

Unit-1

Law and social change

1.1 Introduction

1.2 Topic Explanation

1.2.1 Law as an instrument of social change

1.2.2 Law as the product of traditions and culture. Criticism and evaluation in the light of colonization and the introduction of common law system and institutions in India and its impact on further development of law and legal institutions in India.

1.3 Questions for self learning

1.4 Let us sum up

1.5 Glossary

1.6 References

1.0 Objectives :

After studying this chapter we will be able to.....

1. Understand the importance of Law as an instrument of social change.
2. We will come to know that Law as the product of traditions and culture.
3. We will study about the introduction of common law system and institutions in India and its impact on further development of law and legal institutions in India.

1.1 Introductions

For decades now law and society theorists have been preoccupied with attempts to explain the relationship between legal and social change in the context of development of legal institutions.

They viewed the law both as an independent and dependent and variable (cause and effect) in society and emphasized the interdependence of the law with other social systems. In its most concrete sense, social change means large numbers of people are engaging in group activities and relationship that are different from those in which they or their parents engaged in previously. Thus, social change means modifications in the way people work. Rear a family, educate their children, govern them, and seek ultimate meaning in life. In addition to law and social change there are many other mechanisms of change, such as technology, ideology, competition, conflict, political and economic factors, and structural strains.

1.2 Topic Explanation

1.2.1. Law as an instrument of social change.

Law is the reflection of the will and wish of the society. It is said that if you want to study any society, you have to study the laws enacted by that society and you come to know whether the society is developed or wild world. The law, though it is the product of the society is responsible for the social transformations. In fact, there are two modes of this aspect. First is, “Law changing the society”, which means that the law of the land compels the society to be changed according to it. And secondly is. “Society changes the law”, as per its needs. It means law is made by the society according to its requirement by its democratic institution i.e. Legislative or by adopting custom and usage. When law changes the society it is the sign of beginning of the development of the society. When society changes law it is the sign of maturity of the society. We can cite the enthusiasm of the people in the matter of ‘*Nirbhaya*’ where the commonest of the common was talking on how the law must be, what must be the punishment etc. here this compelled the government to consider the sentiments of the society and set up a commission to give suggestions and untimely the criminal law amendment bill came into existence. The change required in the society can be initiated by a single person also and this has been proved in India right from Raja Ram Mohan Roy; to Mahatma Phule, Mahatma Baseswar, and Mahatma Gandhi up to Anna Hazare! Thus the demand takes root and shakes up the government to either reform the existing laws or make new or even delete the existing unworthy laws.

For this we will have to cite examples for the history of India. When mahatma Phule’s wife Savitribai Phule actually started teaching in a school aimed only for girls it was considered taboo, something not good and would be affecting the society but this movement gradually became the source of law where the girls could actually study and develop. Gradually the then society thought reluctantly adopted this fact and started to send girls to school this is positive sign of beginning of the development of the society. Ultimately the girls got into colleges also. This was not only limited to the Hindu society, finally the Aligarh Muslim college also had some seats for female students studying. But no doubt the lamp was lighted by the phule couple. This is the ‘Society changes the law’, But per its need, rather demands. Whereas the law play important role in changing the society too!

➤ **Definitions of law:** - The laws are variously defined by the scholars.

According to Sumner “Laws are actually codified mores”.

Kant defined it as “a formula which expresses the necessity of an action”.

Krabble defines Law as “the expression of one of the many judgments of value which we human beings make by virtue of our disposition and nature”.

Green Arnold defined “Law is more or less systematic body of generalize rules. Balanced between the fiction of performance and the of change, governing specifically defined relationship and situations and employing force or the threat of force in defined and limited ways”.

According to Duguit, laws are “the rules of conduct normal men know they must observe in order to preserve and promote the benefits derived from life in society.”

According to MacIver and Page “Law is the body of rules which are recognized. Interpreted and applied to particular situations by the Courts of the State.”

B.N. Cardozo says “Law is a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the Courts of its authority is challenged”.

Max Weber feels that “Law is an order, the validity of which is guarantee by the probability that deviation will be met by physical or psychic sanction by a staff specially empowered to carry out this Sanction”.

Hertzler comments, “Law in effect structures the power (Super-ordinate Subordinate) relationship in society; it maintains the status quo and protests the various strata against each other, both in Governmental and non-governmental organizations and relationship”.

According to Roscoe Pound, “Law is an authoritative canon of value laid down by the force of politically organized society”. 12 Anthony Giddens says “Laws are norms define and enforced by Governments.”

Austin defined Law as “the Command given by a superior to an inferior”.

Some define “Law as the Command of Sovereign of the dictates of the State.” Sociological view believes that “Law as the rules of right conduct.”

Laws are the general conditions of human activity prescribed by the State for its members.

Roscoe Pound stated, “Laws must be stable and yet cannot be stand still.”

As defined by Lundberg and others “Social Change refers to any modification in established patterns of inter-human relationship and standards of conduct.” 17 The definition is very apt and properly encompasses all ingredients of the social change. The established pattern of

Inter-human relationship between Caste Hindus and Scheduled Castes was that of touch-me-not-ism as the same was thought to be polluting them i.e. the Caste Hindus. The social change in the above dogmatic stratification really called for modification in the changing and already changed social scenario following independence in 1947 and following coming in force the constitution of India. The standards of conduct of Caste Hindus were required to change in time with Constitutional Provisions. Thus modification in established patterns of inter-human relationship and standards of conduct was brought through legal means mainly the Constitution of India. The equal laws like I.P.C. (Indian Penal Code) / Cri.P.C. (Code of Criminal Procedure) / Evidence Act etc. and finally and especially through the Untouchability (Offences) Act, 1955 and the Protection of Civil Rights Act, 1955 (Amended with new name in 1976) and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989

At the beginning of industrialization and urbanization in Europe, Bentham expected legal reforms to respond quickly to new social needs and to restructure society. He freely gave advice to the leaders of the French revolution, because he believed that countries at a similar stage of economic development needed similar remedies for their common problems. However, Savigny believed that only fully developed popular customs could form the basis of legal change.

As customs grow out of the habits and beliefs of specific people, rather than expressing those of an abstract humanity, legal changes are codifications of customs, and they can only be national and never universal.

There are two contrasting views on this relationship:

1. Law is determined by the sense of justice and the moral sentiments of the population, and legislation can only achieve results by staying relatively close to the prevailing social norms.
2. Law and especially legislation, Is a vehicle through which a programmed social evolution can be brought about. In general, a highly urbanized and industrialized society like the US law does play a large part in social change, and vice versa, at least much more than is the case in traditional societies or in traditional sociological thinking. [e.g. In the domain of interfamily relations, urbanization, with its small apartments and crowded conditions, has lessened the desirability of three-generation families in a single household. This social change helped to establish social security laws that in turn helped generate changes in the labor force and in social institutions for the aged.

➤ **The Binding force of Law**

Law is binding because most people in society consider it to be. Some consider the content of the law to command obedience, which, in turn, is seen as a compelling obligation. The law achieves its claim to obedience, and at least part of its morally obligatory force, from a recognition that it receives from those, or from most of those, to whom it is supposed to apply. Even when laws are against accepted morality, they are often obeyed. The extermination of more than six million Jews in Nazi Germany, clearly the most extreme instance of abhorrent immoral acts, was carried out by thousands of people in the name of obedience to the law. Milgram contends that the essence of obedience is that individuals come to see themselves as instruments for carrying out someone else's wishes, and they therefore no longer view themselves as responsible for their actions. Under certain conditions many people will violate their own moral norms and inflict pain on other human beings, and that succinctly underlines the notion that most people willingly submit to authority and, by extension, the law

➤ **Sanctions**

Sanctions for disobedience to the law are surely among the primary reasons that laws have binding force. "The law has teeth; that can bite if need be, although they need not necessarily be bared." Sanctions are related to legal efficacy and are provided to guarantee the observance and execution of legal mandates to enforce behavior.

1.2.2. Law as the Product of traditions and culture.

Some believe that in the olden days men lived in a perfect state of happiness and such a time was golden time for man. Indian people admire "Satyug" like anything and always found lamenting that society has deteriorated in "Kaliyug" a time not so desirable and full of all sorts of deceit, conceit, cheating and fraud. According to Indian mythology man has passed through four ages (1) Sat Yug (2) TretaYug (3) DwaparYug and (4) Kali Yug. The Sat Yug was the best age in which man was honest, truthful and perfectly happy. Thereafter degeneration and deterioration began to take place. The modern age of Kali Yug is the worst period where in man is said to be deceitful, treacherous, false, dishonest, selfish and consequently unhappy. This concept is found in Hindu mythology, according to which Sat Yug will again start after the period of Kali Yug is over. But looking to various wars fought between different Kings and Emperors in those times, we come across many examples wherein deceit, treachery, falsehood,

dishonesty, selfishness and all vices even from today's point of view were order of the day and even there were no regulatory mechanism to check the same. There was no room for rights of women, Rights of Dalits and noble principles of Liberty, Equality and Fraternity which are noblest cornerstones of to-day's polity. It all depends on how we view the primitive, the past and the present time.

1.2.3. Criticism and evaluation of Law in the light of colonization

Social changes can be brought about by various methods. The social change can be brought by preaching of religions, by launching social reform movements like one done by Raja Ram Mohan Roy, Swami Dayanand Saraswati, Justice Ranade, Shahu Maharaj, Jotiba Phule, Gandhiji, and Dr. B.R. Ambedkar and other such prominent social thinkers. But such efforts have no legal obligations or force of law remedial measures in cases where individuals do not agree to a prescribed social behavior and conduct. Such optional, sweet will obedience was found not bearing desired fruits in right direction and therefore need arose to formulate laws purely to bring about social change prescribing and providing necessary penal mechanism in case of not confirming to change and violating provisions of such law which aimed at social change from extant social process as procedures and practices. A cursory quick look back on history of Dalits/ Scheduled Castes/Harijans/Depressed Class/Shudras/Anti-Shudras/Antyajas as they were variously called or addressed contemptuously by fellow Indians will give an interesting scenario of social change that took place during the passage of time and would be of immense importance from this study's view point.

Every Seventh person in India is a Scheduled Caste. The Scheduled Caste have been oppressed right from post Vedic period. And hence positive discrimination, protective discrimination, affirmative action

(American Concept) and occupational mobility in their favor for their upliftment are warranted. In spite of reform movements in ancient and medieval times, they continued to remain the most backward and deprived groups in Society. Society was comparatively flexible during the Rigvedic period, however, with the passage of time, the Varna system and Caste.

Cobweb of outmoded traditions, meaningless rituals, harmful customs had made the life of Hindus a complex and miserable existence.

The Brahmin controlled every aspects of daily life of a Hindu from birth till death. If he wanted to travel he must consult the priest for auspicious days.

If he decided to marry or start a business or enter his own house, he could not do so unless the Brahmin approved of the time and date.

Dr. Ambedkar always raised voice for the upliftment of the untouchable in our society. He felt that in the matter of pollution, there is nothing to distinguish the Hindus from the Primitive or ancient People.

He studied Hindu scriptures and objected to wherever he found degrading remarks against the untouchables and the Shudras. He was very strong critic of Manusmriti which prescribed various indignities for the Shudras almost in all matters of human life. Manu had made a provision for getting rid of defilement by transmission through a scapegoat namely by touching the cow or looking at the sun after sipping water. The curse of untochability has its roots too strong to be easily uprooted. The non-Hindu society only isolated the affected individuals. They did not segregate them in separate quarters. The Hindu society insists on segregation of Untouchables. The Hindus will not live in the quarters of the untouchables and will not allow the Untouchables to live inside Hindu quarters.

This is a fundamental feature of Untouchability as it is practiced by the Hindus. It is not a case of social segregation, a mere stoppage of social intercourse for a temporary period. It is a case of territorial segregation and of a cordon sanitarium putting the impure people. The first shot to herald the freedom of the Untouchables was fired by Dr. Ambedkar in 1927 at Mahad, in Kolaba district of Maharashtra.

The Kolaba district is now renamed as 'Raigad' to honour the memory of Chharapati Shivaji, in 1923. The Bombay legislative Assembly had passed a resolution moved by S.K.Bole, a prominent social reformer in those days. That the untouchables be allowed to use all public watering places, Wells, Schools, dispensaries etc. In pursuance of this resolution. The progressive Municipality of Mahad resolved in 1924 that the local Chowdar Tank be thrown open to the untouchables. However, the caste Hindus did not allow them to take water from the tank. This promoted Dr. Ambedkar, the liberator and the emancipator of the downtrodden, to launch an agitation to exercise the right of free access to the Chowdar Tank. In response to his call, more than ten thousands men and women assembled at Mahad on 19 March, 1927. Next day the delegates began their March from the venue of Conference to the Chowdar Tank to assert their right of drinking water from the Municipal Tank. Ambedkar was at the head of the procession. Ten thousand volunteers followed their leader in a file of fours wading through the streets of Mahad in a disciplined and peaceful manner, the procession

reached the Chowdar Tank. Dr. Ambedkar, the most gifted and qualified untouchable ever born in India, asserted the right of the suffering humanity by drinking water from the forbidden Tank. Most of the Volunteers also followed suit and vindicated their right. This was truly an historic event. Never before the so the called untouchables had demonstrated their determination to assert their right in such a glorious manner. The participants of the procession returned to their venue of Conference peacefully. Meanwhile a rumor spread that Ambedkar and his men were planning to enter into the Veerashwar temple.

The fanatic caste Hindus attacked unarmed men. Women and children and mercilessly beaten them up. The commando attack on the ‘Pandal’ was followed by attacks on splinter groups of the delegates returning to their villages, in spite of all this beating and humiliation. Ambedkar advised his followers to be calm and not to retaliate. Thus first part of the epic struggle of the victims of untochbaility was over. Soon after news came that the orthodox Hindus had performed a tank purification ceremony which they thought had been polluted by Ambedkar and his people. In the meanwhile the Mahad Municipality revoked on 4 August, 1927 its resolution in accordance with which the Chowdar Tank was thrown open to the unotouchables. Hence the untouchables decided to besiege Mahad again. Accordingly Thousands of Satyagrahis reached Mahad on 2nd December, 1927. This time more than fifteen thousand untouchables turned up for the Mahad agitation

1.2.4. The Introduction of common law system and institutions in India and its impact on further development of law and legal institutions in India.

The law is often used as an instrument of social reform. The Untouchability (Offences) Act, the Hindu Code Bill. The sarda Act, the Prohibition Act are examples in this context. VidyaBushman and D.R. Sachdeva observed 15 that “Thus Law does not always lay behind the times. One great merit of law is that it adapts itself to the changing needs of society and maintains stability when the rapid alterations disturb the relations in society. Law helps the society assimilate the changes by adjusting group advantages and injuries resulting from them. Finally the law may become an advanced instrument of social change on a national as well as international level by affecting the social frame work in which relations take place. However, law is greatly in advance of or greatly behind the

trends of change in the society. It remains unenforceable, if it is in harmony with the processes of change. It accelerates and institutionalizes changes.”

The various “pressure groups” exercise considerable influence on law-making organs. Practically all legislations are passed to satisfy the demands of certain groups presented to the legislature directly or indirectly, which demands will be recognized in Law depends to a large degree upon the power of the groups which make the demands. Political parties themselves are a combination of pressure groups. The legal groups today are the product of the pressures of the most powerful groups in the society. By powerful groups is meant effective power in terms of the number of votes at the disposal of the group, the amount of money it can command, the effectiveness of the organization, the skill of its lobbyists, and the support it is able to secure from public opinion. Despite the directive from the Supreme Court, the Rao Government did not think it politically wise to enact a uniform Civil Code.

1.3 Questions for Self learning

1. What is social transformation?
2. How does Law play role in transformation of the society?
3. Do you agree that Law is the product of traditions and culture?
4. Critically evaluate the introductions of common Law system during colonization?

1.4 Let us sum up

“Change is the law of nature what is to-day shall be different from what it would be tomorrow. The social structure is subject to incessant change... Society is an ever changing phenomenon, growing, decaying, renewing and accommodating itself to changing conditions and suffering vast modifications in the course of time. The word “Change” denotes a difference in anything observed over some period of time.

1.5. Glossary

Social Reformation:-The change in society, i.e. taking the society away from traditional. Orthodox views towards modern reality which is reasonable and acceptable and adopted by people large.

1.6. References

Malik and Rawat, Law and Social transformation

Unit -2 Religion and The Law

- 2.0 Objectives**
 - 2.1 Introduction**
 - 2.2 Topic Explanation**
 - 2.2.1. Religion as a divisive factor**
 - 2.2.2. Secularism as a solution to the problem.**
 - 2.2.3. Reform of the law on secular lines: Problems.**
 - 2.2.4. Freedom of religion and non-discrimination on the basis of**
 - 2.2.5. Religious minorities and the law.**
 - 2.3 Question for self learning**
 - 2.4 Let us sum up**
 - 2.5 Glossary**
 - 2.6 References**
-

2.0 Objective:

After studying this chapter we will be able to understand the role of...

1. Religion as a divisive factor.
2. How Secularism is a solution to the problem of conflicts between Religions.
3. Different kinds of reform of the law were introduced on secularism.
4. Why Freedom of religion and non-discrimination on the basis of religion is important
5. How and why law gives protection to Religion minorities.

2.1 Introduction:

Religion is a social phenomenon, distinctive and each has its own centre of population. The character and right of religious observance depends upon the membership of particular social group. Religious issues often become spots of social anxiety because of competing religious sentiments. Transformations within the religion occur in the course of social development due to reformative movements, emergence of alternative faiths, rise of new leadership, impact of other cultures and efforts of modernisation.

A principled distancing from religions and an approach of impartiality in treatment provide a safe walk, soberness and legitimacy

for state action. Being a component of the policy of multiculturalism, this approach sets ways and limits to law's regulative task, and inculcates an attitude and mindset for co-existence amidst different religious communities.

2.2.1 Religion as a divisive factor:

Basically religion is for spiritual guidance of the people and hence can be a major resource for peace and social justice. It can become, as liberation theology indicates, a powerful option for the weaker sections of society. Instead religion has more often been used by powerful vested interests of which religious functionaries become apart. Worse, religious functionaries and priests themselves create powerful establishments and join hands with politicians to protect their establishments.

➤ **Religious Fanaticism (Religious fanatics)**

Secularism in India is based on the rich heritage and culture steeped in its various religions. The secular fabric of the country is very well reflected in the phrase '*Vasudhaiv Kutumbakam*' which means that the whole world is one family. India has always been an inclusive society, which has welcomed people of all religions and faiths with open arms, never discriminating among religions and never considering any religion or faith to be a threat. But this secular fabric has not meant that there is no communalism in India.

In spite of a number of laws treating people of all religions *at par*, India has had a long history of communal riots, the worst of them being at the time of partition of the country when blood flowed as rivers. In a land where tolerance is byword for life, when did this hatred for fellow beings arise? The answer to this question lies in the British rule of the country, particularly post-1857. Prior to 1857, the British rulers restrained themselves from interfering in the social structure of the country. Post-1857, they realized the importance of dividing the people of the country in order to weaken them. This gave rise to the 'divide and rule' policy, which they used, on religious lines thus distancing Hindus and Muslims.

The persistence of this policy of the British is reflected in the painful partition of the country and the displacement of a large number of people from their hearths and homes. This has continued even after the independence of the country in spite of the government being neutral as far as religion is concerned and the constitution ensuring that there is no discrimination on the basis of religion as far as employment, education etc. are concerned. This is

apparently on account of minimal social interaction between various religious communities leading to a distorted view of other communities and its practitioners. Such a social interaction is especially important to heal the scars and pain of the partition. The delicate secular fabric could not withstand the body blow of the partition. This situation was sought to be remedied through the provisions of the constitution. The pain of the partition revisited the country in the form of communal violence riots from time to time, as if not to let people forget their wounds. The action or inaction of the political leaders and the administrative system at times also added to the communal frenzy. Some major events which changed the way world viewed India were based on communal frenzy viz. *Babri Masjid* demolition, the Gujarat riots, Delhi (Sikh) riots.

Babri Masjid located at *Ayodhya* in Uttar Pradesh was demolished on December 6, 1992 by *kar sevaks* under the guidance of some of our leaders who are facing trial in the case. The demolition of the *Babri Masjid* made the fabled respect for all religions that Indians have a thing of the past. The fact, that a religious shrine of any religion could be demolished, raises questions about the secularity of the people of the country as also the conviction of the state towards secularism.

The Gujarat violence in 2002 is a matter of great shame for the country. The fact, that people were massacred only on account of their belonging to a particular religion, is unacceptable in any secular nation. The fact, that the administration reacted late, also raises questions regarding the State's belief in secularism. A similar incident, which happened about two decades prior to the Gujarat violence, was the riots of Delhi in 1984. Sikhs were brutally slaughtered on the streets of Delhi just because the person who assassinated the then Prime Minister of India, Smt. Indira Gandhi happened to be a Sikh. It is ironic that this killing happened to exact revenge for the death of the person who was instrumental in incorporating the word 'secular' in the Indian constitution.

Needless to say it is totally unfair comparison. In fact one cannot take values of one religion and compare it with history of other. Values must be compared with values and history must be compared with history. While values are divine, humanitarian and common to all religions, history is full of violence perpetrated by various vested interests, power struggle within or two or more faith communities and often represents worst side of human behaviour. It should not be blamed on religion.

Thus what happens in history should not be taken as representative of religious values or religious norms, much less its cause. These massacres and killings represent nothing but lust for power and wealth by some followers of that religion. It has nothing to do with the teachings of that religion. Every religion gives us certain norms and values to improve our conduct and to make us good or even perfect human beings. It is true religion is misused by all sorts of interests and more often than not. It is sought to be misused as it strongly appeals to our emotions and can easily create feeling of ‘we’ versus ‘they’ but nevertheless it is misused and for misuse we cannot blame religion.

As Asghar Ali Engineer rightly puts it, “*Let us be very clear on one thing that no religion would be acceptable to people just because it allows killing or conversion. A religion is acceptable only if improves morality, controls basic instincts and brings about spiritual and moral change for better. It is extremely knave to believe that a religion would spread by sword*”.

➤ **Religion and Terrorism**

The supreme law of the land, rightly described India as a secular country in which the State has no religion, nor does it seek to promote or discourage any religion or religious belief. It guarantees a complete religious freedom, with the absence of any compulsion whatsoever in religious matters. Thus, it is obvious that the Government and people of India are secular, that is, there is no official religion. The State is committed to a policy of non-interference in religious matters.

Religion is a matter of personal beliefs and convictions. But how far are “we the people of India” secular in thought, word and deed? Upon a close observation of the working of our political parties, we shall find that candidates for elections are often chosen on communal considerations—Hindu candidates for constituencies having maximum Hindu electorate, Muslim candidates for areas where the large number of the voters are Muslims. Also we find that the voting in elections is often on communal lines; Hindus voting for Hindu candidates, Muslims for Muslim candidates and Sikhs for Sikh. Although the political parties are not formed on a religious basis, we often find that there are some distinctly communal parties in this ‘secular country’. The emerging concepts like “vote banks,” augments ‘caste’ factor and plays a decisive role in leading the followers to exercise their franchise for a particular candidate in name of religion. Religion should have no connection whatever with politics. But is it really so in India today?

