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Editorial ……..

Legal research in India is now on an unprecedented increase. Simulating the trend in the west and the other parts of the world, Indian legal fraternity, although in hindsight, now increasingly emphasizes the significance of the legal research by academicians and law students. Sadly, Indian students, contrary to their counterparts in the other parts of the world, suffer from a host of setbacks, a major one being lack of proper resources to embark on a journey of legal research. Another major setback that shackles legal researchers is sound mentorship and counseling for fine-tuning of their work and getting it published as a consequence.

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eces of legal writing in our journal.

(Shaik Mohammed Ismail)

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C O N T E N T

EVOLUTION OF RIGHT TO EDUCATION IN THE INDIAN EDUCATION SYSTEM

Dr. Nemi chand*[1]

> "Man has no chance of survival if knowledge only remains knowledge but if we could transform knowledge in to wisdom, he would not only survive but will be able to ascend to greater and greater heights of achievements".
>
> **GB Shaw**

In ancient India education commenced under the supervision of gurus at Ashrams. Students were expected to follow strict monastic guidelines prescribed by the gurus. The ancient education was closely related to religion. Takshasila, Nalanda and vikramshila were the earliest recorded centre of higher learning in India. These institutions by systematically imparted knowledge and attracted a number of foreign students to study literature, grammar, Vedas, philosophy, warefare, statecraft, Medicine Astrology, History etc. In Ancient time the education was free but the students should pay "Gurudakshina" a Voluntary Contribution after the compeletation of their studies. Condition of Education system in the Muslim period was also poor. Medieval period witnessed a radical transformation in India. Our country was invaded by various foreign rules and several traders from around the world came and settled in India. The invaders bought their own education and culture with them and they also established muslim model education in India.

When the east India Company attained political supremacy in India, they did not bestow any thought on the education of the inhabitants of their dominations. Gold was their watchword. Every one

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of their servants who came out of India tried to enrich, himself as quickly as possible at the expense of the children of the soil it was on this account this burke described them as " birds of prey and passage" in India.[2]

After Indian Independence it was duty of our Constitutient Assembly to make education Provisions in our constitutions. **B.R. Ambedkar** had rightly said "By independence we have lost the excuse of blaming the British for anything going wrong. If here after things go wrong, we will have nobody to blame except ourselves."[3] In the words of **Austin** "Indians were at last free to shape their own destiny, to pursue their long-proclaimed aims and aspirations, and to create the national Institutions that would facilitate the fulfillment of these aims. These tasks the members approached with remarkable idealism and strength of purpose born from the struggle for independence."

The evolution of India's education system has been driven by increased focus on basic elementary education. One of the key achievements of India's education system since Independence has been the consistent rise in the country's literacy rate, which has risen from 18% in 1951 to 74% in 2011. Significant efforts have been made to universalize elementary education in these 60 years. The number of elementary schools and teachers grew significantly during the period 1950–51 and 2004–05. Gross enrolment figures for elementary education also increased from 32 in 1950–51 to ~95 in 2004–05. This growth in elementary education in India has largely been the result of the Government's initiatives.[4]

The right to education was initially not included as a fundamental right in the Constitution and was included as a directive

[2] History of Education in India. Under the Rule of the East India company – Major B.D. Basu I.M.S. (retired) published by R. chatterjee, Calcutta.
[3] Quoted from Granville Austin, The Indian Constitutions : Cornestone of a nation (New Delhi, Oxford University press, 1999) at 308.
[4] http://indiainbusiness.nic.in/newdesign/upload/news/EY-Right-to-education.pdf

principle under Article 45 which required the State to endeavour to provide, within a period of 10 years from the commencement of the Constitution. The Government has provided free and compulsory education for all children until they complete the age of 14 years to fulfil the Constitutional mandate. The directive principle in Art. 45 was not confined merely to primary education; it extended to providing free education up to the age of 14 years. Whatever the stage of education it came to. Therefore, education for children of this age group should have been free, ideally speaking, at the latest by 1960. However, only fitful efforts were made by some States to pass laws according to Article 45.[5]

Education has been happily defined as the technique of transmitting civilization. It is shocking that the country with the oldest and greatest civilization should be so lackadaisical about the Technique of transmitting it. The Indian psyche remains today wholly untouched by any thought of the need for wider and more value-based education. Education has never been a high-priority item in any Indian political party's manifesto. The subject which should have galvanized the nation into action forty years ago is still kept in cold storage. Without the guidance which can be derived only from liberal education, a whole generation has grown up which is content to see crime and violence, casteism and communal frenzy, become the order of the day. More criminals have openly entered public life than ever before. No democracy can last long in such circumstances.[6]

Provisions of the Constitution of India related to Education

Elementary education forms the foundation for all levels of learning and development. It empowers and equips individuals with analytical capabilities, instills confidence and fortifies them with

[5] Professor M. P. Jain : Indian Constitutional Law, Sixth Edition Reprint 2011
[6] Female education –The priority of priorities Nani A. palkhivala : We, the nation the lost decades – UBS publisher's (Distributors Pvt. Ltd. Edition 28th 2011)

determination to achieve goal-setting competencies. It, therefore, plays a pivotal role in improving the socio-economic condition of the nation. For any country to grow, it is imperative that it has in place a strong elementary school driven education system.[7]

State can make special provisions for women and children. Hence, separate educational institutions for women can be established.[8]The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine.[9] To provide freedom as to attendance at religious instruction or religious worship in educational institutions.[10] To provide equal opportunity in educational institutions.[11] The right of the minorities to establish and administrate educational institutions.[12] The Constitution provides that "All the citizens have equal right to education ". It states. "The state shall, within the limits of its economic capacity and development, make effective provisions for the right to work, to education and to public assistance in cases of employment, old age, sickness and disablement".[13]The state shall Endeavour to provide early childhood care and education for all children until they complete the age of six years.[14] To provide special care to the promotion of education and economic interests of the scheduled caste, scheduled tribes and the weaker sections of society.[15]

It is fundamental duty of every citizen, Who is a parent or guardian to provide opportunities for education to his child or, as the case may be ,ward between the age of six and fourteen years.[16]To

[7] http://indiainbusiness.nic.in/newdesign/upload/news/EY-Right-to-education.pdf
[8] Article 15 (3) Constitution of India
[9] Article 21A Constitution of India
[10] Article 28 Constitution of India
[11] Article 29 Constitution of India
[12] Article 30 Constitution of India
[13] Article 41 Constitution of India
[14] Article 45 Constitution of India
[15] Article 46 Constitution of India
[16] Article 51A (k) Constitution of India

provide special provision with respect to educational grants for the benefit of Anglo-Indian community.[17]It shall be Endeavour of every state and local authorities with the state to provide adequate faculties for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups: the President may issue directions to any state as he considers necessary for recurring the facilities[18], to provide a special offer for linguistic minorities[19] and to promote the development of Hindi language. It shall be the duty of the Central Government to promote the spread of Hindi language in the entire country.[20]

The seventh schedule of the Indian Constitution contains legislative powers under three lists viz. The Union List, the State List and the Concurrent List, **The Union List** contains 97 subjects where the following entries are related to education: To provide Educational and Cultural relations with foreign countries.[21] Any other such institutions financed by the Government of India wholly or in part and declared by the Parliament by law to be an institution of national importance.[22] The institution known at the commencement of this Constitution as the BHU, AMU and Delhi University etc. declared by Parliament by law to be an institution of national importance.[23] The institution of scientific and technical education financed by the Government of India wholly or in part and declared by law to be institutions of national importance like IITs and IIMs.[24]Union agencies and institutions for:(i) Professional, vocational or technical training, including the training of police officers.(ii) The promotion of special studies or research.(iii) Scientific or technical assistance in the

[17] Article 337 Constitution of India
[18] Article 350 (A) Constitution of India
[19] Article 350B Constitution of India
[20] Article 351 Constitution of India
[21] Entry 13 Union List, Constitution of India
[22] Entry 62: Union List Constitution of India
[23] Entry 63: Union List Constitution of India
[24] Entry 64 Union List Constitution of India

investigation of detection of crime.[25] Coordination and determination of standards in the institution of higher education or research and scientific and technical institutions has also been provided for in the Union List.[26]

State list consists of 66 entries, out of which the following is the entry related to education: According to this entry all libraries, museums and other similar institutions controlled or financed by the state, ancient and historical monuments and records other than those declared by or under law made by the Parliament to be of the national importance.[27]

Concurrent List consists of 47 entries, among them the following are related to education: Economic and social planning,[28] Education, including technical education, medical education and universities subject to provision of entries 63,64,65,66 of list first,[29] Newspapers, books and printing presses.[30]

Supreme Court on the Right to Education

The Supreme Court has added its own creative twist to the issue of Right to Education. In the case of *Bandua Mukti Morcha*[31], the court expressed that the Right to Education was implicit in and flows from the right to life that is guaranteed by Article 21 of the Constitution of India. In doing so, the court essentially did what the Constitution makers and the legislation had refrained from doing right since independence.

[25] Entry 65: Union List Constitution of India
[26] Entry 66 Union List Constitution of India
[27] Entry 12 State list Constitution of India
[28] Entry 20 Concurrent List Constitution of India
[29] Entry 25 Concurrent List Constitution of India
[30] Entry 39 Concurrent List Constitution of India
[31] Bandua Mukti Morcha case, (1984)3SCC161

The question arose for the first time before a two Judge Bench of the Supreme Court in *Mohini Jain v/s State of Karnataka*[32], in the following factual context. With a view of eliminating the practice of collecting capitation fee for admitting students in educational institutions, the Karnataka Legislature passed an Act purporting to regulate tuition fee in private medical colleges in the State by issuing a notification under the Act. The Government fixed Rs. 2000/- per year as tuition fee payable by candidates admitted against government seats, but other students from the state were to pay Rs. 25,000/- per annum. The Indian students from outside the State were to pay Rs. 60,000/- per annum. On a writ petition filed by an out of the State student, the Supreme Court quashed the notification under Art. 14. In justification of the notification, the private medical colleges had argued that they did not receive any financial aid from the Government and so they must charge much higher fees from private students to make good the loss incurred on government students.

The Court accepted that the Constitution does not expressly guarantee the right to education, as such, as a Fundamental Right, but reading cumulatively Art. 21 along with the Directive Principles contained in Art. 38, 39(a), 41 and 45, the Court opined that "it becomes clear that the framers of the Constitution made it obligatory for the State to provide education for its citizens. Taking an absolutist view of the State obligation to provide education at all levels, the Bench observed: "We hold that every citizen has a right to education under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State owned or State recognised educational institutions..... charging capitation fee in consideration of admission to educational institutions, is a patent denial of a citizen's right to education under the Constitution."

[32] AIR1992SC1858:(1992)3SCC666

In *Unnikrishnan*,[33] the Supreme Court implied the right to education from the right to life and personal liberty guaranteed by Art. 21. As the Fundamental Rights and Directive Principles are complementary to each other, the content and parameters of this right were deduced in the light of Arts. 41, 45, 46. Therefore, the right to education in the context of these Directive Principles means: (a) every child has a right to free education up to the age of 14 years: (b) thereafter, his right to education is circumscribed by the limits of the economic capacity of the state and its development. The Court had emphasized that "a child (citizen) has a Fundamental Right to free education up to the age of 14 years." This obligation can be discharged by the state either through governmental schools or private schools run by non-governmental bodies, aided and recognised by the state.

The scheme of *Unnikrishnan*[34] was considered in detail by the Supreme Court in T. M. A. Pai Foundation v. State of Karnataka and overruled in following terms :

> ".....In his scheme, the "payment seat" student would not only pay for his own seat, but also finance the cost of a "free seat" classmate. When one considers the Constitution Bench's earlier statement that higher education is not a fundamental right, it seems unreasonable to compel a citizen to pay for the education of another, more so in the unrealistic world of competitive examinations which assess the merit for the purpose of admission solely on the basis of the marks obtained, where the urban students always have an edge over the rural students. In practice it has been the case of the marginally less merited rural

[33] Unnikrishnan, J.P.v. State of Andhra Pradesh, AIR 1993 SC 2178, 2231 : (1993) 1 SCC 645.
[34] Supra note 32

or poor student bearing the burden of a rich and well-exposed urban student."[35]

In *Islamic Academy of Education v. State of Karnataka*[36].

Considering the question whether educational institutions are entitled to fix their own fee structure, the Court in Islamic Academy of Education case clarified as :If any other amount is charged, under any other head or guise e.g., donations, the same would amount to charging of capitation fee. The Governments / appropriate authorities should consider framing appropriate regulations, if not already framed, where under if it is found that an institution is charging capitation fee or profiteering that institution ca n be appropriately penalised and also face the prospect of losing its recognition/affiliation.

The Right of Children to Free and Compulsory Education (RTE) Act, 2009

The Right of Children to Free and Compulsory Education (RTE) Act, 2009, which represents the consequential legislation envisaged under Article 21-A, means that every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards. Article 21-A and the RTE Act came into effect on 1 April 2010. The title of the RTE Act incorporates the words 'free and compulsory'. 'Free education' means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education. 'Compulsory education' casts an obligation on the appropriate Government and local authorities to provide and

[35] (2002) 8 SCC 481
[36] (2003) 6 SCC 697

ensure admission, attendance and completion of elementary education by all children in the 6-14 age groups.[37]

Four tiers in the management structure need to be strengthened and empowered to make implementation of the Act more effective-[38]

1. The Centre should also address state-specific concerns and provide support, if required. If some states are dragging their feet in implementing the Act, the Centre can demand its implementation by linking it with the SSA and other development grants.
2. The State Commission for Protection of Child Rights (SCPCR), which is the monitoring agency for implementation of the Act in different states, has not been effective in many of them. It is therefore important to ensure that an effective SCPCR is in place.
3. Local authorities need to play a crucial role. Effective implementation of the Act will depend on how effective Gram Panchayats (GPs) and Nagar Palikas are. They need to be given sufficient resources to implement the Act.
4. There should be a bottom-up approach and more autonomy given to schools. These should then be monitored through independent mechanisms.

