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(The Founder of Banaras Hindu University)

(25.12.1861 - 12.11.1946)

"It is my earnest hope and prayer, that this centre of life and light, which is coming into existence, will produce students who will not only be intellectually equal to the best of their fellow students in other parts of the world, but will also live a noble life, love their country and be loyal to the Supreme Ruler."

- Madan Mohan Malaviya

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ARTICLES

NOTES AND COMMENTS

BOOK-REVIEWS

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APPRAISING END SARS PROTESTS UNDER NIGERIAN LAW YOUTH VERSUS GOVERNMENT

KINGSLEY O. MRABUR*

ABSTRACT : The paper examines the End SARS (Special Anti-Robbery Squad) youth protests against the Nigerian government over police brutality and other socio-economic issues. It emphasizes the importance of protests in society as adumbrated by scholars. It strongly condemns military forces shooting of unarmed peaceful protestors on October 20, 2020 at the Lekki toll gate. It is clear that the right to life was infringed upon. The article concludes by stating that under the 1999 Constitution of the Federal Republic of Nigeria as amended, case law and several regional and international conventions, the right to peaceful protests is guaranteed and must be recognized and protected by States

KEY WORDS : End SARS Protest, Youth, Government, Right to life, the Constitution of Federal Republic of Nigeria, 1999 (as amended.)

I. INTRODUCTION

The Special Anti-Robbery Squad (SARS) was formed in 1992 to combat violent crimes, especially armed robbery. SARS has a reputation for using excessive force and breaching human rights[1] of individuals in cases of extra-judicial killings; torture of suspects for confessions; suspects are routinely

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1. Criminal Force: Torture, Abuse, and Extra-judicial Killings by the Nigerian Police Force' Open Society Justice Initiative 2010 <https://www.justiceinitiative.org/uploads/8063279c-2fe8-48d4-8a17-54be8ee90c9d/criminal-force-20100519.pdf> accessed 11 June 2021.

locked sometimes for years without trial; shooting of protesters and other random unprovoked killings. SARS agents, who are supposed to be fighting violent crimes, have recently been tasked[2] with pursuing internet scammers known as 'yahoo boys'. This is done by stopping largely young men on the street and asking for access to their phones. Being in possession of I- Phone automatically makes you a suspect.

Following the unprovoked shooting of a youngster in the streets of Ughelli, the Delta State by the SARS operatives on October 3, 2020, this was widely reported on the social media[3]. Though the Nigerian Police disputed the incident, public outrage intensified as other videos of police shootings were uploaded on social media. As a result, nationwide protests began on October 8, 2020, calling[4]for the Special Anti-Robbery Squad, an aggressive police force, to be abolished. Police used tear gas, water cannons and live bullets against protesters, killing at least four individuals and injuring many more[5].

This organic, decentralized protest lacked[6] leadership. The reason for this is straightforward: 'a head that does not exist cannot be cut off.' Any effort by the government to hold closed-door meetings failed[7] because even if a self-appointed leader was negotiated with, he or she had no authority to order protesters to disperse. Protesters demanded[8] a seven point agenda: the

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2. A Uwazuruike '#EndSARS: The Movement Against Police Brutality in Nigeria'<https://harvardhrj.com/2020/11/endsars -The-movement-against-police-brutality-in-nigeria/> accessed 17 October 2021
3. 'Police Dismiss Video Alleging SARS killing in Delta' <https://www.vanguardngr.com/2020/10/police-dismiss-video-alleging-sars-killing-in-delta/> accessed 7 June 2021.
4. 'Nigeria: Crackdown on Police Brutality Protests' <https://www.business-humanrights.org/es/%C3%BAltimas-noticias/nigeria-crackdown-on-police-brutality-protests/>accessed 8 August 2021.
5. *Ibid.* In response to the #EndSARS protests, the government swiftly announced that it was disbanding SARS and replacing it with a new Special Weapons and Tactics Team (SWAT). This announcement further provoked protestors who were concerned that SARS personnel would simply be drafted into the new SWAT team.
6. 'The Protesters on the Frontline of the fight to #EndSARS'. It's all been Empty Promises'<https: //www.huckmag.com/perspectives/activism-2/the-protesters-on-the-frontline-of-the-fight-to-endsars/> accessed 17 October 2021.
7. *Ibid.*
8. R Olurounbi 'Nigeria: #EndSARS Movement Avoids Pitfalls of 'Leadership' <https://www.theafricareport. com/46106/nigeria-leaderless-movement-endsars-may-be-missing-ingredient-to-end-police-brutality/> accessed 12 May 2021.

immediate release of all protesters; justice for all deceased victims of police brutality and adequate compensation for their families; the establishment of an independent body to oversee the investigation and prosecution of all reports of police misconduct; and the establishment of an independent body to oversee the investigation and prosecution of all reports of police misconduct; before they are redeployed, all SARS officers who were disbanded must undergo psychological assessment and retraining ; increased[9] salary for police officers and so on[10].

This paper is in light of the above deals with eight interrelated sections beginning with the introductory section. Section 2 highlights the importance of protests in the society. It states the reasons for the End SARS protests and views postulated by various scholars. Succinctly, section 3 examines the legality of the End SARS protests under the law. The Federal Republic of Nigeria's 1999 Constitution as amended guarantees the right to protest as a basic right. It also raises concerns about the police's participation in the use of firearms during protests. They failed in their responsibility because there were several incidents of demonstrators' rights being violated. Section 4 covers the killing of innocent peaceful protesters by military officers at the Lekki toll plaza on October 20, 2020. National, regional and international bodies all condemned this cruel act. It raised concerns about the military's engagement in protests. Section 5 examines the definition of rights as proposed by experts as well as statutes and case law in tandem with the fundamental right to life of unarmed peaceful protestors guaranteed under the Constitution. Section 6 of this paper took a look at the 2019 Sudan protests as a comparative study. The lessons learnt by the protestors are explored and stated in section 7. Part 8 concludes by stating that all those found culpable in the Lekki toll plaza killing must face punishment in accordance with the law and that Nigerians have the right to peaceful protests which the government must respect and protect.

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9. *Ibid.*
10. See '#End SARS: Protesters Extend Demands, want Overhaul of Govt' <https://www.thenigerianvoice.com/ news/292856/endsars-protesters-extend-demands-want-overhaul-of-govt.html> accessed 5 June 2021. Various States in Nigeria have set up Judicial Panels of Inquiry which have started sitting to look into most of the demands of the End SARS protesters. The Nigerian government is yet to address the demand on police welfare.

II. THE ENDSARS PROTESTS

Protests are an important aspect[11]of the legal, political, economic, social and cultural life of all countries. Protests have in the past sparked constructive social change and bolstered human rights security and they continue to help define and secure public space around the world. Protests help citizens become more informed and they improve representative democracy by allowing them to participate directly in government activities. Individuals and organizations can use them to voice[12]their opposition and concerns, exchange ideas and counter-ideas, expose governance flaws and openly demand that authorities and other powerful institutions address problems and accept accountability for their actions. This is especially critical for people who do not get their voices heard[13]or who are excluded.

Protest according to Charles,[14]is defined as 'contentious politics' or 'contentious actions' in the case of claimants, or those claiming to represent them, dependent on non-institutional ways of contact with elites, opponents, or the State to some extent. Tercheck defines protest[15]as 'public group activities that use conflict politics to apply tension to a specific purpose in attempt to sway public opinion'. Protest is a non-traditional[16]style of political participation, according to researchers such as Hollander and Einwohner.

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11. K Uwandu 'Right to protest: A Fundamental Human Right' <https://guardian.ng/features/law/right-to-protest-a-fundamental-human-right/> accessed 28 August 2021. See Jasmine Revolution Tunisian History' <https:// www.britannica.com/event/Jasmine-Revolution> accessed 7 April 2021. Jasmine Revolution, popular uprising in Tunisia that protested against corruption, poverty and political repression and forced Pres. Zine al-Abidine Ben Ali to step down in January 2011. The success of the uprising, which came to be known in the media as the "Jasmine Revolution," inspired a wave of similar protests throughout the Middle East and North Africa known as the Arab Spring. See also A Javed 'Demonstrations that Rocked the year 2019' <https://timesofindia.indiatimes. com/readersblog/psychologicalcousins/demonstrations-that-rocked-the-year-2019-9560/>15 June 2021.The demon stration of China (Hong Kong), India, Chile, Egypt, France, Haiti, Indonesia, Iraq and many other countries occupied the headlines of the global news in 2019.
12. *Ibid.*
13. *Ibid.*
14. A Charles 'Political Movement and Social Change: Analyzing Politics' (1996) 90(4) *American Political Science Review* 874-884.
15. R Terchek 'Protest and Bargaining' (1974) *Journal of Peace Research 133*-144.
16. J Hollander, R Einwohner 'Conceptualizing Resistance' (2004) 19(4) *Sociological Forum* 533-554.

They go on to suggest that citizens are becoming[17]more critical of politicians, and that this criticism is constantly manifested in protest, which could explain why there is now a flood of study and theory claiming to address the issue. It's called 'high-risk political behaviour' by Useem and Useem[18]**.** However, Schussman and Soule argue[19]that protests and social movements are normal and 'inherently political' and that they have become 'an accepted aspect of citizens' political activities'.

Whether the protests are against a government policy on university education, fuel price increases, or other government policies, incidents of forcible dispersion by security services occur. Bamgboye and Azu remark[20] that people have been gruesomely killed and others have sustained lasting injuries as a result of similar events.

In Nigeria, individuals use political power to persecute and suppress their opponents. The Public Order Act was used by governors and their accomplices to frighten protestors who were against them, but it was also used to protect[21]those who were protesting against their opponents. What began as a protest by young Nigerians against the feared[22]police Special Anti-Robbery Squad (SARS) turned into a venue for the youth to vent their frustrations with Nigeria's ruling class and demanded change? The protests in Lagos were met with a police crackdown, with government buildings set ablaze and stores looted by hoodlums who hijacked the peaceful demonstrations.[23]The looting and mayhem spread[24] fast across the country. Several warehouses across the country containing COVID-19 relief items

17. *Ibid.*
18. B Useem, M Useem 'Government Legitimacy and Political Stability' (2001) Social *Forces 840* -852
19. A Schussman, S Soule 'Process and Protest: Accounting for Individual's Protest Participation'. (2005) 84(2), *Social Forces,* 1083-1108.
20. A Bamgboye, J Chuks Azu 'Public Order Act, to Be or Not to Be?' Daily Trust: Published on Tuesday, 18 February 2014.
21. *Ibid.*
22. 'How the EndSars Protests have Changed Nigeria Forever' <https://www.bbc.com/news/world-africa-54662986> accessed 15 May 2021.
23. T Omilana, *'I Pretended I was Dead': Chaos and Violence Grip Lagos as End Sars Protestors Continue to Defy Curfew* < https://www.independent.co.uk/news/world/africa/nigeria-protests-end-sars-lagos-riot-looting-b1228242. html> accessed 21 April 2021.
24. *Ibid.*

were looted,[25]bringing the misery of many Nigerians to the fore once more. The demonstrations did not just target the Special Anti-Robbery Squad. It's the outpouring[26]of bottled-up rage at the government's dehumanising policies as well as mismanagement, injustice, famine and sky-rocketing high energy and fuel prices. Nigeria is known[27]for being one of the world's poorest countries despite her abundant resources. Approximately 70% of the population[28]is under the age of 30; in the second quarter of 2020, 21.7 million people were unemployed, with 13.9 million of them being teens. As a result, government policies that have resulted in labour scarcity and sustainable sources of income disproportionately harm young Nigerians. Other factors include political officials lavish lifestyles. 'Sorókèwerey', a Yoruba term that loosely translates as 'speak up stupid,' has become another iconic word linked[29] with the protests. It is directed to the government and the leadership of the police force and it is a demand that SARS be disbanded immediately,[30]that victims be compensated and that concrete measures be made to end police violence.

We believe that the government's failure to provide basic social amenities such as power, portable drinking water and job opportunities, among other things have resulted in bottled-up anger among the youth, which is one of the reasons for the protests. We agree with the above-mentioned viewpoints of scholars on protests. We add that Bamgboye and Azu's perspectives encapsulated the causes for the protest and how it ultimately failed. The Nigerian youth's well-organized and coordinated protests were non-violent and thus well coordinated until suspected government-sponsored hoodlums hijacked the protest by attacking peaceful protestors and stealing and destroying property. The obvious purpose for this was to give the impression

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25. *'#ENDSARS: Looting Spree in Nine States'*<https://www.vanguardngr.com/2020/10/endsars-looting-spreein -nine-states/>. accessed 27 September 2021.
26. The Conversation 'Why #EndSARS Protests are Different, and what Lessons they Hold for Nigeria' <https://theconversation.com/why-endsars-protests-are-different-and-what-lessons-they-hold-for-nigeria-148320> accessed 19 July 2021.
27. *Ibid.*
28. *Ibid.*
29. T Tayo '#End SARS to#End SWAT: Nigeria Needs Real Change' <https://blogs.lse.ac.uk/africaatlse/2020/10/16/ endsars-to-endswat-nigeria-needs-real-change/ > accessed 31 July 2021.
30. *Ibid.*

that law and order had broken down in order for the military to be called in to restore peace and normalcy. As of this, the military was summoned.

III. LEGALITY OF ENDSARS PROTESTS UNDER NIGERIAN LAW

The right to protest originates from the citizen's right to free expression as stated in section 39(1) of the 1999 Constitution as amended, which provides that 'everyone has the right to free speech, including the freedom to hold opinions and to obtain and convey ideas and knowledge without interference'. Persons have the right to protest as a result[31]of their freedom of speech, expression and peaceful assembly and association. It's also worth noting that protest permits are not required in any part of Nigeria.

In Nigeria, protest is legal and protected under the country's constitution. The ability to express oneself and promote one's thoughts[32]is a core human right. Protesters must ensure that their actions and demonstrations are non-violent as it is predicated on a mixture of fundamental rights, the right to protest is considered a fundamental right in Nigeria (specifically, the right to freedom of speech and the press, as well as the right to peaceful assembly and association).An effort to infringe the right to protest,[33]like any other basic right is illegal, unlawful, and unconstitutional and can be challenged in court. Furthermore, any limitations on the freedom to protest must follow the constitutional process and procedure for limiting fundamental rights. In Nigeria, a prohibition on demonstration is either a violation of fundamental rights or a restriction on fundamental rights. The difference is made by rigorous adherence to constitutional clauses restricting fundamental rights. The only way the Judiciary can legally limit them is by a valid court order.[34] Under section 1 of the Public Order Act, the Governor of each State has the authority to direct the conduct of all assemblies, meetings, and procession on public roads or places of public resort, as well as to prescribe the route and times through which the procession may pass, and those interested in holding one must apply for and receive a license from the Governor of the State. The

31. O Umah '#End Police Brutality: When and How can Government Prohibit Protest in Nigeria?' <https:// learnnigerianlaws.com/when-and-how-can-government-prohibit-protest-in-nigeria/> accessed 7 June 2021.
32. *Ibid.*
33. *Ibid.*
34. *Ibid.*

Section 1(3) of the Public Order Act[35]mandates that people or groups may apply for and get police approval to hold peaceful march and assembly. However, in 2007, the Court of Appeal declared that section 1(3) of the Public Order Act was invalid in the case of *Inspector General of Police v. All Nigeria Peoples Party & Ors*[36]

Pertinent to the above is that section 40 of the Constitution and article 11 of the African Charter on Human and Peoples Rights Act, which Nigeria is a signatory clearly mention the right to freely congregate and communicate with others. Section 40 of the CFRN 1999, as amended protects the freedom to protest[37] stating that 'every person shall have the right to freely congregate and associate with other persons, and in particular, to create or join any political party, trade union, or association for the protection of his interests.' This right binds[38] the government, authorities and individuals because it is enshrined in our Constitution.

In the same way, police officers are not allowed[39]to use force against non-violent demonstrators. Under specific circumstances, police officers are authorised to use force when a lawful protest turns violent or is hijacked by hoodlums. According to the 2019 Reviewed Police Force Order 237 on the Use of Force and Firearms, police officers shall use only the force necessary to carry out their duties and that force must be proportional to the threat or resistance posed by the subject in the circumstances. Lethal methods are only used as a last option. As a result, officers must use all proportional

35. Cap 382 LFN, 2004.
36. (2007) 12 WRN 65, The Plaintiffs being registered political parties requested the Defendant, the Inspector-General by a letter dated 21st May, 2004 to issue police permits to their members to hold unity rallies throughout the country to protest the rigging of the 2003 elections. The request was refused. There was a violent disruption of the rally organized in Kano on the 22nd of September 2003 on the ground that no police permit was obtained. In a suit filed at the Federal High Court against the Inspector-General of Police, the Plaintiffs challenged the constitutional validity of police permit under the Public Order Act and the violent disruption of the rally. In defending the action the Defendant contended that the conveners of the rally did not obtain a police permit.
37. 'An Overview of the #End SARS Protest in Nigeria: Legal Issues and Matters Arising'<https://www.thecable.ng /an-overview-of-the-endsars-protest-in-nigeria-legal-issues-and-matters-arising> accessed 18 June 2021.
38. *Ibid.*
39. *Ibid.*

means[40]to apprehend or defend themselves or others prior to using fatal force during a tumultuous protest [41]Only in self-defence or in the defence of others against an imminent threat of death or serious injury, to prevent the commission of a particularly serious crime involving a grave threat to life, to arrest a person posing such threat and resisting their authority, or to prevent his or her escape, and only when less drastic measures are not available.[42]In any case, the use of firearms for the purpose of killing people is only permitted[43]when it is absolutely necessary to safeguard lives. The Nigeria Police Force (NPF) is in charge[44]of preserving law and order in the country. The police officers tasked with handling protests must be well-trained and experienced in the field and they must understand that their primary responsibility is to assist in the management of protests. Human rights standards as well as ways for understanding crowd behaviour and methods and skills for reducing and de-escalating conflict such as negotiation and mediation should all be[45]addressed in training. They must attempt to develop or strengthen[46]discussion with protest organizers in order to foster mutual understanding, reduce tensions, identify potential dangers and conflict escalation, and agree on the best course of action for the protest. The police are expected to ensure public safety[47]as well as the protection of everyone's rights. The police should be a separate executive branch unit, reporting to the courts and following their directives. In Nigeria, this isn't the case.[48]The police force and its ilk obey the present government's commands, despite the fact that its primary responsibility is to enforce law and order, which is

40. *Ibid*.
41. 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' <https://www.ohchr.org/en/pro Fissional interest/pages/useofforceandfirearms.aspx> accessed 7 January 2021.Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
42. *Ibid.*
43. *Ibid.*
44. K. Uwandu (n.11).
45. *Ibid.*
46. *Ibid.*
47. E Akpan 'Police Brutality and the ENDSARS Protest of 2020: The Issue of Stereotyped Criminal Profiling' . <https://www.aa.com.tr/en/africa/nigeria-another-protestor-shot-dead-in-end-sars-demos/2004251> accessed 16 July 2021.
48. *Ibid.*

essentially the responsibility of the legislative branch and by extension the court. Every law enforcement organization represents the entire community, reacts to it and is responsible to it. As unbiased servants of the general public and the current government, members of the police force are to carry out[49]their functions, powers, and obligations as such.

Furthermore, international law also protects the right to demonstrate. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the African Charter on Human and Peoples' Rights, and the UN Human Rights Council's Resolution on Promotion and Protection of Human Rights in the Context of Peaceful Protests from its 38th Session are all clear on this. Principle 1 of the Resolution on the Promotion and Protection of Human Rights in the Context of Protest recognizes that a protest can anger or offend persons who disagree with the ideas, including government entities, commercial entities or individuals, or the general public. It also recognizes that protests may hinder or hamper third-party activities for a short period of time. The right to protest is then protected under principle 2 by states/countries. Instead of the Nigerian government defending its citizens who exercised their right to demonstrate, the protestors were mocked and rendered susceptible to harm. Principle 4 ensures that internationally mandated human rights be protected during all protests, regardless of restrictions or exceptions. Furthermore, principle 5 allows states to diverge from international human rights commitments only in cases of national emergency; nevertheless, such derogation must be announced openly and legitimately in accordance with both national and international law. Principle 8 permits anybody to choose the place of a protest, but the chosen location must be relevant to the protest and its expressive goal. States should also allocate sufficient resources to prevent counter-protests from devolving into mayhem when they are within sight and hear of each other. The possibility of disorder resulting from disagreements or tensions between opposing parties should not be used to justify banning protests. Everyone has the right to select the form and manner of their protest, including its duration, according to principle 9. Non-violent direct action or civil disobedience are also recognized as viable forms of protest. President Buhari, like any other public figure, has no way of knowing how long a protest will last or whether or not protest demands will be met. Protesters are allowed to do so under the law. Principle 12 compels states to

49. *Ibid*

handle protest policing from a human rights perspective. Protest policing by law enforcement agencies should be guided by human rights principles such as legality, necessity, proportionality, and non-discrimination, and should always adhere to international human rights law and policing standards, especially the United Nations Code of Conduct for Law Enforcement Officials.

We assert unequivocally that peaceful protests against a State's citizenry such as the End SARS protests are protected under national laws, international laws and many regional and international accords. The use of guns by law enforcement officers who fired live ammunition at peaceful protestors violated national and international regulations. We strongly condemn all of these actions.

IV. IMPOSITION OF CURFEW AND LEKKI GATE KILLING

A curfew was imposed ahead of the protests on October 20, 2020 at the Lekki toll plaza in Lagos. Governor of Lagos State, Sanwo-Olu issued a statement[50] urging 'peaceful protestors and residents' to adhere to the curfew and stay at home.

Security forces opened fire non-violent protestors at the toll plaza without notice,[51]according to rights groups and the United Nations, killing at least 12 people and injured many more. Sanwo-Olu said that the forces were outside his authority claiming that they were dispatched by Buhari. According to Amnesty International, government officials cut off[52]the electricity and removed CCTV cameras from the Lekki toll gate where EndSARS protesters had been camping for two weeks, in an obvious attempt to hide evidence. As in earlier cases reported by Amnesty International, several of those slain and injured were purportedly taken away by the military. On Instagram Live, a musician named DJ Switch videotaped demonstrators[53] being shot and

50. 'What you need to know about Nigeria's #ENDSARS Protests' <https://www.dw.com/en/ahat-you-need-to- know- about-nigerias-endsars-protests/a-55362389> accessed 7 April 2021.
51. 'Nigerian Police kill Protesters Defying Curfew in Lagos, Amnesty says' <https://www.france24.com/en/afri ica/20201021-nigeria-police-kill-protesters-in-lagos-after-curfew-imposed> accessed 9 June 2021
52. 'Nigeria: Killing of #EndSARS Protesters by the Military must be Investigated' <https://www.amnesty.org/en/ latest/news/2020/10/killing-of-endsars-protesters-by-the-military-must-be-investigated/> accessed 23 July 2021.
53. I Ani 'Nigeria's #EndSARS Movement and Media Suppression' <https://www.cjr.org/analysis/nigeria-endsars-press-freedom.php> accessed 25 August 2021

wounded by Nigerian military officers, attracting international attention to the problem. The Economic Community of West African States (ECOWAS) also urged[54]Nigeria's leadership to start a discourse as soon as possible in order to find a peaceful settlement. The African Union (AU) has asked Nigeria to launch an investigation to guarantee that those responsible for violent acts are brought to justice.[55]The International Criminal Court (ICC) Prosecutor has also called[56] for 'calm and restraint.' The African Commission on Human and Peoples' Rights expressed[57] serious concern about reports of the use of excessive force by the police.

The Nigerian military's killing of protestors raised attention to the military's participation in protests as well as how and when they can interfere. The Nigerian military's major function is enshrined[58]in the 1999 Federal Republic of Nigeria Constitution (as amended). The principal responsibility[59]of the armed forces according to section 217 of the Constitution is to safeguard Nigeria from all types of foreign aggression and insurgency. As a result, they are under no responsibility to interfere with peaceful protest by Nigerian citizens demanding the enforcement of their fundamental rights. Unless there is a violent attempt to overthrow the government, the army has no business engaging in civil protests. The social contract theory emphasizes[60]the existence of government and its authority to act on behalf of the people, primarily for their welfare and security. The Nigerian military's (as an agency of the State) indiscriminate killing of unarmed peaceful protestors undermined this and brought to the fore the fundamental right to life contained in the Nigerian Constitution. The act was barbaric and heinous act of killing unarmed innocent protestors in Nigeria in the twenty-first century calls for questioning.

V. BREACH OF FUNDAMENTAL RIGHT TO LIFE

The word 'right' comes from the Latin word '*rectus*' which means[61] 'proper', 'straight' or 'opposite of wrong'. It could also mean in line with the law, morality, or justice. The term 'right' also refers[62]to something that a

54. 'Nigeria: Stop the killings of Protesters by Security Forces and End Impunity' <https://www.article19.org/resour urces/nigeria-stop-the-killings-of-protesters/> accessed 15 May 2021.
55. *Ibid.*
56. *Ibid.*
57. *Ibid.*

person holds, such as a just and lawful claim to land, a thing, or the ability to do or say something. A right according to Salmond,[63]is an interest or advantage recognized by law. A right according to Raz exists[64]when one characteristic of a person's well-being is sufficient to impose an obligation on another person or persons. The term 'human' refers to someone who possesses characteristics of, or is of the nature of, mankind. Human rights are thus rights that all people (humankind) have everywhere and at all times because they are mortal and intellectual beings. These rights according to Ogbu,[65]cover a wide variety of civil, political, economic, social, cultural, group solidarity, and developmental demands that are thought essential for a meaningful human existence. They are demands or claims[66]placed on society by individuals or organizations according to Eze, some of which are protected by law and are part of *ex lata*, while others are ambitions that will be achieved in the future.

Many of today's human rights documents have their origins in papers[67]like the *Magna Carta* of 1215, the English Bill of Rights of 1689 and the French Declaration on the Rights of Man and Citizen of 1789. The Declaration of Independence of the United States of America proclaimed [68] that 'life' is one of the inalienable rights, meaning that all people have the right to live and/or exist, and that governments have the responsibility to protect their citizens' inalienable rights. In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights states in article three that 'everyone has the right to life, liberty, and the security of person'.

58. An Overview of the #EndSARS Protest in Nigeria: Legal Issues and Matters Arising' (n.38)
59. *Ibid.*
60. Uwazuruike (n.2).
61. CA Oputa *Human Rights in the Political and Legal Culture of Nigeria* (Lagos: Nigeria,Law Publications,1989) 38.
62. *Ibid.*
63. J. Salmond, *Jurisprudence* (3rd ed, London: Sweet & Maxwell,1973) 72.
64. J Raz, *The Morality of Freedom* (London: Oxford, 1986) 116.
65. ON Ogbu*Human Rights Law & Practice in Nigeria; An Introduction* (Enugu: Cidjap Publishers 1999) 1-2.
66. OC Eze *Human Rights in Africa: Some Selected Problems* (Lagos: NIIA & Macmillian Nig.Pub. Ltd. 1984) 5-6.
67. 'A Short History of Human Rights' <http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-histo ry.htm>accessed 7 June 2021.
68. '13a. The Declaration of Independence and Its Legacy' <https://www.ushistory.org/us/13a.asp> accessed 9 May 2021.

In 1950, the Council of Europe adopted the European Convention on Human Rights states in article 2 that 'everyone has the right to life, liberty, and the security of person'. Similarly, the African Charter on Human and Peoples' Rights (ACHPR)[69] and the United Nations Convention on the Rights of the Child (UNCRC) affirmatively provide for the right to life in articles 4 and 6(1)[70] and (2),[71] respectively .This could also be exemplified by the African Commission for Human and Peoples' Rights' finding in *Organisation Mondiale Contre La Torture Association Internationale des Juristes Democrates) Commission Internationale des Juristes (C.I.J) Union Interafricaine des Droits de l'Homme/ Rwanda*, where the Commission found[72] that the massacre of a large number of Rwandan villagers by the Rwandan Army, as well as the numerous reported extrajudicial executions for reasons of ethnic group membership, were a series of violations of the right to life enshrined in article 4 of the African Charter on Human and Peoples' Rights.

In many aspects, there has been a shift away from this traditional perspective toward a more liberal and expansive view that does not regard a violation of one's right to life in terms of death. This can be explained in a few ways. The European Court of Human Rights decided in *Makaratzis v. Greece*[73] that the use of potentially deadly force by the police against the applicant was a violation of his right to life, despite the fact that he survived the injuries for which the Greek government was responsible. Furthermore, the African Commission on Human Rights declared in *World Organization Against Torture, Lawyers' Committee for Human Rights, Jehovah Witnesses, Inter-African Union for Human Rights/Zaire,*[74] that arbitrary arrests, detention and torture violated the right to life in article 4 of the African Charter on

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69. African Charter on Human and Peoples' Rights, art. 4, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter ACHPR] 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.'
70. Convention on the Rights of the Child, G.A. Res. 44/25, art. 6(1) (Nov. 20, 1989) ('mandating States parties to "recognize that every child has the inherent right to life.')
71. *Ibid*. art. 6(2) ('States Parties shall ensure to the maximum extent possible for the survival and development of the child.').
72. Communication 27/89, 46/91, 49/91,99/93.
73. Application No. 50385/99
74. Communication 25/89, 47/90, 56/91, 100/93

Human and Peoples Rights.[75] It has even been held that the Turkish government violated the deceased's right to life by failing to conduct a thorough investigation into the cause[76] of death. In the *Juvenile Re-education Institute case*,[77], the Inter American Court of Human Rights declared that the right to life and the right to humane treatment require the state to not only respect them (negative obligation), but also to take all appropriate measures to protect and preserve them (positive obligation) (positive obligation). The right to life is a fundamental human right according to the Inter-American Court of Human Rights in the case[78] of the Street Children .All rights become useless if it isn't honoured. In essence, the fundamental right to life comprises not only the right of every human being not to be arbitrarily deprived of his or her life, but also the right to access to the conditions necessary for a dignified living. States must ensure that the conditions necessary to prevent violations of this fundamental right are created. As a result, states must take whatever steps that are necessary to create an adequate statutory framework to deter any threat to the right to life; to establish an effective system of administration of justice capable of investigating, punishing and repairing any deprivation of life by state agents or individuals; and to protect the right not to be denied[79] access to conditions that may be life-threatening.

In the Nigerian case of Ransome *Kuti and Ors v The A.-G .of the Federation*[80],Eso JSC defined fundamental right as:

> A right that exists prior to the political society and exists above the regular rules of the land, it's a requirement for living in a civilized society... and what your constitutions

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75. *Ibid*, para 43.
76. *Tanrikulu v. Turkey,* Application No. 23763/94 of July 8, 1999.
77. Judgment of September 2, 2004. Series C. No. 112, para 158.
78. *Villagran-Morales et al v. Guatamela*, 1999 Inter-Am. Ct. H.R. (Ser. C) No. 63, 144 (Nov.19, 1999). Applauding the approach of the Court, Steven R. Keener and Javier Vasquez, 'A Life Worth Living: Enforcement of the Right to Health Through the Right to Life in the Inter-American Court of Human Rights', (2008-2009) 40 Colum. Hum. Rts Rev, 595, 597, opined that 'the court took the idea that the right to life must be a right to a dignified life and began to enforce many elements of the right to health, finding violations even when the victims did not die and requiring government provision of food, water, sanitation, medicine and adequate medical care'.)
79. *The Indigenous Community of Sawhoyamaxa v. Paraguay,* Series C No. 146 [2006] IACHR 2, para 153.
80. (1985) 2 N.W.L.R (Pt 6) 211.

> have done since independence...is to have these rights incorporated in the constitution so that they might be "inevitable" to the degree of the constitution's "non-immutability."

All Nigerians have a right to life, according to section 33 (1) of the Nigerian Constitution and no one shall be purposefully deprived of his life unless he is serving a judicial sentence for a criminal offence for which he has been proven guilty;. to perform a lawful arrest or prevent the escape of a person lawfully imprisoned; to quell a riot, rebellion, or mutiny; and to effect a lawful arrest or prevent the escape of a person lawfully detained are all exceptions to the right to life under section 33(2). However, in recent years, the number of people killed as a result of unlawful acts of commission or omission by the Nigerian state law enforcement agents in violation[81]of section 33 of the Constitution has raised, with the Lekki toll gate killings of October 20, 2021 serving as a prime example. The perpetrators of these horrible acts are rarely brought before a competent court to account for their deeds. Furthermore, individuals are bound under the right to life not to willfully deprive someone of his or her right to life, unless in legally permitted circumstances.

The 1999 Constitution recognizes the sacredness of life. The Supreme Court condemned the behaviour of the Oyo State Governor in the premature execution of Aliu Bello whose appeal was pending before the Court of Appeal in caustic terms because of the sacredness attached to this privilege. The accused had been found guilty of armed robbery and condemned to death by the Oyo State High Court under the State's Robbery and Firearms Law in the case of *Aliu Bello and 13 ors* v *Attorney-General Oyo State*[82].The convict's appeal was still pending before the Court of Appeal when the Governor ordered his death. The Supreme Court of Nigeria declared in *Kalu v. State*[83] that the right to life in Nigerian law is conditional rather than absolute. In reaction to this clause, Ajomo argued that life is sacrosanct and that all communities around the world reject willful killing. Everyone has the right to have their

81. Fred-Young, LP Evans 'Nigeria: I Am Confused. What Does My Right To Life Mean In Nigeria?.<https://www. mondaq.com/nigeria/constitutional-administrative-law/974416/i-am-confused-what-does-my-right-to-life-mean-in-nigeria> accessed 14 June 2021.
82. (1986) 5 NWLR 828.
83. (1998) 13 NWLR (Pt 583) 531.

life and safety respected according to this clause. Police officers or soldiers may not use lethal force such as firing live ammunition at unarmed peaceful demonstrators at the Lekki toll plaza unless their lives or those of others are in immediate danger and less drastic methods are not available to prevent the threat. In this scenario, neither their lives nor the lives of others were in any grave danger; hence their barbarous and unprofessional behaviour was not justified.

VI. 2018 PROTESTS IN SUDAN

Sudanese protests began[84]in December 2018 in response to rises in the price of basic commodities such as bread and fuel, as well as the economic impact of austerity measures. Protests erupted[85]around the country and by April 2019, demonstrators were clamouring for a change of administration. As a result, on April 11, 2019, Bashir, Sudan's long-serving president who had been in power for 30 years was ousted. He was removed with the help of the military. On June 3, 2019, the rapid support forces killed[86] several demonstrators. The people's voice on was significantly more strong. The demonstrators were adamant that the political system be changed. They regrouped and were brutalized by the troops. They received[87] international support after days of non-stop rallies, forcing the military to give in to their demands for a civilian administration, resulting in the formation of the Sudanese Sovereignty Council.

Women played[88] crucial roles in the Sudanese protests. Women were motivated to take the lead during rallies and the Sudanese youth revolt took advantage of this by harnessing the power of women. Alaa Salah, a young woman, rose[89]to fame as a notable leader. During political protests, they also

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84. T Maganga 'Youth Demonstrations and their Impact on Political Change and Development in Africa' <https://www.accord.org.za/conflict-trends/youth-demonstrations-and-their-impact-on-political-change-and-develo pment-in-africa/> accessed March 17 2021.
85. *Ibid.*
86. B Jason, SM Zeinab 'Crowds Gather in Khartoum and Other Cities after Deaths of over 120 Peaceful Demonstrators' <https://www.theguardian.com/world/2019/july/13/sudanese-protesters-demand-justice-after-mass-killings> accessed 22 July 2021.
87. *Ibid.*
88. Above (n.84).
89. *Ibid.*

displayed their capacity to lead. The employment of non-violent[90]protest methods proved successful. Victory did not always come from destructive actions like burning down buildings and blocking key highways; victory came[91]from non-violent marches and demonstrations.

VII. LESSONS LEARNT

The youth-led protests in Nigeria and Sudan were aimed at addressing particular government decisions and/or activities by certain government agencies. The protests were non-violent and carried out by unarmed youth protestors in both jurisdictions. In both jurisdictions, lives were lost as a result of security personnel's use of live ammunition, which were blatant infringement of demonstrators' rights. The protests in Sudan against the government's activities was successful due to the protestors' tenacity and the military's aid, as the military was forced to give in to create a new administration following the president's resignation. The EndSARS protests in Nigeria failed because they were hijacked by alleged sponsored state hoodlums who converted it into violent demonstrations, allowing the military to intervene.

As a result of the foregoing, all police officers and military officers should[92]be trained and re-trained (as needed) in human rights-compliant activities in order to instill professionalism among the ranks and file. Such training must be accompanied by a policy of careful investigation into any violations of human rights. They must understand that indiscriminate killings, arbitrary arrests and indiscriminate use of guns, as well as other cruel, inhuman, or degrading treatment and excessive use of force are all abuses of human rights and must be severely forbidden. Even though the Nigerian protests came to a stop when hoodlums began stealing and torching property, it demonstrated[93]the ability of young Nigerians to organize and the prospect

90. *Ibid.*

91. *Ibid.*

92. 'Amnesty International Nigeria: Time to end Impunity Torture and Other Violations by Special Anti-Robbery Squad(SARS)'<https://www.policinglaw.info/assets/downloads/Amnesty_International_Report_on_Special_Robbery_Squad.pdf> accessed 28 April 2021.

93. 'Africa in Focus: Youth Protests for Police Reform in Nigeria: What Lies Ahead for #ENDSARS' <https://www.brookings.edu/blog/africa-in-focus/2020/10/29/youth-protests-for-police-reform-in-nigeria-what-lies-ahead-for-endsars/> accessed 13 March 2021.

of turning #End SARS into a political movement. Indeed, roughly half of all registered voters in Nigeria are between the ages of 18 and 35, meaning that if adequately organized, the youth will wield[94]substantial electoral power in the election of 2023.

In attempt to fulfill some of the protesters' requests, the administration has established[95] panels of investigation to investigate into incidences of police abuse. Simultaneously, protesters believe that the government is conducting a targeted campaign to pursue[96]the alleged sponsors of the End SARS protests by freezing some of their bank accounts.

VIII. CONCLUSION

We strongly condemn the military's use of live ammunition in the killing of unarmed protestors at the Lekki toll plaza. Those responsible should be held accountable to the full extent of the law. When it comes to the use of guns, security forces should exercise extreme caution. Nigerians have the right to peaceful demonstrations. This is a fundamental right that the government must uphold and safeguard at all costs.

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94. *Ibid.*
95. The Conversation (n.26).
96. 'Nigeria's Police Brutality Crisis: What's Happening Now' <https://www.nytimes.com/article/sars-nigeria-police.html>accessed 30 July 2021.

REPUBLIC, DEMOCRACY AND STATUS OF ELECTORATE: A STUDY OF BANGLADESH

*MD. MORSHEDUL ISLAM**

ABSTRACT : Voice of the people is supreme in democracy. Government is subservient to the hopes, aspirations, desires and demand of the electorates in a republic. Where these are absent in day to day life but party in power, government, judiciary, armed forces, news media relentlessly reiterate true existence, practice, and exploration of the same more than any other period ever then the common masses and rational people become fumbled of what they see and perceive is just or unjust. Overcoming this dubious stands of government and party in power true scenario of the political system should be reflected in the constitution so people and world community can't be cheated. This writing is directed to acquaint people of Bangladesh as well as world community with the reality of the political practice and system prevalent right now in Bangladesh and acquiesces a new constitutional name of Bangladesh thereby.

KEY WORDS : : Republic, Democracy, Electorate, Rule of Law, Judiciary.

I. INTRODUCTION

Official name of Bangladesh is the Peoples' Republic of Bangladesh. In spite of being a republic, basic features of that sense is not felt in the actions and policies of Bangladesh government except the election of the head of the state by indirect vote. Bangladesh is also a democratic polity. Democracy cannot be diminished by the working of the government in power. Democracy is one of the four pillars of Bangladesh Constitution. In a democratic republic electorate is all in all in every sphere of statehood. In Bangladesh

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electorate are given salute and are also commemorated in every action of government meeting, pubic gathering, public speech, pubic speeches and in the Jatiya Sangsad. Though the electorate were ensured to cast their electoral choice in 1991, 1996, 2001 and 2008 national polls yet those elected government did not rationally treat those verdict in their decision and policy making matters. During the military rule though electoral voice was hijacked yet wishes of the electorate were reflected in the actions and policies of those authoritarian regimes. After 2008 national polls electorate of Bangladesh lost everything that were entrusted with them by the political thinkers of all ages on republic and democracy. Being a democratic republic the electorate of Bangladesh should have say in every action of the executive, legislature, judiciary, but in reality that is not visible. This article is directed to find out the soundness of nomenclature of Bangladesh as a republic as well as democratic polity and show the hopelessness undone condition of electorate under prevalent socioeconomic and political environment of Bangladesh to the democracy loving world.