Instead of creating amicability amongst the public of all the religion the fundamentalist and politicians are hand in glove. The social fabric gets destroyed by religious controversies. Once the religious fanatics or fundamentalist come face to face they destroy the balance created by these aspects. Overt act of fanatic is to cause injury to other in such a way that the enjoyment of human rights of the individual as well as the society at large is impaired. Thus leads to terrorism.

Terrorism is a global phenomenon. No doubt it has direct impact on human being, with shattering loss of right to life, liberty and physical integrity of victims. In addition to this individual loss, terrorism has destabilized Governments, weaken civil society, jeopardize peace and security, and threaten social and economic development.

The common understanding of the world ‘terrorism’ is: any organized program of individual, social groups or political groups of using force to create fear or panic. It is belief in resorting to violence for the purpose of bringing pressure on the government and non-governmental bodies and individual to agree to the view point of the perpetrators and compel all to concede to their demands.

The United Nations General Assembly in the open sessions of their 53rd meeting explained terrorism in the following words “In its wider sense, terrorism is the tactic of using an act or threat of violence against individuals or groups to change the outcome of some process of politics”

The basic question is why at all terrorism has grown so fast and steadily? Why is it a threat to the civil society? Who is responsible for the growth of terrorism is it the religious fanatics or fundamentalist or politicians or business class?

2.2.2 Secularism as a solution to the problem

Secularism is one of the important national goals. Though secularism has been an official Government policy, bulk of people in India still remain non secular. Communalism and Terrorism are big threat to secularism.

Secularism as a means of liberation from prejudices and communal frenzies has inherent competence to enhance the worth of human rights and welfare. Search for viable parameters for the appropriate triangular relations

among state, religion, and individual become an imperative in shaping the legal policies in the task of social transformation. Hence it was felt that India be declared as secular State.

The English word “secular is derived from the Latin word SAECULUM”. Earlier in Monarchical countries secularists were described as republicans. The French Revolution of 1789 popularized the idea of secularism. The French constitution of 1791 introduced the idea of secular state. Great Indians like, the mughal king Akbar, social and religious reformers like Raja Ram Mohan Roy and Swami Vivekananda respected the people of all religions. Particularly Indian king Maharaja Ranjith Singh officially announced secularism as the policy of his Government. He was successful in this regard. Ranjith Singh is considered as a forerunner in implementing the idea of Secularism through Government means. In the year 1888 the Indian National Congress opened a debate on secularism and proposed secular nationalism for India. The idea of secularism began in Indian politics in 1920 when Mahathma Gandhi organised Khilafat movement in support of the Sultan of Turkey.

It is necessary to have an idea of the nature and meaning of the term ‘secularism’. It is interesting to note that there is no agreed and precise meaning of ‘secularism’ in our country. As Jawaharlal Nehru wrote in his autobiography... *“no word perhaps in any language is more likely to be interpreted in different ways by the people as the word ‘religion’. That being the case, ‘secularism’ which is a concept evolved in relation to religion can also not have the same connotation for all”*.

There are two possible models of secularism. In the first one, there is a complete separation of religion and state to the extent that there is an ‘impassable wall’ between religion and secular spheres. In such a model, there is no state intervention of religious matters and vice versa. In the other model, all religions are to be treated equally by the state; in other words, the state is equi-distant from all religions. This model is also referred to as ‘non-discriminatory’ and is particularly relevant for multi-religious societies. In contrast to the former model, the latter allows for state intervention on grounds of public order and social justice.

The Sanskrit phrase ‘*Sarva Dharma Sambhava*’ is the most appropriate Indian vision of secular state and society. But it should not be forgotten that the word ‘Secular’ has not been defined or explained under the constitution either in 1950 or in 1976 when it was made part of the preamble.

Secularism as a modern political and constitutional principle involves two basic propositions. The first is that people belonging to different faiths and sects are equal before the law, the constitution and the government policy. The second requirement is that there can be no mixing up of religion and politics. It follows that there can be no discrimination against any one on the basis of religion or faith nor is there room for the hegemony of one religion or religion of majority sentiments and aspirations. It is in this double sense – *no discrimination against any one on grounds of faith and separation of religion from politics* – that our constitution safeguards secularism.

2.2.3 Reform the law on secular lines: Problems

The constituent assembly which was constituted to frame a constitution for India declared eight guiding principles of Indian constitution. Among these eight basic and guiding principles of the constitution–Secularism is placed in fifth position. To that extent the constitutional pandits gave importance for secularism. The idea of secularism is essential to maintain unity in diversity. Secularism is a basic ideology for the effective functioning of a healthy Democracy. When the Indian constitution was adopted in January 1950, it has got sufficient provisions to promote secularism. The Constitution of India firmly believes in the principle of secularism.

The founding fathers of the Indian Constitution never hesitated to build India on secular foundations. They opposed and defeated the amendment of Mr. H. V. Kamath to invoke the name of god in the preamble of the Constitution. Pandit Kunjru said that we invoke the name of God, but I am bold to say that while we do so, we are showing a narrow, sectarian spirit, which is contrary to the spirit of the Constitution. The Indian Flag consists of Ashoka Chakra in its center. The wheel has many spokes but, all are of equal length. It indirectly refers to the Indian stand on the principle of equal treatment of all religions. (*Sarva Dharma Sambava*).

Although, the word ‘Secular’ was not there initially in the constitution, a mere perusal of the various articles of it would amply demonstrate that ‘Secularism’ is an integral part of the Indian constitution. At this juncture, it would not be inappropriate to have a glance at the relevant constitutional provisions pertaining to secularism. Article 14 of the constitution provides for equality before law for all people. Article 15, *inter alia*, lays down that the state shall not discriminate any citizen on the ground of religion. Article 16 provides for equality of opportunity in matters of employment under the state,

irrespective of religion. Article 25 provides for freedom of conscience and the right to profess practice and propagate the religion of one's choice.

The constitution not only guarantees a person's freedom of religion and conscience, but also ensures freedom for one who has no religion, and it scrupulously restrains the state from making any discrimination on grounds of religion. Article 26 provides freedom to manage religious affairs and Article 27 prohibits compulsion to pay taxes to benefit any religious denomination. The impact of Secularism can also be seen in Article 28, which states that no religious instruction shall be provided in any educational institution wholly maintained out of state funds. The analysis of the above said constitutional provisions makes it amply clear that Indian secularism is unique and it treats all religions alike. In our country, judiciary is the guardian of the constitution and it has been held by the Supreme Court that secularism is a basic structure of the constitution and it cannot be altered by a constitutional amendment.

Before looking into the Articles in the Constitution that are supposed to interpret the idea of secularism, it will be worthwhile to look into one important judgment given by the Supreme Court of India viz. *Kesavananda Bharati vs. Kerala* case which was decided by a full Constitutional bench of judges on April 24, 1973. By a water-thin majority of 7-6, the Supreme Court held that the power to amend the Constitution under Article 368 couldn't be exercised in such a manner as to destroy or emasculate the fundamental features of the Constitution. In identifying the features, which are fundamental and thus non-amendable in the constitution was this statement – *A secular State, that is, a State in which there is no State religion* (5(vii)). This was (probably) the first time that the concept of secularism was interpreted by the Supreme Court. Here we get the first authorized interpretation of the word “secular” as mentioned in our Constitution. So our basic idea of being a secular state is that we do not have a ‘*State religion*’.

“...THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVERIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC and to secure to all its citizens...”. So we have decided that we will create India as a secular state. The only other place where the word secular appears in our Constitution is in Article 25 (2) (a) while discussing the “Right to freedom of religion”.

What is problematic in this context is the absence of a proper definition of secularism. How can we interpret the term secularism? Do we interpret it as the complete detachment of state from religious activities or do we accept the

original definition of Holyoake? What is the stand of the government regarding this? To find answers to these questions, we have to look at the related discussions in the Constituent Assembly. An important amendment (Amendment 566) was moved in the meeting dated December 03, 1948 by Prof. K.T. Shah. “The State in India being secular shall have no concern with any religion, creed or profession of faith; and shall observe an attitude of absolute neutrality in all matters relating to the religion of any class of its citizens or other persons in the Union.” It is now clear that this idea of making India a secular state was not there in the original draft. It was only on December 18, 1976 the word “SECULAR” was added in the preamble of our Constitution. The 42nd amendment Act reads – “In the Preamble to the Constitution, - (a) for the words “SOVEREIGN DEMOCRATIC REPUBLIC” the words “SOVERIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC” shall be substituted”. So the word secular entered our Constitution only almost 25 years after it had come into effect.

2.2.4 Freedom of religion and non-discrimination on the basis of religion

➤ Freedom of religion under Article 25

Article 25 of the Constitution of India guarantees to every citizen the right to profess, practice and propagate religion. Article 25 reads as follows:

➤ Freedom of conscience and free profession, practice and propagation of religion.—

(1) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I: The wearing and carrying of Kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II: In sub-clause (b) of the clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina

or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly."

Accordingly Article 25 protects two freedoms:

- (a) freedom of conscience,
- (b) freedom to profess, practice and propagate religion.

The freedom of conscience is absolute inner freedom of the citizen to mould his own relation with God in whatever manner he likes. When this freedom becomes articulate and expressed in outward form it is to profess and practice religion. To profess religion means to declare freely and openly one's faith and belief. To practice religion is to perform the prescribed religious duties, rites and rules. To propagate means to spread and practice his view for enlightening others. The right to propagate one's religion is not a right to convert other to one's own religion.

Article therefore postulates that there is no fundamental right to convert another person to one's own religion, 'because if a person purposefully undertakes the conversion of another person to his religion as distinguished from his effort to transmit or spread the tenets of his religion that would impugn on the freedom of conscience guaranteed to all citizens of the country alike'; as decided in *Rev. Stainialaus v. St. of Madhya Pradesh* (AIR 1977 SC 908)

The Supreme Court in *Punjab Rao v. D. P. Meshram*, (AIR 1966 SC 1179) expresses that, the right is not only to entertain such religious belief as may be approved by his judgment or conscience but also to exhibit his sentiments in overt acts as are enjoyed by religion. In the words of the Article, he may "profess a religion means the right to declare freely and openly one's faith." And in *Ratilal Panachand Gandhi v. State of Bombay*, (AIR 1954 SC 388) declares that he may freely practice his religion; "Religious practices or performance of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines".

Rituals and observances, ceremonies and modes of worship considered by a religion to be its integrals and essentials part are also secured. What is integral and essential part of a religion or religious practice has to be decided by the Courts with references to the doctrine of a particular religion include practice regarded by the community as part of its religion as put forth by the honourable Supreme Court in *Seshammal v. state of Tamil Nadu*, (1972) 2 SCC 11. Again in *Ratilal*, the SC states that, he may propagate freely his religious views for the edification of others. It is immaterial also whether a person makes the propagation in his individual capacity or on behalf of some church institution.

If one makes an attempt to look at the secular aura in our Constitution, the only point to reach is Article 25, which refers “Right to freedom of religion”. It reads thus– “Freedom of conscience and free profession, practice and propagation of religion – (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion”.

In *Bijoe Emmanuel v. State of Kerala* (AIR 1987 SC 748) also known as National Anthem case, the Supreme Court has upheld the religious belief of the Jehovahs witness, a Christian community not to praise anybody but for his or her own embodiment of God. In this case the children of Jehovahs witness were expelled from the school for refusing to sing the National Anthem. The Supreme Court held their religious practice was protected under Article 25. Chinnappa Reddy, J., observed “that the question is not whether a particular religious belief or practice appeals to our reason of sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Article 25 but subject, of course, to the limitations contained therein”.

The Indian constitution provides for the individual as well as collective freedom of religion. The basic guarantee of this right of individual freedom is in Art. 25 (1). This freedom extends to all persons including aliens underlined by Supreme Court in *Ratilal Panchand vs. State of Bombay*. The Indian Constitution makes freedom of conscience as well as right to freely profess, practice and propagate religion subject to state control in the interest of public order, morality and health.

But Supreme Court has made it clear that state can have no power over the conscience of individual – this right is absolute. The Indian Penal Code (sections 295-8) makes it a crime to injure or defile a place of worship or to disturb a religious assembly etc. even though these actions might be sanctioned by offender’s own religion. Practices like *devadasi*, *sati* may have religious sanctions but the state still has constitutional power to ban them. Art. 25(2) grants to the state broad, sweeping powers to interfere in religious matters. This reflects peculiar needs of the Indian society. The extensive modification of Hindu personal law has been by legislation based on this provision. Art. 25(2) thus authorizes the state to regulate any secular activity associated with religion, to legislate social reforms.

Article 25 gives freedom for all to practice any religion they want. This is a basic right guaranteed in the Constitution. Article 26 (Freedom to manage religious affairs), Article 27 (Freedom as to payment of taxes for promotion of any particular religion) and Article 28 (Freedom as to attendance at religious instruction or religious worship in certain educational institutions) can be considered as the interpretations of the principle of secularism in the constitution. Art. 26 deals with the freedom to manage religious affairs. Accordingly any religious denomination is given right to establish religious institutions, acquire properties (movable and immovable) and manage affairs regarding the religion. Art. 27 is also very important which reads – “Freedom as to payment of taxes for promotion of any particular religion. – No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.”

➤ **Restrictions on the freedom of religion**

a. Restrictions to the enjoyment of Right to Religion:

The right to religion guaranteed under Article 25 is not an absolute right, like other rights this right too can be restricted for the purpose of maintaining public order, morality and health.

In addition Article 25 further exceptions are engrafted by clause (2) of the Article. Sub-clause (a) of clause (2) saves the power of State to make laws regulating or restricting any economic, financial, political or secular activity which may be associated with religious practice and sub-clause (b) reserves the State's power to make laws for providing for social welfare and social reform even though they might interfere with religious practices.

In *S.P. Mittal v Union of India*, the Government enacted the Auroville (Emergency Provision) Act, to take away the management of Aurobindo Society property on the ground of mismanagement of affairs. The petitioners challenged the validity of the said Act on the ground that it violates Articles 25 and 26 of the Constitution. The Court held that teachings of Aurobindo did not constitute 'religion' and therefore taking of Aurobindo Ashram did not infringe the Society's right under Articles 25 and 26. It further held, even if it was assumed that the Society were a religious denomination, the Act did not infringe its rights under Articles 25 and 26. The Act has taken only the right of management of property of Auroville, in respect of secular matters, which can be regulated by law.

Also, in *Mohd. Hanif Quareshi v State of Bihar*, the petitioner claimed that the sacrifices of cows on the occasion of Bakr-Id was essential part of his religion and therefore the State law forbidding the slaughter of cows was violative of his right to practice religion. Court rejecting the argument held that sacrifice of cow on Bakr-Id day was not essential part of the Mohamedan religion and hence could be prohibited by State under Clause 2(a) of Article 25.

In a another case *State of West Bengal v Ashutosh Lahiri*, the Supreme Court held that slaughter of cows on Bakrid day is optional and not obligatory. It is not essential or required for religious purpose of Muslim. Article 25 deals with essential religious practices.

b. State Acting towards Social Welfare and Social Reforms:

Under clause (2)(b) of Article 25, the State is empowered to make laws for social welfare and social reforms. Under this the State can eradicate those evil practices, which are under the guise and name of the religion. Example, the devadasi system, the Sati system *etc.*

The State can throw open Hindu religious institutions of public character to all Hindus. Article 25(2)(b) enables the State to take steps to remove the untouchability from amongst Hindus. But this does not mean the right is absolute and be unlimited. The Supreme Court in *Shastri Yagnapurushdasji v Muldas Bhundardas Vaishya* makes it clear that the State cannot regulate the manner in which the worship of the deity is performed.

Whereas it justifies banning of polygamy amongs hindu in *State of Bombay v Narasu*. What the Courts have tried to do is to separate 'religious' activities and 'social and secular' activities, the former are protected under Article 25 the latter are not.

In *Ismail Farooqi v Union of India*, ((1994) 6 SCC 360) the Supreme Court has tried to differentiate between "essential parts" of religious practice. It has held that offer of prayer or worship is a religious practice; its offering at every location where such prayers can be offered would not be essential religious practice. What is protected under Articles 25 and 26 is a religious practice, which forms an essential part of religious practice. Thus, a place of worship may be acquired by the State in exercise of its supreme power. Thus places of worship be it temples, mosques or churches can be acquired.

➤ **Right to manage religious affairs**

Article 26 says that: Subject to public order, morality and health, every religious denomination of any section have the following rights:

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in the matters of religion;
- (c) to own and acquire moveable and immovable property;
- (d) to administer such property in accordance with law.

The right guaranteed by Article 26 is the right of an ‘organized body or entity’ like the *religious denomination* or any section thereof. The word ‘denomination’ can be understood as a collection of individuals, classed together under the same name; generally religious sect or body having a common faith and organization and designated by a distinctive value.

In *S.P. Mittal* the SC states that, the words ‘religious denomination’ in Article 26 must take colour from the word ‘religion’ and therefore as described in the case of *Acharya Jagdishwaranand Avadhuta v Commissioner of Police, Calcutta* it must also satisfy three conditions:

- (1) It must be collection of individual who have a system of beliefs, which they regard as conducive to their spiritual well being, that is common faith;
- (2) It must have a common organization; and
- (3) it must have distinctive name.

Thus in the large sense 'Hinduism' is a denomination and to some extent various philosophies governing the Hindu Society, such as *Advaitas, Dwaitas, Visishtadwaitas and Shaivites* can also be termed as denomination. On this base the SC held that "Anand Marg" is a religious denomination within the Hindu religion in *Shastri Yagnapurushdasji v Muldas Bhandardas Vaishya*.

Clause (a) of Article 26 talks about right to establish and maintain institutions for religious and charitable purpose — “*Every religious denomination has right to establish and maintain institutions for the religious and charitable purposes*”. The words “establish and maintain” in Article 26(a) must be read together and therefore it is only those institutions, which a religious denomination establishes, which it can claim to maintain it. Thus in *S.*

Azeez Basha v. Union of India, the Supreme Court held that the “Aligarh University was not established by the Muslim minority and therefore it could not claim the right to maintain it”. It was established under the Statute passed by the Parliament.

Clause (b) of Article 26 says about right to manage ‘matters of religion’-a religious denomination or organization is free to manage its own affairs in matters of religion. The State cannot interfere in the exercise of this right unless they run counter to public order, health or morality. Accordingly every religious denomination or organization enjoys complete freedom in the matter of dealing what rites and ceremonies are essential according to the tenet of the religion they hold.

The Court has the right to determine whether a particular rite or ceremony is regarded as essential by the tenet of the particular religion. The “matters of religion” means that secular activities connected with religious institution can be regulated by State. The places of worship like temples, mosques, Gurudwaras cannot be used for hiding criminals or carrying on anti-national activities. They cannot be used for political purpose. The State has power under Article 25(1) and clause (2) to prohibit their activities in the places of worship.

In *Athiest Society of India, Nalgonda District Branch v Government of Andhra Pradesh*, the petitioner, Atheist Society of India, prayed for issuing a writ of *mandamus* directing the State Government to prohibit breaking of coconuts for performing of Pooja, chanting of mantras or sutras of different religions in religious functions organised by the State. The Andhra Pradesh High Court rejected their prayer and held that these activities have been a part of the Indian tradition and are meant to invoke the blessings of almighty for the success of the project undertaken. Such noble thought cannot be found fault with as offensive to anyone. May be that the petitioner Society who claim to be atheist do not appreciate invocation of Gods as they do not believe in God.

There is no constitutional guarantee to the faith of the atheist who worships barren reason that there is no God. It is not the object of Constitution to turn the country into irreligious place. A secular State does not prohibit the practices of religion. If that is parented it will infringe the rights of millions of Indians, which are guaranteed to them under Article 25 and will run directly contrary to the secular objectives of preamble to the Constitution, which is one of the basic structures. It would deprive them of their right of thought, expression, belief, faith and would amount to abolition of Indian tradition and religious practices.

Clauses (c) and (d) of Article 26 says that right to administer property owned by denomination. It is to be noted that the rights under clauses (c) and (d) of Article 26 are confined to the existing rights to administer its property by a religious denomination cannot be destroyed or taken away completely. It can only be regulated by law with a view to improve the administration of property. Thus the law must leave the right of administration of property to the religious denomination itself subject to such restrictions and regulations as it might choose to impose. Thus in *Ratilal's* case, a law which took away the right of administration altogether from religious denomination and vested it in other secular authority was held to be violative of right guaranteed by Article 26(d).

However, if the right to administer property had never vested in the denomination or had been validly surrendered by it or had otherwise been lost, Article 26 will not create any such right in religious denomination.

2.2.5 Religious Minorities and law

❖ Right to religion

➤ The Universal Declaration of Human Rights:

The Universal Declaration of Human Rights, 1948 recognizes the right to religion in Art. 18 which say that “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief; and freedom, either alone or in community with others in public or private, to manifest his religion or belief in teaching, practice, worship and observance”. That makes it clear that an individual who is ‘born free’ also has freedom to manifest his religious beliefs as he is free to practice any religion, he is also free to change his religion. Either he automatically adopts the religion practiced by his parents after his birth or has freedom to choose his own. It is his absolute choice to profess his religion in private and if he wishes he may join any religious group.

➤ Civil and Political Convention 1966:

In the Civil and Political Covenant, 1966, the right to religion is discussed as follows: Article 18 ;

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardian to ensure the religious and moral education of their children in conformity with their own convictions.

➤ **Declaration on religious Discrimination, 1981:**

The Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief adopted by General Assembly of UN in 1982 states in Article 1,

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practices and teaching.
2. No one shall be subject to coercion, which would impair his freedom to have a religion or belief of his choice.
3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to public safety, order, health, or morals or the fundamental rights of freedoms of others.

➤ **Right not to be taxed to promote a religion:**

Individual freedom of religion is further strengthened by Article 27 prohibiting religious taxation.

Article 27: No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

To maintain the “secular” character, the Constitution guarantees freedom of religion to individuals and groups, but it is ‘against the general policy of the Constitution that any money being paid out of public funds for promoting or maintaining any particular religion’ as stated in Commissioner HRE v. L.T. Swamiar. Therefore Article 27 lays down that no person "shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination."

The Supreme Court in various decisions has tried to differentiate between tax and fee. Tax is in nature of compulsory exaction of money by public authority for public purposes the payments of which are imposed by law. Tax is imposed for public purposes to meet general expenses of State. Tax is collected and merged with the general revenue of the State. Tax is a common burden. Fees on the other hand is payments primarily in public interest lent for some special work done for the benefit of those from whom payments are demanded. Article 27 prohibits imposition of the tax and not fee.

Thus fee can be levied as decided in *Jagannath Ramanuj Das v State of Orissa*, the Government's imposition of fee on temples whose annual income exceeds Rs. 250 for meeting the expenses of Commissioner and Officers and Servants was held valid. As decided by SC in *Bira Kishore v State of Orissa*, the Grant of money by State for renovating water tanks belonging to Lord Jagannath was held to be valid under Article 27, for these tanks were used by the general public for bathing and drinking purposes. As a result in *K. Raghunath v State of Kerala*, after the communal riots some places of worship were destroyed, the Government agreed to meet the cost of restoring these places. It was also held valid.