Conclusion

The right to education is a crucial fundamental human right. Every individual, irrespective of race, gender, nationality, ethnic or social origin, religion or political preference, age or disability, is entitled to a free elementary education. This right is explicitly stated in the United Nations Universal Declaration of Human Rights (UDHR), adopted in 1948. Everyone has the right to education. Education shall

[37] http://mhrd.gov.in/schooleducation
[38] http://indiainbusiness.nic.in/newdesign/upload/news/EY-Right-to-education.pdf

be free, at least in the elementary and fundamental stages, Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. Ensuring access to education is a precondition for full realization of the right to education. Without access, it is not possible to guarantee the right to education. The right to education is also not an end to itself, but an important tool in improving the quality of life. Education is the key to economic development and the enjoyment of many other human rights. Education provides a means through which all people can become aware of their rights and responsibilities, which is an essential tool for achieving the goals of equality and peace.[39]

While everyone agrees that there is a need for more number of schools, improved infrastructure, universal enrolment and better PTR, what we miss is the granularity of the issue of actual teaching and learning happening in the classroom. Meaningful access is providing not just the physical access to participate in the formal education system, but more importantly, an equitable opportunity for all children to engage with a quality education system. Meaningful access needs to happen at every single step of the education delivery system, right from bringing the child to the school or for that matter, taking the school to a child. Right from ensuring that schools are available for all children from any social group to ensuring that once the child reaches the school, it is a safe haven of learning and growth to achieve his or her potential instead of a few skills thrown in a staccato manner. Meaningful access includes access to teachers, who will provide differentiated support catering to varied learning styles and who will pay special attention to those that need extra nudge to keep pace. And most importantly, meaningful access to provide a safe, gendered space with room to find and express one's own identity shaped by

[39] Shraddha Tiwari-Right to education as a Human Right ,research paper ,Journal of Indian Bar Review Volume XL(3) 2013.

membership in any social group without the fear of mockery or discrimination.[40]

Education is an end in itself; and not merely a means to an end like financial well-being. There should be no profit motive in liberal education, any more than in friendship. Then alone can knowledge ripen into wisdom. The timeless lesson of ancient Indian culture is that man is more than a man, and there is more to the world than the world.[41]

[40] women & Girls' Education: Issues in India ,Vimala Ramachandran yojana, January 2016

[41] Female education –The priority of priorities Nani A. palkhivala : We, the nation the lost decades – UBS publisher's (Distributors Pvt. Ltd. Edition 28th 2011)

SECULAR CHARACTER OF INDIAN DEMOCRACY: ISSUES AND THREATS

Reeta*

1. Introduction

It is universally admitted that the democracy means rule of the people, by the people and for the people as stated by Abraham Lincoln in his Gettysburg speech. The Preamble of the Indian Constitution after the 42nd Amendment Act 1976 also declares India to be a secular democratic state. In fact, democracy has proved to be the best form of governance for centuries among the people who believe in human rights and human dignity. It can be accepted that democracy has become gainful for any state as the Soviet union, and communist states of Eastern Europe, Chinese People's Republic, North Korea and North Vietnam, all call themselves democracies but these states do not meet the same definition of democracy. It cannot be denied that democracy may exist in secular and non-secular states but it could be more meaningful and profitable in a secular state. In a democracy, a favourable social, political and religious atmosphere is needed where each individual can benefit materially and spiritually and the concept of the secular state that the state and the church should remain away from each other. According to Rama Swamy, J. in **S.R. Bommai V Union of India,**[1] secularism is essential for the successful working of a democratic form of government. The principle of secular state, also seeks to avoid the influence of religion in matters relating to the state affairs. True to say that various provisions connected with the idea of secular state lie scattered in the constitution. Leaving on one side the provisions relating to the freedom of religion and the cultural and educational rights, there are many other provisions which form a secular framework in Indian polity. It is past all doubt that no

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[1]. (1994) 3 SCC.

democratic country can function without elections of representatives for determining the will of the people. The highest organs of the state in a democracy are the executive, the legislature and the judiciary. There is the legal framework to prevent the influence of religion in elections and the provisions require the candidate to be a citizen of India. The examination of various provisions dealing with offices and election to those offices would show that no religious considerations are permitted by the constitution for holding these posts. More over, the oaths of office to be taken by the President or by a Governor need not be in the name of God or based on any religious practice. Further, Article 325 abolishes separate communal electorate and it holds that no person shall be eligible for inclusion in any general electoral roll for election to parliament or state assembly on grounds only of religion. Article 124 (3) prescribes the qualifications for appointment as a judge of the Supreme Court and Article 217 (2) prescribes the qualification for appointment as a judge of the High Court but all the qualifications for appointing judges are secular in nature. Similarly no qualification based on religion is attached for appointment to the constitutional posts in the Election Commission of India which like the judiciary, plays a significant role in the working of the democracy. The constitution also envisages for the election commission the most important part in maintaining fairness of the election process in the democratic polity of India. Election commission at the present time consists of 3 members who are appointed by the President. It could be seen that the only requirement for contesting and holding the various democratic and constitutional offices essential for democracy, is the fulfilment of the accepted qualification and religious considerations have to play no role at all in determining the eligibility for holding of such offices. The office of the President has been held by persons belonging to different religions including those belonging to minority communities. For instance, the office of the President was held by Dr. Zakir Hussain, Fabhruddin Ali Ahmad and Dr. A.P.J. Abdul Kalam, all

belonging to the Minority community of Muslims and likewise, Giani Zail Singh, belonging to Sikh minority community. Similarly, the office of the Prime Minister of India was held by Dr. Man Mohan Singh who also belongs to the minority Sikh group. In the case of Legislature, persons belonging to all major religions have been and are presently members of the Parliament and various state legislatures. Moreover, the constitution provides express reservation to Anglo-Indians and scheduled castes and scheduled tribes. This is the only provision insisting on membership of a caste, tribe or community for election or nomination to the Parliament or Legislative Assemblies. In the case of judiciary also several prominent persons belonging to different communities have held the highest judicial office in the country and eminent persons belonging to different religions have held the office of the Chief Justice in various High Courts in the country. In this connection, it is essential to say that the Chief Election Commissioner's office has been held by M.S. Gill belonging to the minority Sikh Community and J.M. Lyngdoh who belongs to the minority Christian Community.

2. Issues and threats:-

The chief challenge or issue to secular democracy in India is the historical nexus or connection between electoral process and communal as well as religious considerations and now politics has become a weapon in the hands of all political parties for winning elections. It has been well remarked that ***"police criminal nexus and the political parties playing communal card are behind communal riots."*** Though the Constitution of India accepts the Concept of Secularism and provides for a Secular State in India, Indian secularism is confronted with the several and serious challenges. As the nature of the Indian secularism is different from the Western Secularism, its problems are also very different from that of Western Secularism. It has been argued that 'the theory of the Secular State in India, raises many problems unknown to Western Political experience such as

separate electorate for the various religious communities, communal personal laws, the caste system, agitation for laws banning cow slaughter and so forth.[2] It should be noted in this context, that the problems of Indian Secularism are the result of total Indian life. Therefore, a solution to them is to be found in Indian situation. In the words of Smith 'Indian Solution must be found for Indian problems'.[3] The challenges to the Indian Secularism are many and complex. They can be listed and discussed as follows:

(i) Communalism

(i) Of all the challenges, the Communalism is the most serious challenge to Secularism in India. It is unfortunate, that despite having a Secular Constitution, and even in the sixth decade of our Independence, our country has not been able to free itself from communal conflicts. The communalism not only exists, but has increased. Now it seems that communalism pervades the whole country. The discussion of communalism as a challenge to secularism can be started with its definition. Smith D.E. defines 'Communalism' is the tendency of religious groups to function as such in Politics'.[4] Communalism is also defined as 'Strong allegiance to one's own ethnic group rather than to the society as a whole.[5] It is also defined as 'an insistence on the special interests of the community and its preference for its own tenets'.[6] Saksena points out that, 'Communalism is the affirmation of a religious community for attaining or retaining power social, political or economic or all of them. It can be parochial but

[2] . Smith, D.E. Nehru and Democracy, Orient longmans first Edition, (1958), p. 182.
[3] . Smith, D.E. India as a secular State, Princeton University Press, New Jersey, (1963), p. viii.
[4] . Smith, D.E., Nehru and Democracy, Orient Longmans, First Edition, (1956), p. 173.
[5] . Brij Mohan, India's Social Problems, Indian International Publications, Allahabad, First Edition, (1972), p. 30.
[6] . Mishra, Dina Nath, R.S.S., Myth and Reality, Vikas Publishing House, Pvt. Ltd. (1980), p. 123.

certainly not national'.[7] It can also be pointed out that 'Communalism' is a Thought and action of safeguarding religious, social, economic and political interests of one's own community which is mainly a religious group. Thus there is 'Hindu Communalism', 'Muslim Communalism, 'Sikh Communalism'. Communalism is the result of distrust and suspicion among the people of different communities and it often turns into mob-violence which presents a serious challenge to Secular ideals. Before the Independence of India, the Communalism was against the Nationalism and at present, it is against Secularism.

How to eradicate communalism from Indian life is a difficult problem. There can be no single solution for it. The fight against the communalism must be multi-dimentional. Many political scientists and writers have suggested different remedies to solve the problem of communalism. Dr. Luthera has suggested that 'if communalism is to be eradicated, a beginning has to be made from the Constitution itself. There is need to amend it so as to make the enactment of the Communal Laws illegal. In the opinion of Mr. Setalvad, education with a secular bias can play in reducing the impact of the forces of the communalism and secularism-Only sustained and effective co-operation between the State and citizens in a system of education with a clear bias towards the Secularism can wear off these narrow and sectarian loyalties. Mr. Dalwai considers that ***'the only answer to the communal problem in India is secular integration of all the people of India.***' To meet the challenge of communalism, it can be suggested that as communalism is a way of thinking, it is necessary to reorient the thinking of the people of our country. The people should be educated that the problems of life cannot be solved by the religion. They must be educated to treat religion strietly as their personal matter and to oppose mixing of religion with politics. They should be made Secular. If more people believe in Secularism rather than

[7] . Saksena, R.N., Indian Social Thought, Meenakshi Prakashan, Meerut, (1981), p. 123.

communalism, perhaps, fewer communal riots would take place all over the country. It is also very essential to create mental climate of trust and harmony among the various religious communities, and for this education and enlightenment of the people is needed. Certainly, the communal parties and organisations are on the forefront of communal violence, therefore, such parties and organisations need to be banned by the law. The Government also must function as really Secular Government. Its functions should not be associated with any single religion. Frequent reference to 'religious majority' and 'religious minority' should be avoided by all the persons in the Government and politics.

(ii) . Casteism

Next to religion, caste is the dominant factor in Indian life, and it has also been a major factor preventing the growth of secular forces in India. Indian Society is basically a caste society and as Nehru observed 'a caste ridden society is not properly Secular. The Institution of caste has been one of the exclusive characteristics of Indian Society, especially Hindu society since early ages, and inspite of great changes in history of India, the caste system continued to be an important feature of social life in India, and in the course of time, it has also become important factor in the politics of the country. The roots of the caste system are very deep. The ancient 'Varna' scheme is supposed to be the basis of caste system, though both are different Concepts, 'Varna' scheme includes four groups- The Brahmin. The Khastriya, the Vaishya and the Sudras. And 'This four-fold division is only ideological and is not in any manner based on the facts of social system. The 'Varna' scheme was not rigid as it was based on occupation. The caste system, on the other hand refers to endogamous kinship groups and social institutions, and it includes several hundred castes and sub-castes. The Hindu caste system is also looked upon as a divine institution with religious sanction. However basically caste is a social institution, whose membership is largely decided on the basis of birth.

A man is born into a caste and he dies in it, if he is not excluded from it. Man's individual efforts do not change his position in the caste. Caste is the basis of individual's social status and his social relationship in the society. The Hindu caste system is hierarchical and it creates social inequalities in the society. Originally caste was associated with a specific occupation and village community and village economy. But during British period, it has undergone profound changes and became more flexible as a result of industrialization and modernization. The British government, also passed some laws affecting the caste system. During this period, the caste system lost many of its traditional features. After India attained Independence in 1947, the caste system again has undergone profound changes. The Constitution of India accepts equality as its basic principle and enforces it by recognising the individual as the unit of power operting through a system of universal adult franchise. The Constituion has also abolished untouchability which was the most undesirable and inhuman feature of caste system. The Constitution also makes discrimination and exploitation on caste, communal grounds punishable. But the Constitution itself provides for a kind of protective discrimination for those sections of the society which are backward and downtrodden. The principle of reservation has been incorporated in Part-XVI of the Constitution, in which the provision has been made for the reservation of seats for the Schedule Castes and Scheduled Tribes in the House of People, is the Legislative Assemblies of the States, in the ..... of the Government and Institutions. They are also given all types of facilities and special scholarship for education. It may here be noted that the reservation was extended to the Scheduled Caste and Scheduled Tribes. Economically backward communities in the Hindu and the weaker sections in the Non-Hindu communities were left unprotected. Naturally, it was reseated by the people who were excluded from the reservation. The first Amendment to the Indian Constitution in 1951, introduced a new clause in Article 15 which empowered the State to

take steps for the advancement of any socially and educationally backward classes of citizens.

(iii) . Democracy and electoral process:-

In a democracy the electoral process plays a fundamental role and thus the essential backbone of any democracy is free and fair election based on universal adult franchise. It is indispensable that elections must be free and fair in the democratic system as in the case of **Smt. Indira Gandhi V. Raj Narain,**[8] H.R. Khanna, J. has wisely upheld. ***"The principle of free and fair elections is an essential postulate of democracy."*** The relation between democracy and free election has been well emphasized by Justice Arijit Pasayat thus: ***"Democracy' and 'free and fair elections' are inseparable twins. There is almost an inseparable umbilical cord joining them."***

The Indian democracy is based on the parliamentary form of democracy which has been adopted in the constitution following the British form of parliamentary democracy in existence in the U.K. It is accepted that U.K. is not a secular state because of the fact that the church of England remains the official religious forum with the Queen as its head and the ecclesiastical courts exist even today in the U.K. and their decisions are enforced by the state. However, being a non-secular state, the electoral laws do not prohibit religious influences in electoral process. The U.K., having better literate Christian Community, the influence of religion in the electoral process may not be a matter which considerably affects fairness of election. It is well approved that U.K. is one of the best democracies in the world with free and fair elections. In this way free and fair election does not mean election without influence of religion though in a secular state free and fair election ought to mean elections free of religious influences. In the light of aforesaid observation, it can be concluded that free and fair election devoid of

[8], A.I.R. (1975) S.C. 2299, 2335.

religious influence is absolutely necessary for preservation of a secular state. The experience of U.K. reveals the fact that free and fair elections in a non-secular state could include religious influence in the election process but a secular state needs exclusion of religion from state matters. Thus India, being a secular state, unlike the U.K., requires express provisions to the effect. This is clearly and definitely in accordance with the constitutional mandate in the Preamble and Articles 325 and 326. Article 326 reads. ***"The elections to the House of the people and to the Legislative Assembly of every state shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this constitution or any law made by the appropriate legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election."*** The election process initiated by the British to introduce partial democracy in India only increased the Hindu Muslim religious divide and the parliament had to make express provision for excluding religion from election process. Although there were many demands for separate communal electorate, the Constituent Assembly after much discussion and deliberation adopted Article 325 providing for non-exclusion of any one from the electoral roll on grounds only of religion, race, caste, sex or any of them. By virtue of Section 29A of the R.P. Act, a political party has to register with the Election Commission and for the registration such political party should owe true faith and loyalty to the constitution and that its members should be bound by socialism, secularism and democracy and would uphold the sovereignty, unity and integrity of India. However, there is no legal prohibition in the R.P. Act as to party names having names of religions. In the Indian polity, parties having religious names freely use their religious labels to their

advantage. The Supreme Court is considering the question in a pending petition but for the development of a secular state, it is indispensable to amend the laws to prohibit the use of religious names as labels of parties.

