of Indian law is indispensable for the maturation of concern with a sociology of law in India”.²⁶

²⁶ Upendra Bakshi, *Toward a Sociology of Law*, Satavahan, Delhi 1986 p.20.

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CHAPTER 7

DOWRY: A SOCIAL EVIL

“Widowhood imposed by religion or custom is an unbearable yoke and defiles the home by secret vice and degrades religion. If we would be pure, if we would save Hinduism, we must rid ourselves of this poison of enforced widowhood”

Mahathma Gandhi¹

Dowry is a custom turned as a social evil. The concept of equality among marital relationship is toppled by the custom. Moreover human dignity of women is questioning through the custom. Women who have not enough money or property are the worst sufferers. Most of them is denied marital life or right to choose appropriate spouse. Justice is denied to the females and the custom is beneficial to male.

The word 'dowry' is almost synonymous with Indian women's oppression under patriarchal systems. It has been a short cut for indicating low status for women, the argument being that the callous and mundane efficiency of "dowry deaths" indicates the low value of women's labor and the high cost of their marriages, making women a liability for their natal families and a source of lucre for their marital families. There is ample evidence that the phenomenon of dowry is expanding, spreading to communities where it had never existed, and that the value of dowries is rising to untenable limits; there are horrific reports of fathers selling kidneys to cover dowry payments,

¹ Young India 5th August 1926

or collective suicides in families with multiple daughters. The Indian government's Department of Women and Child Development reported 6,006 dowry deaths for 1997.

The common conclusion has been to condemn exorbitant dowries. Scholars and activists have been pointing out, however, that criminalizing the giving and taking of dowry and applying social pressure to ban dowry in marriages are partial and inadequate solutions. Rather, the problem of dowry must be considered alongside questions of property, labor and the fundamental nature of marriage. Dowry, or some form of marriage payment, is hardly unique to India. Of the 563 societies listed in George P Murdock's Atlas of World Cultures, 24 (four per cent) are associated with dowry systems, 226 with bride wealth (grooms' families making payments to brides' families), and 63 with bride service (grooms contributing labor to brides' families in lieu of money).

Anthropologists have suggested that marriage payments are one of the ways in which cultures expand social relations between communities by exchanging gifts. Other explanations are that marriage payments help secure labor rights, or that they provide occasions for display of social status.

Cultural and Sociological Background

A system of dowry exists in many cultures and societies, but nowhere has it become such a colossal problem as in India. The system and its concomitant evils are perhaps the best indicators of moral and economic

norms in a society which claims very old and rich cultural traditions. Elsewhere, in some primitive tribes, the would-be groom has to pay a bride price and there is talk of the woman being bought and sold like a chattel. The situation is reversed in India; the husband, besides acquiring a woman who fulfils all the requirements of wife, cook, housekeeper and mother, also demands an exorbitant dowry. If this is not paid, the husband and his family might, literally, reduce the wife to ashes. Dowry giving is a commercial bargain with no ethical foundation. The system has caused physical, psychological and financial hardship to parents who have more daughters than sons as well as more daughters than wealth. Highly educated and sophisticated families are ruthless when it comes to extorting money and material goods from brides and their families. Marital discord results if the parents of the bride or wife are unable to satisfy these ever-increasing demands.

Definition of dowry

In the legal sense, dowry means any property or valuable security given or agreed to be given, either directly or indirectly, by one party to a marriage to the other party at or before or after the marriage as a consideration for the marriage of the said parties.²

² Mohan, S., ed, Problem of dowry in Bangalore city, Bahni series. Joint women's programme series, 1983, p 9.

Historical background

Stereotyped customs sometimes persist, irrespective of the harm or good they may bring to a society. Legal reforms lag behind, and the legislators do not perform their tasks well — perhaps because they don't have a sense of the urgency of the task or the power of social and economic conditions to limit legal rights and duties. The custom of dowry giving thus continues to lead to economic exploitation and ill treatment of brides, and humiliation of other people affected by it.³

In India, social and spiritual doctrines have a tremendous impact on the dowry system. It is difficult to determine exactly how or when the practice began in India, but there is no doubt that it has existed since ancient time.⁴

In Sanskrit texts, dowry is referred to as *yautraka* — the material gifts which serve to confirm the union of those joined together in matrimony. In one form of ancient Indian marriage, a girl was given away upon her father's receipt of a bride price called *sulka* — a form of compensation to the girl's parents for the loss of their daughter. The custom had fallen into virtual disuse by the early middle ages, when it came to be regarded as disreputable because it made the father a "seller of children". However, it is still practised clandestinely where, for example, a wealthy old man who desires a young

³ Hooja, S.L., Dowry system in India: a case study, Dehli, Asia Press, 1969.p.15.

⁴ Hooja, p.15.

bride will pay her father a large sum of money as a settlement for the daughter.

In course of time, a gradual reversal of roles took place, and today it is the groom and not the bride who commands the price. Some trace the origins of the modern Hindu dowry system to ancient times, when a bride given to a Brahmin was decked with ornaments at her wedding. The jewels and adornments then passed to her husband. Others believe that the custom originated with royalty: it was among the aristocratic and royal families that brides were accompanied by elephants, horses, gold, silver and the like at the time of marriage. What has probably happened is that brides have always received some voluntary gifts of valuable jewellery and garments, but this custom has gradually turned into a commercial transaction between the families of the bride and groom. With the emergence of pre-puberty marriage, families proud of their ancestry were anxious to give away their daughters within a limited time. In some cases, when the transfer of a woman from her own family to the husband's family took place, a certain amount of wealth in cash or kind, agreed upon by the parents of both parties, was also transferred in the same direction.

Today, the groom's party often demands a complete inventory of ornaments, clothing, cash bonds, utensils and other properties that will accompany the bride before the marriage proposal is accepted. This is

regarded as the daughter's share in her family inheritance; henceforth her husband must accept all responsibility for her economic needs. The transfer of dowry should ensure that the husband cannot, at any time in the future, accuse the woman of "coming to him like a beggar".

In Punjab, dowry was a form of 'Streedhan' (women's wealth). Dowry was put together by the bride's female relatives, partly from their own jewellery but partly from setting aside household resources. Land was attached to households and neither men nor women were sole legal owners of pieces of property. This benefited women because it gave them a fund of their own. But this practice changed as colonial policies were put into place.⁵

Oldenburg contends that dowry among Punjabis had commonly functioned as a property fund for women, "one of the few indigenous, woman-centered institutions in an overwhelmingly patriarchal and agrarian society", put together by women over numerous years, and paid for through a complex system of community reciprocity. The colonial concern about rising dowry payments, infanticide linked to Hindu concerns about not being able to pay dowry, and the attempt to control marriage expenses to diminish the impoverishment attributed to dowry were all 'scapegoating' attempts that cast 'Hindu culture' as the problem and justified colonial paternalist domination. Oldenburg not only refutes the evidence that infanticide was a high-caste

⁵ Veena Talwar Oldenburg, 'Dowry Murder: The Imperial Origins of a Cultural Crime' ; Oxford University Press, 2003.