II. CONCEPTUAL FRAMEWORK

Republic, democracy and electorate these three are main themes of this research. Without having basic idea on any of these this writing fails to reach a justified conclusion. Summary exploration of their cardinal features will enrich this comparative writing.

i. The Republic

Republic is a system of government where the head of the state is elected by people in a direct or indirect means and in which electorate asserts absolute power to realize their rational and legal hopes and aspiration through direct or indirect control over executive machineries of the government in power.

Here people as a whole means their chosen representative found through election. People here do not mean only the victorious party but also the losing party too. Interest and service must be secured for all sections of the population whatever their race, color, religion, gender, political ideology, may be. That's why it is said that republic bears three cardinal features in it viz; i) power is held by people, ii) people give this power to their elected representative for serving their (people) interest; iii) the representative serve all the people irrespective of their stand during election process.

Despite defeat is looming for their favourite person in the highest post of the state the system exercises such tactic which foils any possibility of doing injustice towards the losing party in election process[1]. In judiciary such protective measures are adopted that block the chance on the part of the victorious party of employing political vice against opposition for depriving them of state privileges.[2]

In case of legislation, Treasury Bench does not proceed with any law without taking confidence of the opposition. Without the sanction of the defeated party legislature does not legislate on any issue concerned with them.[3] That's why it is said that republic is a system where voice of the people is reflected, honoured, respected and accommodated sincerely and prudently in all spheres of government policies and activities as a whole not as parity/differently/ divisively. This concept of republic disappeared with the fall of Republican era in Roman political history i.e. republic is a part of ancient political thought. With the demise of ancient political history mediaeval age began with absolute monarchy having total interference of religion in every sphere of statehood. Renaissance halted the speed of religion in statehood and encircled religion within the periphery of church and personal life of electorate. Concept of republic started looming in the writing of modern political thinkers in different headings viz; freedom of thought, legitimacy of the government, consent of the people, rule of law, enjoyment of rights, independence of judiciary. Consequently USA declared independence from UK and established itself as the 1st republic of modern era on July 4, 1776. Modern republic contains only one feature of ancient style republic ie the head of the state must be elected by the choice of the people in direct or indirect vote. No other feature of ancient republic matches with modern republic. However elements of democracy overwhelm other tools of ancient republic in current political systems.

ii. The Democracy

Democracy is a form of government where state power is exercised by adult citizens directly or through their representative chosen in a free, fair and well managed election held periodically. It resets on the principle of

1. Kabir, L, *Roman Law*, Law House, Dhaka, 1974, p13
2. Ibid pp 16 17
3. Ibid, p 21

majority rule and individual rights. Rule of law must be established by the government and it must be reflected in its policies and actions.

Existence of opposition voice/giving space to the dissident opinion is a part of viable democracy. View expressed by opposition political party or group or in other words active participation of people must be there in politics and civic life. In nutshell democracy must contain the principle of checks and balance. Legitimacy of the government must be there in democracy. This legitimacy is determined in a free, fair, neutral election held in a peaceful atmosphere.

In democracy, judiciary not only plays the role of guardian of the Constitution but also protects fundamental rights of the citizens. An independent judiciary ensures and keeps constant eye on the free enjoyment of civil liberties by citizens. Democracy is vibrant where judiciary does not sing with the same tune of the government but with the words of rational choice of the people.

There must be at least two political parties. Having a strong opposition (political group) is a must for fruitful realization of democratic sense in the society. Keeping and maintaining strong democratic institutions such as judiciary, election commission, bureaucracy, print and electronic media, political parties etc is another precondition of democracy. Having an efficient, professional, honest, strong and time worthy people oriented bureaucracy is required for sound democratic system. Bureaucracy is part of republic. It is a part of the political government so far it (political government) is directed under constitution and law.

Civil society is a part of modern democracy. This group upholds, maintains and represents the real ideals of the society. It neither follows the path of government nor the support or decline the opinion of the opposition but portrays the moral and ethical values and rational of the society.

Patriotic and apolitical army is essential for nourishing a sound and healthy democracy. Military must not be partisan forum nor advocate for any political party or government in power. Military must keep and uphold the sacred voice and will of the people.

Independent and neutral press is another basic essence of modern democracy. It obliges the government to be in right path by revealing the right and wrong, misdeeds and anti people policies and action of the

government to the people. Sham type press and media is not suit for workable democracy. Where opposition is not able to counter the evils of the government due to lack of cooperation and coordination, the press plays the role of powerful opposition bringing the people under one umbrella for the cause of betterment of the people and the state against the wrong policies and actions of the government.

iii. The Electorate

Electorates are those people who are eligible to vote in an election. In other sense it means the citizens who enjoy voting right in determining authority of a political system are electorates. Certain age, citizenship and full possession of civil and political rights are required for attaining voting right. Having property is another vital condition of becoming voter as insolvent is disqualified for casting vote.

Electorate is to familiarize him/herself with the candidates and issues, maintain with the office of the supervisor of election a current address, know the location of his/her polling place and its hours of operation and bring proper identification to polling station.

Voter must cast his/her vote in a free, fair, and peaceful atmosphere. No threat, violence, intimidation will be there before, during and after the poll day. Not only that entry and exit route towards polling station must be kept free of candidate's spokes person/ representative. Voter must not be asked by any person about his/her choice within the premises of poling station. Not only that, none can cast vote on behalf of other/others.

Election commission arranges a sound and complete voter list, arrange proper mechanism for ensuring the presence of voters spontaneously without intimidation and fear. Government institutions (bureaucracy) must act under the authority of Election Commission during election. Electorate must be assured of that the party for which/whom he voted become victorious in the election outcome.

When voters have any question regarding genuineness of election result he/she shall have the opportunity to recount the ballot for pacifying his/her query. Here the Election Commission must be cooperative and must keep in mind that the voter must not be deprived of their decision and at the same time EC must neither act on the dictate of government nor opposition. Consent of the electorate must be reflected in the action of the EC and the government.

The party voted to power by the electorates must fulfill her election manifesto on the basis of which it drew the attention of the electorates in the polls. Any deviation from or violation of election promises in the action and policies of the government is ultra vires and has no effect under secularized political system. State privileges must be enjoyed by the electorates, and reached and distributed equally to the people. Priority among the electorates on the basis of political affiliation regarding distribution of state privileges must not be maintained by the government. Government official, temporary executive and electorates must be treated equally in respect of having economic, social, political benefits of the state. In secularized political system permanent and temporary executive do not use their official power/position/ post in availing any needs of daily life in advance of electorates.

After acquaintance with the cardinal features of republic, democracy and becoming familiar with importance and role of electorate it is obvious that a viable democratic republic works in conjunction with spontaneous positive consent of electorate. Lack of cooperation and shortcoming in any basic essences of the two concepts *viz*, republic and democracy peaceful harmony in political system cannot be realised.

Bangladesh is a democratic republic. It is one of the basic pillars of Bangladesh Constitution as well as the commitment of martyrs of liberation war which judiciary endorses as a part and parcel of Bangladesh Constitution. In saying that judiciary declares Parliament has no right/authority to obliterate the term of democracy in any of its form/sense. Bangladesh Constitution surrenders her sovereignty to the electorate/ people. Ruling parties in Bangladesh reiterate that people's sovereignty and democracy explore in sky high speed during their reign. And when they remain outside the throne sovereignty and democratic norms and values disappear from the country. Political parties in Bangladesh are committed to peoples/electoral sovereignty as well as electoral democracy whether they have belief in those or not. What type of political situation prevails in Bangladesh in reality in comparison to democratic republic is intended to be portrayed in this writings.

iv. The President

As parliamentary form of government is at work in Bangladesh, President has little to do with state affairs of the government except playing the role of rubber stamp. President of Bangladesh under the constitution is to put signature on the papers put forward by Prime Minister. In three occasions e.g.

appointment of the Prime Minister, the Chief Justice of Bangladesh and pardoning power along with power of remitting or reducing sentence/ conviction of convicted criminals President has some space to use his/her wit. For unknown reason he is not seen to exercise that space. In a republic as the head of the state responsibility of ensuring well and woe of every citizen lies with him. For last seventeen years precisely speaking after the removal of President Badruddoza Chowdhury[4] by the then ruling Bangladesh Nationalist Party Presidents are seen inactive in carrying out his constitutional duty rather he is eager to show his loyalty towards the party from which he has been appointed to the presidency. In a republic every office of the state is entrusted with specific power and duties. Persons holding these offices are bound to materialize their own duties without fair and interest. In Bangladesh in spite of occupying highest office of the republic President is to obey the command of the Prime Minister not to the citizens who are the owner of the state power under republic. Another important judicial power wrongfully exercised by the President of Bangladesh is grant clemency to criminals denying the norms and values of eternal justice system. In such cases President and party in power brand these criminals as the victim of political vice of previous government. In 2018 president Abdul Hamid Khan gave general mercy to To fail Ahmed Joseph, younger brother of Army Chief General Aziz who is a diehard Awami leader.[5] This guy was a murderer and close associate of PM Sheikh Hasina during 1996 to 2018. In another event President used his power under article 48 of Bangladesh Constitution in trial stage before becoming matured for asserting his judicious power over highest judiciary. Not only that criminal charges brought by military backed caretaker government headed by Mayeen Uddin Fakruddin against leaders of Awami League were withdrawn on the plea of politically motivated with the sanction of President.[6] For unknown reason charges instituted against leaders of political parties other than Awami League have been going on in normal course. Here President Abdul Hamid has no response.

The basic feature currently considered as only symbol of republic reflected in the screen of political system is the head of the state must be the

4. *The Frontline* (Indian national Magazine) July 6, 2002
5. *The Daily Star*, June 1, 2018. *The New Nation*, June 1, 2018. All the Prime Minister's Men, *Al Jazeera,* February 1, 2021
6. *The Daily Star,* June 11, 2009. See also *the New Age*, June 22, 2009, bdnews.com June 10 2009, 02.18 pm.Bdst

choice of the people through direct /indirect election. The consent of the people must be a genuine one as in the case of USA. US president is not the direct choice of the electorate but the electorate believes and means that the President elected is complete expression of their consent. But Presidents elected by 10th and 11th parliament in Bangladesh are not the consent of the people. The reason lies with the fact that the Members of these two parliaments are not choice of electorate. Therefore assent of the people required for having the President of a Republic is absent here.

v. The Prime Minister (Head of the government)

Prime Minister is the most powerful figure in parliamentary form of government in third world countries like Bangladesh where secularized political culture is absent and head of all constitutional and non constitutional posts are manned by partisan, corrupt, dishonest and sham type figures. Being a republic office of Prime Minister should be an office for the people. Where PM is not acting as commoner there should remain another post representing the neglected section of the population. Such system was prevalent in ancient Roam during republican era. In Bangladesh democracy is one of the four pillars of Bangladesh Constitution and spirits of liberation war as well. Being so opposition leader should have the same honor and command as well as authority to protect the opposition view i.e the dissident view against the party in power.

In Bangladesh since 2009 opposition views and thought are not only undermined but all efforts are made to alienate shadow government theory brutally by employing every possible and impossible wrong and vicious means. PM of Bangladesh is the PM of one political party. Whoever brings any genuine allegation of corruption and malpractice against the PM he/she vehemently denies that tagging it as the malicious conspiracy of the opposition. Not only that he/she is termed as traitor or enemy of development and peaceful environment of the state. PM of Bangladesh is the guy who maintains all sorts of solution in her pocket which other ministers of her ministry do not possess.

In 2020 one Army officer Major (Ret) Sinha was murdered by a police officer for hiding the wrongful affairs of concerned police officer. After murder under police custody the parents of the army officer made appeal to PM Sheikh Hasina for doing justice to his slain son.[7]

7. *The Prothom Alo*, August 1 2021. See also *the Naya Diganto*, August 2, 2021

At the time of 'Nirapod Sharak Chai' movement undergoing with the auspices of school students when public life was halted whole nation was waiting for what action the PM would take to pacify the abnormal situation into a normalcy one.[8] Prime minister Sheikh Hasina did not take any step to quiet the anguish of people as well as the students. Rather she appreciated the goondas and members of Chhatra League who mercilessly attacked the agitating students for dispersing and suppressing fortnight long movement. And visited the wounded party men received injury during their offensive against leaders of student movement at the hospital.[9]

At the killing of Sagar Runi, two prominent investigative journalists, relatives of the victims urged the PM for justice in the case. PM Hasina did not listen to that call. She expressed her satisfaction by relieving the law enforcing agencies of their incapacity of protecting victims' lives saying that police duty is not to protect people in their bedroom.[10]

During crash in share market thousands of share holders were turned into beggars and number of shareholders committed suicide owing to becoming penniless in share market crash by nights. It is estimated that around thirty lac shareholders suffered unprecedented loss in that crash. Shareholders urged the PM for taking steps for stopping that collapse and bringing the culprits involved in that crash into justice. In reply PM Sheikh Hasina did nothing except forming an inquiry commission.[11] However she withheld the inquiry commission findings as family members of PM and some big fishes of her AL party were directly manipulated the crash.[12]

In Pilkhana massacre 56 high ranked army officers were brutally murdered in the hands of BDR members on February 25, 2009. During the trial hundreds of DBR members were tortured to death for extorting false evidence and hundreds of BDR members were given death sentence for committing the heinous massacre. Government and AL were satisfied that they successfully dealt with the BDR mutiny and culprits of the event. But the relatives and people of the country are not satisfied with outcome the ruling AL government present before them. They asked the PM for fear

8. *The daily Star*,August, 1,2,3,5,6, 2018
9. *The Observer*, August 5 2018
10. *The New Age*, February 23, 2012
11. *The Naya Diganto*, January 25, 2011
12. *The Daily Star*, April 8, 2011. See also *the Prothom Alo*, April 8, 2011

investigation of the incident and justice to the deceased souls. After expiry of 12 years the PM and her party AL have not heed that call.[13]

In case of demise of any prominent figure or at the achievement of any electorate of Bangladesh in any field viz; noble prize, culture, literature, sports, research, etc PM Sheikh Hasina always gives condolence and greeting to pro Awami League icons not to others possessing dissenting opinion. In very few cases dissidents are praised but PM's tone remains dim. Noble laureate Dr. Yunus[14] and death of President Yasuddin Ahmed[15] may be mentioned here in this regard.

In democratic society electorates expectation and PM's action will be directed to one goal. PM is PM where people's voice is reflected in actions and policies of the government. Where people's choice and expectation differ from that of PM that is not a democracy nor a republic though government, PM and ruling party reiterate democracy, peoples' government in meeting, public gathering, and speeches.

vi. The Judiciary

In a democratic republic judiciary is to protect not only fundamental and human rights of the subjects /people but also to ensure the smooth working of all tools of democracy as well as republican features of the state. Judiciary is the task master of executive.[16] Judiciaries of USA, Switzerland and Germany are glaring example in this respect. Since constitution is the highest law of the land and none is found to protect it's sanctity, judiciary as the protector of soul and reason of the society is entrusted with the power of protecting the common will of the electorate i.e the constitution.[17] In Bangladesh theoretically judiciary is the guardian of the constitution i.e. democratic republic and electorate are the responsibility of the judiciary.[18] Working of the same is reverse from its constitutional obligation. It is a sham in the hands of the politicians in power. In Bangladesh judiciary salutes every decision of the ruling party as constitutional word. It is seen to assert its guardianship role

13. *The daily Star*, February 25, 2021, *The New Age*, February 25, 2021
14. *The Protham Alo*, July 17, 2013 *The Daily Inqilab*, January 26, 2017
15. *The Daiy naya Diganto* December 11, 2012
16. Kaski Harold J, *A Grammar of Politics,* 1948, P298
17. *Murbery Vs Medison Case*(1803)
18. See Article 7 of *the Constitution of the People's Republic of Bangladesh*. Ministry of law, Justice and Parliamentary Affairs, Dhaka, 2017

only when government's action affects their professional interest and job security. In case of Eighth Amendment judiciary buried the wellbeing of common masses by declaring the change *ultra vires* but assertion of this power was to save the professional and financial interests of justices and law professionals.[19] However, where executive head is adamant the judiciary surrenders to the vice of the party in power. In Sixteenth Amendment of Bangladesh Constitution Chief Justice SK Sinha was to lose every thing for meeting unconstitutional desire of the top leadership of ruling Awami League.[20]

Bangladesh Judiciary is divided into two parts lower judiciary and higher judiciary. Lower judiciary is to deal with ordinary civil and criminal cases. Lower judiciary was given independence in 2007 by the military backed caretaker government led by Fakruddin Ahmed. Before that all efforts and commitments for establishing independent judiciary of previous governments were limited in speech and agenda of election manifesto. Though independence was given to judiciary by military backed caretaker government it was abnormally abused against politicians for injecting new political thought.[21] Peoples' disregard for this new political theme forced the military backed Caretaker government to leave power to traditional system. But the technique of using judiciary for smooth running of authoritarian rule by alienating all possible threat to government was imbibed by next civilian governments under the leadership of Prime Minister Sheikh Hasina. As a result criminal courts do not hear the voice of common masses let alone the opposition. It (lower judiciary) is thought to be a grinding machine to squeeze the opposition as well as true speaking people of the society. Where criminal courts are seen to do justice to people (activist or leaders of opposition political party or dissident of ruling party) persecution alone with demotion and forced transfer is fallen upon the judicial officer for performing his duty in conformity with law and evidence.[22]

On the contrary in cases where Awami League leaders, party men, relatives of Awami League leaders such as viz,Casino king Jubo League leader

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19. Islam, Md. Morshedul , Decentralization of Judiciary and the Role of Lawyers in Bangladesh: an Analysis, *Journal of Law, Policy & globalization,* Vol.20,2013
20. *The Daily Star*, September 14, 2017
21. *The Benar News*, May 3, 2022
22. *The Arab News*, July 2013, See also *The Naya Diganto,* October 14, 2018
23. *The New Age*, April 11, 2022

Samrat [23], Mr. Tanvir Ahmed in Hall Mark case,[24] Mr. Tareque in Narayangang[25] Seven Murder Case are involved judiciary is seen to follow go slow policy. Though trial court announces highest punishment in these cases yet nobody knows when the punishment would be executed. Awami League and government in different forums used these sentences against their opponent in name of independence as well as rule of law but common masses possess different view in this regard.

Higher judiciary i.e. Supreme Court is the guardian of Bangladesh Constitution as it is a written constitution. It is used as a rubber stamp of the government in power for endorsing all its right and wrong decisions. This subservient judiciary is secured by appointing ruling party lawyers to the High Court Division and Appellate Division. Only lawyers who prove his/her selfless loyalty without professional efficacy towards the ruling party and its leadership are eligible for getting appointment to higher judiciary. After recruitment 2nd time the justices are to prove their adherence to the ruling party by endorsing unconstitutional, undemocratic and anti people actions and decisions of the party in power and government. Where justice is seen or perceived by the ruling party that any right decision is going to be discharged for the shake of justice, rule of law, democracy, and constitutionalism the justices concerned are to face persecution from the government, party in power, judiciary, news media etc. Removal of Chief Justice Surendra Kumar Sinha is the glaring example of this kind.[26]

In a system where republic is the choice of the people, people sacrificed in millions for the cause of democracy, rule of law and securing basic fundamental human rights in 1971, such backboneless institution (Constitutional Court) can only serve vices of government in power other than constitution, democracy and peoples' right in a polity like ours. Thus executive is the taskmaster of judiciary in Bangladesh.

vii. The Rule of Law

The sacred word "rule of law" is frequently and heavily uttered by government, leaders of party in power, politicians and persons occupying top posts of the republic in a chorus. It is interesting that these people do not

24. *The Prothom Alo*, April 18, 2018
25. *The Daily Star (On Line)*,August 27, 2017
26. *The Aljazeera*, September 28, 2018, See also Sinha, S K, *A Broken Dream: Rule of Law, Human Rights & Democracy*, 2018

believe in rule of law. Not only that they are not capable of understanding the meaning and concept of that. None of these people has taken any steps towards the realization and meaningful implementation of this word in their thinking, policy and working. Though they reiterate 'rule of law' in public meeting and gathering they do never order their subordinates or persons occupying constitutional posts to materialize rule of law in their actions and policies. Officially they adopt partisan policy beneficial only for the members of the party in power and detrimental to the rest. The Mayors of different city corporations were given the status of Deputy Minister in 2010. All Mayors elected from Awami League were given this status of Deputy Minister under this law from 2010. In 2013 mayors elected from opposition political parties were deprived of this honor.[27]

During military backed caretaker government (January, 2007 to January, 2009) the authority then in power brought huge number of criminal and politically motivated cases against leaders of major political parties prevalent there in Bangladesh. Awami League government formed under the auspices of Hasina in 2009 withdrew most cases lodged against its leaders from top to bottom but continues other cases made against opponent party.[28] Begum Khaleda Zia, Bangladesh nationalist Party Chair Person, was tried and convicted of one of such politically motivated cases lodged by 1/11 government.[29]

In police station you will not get any justice if you don't belong to ruling party. Here right and wrong does not matter. What type of crimes you commit or you are accused of does not concern the police if you are a member of ruling party. Regarding opposition whether you are involved in wrong doing or not, police invents new mechanism to ensure your (opposition and common masses) presence behind iron cage for pacifying government and party in power.

Lower judiciary does not give bail to an accused if he/she (accused) smells opposition fragrant. Where it is revealed that rule of law is maintained in any case where opposition member/members is/are linked the adjudicating officer/officers are to succumb administrative as well as professional punishment for singing with justice (rule of law).[30]

27. *The Protham Alo*, May 6, 2015
28. *The Daily Star,* july 8, 2009
29. *The Al Jazeera News Channel*, February 8, 2018
30. *Ibid*

In case of Anti Corruption Commission ruling party persons involved in corruption are purified through its bias magnifying test machine by giving them certificate of clean sheet that they had no connection with those alleged and established misdeed, corruption and malpractice denying the belief of electorate.[31] On the contrary if you are from any party other than party in power the ACC asserts its relentless efforts and bias sincerity in action. Where you are from opposition it tries her best to criminate so called accused by applying all wrong and right vices of its weaponry.[32]

Regarding recruitment to government offices and public universities (particularly in Dhaka University and Judicial Service Commission) selection committees under Awami League regime from 2009 have been denouncing the appointment of any eligible candidate from Madrasha background though Madrasha Education is recognized by law of the land.[33] However opposite view is visible where the candidate has proved his/her allegiance towards Awami League party through his/her action/ working.[34]

Awami League government started trial of associates of war criminals on the plea of committing genocide, massacre, rape, arson, looting in 1971 liberation war and successfully hanged top leadership of Jamayat e Islam as well as some veteran leaders of opposition Bangladesh Nationalist Party.[35] People cautiously responded as none of the associates/collaborators of war criminals belonging to Awami League Party has yet been brought under the International War Crime Tribunal. Khandaker Mosharraf Hossain incumbent Jatiya Sangsad member representing the Faridpur-3 constituency since 2009 from Bangladesh Awami League, Md. Nurul Islam, State Minister, Ministry of Religious Affairs, from June 23, 1996 to July 2001 from Awami League though involved in war crimes are tried for that.

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31. In Mr. Sayeed Khakon, a prominent Awami League leader and former Mayor of Dhaka City Corporation, Dr. Mohiuddin Khan Alamgir in Farmers Bank scam, Dr, Atier Rahman, former Governor of Bangladesh bank, in eight and a half thousand Crore taka scam cases ACC did not find any corruption doing.
32. *The Daily Inqilab*, June 2, 2022
33. Researcher got the information after taking interview with applicants having Madrasha back ground who faced Viva Voce at Judicial Service Commission and Dhaka University.
34. Appointment of Md . Mokter Ahmed in the Department of Islamic Studies, Rajshahi University, Bangladesh.
35. Abdul Kader Molla, Matiur Rahman Nizami, Mohammad Kamruzzaman, Mir Kashem Ali, Ali Ahsan Mohammad Mujahid are all top leaders of Jamayat e Islam of Bangladesh. Salauddin Kader chawdhury was BNP leader.

viii. The Legislature

In a Republic where parliamentary style of government is in action legislature is the centre of sovereign power within the frame work of constitution. Legislature ensures the satisfaction of the people of the republic. Interest and benefit of electorate and reduction of bottle necks or hindrance to the way of sound and healthy life of the citizens should definitely be the subject of legislature. These are achieved by forming the legislature with literate, sound, sincere, honest, aristocratic and rational law makers. Law maker speaks the voice of the electorate fearlessly and in dominant character. And it guarantees better life for all the electorate assisted in reaching here.[36] Legislature of Bangladesh shows different character in this regard. Voice of the people is altered frequently but is barely reflected in its actions. Legislators are kept in silence for making rule of the government secured during her tenure under article 70 of Bangladesh Constitution.[37] Ruling party law makers are seen to spend most of their allotted time fixed for speaking in the House in praising the ruling government and rest to speak ill of opposition party. Rarely lawmakers are seen to discuss on constructive and dynamic issues of the subjects and political development relevant to public importance or electorate. Opposition view or matters affiliated to development, welfare, rule of law, justice for the common masses etc are squeezed by disconnecting the microphone or by creating abnormal hue and cry in the floor of the House. Legislators are habituated of spoiling approximately 90 percent working hour in slashing past governments and opposition or praising policy, working, and success of ruling party. Rest period the House spends for materializing real moto of her election.

Most interesting matter in respect of legislator is that political parties having representation in the House are often seen to use their lawmakers in the street movement not in the legislative process.

In 10th and 11th parliament legislators were not the choice of the electorate. Awami League government under the leadership of PM Sheikh Hasina abolished Non Party Caretaker Government the only mechanism which guarantees free, fair, credible and neutral polls.[38] As a result BNP having

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36. Kapoor, Anup Chand, Select Constitution.
37. See Article 70 of *the Constitution of the People's Republic of Bangladesh*. Ministry of law, Justice and Parliamentary Affairs, Dhaka, 2017
38. *The Daily Star*, June 30, 2011

highest popularity among the electorates since its creation, it is argued, boycotted 10th parliamentary polls in the plea of vote rigging and malpractice on the part of EC and ruling AL party. In 10th parliament 154 seats out of 300 were elected uncontested and the rest were decided by less than 5% electorates as 39 political parties including BNP led 20 party alliance boycotted the polls.[39] As 90% electorates did not cast vote and 154 MPs were not the choice of the people this legislature had no legitimacy to act for the electorates. 11th parliament was elected by the election officials of the EC.[40] Electorates had no say in the creation of 11th parliament.[41] Thus this parliament has no legal, rational and moral authority to act for the electorate or other words government formed by 11th parliament is *void ab initio*.[42]

ix. The Election Commission

Election Commission is a constitutional body. During election all machineries of the government are to be subordinate to it and to carry out the order and direction of it for arranging and holding free, fair and credible election under constitutional terms. Proving its independence, boldness and stiffness in power and authority Chief Election Commissioner showed his backbone straight through electronic media! Not only that it tried to explore her sanctity by asking the American Election Commission during 2020 US Presidential Election to have lesson from Bangladesh Election Commission of holding free, fair polls and publishing first and query free polls outcome.[43] However the EC is not seen to assert her authority under the constitution at all. All elections held under party government since the independence of Bangladesh were marked with fraud, rigging and malpractice. Electorates were not seen to be happy with the election outcome. Party government uses the EC as her party office with the goal of securing her victory in polls by hijacking the will /consent of the electorates towards her party. For security of consent of the electorate in a free, fair and credible election, Non Party Caretaker Government was made by Constitutional Thirteen Amendment in 1996. Since the working of the Non Party Caretaker Government stopped

39. *The New Age*, January 6, 2014, The Naya Diganto, January 6, 2014
40. *The Jai Jai Din*, January 6, 2014
41. Election officials from government, semi government, autonomous bodies as well as independent persons involved in 11th parliamentary polls revealed these on the condition of keeping their identities secret.
42. Applbaun, Arthur Isak, *Legitimacy: The Right to Rule in a Wanton World*, Harvard University Press, 2019

hijacking consent of the electorate in managed polls Awami League government abolished this pro people amendment on undemocratic plea in 2011 for perpetuating her grip in state power. Accordingly Awami League government manned the EC with its loyal bureaucrat. As a result history was created in 10th parliamentary polls regarding number of MPs elected uncontested and percentage of voters cast vote in the election. EC declared result of 154 uncontested seats out of 300 before election date, as most of the opposition political parties did not participate in 10th parliamentary election in contemplation of fraud, rigging and malpractice on the part of the ruling AL in the polls. In 11th parliamentary election EC invented as well as implemented a system where approximately 80 percent ballots were sealed for the ruling party by election officers at dead of night on the eve of election date. On the election date, 20 percent voters were allowed to cast their choice.[44] After 11th national polls EC achieved another mile stone in vote rigging during local elections viz; City Corporation, Union Council, Upazilla Parishad where voters are allowed to go to the polling station on election date but they are not allowed to cast their vote. Here voters are asked for his/her choice thereafter the polling officers put seal on the ballot paper accordingly for the ruling party. Where voters have different choice they are asked not to go to polling centre. Expressing satisfaction at this new mechanism of voting Chief Election Commissioner said there requires no stuffing ballot midnight before election date from now. [45]

Under this circumstances where electorates have no minimum opportunity of casting their consent the CEC says democracy is exploring in Bangladesh day by day by huge participation of electorate in the polling stations. Electoral choice for the AL government makes democracy sound, healthy and strong under AL leadership. The stand of Chief Election Commissioner for republic, democracy, consent of the electorate, rule of law, and efficiency of arranging and holding free, fair and credible polls looks absurd and proves his insanity as well.

x. The Opposition

In Bangladesh opposition parties are branded as enemy of the society/

43. See the comment of CEC of Bangladesh published in print media. *The Naya Diganto*, *The Daily Star*, *the Protham Alo*, November, 12, 2020

44. Election officials from government, semi government, autonomous bodies as well as independent persons involved in 11th parliamentary polls revealed these on the condition of keeping their identities secret.

state and ruling elites try their best to eliminate all sorts of opposition regarding party, opinion, view and thought from their path by using state power absolutely. Bangladesh Awami League as a ruling party is the strict follower of this tradition. The reign of AL from 1972 to August 15, 1975 under Sheikh Mujibur Rahman, the regime of AL from June 1996 to October, 2001 and current AL rule from 2009 under Sheikh Hasina are glaring examples of this feature.

Opposition thought, voice, view, stand, opinion always have vital role in a viable political system in a republic and democracy. Distancing from these is a death blow to healthy socio economic and political atmosphere. Rational demands and issues raised by opposition are honored and praised in a democratic republic, and must be accommodated in the policies and undertakings of the government for ensuring a happy peaceful, harmonious and prosperous polity. Where rational and legal dissident voice is branded as enemy of democracy, society, and independence of the state the existence of republic and democracy in the polity is in question and exploration and expansion of democracy, rule of law, good governance etc acclaimed by the regime cannot be relied upon and appreciable too.

In Bangladesh post independent government led by father of the nation Sheikh Mujib squeezed opposition voice by inserting special powers Act and one party dictatorial system in the constitution through 2nd constitutional amendment and 4th constitutional change. These two amendments are considered as undemocratic, unconstitutional and betrayal with the martyrs of liberation war. First military government led by Ziaur Rahman restored democracy as well as republican environment ensuring peoples' participation in all spheres of statehood. Ziaur Rahman's philosophy was followed by BNP governments during 1991 to 1996 led by Begum Khaeda Zia, wife of Zia but 3rd term from 2001 to 2006 BNP deviated from opposition oriented political philosophy. 1/11 government took state power due to indifferent stand of BNP government against the people.

Awami League governments starting from January, 2009 to till date led by Sheikh Hasina have established opposition free polity by applying fascist rules and policies in Law Enforcing Agencies, Armed Forces, Judiciary, Election Commission, Anti Corruption Commission, Bureaucracy and News Media. It abuses the ICT Act, 2019 in pacifying anguishes of common masses in social media against the regime. Massacre in Pilkhana BDR Head Quarter

against unarmed army officers, suppression in armed forces by removing thousands of high ranked army officers in the name of bringing discipline therein[46], Massacre in Hepazat E Islam's colossal gathering in 2013,[47] Use of fire during BNP led opposition movement in 2014,[48] brutal attack against the student leaders of Nirapad Sharak Chhai movement,[49] imprisonment of Begum Khaleda Zia in a politically motivated corruption case[50], hanging of top opposition leaders in the name of war crimes[51], use of Bureaucrats, Army, Police, RAB, EC in conducting midnight vote robbery in 11th parliamentary polls,[52] and bringing of thousands of false criminal cases against opposition political activist, disappearance and killing of unknown numbers of opposition political activist by law enforcing agencies, etc were used and are still being used to suppress the opposition for perpetuating AL Government under Sheikh Hasina.

New trend that is development in sacrifice of democratic republic in policies and actions of the AL government is visible. For materialising this theme current government leaves nothing undone in uprooting opposition from its path. Thus while AL praises for democracy and opposition voice it sounds rape of democracy and slapping at the sacrifice of the martyrs of 1971 war.

xi. The Armed Forces

Military is the reflection of sovereign power of the state.[53] Sovereignty must not be bias. It upholds the reason and consent of the people as a whole. Where decision is prevalent among the subjects regarding the choice of party military must side the reasoned block. In case of republic and democracy, military sticks to constitution and consent of the people. Where evil power comes to the throne and seeks support of military it extends cooperation to

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45. *The Protham Alo*, *The Naya Diganto*, March 9, 2021.
46. Kumar, Anand, The BDR Mutiny: Mystery Remains but Democracy Emerges Stronger, *The Journal of Defense Studies*, Vol 3, No 4, October, 2009
47. The Weekly Holiday, May 10, 2013
48. *The DW*, February 3, 2015
49. *The Daily Star*, August 3, 2018
50. Aljazeera news, February 8, October 29, 2018
51. VOA, East Asia, November 13, 2015
52. *The New Age* , September 25, 2020
53. Dicey, A.V. , An Introduction to the study of the law of the Constitution, Macmillan, Universal Book Traders, tenth Edition, Published 1959, pp 39 to 150, 304

the cause of electorate. Such basic role of sovereignty is absent in Bangladesh. It is said that rational stand of Bangladesh armed forces was destroyed with the killing of 56 army officers under a conspiracy orchestrated by Awami League government in Pilkhana Hatya Kanda on February 25, 2009.[54] In consequence to that so called mutiny thousands of rational and honest army officers along with thousands of BDR personnel were given forced retirement and dismissed from armed forces. Trial of the mutiny has not satisfied the relations of the murdered officers.[55] After that event armed forces became sham in the hands of AL government and party. Alleged involvement of army in Hepazat E Islam movement in 2013 and in midnight vote robbery in 11th parliamentary polls erased democracy and republic from the polity of Bangladesh. Army Chief of Staff General Aziz Ahmed described 11th parliamentary polls as free, fair and best polls ever held in Bangladesh since 1971.[56] RAB Head Bengir Ahmed and Police Chief publicly supported the government as if they are AL party men not the servant of the republic. They should work for the republic and cause of the electorate. The working of top officers in armed forces stands against the electorate, democracy and sovereignty of Bangladesh but satisfies the authoritarian reign of current AL government. Their role should have been for the republic not for the party in government.

xii. The Civil Society

Civil society maintains and upholds secularized norms and values of a political system. Whatever may be the condition of a political system under all circumstances, it sticks to reason and rational view of the society and common masses. It portrays secularized culture of the state without fear and threat. [57]

In Bangladesh civil society is divided into two sects. Views of civil society are hired and bought by money, and political post. It is pathetic as well shameful for the people of Bangladesh that their civil society advocates for corrupt, dishonest, characterless political leaders, criminals, anti socials and terrorists for little financial and political gains undermining the spirits of republic. Such character of civil society is a barrier to political development

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54. Ahmed Rumi, The war that was never fought, *Bdnews.com,* February 27, 2011
55. *The Naya Diganto*, February 25, 2022
56. *The Daily Star*, December 30, 2018
57. Edward Micheal, Civil Society(1st Edition), Polity Press, Cambridge, UK, 2004

and exploration of the spirits of liberation war. A new trend has been developed since 2007 that members of civil society are forced to support the government in power without making any sense of right and wrong. Where its members do not respond positive towards government policies and actions, they are branded as enemy of the society, democracy, independence and state. Thereafter they are declared unwanted as well as persona non grata to the nation for their stand for truth, justice, constitution, democracy, rule of law.[58] Thus republic and democracy cannot be imagined in Bangladesh where civil society is announced persona non grata by the ruling party.

III. CONDITION OF ELECTORATE IN BANGLADESH

Electorate of Bengal had crucial role in the creation of Pakistan in 1946 Provincial polls and they played vital role in establishing independent Bangladesh in 1970 National Assembly as well as in Provincial polls. In spite of having dominating contribution in materialization of independent polity, governments in new territory ignore their choice in running administration. The electorate was first denied of their opinion in the hands of Sheikh Mujibur Rahman by creating BAKSAL, One Party Dictatorial Government in place of democratic republic.[59] Choice of electorates was manifested in the working of 1st military ruler under the guardianship of Ziaur Rahman. Consent of the people once against was snatched away by 2nd military ruler General Ershad. Wishes of the voters came into track during the reign of Khaleda Zia[60]. Peoples' verdict was reflected in the formation of Awami League under the leadership of Sheikh Hasina but AL government failed to do justice with that sanction in operating administration (1996 to 2001).[61] Though electoral choice cast heavily in bringing Bangladesh Nationalist Party in power under the auspices of Khaleda Zia citizens were disappointed with the action and policies of thereof in 2001 to 2006.[62] Disregard of electorate by incumbent BNP led four party alliance

58. *The Daily Star*, September 28, 2020
59. See the 4th Amendment to the Constitution of the People's Republic of Bangladesh, *the Bangladesh Observer*, January 26, 1975
60. See the Article "1996 Non Party caretaker Government Movement and the Roe of Opposition In Bangladesh: A politico legal Analysis", The Banaras Hindu University Law Journal, 2020, India
61. See the result of 8th Parliamentary Polls, *The daily star*, October 2, 2001
62. See the article The Politics behind the Passage of Fourth Amendment to the Constitution of the People's Republic of Bangladesh and Its Provisions: A Modest Analysis, *Journal of Public Policy and Administration Research*,Vol.4, No.9, 2014

government bought AL in power under Hasina in 2008. Overwhelming popular vote was manhandled by incumbent AL.

As a result government's fate was settled in the minds of electorate. Truth lies in the fact that voters choice (from the inception of Bangladesh) goes against the incumbent government. People of Bangladesh are keen enough to examine every policy, action and inaction of the running government and decide their opinion thereon in the polls. Reigning governments do not digest this prudent decision of the voters. They consider them (electorate) illiterate, fool, and immature of taking electoral decision. Bangladesh is perhaps the only country where Election Commission, government and judiciary are not ashamed of ignoring the query of voters regarding vote irregularities.

Perhaps foreseeing her defeat in 10th parliamentary election Awami League leadership, the spokes person of spirit of liberation war, republic, democracy and peoples' voting right, created bottlenecks to holding free, fair and credible election by abolishing Non Party Caretaker Government bringing change in the Constitution in name of being anti democratic republic. On the other hand opposition spearheaded by BNP took drastic steps for refraining incumbent AL government and EC from arranging questionable vote. Thus dogs were frequently seen in polling stations and polling booths on January 5, 2014 (polling date of 10th Parliamentary Polls) instead of gathering of electorates.[63]

In 11th Jatiya Sangsad Election Awami League government under the leadership of Sheikh Hasina relieved the voters of their right as well as duty of casting vote by stuffing ballot midnight before election date in cooperation with Election Commission, Bureaucrats, Election Officers, Armed forces, Police, News Media along with AL party men. In local body election held after 11th national polls EC officers in harmony with AL party men expedited voting capacity of the electorates by putting seals on the ballots on behalf of the voters. In this way reigning government under its auspices has snatched away voting right of the subjects since 2014 National Polls. In a political system where the subjects are disappeared of giving verdict in coordinated conjunction of bureaucrats, EC, armed forces, news media, police and election officers that polity can be termed as any name other than republic and democracy. The government exercising sovereign power has no legitimacy to do so in a democratic republic.