(iv) Party Politics

Party-Politics, especially of communal nature has also created a hindrance in the way of Secularism in India. India has a multi-party system. But right since the Independence, there is a dominance of one party in the country. Up-to March, 1977, the Congress Party played a dominant role, then upto 1979, the Janata Party which was a Grand Alliance of the Jana Sangh, the Congress, the Bhartiya Lok Dal, and the Socialist, was dominant party, and since January, 1980 Congress (I), is the dominating party both at the Centre and in many of the States in India. The opposition party has always been weak in India. Today B.J.P. is the dominating party at the Centre playing its vital role. The Indian National Congress which was founded in December, 1885, was the first Political Party in India. The foundation of the Congress was the most remarkable event in India's history. In the beginning, the Congress was the organisation for political reforms, but as time passed, it became the instrument of India's struggle for independence. The Congress was the national organisation from its very inception. It was also by and large Secular in outlook and its organisation was not communal, as its membership was open to all the people irrespective of religion, faith and caste etc. The Indian National Congress was to separate religious values from political objects. The object of the Congress was not the establishment of a 'Hindu State', but the establishment of 'Secular State', in India. The Congress stood for the secularism, but its Hindu Phraseology, and the religiosity of many of its leaders and their programmes created doubt, distrust and uneasiness among some of the Muslims in India. In 1905, the Partition of Bengal opened a new phase in the politics of the country. The nationalism passed on religion sprang up. In 1906, there came into

being a communal party namely the All India Muslim League which launched the separatist movement with the blessing of the British. The membership of the Muslim League was to operate the Muslims only and it was to safeguard the political rights and interests of the Muslims in India. As a reaction to the Muslim League, the Hindu Maha Sabha was established for Punjab as a provincial organisation in 1907 and its All India Organisation came into being in 1915.

It is true that the communal parties do not possess effective leadership and they have a microscopic amount of popular support, but their existence is not healthy sign in the secular State in India. Therefore, there should be legal restrictions on the political parties to make communal or religious demands and the political parties should not be allowed to make representation of religious affairs and propagate communalism. It is also necessary that the people should be adherent to secular principles in the politics of the country. In **Manoj Narula V. Union of India**,[9] the Supreme Court held that democracy is the heart and soul of parliamentary system. In democracy people will never cherish that they should be governed by such persons, leaders or ministers as have criminal histories.

A democratic polity, as understood in its quintessential purity, is conceptually abhorrent to corruption and, especially corruption at high places, and repulsive to the idea of criminalization of politics as it corrodes the legitimacy of the collective ethos, frustrates the hopes and aspirations of the citizens and has the potentiality to obstruct, if not derail, the rule of law. Democracy, which has been best defined as the Government of the People, by the People and for the people, expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the pillar stone of good governance. In

[9] . AIR (2014) SC. 2140.

T.N. Seshan, CEC of India V. Union of India and ors.[10] and **Kuldip Nayar V. Union of India and Ors,**[11] it was pronounced with asseveration that democracy is the basic and fundamental structure of the Constitution. There is no shadow of doubt that democracy in India is a product of the rule of law and aspires to establish an egalitarian social order. It is not only a political philosophy but also an embodiment of constitutional philosophy. In **People's Union for Civil Liberties and Anr. V. Union of India and Anr.**[12] while holding the voters' rights not to vote for any of the candidates, the court observed that democracy and free elections are a part of the basic structure of the Constitution and, thereafter, proceeded to lay down that democracy being the basic feature of our constitutional set-up, there can be no two opinions that free and fair elections would alone guarantee the growth of a healthy democracy in the country.

This is undoubtedly true that Criminality and corruption go hand in hand. From the date the Constitution was adopted, i.e. 26th January, 1950, a Red Letter Day in the history of India, the nation stood as a silent witness to corruption at high places. Corruption erodes the fundamental tenets of the rule of law. In **Niranjan Hemchandra Sashittal and Anr. V. State of Maharashtra** [13] the court has observed:

"It can be stated without any fear of contradiction that corruption is not to be judged by degree, for corruption mothers disorder, destroys societal will to progress, accelerates undeserved ambitions, kills the conscience, jettisons the glory of the institutions, paralyses the economic health of a country, corrodes the sense of civility and mars the marrows of governance. It is worth noting that immoral acquisition of

[10] . MANU/SC/2271/1995: (1995) 4 SCC 611.
[11] . MANU/SC/ 3865/2006: AIR 2006 SC 3127.
[12] . MANU/SC/0987/2014: (2013) 10 SCC J.
[13] . MANU/SC/0251/2013: (2013) 4 SCC 642.

wealth destroys the energy of the people believing in honesty, and history records with agony how they have suffered. The only redeeming fact is that collective sensibility respects such suffering as it is in consonance with the constitutional morality." Recently, in **Dr. Subramanian Swamy V. Director, Central Bureau of Investigation and Anr.** [14] the Constitution Bench, speaking through R.M. Lodha, C.J., while declaring Section 6A of the Delhi Special Police Establishment Act, 1946, which was inserted by Act 45 of 2003, as unconstitutional, has opined that:

"It seems to us that classification which is made in Section 6A on the basis of status in the Government service is not permissible Under Article 14 as it defeats the purpose of finding prima facie truth into the allegations of graft, which amount to an offence under the PC Act, 1988. Can there be sound differentiation between corrupt public servants based on their status? Surely not, because irrespective of their status or position, corrupt public servants are corrupters of public power. The corrupt public servants, whether high or low, are birds of the same feather and must be confronted with the process of investigation and inquiry equally. Based on the position or status in service, no distinction can be made between public servants against whom there are allegations amounting to an offence under the PC Act, 1988."

And thereafter, the larger Bench further said:

"Corruption is an enemy of the nation and tracking down corrupt public servants and punishing such persons is a necessary mandate of the PC Act, 1988. It is difficult to justify the classification which has been made in Section 6A because the goal of law in the PC Act, 1988 is to meet corruption cases

[14] . Writ Petition (C9v9l) No. 38 of 1997 etc. pronounced on May 06, 2014.

with a very strong hand and all public servants are warned through such a legislative measure that corrupt public servants have to face very serious consequences."

"Secularism is the basic feature of the constitution. It envisages a cohesive, unified and casteless society. The constitution has completely obliterated the caste system. It has assured equality before the law. Reference to caste under Articles 15(2) and 16(2) is only to obliterate it. The prohibition on the ground of caste is total, the mandate is that never again in this country caste shall raise its head. Even access to shops on the ground of caste is prohibited. The progress of India has been from casteism to egalitarianism, from feudalism to freedom."

It is sad and shameful that ***the caste system which has been put in the grave by the framers of the constitution is trying to raise its ugly head in various forms. Those who do not learn from the events of history are deemed to suffer again. It is, therefore, of utmost importance for the people of India to adhere to the constitution which has moulded this country into a sovereign, socialist, secular democratic republic and has promised to secure to all its citizens' justice, social, economic and political, equality of status and of opportunity."***

(v) Problem of Uniform Civil Code.

A problem of uniform civil code is essential in the direction of bringing about national identity and the integration of members of all religious communities into one bond of common citizenship. Following independence, it was hoped that this step would be taken to usher in secular society. But unfortunately till now, no progress has been made in the evolution of a uniform civil code and today its adoption appears to be more problematic than it was at the time when the constitution was framed. Thus, the Muslim minority compelled the government in

1986 to enact legislation concerning maintenance of divorced women which it felt was closer to its personal laws and, therefore, religiously more acceptable, but modern secular considerations, and the opinion of those Muslims who took a secular position, were given no cognizance by the government. Similarly other minorities like Christians and Sikhs, too, have given some indications that would render the formulation and enforcement of a uniform civil code an impossibility. Such limitations indicate that the path leading to a truly secular society in India is return with numerous hurdles. It is undoubtedly true that some provisions of the Constitution and some of the laws passed interfere with the religious customs and practices of Hindus. There is no doubt that the religious tolerance or non-intervention does not mean secularism. It is felt that partial non-intervention has led to religious fundamentalism in place of growth of humanism. The present conflict on Ram Janambhumi and Babri Mosque is the glowing example of fundamentalism. Crities have remarked that the Indian polity suffers from serious short comings and it has failed to develop true secular lines.

(vi) Cultural symbols and Secularism

Many public rituals and ceremonials like pujan, breaking of coconuts on inaugural or auspicious occasions, performing of 'Aarti' and applying to 'Tilak' to distinguished guests are perceived by Hindus as cultural or nationalistic expressions, but to non-Hindus these are manifestations of Hindu culture. Such rituals are performed even on state functions and therefore, create unnecessary misgivings about the neutrality of the State. The confusion between "Hindu" and "Indian" has largely arisen in the last forty years. The cultural dimension of secularism has been totally neglected, and we have, therefore, neither attempted to develop a composite Indian culture based on a true amalgam of all religious sub-cultures, nor have we developed a new culture based on secular values, with emphasis on secular symbols. Of late an attempt has been made by a sizeable section of the Indian

society to equate Hindu cultural symbols as national culture. This is possibly the expression of what has been called the ***"Hindu backlash",*** which is believed to be the consequence of rise in Muslim and Hindu fundamentalism. but this, or any other, explanation does not condone the lapses of the State in this regard. Such insensitivity to the feelings of the minorities destroys the credibility of the secular professions of the State. Due to the limited interpretation of secularism, as being confined to State policy only, the religious identities and other sub-cultural differences of Indian citizens have continued to remain strong. In societies where such distinctions are emphasized, groups and communities remain distanced from one another. Indian secularism is also confronted with obscurantism. Despite the progress in almost all the directions of life, obscurantism still persists in all the religions. There are obscurantist elements which create obstacles in the way of evolution of human and dynamic social order. It is because of obscurantism the people give importance to customs and traditions rather than reason. In the context of the Indian society, it may be pointed out that, there are obscurantists among all the communities and so countrymen are required to be watchful and enlightened as eternal vigilance is the price of liberty.

(vii) The Defective Educational System.

The defective educational system which has encouraged the people to think in terms of groups and communities, has also failed to inculcate secular ideas in the minds of young students and promote feeling of mutual give and take and the duty of loyalty to the nation. Like religion, the position of education is complex and it is changing in several ways. The reach of education has extended from being confined to the elite towards secularism for all in order to eradicate illiteracy as a means of reducing inequities in society and compensate for historical injustice. The focus in education has moved from access to education (for example, the Education for all movement coordinated by UNESCO) towards equity and quality. In societies with diverse populations, the

issue of equity is more complex because the difference is multifaceted and also because 'diversity' refers to deviation from an arbitrary norm. The aims of education have changed from conformity and socialisation in the form of cultural transmission (culture, religion, values and knowledge) to critical thinking and socialisation (intercultural competencies, knowledge of human rights and values such as democracy and respect for others). The passive recipient of 'knowledge' is now encouraged to be an active learner who constructs his/her knowledge. The process has moved from a banking method (where knowledge was 'deposited' to the student's head) to one of questioning and critical reasoning. The various political parties and groups in India have frequently used religion and caste factors to get into power and thus they greatly undermined the secular values. In this regard both the minorities and the majority communities are equally to blame. Unless the growing communalism is shunned and abandoned, secularism cannot take firm roots in the Indian soil. It can be justly said that there is failure of the Government in evolving a just economic order. The government failed to provide the common masses suffering from poverty, all the basic necessities and thus did not attach much importance to secular values. The defective educational system has also failed to inculcate secular ideas in the minds of young and energetic students. Thus all this has greatly hampered the growth of genuine secularism in the country.

As a matter of fact, the Law Reforms Commission functions for a secular society with a creative future. It is sad that religious and sects have become communally and politically mad. The Law must redeem God from godism, Jesus from communalism and great prophet Muhammad from Crazy, Jihedist terrorism. It should be borne in mind that things are changing fast and the basic structure of religious pluralism survives and now Hindus, Christians and Muslims have a finer fellowship which the Law Reforms Commission must rehabilitate. In short, the legal structure is bound to be in consonance with the

fundamental rights in Part III and Directive Principles in Part IV and the fundamental duties in IV A. The Law Reform Commission as a progressive instrument, must abolish the growing gap between the status quo statute system and the Supreme Lex. It is decidedly true that Integration of people and laws to build a strong and united nation is a great march and the commission shall pioneer as protagonist in this noble and indispensable task. It is beyond doubt that Law Reform has a positive and corrective role to obviate misunderstandings about Muslims and promote friendly and sweet relations among religions. The Commission bears in mind the sharp distinction between secularism and religionism and stands firm by the basic structure of the Republic as socialist, secular and democratic. The great religions of the world claim humanity as their constituencies. Theological pluralism is a fertile soil of divergent allegiances. Kerala is, of course, the home of Hindus but Christianity and Islam have a long history in this state and are considerably flourishing in the shape of devoted followers of these faiths and many churches and mosques. Communalism is a degeneration of religion, with bigoted dogmas, political motives blind gregariousness and materialistic objectives. If the nation is to remain united, if Kerala, multi religious though, is to maintain its human solidarity in all dimensions of social life, communal disruption using religion as catalyst must be arrested. You may go to temples, churches, mosques or other shrines according to your beliefs but in matters of public order, security, personal privacy and material and moral circumstances, the dogmas of religions shall not prejudice secular prescriptions of good conduct and decent behaviour and proper governance.

Thus to sum up, it seems right and reasonable to assert that in the Russian Communist pattern of state- secularism besides abstaining from favouring any religion, the state favours and encourages anti-religious beliefs. In this system there is no freedom to propagate religion and except considerations of policy, there is nothing in the

constitution to prevent, the state from altogether abolishing religion. The United States, concept of state secularism presents a different pattern based on the principle of freedom for the individual in the exercise of religion as a segment of the general scheme of individual liberty. The United States Constitution guarantees not only the free "exercise" of religion but it also enjoins Congress not to make any law establishing a religion. As already pointed out, the framers of the constitution of India shared with the Americans the ideology of the free exercise clause and they also believed that the state should neither sponsor nor favour any religion and should treat all religions with tolerance and equality. The fundamental rights in Indian constitution, including those concerning religion, were prompted for the liberty, dignity and well being of the individual. To conclude, as already reiterated, this principle of giving primacy to the individual, placing him above religion and recognizing freedom of religion and of religious denominations as incidental to his well-being and liberty is a distinguishing feature of the Indian secularism, conjointly with the principles of tolerance and equality.

RIGHT TO ENVIRONMENT AS A THIRD GENERATION HUMAN RIGHT: A CRITICAL ANALYSIS

Manjunatha N G*[1]

INTRODUCTION:

The Constitution of India came in to force with effect from 26th January, 1950. The framers of the Constitution sculptured it as a beautiful manifesto picking the important points from the Indian Government Act. 1935, the United Nations charter Constitution of America, France, Canada Australia etc. and certain points from the common law and unwritten constitution of Great Britain Etc. It is surprised to note that our Indian constitution was written five decades back. When the environmental problem was not severe the Framers incorporated several Important and specific provisions for environmental protection. Thus the Indian constitution is amongst the few in the world containing specific provisions for environmental protection.

The Supreme Court gave a broader and depth meaning, and in several cases observed that Right to a wholesome environment is a Fundamental right. The court recognized several an articulated liberties that are implied by article 21 it interpreted that the right to life and personal liberty includes the right to live is not a real right to live that it should accompany with free and pure air, land, and water.

RIGHT TO LIFE:

For sometime the court held the view that right to life in Article21, does not include right to civic hood as decided in *Sant Ram Re. AV Nachane v/s Union of India*[2] after some controversy on that issue. The court has dearly held that right to livelihood is included in

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[2] 1982 SC 205

the right to life because no person can live without the means of living i.e. the means of livelihood. The same was held in *Olga Teleis V. Bombay Municipal Corporation.*[3] But, in *Sodansing V. NDNC.*[4] Right to carry on tread or business is not covered by Article21. Further upholding the right of people in hill areas for a suitable approach. The court in state of *HP V/s Umed Ram 1986*[5]*,* held that the right to life in Article 21. Embraces not only physical existence of life but also the quality of life and for residence of hilly areas access to road is access to life itself. Right to unpolluted environment and preservation and protection of nature's gift has also been considered under article 21 by the supreme court to *Dhamodhar Rao v/s Muncipal corporation case*[6]*,* the court has also observed that life includes all that give meaning to a mans life including his tradition, culture and heritage and protection of his heritage in its full measure". Again the court has held that right to life includes the right to a reasonable accommodation to live in.