➤ **Restriction on religious instruments in educational institution:**

Article 28. -

- (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.
- (2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.
- (3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Art. 28(3) which forbid compulsory religious instruction or worship in state aided institutions strengthen Art. 25 (1). According to Article 28(1) no religious instruction is to be provided in any educational institution, which is wholly maintained out of State funds. Under Article 28(2) this restriction would

not apply to educational institutions, which though administered by the State, has been established under an 'endowment' or 'trust' requiring that religious instruction should be imparted in such institutions.

According to Article 28(3) no person attending any educational institution recognized by the State or receiving aids out of State funds shall be required to take part in any religious instruction imparted in the institution, or to attend any religious worship conducted in the institution thereto, unless he consents to do voluntarily or, if a minor, his guardian gives consent for the same

➤ **Cultural and Educational Rights**

The constitution keeps the spirit of secularism by making a space to all the religious protecting the interest of minorities respecting their right to development. Art 29 and 30 guarantee certain cultural and educational rights to cultural, religious and linguistic minorities.

Article 29. -

- (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
- (2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30.-

- (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
- (1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.
- (2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

2.3 Question for self learning

I. Write true or false:

1. Secularism is an official policy of India. ()
2. During the ancient period politics was a dominant factor in the human society ()

3. Some countries have religion as the base for their Government. ()
4. Unity in diversity is a base for Indian cultural nationalism. ()

II. Choose the correct answer:

1. Secularism is followed in
a) India b) Turkey c) Pakistan
2. The forty second amendment in Indian constitution was made in the year
a) 1976 b) 1977 c) 1978
3. Indian constitution was adopted in the year
a) 1935 b) 1950 c) 1947

III. Write briefly:

1. How can we promote secularism?
2. Write short notes on 42nd amendment.
3. Write short note on Religious Fanaticism

IV. Write in detail:

1. Discuss the concept of Secularism as highlighted by the Constitution.
2. Explain how our Indian constitution is purely secular in character.
3. Discuss the effect of terrorism on the secular fabric of India

2.4 Let us sum up

The decision arrived at by the judges in the *S.R. Bommai's* case and *Ismail Faruqui's* case reemphasized the concept of secularism being the basic feature of the Constitution. The only issue relating to the basic feature was whether secularism is a basic feature of the Constitution, which was answered in the affirmative. It would be thus clear that Constitution made clear demarcation between religious part personal to the individual and secular part thereof. The State does not extend patronage to any religion; State is neither pro-any particular religion nor anti-any particular religion. It stands aloof, in other words, it maintains neutrality in matters of religion and provides equal protection to all religions subject to regulation and actively act on secular part.

Acquisition of certain land under *Ayodhya* Act, 1993 was held to be negation of law and therefore invalid and the court held that the greatest religious tensions are not those between any one religion and another; they rather are the tensions between the fundamentalist and pluralist in each and every religious tradition. The intention of the constitutional guarantee on minority rights, as we understand it is to promote and to protect the distinctiveness of religious and linguistic minorities in the country.

Secularism may be defined as the “neutrality of the state in matters relating to religion or creed”. It may also be understood as ‘non-patronizing’ attitude of the state to any one religion. In a secular state, there is no state religion and every citizen is free to preach, practice and propagate any religion. Thus, secularism defines the way the people of a country carry on their individual affairs as also their behavior towards others.

The hatred of statues in Islam emanate from Islam's intense hatred of Idol-worship, over which Muslim never fail to point fingers at Hinduism. In reality, true Hinduism, the *Sanatan Dharma*, is monotheistic like Islam.

2.5 Glossary

Religion: faith, belief, religious conviction, a way of life

Secularism: Secularism a concept where one is free of all religious convictions. In Indian constitution it means ‘no religion for state’. That does not mean denial of God or religious believes in fact in Indian context it means equality of all religious i.e. *Sarva Dharma Sambhav*.

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Unit 3

Women and the Law

3.0 Objectives

3.1 Introduction

3.2 Topic Explanation

3.2.1. Crimes against women.

3.2.2. Other Crimes against women.

3.2.3. Gender injustice and its various forms.

3.2.4. Women's Commission.

3.2.5. Empowerment of women: Constitutional and other legal Provisions.

3.3 Questions for self learning

3.4 Let us sum up

3.5 Glossary

3.6 References

3.0. Objectives

After studying this unit you will be able to understand....

1. Various Crimes against women.
2. Gender injustice and its various forms.
3. Existence women's Commission its functions.
4. How important is Empowerment of women:
5. Various Constitutional and other legal provisions for empowerment of women.

3.1. Introduction

Women are the half of world's population. Are human women have right to live a dignified and secured life. They are strong enough but gets shattered when their self esteem is hurt. The dignity for women is much precious then life and this is universal phenomenon. Right to life includes right to human dignity. Various Laws reinforce safeguards against discrimination and provide for positive discrimination for women. Women ought to be protected and responsible persons or institutions must observe certain guidelines to ensure the prevention of sexual harassment of women so that lives with dignity as guaranteed by our Constitution.

In this unit you will be studying Various Crimes against women, Gender injustice and its forms. Existence of Women's Commission its

functions. How important is Empowerment of women and Various Constitutional and other legal provisions for empowerment of women.

3.2.1. Crimes against women.

➤ **Women her dignity and sexual harassment**

All over the world sexual purity of women is attached to the 'honour' of the family and thus to attack the honour of certain family the women of that family is sexually assaulted. 'Dignity' of the women becomes fragile as women have been victims of humiliation, torture and exploitation. In India, gender based violence is very common, perhaps it is deeply rooted in the society. Almost every woman is victim of violence. There is not even a single day when a crime against the woman, whether in the form of eve-teasing or molestation or rape or immoral trafficking or sexual harassment at the work place or domestic abuse, has not taken place, thereby putting a woman's right to live with dignity in anger at one point of time or the other. The Supreme Court is the custodian of Fundamental rights and consequently the dignity of women. In *Maneka Gandhi V. 'Union of India'*, it was ruled that right to live with human dignity. In *Francis Coralie V. 'Union of Territory of Delhi'* it was held that means something more than just physical survival and is not confined to protection of any faculty or limb through which life is enjoyed or the soul communicates with the outside world, but includes 'the right to live with human dignity'

➤ **What amounts to sexual harassment?**

Sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

- (a) Physical contact and advances, or
- (b) A demand or request for sexual favours, or
- (c) Sexually coloured remarks, or
- (d) Showing pornography, or
- (e) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature

➤ **Laws under which a case can be filed**

Section 209, IPC deals with obscene acts and songs, *whoever, to the annoyance of others:*

- (a) *Does any obscene act in any public place or*
- (b) *Sings recites or utters any obscene song, ballad or words in or near any public place, shall be punished with imprisonment of either*

description for a term, which may extend to 3 months or with fine or both. (Cognizable, bailable and triable offences),

-Section 354, IPC deals with assault or criminal force to a woman with the intent to outrage her modesty:

Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or both.

Section 509, IPC deals with ‘word, gesture or act intended to insult the modesty of a woman: *Whoever intending to insult the modesty of any woman utters any word, makes any sound or gesture, or exhibits any object intending that such word or sound shall be heard or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or both. (Cognizable and bailable offences).*

Civil suit can be file for damages under tort laws. That is, the basis for filing the case would be mental anguish, physical harassment, loss of income and employment caused by the sexual harassment.

➤ **IRWPA:**

Under the indecent Representation of women (Prohibition) Act (1987) if an individual harasses another with books, photographs, paintings, films, pamphlets, packages, etc. containing “indecent representation of women”, they are liable for a minimum sentence of 2 years, Further section 7 (Offenses by Companies) holds companies responsible (guilty) where there has been “indecent representation of women” (such as the display of pornography) on the premises. Person guilty of offenses under this act, shall be punished with a minimum sentence of 2 years.

➤ **Sexual harassment at work place:**

Where any such acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim’s employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem it amounts to *Sexual harassment*. It has been laid down by the Supreme Court that it is the duty of the employer or other

responsible persons in work places or other institutions to prevent or deter the Commission of acts of sexual harassment and provide the procedure for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

➤ **Steps to be taken by the employer:**

All Employer or persons in charge of work place whether in public or private sector should take appropriate steps to prevent sexual harassment. They should take the following steps:

- (a) Express prohibitions of sexual harassment as define, above at the work place should be notified. Published and circulate in appropriate ways.
- (b) The Rules/Regulations of Government and public sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender,
- (c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1940.
- (d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

➤ **Complaints, Criminal proceedings / disciplinary action:**

1. Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be create in the employer's organization for redress of the complaint made by the victim.
2. Such complaint mechanism should ensure time bound treatment of complaints.
3. The complaint mechanism, referred above should be adequate to provide, where necessary, a Complaints Committee, a special counselor or other support services, including the maintenance of confidentiality.
4. The Complaints Committee should be headed by a woman and not less than half of its member should be a woman.
5. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

6. Complaint procedure must be time bound. Confidentiality of the complaint procedure has to be maintained.
7. Complainants or witnesses should not be victimized or discriminated against while dealing with complaints.
8. The Complaints Committee must take an annual report to the Government department concerned of the complaints and action taken by them.
9. The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.
10. The head of the organization, upon receipt of the report from the Complaints Committee shall after giving an opportunity of being heard to the person complained against submit the case with the Committee's recommendations to the management.
11. The Management of the Organization shall confirm with or without modification the penalty recommended after duly following the prescribed procedure.
12. Where the conduct of an employee amounts to misconduct in employment as defined in the relevant service rules the employer should initiate appropriate disciplinary action in accordance with the relevant rules.

➤ **Third Party Harassment:**

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

3.2.2. Other Crimes against Women recognized by IPC, 1860

➤ **Crimes against women recognized by IPC, 1860**

Section- 312- *Causing miscarriage*- Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman be punished with imprisonment of 3 yrs or with fine. If the woman be quick with child shall be punished with imprisonment for 7 yrs or with fine.

Sec. 314-16- *Causing miscarriage without women consent*- whether the woman is quick with child or not shall be

punished with imprisonment for term which may extend to 10 yrs shall also be liable to fine.

Sec. 315 Act done with intent to prevent child being born alive or the cause it to die after birth shall punished for 10 yrs.

Sec. 372 and 373 penalize buying and of minor girls for purposes of prostitution.

Sec. 361- Kidnapping from legal guardian.

Sec. 366- Kidnapping, abduction or inducing women to compel her to marry.

Sec.366-A- procurement of a minor girl.

Sec.366-B- Importation of girl from foreign country, etc., has a bearing on curbing conditions which may lead towards trafficking and prostitution.

➤ **Crimes against women recognized by other laws**

Police records show high incidence of crimes against women in India. The National Crime Records Bureau reported in 1998 that the growth rate of crimes against women would be higher than the population growth rate by 2010. Earlier, many cases were not registered with the police due to the social stigma attached to rape and molestation cases. Official statistics show that there has been a dramatic increase in the number of reported crimes against women.

➤ **Dowry**

In 1961, the Government of India passed the Dowry Prohibition Act, making the dowry demands in wedding arrangements illegal. However, many cases of dowry-related domestic violence, suicides and murders have been reported. In the 1980s, numerous such cases were reported.

In 1985, the Dowry Prohibition (maintenance of lists of presents to the bride and bridegroom) rules were frame. According to these rules, a signed list of presents given at the time of the marriage to the bride and thebridegroom should be maintained. The list should contain a brief description of each present, its approximate value, the name of the who has given the present and his/her relationship to the person. However, such rules are hardly enforced.

A 1997 report claimed that at least 5,000 women die each year because of dowry deaths, and at least a dozen die each day in 'kitchen fires' thought to be intentional. The term for this is bride burning and is criticized within India itself. Amongst the urban educated. Such dowry abuse has reduced dramatically.

➤ **Female infanticides and sex selective abortions**

India has a low sex ratio, the chief reason being that many women die before reaching adulthood. Tribal societies in India have a better sex ratio than all other caste groups put together. This is spite of the fact that tribal communities have far lower levels of income, Literacy and health facilities. It is therefore suggested by many experts. That the low sex ratio in India can be attribute to female infanticides and sex-selective abortions.

All medical tests that can be used to determine the sex of the child have been banned in India, Due to incidents of these tests being used to get rid of unwanted female children before birth. Female infanticide (Killing of girl infants) is still prevalent in some rural areas. The abuse of the dowry tradition has been one of the main reasons for sex-selective abortions and female infanticides in India.

➤ **Abortion permitted on therapeutic ground**

Abortions are only permitted on medical ground in order to protect the life of the mother. That is to say, the unborn child must not be destroyed except for the purpose of preserving the yet more precious life of the mother.

➤ **Medical Termination of Pregnancy Act, 1971 Legalize abortion**

In 1971 India liberalize its abortion law by enacted the above said Act, Which permitting abortion number of conditions.

- The termination of pregnancy involves a risk of life of a pregnant woman or a risk of grave injury to her physical or mental health.
- The termination of pregnancy is not an offence if there exists a substantial risk that, if the child were born, it would suffer some physical or mental abnormalities so as to be seriously handicapped.
- The termination of a pregnancy would not be an offence if the pregnancy is caused by rape.
- The termination of pregnancy is not an offence of the pregnancy is result of failure of any device or method used by the married couple for the purpose of limiting the number of children.

Hence the Act permits termination of an unwanted pregnancy of a

married woman on the ground that a contraceptive device failed. The provides very mere punishment for the contravention of the provisions of the Act, which may extend to one thousand rupee only.

➤ **The Pre-conception and Pre-natal Diagnostic Technique (Prohibition of Sex Selection) Act, 2003:**

“An Act to provide for the prohibition of sex selection before or after conception and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities of metabolic disorder or chromosomal abnormalities or certain congenital malformation or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matter connected therewith or incidental thereto”

The use of technology for pre-natal determination of sex, in the context of India, is wholly discriminatory to the female sex and has an impact on the status and dignity of women. Large scale misuse of the technologies in future would precipitate a severe imbalance in male and female ration. Keeping in view the emerging technologies selection of sex before and after conception and problem faced in the working of implementation of the Act and certain direction of Hon'ble Supreme Court²New amendment in Sec. 23 legislator has increased the punishment up to five yrs, imprisonment and fine up to Rs. 1, 00,000.

➤ **Human Right and Unborn Child**

The basic principle of Human Right is that “All human being born free and equal in dignity and right, as well as no discrimination on the basis of race, colours, language, religion, right to vote, freedom of speech and freedom of press. Human Rights are essential to the well being of every man, woman and child. They are fundamental inviolable universal and inalienable.

Right to life personal liberty and security of woman includes her right to terminate pregnancy, depend on whether or not the exercise of such right would affect the right to life of unborn child³. The unborn child is person under Art.21 of Indian constitution. Life begins immediately after conceiving and some believe life begins only after completion of first trimester⁴

➤ **Domestic Violence**

The incidents of domestic violence are higher among the lower Socio-Economic Classes (SECs). There are various instances of an inebriated husband beating up the wife often leading to severe injuries. Domestic is

also seen in the form of physical abuse. The Protection of Women from Domestic Violence Act, 2005 came into force on October 26, 2006.

➤ **Trafficking**

The Immoral Traffic (Prevention) Act was passed in 1956. However many cases of trafficking of young girls and women have been reported. These women are either forced into prostitution, domestic work or child labour.

3.2.3. Gender injustice and its various forms.

Women's groups started emerging in India in the early 1900s and at first focused on Social reform. They have also campaigned vigorously and successfully for social and political equality with men. In 1950 women and men over the age of 21 were granted voting rights. Indian patriarchal society not only harbours a culture of violence against women in the form of dowry, domestic violence and female infanticide, it also manifests in government policies towards women. The unequal representation of Indian women in national political parties is all the more disquieting given that the Indian constitution guarantees gender equality in the Articles 325 and 326. Despite the deeply ingrained patriarchal attitude prevalent in India, it is one of the few countries ever to have elected a woman prime minister: Indira Gandhi. We still haven't secured 33% reservation for women in parliament and state assemblies, despite the women's Reservation bill being close at hand for so long.

The Constitution of India has various provisions to ensure equality of the sexes and also to dismantle the prevalent imbalances in gender hierarchy. Article 14 of the Constitution states that there shall be "equality before the law and equal protection of the law", Article 15 safeguards the right against discrimination. The Constitution also provides for positive discrimination and affirmative action on some counts. Article 15(3) permits special provisions for women. Article 16 provides equal opportunity with respect to public employment and they shall not be discriminated on the basis of sex of the person. Article 21 guarantees the right to life, the interpretation which has been broadened to include the right to live with dignity. Article 23 guarantees the right against exploitation. It prohibits traffic in human beings.

The directive Principles of State Policy also provide measures for gender equality. Article 39(a) aims providing the right to adequate means of livelihood for men and women equally. Article 51(A) (e) of the Constitution provides that it will be the duty of every citizen to renounce practices derogatory to the dignity of women.

The India Constitution calls for eight years of compulsory education for girls and boys aged 6 to 14. However, women still lag far behind men and rural women are twice as likely to be illiterate compared to their urban counterparts. The legal marriage age is 21 for males and 18 for females. A recent law commission has recommended equalizing the marriage age for both men and women to 18 but this has yet to be implemented. Personal laws of Hindus and Muslims dictate different codes of conduct regarding marriage and divorce.

The people of India are guaranteed equal pay for equal work by the Constitution and reinforced by the 1975 Equal Remuneration Act. The drawback is that this law does not apply to agriculture, the area where most women in India are employed. Gender based pay scales with lower wages for female workers are not uncommon. Today we observe a shift towards the service sector by working women but no occupational field is impervious to gender injustice as of today. It is also horrifying to note that there is no statutory enactment in India against sexual harassment at work place. But in the absence of a law, the Supreme Court has laid down certain guidelines pertaining to sexual harassment at the work place in the landmark case of *Vishakha and others v. State of Rajasthan*. Women are entitled to maternity benefits under the Employees' State Insurance plan, which provides a 90 day paid leave. The central government has endorsed the concept of paternity leave for the same duration for men, but this cannot be enforced in the private sector.

A woman does not have a right to Abortion in India. The Medical Termination of Pregnancy Act, 1971 legalizes abortion only in certain circumstances- to preserve the woman's physical and mental health, rape and incest cases or when the fetus suffers severe abnormalities. There is no provision in the Act which allows abortion on the basis of the will of the woman. Section 312 of the Indian Penal Code, defines the offence of 'causing miscarriage'. It states that whoever voluntarily causes a woman with child to miscarry shall, if not in good faith be punished with imprisonment of upto 3 years or fine or both. A woman who causes herself to miscarry is within the scope of this section. This form of oppression violates the fundamentals of justice. Women are entitled to their opinion and choices.

The Domestic Violence Act, 2005 was enacted to curb the onslaught of domestic violence. It is the first of its kind in India. An important advance made by the Act in understanding the nature of domestic violence has been in the combination of civil and criminal remedies. The numbers of cases of domestic

violence in India are on the rise. This may also be due to greater reporting of Domestic Violence Cases.

A great majority of Sexual assaults go unreported. Section 397 of the Indian Penal Code penalizes the offence of Rape. The Average penalty is seven of imprisonment. It is unfortunate to note that marital rape is not yet an offence in India as it is in most developed countries. The only semblance to marital rape is where the husband has intercourse with his wife without her consent during separation, where the punishment is lighter. (2 years)

Rape is a perverse form of subjugation of women by men. It is a crime of violence, not sex primarily. Some scholars opine that the Indian Law on rape is gender biased and male oriented. Gender neutral rape laws in India have been proposed but are yet not acted upon. If the legislature responds to this reform favorably, we will have reached a step further in achieving gender justice.

Commercial sex work i.e. the exchange of sexual services for money is legal in India but related activities such as soliciting in public places, owing a brothel, kerb crawling and pimping are illegal. The primary law dealing with sex workers is the Immoral Traffic (Suppression) Act of 1956. Male prostitution is not recognized in the Indian Constitution. In order to achieve gender justice, male sex workers should also be given recognition in order to avail of their basic rights. There are a few contentious issues which are peculiar to developing countries like India. Because of the tremendous preference for sons over daughters, female infanticide is not uncommon. The law bans infanticide and imposes penalties of life imprisonment or death. Harsh punishment has also been ineffective as a deterrent. The age old custom of Sati, in which the widow is burnt alive on her husbands' funeral pyre, has been abolished since 1829 under the aegis of Lord William Bentinck, and the government eventually passed the commission of Sati Prevention Act to prevent its occurrence and curb its glorification.

Another oppressive tradition of giving dowry has been abolished by The Dowry Prohibition Act, 1961 which imposes stiff fine and minimum imprisonment of 5 years in prison for violation.

With disregard to the third gender, Indian laws recognize only two genders, so getting ration cards or other documents is a formidable task for the transsexuals. Tamil Nadu is the first state in India that has allowed the transsexuals to indicate their sex as 'T' Though the transsexuals got the right to vote in 1994, they had to declare their sex as 'M' or 'F' in the gender columns. Only very recently, the Election Commission allowed them to indicate their sex

as 'O', or Others. Panna is the first transgender person in India to have the letter 'E' for Eunuch stamped on her passport.

➤ **Initiatives by the Judiciary for Gender Justice**

Article 51 of the Constitution imposes an obligation on the State to foster respect for international law and treaty. However, the treaty provisions cannot be invoked without the same being incorporated through enabling legislation.

The judiciary through its proactive role has applied the principles of the treaty in many judgments.

The judiciary in a number of decisions has struck down the discriminatory provisions of law and rules, such as, in *C. B. Muthamma v. Union of India*⁵ wherein the service rules requiring a female employee to obtain permission of the Government in writing before her marriage and denying her right to be appointed on the ground that the candidate is a married woman was held to be discriminatory against women. In *Air India v. Nargeesh Meerza*⁶ the service condition that terminated the services of an Airhostess on becoming pregnant was struck down as being discriminatory. In *Vasantha v. Union of India*⁷ Section 66 of the Factories Act which prohibited night shift work for women held to be discriminatory.

In *MadhuKishwar v. Union of India*⁸ and in *C. MasilamaniMudliar and others v. The idol of SwaminathaswamiThirukoil and others*⁹ property rights for women were upheld. In *M/s Mackinnon and Co Ltd v. Audrey D 'Cost'*¹⁰ provided for equal wages. *Delhi Domestic Working Women's Forum v. Union of India*¹¹ and *BodhiSattwaGautam v. Subhra Chakroborthy*¹² and *Chairman Railway Board v. Chandrima Das*¹³ provided for compensation in rape cases.

*Municipal Corporation of Delhi v. female workers (Muster Roll case)*¹¹ ensured maternity benefit for contract workers. And in *Gita Haiharan*¹⁵ case regarding guardianship rights interpreted the provisions in favour of women dealing with the rights of woman to be a guardian for the minor child, the principles of the Convention have been applied to hold the provisions of the Hindu Guardianship and Minority Act, 1956, as being discriminatory. The *Daniel Latiffs*¹⁶ case enabled Muslim woman to seek maintenance from divorced husband.