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63. *The daily Star*, January 6, 2014, see also *The Bangladesh Observer, The New Age, And the Prothom Alo*, January 6, 2014

Electorates bring parties into state power for securing state privileges for their cause. AL government fails to provide adequate jobs to citizens. Unemployment rate is highest in Bangladesh. Law and order situation is not up to the mark to ebb the dissatisfaction of the voters. Trade and commerce is open for the reigning party men. Judiciary does not adjudicate cases against ruling party men under unwritten law. Abuse of citizens, voters, opposition activists by police and law enforcing agencies is abnormally high since 2009. Political freedom is made absolute for the AL and its associates. People lost faith in police and armed forces, judiciary as well for getting justice. Right to know the truth has become a lie as news media is suppressing the truth for the cause of government persecution. These have no value to reigning AL government since 2009. But these are inseparable to electorate. Right now voters are made slaves in the hands of reigning party. That's why its proper time to rename Bangladesh in any adjective other than democratic republic.

IV. BANGLADESH : AN APPRAISAL

The constitutional name of Bangladesh i.e. the People's Republic of Bangladesh is not matched with the current reality of Bangladesh polity. The head of the state is not the choice of the electorates since MPs electing President are not the choice of people. Reason lies in the fact that voters were barred from casting their consent in 10th and 11th national polls. Democracy where electorates have say in the making and unmaking government is absent in Bangladesh since 2014. Democracy one of the four pillars of Bangladesh constitution is enchained in the hands of Sheikh Hasina, Awami league Chief and Prime Minister of Bangladesh. Parliament spends less than ten percent of its working hours in people related subjects. Rest hours are exploited in unproductive and irrelevant issues. Bangladesh Election Commission is not aware of its duties and responsibilities but surrenders its constitutional responsibilities to serve reigning party interest at the cost of electoral choice. Judiciary being the guardian of constitution instead of protecting it (Bangladesh Constitution) justifies the evils of ruling party AL and government. Armed forces e.g. army, navy, air force, BGB and law enforcing agencies i.e. police, RAB etc must serve the republic not the party in power. In Bangladesh they selling their reason suck the feet of Awami League government and by doing this they have established sovereignty of government not the state of Bangladesh.

Enjoyment of fundamental rights by electorate is not prevalent in Bangladesh. Rule of law is explored when ruling party means but electorate are out of its ambit. Judiciary is for the ruling party not to do justice to common masses/electorate. Job is not for citizens or qualified persons. It is given to pro regime person qualified or not. Precarious fact in respect of Bangladesh is that civil society advocates for the corrupt, dishonest, white color criminal and political robber. In some cases when some members(civil society) are seen to speak for nation ie peoples betterment out of reason ruling party (AL) brand them unwanted and ask all to boycott. Division in civil society is fatal for democratic republic and electorate of Bangladesh. All the facts portrayed in the findings are proven subjects. As a fellow citizen having little academic wit researcher can say Bangladesh is riding on back gear looking for materialization of BAKSAL(dream of Sheikh Mujibur Rahman) one party authoritarian fascist rule which buried spirits of liberation war and democracy, republic and reason.

In order to overcome this environment researcher prescribes the following steps for restoration of a rational people oriented polity in Bangladesh:

Bangladesh is right now running under an unknown abnormal political system. All constitutional organs surrender their fundamental duties and responsibilities to the Prime Minister (Masiah). State has four elements ie territory, population, sovereignty and government. Government has three organs viz executive, legislature and judiciary. In parliamentary system of government executive and legislature have close tie. As executive is of two types e,g permanent and temporary (political) executive, temporary executive has dominant role in legislature. Republic and government are not alike. Temporary executive is the choice of the people. Permanent executive is the servant of the republic (people). Permanent executive are appointed after becoming toppers in public examination held for selecting qualified man in this regard. Sovereign power is reflected through the armed forces of the country. This military serves the republic (people) not the government that means it follows the path of government so far she (government) abides by the constitution.

Since 2009 permanent executive and members of armed forces perhaps fail to identify the difference between government and republic. These two pillars of republic have become loyal to the evils of temporary executive and party in power. Judiciary protector of the constitution and the people for

unknown reason gives up its constitutional responsibilities to the political executive and Awami League (ruling party). In such way if analysis is made it reveals that every constitutional body and pillar of republic resigns its respective responsibilities and became a sham in the hands of temporary executive and ruling party. Thus the first recommendation to overcome this abnormal wild political system these constitutional institutions along with the armed forces must have to give up their slavish loyalty towards political executive and Awami League (ruling party) and allegiance towards Bangladesh republic has to be reestablished. However these will cooperate with the temporary executive so far it (government) works within the framework of the constitution and law.

Permanent executive must be manned by efficient and rational candidates chosen in a competitive public examination on the basis of performance and efficacy not on the basis of loyalty towards the party in power. Members of armed forces are to be recruited following the same criterion. Appointment to the constitutional institution has to be made on the basis of honesty, sincerity, efficiency, capability and experience of the person not on the basis of gravity of allegiance towards party in power. Promotion in bureaucracy as well as armed forces has to be given on the basis of professional performance and eligibility of the person concerned not on party affiliation. Consent of the electorate must be guaranteed and ensured through free, fair, credible, transparent and peaceful environment. Government in power must prove her legitimacy in running the administration.

Government is a trustee of the statehood. Where government fails to carry out the duties and responsibilities of trustee in discharging her vested tasks she should leave the trust and allow new one more efficient and dutiful to materialize that goal. Specifically speaking temporary/political executive should not treat herself as the owner of the state. Adopting and maintaining secularized political culture in every sphere of statehood starting from family to head of the state.

Republic and democracy is not the voice of the government and the party in power. It is so only electorate/people of a territory believe and realize in their day to day life. Hence election commission is entrusted with the duty of measuring peoples' right and correct opinion. EC must have all mechanism to have the real consent of the electorate. EC is bound to give correct and sound answer to any query made by electorate as to their choice in the polls.

EC must not do anything that might raise any suspicion in the minds of voters relating result of election. That means policies; actions and measure of EC must have transparency. EC must act as a part of the republic, not to be used as a tool to the desires of the government in power.

Armed forces must not be made up with partisan persons. Military must be loyal to the voice of the people i.e. republic not to the scrupulous wishes of the reigning government. Student politics must be made compulsory in all public and private universities. Democratic election has to be arranged to constitute student forum with direct participation of the students in universities annually.

Rule of law has to established and ensured by the policies and workings of the government. Peoples'/electorate's query pertaining to violation of rule of law has to be resolved by accurate pinpoint explanation. Rule of law must not be topic of speech but be reflected in the policies and under takings of government. Corruption in government, political parties, elected representatives, judiciary, Election Commission, Anti Corruption Commission, educational institution, social and economic field has to be uprooted by proper and meaningful means. Dubious and partisan corruption drive against opposition and dissidents of government is meaningless in this regard.

Promotion and transfer cases in law enforcing agencies specifically Police and RAB have to be brought under the jurisdiction of District Judge. Extrajudicial killing and forced disappearance must be stopped and all starting from mastermind to executor involved in these heinous and barbaric cases must be brought to justice setting up special courts. Independent, fearless, bold and authentic news media must be established and explored where reality of the politics, social and economic aspects will be reflected not the lies and untrue facts and events of the government and political parties.

Scarcity of moral and ethical values and lust for becoming rich and powerful in short period in society give birth to all these evils. There is no other alternative but to imbibe, nourish and follow moral and ethical values in individual and social life to overcome these rubbishes of political, social and economic life of the country Bangladesh.

V. CONCLUSION

People's government, people's interest, people's welfare, people's

demand, people's wish, people's desire, people's dream, hopes and aspiration are all bogus assertion and rubbish talking of the authority (temporary/ permanent executive) right in Bangladesh. People's consent i.e. legitimacy of the government to her subjects is immaterial in the context of ruling government of Bangladesh. Therefore secularism, rule of law, republic, welfare state, justice, equality are absent in the governance in Bangladesh polity. The concept of people's participation and representation are deserted of by the devils occupying the throne. All constitutional institutions are manned by diehard party followers who have no loyalty towards the republic but keep allegiance to the party leadership. Even non constitutional bodies such as bureaucracy, law enforcing agencies, lower judiciary, Civil Society have been channelized to the path of party policy. These members of constitutional and non constitutional bodies orchestrated voteless 10th and 11th Parliamentary elections as well local polls sidelining the role of electorate as immaterial in making and unmaking government and local bodies in Bangladesh. Likings and disliking of the party leadership and head of the government has been branded as hopes and aspiration as well as mission and vision of the people and nation who are deserted of electorate status. The aspects of republic, democracy and electorate are buried in and vanished from Bangladesh. Thus this is the ample hour to give Bangladesh a rational, proper and suited name after Sheikh Mujibur Rahman obliterating the People's Republic of Bangladesh from the Constitution.

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CHANGING DYNAMICS OF THE LAW CONCERNING WILLFUL DEFAULT CASES IN INDIA

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ANURAG AGRAWAL**

ABSTRACT : Since previous decade, Indian economy seems to have been plunging on the tides of Non-Performing Assets. NPA has been a pandemic for the depleting banking industry in India which is not getting over it despite all efforts and solutions. Among other causes, willful default is a major cause for increasing ratio of Non-performing Assets. Several economic and noneconomic factors are responsible for increasing cases of willful default. Financial regulators such as RBI, SEBI have made regulation for controlling the willful defaults. Amending rules and regulations in the year 2016 and 2017 have been successful in covering and correcting the grey area of law and strengthening it in relation to willful defaulters. The different provisions of statutory laws have been brought with a view to tightening the grip on willful defaulters. The cognizance also has been taken by the apex court of India in various cases like Jayantilal N. Mistry case, Bikram Chatterji case. Looking at criminal provisions, there are several offences such criminal misappropriation, cheating cover the culpability of willful offenders. The Fugitive Economic Offenders Act, 2018 gives another edge to banks to move against willful offenders. Civil laws are still in their conventional way in approaching these offenders. Certain disabilities have been imposed under the Companies Act. Certain Amendments have also been made in the SARFAESI Act, 2002 with view to catch the willful defaulters. The paper

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analyses effectiveness and implication of these provisions in bridling this increasing tendency of borrowers to willfully default of repayment of loans..

KEY WORDS : Willful Default, Bank, Bad Loans, NPA, SARFAESI, RBI.

I. INTRODUCTION

The sudden outbreak of global pandemic Covid-19 in the financial year 2019-20 has indeed given a jolt to economic growth at a pace all over the world. The pandemic has also made a dent in the health of the banking sector in India. To overcome the pandemic effect RBI gave options such as six-month moratorium and one time debt restructuring scheme.[1] Deteriorating asset quality during the period has been a formidable challenge and of course, one of the reasons for affecting banking sector health. Non-performing Asset, popularly known as NPA, is a business risk for banking institutions. NPA is a barometer of the economy based on which predictions are made as to pressure on it. NPAs have been one of the prominent causes of depleting conditions of banks. They rob the overall profitability of banks. Further, NPAs lead to opportunity costs as the otherwise gained profit could have been invested in some return-earning projects. For the past few decades, the problem of rising NPA is under close scrutiny by the government.

International Monetary Fund has defined Non-performing Loans (NPL) on the basis of a uniform criterion of "principal or interest payments 90 days overdue" for declaring a loan as nonperforming.[2]"*NPA is defined* as *an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset."*[3]Non-performing Asset is the narrowest concept, as it refers only to problem loans, but is the term most commonly used in academics as well as among market stakeholders in several nations.

Various government initiatives such as the Mission Indradhanush in

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1. Reserve Bank of India, RBI's Report on Trends and Progress of Banking in India 2020-21 (December 2021) *available at* https://rbidocs.rbi.org.in/rdocs/Publications/PDFs (accessed on January5, 2022)
2. The International Monetary Fund, The Financial Soundness Indicators (FSI): Compilation Guide 2006, Para 25, *available at:* https://www.imf.org/external/pubs.pdf (accessed on January 2, 2022)
3. The SARFAESI Act, 2002, s. 2(o)

2005, the 4R's Strategy in 2015 and the Project Sashakt in 2018 have been failed to stop the rising level of NPA.[4] RBI, the apex body for regulation and controlling of banking functions, has also taken measures at different levels such as time-bound Asset Quality Review (AQR) gauging higher deterioration of assets, early identification of NPA as Special Mention Accounts (SMA), Prompt Corrective Action Framework, Asset Reconstruction and Securitization provisions[5]. Even after numerous measures taken by the Government and RBI, the problem is still rampant. The Gross Non-Performing Asset ratio of Scheduled Commercial Banks stood at 8.2 percent in the financial year 2019-20 against 9.1 percent in the year 2018-19.[6] The ratio has been predicted by RBI in its Financial Stability Report, December2021 to be bounced back up to 9.5 percent by the end of September 2022.[7] Even the Supreme Court in its judgments *Transcore v. Union of India,*[8] *Mardia Chemicals Ltd. v. Union of India*[9] etc., has acknowledged the problem of rising NPA. Non-viable non-performing accounts are a cost to the country's economy. This problem arises due to a mismatch in assets and liabilities of banks and financial institutions. NPAs represent amounts receivable and realizable by banks. Many a time, bad loans are unpreventable due to unpredictable circumstances like business or economic slowdown, fluctuations in the market price of commodities, liberal imports policy resulting in revenues deficits, rise in production costs and subsequent fall in cash flows.[10] Hence, the economy experiences a surge in NPA stock due to several economic and non-economic reasons. Similarly, defaulting debtor can also be categorized into one who is unable to pay debt and another who is really not willing to do so.[11]

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4. Press Information Bureau, Ministry of Finance, Government of India, *available at* https://pib.gov.in (last visited on February 20, 2021)
5. Business, "Five ways govt. RBI trying to speed up NPA recovery" *The Hindustan Times* July 8, 2017
6. *Ibid.*
7. RBI's Financial Stability Report (FSR) December 2021 *available at*: https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs (accessed on January5, 2022)
8. AIR 2007 SC 712
9. 2004 4 SCC 311
10. M. Jayadev, N. Padma "Willful defaulters of Indian banks: A first cut analysis" 32 *IIMB Review* 129 (2020)
11. *Ibid.*

In the recent past, rising cases of willful defaults have been one of the major causes of increase in NPAs in Indian banks. In order to provide a legal mechanism and facility to collect credit information of borrowers through information companies or company bureaus, the Credit Information Companies Regulation Act, 2005 was passed.[12] To put this in NPA perspective, as of December 2020, Rs 244,622 crore loans have been classified as willful defaults against Rs. 205,606 crore in December 2019.[13] However, banks have experienced a marginal fall in the number of cases in the financial year 2020-21 with 1.90% and total outstanding willful default stands Rs. 2.11 lakh crores as of March 2021.[14] The data on willful default released by the RBI comes from a large centralized banking system database called 'CRILC' (the Central Repository of Information on Large Credits).

II. WILLFUL DEFAULT: A DELIBERATE DELINQUENCY

Default is the result of a genuine inability to repay.[15] This inability may be caused because of several factors such as financial hardship due to unpredictable reasons such as market recession, pandemic breakdown, crop failure etc. However, many a time such defaults are deliberate or willfully moved in a calculated way. A corporation or firm or individual or any other borrower comes into the category of 'willful defaulter' if it does not meet repayment despite having the capacity to do so.[16] A borrower may be identified as a willful defaulter for many reasons. RBI has enumerated the scenarios on the occurrence of which a unit is identified as a 'willful defaulter'[17]. A borrower may be classified as a 'willful defaulter' when it defaults in meeting payment

12. V. Kothari, *Taxnnan's Banking Law and Practice in India*, 1340 (Lexis Nexis 26th Edi. 2017)
13. Banking, "Amid Covid effect, bank steps, willful defaults rise Rs. 38,976 crores" *The Indian Express*May 11, 2021 *available at*https://indianexpress.com/article/business (accessed on January 5, 2022)
14. Business News, "Willful Defaults fall marginally in pandemic hit FY21: TransUnion CIBIL data" *The Economic Times* January10, 2022
15. M. Bhattacharjee and M. Rajeev, "Modeling Loan Repayment Behavior in Developing Countries" 35 *Applied Economic Perspectives and Policy,* Oxford University Press 270 (2013)
16. Master Circular No. DBR.No.CID.BC.22/20.16.003/2015-16 1 July 2015, Para 2.1.3, *available at:* https://rbidocs.rbi.org.in/rdocs/notification (accessed on January 10, 2022)
17. *Ibid.*

even after having the financial capacity to honour the same. When a borrower is *malafide* in repaying the debt, it does not avail the credit facilities offered from the lender and diverts the funds movable, immovable, fixed assets for other purposes than that for which it was actually obtained. Many a time, the borrower conceals the fact from the lender. *In 2015, Jayantilal N Mistry v. RBI*[18]the Supreme Court directed the RBI to disclose the information relating to the list of willful defaulters. The central bank has finally disclosed the list of 30 Willful defaulters which it had been evading on the superficial ground of 'fiduciary relationship' with banks.

A borrower who has siphoned off the which are untraceable in the unit, may also be tagged as a willful defaulter by RBI guidelines. The Supreme Court in the recent case of *Bikram Chatterji v. Union of India*[19] has dealt with 'siphoning of funds' and has termed it as a 'serious fraud'. Using short-term funds for long-term purposes not in conformity with the terms of the sanctioned loan or deploying loan for other purposes than those for which the loan was sanctioned or transferring it to the subsidiaries or other corporates or routing of funds through any bank or financial institution, other than the lender or members of consortium without prior permission of the lender, may be construed as 'siphoning of funds'.[20] If the borrower has invested or routed the funds other than lenders without permission of one of the consortium members, the same is covered under the head of 'siphoning of funds'.[21] Any kind of shortfall in the deployment of the fund not being accounted for may be termed as 'siphoning of funds'. However, a person cannot be declared a willful defaulter only based on an isolated transaction. RBI prescribes banks to keep in view the track record of their borrowers. The apex court in *Kotak Mahindra Bank Ltd v. Hindustan National Glass & Industries Ltd.* has held that banks can classify a borrower as willful defaulter under the RBI Circular even the transaction was not a customary borrower lender transaction and therefore, derivative transactions, guarantees are also covered under the provision of the Master Circular by RBI.[22]

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18. AIR 1 SC 2016
19. 2019 SCC Online SC 901
20. *Ibid.*
21. Master Circular No. DBR.No.CID.BC.22/20.16.003/2015-16 1 July 2015, Para 2.2.1, *available at:* https://rbidocs.rbi.org.in/rdocs/notification (accessed on January 10, 2022)
22. (2013) 7 SCC 369

In the event of evidence of willful default against a borrower or its promoter or whole-time director (in case a company) at the relevant time should be examined by an identification committee headed by an executive director or equivalent and consisting of two other senior officers of the rank of general manager/deputy general manager.[23] If the committee finds a case of willful default, it issues an order recording the fact of willful default after hearing the parties on a show-cause notice. The order of the identification committee becomes final only after it is confirmed by the said review committee. However, in case any order is in favour of the borrower, the review committee need not be set up.[24]

III. CAUSES BEHIND

Banks are public institutions functioning in public and social interests. Banks contribute to social development by fulfilling the socio-economic needs of a person from high to low class of society for his day-to-day transactions for various purposes. Additionally, banks themselves launch various loan and financing schemes to assist the common man to reshape his dreams. Hence, a borrower may take a loan for fulfilling personal needs such as house loans, vehicle loans, education loans etc., or for achieving social objectives such as marriage or other kinds of celebration, cremation or other kinds of rituals. These social and personal causes for taking loans though a small fraction of the country's total Gross-NPA are yet a cause for mounting of NPA, if not repaid.

Banks are also backbone of economic development of the country giving financial support and a mode of payment to commercial concerns, industries in the corporate sector. Another reason is that project financing over-expectations after the initial success of public-private partnerships (PPPs) in infrastructure during 2006-08 with slower GDP growth after 2008 with lower traffic and industrial demand later on stimulated by land acquisition delays, non-availability of gas and coal for power plants led to explosive expansion without due diligence.[25] With loans being available more easily than before,

23. Master Circular No. DBR.No.CID.BC.22/20.16.003/2015-16 1 July 2015, Para 3, *available at:* https://rbidocs.rbi.org.in/rdocs/notification (accessed on January 11, 2022)
24. *Ibid.*
25. Economy, "View: Falling, not rising, cronyism is the main cause of NPAs" *the Economic Times* September 26, 2018

corporations grew highly leveraged, implying that most of the financing was through external borrowings rather than internal promoter equity. But economic growth languishes following the financial crisis such as the financial crisis of 2008.

Causes behind the cases of willful default have social political and economic and legal relevance. Scrupulous business tactics, shaded corporate structure, political nexus to bank credits, overleveraging for getting huge loans, structural and procedural weakness of the Bankruptcy and Insolvency laws are some of the prominent causes that encourage willful defaulters to take law in their hands at the stake of public money in banks.[26] When a commercial concern comes under financial distress, the option of bankruptcy and liquidation is always a last resort for the firm. A long course of negotiations takes place between the debtor and creditor. When the creditor finds its feet in complete loss and thereby finds it difficult to grab the whole debt, he starts negotiation with the reluctant borrower. Debt renegotiation always generates the possibility of debt reduction. Desperate Debtor delinquents from honoring the debt even at their solvent situation to take advantage of debt reduction. Shareholders of a company may opt for the strategic default for corporate bond spread, dividends benefit and optimal calculations of debt and equity etc. However, shareholders' strategic default has a direct impact upon a firm's financial risk.[27] Moreover, political factors are also responsible to cause an increase in NPA behind social reasons. Our constitution, through Part IV, has given the government a responsibility to maintain a balance between the social and economic structure of the society that it does through its policies.[28] The government frames monetary policy for the country in consultation with the Reserve Bank of India. Nevertheless, corruption leads high-risk lending. Corrupt practices by politicians, bureaucrats and business tycoons for their motives have left the country on the verge of another great economic crisis. The borrowers daring to default willfully are unscrupulous to take the law into their hands. Political influence is used not only in availing loans but also in delaying or non-payment of loans. Other reasons for the surge in such strategic defaults are weak governance and ineffective legal

26. *Supra* note 10.
27. G Favara, E. Schroth *et. al.* "Strategic Default and Equity Risk Across Countries", 67 *The Journal of Finance* Wiley 2051 (2012)
28. M. P. Singh, *V N Shukla's Constitution of India* 370 (Eastern Book Company, Lucknow, 13th Ed. 2013)

and regulatory mechanism. In India, penalties in the form of collateral transfers, are almost absent for households defaulting on agricultural or other scheme-based loans.[29] Though loans are provided against collateral (such as a current stream of income, or land in the case of uncertain income), and there are various legal ways for acquisition of collateral in the case of default, however, for political reasons and the legal complexities, exercising such provisions becomes difficult to execute.[30]

IV. REGULATIONS

RBI is the apex authority for the regulations of banking practices. The Reserve bank is a guardian of banking and financial institutions in India. It publishes guidelines and master circulars for the governance and regulation of banking affairs from time to time. The latest master circular by RBI for the regulation of willful defaults is the Master Circular No. DBR.No.CID.BC.22/20.16.003/2015-16. The master circular provides for guidelines related to end-use, transfer, siphoning of funds by individuals and companies. In *SBI v. Jah Developers Pvt. Ltd. & Ors.,* it has been held by the Supreme Court that compliance of the master circular dt. 01.07.2015 is mandatory for banks.[31] Willful defaulters have been restricted from raising capital and be involved in capital market activities.[32] The master circular date 01.07.2015 permitted the banks to disseminate the information and publication of the photograph in newspapers, websites etc.[33] Earlier banks had developed a trend of publishing a photograph of defaulting borrowers publicly upheld by the judiciary in judgments such as *Km. Archana Chauhan v. SBI, Jabalpur*[34], *K.J. Doraisamy v. AGM, SBI*[35] etc. However, later on, judiciary

29. *Supra* note 15.
30. M. R. Veerashekarappa, M. Bhattacharjee "Has Revival Package Improved Functioning of Short-term Cooperative Credit Societies? A Case Study of Madhya Pradesh" 28 *Social and Economic Change Monographs* 2012
31. 2019 (6) SCC 787
32. The Security Exchange Board of India (Listing obligations and Disclosure requirements) Regulation, 2016 *available on* https://www.sebi.gov.in/legal/regulations/may-2016 (accessed on January 10, 2021)
33. Business News, "RBI asks Banks to publish photographs of willful defaulters only" *The Economic Times* September 30, 2016
34. AIR 2007 MP 45
35. (2007) 136 Comp Cas 568

also supported the view that the penalty of shaming by the publication of photographs is restricted to willful defaulters only and should not be resorted routinely against the general defaulters unless defaults have been committed under special circumstances as specified in the master circular.[36] The court acknowledged that the Master circular well explained the circumstances in which a person can be declared a willful defaulter. In those circumstances, it would be apt for the authority to publish name addresses as well as a photograph of the defaulter in the public interest. Publication of such details in a routine manner will have serious repercussions on the economy as a borrower might have genuinely been unable to pay his loan for reasons other than those that bring him into the category of willful defaulters.[37] Moreover, credit information companies according to the Credit Information Companies (Regulation) Act, 2005 as amended in 2017, may also disseminate the details relating to willful defaulters.[38] Under the Banking Regulation Amendment Act, 2017, the RBI can issue directions to banks for the resolution of stressed assets. Publishing photographs of general defaulters otherwise in a routine manner may amount to undue influence ultimately violating constitutional rights to life with dignity under Article 21.[39] Further, the RBI can specify authorities or committees to advise these banks on the resolution of stressed assets. The members on these committees will be approved and/or appointed by the RBI. The Security Exchange Board of India has also acknowledged the loss incurred by the willful defaulters.[40] Under recent regulation merging the earlier SEBI regulations for non-convertible redeemable preference share of 2013 and that for issue and listing of Debt Securities notified on August 9, 2021, SEBI has prohibited any issuer from eligibility of issuing of non-convertible securities if he has been declared willful defaulter as on the date of filing draft offer document.[41] As per the rule framed under the new regulation, there is a requirement as to disclosure of details pertaining to

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36. *Metcil Exports Pvt. Ltd. v. PNB & Anr.,* AIR 2017 Cal 1; *State Bank of India & Ors. v. Ujjal Kumar Das*, AIR 2016 Cal 281; *DJ Exim (India) Pvt. Ltd. & Ors. v. State Bank of India,* CDJ 2014 BHC 1310
37. *Ibid.*
38. The Credit Information Companies (Regulation) Act, 2005
39. *Ibid.*
40. SEBI Board Meetings, *available at* https://www.sebi.gov.in/sebi_data/docfiles/33245_t.html (last visited on January 15, 2022)
41. SEBI (Issue and Listing of Non-convertible Securities) Regulation, 2021, p. 5

issuer declared a willful defaulter.[42] SEBI has also prohibited willful defaulters from setting up market intermediaries such as Mutual funds and brokerage firms.[43] Further, RBI as well as SEBI have taken measures such as complaints against the defaulting parties of their auditors, shaming them by publishing their photographs in newspapers. The Central Vigilance Commission has also issued guidelines related to vigilance governance in banks.[44]

V. CIVIL LIABILITY

Recourse for aggrieved creditors is to approach the civil laws. The general civil laws such as the obligation under the Indian Contract Act, 1872, the Companies Act, 2013 and the Transfer of Property Act, 1882 apply to loan defaults. The remedy provides under these Acts or the Civil Procedure Code, 1908 or the Specific Relief Act 1963 can be enforced against the willful defaulters. Under section 17 of the Indian Contract Act, 1872, A promise made to repay without any intention of performing it amounts to fraud.[45] In such a situation, the loan agreement will be voidable at the option of the bank Section 19, the Indian Contract Act, 1872.[46] In case, the loan is availed through a pledge, and the borrower makes default in payment of a debt, the bank may bring a law in motion against him and has the right to retain the goods pledged as collateral security. The aggrieved bank may also sell the goods pawned on giving reasonable notice of the sale under section 176 of the Contract Act.[47] Moreover, under section 171 of the Contract Act, the banker has general lien over all forms of commercial paper or bills deposited by the borrower in ordinary course of a loan transaction.[48] Mortgages are most frequently used for availing of loans from banks. Section 58 of the Transfer of Property Act, 1882 defines mortgage as transfer of an interest in specific immovable property

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42. SEBI (Issue and Listing of Non-convertible Securities) Regulation, 2021, Schedule I, r. 2.3.23
43. "SEBI bans willful defaulters from markets, holding board positions" *the Economic Times,* May 26, 2016
44. Office order No. 20 / 4/04 Central Vigilance Commission, also *available on* https://eprocure.gov.in (accessed on February 20, 2022)
45. Avtar Singh, *Law of Contract and Specific Relief* 182 (Eastern Book Company, 8th Edi., 2004)
46. *Id* at 184.
47. *Id* at 584.
48. *Id* at 568.

for securing payment of money by way of loan.[49] The section also describes the different types of mortgages possible for obtaining loans. The Act provides for different rights to a bank under different sections in the chapter relating to mortgage including the right to foreclose and sale the securities. The bank has a right to foreclose the security, once the money becomes due. Order XXXIV of the Civil Procedure Code provides for mortgage suit by the banks or lenders for foreclosure and sale of the security provided by the lender. The order provides for a preliminary decree in favour of banks at the early stage of suit. The order also lays down a distinct procedure of execution for mortgage suits than that provided in order XXI of CPC for general suits.[50] Under section 94, the court may grant a temporary injunction to prevent the end of justice and may commit the person to civil prison in case of disobedience. Such a court may attach or sell the disobedient party's property.

However, special legislations have also been enacted for the recovery of loans such as the Recovery of the Debt and Bankruptcy Act 1993, the SARFAESI Act, 2002 and the Insolvency and Bankruptcy Code, 2016.[51]

In 1993, Debt Recovery Tribunals were established in India to provide for speedy disposal of debt recovery cases on the recommendation of the Narasimham Committee. The Recovery of Debts and Bankruptcy Act, 1993, originally named as the Recovery of Debt due to Banks and Financial Institution Act, 1993 provides for the setup of special tribunals and qualifications of presiding officers therein. The Act provides for procedural steps to be taken by banks and financial institutions. However, the Act originally lacked the element of transparency and accountability of its officers and other staff. Soon, it was pretended that due to these deficiencies the Act was also plagued with the same disease which Indian courts were suffering already. the proceedings in the tribunals are stalled for several years making the interest and efforts of bank officials futile. The objective of summary and speedy recovery proceedings seemed to be sinking and causing disappointment of bankers. Travelling through several amendments, the Act was overhauled in 2016 amending its provisions relating to the constitution of tribunals,

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49. R. K. Sinha, *The Transfer of Property Act* 272 (Central Law Agency 19th Edi. 2018)
50. C. K. Takwani, *Civil Procedure with limitation Act 1963* (Eastern Book Company, 6th Edi, 2011)
51. R. C. Kohli, *Taxmann's Practical Guide to NPA Resolution* (Taxmann Publications (P) Ltd., 2017)

proceedings therein and provisions relating to appeals and also inserted the provision relating to bankruptcy. Though an attempt to bring reforms in the law has been made in 2016, however, the same is still inflicted with issues like lack of expertise, under-staffing accountability of the officers. Different DRTs adopt different approaches to proceed in recovery cases. Moreover, the defaulting parties become successful in the shelter of the legal flaws as the anomalies like jurisdictional conflict, overlapping with other laws are not properly addressed. The Act lacks specific provisions addressing the provisions relating to willful default. Most importantly, the DRT Act is legislation that provides remedies only of civil nature. This has removed any kind of apprehension from the mind of a willful defaulter.

The SARFAESI Act, 2002 popularly known as the NPA Act was brought into force in aid to the DRT Act 1993. The Act brought the provision relating to securitization on the statute book. The Act strengthens the asset reconstruction and securitization law. Besides the Act also give additional powers to banks to recover the bad loans without recourse from the court of law. However, the Act also not proved so efficient in the recovery of loans from willful defaulters. like the RDB Act, the NPA Act has undergone major changes in 2016. But the amendments did not provide a solution to the growing problem of willful defaults. Recently, the SARFAESI Act, 2002 was amended to include three months of imprisonment in case the borrower does not provide asset details, and for lender getting the possession of the mortgaged property in 30 days.[52] As an important remedy to bankers, the Insolvency and Bankruptcy Code, 2016 provides for an extensive and comprehensive framework for resolving insolvency and bankruptcy in India. As mentioned above, a company's shareholder sometimes goes for strategic default instead of opting for bankruptcy and insolvency resolution. Study shows that Firms' financial risk due to this move of shareholders varies across counties.[53] It has been observed firms' financial risk is lower if the insolvency procedure provided in the country favors debt renegotiation. It not only increases the payoff limit for the defaulting firm but also induces its members to guess the expected default timings. India's Insolvency Code, 2016 was brought into force with an objective of speedy resolution and value enhancement. However,

52. Kashish Khattar "Legal framework and regulations on willful defaulters" December 28, 2018 *available on*https://blog.ipleaders.in (accessed on February 20, 2022)

53. *Supra* note 27.

the languishing resolution process is becoming an obstacle in the path of achieving its objective. Since 2016, several amendments have been made in the code with a view to a faster resolution process. Section 12(3) has been amended reducing the time limit of completion of the resolution process i.e. 330 days. Section 29A of the Insolvency and Bankruptcy Code, 2016 inserted by the Amendment Act, 2018 provides in its clause (b) prohibiting willful defaulters to submit a resolution plan.[54] Strategic defaulters have been made ineligible to file any kind of resolution applications. The list also precludes other insolvents their relative or connected anyway to these strategic defaulters. Considering the seriousness of the problem of willful default, the government has inserted provisions through the ordinance dated 23 May 2018 providing that the promoters of Micro Small and Medium Enterprises (MSMEs) who are not classified as willful defaulters can bid for their companies.[55]

VI. CULPABLE CONSEQUENCES

The English criminal law principle '*actus non facit reum, nisi mens sit rea*' acknowledges that for the commission of a crime, intention and an act in furtherance of that intention are indispensable. The full definition of every crime contains expressly or by implication or proposition as to the state of mind.[56] Criminal intention simply means the purpose or design for doing an act forbidden by the criminal law without just cause or excuse. An act is intentional if it exists in an idea before it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied.[57]

Words such as dishonestly, fraudulently, intentionally, voluntarily have been consistently used in the Indian Penal Code, 1862 as an indicator of mens rea. These terms, moreover, can be synonymous with the word 'willful' and therefore, assist the court in fixing the liability as criminal. Motive also gives birth to action. It's a relevant and important question of intention.[58]

54. Insolvency and Bankruptcy Code, 2016 42 *Eastern Book Company* 5th Ed 2019
55. Monthly News Letter, vol. 7 may 2018 *available at*http://www.mca.gov.in/Ministry/pdf /Monthly_Newsletter_May_2018.pdf (accessed on February 20, 2022)
56. Justice KT Thomas, M A Rashid, *Ratanlal & Dhirajlal the Indian Penal Code*, 7 (Lexis Nexis 34th Edi. 2014)
57. *Ibid.*
58. *Ibid.*

The term 'willfully' has been interpreted extensively in English and Indian judgments.[59] Lord Rusell C. J. describes the term 'willfully' in *Queen v. Senior* as the act is done deliberately and intentionally, but not by accident or inadvertence.[60] The application of criminal liability depends upon facts and circumstances of each case. Once the repayment of a loan is stopped for wrongful gain to oneself and wrongful loss to another or only to defraud the creditors or other persons related to the loan transaction, the default may attract criminal liability.

A bank may initiate criminal action against a willful defaulter[61] A willful offender may be charged under sections 403 and 415 of the Indian Penal Code, 1860.[62] Criminal misappropriation takes place when the possession has innocently come but by a subsequent change of intention, retention becomes unlawful or fraudulent.[63] In case, the borrower gets a loan sanctioned but later on, he dishonestly or *malafide* refuses or avoids repaying the loan. This amounts to criminal misappropriation. Under section 403, IPC is complete as soon as misappropriation or conversion with a dishonest intention takes place. Section 406 punishes for criminal breach of trust. Generally, a bank is a trustee of a customer's money. However, the relationship gets reversed when a bank gives a loan to its customer. In a loan, transaction money is entrusted to the customer.[64] The word 'entrustment' in section 406 attracts criminal liability of a willful defaulter when money is entrusted for specific purposes through loan transactions.[65] The section applies to money obtained from goldsmith on a pledge.[66] Further, willful defaulters may be booked under sections 417, 421 and 422 IPC. The sections constitute different forms of

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59. H. S. Gour, *Dr. Hari Sing Gour's Penal Law of India*, 3948 (Law Publishers (India) Pvt. Ltd. VI Vol. 11th Edi. 2016)
60. (1899) 1 Q. B. 283
61. Master Circular No. DBR.No.CID.BC.22/20.16.003/2015-16 1 July 2015, Para 4, *available at:*https://rbidocs.rbi.org.in/rdocs/notification (accessed on February 20, 2021)
62. *Ibid.*
63. Justice KT Thomas, M A Rashid, *Ratanlal & Dhirajlal the Indian Penal Code*, 987 (Lexis Nexis 34th Edi. 2014)
64. S.N. Gupta, *The Banking Law in Theory and Practice* 2 (Universal Law Publishing, New Delhi 3rd Ed. 1999)
65. H. S. Gour, *Dr. Hari Sing Gour's Penal Law of India*, 3946 (Law Publishers (India) Pvt. Ltd. VI Vol. 11th Edi. 2016)
66. *Ibid.*

actions as cheating. When a person fraudulently or dishonestly induces bank and causes loss to the bank by obtaining a loan and not repaying it willfully, the person may be charged with the offence of cheating. For the the offence of cheating, there must be a false representation to the knowledge of the accused in order to deceive the complainant.[67] If the borrower dishonestly or fraudulently removes or conceals property to prevent its distribution among creditors or so prevent any debt due to him, the creditor or bank may book the borrower under sections 421 or 422 respectively.

In the recent past, giant defaulters such as Vijay Mallya, Nirav Modi, Lalit Modi, Sanjay Bhandari and many others have fled from the country after robbing the public money sanctioned in the form of loans. Taking seriously the gravity of these offences, the Fugitive Economic Offenders Act, 2018 was passed to tighten the grip on such defaulters. A willful defaulter can be treated as fugitive economic offenders for offences scheduled in the Act itself if an individual against whom a warrant for arrest concerning a scheduled offence has been issued by any court in India, and who has either left India to avoid criminal prosecution; or being abroad, refuses to return to India to face criminal prosecution.[68] The Act gives power to the special court convened under the Prevention of Money Laundering Act, 2002 to declare an individual as a fugitive economic offender. The court may confiscate the Benami properties and other proceeds of crime. After the confiscation, all such properties of the offender shall vest in the central government. The Act put legal disabilities on the offender from filing and defending a civil claim. The search and seizure power of the court is that of a civil court.