RIGHT TO LIVE IN HEALTHY ENVIRONMENT.

The right to live in a clean and healthy environment is not a recent invention of the higher judiciary in India. This right has been recognized by the legal system and by the judiciary in particular for over a century or so. The only difference in the enjoyment of the right to live in a clean and healthy environment today is that it has attained the status of fundamental right the violation of which the constitution of the India will not permit. It was only form the late eighties and thereafter various high courts and the supreme of India have designated this right as a fundamental right.

Right to live in a healthy environment as a constitutional right.

[3] 1985 SC 545

[4] Sec 1989,D,155.

[5] SCE 68.

[6] Apr 1987.AP77.

After the Stockholm Declaration there was a growing trend in national legal system to give constitutional status to environmental protection. For example, Article 24 of the Swiss constitution adopted on Jun 6 1976 provides that the federal legislature shall enact laws concerning the protection of man and his natural environment against burdensome influences. "Article 24 of the Greek constitution 1975 provides that the protection of the natural and cultural environment constitutes duty of the state". Article 45 of the Spanish Constitution (1978) provides that "every one has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it. "The Netherlands amended its constitution in 1983 to include Article 21 which provides that "It shall be the concern of the authorities to keep the country habitual and to protect and improve the environment". Article 225 of the constitution of the Federal Republic of Brazil (1988) declares that "Everyone is entitled to an ecologically balanced environment.

Even in India the Constitution was amended in the year 1976 by the constitution of India forty second (Amendment) Act. This amendment act amended the constitution to add among other articles article 48A and 51A (g) Article 48A provides that the state shall endeavor to protect and improve the environment to safeguard the forest and wild life of the country "Article 51 A (g) provides that it is the fundamental duties of every citizen of India "to protect and improve the natural environment including forest, lakes, rivers and wild life and to have compassion for living creatures.

Evolution of the fundamental right to live in a healthy environment in India:

In India the higher judiciary has interpreted the existing provision viz., "The right o life guaranteed in article 21 to mean and include the right to live in a healthy environment the courts have intervened by

writs orders and directions in appropriate cases the constitutional right to healthy environment.

The supreme court of India while deciding that certain limestone quarries in the doom valley should be closed down to soil erosion deforestation and river silting declared for the first time in rural litigation and entitlement Kendra v/s state of U.P[7], that the right of people to live in a healthy environment with minimal disturbance to ecological balance shall be safeguard. In this case though the Supreme Court evolved a new right to environment right of people to live in a healthy environment.

Though the Supreme Court of India did not clearly and explicitly recognize the right to healthy environment. It has indirectly approved in mans M.C. Mehtha cases.[8] In the first M.C. Mehta case[9] which was filed against the alleged leakage of Oleum Gas form a factory by a public- spirited environment conscious lawyer the Supreme Court found that the case raised some seminal questions concerning the scope and ambit of article 21and 32 of the constitution.

The second M.C. Mehta case[10], was relating to the modification of some of the condition which were laid down by the Supreme Court in the first M.C. Mehta case for the restarting of the Industries were earlier order to be closed.

The Third M.C. Mehta case[11], was filled to determine the amounts of compensation table to the victims affected by the leakage of Oleum Gas from a factory. This case is considered to be one of the land mark case as it evolved a new jurisprudences of liabilities of the victims of pollution caused by on industry engaged in hazardous and inherently

[7] AIR 1985, SC 652

[8] AIR 1987 SC 985: AIR 1987SC 1086: AIR 1988 SC 1037: AIR 1988 SC 1115

[9] AIR 1987 SC985

[10] AIR 1987 SC 982

[11] AIR 1987 SC 1086

dangerous activity. In the case the court did not specifically declared the existence of the right to a clean and healthy environment Article 21

The fourth case M.C. Mehta case[12] was filed against the leather tanneries, which were polluting the holy river Ganga by letting the effluents in to the river in this case the court held that at the pollution of river Ganga is the effecting the life and health of the people and also the ecology of the indo – gangetic plain. In this case the court issued direction to the tanneries to set of effluent treatment plants within the six months, failing which the court held that the tanneries would be closed. It concluded that although closer of tanneries might result in unemployment and loss of revenue life, health and ecology had greater importance.

The fifth M.C. Mehta case[13], was filed against the failure of the Kanpur Nagara Mahapalika to fulfill its statutory duties which caused the water in the river Ganga at Kanpur becoming so much polluted that it can no longer be used by the people either for drinking or for bathing in this case the court directed the Mahapalika to get the dairies shifted to a place out side the city to lay sewerage line where the same is not constructed as also to increase the size of the existing slavers in labour colonies to construct public latrines and urinals for use of poor people free of charge to ensure with the help of police that dead bodies or half. Burnt bodies are not thrown in to the Ganga and to take action against the industry responsible for the pollution.

The Supreme Court in neither of these cases declared explicitly that the right to a clean and health is contained in the compendium of un enumerated rights under article21 however since the court issued direction in all direction above case under article 32 of the constitution it is evident that the court has used article 32 which is a provision to

[12] AIR 1988 SC 1037
[13] AIR 1988 SC 1115

enforce fundamental rights for the purpose of protecting the lives of the people their health and ecology.

The Supreme Court and the right to clean and healthy environment:

The Supreme Court of India in *Chhetriya Pardashan Mukti Sangarsh Samiti v/s State of U.P*[14] for the first time declared that the right to environment is contemplated in article 21of the constitution of India. In his judgment the then chief justice mukerji observed that "every citizen has a fundamental right too have the enjoyment of quality of life and living as contemplated by article 21 of the constitution of India. Anything which endangers or impairs that quality of life is entitled to take recourse to article 32 of the Constitution of India." This case was initiated by a letter written to the can not which was treated as a writ petition under article 32. It was alleged that certain oil mills and refineries located in the sarnath area causes environmental pollution and thereby a serious health hazard.

In *Subhash Kumar v/s State of Bihar*[15] the Supreme Court observed that the right to life enshrined in article 21, includes the right to enjoyment of pollution tree water and air for the fell enjoyment of life. It anything endangers or impairs the quality of life an affected person or a person genuinely interested in the protection of society would have recourse to article 32." This case was public interest litigation filed against pollution of the Bokaro river by the sludge/ slurry discharged from the washeries of the Tata Iron and steel company limited. It was alleged that the release of effluent in to the river results in making the water unfit for drinking purposes and for irrigation.

[14] AIR 1990 SC 2060

[15] AIR 1991 SC 420

In *Bangalore Medical Trust v/s B.S. Mudappa*[16] the Court observed that protection of the environment. Open space for recreation and fresh air play grounds for children are matters of great public concern and of vital Interest to be taken care of in a development scheme the public Interest in the reservation and preservation of open spaces for parks and play grounds cannot be sacrificed by leasing or selling such sites to provide persons for conversion to other user any such act. Would be in direct conflict with the constitutional mandate too ensure that any state action is inspired by the basic values of Individual freedom and dignity and addressed to the attainment of quality of life which makes the guaranteed right a reality for all citizens. This case was filed challenging the leasing of an open space laid down in a development scheme for a private nursing home.

In *Virandar Gaur v/s state of Haryana*[17] the Supreme Court after reciting reaffirming and applying principle, of the Stockholm declaration held that "Article21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment. Ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental. Ecological air, water. Pollution, etc, should be regarded as amounting to violation of article 21. Therefore hygienic environment is an Integral facet of right to healthy life and it would be impossible to live with human dignities without a humane and healthy environment." In this case the order of the municipality and the government permitting the building of Dharmasala as in the open space earmarked to provide the residence of the locality public amenities such as recreation, play space and ventilation.

[16] AIR 1991 SC 1902

[17] (1995) 2 SCC 577

In B.L.Wadehra v/s Union of India[18] the Supreme Court relying on municipal council, *Ratlam v/s Vardichand*[19] categorically asserted that Residents have constitutional as well as statutory right live in a clean city and authorities concerned have a mandatory duty to collect and dispose of the garbage waste generated from various sources in the city Non-availability of funds. In adequacy or inefficiency of staff. Insufficiency of machinery etc. cannot be pleaded as grounds for non-performance of their statutory obligations. This PIL was filed against Municipal Corporation of Delhi for the non-performance of mandatory duties like garbage clearance, disposal of bio-medical wastes scavenging and clearing Delhi city.

In Vellore citizens welfare forum v/s Union of India[20] the Supreme Court has observed that the constitutional and statutory provisions protect a persons right to fresh air, clean water and pollution free environment, but the source of the right is the inalienable common law right of clean environment. Our legal system having been founded on the British Common Law. The right of a person to pollution free environment is a part of the basic jurisprudence of the land." This PIL was directed against the pollution which is being caused by enormous discharge of untreated effluent by the tanneries in to agricultural field road sides, water ways, open lands and finally discharged in to river polar.

Another decision emphasizing the importance of the environmental aspects of right too life under article 21 is the case of *Andhra Pradesh pollution control Board v/s M.V. Nayudu*[21]. In this case the Supreme Court observed that environmental concerns arising in the Supreme Court under Aritcle32 or under article 136 or under

[18] (1996) 2 SCC 594
[19] (1980) 4 SCC 162
[20] AIR 1996 SC 2715
[21] (1999) 2 SCC 718

article226 in the high courts are of equal importance as human rights concerns. In fact both are to be traced to article 21 which deals with the fundamental right to life and liberty. It was further observed that while environmental aspects concern life, human rights aspects concern liberty. In our view in the context of emerging jurisprudence relating to environmental matters, as in the case of matter relating to human rights it is the duty of this court to render justice by taking all aspects in to consideration." This PIL was filed challenging the permission given by the appellate authority under the water act to a company which sought to set up an Industry for production of castor oil derivatives within 10 km radius of the two important lakes Himayat Sagar and Osman Sagar which supplied drinking water too the twin cities of Hyderabad and secundrabad.

In *Narmada Bachao Andolan v/s Union of India*[22] the Supreme Court of India declared that water is the basic need for the survival of human being and is part of right to life and human rights as enshrined in article 21 of the constitution of In after half a century of freedom, water is not available to all citizens even for their basic drinking necessity.

RIGHT TO ENVIRONMENT AS A THIRD GENERATION HUMAN RIGHT:

The idea of third generation of human right was launched as a theoretical concept by distinguished French lawyer. Karel Vasak he led the idea of human right from a basic concept to an advance conception. He gave this concept 10th study of the international institute of human rights at Strausbury in 1999. At this session a new category of human rights was proposed to be called the solidarity rights.[23]

[22] Third generation of Human rights comprises of right to peace, right to development, right to environment and right to common heritage of mankind.

[23] U.N. Conterence on Human Environment, Stockholm 1972

The third generation of human rights presupposes common and solidarity efforts by all members of the world community. Its concept was first formulated in 1972 with a proposal that the international human rights law be a separate branch of international law. Generally for the sake of clarification we classify human rights into.

1) Civil and political rights (First generation).
2) Economics, social and cultural rights (second generation).
3) Rights of solidarity (third generation).

Right to environment vis-à-vis third generation human rights.

The polluted divested or unbalanced to environment is incompatible with the established human rights and especially with the rights of life and health. The interdependence seems to be insufficient for proclamation of the right to environment as human rights (23).

The foundation of recognition of the human rights of individuals to a healthy and decent environment is the quest of new world order.

Right to live in a healthy environment basic human right.

UDHR 1948:

Article 3 : Right to life.

Article 25 : Right to a standard of living adequate for the health and well being of himself and of his family.

ICESCR 1966 :

Article 11 : Right to an adequate standard of living for himself and his family and to the continuous improvement of living conditions.

Article 12(1) : Steps shall be taken by states for the improvements of all aspects of environmental and industrial hygiene.

ICCPR 1966 :

Article 6 : Every human being has the inherent right to life.

UNCHE Stockholm, 1972 :

Principle 1 : Man has the fundamental right to freedom, equality and adequate conditions of life. In an environment of a quality that permits a life of dignity and well being.

UNCED Rio 1992 :

Human beings are at the center of our concern for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

The Supreme Court in its interpretation of article 21, has facilitated the emergence of and environmental jurisprudence in India. While also strengthening human rights jurisprudence. There are numerous decisions where in the right to a clean environment. Drinking water, a pollution free atmosphere, etc., have been given the status of inalienable human rights and therefore fundamental rights of Indian citizens.

In *M.K.Sharma v/s Bharat Electric Employees Union*[24], the court directed the Bharat Electric Company to comply with safety rules strictly to prevent hardship to the employees ensuring from harmful x-ray radiation. The court did so under the ambit of article 21, justifying the specific order on the reason that the radiation affected the life and liberty of the employees.[25]

In *Rural Litigation and Entitlement Kendra v/s State of Uttar Pradesh*[26], the Supreme Court based its five comprehensive interim

[24] 1987 (1) scale 1049.

[25] For a discussion of the widening scope of fundamental rights see Menaka Gandhi V/s Union India. AIR 1978 SC 597

[26] AIR 1985 SC 652

orders on the judicial understanding the environmental rights were to be implied into the scope of Article 21.[27]

The advancement of the relationship between human rights and the environment would enable the incorporation of human rights principles within an environmental scope. Such as anti discrimination standards the need for social participation and the protection of vulnerable groups. At the same time the human rights system would be strengthened by the incorporation of environment concerns enabling the expansion of the scope of human rights protection and generation of concrete solutions for cases of abuses. Of course one of the most important consequences is to provide victims of environmental degradation the possibility to access to justice. Given the occasional helpless ness suffered by victims of environmental degradation, linking human rights and the environment brings such victims closer to the mechanisms of protection that are provided for by human law.

CHANGING FACETS OF THE RIGHT TO WHOLESOME ENVIRONMENT THROUGH THE DECISION OF THE APEX COURT.

The higher judiciary of this country has drawn much attention to itself due to its initiatives in environment protection. Time and again the supreme court and the various High courts have chastised the forces which degenerate the environment and taken up cudgels against them, they have also served as a forum where the to unheard voices of those suffering privations from environmental degradations l have been rendered audible. They have also either pulled up sloth like administrations and goaded them into action, the activity of the courts has been labeled" Activism" and has been of such nature as to attract both praise and criticism and encourage debate.

[27] See also T. Damoda rarao v/s Municipal Corporation, Hydrabad. AIR 1987 AP. 17% L.K Kootwal v/s state of Rajastan AIR 1988 Raj 2.

The phrase "judicial activism" has received diverse interpretations ranging from the rather sober to the very profound. However, it is generally understood that an activist judiciary undertakes some of the functions traditionally the preserve of other wings of the government. Viz. the legislature and the executive, judicial activism is thus seen to tread upon the paths of policy. Formulation Legislation and administration. Seen this way. Judicial activism has been justified, if not hailed, criticized if not condemned. It is also a striking feature of judicial activism has been seen in tandem with the growth of the concept of public interest litigation (PIL).