3.2.4. Women's Commission.

➤ National Commissions:

The National Commission for Women was established in January 1992 under the 1990 National Commission for Women Act. The National Human Rights Commission was established in 1993 under the Protection of Human Rights Act, 1993. The Protection of Human Rights Act, 1993 provides for the constitution of a National Human Rights Commission and State Human Rights Commission for better protection of Human Rights and enforcement of the same. The National Human Rights Commission (NHRC) was set up in October 1993. It is empowered to deal with all cases of human rights violations by public servants. The powers of NHRC include inquiry into violations of human rights or their abetment, review of constitutional and legislative safeguards for the protection of human rights to ensure their effective implementation; undertaking research in human rights; visiting jails and other places of custodial detention under the supervision of Government; reviewing factors including terrorism which inhibit the enjoyment of human rights; recommending remedial measures and encouraging non-Governmental organizations and institutions working for human rights. The NHRC has the powers of a civil court to summon persons and record evidence and investigate both *suomoto* and individual complaints and violations of human rights. Every proceeding before the Commission is a judicial proceeding under the law.

3.2.5. Empowerment of Women: Constitutional and other legal provisions.

In ancient India, The women enjoyed equal status with men in all fields of life. Women were educated in the early Vedic period. Rigvedic verses suggest that the women married at a mature age and were probably free to select their husband. Scriptures such as Rigveda and Upanishads mention several women sages and seers, notably Gargi and Maitreyi. However, later (approximately 500 B.C.). The status of women began to decline with the Smritis (esp. Manusmriti) and other religious texts curtailing women's freedom and rights.

Sati: Sati is an old, largely defunct custom, in which the widow was immolated alive on her husband's funeral pyre. Although the act was supposed to be a voluntary one on the widow's part, it is believed to have been sometimes forced on the widow. It was abolished by the British in 1829. There have been

around forty reported cases of Sati since independence in 1987, the Roop Kanwar case of Rajasthan led to The Commission of Sati (Prevention) Act,

Child Marriages: Earlier, child marriages were highly prevalent in India. The young girls would live with their parents till they reached puberty. In the past, the child widows were condemned to a life of great agony, shaving heads, living in isolation, and shunned by the society, although child marriage was outlawed in 1860, it is still a common practice in some underdeveloped areas of the country and ban on widow remarriages became part of social life in India. Among the Rajputs of Rajasthan, the Jauhar was practiced. Jauhar refers to the practice of the voluntary immolation of all the wives and daughters of defeated warriors, in order to avoid capture and consequent molestation by the enemy. The practice was followed by the Rajputs of Rajasthan, who are known to place a high premium on honour. In some parts of India, the Devadasis or the temple women were sexually exploited. Devadasi is religious practice in some parts of southern India, in which women are “married” to a deity or temple. The ritual was well established by the 10th century A.D. in the later period, the sexual exploitation of the devadasis became a norm in some parts of India.

➤ **Constitutional Provisions**

The Muslim conquest in the Indian subcontinent brought the purdah¹⁷ practice in the Indian society. Polygamy was widely practiced especially among Muslim and Hindu Kshatriya rulers in many Muslim families, women were secluded to Zenana, by and large, the women in India faced confinement and restrictions. In spite of these conditions to our amazement we find many women excelled and found a niche in the fields of politics, literature, education and religion for themselves.

➤ **Reformation for liberation of women**

During the British Raj many reformers such as Mahatma Jyotirao Phule, Raja Ram Mohan Roy, Ishwar Chandra Vidyasagar etc. fought for the upliftment of women. Many women reformers such as Pandita Ramabai also helped the cause of women upliftment.

In 1917, The first women’s delegation met the Secretary of State to demand women’s political rights, supported by the Indian National Congress. The All India Women’s Education Conference was held in Pune in 1927. In 1929, the Child Marriage Restraint Act was passed, stipulating fourteen as the minimum age of marriage for a girl. Though Mahatma Gandhi himself married at the age of thirteen, he later urged people to boycott child marriages and called upon the young men to marry the child widows. We also come across a group of women who had inscribed their

names in history. Women played an important part in India's independence struggle. Then came the independence and with it the plethora of laws for the reformation of the old stagnant society. Thus the contribution of the great dignitaries like Mahatma Gandhi, Pt. Jawaharlal Nehru and Dr. B. R. Ambedkar cannot be ignored.

➤ **Dr. B.R. Ambedkar and movement of women liberation.**

Upon India's independence on 15th August 1947, the new Congress-led government invited Ambedkar to serve as the nation's *First* law minister, which he accepted. On August 29, Ambedkar was appointed chairman of the Constitution drafting committee, charged by the Assembly to write free India's constitution. He is widely regarded as the "*father of the Indian Constitution*" for his role in creating the document. Ambedkar won great praise from his colleagues and contemporary observers for his drafting work. Ambedkar's work would guarantee political, economic and social freedoms for untouchables and other ethnic, social and religious communities of India.

The text prepared by Ambedkar provided constitutional guarantees and protections for a wide range of civil liberties for individual citizens, including freedom of religion, the abolition of Untouchability and the outlawing of all forms of discrimination. Ambedkar argued for extensive economic and social rights for women, and also won the Assembly's support for introducing a system of reservations of jobs in the civil services, schools and colleges for members of scheduled castes and scheduled tribes, a system akin to affirmative action. India's lawmakers hoped to eradicate the socio-economic inequalities and lack of opportunities for India's depressed classes through this measure, which had been originally envisioned as temporary on a need basis.

The constitution was adopted on November 26, 1949 by the Constituent Assembly. Speaking after the completion of his work, Ambedkar said: "I feel that the Constitution is workable; it is flexible and it is strong enough to hold the country together both in peace time and in war time. Indeed, if I may say so, if things go wrong under the new Constitution the reason will not be that we had a bad Constitution. What we will have to say is that Man was vile."

A. Constitutional provisions

The Constitution of India guarantees the right to equality and equal protection before the law¹⁸, right to life¹⁹ and provides for discrimination in favour of women²⁰. Untouchability has been prohibited in the Constitution and is made an offence under the Protection of Civil Rights Act, 1955. Article 17, The Government recognizing the historical disadvantage and vulnerability of the dalit women has adopted several measures to address their concerns and the same has been highlighted in Article 4 of CEDAW. The Government has passed two legislations namely the Protection of Civil Rights Act (PCRA), 1955 and the Prevention of Atrocities against Scheduled Caste/Tribes Act, 1989 to enable the dalits to enjoy human rights on par with other sections of Indian society and empower them in their struggle for their rights, but crimes against dalits continue to exist.

The Constitution of India contains various provisions, which provide for equal rights and opportunities for both men and women. The salient features are:-

Article 14 guarantees the State shall not deny equality before the law and equal protection of the laws;

Article 15 prohibits discrimination against any citizen on the ground of sex;

Article 15(3) empowers the State to make positive discrimination in favour of women and children;

Article 16 provides for Equality of Opportunity in the matters of public employment;

Article 23 prohibits trafficking in human beings and forced labour;

Article 39 (a) and (d) enjoins the State to provide equal means of livelihood and equal pay for equal work;

Article 42 enjoins upon the State to provisions for securing just and humane conditions of work; and for maternity relief;

Article 51A (e) imposes a fundamental duty on every citizen to renounce the practices derogatory to the dignity of women;

Article 243 D (3) provides that not less than $\frac{1}{3}$ rd of the total number of seats to be filled by direct election in every Panchayat to be reserved for women, and such seats to be allotted by rotation to different constituencies in a Panchayat;

Article 243 T (3) provides that not less than $\frac{1}{3}$ rd of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality;

Article 243 (4) provides reservation of offices of Chairperson in Municipalities for SC, ST, Women in such a manner as the legislature of a State, may by law provide;

In pursuance of the above Constitutional provisions, various legislative enactments have been framed to protect, safeguard and promote the interest of women. Many of these legislative enactments have been in the sphere of labour laws to ameliorate the working condition of women labour.

Part IV of the Constitution contains active obligations of the State to secure social economic freedom which could not be granted at the time when the Constitution was framed due to the prevalent socio-economic conditions. But, equality in wages is surely not dependent on the existence of suitable economic conditions. Yet, it was not guaranteed as a right but was incorporated in Part-IV.

It was only in 1976, that the Equal Remuneration Act, 1976 a landmark enactment was introduced, which provides for payment of equal wages to both men and women workers for the same work, or of similar nature. The act also prohibits discrimination against women in the matter of recruitment. Yet, studies reveal that wage differentials still exist, and continue to persist.

The State, under Article 21A of the Constitution has an obligation to provide free and compulsory education for all children in the age group 6-14 years. Further Article 45 ensures that the State shall endeavor to provide early childhood care and education for all children until they complete the age of 6 years and Article 51 A (k) has enforced a fundamental duty on the parent/guardian to provide opportunities for education to his/her child between the age of 6 to 14 years. Article 23 of the Constitution prohibits traffic in human beings and forced labour.

The Government has adopted the Yokohama Global Commitment, 2001 for eradication of commercial sexual exploitation of children. It is actively considering the question of ratifying the UN Protocol to Prevent, Suppress and Punish Trafficking in especially Women and Children and the UN Optional Protocol on the Involvement of Children in Armed Conflict and on Sale of Children, Child Prostitution and Child Pornography. The Government has also undertaken to implement the commitments made in the World Congress against Commercial Exploitation of Children (Stockholm, 1996), In addition to this, India, pursuant to the International Convention for Suppression of Traffic in Persons and of the Exploitation of the Prostitution, has enacted the Immoral Traffic (Prevention) Act, 1956 (ITPA), which has been amended in 1978 and 1986.

The certification by the Central Board of Film Certification (CBFC) is essential under before screening films. Under the Cable Television Network (Regulation) Act, 1995 the policy initiatives include a code of commercial advertising. Content telecast on TV Channels are guided by Prescribed Program and Advertising code and rules framed there under. Doordarshan and Akashwani strictly adhere to the broadcasting codes and journalistic ethics.

B. Other Legislation.

There are several laws enacted by the Parliament of India some of them are: the Immoral Traffic (Prevention) Act, 1956. The Dowry Prohibition Act, 1961, The Indecent Representation of Women (Prohibition) Act, 1986. The Commission of Sati (Prevention) Act, 1987: The Guardians and Wards Act, 1860; Indian Penal Code, 1860; The Christian Marriage Act, 1872; The Indian Succession Act, 1925; The Child Marriage Restraint Act, 1929; The Muslim Personal Law (Shariat) Application Act, 1937; The Factories Act, 1948; The Minimum Wages Act, 1948 The Employees State Insurance Act; The Special Marriage Act, 1954; The Hindu Marriage Act, 1955; The Hindu Adoption and Maintenance Act, 1956; The Hindu Minority and Guardianship Act, 1956; The Hindu Succession Act, 1956; The Maternity Benefit Act, 1961; The Foreign Marriage Act, 1969; The Indian Divorce Act, 1869; The Medical Termination of Pregnancy Act, 1971; The Bonded Labour System (Abolition) Act, 1979 The Equal Remuneration Act, 1976; The Contract Labour (Regulation & Abolition) Act, 1979; The Family Courts Act, 1984; National Commission For Women Act, 1990; The Inter-State

Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979; The Pre Natal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994; The Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992. The Cinematography Act, 1952²¹, the Right to Information Act in 2005²²

The discriminatory provisions of law are being progressively reviewed by several bodies, such as the Law Commissions, the Legal Department, DWCD, National Commission for Women and National Human Rights Commission. An Inter-Ministerial Committee including NCW and NGOs working in this field has been constituted in May 2005 to review existing laws to address discrimination and ensure equality to women.

The Juvenile Justice Act (Care and Protection of Children Act, 2000) Provides for Protection, treatment, development and rehabilitation of neglected and delinquent juveniles including girls. The Information Technology Act, 2000 penalizes publication or transmission in electronic form of any pornographic material. The Central Government has also adopted a code of conduct for Internet Service Providers (ISP) with the objective of enunciating and maintaining high standard of ethical and professional practices in Internet and related services.

➤ **The Protection of Human Rights Act, 1993;**

This act provides for the constitution of a National Human Rights Commission 1993 and State Human Rights Commission for better protection of Human Rights and enforcement of the same. Empowered to deal with all cases of human rights violation by public servants, the powers of NHRC include inquiry into violations of human rights or their abetment, review of constitutional and legislative safeguards for the protection of human rights to ensure their effective implementation; undertaking research in human rights; visiting jails and other places of custodial detention under the supervision of Government; reviewing factors including terrorism which inhibit the enjoyment of human rights; recommending remedial measures and encouraging non-Governmental organizations and institutions working for human rights. The NHRC has the powers of a civil court to summon persons and record evidence and investigate both *suomoto* and individual complaints and violation of human rights. Every proceeding before the Commission is a judicial proceeding under the law.

➤ **National Policy for the Empowerment of Women (2001)**

The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The Constitution not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women.

Within the framework of a democratic polity, our laws, development policies, Plans and programs have aimed at women's advancement in different spheres. From the Fifth Five Year Plan (1974-78) onwards has been a marked shift in the approach to women's issues from welfare to development. In recent years, the empowerment of women has been recognized as the central issue in determining the status of women. The National Commission for Women was set up by an Act of Parliament in 1990 to safeguard the rights and legal entitlements of women. The 73rd and 74rd Amendments (1993) to the Constitution of India have provided for reservation of seats in the local bodies of Panchayats and Municipalities for women, laying a strong foundation for their participation in decision making at the local levels.

- India has also ratified various international conventions and human rights instruments committing to secure equal rights of women. Key among them is the ratification of the Convention on Elimination of All of Discrimination against Women (CEDAW) in 1993.
- The Mexico Plan of Action (1975), the Nairobi Forward Looking Strategies (1985), the Beijing Declaration as well as the Platform for Action (1995) and the Outcome Document adopted by the UNGA Session on Gender Equality and Development & Peace for the 21st century, titled "Further actions and initiatives to implement the Beijing Declaration and the Platform for Action" have been unreservedly endorse by India for appropriate follow up.
- Policy also takes note of the commitments of the Ninth Five Year Plan and the other Sectoral Policies relating to empowerment of Women.
- The Women's movement and a wide-spread network of no-Government Organizations which have strong grass-roots presence and deep insight into women's concerns have contributed in inspiring initiatives for the empowerment of women.
- However, there still exists a wide gap between the goals enunciated in the Constitution, legislation, politics, plans, programs, an relate mechanisms on the one hand and the situational reality of the status of women in India, on the other. This has been analyzed extensively in the Report of the Committee on the Status of Women in India, "Towards Equality". 1974 and highlighted in the National Perspective Plan for Women, 1988-

2000, the Shramshakti Report, 19898 and Platform for Action, Five years After- An assessment”

- Gender disparity manifests itself in various forms, the most obvious being the trend of continuously declining female ration in population in the last few decades. Social stereotyping and violence at the domestic and societal levels are some of the other manifestations. Discrimination against girl children, adolescent girls and women persists in parts of country.
- The underlying causes of gender inequality are related to social and economic structure, which is base on informal and formal norms, and practices.
- Consequently, the access of women particularly those belonging to weaker sections including Scheduled Castes/Scheduled Tribes/Other Backward Classes and Minorities, majority of whom are in the rural areas and in the informal, unorganized sector to education, health and productive resources, among others, is inadequate. Therefore, they remain largely marginalized, poor and socially excluded.
- The goal of this Policy is to bring about the advancement, development and empowerment of women. The Policy will be widely disseminated so as to encourage active participation of all stakeholders for achieving its goals. Specifically, the objectives of this Policy include.
 - (i) Creating an environment through positive economic and social policies for full development of women to enable them to realize their full potential
 - (ii) The *de-jure* and *de-facto* enjoyment of all human rights and fundamental freedom by women on equal basis with men in all spheres-political, economic, social, cultural and civil.
 - (iii) Equal access to participation and decision making of women in social, political and economic life of the nation.
 - (iv) Equal access to women to healthcare, quality education at all levels, career and vocational guidance, employment, equal remuneration, occupational health and safety, social security and public office etc.
 - (v) Strengthening legal systems aimed at elimination of all forms of discrimination against women
 - (vi) Changing societal attitudes and community practices by active participation an involvement of both men and women.
 - (vii) Mainstreaming a gender perspective in the development process.
 - (viii) Elimination of discrimination and all forms of violence against women and the girl child; and
 - (ix) Building and strengthening partnerships with civil society, particularly women’s organizations.

➤ **Panchayati Raj Institution**

The 73rd and 74th Amendments (1993) to the Indian Constitution have served as a breakthrough towards ensuring equal access and increased participation in political power structure for women.

3.3 Questions for Self Learning

1. What are the various crimes against women? What are the remedies for women against these crimes?
2. Do you agree that injustice against female Gender exist in its various forms?
3. Discuss in detail constitution, powers and functions Women's Commission
4. According to you how important is Empowerment of Women? Why?
5. Discuss the various Constitutional provisions for empowerment of women.
6. Besides Constitutional provisions discuss the other legal provisions for empowerment of women

3.4 Let us sum up

Implementation of the standard of the CEDAW Convention at the domestic/private sphere is still a challenge to be addressed. The Government is strengthening the existing legislation and developing institutional machinery. The Government has initiated the Sarva Shiksha Abhiya (SSA), a national program for universal primary education. There are several schemes of the government such as 'Swayamsidha'²³, the Support to Training and Empowerment Programme (STEP)²⁴ The RashtriyaMahilaKosh (RMK)²⁵, the Swarnajayanti Gram Swarozgar Yojana (SGSY)²⁶, The Sampurna Grameen Rozgar Yojana (SGRY)²⁷, Under the Urban Self-employment Programme (USEP) of Swarna Jayanti Shahari Rozgar Yojana (SJSRY) assistance is provided to the urban poor, especially women, living below the urban poverty line.

What ever is presented to people through various law has to be known to them as we know "ignorance of law is not an excuse" therefore there is need to go to them and create awareness amongst the common people (specially the women) so that justice will not only be done but seen to be done. Indeed it is none but the legal fraternity has to shoulder the responsibility.

3.5. Glossary

Gender Injustice: The various forms of injustice over the other gender in India the victim is generally a woman.

Empowerment: uplifting the venerable, giving them confidence and standing by them.

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Topic No. 4

Alternative approaches to law

4.0 Objectives

4.1 Introduction

4.2 Topic Explanation

4.2.1 The jurisprudence of Sarvodaya--- Gandhiji, Vinoba Bhave; Jayaprakash Narayan –Surrender of dacoits; concept of grama nyayalayas.

4.2.2 Socialist thought on law and justice: An enquiry through Constitutional debates on the right to property.

4.2.3 Indian Marxist critique of law and justice.

4.2.4 Naxalite movement: causes and cure.

4.3 Question for self learning

4.4 Let us sum up

4.5 Glossary

4.6 References

4.0 Objectives:-

After studying this unit you will be able to;

- 1) Explain the basic concept of Gandhi's Sarvodaya;
- 2) Recall the major contribution of Vinoba Bhave; Jayaprakash Narayan for movement of Sarvodaya; Fabien the importance of Gram Nyayalayas;
- 3) Trace the evolution of right to property in constitution;
- 4) Trace the development of Marxists' view law and justice in India.
- 5) Trace the reason for development of Naxalite movement.

4.1 Introduction:

The law has been instrument of social change. Time and again it was proved by history. India is a culminating point of many cultures and had seen many rulers. Thus the law also kept on changing. Sometimes it was harsh and sometimes people friendly. But the law was and is always a necessary instrument to maintain law and order in the society. The courts are the byproducts of law.

It is always thought that a wise man should not approach the courts. It is not true that there is not proper justice done in the court, but it is true that legal proceedings take too much of time as well as money spent is also high. Therefore there was always a medium way to sort the problems through institute alternate to the legal system. Because law must not be what it is it must be what it ought to be. The ultimate goal of law is justice and if it is delayed. That truly means justice delayed is justice denied.

Gandhiji was exponent of Sarvodaya movement and his follower Vinoba Bhave and Jayaprakash Narayan lead it further. The difficult problems like those of land less labours, the dacoits they found a solution. But after them the present leaders are unable to look into the problem of Naxalites.

However justice to the grassroots can be now achieved through the gram nyayalayas which is new concept. And it is gaining popularity, which is the sign of a mature society.

4.2 Topic Explanation

4.2.1. The jurisprudence of Sarvodaya- Gandhi, Vinoba Bhave; Jayaprakash Narayan- Surrender of dacoits; concept of grama nyayalayas.

➤ The jurisprudence of Sarvodaya.

Sarvodaya aims to establish a new social order on the basis of truth, love and non-violence. It is highly critical of the state and its government, because both are based on force and coercion. Human society must be free from coercive institutions. As such, Sarvodaya aims towards the creation of a social order free from every form of authority. Its ultimate aim is to establish a Stateless society where “the ruler and the ruled will be merged in the individual”. The main features of Sarvodaya social order, as expounded by Vinoba Bhave, are as under:

- i. No power should be dominant in society; there should only be a discipline of good thought;
- ii. All faculties of the individual to be dedicated to society which must provide the individual with growth and development; and
- iii. The moral, social and economic values of all the callings performed honestly should be the same.

Sarvodaya aims towards the welfare and rise of all individuals. Man will be the center of such a society, but self-interest will not be the basis of social organization. In an ideal social order no one should be downtrodden. An ideal social order is one where “love is to reign and cooperation to prevail”. It is that order where ‘there will be freedom for all and utmost equality; there will be no class and castes; no exploitation nor injustice; and equal opportunity for each for fullest development shall prevail’.

➤ **Mahatma Gandhi’s concept of Sarvodaya:**

Gandhism and Sarvodaya are inter-related to each other, the former is the essence of the latter. Gandhism is associated with the teachings and writings of Mahatma Gandhi. Gandhi’s mission in life was to regenerate faith and trust in mankind, to reinstate the freedom of man, and to renovate the dignity of human beings. Gandhian way of life is closely related to the doctrine of Sarvodaya. Gandhi visualizes an integral development in society which is realised through Sarvodaya. Sarvodaya is the name Gandhi gave to his mission embracing betterment of humankind. Sarvodaya builds a new society on the foundations of moral values. The society so established shall head towards integral welfare of all human beings.

After the Independence of India, Gandhi’s devoted disciple Acharya Vinoba Bhave established a Sarvodaya Society. Later on, Jaya Prakash Narayan joined the Sarvodaya movement. The Sarvodaya movement aims to reconstruct social and political order on the ideals and teachings of Mahatma Gandhi. It means to give the Gandhian way of life a realistic profile.

➤ **Vinoba Bhave the exponent of Sarvodaya movement**

To continue the ideology and mission of Gandhi, ‘Sarvodaya Plan’ was drafted in 1950. Which intended to achieve a non-violent, non-exploitative, cooperating society with equal opportunity for all without distinction based on caste or class. It set forth the policy of “tiller to be the owner of land”, redistribution of excessive land, and formation of cooperative farms by accumulating uneconomic holdings. It contemplated protection of minimum wages and formation of multipurpose village cooperatives. It divided industries into centralised and decentralised ones. The former was to be owned by autonomous corporations or cooperatives with workers’ participation in management and the latter by individuals or corporations. Banking and insurance ought to organise mass saving and control of investment. 50 per cent of the public revenue might be spent by the village Panchayat.