Moreover, liabilities for the conduct of business to defraud the creditor under section 339 of the Companies Act, 2013 may be imposed on willful defaulters.[69] Under the Companies Act, 2013, Section 447 and 448 would also be applicable with regard to willful defaulters. Under Section 447 a willful defaulter committing fraud on their lenders shall be punishable with six months' imprisonment extendable up to ten years, or with a fine of three times of amount involved in fraud or with both.[70] Section 448 gives out

67. H. S. Gour, *Dr. Hari Sing Gour's Penal Law of India*, 4139 (Law Publishers (India) Pvt. Ltd. VI Vol. 11th Edi. 2016)
68. The Fugitive Economic Offenders Act 2018, s. 2(f)
69. G. K. Kapoor, S. Dhamija, *Taxmann's Company Law and Practice* 994(Taxmann Publications (P.) Ltd. 24th Edi. 2019)
70. *Id* at 1051.

punishment for making a false statement or producing false pieces of evidence for the purpose of concealment of the above fraud.[71]

VII. CONCLUSION

Willful defaults have become a serious threat to the efficient working of banks and financial institutions in India. Banks' economy is being robbed by these culprits and these public institutions have remained helpless at the mercy of the toothless laws. The government's efforts have been futile in curbing these cases. Worldwide Governance Indicators report, 2020 by the World Bank based on Six Factors Country-Level Governance, India, though a better performer in the SAARC region, has not shown any remarkable improvement overall in terms of controlling corruption, regulator quality, government effectiveness and rule of law.[72] The low quality of country-level governance is one of the significant causes for growing willful defaults in the country. Credit information agencies and bureaus set up in the country are unable to trace the root cause behind rising cases of willful defaults. There are gaps in identifying these defaulters at small and marginal levels. General civil and penal laws are far from leaving any kind of deterrence on these scrupulous offenders substantively and procedurally. General penal laws are still in dormant condition to deal with the courageous defaulters. Provisions of the Indian Penal Code are inadequate in providing punishments to willful defaulters. Penalties and punishments provided by the code must be made a deterrent for these defaulters. Moreover, suitable changes in the criminal procedure code should be made to bring these offenders to the purview of penal laws. Special laws such as the DRT Act, NPA Act were especially enacted to solve the problem of NPA. The defaulting parties become successful in the shelter of the legal flaws as the anomalies like jurisdictional conflict, overlapping with other laws are not properly addressed. Most importantly, most of the legislations provide remedies only of civil nature removing any kind of apprehension from the mind of defaulters. It is important to note here that the application of the Fugitive Economic Offenders Act, 2018 is limited in application. It only applies to an offender who has fled

71. *Id* at 1052.

72. Dr. A. Ravichander, "India's Performance in the Worldwide Governance indicators" Department of Administrative Reforms and Personnel Grievances, April 16, 2021 *also available at* http://www.ncgg.org.in (last visited on March 05, 2022)

away across the boundaries. Similar stringent provisions should be made for willful defaulters staying and absconded from the course of law in the country. In the recent past, financial regulators have shown serious concern for the increasing tendency of willful defaults. Former RBI Governor Raghuram has not been in favour of any kind of regulatory forbearance against such culprits "We need a change in mindset, where the willful or non-cooperative defaulter is not lionized as a captain of industry, but justly chastised as a freeloader on the hardworking people of this country."[73] However, reformative steps taken by the government and regulatory bodies to bring changes in statute books are merely a drop in the ocean and is not going to subside the pain of banker. The regulations have been made to control the problem. RBI recommends banks to have the recourse of heavy haircuts in form of a substantial percentage of loans in order to clean their balance sheets. Banks are bound to opt for heavy haircuts unwillingly against willful defaulters.[74] Recently, Financial creditors have decided to take a 95 percent haircut on Jet airways loans.[75]However, the option of haircut does not solve the gordian knot. Despite various regulatory steps by RBI, SEBI and CVC, the problem is still the same. Financial Regulators and other key players have to introduce stricter norms.

Moreover, the treatment of these defaulters is inevitable at the governance and management level of banks. At present, banks are regulating the recovery-related matters only at a regional level, remote urban, semi-urban and rural branches have no means for detection and dealing in such defaulters. the bank's governance has to be improved and strengthened at grass-root level. Banks should be strengthened at the functionary level. Mechanisms like DRT, SARFAESI took a long span of time in their establishment in different states across countries, and accordingly, the default recovery varies in different regions irrespective of the defaulter's paying capacity. Problems of special tribunals such as lack of expertise, understaffing, accountability of the officers should be properly acknowledged by the government and regulatory bodies. DRTs adopt different approaches in different regionsfor loan recovery. Despite

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73. Banking "Treat willful defaulters as freeholders: RBI's Rajan" *Mint* 26 Nov 2014 *available at* https://www. livemint.com/Money (last visited March 4, 2022)
74. Business News, "Haircuts a way to address NPAs in banking system" *The Economic Times* February 14, 2017
75. News, "Financial creditors to take 95% haircut on Rs 7,800 cr. Jet Airways dues" *Business Standard*July 1, 2021

rules and regulations, casual and liberal approaches in tribunals are creating their image merely of white elephants and losing the faith of public as well as bankers.

Also, bank officials should be given wider powers under bankruptcy and insolvency laws for proceeding against such scrupulous defaulters. stricter rules and guidelines for due diligence of properties at multi-levels.Overthe time, several reforms are brought in civil and criminal laws concerning willful defaults looking at their increasing numbers in the country according to the list published by the Reserve Bank of India. Despite these changes, the situation is worsening the conditions of banks. Depleting Banks are helpless in taking recourse against the willful defaulters. Undoubtedly, laws have been changed substantively but there is a need for procedural reforms so that willful defaulters cannot escape from their liability taking benefits of traditional procedural laws. Banks have only regular laws in the form of machinery to tackle these defaulters. If the increasing strength of these courageous robbers of public money is to be checked in reality, banks have to be empowered and strengthened at the grass-root level. Moreover, a deeper introspection is required in understanding behavioral aspects of willful defaulters, their nexus with political dignitaries and failure on regulatory compliance, social, and, economic factors contributing to willful defaults, then only the economy can be saved from erosion by Non-performing Assets in future.

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RESPONSE IN NEED, REHABILITATION AND COMPENSATION TO CRIME VICTIMS

BIBHA TRIPATHI*

ABSTRACT : India's adversarial Criminal Justice System (CJS) is pro perpetrator and anti victim. From the Victimological point of view, it is considered as Dark Age and Golden age can be there where victims play a direct role in CJS and have a vital say. The bitter taste of the fact could only be realised through intensive works done by the authorities for the development of Victimology as part of Criminology. Authorities have gone up to the extent of saying that the study of victims and victimisation has the potential of reshaping the entire discipline of Criminology. The paper intends to explore the role of Victimology in recognizing the Response in need, Rehabilitation and Compensation to Victims with the help of efforts made at National and International level for establishing a coordination between the triangular duo of response, rehabilitation and compensation and victim, offender and society. It is also submitted through the paper that crime is ultimately a loss to the society and crime is a suffering too. The paper ends with strongly advocating and suggesting for an effective Community Crime Prevention Programme.

KEY WORDS : Victimology, Response in need, Rehabilitation, Compensation, Community Crime Prevention Programme.

I. INTRODUCTION

While writing on Response in need, Rehabilitation and Compensation

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to victims of crime[1] it is hypothesised that most of the victims do not seek criminal sanctions because sanctions are unlikely to help to end the incidents of violent crimes. It has further been hypothesised that the traditional Criminal Justice System which gives effect to victim preferences is also naive in ignoring the circumstances which shape victim preferences. A response corresponding to victims' need and preferences is the need of the hour. There should be sufficient say of victim in determining, rehabilitation and compensation due to the victims. It has also been observed that punishment do serve some purpose but apart from punishing the offender, response, rehabilitation and compensation to victims considering their perspective constitute a whole victimological jurisprudence. It has been advocated through the paper that the ex-gratia payment, which is not only ad hoc and discretionary, but also inadequate cannot rehabilitate the victim to the fullest.

Therefore, it is argued that an approach empowering victims and making them competent in expressing their choices which are less coerced (by their circumstances) than is usual at present[2] is too important to be ignored and too urgent to be neglected. It is further submitted that if we have to talk about response, rehabilitation and compensation to the victims, we should have to take victims' perspective in consideration because perspective matters.

II. DEVELOPMENT OF VICTIMOLOGY

In the modern Criminal Justice System a pro- perpetrator surrounding and anti victim system have been experienced as a dark age from the victims' point of view because it was an era where all offences were viewed as perpetrated against the king or state and not against the victims or their family. An era where victim plays an important and direct role in determining the punishment for actions of another committed against them and being

1. On 30th October, 2021 National Commission for Women Launched Pan India Legal Awareness Programme For Women in collaboration with National Legal Service Authority. I had to speak in the third technical session of the workshop on the topic "Response in need, Rehabilitation and compensation to victims (RNRC)." The present write up is an extension of the thoughts generated in the event.
2. Carolyn Hoyle and Andrew Sanders, POLICE RESPONSE TO DOMESTIC VIOLENCE: From Victim Choice to Victim Empowerment? *The British Journal of Criminology* , WINTER 2000, Vol. 40, No. 1 (WINTER 2000), pp. 14-36 Oxford University Press, https://www.jstor.org/stable/23638528, visited on 10th November 2021

compensated for the same can be termed as the golden age from victims point of view[3]. It would not be irrelevant to mention here that in ancient civilizations the victims of any offence were the central figure in any criminal setting. In our own polity, the injured or the victim had a vital say in matters connected with restitution or retribution. But slowly, as one civilization gave way to another, private revenge gave way to public justice. With the government taking on the responsibility for meting out justice, the offender has become the *prima-donna* and the victim is completely forgotten.

Victimology is a social science regarded as the scientific study of victims[4]. Currently, victimologists tend to find themselves operating within one of three main subgroups; general victimology[5] , penal / interactionist victimology[6] and critical victimology. General victimology is the study of all those individuals or groups who have suffered harm or loss, whether they are victims of a specific crime, general oppression, or a natural disaster. According to Mendelssohn, this vast landscape includes victims of criminal offenders, the social political environment, the natural environment, technology, and even those who victimize themselves. General victimologists are concerned with identifying or developing preventive measures, as well as tools for victim's assistance. They not only want to study the characteristics and causes of victimization, but also want to determine remedies. Interactionist victimology or penal victimology is the study of the dynamics between victims and their offenders. It is limited however to those who have been the victims of a specific crime. It studies the victims' participation in crime causation through their interaction with the offender, the interaction between the victim and the society, and the victim's subsequent role in the Criminal Justice System. It also intends to examine causes to develop remedies that favour the victim. Critical victimology is a reaction of the two above mentioned groups. It seeks to question how criminality and victimity are established,

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3. See, Section 439(2) Cr.PC 1973 & Section 12(1) Legal Services Authorities Act, 1987
4. Drapkin and Viano, 1974, cited in Brent E. Turvey, Wayne Pethrick, Forensic Victimology, Elsevier Publications, U S A ,2009, preface, at xiii, see also, Paul C. Friday and Gerd Ferdinand Kirchhoff (eds) Victimology at the transition from the 20th to the21st Century, World Society Of Victimology Monchangladbach, (2000)
5. Mendelsohn R, "Victimology and Contemporary Society's Trends", *Victimology, an International Journal* (1976)
6. *Infra* note, 7

tolerated, and even sanctioned. But all three are ultimately oriented towards helping victims.

Through the development of victimology, on the one hand it could be noticed that those who were most affected by criminal acts were rarely involved in the criminal justice process and on the other hand various terms have been used to distinguish the types of victims viz; completely innocent victim, victim due to ignorance, voluntary victim, victim more guilty than the offender, unrelated victim, provocative victim, precipitate victim, biologically or sociologically weak victim etc. and on the basis of types of victimology, theories have also been developed like Routine Activity Theory, Victim Precipitation Theory and Psycho- Social Coping Theory etc[7]

7. Routine activity theory-Routine activity theory looks at crime from the point of view of both the offender and crime prevention. A crime will only be committed when a motivated offender believes that he or she has found something worth stealing or someone to victimize who lacks a capable guardian. This theory says that crime occurs whenever three conditions come together: (i) suitable targets; (ii) motivated offenders; and (iii) absence of guardians. A capable guardian is a person or thing that discourages the motivated offender from committing the act.

Psycho- social coping theory-To understand how and why some victims are able to overcome life's problems and some others not, a psycho-social coping model was developed in order to comprehensively deal with psychic, social and physical variables. A psycho-social coping model is an attempt to explain the dynamics of how people deal with problems in their environment. The term "environment" used in this model is referred to as 'Coping Milieu'. The main term in the Coping Milieu is the Coping Repertoire, which is made up of a person's coping skills and supported by four other interacting resources: (i) time; (ii) social assets; (iii) psychic assets; and (iii) physical assets.

Victim precipitation theory -Victim precipitation means a crime is caused or partially facilitated by the victim. Marvin E. Wolfgang developed the theory of Victim precipitation in cases of homicide but his disciple Menachem Amir applied the theory in case of rape. It is worth mentioning here that a significant portion of the social science literature on rape has been marked by misogynist assumptions and a tendency to blame women for their own victimization. (Wisan G. "The Treatment of Rape in Criminology Textbooks" Victimology : *An International Journal* 4. no.l (1979):86-99. Cited in Ronald J. Berger And Patricia Searles, "Victim Offender Interaction In Rape: Victimological, Situational, And Feminist Perspectives", *Women's studies Quarterly*, Vol.13, No.3/4 (Winter 1985) It is assumed that, there often is "some reciprocal action between perpetrator and victim".(The quotes are from the pioneering paper, Von Hentig, Remarks on the Interaction of Perpetrator and Victim, 31 J. CRIM. L. & C. 303, 304 (1940), in which he dealt with the subject in its general aspects rather than with rape alone. See, Wolfgang, Patterns in Criminal homicide24 5-246 (1958). See also, James J . Gobert, Victim Precipitation, *Columbia Law Review*, Vol. 77, No. 4 (May 1977).p.511-553 Jstor visited on 21/4/2014.)

Victimology is a new branch of criminology with the impetus given in the

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The concept also assumes that the offender rests in a passive state and is set into motion primarily by the victim's behavior, that the victim's behavior is a necessary and sufficient condition for the offense. Such observations were also made in Criminology too. Sigmund Freud is considered to be a traditional criminologist, who has not only belittled the gravity of crime against women but also considered them as participis- criminis in cases of rape. Freud bequeathed the notion of rape as a victim-precipitated phenomenon. .(J. B. Miller, ed., Psychoanalysis and Women (Baltimore: Penguin Books, 1973); J. Mitchell, Psychoanalysis and Feminism (New York: Random House, 1974); J. Strouse, (ed)., Women and Analysis (New York: Viking Press, 1974).cited in, Rochelle Semmel Albin, "Psychological Studies of Rape Signs", Vol. 3, No. 2 (Winter, 1977), pp. 423-435) If, as Freud insisted, women are indeed masochistic, rape-either in fantasy or in fact-can satisfy those self-destructive needs.(S. Freud, "Some Psychical Consequences of the Anatomical Distinction between the Sexes" [1925], in *Standard Edition of the Complete Psychological Works of Sigmund Freud,* ed. J. Stachey (London: Hogarth Press, 1964). 5. H. Deutsch, "The Psychology of Women: Motherhood" (New York: Grune & Stratton, 1944).) Helene Deutsch-a follower of Freud-was the major contributor to the view that the female herself is responsible for her own rape. In this view, psychoanalytic descriptions of female psychology were merely descriptions of the male analysts' fantasies about women. Through Sigmund Freud and Helene Deutsch, it could be established that it was not only the victimologists dealing with victim precipitation but also some psychoanalytical criminologists who have also dealt with the concept of victim's precipitation.

Feminists have demonstrated the relationship between trivialization of rape and the cultural view of women as inferior and unimportant. The female stereotype includes the notion of a female vulnerability so great that women who have been raped are viewed as scarred for life, and the victims themselves often live according to this cultural expectation. One of the reasons of non reporting of rape cases is that the police remains skeptical as to whether she consented.(James J. Gobert, Victim Precipitation, *Columbia Law Review*, Vol.77 No.4 (May1977),P-511-553 At 517) Feminists assert the law of rape does not recognize women's right to sexual autonomy as absolute. Instead, rape law reflects the sexually coercive society in which it operates.(Ann Norton, Talking Back To Sexual Pressure, Whole Earth Rev., Summer 1992, At 111 (Reviewing Elizabeth Powell, Talking Back To Sexual Pressure (1991) cited in N. Banerji, Compensation to the Victims of Criminal Violence in India, *Banaras Law Journal*, Vol.12,(1976), 110-128, at 128

Feminists have taken strong exception over the work of Amir, a student of Marvin Wolfgang, who applied his supervisor's methodology not only to cases of homicide but also to rape too. It became an iconic target for a number of feminists who renamed victim-precipitation as victim blaming (Clark, L. And Lewis, D. *Rape: The Price of Coercive Sexuality,* Toranto: Women's Press, Cited In Paul Rock Theoretical Perspectives On Victimization, Sandra Walklate(ed) (1977)

Amir's application of the concept "victim precipitation" to rape cases has been roundly criticized(Weis, Kurt and Sandra S. Borges , "Victimology and rape: the case of the legitimate victim." issues in criminology 8 (Fall):71- 115. 1973, cited in**,** Vicki

United Kingdom by Margery Fry[8] who was never tired of advocating the need for translating abstract theory into legislative terms, the idea of state compensation to victims of criminal offences was mooted by him. Then after, several countries have legislated for payment of compensation to victims of criminal offences from public funds. But this has not touched the developing world of Asia, Africa, and South America.[9]

III. UN BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER, 1985

After the theoretical development in the field of victimology, the significance of UN Basic Principles of Justice for Victims of Crime and abuse of Power, 1985(UNBP) must be discussed because it has not only provided provision for victims of crime but also made a distinction between victims of crime and abuse of power. The cases in which Supreme Court

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Mc Nickle Rose, "Rape as a Social Problem: A By product of the Feminist Movement" , *Social Problems*, Vol. 25, No. 1 (Oct., 1977), pp. 75-89 Published by University of California Press on behalf of the Society for the Study of Social Problems

and rejected in principle by feminists**.** Now feminists are developing the concept of 'feminist victimology'(Feminist Victimology uncovers the gendered nature of victimization, recognizing victimization as the product of power relations, combating sexism and other types of prejudice in law and criminal justice, and working toward the empowerment of women. Feminist approaches to victimology are likely to emphasize activism and advocacy for social change. See, Sandra Walklate, *Victimology: the victim and the criminal justice process*, London: Unwin Hyman, (1989).

It is apparently clear that rape(It is understood that sexual offenders can be male or female, and victims can be of either sex; however, throughout this chapter, offenders will be referred to as female, unless otherwise noted.

a *mala-in se* crime has a chequered history of interpretation. It has been interpreted as most hated crime, a gender neutral crime, a social problem and as a violent crime. Each interpretation is linked with the views with which woman has been seen and analyzed in a traditional/progressive/feminist/criminological perspective Bibha Tripathi, "Victims precipitation theory, Rape and Judicial trend: A study in criminological perspective", *Dehradun Law review,* (2014). These perspectives have affected the overall compensatory jurisprudence too.

8. Margery Fry, Jusice for victims, Journal of Public Law, Vol.8, 1979
9. In India, the government sanctioned two pilot projects for the first time in 1980, one on the study of victims of homicide in Delhi and Bangalore and the other on victims of fatal motor vehicle accidents in Delhi, Kumarvelu Choklingam, Measures for Crime Victims In The Indian Criminal Justice System, recourse material series no 81, the 144th international senior seminar visiting experts paper, 97-109

has ordered monetary compensation[10] were primarily the cases of State Tort. Allowing compensation to victims of crime could only be recognised only through the UNBP. Its principle one gives a comprehensive definition of term 'victim'[11] and mentions certain basic principles of justice ie; access to justice and fair treatment, [12]restitution[13], compensation[14] and assistance[15]. The principles dealing with access to justice do focus on the need that victims should be treated with compassion and respect for their dignity and enables victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. The assistance mechanism could be linked with response in need because it recognises that victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

Despite providing comprehensive guidelines for victims' compensation the plight of victim remained unchanged in most of the countries in most of the cases.

IV. COMPENSATORY JURISPRUDENCE

The sad plight of the victims of criminal violence should not be ignored and they must be compensated. It has also been supported by number of authorities that rather than imposing fine on the offender, victim's plight and restitution should be the first consideration in resolving the criminal victim conflict[16]. The increasing use of compensation by justice systems throughout

10. *Infra,* notes 17 &18
11. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.(Principle 1) A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. (Principle 2)
12. See Principle 4 to 7
13. See Principle 8 to 11
14. See, Principle 12 to 14
15. See, Principle 14 to 17
16. Supra, note 10

the world is due to a vast amount of research in the field of victimology and now it is an established fact that state compensation to victims of violent crime is not only justified but also the need of the hour to go beyond the slow motioned and high priced civil suits to compensate victims, even if the offender could not be identified or traced.

(i) Development of Laws of compensation in India

The Constitution of India does not expressly provide for a right to compensation unlike other legal systems. Nor is there any specific legislation, which deals with such compensatory relief. Despite this the Court has awarded compensation, exercising its inherent power to do complete justice and awarding appropriate relief under Art.32. In the initial phase of evolution of compensatory relief, the Court did not offer any firm jurisprudential basis for such a remedy. The award of compensation as a remedial measure has been established by interpretative techniques of the Supreme Court, even though the Court has not been consistent in awarding the same. The award of compensation by the Court has evolved as a discretionary relief, even though it has emphasized justifications for such a relief. For the first time in the history of awarding compensation, it was the case of *Khatri* v. *State of Bihar*[17] in which the court considered the issue of award of monetary compensation and upheld the doctrine that the Supreme Court under Art. 32 and the High Court's under Art.226 can award compensation[18] in the event of infringement of Fundamental Right to life and liberty by the State relying on Constitutional Tort theory[19]. It is pertinent to note that Courts have awarded compensation as a remedy for violation of fundamental human rights, to the individuals for injuries suffered at the hands of State and its employees[20] and in Chandrima Das case the victim could get compensation only because of

17. AIR 1981 SC 928 at 1068
18. See, *Rudul Sah v. State of Bihar*, AIR 1983 SC 1086, Sebastian *M. Hongray v. Union of India* AIR 1984 SC 1026, See also *Nilabati Behara v.State of Orissa*(1993) 2 SCC 746, *Bhim Singh v. State of J&K* AIR 1986 SC 494, *D.K.Basu v. State of west Bengal (1997*) 1 SCC 416, Also See *In Re Death of Sawinder Singh Grover* 1995 Supp(4) SCC 450, Chairman, *Railaway Board and Ors, v. Chandrima Das* AIR 2000 SC 988
19. J.L.Kaul and Anju Vali Tikoo Revisiting Award of Compensation for Violation of Fundamental Human Rights: An Analysis of Indian Supreme Court Decisions http://ailtc.org/publications/revisiting_award_of_compensation.pdf
20. *Id*; at 48

the fact that the accused persons were employees of Railway Government[21]. There are certain laws also to provide compensation to different types of victims. The Protection of Women from Domestic Violence Act, 2005, the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Prevention of Caste-Based Victimization and Protection for Victims: The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 are a few. The provisions relating to the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 are very important for the purpose of resolving the problem of uniform and comprehensive provision for women victims. It has been mentioned there that rehabilitation has a wider connotation. It takes into account the cost borne by a victim to travel to the court. Every woman, a minor or a person older than 60 years of age, is allowed to bring an attendant whose expenses must be met by the state during hearing, investigation and trial. The state is liable to pay daily maintenance, not less than minimum wages paid to agricultural labourers, to the victim and her attendant. Moreover, the state is required to pay a diet expense to the victim and her attendant. This payment has to be made no later than three days by the district magistrate. The victim of any atrocity is supposed to get 25%when the charge sheet is sent to the court and 75% after the conviction[22].

There are several reports of various committees and commissions on compensation to the victims of criminal violence in general and women victims in particular[23].

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21. *Hindustan Paper Corporation LTD. V. Anant Bhattachargee*, (2004) 6 SCC 213, the Supreme Court held that it is not every violation of the provisions of Constitution or a statute which would enable the court to direct grant of compensation.

22. Rule 11, The Provisions Relating To The Scheduled Castes And The Scheduled Tribes (Prevention of Atrocities) Rules, 1995

23. See, The Law Commission of India, 1994, 1996 and 2009 in 152nd Report on Custodial Crime,154th Report on Code of Criminal Procedure 1973, and 226th Report on Inclusion of Acid Attack in IPC and Compensation.

    The Law Commission, in its Report in 1996, stated that, "The State should accept the principle of providing assistance to victims out of its own funds, (i) in cases of acquittals; or (ii) where the offender is not traceable, but the victim is identified; and (iii) also in cases when the offence is proved" (Law Commission of India Report, 1996). See also, The Justice Malimath Committee on Reforms of Criminal Justice System (Government of India, 2003)

    The Justice V. S. Malimath Committee has made many recommendations of far-reaching significance to improve the position of victims of crime in the CJS, including the victim's right to participate in cases and to adequate compensation. Some of the

Number of schemes[24] and funds has also been created to provide adequate relief to the victim[25].

Under the influence of various developments at International level particularly UNBP and the European Convention on the Compensation of

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significant recommendations include:

• The victim, and if he is dead, his or her legal representative, shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with seven years' imprisonment or more;

• In select cases, with the permission of the court, an approved voluntary organization shall also have the right to implead in court proceedings;

• The victim has a right to be represented by an advocate and the same shall be provided at the cost of the State if the victim cannot afford a lawyer;

• The victim's right to participate in criminal trial shall include the right: to produce evidence; to ask questions of the witnesses; to be informed of the status of investigation and to move the court to issue directions for further investigation; to be heard on issues relating to bail and withdrawal of prosecution; and to advance arguments after the submission of the prosecutor's arguments;

• The right to prefer an appeal against any adverse order of acquittal of the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation;

• Legal services to victims may be extended to include psychiatric and medical help, interim compensation, and protection against secondary victimization;

• Victim compensation is a State obligation in all serious crimes. This is to be organized in separate legislation by Parliament. The draft bill on the subject submitted to Government in 1995 by the Indian Society of Victimology provides a tentative framework for consideration;

• The Victim Compensation Law will provide for the creation of a Victim Compensation Fund to be administered possibly by the Legal Services Authority. (Government of India, 2003) See also, The National Commission to Review the Working of the Constitution The Commission to review the working of the Constitution (Government of India, 2002) has advocated a victim-orientation to criminal justice administration, with greater respect and consideration towards victims and their rights in the investigative and prosecution processes, provision for greater choices to victims in trial and disposition of the accused, and a scheme of reparation/compensation particularly for victims of violent crimes.

24. The schemes are being criticized by judges too. Chief Justice Manjula Chellur of Bombay High Court opined that the compensation awarded to victims of rape, sexual assault and acid attacks under Maharashtra's Manodhairya scheme is insulting, inhuman and shameful. There has been no application of mind while formulating this scheme,"

25. See. Central victims compensation fund 2015, http/mha.nic.in/sites/upload_files/mha/cvcf dated 06 Sept 2016.P D F , draft scheme for relief and rehabilitation for victims of rape revised by National Commission for Women 2010, http/ncw.nic.in/PDFfiles/Scheme_Rape_Victim.pdf

Victims of Violent Crimes,1983 and laws of many developed common and civil countries like the U K[26], USA[27], New Zealand[28], Canada[29], Australia[30], France[31], Japan[32] etc. various legal changes have been brought in India in relation to compensation to the victims of violent crime including rape, sexual assault or any other violent act in which women become the victim. Now it is established that victim's rights are human rights and in case of violation they are entitled to compensation even if the violator is neither state nor its employees.

In case of interactionist or penal victimology, the Code of Criminal Procedure (hereinafter referred as Cr. PC) contains provisions for compensation, which was earlier limited only to the amount of fine recovered from the accused[33] . The Criminal Law Amendment Act of 2008[34] and 2013[35] has also tried to bring considerable change in the victim's condition but much more is to be done to reduce the plight of victims.

(i) Judicial trend

Judiciary in general has shown a positive attitude to reduce the victims' plight by extending the meaning of the term 'life' under article 21 of the Constitution of India[36] and recommended National Commission for Women to prepare a compensation scheme for rape victims[37]. The court has taken *suo-motu* cognizance in case of rape of a 20 year old woman of Subalpur village on the orders of community panchayat as punishment for having

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26. Criminal Injuries Compensation Act 1995 and Criminal Injuries Compensation Scheme, 2012
27. Victims of Crime Act, 1984
28. Accident Compensation Act, 2001 and Reparation under the Sentencing Act, 2002
29. Victims of Crime Act, Revised Statutes of Alberta 2000 and Victims of Crime Regulation 63/2004
30. Victims Rights and Support Act, 2013
31. Guarantee fund (fonds de garantie)
32. The Basic Act on Crime Victims Act, 2004 and The Crime Victim Support Act, 1980
33. See Sections 357 Cr.PC, 357(1)(b), 357(1)(d) and Section 421 Cr. P. C,
34. See Section 2(w)a, definition of victim, section 357A, victim compensation scheme
35. See, Sections 357B and 357C, CrPC 1973
36. *Bodhsattwa Gautam V. Subhra Chakraborty,* AIR 1981 SC 928, the Supreme Court observed that rape is violative of the victim's most cherished fundamental rights, namely the right to life contained in article 21. The case is also known for interim compensation.
37. *Delhi Domestic Working Women,s Forum V. Union of India*, (1995)1 SCCs 14

relationship with a man from a different community and did justice to the rape victim by directing the West Bengal Government to make a payment of Rs. 5 lakhs to the victim for her rehabilitation[38]. Recently the court has suggested for a uniform scheme of compensation to the victims of rape for all the States and Union Territories[39].

(ii) Crisis of compensation in India

Apart from all the developments in the field of compensation the question of monetary compensation for rape, however, has been more controversial with special reference to cases of rape of minor, rape under the promise of marriage with a minor or major and in cases of child born out of rape etc. the amount of compensation varies from case to case like in case of Dalit woman, literate woman, modern woman, rural woman, sex worker or prostitute the approach differs.

In the backdrop of such events, there continues to be heated debate around certain aspects of monetary compensation for rape as to who is more worthy of compensation, an adult or a minor? Someone merely raped or someone raped, beaten and wounded? Should compensation be more if a custodian of the law, for example a police officer, is the accused? The extremity could be noticed with the pathological political patriarchal notions when the politicians prevent any real public conversation on such issues. They use to make provocative comments on the then governments' rape compensation policy and use un parliamentary language against one another. Such incidents reveal two major anxieties: one, that rape is perceived to be something different from other crime (which is troubling in itself) so much so that it cannot be similarly 'compensated'. And two, no one is really clear what is an acceptable amount for compensation for the crime.

This is not surprising, given the confusion even about what is an acceptable punishment for rape. Living under the dark cloud of these realities, it is no wonder that women's rights activists have not been celebrating the pronounced compensation schemes, many going on record with their cynicism to state that it is 'too little, too late'.

However, compensation does have its own place in restorative justice[40].

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38. *In re: Indian women* (2014) 4 SCC 786
39. *Tekan alias Tekram V. State Of Madhya Pradesh* AIR 2016 SC 817
40. Bibha Tripathi, "Restorative Justice: An Overview", Vol 61, Issue 1 *Pajna,* 2016

It has also been advocated that to increase practical utility of the statutory provisions law governing compensation in India, it is imperative to convert discretionary power of the court into a legal mandate requiring it in all suitable cases to pass compensation orders and when it decides not to do so it be obligatory to record reasons for this.

Moreover, the deep rooted patriarchy shows its real face when a woman actually accepts compensation. Bhanwari Devi did take compensation for what happened to her after women's groups lobbied for it, but did not use it eventually as the community started 'saying things' like rape was an excuse for taking the money, implying that by taking money she was identifying herself as something like a prostitute. In the context of the gaze we live under – a gaze that is moralistic, and looks at rape as a sexual act more than a crime, and that finds offensive/immoral the idea of money for sexual exchange – speaking of money and a sexual act, regardless of the violence and force, is too close to other sexual taboos like sex work or prostitution.

V. LEGISLATIVE DEVELOPMENT IN INDIA

So far as the legislative development is concerned, we find in view of UN declaration and Law Commissions Recommendations in its 42nd and 226th report along with Justice Malimath Comittee Report some acts and rules contained provision for compensation. If we take note of Code of Criminal Procedure, we find that it has been amended many times. Through the amendments made in the year 2008, 2013 and 2018 the term victim was defined and apart from the fine imposed on the offenders, provision was made to further compensate the victim if the amount of fine is not appropriate and State Legal Service Authority and District Legal Service Authority has to decide the amount after due inquiry.

(i) Role of NALSA, SALSA and DALSA and desired changes

In recent times, the role of National Legal Service Authority (NALSA), State Legal Service Authority (SALSA) and District Legal Service Authority (DALSA) has also become important. It has been realised that NALSA and Cr. PC has to go hand in hand. Section 12 of NALSA entitles every person who has to file or defend a case to legal services if the person comes under the category of section 12 (a) to (h). So far as the category is concerned it can be submitted that now LGBTQA+ should also be added under a new sub clause 12 (i). Here, it is worth noticing that any assistance by NALSA or

DALSA can only be given to those who have to file or defend a case and response in need is *a-priori* to section 12. Any destitute, distressed, harassed and victimised woman first of all require listening, that someone should listen to her patiently, console her, counsel her and then if she agrees to file a case may be processed to assist. Under Section 357 (A) it has been mentioned that if the victim needs immediate first aid or medical treatment than after getting approval of police officer or magistrate she can be helped. Practically it is more viable that she should immediately get first aid and medical treatment and then after approval may be taken. If possible in place of police officer, protection officer should be mentioned.

VI. TRIANGULAR DUO OF RESPONSE REHABILITATION AND COMPENSATION AND VICTIM, OFFENDER AND SOCIETY

This part focuses on the Triangular Duo of Response Rehabilitation and Compensation and Victim, Offender and Society. This part pays due attention towards global efforts as to how they are trying to coordinate between the two. There is a move towards emphasizing rehabilitation rather prosecution. Rehabilitation has a wider connotation. So proper policy should be prepared to plan as to how different victims should be rehabilitated. It should also be remembered that a criminal act is analyzed in triangular relationship where the offender, the victim and the society is directly linked with. Therefore, response is also multi dimensional effort, from responding to rehabilitating many stages of restoration can be there ie; listening, consoling, counseling, repairing, restoring and rehabilitating.

In United States of America Victim-Services Programs provide short-term crisis counselling and support to crime victims and their families. Typically, advocates arrive at the scene of a crime and offer physical and emotional comfort, establishing a support system for victims. Advocates help victims' access community services, answer victims' questions, and provide information[41]. While police focus on locating and arresting offenders,

41. Victim-services programs blossomed after the 1981 attempted assassination of President Reagan, as even President Reagan had difficulty acquiring information about the status of his case. President Reagan's frustration led to the passing of the Victims of Crime Act in 1984, which provided federal subsidies to state victim assistance and compensation. Patrycia Hatten and Mel Moore, Police Officer Perceptions of a Victim-Services Program, *Journal of Applied Social Science* , September 2010, Vol. 4, No. 2 (September 2010), pp. 17-24, Sage Publications, https://www.jstor.org/stable/23548934, visited on 15th October, 2021

prosecutors try cases, and judges hand down sentences, victims often were left out of the criminal justice.

(i) National crime victimisation survey

The National crime victimisation survey (NCVS) is a survey conducted annually by the Bureau of Justice Statistics that provides data on surveyed households reporting that they were affected by crime[42]. The interviewers gather data on crimes, whether or not those offences have been reported to the police. It is now being advocated by many scholars[43] that a system of NCVS must be developed in India too[44] so that a proper record can be maintained of those who have suffered loss/harm due to the criminal incident and their cases could not be reported due to one or the other reason.

(ii) Victim impact system

It is worth mentioning that compensation and its amount especially for rape cases has gained much controversies and political colour too. Here, it is worth mentioning that the US Supreme Court in *Payne V. Tennesse* case focused on the rights of crime victims to make a Victim Impact Statement during sentencing phase of a criminal trial. Since Victimology deals with vagaries of human behaviour therefore it is also the need of hour to take personal note of devastating impact of harm caused by the criminal acts over the victim.

(iii) Post traumatic stress disorder

It is a fact that victims of crime and violence do suffer from invisible wounds that affect them emotionally and psychologically subsequently leading them to suffer symptoms of Post traumatic stress disorder. Therefore, in the rehabilitation policies it is required that they must get relief from such stress.

(iv) Community crime prevention programme

Efforts are also being made for effective Community Crime Prevention Programme. Crime prevention is too important a matter to be left either to makers of law or to the functionaries of CJS. In western countries community

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42. Frank Schmalleger, *Criminology Today*, Chapter 10, "Criminal Victimization", 9th Edn, (2019), at page 261
43. G.S.Bajpai, https://indianexpress.com/article/opinion/columns/crime-data-in-india-6035032/ visited on 3rd October, 2019
44. The NCVS Victimization tool can be reached via http:/www.bjs.gov/index.cfm?ty=nvat, Supra Note 41

crime prevention programme (CCPP) are receiving more and more attention. We should also strive to moot the idea of community crime prevention programme. Concept of Good Samaritan should be introduced in the CCPP. Such efforts will be in consonance of UN declaration principle seven, focusing on informal mechanism for the resolution of dispute. Funds and budgets are always crucial for welfare measures. Therefore, in place of corpus funds separate budget allocation is also needed.

Again, some theories of Victimology especially the Routine Activity theory can be very helpful in this regard. It says that most of the criminal incidents occur where a motivated offender gets a suitable target and there is absence of guardian. This theory highlights the fact that the offender is usually a motivated offender not in search of any specific victim rather any one can randomly be the victim if there is absence of guardian. Need not to say that community policing, proper patrolling and installment of CCTV cameras at all sensitive places and on highways, ropeways and balloon rides, boat rides etc. can reduce the incidents of crime up to a great extent.

VII. CONCLUSION

On the basis of discussion, it is concluded that Victimized persons are active help-seekers. Response should not be focussed only to sustaining victims' commitment to the prosecution effort rather protecting them from further violence too. Response in need means whatever is done to victims before the beginning of criminal justice process and does not end with conviction or acquittal of the offender. The background context should also be taken into account. It should also be understood that the victims are often torn between their desire to escape the violence and their fear of being isolated in the wider world.

Now it is submitted that different victims have different aims and needs and therefore the CJS is invoked for different but overlapping reasons. Therefore, it is suggested that a victim empowerment model should be developed. Offenders, if identified and apprehended, should also be studied in detail.

Restitution, restoration and reconciliation of victims are some other significant issues to be touched. Restitution is said to be punitive and rehabilitative. It is also said to serve the purposes of deterrence and criminal therapeutics. Since it is one of the alternatives in sentencing policy, it is a

flexible means limited by the judge's imagination, the offender's willingness to participate, and the readiness of the victim to accommodate him/her to the arrangement. Though there are number of cases of rape in which out of court settlement took place but when Supreme Court got it done, it led to huge controversy particularly amongst the feminist scholars[45]. It has also been realised that amongst several measures prescribed for the compensation of victims, the provisions mentioned under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 are considerably practical but the foremost problem is of implementation.

Rules should neither lead to a conclusion as a symbol of social conflict nor should the compensation be awarded as a form of humiliation. It is now well settled that a victim of criminal violence must be compensated apart from the punishment given to the offender. Brutalities of the crime not only affect the punishment but also the compensation too. Following the demand of Supreme Court regarding enactment of a uniform law on compensation and implementing the same, may have certain practical problems and there are certain very pertinent issues to be touched while discussing severe punishment and sufficient compensation. There are certain cases of alleged rape and sexual assault which ends in acquittal for number of reasons. Therefore, it is also submitted in the paper that in rape and other offences of sexual assault the professional ethics must be sound enough either they are medical person or they are police personals or they are advocate or judges. Everyone is equally important pillar of the justice system. The medicos should perform their duties with utmost care and responsibility so that there is no loop hole or lacunae in the medical report. No woman in any circumstance should attempt to lodge false case[46]. Compensation in cases of marital rape is subject to recognition of marital rape as an offence in India. Compensation in cases of sexual assault of LGBTQ should also be dealt with same sensitivity. Scope of reconciliation and mediation in cases of criminal violence must also be searched. Therefore, the paper ends with a concluding observation that an honest 'victim centric' and 'empathetic attempt' may be more helpful to the hapless victims.

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45. *Baldev Singh & others v. State of Punjab* A.I.R. 2011 S.C. 1231

46. It is admitted on the ground of acquittals and it should be accepted as a harsh reality of today's time.

GLORY OF PARLIAMENTARY DEMOCRACY: SEVENTY-FIVE YEARS OF INDIAN EXPERIENCE

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ANSHU MISHRA**

"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 but rarely in history, when we step out from the old to new, when an age ends, and when the soul of a nation, long suppressed, finds utterance..... The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but so long as there are tears and suffering, so long our work will not be over. And so we have to labour and to work, and work hard, to give reality to our dreams. Those dreams are for India, but they are also for the world."