Hindu problem and that dowry was suddenly extortionate, but turns the culpability back upon the colonial State. She argues that the growing impoverishment had a far greater correlation with colonial land and revenue policies and suppression of modern industry. And increasing son-preference correlated highly with the colonial construction of males as property owners and the creation of lucrative wage jobs in the military. A professor of history at Baruch College (City University of New York), Oldenburg emphasizes that the present scenario bears little resemblance to pre-colonial traditions. That the extreme devaluation of women reflected in contemporary practices such as dowry, female infanticide and female feticide may be traced back in Punjab to colonial policies.

Another research has indicated that dowry cannot be treated as equivalent to women's inheritance. Unlike the European case, neither is it equal to the share of wealth that would go to sons, and nor are daughters given property in cases where no dowry has been given.⁶

Arguments that daughters are cut off from their natal families after marriage, that dowry "pays off" their share of property, and that sons look after parents in old age are used to deny women shares of natal inheritance. This disenfranchisement makes women even more dependent on marriage as a route to economic security, and makes it likely that women will tolerate

⁶ Srimati Basu, 'She Comes to Take Her Rights: Indian Women, Property and Propriety', Kali for Women, 2001.

abuse within marriage. It may be that women themselves concur with dowry for their own marriages because they know they will receive little else from their parents. But dowry often is not a fund that is for their own use or control, and does not have the benefits of an inheritance portion. As noted sociologist and anthropologist M N Srinivas stated, the contemporary phenomenon of Indian dowry may be explained not in terms of scriptural concepts but as a modern institution of showing off wealth connected to colonial monetization of the economy and to postcolonial globalization. It can also be explained in terms of "hypergamy" where families seek to marry daughters to families of higher status and to "sanskritisation" where communities try to improve their caste status by adopting dowry practices.

Legal drives to ban the practice of dowry in India have met with little success. The Dowry Prohibition (Amendment) Act (1984, 1986) makes the giving and taking of dowry "as a condition of marriage" punishable by law,⁷ while excluding "voluntary gifts" - a combination of provisions which makes for toothless sanctions. Not only may gifts easily be claimed as voluntary or be deliberately distanced from the wedding ceremony, but because dowry-givers are penalized as well as dowry-takers, even those coerced into payment are unlikely to file claims. Dowry practices are thus legally prosecuted largely in conjunction with suicides or murders connected to dowry demands or in

⁷ Helpline law 2006 May 25, www.helplinelaw.com

conjunction with domestic violence or property recovery cases often filed in conjunction with divorces. Legal directives are blatantly ignored in the focus on wealth and status accumulation, and the urgency of having daughters married at all cost.

Factors contributing to the practice of the dowry system

Apart from its roots in Hindu culture, there are other reasons for the continued existence of the dowry system. There is widespread belief in India that the marriage of a man to a girl makes that man superior to the girl's family. The transactions of the dowry system have not, therefore, evolved in order to provide security for the newly married couple — but rather are based on the "disadvantage" that a woman causes her husband; monetary compensation is deemed necessary to offset such an unprofitable deal. This is one of the reasons why Hindus have ever dreaded the birth of a daughter. Daughters are a heavy financial liability when they are to be married, and a blot on the family if they remain unmarried,

It is vital to the Hindu father that his daughter marries; he is prepared to pay as much as he can afford or even borrow in order to obtain a suitable husband for her. The demand for bridegrooms makes them much-sought-after commodities, and a "price" is placed on grooms from even the most respectable families.

Many Indian men go abroad for higher education, for the sake of a bright career. Once they have completed their studies, demand for them increases in the marriage market. Plenty of offers are made, with the result that these young men become conscious of their importance, and attach an unduly high value to their education and career. They become selective in their choice of partners: the girl needs to be smart, highly educated, accomplished in domestic work, and from a rich and influential family. This intensifies competition among the girls' parents, who are compelled to agree silently to the groom's demands. If the father has the misfortune to possess a daughter who is of dark complexion, or in any way ugly or deformed, the amount of dowry to be given increases.⁸

Parents of daughters favour the dowry system — when it comes to taking dowry for their sons! When their sons marry, the parents demand huge sums of money, anticipating that they might have to pay a similar amount when their daughter weds. Through their defensive actions, these people also contribute to the continuation of the dowry system.⁹

Dowry is considered by many Indian as *Dakshina* — an offering attending the gift of the girl. They believe they cannot achieve salvation without fulfilling their religious duty to give dowry to a daughter; it would be

⁸ MOHAN, S., ed, Problem of dowry in Bangalore city, Bahni series. Joint women's programme series, 1983, p 9.

⁹ Mohan, S, p.16.

sinful if parents did not give her gifts on her marriage. These people believe that happiness cannot dwell in their houses if they send their daughter or sister away without giving her due share of dowry. Religion is therefore a strong social force behind the retention of the dowry system.¹⁰

According to Professor M.N. Srinivas, the increase in dowry-giving is also attributable to a sharp increase in the emulation of the higher castes by the lower castes. There is improved access to education and jobs in the organised sector; dowry is a practice adopted to exhibit a new status.¹¹

Another major factor contributing to this evil system is the inheritance law. Until comparatively recently, women were denied the right of inheritance. This led to the rigidity of the custom of dowry among the propertied classes. But with the passage of the Hindu Code Bill 1956 which, for the first time, conferred the right of property upon women and entitled them to a share in the father's property previously bequeathed only to sons, things have gradually taken a different turn and western values have influenced the institution of marriage.

Besides these factors, the modern Indian girl has also become status-conscious, and often wants to marry someone of higher social standing who draws a large income.

¹⁰ Hooja, p.22.

¹¹ See "Understanding the dowry system", The Sunday Herald, April 28, 1985.

The very institution of marriage is being altered by this evil system. Marriage has become a potential death trap for many women, particularly in the northern parts of the country. Instead of assisting newly-wedded couples to set up a household, dowry has become a major disruption of marital harmony. It has taken the shape of a business transaction, in which material goods take priority over the bride herself. The bride's parents are often taxed with frequent fresh demands, even after the marriage. Inability to satisfy these demands can lead to the wife bearing the brunt of her in-laws' anger, and to psychological, social and economic problems for her family. The parents often get into debt so heavy that it passes from one generation to the next. In cases where a man has more than one daughter, he usually struggles to get them all married, because he spends all his money and borrows more to get the eldest married.

Law reform

The dowry system has come in for scathing criticism from Hindu liberals. The institution, they declare, ensures that the Hindu girl will have the best husband that money can buy. According to the critics, the legislation passed in 1961 to restrict the operation of the dowry system has so far done little to stop the custom; it has merely substituted the disposal of eligible bachelors by private auction for the previous public sale. The genesis of the problem of cruelty towards women can be traced to the social apathy of the

Indian populace. Although the Indian Constitution provides for equality of the sexes, with special protections for women and children, in their family life Indians have been governed by personal and religious laws which militate against women's interests. These laws have relegated Indian women to an inferior position, both legally and socially.