Vinobaji's *Bhoodan* and *Gramdan* movements are to be understood as specific schemes of Sarvodaya movement. *Bhoodan*, according to him, was not charity, but a realisation of right, a method of equitable distribution and an introduction of new values to the society. Eminent Gandhian puts it as; it was an experiment in non-violent economic revolution, a trusteeship theory put into action. And in words of Vinoba, "through the medium of land donation campaign, thoughts of the religion of humanity are taking roots in the country." Donation had the dimension of equal division and distribution and attitude of non-accumulation. He said, "Distribution of land is not our ultimate goal, but means to the goal. The goal is social revolution. The government is a servant. The people are the masters. I am trying to convince the masters. If they are convinced, they will get their servants do the needful.." for him the government was a bucket and people were the well. If there would be water in the well, then only then could the bucket be filled.

Acharya Vinoba well known as the Walking Saint of India, conducted series of pilgrimages convincing the landowners with cultural reasons to donate one sixth of their land to the landless. Jayaprakash Narayan in his book *Total Revolution* (Vol.-II) notes that, in Telangana area, where communists claimed to have distributed 30,000 acres of land after two and a half years' of violence resulting in 3000 murders and destruction of huge public property, Vinoba Bhave activated *Bhoodan* movement and could collect 1.5 million acres of land. In U.P. he collected five lakh acres. *Bhoodan* movement made moral appeal to the landed class to donate land, and provoked the landless not to cooperate with those landlords who did not donate. According to one source, donation of land under *bhoodan* was 3.46 million acres up to 1954, which made a slow progress reaching 4.26 million acres in 1967. The land distributed was 1.19 million acres because of unfitness of 44 per cent of land for cultivation and withdrawals by donors. The *bhoodan* figure in states ranged between 21 lakh acres in Bihar and 211 acres in Jammu and Kashmir. The contribution of Bihar, M.P., U.P., and Rajasthan aggregated to 85 per cent of donated land.

Jayaprakash Narayan writes, about the role of law in the process of change contemplated in *bhoodan* movement, "Vinoba is not against legislation. But he is impatient and does not want to wait till there is legislation. He says he is clearing the road for legislation. There must be public opinion created before a law can be made. It would come sooner if his message spreads to every village." The legal procedure for *bhoodan* included owner's declaration before Revenue Officer, registration of gift deed under the Indian Registration Act, distribution of donated land to the landless families by the

Sarvodaya Mandal with title subject to a condition not to sell, lease or mortgage. In order to help the poor donees to cultivate the land, *sampatti dan* and *sadhan dan* (donation of money and equipments) were also popularized by Vinoba.

In addition to resolving the problem of inequality in possession of land, bhoodan was aspired to release and bring into play the moral and social forces for the regeneration of society. *Gramdan* abolishes private proprietorship of land, and recognises community ownership and cooperative farming. The revival of the concept of common property resource by community's participation rather than by imposition from the top is part of the process building the rural economy by sharing of ownership, work and benefits. Socialism of Sarvodaya was unique through voluntary efforts.

The Programme of Sarvodaya

Though Sarvodaya is a comprehensive movement, yet one can trace the basic items in its programme. They are—

1. to establish communal peace and harmony
2. to remove Untouchability
3. to eliminate the caste system
4. to implement prohibition
5. to encourage Khadi and village industries
6. to make the village a unit of self-government
7. to spread new education
8. to propagate the ideals and rights towards women's equality and dignity
9. to develop Indian languages
10. to remove the provincial and sectarian feelings of narrowness
11. to take steps towards the development of agriculture and labour organizations
12. to provide service to tribes and other backward and weaker classes
13. to provide other welfare activities to society in general.

➤ **Jayaprakash Narayan, Sarvodaya and Surrender of dacoits**

(a) Jayaprakash Narayan's notion of total revolution

Jayaprakash Narayan visualized the plan of total revolution as continuity or rather a new version concept of Sarvodaya. By "total revolution" he meant inclusive revolution affecting all aspects of social life including individual life. The nature of total revolution was to be

governed by the needs of the time and situations pertaining in the country. He proposed to bring total change in civic life, civic relationships, civic institutions, and ultimately “beyond the sphere of civic life we enter larger spheres of the state of the national life”. He believed there was need to bring changes in innumerable spheres.

According to him total revolution was a combination of seven revolutions- (i) social, (ii) economic, (iii) political, (iv) cultural, (v) ideological or intellectual, (vi) educational and (vii) spiritual. Economic revolution meant revolution in the structure and institutions of society. Since man’s material and spiritual needs were to be fulfilled within a moral framework, he suggested modest living as the best solution at the individual level. At the village and city level, moral-spiritual constraints arising from natural-environmental framework were to operate on material development. The economic framework for development that Jayaprakash Narayan contemplated was one that aimed at human welfare; he suggested ‘broad spread ownership of industries and workers’ participation’ in management. Rural schools were to cater to the requirements of the countryside development. He had conceived definite principles of socialized economy suitable to the Indian circumstances. Concerned about the role of weaker sections and religious minorities in total revolution, Jayaprakash Narayan preached the Sarvodaya attitude of enhancing their strength by their effective organizations which was to be preceded by change in the attitude of stronger sections by taking more benevolent view of their responsibilities and obligations to the weaker sections and minorities.

(b) Jayaprakash Narayan and Sarvodaya.

His view was that protection to landless laborers; better wage structure as well as their social participation -which must be meaningful- was preconditions to development. He conceived total revolution to leading light for eradication of caste system. Buy which he dreamt to bring dynamism and mobility in social structure; this was the process which the social reformers advocated from days immemorial. Removing the persistent impediment in the form of ‘caste system’ could bring Cultural Revolution in rural society as India lived in villages.

To ensure direct and effective participation of people a unique demand for restoration of Indian polity was naturally. According to him, the Modern Western democracy was based on a ‘negation of the social

nature of man and the true nature of human society'. This democracy conceives of society as a non-living 'accumulation' of separate individuals. The differences of religion, caste, community, language, culture have aggravated Indians to ambush on each other with all kinds of violence. Disunity of people had weakened the polity in the past, and could hardly be continued. Therefore Jayaprakash Narayan preached for elementary humanity for developing India as a decent community.

➤ **Jayaprakash Narayan and surrender of dacoits:**

In his view for the problems that involve 'human beings', entirely legalistic or coercive solutions are not proper. His solution to the nuisance of Chambal dacoity consisted in human treatment of them to convert them into good citizens. Jayaprakash Narayan was a great organizer and motivator. He has previously organised *Jana Sangharsha Samiti* and *Chhatra Sangharsha Samiti* at Gujarat and Bihar in pre-emergency days to combat corruption, lawlessness and oppression of the poor, he demonstrated the potentiality of people's control over government. Also, regarding implementation of agrarian laws and struggles against benami transactions and other devious methods of land grabbing, he constituted struggle committees in each panchayat in order to unearth facts and remedy the grievances. His approach was central to his 'people oriented strategy'

➤ **Surrender of dacoits:**

Dacoity means a robbery committed by five or more persons. Dacoity is a crime under Indian Penal code, 1960. Preparation for dacoity and to be member of a gang of dacoits is also punishable under IPC. The dacoits considered looting as a profession and the gangs were organized, reports *The Hindu* magazine. It also reports that, if a person had any dispute and killed anyone in a fury or committed a murder, would join the gang instead surrendering the police. Chambal's gun culture propelled due to the caste and class system as well as geographical condition. For nearly 1000 years Chambal had been a homeland to the feared dacoits—professional bandits for whom murder and robbery were a tradition as well as a way of life. Chambal's dacoits had captured the public imagination as the royal rebels (*baaghi*), who helped the helpless; the long-suffering farmer who took up arms against the rich feudal lord; the poor goatherd who could find no other escape from state atrocities; and the woman who swore blood-revenge against

her rapists. Because of the Robinhood character of the key leaders, they had some supportive social base. They acted as parallel police in providing security to the poor villagers who believed in them.

When the conventional police methods had persistently failed to control the dacoits, Acharya Vinoba Bhave gently persuaded 20 bandits to give themselves up in 1960 pointing out that everyone had both good and bad propensities and sins of life are burnt out by repentance and by following righteous path just like the darkness of cave is dispelled even by a small candle. He compared the rebellious character of dacoits to the rebellion against the social order infested with poverty, inequality and injustice and preached for non- accumulation of wealth and donation of land to uproot the evil. He pleaded with the state authorities, “It is unbecoming of a welfare state to try to solve the dacoit-problem with the help of the police. It should be tackled as a human problem... Treat them as human beings.”

In 1972, a large number of dacoits surrendered in the Chambal Valley and Rajasthan owing to an important role played by Gandhian organizations under the leadership of Jayaprakash Narayan. Jayaprakash Narayan assured them that they won't be hanged i.e. the punishment under IPC would not be implemented. The Indian Government promised commutation of all death sentences, take care of families of dacoits and provided scholarships for their children. In response to the desperate poverty that led many of the dacoits to lives of violence the redevelopment program for the Chambal valley was planned by the government. After the multiple surrenders, the Chambal valley enjoyed a period of relative peace. As a result, agriculture and other development activities flourished. Most dacoits who did surrender lived peaceably, farming the 30 bighas of land that the government allotted to them as a measure of rehabilitation. The once turbulent Chambal became known for its prosperity. Compassionate advance put forward by voluntary action and governmental support to rehabilitate the surrendered dacoits within the legal framework provided a comfortable solution. What could not be accomplished by police force could be achieved by an approach of benevolence, correction and amelioration. How the Sarvodaya principle and procedure can supplement the basic aim of the legal system is fruitfully confirmed in the Chambal incident.

➤ **Concept of Grama Nyayalayas.**

The Gram Nyayalayas Act was passed in January 2009 (got President's assent on 7 January 2009) to provide for the establishment of Gram Nyayalayas at the grass roots level for the purpose of providing access to justice to the citizens at their doorsteps and to ensure that opportunities for securing justice are not denied to any citizen by reason of social, economic or other disabilities and for matters connected therewith or incidental thereto.

The latest in the reforms in the structure of the Indian judiciary is the Gram Nyayalayas. The State initiated other means to dispense justice such as Fast track Courts and Lok Adalats to address the colossal backlog of cases in the judiciary. Considering the sensitive issues of family the Family Courts were instituted in 1984 which also promotes speedy disposal, sensitive approach and relaxation of strict rules of evidence and procedure. The Gram Nyayalayas seems to be a combination of the objectives of several special courts in disparity to the regular stress on the adversarial trial.

The 114th Law Commission of India back in 1986 proposed the Gram Nyayalaya as a different court. The report recommended the concept of the Gram Nyayalaya had two objectives. While addressing the pendency in the subordinate courts was the major objective, other objective was the introduction of a participatory forum of justice. To make it participatory the Law Commission recommended that the Magistrate be accompanied by two persons who shall act as Judges, that the legal training of the Magistrate will be complemented by the knowledge of the lay persons who would bring in the much required socio-economic dimension to adjudication. It was proposed that such a model of adjudication will be best suited for rural litigation. However the participatory aspect has been set aside in current Act and we find the Gram Nyayalaya manned by the regular Judicial First Class Magistrate. The Law Commission also observed that such a court would be ideally suited for villages as the nature of disputes coming before such a court would be 'simple', 'uncomplicated' and obviously would be easy for solution and that such disputes should not be trapped in procedural claptrap.

This act extends to whole of India except the State of Jammu and Kashmir, the State Nagaland, the State of Arunachal Pradesh, and the State of Sikkim and to the tribal areas of country. The Tribal area under this act means the area specified in Part I, II, hA, and III of table below

paragraph 20 of the sixth Schedule to the Constitution within the State of Assam, the State of Meghalaya, the State of Tripura and the State of Mizoram, respectively.

➤ **Establishment of Gram Nyayalaya -**

The State Government shall, after consultation with the High Court establish one or more gram Nyayalaya for every Panchayat. Such establishments shall be in addition to the 'courts established under any other law for the time being in force'. The State Government shall, in accordance with this act specify the local limits of the area of jurisdiction, as well as increase or reduce or alter such limits of a Gram Nyayalaya.

The Nyayadhikari, shall preside the matters of dispute in the Gram Nyayalaya, and shall be appointed in consultation with the High Court. Any person eligible to be appointed as a judicial magistrate of first class shall be qualified to be appointed as Nyayadhikari. It is specifically mentioned in the act that appropriate representation shall be given to the members of Schedule Castes, the Scheduled Tribes, women and such other communities as may be specified in the notification by the State Government. Also the salary and other allowances and the terms and conditions of services shall be as of the Judicial Magistrate first class.

The Nyayadhikari shall not preside in the matters which he has interest or is otherwise involved or is related to any party to such proceedings. If it is so he shall refer the matter to the District Court or Court of Sessions, which shall subsequently transfer the matter to other Nyayadhikari. It shall be the duty of the Nyayadhikari periodically the village under his jurisdiction and conduct trials or proceedings. If the Gram Nyayalaya decides to hold mobile courts outside its headquarters it shall give wide publicity as to the date and place where it proposes to hold mobile court.

➤ **Jurisdiction of Gram Nyayalaya.**

The Gram Nyayalaya shall exercise both civil and criminal jurisdiction in the manner and to the extent provided under this Act. And act according to the Code of Criminal Procedure, 1973 or the Code of Civil Procedure, 1908 or any other law for the time being in force. The Gram Nyayalaya may take cognizance of an offence on a complaint or on a police report and shall-

- (a) try all offences specified in Part I of the First Schedule; and
- (b) try all offences and grant relief, if any, specified under the enactments included in Part II of that Schedule.

(c) shall also try all such offences or grant such relief under the State Acts which may be notified by the State Government under sub-section (3) of section 14.

➤ **Civil jurisdiction.**

The Gram Nyayalaya shall have jurisdiction to according to provisions contained in the Code of Civil Procedure, 1908 or any other law for the time being in force, and shall

- (a) Try all suits or proceedings of a civil nature falling under the classes of disputes specified in Part I of the Second Schedule;
- (b) Try all classes of claims and disputes which may be notified by the Central Government under sub-section (1) of section 14 and by the State Government under sub-section (3) of the said section. (2) The pecuniary limits of the Gram Nyayalaya shall be such as may be specified by the High Court, in consultation with the State Government, by notification, from time to time.

I. Civil Disputes :

Disputes arising out of implementation of agrarian reform and allied statutes

- 1. Tenancies -protected and concealed and contested.
- 2. Boundary disputes and encroachment.
- 3. Right to purchase.
- 4. Use of common pasture.
- 5. Entries in revenue records.
- 6. Regulation and timing of taking water from irrigation channel.
- 7. Disputes as to assessment.

II. Property Disputes:

- 1. Village and farm houses (possession).
- 2. Easements : Right of way for man, cart and cattle to fields and courtyards.
- 3. Water channels.
- 4. Right to draw water from a well or tubewell.

III. Family Disputes:

1. Marriage.
2. Divorce.
3. Custody of children.
4. Inheritance and succession — share in property.
5. Maintenance.

IV. Other Disputes:

1. Non-payment of wages and violation of Minimum Wages Act.
2. Money suits either arising from trade transaction or money lending.
3. Disputes arising out of partnership in cultivation of land.
4. Disputes as to use of forest produce by local inhabitants.
5. Complaints of harassment against local officials belonging to police, revenue, forest, medical and transport departments.
6. Disputes arising under the Bonded Labour System (Abolition) Act, 1976 and the Protection of Civil Rights Act, 1955.

The *Gram Nyayalaya* must have jurisdiction to try all offences which can be tried under the Code of Criminal Procedure, 1973, by the Judicial Magistrate First Class.

Though undoubtedly, the Family Courts Act, 1984 has been enacted and brought into operation, since custody of children has a distinct local flavour, the *Gram Nyayalaya* must have jurisdiction to deal with matrimonial disputes arising in rural areas.

The *Gram Nyayalaya* would be a body for administration of justice, and a legislation for the same would squarely fall under Entry 11-A of the Concurrent List.

At the end of the trial, if the decision is not by consensus between the parties, the Presiding Judge shall draw a brief statement of the dispute, the evidence led, the decision and the reasons in support of the decision. It shall be signed by all the three Judges. In the event of a difference of opinion, the decision of the majority will be binding. On a question of law, the view expressed by the Presiding Judge shall be binding on the lay Judges.

If the *Gram Nyayalaya* finds that it has no jurisdiction, it may make over the case to the District Court having jurisdiction for transfer of the case to the Court having jurisdiction.

As a first step, it is advisable to retain the procedure prescribed in the Code of Criminal Procedure, 1973 for trial of offences before the *Gram Nyayalaya*. An attempt, however, should be made to devise a still simpler procedure which may stand the test of Article 21 of the Constitution. The Evidence Act as such *stricto sensu* would not apply.

The parties appearing before the *Gram Nyayalaya* will be entitled to appear through lawyers of their desire both in civil and criminal proceedings. But the *Gram Nyayalaya* shall not adjourn the case, or change the venue, to accommodate the lawyer. The proposed National Legal Services Act should assign two lawyers to be attached to each *Gram Nyayalaya* who would be independent of party influence and who would assist as court officers in disposal of the disputes, and also would be readily available to the parties if they so desire.

➤ **The *Gram Nyayalaya* will have power to:**

- (a) Enforce the attendance of any person and examine him on oath;
- (b) Compel the production of documents and material objects;
- (c) Issue commissions for the examination of witnesses or if the witness is unable to appear before it on account of physical incapacity; and
- (d) Do such other things as may be prescribed.

The proceedings before the *Gram Nyayalaya* shall be conducted in the State language permitting the dialect of the locality to be used. Records shall be maintained in the State language and copies shall be furnished to those who desire the same. The decision shall be, if not by consent of the parties, recorded in the language of the court. No court fee shall be levied in the proceedings before the *Gram Nyayalaya*.

No appeal would lie against any decision of the *Gram Nyayalaya* except the one in which at the end of a criminal trial a substantive sentence is imposed. A revision petition would lie to the District Court of the district in which the *Gram Nyayalaya* is functioning. Only errors of law can be corrected by this revisional forum. Even if it comes to the decision that another view is possible, it would have no jurisdiction to interfere with the decision of the *Gram Nyayalaya*. A decision by peers should not be interfered with by a court presided over by a Judge considering the matter from a purely technical legal approach.

An appeal would lie to the Sessions Court against the decision by a *Gram Nyayalaya* in a criminal case in which a substantive sentence of imprisonment has been imposed. The appeal would be both on questions of fact and of law. The appeal should be dealt with according to the provisions of the Code of Criminal Procedure applicable to the appeals entertained against the decision of

a Judicial Magistrate, First Class. Any other view is likely to infringe Article 21 of the Constitution.

The jurisdiction of the *Gram Nyayalaya* is exclusive to the extent that in respect of matters covered by the jurisdiction conferred on the *Gram Nyayalaya*, the jurisdiction of any other court is ousted; such jurisdiction is not optional.

A simple method for execution of its orders must be provided for. The nature of the execution would depend upon the relief granted by the decision of the *Gram Nyayalaya*. Depending upon the relief granted, the fruits must be made available forthwith or soon thereafter. No prayer for granting interim stay till the party aggrieved by the decision prefers a revision petition should be entertained.

All authorities -revenue, police, forest -- operating at village and Tehsil level should be put under an obligation to assist the *Gram Nyayalaya* in discharging its functions and performing its duties. Failure on their part shall be treated as misconduct, and a *Gram Nyayalaya* should be empowered to take effective action against such defaulting authority.

For a uniform pattern of functioning of the *Gram Nyayalayas*, a simple code may have to be drawn up by the State Government in consultation with the High Court.

A liaison officer with a legal background should be appointed and attached to each *Gram Nyayalaya*. It shall be his duty to move around the villages regularly and as soon as he comes across violation of individual or group rights, on their behalf, take recourse to the court. A statutory provision shall be made not permitting *his locus standi* to be questioned by the party against whom the action is commenced.

Every *Gram Nyayalaya* will be furnished with a copy of a list drawn up by the State Government of non-governmental voluntary organisations operating in rural areas. The *Gram Nyayalaya* may enlist their help in reconciliation proceedings before resorting to adjudication. The list may also be useful in selecting the panel of lay Judges. This will make the participatory process far more effective.

The treble objects behind devising this new forum for resolution of disputes at grass-level is to provide a participatory system of justice; expeditious disposal of disputes; and justice taken to the doorstep of the people.

➤ **Salient Features Gram Nyayalaya Act, 2008**

- *Gram Nyayalayas* are aimed at providing inexpensive justice to people in rural areas at their doorsteps.
- The *Gram Nyayalayas* shall be court of Judicial Magistrate of the first class and its presiding officer (Nyayadhikari) shall be appointed by the State Government in consultation with the High Court.
- The *Gram Nyayalayas* shall be established for every Panchayat at intermediate level or a group of contiguous Panchayats at intermediate level in a district or where there is no Panchayat at intermediate level in any State, for a group of contiguous Panchayats.
- The Nyayadhikaris who will preside over these *Gram Nyayalayas* are strictly judicial officers and will be drawing the same salary, deriving the same powers as First Class Magistrates working under High Courts.
- The *Gram Nyayalaya* shall be a “Mobile Court” and shall exercise the powers of both Criminal and Civil Courts.
- The seat of the *Gram Nyayalaya* will be located at the headquarters of the intermediate Panchayat, they will go to villages, work there and dispose of the cases.
- The *Gram Nyayalaya* shall try criminal cases, civil suits, claims or disputes which are specified in the First Schedule and the Second Schedule to the Act.
- The Central Government as well as the State Governments have been given power to amend the First Schedule and the Second Schedule of the Act, as per their respective legislative competence.
- The *Gram Nyayalaya* shall follow summary procedure in criminal trial.
- The *Gram Nyayalaya* shall exercise the powers of a Civil Court with certain modifications and shall follow the special procedure as provided in the Act.
- The *Gram Nyayalaya* shall try to settle the disputes as far as possible

by bringing about conciliation between the parties and for this purpose, it shall make use of the conciliators to be appointed for this purpose.

- The judgment and order passed by the *Gram Nyayalaya* shall be deemed to be a decree and to avoid delay in its execution, the *Gram Nyayalaya* shall follow summary procedure for its execution.
- The *Gram Nyayalaya* shall not be bound by the rules of evidence provided in the Indian Evidence Act, 1872 but shall be guided by the principles of natural justice and subject to any rule made by the High Court.
- Appeal in criminal cases shall lie to the Court of Session, which shall be heard and disposed of within a period of six months from the date of filing of such appeal.
- Appeal in civil cases shall lie to the District Court, which shall be heard and disposed of within a period of six months from the date of filing of the appeal.
- A person accused of an offence may file an application for plea bargaining.

4.2.2 Socialist thought on law and justice:

India through its constitution adopts the policy of 'Welfare State'. The concept Welfare State means the welfare of the citizens, should be above all goals. The preamble of the constitution, assures to its citizen— social, economic and political justice; with equality of the status and of opportunity.