-Pt. Jawahar Lal Nehru[1]

ABSTRACT: - Democracy is the most representative form of government as far as the conscience and consciousness of the people are concerned. There is hardly any country today, which would like to be called non-democratic. The 21st century world has been of organized governments and almost all the civilized countries across the globe have democracies either in the Presidential form or in the Parliamentary form of government. The democratic system ensures three basic ideals: individual rights, liberty and

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1. 'Tryst with Destiny', address of Pt. Jawahar Lal Nehru (the first Prime Minister of the Republic of India) in the Constituent Assembly of India, delivered on 14th August 1947

equality. These ideals are enshrined in the Constitution of India as its integral part as the basic structure.[2] In India, the framers of the Constitution were also in strong favour of the democracy, particularly parliamentary system of government, which is based on the Westminster-model[3] not on the Washington-model[4], for having a close relationship between the Executive and the Legislature. However, when this matter was being discussed in the Constituent Assembly as to whether the Presidential system would be more suitable or the Parliamentary system? except few, majority of the members supported the idea of adopting the parliamentary form of government. Thus, democracy in the Parliamentary form of government was the unanimous choice of the Constituent Assembly and the reason behind this decision was that the people of India had some experience in working with this type of system before the independence. It provides with a government to be directly responsible to the Legislature (the representative body of the people) and ultimately serves the general interest of the common people. In this system of governance, the Executive is not only accountable to the Legislature but also stays in office only as long as it enjoys the confidence of the Legislature. The Indian Parliamentary system of government is unique in many ways. The present paper focuses evolution and transformation process from the democratic City-States to Republicanism, or Representation up to the liberal democracy, that finally took place in the political ideas and executed into the political institutions in the new world order in general and in Independent India in particular. It also examines the glory of the Indian Parliamentary form of government, and the topical aspects relating to its form that had arisen from time to time.

KEY WORDS : Democracy, Parliamentary form of government, Presidential form, the Judiciary, Liberal Democracy, Cabinet (Council of Ministers).

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2. *Kesavanand Bharati v State of Kerala* (1973) 4 SCC 225, S M Sikri, CJ included in the list of basic features the republican and democratic form of government; freedom of individual; and Jagmohan Reddy, J. added to the list: liberty and equality.
3. The term 'Westminster-model' is commonly used to encapsulate the characteristics of representative government prevailing in the United Kingdom.
4. The term Washington-model refers to denote the characteristics of the presidential form of government prevailing in the United States

I. INTRODUCTION

A famous Latin maxim reveals the fundamental principle- *vox populi suprema lex est*, i.e. 'the voice of the people is the supreme law'. At the beginning of the twenty-first century, democracy is at high tide in the world. In this century, according to the Freedom House, the number of democracies in the world and the proportion of the Nation-states that are democratic are higher than ever before[5]. Though, there is strange paradox about the democracy; it is a contested yet normative term.[6] The idea of democracy, as it evolved from its ancient meaning to the form it has taken in the capitalist era, has been a subject of profound and intense controversy. Nevertheless, Democracy is widely accepted in the politico-legal world as a Western idea born in the Age of Enlightenment and enlarged by capitalism for the promotion and protection of individual rights. In the modern world, generally, there is either Westminster or Washington models of democratic government. On the basis of the relationship between the Executive and the Legislature, democratic governments are classified into two types: parliamentary and presidential. A parliamentary or cabinet form of government is a system of governance in which a close relationship is maintained between the two, whereas the presidential system rests on the principle of separation of powers and checks and balances.

Basically, Democracy is government by the people which is formed by the will of the people.[7] It is a process rather a state of being a continuous

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5. Report of Freedom House (New York, 1941), it is a non-profit and non-governmental organisation which promotes and monitors political rights and civil liberties in the countries around the world. The survey rates each country on a seven-point scale for both political rights and civil liberties. In the scale, 1 represents most Free State and 7 the least free. It divides the world in three broad categories: i) free - rating (1- 3), ii) partly free-rating (3- 5.5), iii) Not free-rating (5.5-7)

6. C K Lal, *Human Rights, Democracy and Governance*, Action International Asia, 2010, p64

7. See also,…"but, in a larger sense, we cannot dedicate—we cannot consecrate—we cannot hallow—this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and *that government*

journey towards ever-growing goals.[8] The people realise that they are responsible for choosing the right and proper persons to represent them in national affairs and decision-making. The real test of democracy is to give rights to the common people to decide for themselves the nature of the government, they would like to have. The cornerstones of democracy are justice, liberty, equality, fraternity and limited government[9]. R. V. Dhulekar (United Provinces), a member of the Constituent Assembly, has rightly remarked on the Democracy. He said:

> "What is democracy? I define it, in one word. Democracy is accommodation. Any person, who does not understand this small definition of democracy, cannot be a democrat at all. Any person who feels dissatisfied after going out of a Committee and harps upon the fact that he was not beard and keeps a grievance going on, I say that he is not democratic. When 10 persons sit together and apply their mind, they either agree or disagree. If they come to a certain conclusion, I think and believe that it is a democratic resolution and it must be obeyed. Therefore, I say, when we 300 and more persons sat together, applied our mind and produced a Constitution—I may not have had my resolution passed and other people may feel that their resolution has not been passed, that is not the point at issue— it is then the result of combined attention and as such it must be obeyed. It is sacred.[10]"

Democracy, in the modern sense, needs over and above its principles, a freely elected legislature usually with an adult franchise i.e. through the voting right. It is a representative government and a form of politics in which citizens are engaged in self-government and self-regulation which requires academic freedom for neutral debate in making of the public policies. B.P.

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of the people, by the people, for the people, shall not perish from the earth'—the world-famous speech delivered by U.S. President Mr. Abraham Lincoln at the dedication (November 19, 1863) of the National Cemetery at Gettysburg, Pennsylvania, the site of one of the decisive battles of the American Civil War (July 1–3, 1863)

8. John T. Reid : *Democracy Administration and Politics in Modern Democracies* : Edited by : Sardar Patel Institute of Administration Madras, 1976.
9. See, the Preamble of the Constitution of India

Jeevan Reddy J., has remarked that in a democracy, the discussion of public issues and the conduct of public officials must be uninhibited, vigorous and robust[11]. A successful democracy necessitates that people should have the maximum information on the state of affairs and if a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their Government is doing.[12]

In a real democracy, there should be enough places to visualize for play of political forces in logical and rational manner. A successful democracy requires many things, some of which are ensured by the operation of the legal process. The essence of democracy is the right to form political party for political speech and organize public meeting and political protest. The classical remark, of P. N. Bhagwati J. about the democracy, is praiseworthy to note, as he said that:

> "The citizens have a right to decide by whom and by what rules, they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic Government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government. It is only if people know how government is functioning that they can fulfil the role which democracy assigns to them and make democracy a really effective participatory democracy.[13]"

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10. XI, *Constituent Assembly Debates*, p826, (VI Reprint, 2014)
11. Cited in *Fundamental Rights and Their Inforcement,* Uday Raj Rai, p32 (Eastern Economy Edition, 2011)
12. *S P Gupta v Union of India,* AIR 1982 SC 149 para 64 as per P N Bhagwati, J.,
13. *Ibid,* it is now widely accepted that democracy does not consist merely in people exercising their franchise once is five years to choose their rules and, once the vote is cast, then retiring in passivity and not taking any interest in the government. Today it is common ground that democracy has a more positive content and its orchestration has to be continuous and pervasive. This means inter alia that people should not only cast intelligent and rational votes but should also exercise sound judgment on the conduct of the government and the merits of public policies, so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of government - an attitude and habit of mind. But his important role people can fulfill in a democracy only if it is an open government where there is full access to information

Thus, in a democratic set-up, there is sub-division of Parliamentary and Presidential forms of the government. In short, the Parliamentary system is characterized by fusion of powers and the Presidential system by a separation of powers. But, in common practice, there is always an apprehension that the Parliamentary democracy, in a federal setting, may be handicapped due to social strains; fragmented elite politics and influence of external powers. Therefore, the objective of the Constitution[14] should overcome any challenges that may come in the functioning of true democracy.

II. PARLIAMENTARY DEMOCRACY: THEORETICAL PERSPECTIVE

The current discourse on democracy flows from two broad genres of theoretical writings: first, theories of modernization and political development that look for prior structural transformations and use these as yardsticks of democratic development; and secondly, the pluralist theories that look for fulfilment of procedural conditions that is, regular and fair elections, a free press and democratic participation to evaluate democratic advances or retreats[15]. Whereas structuralists and pluralist theorists have focused on domestic aspects, a new body of theoretical work has sought to link regime type to international developments[16].

In recent years, the emphasis in the study of democracy has shifted from the explanation of the prerequisites of democracy to its procedural conditions. This is taking place because of the rapid replacement of authoritarianism with democratic regimes in Eastern Europe, Latin America and Africa. These countries fulfilled very few of the structural prerequisites that had been considered essential for democracy. Despite that, democratic regimes had emerged and met with a fair degree of success. Thus, there are

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in regard to the functioning of the government, para 65

14. Constitution is a document that relates to the governance of a country. It provides the frame-work within which the governance is carried on.
15. Supra Note 18 p4
16. Bruce Russett, a leading proponent of this work, argues that the spread of democracy will lead to peace between democratizing countries. He cites the post–World War II experience among European countries and between the United States and Canada to prove that democracies do not go to war with each other. Russett also extends his thesis to pairs of regional rivals- Greece and Turkey, India and Pakistan - as possible "dyads" to test his democratic peace thesis. Not unlike the elite bargain theorists; Russett defines democracy in procedural terms derived largely from western experience.

now two competing sets of criteria for judging whether a country can be considered a full-fledged democracy not[17]? Both have been applied in South Asia.

III. FORM OF PARLIAMENTARY DEMOCRACY

The term 'Parliamentary democracy' provides a powerful clue as to the perspective adopted towards the United Kingdom political system. If the word 'parliamentary' is emphasised, then most likely focus of attention is upon processes of representation and the legitimation of government outputs through those processes. Representation has traditionally formed an essential term in the language of legitimation used by decision-making to establish their credentials to act on behalf of those not actually present at the point of decision, and also to assert their responsibility and accountability for decisions taken. As such, it is not exclusively a part of the lexicon of democracy[18]. In parliamentary democracy, the most fundamental phenomenon is that parliamentary representation serves to include 'the people' in decision-making, indirectly and infrequently through the process of elections; yet, simultaneously, it serves to exclude them from direct and continuous participation in the decision-making process.[19]

As such, the parliamentary system contains some special features that are different from presidential system. These features are discussed by various writers like Walter Bagehot[20], K.C. Wheare, and Ivor Jennings etc. In this

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17. It has at least universal, adult suffrage; recurring, free, competitive and fair elections; more than one political party; and more than one source of information. In addition, democratic institutions, existing rights and also the decision-making process should not be constrained by non-elected elites or external powers. Among the countries that meet these minimal criteria, further empirical analysis is still necessary to detect the degree to which they have achieved the two main objectives of an ideal democracy: freedom and equality- See, Robert Dahl, Polyarchy: Participation and Opposition(New Haven, CT: Yale University Press, 1971; see also, Philippe Schmitter and Terry Karl, 'What Democracy Is...and Is Not', in Larry Diamondand Marc Plattner (eds.),The Global Resurgence of Democracy (Baltimore, MD: Johns Hopkins University Press, 1993), pp39–52 (pp45–6)
18. David Judge, Whatever Happened to Parliamentary Democracy in the United Kingdom, *Parliamentary Affairs* Vol 57, Issue 4 July, 2004 p 682
19. Id at 683
20. SAM Wastewater, Walter Begehot: A Reassessment, Vol 35, No1 Pp 39-49 (Winter, 1977)

system, the Head of the State exercises nominal power. He may be the President, the Governor-General, the King or the Queen. In this system, constitutionally the Head of State enjoys many powers, but, in practice, these powers are utilized by the ministers in power. The ministers run the administration in the name of the Head of the State, but the entire responsibility of the administration lies on their shoulders.

Walter Begehot explains the cabinet system of Great Britain as "a hyphen that joins a buckle that fastens the executive and legislative departments together."[21] Developed in Western Europe and particularly in Great Britain, parliamentary government provides the pattern usually assumed by democratic experiments in Eastern Europe, Asia and Africa. In common usage, the term parliamentary government is reserved for those political systems that not only are parliamentary but are based on free and competitive elections. This excludes one party dictatorship, exercising power within a formal parliamentary structure.

Another feature of the parliamentary government is that the Cabinet (the Council of Ministers headed by the Prime Minister) is collectively responsible to the Parliament. The Cabinet is a committee of the party that has majority in the Legislature. The members of the Cabinet are usually leaders of the party enjoying majority in the Legislature. They come to the legislature with a programme, a well-knit majority to support it, and a mandate from the electorate to implement the programme with the help of the majority. Collective responsibility means that once a decision is taken by the Cabinet, it becomes the responsibility of each minister to support it in and outside the Parliament, despite disagreements of any kind. For the administration and policies of every department of the government, the ministers are collectively responsible to the Parliament, even if that policy is related to a single minister. If a, motion of no confidence is passed by the Parliament against one minister, it is considered to have been passed against the entire Cabinet. The Prime Minister and the entire cabinet then tender its resignation.

In the parliamentary system, it is essential for the ministers to be the members of the Legislature. If anyone who is not the Member of Parliament is appointed as minister by the Head of State on the recommendation of the

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21. John D Fair, Walter Bagehot, Royal Mediation, and the Modern British Constitution1869-1931, the Historian, Vol. 43, No. 1 (NOVEMBER 1980), pp. 36-54; Bagehot, Walter, The English Constitution, p 42 (London, Watts 1964)

Prime Minister, he or she has to seek the membership of any house of the Parliament within a specified period. One of the main characteristics of parliamentary government is the leadership of the Prime Minster over the Cabinet and he, being leader of the 'majority' party in the Lower House, is also called the leader of the House. The Head of State appoints ministers on his advice. He presides over the meetings of the Cabinet. The Prime Minister is also considered chief spokesman to the head of the State in parliamentary system. It means all the ministers act like a team in the Cabinet and they do not disclose their differences in the public. Generally, the ministers are from one party, but in case of a coalition government, they relate to more than one party. In such a situation ministers from all parties in coalition decide the policy line on which they have to work.

IV. PARLIAMENTARY DEMOCRACY: HISTORICAL PERSPECTIVES

From ancient times, some people have conceived of a political system in which the members regard one another as political equals, collectively sovereign, and possess all the capacities, resources, and institutions they need in order to govern themselves. This idea, and practices embodying it, appeared in the first half of the fifth century B.C. among the Greeks who though few in number and occupying but a tiny fragment of the world's surface exerted an exceptional influence in the world history.[22] However, ancient India has been an exception to this narrative and still today it has a new kind of democracy[23]. Political homogeneity is inherent in the

22. Robert A. Dahl, *Democracy and Its Critics,* Introduction p1, (Yale University Press, 1989)

23. The *Rig-Veda* comprehends the same foundational principles of modern democracy way before the Greek civilization. The *Sabha* and *Samiti* are mentioned in both *Rig-Veda* and *Atharva-Veda*. In these meetings, a decision was made after a discussion with the king, ministers, and scholars. This shows how people together used to settle and resolve debates in the *Sabha* and *Samiti*. Even people of different ideologies were divided into various groups and take a decision after mutual consultation. Popular democracy and representative institution are neither entirely alien to the Indian soil nor of recent origin. The history of democratic traditions goes back to the Vedic Period (circa 3000 BC to 1000 BC); It is a recorded historical fact that even without a nation-state, our experiments with representative governance started from 6th Century BC in the form of 'Republic' (i. e. *Gad-Rajya*) of the erstwhile kingdoms of Lichhavi, Kapilvastu, Pava, Kushinara, Ramagrama, Sunsamagiri, Piphali, Suputa, Mithila and Kollanga. The modern day Parliament, Cabinet and the Prime Minister were

parliamentary democracy.

The United Kingdom is a parliamentary democracy. In Great Britain, where the system originated, the Parliament evolved through different stages to its present position[24]. Britain became a mature democracy after 800 years from the days of *Magna-Carta*. It went through a prolonged persistent struggle for devolution of authority from 'the Crown to the People'. It had also patches of nepotism and corruption during the period of the struggle. During the latter part of the nineteenth and the early part of the twentieth century, the system came to be called the 'Cabinet government', as the initiatives as well as the regulatory mechanisms, were exercised by the Cabinet. In recent time, the government in Great Britain has largely become a Prime Ministerial government. Through his control over the party and the Parliament, the Prime Minister is able to exercise a great amount of influence over the government.

V. PARLIAMENTARY DEMOCRACY: INDIAN EXPERIENCE

India is the most populous country and also the largest democracy of the world. It is home to a bewildering number of different ethnic, religious, linguistic, caste, and cultural groups whose community boundaries are difficult to define because of both cross-cutting cleavages and overarching identities.

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the *Sabhas*, *Samitis* and *Ganapati* of these republics. The emperors did in these so called 'republics' were bound by the collective wisdom of their advisors in the form of Council of Ministers. The ruler was a monarch, bound by the *Rajdharma*. An intrinsically Indian concept akin to today's Constitutionalism. *Rajdharma* essentially is the path of political righteousness or 'political ethics' or the duties and responsibilities to which the ruler was bound.

24. See also, Modern Parliaments trace their history to the 13th century, when the sheriffs of English counties sent knights to the king to provide advice on financial matters. Kings, however, generally desired the knights' assent to new taxation, not their advice. Later in the 13th century, King Edward I (1272–1307) called joint meetings of two governmental institutions: the *Magnum Concilium*, or Great Council, comprising lay and ecclesiastical magnates, and the Curia Regis, or King's Court, a much smaller body of semiprofessional advisers. Modern parliaments trace their history to the 13th century, when the sheriffs of English counties sent knights to the king to provide advice on financial matters. Kings, however, generally desired the knights' assent to new taxation, not their advice. Later in the 13th century, King Edward I (1272–1307) called joint meetings of two governmental institutions: the *Magnum Concilium*, or Great Council, comprising lay and ecclesiastical magnates, and the Curia Regis, or King's Court, a much smaller body of semi-professional advisers; "It is evident to all alike that a great democratic revolution is going on

In a parliamentary democracy with a competitive political party system, India is having federated polity with twenty eight States and eight Union Territories. Thus, political competition occurs not only on the national level but, perhaps even more importantly, at the provincial level too, where each State has a unique political party system. Local political competition—often based on parochial idiosyncrasies, identities, and interests—adds further complexity to the diverse nature of Indian democracy.

India on becoming independent deliberately chose the Westminster-model of Parliamentary democracy. Most of the framers of the Constitution were from the legal profession and had imbibed the liberal traditions of Mill and Laski. Besides, Britain in their days was a superpower spread over the entire globe and it used to be said that the sun never sets in the British Empire. Authors and Pandits extolled the British Parliamentary system so profusely that it appealed to many intellectuals in the world as an unerring model for others to follow[25]. Ivor Jennings described the British constitution as one of the strongest if not the strongest in the world. No wonder, we adopted the Westminster-type of parliamentary democracy with the addition of a few chapters such as Fundamental Rights and Directive Principles of State Policy etc. Fundamental Rights and the Directive Principles of State Policy are the conscience of the Constitution of India.

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amongst us; but there are two opinions as to its nature and consequences, To some it appears to be a novel accident, which as such may still be checked; to others it seems irresistible, because it is the most uniform, the most ancient, and the most permanent tendency which is to be found in history"-Alexis de Tocqueville, *Democracy in America*, Introductory chapter, translated by Henery Reeve, A Penn State Electronic Classics Series Publication, Vol-1, p12; that modern Britain is a democratic country is perhaps a contemporary 'self-evident truth', the point is so obvious that few observers would ever question it. But, if we dig beneath the surface of that assumption, we may find that we hold different views about the essential features of a democratic state and would reach different conclusions about how democratic a country Britain actually is—Bralley F (1998) *Democracy in the Contemporary state* esp chs 1 and 2: Holden B (1988) *Understanding liberal democracy* esp ch 1

25. K. M. Munshi, one of the architects of our Constitution summed up the prevalent thinking at the time in his speech in the Constituent Assembly. He said that most of us and ……..during the last several generations before us, public men in India have looked up to the British model as the best. For the last thirty or forty years some kind of responsibility has been introduced in the governance of this country. After this experience why should we go back on the tradition that has been built for over 100 years?"

To make an understanding of the 75 years of Parliamentary democracy in India, we have to invite an open-minded dialogue to know our journey. Our Freedom-fighters made India a democratic country and adopted parliamentary system of democracy through the democratic revolution. It was a unique experiment for the country like India. The political structure and system, under the Indian Constitution envisages a federal democratic form of government, based on the values of equality, social justice and republicanism. It provides a framework for the attainment of its social and economic goals. It also envisages a State-centric welfare government and the State has social obligations to fulfil the aspirations of 'we the people'.

VI. SOLIDARITY OF EXECUTIVE UPON LEGISLATURE

The Constitution of India accepts the principle of separation of powers, but not in the strict sense. Here, a close nexus and proximity is found between the Executive and Legislature. The Parliamentary form of government always emphasizes on the harmony and cooperation in nature and functions of the Executive and the Legislature. A General Election, on a fixed interval, is *sine qua non* for the representative system. It is known as a limited and indirect form of democracy; limited in terms of participation in the government restricting the common people to the act of voting only and indirect for not exercising power by the public. Representatives are elected to rule the country on behalf of the common people.

In this context, it establishes a reliable and effective link between the government and the governed. The process of election in India provides a proper and legal way for the people to raise their voices, and opinions and choose the right person from the different political parties which have good ideas, ideals, and policies to fulfil the objectives of social, economic and political justice[26] based on the principle of political equality and universal adult franchise, irrespective of caste, colour, creed, sex, religion or economic status. Thus, in this system, members of the Legislature are eligible to be members of the Council of Ministers headed by the Prime Minister for governance. The Constitution of India provides detailed framework to carry out the parliamentary system of government in different articles.[27]

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26. The Constitution of India, Preamble
27. The Constitution of India, arts.53, 74,75,77

The first general election in independent India was held in 1952. Since then, this democratic process of making the Government in the parliamentary system is continuing till date for the Union of India as well as its Units. Electorates of India have witnessed many significant shifts from the very 1st General Election to the 17th General Election (held in 2019) and in these more than six decades, the changing attitudes of the Indian voters, towards their government, make the result of general elections unpredictable. During the period of 1952 to 1984, there was only a single-dominating party which won the general elections and ruled. Since the late 1980s, the era of coalition government started and after 1990s, many ups and downs came in the result of general election, but, finally, this trend changed in 2014 and continued in 2019 also. It is one of the biggest successes of the parliamentary system in India and credit goes to the Election Commission of India to conduct free and fair elections and to the electorates.

India got independence after a constant struggle and began with a system of Parliamentary democracy for governance. However, it was an extra ordinary experience to a country like India, but our founding-fathers tried with their best efforts to make it vibrant, transparent and accountable to the common people. As far as the achievements of the parliamentary democracy are concerned, India has many achievements in the journey of last 75 years that is prevailing since its independence. If someone compares the Indian democracy with democracies of others countries that became independent in the contemporary world from clutches of Great Britain along with India , it seems that India is not only standing at the forefront but also is in the vanguards role in democratic world. In post-War era, most of the newly independent countries imbibed democratic values in their Constitution, but could not sustain. The story finds place from Pakistan to Brazil and from Indonesia to Nigeria. In majority of these countries, first of all they changed themselves into one party-system from multi-party system; and again, this one-party system was transformed into the rule of individuals (autocracy)-authoritarian system or dictatorship or martial law.

In this backdrop, most of the politicians, political scientists and experts had predicted that Indian democracy will also not sustain in the independent India in coming future. They were waiting for the collapse of India's new democracy. For some time, during National Emergency, Indian democracy was on stake, and situation was unstable and dangerous. But we the people

rectified this mistake and vowed from this great error that we shall neither play with democratic values nor take democracy lightly.

VII. GLORY OF INDIAN PARLIAMENTARY SYSTEM

In the post-colonial era of Indian Democracy, we have to be proud of its three achievements: the Constitution; freedom and national integration.

i) the Constitution

Framing of the Constitution is a very tough and tedious task. Many new nations of the world community framed their Constitutions and failed to retain it, e.g., Pakistan took 9 long years in drafting and finalizing its Constitution and failed within 10 years and finally divided into two nations; Yugoslavia also pathetically broke into five Nations and USSR after *Perestroika* and *Glasnost* only in 70 years gave birth to 15 new countries. But India is proud of to say that our Constitution, even after more than 100 Amendments continues to be stronger and stronger. The Constitution of India can readily solve whether it is Centre-state relations dispute; or Inter state river water dispute and as far as, social opportunity is concerned, the recommendation of the Mandal Commission and its implementation on the issue of reservation is worth solving. Thus, the Constitution of India has capacity of resolving conflicts peacefully, democratically and effectively.

ii) Freedom

When British rule came to an end and Britishers started backing off to their country, they warned that India would be shattered very soon and would be a prey of internal feud. Balkanization was the threat about the idea of India, linguistic divisions were very deep, caste rivalries were very sharp, religious antagonism have already been crept in. So there was a dark future for us. But salute to our constitution-makers, their heritage and first generation of the Nation-builders, they kept India free from of all kind of colonial and non-colonial conspiracies and we are today enjoying freedom and nurture the parliamentary democracy even after 75 years.

iii) National Integration

National integration has been a herculean task to perform. So far, ancient and medieval history of India is concerned, national integration has always been found in very small pockets. Right from Emperor Ashok- the great to Mughal Emperor Akbar, we find a very few examples of *Akhand Bharat*,

otherwise, India has always been scattered and divided in pieces, it had never been in unity. Even at the time of India's independence, there has been British India and 565 Princely States enjoying their own sovereignty. Few Princely States were rather diabolic regarding merger with the Union of India, so our democracy under went to fulfil the up-heavel task of unifying them. The momentous role in this achievement was performed by the political elites. Thus, looking back, credit can be given for these historical successes to our freedom fighters and nation-builders.

Now, let us look at some other arguments as well. With lapse of time, a type of neo-feudal government has started over shadowing the sign of parliamentary democracy. The Indian Democracy is now almost eclipsed with few problems; first, this democracy is casually changing in *Dhan-tantra* (plutocracy). If we take into account right from first general election of India up to present scenario which is going on in the country and see the general expenses of the General Election, we find a sea change. There is a big difference between the assigned expenses and the expenses actually spent by the contesting candidate. This is general impression in the society that what was being spent in the beginning of the General election for contesting the Lok-Sabha is now not sufficient for the election of Gram Panchyat. Second, through the election, three ailments or viruses have entered and unfortunately up to the date, there is no effective remedy to eradicate them. These are money power; muscle power and media power. These three viruses have started polluting the fragrances of Indian Parliamentary democracy. Thus, the dream of empowerment of common public and vulnerable class is gradually turning into de-empowerment.

VIII. CONCLUSION

The need of hour is to analyse critically the successes and failures (deficits) of Indian democracy. Generally, there are four pillars for the success of Parliamentary democracy-the Legislature, the Executive, independent Judiciary and the Press. In Indian context, these are playing their significant role in strengthening the governance but despite this, we find three more pillars. These are as follows: Political Parties; Knowledge Centers; and Voluntary Organisations. A political party provides strong foundation stone to the Parliamentary democracy. Although, intellectuals look down upon the political parties but this is an important point to note that without political parties, there will be no parliamentary democracy and if, obviously, there is

no political democracy, the state of affairs in the nation will never be good. But there is a good omen for political parties of India that parties are multiplying either small or big. Sociologists find democratic potential in such a kind of system. There is a special feature of Indian democracy that the lost candidate, who contested the general election, does not become worthless for the common man. He also raises the voice of common man and thus enhances and makes an addition to the political process. Therefore, political parties have an important role in making the parliamentary system vibrant, irrespective of being national or regional, big or small. Knowledge centers are educational institutions like universities etc. They are places of hard-core learning think tank. They are not only providing space for pursuing academic researches and analysis but also a place of citizenship-building and leadership-building. These centers also provide a common platform for open dialogue and objective analysis on the emerging social, economic and political issues which are not possible for debates in the Parliament. Third is Voluntary Organisations. In India, creation of civil societies and NGOs are very feeble. We were used to live in silence. When freedom fighters became volatile in every field during British rule whether it was militancy in writing or a proper way of raising voice, they were suppressed. The British Govt. either imprisoned or deported them. There was neither a single space of oracular liberty nor writing on a genuine issue. But in the free India, under parliamentary system, we are free to express our thinking, thoughts, views and ideas. This social transformation is possible by the pivotal role of these social voluntary organisations. In this context, it is worth mentioning that the democratic revolutions of France and United States are a big political events and eye-opener for the rest of the world community. Democracy became stronger in U.S. after revolution and political leaders like Jefferson and Lincoln carried forward to its basic values and helped in strengthening. But, on the other hand, contrary to this, in France, democracy became weak after 1789 revolution. Political leader like Napoleon Bonaparte converted the democracy into Bonapartism. A French thinker, Tocqueville concluded in his seminal work[28] that American people are habitual and inclined towards the civil societies and thus, tacitly strengthening the democratic process through these NGOs; whereas most of the French people were either self-centered or believing personalism. They don't trust in collectivism. So, if we wish to strengthen

28. Supra Note 23

the system of parliamentary governance in our country, the Government has to promote civil societies that work like safety valve mechanism. This may provide a concrete foundation to the parliamentary democracy.

Thus, to make Indian Parliamentary democracy sustainable, vibrant, transparent, accountable and responsive, some steps needed to be taken on priority. The government should remove various deficits like- development deficit; governance deficit; legitimacy deficit; democracy deficit; citizenship-building deficit; nation-building deficit and ecological deficit that are emerging as obstacles directly or indirectly in the way of the parliamentary system in India. Such reforms will vitalize and ameliorate the functioning of this system.

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MOTOR VEHICLE (AMENDMENT) ACT 2019: A DIGITAL STEP FORWARD BY INDIA TOWARDS CONTROLLING THE AIR POLLUTION

*THOMAS MATHEW**

ABSTRACT : Air pollution has emerged as one of the world's leading health risks and the Government of India through its Ministry of Road Transport and Highways (MoRTH), with the power vested in the parliament by the Constitution of India, has come up with certain amendments in the Motor Vehicle Act in the year 2019. The steps under the Digital India Mission and compliance with the Act is resulting into a digital step forward by India in monitoring and controlling the air pollution being caused by motor vehicles in its territory. The Pollution under Control certificate has to be mandatorily carried by the commuters while plying the motor vehicle else will have to pay out the penalty mandated under the Act. The certificate can be obtained from an agency having the online facility, which helps in storing of the details in the electronic form in the applications created by the Government, resulting in to collection of the whole data of the entire vehicles. The information generated through the analysis of this collected data can be used for taking appropriate measures towards controlling the air pollution, which in turn will help India to fulfill its obligation under the Paris Agreement.

KEY WORDS : Constitution of India; Air Pollution; Environment; Motor Vehicle; Paris Agreement.

I. INTRODUCTION

Air pollution has emerged as one of the world's leading health risks. World Health Organization (WHO) in its news release of 2 May 2018, estimates

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that around 7 million people die every year by getting exposed to fine particles in polluted air that penetrate deep into the lungs and cardiovascular system, causing several diseases[1]. WHO recognizes that the air pollution is a critical risk factor for non-communicable diseases (NCDs), causing an estimated 24% of all adult deaths from heart disease, 43% from chronic obstructive pulmonary disease, 25% from stroke and 29% from the lung cancer. In fact, the fourth leading fatal health risk is due to the exposure to air pollution worldwide behind metabolic risks, dietary risks, and tobacco smoke[2].

According to the World Health Organization (WHO), more than 80% of people residing in urban areas, that monitor air pollution, are exposed to air quality levels that exceed the limits prescribed by it. All regions of the world are affected, however, populations in low-income cities are the most impacted. According to the urban air quality database of the World Health Organization (WHO), 56% of cities in high - income countries with more than 100, 000 inhabitants, do not meet its air quality guidelines and this increases to 98% of cities in low - income and middle - income countries[3].

The Central Pollution Control Board (CPCB)[4] is a statutory organization of India that serves as a field formation and provides technical services to the Ministry of Environment and Forests. One of the principal functions of the Central Pollution Control Board (CPCB) is to improve the quality of air and to prevent, control or abate air pollution in the country. The Annual Report 2014 – 2015 of the Central Pollution Control Board (CPCB) states that the scientific studies have indicated links between fine particulate matter and numerous health problems including bronchitis, acute and chronic respiratory symptoms such as shortness of breath and painful breathing[5].

1. World Health Organization News Release dated 2 May 2018, *available at*: https://www.who.int/news-room/detail/02-05-2018-9-out-of-10-people-worldwide-breathe-polluted-air-but-more-countries-are-taking-action (last visited on July 19, 2021).
2. GBD 2013 Collaborators, "Global, Regional, and National Comparative Risk Assessment of 79 Behavioural, Environmental and Occupational, and Metabolic Risks or Clusters of Risks in 188 Countries, 1990–2013: A Systematic Analysis for the Global Burden of Disease Study 2013"The Lancet, Vol. 396 (10010), 2287-2323 (2015).
3. World Health Organization urban air quality database, *available at*: https://www.who.int/phe/health_topics/outdoorair/databases/cities/en/ (last visited on July 11, 2021).
4. Central Pollution Control Board (CPCB) Introduction, *available at*: https://cpcb.nic.in/Introduction/, (last visited on July 12, 2021).
5. Central Pollution Control Board (CPCB), "Annual Report 2014 – 2015", Ministry of Environment, Forest and Climate Change, Government of India (2015).

The transportation system of a country plays a role of backbone in any nation's economy and acts an essential component assisting people not only to connect with each other, but also progress. Hence, a country shall ensure a periodic up gradation of the transportation infrastructure, as per the requirement of its economy and more importantly with the increase in types of motor vehicles. There are two major segments of the road transportation system viz., road network and vehicle systems. As of November, 2016, India had one of the largest road networks in the world aggregating to approximately 5.23 million kms and the roadways remains the dominant mode of transport in India, carrying more than 75% of total traffic, out of which, road carries more than 57% of freight traffic and more than 85% of passenger traffic[6]. The road network of India faces numerous challenges such as overcrowding, congestion, pollution, overloading and poor maintenance of the available infrastructure. There are various modes of road transport in India including two - wheelers, three - wheelers, Cars, Jeeps, SUVs, Buses, Mini -Vans, Mini - Buses, Vans etc. The urban road transport is increasing significantly per capita, however availability of road space per vehicle is declining rapidly, adding to urban congestion woes. As on March 2011, amongst the total registered motor vehicles of the country, the two - wheelers accounted for the largest share (72%), followed by Jeeps, Cars and Taxis (14%), other vehicles (8%), goods vehicles (5%) and buses (1%).

The Information Technology is being used in the following manner to develop the intelligent transport system in turn improving the vehicle safety and contribute to resolving traffic management issues in India:

(i) GPS and Navigation aids the drivers based on satellite systems for safe and efficient travel with less congestion.

(ii) Electronic Toll Collection (FASTag)[7] is a technology that enables the electronic collection of Toll Payments which has been applied to few Highways and Expressways for faster toll collection to ensure less holdup of vehicles resulting in to low travel time and reduced traffic congestion.

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6. Technology Information, Forecasting and Assessment Council (TIFAC), "Technology Vision 2035: Technology Roadmap Transportation", Department of Science and Technology (DST), Government of India (2016).
7. Electronic Toll Collection (FASTag), *available at*: https://morth.nic.in/toll, (last visited on July 12, 2021).

(iii) Traffic Management along with timers help in smooth flow of traffic also providing information to the commuters about the time that will be taken to change the signals enabling the vehicles to be switched off appropriately.

(iv) Intelligent Speed Management helps in restricting the speeding of vehicles through speed tracking of vehicles.

Air pollution can be in many forms; however, the most lethal pollutant is $PM_{2.5}$, very fine particulate matter (PM) with an aerodynamic diameter of less than 2.5 micrometers. These particles in view of their negligible size are capable to penetrate deep into the lungs and depending on their source has varying chemical makeup. They often consist of carbon, nitrate and sulfate compounds, but may also include toxic substances such as heavy metals. The combustion sources such as motor vehicles may emit directly very fine particles or they may be formed when gases like ammonium from fertilizers react with other pollutants in the atmosphere. It may also include concentrations of natural windblown dust.

The estimated average $PM_{2.5}$ concentration[8] for the year 2017, within India is 91 μgm^{-3}.The national ambient standard of India, for CO is considered to be better than the WHO guideline, whereas the NO_2, SO_2 and O_3 standards are considered to be at par with the guidelines. However, the standards for $PM_{2.5}$ (aerodynamic diameter <2.5 mm) and PM_{10} (aerodynamic diameter < 10 mm) are still lagging. As like any other developing country, the cities of India are also increasing in size and population, stressing on a steady demand for motorized vehicles in both public and personal transport sectors. This puts a substantial stress on the city's infrastructure and environment, especially as most of the Indian cites have mixed land use. The most commonly considered sources of air pollution are manufacturing industries, electricity generation set - ups, vehicles, construction activities, waste burning, road dust, combustion of oil, coal, and biomass in the households, and marine or sea salt[9]. In view of this it becomes imperative for India to undertake appropriate measures to regulate the pollution caused to the air from its region.

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8. The World Bank Data, *available at*: https://data.worldbank.org/indicator/EN.ATM.PM25.MC.M3, (last visited on July 11, 2021).
9. Guttikunda, S. K.; Goel, R. and Pant, P., "Nature of air pollution, emission sources, and management in the Indian cities" *Atmospheric Environment*, Vol.95, 501-510 (2014)

II. PARIS AGREEMENT[10]

At the Conference of Parties (COP) 21 held in Paris, the parties of the *United Nations Framework Convention on Climate Change* (UNFCCC)concluded a landmark agreement, known as the Paris Agreement, aimed to combat the climate change in turn accelerating and intensifying the actions and investments required for a sustainable low carbon future. The Agreement, for the first time brought all the nations across the globe into a common cause to undertake ambitious measures to battle against the climate change and adapt to its effects, with greater support to assist developing countries to do so.

As per the Article 2 of the Paris Agreement[11], the central aim is to embolden the global response to the menace of climate change by keeping the global temperature rise in this century well below 2 ^{o}C above pre-industrial levels and to undertake measures to limit the rise in temperature even further to 1.5 ^{o}C. The agreement also aims to enhance the ability of the countries across the globe to deal with the impacts of climate change, and at making finance flows consistent with a low Green House Gas (GHG) emissions and climate-resilient pathway.

The Paris Agreement requires all the signatory parties to put forward their best efforts through *Nationally Determined Contributions* (NDCs) and to strengthen these efforts in the years ahead, which includes a requirement on part of all the signatory parties to regularly report on their emissions and on their implementation efforts. A global stocktake will also be undertaken every five years to assess the collective progress made towards in achieving the purpose of the agreement and to inform the further individual actions by the parties.

India is also party to this agreement[12] and hence it becomes imperative for India to take appropriate measures so as to ensure that the commitments made under this agreement are fulfilled. Since India is union of states, it is of importance to understand that as per the Constitution of India who has been vested with the powers to frame the appropriate guidelines to be followed by its citizens so as to enable it achieve the goal and fulfill its obligations.

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10. United Nations Climate Change: Process and Meetings, *available at*: https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement, (last visited on July 12, 2021).
11. The Paris Agreement, *available at*: https://unfccc.int/sites/default/files/english_paris_agreement.pdf, (last visited on July 13, 2021).
12. United Nations Treaty Collection, *available at*: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&lang=en, (last visited on July 13, 2021).

III. CONSTITUTION OF INDIA - POWERS TO REGULATE ENVIRONMENTAL MATTERS

The Constitution of India[13]governs the legislative and administrative relationship between the Union and the States, in view of India being a union of States and having a federal system of governance. The division of powers related to governance is there in the Seventh Schedule to the Constitution, provided in the form of three lists. Deriving the powers from the Indian Constitution, the Union Parliament has the power to legislate for the whole or any part of the country whereas the State legislatures are authorized to enact laws only for their respective States.