The Dowry Prohibition Act of 1961 has been totally ineffective because, although it seeks to punish offenders, it is hard to see how they can be brought before the court under this act, especially given the hidden nature of the offences. The people of India are affected by innumerable superstitions, and it is impossible to expect, as a sequel to a highly sanctified ceremony like marriage, that a bride, groom or any near or distant relative would drag the guilty parties to a court of law. This is clearly evident from the lack of complaints since the passage of the act.

The Dowry Prohibition Act defines dowry as any property or valuable security given or agreed to be given either directly or indirectly:—

- (a) by one party to a marriage to the other party to the marriage or
- (b) by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person. at or before or after the marriage as consideration for the marriage of the said parties, but does not include dower or *mahr* in the case of persons to whom the Muslim Personal Law (shariat) applies. For the removal of doubts, it is hereby declared that any

presents made at the time of marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles shall not be deemed to be dowry, within the meaning of this section, unless they are made as consideration for the marriage of the said parties.¹²

The Act further states that the giving and taking of dowry or its abetment, or the demand for it, has been made an offence to be visited with imprisonment, fine or both.

But the success of the act essentially depends on public co-operation. The legislation has so far failed because of its self-contradictoriness and the mixed attitudes found in the Indian society today. In order to be effective, the act should be accompanied by political, social and economic changes in the status of women both inside and outside the family.¹³

A 1985 amendment has replaced the phrase "in consideration for the marriage" with the words "in connection with the marriage". This has widened and improved the definition of dowry: according to the old definition, things given after the marriage could not be defined as dowry because they were not given to effect the marriage.¹⁴ The amendment recognises that dowry demands often increase after marriage, when the bride

¹² Achar, M.R., and Venkanna, T., Dowry Prohibition Act, Law Book Co, Allahabad, 1962, p v.

¹³ See Manushi journal about women in society, no 24, 1984, p 20.

¹⁴ The dowry prohibition (Maintenance of lists or presents to the bride and bridegroom) rules 1985, Helpline Law, www.helplinelaw.com

is at the mercy of her in-laws. The amendment also adds that presents shall not be treated as dowry so long as "no demand has been made" for such presents. A suggestion, by the committee which recommended the amendment, that a ceiling be laid on such presents was overlooked. Hence, the problem continues — the in-laws' demands, made verbally, cannot be proven.

The amendment continues: the "presents" should be of customary nature, and the value thereof not excessive, having regard to the financial status of the person by whom or on whose behalf such presents are given. But who decides as to what is customary? What is excessive? The decision is left to the judge's arbitrariness, giving play to individual biases and legal uncertainty.¹⁵

According to this act, both the giver and taker of dowry are equally guilty. In both cases the court has a discretion to reduce the minimum period of imprisonment (six months). The amendment committee opposed this discretion as it would be misused.

When both parties are held guilty and are equally liable to punishment, the bride and her parents become reluctant to prosecute the other party for fear of social reprobation. They are afraid that the prosecution may rebound on themselves. The amendment committee therefore recommended that the

¹⁵ Manushi journal, p.30.

offence of taking dowry be made cognisable, in order that anyone might report it. But the new amendment has imposed certain limitations on this: "any recognised welfare institution or organisation" has the right to complain if the harassed woman or her relatives are not in a position to do so.

One of the most laudable recent judgments which, in immediate terms, will have a wide-ranging effect on dowry disputes, was passed by the Supreme Court. It declared that all gifts to a woman at marriage remained her absolute private property until the end, and that neither her husband nor any other had the right to them without her sanction. Gifts of cash, ornaments, silver, clothing or anything that constitutes dowry may be entrusted by the wife to the husband, but the husband will be deemed "guilty of criminal breach of trust" if he misappropriates or refuses to return what the court regards "as the absolute and personal property of his wife".¹⁶

As is the case with most laws, these laws feature loopholes which the guilty person can use to get away. Social injustices cannot always be solved through the medium of legal safeguards alone. It is difficult to collect evidence of dowry offences: neighbours are reluctant to offer eye-witness corroboration. More social organisations should vigorously take up the issue, thereby building up social resistance to such behaviour.

¹⁶ Sethi, S-, "Dowry: a gift of justice", India Today, April 15, 1985, p 81.

Students should be infused with high social ideals. If the male student decides not to accept dowry in spite of his parents' coercion, this will have a good effect on society. But for this to happen, a complete re-orientation of the education system is necessary. Women should be encouraged through education to develop whole personalities. Inter-caste, inter-religious and inter-lingual marriages may also discourage the practice of dowry. They would definitely reduce competition among the girls' parents and encourage love marriages instead of arranged marriages.

For dowry to disappear completely — which seems far off — a major change in the social value system has to come. Public opinion against the system needs to be created with the help of the media, seminars, symposium and debates. Legal deterrent punishment is likely to be abused by enforcement agencies like police while the system has social and cultural approval.

Dowry among Muslims

All Muslim marriages involve *Mahr*, a payment to the bride by the groom and his family whenever she demands it. If so agreed, some or all the mahr may be paid at the wedding. *Mahr* is usually given in cash, but may also include real estate and jewellery. The pledge of *Mahr* is said to be legally binding. The groom's kinsmen are also expected to provide the bride with

clothing and jewellery at the wedding.¹⁷ All Muslim brides are expected to bring dowries to their conjugal homes. These range from a few cheap cooking pots to a grand array of household goods, clothing, milking animals and even servants. Detailed lists of dowry items are kept and, should a marriage end in divorce, a woman would, ideally, take her dowry away with her. In practice, complete retrieval of a dowry is likely to be difficult. The evils of dowry are being experienced by Muslim brides also.

Dowry among Indian Christians

The Indian churches also face the problem of dowry — especially those with ancient traditions in South Tamil Nadu and Kerala, such as the Syrian Church. Believed to have been founded by St Thomas the disciple of Christ, the Syrian Church has many Hindu traditions woven into its Christianity. The dowry arrangement is commonly accepted by the church; justified on the grounds that the bride is bringing with her wealth equivalent to her share in the family property. In order to avoid sub-division and fragmentation of immovable property, the female members of the family are given their share in cash and jewellery. If this really were true, it would probably be acceptable. But many grooms choose girls who can afford to bring dowry that is satisfying to them. Until recently, a certain portion of the dowry was given to the church as a gift. There is, even now, a special

¹⁷ Ahmad, I., ed. *Family, kinship and marriage among Muslims in India*, Dehli, Manohar Book Service, 1976.

ceremony among these Christians in the presence of the local priest, to mark the giving of the dowry. The evils of the dowry system are therefore experienced by the Christian community, no matter what justifications are put forward.

Demanding dowry and the corresponding marital problems are the major issue includes violation of Human Rights. As selected earlier it has no ethical or moral background. It makes women as commodity, which can be handed over through bargaining; one major difference is that anybody who buy the commodity never pay but get the value of it.

The system pose two things:

1. She posses not even a minimum value comparing to that of a commodity.
2. She is considered as burden to the receiving person, for that he gets a compensation from her parents.