➤ Socialism:

According to *Cambridge Dictionary*, socialism means the set of beliefs, which states that people are equal and should share equally in the wealth of the country, or the political systems based on these beliefs. Thus one can understand that Socialism is a political theory or system, in which the means of production and distribution are controlled by the people and operated according to equity and fairness rather than market principles. The principal of socialism is that, the social states should strive for, right to equality, equal wages for equal works, minimum wages, right to free and compulsory education, right to property, etc.

➤ **Socialist Nation:**

Socialist nation means the policies of a country influenced with socialist thoughts. The term 'socialist' has been inserted in the preamble of Constitution by 42nd Amendment Act, 1976. This Amendment has merely explained the concept, which was already embedded in constitution. The word 'socialism' is used generally in democratic as well as socialistic constitutions. 'Socialist' means in general some form of ownership of the means of production and distribution by the State. The degree of State control will determine whether it is a democratic State or socialistic State. India has chosen, however, its own brand of socialism, i.e., mixed economy.

The word "socialist" implies a system of Government in which the means are wholly or partly controlled by the State. India's socialism is not a communist socialism but it is er a democratic one. The preamble has embodied both, socialism and democracy. This is a unique combination and the combination has been criticised by many writers. It has been said that democracy and socialism cannot co-exist. However, this criticism is not justified. In the view of modem socialist thinker, India emerging as a '*Welfare State*', would prevent the excess of exploitation and allow free competition without destroying individual initiative and without detriment to the political freedoms.

The Hon. Supreme Court in *Excel Wear's* case held that the addition of word 'socialist' might enable the courts to lean more in favour of nationalisation and State ownership of an industry. But so long as private ownership of industries is recognized and governs an overwhelming large proportion of our economic structure, the principle of socialism and social justice cannot be pushed to such an extent so as to ignore completely, or to a very large extent, the interest of another section of the public; namely, the private owners of undertaking.

The Hon'ble Supreme Court, in *D.S. Nakara 's* case held that "...the principal aim of a socialist State is to eliminate inequality in income and status and a decent standard of life". Court further observed that "...the basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. This amongst others on economic side envisaged economic equality and equitable distribution of income. This is a blend of Marxism and Gandhism leaning heavily towards Gandhism socialism. This is the type of socialism which we wish to establish in our county"

The Constitution of India declares India to be a socialist, republic as well as a secularcum-sovereign democratic republic. The preamble of a Constitution enlightens the path to which is to be follow by the State to set-up a sovereign, socialist, secular, democratic entity. Although, the concept of “socialism” has not been defined in the Constitution of India, it is commonly understood to mean “from each according to his ability to each according need”. (Malik and Raval). After the induction of the word “socialism” under the preamble of the Constitution (42nd Amendment), the State has aimed to eliminate inequality in life of people with the object of providing decent standards of life.

4.2.2.1. An enquiry through constitutional debates on the right to property.

➤ A Debate on right to property in India:

Originally “right to property” was a fundamental right. Under Art. 19(1) (f) and 31 the constitution guaranteed to the Indian citizen the freedom to acquire, hold and dispose of property. However, the State by the Art. 19 (5) was permitted to impose by law reasonable restrictions on this right in the interest of general public or for protection of the interest of any Scheduled Tribe. Anyone could invoke the Supreme Court under Art.32 on the violation of right to property. But, Constitution (44th Amendment), has converted this right from fundamental right to constitutional right by inserting a new Article in the form of Art.3 00-A therefore, consequently, Art. 19(1) (f) & (5) and Art.3 1 have been deleted. The effect of the Amendment is that a person will not be entitled to invoke the writ jurisdiction of the Supreme Court under Art.32 for violation of his right to property under Art.300 A. He will however, be entitled to invoke the jurisdiction of High Court under Art.226.

The Art. 300-A reads as follows — “*No person shall be deprived of his property save by authority of law*”. Thus the only condition to be complied with for the acquisition of private property right is law of legislature. Where the property of any one will be taken away appropriate compensation will be paid. No one can be deprived of the possession of any property without due process of law which is also the mandate of this Article. The authority of law must mean ‘due authority’ of a ‘valid’ law (*Jilabhai Kochar case*).

Abolition of the right to property as a fundamental right has been criticized by an eminent authority on Constitution Mr. H.M. Seervai. He opinioned that “the abolition of the right to property as fundamental right would destroy the other fundamental rights which are embodied in the

constitution”, he further states that the fundamental right to freedom of speech and expression including the freedom of press and freedom of association, the freedom to move freely throughout the territory of India to settle in any part of India, to carry business, profession or vocation in any part of India would be destroyed if the right to property, is not guaranteed as fundamental right and the obligation to pay compensation for private property, acquired for public purpose is not provided for.

After the amendment and insertion of Art., 300-A, the right to property is more definitely and largely secured under the constitution, than ever before. Now, the State will not be able to acquire private property without showing ‘public purpose’ and without paying ‘full compensation’ or the ‘market value’ of the property. If any amendment in the existing position is to be brought in, now it will not only require the procedure laid down in Art.368, but also the consent of the States as prescribed in the proviso to Art-368. Also, under Entry-42 of the Concurrent List Parliament and the State Legislatures have power to legislate on “acquisition or re-acquisition of the property”.

Although, the Government has an inherent right to take and appropriate the property belonging to individual citizen for public use. This power is known as *Eminent Domain*. It may be out of any public necessity. Keeping in mind the famous maxim *Salus populi est superema lex*, which means that the welfare of the people or the public is the paramount law and is also on the maxim *necessita public major est quam*, which means public necessity is greater than the private observed Justice B. K. Mukherjee (in *Bishambers* case). Thus property may be needed and acquired under this power for Government for office, libraries, and slum clearance projects of public interest, public schools, and hostels for students, colleges and universities, public highways, Public Park, railways lines, telephone lines, dams, drainage, sewer and water systems, airport and many other project of public interest, convenience and welfare schemes. That the existence of such power (compulsory acquisition of land by State) has been recognised in the jurisprudence of all civilised countries as conditioned by public necessity and payment of compensation observes the Hon. Supreme Court in *Kameshwar Sings* case.

According to Section 4 of the Land Acquisition Act, 1894 ; Whenever it appears to the Appropriate Government that land in any locality is ‘needed’ or is ‘likely to be needed’ for any ‘public purpose’ or for a ‘company’, a notification to that effect shall be published in the Official Gazette as well as in two daily newspapers circulating in that

locality of which at least one shall be in the regional language. Also the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality. , the date of publication of the notification shall be considered as the last of the date of such publication and of such public notice. Before the acquisition is held to be valid, it had to pass the test of Art. 19 (5) on the ground of procedural reasonableness as held in *R.C. Cooper Case*.

Depriving a citizen of his private property can be challenged on the ground that it does not provide for payment of compensation and is not for 'Public purpose'. In that case, it has been held that the 'law' and procedure enacted and prescribed for the deprivation of personal liberty must be just, fair and reasonable. So, if a law under Art.300-A does not provide for taking away private property of an individual for public purpose and for payment of compensation, it will be an unjust, unfair and unreasonable law and hence can be declared unconstitutional and void. Non-payment of compensation can be challenged as expressed in the decision of the Supreme Court in Maneka Gandhi's case and a series of cases following it.

4.2.3. Indian Marxist critique of law and justice -

Marxism'

Marxism is a philosophy that advocates revolutionary social change. It is a method of reversing the exploitations and tyranny of the strong over the weak. It responded to the deep-rooted differences between capital and labour by looking to the materialistic background of exploitation and historical instances of class conflicts. Karl Marx believed that law was a superstructure built on the economic foundations and essentially reflected the implications of class struggle. As instrument of domination in the hands of the economically powerful, law's function consisted in crushing and eliminating the minority, they reasoned. Marx's opinion was that the dictatorship of proletariat is deliberately built was to serve the interests of the classless society on a footing of equality and gradually enable withering away of state.

Indian Marxism

Jaya Prakash Narayan: (1902-1979) was greatly influenced by the Russian Revolution in 1917. In his booklet *Why Socialism!* Narayan defended the new social order that took shape under the leadership of Stalin. He believed that the *New Russia* was free from exploitation as any other developed society free from pleasant imagination. He even supported 'political violence' in Russia as its aim was towards the betterment of the conditions of the proletarians and the peasants. Narayan laid great stress on the economic foundations of politics. He argued that inequality was not due to the natural inequalities between men in respect of intelligence, moral stamina, and physical strength. He disliked the unchecked economic inequality prevalent in society and urged for a proportionate control of the means of production. The solving of economic problems had a priority in his thought.

Ram Manohar Lohia (1910-1967) He applauded Marx's criticism of private property, but did not accept his theory of class struggle. He appreciated Marx as well as Gandhi as he thought "there are priceless treasures to learn" from both, but didn't want to follow either of them, for him "to become either a Gandhite or a Marxist" was not a good idea. In his book, *Marx, Gandhi and Socialism*, he broadly accepted the Marxian analysis of capitalism as applied to England and Germany of those days. The best method, for him, to achieve the economic objectives of Marxism was to adopt the Gandhian techniques of *Salyagraha* and complete decentralization in the economic and political spheres. His thinking was that if socialism could absorb the essence of Gandhism, it could acquire an integral character. He stressed on economic development and eliminating all forms of exploitation as it was Marxian in orientation. His concern for the development of the total personality of an individual, ethical values and cultural ethos of the country were Gandhian in outlook.

Pt. Jawaharlal Nehru. (1889-1964): In *The Discovery of India*, Nehru wrote, "A study of Marx and Lenin produced a powerful effect on my mind and helped me to see history and current affairs in a new light." Nehru was fascinated by Marxism because he found it free from dogmatism. It had a scientific outlook and attitude to action. Although according to him Marxist theory was not complete

he thought of it as a cornerstone of the science which according to him a socialist must advance in all direction of they did not want to fall. For Nehru Marxism was an indispensable guide to understand history and social phenomenon.

4.2.4 Naxalite movement: Causes and cure.

The *adhiars* i.e the tenant was exploited at the hand of the *jotedars* i.e. the landlords. There was a discontent peasants and landless labourers. The organised efforts initially by the Communist Party and later on by in West Bengal got together to express their frustration in the form of organised efforts. The share of *adhiars* was to undergo deductions on account of supply of cattle plough, seeds and loan of paddy at a totally disproportionate rate. Free-of-cost maintenance of *jotedars'* labourers, stable and granary was also the burden of *adhiars*. The ever-increasing burden of debt, loss and fraud, in addition to feudal practices of social hierarchy, provoked the peasants to revolt against the system. Added to this were the anti-people activities of gardeners and estate owners. Thus the relation between the landlords (*jotedars*) and tenants (*adhiars*) had become deepened with the exploitative practices about crop sharing and money lending.

➤ Naxilism:

In remote area of Darjeeling district there is a cluster of villages known as Naxalbari. In this village in 1967 the revolutionary peasants losing faith in legal remedy they resorted to revolutionary thoughts and strategies developed by leaders under influence of Marxism. Which latter was recognized as Naxilism derived after the name of the village cluster. Naxalbari proclaimed that the existing economic and political could be overthrown by the oppressed classes only through the use of revolutionary violence and then regenerated India could arise. Ultimately both the fractions the CPI and CPI(M) abandoned Marxism —Leninism and Naxalbari revolutionaries were guided by revisionist orientation, 'the new orientation' and the 'new concepts' preached by Khrushchev and his successors. Guided by Mao Tsetung thought Charu Majumdar made his contribution to what brought about the Naxalbari Struggle writes Suniti Kumar Ghosh.

➤ Causes of Naxalite movement:

The discontent peasants and landless labourers in West Bengal got together to expressed their frustration in the form of organised efforts.

The *adhiars* i.e the tenant was exploited at the hand of the *jotedars* i.e. the landlords. The share of *adhiars* was to undergo deductions on account of supply of cattle plough, seeds and loan of paddy at a totally disproportionate rate. Free-of-cost maintenance *of jotedars'* labourers, stable and granary was also the burden of *adhiars*. The ever- increasing burden of debt, loss and fraud, in addition to feudal practices of social hierarchy, provoked the peasants to revolt against the system. Added to this were the anti-people activities of gardeners and estate owners. Thus the relation between the landlords (*lotedars*) and tenants (*adhiars*) had become deepened with the exploitative practices about crop sharing and money lending.

In the report of an Expert Group submitted to the Planning Commission, in April, 2008 states that, "The analysis of roots of discontent, unrest and extremism rely upon extensive discussions based on official reports in the past, publications from the extremist groups, reports of human rights groups, books by observers of such developments, and media coverage in the background of field insight and interaction of members of the Expert Group. This has revealed that the causes are varied depending on characteristics of an area; social, economic and cultural background; a history of not working out solutions to lingering structural problems; and ineffective application of ameliorative steps undertaken since Independence and more so since the mid-sixties of the last century. Dissent movements, including the extremist Naxalite movement, are not confined to difficult hilly and forested areas but cover large contiguous tracts in the plains. They are not limited to dry land areas of recurring crop failures but extend to irrigated commands of major irrigation systems, as in the state of Bihar. The causes are, therefore, complex. The intensity of unrest resulting in extremist methods and effort to resolve issues through violent means as a challenge to state authority is in response to the gathering of unresolved social and economic issues for long durations. It creates' the impression that policy making and administration responds to extreme means.

The more recent development is in the emergence of CPI (Maoist) after the merger and consolidation two powerful naxalite streams in September, 2004. This new formation, since its inception, is defining the official understanding of the extremist phenomenon of the level of the state as well as the Union Government. This has appeared in the public perception as a simplistic law-and-order face-off between the official coercive machinery and this more radical extremist political formation. The social consequence results, then, in undermining instruments of

social and economic amelioration as well as processes of democratic exchange to resolve persisting issues. This is the crux of the problem". After perusing the report of experts and the report of Experts (2008) and the report of the Ministry of Home Affairs (2003 -04) we get to understand that the Naxalite movement is principally a political action for armed conquest of State power.

➤ **Naxalite movement and its cure.**

In 1970 Jayaprakash Narayan thought to give solution to the Naxalite problem. For him the Naxalism was basically a social, economical, political, and administrative problem and to a small extend a question of law and order. He suggested that arrests, imprisonments, and shootings could not put down Naxalism or any other kind of revolutionary violence. Therefore he undertook the work in Musahari of Bihar, the Naxal hit area, to wean the area away from violence included establishment of the *Gram Sabha*; redistribution of one twentieth of the land covered by *gramdan*; setting up of *gramkosh*; organisation *gram shanti sena*, and legal confirmation of *Gramdan*. By redistribution of land collected through gentle persuasion He looked into the problem of landless labourers and cases of injustice and oppression. He was of the opinion that the laws agrarian reform laws and Minimum Wages Act were not implemented properly and that had led to the growth of the rural violence. Law furnishes a false sense of promise and expectation, ultimately leading to self- deception, dissatisfaction and frustration.

Few suggestions to bring an end to violence by the tribals can be discussed as follows.

- Due to acquisition of land involuntary displacement of tribes ultimately turning them landless.
- Indiscriminate land acquisition should be stopped.
- The land acquired in the name of public should be restricted to public welfare activities and matters of national importance.
- The proposals of Land Acquisition must be such that they minimize displacement and secure the rights of affected displaced persons.
- The law must be so formulated so as to protect poor and vulnerable sections in case of direct acquirement by companies.
- The provision for rehabilitation and resettlement of persons whose lands are procured by companies or other private interests should be compulsory on the State.

- The 'Acquired land' which is not utilised should be give back to previous land owners.

4.3 Questions for self learning

Q. 1 Answer in detail

- 1) Explain the basic concept of Ganhi's Sarvodaya.
- 2) Discuss the contribution of Vinoba Bhave and Jayaprakash Narayan for movement of Sarvodaya.
- 3) Explain the importance of Gram Nyayalayas
- 4) Salient Features Gram Nyayalaya Act. 2008.
- 5) Discuss in detail the evolution of right to property in constitution.
- 6) Discuss with the help of case law the effect Marxist's views on law and justice in India.
- 7) What are the reasons for development of Naxalite movement?

Q. 2. Write notes on

- 1 The jurisprudence of Sarvodaya.
- 2 Mahatma Gandhi's concept of Sarvodaya
- 3 Vinoba Bhave the exponent of Sarvodaya movement
- 4 Programme of Sarvodaya
- 5 Jayaprakash Narayan an Surrender of Dacoits.
- 6 Jayaprakash Narayan's notion of total revolution
- 7 Jayaprakash Narayan and Sarvodaya.
- 8 Concept of Grama Nyayalaya.
- 9 Socialism:
- 10 India a Socialist Nation
- 11 Marxism
- 12 Pt. Jawaharlal Nehru & Indian Marxism
- 13 Causes of Naxalite movement
- 14 Naxalite movement and its cure.

4.4 Let us sum up

Sarvodaya aims to establish a new social order on the basis of truth. Love and non-violence. It is highly critical of the state and its government, because both are based on force and coercion. Gandhism and Sarvodaya are inter-related to each other. After the Independence of India, Gandhi's devoted disciple Acharya Vinoba Bhave established a Sarvodaya Society. Later on, Jayaprakash Narayan joined the Sarvodaya movement. Vinobaji's *Bhoodan and Gramdan movements* are to be understood as specific schemes of Sarvodaya movement. Jayaprakash Narayan visualized the plan of total revolution as continuity or rather a new version concept of Sarvodaya. By "total revolution"

he meant inclusive revolution affecting all aspects of social life including individual life. His solution to the nuisance of Chambal dacoity. The Gram Nyayalayas Act was passed in January 2004 (got President's assent on 7 January 2004) to provide for the establishment of Gram Nyayalayas at the grass roots level for the purpose of providing access to justice to the citizens at their doorsteps and to ensure that opportunities for securing justice are not denied to any citizen.

In cluster of villages known as Naxalbari the peasants resorted to revolutionary thoughts and strategies developed by leaders under influence of Marxism, which latter was recognized as Naxilism. Agrarian reform laws and Minimum Wages Act were not implemented properly and that had led to the growth of the rural violence. Establishment of the Gram Sabha; redistribution of one twentieth of the land covered by *gramdan*; *setting up of gramkosh*; organization *gram shanty sena*; and legal confirmation of *Gramdan* can be appropriate solution.

4.5 Glossary

Socialism: According to *Cambridge Dictionary*, socialism means the set of beliefs, which states that all people are equal and should share equally in the wealth of the country, or the political systems based on these beliefs.

Socialist Nation: Socialist nation means the policies of a country influenced with socialist thoughts. The term 'socialist' has been inserted in the preamble of Constitution by 42nd Amendment Act, 1976.

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Unit - 5

Nature of judicial process

5.0 Objectives

5.1 Introduction

5.2 Topic Explanation

5.2.1 Judicial process as an instrument of social ordering

5.2.2 Judicial process and creativity in law - common law model - Legal Reasoning and growth of law - change and stability.

5.2.3 The tools and techniques of judicial creativity and precedent.

5.2.4 Legal development and creativity through legal reasoning under Statutory and codified systems.

5.3 Questions for self learning

5.4 Let us sum up

5.5 Glossary

5.6 References

5.0 Objectives

After studying this unit the student will be able to understand that...

- 1) Judicial process as an instrument of social ordering.
- 2) Judicial process and creativity in law- common law model- Legal Reasoning and growth of law- change and stability.
- 3) The tools and techniques of judicial creativity and precedent.
- 4) Legal development and creativity through legal reasoning under statutory and codified systems.

5.1 Introduction

The American Supreme Court Judge, Justice Cardozo was the first to mention about the Judicial Process in his famous book 'The Nature of Judicial Process'. Justice Cardozo has delivered lectures on the nature of judicial process in 1921 at Yale University which later on created the milestone in the history of law. He is a pioneer of the subject 'Judicial Process'. According to him everything done by judge in the process of delivery of justice is called Judicial Process. From the institution of the suit till the delivery of judgment, the procedure follows by the court is called the Judicial Process.

5.2 Topic Explanation

5.2.1 Judicial process as an instrument of social ordering

Everything done by judge in the process of delivery of justice is called Judicial Process. Judicial process is basically the path or the method of attaining “justice”. Justice is the approximation of the ‘is’ to ‘ought’. Judicial power is involved in the legal ordering of facts and is under the obligation to approximate ‘is’ with the ‘ought’. This ordering is nothing but the performance of administrative duties. Supremacy of law implies that it is equally applied and nobody is above the law.

The objective nature of the judicial process in the words of Justice Cardozo is as follows:

“The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.”

Judiciary is one pious system. The judiciary, the principal system present in all the societies created, mainly to fight injustice, lawlessness and uphold what is just, right and fair. The judicial process is very essential for the smooth running of country as well as the progress of country. Apart from the regular arbitrator, judges have to give decision on different issues touching the national importance. Hence the versatile role of the judges is important in the country and some time it is the supreme authority which looks for the welfare of the people and country.

Law cannot be efficient and useful without taking recourse of judicial process in maintaining social order. Justice P. N. Bhagwati and Justice V. R. Krishna Iyer, both were of the opinion that law is an instrument of social change, social justice and social ordering. Justice Rangnath Mishra, former C.J.I., has rightly observed that ‘Law is a means to an end and justice is the end.’ Therefore, undoubtedly we can say that Judicial Process, which operates laws, is an instrument of social ordering.

We always approach, the law, as the “object” of legal cognition and interpretation. The law itself is a product of the same tradition, the same culture.

Thus, we can argue for the inevitable inter connectionless of the subject and object of legal cognition and interpretation already on this philosophical-hermeneutical basis. But, again, we should be aware of the specifics of laws and legal scholarship: the inter-relation between law and legal scholarship display peculiarities absent form, for example, other human and social sciences. These peculiarities are due to what might be called the dual citizenship of legal scholarship: legal science is a citizen of both the realm of science and the realm of law; legal science is at one and the same time a scientific and a legal practice.²⁸

5.2.2 Judicial process and creativity in law - common law model - Legal Reasoning and growth of law - change and stability.

➤ **Backward Classes of the Society**

In “*Indra Sawhney v. Union of India*”, AIR 1993 SUPREME COURT 477, the Apex Court has innovated concept of ‘creamy layer test’ for securing benefit of social justice to the backward class, needy people, and excluded persons belonging to ‘creamy layer .’

➤ **Bigamy.**

Bigamy is a social evil which often creates social disorder. The Apex Court has tightened the noose over those avoiding punishment by taking plea of conversion to Islam. In “*Lily Thomas v. Union of India*”, AIR 2000 S C 1650, it was held by the Apex Court that the second marriage of a Hindu husband after conversion to Islam without having his first marriage dissolved under law, would be invalid, the second marriage would be void in terms of the provisions of Section 494, IPC and the apostate-husband would be guilty of the offence punishable under Section 494, IPC. This verdict of the Apex Court would certainly be helpful in eliminating social evil of bigamy.

➤ **Bride Burning**

In “*Paniben v. State of Gujarat*”, AIR 1992 S C 1817, the Apex Court held that it would be a travesty of justice if sympathy is shown when cruel act like bride burning is committed. Undue sympathy would be harmful to the cause of justice. The Apex Court directed that in such cases heavy punishment should be awarded.