The activism of the judiciary is reflected in both the substantive and procedural spheres of the law. On the substantive side, the inclusion of the right to a wholesome environment in Article21 is perhaps most significant. The Supreme Court held in *Subhash Kumar v/s State of Bihar*[28] that the right to live is a fundamental right under Article.21 of the constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws a citizen has right to have recourse to Article32 of the constitution for removing the pollution of water or air which may be detrimental to the quality of life" the evolution of the principle of Absolute liabilities in the Shriram Gas Leak Case[29] is another fell out of an activist approach. While laying down the parameters of that principle, justice Bhagwati spelt out the bases for judicial dynamism thus". Law has to grow in order to satisfy the needs of a fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenges of such new situations. Law can not afford too remain static. We have too evolved

[28] See supra note 13

[29] AIR 1987 SC 1086

new principles and lay down new norms which adequately deal with new problems which arise in a highly industrialized economy.

The petitioners pray the courts to issue writs of mandamus and the like to set right the perceived illegalities. The courts respond by issuing such writs, directions and guidelines, a set of do's and don'ts directed against defaulting governments and other parties to the disputes.

The limitations of judicial activism are actually felt when the time comes for the orders of the courts to be implemented. The court do not have any personal by whom they can have the implementation of their directions overseen as a consequence the more detailed the directions of the court. The more difficult does it becomes ensure effective implementation.

The Supreme Court has taken bold steps in the direction of improvement to the environment and protection and preservation of natural resources. The changing pattern of right to life as enshrined in article 21 stresses more on the phenomenon of leading a life that just to live a life by the following cases.

Olga Tellis V/s Bombay Municipal Corporation[30] :

The petitioner challenged the government decision that all pavement dwellers and the slum dwellers in the city of Bombay will be evicted forcibly and deported to their respective places of origin. The main contention of the petitioners was that right to life includes the right to livelihood and hence the government action amounted to depriving a payment dweller of his right to livelihood which was guaranteed by Article 21 of the constitution which mandated that no person could be deprived of which life expect according to procedure established by law.

[30] 1986 SC 180

CONCLUSION:

The Apex court led a great importance on reasonableness and rationality of the provision and it is pointed out that in the name of undue stress on fundamental rights and individually liberty, the ideals of social and economic cannot be given a go-by. Thus it is clear that the provisions Article 21 was constructed narrowly at the initial state but the law in respect of life and personal liberty of a person was developed gradually and a liberal interpretation was given to these words. New dimensions have been added to the scope of Article 21 from time to time. The interpretation has been given to the words life and personal liberty in various decisions of the apex court. It can be said that the protection of life and personal liberty has got multi dimensional meaning and any arbitrary. Whimsical and fanciful act of the state which deprived the life or personal liberty of a person would be against the provisions of Article 21 of the constitution.

The judicial Activism has had very positive effects in the field of environment in India. The justice delivery system has really acquired a human face. But for stringent action taken by the higher courts of the land, the story may have been much worse as for as deforestation, pollution and quality of life or concerned. But, as withal things judicial activism in this field has its limitations and pit falls. The judiciary must be constantly mature and realize the same only then can activism be a powerful to save's environment.

ROLE OF LAW STUDENTS AND FREE LEGAL AID

Dr. Payasam Suresh*

Introduction

Legal aid is a vital limb of our constitution and becomes, for this reason, an interpretative doctrine reflecting the desired fulfillment of the basis objectives of equality. Equal justice is corrective of inequalities which create social imbalance without which justice in society cannot be established in truth.[1] If a large section of society is prevented from exercising its legal power for protection of their rights and security of an honorable existence, there can be neither equality nor justice in such society. In modern times, political social and economic theories have radically changed. Legal theories or norms have kept place with these changes, many new legal doctrines have received widespread recognition and acceptance. In modern welfare State all round development of the common man has assumed greater importance. In democratic countries, rule of law and human rights movement have gathered momentum. Concept of equal justice and social justice is the crying need of the hour. Poverty and social inequalities have to be removed sooner or later. So long as poverty exists in a society, the poor person can afford. Hence the poor person must receive legal assistance so as to enable him to vindicate his rights.

Public Legal Literacy:

Public Legal Education /legal literacy aims at radical changes in society, enabling the individuals and societies to become aware of their inherent human rights and civil liberties, so that people may live in dignity an d freedom , free from fear and want. Constitutional of India is intended and designed for the deference of life, dignity, liberty and other fundamental rights of the defenseless. It facilities a process of

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[1] Report of Gujarat Legal Aid Committee (1971) 107

accessing justice, governed by democratic peoples and rule of law, focusing on the weak and vulnerable in the society.

Legal Aid in India:

Legal Awareness of higher quality of life, universalization of aspirations, and enhanced senses of social justice, all together helped to articulate the feeling of inalienable human rights. Now people are thinking about the issues in terms of human rights perspectives. Human Rights culture has to be global; it cannot thrive in an environment of wide disparities and exploitation of any kind at any level. Human Rights education of the twenty first century could ill-afford to ignore this perspective. Establishment of Human Rights culture demands elimination of all kinds of exploitation employing bonded labour, practicing, untouchability, perpetrating sati, legal, social and economic discrimination against woman and her exploitation, prevalence of child labour in hazardous industries.

Legal Aid is an instrument to get equality before law mentioned in the Indian Constitution as a fundamental right. The importance of legal aid can be stressed in a country where hunger and illiteracy is prevalent. Legal Aid concept is of recent origin and taken its shape in twentieth century. The concept of legal aid has attracted to many countries in the world compared to other socio-legal 'equality before law'. Legal Aid is an integral part of administration of justice. The democracy, as a method of ruling or governance is kept on the system of equality of all citizens guaranteed with some liberties and freedom which can be exercised by the citizens only in a proper socio-economic situation, following the certain legal provisions desired at providing certain deprived rights; if any. Our Constitution guarantees equality before the law and equal protection of the laws. Very few persons who are privileged and rich are enjoying these freedoms guaranteed in the Constitution. Whereas majority people, who are poor and illiterate, are unable to get these freedoms and they are prevented from getting

justice. If such persons are not provided equality before law and the rule of law, there is no meaning or importance to the functioning of the society in a democratic way. Therefore, it is essential to provide legal aid to the poor, illiterate, deprived and weaker sections of the society, with a view to have benefits of rights, freedoms and liberties provided to them as citizen without any hesitation.

The term 'Legal Aid' in its ordinary meaning conveys the help given by the society to its poor members in their struggle to protect their rights, freedom and liberties, provided in the various laws and to see that these benefits and rights given back if rights are forcefully denied to them by the strong and rich members of the society.

Justice P.N. Bhagawati said: "The legal aid means providing an arrangement in the society so that the machinery of administration of justice becomes easily accessible and is not out of reach of those who have to resort to it for enforcement of rights given to them by law. The poor and the illiterate should be able to approach the Courts and their ignorance and poverty should not be an impediment in the ways of their obtaining Justice from the Courts." (Report of the Legal Aid Committee, 1971, Government of India, P.5.)

Poverty is the mother of many evils. Today, one of the greatest evils rampant in society is that the poor do not have easy access to the Courts and remain deprived of justice. The present costly adversarial form of administration of justice is not quite suitable to the present condition of out Indian society. To majority of people, who are living below the poverty line, justice has become a costly luxury. Legal provisions and procedures are also very complicated and cumbersome. In these circumstances the down-trodden and the vulnerable masses of our society hardly have an easy access to the Courts of law. When Indian has declared itself to be democratic welfare State, it owes a paramount duty to provide free legal aid to those who fail to get justice due to poverty. It is heartening to note that after independence, the

Government of India as well as the State Governments have made vigorous efforts to provide legal aid to needy persons and have launched a nationwide legal aid programme. A new Article 39-A has been added in the Constitution of India by Forty-Second Amendment as one of the Directive Principles of State Policy which directs the State to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities and should provide free legal aid by suitable legislation or schemes. The provisions of the Code of Criminal Procedure and the Code of Civil Procedure have also been amended for providing legal aid in Criminal and Civil cases, Growing realization and active participation by the judiciary, legal profession, law schools, social workers, etc., have given a further impetus to the legal aid movement in India. The parliament has passed the Legal Services Authorities Act, 1987, which is to be enforced by the Central Government in near future.

Legal Aid and Law Colleges and Law schools:

Education is the main and primary aim of the law school. Therefore, its clinic has to serve as effective methods to provide legal education to the students. The clinical teaching is a better substitute for traditional method of imparting legal knowledge to the students. Though clinic the students may get may opportunities, VIZ interviewing the clients. The education will certainly be socially relevant and promote multi disciplinary approaches in legal field. The student trained in the clinic will prove himself as social engineer in balancing interests of various classes in the society. Setting up legal aid clinics in all law colleges and law universities and to encourage students to adopt remote village areas as their area of operation, for this purpose, the following strategies may be adopted:

1. The students may be divided into small groups and deputed to the adopted villages.

2. In urban areas, colonics and slum areas where economically and socially backward people reside may be chosen for setting up legal aid clinics.
3. Law students should be guided team of by a team of senor professionals/ lecturers including part time lectures. Report between the students and the people of the adopted area should be maintained throughout the year.
4. Law students shall identify the problems which require legal aid .they shall discuss the problem with the teacher-in- charge and if it warrants future free legal services, he matter should be brought before the legal services authorities/ committees concerned.
5. A student shall be encouraged to organize legal awareness classes for small groups of people. It should be more in the form of informal gatherings.
6. The students should aim at preventive and strategic legal aid.
7. In appropriate cases, senor students and postgraduate students who have already enrolled as lawyers, may be entrusted with the fling and conducting of ht litigation in the courts free of cost.
8. No fee shall be collected from the beneficiaries of legal aid clinic.

The legal aid is a social service. Legal services comprehend not only legal representation and assistance in legislation but also such other things are legal advice, arbitration creation of legal awareness and assertiveness in the poor masses. Such actions can be accelerated if we utilize all possible human resources specially law students. The law students while learning in law school may render their services for the cause of the poor in the society, through legal aid clinics in law colleges/Law Schools/ Universities.

The Bhagawathi Committee on Juridicare (1977) has also recommended for the establishment of such clinics for implementing legal aid schemes. In India, where more than half of the population lives below poverty line, and where a large part of the legal need of the poor cannot be afforded by the state, the law schools can play an important role o make the legal awareness and legal aid programme successful by involving law students in its activities[2].

The creative use of law students in a country like India will be very significant for the success of legal aid movement. The easy availability of vast technical manpower in the hundreds of law schools in the country must stir the planners and Judicial Administration to mobilize these untapped human resources for the services of the poor and distribute millions of the country towards building up a democratic, secular egalitarian under the constitution[3].

Role of Law students in creating Legal awareness:

Law is a social science it is closely linked with the society. If faithfully reflects the nature of life lived by the society. A society cannot remain static. It keeps on moving with economic, scientific and technological developments. Therefore, law in order to meet the changing requirements should keep on evolving itself. The law, in order to respond to social change, should go on changing. It should drop the outdated rules and should lay down new rules as per requirements social necessities[4].

Justice and equality is the goal of law. Law is a means to the end of justice. Law is an instrument to source justice. Justice is equal treatment to all situated alike. A person situated is different stands, positions or levels cannot be treated alike, equality among unequal

[2] Tika Vs. State of UP (1975) Cr..L. J 33
[3] Madhava Meanon N R (1982) Legal Education for services to the poor AIR, Journal, Vol. 69, p. 65
[4] Bijai Narim (2006) Jurisprudnce : Legal theory , Allahabad , Law Agency, Allahabad, Delhi p. 326

amount to inequity. Law is a body of rules enacted by legally authorized bodies and enforced by authorized agencies.

The legal aid is very essential for the survival of healthy democracy which is founded on the equality, dignity and worth of man as man as live and available component of society. A society riddled with social and economic inequalities is undemocratic. Democracy today has been a social democracy which aims at the welfare of all its classes. For want of appropriate system of administration of justice, social justice is not available to all; we can not keep our political democracy on the path of social progress and economic development. Our democracy should not merely be seen as political democracy but also a social democracy. The rule of law, without legal aid is nothing but a psudo slogan and a justice myth. Equal access to justice for the rich and the poor alike must be seen as an essential part of the maintenance of the rule of law[5].

Legal aid in India has been immensely influenced by the contemporary legal developments in Anglo- American and European countries. The concept of legal aid has been defined very clearly. Its objectives are universally acknowledged and appreciated, and a definite result oriented mechanism has been created for it[6].

Conclusion:

The common man does not have knowledge about the laws which do the frequent changes in the society. It is a known fact that the common man cannot understand the legal terminology and the activities going on the law courts. The universities and law colleges may be required to establish Legal Aid Clinics and clinical legal education may be imparted to them compulsory. Law students of final year may

[5] Shama s.S (1993) legal aid to the poor, deep and deep publication, New Delhi 1sted., p. p. 5-6
[6] Chappelleti (1975) Towards equal justice ; A Comparative study of legal aid in Modern societies, Oceana Publications, INO,p.6

also be required to undertake legal aid work for which due credit may be given to them. Public library is free dissemination of the information in society. So, Law students should establishing legal aid clinics in all Gram Panchyayaths at public libraries and health center engaging competent lawyers and like mind legal fraternity and as legal consultants in the clinics. Give wide publicity about the clinics with the help of local self Government institutions. The legal service authorities and law students should conduct camps in public libraries and public health centers, where the rural people, depressed class people live to create awareness about various laws and how to use free legal aid. The legal service authorities involve the NGOs to participate and to help in conducting the legal awareness camps about the laws.

HUMAN RIGHTS BASED APPROACH TO PROTECTION OF HEALTH AND ENVIRONMENT: AN ANALYSIS

Shivakumar M.A*[1]

1. Introduction:

Human rights are intrinsic values that give all human beings dignity. As is stated in the very first line of the preamble to the Universal Declaration of Human Rights (UDHR): "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[2]." This is followed by the first line of Article 1 of the UDHR: "All human beings are born free and equal in dignity and rights." Human rights are thus basic values that are essential to human dignity. Human rights are legally guaranteed by human rights law. They protect individuals and groups against actions that interfere with fundamental freedoms and human dignity. Human rights impose obligations on governments (who are the primary duty-bearers).

Human Rights are based on international agreements states have freely signed and ratified, thereby taking up the duty to respect, protect and fulfill the rights provided by the Human Rights treaties. The main international Human Rights agreements are the International Covenant on Civil and Political Rights **(ICCPR)[3]** and the International Covenant on Economic, Social and Cultural Rights **(ICESCR)[4].** Nine of the eleven countries in the SEA Region have ratified these conventions: Bangladesh, DPR Korea, India, Indonesia, Maldives, Nepal, Sri Lanka, Thailand and Timor-Leste. All countries in the Region have ratified the Convention on the Elimination of All

[1] Assistant Professor P.G. Department of Studies in Law, Karnatak University, Dharwad
[2] Universal Declaration of Human Rights. Available at: http://www.un.org/Overview/rights.html.
[3]The International Covenant on Civil and Political Rights-1966
[4]The International Covenant on Economic, Social and Cultural Rights-1976

Forms of Discrimination against Women (CEDAW)[5] and the Convention on the Rights of the Child (CRC)[6]. The Universal Declaration on Human Rights[7] is an international declaration that is binding universally and has significant moral value. Human Rights principles govern the application of Human Rights norms. Human Rights are universal and they must be applied equally without discrimination. Human Rights are also inalienable: it is not possible to contract out of Human Rights entitlements. For the health and Human Rights agenda, it is significant that human Rights are considered indivisible, interdependent and interrelated. There is no hierarchy between Human Rights; the right to health is as important a human right as other Human Rights, including civil and political rights. Human Rights obligations relate to all countries, rich and poor. The principle of progressive realization requires that states take concrete steps towards the fulfillment of Human Rights obligations using maximum available resources. Governments are held accountable for their actions under the principle of the rule of law. Moreover, Human Rights have to be implemented in a participatory and inclusive manner. Human Rights are applicable at all levels of development, but receive different treatment from one country to another. Some Human Rights, such as freedom from discrimination, become fully effective on governments upon the ratification of the Human Rights treaty in question. The realization of other rights, such as the right to health and the right to housing, depends on available resources. The principle of progressive realization obliges governments to take steps to realize such rights as expeditiously and effectively as possible.