Nullifying the dignity of women and considering her as a waste commodity (often waste cargos need compensation to be received)raises serious human rights problems. Changing values and concepts of the society with reference to the monetary gains increased the problem. The women who has some job or earnings escapes from this trap. The groom does not bargain for dowry from a lady who has job. Here the fact is that she has also her own bargaining

power, i.e. the value of a of the women is changing. The basic problem is that man inherently considers jobless or poor women as a burden.

Here the outlook of both men and women need change. Feminist movement are always making some ideological propaganda for women, saying that 'do not submit before the male'. They even question the custom of appearing the girl in front of every youth who is coming for 'bride selection'. Choosing a life partner with equal freedom and responsibility should be the custom of society. Here the voice of the women should be brave.

The dowry system is to be considered as a custom which is against social justice. Only because of social backwardness girls were denying the right of marital life or they are doing slavery in the form of domestic jobs for their husband. Another outcome of this system is the increasing rate of female foeticide. A recent study by Canadian research team find out the shocking fact that female foeticide in India crossed one crore in 20 years. Pre-natal sex determination was banned in 1994 but 5,00,000 female fetuses have been destroying every year. According to a recent report by the United Nations Children's Fund (UNICEF) up to 50 million girls and women are missing from India's population as a result of systematic gender discrimination in India. In most countries in the world, there are approximately 105 female births for every 100 males. While there exists no quick and easy solution to the problem, it is possible to reduce gender inequality, which lies at the core

of femicide. The first critical step is to challenge the patriarchal attitudes that applaud boys and undermine girls ,and to create a culture that celebrates both the genders equally. More so, the medical fraternity can do a lot of service by preventing the practice of female foeticide.

The system of dowry cause another social evil in northern states of India, child marriage. Parents arrange marriage for their 11 or 12 year old daughters in order to escape from giving large amounts as dowry. In such circumstances girls were pushed into marriage life before attaining maturity and also they are compelled to stop their school education. In short the problem of dowry involves social/ethical/economical problems. Social philosophers have an important role to solve the problem. For any action against such a deep rooted custom an ethical back ground is to be formed. Hence we need Philosophical formulations based on justice especially considering new principles of human rights.

CHAPTER 8

MOHAMMEDAN LAW

“All Truth is in itself certain .But as received by men, and understood with reference to men’s psychology, certainty may have certain degrees. There is the probability or certainty resulting from the application of man’s power of judgment and his appraisal of evidence” Quran¹

Hindus and Muslims are the two leading communities of India. Except the special status which are of general application, each of these communities is governed by it’s own personal laws regarding family matters and religious institutions, but in other matters both are governed by the common laws passed by the Indian Legislature. The personal laws of both these communities are based on their respective religions giving effect as Divine Laws.

Muslim personal Laws has its origin from Quran. One of the important reason is that the word Islam itself relates to submission. In it’s religious sense it denotes ‘submission to the will of God’ and in it’s secular sense, the esablishment of peace. Muslims believe in divine origin of their holy book which according to their belief was revealed to the prophet by Gabriel.

¹ S.69 Aiyat 51, The Holy Quran-Trans. ,The custodian of the two Holy mosques King Fahd complex for the printing of the Holy Quran, Al Madina,1413 H,p.1812

“The *Quran* is *Al Furquan* ie.one showing truth from falsehood and right from wrong”.² The Quran contains about 6000 verses but not more than 200 verses deal with the legal principles. If we leave out of account those which concern the state as such there are about 80 verses, more or less, which deal with the law of personal status. Most of them are concerned with inheritance, marriage, divorce and such like matters.

The Quran does not even set them out as a code in one place. They are found in the portion of the Quran revealed to the prophet at Medina .The portion which was revealed at Mecca is singularly free of legal matters and contains the philosophy of life and religion. The legal verses embody broad principles but do not explain or expound them. According to the classical belief of the Muslims the word of God is law and law is the command of God. This law is known as Sharia. ‘Fiqh’ which is jurisprudential in character is the ascertainment of the right principle. These two sources, namely the Koran and Sunna may be said to form the fundamental roots of Islamic law.

Ijmaa is another important source of Mohammedan Law. Ijmaa means a kind of communal legislation by great scholars. It was equally binding on the people to act on a principle (not contrary to the Koran or Hadis) which had been established by agreement among highly qualified legal scholars of any generation. This was supported by the Hanafi doctrine that the provisions

² Hidayathullah,Mulla’s Principles of Mohammedan Law, M.N.Tripathi Private Ltd., Bombay,1972 p.XXI

of law must change with the changing times and of the Malikis that new facts require new decisions.³ The validity of ijmaa as containing a binding precedent is based upon a Hadis of the prophet which says that god will not allow his people to agree on an error. Ijmaa thus become a source of law . Ijmaa is however to be distinguished from mere heresy for which the name is Bidah. Ijmaa was a feature of all schools of Sunni law and the rules deduced by ijmaa are equally valid and binding in each school. Some western writers have described Ijmaa as means of “Muslims shaping Islam, instead of Islam shaping Muslims” Authority for Ijmaa is said to emanate from a verse of the Koran

“*Amrahum shura bay nahum*” (The way is by counsel in their affairs). So it was said that the writ of the Koran runs by Ijmaa.

In developing Islamic law by consensus the doctrine of Ijtihad was employed. Ijtihad means one’s own exertions and it denotes the exercise of one’s reason to deduce a rule of sharia law. Although it can be stated as a general rule that the principles laid down by the Koran and the Hadis must always be followed.

In deducing a new principle the text of the Koran and the Hadis were not lost sight of but exigency of the time and public interest were also borne in mind. It is not wrong to say that the development and advance in legal principles was the result of compelling necessity when the Koran and the

³ Hidayathullaa, p.XXIV.

Hadis did not disclose the precise line to follow. Where a principle was silent to cover an individual case an independent effort had to be made and this is what is meant by *ijtihad*.

The doctrine of *Ijtihad* was itself based on the application of some distinct principles :

Abu Hanifa applied the principle of *Istihān* (equity), Malikis applied '*Istislah*'. (Consideration of public interest), *Maslaha* (discovery of sound precedent).⁴

Quiyas is the last source of Islamic law it has lesser significance. This is reasoning by analogy

Mohammedan Law in India

The Indian legal system is based in part on the English common law system. With respect to Muslim personal law as applied in India, the sources of law are Hanafi *fiqh* along with some resort to other schools, legislation, precedent, certain juridical texts (both classical and modern) that are considered authoritative, and custom. During the British Raj, the colonial courts were directed to apply "indigenous legal norms" in matters relating to family law and religion, with "native law officers" advising the courts on the determination of those norms. A number of Hanafi sources (notably *al-Hidaya* and the *Fatawa Alamgiri*) were translated into English. The advisory

⁴ Mulla , p. XXVI.

positions of legal experts on Hindu and Muslim law were abolished in 1864. Legal commentators on the development of the indigenous system of "Anglo-Muhammadan" law (now more commonly referred to as Indo-Muslim law) attach varying degrees of significance to the subsequently authoritative position of these works (and the quality of the translations), the absence of judicial expertise in Muslim law, the introduction of principles of English law and procedure through judges trained in the English legal tradition and through interpretation of the residual formula of justice and right or justice, equity and good conscience to imply mainly English law, and to the position taken on customary law.