➤ **Bonded Labourers**

Bandhua Mukti Morcha v. Union of India”, AIR 1984 S C 802, is a good example of social ordering by way of judicial process. The Apex Court has tried to eliminate socio-economic evil of bonded labour, including child

labour and issued certain guide lines to be followed, so that recurring of such incidents be eliminated.

➤ **Caste system and Judicial Process**

In “Lata Singh v. State of U. P.”, AIR 2006 SC 2522, the Apex Court has given protection to the major boy and girl who have solemnized inter-caste or inter-religious marriage.

➤ **Child Labour**

In “M.C. Mehta v. State of T.N.”, AIR 1997 S C 699, the Supreme Court has issued direction the State Governments to ensure fulfillment of legislative intention behind the Child Labour (Prohibition and Regulation) Act (61 of 1986). Tackling the seriousness of this socio-economic problem the Supreme Court has directed the Offending employer to pay compensation, a sum of Rs. 20,000/ for every child employed.

➤ **Child Prostitution**

In Gaurav Jain v. U.O.I. AIR 1997 SC 3021, the Apex court issued directions for rescue and rehabilitation of child prostitutes and children of the prostitutes.

➤ **Dowry Death**

Dowry death is perhaps one of the worst social disorders prevailing in the society, which demands heavy hand of Judicial Process to root-out this social evil. In “Raja Lal Singh v. State of Jharkhand”, the Supreme Court has laid down that there is a clear nexus between the death of Gayatri and the dowry related harassment inflicted on her, therefore, even if Gayatri committed suicide, S. 304-B of the I. P. C. can still be attracted.

➤ **Equality: Man and Woman**

In AIR India v. Nargesh Meerza, AIR 1981 SC 1829, the Apex Court declared that – “the provision of AIR India Service Regulation 46 (i) (c)” or on first pregnancy whichever occurs earlier” is UN-constitutional, and is violative of Article 14 of the constitution.

➤ **Female Foeticide and Judicial Process.**

Leading to unhindered female infanticide affecting overall sex ratio in various states causing serious disorder in the society. In “Centre for Enquiry into Health and Allied Themes (CEHAT) v. Union of India”, AIR 2001 S C 2007, the Apex Court has held that despite the PNDT Act being enacted by the Parliament five years back, neither the State Governments nor the Central Government has taken appropriate actions for its implementation.

Hence, directions are issued by the Court for the proper implementation of the PNDT Act, for eliminating this Social evil.

➤ **Harassment of Woman**

The Apex Court in *Vishaka v. State of Rajsthan* (AIR 1997 SC 3011) created law of the land holding that the right to be free from sexual harassment is fundamental right guaranteed under Articles 14, 15 and 21 of the Constitution. The Court has issued guidelines to be followed by employer for controlling harassment of woman at her work place.

➤ **Immoral trafficking**

Immoral trafficking has now become a widespread social disorder. This is a deep rooted social evil has to be controlled. The Apex Court is of the opinion that accused persons are to be dealt with heavy hands of the Judicial Process in such cases. In “*State of Maharashtra v. Mohd.Sajid Husain Mohd. S. Husain*”, AIR 2008 SUPREME COURT 155 , the Court has rejected application for anticipatory bail, in a case where a minor girl was driven to flesh trade by accused persons , comprised of police officers, politicians and all were absconding for long time.

➤ **Maintenance**

In *Mohd. Ahmed Khan v. Shah Bano*, AIR 1985 SC 945, the Apex Court , for the first time, granted maintenance to divorced Muslim woman under section 125 Cr. P. C., ignoring her personal law, keeping in view essence of equality before law.

In “*Dimple Gupta v. Rajiv Gupta*”, AIR 2008 S C 239, the Apex Court has granted Maintenance to illegitimate child under S. 125 Cr. P.C. This path breaking judgment has given breath to the innocent children who were victim of no fault of their own. These verdicts are judicial instruments of social ordering.

➤ **Outraging Modesty of Woman**

Outraging the modesty of a woman is a serious social disorder has to be taken seriously by courts during the course of Judicial Process. In “*Kanwar Pal S. Gill v. State (Admn. U. T. Chandigarh)*”, the accused slapped on the posterior of the prosecutrix, Mrs. Rupan Deol Bajaj, an I. A. S. officer , in the presence of other guests. The accused, who was then the D.G.P. of the State of Punjab. The CJM convicted him under Sections 354 and 509 IPC. Appeal filed by the accused was dismissed by the Apex Court. That by itself is setting a model for others and it is a good example in connection to social ordering.

➤ **Prevention of Atrocity**

When members of the S. C. and S. T. assert their rights and demand statutory protection, vested interest try to cow them down. In these circumstances, anticipatory bail is not maintainable to persons who commit such offences; such a denial cannot be considered as violative of Article 14 as held in “State of M.P. v. R. K. Balothia”, AIR 1995 S C 1198.

➤ **Rape**

In “State of M.P. v. Babulal”, AIR 2008 SUPREME COURT 582, the Court has laid down the principle that rape cases need to be dealt with sternly and severely. A socially sensitized Judge is a better armour in cases of crime against women. Once a person is convicted for an offence of rape, he should be treated with a heavy hand and must be imposed adequate sentence. This goes to show that how the Supreme Court is keen in eliminating social disorder by the heavy hands of judicial process.

5.2.3 The tools and techniques of judicial creativity and precedent

Some landmark cases decided by the Honorable Supreme Court:

➤ **Public Interest Litigation (PIL):**

The seeds of the concept of public interest litigation were initially sown in India by Krishna Iyer J., in 1976 in *Mumbai Kamagar Sabha v. Abdul Thai*²⁹ and was initiated in *Railways v. Union of India*, wherein an unregistered association of workers was permitted to institute a writ petition under Art. 32 of the Constitution for the redressal of common grievances. Krishna Iyer J., enunciated the reasons for linearization of the rule of Locus Standi in *Fertilizer Corporation case*³⁰ vs. Union of India and the ideal of ‘Public Interest Litigation’ blossomed in *S.P. Gupta and others vs. Union of India*³¹.

So far as Public Interest Litigations are concerned, firstly it is a remedy for justice in true sense “The Fundamental Rights are intended not only to protect individual’s rights but they are based on high public policy. Liberty of the individual and the protection of his Fundamental Rights are the very essence of the democratic way of life adopted by the Constitution Court would refuse to circumscribe them or to curtail them except as provided by the Constitution”³². Secondly, the Court has broadened the scope of these rights by interpretative techniques. The Court has rightly observed: ... “it must be remembered that Fundamental Rights are constitutional

guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by narrow and constricted judicial interpretation³³.

The Constitution of India guarantees equal rights to all citizens, irrespective of race, gender, religion, and other considerations, and the “directive principles of state policy” as stated in the Constitution obligate the Government to provide to all citizens a minimum standard of living but many times the promise has not been fulfilled. The greater majority of the Indian people have no assurance of two nutritious meals a day, safety of employment, safe and clean housing, or such level of education as would make it possible for them to understand their constitutional rights and obligation. Indian newspapers abound in stories of the exploitation by landlords, factory owners, businessmen, and the state’s own functionaries, such as police and revenue officials- of children, women, villagers, the poor, and the working class.

India’s higher courts and, in particular, the Supreme Court have often been sensitive to the grim social realities, and have on occasion given relief to the oppressed, the poor do not have the capacity to represent themselves, or to take advantage of progressive legislation. In 1982, the Supreme Court conceded that unusual measures were warranted to enable people the full realization of not merely their civil and political rights, but the enjoyment of economic, social, and cultural rights, and in its far-reaching decision in the case of *People’s Union for Democratic Rights v. Union of India*³⁴ it recognised that a third party could directly petition, whether through a letter or other means, the Court and seek its intervention in a matter where another party’s fundamental rights were being violated. In this case, advertent to the Constitutional prohibition on “beggar”, or forced labour and traffic in human beings, *People’s Union for Democratic Rights* submitted that workers contracted to build the large sports complex at the Asian Game Village in Delhi were being exploited. *People’s Union for Democratic Rights* asked the Court to recognize that “beggar” was far more than compelling someone to work against his or her will, and that work under exploitative and grotesquely humiliating conditions, or work that was not even compensated by prescribed minimum wages, was violative of fundamental rights. As the Supreme Court noted, “The rule of law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the status quo under the guise of enforcement of their civil and political

rights. The poor too have civil and political rights. But this traditional rule was considerably relaxed by the Supreme Court in its recent rulings”.

After Peoples Union for Democratic Rights case, the court now permits Public Interest Litigation or Social Interest Litigation at the instance of “Public spirited citizens” for the enforcement of constitutional & legal rights of any person or group of persons who because of their socially or economically disadvantaged position are unable to approach court for relief. Public interest litigation is a part of the process of participate justice and standing in civil litigation of that pattern must have liberal reception at the judicial door steps.

In the Judges Transfer Case⁻³⁵; Court held Public Interest Litigation can be filed by any member of public having sufficient interest for public injury arising from violation of legal rights so as to get judicial redress. This is absolutely necessary for maintaining Rule of law and accelerating the balance between law and justice.

It is a settled law that when a person approaches the court of equity in exercise of extraordinary jurisdiction, he should approach the court not only with clean hands but with clean mind, heart and with clean objectives Public Interest Litigation is a strategic arm of the legal aid movement which intended to bring justice. Rule of Law does not mean that the Protection of the law must be available only to a fortunate few or that the law should be allowed to be abused and misused by the vested interests.

➤ **Environment and the Supreme Court:**

The efforts of the Apex Court in environmental pollution control through public interest litigation are indeed praiseworthy. If there is any lacuna in the existing system legal system or administration is not well equipped to meet the challenge, the Honourable Supreme Court of India shouldered the responsibility by entertaining a number of petition or writs on environmental protection, is the champion for the causes of pollution control.

The Supreme Court established the, rights to be free from pollution for the first time³⁶. Public interest litigation was filed for the closure of certain lime stone quarries on the ground that there was serious deficiency regarding the safety and hazards in them. The court had appointed a commission for the purpose of inspecting certain lime stone quarries. The commission had reported for the closure of them having regard to adverse impact of mining operations there in and was causing for a large scale of pollution by the lime stone quarries. On the basis of the report of the Commission the Court ordered the government to take

step to control the affecting the safety and health of the people living in the areas otherwise close them.

Due to the negligence of the management in maintenance and operation of the caustic chlorine plant of the company there was a leakage of chlorine gas from the Shriram Food and Fertilizers Manufacturing Plant resulting in the death of one person and causing hardships to the workers and the residents of the locality. This matter was brought before the Court through Public Interest Litigation³⁷. The Supreme Court directed the company manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in the neighbourhood, to take all safety measures before reopening the plant. The court held that compensation should be in the financial capacity of the erring company. It is also held that the directors and the officers who are responsible for the leakage shall be liable to pay the dangers. The company management was directed to deposit a sum of Rs twenty lakhs by way of securing payment of compensation.

In a PIL, brought before the Apex Court regarding the pollution of the Ganga³⁸ by tanneries at Jajman near Kanpur the Court observed that no effective steps have been taken by the government to stop the grave public nuisance caused by the tanneries at Jajman. Kanpur notwithstanding the comprehensive provision contained in the Water (Prevention and Control of Pollution) Act and the Environment (Protection) Act. It held that the Court was entitled to order the closure of tanneries unless they took steps to setup treatment plants.

In a Public Interest Litigation the Apex Court laid down the guidelines for the protection of workers' health. It held that living in polluted environment endangers the life of human beings, animals and plants³⁹.

In the *Ganga water pollution case*³⁰, the Apex court issued appropriate directions for the prevention of pollution of the water of the river Ganga. The Court directed all the Mahapalikas and Municipalities which have the jurisdiction over the areas through which the river Ganga flows. (i) to get the dairies shifted to a place outside city and arrange for the removal of wastes accumulated at the dairies so that it may not reach the river Ganga. (ii) to lay the sewage line wherever it is not constructed. (iii) to construct public latrines and urinals for the use of poor people free of charge. (iv) to ensure that dead bodies or half burnt bodies are not thrown in the river Ganga. (v) to take action against the industries responsible for pollution and (vi) to grant licenses to establish new industries to those who make adequate provisions for the treatment of

trade effluents flowing out of the factories. When a plea was taken about the financial inability to set up treatment plant the Court observed that

“Just like an industry which cannot pay minimum wages to its workers cannot be allowed to exist; a tannery which cannot set up a primary treatment plant cannot be permitted to continue to be in existence for the adverse effect on the public at large’.

Pollution in Delhi⁴¹, Public interest litigation against the pollution in Delhi by increasing number of petrol and diesel driven vehicles was admitted and the court directed the Delhi administration to make the Motor Vehicles Act, 1988 effective from April, 1, 1991 and to implement it seriously and effectively. The court cleared that the public interest litigation of pollution under Article 32 is maintainable at the instance of affected person or even by a group of social workers or journalist. It also held that public interest litigation is also maintainable for ensuring enjoyment of pollution-free water and air which is not included in the right to life under Article 21 of the Constitution of India⁴²

The Apex Court directed the government to spread the knowledge and the need of protection of the environment through the audio-visual media. The court also directed the government to introduce the subject of environment as a compulsory subject in schools and colleges⁴³. A litigation regarding the pollution caused by enormous discharge of effluents by the tanneries into the agricultural fields, waterways, open lands and rivers rendering the river water unfit for human consumption contaminating the sub-soil water and spoiling the physio chemical properties of the soil and making it unfit for agricultural purposes⁴⁴. Further it observed that though the State government conducted water tests it failed to conduct fluoride test as a result the health of large number of in the village was affected.

The court ordered free medical treatment to be given to these people besides awarding compensation to certain categories of persons⁴⁵. Also it issue direction to the Delhi administration for checking the vehicle pollution in Delhi⁴⁶. In furtherance the Apex Court also issued the following directions: Implement a direction to restrict playing of commercial vehicles including taxis which are 15 years old, by 2nd October, 1998. Restriction on plying of goods vehicles during the day time shall strictly enforced by 15th August, 1998. Expansion of pre-mixed oil dispensers (Petrol and 2T Oil) shall be undertaken by 31st December, 1998. Regarding the commercial vehicles the court directed that all commercial/ transport vehicles which are more than 20 years old shall be

phased out and not permitted to play National Capital Territory of Delhi after 2nd October, 1998, and all such commercial transport vehicles which are 17 to 19 years old shall not ply after 15th November, 1998⁴⁷

The Supreme Court held that though industries are of vital impotence to the country's development but they cannot be allowed to destroy the ecology, degrade the environment and pose a health hazard and cannot be permitted to continue their operations unless set up pollution control devices. In this litigation, the Supreme Court elaborated on the '***polluter pays principle***' as follows;

“The polluter pays principle’ interpreted by this court means that absolute liability from the harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradations. Remediation of the damaged environment is part of the process of ‘sustainable development’ and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost for reversing the damaged ecology”.

The Court by recognizing the “***polluter pays principle***” in pollution cases wants to indicate that the polluter should pay for the administration of the pollution control system and the polluter should pay for the consequences of the pollution.

The Apex Court directed the government for the prevention of industrial pollution as under:

“The Central Pollution Control Board and the A.P. State Pollution Control Board shall jointly prepare a scheme of action for controlling the industrial pollution and for disposal of industrial waste as also for reclaiming the polluted lands and the polluted water supply. The scheme will contain immediate steps to be taken either by the State of A.P. or by the industries concerned giving particulars there of setting out a goal to be achieved every four months as also the step to be taken on a long term a goal to be achieved every four months as also the step to be taken on a long term basis for prevention of industrial pollution and the stages by which these long term measures have to be completed so that every four months both, the pollution Control Board can give a report as to whether the measures prescribed have been carried out or not”⁴⁸

Vardharajan Committee was appointed to submit the report regarding the yellowing of the Taj Mahal in Agra. As per the findings of the Committee, the court found that the foundries. Chemical or hazardous industries and the Mathura refinery were major sources of pollution in the area. The court ordered the industries to shift away from the Taj Trapezium or to switch over to gas as fuel instead of coke and those

industries which did not switch over to gas were ordered to shut down. At the same time the court had taken the rights and benefits which a worker should receive in case the industry was to close down or to stop its operation. The court gave certain direction in the interest of workers as the court felt that the workers were also the victims of these polluting industries and that the issue of pollution should not be resolved at the cost of poor people's livelihood⁴⁹. The Apex Court has a major role in the development of Environmental Laws in India. It is hence clear that by evolution of Public Interest Litigation has created "justifiable environmental rights" and "environmental jurisprudence".

5.2.4. Legal development and creativity through legal reasoning under statutory and codified systems.

Articles 14, 15, 16, 17, 38,39A and 42 of the constitution deals with facets of social Justice. Needless to say that, Court have played very wide role in interpreting the constitution for achievement of social justice. One can see how the Supreme Court of India has evolved, case after case, various Principles of Justice and doctrines for upgrading social order. Many areas of the law have been developed by the decision of Judges for example, the tort of negligence.

The speed at which the law develops can depend on whether the judge is an active or passive law maker. Judicial law making inheres in the incompleteness of any system of rules. The Judge is supposed to resolve disputes in accordance with pre-existing legal rules, but quite often Pre-existing legal rules do not provide a definitive answer. When confronted with rule. But because abhorrence of retroactive law is so great, judges and parties are reluctant to admit that judicial law making fills the gaps in the pre-existing rule.

Supreme Court is employing article 142 as a tool to pass final decisions, apart from and without recourse to the law of the land. In case of Nilabati Behera Vs. State of Orissa [(1993)] 2 SCC 746] the Supreme Court has evolved 'new tools' and moulded remedy to provides redressal in case of deprivation of fundamental right like that under Article 21. Provisions of Article 142 and 226 of constitution, Section 482 Cr.P.C. and 151 of CPC though gives inherent power to the supreme court an high court to render complete justice, it means only to fill the gap within the parameter of the constitution and statue and it not mean to supersede the constitution or statute.

5.3 Questions for Self learning:

Q. 1. Answer the following in detail

1. Judicial process as an instrument of Social ordering comment
2. Do you agree that judicial process generates creativity in law?
3. Explain with help of decided cases how 'Legal Reasoning' help

- in growth of law
4. Discuss the various tools and techniques of judicial creativity.

Q.2. Write notes on

1. Precedent.
2. Legal reasoning
3. Creativity in law.
4. Legal development

5.4. Let us sum up

Justice Cardozo was the first to mention about the Judicial Process, in his famous book 'The Nature of Judicial Process', everything done by judge in the process of delivery of justice is called Judicial Process. It is basically the path or the technique of accomplish "justice". Justice is the approximation of the 'is' to 'ought'. The judicial process is very essential for the smooth running of country as well as the progress of country. Judicial law making inheres in the incompleteness of any system of rules.

5.5. Glossary

Judicial Process: Everything done by judge in the process of delivery of justice is called Judicial Process.

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Unit - 6.

Special Dimensions of Judicial Process in Constitutional Adjudications

6.0 Objectives

6.1 Introduction

6.2 Topic Explanation

6.2.1 Notions of judicial review

6.2.2 Role' in constitutional adjudication - various theories of judicial Role.

6.2.3 Tools and techniques in policy-making and creativity in constitutional adjudication.

6.2.4 Varieties of judicial and juristic activism

6.2.5 Problems of accountability and judicial law-making.

6.3 Questions for self learning

6.4 Let us sum up

6.5 Glossary

6.6 References

6.0 Objectives

After studying this unit the student will be able to understand that...

- 1) Notions of judicial review
- 2) Role' in constitutional adjudication - various theories of judicial role.
- 3) Tools and techniques in policy-making and creativity in constitutional adjudication.
- 4) Varieties of judicial and juristic activism
- 5) Problems of accountability and judicial law-making.

6.1 Introduction

Judicial process is to be followed by one of the organ of democracy called as judiciary. Judicial process is a process followed by courts while deciding a case. It is very wide concept. It includes all the things which court perform or has to perform while giving judgment. In short the judicial process is a process followed or which have to follow by court as well as judges while delivering of justice. If one of part of chain of judicial procedure is missed, then the outcome may not be called as justice. It may be sometimes turn to give injustice. In our democracy, the Constitution is supreme law & the judiciary is

safe guarder of constitution. The constitution has envisaged the different goals like Democracy, secularism, socialism, sovereign, republic and

6.2 Topic Explanation

6.2.1 Notions of judicial review

The Judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us. This is possible due to the power of judicial review and employing the judicial activism through the judicial process. A principle of Judicial Review is a part of basic structure of the Constitution of India. The power of Judiciary to review and determine validity of a law or an order may be described as the power of “Judicial Review.” It means that the constitution is the Supreme law of the land and any law inconsistent with it is void. The term refers to “the power of a court to inquire whether a law executive order or other official action conflicts with the written constitution and if the court concludes that it does, to declare it unconstitutional and void.”

Generally judicial review means the revision of the decree or sentence of an inferior court by a superior court. Judicial review has a more technical significance in public law, particularly in countries having a written constitution which are founded on the concept of limited government. Judicial review in this case means that Courts of law have the power of testing the validity of legislative as well as other governmental action with reference to the provisions of the constitution. The doctrine of judicial review has been originated and developed by the American Supreme Court, although there is no express provision in the American Constitution for the judicial review. The power of judicial review was first acquired by the U.S. Supreme Court in Marbury vs. Madison case. 1803.

In U.S. Constitution the most distinctive feature of United States Supreme Court is its power of judicial review. As guardian of the constitution, the Supreme Court has to review the laws and executive orders to ensure that they do not violate the constitution of the country and the valid laws passed by the congress.

The constitution of India, in this respect, is more a kin to the U.S. Constitution than the British. In Britain, the doctrine of parliamentary supremacy still holds good. In the United Kingdom, statutes cannot be set aside under the doctrine of [parliamentary sovereignty](#). No court of law there can declare a parliamentary enactment invalid. On the contrary

every court is constrained to enforce every provision” of the law of parliament.

Under the constitution of India parliament is not supreme. Its powers are limited in the two ways. First, there is the division of powers between the union and the states. Parliament is competent to pass laws only with respect to those subjects which are guaranteed to the citizens against every form of legislative encroachment. Being the guardian Fundamental Rights and the arbiter of-constitutional conflicts between the union and the states with respect to the division of powers between them, the Supreme Court stands in a unique position where from it is competent to exercise the power of reviewing legislative enactments both of parliament and the state legislatures. This is what makes the court a powerful instrument of judicial review under the constitution, As Dr. M.P. Jain has rightly observed: “The doctrine of judicial review is thus firmly rooted in India and has the explicit sanction of the constitution.”

In the frame work of a constitution which guarantees individual Fundamental Rights, divides power between the union and the states and clearly defines and the limits the powers and functions of every organ of the state including the parliament, judiciary plays a very important role under their powers of judicial review. The power of judicial review of legislation is given to the judiciary both by the political theory and text of the constitution. There are several specific provisions in the Indian constitution, judicial review of legislation such as Act 13, 32, 131-136, 143, 226, 145, 246, 251, 254 and 372. Article 372 (1) establishes the judicial review of the pre-constitutional legislation similarly. Article 13 specifically declares that any law which contravenes any of the provision of the part of Fundamental Rights shall be void. Even our Supreme Court has observed, even without the specific provisions in Article 13.