The List I, also known as the Union List, consists of 97 subjects and the Parliament has the exclusive power to legislate these subjects, including but not limiting to environmentally relevant subjects such as atomic energy and mineral resources; interstate rivers and river valleys; highways; shipping; major ports; air navigation; mines; oil fields etc. The State legislatures have exclusive power to regulate and frame laws with respect to 66 subjects enlisted under List II, also known as the State List, wherein the environmental subjects included are like public health and sanitation; communication; agriculture; preservation, protection and improvement of stock and prevention of animal diseases; water; land; etc.

There are 52 subjects provided under the List III or the Concurrent List over which both the Parliament and the State legislatures have overlapping, concurrent and shared jurisdiction like covering amongst others, protection of wild animals, forests, mines and mineral development, population control and family planning, minor ports, factories and electricity. The State legislatures have full powers to enact laws with regard to the subjects mentioned under the Concurrent List subject to the limitation that the provisions enacted by the State shall not conflict with any of the provisions of the law enacted by the Union on the same subject and if the laws enacted by the State relating to a concurrent subject is in conflict to a law enacted by the Union relating to the very subject then the State law shall be void and the Union law shall prevail. However, if a State enacted law on a concurrent subject is inconsistent with a prior law enacted by the Union on the same concurrent subject and the same has received the presidential assent then under such circumstance,

13. The Constitution of India, *available at*: http://legislative.gov.in/sites/default/files/COI-updated.pdf, (last visited on July 13, 2021).

the law enacted by the State shall prevail in that State and overrule the law enacted by the Union in the applicability to that particular State only.

The Constitution of India comprises of few Articles too, where in the legislative power is specifically and exclusively reposed in the Parliament like Article262 and in such cases, the power distribution based on the three lists is not applicable.

The Indian Parliament enacts laws on environmental matters relying upon the constitutional provisions, viz., Article 253 and Article 51(c). The Article 253 empowers the Parliament to enact laws for implementing any treaty, agreement or convention with any other country/countries or for implementing any decision made at any international conference, association or other body whereas Article 51(c) mandates that the State shall endeavor to foster respect for international law and treaty obligations. Apart from this, few changes like the Constitutional (42nd Amendment) Act, 1976 resulted in giving more powers to Parliament to enact laws on environmental issues.

The Parliament has the supreme powers to enact laws on environmental issues while the duty to protect and enhance the quality of environment in India is the duty of the Union, States, local Governments and the citizens.

IV. MINISTRIES OF THE UNION GOVERNMENT RESPONSIBLE FOR CONTROLLING AIR POLLUTION IN INDIA

The Government of India in order to ensure proper governance of various sectors has various ministries focusing on specific domains. The ministries that play a predominant role in the protection of environment are as follows:

(i) Ministry of Environment, Forest and Climate Change (MoEFCC)[14]:

With the vested powers by the Constitution of India in the Union Government, it has in its ambit, Ministry of Environment, Forest and Climate Change (MoEFCC), which acts as the nodal agency for the planning, promotion, co-ordination and overseeing the implementation of India's environmental and forestry policies and programmes. The primary concerns of the Ministry are implementation of policies and programmes relating to

14. Ministry of Environment, Forest and Climate Change, *available at*: http://moef.gov.in/about-the-ministry/introduction-8/, (last visited on July 14, 2021).

conservation of the country's natural resources, its biodiversity, forests and wildlife, ensuring the welfare of animals, and the prevention and abatement of pollution. While implementing these policies and programmes, the Ministry is guided by the principle of sustainable development and enhancement of human well-being. One of the broad objectives of the Ministry viz., Prevention and control of pollution, is well supported by a set of legislative and regulatory measures, aimed at the preservation, conservation and protection of the environment.

(ii) Ministry of Road Transport and Highways (MoRTH)[15]:

The motor vehicles act as one of the prominent sources of air pollution in India, especially the urban areas. The Ministry of Road Transport and Highways (MoRTH), is the apex organization under the Central Government, that is entrusted with the task of formulating and administering, in consultation with other Central Ministries/Departments, State Governments/UT Administrations, organizations and individuals, policies for Road Transport, National Highways and Transport Research with a view to increasing the mobility and efficiency of the road transport system in the country. The Ministry has two wings viz., Roads wing and Transport wing. The Road Wing deals with the development and maintenance of National Highway in the country where as the Transport Wing deals with matter relating to Road Transport, in turn Motor Vehicle legislation is its main responsibility.

The prevention and control of pollution as such comes under the purview of Ministry of Environment, Forest and Climate Change (MoEFCC), however, it is the Ministry of Road Transport and Highways (MoRTH) that notifies the emission standards for motor vehicles, under the provisions of Motor Vehicles Act, 1989[16]and in turn is the responsible ministry for ensuring that the motor vehicles plying on the roads in India are not polluting its environment.

V. VEHICLE MASS EMISSION STANDARD

The vehicle mass emission standard of India is known as *Bharat Stage* (BS) standard and it prescribes the quantum of pollutants that can be released

15. Ministry of Road, Transport and Highways, *available at*: https://morth.nic.in/about-us, (last visited on July 14, 2021).
16. Press Information Bureau Notification on Vehicular Pollution dated March 15, 2016, *available at*: https://pib.gov.in/newsite/PrintRelease.aspx?relid=137981, (last visited on July 15, 2021).

by a vehicle. Indian regulations on emission standards for four - wheeled vehicles have been in line with the European Union regulatory pathways. The *Bharat Stage* (BS) - IV was initially implemented in select cities of India in the year 2010 and thereafter came in to force[17] all over the country on or after 1 April 2017, which shows that the implementation of progressive standards in India had generally lagged behind the equivalent *European Union* (EU) standards by about five years in major cities of select states and about 10 years across the whole country. The standards related to the two -and three - wheeled vehicles have been, in general, developed independently and had not been made in - line with the *European Union* (EU) Standard.

The Ministry of Road Transport and Highways (MoRTH) in a precedent-setting step announced on 06 January 2016, its decision to leapfrog the *Bharat Stage* (BS) - V level emission standards and move from the existing highest level of emission standard *Bharat Stage*(BS) - IV to more stringent and robust *Bharat Stage* (BS)- VI level[18]. The *Bharat Stage* (BS)- VI standards are far-reaching in scope and incorporated substantial changes to the existing *Bharat Stage*(BS) - III and *Bharat Stage* (BS) - IV emission standards, which will help in reducing the pollution caused by the motor vehicles to a greater extent. This particular decision came at a time when many big cities of India were facing the problem of severe air - quality problems and this measure was an important step in addressing these issues.

The Bharat Stage (BS) - IV emission standards could be implemented across India in 2017, after the Supreme Court of India had passed an order[19] on 29 March 2017 followed by a detailed judgment[20] later on 13 April 2017, in the case filed by the manufacturers of vehicles (two - wheelers, three - wheelers, four - wheelers and commercial - vehicles) and association of

17. Gazette Notification on Bharat Stage - IV, *available at*: http://egazette.nic.in/WriteReadData/2015/165494.pdf, (last visited on July 15, 2021).
18. The Policy Update on India Bharat Stage VI Emission Standards by International Council on Clean Transportation, *available at*: https://theicct.org/sites/default/files/publications/India%20BS%20VI%20Policy%20Update%20vF.pdf, (last visited on July 15, 2021).
19. Order dated March 29, 2017 in the Writ Petition (Civil) No. 13029/1985, *available at*: https://main.sci.gov.in/jonew/bosir/orderpdf/2881662.pdf, (last visited on July 16, 2021).
20. Judgement dated April 13, 2017 in the Writ Petition (Civil) No. 13029/1985, *available at*: http://cja.gov.in/Latest%20Judgement/2017-04-13_1492085896.pdf, (last visited on July 16, 2021).

dealers of vehicles. The contention placed by the manufacturers and the dealers before the Supreme Court of India at that time was that they were entitled to manufacture *Bharat Stage* (BS) - IV vehicles till 31 March, 2017 and by undertaking the manufacturing they had not violated any law or any prohibition. Hence, the prayer by them was that there shall be no prohibition on the sale and registration of *Bharat Stage* (BS) - IV vehicles after 01 April 2017 so that the commercial interests of the manufacturers and dealers of vehicles, who have ample stock of vehicles that do not comply with the *Bharat Stage* (BS) - IV emission standards as on 01 April 2017, is safeguarded. The manufacturers and the dealers had urged before the Supreme Court of India, the apex court of India that they may be provided with the reasonable time to dispose of the existing stock of such vehicles.

The Supreme Court of India observing that the manufacturers of *Bharat Stage* (BS) - III vehicles were fully aware, way back in 2010, that all vehicles would have to be converted to *Bharat Stage* (BS) - IV fuel, on and from 01 April, 2017 and therefore, they had more than enough time to stop the production of *Bharat Stage* (BS) - III compliant vehicles and switch over to the manufacture of *Bharat Stage* (BS) - IV compliant vehicles. In addition, the Supreme Court of India primarily also observed that the usage of *Bharat Stage* (BS) - IV auto fuel will reduce the release of the particulate matter in the air by 80% in comparison to the *Bharat Stage* (BS) - III auto fuel, apart from other reasons as detailed in its judgement dated 13 April 2017 and rejected the plea made by the manufacturers of vehicles (two - wheelers, three - wheelers, four - wheelers and commercial - vehicles) and association of dealers of vehicles.

Since the Ministry of Road Transport and Highways (MoRTH) decided to go for more stringent and robust *Bharat Stage* (BS) - VI level emission standards, the Society of Indian Automobile Manufacturers had again approached the Supreme Court of India, urging that the companies selling the vehicles had huge stock of vehicles with *Bharat Stage* (BS) - IV engines and hence they may be permitted to sell the vehicles already available in their stock even after 01 April 2020 so as to safeguard their commercial interests[21]. The Supreme Court of India asked the Society of Indian Automobile

21. Judgement dated October 24, 2018 in the Writ Petition (Civil) No. 13029/1985, *available at*: https://main.sci.gov.in/supremecourt/1985/63998/63998_1985_Judgement_24-Oct-2018.pdf, (last visited on August 10, 2021).

Manufacturers to ensure that from 01 April 2020, the vehicles with *Bharat Stage* (BS) - VI are only rolled out by them, for the same reasons as was detailed in its earlier judgment when there had been a similar plea before it during the shift from *Bharat Stage* (BS) – III to *Bharat Stage* (BS) - IV.

Due to the COVID – 19 pandemic and the lock - down that was observed across India, it was placed by the Federation of Automobile Dealers Association before the Supreme Court of India that many vehicles were being sold out but not registered throughout India. The Supreme Court of India[22]giving some reprieve to the Federation of Automobile Dealers Association ordered on 27 March 2020 that the sold but unregistered vehicles be registered by the concerned competent authorities by 30 April 2020. With respect to the unsold vehicles, the Supreme Court of India observed that there can be no justification in extending the time which was fixed long time ago, as it would be further injurious and further burden on human health to be caused by pollution of *Bharat Stage (BS)* – IV vehicles when *Bharat Stage (BS) – VI* vehicles were supposed to be produced, well in advance, by the manufacturers considering the deadline of 31 March 2020. However, taking a lenient view due to the lock - down, the Supreme Court of India further ordered that it won't allow sale and registration of the unsold vehicles in the Delhi and National Capital Region (NCR) region, where the pollution level is more compared to the remaining places of the country, but permitted the sale of not beyond 10% of the already available vehicles in the stock with the dealers in the remaining part of the country and such sale was to be done within ten days of the lifting of the lock – down operating in the concerned cities and not beyond it, with a rider that if out of the vehicles which are permitted to be sold some of them remain unsold then no any further extension of time shall be there for the sale of these kind of vehicles.

Due to the COVID - 19 pandemic and non - selling of vehicles since a long time due to the lockdown that was observed across India, it has to be seen the manner in which the automobile sector is able to manage and respond to the *Bharat Stage* (BS) - VI engine order, along with the financial impact it will have on the automobile sector.

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22. Order dated March 27, 2020 in the Writ Petition (Civil) No. 13029/1985, *available at*:https://main.sci.gov.in/supremecourt/1985/63998/63998_1985_0_1_21579_Order_27-Mar-2020.pdf, (last visited on August 15, 2021).

There are already a large number of vehicles are currently plying on the roads of India, which are not compliant with the *Bharat Stage* (BS) - VI emission standards and moreover the vehicles shall also be regularly serviced or maintained, hence, it becomes important to have a mechanism that will ensure that the pollution caused by the vehicles are maintained within the limit and monitoring of the same is being done on a regular basis. The Ministry of Road Transport and Highways (MoRTH) before the implementation of the *Bharat Stage* (BS) - VI amended the Motor Vehicle Act, 1988.

VI. MOTOR VEHICLE (AMENDMENT) ACT, 2019[23]

The Motor Vehicle (Amendment) Act 2019 was enacted on 09 August 2019 after making certain amendments in the Principal Act, The Motor Vehicle Act, 1988. The Central Government, in exercise of the powers vested in it, by sub-section (2) of section 1 of the Motor Vehicles (Amendment) Act, 2019 (32 of 2019), fixed 01 September, 2019 as the date to enforce the section 1 of the said Act[24]. With this Act, amendments in the 65 existing sections, substitution of 7 new section/chapter, insertion of 30 new sections and omission of 4 chapter/schedule/section have been made in the Principal Act.

VII. ELECTRONIC FORM OF DOCUMENTS PERMISSIBLE UNDER THE ACT

The amendment in the Act mandates compulsory carrying of certain documents while driving or riding a motor vehicle viz., Driving Licence (DL), Registration Certificate (RC), Insurance of the vehicle and Pollution under Control (PUC) certificate. If, while commuting, not in possession of any of the documents on being asked by the Traffic Police official, then corresponding penalty as prescribed under the Act will be imposed on the individual driving or riding the vehicle.

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23. The Motor Vehicles (Amendment) Act, 2019, *available at*: https://morth.nic.in/sites/default/files/notifications_document/Motor%20Vehicles%20%28Amendment%29%20Act%202019.pdf, (last visited on July 17, 2021).
24. Notification dated August 30, 2019 by the Ministry of Road Transport and Highways, *available at*: https://morth.nic.in/sites/default/files/notifications_document/S.O.%203147%28E%29%20dated%2030%20August%202019%20regarding%20implementation%20of%20Section%201%20of%20the%20MV%20%28Amendment%29%20Act%2C%202019.pdf, (last visited on July 17, 2021).

In this paper, the focus of is restricted only to highlighting the manner in which the Act contributes in controlling of the air pollution. It becomes difficult to carry all the mentioned documents every time with self in physical form and there is also a good probability of one forgetting to carry a particular document in hurry with self while using the vehicle. Apart from these, there is also a probability that individuals fear the misplacement or loss of the original documents due to everyday carrying may tend to avoid carrying it. These all - in turn will result in to an individual shelling out paying heavy penalty. Taking in to consideration these aspects and to further strengthen its Digital India Mission, the Government of India notified that carrying these documents in the electronic form are also acceptable[25], for which necessary standard operating procedure were also been notified by the Ministry of Road Transport and Highways (MoRTH)[26]. The carrying of the soft copy of the Driving License (DL), Registration Certificate (RC), Insurance of the vehicle and Pollution under Control (PUC) certificate, downloaded in the "DigiLocker" application of the Ministry of Electronics and Information Technology, Government of India or "mParivahan" application of the Ministry of Road Transport and Highways, Government of India, are only bring considered to be valid under this notification. The Ministry of Road Transport and Highways, Government of India maintains a website Parivahan Sewa (www.parivahan.gov.in) where in one can find the details on all the four documents. The carrying of the scanned copy or photograph of these documents is not acceptable.

In order to get this effectively implemented, the agencies issuing the Pollution under Control (PUC) Certificate or the Pollution under Control (PUC) Centers will have to first of all register themselves with the Government by completing the formalities as prescribed at the website maintained by the Ministry of Road Transport and Highways (https://vahan.parivahan.gov.in/puc/). The agencies or centers which register themselves will be able to issue the online Pollution under Control (PUC) Certificate and the details will get automatically reflected in the "Digi Locker" application or "*mParivahan*"

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25. Notification on Digi Locker, *available at*: https://digilocker.gov.in/circulars/morthcircular.pdf, (last visited on July 17, 2021).
26. Standard Operating Procedure (SOP) notified by the Ministry of Road Transport and Highways dated December 17, 2018, available at: https://parivahan.gov.in/parivahan/sites/default/files/NOTIFICATION%26ADVISORY/17th%20Dec%202018.pdf, (last visited on July 17, 2021).

application. However, to register, the agencies or centers will have to use the Automotive Research Association of India (ARAI) approved equipment only, to undertake the testing of the vehicles. The Automotive Research Association of India (ARAI), with the Ministry of Heavy Industries and Public Enterprises, Government of India, is the Research Institute of the Automotive Industry (https://www.araiindia.com/home). This step ensures that the quality of the instrument is maintained and is as per the requirement mandated by the Government, in turn resulting into ensuring that the emission of pollutants from a motor vehicle remains within the permissible limits. In case of online Pollution under Control (PUC) certificate, the application captures the various parameters in the smoke through the API provided by the manufacturer, number plate of the vehicle through the webcam, and sends a One Time Password (OTP) to the vehicle owner. Subsequently, a Pollution under Control (PUC) certificate is issued to the owner of the vehicle if the pollutants released by the vehicle of all types viz., petrol, diesel, compressed natural gas (CNG), four - wheeler or two - wheeler, transport or non - transport etc., are as per norms.

Currently, there are also agencies or centers, which have not registered themselves with this portal of the Government but are registered ones. In such case, the agencies or centers will be able to issue the certificate but only in the offline mode and such certificate will not be getting automatically reflected on the "Digi Locker" application or "*m-Parivahan*" application. This certificate is also a valid one and, in such case, the hard copy of the certificate will have to be carried while driving or riding the motor vehicle.

VIII. CONCLUSION

The air pollution has great risks associated with it and with an estimated average $PM_{2.5}$ concentration within India being 91 μgm^{-3}, it is imperative to take measures to control the release of pollutants in to the air, so that India is able to fulfill its obligation under the Paris Agreement effectively. The Constitution of India provides the Parliament with the maximum powers to legislate on environmental issues while the duty to ensure the protection and enhancement of the quality of environment in India is the duty of the Union, States, local Governments and its citizens. The Central Government with the power vested in it, through its Ministry of Road Transport and Highways (MoRTH) accordingly came up with the Motor Vehicle (Amendment) Act in

2019 making it compulsory for the commuters to carry the Pollution under Control (PUC) Certificate while driving or riding a motor vehicle. Under the Digital India Mission, a mission adopted by the Government of India to digitize most of its functioning, created platforms where these details can be stored. The registration as the online Pollution under Control (PUC) Centers will help the common people know the authorized centers registered with the requisite portal of the Government and its location, from where they should get the vehicle tested so as to get the output of the test recorded online in the records of the Government and the information also automatically getting available in the Digi Locker application or *mParivahan* application, which will help the individual follow the law with comfort not paying fines for non-compliance. Moreover, this will also help in reducing the probability of unequal distribution of certificate seekers from different agencies that could act as one of the factors resulting into closure of those centers, which are not finding requisite number of customers.

The registration of the centers for getting recognized as online Pollution under Control (PUC) Centre will also help in avoiding fraud and to keep a tab on the money flow taking place through these centers with regard to the testing of vehicles undertaken by them. The data recorded during the test of the vehicle can be of help to the Government in ensuring that only those vehicles are plying on the Indian roads, which are releasing pollutants within the permissible limit as prescribed by the Government, provided it is strictly implemented.

The data, thus, collected through the portal can also help the Government to come up with appropriate policies or measures that will help in ensuring lesser pollution being caused to the environment through the motor vehicles and the data can be used by both the Ministries. The permission being granted to carry the Pollution under Control (PUC) Certificate in electronic form in the Digi Locker application or *m-Parivahan* application will help further in reducing the use of paper and / or plastic, in turn contributing towards the welfare of the environment. This move, a step forward towards accomplishing the Digital Mission of India, will help India accomplish its obligations under the Paris Agreement in an effective way by digitally monitoring and controlling the air pollution from motor vehicles.

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APPOINTMENT OF JUDGES AND COLLEGIUM SYSTEM: CRITICAL ANALYSIS

NAWAL KISHOR MISHRA*

ABSTRACT : This paper talks about the appointment procedure of the judges to the higher judiciary in India. It also talks about the working of the collegium system and the procedure followed. It also analyses the cases from the first judges' case to the third judges case and how such developments changed the process of judges appointment in India. It also focuses on what type of important reform are essential for the smooth functioning and transparency of the higher judiciary by maintaining the core constitutional values which exists in our Constitution. It also closely examines the role of the executive in this entire process of appointment of judges in the higher judiciary. Through this we have to maintain the independence of judiciary and integrity and core and proper effectiveness of judiciary must be kept in our mind. So all in all, firstly, it discusses the processes and methods of appointment judges in High Courts and Supreme Court. It also highlights that free and fair process must be followed while appointing the judges in higher judiciary because it is an important aspect for judicial integrity and to maintain the independence of judiciary. In the segment of critical analysis of this entire process, this paper highlights that the appointment and the entire process must be unbiased and free from directly or indirectly or any kind of influence from executive or legislative or political bodies. In democratic nation, independence of judiciary is the most important and In alienable part of democratic process and judges must be free from all type of pressure to perform their duties honestly without any fear and bias. In this paper, finally the entire system for appointment of Judges

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in India has critically been examined.

KEY WORDS : Appointment of Judges, Collegium System, Independence of Judiciary, NJAC.

I. INTRODUCTION

The judiciary plays a crucial role in a democracy. The judiciary, the executive and the legislature are the three basic pillars which underpin the democratic foundation of India. The role, powers and functions of these organs are clearly mentioned in our constitution. However, a few controversial issues seem to linger, particularly in the appointment of the magistrates to the superior judiciary. After the adoption of the constitution, the executive had a say in the appointment of judges. But later, the judiciary interpreted constitutional provisions and developed the collegium system which reduced the role of the executive in appointing judges to the higher judiciary. Constitution mentions that judiciary is one of the three pillars of democratic government and with the principle of separation of power, the Constitution of India also sought to distribute the power among all the branches of government as no branch can be entrusted with unchecked, unbridled powers. The members of the constituent assembly were very much concerned about the judicial competency. In the Constituent Assembly, Dr Ambedkar proposed that our judiciary must be competent and independent. Therefore, the achievement of such objective is to be sought after.[1]

II. APPOINTMENT OF JUDGES (CONSTITUTIONAL PROVISIONS)

Article 124(2) and 217 of Indian Constitution discusses about the appointment of Supreme Court and High Court judges. The appointment must be made by the president (in case of Chief justice of India) with the consultation of a number of other Supreme Court or High Court judges as he deems fit.[2]

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1. Constituent Assembly Debate volume-III, on 27th May, 1949, Dr Ambedkar in the Constituent Assembly Debates stated that "our judiciary must both be independent of the executive competent in itself. And the question is how these two objects could be secured"
2. 194 [2]- Article 124(2) of the Constitution of India

(i) Methods Of Judges' Appointment (Position Before 1993)

Before 1993, the powers of the President related to the appointment of judges were purely formal in nature. He acted on the advice of the Council of Ministers. The final power to appoint the Supreme Court judge rested with the executive and the view expressed by Chief Justice of India were not regarded as binding on the executive.

Whenever, the post of Chief Justice falls vacant, it has been in practice for very long period of time to appoint the senior most judge of the apex court as the Chief Justice of India. In the year 1958, the Law Commission, in its report regarding the appointment of Chief Justice, had an opinion that Law not nerely seniority should be the criterion behind the appointment of the Chief Justice of India. However government did not consider it and continued to appoint seniormost judge as Chief Justice of India. In the year 1973, the government, unprecedentedly, appointed Justice A.N. Ray as Chief Justice of India who was the fourth in order of seniority. Rest three judges, who were by passed, resigned from their post. This raised an alarming situation& the government was accused of playing with the independence of judiciary.

Subsequently, government in its defence came up with the recommendation of Law Commission report. Even the appointment of Chief Justice was challenged in the case of *P.L. Lakhpal v AN Ray*[3] but High Court rejected the petition by saying that the motive of the appointing authority are irrelevant in *quo warranto* proceedings. Once again in the year 1976,the then government appointed Justice Beg as the Chief Justice of India by-passing Justice Khanna who was senior to him at that time. Consequently, Justice Khanna resigned in protest. These incidents make it very clear that among all the constitutional institutions and bodies designed to protect the core foundation of democracy, the pride of eminent place is enjoyed by the Indian judiciary. The Nation, the Constitution, the Citizens and the Judiciary must guard against the dilution of its independence and impartiality. However, the efficiency of the collegium system has been challenged from time to time in terms of its independence and transparency of judicial appointments and other decisions. For maintaining the faith of citizens in the judiciary, the collegium must shield itself from further erosion of its independence by scrupulously following the law.

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3. AIR, 1975, Del, 66

(ii) Position After 1993 (Judicial Supremacy)

Appointment and selection of judges is very crucial to maintain independence of judiciary. Constitution has not aid down definite procedurs in case of appointment of judges. Before 1993 historical judgment in judges transfer case 1 (in 1991) in *Subhash Sharma v. Union Of India*,[4] a three judges bench of the Supreme Court expressed the view that was consistent with the constitutional purpose and process, "it becomes imperative that the role of the institution of the Chief Justice of India be recognised as of crucial importance in the matter of appointments to Supreme Court.'' Regarding the word 'consultation', the bench suggested that this question be considered by a larger bench. The bench said that;-'An independent non-political judiciary is crucial to the sustenance of our chosen political system. The viability of the democratic process, the ideals of social and economic egalitarianism, the imperatives of constitutional social and economic transformation, as well as the rule of law and the great values of freedom and equality, depend on the tone of power judicial. The quality of the judiciary, in turn, cannot remain indifferent to the process of selecting judges.

A remarkable judgment delivered by Supreme Court in 1993, *Supreme Court Advocates on Record Association v. Union of India*[5] popularly known as judges transfer case 2, a nine judge bench of the Supreme Court by 7:2 majority overruled its previous judgment in SP Gupta case popularly known as judges transfer case1 and court held that in the matter of appointment of the judges of the Supreme Court and the high courts, the chief justice of India should have primacy. Only in exceptional cases and for valid reason, the name recommended by the chief justice may not be made. In case of appointment of the Chief Justice of India, majority held that the Chief Justice of India must be made on the basis of seniority, senior most judges considered fit to hold office to be appointed as the Chief Justice of India. It was also said that constitutional functionaries must act collectively in judicial appointments. Chief Justice of India was given the final say in transfer of chief justice and judges of high courts. No judges can be appointed by the central government without consultation with the chief justice of India. So, for the first time collegium was introduced through this landmark case.

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4. AIR 1991, SC 631
5. AIR 1994, SC 268

Now moving to the *In re Presidential case*[6] a nine judges bench of the Supreme Court unanimously held that the recommendation made by the chief justice of India on the appointment of judges of the Supreme Court and the High Court without following the consultation procedure is not binding on government. In this case apex court gave its opinion on the nine questions raised by the president in his reference to the Supreme Court under Article 143 of the Constitution. The court held that in consultation process it requires consultation of plurality of judges. The Chief Justice of India is expected to consult with a panel of the four most senior justices of the Supreme Court and has made it clear that if two judges gave an unfavourable opinion, the Chief Justice should not make a recommendation to the government. Moreover, the opinion of the college must be in writing.

III. ORIGIN AND DEVELOPMENT OF THE COLLEGIUM SYSTEM IN INDIA

The core word 'Collegium' is nowhere written or cited in the Constitution of India, it has come into the domain of discussion due to various judicial decisions, order and various pronouncements. If we closely examine the textbook and manuscript of those days, we clearly find that the origin of the concept for establishment of the system of collegium may be found by the recommendations of the Bar Council of India, made on 17 October 1981, at the time of a national seminar and discussion forum of the lawyers at Ahmadabad, Gujarat. It was advised and tendered that there can be a collegium system for the appointment of the Supreme Court Judges by the following authorities:

- o The Chief Justice of India
- o Five senior Judges of the Supreme Court
- o Two representatives who would be representing the Bar Council of India and the Supreme Court Bar Association.

These recommendations of such type of a Collegium system should be binding on the President (though he can say for reconsideration on some specific grounds).

Later, on 30 December 1981, Bhagwati, a senior Judge of the Supreme Court examined the necessity of establishing collegium system in India in the

6. AIR 1999, SC 1

case *S.P. Gupta v. Union of India*[7]. In analyzing and expressing the meaning of the word 'consultation', Bhagwati J focused on the views of Krishna Iyer J, expressed in the *Union of India v. Sankalchand Himmatlal Sheth*[8] that 'we agree with what Krishna Iyer, J. said in Sankalchan Sheth Case that the word 'consultation' sounds totally different in meaning from the consentaneity'. There can be the discussion, but it may be possible that they can disagree, without any doubt they can confer but they cannot concur. This is reminiscent of the views of Dixon, CJ of Canada who had said that, 'The Prime Minister and the Minister of Justice with whom the final choice on appointment rests can feel free to consult me, I feel free to give views which they are free to take or not to take.' However, Bhagwati J, in the first Judges case, showed his dissatisfaction and disagreed with the popular and well used mode of appointment of judges in India-in which the authorised body for selection of judges, has exclusively been vested 'in a single individual' (the President) whose choice 'may be incorrect or inadequate' and 'may also sometimes be imperceptibly influenced by extraneous or irrelevant considerations.

Therefore, he considered it unwise and unhealthy practices to entrust power, particularly to make crucial and sensitive appointments, such as judicial appointments, to a single individual (the President) without putting checks and controls on the exercise of such a power. Accordingly, he suggested that there must be a system of Collegium to make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge. If the Bench is composed of people who need to know who can be appointed to the court and what qualifications are required for appointment, and this last requirement is absolutely necessary, it will go a long way to ensure the right type of judges that would be truly independent.

IV. SUPREMACY OF EXECUTIVE IN CASE OF APPOINTMENT OF JUDGES

As per Article of 124 the president is required to 'consult' legal experts but prior to decision of judges transfer case 1 .it was interpreted that president was not bound to act in accordance with such consultation. First time in the case of *Union of India v. Sankalchand Sheth*[9] meaning of 'consultation'

7. AIR 1982, SC 149
8. AIR, 1977, SC 2328
9. Supra 6.

came before the Supreme Court which was related to the scope of article 222 of the constitution in which it was held that the word 'consultation' means full and effective consultation. For all and effective consultation it is necessary that the three constitutional functionaries must have for its consideration full and identical facts on the basis of which they would be able to take decision. The president however has the right to differ from them and take contrary view. Consultation does not mean concurrence and the president is not bound by it.

Once again in the *SP Gupta v. Union of India*[10] popularly known as the judges transfer case, the Supreme Court unanimously agreed with the meaning of term consultation as it explained in the case of *Sankalchand Case*.[11] Supreme Court clearly mentioned that the meaning of the term 'consultation' in article 124(2) is the same as the meaning of the word 'consultation' in article 212 and article 222 of the constitution. Supreme Court mentioned that the constitution functionaries had merely a consultative role and the power of appointment of judges is solely and exclusively vested in the central government. Justice Bhagwati in his judgment suggested that for the appointment of judicial committee for recommending names of persons for appointment as judges of the higher courts. He observed, "it is unwise to entrust power in power in any significant or sensitive area to a single individual however high or important may be the office, when he is occupying."

V. COLLEGIUM PROCEDURE

The President, as the head of the executive, appoints judges in apex court of country (it includes Chief justice and other judges of Supreme Court). The Chief justice of India recommends his successor. This was the practice but in 1970's it came in controversy when a junior judge had been appointed the chief justice ignoring the three seniormost judges as of tradition. The recommendation must be made to the law ministry to the Prime Minister Office and it has to be sent to the office of the president of India. In the appointment of High Court judges the recommendation made by the Chief justice of India with two other senior-most judges of the Supreme Court and the chief justice of high court made through elevation. The recommendation made through the Governor of concern state to the Law Ministry, Government

10. Supra 5.
11. Supra 6.

of India.

(i) Evolution of NJAC

With the 99th Constitutional Amendment, Parliament has constituted the National Judicial Appointment Commission (NJAC) in order to replace the collegiums system by interesting Article 124A and amending Article 124. It comprised of Chief Justice of India and other judges as per Article 124A[12]. The main function of the NJAC was make recommendations to appoint or transfer judges in High Courts and Supreme Court.

However, Supreme Court has declared the 99th Constitutional Amendment as unconstitutional in *SCORA v. Union of India* in order to protect independence of judiciary, which is basis structure and thereby nipped the NJAC in the bud itself.

(ii) Critical Analysis of Collegium System

Appointments of judges under article 124 and 217 for the Supreme Court and high courts are under control of executive as one can have while going through the bare reading of provisions. Judiciary has the primacy in judicial appointments. As is found in the constituent assembly debates and later in the Constitution, appointment in the judiciary has always been done with the consultation, though that has been an act of executive. It has been affirmed by the apex court in the SP Gupta case popularly known as first judge's case. After that, radical changes took place in the case of appointment of judges and one must observe in later judgment by the Court and finally a collegium system was developed. The apex court will look into the system of all the appointments.

This has been questioned from time to time by the intellectual community of the country, clothing the name of transparency and accountability of any system which has gone futile before the apex court. The efforts done by the central government in the year 2014 to abolish the collegium system and to introduce the 'National Judicial Appointments Commission. After so much heated arguments between the judiciary and the executive, it was declared

12. Chief Justice of India as a chairperson, two senior-most judges of the Supreme Court, Union Minister of law and Justice, two eminent personalities (to be nominated by a committee consisting of Chief Justice, Prime Minister and leader of opposition in LokSabha). Of these two eminent persons, one person would be from SC/ST/OBC or minority community, or a woman, and they are to be nominated for a period of three years and shall not be eligible for re-election.

unconstitutional by the judiciary because it posed threat to its independence. In the Dissenting opinion, avoiding all majority opinion justice Chelameswar quoted it as 'inherently illegal'. Though, the apex court with full majority accepted that there is the need for transparency in case of the appointment of judges. In an effort to maintain some transparency, the Collegium's resolutions and discussions are now posted online, but no specific reasons are highlighted. So after having understood so many points, one thing is very clear that in India, the appointment of judges through the collegium system is also a system of judges selecting judges where judges are appointed as well as transferred by the judges themselves. Also, we come to know about one interesting thing that the process of collegium is not by an act of parliament or by any constitutional provision. And also why the Supreme Court is the ultimate boss in the case of appointment of judges because the central government is mandated to appoint as a judge of the apex court if the collegium reiterates its recommendation.

So, finally the above mentioned the three judges cases, apex court developed the concept of new jurisprudence called judicial independence which clears everything that no other branches of system can interfere in case of appointment of judges. So apex court introduced the concept of collegium system in India. Government, through 99thconstitutional amendment, tried to replace the collegium system with the national judicial appointment commission but however it was declared unconstitutional and against the basic structure of the constitution of India. While delivering judgment of this case, apex court promised to consider necessary steps for improvement and betterment of the entire system related to the appointment of judiciary. Even after declaring NJAC unconstitutional, court did not do anything. They are still in favour of highly undemocratic unconstitutional system called collegium system. Our judicial system has set many highly admirable benchmarks, but in the case of the appointment process of the judges that mystery must be solved through judiciary and set a benchmark in this scenario.

As far as appointment of apex court is concerned it has specific provisions under Indian Constitution. The bare reading of provisions and the debate by the constituent assembly, one can understand well that the constitution framers wished for an independent and impartial judiciary. This is the reason they left the provision with utmost faith on the office of the executive and the judiciary. The appointment made by the executive but even executive is not given free hand and at the same time (since appointment

questions is of highest court of land) even judicial involvement are given privilege. But it has been seen that with the passage of time the appointment has gone into different direction which was not at all the dream of constitution makers. The apex court being supreme law interpreter, delivered many significant judgments and have cleared the system. It was criticized by various right minded citizens of the country. The analysis can remind one that it is not the earlier appointments, when primary was given to the executive, was free from all biasness and fancies. In-fact, if it were so, the people may have been a greater sufferer than they are today.

The Legislature looking at both sides if the argeement tried to come up with a balanced system like NJAC. It has again been criticized and finally struck down by the apex court. Since the rays of hope was longer and stronger when the legislature brought a specific legislation for appointment of judges but as it came before the judiciary the rays went back. This has given rise to the question about the perfect procedure for the appointment of judges so far.

VI. CONCLUSION

Highly discussed and celebrated case of Advocates-on-Record Association v Union of India, apex court declared it unconstitutional and stuck down the NJAC (National Judicial Appointment Commission) act for the appointment of judges by the national judicial appointment commission. Earlier, so called collegium system was highly criticized for its opacity but still collegium system was revived. The senior lawyers of the court heard with the sole objective of the improvement in the collegium system. Even suggestions were also invited from any individual or public by the bar council of India. Finally court agreed that the Government of India will prepare memorandum of procedure consultation with President and Chief justice of India.

All such things were discussed at that time when NJAC was declared unconstitutional by the Supreme Court. Now once again appointment of judges is happening by the controversial collegium system. The concept of memorandum of procedure is still in the files of the central government offices. Cautiously, Supreme Court also does not want to consider this matter. So now, the reality is that the judges are appointed by the judges. Collegium is effectively working. In the name of independent judiciary, apex court does

not want to allow anything beyond its scope when it comes to the appointment of judges in the Supreme Court as well as the High Courts. Here the statement of justice Chelameswar is very important that transparency is a very crucial and significant in constitutional governance. Transparency is a situation of rationality. The amount of transparency is needed more in case of appointment of judges. He advocated that full elimination of government from the appointment process of judges is an undemocratic principle. There are so many cases where Supreme Court collegium withdrew their recommendation when objection came from the government. That is the real bone of contention and it gives a great deal of speculation. Record of collegium functioning and how it works, there is no accountability in this record, such kind of affair may frame disloyalty towards utmost dignified institution.

Whatever it is called – Judicial Activism or Judicial Overreach, striking down of NJAC or declaring NJAC unconstitutional has added another chapter in the debate & discussions for the judges appointment to the Constitutional Courts in India. It is firmly believed that for securing independence and objectivity of the judiciary, it is necessary that the selection be based on merits. Thus, a balance needs to be struck between the collegium system and the proposed commission for the appointment process. People of this country have great faith in the highest body of judiciary called apex court. Only in the name of the separation of power, court cannot deny a lot of problems regarding the appointment of judges through the collegium process. For the betterment of democracy and to maintain the highest level of standard and integrity, apex court must take some revolutionary steps in the appointment of the judges with other organs of the system.

So, today, with a finger crossed moment for the nation, all eyes are on the apex court. The Supreme Court of India has to answer the tough questions in the upcoming years in case of the appointment of the judges in the higher judiciary. Therefore it is the need of the hour that the appointment in the judiciary must be kept free from all influences.

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NOTES AND COMMENTS

CONCEPTUALISING RIGHT TO PROPERTY

*RABINDRA KUMAR PATHAK**

ABSTRACT : The idea of property is an essential aspect of human existence. It is an age-old idea that has attracted many a scholarly explication as to its meaning and relevance in human life and law. It is said that law and property are intertwined. They are inseparable. Law plays an important role in protecting and regulating the use and utilisation of property. However, the most intrigued aspect of the idea of property is that being a dynamic concept, it cannot be confined to a single meaning. It has been construed in diverse manners across societies, legal systems and periods in times. Even within the same society and legal system, it has varied significantly, though it is generally agreed that it entails certain rights and liabilities. The present paper, therefore, seeks to explore the endeavors, juristic and judicial, made towards understanding the concept of property. It also takes into account the constitutional conception of right to property. The post-constitutional developments contributed a great deal to the conceptualisation of right to property which remains crucial to the very idea of social justice. All said, inherent societal inequalities also shaped the final outcome as to how right to property is to be viewed and regulated.

KEY WORDS : Property, Right in- rem, Bentham, the Constitution of India, neighbours.