The status of the personal laws of minority communities, and the plurality of religious laws in general, is much debated in India. Article 44 of the Constitution legislates a commitment to the gradual establishment of legal uniformity in India, the aim being that the state "shall endeavor to secure for the citizens a uniform civil code throughout the territory of India . This directive is considered a threat by elements of religious minority communities, who continue to be governed by their own personal laws in family matters, as applied within the superstructure of the Indian legal system.

Constitutional Status of Islamic Law

The Indian Constitution was adopted on 26th November 1949 and has been amended many times. The preamble of the Constitution affirms that

India is a "sovereign socialist secular democratic republic". India's secularity is framed in terms of neither favoring nor officially adopting any particular religion, and Article 26 guarantees the freedom to manage religious affairs (subject to constraints imposed by the requirements of public order, morality and health) for every recognized religious denomination or sect. The aforementioned Article 44 of the Constitution contains the Directive Provision stating that Indian legislators shall aim to establish a uniform civil code throughout India. For the time-being, religious communities continue to be governed by their own personal laws (apart from Muslims, this applies to Christians, Zoroastrians, Jews and Hindus, as well as Buddhists and Sikhs who, for legal purposes, are classified as Hindus). Although the option of civil marriage exists, it is not often the only regime under which Indians marry. The difficulty of reconciling the secularity of the Republic and the objective of establishing legal uniformity with the protection of minority rights (also enshrined in the Constitution) has meant that, almost fifty years since the adoption of the Constitution, the goal of the directive principle in Article 44 is still far from being realised.

Notable Features

With the exception of some enactments, most of the personal law applicable to Indian Muslims is uncodified and administered by state courts on the basis of Indo-Muslim judicial precedents. With one exception, the

legislation regulating Islamic family law dates from the period of British colonial rule. The Muslim Personal Law (*Shariat*) Application Act 1937 directs the application of Muslim Personal Law to Muslims in a number of different areas mainly related to family law. The Act also directs the application of Muslim personal law in matters relating to interstate succession among Muslims. On the matter of Islamic inheritance law, as the Quran provides a systematic scheme for intestate succession, there has been no particular legislation in that area. The courts generally apply the classical rules relating to intestate succession.

The Child Marriage Restraint Act 1929 introduced under the British provided penal sanctions for contracting marriages below the specified minimum age, originally established at 18 and 15 years. As the Act currently stands in India (amended by Act 2 of 1978), the minimum marriage age is 21 for men and 18 for women. However, as registration is not compulsory in India, and as the Act does not instruct the dissolution of under-age marriages, such unions are not rendered invalid. The Registration of Mohammedan Marriages and Divorces Act 1876 is still in operation in Bihar and West Bengal. Other states of the federation also have similar Acts, and there are facilities for voluntary registration. However, registration is not a requirement in India. The option of registering a marriage under the Special Marriage Act 1954 (under which all inter-religious marriages must be registered) also exists, in which case a different set of secular marriage and divorce laws

would apply; it does not, however, appear to be very common to do so in practice. Registration may prove useful if recourse is had to the courts, but because it is not compulsory, other evidence may be used to prove the existence of an unregistered marriage. India submitted a declaration affirming the government's commitment to the principle of obligatory registration of marriage, but stating that, for the present, the diversity and size of India's population make strict adherence to this principle impractical.

With regard to polygamy, the Criminal Procedure Code establishes that a woman who refuses to live with her husband on just grounds will still be entitled to maintenance and those just grounds, as defined in the Code, include the contracting of a polygamous marriage by the husband, even if the personal law applicable to the parties permits polygamy. This proviso only actually applies to Muslims as polygamy has been abolished for all other communities. In *Itwari v. Asghari*⁵, a suit for the restitution of conjugal rights by a Muslim husband against his first wife, the Allahabad Court stated that the onus was on the husband to prove that his second marriage did not constitute any insult or cruelty to the first wife. Although the Muslim husband has the right to contract a polygamous marriage, the Court held that it does not necessarily follow that the first wife should be forced to live with him under threat of severe penalties after the husband has taken a second wife. Even in the absence of proof of cruelty, the Court would not pass a decree for

⁵ AIR 1960 All 684

restitution of conjugal rights if it appeared that it would be unjust and inequitable to compel her to return to her husband under the circumstances of the case.

The Dissolution of Muslim Marriages Act 1939 introduced changes to the extremely restricted Hanafi rules on judicial divorce at the petition of the wife by the adoption and adaptation of certain Maliki principles. The nine grounds upon which a woman is entitled to obtain a decree of dissolution of her marriage under the Act are as follows: if the husband's whereabouts have not been known for four years; if the husband neglects to maintain the wife for two years; if the husband has been sentenced to seven or more years imprisonment; if the husband has failed to perform his marital obligations for three years; if the husband was impotent at the time of marriage and continues to be so; if the husband has been insane for a period of two years or suffers from a serious illness harmful to the wife; if the wife was contracted into marriage by her father or other guardian before the age of 15 and repudiates the marriage before she becomes 18 (provided the marriage has not been consummated); if the husband treats her with cruelty (including physical or other ill-treatment or unequal treatment of co-wives); and any other ground which is recognised as valid for the dissolution of marriage under Muslim law.⁶ On the other hand, apostasy by the Muslim wife, including conversion to another religion, does not in and of itself dissolve her marriage. The Act

⁶ Helpline law, 26 May, 2006, www.helplinelaw.com

expressly extends the option of puberty to women who were contracted into marriage as minors by their fathers or paternal grandfathers, broadening the classical Hanafi rules. There has, however, been no substantial reform of the classical law relating to *talaq*. The Muslim husband retains the right to repudiate his wife extra-judicially, and from the available sources it appears that the most common form of divorce is the triple *talaq*. The stance of the pre- and post-independence courts has generally been to accept extra-judicial repudiation as "good in law, bad in theology". A major issue of concern is the determination of the time from which maintenance becomes due in cases where the *talaq* has not been communicated to the wife, but the validity of such repudiations has not been called into serious question. Pearl and Menski also note that the scarcity of case law reflects the fact that, in actual practice, the exercise of *talaq* doesn't often involve the courts.⁷

With regard to maintenance upon divorce, classical Hanafi law has been modified in India by the Muslim Women (Protection of Rights on Divorce) Act 1986, passed following fierce protest by sectors of the Muslim community that viewed the Supreme Court's ruling in the Shah Bano case as a gross interference in matters of Muslim personal status.

⁷ Pearl & Menski, *Muslim Family Law*, 3rd ed., London, 1998.

Shah bano Case

Shah bano, 62 year old Muslim women and mother of five from Indore, Madhya Pradesh, was divorced by her husband in 1978. The muslim personal law allows the husband to do this without his wife's agreement. She tried to get maintenance (similar to alimony) through the Indian court system, and seven years later her case reached the supreme court. Maintenance is an area of law that falls under the personal codes, and Muslim law does not entitle women to ongoing maintenance. A divorced Muslim woman is entitled to her mehr, which is a payment to her from her husband at the time of marriage, and three months of maintenance. Following that , her family and community may help to support her.