2. What is Human Rights-based Approach?

[5]The Convention on the Elimination of All Forms of Discrimination against Women-1981
[6]The Convention on the Rights of the Child (CRC)-1990
[7]The Universal Declaration on Human Rights-1984

A Human Rights based approach is about empowering people to know and claim their rights and increasing the ability and accountability of individuals and institutions who are responsible for respecting, protecting and fulfilling rights, A Human Rights-based approach is a conceptual framework that is normatively based on international Human Rights standards and operationally directed to promoting and protecting Human Rights. It seeks to analyze obligations, inequalities and vulnerabilities and to redress discriminatory practices and unjust distributions of power that impede progress and undercut Human Rights.

The human rights based approach offers a framework that will better enable community organizations to understand society's expectations and deliver more sustainable services that are respectful of the inherent dignity of individuals. It provides a common language though which the policy and practice of all organizations can be objectively measured against universal benchmarks and minimum standards. A human rights based approach to service delivery and policy development involves a consideration of both *what* you are going to do based on the principles of human rights and the corresponding duties you may have, and then *how* you are going to do your work in ways that promote these rights. In summary, a human right based approach may require changing what you do, not just how you do it[8]. Under a Human Rights-based approach, plans, policies and programmes are anchored in a system of rights and corresponding obligations established by international law. This helps to promote the sustainability, empowering people themselves (right-holders) especially the most marginalized to participate in policy formulation and hold accountable those who have a duty to act (duty-bearers). United

[8]A Training Model published by Victorian Equal Opportunity and Human Rights Commission in their website. http://www.humanrightscommission.vic.gov.au/privacy

Nations agencies have nonetheless agreed on a number of essential attributes to Human Rights-based approach[9] are as follows:

a. As policies and programmes are formulated; the main objective should be to fulfill Human Rights.

b. A Human Rights-based approach identifies rights-holders and their entitlements and corresponding duty-bearers and their obligations, and works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.

c. Principles and standards derived from international Human Rights treaties should guide all policies and programming in all sectors and in all phases of the process

d. Promotes realization of human rights and helps government partners achieve their human

e. rights commitments;

f. Increases and strengthens the participation of the local community;

g. Improves transparency;

h. Promotes results (and aligns with Results Based Management);

i. Increases accountability;

j. Reduces vulnerabilities by focusing on the most marginalized and excluded in society; and

k. More likely to lead to sustained change as human rights-based programmes have greater impact

l. on norms and values, structures, policy and practice[10]

[9]http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx,accessed on 26.12.15

3. Application of Human Rights based Approach

Why should you support the implementation of a HRBA? Three main rationales are suggested: (a) intrinsic, (b) instrumental and (c) institutional. we summarize them here under as follows,

a. Intrinsic rationale

- The UN has acknowledged that a HRBA is the right thing to do, morally and legally:
- A HRBA is based on the universal values (freedom, equality, solidarity, etc.) reflected in the human rights principles and standards that provide a common standard of achievement for all women, men and children and all nations.
- A HRBA moves development action from the optional realm of benevolence (or charity) into the mandatory realm of law.
- A HRBA establishes duties and obligations and corresponding claims**,** while underscoring the importance of creating accountability mechanisms at all levels for duty-bearers to meet their obligations.
- A HRBA ensures people are not passive beneficiaries of State policies but active participants in their own development and further recognizes them as rights-holders, thereby placing them at the centre of the development process.

b. instrumental rationale

- A HRBA leads to better and more sustainable human development outcomes because it:

[10] CARE International reached this conclusion in a study that compared rights-based programmes to non rights-based programmes in 2006. Care International UK and DFID Programme Partnership Agreement: Annual Report, 2005-2006.

- Focuses on analysing the inequalities, discriminatory practices and unjust power relations that exacerbate conflict in human rights and development processes.
- Has a special focus on groups subjected to discrimination and suffering from disadvantage and exclusion**.** For UNFPA, the groups to target include: the poorest of those already living in poverty, especially disadvantaged adolescents and youth; women survivors of violence and abuse; out-of-school youth; women living with HIV; women engaged in sex work; minorities and indigenous peoples; women living with disabilities; refugees and internally displaced persons; women living under occupation; and aging populations.12 In addition, the twin principles of non-discrimination and equality call for a focus on gender equality and engaging with women's human rights in all development programmes.
- Depends on the accountability of the State and its institutions with regard to respecting, protecting and fulfilling all the human rights of all people within its jurisdiction.
- Emphasizes participation, particularly of discriminated and excluded groups at every stage of the programming process.
- Gives equal importance to the processes and outcomes of development**,** as the quality of the process affects the achievement and sustainability of outcomes.

c. Institutional rationale

- Recognizing that the UN has a core mandate on Peace, Security, Human Rights and Development, and that neutrality and respect for self-reliance make it a privileged partner to deal with sensitive issues, means that:
- Development challenges are examined from a holistic lens guided by human rights principles while taking into account the

civil, political, economic, social and cultural aspects of a problem (e.g. an HIV prevention strategy guided by rights to education and health as well as right to information, right to nondiscrimination, etc.).

- A HRBA facilitates an integrated response to multifaceted development problems, including addressing the social, political, legal and policy frameworks that determine the relationship and capacity gaps of rights-holders and duty-bearers.
- A HRBA suggests using the recommendations of international human rights mechanisms in the analysis and strategic response to development problems.
- A HRBA can also shape relations with partners since partnerships should be participatory, inclusive and based on mutual respect in accordance with human rights principles. The Committee on Economic, Social and Cultural Rights has summarized some of the key elements that give a HRBA enormous potential for strengthening development efforts and achieving results[11]

4) Implementation UN Human Rights based approach Programme (HRBA)

The United Nations is founded on the principles of peace, justice, freedom and human rights. The Universal Declaration of Human Rights recognizes human rights as the foundation of freedom, justice and peace. The unanimously adopted Vienna Declaration and Programme of Action states that democracy, development, and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. In the UN Programme for Reform that was launched in 1997, the Secretary-General called on all entities of the UN system to mainstream human rights into their various activities and

[11] See UN Statement of Common Understanding of Human Rights Based Approach

programmes within the framework of their respective mandates. Since then a number of UN agencies have adopted a human rights-based approach to their development cooperation and have gained experiences in its operationalization. But each agency has tended to have its own interpretation of approach and how it should be operationalized. However, UN interagency collaboration at global and regional levels, and especially at the country level in relation to the CCA and UNDAF processes, requires a common understanding of this approach and its implications for development programming. What follows is an attempt to arrive at such an understanding on the basis of those aspects of the human rights-based approach that are common to the policy and practice of the UN bodies that participated in the Interagency Workshop on a Human Rights based Approach in the context of UN reform 3-5 May, 2003. This Statement of Common Understanding specifically refers to a human rights based approach to the development cooperation and development programming by UN agencies[12].

5) Common Understanding: All programmes of development co-operation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments. 2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process. 3. Development cooperation contributes to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights, Among these human rights principles are: universality and inalienability; indivisibility; interdependence and inter-relatedness; non-discrimination and

[12]https://undg.org/main/undg_document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies, accessed on 28.12.2015

equality; participation and inclusion; accountability and the rule of law. These principles are below, a) Universality and inalienability, b) Indivisibility c) Inter-dependence and Inter-relatedness, d) Equality and Non-discrimination e) Participation and Inclusion f) Accountability and Rule of Law.

6) Human Rights Instruments with Provisions on Health and the Environment

Most human rights treaties were drafted and adopted before environmental protection became a matter of international concern. As a result, there are few references to environmental matters in international human rights instruments, although the rights to life and to health are certainly included and some formulations of the latter right make reference to environmental issues. The International Covenant on Economic, Social and Cultural Rights (16 December 1966), guarantees the right to safe and healthy working conditions (Art. 7 b) and the right of children and young person's to be free from work harmful to their health (art. 10-3). The right to health contained in article 12 of the Covenant expressly calls on state parties to take steps for the improvement of all aspects of environmental and industrial hygiene and the prevention, treatment and control of epidemic, endemic, occupational, and other diseases. The Convention on the Rights of the Child (New York, November 20, 1989) refers to aspects of environmental protection in respect to the childs right to health. Article 24 provides that States Parties shall take appropriate measures to combat disease and malnutrition although the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution. (Art. 24(2) (c). Information and education is to be provided to all segments of society on hygiene and environmental sanitation. (Art. 24(2)(e), ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (Geneva, June 27, 1989) contains numerous references to the lands, resources, and environment of indigenous

peoples (e.g., Arts. 2, 6, 7, 15). Part II of the Convention addresses land issues, including the rights of the peoples concerned to the natural resources pertaining to their lands. Further, governments are to ensure adequate health services are available or provide resources to indigenous groups So that they may enjoy the highest attainable standard of physical and mental health. (Art. 25(1). Article 30 requires that governments make known to the peoples concerned their rights and duties. Two regional human rights treaties contain specific provisions on the right to environment. The approach of each differs, with the African Charter linking the environment to development, while the American Convention Protocol speaks of a A healthy environment.[13] The African Charter on Human and Peoples Rights, (Banjul June 26, 1991) contains both a right to health and a right to environment. Article 16 of the African Charter guarantees to every individual the right to enjoy the best attainable state of physical and mental health while Article 24, states that All peoples shall have the right to a general satisfactory environment favorable to their development. The distinction between an individual and a peoples right is not made clear. The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, 5 also contains both a right to health and a right to environment, drafted in more detail than in other human rights instruments. Article 10 provides: (1) Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being. (2) In order to ensure the exercise of the right to health, the States Parties agree to recognize heath as a public good and, particularly, to adopt the following measures to ensure that right: (a) Primary health care, that is, essential health care made available to all individuals and families in the community; (b) Extension of the benefits of health services to all individuals subject to the States jurisdiction; (c)

[13] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador, November 17, 1988, OAS T.S. 69.

Universal immunization against the principal infectious diseases; (d) Prevention and treatment of endemic, occupational and other diseases; (e) Education of the population on the prevention and treatment of health problems, and (f) Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable. Article 11 is entitled: Right to a healthy environment. It proclaims: 1. everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation and improvement of the environment. b. Environmental Instruments with Provisions on Health and Human Rights Concern for health is a constant theme in environmental agreements, indeed one of the principal aims of environmental protection. A standard definition of pollution, found in many legal texts, is the introduction by man, directly or indirectly, of substance or energy into the [environment] resulting in deleterious effects of such a nature as to endanger human health, harm living resources[14] being to protect human health and the environment.[15]

[14] See, e.g., Convention on Long-Range Transboundary Air Pollution (Geneva, 13 Nov. 1979), 1302 U.N.T.S. 217, art. 1. See also: Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 Mar. 1985), UNEP Doc. IG.53/5, art. 1(2); Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16, Sept. 1987), 26 I.L.M. 1550 1987), Pmbl, para. 3; Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 Mar. 1992), 31 I.L.M. 1330, art. 1(c); United Nations Framework Convention on Climate Change (Rio de Janeiro, 9 May 1992), 31 I.L.M. 849, art. 1(1); Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 Mar. 1974), 13 I.L.M. 546, art. 2(1); Convention for the Prevention of Marine Pollution from Land-Based Sources (Paris, 4 June 1974), 13 I.L.M. 352, art. 1; Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 16 Feb. 1976), 15 I.L.M. 290, art. 2(a) and all subsequent regional seas agreements; Convention on the Non-Navigational Uses of International Watercourses (New York, 31 May 1997), 36 I.L.M. 700, art. 21(2).

[15] EC Council Directive No. 85/201 on Air Quality Standards for Nitrogen Dioxide, 7 Mar. 1985, L 87 O.J.E.C. (1985); EC Council Directive No. 80/779 on Air Quality Limit Values, 15 July 1980, L 229, O.J.E.C. 30 (1980).

Similarly, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal[16] begins its preamble aware of the risk of damage to human health and the growing threat to human health posed by hazardous wastes. Non-binding declarations also make the link.

The Stockholm Declaration proclaims in paragraph 3 its concern about: growing evidence of man-made harm in many regions of the earth: dangerous levels of pollution in water, air earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment. Stockholm Principle-7 calls on States to take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health. Article 1 of the Legal Principles for Environmental Protection and Sustainable Development, adopted by the Expert Group of the Brundtland Commission, expressly links the three fields in declaring that All human beings have the fundamental right to an environment adequate for their health and well-being[17]. Chapter 6 of Agenda 21, adopted at the 1992 Rio Conference on Environment and Development, is entirely devoted to A protecting and promoting human health conditions, while the Rio Declaration itself proclaims that human beings are entitled to a healthy and productive life in harmony with nature (Principle 1) and provides that states should effectively cooperate to discourage or prevent the relocation and transfer to other states of any activities and substances

[16] Basel Convenion on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 Mar. 1989), 28 I.L.M. 657.