I. INTRODUCTION

The idea of property is instinctive. It is so in men and in animals. It is with the passage of time and with the society becoming more and more complex that we notice that ownership, possession and enjoyment of property

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started to be regarded as rights, to be protected by the state as legal rights.[1] This therefore brought into significance the role of law as regards the protection of property because one of the important functions of government was argued to be the protection of private property. It is said that property and 'law' are so inseparably intertwined, and necessitates uncovering many a layer of the notion of property, and legal regulation thereof. As Bentham would say, "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[2] It goes without saying that concept of property is a dynamic concept, and cannot be confined to a single meaning. It has been construed in diverse manners across societies, legal systems and periods in times. Even within the same society and legal system, it has varied significantly.[3] However, with the adoption of the constitution, a constitutional conception of property has become very much perceptible, and it helps understand the broad conceptual contours as well the limits and regulation of the right to property.

II. CONCEPTUAL UNDERSTANDING: FROM BLACKSTONE TO COASE AND BEYOND

Property is about rights and liabilities. A person has the right to enjoy his property, but it has to be in such a manner that it is not to the prejudice of the others. That is, the legal rights of neighbours should not be infringed. According to Cairns, the property relation is triadic: A owns B against C, where C represents all other individuals.[4] *Exclusion*, it is said, is the essence of property, and right to property is an exclusive right. It *excludes* others.[5] To quote Cohen[6],

Whatever technical definition of property we may prefer, we must recognise that a property is not a relation between an owner and a thing. A right is always against one or more individuals. This becomes unmistakably clear if we take specifically modern forms of property such as franchises,

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1. M Hidayatullah, *Right to Property and Indian Constitution*, 12(1983)
2. Jeremy Bentham, *Theory of Legislation* 111-13 (1931)
3. See, A K Ganguly, "Right to Property: Its Evolution and Constitutional Development in India", 48 *JILI* 489 (2006).
4. See, H Cairns, *Law and the Social Sciences* 59(1935)
5. R T Ely, *Property and Contract in their Relation to Distribution of Wealth, Vol. 1* 136 (1914)

patents, goodwill etc., which constitute such a large part of the capitalised assets of industrial and commercial enterprises.

One of the traditional understandings of property is to visualise it as a relation where a person has an exclusive dominance over a thing. However, in the present day society, the meaning of property can be seen differently as Friedman says, "it is rather a collective description for a complex of powers, functions, expectations, liabilities, which may be apportioned between parties to a legal transaction."[7] According to him, a definition of property which 'confines it to the complete control over a thing' is an 'artificial' one. Changing times require taking into consideration 'things' as well as 'non-things' as regards evolving understanding of the concept of property. Austin describes 'things' as permanent objects that are sensible or perceptible through senses. A thing has two essential features: first, it must have an element of permanence, and second, it must have a certain element of physical unity.[8] Evolving and expanding meaning of property includes now patents, copyrights, and such other non-things, which are intangible in nature unlike the tangible things, which have been traditionally and in popular sense understood as property.

To elaborate further, Paton provides different usage and meanings of 'thing'. A thing in material sense may be corporeal and tangible having physical unity, such as a block of marble. It may exist in physical world without being material in popular sense, as can be seen in case of electricity. A thing may not be material, corporeal or tangible, but may be an element of wealth, copyright and patent being the common example.[9] Thus, the concept of 'Intellectual Property' has widened the traditional understanding of what constitutes 'property'.[10]

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6. M R Cohen, *Law and Social Order*, 45 (1933)
7. Friedman, *Law in a Changing Society*, 96(2001, Indian reprint)
8. G W Paton, *A Textbook of Jurisprudence*, 456(1969)
9. *Id*. at 457.
10. In *R C Cooper* v. *Union of India,* AIR 1970 SC 564 the Supreme Court observed that "In its normal connotation "property" means the "highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which does not depend on another's courtesy : it includes ownership, estates and interests in corporeal things, and also rights such as trade-marks, copyrights, patents and even rights in *personam* capable of transfer or transmission, such as debts; and signifies a beneficial right to or a thing considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured." In *K.T. Plantation (P) Ltd*. v. *State of Karnataka,* (2011) 9 SCC 1 Supreme Court held that property includes intellectual property.

The above observation would require some elaboration in order to understand the finer nuances of what constitutes property, and how it has developed over the years. Justice K Subba Rao in his work *Man and Society* described the concept of property thus:

> "Property is a general term of extensive application. It is indicative of every possible *interest* which a man can have. It may mean a thing or a right which a person has in relation to that thing. It is extended to all recognised types of *interest* which has the characteristic of property."[11]

However, it needs to be acknowledged that 'private property' presupposes duty on the part of others. It goes with a presupposition that others will not interfere with the rights that an owner of property has. Property in Hohfeldian sense implies 'immunity' from interference. The law protects this 'immunity' by way of legal provisions under criminal law and civil law.[12] The essence of property is *exclusion*, and *immunity* accorded to property by way of law that seeks to protect this element of exclusion. Blackstone "set the stage" for the *exclusion thesis* by emphasising upon the element of "sole dominion" with regard to property rights a person may have.[13] This view of 'property' is a conception of property where property rights exist *in rem*, indicating clearly that property rights are different from the rights that are *in personam* as we find in cases of contractual rights i.e. rights resulting from a contract.[14]

The *in rem* conception of property was further elaborated by Adam Smith who argued that all exclusive rights are real rights, besides property.

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11. Quoted in T K Tope, *Constitutional Law of India*, 327(2010). See, *Ahmed G.H. Ariff* v. *CWT,* (1969) 2 SCC 471 where the Supreme Court observed that property "Signifies every possible *interest* which a person can clearly hold or enjoy". Emphasis added.
12. See Chapter XVII titled "Of Offences against Property" under Indian Penal Code, 1860. Likewise, there are remedies and protection available under the civil law. Constitution of India under article 300A provides that no person shall be deprived of his property *save by authority of law*.
13. Blackstone described the notion of property as comprising of two important facets: first, "sole and despotic dominion" which a man has over a "thing" and secondly, to the "total exclusion" of *others*. Justice Holmes in *White-Smith Music Publishing Co*. v. *Apollo,* Co., 209 U.S. 1, 19 (1908) supported the "exclusion thesis" of property where the exclusion was to be against "interference with the more or less free doing with it as one wills."
14. *See generally*, Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", 26 *Yale L.J.* 710 (1917)

Intellectual property rights were, according to him, *real* rights. He stated that the *in- rem* rights had progressively become more important as the humanity moved from the "stage of hunters" to the "age of agriculture" to the "age of commerce". In the years to come, we notice that *in-rem* nature of property was also recognised by the utilitarian philosophers and thinkers such as Bentham. In sum, different jurisprudents at different times have tried to untangle the concept of property in different and *differing* ways. For instance, Blackstone, an ardent supporter of *exclusion thesis*, characterised property as being capable of being "acquired, held and disposed".[15] We find the reflection of this in now-repealed right to property provision under article 19.[16] Moreover, the term property includes within its conceptual confines, as stated before, concepts like copyrights and other intellectual property, as has been recognised by the Supreme Court.[17] In the context of article 300-A, the Court has observed that the expression "property" in Article 300-A is confined not to land alone and it "embraces every possible interest recognised by law."[18]

Be that as it may, Ronald Coase, known for his path-breaking paper "The Problem of Social Cost"[19], put forth a fresh perspective on property though he did not define the term unlike others. However, his understanding of property may be gleaned from his observations made in the aforementioned paper, where he writes:[20]

> The rights of a land-owner are not unlimited. It is not even always possible for him to remove the land to another place, for instance, by quarrying it. And although it may be possible for him to exclude some people from using "his" land, this may not be true of others. For example, some people may have the right to cross the land. Furthermore, it may or may

15. *See* Rajeev Dhavan, *The Supreme Court of India: A Socio-legal Critique of Its Juristic Technique*, 140 (Bombay, NM Tripathi Pvt. Ltd, 1977).
16. Article 19(1) (f) provided that "All citizens shall have the right to acquire, hold and dispose of the property…." Likewise, Article 31(1) read thus: "No person shall be deprived of *his* property save by the authority of law." Emphasis added.
17. *K.T. Plantation* v. *State of Karnataka,* (2011) 9 SCC 1
18. *Id*. at 51. Article 300A of the Constitution reads thus: "No person shall be deprived of his property save by authority of law."
19. R.H. Coase, "The Problem of Social Cost", 3 *J.L. & ECON*. 1 (1960)
20. *Id*. at 44.

> not be possible to erect certain types of buildings or to grow certain crops or to use particular drainage systems on the land.

This shows that the owner of the land has only *certain* rights over the lands which Coase describes as "circumscribed list of actions", meaning thereby that an owner of the land does not 'own' it to the exclusion of others, rather he has a bundle of rights with respect to the land. Therefore, expressed in general terms, Coase simply meant that with regard to property, it is better to view property as a *bundle of rights* and not as a *distinctive right* that a person has over a thing, say land, to the exclusion of others.[21]

III. CONSTITUTIONAL CONCEPTION OF RIGHT TO PROPERTY

The constitutional conception of right to property veers around some of the important and key concepts that remain essential to understanding how constitution conceptualises and regulates the right to property. The concept of private property, the doctrine of eminent domain, and right to property as a fundamental right are some of the aforesaid key concepts that have over the years also engaged considerable judicial mind. Amid all this, the notion of private property assumes great importance given the power of the state to protect it, regulate it, and at times to acquire it. History of India in the preceding seven decades or so showcases many instances where the state usurped the property rights of people through *acquisition* raising question as to what is the *extent* of property that a person has or may have, and also as to the role of the State in acquiring the private property of people. This requires enquiring about the legal framework that existed, and that exists, providing constitutional protection to property rights.

i. Pre-constitutional legal framework

It is a known fact that under the Government of India Act, 1935, section 299 and section 300 intended to protect the property rights. Subsequently, section 299 was "modified and incorporated" as Article 31 under the constitution of India, 1950 as a fundamental right to property in independent India, and it was *notably* a provision that was drafted by the British to protect

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21. He assumed "a picture of property as ad hoc bundles of government-prescribed use rights". See, Thomas W. Merrill and Henry E. Smith, "Making Coasean Property More Coasean", 54 *Journal of Law & Economics*, 77 (2011).

their vested interests.[22] Merillat underscores the fact that the British devising the Government of India Act, 1935 wanted to protect "those to whom they had made past commitments and those who formed their last bastion of support in increasingly nationalist India."[23] A reading of the Parliamentary Joint Committee on Indian Constitutional Reform shows that the Committee was for the protection of private property from possible confiscation, as the following observation of the Committee indicates: "We think that some general provision should be inserted in the Constitution Act safeguarding private property against expropriation…." The Committee further observed that "the property of particular individuals should be lawful only if confined to expropriation for public purposes and if compensation is to be determined, either in the first instance or on appeal, by some independent authority."[24] In the words of Merillat, the Parliamentary Joint Committee recommended that:[25]

> "…an act to authorize the taking of a particular person's property must be for a "public purpose" and the compensation provided would be subject to review by a court or other "independent authority". For *other kinds of expropriation*—the acquisition of classes of property, of jagirs and similar individual grants for services rendered, of *zamindars*—the principal safeguard was to be the requirement of the British rulers' prior consent, through Governor General or the Governor of a Province."

When the Government of India Act, 1935 was enacted, one could see the tilt towards protecting the interests of the privileged class though it did mandate 'authority of law' and requirement of 'compensation' for acquisition of private property for public purpose. As regards the State's approach towards property, a visible categorisation was noticeable that of 'a particular person's property' under section 299(2) and that of the *zamindars* or *jagirs* and so on under section 299(3) of the Act. This was subsequently to provide

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22. Kaushik Basu and Annemie Maertens, *The New Oxford Companion to Economics in India*, 448 (New Delhi, Oxford University Press, 2012).
23. HCL Merillat, *Land and the Constitution of India*, 38 (Bombay, N M Tripathi, 1970).
24. *Report of the Joint Committee on Indian Constitutional Reforms*, para 369 (1934), available at https://indianculture.gov.in/report-joint-committee-indian-constitutional-reform-session-1933-34 (last accessed on 18.09.2021)
25. Merillat *op.cit*. at 43. Emphasis added.

the background to the drafting of the provisions relating to right to property under the Indian Constitution. Section 299(1) of the 1935 Act dealing with compulsory acquisition of land provided that "No person shall be deprived of his property save by authority of law."[26]

It further provided that "Neither the Federal or a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any *land*, or *any commercial or industrial undertaking*, or any interest in, or in any *company* owing, any commercial or industrial undertaking, *unless the law provides for the payment of compensation for the property acquired* and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, it is to be determined."[27] These two foregoing provisions settled two important points: *first*, extinguishing property rights would require the 'authority of law', and *second*, compensation was mandatory for the compulsory acquisition of land and undertakings. The third clause of the aforesaid provision under the 1935 Act clearly indicated the intention to protect "certain vested interests" that included *zamindari*.[28] Constituent Assembly subsequently tried to *reverse* this colonial legacy while drafting Article 31.[29] Prior to the 1935 Act, Karachi Congress Resolution, 1931 demanded that no constitution would be acceptable unless it provided for enabled the Swaraj Government to provide for a set of fundamental rights one which was no person to be deprived of property or liberty except in accordance with law.[30] Notably, it is said that the Fundamental Rights Resolution at the Karachi Session may be described as the first draft of what came to be Parts III and IV of the Constitution.[31]

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26. Section 299(1), Government of India Act, 1935
27. Section 299(2), Government of Indian Act, 1935
28. Section 299(3) of the 1935 Act read thus: "No bill or amendment making provision for the transference to public ownership or any land or for the extinguishment or modification of rights therein, including rights or privileges in respect of land revenue, shall be introduced or moved in the Federal Legislature *without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion*." Emphasis added.
29. See, Wahi, Namita, The Fundamental Right to Property in the Indian Constitution (August 10, 2015), available at SSRN: https://ssrn.com/abstract=2661212 or http://dx.doi.org/10.2139/ssrn.2661212 (Last visited on 20.09.2021).
30. See, V Krishna Ananth, *The Indian Constitution and Social Revolution: Right to Property Since Independence* (New Delhi, Sage Publications, 2015).
31. *Id*. at 43.

ii. Constituent Assembly debates: formative discussions

Based upon his reading of various other constitutions of the world, Sir B N Rau in his preliminary notes of September 2, 1946 listed out possible areas that could be enshrined as fundamental rights. Security of property was one of them.[32] In Clause 28 another note of December 23, 1946 prepared by KT Shah, it was stated that:[33]

> "Every citizen has and is hereby guaranteed the right of *acquiring*, *owning*, *holding*, *selling* or *mortgaging* property, real or personal in any part of the Union subject to such laws as relate to tenure, taxation, public dues, local rates, stamp duties, and other such imposts, and regulations, duty enacted and in force in any such part of the Union. Provided that, in virtue of its sovereign authority, the Union of India (or any component thereof), shall be free and entitled to acquire ant private property held by any private individual or corporation as may authorized or permitted under the law for the time being in force."

Clause 34 of the note further provided that:[34]

> "Existing rights of ownership of any degree in agricultural land and any other items mentioned in the preceding article shall be acquired by and on behalf of the State of India and vested in the Government of the Union subject to such compensation of any as may be deemed proper and reasonable."

These two clauses in many ways formed the basis of Article 19(1) (f) and Article 31 of the Constitution.[35] The Sub-Committee on Fundamental Rights in draft clause 27 provided thus:[36]

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32. *Id*. at 50.
33. B Shiva Rao(ed), *The Framing of India's Constitution – Select Documents*, Vol. 2, 52 (New Delhi, Universal Publishing Co. Pvt. Ltd., 1967). Emphasis added.
34. *Id*. at 53.
35. *Ananth op.cit.* at 52.
36. Sub-Committee on Fundamental Rights (26 March 1947). Emphasis added. It is important here to note that during the British time, "The notion of identifying property with land was one that abided, even right up to the coming of the Indian Constitution. Little attention was paid to incorporeal or moveable property, with the laws concerning them relating primarily to penal regulation for theft and burglary."

> "No property, *movable* or *immovable*, of any person or corporation, including any interest in any commercial or industrial undertaking, shall be taken or acquired for public use unless the law provides for the payment of just compensation for the property taken or acquired and specifies the principles on which and the manner in which the compensation is to be determined."

The foregoing observations evince the efforts that framers of the Constitution made to conceptualise the notion of right to property, along with a constitutional mechanism to ensure protective measures with respect to private property. Right to property provision was the "second most contentious" provision during the drafting of the constitution as the debates over property stretched over two and half years.[37] The founding fathers of Indian constitution had before them a history of denial of right to property, and at the same time, they were cognizant of the existence of practices such as *Zamindari* among others. Having been well versed with other constitutions in the world as regards right to property, and the prevailing social milieu in India, they adopted a "seemingly ambivalent position in relation to right to property"[38] as Sivaramayya writes: "On the one hand, they wanted to protect the property right of citizens, like the right to life and liberty. On the other hand, the Congress Party was committed to the abolition of *Zamindaris*. It wanted that the *Zamindaris* should be abolished unhindered by compensation issues. Particularly, Nehru and Pant were against the compensation issue being open to judicial scrutiny."[39] They were in favour of legislative determination of compensation being final, and this, they believed, was possible by using the word "compensation" in place of "just compensation".[40]

See, Gopal Sankaranarayanan, "The Fading Right to Property in India", 44 *Law and Politics in Africa, Asia and Latin America* 222(2011).

37. See, Wahi, Namita, The Fundamental Right to Property in the Indian Constitution (August 10, 2015), available at SSRN: https://ssrn.com/abstract=2661212 or http://dx.doi.org/10.2139/ssrn.2661212 (Last visited on 20.09.2021). Also see, Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (New Delhi, Oxford University Press, 2000).
38. B Sivaramayya, *Inequalities and the Law* 84 (Lucknow, Eastern Book Company, 1984)
39. *Id*. at 84-85.
40. *Ibid*. Be that as it may, it has to be seen in the light of the post-constitutional developments, more so that of the Supreme Court with respect to the interpretation

It is also equally noticeable that framers had before them Fifth Amendment of the American Constitution which *inter alia* provided that "…nor shall any person …be deprived of life, liberty or property without the due process of law; nor shall private property be taken for public use without just compensation". The phrase *due process* was a debatable one as many like B N Rao were of the opinion that a *due process clause* might prove to be an obstacle to efforts aimed at attaining social justice, and moreover, it was also an evident fact that in the United States, the *due process clause* had been at the root of a plethora of cases, and such a tendency, it was apprehended, might inflict Indian courts as well. Framers, therefore, evidently showed their discomfort as to the applicability of *due process clause* to right to property as feared that doing so would adversely affect initiatives to effectuate land reforms. To quote *in extenso*, the following observation of B N Rao merits mention:[41]

> A vast volume of case law has gathered round this "due process" clause, of which it has been said that it is "the most important single basis of judicial review today". At first it was regarded only as a limitation on procedure and not on the substance of legislation; but it has now been settled that it applies to matters of substantive law as well. In fact, the phrase "without due process of law" appears to have become synonymous with "without just cause", the court being the judge of what is "just cause"; and *since the object of most legislation is to promote the public welfare by restraining and regulating individual rights of liberty and property, the*

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of the word compensation in Article 31. "This reflected the socialist Congress party's desire to enact redistributive land reform policies without judicial intervention. Notwithstanding the enactment of two amendments by Parliament to eliminate the justiciability of compensation, the Indian Court later ruled that compensation was justiciable and that such amounts could be reviewed in accordance with principles set forth by the Court."See, Manoj Mate, "The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases", 28 *Berkeley Journal of International Law* 216(2010).

41. B N Rao, *India's Constitution in the Making,* 243 ((Bombay, Orient Longmans, 1960). Emphasis added. For a brief and lucid analysis on due process in property, *see* T R Andhyarujina, "Evolution of Due Process of Law by the Supreme Court", in B N Kripal *et. al*.(ed), *Supreme But Not Infallible*, 196-197(New Delhi, Oxford University Press, 2000).

court can be invited, under this clause, to review almost any law.

IV. RIGHT TO PROPERTY UNDER CONSTITUTION

Article 19(1) (f) provided that all citizens shall have a right to *acquire*, *hold* and *dispose* of the property.[42] Sub clause (5) of article 19 laid down certain restrictions on the exercise of aforesaid rights by way of a law *in the interest of the general public* or *any Scheduled Tribes*. Thus, right to property was to be a fundamental right subject to certain restrictions. On the other hand, sub chapter "Right to Property" under Part III of the Constitution had Article 31 which, as it was originally drafted, provided under 31(1) that no person shall be deprived of his property *except by the authority of law*, and Article 31(2) clearly stated that no property, moveable or immovable, shall be taken possession of or acquired for public purpose under any laws authorising the taking of such possession or such acquisition *unless the law provides for compensation for the property taken possession of or acquired* and either fixes the *amount* of the compensation or *specifies the principles* on which, and the manner in which, the compensation is to be determined and given.[43] Clause (2) therefore enwombed the doctrine of *eminent domain*.

Compared to section 299 of the 1935 Act, Article 31(1) clearly seems to be on the lines of section 299(1)[44] whereas article 31(2) closely scrutinised shows noticeable departures *vis-à-vis* section 299(2), though the phraseology of the two provisions may appear to have resemblance.[45] First difference is to be noticed with respect to the fact that whereas section 299(2) was to be applicable only to "land" or "immovable property", Article 31(2) covers a wide canvass and applies to both moveable or immovable, and therefore to

42. Noticeably and significantly, the Government of India Act, 1935 did not have a corresponding and similar provision.

43. See, M Hidayatullah, *Right to Property and the Indian Constitution*, 148 (Calcutta University, 1983). Article 13(2) that declared any law to be void if it 'takes away or infringes the rights' conferred under Part III of the Constitution, which then was inclusive of Article 19(1) (f) and Article 31. Moreover, article 32 provided remedial safeguard for the protection of fundamental rights under Part III of the Constitution.

44. Section 299(1) of the 1935 Act read thus: "No person shall be denied of his property in British India save by the authority of law."

45. For instance, both the provisions under the Act and the Constitution mention "public purpose" and the word "compensation".

all, property. Moreover, Section 299(2) referred only to "compulsory acquisition" whereas Article 31(2), seen comparatively, uses the expression "taken possession of or acquired" with a corresponding Entry 42 in the Concurrent List.[46]

In a series of cases, the Supreme Court has tried to grapple with the questions pertaining to the import of expression such "property", "taken" or "acquired" in the context of Article 31. Shastri, J in *Subodh Gopal*[47] observed thus:[48]

> …the word "property" in the context of Article 31 which is designed to protect private property in all its forms, must be understood both in a corporeal sense as having reference to all those specific things that are susceptible of private appropriation and enjoyment as well as in its juridical or legal sense of a bundle of rights which the owner can exercise under the municipal law with respect to the user and enjoyment of those things to the exclusion of all others. This wide connotation of the term makes it sometimes difficult to determine whether an impugned law is a deprivation of property within the meaning of Article 31(2), for, any restriction imposed on the use and enjoyment of property can be regarded as a deprivation of one or more of the rights therefore exercised by the owner.

He further elaborated:[49]

No cut and dried test can be formulated as to whether in a given case the owner is "deprived" of his property within the meaning of Article 31; each case must be decided as it arises on its own facts. Broadly speaking, it may be said that an abridgement would be so substantial as to amount to a deprivation within the meaning of Article 31 if, in effect, it withheld the property from the possession and enjoyment of the owner, or seriously

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46. Entry 42, Concurrent List, Seventh Schedule read thus: "Principles on which compensation for property acquired or requisitioned for the purposes of the Union of a State or any other public purpose is to be determined, and the form and the manner in which such compensation is to be given."
47. AIR 1954 SC 92.
48. *Id*., para 25.
49. *Ibid*.

impaired its use and enjoyment by him, or materially reduced its value.

Article 31 was repealed by the 44th Constitutional amendment in 1978, which also inserted Article 300A providing for right to property. The new provision was an exact reproduction of the repealed Article 31(1). Right to property was relegated to being a constitutionally recognised legal right. Article 300-A, it has been *held*[50], implies that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without the support of law made by a competent legislature, and that the expression "property" in Article 300-A is not confined to land alone, it includes intangibles like copyrights and other intellectual property and embraces every possible interest recognised by law.[51] In *Hari Krishna Mandir Trust* v. *State of Maharashtra*[52], the Supreme Court observed that Article 300-A comprises two parts: *possession of property in the public interest* and *payment of reasonable compensation*. It further held that the State possesses the power to take or control the property of the owner for the benefit of public. However, when a State so acts, it is obliged to compensate the injury by making *just* compensation.[53]

Right to property under Article 300A despite its relegation continues to be a great bulwark against unjust and undue deprivation of property. It is interesting to note that Article 300A shares resemblance with Article 21 and Article 265, and it cannot be, and should not be, overlooked as they remain foundational to the very idea of rule of law. Supreme Court has recognised right to property as a basic human right.[54] To quote the following observation of the Supreme Court:[55]

> It is accepted in every jurisprudence, and by different political thinkers that some amount of *property right is an indispensable safeguard against tyranny and economic oppression of the Government*. Jefferson was of the view that liberty cannot

50. *K.T. Plantation (P) Ltd. v. State of Karnataka*, (2011) 9 SCC 1
51. *Id*. at 51
52. (2020) 9 SCC 356
53. *Id*. at 387. Also see, *State of Bihar* v. *Project Uchcha Vidya, Sikshak Sangh*, (2006) 2 SCC 545; *Jilubhai Nanbhai Khachar* v. *State of Gujarat*, 1995 Supp (1) SCC 596 ; *Bishambhar Dayal Chandra Mohan* v. *State of U.P.*, (1982) 1 SCC 39;*Girnar Traders* v. *State of Maharashtra*, (2007) 7 SCC 555.
54. *Delhi Airtech Services (P) Ltd.* v. *State of U.P.*, (2011) 9 SCC 354.
55. *Id*. at 379. Emphasis added.

> long subsist without the support of property. "Property must be secured, else liberty cannot subsist" was the opinion of John Adams. Indeed the view that property itself is the seed-bed which must be conserved if other constitutional values are to flourish is the consensus among political thinkers and jurists.

V. CONCLUSION

Conceptualising right to property is a demanding task, more so in a diverse society that has a long history of periods of different regimes being in power and each casting their imprints upon the evolving notion of property. Inherent societal inequalities also shaped the final outcome as to how right to property is to be viewed and regulated. The post-constitutional developments contributed a great deal to the conceptualisation of right to property, which in constitutional parlance, needs also to be seen in a comparative context, especially with reference to the doctrinal debt Indian constitution owes to the constitutional jurisprudence of the United States. The demands of modern times would necessitate rethinking of the prevailing notion of property, and therefore, of the right to property which remains crucial to the very idea of social justice.

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BANKING SERVICES AND CONSUMER PROTECTION IN INDIA

*RAJU MAJHI**

ABSTRACT : In the Constitution of India, social and economic justice is an important part in which a consumer justice and protection is imbedded. The need and importance of the consumer protection is expanding at a rate of knots especially in the Indian Banking Sector. There are number of legislations were passed by the Indian Parliament but unfortunately they fail to protect the interest of small consumers. Specifically, the Consumer Protection Act, 2019 has been passed to protect the interest of the consumers. We have encountered many incidents in the banking sector where the consumers are misled due to the failure of bank's operational capacities leading to the financial insecurity amongst the innocent customers. This paper aims to examine the negligence and deficiency in service of banks in relation to various businesses dealing with the customers.

KEY WORDS : Banking business, deficiency in service, negligence.

I. INTRODUCTION

The law of consumer protection has come to meet the long felt necessity of protecting the common man from wrongs for which the remedy under the ordinary law for various reasons has become illusory. The importance of the Act lies in promoting the welfare of the society in as much as it attempts to remove the helplessness of a consumer which he faces against powerful business, described as a network of rackets or a society in which producers have secure power to rob the rest and the might of the public bodies which are degenerating into store houses of inaction where papers do not move from one desk to another as a matter of duty and responsibility for

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extraneous considerations. The Act aims to protect the economic interest of the consumer as understood in the commercial sense as a purchaser of good and in the large sense of user of services."[1] The recent example is the Punjab and Maharashtra Co-operative Bank issue, wherein, the Reserve Bank of India under Section 35(A) of the Banking Regulation Act, 1949 imposed the regulatory restrictions and withdrawal restrictions upon the said bank due to its irregularities disclosed to the Reserve Bank of India, which in turn has affected the faultless customers.

One of the laudable features of the Act is that it provides relief to consumers, if they suffer loss or injury due to a deficiency of services. In all developed economies, the concept of services has assumed great importance. A modern society lives and thrives upon services of numerous kinds which have become indispensable for comfortable and orderly existence of human beings.[2] Services which are included in the definition are banking, financing, insurance, transport, and supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information.[3]

Banking is specifically mentioned as services under the Consumer Protection Act. There has been a steady growth in the number of complaints filed against banks. Since finance is the life blood of a modern economy, therefore, banking system is the linchpin of any development strategy. Banking promotes saving by providing a wide variety of financial assets to general public.[4] Against this background this paper is very comprehensively trying to discuss the various provisions to protect the interest of the customers of banking sector from deficiency of service. To better understand it is very necessary to understand the term Bank and Banking.

II. MEANING AND DEFINITION OF BANK AND BANKING

The term "Bank" originally referred to an individual or organisation which acted as a money changer and exchanged one currency for another. But, these days, a bank is an institution in which people keep their cash balance in the form of deposits. Definition of banking may vary from country

1. *Lucknow Development Authority* v. *M.K. Gupta*, (1994)1 SCC 243
2. Journal of Indian Law Institute, Vol. 341, p.41 (1992)
3. The Consumer Protection Act, 2019, Section 2(1)(o)
4. Niti Bhasin, "*Banking Development in India 1947 to 2007*" Growth, Reforms and Outlook, p.(viii)

to country. According to Prof. Sayers, "Banks are institutions whose debt-usually referred to as 'bank deposits'- are commonly accepted in final settlement of other people's debt. He further states that "Ordinary banking business consists of changing cash for bank deposits and bank deposits for case, transferring bank deposit from one person or corporation to another, giving bank deposit in exchange for bills of exchange, government bonds and so forth. According to Banking Regulation Act, 1949, "Banking means the accepting for the purpose of lending or investment of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise."[5] The business or a commercial bank is primarily to hold deposits and make loans and investments with the object of securing profits for its shareholder.

Definition of banking has undergone a sea change in several countries due to various changes in the socio-economic and political environment. A raft of changes is taking place which together are blurring the accepted definitions. In ordinary parlance, banking is a business transaction of bank. Banking in India is venerable. Banking during ancient times was synonymous with money lending. The Manu Smriti speaks of deposits, pledges loans and interest rate. The indigenous banking had been organized in the Indian form of family. The well-developed financial system can be traced from Kautilya (Chanakya) "Arthashastra". It has been described in it "all understanding depends upon finance", hence foremost attention shall be paid to the treasury. During Muslim period the local financiers played the role of banker and the main credit instrument through which banking and transfer of funds was carried out was through the inland bills of exchange or Hundis, Indian bankers lent money, financed the rulers and trade, acted as the trader of the State and also as insurer of goods. The Jagat Sheths were the hereditary bankers and they played an important role in the finance of the country. Due to the arrival of English in India indigenous bankers began to wane although the East India Company successfully presented the establishment in India of banking on western lines for a considerable time, on the ground that the indigenous banking was more suited to be banking requirements of the country.

The Indian banking system had gone through a series of crisis and consequent bank failures and thus its growth was quite slow during the first half of this century. But after independence, the Indian banking system

5. The Banking Regulation Act, 1949, Section 5(b).

recorded rapid progress. After this we have to give a focus on various enactments through which bank and banking systems are regulated.

III. LAWS REGULATING THE BANKING

There are various laws are prevailing to regulate the banking systems in India, like, Reserve Bank of India Act, 1934, Banking Regulations Act, 1949, Foreign Exchange Management Act, 1999 and Negotiable Instruments Act, 1881. Banking in India is mainly governed by the Banking Regulation Act, 1949 and the Reserve Bank of India Act, 1934. The Reserve Bank of India and the Government of India exercise control over banks from the opening of banks to their winding up by virtue of the powers conferred under these statutes. The Negotiable Instruments Act 1881 is the law which governs the banking processing in India. A negotiable instrument means "a promissory note, bill of exchange or cheque payable to either order or to bearer. There are other negotiable instruments also recognized by usage or custom of trade as government promissory, railway receipt and Shahjog Hundies, bearer bonds, bearer debentures, share certificates and postal orders etc.[6] Negotiable instruments form the backbone today's complex commercial world. In our day to day life we find a negotiable instrument in some form or other exchanging hands. Banking law is based on a contractual analysis of the relationship between the bank and the customer. In order to be a customer, some sort of an account is necessary with the bank. After the negotiable Instruments Act, certain rights and obligations are implied by the law into such relationship as:

1. When the bank account is in credit, the bank owes the balance to the customer and when the account is overdrawn, the customer owes the balance to the bank.
2. The bank is under obligation to honour customers' cheque.
3. The bank is under an obligation to maintain secrecy of the transaction unless the customer consents, there is a public duty to disclose, the bank's interest require it, or under compulsion of law.
4. The bank is not to close a customer's account without reasonable notice to the customer land the bank may not pay from the customer's account without a mandate from the customer.

6. The Negotiable Instruments Act, 1881, Section 13.

However, these implied contractual terms may be modified by express agreement between the customer and the bank.

IV. MEANING AND DEFINITION OF BANKER AND CUSTOMER

The term 'Customer' of a bank is not defined by law. Ordinarily, a person who has an account in a bank is considered its customer. According to Sir John Paget "to constitute a customer there must be some recognizable course or habit of dealing in the nature of regular banking business."[7] This definition of a customer of a bank lays emphasis on the duration of the dealings between the banker and the customer and is, therefore, called the 'duration theory'. According to this viewpoint a person does not become a customer of the banker on the opening of an account, he must have been accustomed to deal with a banker before he is designated as a customer. In contrary to that according to Dr. Hart, "a customer is one who has an account with a banker or for whom a banker habitually undertakes to act as such."[8] Supporting this view in the case of *Central bank of India Ltd., Bombay* v. *Gopinathan Nair and Others*[9] the Kerala High Court observed that "Broadly speaking, a customer is a person who has the habit of resorting to the same place or person to do business. So far as banking transactions are concerned he is a person whose money has been accepted on the footing that the banker will honour up to the amount standing to his credit, irrespective of his connection being of short or long standing."

But in practice it is well established that, to constitute a customer the following essential requisites must be fulfilled:

(i) a bank account- savings, current or fixed deposit-must be opened in his name by making necessary deposit of money, and

(ii) the dealing between the banker and the customer must be of the nature of banking business.

But here it is very important to note that a customer of a banker need not necessarily be a person. A firm, Joint Stock Company, a Society or any separate entity may be a customer. It also includes a Government department

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7. Sundharam & Varshney, *Banking Theory Law & Practice*, Sultan Chand & Sons, New Delhi 2021), p.2.1.
8. *Ibid.*
9. AIR 1979 Kerala 74.

and a corporation incorporated by or under any law.[10] On the other hand bank has been statutorily defined. Section 5(b) states that banking means "the accepting for the purposes of lending or investment of deposits of money from public repayable on demand or otherwise and withdrawals by cheque, draft, cash or otherwise and banking means any company which transacts business or banking in India."[11] As there is no definition of customer in statutes so in order to understand the word customer we have to look in detail the relationship between a banker and a customer depending upon transactions and variety of services offered by the banks and availed by the person. The banker and the customers are interlinked in the socio-economic revolution in which they country is passing. In a developing economy bankers have to play a vital role to serve the cause of consumer of banking facility. Banking system reflects a country's economy growth to a large extent. Due to this kind of transactions and services provided by banker to its customer there are various kinds of relationships are developed like Debtor and Creditor, Principal and Agent, Trustee and Beneficiary, Bailer and Bailee, Pawnee and Pawnor, Mortgagee and Mortgagor, Lessee and Lessor, Guarantor and Guarantee and Trader and Consumer. After discussing the relationships between banker and customer, it is very significant to have a look on banking business.

V. THE BUSINESSES THAT CAN TRANSACT THE BANKING COMPANIES

The essence of a banking business is receiving money on current account for deposit from the public repayable on demand and withdrawable by cheque, draft or otherwise and lending or investing the same. Therefore, if the purpose of accepting the money is not lend or invest, the business cannot be called as banking business. The Banking Regulation Act specifies other forms of businesses a banking company may be engaged in.[12] It is also very important to note here that it is mandate for every company carrying on the business of banking in India to use as part of its name at least one of the words- bank, banker, banking or banking company.[13] The very prominent transactions which are entered between the banks and customer are:

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10. The Banking Regulation Act, 1949.Section 45-Z.
11. The Banking Regulation Act, 1949, Section 5(b) and 5(d)
12. *Ibid.*, Section 6.
13. *Ibid.*, Section 7.

1. Deposit transactions- It included saving bank accounts, fixed deposits or term deposits or currents accounts.
2. Loan transactions- Loan to bank customer are drawn on the funds deposited with the bank and yield interests which provided the profit for banking industry and the interest on saving accounts.
3. Services- Some of the major services utilized by the customer are:
   a) Collection of cheques and bills, inland and foreign
   b) Issue of bank drafts.
   c) Mail, Telegraphic Transfers
   d) Travelers cheque
   e) Letter of credit
   f) Acting as insurance agents and Travel agents
   g) Collection of pensions
   h) Credit cards
   i) Teller facility
   j) Advisor to customer for personal investment
   k) Safe deposit lockers

However, as we have seen above that the relationship between a banker and a customer is more complex and it usually governed by contract and other statutes dealing with the rights and obligations of the customer. A customer has a right to expect that the bank would follow his instructions in letter and spirit and where a customer instruct a bank to put certain money in to fixed deposits for maximum returns and banks fail to do so the same would constitute the basis for a claim against the bank.

VI. DEFICIENCY IN SERVICE

Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes- (i) any act of negligence or omission or commission by such person which causes loss or injury to the consumer; and (ii) deliberate withholding of relevant information by such person to the

consumer.[14] Here it is very pertinent to have a look on the term consumer under the Act. The consumer means any person who- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose or

(ii) hires or avails of any service for a consideration which has been paid or beneficiary of such service other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person, but does not include a person who avails of such service for any commercial purpose.[15]

It is also very significant to note here that the term service is also defined under the Act. The Act provides the definition of service as "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.[16]

The growth of trade and services in the present global networking of business activities has also tremendously boosted the banking service. The major chunk of the banking activities is controlled by the nationalized banks and comparatively only a small segment of the banking business is in the private set up. Deficiency in the services of the bank is covered by the provisions of the Consumer Protection Act, 2019. However, the Banking Ombudsman Scheme, 1995 which was notified by the Reserve Bank of India is to provide for a system of redressal of grievances against banks. Any person whose grievance against the bank is not resolved to his satisfaction

14. The Consumer Protection Act, 2019, Section 2(11)
15. *Ibid.,* Section 2(7).
16. *Ibid.,* Section 2(42).

by that bank within the period of two months can approach the banking ombudsman if his complain pertains to any matters specified in the scheme. As per the scheme, a customer can make a complaint against deficiency in bank services.

The grounds of the complaint are:

a) Non-payment or inordinate delay in the payment or collection of cheques, drafts, bills, etc.

b) Non-acceptance without sufficient cause;

c) Non-issue of drafts to customers and others;

d) Non-adherence to prescribed working hours by branches;

e) Failure to honour guarantee or letter of credit commitments by banks;

f) Claims in respect of unauthorised or fraudulent withdrawals from deposit accounts, etc;

g) Complaints pertaining to the operations in any saving, current or any other account;

h) Complaints from exporters in India;

i) Complaints from NRI having accounts in India

j) Complaints pertaining to refusal to open deposit accounts without any valid reasons;

k) Any other matters relation to violation of directives issued by Reserve Bank of India;

l) Complaints can be lodged concerning loans and advances.