When shah Bano's case reached the Supreme Court in 1985, the court turned to the criminal code , which applies to everyone, specifically Article 125. This Article was from the British colonial criminal procedure code of 1898 as revised in 1973. This Criminal code entitles divorced, destitute women to some maintenance. The Supreme Court used this Article to grant ongoing maintenance to shah Bano, in spite of Muslim personal law. Moreover, the court went on to argue in their decision that "a common civil code will help the cause of national integration by removing disparate loyalties in laws which have conflicting ideologies".⁸

⁸ Zoya Hassan, Muslim women and the Debate on Legal Reforms in Bharati Ray and Aparna Basu, eds *From Independence Towards Freedom: Indian women since 1947*. Oxford 1999, p.126.

In *Mohammad Ahmed Khan v. Shah Bano Begum*,⁹ the Supreme Court ruled that there was no conflict between classical Hanafi law, which only specifies the obligation to maintain a wife during her *idda* period, and the requirement to support a former wife unable to maintain herself established by state legislation. During the aftermath of the controversial judgement, the Congress government passed the Muslim Women (Protection of Rights on Divorce) Act 1986.

The Act entitles the divorced Muslim woman to "a reasonable and fair provision and maintenance to be made and paid to her within the *idda* period by her former husband." Although the Act itself provoked differing reactions as to what its effect would be, court practice allows the Muslim divorcee to appeal to the courts if her former husband has not provided her with a reasonable sum for maintenance during her *idda* period. As in classical law, the *idda* period is defined as three menstrual cycles after the divorce; three lunar months if the wife is not subject to menstruation; or until delivery of the child or termination of pregnancy if the woman is enceinte.

The Act also stipulates that the divorced wife is entitled to any outstanding dower, any property given her before or during marriage, and maintenance for children in her custody born before or after the finalisation of the divorce. There appears to be some modification to classical Hanafi law in the definition of a divorcee entitled to claim such support, as the Act specifies

⁹ AIR 1985 SC 945

that its application pertains to marriages conducted according to Muslim law where a Muslim woman has obtained a divorce from or has been divorced by her husband in accordance with Muslim law. The Act directs that if neither the former wife or husband has the means to provide for her support, the responsibility of maintenance of the divorce falls on her relations, that is, those relatives that would stand to inherit from her. If she has no close relations or they are unable to support her, liability falls to the State *Waqf* Board.

Section 5 of the Act also allows for a divorced Muslim woman and her former husband to declare to the Court their willingness to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure relating to the maintenance of dependants unable to support themselves.

In the first reported case relating to the Act,¹⁰ the Kerala High Court rejected a narrow interpretation of the legislation as only requiring Muslim men to support their divorced wives during the *idda* period. Rather, the Court stated that the appropriate interpretation of section 3(1)(a), "a divorced women shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the *idda* period by her former husband", was that maintenance during the waiting period and reasonable and fair provision were two separate issues. Thus, the Court ruled that the Muslim divorce is

¹⁰ *Ali v. Sufaira* 1988 (2) KLT

entitled not only to maintenance for her waiting period, but also to a reasonable and fair provision to provide "for her future livelihood, from her former husband." This has since been confirmed by a large number of judgments.

Constitutional considerations of Shah bano case

The Shah bano dilemma also raises key constitutional issues. The Indian constitution is the longest in the world. It includes a section on Fundamental Rights, which is a bill of rights, as well as a section of Directive Principles. Which are to guide state policies and actions. Perhaps inevitably in such a lengthy document, at times it seem to contradict itself; on the other hand, the level detail can help to guide some decisions. Here one more point to note is that Preamble affirms Justice, liberty, secularism, and equality. Defining and reconciling these ideals is one important aspect of the Shah Bano dilemma. The major relevant rights and directives are as follows:

According to article 13(2)

“ The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void”.¹¹

¹¹ Constitution of India, Eastern Book Company, Lucknow, 1980 p.4.

According to Article 14. the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 15. Prohibits discrimination on grounds of religion, race, caste, sex or place of birth-the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Considering these relevant Articles of Indian Constitution , how can we say the legislation of the Muslim Women (Protection of Rights on Divorce) Act1986 is right. Whatever be the loopholes in constitutional law one can say it as unjustifiable. The legislation is an example of denying justice to a weaker section, i.e. women.

Directive Principles of the constitution also posses certain important Articles which is to be read with the Shah Bano issue.

“The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws”.¹²

Article 39 Certain principles of policy to be followed by the state- The state shall, in particular, direct it's policy toward securing-

¹² Bakshi, 1996, p.69.

a- the citizen, men and women equally, have the right to an adequate means of lively hood.¹³

Article 44. Uniform Civil Code for the citizens- The state shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.¹⁴

The directives are guides for judges and policy makers. Scholars advices that the legislation enacted to implement the Directive Principles should be upheld, as far as possible. They also says that, where necessary, even constitutional provisions as to fundamental rights should be adjusted in their ambit so as to give effect to the directive principles.

On the other hand , they do not confer any enforceable rights and their alleged breach does not invalidate a law. How can these disparate parts of the constitution be reconciled? Rights trump directives, although even rights can be “adjusted” to fulfill directives. Even within the list of rights, the prohibition of sex discrimination and freedom of religion clash in the Shah Bano case. “Secular” in the Preamble, is perhaps the most contested single word in the Indian Constitution and a key issue in the Shah Bano dilemma. The State has no official religion, but beyond this what does secularism mean? Secularism can be taken to mean religious freedom, or noninterference in citizen’s private religious practices, but this interpretation is in tension with

¹³ Bakshi,p.70.

¹⁴ Bakshi,p.72.

another notion of secularism as equality before the law of all citizens regardless of religion.

Shah Bano and Human Rights

Shah bano case raises issues important to a broader understanding of Human Rights. A key aspect of the dilemma is the tension between group rights and individual rights, especially the individual rights of women. Rights scholars in the developing world have launched various critiques of a western tradition that privileges individual rights over collective or community rights and duties. Moreover, cultural relativists argue that universal human rights may be impossible in a culturally diverse world, since values vary from country and community to community.¹⁵

Here the strongest players value may prevail, first world over third world at the global level, Hindus over Muslim's fears of what will happen if a Hindu dominated polity designs a uniform civil code; yet within the Muslim community a similar dynamic occurs , as dominant male politicians reinforce a legal system which disadvantages women.

Another thing to be note is that India has signed and ratified the Convention on the Elimination of All Forms of Discrimination Against Women(CEDAW), which is hampered by weak enforcement mechanisms.

¹⁵ Vincent.R.J, Human Rights and International Relations, Cambridge University Press,1986, p.37.