[17] Legal Principles for Environmental Protection and Sustainable Development, adopted by the Experts Groups on Environmental Law of the World Commission on Environment and Development (WCED), 18-20 June 1986, U.N. Doc. WCED/86/23/Add. 1 (1986), Art. 1.

that, inter alia, are found to be harmful to human health (Principle 14)[18]

7) Linkage between Human Rights, Environment and Health

The origins of a right to environment can be found in the Stockholm Declaration. Moreover, since 1980 several international and regional human rights instruments have included various statements of a right to environment. Environmental Rights in Existing Human Rights Treaties Concerned with Civil and Political Rights The United Nations Charter, 1945 does not define human rights. However, the human right to environment could be interpreted through the concept of "well-being". Similarly, the Universal Declaration of Human Rights, adopted by the General Assembly on December 10, 1948 does not mention a human right to environment. It affirms the right to life and a right to a standard of living adequate for health and well-being. Again, the right to environment could be read into this right The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights affirm that every human being has the "inherent right to life" and the right of everyone[19] "to the enjoyment of the highest attainable standard of physical and mental health" through "the improvement of all aspects of environmental and industrial hygiene". The right to life and the right to be free from interference with one's home and property are civil and political rights covered by various treaties. In environmental terms the right to life may include a positive obligation on the state to take steps to prevent a reduction of or an extension of life expectancy. For example, by providing better drinking water or less polluted air. Article 8, of the European Convention on Human Rights incorporates the right to be free from interference with one's home and property. The limited

[18] http://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf, accessed on 23.12.2015
[19] http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html, accessed on 08.01.2015

case law in this area usually deals with noise pollution for example, in alleged nuisance complaints about excessive aircraft noise at Heathrow Airport the European Court on Human Rights found that the benefits to the community out-weighed the individual's right to bring a claim. However, in the case of Lopez Ostra v Spain (20 EHRR 277 of 9 December, 1994), the Court ruled that the applicant suffered health problems from the fumes of a tannery waste treatment plant operating a few meters away from her home. Economic, Social and Cultural rights include the right to, a healthy environment, a decent working environment, decent living conditions and to health. These rights are covered by various treaties which establish the close relationship between socio-economic development, environmental and human rights concerns. Under the right to a healthy environment everyone shall have the right to live in a healthy environment and to have access to basic public services. States are obliged to promote the protection, preservation and improvement of the environment. States must adopt the necessary measures to the extent allowed by their available resources and their degree of development to implement these objectives. If necessary, legislation may be required to realize these objectives. However, a state can only promote a healthy environment according to their resources. The right to a decent working environment imposes obligations on States to give effect to the various rights contained in the Covenant on Economic, Social and Cultural Rights (ICESCR) including reporting mechanisms to secure a State's compliance with their obligations. The 1981 African Charter on Human and Peoples' Rights was the first human rights treaty to expressly recognize the right of "all peoples" to a "satisfactory environment favorable to their development". Within Europe, the Organization of Economic and Development (OECD) has stated that a "decent" environment should be recognized as one of the fundamental human rights. Furthermore the United Nations Economic Commission for Europe (UNECE) has drafted the Charter on Environmental Rights

and Obligations which affirms the fundamental principle that everyone has the right to an environment adequate for general health and well-being. The Organization of American States, introduced a right to environment in its 1988 Protocol of San Salvador. The European Social Charter aims to ensure the right to safe and healthy working conditions. Art 11 (1) of the ICESCR deals with the right to decent living conditions. This would include requiring a State to take measures to minimize pollution. The right to health covered by Art 12 of ICESCR provides that State Parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This includes improving all aspects of environmental and industrial hygiene to mitigate pollution. Part 1 of the 1961 European Social Charter requires parties to take appropriate measures in particular to prevent air and water pollution, protection from radioactive substances, noise abatement, food control and environmental hygiene. Article 10 of the 1988 American Protocol to the Inter-American Convention on Human Rights provides that everyone shall have the right to health. Art 24 of the 1989 Convention on the Rights of the Child provides that a child has the right to enjoy the highest attainable standard of health. For the first time in any human rights treaty, there is an explicit link between health and the State of the environment.

8) ICJ Decisions on Right to Environment and Health

The ICJ has decided several cases relevant to the discussion of human rights and the environment, handful of which are presented here. Though the ICJ has failed to explicitly recognize the link between human rights and the environment in a judgment, it has discussed the relevance and importance of environmental issues and elaborated procedural mechanisms for environmental protection. In addition, separate opinions of individual judges have explicitly addressed the connection between environmental protection and human rights, as

well as issues relating to future generations, and principles of international environmental law.

In case of **Nuclear Tests (New Zealand v. France)**[20] New Zealand filed applications in the International Court of Justice (ICJ) claiming breach of legal norms in the testing of atmospheric nuclear weapons, unlawful action by allowing radioactive fallout to cause atmospheric and marine pollution in their territories, and interference with maritime and air navigation. The Court issued an interim protection order on June 22, 1973 in favor of New Zealand, which stated that the French government should avoid conducting any nuclear tests in the region until the Court had rendered a decision in the case. At the interim stage, the Court expressly refrained from expressing a view on the merits, in particular on whether radioactive matter from the testing posed a danger to the health of the local populations.

In case of Gabcikovo-Nagymaros Project (Hungary v. Slovakia)[21] Hungary and Czechoslovakia had entered into a treaty in 1977 (Budapest Treaty) to provide electric power, improve navigation, and eliminate flooding along the River Danube. The construction of the Gabč.kovo-Nagyaros System was a large and integrated complex of structures and installations on the territories of both countries along the Danube. It aimed to enhance both countries' economies, increasing shipping and producing hydroelectric power. Article 15 of the Budapest Treaty aimed to reduce the threat it posed to the environment by requiring the parties to ensure water in the Danube would not be impaired by the project. Article 19 provided that the parties should "ensure compliance with the obligations for the protection of nature" in connection with the construction and operation of the locks. In constructing the works which would lead to the putting into operation

[20] 1974 I.C.J. Rep. 253 (Dec. 20, 1974)
[21] 1997 I.C.J. 140 (Sept. 25, 1997)

of Variant C, Czechoslovakia did not act unlawfully so the notification of termination by Hungary prior to this was premature. No breach of the treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the treaty as a ground for terminating it when it did. But the Court also found that Slovakia's operation of Variant C, substantially interfering with an international watercourse, was in breach of international law.

In the case of Pulp Mills on the River Uruguay (Argentina v. Uruguay)[22] In 2003, the Uruguayan government granted permission to Spanish and Finnish companies to build two pulp mills along the Uruguay River. The river forms a boundary between Uruguay and Argentina and its use is regulated by the Statute of the Uruguay River, 1975, (hereinafter "the Statute"). The Statute is a bilateral treaty between the two countries, the purpose of which was to establish mechanisms for the optimum and rational utilization of the river. Argentina brought a complaint before the ICJ in 2006, alleging that the government of Uruguay had violated the Statute. Argentina's arguments The ICJ noted that construction was continuing despite the protests, so blockades of the bridges and roads linking the two States did not present an imminent risk of irreparable prejudice to the rights of Uruguay in the dispute. At the merits stage, Argentina won their argument on the procedural point, but lost on the substantive point. The ICJ rejected Argentina's argument that it had jurisdiction over any kind of environmental damage.

In case of Aerial Herbicide Spraying (Ecuador v. Colombia)[23]

As part of "Plan Colombia" (Colombia's broad policy, largely funded by the U.S., for combating armed guerrilla groups), beginning in 2000, aerial fumigations of a strong herbicide containing glyphosate were sprayed across the Colombian countryside for several contiguous

[22] 2010 I.C.J. (20 April 2010)
[23] International Court of Justice wide Order (September 13, 2013)

days at a time, for ten hours each day. While the objective was to eradicate Colombian coca and poppy plantations, Ecuador's application asserts that the herbicide was carried by the wind onto not only Colombian houses and other types of crops but also across the border into Ecuador and the San Miguel River, which lies between the two states. Additionally, Ecuador argued that Colombian planes intentionally sprayed herbicide directly onto the border (where lies the San Miguel River) and entered Ecuadorean air space to turn around, thus permitting herbicide to fall indiscriminately on Ecuadorean soil.Closely following the sprayings, Ecuadorean citizens reported severe adverse health reactions, including "burning, itching eyes, skin sores, intestinal bleeding and even death."Sustenance crops, such as yucca, rice, plantains, and coffee, were eradicated by the sprayed herbicide. In 2008, Ecuador submitted an application instituting proceedings to the ICJ, requesting that Colombia's actions be deemed internationally wrongful acts and that Colombia be compelled to compensate the government and citizens of Ecuador for their losses suffered.

The ICJ's decision in the Pulp Mills Case[24] illustrates the essentially 73 See Sporrong and Lonnroth v. Sweden (1982) EHCR Sers. A/52. 74 Fredin v. Sweden (1991) ECHR Sers. A/192, paras. 41-51. See also Apirana Mahuika et al v. New Zealand (2000) ICCPR Communication No. 547/1992, in which the UN HRC upheld the state's right to conserve and manage natural resources in the interests of future generations provided this did not amount to a denial of the applicant's rights. Boyle UNEP Paper Revised 21 relative character of these competing interests. As the Court held there: 'Whereas the present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development; whereas it is in particular

[24] Pulp Mills Case (Provisional Measures) (Argentina v Uruguay) (2006) ICJ Reports, 13 July 2006

necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development; whereas from this point of view account must be taken of the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States[25]. The Inter American Commission of Human Rights[26] and the UN Human Rights Committee[27] have taken a similar approach in cases concerning logging, oil extraction and mining on land belonging to indigenous peoples.

9) Conclusion:

Whatever perspective one adopts regarding the link between human rights and the environment, it is clear that failure to preserve a healthy environment has a clear and even increasing effect on the

[25] Case Concerning the Gabčíkovo-Nagymaros Dam (1997) ICJ Reports 7, para. 140

[26] See Maya indigenous community of the Toledo District v. Belize, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004), para. 150: 'This Commission similarly acknowledges the importance of economic development for the prosperity of the populations of this Hemisphere. As proclaimed in the Inter-American Democratic Charter, "[t]he promotion and observance of economic, social, and cultural rights are inherently linked to integral development, equitable economic growth, and to the consolidation of democracy of the states of the Hemisphere." At the same time, development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being

[27] In Ilmari Lansman et al. v. Finland (1996) ICCPR Communication No. 511/1992, para. 9.4, the UN HRC held that 'A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.' The Committee concluded that Finland had taken adequate measures to minimise the impact on reindeer herding [para. 9.7]. Compare Lubicon Lake Band v. Canada (1990) ICCPR Communication No. 167/1984, para. 32.2, where the UNHRC found that the impact of oil and gas extraction on the applicants' traditional subsistence economy constituted a violation of Article 27.

enjoyment of human rights. The linkage of human rights to the environment not only helpful to protect the environment but at the same time the human rights system would be strengthened by the incorporation of environmental concerns, enabling the expansion of the scope of human rights protection in the area of environment. Following are some sensible suggestions to make use of the human rights framework for the better protection of the environment: (1) The quality of human rights in conditioned by the human being is relationship with the surrounding ecology. Threats to the environment compromise mankind's well being and the full enjoyment of fundamental human rights. The kind of luxurious and unsustainable lifestyle adopted by developed nations is also responsible for the deterioration of our environment. As the issue of environmental pollution does not recognise the political boundary, the world's poor are forced to pay the price for the selfishness of others. The human rights approach can stop this happening. By focusing on equality and respect for individual dignity, an insistence on attention to human rights has the effect of forcing all decision- makers to look outside their own circle, to see the human as well as the global consequences of their actions. (2) The Indigenous population often suffers the brunt of environmental harm and have least access to justice and has no role in the decision making process. This particular fact must be taken into consideration while making policies and programme for the protection of the environment as well as at the time of allowing and development activities in the area of such population. (3) The scientific community can contribute to the theoretical soundness of the right to a healthy environment by providing data regarding the impact of environmental degradation on human health and the environment as a whole. (4) In the Indian perspective, the right to healthy environment should be incorporated in part III of the Constitution on the line of the recommendation made by the Commission on the review of the working of the Constitution (National Commission to Review the Working of the Constitution,

2002). (5) With regard to the linkage between human rights and environment, regional human rights bodies and domestic court are working well but it is not appropriate to leave such an important and vital right to judicial vagaries. Judicial interpretation has its limitation. The right to healthy environment should be included in the hard law. (6) Linking human rights to environmental harm allows individuals to use global and regional human rights complaint procedures when states violate human right by allowing substantial environmental degradation. Of course, one of the most important consequences is to provide victim of environmental degradation the possibility to access to justice. Human rights protection will be strengthened with the incorporation of environmental protection because it extends human rights protection to an area previously overlooked.

LENDER'S LIABILITY VIS-À-VIS MICRO, SMALL AND MEDIUM ENTERPRISE

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Atisha Singh[2]**

1. INTRODUCTION

The growth of any sector majorly depends on the adequate availability of finance. Availability of finance and also the terms on which it is available has direct link to the economic growth of any industry .Banks and other financial institutions play an important role in disbursing credits. A developed financial system along with a developed legal system is necessary for development of any sector.

Along with the adequate availability of finance it is also essential that the credit is offered at fair terms. Lenders especially banks also owe certain obligations towards growth of any sector and more importantly economic growth of the country so it is essential that do not operate purely as a business i.e. just for profit motive. It is important for the lenders to deal with borrowers with certain responsibility. The basic principle is to lend the money in good faith. While lending it is also important for the banks to look into the interest of the nation and social necessity. This is known as lender's liability

The doctrine of lenders liability has its origin in America. Earlier it had limited scope and was used only in cases in which credit was given in bad faith by the lenders however the scope has widened since then. In some countries there are separate laws and regulations on lenders liability like America, Malaysia etc. However there is no such separate law on lenders liability in India .In 2003, influenced by the American Law on lenders liability it was decided by the ministry of finance that a similar laws would be adopted in India too but no such

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statute was drafted. Instead RBI, in 2003 issued certain guidelines which were "Fair practice code for Lenders" This code basically prescribes the minimum level of conduct to be adopted by the lenders and it also prescribe for lenders to help the borrowers in distress. Again in 2004 in Mardia chemicals case the whole doctrine of lenders liability was in issue and there was hue and cry about a separate statute of lenders liability in India. Though in India there is no separate legislation yet the concept has to be read in various statutes and directives.[3]

Doctrine of Lenders liability pose certain obligations on lenders to protect the interest of borrowers who otherwise are always on a lower footing when compared to the lenders thus especially for economic growth of any sector this doctrine is essential as it protects the interest of borrowers of that sector. Micro small and medium enterprises in India are a growing sector which accounts for a large extent of employment generation and growth of economy of the country. The contribution of these enterprises in GDP of India is almost 8%.[4] They are also essential for meeting up the needs of local markets in terms of manufacturing. However this sector has always being facing problems related to acquiring finance. Also, there are issues related to availability of collateral with them thus they are usually on lower footing when compared to the lenders.

In this paper the researcher would analyze the obligations on the Banks while lending to MSME sector. The researcher would for this purpose discuss the stipulation relating to obligation on lenders given by RBI and also the voluntarily adopted stipulation through BCSBI's code. The researcher would also scrutinize various case laws so as to

[3] Banking Conundrum! What about Lender'sLiability?,May30,2016,http://tiolcorplaws.com/

[4] http://msme.gov.in/sites/default/files/Accelerating%20Manufacturing%20in%20the%20MSME%20Sector_0.pdf (Last Visited 03-09-2016)

determine whether the obligations posed on lenders through various directives is just a lip service or does it have any actual implementation

2. BANK'S OBLIGATIONS ON LENDING TO MSME SECTOR

1. Guidelines on fair practice code for lenders[5]

This code provides for the broad framework within which all banks and financial institution have to make their own rules for dealing with borrowers. The rules made by bank can supplement these preexisting guidelines and in no way they must be against their spirit. These rules have to be approved by the Board of Directors of the Banks and Financial institution. These Guidelines provided by RBI provides for the minimum standard which has to be adopted by the financial institutions while making their own rules.

Guidelines given in the code are as follows-

1. Loan Application and Processing thereof-
    - The application for loan must be comprehensive especially when it is regarding a priority sector loan up to Rs.2 lakh. This is necessary to protect the interest of borrowers so that such meaningful information is provided which helps the borrower to make comparison with other financial institution and banks.
    - Time within which the application for loan would be disposed of must also be specifically given.
    - Also the processing of the application must be done within reasonably time period. There must not be any unreasonable delay.

[5] DBOD. Leg. No.BC. 104 /09.07.007/2002-03

- In case the banks rejects the application for the loan amount less than 2 lakhs then such rejection must be communicated with reasons for the same.