VII. JUDICIAL APPROACH TOWARDS THE CONSUMER PROTECTION IN BANKING

Banks provided or render services or facilities to its customers or non-customers. Banking is a business transaction of a bank and customers of banks are consumers within the meaning of the Section 2(42) of the Consumer Protection Act, 2019.[17] In order to be a customer some sort of account is necessary with the bank, however, a consumer need not have an account as in the case of bank draft or credit card. The banking institution since the

17. Avtar Singh, Consumer Protection Law in India,

dawn of freedom has been growing unprecedently.[18] Banking is one of the important services which has been expressly covered under the Consumer Protection Act, 2019 . The purpose of express inclusion of banking in the definition of service is that any kind of disruption in such an important service sector can not only create hardship for consumer but also have severe economy repercussions on the nation. This fact has been recognized by court also and the remedy has been extended to any kind of deficiency in payment of interest on overdraft, charging of interest a leading rate, wharf age, demurrage, defect in demand draft, wrongful crediting of an amount, delay in crediting, improper maintenance of lockers, passing of forged cheques etc.[19] In a large number of cases, banks have been pulled up for deficiency in service and compensation has been awarded to complaints by consumer courts. Some important cases are analyzed hereunder. In *Central Bank of India* v. *M/s. Grains & Gunny Agencies*,[20] the court defended the cause of consumers of banking facilities and made an advance towards consumerism. In *State Bank of India* v. *N. Raveendran Nair*,[21] the payment was refused to the persons because capacity under the person signing the draft was not mentioned. The bank was held liable. In another landmark decision, the commission observed that delay on the part of the bank in payment of the amount of deposit on its premature encashment entitled a customer to claim compensation.[22]

The bank is liable for deficiency in service for inordinate delays in providing banking services and the customer of bank is entitled to claim compensation for the loss and the injury suffered by him due to the inordinate delay in the payment of the amount of deposit certificate on its premature encashment.[23]

In *K. B. Shetty* v. *P.N. Bank, Goregoan (West)*[24], the Commission stated that a customer places implicit faith in the bank as regard his money deposits

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18 R. K. Nayak, *Consumer Protection Law-Annual Survey of Indian Law*, Vol.25, 1989, p.360.

19. S.K. Verma and Afzal Wani, *A Treatise on Consumer Protection Laws*; The Indian Law Institute, New Delhi, 2004, p.360.

20. AIR 1989 MP 28.

21. 11(1991) CPJ-25.

22. *S. Nagabushan Rao* v. *Union Bank of India*, 1991 CPR 197.

23. *P.N. Prasad* v. *Union Bank of India*, 1991 (1) CPR 198.(SCDRC-AP, Hyderabad).

24. 1991 CPR 125.

or locker facilities. It due to the negligence of bank the precious ornaments of a customer in a locker are lost due to breaking open of the locker the very faith of customer is shaken.

In *Arjun Lal Aggarwal* v. *State Bank of India*[25], the Bank failed to credit the account of the complainant expeditiously in order to enable him to receive the sum-sent as a wedding gift from UK by a relation. The wedding was fixed for 4-7-1991 and draft was cashed by SBI on 29th of May 1991 and amount was credited almost four months after marriage. The State Commission held that it was a paten deficiency in the service.[26] The refusal of a bank not to accept Rs. 5/- note is also deficiency in service. In *Punjab and Sind Bank* v. *Manpreet Singh*[27], it has been held that the cheque facilities provided by a Bank to a consumer is a service for consideration and that dishonouring of a cheque when there is money in the account is deficiency in service. There is duty to honour cheque as long as there is balance or the amount of the cheque is within the limit of cash credit arrangement. A bank was held not liable for the dishonour of the customer's cheque because of insufficiency of funds.[28]

In *Bimal Chandra Grover* v. *Bank of India*[29], Supreme Court held that client was a customer when he gets over draft facility from a Bank. Bank could not sell shares within reasonable time occasioning loss to client. Service rendered by bank is deficient. it is the duty of the bank to inform customer if cheque is returned. The customershould be informed quickly of the fact that the cheque given for collection has come back. This will enable the customer to pursue his remedies. Where a cheque under collection was dishonoured and also lost in transit, the bank did not inform the customer of this fact. The National Commission held the bank liable to pay compensation.[30] However, in *Akhil Bhartiya Grahak Panchayat* v. *Central bank of India*[31], it was held that it is not a deficient service on the part of a bank to charge simple interest when the loan stipulated compound interest and hiking of service charges is not a matter which can be examined by the Forum under

25. (111) 1994 CPR (1) 610 (Har).
26. *Gandhi Balakrishna* v. *Canara Bank*, 1995 (1) CPR 10.
27. VIII 1994(2) CPR 627 (Punj.).
28. *Hadimba Creations* v. *State Bank of India*, (2003) 1 CRT 233 (NC).
29. AIR 2000 SC 2181
30. *State Bank of India v. Rajinder Lal,* (2003) 4 CPJ 53 (NC)
31. (1993) 2 CPR 307 Mah

the Act.[32] In *Corporation Bank and Another* v. *M/s. Filmalaya Pvt. Ltd.*,[33] the complaint was filed for forged encashment of the cheques. The National Commission held that the encashment of such cheques was born out of gross negligence at best and collusion between the employees of the complainant and the officials of the bank and it was a clear case of deficiency in service by the bank.

In *Tufail Ahmad Shah* v. *J & K Bank*[34], cheque which was sent for collection was lost in transit by courier service. The bank took due care and caution in sending the cheque. The bank was not held liable. In case where a cheque book was issued to the imposter to encash the cheque and the bank failed twice to verify the signatures with specification signatures of the complainant was held as a clear case of deficiency in service.[35] In *Manager, Kerala State Cooperative Bank* v. *K. P. Suran*[36], it was held that the sanctioning of loan is within the discretion of the bank. The respondent did not have any vested right of being provided the entire amount of loan applied for so there is no deficiency of service.

Maturity value on fixed deposit was not paid. it was held to be a deficiency in service and bank was liable to pay principle amount with interest and cost awarded.[37] In *H.S. Arya and Others* v. *CEO, SBI International Card*[38], the payment of educational fee denied through credit card in spite of sufficient credit limit, wrong advice was given by the bank helpline was a deficiency in service, as harm caused to the professional life as the complainant could not to US for examination to make career, hence direction was given to bank to pay Rs. 96,649/- for examination fee and Rs.50,000/- for mental agony. In *Canara Bank* v. *Sudhir Ahuja*[39] a cheque lost in transit and neither amount credited nor cheque returned.

The deficiencies in service were proved and bank was held liable to pay compensation. The cases cities above indicate that the machinery for the settlement of customer dispute is working in accordance with the spirit of the

32. *Consumer Action Group v. RBI,* (1995) 3 CPJ 256
33. (1992) 11 CPJ 428 (NCDRC)
34. 111 (2003) CPJ 531
35. *Abdul Razak v. South India Bank Ltd.,* 111 (2003) CPJ 20
36. 2004 (1) JRC 304
37. *Consumer Union, Kashmir Valley Finance and Investment Ltd. v. Kashmir Valley Finance Investment Ltd.,* IV (2003) CPJ 570 (JKSC)
38. 2006 (2) JRC 474 (C)
39. 1 (2007) CP) J 1 (NC)

legislation and protecting the customer interest to the optimum possible. The cases cited above are few of the cases decided by the Supreme Court, National Commission and other residual agencies but from the above illustration cases it was become obvious that the case law on banking services has developed to cover many issues relevant to securing the benefit of the consumers in different ways, such an approach would help in improving the system of banking as well as extending more and more protection to consumers.

VIII. CONCLUSION

From the above discussion it is crystal clear that the consumer protection law has significantly developed during the years. The law developed by Consumer Dispute Redressal Agencies has been a source of rights and remedies in important consumer cases as banking, insurance, housing etc. The time taken for disposal of cases has been usually much more than the statutory period fixed by the Consumer Protection Act, 2019. To provide speedy justice is, therefore a goal yet to be achieved. The measures to attain the objective of speedier remedy to consumers should include the joint involvement of the voluntary organizations, manufacturers and suppliers and the service providers in the process of Consumer Protection. This can make possible reduction in the number of complaints and help in making the extra-judicial settlements of consumer disputes more effective.[40]

In India banking industry need regulatory measures in order to meet the growing need of the vast masses in rural and urban India. Banking industry has been making efforts to evolve new safer methods to meet the growing challenges emerging out of urbanization and industrialization. Bankers and customers are interlinked in the socio-economic revolution through which country is passing. In a developing economy bankers have to play a vital role to serve the cause of consumers of banking facilities. Banking system reflects a country's economic growth to a large extent.[41] Last but not the least, without any hesitation it can be said that in present time banking sector plays a very significant role for the economic systems of any country and that is one of the reason that bank has to be very much accountable towards its customers when he dealing any business.

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40. S.K. Verma and Afzal Wani, *A Treatise on Consumer Protection Laws*; The Indian Law Institute, New Delhi, 2004, p.360.
41. R.K. Nayak, "Consumer Protection Law", XXIV ASIL, 427 (1998)

GENOCIDE IN INTERNATIONAL LAW: A SOUTH ASIAN PERSPECTIVE

ANIL KUMAR MAURYA*
ABDULLAH NASIR**

ABSTRACT : The term genocide, coined by Raphael Lemkin, is a combination of two words: '*genos*' (Greek) which means race, nation or tribe and '*cide*' (Latin) meaning killing. Lemkin had drafted a resolution on the subject matter, which was later adopted by the General Assembly on 11th December 1946 after much deliberation and with certain amendments. The development of the recognition of the crime of genocide in international law has mainly been through the efforts of the United Nations (UN). Accordingly, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly on 9th December 1948 by Resolution 260A (III) and came into force on 12th January 1951. This paper seeks to focus on the origin of the convention on genocide and the definition of genocide. The paper describes the genocidal events in South Asia and attempts to analyze the disheartening and disturbing repetition of genocide in various parts of South Asia. The paper aims at an evaluation of the international legal regime on genocide and highlights the inherent inadequacies of the convention and in particular the inadequate definition of crime of genocide itself.

KEY WORDS : Genocide, *mens-rea*, United Nation General Assembly, ECOSOC, South Asia, Raphael Lemkin

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I. INTRODUCTION

Genocides have occurred and continue to occur in every corner of the world to every type of people. For reasons varied and many, Turks are known to have massacred over a million Armenians between 1914 and 1917 during World War 1, during the 1930s and 40s, and the Japanese slaughtered millions across Asia. The number of deaths in the Gulag camps in the Soviet Union is estimated to be as high as eight million. Nazi Germany under Hitler is known to have slaughtered six million Jews and millions more in World War II. In the 1950s and 60s, the Communist Chinese took away the lives of an estimated thirty million. During the 1970s the Khmer Rouge killed almost two million Cambodians. The genocides of Bosnia, Rwanda, Congo and Darfur are also examples of the systematic murder of hoards of people for being members of a particular ethnic, racial, or religious group. Over the past hundred years or so, an estimated one hundred million people across the world have been victims of genocide, a number which is staggeringly higher than all the combat deaths in all the wars fought during that time in the world.[1] Not a discovery of modern times but the extremely high numbers of victims make genocide one of the worst problems of our days, a problem that must be addressed. As per the modern legal lexicon, genocide is a recent phenomenon to be identified as an international crime, but history is rife with examples of people being killed for being the members of a particular nationality, race, ethnic or religious group. The efforts to address the crime of genocide by the international community started as a result of the holocaust of Jews under the Nazi regime during World War II and the United Nations was at the forefront of those efforts.

II. CONVENTION ON GENOCIDE: THE ORIGIN

The efforts for a convention on genocide were started by the inspirational book[2] of Raphael Lemkin[3] in the year 1944. Lemkin drafted a resolution on

1. Daniel Goldhagen, *'Genocide: Worse Than War'* (April 14, 2010) <https://www.youtube.com/watch?v=w7cZuhqSzzc> accessed on 2nd March, 2022
2. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Camegie Endowment for International Peace, Washington 1944)
3. Raphael Lemkin (1900-I959) was a Polish scholar, he escaped from the Nazi genocidal plot went to Sweden and finally to the United States of America, he taught at the Duke University and later in Yale University, he served as a Consultant to the United

the subject matter, which was later adopted by the General Assembly on 11th December 1946[4] after much deliberation and with certain amendments. The resolution is considered a landmark step in the evolution of international law on genocide as it was the first attempt by the international community to look into the issue. The resolution stated that:

> "Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of human beings; such denial of the right of existence shocks the conscience of mankind ... ".[5]

General Assembly's resolution also affirmed that genocide is a crime under international law, and fixed the criminal responsibility of perpetrators irrespective of their positions, ranging from private individuals, public officials to statesmen.[6]

The most important contribution of the resolution was that it highlighted the need for a Convention on genocide and requesting the ECOSOC to prepare a Draft Convention on the subject. After deliberations, the Council asked the Secretary General to prepare the draft for a Convention on genocide. The first draft of the proposed convention was prepared by the UN Secretariat. Through its Resolution 180 (II) United Nations General Assembly requested the ECOSOC to examine the Secretariat Draft and submit a report. An *Ad-Hoc* Committee was formed to prepare a draft Convention on the subject. In its preparations, the *Ad-Hoc* Committee had a number of references such as, the Secretariat Draft and drafts submitted by the Members of the United Nations. Thus, the draft prepared by the *Ad-Hoc* Committee came to be

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States Government on Economic Warfare and on Military Government. His determined effort to fight against the crime of genocide in the international plane saw the birth of jurisprudence on genocide. His works have greatly influenced the development of International criminal law.

4. UNGA Res 96(I) (11th December 1946)
5. *ibid* 188-189, Resolution also stated that "Genocide ... results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part. The punishment of the crime of genocide is a matter of international concern."
6. *ibid* 189, Resolution also affirmed that 'genocide is a crime under international law which the civilized world condemns' and it invited the member states to 'enact the necessary legislation for the prevention and punishment' of crime of genocide.

known as the Second Draft.[7]

The Sixth Committee of the United Nations General Assembly considered the *Ad-Hoc* Committee draft. Two other resolutions on the subject were submitted for consideration to a drafting committee consisting of representatives of Australia, Belgium, Brazil, Czechoslovakia, China, Cuba, Egypt, France, Iran, Poland, USSR, UK and US. The results of these deliberations constituted the final text of the Convention on genocide which came to be adopted by the General Assembly on 9th December 1948 by Resolution 260A (III). It was titled as the "Convention on the Prevention and Punishment of the Crime of Genocide, 1948"[8] and came into force on 12 January 1951.

Another significant contribution to the 1948, Genocide Convention was the codification of 'genocide' as an international crime which should be prevented and punished, irrespective of whether committed during wars or in peacetime.[9] The Convention defined "genocide as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group".[10]

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7. For a comprehensive and detailed history of Genocide Convention, *see*, Matthew Lippman, 'The Drafting and Development of the 1948 Convention on Genocide and the Politics of International Law' in H G Van Der Wilt and others (eds.), *The Genocide Convention: The Legacy of 60 years* (Martinus Nijh off Publishers 2012) 15-25. Also see, Henry T. King and others, 'Origins of the Genocide Convention' (2007-08) 40 Case W. Res. J. Int'l L. 13.
8. Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12th January 1951) 78 UNTS 277 (Genocide Convention)
9. Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12th January 1951) 78 UNTS 277 (Genocide Convention) Article I
10. Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12th January 1951) 78 UNTS 277 (Genocide Convention) Article II Article III of the Convention contains the punishable acts (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and Public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

In addition to the above mentioned Convention, the crime of genocide was covered by the ILC in the Draft Code of Crime against Peace and Security of Mankind[11] (adopted in 1996), which defined genocide resembling the 1948, Genocide Convention's definition. The comprehensive and influential definition of the 1948, Genocide Convention was further recognized when it was retained verbatim in the Statutes of the International Criminal Tribunal for the former Yugoslavia,[12] the International Criminal Tribunal for Rwanda[13] and the International Criminal Court.[14]

III. GENOCIDAL TENDENCY IN SOUTH ASIA

In spite of aforesaid efforts at international level, the crime of genocide has still been experienced in different parts of the world and South Asia is no exception to it. Moreover, countries in South Asia have experienced genocide although perhaps not on the same scale or intensity of incidents as happened in Europe or Africa. Is that making it any less an incident of genocide? According to Benita Sumita, South Asia is to some extent genocidal. genocidal refers to a state of mind in which a person or a group will not hesitate if given an opportunity to exterminate or marginalize to the degree of extinction

11. ILC, 'Draft Code of Crimes against the Peace and Security of Mankind' 85th session (U.N. Doc A/CN.4/L.532) (1996), The 1996 Draft Code of Crimes is the result of several decades of work by the ILC since its adoption of the 1954 Draft Code of Offences against the Peace and Security of Mankind. In addition to the text of the Draft Code, the ILC site includes an analytical guide, commentaries, and the ILC Report to the General Assembly. By Resolution, GA res. 51/160 (1996/12/16), the General Assembly drew "the attention of the States participating in the Preparatory Committee on the Establishment of an International Criminal Court to the relevance of the draft Code to their work" and requested "the Secretary-General to invite Governments to submit, before the end of the fifty-third session of the Assembly, their written comments and observations on action which might be taken in relation to the draft Code . . . ."
12. UNSC, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993 The statute was established by resolution 808/1993, 827/1993 and amended by Resolution 1166/1998, 1329/2000, 114/2002)
13. UNSC, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, The statute was established by Security Council Resolution 955 (1994) of 8 November 1994 and last amended by Security Council Resolution 1717 (2006) of 13 October 2006.
14. UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (17 July 1998) UN Doc A/CONF.183/10 (*entered into force* July 1, 2002)

of another group ethnically, religiously, nationally and/or culturally distinct.[15] She further argued that there are historical reasons for stating that South Asia is genocidal – a boiling pot that can be cooled down. This history starts from who we are and where we belong that has been imbibed into our body and soul the day we are born. Whether, it was in undivided India, Sri Lanka, Bangladesh, Pakistan or Nepal. We are not born only a boy or girl, more importantly, we are born a Hindu, Muslim, Christian, Sinhalese, Tamil, Buddhist or into the numerous sub-sects, castes or sub-castes. Together with the history of which we are, the history of which we are not–the history of the other – is more acutely and fatally inculcated into our mindset.[16]

As Amartya Sen, rather appropriately emphasized in his book, *Identity and Violence: the Illusion of Destiny*, that "the art of constructing hatred takes the form…of some allegedly predominant identity…the result can be homespun elemental violence or globally artful violence and terrorism." [17] These lines explain the reason behind the history of violence and conflict in the South Asian region. It rightly asserts that it is not the multiple identities that are the cause for concern but the desire for the single identity to be predominant.

Post-colonisation South Asia is facing mass killings in one form or the other. Thousands of lives were lost during the partition of India, and the riots aftermath, the persecution of Tamils by the Sinhala-Buddhist in Sri Lanka, the 1971 conflict in East Pakistan, the killings of Ahmadiya's and Shia's in Pakistan are some of the incidents which has shocked the conscience of the habitants of this region. The most worrying feature of these incidents is the involvement of state agencies in one form or another. Francis A. Boyle in his book "*The Tamil Genocide by Sri Lanka*, argued that "Tamils on the Island known as Sri Lanka have been the victims of genocide as defined by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide".[18] Sri Lanka for the past over six decades, have implemented a systematic and comprehensive military, political, economic, cultural, linguistic, and religious campaign with the intent to destroy in substantial part the different

15. Benita Sumita, '*South Asia and Genocide: A Case for Prevention'* (2007).
16. *Ibid*
17. Amartya Sen, '*Identity and Violence: The Illusion of Destiny*', (London: Penguin Books, 2006).
18. Francis A Boyle, '*The Tamil Genocide by Sri Lanka: A Global Failure to Protect Tamil Rights Under International Law*' (Clarity Press, Inc. 2009).

national, ethnical, racial, and religious group constituting the Hindu and Christian Tamils. This Sinhala-Buddhist Ceylon campaign has consisted of killing members of the Hindu and Christian, Tamils in violation of Genocide Convention Article II(a). This Sinhala-Buddhist Ceylon campaign has also caused serious bodily and mental harm to the Hindu and Christian Tamils in violation of Genocide Convention Article II(b). This Sinhala-Buddhist Ceylon campaign has also deliberately inflicted on the Hindu and Christian Tamils conditions of life calculated to bring about their physical destruction in substantial part in violation of Article II(c) of the Genocide Convention.[19]

Indeed, the genocidal tendencies of the fanatical groups will need to be urgently tackled at various levels—social, political, legal, and even religious. This highlights the need for enactment of a special law on genocide".[20] Despite all these shocking events, there hardly have been attempts to prosecute the perpetrators of the crime. Even if actions have been taken, the political influences over the trials have diminished the value of these judicial proceedings.

An academic enquiry into the issue reveals that these conflicts revolve around identities, which sustain political patronage, a symbiotic relationship which benefits the group and the political patron; however more beneficial to the political leaders than the people. Most often violence in the South Asian region erupts in an attempt to consolidate the support of ethnic, religious or other culturally marked groups or merely to appease these groups.[21] Such is a similarity in the democratic framework of governance in South Asia. Because of the involvement of influential political institutions, the author senses unwillingness on the part of the State to frame policies to combat such heinous crimes.

Another aspect which needs special mention here is that of the International Criminal Tribunal of Bangladesh. Article 3(2) (c), of the International Crimes (Tribunals) Act,1973 formed in Bangladesh for the prosecution of those who were implicated in the atrocities committed during the 1971 war, provided for genocide as one of the crime. In the protected

19. *Ibid.*
20. V.S. Mani, '*A Law on Genocide'* the Hindu (10 April, 2002).
21. Paul Brass, '*On the Study of Riots, Pogroms and Genocide*', prepared for the Sawyer Seminar, Centre for Advanced Study in the Behavioral Sciences, Stanford University (2002).

group list the Act also included political group apart from national, ethnic, racial and religious. But the Act is only applicable to the crime committed in the context of 1971 war. This is one of the most serious limitations of this Act. The Act should have made the crime of genocide punishable without limiting its scope to one particular situation.

Over past sixty years, the jurisprudence on the crime of genocide has evolved mainly due to and in tandem with the work of the international tribunals. Contributions of the International Court of Justice have also been considerable particularly in the context fixing responsibility of State for acts of genocide. Primarily it is significant to note that addressing the crime of genocide at the international level is a task made especially difficult due to reasons of legality and sovereignty. Raphael Lemkin faced the difficulty in establishing the crime as a problem of international concern.[22] The United Nations failed to prevent the genocide that occurred in various parts of the world, including the Rwandan[23] and the Yugoslavian genocide.[24] The 1948 Genocide Convention could not be applied in certain cases of genocide for its inherent inadequacies.

IV. IS THE EXISTING DEFINITION OF GENOCIDE COMPREHENSIVE ENOUGH?

One of the inherent inadequacies of the Convention is the inadequate definition of the crime of genocide itself. If we look at the history of the

22. Lemkin was successful in establishing genocide as a crime under international law; however his call to repress the crime universally went unanswered. He urged the principle of universal repression or universal jurisdiction to be adopted for the crime of genocide. Prof. Lemkin said in 194 7 'This ... principle is the symbol and practical application of the higher doctrine of moral and legal solidarity in protecting the basic values of our civilization' (Lemkin R, 'Genocide as a Crime under International Law' [1947] 41 AJIL 145). The 1948 Genocide Convention omitted the concept as a whole.

23. The report given by the international panel of eminent personalities [created in 1998 by the Organization of African Unity (OAU) with a mandate to investigate the 1994 Rwandan Genocide and other issues associated with it], pinpoints the collective failure of the international community in preventing the Rwandan genocide in particular it criticizes the silence maintained by the United States in the Rwandan genocide. For a brief account of the OAU Report See "OAU Report Regarding Rwandan Genocide" (2000) *The American Journal of International Law,* Vol.94, No 4 pp. 692

24. B.S.Chimni, and Antony Anghie, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts",(2003), Chinese Journal of International Law, Vol.2, No.1. pp77.

negotiation of the Convention, it tells us the purpose of the drafters of the definition of genocide. They intended a flexible and progressive definition that will meet the evolving demands of the time.[25] The two unprotected victim groups, social and political were included in the original draft of the Convention; however, the former USSR opposed the inclusion of these groups. The Russian delegates argued that the inclusion of political groups was not in compliance with the scientific definition of genocide and would in practice, misrepresent the perspective in which the crime should be viewed and impair the efficiency of the Convention, giving the notion an extension of meaning contrary to the fundamental conception of genocide as recognized by science.[26]

Not all delegates accepted the Russian delegation's contention, even though that was the definition adopted under the Genocide Convention. The Haitian representative cautioned the delegates on the consequences of not including social and political groups in the definition, stating, "Since it was established that genocide always implied the participation or complicity of Governments, that crime would never be suppressed. The government which is responsible for committing genocide would always be able to allege that the extermination of any group had been dictated by political considerations such as the necessity for quelling an insurrection or maintaining public order".[27]

The Genocide Convention's list of protected groups, while restrictive, contains ambiguous terms minus accompanying criteria. Antonio Cassese criticizes the Convention's lack of criteria for protected groups as a "serious" omission.[28]ICTR stated that "the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof."[29]

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25. See United Nations Report on the Study of the Question of the Prevention and Punishment of the Crime of Genocide, E/CN.4/Sub. 2/416, July 4, 1978, pp. 13 – 24 particularly paragraphs. 46 – 91.
26. Kuper, L. "Genocide: Its political use in the Twentieth Century",(1981) New Haven & London: Yale University Press.
27. Kuper, L.(n 5)
28. Antonio Cassese, International Criminal Law in International law 739 (Malcolm Evans ed., 2006)
29. Prosecutor v. Rutaganda, (Judgment and Sentence) ICTR-96-3-T, (Dec.6,1999), http://www.unictr.org/Portals/0/Case/English/Rutaganda/judgement/991206.pdf ; Prosecutor v. Musema, (Judgment and Sentence), ICTR-96-13-I, (Jan. 27, 2000), <http://www.unictr.org/Portals/0/Case/English/Musema/judgement/000127.pdf > accessed 15 March 2022

Similarly, ICTY stated that "to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise" and, consequently, suggested that targeted groups be categorized based on the specific context of each case.[30] As the categories of protected groups are "social constructs, not scientific expressions,"[31] enumerated in the Convention, unaccompanied by suggested definitions, customary law is needed to clarify the scope of protected groups.

Therefore, the present restricted definition of the victim groups which lies at the heart of the genocide convention was the direct result of a political compromise based on the fear that the inclusion of social and political groups would expose nations to external intervention in their domestic concerns, and might jeopardize the future of the convention because many States would be unwilling to ratify it. Some scholars believe that an expansive definition of genocide risks incorporation with crimes against humanity. However, this danger is averted by the *mens-rea* of genocide. Genocide is defined in Article II of the Genocide Convention, where the *mens-rea* is "intent to destroy, in whole or in part, national, ethnical, racial or religious groups, as such". On the other hand crimes against humanity only require "knowledge of the attack. For guidance, we can look at the definition of genocide and list of the protected groups given by the proponent of the term 'genocide' himself. In 1933 Lemkin made a proposal to the International Conference for Unification of Criminal Law convened in Madrid. He requested the codification of what he called the connected crimes of "barbarity and vandalism" to prohibit the annihilation of racial, ethnic and religious groups. By barbarity Lemkin meant "the premeditated destruction of national, racial, religious and social collectivities." Vandalism meant "the destruction of works of art and culture, being the expression of the particular genius of these collectivities."[32] Lemkin proposed that the crimes of "barbarity and vandalism" be repressed universally anywhere and whenever they were committed, disregarding state borders and under

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30. Prosecutor v. Jelisiæ, (Judgment) IT 9510T, (Dec.14, 1999), <http://www.icty.org/x/cases/jelisic/tjug/en/jeltj991214e.pdf> accessed 15 March 2022.

31. William A Schabas, *,* "Genocide in International Law" (2d ed. 2009) at 129.

32. Power wrote that "the link between Hitler's Final Solution and Lemkin's hybrid term would cause endless confusion for policymakers and ordinary people who assumed that genocide occurred only where the perpetrator of atrocity could be shown, like Hitler, to possess an intent to exterminate every last member of an ethnic, national, or religious group." Samantha Power, A Problem from Hell: America and the Age of Genocide (New York: Basic Books, 2002), p.21

universal jurisdiction.[33] During World War II as the Nazi horrors predicted by Lemkin became real, he coined genocide to replace "barbarity and vandalism" because the Nazi's crimes further extended the old phenomenon of destroying a particular group. By genocide he meant "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups with the aims of annihilating the groups themselves."[34] Lemkin wished to cover the protection of all groups including "physical, biological, political, social, cultural, economic, and religious."[35]

According to him, particular cultures take thousands of years to form; Lemkin considered the annihilation of culture a second type of genocide, later known as ethnocide.[36] The first type of genocide was the total or near annihilation of a group and the second was the combination of massacre and eliminating a culture.[37] There are two noteworthy points in Lemkin's principle. First, he intended to protect all groups within a nation. Second, he included ethnocide as a type of genocide. The 1948 Convention was a compromise of his original goals. It incorporated ethnic groups and acts (c) and (e) as an incomplete measure to protect a culture. On the other hand, it listed only four protected groups. As some delegates noted, "there was no absolute concept of genocide."[38] It is an evolving concept.

The above mentioned instance suggests that there is a need to modify the definition of genocide because it does not encompass the extermination of a group on political grounds. The Genocide Convention limits the protected classes to national, ethnic, racial, and religious groups. After prolonged debate, the drafters of the Genocide Convention expressly excluded "political groups" from Article II. An examination of the *travaux preparatoires* of the Convention reveals the compromises born of politics and the desire to shield political leaders from scrutiny and liability that can occur when political bodies attempt to reduce customary law principles to positivistic expression. The exclusion of political groups from the Genocide Convention represents one such

33. *Ibid.*p.29
34. *Ibid.*p.43
35. *Ibid.*p.40
36. *Ibid.*p.43
37. Frank Chalk and Kurt Jonassohn, "*The History and Sociology of Genocide: Analysis and Case Studies*'"(New Haven and London: Yale University Press, 1990), p.9
38. Leo Kuper, (n 5)p 27

compromise. No legal principle can justify this omission.[39] On similar lines, author feels that 'cultural groups' should also be included in the list of protected groups to meet the needs of time.

Despite the fact that South Asian nations are party to the Genocide Convention of 1951, author also feels that the lack of respect for international law in these third world countries has prevented the incorporation of appropriate mechanism for the protection and prevention of the crime of genocide.The last point which needs special mention here is that the Genocide Convention is not the sole authority on the crime of genocide. In fact, as some jurists argue (including Lemkin), the prohibition of genocide symbolizes the exemplary *jus cogens* norm, a customary and peremptory norm of international law from which no derogation is permitted. Needless to mention that *jus cogens* prohibition with regard to the crime of genocide, is broader than the Conventions prohibition, as has been demonstrated with respect to the jurisdictional principle applied to acts of genocide.

V. CONCLUSION

As has already been pointed out that, Genocide Convention has limited the prohibition to genocide by intentionally excluding political and cultural groups from its list of protected groups; therefore, this provision is without any legal force to the extent that it is inconsistent with the *jus cogens* prohibition of genocide. It can be argued that *jus cogens* prohibition of genocide could be applied to the cases concerning political, cultural groups and any other group not covered under the Convention. As a whole, it is important to note that Genocide is an inhuman offence, inflicted upon vulnerable groups throughout human history, and while some argue that it is human nature to kill; our feeling of compassion must be stronger. As a whole, it is important to realise that the statistics that come from genocides are actual people and should not be dehumanized within our minds, by the media, or by our governments while being referred to. International community should commit itself to achieve a genocide-free world.

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39. Beth Van Schaack, '*The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*' (1997) Yale L.J.

BOOK-REVIEWS

INDIAN PENAL CODE

(2022) Second Edition by C. K. Takwani, Eastern Book Company, Lucknow LIV+386 Rs. 495/- (Paperback)

There was no branch of law devoted to crimes in primitive societies. At one point of human history, the cause of crime was supposed to lie in devil spirit and the punishment was harsh with a view to weed out the devil entered in the body of man committing crime. With the development of society, the cause of crime was found to be in free will of the individual and every human action was attributable to utility. In India, before the advent of British ruler, the law of crimes was not developed and no formal procedure for declaring a person guilty existed. However, under the influence of classical school of criminology, the codification of criminal law started taking shape in many societies including India. The attempt to bring uniformity in criminal law started during the regime of East India Company, but it could be implemented till it was taken over by the British Government. The Indian Penal Code is substantially based on Classical School of Criminology requiring guilty act and guilty mind to concur and punishment to be enough to create deterrence - general and specific.

Chapters 1 to 5 of the book under review, apart from distinguishing crime from morality and torts, succinctly cover many aspects of criminal law particularly causation, elements of crime, the concept of strict liability and forms of punishment recognized under the law. It may be pointed out here that while dealing with strict liability mention of few cases like that of Prince, Tolson and MH George would have been appropriate. Chapter 6 to 8 is appreciable. In chapter 9, some of the important offences against State and public tranquility like Sedition, Unlawful Assembly, Rioting and Affray have adequately been covered. However, the discussion on the principle of joint liability enshrined in Section 34 of the Code does not seem to be appropriate in this chapter.

Chapter 10 of the book is on Offences against Human Body. The authors have devoted substantial space for it (pp. 211-283). The offence of culpable homicide, murder and exceptions to murder, hurt, kidnapping and abduction have been lucidly analyzed in simple language. The relevant cases have been discussed throughout. Chapter 11 of the book is on Offences against Property and offences incidental to it (Sections 378 to 489E). The authors have given emphasis on this chapter too by providing space running from 284 to 329. The provisions of the Code have been convincingly discussed.

Chapter 12 deals with offences against marriage. In this chapter, the provisions relating to mock marriage, bigamy and adultery besides matrimonial cruelty and criminal elopement have been analyzed. While dealing with bigamy, the case of *Bhaurao Shankar Lokhande v. State of Maharastra* could have been analyzed instead of giving its reference at an unconnected place (page 34 foot note 54)

Chapter 13 is on defamation. The provision creating criminal liability has been adequately discussed along with various exceptions exonerating accused from liability under this offence. Criminal Intimidation, Insult and Annoyance have been briefly dealt under chapter 14.

Chapter 15 is devoted to Criminal Attempt. This chapter could have been strengthened by incorporating various theories like Last act theory, Proximity, point of repentance, impossibility - evolved by the courts while distinguishing attempt to commit crime from its mere preparation. Further, the Law Commission of India recommendation for Proximity theory deserved some space.

Voluminous book ordinarily discourages students. The authors deserve praise on this account that they have expressed maximum contents in minimum space which will certainly encourage students at LL.B. level to go through. After having discussion on creation of criminal liability, the immediate question comes to the mind of the student as to the quantum of sentence. The beauty of the book lies in fact that the issues of burden of proof, the role of court and provision for sentence have been discussed at relevant places. A section devoted to the recommendations of the Law Commission of India also deserves appreciation to the author. The references at the end of each chapter enhance the utility of the book. Table of cases with subject index make the search easy. The moderate price of book would tempt anyone to have it in book shelf.

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V.D. MAHAJAN'S JURISPRUDENCE AND LEGAL THEORY

(2022) Sixth Edition, by V.B. Coutinho, Eastern Book Company, Lucknow, pp.[XXXII]+702, Price 699/-

Jurisprudence attempts to answer many fundamental questions about law. The study of jurisprudence is of intrinsic value for the examination of leading legal theories and selected legal concepts. It attempts to place legal theories and concepts in the context of a legal system.[1]It consists of scientific and philosophical investigations of the social phenomenon of law and justice generally. The study of jurisprudence brings immediate rewards to the legal professionals.[2]It gives a way of thinking to the legal professionals and presents theoretical concerns.The systemic thinking about legal theory is linked at one end with philosophy and, at the other end with political theory.[3] It contains elements of philosophy and gains its color and specific contents from political theory.Scholars draw distinction between "Legal Theory" and Jurisprudence".[4]In recent times the ultimate end of law has become the core of the study of legal theory. The professional study and practice of law has changed the approach to study of legal theory.It has become much broader and encompassing term, encompassing the philosophy of law and jurisprudence as well as theorizing from a variety of other perspectives, including law and economics and the law and society movement*etc*.[5]

The study of jurisprudence started with Romans. Initially, the scope of study of jurisprudence was vague. With the advent of various schools of jurisprudence and particularly the analytical approach of study in 18th and 19th Centuries, the study of jurisprudence started focusing on study of concepts of positive law, and ethics and theology fall outside the province of jurisprudence. However, there has been the tendency to widen the scope of jurisprudence and at present one may include subjects what was previously considered to be beyond the province of jurisprudence.[6]

The study of jurisprudence sharpens the skill of logical analysis of legal concepts and theories. It teaches the people to look, if not forward, at least sideways and around them and realize that answers to new legal problems must be found by a consideration of the present social needs and not in the wisdom of

1. Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory,* (New Delhi: Oxford University Press, Fifth Edition, 2017) at 1.
2. SuriRatnapala, *Jurisprudence*, (New Delhi: Cambridge University Press, Second Edition, 2013, Reprint 2019) at 3.
3. W. Friedmann, *Legal Theory*, (Universal Law Publishing Co., Fifth Edition, 1967, Fifth Indian Reprint, 2011) at 3.
4. Jerome Hall, "From Legal Theory to Integrative Jurisprudence", 33(2) *University of Cincinnati Law Review*, 1964, at 154. He writes that the distinction is drawn between "Legal Theory" and "Jurisprudence" as the theory of a particular field of law or even the "sum" of all such theories and the theory of all law, which last is preferably therefore called as jurisprudence.
5. Lawrence B. Solum, "Legal Theory Lexicon: Legal Theory, Jurisprudence, and the Philosophy of Law", 1 *Journal of Law,* 2011, at 421.
6. V.B. Coutinho, *V.D. Mahajan's Jurisprudence & Legal Theory*, (Eastern Book Company, Sixth Edition, 2022) at 9.

the past.[7]Study of jurisprudence develops critical faculties of its readers so that they can detect fallacies and use accurate legal terminology and expressions.[8]

The Bar Council of India prescribes Jurisprudence and Legal Theory a compulsory course in undergraduate law programmes. In post-graduation, the advance course on legal theory offersa deeper understanding of recent developments in the field of legal philosophy.

The book under review contains a total twenty seven chapters followed by an exhaustive"subject index"which providesan easy reference to readers. The book is divided in two parts which are focusing on "jurisprudence" and "legal theory".[9]The clear demarcation between discussions on "jurisprudence" and "legal theory" isvery helpful. In part one, the first eighteen chapters of the book cover discussion on fundamentals of jurisprudence. Under these chapterthe topics nature and scope of jurisprudence, nature and kinds of law, relations between law and morals, sources of law (legislation, precedent, custom), administration of justice, state and sovereignty, legal rights and duties, concepts of ownership and possession, title, liability and law of property, obligations and law of procedure have been discussed in a very eloquent manner.

In part two, the last nine chapters of the book focuson legal theory. The discussion on legal theory begins with Analytical Legal Positivism followed by Pure Theory of Law, Historical School of Law, Philosophical School of Law, Sociological School of Law, American Realism, Scandinavian Realists, Natural Law and Feminist Movement in manner easy to understand. The last chapter, focusing on protection and enforcement of Women's Rights,isavaluable addition to the current edition of the book.

Theoretical discussions accompanied with judicial observations and criticisms make the book interesting. Judicial observations give a practical approach to understand the subject in Indian context.Besides references, and case laws each chapter contains a list of "suggested readings' which add to the utility of the book to the interested readers and provide useful resources on the subject. The book also refers to the decisions of foreign courts to trace the theoretical developments and to explain the subject. The book focuses much on western legal philosophy and fails to give due attention to Indian legal thoughts and philosophy.Such a discussion in the bookmay have beenveryuseful for readers interested in understanding the Indian legal philosophy.

The recent edition of the book is available at an accessible price in soft-bound form. It is useful for advocates, academicians, researchers, and students of law and social sciences.It presents the subject in simple language and in an attractive get-up.

DIGVIJAY SINGH*

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7. *Id.,* at 9.
8. *Id.,*at 13.
9. The division of book in two parts gives a clear picture as to what we study in "jurisprudence" and in "legal theory".

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