Parts of CEDAW are relevant to the personal law debates in India. Article 16 of CEDAW includes the following:

“States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women ... the same rights and responsibilities during marriage and its dissolution”.¹⁶

When considering the disparities between muslim personal law and other family laws one might have of the opinion that uniform civil code is a must. Because of the diversity of religions and customs, personal came into force in India. While observing with a pluralistic outlook one cannot say that the system is against social justice .And the provisions of personal does not affect other religion or people outside the particular religion. But a close view reveals the reality of injustice happening inside the community. Muslim personal law considers women inferior to man. Law relating to marriage, divorce etc. are the examples. The religious leadership is always protecting the interest of male community. (Unfortunately in Muslim community there is no females among religious leadership). Some of the primitive laws (which may be just at the time of Mohammed Nabi, because of special socio-

¹⁶ Convention for the elimination of all forms of Discrimination against women, First south African Report, 1997, 2006 May 26, <http://www.polity.org.za/html/govdocs/reports/cedaw4.html#Art16>

economical situations) were encoded among the present Laws. Permitting man to have four wives is one among them. Divorcing a wife is easy while divorcing husband is not at all easy. Here the women are the only sufferers .In the matter of right relating property also male dominate.

Now the question arise, that whether religious texts and preaching of prophet or the present social reality , which will be the basis of legislation? Though there is a code which regulate all affairs of human relations , can there be any renovations according to the time. Whether the social philosophy is static or subject to change according to the passage of time? Can we deny justice to a section(may be women) in the name of religious principles? But one of the main arguments is that not the Holy Text, but the interpretations trap the weaker sections of the community. For example in the case of maintenance Quran have a positive attitude.

Verses (Aiyats) 241 and 242 of the Quran show that according to the prophet , there is an obligation on Muslim husbands to provide for their divorced wives. The English translation of the Aiyats is reproduced below:

Aiyat No.241

For divorced women

Maintenance (should be provided)

On reasonable(Scale)

This is a duty in the righteous..

The correctness of the translation of the Aiyats is not dispute except that, the contention is that the word Mata in Aiyat No.241 means 'provisions' and not maintenance .That is a distinction without a difference. Nor are we impressed by the shuffling play of All India Muslim Personal Law Board that , Aiyat 241 , the exhortions is to ...the more pious and the more God-fearing . not to the general run of the Muslims.¹⁷

Considering all these facts need of a uniform civil code is not only the solution to remove injustices caused by the personal law to women, the renewal of the laws can do a lot. Social justice can be not only applied in between various religions but also inside the religion itself.

¹⁷ Asgar Ali Engineer, The Shah Bano Controversy, Orient Longman, Hyderabad, 1987 p.28.

CONCLUSION

“It is odd, when one thinks of it, that there are people in the world who, having renounced all the laws of god and nature, have themselves made laws which they rigorously obey...”
Pascal¹

It is quite natural that laws which derives it's source from rituals, believes and also from particular social system are subject to change. But the main issue which is to be noted is that whether the reforms are timely or keeping pace with the social change. If it is not so that it result in hindering social progress. Law Reforms simply aiming at the practicality is very easy. But ignoring sociological and philosophical background of society will do little benefit to the people. Every legislation affecting the social life influences our value system. This will take place directly or indirectly. If the law making authority is not considering this fact it may affect the future social set up. Therefore analysis of the legal system with the help of philosophical tools has its relevance.

Major laws existing in India came into force during the period of British rule. No important reformations except some meager changes took place. Certain laws turned irrelevant now. There are also laws which were enacted in a particular social set up of our country. Now these laws were also

¹ Pascal, cited in A.P.d'Entreves, Natural Law, Hutchinson University Library, London, 1972 p.6

became impractical. One cannot analyse all these facts in a brief study. Constitution is the major guideline of Indian legal system. Though there are laws enacted before the commencement of the constitution, they also come under the purview of the constitution. So the relevance of constitution in our legal system is very important. Constitution is a declaration for the people by the constituent assembly representing the people. It is more than a declaration. Former Prime minister Jawaharlal Nehru viewed it as a "declaration, a firm resolve, a pledge, an undertaking and for all of us a dedication".² For the same reason the reformation of legal system is depended on the flexibility of the Constitution also. So every discussion regarding Indian legal system start from the nature and scope of constitution. Likewise penal laws, family laws, human rights issues etc. should be analysed.

Criminal Justice System

The unsatisfactory nature of criminal justice in India has nothing to do with the adversarial system. The reason for the unsatisfactory situation lies elsewhere. India's social structure and attitudes are very much conditioned by entrenched habits of discrimination. There are various forms of discrimination, among which one may mention caste discrimination, discrimination of indigenous (tribal) people and minorities. Discrimination on the basis sex is also a major issue. Discrimination weighs heavily on the

²Durga Das Basu, Introduction to the Constitution of India, Wadhwa & Co.,1999 p.20.

justice system. This has created severe obstacles to the development of India's justice system in general and the criminal justice system in particular.

Another point to be noted is that , now the concept of punishment is changed. For example in contrast with the primitive community a civilised society considers the social and psychological background of a person before convicting him for an offence. According to the present human rights thoughts the elaborate principles of natural and social justice should also be considered. Rehabilitation of the criminal back into the society is a prime task. Here an important question arises how can a penal code enacted before a century, work effectively without timely reformation. The investigative machinery regarding crimes is terribly crude, both in terms of attitudes as well as facilities. Furthermore, the justice that one may get is also associated with poverty. The level of poverty in India is so appalling that the poor cannot afford justice. In addition, the management of the criminal justice system is inefficient and obsolete. Poor human resources and inadequacy of technical resources affect every area of the system.

The administration of justice in criminal as well as civil cases are mainly based on the evidence given by witness. Some legal concepts such as eyewitness is necessary to convict an accused in certain criminal cases are not at all relevant in modern age. This is because, criminals are using modern weapons and new methods in a crime. Producing eye witness in such

occasions is not practical. Moreover witnesses are often subject to serious threats to their life and property by the accused or their supporters. The causes of such threats can be removed only by strong anti-corruption measures as suggested above. Systematic threats and intimidation take place due to the weaknesses of the system. The people who intimidate feel that law enforcement is weak and they can do what they like. Without improving the overall system, it is not possible to change such a mentality.

Death penalty is an important issue discussed by legal philosophers and jurists all over the world. The predominant global view, including international conventions, appears to favour the abolition of the death penalty. The Supreme Court of India has ruled that the death penalty is not unconstitutional and may be imposed in the rarest of rare cases. But life imprisonment exists as an alternative, and this is quite enough punishment. Furthermore, a large number of cases prove the a miscarriage of justice in a significant number of cases ending in death sentences. The discovery of a miscarriage of justice after the execution is futile for the person concerned and their family. Moreover, the people who are given death sentences are usually the poor. Prominence of reformatory theory above retribution is also strong ground for the abolition of death sentence. In India, the number of death sentences were less comparing to the previous decades. More over the concept of government, which is supposed to exercise more power to rule efficiently has also changed. The new concept is that whenever the

government become more democratic, then the rudeness of punishment vanishes.

Judiciary for the Disadvantaged

The existing laws dealing with crimes against women, children, Dalits and disadvantaged people do not adequately safeguard their interests. There needs to be more improvements.. The most important aspect is the implementation of existing laws. For example, there are many laws relating to Dalits, but they are hardly implemented. The reasons for non-implementation should be studied. One obvious reason is the attitude of the law enforcement agencies and therefore a radical change is necessary in this area.