2. Terms of Loan-

- Credit worthiness of the borrower must be properly assessed by the Banks and other financial institutions.
- Credit limit and other terms and conditions must be clearly be brought to the knowledge of the borrower and his acceptance for the same must also be taken.
- Borrower must be provided with the copy of loan agreement and other related document duly signed by the authorizing authority.
- Terms which are exclusively at the volition of the lenders must be clearly explained to the borrowers such as if an account has been declared as NPA then drawing from such account can be disallowed.

3. Rules regarding Disposition of Loan-

- The Loan should be disbursed within time limit already brought to the knowledge of the borrower and also is compliance with the terms and conditions decided after final negotiation. Due communication must be made to the borrowers regarding any change in terms and conditions especially when it is relating to interest rates or service charge. Also Interest rates must only be increased prospectively.

4. Post Disposition Management

- For the Loans below the amount of 2 lakhs the lender must take post disposition supervision in case there arises any

kind of lender associated genuine difficulty faced by the borrower.

- Reasonable time and notice must be given to borrower before lender takes any decision regarding calling for additional securities or quickening the performance or repayment.
- All securities must be immediately delivered to the borrower as soon as loan amount is fully repays. However in case any legitimate right to lien exists then the securities can be held back. Also if any right of setoff is exercised then the same must be brought to the knowledge of borrower with full documents under which such right exist.

5. Miscellaneous

- Lenders must not interrupt in any matter of borrower for which there is no provision in terms of Loan. However if any material information which was not disclosed by the borrower comes to the knowledge of lender then any action on the same can be taken.
- No discrimination must be done on the basis of religions, caste , race ,sex etc. However the lenders can form certain schemes for the benefit of the lower strata of the society and this would not be termed as discrimination.
- Recovery of loan must be done by adopting methods within the realm of law. No illegal harassment must be done and use of muscle power for recovery purpose is also prohibited.

Any decision or objection of the lender with reasons thereof must be communicated within 21 days of receiving notice for transfer of borrowers account.

6. Redressal of grievance

- Proper mechanism must be provided by the board of directors of Banks and Financial institutions for any kind of dispute resolution or redressal of grievance regarding the above guidelines in addition to guidelines specifically adopted by the Banks.

2. Banking Codes and Standard Board of India-Code of Banks Commitment To MSE'S-[6]

The main objective if this code is to provide for such rules so as to make it easy for MSE sector to borrow money from the banks and enhance transparency and lessen the complication needed for taking Loan's sector has from a long time being suffering from financial distress. This code was adopted by Banking Codes and Standard board of India for easy accessibility of banking services to this sector for time of its distress and also for day to day operation. Also this code is in addition to Code of Banks commitment to customers and not in derogation of it. It also in no way supersedes any directive or instruction issued by RBI in this regard.

Objective of Code-

The main and foremost objective of this code is to reduce the problem of financial distress to MSME sector by providing them with uncomplicated lending facilities and also to adopt best Banking practices.

The code also aims to evolve a fair relationship between Micro Small or medium Enterprise and Banks and cater to the financial needs of this sector as and when necessary.

[6] http://bcsbi.org.in/Codes_MSE.html

Commitments on Lending

APPLICATION

- Banks will formulate policies on Lending to Micro, Small and Medium Enterprise and declare it on the websites.
- Information relating to CGTMSE scheme would be disbursed to the customers wherein such scheme is available to pre- existing as well as new ventures with the capping of Rs. 100 lakh per customer.
- The Loan application forms must not be vague and complex. They must be presented in a very clear and unambiguous manner.
- Acknowledgement of the application must be communicated by the bank and it must also communicate the time frame within which the bank will be able to dispose it off.
- No processing fee should be charged when the amount of Loan is less than Rs 5 Lakh.

Credit Limit	Time for disposition of application
>= 5Lakh	2 weeks
5 Lakh-25 Lakh	3 weeks
<=25 Lakh	4weeks

CREDIT ASSESSMENT-

Detailed due diligence and credit assessment would be done by the banks before lending or increasing the limit of overdraft. Seasonal behavior of the trade or service would also be taken into account which assessing the credibility. Rating by the credit rating agencies would be relied upon to take any decision regarding lending.

COLLATERAL

Collateral free loans would be given by banks for the loan amount to Rs 10 lakh or less. Also if the amount of loan is up to Rs. 25 lakh still it is on discretion of banks to provide interest free Loans if the creditworthiness of the company is up to the standards determined by the lending Bank. Also the Banks would prefer to cover the loan up to amount of Rs. 100 lakh under the scheme for credit guarantee but only after the consent of the borrower.

GUARANTEE

It would be recommended by the Banks to disclose the financial status to any person who comes forward to take the guarantees for the liabilities of the borrower. Also it would be the obligation of the Bank to clearly explain the rights and liabilities of the party as guarantor and recommend it to take legal advice before becoming guarantor.

SANCTION OF LOAN

- The Banker must not ask for deposits in the bank as a precondition for sanctioning the credit. Also it must be clearly explained by the banker that the credit is payable on demand or otherwise. Copies of full loan application with all annexures and other enclosures must be provided by the bank free of cost.
- In case the loan application is rejected then the reasons for the same must be communicated. Also the rating system based upon which an application is accepted or rejected must also be disclosed by the Banks.
- Efforts must be made to disburse the sanctioned loan within 2 working days.

POST DISBURSEMENT COMMITMENTS

As a General rule the Banks are not allowed to intervene in the business affairs of the borrower except-

- When the terms of the Loan agreement itself provides for it and only to that extent
- When any new and material information later comes to the knowledge of lender.

The banks would be supportive in any further genuine difficulties being faced by the borrowers.

The application for the transfer of the account of borrower would be deal with as expeditiously as possible, within the period of two weeks.

In case the repayment for the loan account is irregular and there are chances for it to fall to the category of Non profitable assets then such alerts as are necessary would be send to the borrower by the banks so that the borrower has enough time to take steps to prevent the account to fall into the category of NPA.

ASSISTANCE IN FINANCIAL PROBLEMS

The banks would provide full assistance in any financial difficulty of the borrower , whether it is told by the borrower or comes to their knowledge by itself. The bank would help by developing a plan for overcoming the difficulties. The Bank would also endeavor to provide credit counseling to the borrower.

RESTRUCTURING SICK MSE'S

If the project is viable then the banks would provide rehabilitation strategy which must be implemented by the borrower within 60 days as per the RBI guidelines. However rehabilitation package would only be provided if the count of borrower consecutively fall into the category of NPA for 3 months or 50% of the net worth is eroded in the previous financial year due to accumulation of any loss. If the project is determined to be unviable and the bank decides not to

give any further financial support then the reasons for the same must also be communicated.

ONE TIME SETTLEMENT[7]

In one time settlement scheme usually in situation wherein the interest amounts exceeds the principal amount also then the bank might offer one time settlement. In OTS the lender usually settles the loan account by accepting payment for part of amount due which is usually more than the principal. All public sector banks have to mandatorily adopt OTS schemes. In case the banks adopt OTS it has to publicize it.

COLLECTION OF DUES

Recovery of dues would be made by the Bank within the realms of the law. There would be specific policy for recovery of due adopted by every bank which has to be approved by the board. Recovery agents would be specifically appointed for this purpose. It is important that recovery agents deal with the matter in a sensitive manner and do not harass the borrower. In case recovery agents adopt any unfair practice then such a complaint would be then the matter would be investigated by the banks within one month of the complaint.

Miscellaneous Obligations-

- All banks would be fair and reasonable while dealing with the Msme sector. This would be achieved by providing quick and efficient credit facilities and setting up reliable mechanism for banking. Transparency would automatically be achieved if the commitment in present code and other laws are followed in true spirit.
- Banks must give clear and unambiguous information regarding their financial products in such manner that it is easily

[7] RPCD.PLNFS. BC.No.39 / 06.02.31/ 2005-06

understood by the customers. Also there must not be any kind of misleading advertisement.

- All kind of user friendly facilities must be adopted such as providing timely information of any change in interest rate etc. details of banking ombudsman must be provided to the customer. All policies related to recovery of loan, deposits etc. must be displayed on the official website of the Banks.
- In case of any complaint made by MSME , the Bank must give due acknowledgement to the complaint and must redress the grievance within appropriate time.
- It is the duty of the Banks to not to reveal any business information revealed to the Banks and consider it with full confidentiality.
- There must not be any kind of discrimination on the basis of race, caste, gender, marital status etc.
- Any kind of changes in interest rate whether in case of fixed rate or floating rate must be revealed at least a fort night before. Also all kinds of charges, however minimal, applied on the loan would be declared beforehand.

3. RBI Directives on Lending to MSME Sector[8]

Micro, Small and Medium enterprise are eligible as per the guidelines to be treated as a priority sector. A target of 7.5% of ANBC or credit equivalent amount of balance sheet exposure has been prescribed to the banks for the year ending March 2017.

Also following the suggestions of PM Task Force committee there should be 20 % growth every year in lending by Banks to MSME's and 10% growth in the number of Bank accounts of Micro Enterprises

[8] FIDD.MSME & NFS.BC.No.07/06.02.31/2015-16

opened every year. Moreover it is also prescribed that 60% of the total credit lend to MSME sector must specifically be to micro enterprise.[9]

Acknowledgement of Loan application-

All the loan application whether submitted manually or through online portal must be duly acknowledged by the banks. In addition to this the Banks must also provide the MSME borrowers with a serial number for their loan application. It is also necessary to get the loan registered under central registry.

Collateral-

It is mandatory for banks to give collateral free loans to MSE sector for the loan amount up to 10 lakhs. It is also obligatory upon banks to extend its service of collateral free loan to all those units which are finance under PM's employment generation program.

Banks to offer consultancy support and financial literacy-

A large part of MSME sector is still far away from the benefits of formal banking system. As per the directive issued by RBI, the banks are duty bound to help such enterprises in finance related issues. For this purpose the banks are recommended to set up specified centers called financial literacy centers just to provide consultancy service to this particular sector.

3. CASES

- Nidhi Knitwear's v/s Manager, Bank of Maharashtra[10]

In this case Nidhi Knitwear is a medium enterprise. It got sanction loan under different schemes from the bank for the total amount of Rs 6 crores. The loan was disbursed on 12.08.2011.However after the disbursement the account of the borrower i.e. Nidhi Knitwear remained operative for just one day. The operation of the accounts was

[9] circular FIDD.CO.Plan.BC.54/04.09.01/2014-15 dated April 23, 2015
[10] III(2014)CPJ147(NC)

ceased by bank till 23.08.2011 without any notice because of which the borrower suffered huge losses due to its failure to make timely payments and honor its commitment as this duration was also the peak season for its business. The respondent clearly violated Banks fair practice code and also Banks code of commitment to Msme according to which proper and timely notice must be given before any such decision. The case was however dismissed because of filling complaint in the wrong forum.

- Sardar Associates vs. Punjab and Sind Bank[11]

In this case it was held that the circulars issues by RBI relating to one time settlement scheme are binding on all nationalized Banks. This is in accordance to section 21, section 35-A and section 46(5) of Banking Regulation Act.

The court also stated that consideration for one time settlement is governed by directives of RBI and is not merely an act of charity.

- Ram Ganga Valley chemicals and fertilizers vs. SBI[12]

In this case even after complying with all the formalities the respondent bank took 2 years to sanction the loan. Secondly when the account of the petitioner was declared as NPA they applied for OTS under SBI'S OTS policy of 2010.There application was directly rejected without giving any reasons thereof. This lead to clear violation of Banks code of commitment to MSME according to which , if an application for OTS is rejected the applicant must be supplied with sufficient reasons. Also the OTS policy stated that in case the NPA was of loan amount more than 5 lakhs the case would be taken up for review and it would be the discretion of the Bank to allow for OTS policy. However in the present case the application was directly rejected without taking up for

[11] Civil Appeal no. 4970-4971 OF 2009
[12] 2014(3)PLJR337

any review. Thus the court ordered the banks to reconsider the application for OTS.

- Navdeep Theatre vs. Punjab and Sind Bank[13]

OTS application of the firm was rejected by the bank stating that the concerned firm does not fall into the category of MSME. The firm had also filed RTI concerning whether the theatre business falls into the category of MSME. The response from RBI was affirmative. As per the RBI guidelines the firm was eligible for the OTS. Thus the court directed the Bank to consider Navdeep' theatres application in accordance with RBI guidelines.

- Hotel Parag Ltd vs. SBI[14]

The application for the OTS by the applicant was rejected at the very first instance without any detailed factual determination and no reasons were stated thereof. Due to this reason he filed the case against the Bank. Later after factual determination it was held that hotel Parag does not fall into the category of MSME. Due to the reckless behavior of the Banks toward the firm they incur unnecessary cost in filing the case. Had the Bank explained the reasons beforehand and conducted proper enquiry earlier only so much time and money would not have been wasted.

- MSG Arts Craft vs. SBI[15]

RBI had issues directives[16] according to which all scheduled banks had to come up with OTS policy. The SBI violating such guidelines had not come up with any OTS policy even after 4 years of the directive. It was held that all schedule banks must compulsorily

[13] (2011)164PLR92, 2012(5)RCR(Civil)333
[14] MANU/KA/3212/2015
[15] MANU/TN/1216/2010
[16] RPCD.PLNFS. BC.No.31/ 06.02.31/ 2005-06

comply with the guideline and if they do not have their own OTS policy then the must accept OTS under the scheme provided by RBI.

CONCLUSION AND RECOMMENDATIONS

There is adequate number of obligations put upon Banks which they have to comply with while extending credit to SME'S. Firstly, Banks are bound by RBI directives on lending to MSME, then there are a number of commitments adopted through Code of Banks commitment on lending to MSME and finally Banks also have to comply with the fair practice code. Thus looking at the number of obligations on the Bank it can be said that In India the interest of SME'S as borrowers is fairly protected. However it must also be noted that apart from RBI directives none of the obligation has statutory force. Bank's code of commitment is a voluntary code and Fair practice code issued by RBI also stipulates guidelines which lack statutory force. Thus even though there are a number of obligations on Bank, very few of them have a force of statute.

This leads to another problem relating to implementation of the obligations. After analyzing the number of cases the author is of the view that the directives of RBI as well as other codes dealing with liability of Banks as lenders are not properly implemented. In June 1998 Kapur committee formed for assessing credit to SSI recommended to simplify Loan application. On this basis directives were passed by RBI and also simplification of the application form was provided for in Bank's code of commitment but this served as mere lip service. Research show that still before lending loans to MSME the whole procedure is very complicated.

Data also show that even SME's do not prefer lending from formal banking sector[17]. Reason being that the whole procedure is very

[17] Issues in SME Financing, Dr.Ram Jas Yadav,chief Manager, Bank of Baroda, http://www.iibf.org.in/documents/reseach-report/Report-30.pdf (Last Visited 03-09-2016)

complicated and also there are a lot of formalities. The banks also take lot of time to sanction the Loan.

A lot of provisions have been provided for to financially help the MSME sector such as credit guarantee fund scheme, collateral free loans etc however as per the committee reports still the sector continues to suffer from financial distress.[18] The data itself is evident that there is some lacunae in the implementation.

Lastly one time settlement scheme is a failure in a huge number of cases. The cases analyzed in the research paper clearly show that the banks straightforward reject the applications for OTS without even providing for any reasons.

Thus according to the research firstly there must be statutory obligations and not merely voluntary commitments, posing liability on lenders while extending credit to SME'S ,secondly, such a mechanism should be developed to ensure proper implementations of such obligations.

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