Reforming legal system is not only related to the amendment of laws, what is required is a change of attitude. Judges must be able to use modern communication techniques and administration methods. However, for that, they must feel that the system they are leading is really working. Above all, they need higher morale. It is a common principle that every profession needs improvement. The immunity of judges for actions taken in their official capacity and in good faith is a concomitant part of the independence of the judiciary. At the same time, a judge who lives in a society open to the 'pulls and pressures of the cosmos' cannot be left unaccounted too. An independent and efficient body should be devised to monitor the judiciary.

The protection of human rights of citizens is one of the important responsibilities of the legal system.. It is not satisfactory at all. Meanwhile, legal redress must be provided to victims of human rights violations, India must ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), torture must be made an offence with serious punishment provided to offenders, human rights claims must receive priority in the courts, more compensation must be granted to victims and violators should be debarred from the civil service

Women's rights

As long as women do not have the same rights in law as men, as long as the birth of a girl does not receive the same welcome as that of a boy, so long we should know that India is suffering from partial paralysis. Suppression of women is inconsistent with principles of ahimsa (non-violence).³

The legal system is an important tool for social change and reform. It is capable of establishing an equitable and transparent framework for the functioning of a civilized society and for protecting the rights of vulnerable groups including women. Many constitutions of the world recognize equality before the law and prohibit discrimination on the basis of sex. Statutory laws aim to reform discriminatory customary practices, and an active judiciary can further protect women's social, economic, and political rights. Indian constitution provide two examples where the legal framework has sought to

³ Mahatma Gandhi, Harijan, August 18, 1940

protect the interests of women. Most of the democratic countries, prohibit discrimination on the basis of sex, although they uphold the application of customary laws to personal matters. Women have obtained equal access to property and are able to participate freely in economic activities. These laws also give women inheritance rights equal to those of men.

Such a potentially powerful instrument of change still only vaguely protects the rights of the most vulnerable groups. Equal protection laws have not yet benefited the majority of women who remain unaware of their rights or unable to seek legal protection.. Working mostly in the unregulated informal labor markets, these poor women experience the law as harassment, and not assistance. This leads to the question why legal systems in country is unable to protect poor women, identifies reasons why previous legal reforms may not have worked, and high-lights some principles that may be useful for undertaking future legal reform.

The discourses of Muslim reformers deprecated useless custom, particularly as observed by women, and placed heavy emphasis on the need to observe the *Shariat* in everyday life. The recommendations of these reformers involved changing personal habits and eliminating household rituals. In some cases, however, reformers advocated legislative enactments in order to bring Muslim personal law closer to the spirit of the scriptures, as well as to improve women's rights in the context of family relations. Thoughts on the

need for a reformed divorce law was one such instance. Reformers were concerned about British legal actions invalidating certain types of *waqf* (pious endowments) that had been used in the past to support the donor's surviving family members - frequently women. Thus, the revalidation of such *waqf* would benefit indigent Muslim women.

Another matter that concerned reformers was succession to property. Under the *Shariat* a daughter is entitled to inherit a share of her father's property - half that of a son, to be sure - but nevertheless her right to property is specified in the Koran and *Hadith*. In many places in British India, however, 'customary law' was enforced, custom that favoured sons to the exclusion of daughters. This was to the benefit of rural landed magnates, cultivated as political allies by the British, in the interests of keeping landholdings intact. The nature of rural landholdings varied greatly from place to place, but in general, the issue of *Shariat versus* custom among Muslims pitted rural landholders against urban reformers and some *ulama*.

In the early part of the twentieth century, therefore, an undesirable coalition of *ulama*, Muslim middle-class reformers, and Westernized politicians with nationalist leanings came together - for very diverse reasons - to enact a series of legal reforms. The Waqf Validating Act of 1913, the Muslim Personal Law (*Shariat*) Application Act of 1937, and the Muslim Dissolution of Marriage Act of 1939 were laws that specifically applied to

Muslims. In this period also the Sarda, or Child Marriage Restraint Act of 1929, was enacted that applied to all religious communities. The latter was heartily endorsed by the All-India Women's Conference (AIWC), founded in 1927, representative of the growing voice of Indian women in the social and educational reform arena.⁴

LAWS ARE BASED ON DIFFERENT VALUES

Laws are often more difficult and costly to implement when based on values alien to those they are supposed to help. In India, the reform of personal laws for the Hindu majority imposed values different from those based on principles of dharma or obligations. New laws adopted an individual-rights approach and assumed a community of nuclear families.

Egalitarian laws and norms work best when both men and women have economic opportunities. When poor, uneducated, and often illiterate women have little chance of attaining economic independence, they cannot take advantage of egalitarian laws to assert their individual rights. Exiting out of inequitable contexts has high social and economic costs. They may instead choose options offering less individual freedom but lower social costs, lessening the impact of egalitarian legislation. Despite good intentions, legal reforms may have unintended effects on women's property rights. The dowry system in India, for example, shifted from a familial obligation to provide a

⁴ Janaki Nair, *Women and Law in Colonial India* New Delhi, 1996, pp. 79-84.

share of family property to daughters at marriage to a de facto right of the bridegroom's family to demand compensation. In response, the Dowry Prohibition Act (1961), while not banning dowries, prohibited gifts given or taken in consideration for marriage. Unfortunately, it also reduced the willingness of families to provide property to their daughters at marriage, while maintaining preferential rights of male members of joint families over inherited properties. Subsequently it led to the fact that daughters' claims to family property were generally not in practice.

For effective legal reform, both substantive and procedural issues must be addressed; piecemeal legal reform is ineffective. Judges as impersonal officers of the court and their concern should not be near the peace of the community but upholding of laws prescribed by the state. With increasing importance given to inflexible written laws and judicial precedents, the illiterate and the poor became more disempowered. Court and advocate fees and complex procedural rules ensured that the process of seeking justice became expensive and difficult for the poor, let alone for women.

Need of holistic reform

Considering all the issues discussed above, legal system in India needs holistic reform. It requires an interdisciplinary approach to benefit more. Mere legal consideration will not do good. Here the importance of philosophical perspectives shows its importance. As the ethical principles contribute to the

basics of law, the prominence of philosophy increases. More over the new principles of social and political philosophy is also to be considered. Green politics, Feminism, Human rights and even the concept of animal rights should be included among the guidelines.

The essence of legal thought and practice, the delimitation of it's areas, the norms and conditions of its validation were problems to all. The present day legalists and socio-political and cultural study experts may say that they have nothing to do with natural law not with social norms and ideas to which it represented. But such an approach have not succeeded in resolving or removing the problems which natural law attempted to solve. The present thesis aims to project the fact that such vital issues are problems which are the domain of legal and socio-political philosophy are nothing else than natural law write large. Conceptual clarity, objectivity and public nature of legal terminology and discourse is another point that the present thesis aimed to highlight, for it is an important problem in humanistic terms. All the wisdom includes legal thought is for man or humanity. There should not be any cleavage between law and humanity. This is another point which the present project intended to presents.

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