The power of judicial review is specially enumerated under the article 13 of the constitution of India. According to Art.13 the court would have the power to declare any enactment which violates a Fundamental Right as invalid. The Supreme and high courts are constituted the protector and guarantor of Fundamental Rights under Articles 32 and 226. Articles 251 and 254 say that in case of in consistent if between union and state laws, the state law shall be void.

In *Shankari Prasad vs. Union of India* (1951) the first Amendment Act of 1951 was challenged before the Supreme Court on the ground that the said Act abridged the right to property and that it could not be done as there was a restriction on the amendment of Fundamental Rights under Article 13 (2). The Supreme Court rejected the contention and

unanimously held. “The terms of Article 368 are perfectly general and empower parliament to amend the constitution without any exception whatever.

In the context of Article 13 law must be taken to mean rules or regulations made in exercise of ordinary legislative power and amendments to the constitution made in exercise of constituent power, with the result that Article 13 (2) does not affect amendments made under Article 368.”

In Sajan Singh’s case (1964), the competence of parliament to enact 17th amendment was challenged before the constitution Bench comprising of five judges on the ground that it violated the Fundamental Rights under Article 31 (A).

Supreme court reiterated its earlier stand taken in Shankariprasad’s case and held, “when article 368 confers on parliament the right to amend the constitution the power in question can be exercised over all the provisions of the constitution, it would be unreason about to hold that the word law’ in article 13 (2) takes in amendment Acts passed under article 368.

Thus, until 1967 the Supreme Court held that the Amendment Acts were not ordinary laws, and could not be struck down by the application of article 13 (2).

The historic case of GolakNath vs. The state of Punjab (1967) was heard by a special bench of 11 judges as the validity of three constitutional amendments (1st, 4th and 17th) was challenged. The Supreme Court by a majority of 6 to 5 reversed its earlier decision and declared that parliament under article 368 has no power to take away or abridge the Fundamental Rights contained in chapter III of the constitution .

In Minerva Mills case (1980) the Supreme Court by A majority decision has trunk down section 4 of the 42nd Amendment Act which gave preponderance to the Directive Principles over Articles 24, 19 and 31of part III of the constitution, on the ground that part III and part IV of the constitution are equally important and absolute primacy of one over the other is not permissible as that would disturb the harmony of the constitution.

6.2 .2 Role' in constitutional adjudication - various theories of judicial role.

Though the main role of judges is to deliver a justice but for achieving the object of justice, judges need to play various roles as legislator, as administrative, as a executive etc. as the time requires for the justice in

true sense. Judicial process requires the judges to perform various functions. These functions are called theories of judicial role. Many times these roles are criticized due to excessive use of power. Theories of judicial role can be classified as follows.

1. Role of judges as trustee of public faith
2. Role of judges as judicial officer
3. Role of judges as legislator
4. Role of judges as an executive and Administrative.
5. Role of judges as a guardian and protector of the Constitution
6. Role of judges as creative of new principles.
7. Criticism and Limitation on the role of judges

The theories of judicial role mainly debated on the issue that whether the judges has only role to declare the existing law made by legislator or the role of judges to mould the law as they wish to interpret by indulging into the judicial legislation. Montesquieu is the advocate of the theory which says that the judge's role is limited to the extent of the declaration of law made by parliament. Whereas Justice Cordozo propounded the theory of judicial role that judges as a legislator and the creative role of judges.

➤ **Role of judges as judicial officer.**

The main function of the judiciary is to deliver the judgments. Judges as judicial officer hold the office of judge, hear the parties, consider the fact and circumstances and apply the law and observe the principles of natural justice while giving judgment.

➤ **Role of judges as an executive and Administrative.**

Judges has to play the role as administrative by taking part in appointment and removal procedure of judicial officer, judicial staff, decide the complaints and report the internal grievances to the higher authority. i.e. The District judge is responsible for the administration of judiciary with in the district.

➤ **Role of judges as a guardian and protector of the Constitution.**

The role that one expects the judge to play in the country is the dispensing justice in individual disputes brought before it. The judiciary is expected to be the guardian of the Constitution and is supposed to protect the fundamental rights of the people and implement the rule of law. The higher judiciary has power of judicial review to declare a law as unconstitutional if the law made

by parliament is violates the constitutional provisions. Secondly the judiciary is expected to protect the civil rights under Articles 14(equality), 19 (speech, movement, profession etc.) and 21 (life and liberty), not just in the narrow literal sense, but also in the liberal purposive sense in which the Supreme Court itself has interpreted these rights. The Judiciary is expected to protect the rights of the common people of the country to a free and dignified life where every citizen is guaranteed the means of securing the basic necessities of leading a dignified life, such as food, clothing, housing, healthcare and education etc. The judiciary is also expected to ensure that the executive and the legislature function within their powers and do not encroach on the fundamental rights of the people.

➤ **Criticism and Limitation on the role of judges**

Harlan F. Stone wrote in *United States v. Butler*: "... [W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." (297 U.S. 1, 78-79, 1936).

The higher judiciary is expected to exercise the power of judicial review where the executive or legislation is crossing their limit provided by the constitution. While acting as a judge one has to undertake the self-restraint principle that he also should not encroach in to the domain of other organ.

The great Felix Frankfurter justified the criticism of judges thus: "Judges as persons or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions.

Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinetts upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candour, however blunt." (*Bridges v. California*, 314 U.S. 252, 289)

The judges are the persons who hold the public office, they are the trustee of public faith hence they are answerable to the public for any kind of misconduct or breach of faith. Judges must maintain their dignity. Judges should act within their limitation to maintain the dignity and faith of the people.

Justice V.R. Krishna Iyer said in his Article ‘Limits of judicial conduct’ that “The judges of India’s highest court consider themselves to be gifted with infallibility because of the finality of their judgments. This shall not be. Like other institutions they too must suffer when they go wrong or are negligent. Rules of good conduct that were voluntarily created do exist. But they carry neither sanction nor penalty and are often violated, though yet rarely. If Parliament has enough vitality and sense of duty it must forthwith create a comprehensive code of judicial conduct for higher judges when state power is exercised by constitutional instrumentalities. Transparency in functioning and accountability with respect to duties are fundamental in a democracy. Parliament is the ultimate inquest of the nation, and judges are no exception to this. If robes rob by corruption they must be subject and answerable to, like other constitutional agencies, the people through Parliament. They are no Niagara but great power canalised and controlled in their furious flow, ultimately to be beneficial to the nation. This process of social engineering is part of social philosophy which is structurally basic to legal engineering, so that justice, social, economic and political; human rights and fundamental duties laid down by the Founding Fathers (vide Parts III, IV and IV A) do not remain an illusion.”

He further said, “Judges are the salt of the earth. If the salt loses its savour, wherewith shall they be salted? You have assumed office by an oath to uphold the socialist, secular, democratic Republic. If you breach this oath, the Performance Commission shall disrobe you and forfeit the Bench. Be you ever so high, the oath binds you.”

It means the judge plays a very important role for securing the different goals and values of our constitution. Judges are not exceptions regarding accountability. The corruption in judiciary should be taken as serious breach of public faith and they should be punished for that one.

In the classic text, the nature of judicial process, Justice Benjamin Cardozo, accepted the fact that judges do make law. However he stated that;

“The judges legislate only between gaps. He fills the open space in the law. How far he may go without travelling beyond the wall of the interstices cannot be staked out for him on a chart. He must learn it for himself as he gains the sense of fitness & proportion that comes with years of habituate in performance of an art.”

It means judge has to make a law for filling the gaps, loopholes of the law made by legislator. Judges have their own limitations, they have to work within that limitation which will helpful for maintain the structural balance & for the running of healthy democracy. But the above example shows that

judiciary is crossing their limits by entering into the domain of legislative and executive. This has created the big structural challenge before India.

Justice Cardozo has further stated that “judges should not act with his spasmodic sentiments to vague an unregulated benevolence. He exercised the discretion informed by the tradition, discipline by the system, & subordinate or pre cordial necessity of order in the social life”.

It means judges has not to act with the prejudice mind or with their feelings, sentiments, while delivering a justice, but he has to act fairly & with disciplined system as required for maintaining peace in social life of person.

The role of judge as a legislator and creator of new principles.

“The judge as a legislator.”

-JUSTICE CARDOZO.

First time Justice Cardozo has recognized the creative role of judges by stating the above statement in his famous book *The Nature of Judicial Process*. The judgments declare by the higher judiciary is binding over all peoples like a law declare by the legislature. Hence judges are creating the laws, apart from the justice delivery. They are sometimes mould the existing law by interpreting it for end of justice and indirectly create new form of that law. He has stated about the creative judge whose freedom was exercised within the bounds of a tradition:

“This judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.”

The mind of creative judge is never free. His mind is always working for innovation in law. That makes to pass the judgment going beyond the for-corner of traditional decisions.

The Indian judiciary, at times, is forging new tools, devising new strategies for the purpose of making fundamental rights meaningful for the large masses of the people. While treating a letter, addressed to the Supreme Court seeking release of bonded labours in the country, as a writ petition under Article 32. But while acting as legislator the judges should not cause the disturbance to the structure of separation of power. They have to act with self-impose limitations. On this point justice Cardozo stated that, “There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the

reminder that they are subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do.

The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by. ... 'The judges of the nation,' says Montesquieu, 'are only the mouths that pronounce the words of the law, inanimate beings, who can moderate neither its force nor its rigor.' . . . It has a lofty sound; it is well and finely said; but it can never be more than partly true. . . the ideal is beyond the reach of human faculties to attain. And again: But every day there is borne in on me a new conviction of the inescapable relation between the truth without us and the truth within. The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties."

6.2.3 Tools and techniques in policy-making and creativity in constitutional adjudication

➤ Techniques of creativity

Followings are the different techniques of creativity implemented by the higher judiciary for giving a justice in true sense by moulding the judicial process.

- 1) Judgment by going out of box for integrity of nation i.e. Ayodhya case
- 2) Epistolary jurisdiction
- 3) Compensatory jurisdiction
- 4) Relaxation of rule of locus-standi
- 5) Public interest litigation or socio-action litigation.
- 6) Expansion of scope of article 21.
- 7) A letter treated as P.I.L
- 8) Order against the executive to enforce the fundamental rights.
- 9) Taking a step as legislator.
- 10) Environment protection with reference to compensation and polluter pay principle, etc...
- 11) Rule of absolute liability and strict liability.

- 12) Writ jurisdiction
- 13) Issue of guidelines in the field where law is not enacted or the existing law is unable to provide remedy.

➤ **Tools of creativity**

The above new techniques are created with the help of following tools. The higher judiciary has used the following Articles as a tool for creation of new way of justice delivery called techniques of judicial creativity. Precedents with reference to the Obiter-dictum and ratio decedent are binding over all the country and treated as law.

1. under Article 32. Anybody can move to Supreme Court for redress against the violation of the fundamental rights.
2. Under Article 226 anybody can move to High court for redress against the violation of the fundamental rights as well as other legal rights.
3. under Article 227, 141, 142, 136 of the Constitution.
4. Section 134, 144 and 482 of Cr.P.C.
5. Section 151 of C.P.C.

6.2.4 Varieties of judicial and juristic activism

➤ **Judicial activism**

In recent times judiciary has been very active in various facets of life. The concept of judicial activism is another name for innovative interpretation. Judicial activism implies laying down priorities, policies and programs and giving direction to execute them when they are not obligatory and are entirely at the discretion of the executive and legislative or other authorities. Sometimes it goes beyond its jurisdiction in public interest and interferes with the working of the independent autonomous authorities. In other words, activeness on the part of the members of judiciary is termed as 'judicial activism'.

The permanent values embodied in the Constitution need interpretations in the context of the changing social and economic scenario. The court undertakes a delicate task of reconciling with the changing situations and the resultant needs. It is the duty of the executive to implement faithfully the laws made by the legislature. When the executive fails to discharge its obligations, it becomes the primordial duty of judiciary to compel the executive to perform its lawful functions. The higher judiciary has passed the various judgments in this context are term as Judicial activism.

The pro-active approach of the judiciary with regard to particular socio-economic conditions prevailing in the country is judicial activism. According to former Chief Justice of the Supreme Court of India, Justice J.S. Verma, “The role of the judiciary in interpreting existing laws according to the needs of the times and filling the gaps appears to be the true meaning of judicial activism.” In other words, it is a continuous process that helps to advance the cause of law in the wider interest of the public. In a way, judicial activism constitutes an integral part of judicial review.

Judicial activism is a concept firstly established in America in 1959, where in *Meberly vs. Medison*’s case, chief justice Marshall has recognized the right of Negroes against discrimination. In India Judicial activism has been a very frequent and common phenomenon during one and a half decade. Its credit goes to Justice P.N. Bhagwati and Justice V.R. Krishna Iyer. Justice P.N. Bhagwati introduced the tradition of hearing on PIL even on a postcard.. The first PIL is recognized in the case of *Hussainara Khatoon vs. Chief Secretary of Bihar*. In this case a writ is filed concerning the prisoners who were behind the bars more than a period which they may suffer if the maximum sentence awarded.

The Supreme Court has given guidelines to release all the prisoners who were behind bars more than a period which they may suffer if the punishment is awarded & also issue a commission to see the actual situation of jails in Bihar state. This judgment recognized the right to speedy trial as a part of right to life & personal liberty u/art 21 of the constitution. This active and creative act of the judiciary is called as judicial activism.

➤ **American experience.**

The concept of judicial activism is not new. Its origin goes back to nineteenth century America when Chief Justice Marshall, one of the greatest judges of the West, was made a judge in the *Marbury vs. Madison* case. Marbury was appointed judge under the judiciary Act of 1789 by the US Federal Government. Though the warrant of appointment was signed it could not be delivered. Marbury brought an action for issue of a writ of mandamus. By then Marshall became the Chief Justice having been appointed by the outgoing President, who lost election. Justice Marshall faced the imminent prospect of the government not obeying the judicial fiat if the claim of Marbury was to be upheld.

In a rare display of judicial statesmanship asserting the power of the Court to review the actions of the Congress and the Executive, Chief Justice Marshall declined the relief on the ground of the certain section of the Act, on the ground of which the claim made by Marbury, was unconstitutional,

since it conferred in violation of the American Constitution, original jurisdiction on the Supreme Court to issue writs of mandamus. He observed that the Constitution was the fundamental and paramount law of the nation and 'it is for the court to say what the law is'.

He concluded that the particular phraseology of the Constitution of the United States confirms and strengthens the principle supposed to be essential to all written Constitutions. That a law repugnant to the Constitution is void and that the courts as well as other departments are bound by that instrument. If there was a conflict between a law made by the Congress and the provisions in the Constitution, it was the duty of the Court to enforce the Constitution and ignore the law. Thus, the twin concepts of judicial review and judicial activism were born.

➤ **Indian position**

In India judicial activism was made possible by PIL (Public Interest Litigation). Generally speaking, before the Court takes up a matter for adjudication, it must be satisfied that the person who approaches it has sufficient interest in the matter. PIL entertained by the Supreme Court relaxing the rule of locus standi. Undoubtedly, such litigation has provided an ordinary man an access to the apex court of the country. It has in a way democratized the judicial process. Furthermore, the PIL has contributed to the rise of a form of judicial scrutiny of each and every governmental institution ranging from hospitals, prisons, manufacturing units covering issues of health, environment, safety, security, privacy and welfare, etc.

Justice Bhagwati has clearly stated, "The Supreme Court has adopted a pro-active approach for the last two years, particularly, having regards to the peculiar socio-economic conditions prevailing in the country." Thus, judicial activism was born out of a public litigation appeal. Judicial activism is developed in each and every aspect of life, including social, economic, political, religious, educational, etc. Undoubtedly, it has strengthened the faith of masses in the judiciary of the country.

A political state usually consists of three things-Executive, Judiciary and Legislature. All of them have their own well- defined and well-laid roles in the Constitution. When any of these wings of the government fails to dispense with its duties properly or refuses to comply with the statutory provisions, the judiciary has to intervene. Justice J.S. Verma, the former Chief Justice of India has this view in this regard, "Judicial activism is required only when there is inertia in others. If everyone else is working, we do not have to step in." These words of Justice Verma clearly define the situation in which judicial activism is required. It would not be out of place

to mention that in recent past when there were news of various scams and scandals, the executive did not take proper action against those bureaucrats and politicians involved in them. In such situations, the judiciary has to go beyond its jurisdiction to ensure justice and build public faith in constitutional bodies.

Justice P.B. Sawant, former Justice of the Supreme Court says, “It is circumstances which compel it to intervene and assert its role as the guardian of the law when the law is not respected by those who ought to enforce it.” Thus, it is clear that when the executive is lax or the legislators lack initiative to mend outdated laws or bring about changes as per the changing socio-economic conditions, or remain impervious to public pressure to bring about a change when public interest clashes with the members’ collective self-interest, the judiciary is forced to step in as the guardian of the Constitution.

➤ **Cases on judicial Activism.**

1. NilabatiBehras case – In which compensation of Rs. 150000 / -has given to themother of victim of custodial violence’s.
2. Maneka Gandhi’s case – In which right to abroad is considered as right to life & liberty.
3. Various decisions given in MC Mehta’s Writ Petition concerning the pollution of air & water under the purview of right to life u/art 21 of constitution.
4. Right to speedy trial is recognized in HussainaraKhatoonVs. Chief secretary of Bihar’s case.
5. SheelaBorseVs. State of Maharashtra & D.K .Basu Vs. State of West Bengal in which prisoner’s right to consult & appoint legal practitioner of his choice & right to free legal aid is recognized.
6. In Sakal Paper case &BannetColleman case right to freedom is recognized as right to freedom of speech & expression.

➤ **Criticisms and self-restraint principle.**

This new jurisprudence in the form of judicial activism has no doubt, contributed in a great measure to the well-being of the society. People, in general, now firmly believe that if any institution or authority acts in a manner, not permitted by the Constitution, the judiciary will step in to set right the wrong.

However, judiciary has to work within the parameters laid down by the Constitution without affecting the basic structures of any of the government’s organs. Reconciliation of the permanent value embodied in the

Constitution with the transitional and changing requirements of society must not result in undermining the integrity of the Constitution. Any attempt leading to such a consequence would destroy the very structure of the constitutional institutions. Conscious of the primordial fact that the Constitution is the supreme document the mechanism under which laws must be made and governance of the country carried on, the judiciary must play its activist role. No constitutional value propounded by the judiciary should run counter to any explicitly stated constitutional obligations or rights in the name of doing justice and taking shelter under institutional self-righteousness.

The judiciary cannot act in a manner disturbing the delicate balance between the three wings of the State. According to Justice J.S. Verma, “Judicial activism and judicial restraint are the two faces of the same coin. Self-discipline is to be practised strictly by the members of the judiciary and the judges must refrain from commenting on policy matters.” Warning against the over activism of judiciary, Justice H.R. Khanna said, “Special responsibility devolves upon the judges to avoid the over activist role and to ensure that they do not overstep or trespass upon the sphere marked for the other wings of the State.”

6.2.5 Problems of accountability and judicial law-making.

➤ Judicial Accountability

Accountability is also called answerability. It is the liability of person or authority toward the person to answer for his act or omission. It shows to whom an authority is answerable. At every stage a person is answerable to some other person. Such stage is because there must be fair & perfect conduct. So it is quit necessary that each & every authority must be answerable to the other authority. There might be control of a superior on the inferior regarding the conduct and the fair practice.

Every other institution of the State is accountable to the anti-corruption agencies, and to the judiciary which has the power of judicial review over every executive and legislative action. Moreover, the political executive is accountable to the legislature and the legislature is democratically accountable to the people-that at least is the theory of our constitutional scheme.

However, when it comes to the judiciary, we find that it is neither democratically accountable to the people, nor to any other institution. Judges cannot be accountable to the electorate as politicians are accountable: The duties of the Judiciary are not owed to the electorate; they are owed to the law, which is there for the peace, order and good government of all the

community'. On the other hand, the point is made that accountability is required nowadays in most areas of public life and that the judiciary should be no exception to this rule. A full Bench of the Delhi High court held on the 12th of January 2010. The historic judgment which rules that the office of the Chief Justice of India (CJI) is a "public authority" that comes under the ambit of the Right to Information (RTI) Act, also held that judges of superior courts should make public their assets.

"Judicial independence was not a judge's personal privilege but a responsibility cast upon him "Judges like all other public officials in the community must be accountable to the community. The judiciary has become almost a law unto itself, answerable to none and under no pressures to reform or change with time. There is no manner of public accountability procedure, grievance reported by the public, no monitoring or periodic performance audit and its annual reportage and public discussion by concerned organs. The only recourse against a judge committing judicial misconduct is impeachment, which has been found to be a totally impractical remedy.

It is a fact that in the present parliamentary system, judiciary has a role to play. But there are many weaknesses, shortcomings and deficiencies in the functioning of judiciary, which have to be rectified and remedied, so that the judicial system would become more efficient.

There are reports that a section among the judges is corrupt. There are allegations that some judges are showing favoritism and some are inefficient. Some judgments usurp the powers of executive and legislature. Some judgments are trying to rewrite the Constitution by giving innovative interpretations of the Constitutional provisions in order to restrict the power of parliament in making laws and to capture more powers for the judiciary. And some judgments ignore the interest of the common people by their complete surrender to the globalization philosophy. The exorbitant court expenses and inordinate delay in court proceedings are denying justice to common man. The people are increasingly losing confidence in the judicial system. Even a reasonable criticism against a judgment can be branded as contempt of court as per the provisions of the present law. The system that deals with the contempt proceedings is also defective leading to denial of natural justice. A dangerous situation is created due to the cumulative effect of these factors. The present situation nurtures the emergence of authoritarian trend from certain judicial pronouncements. The globalization forces are increasingly trying to make use of judiciary to facilitate implementation of their agenda as the other two pillars of the government – executive and legislature – are influenced by democratic intervention.

If judiciary is criticized, people may lose faith in the judicial system and it would result in dangerous situation. We do not agree with these views. Whatever be the manner of criticism, if the judicial system is without shortcomings or weaknesses, people would not lose confidence in it. Confidence is to be earned through the efficient functioning of the judicial system and by correcting its mistakes and deficiencies. Confidence cannot be inspired by threats of contempt of court proceedings and by prohibiting public criticism

Judicial Accountability means to whom the judiciary is answerable for his conduct. An accountability of judiciary has always being in question. Many debates are been seen on the issue of judicial accountability. There are credible complaints against the higher Judiciary regarding the corruption, excessive use of power, arbitrary exercise of judicial discretionary etc.

➤ **Judicial Accountability on the point of judicial legislation.**

In the last decade the judiciary has been many times criticized by other organs of society for its over activism and the judicial legislation. i.e. In June 2011, Supreme Court has directed the govt. to sale out the wastage wheat to people at lower price. This direction is too much criticized by the constitutionalist and by the executive of the country. It's a government, executive to decide the policy of selling or purchasing the wheat. Another instance is that S.C. has issued a direction to govt. & TRAI to cancel the license given to companies in A Raja 2 G Spectrum Scam. Now the question arisen before the executive that who will be responsible for the losses of companies due to cancellation of licenses. Here the judiciary is entered into the domain of executive which is harmful to the parliamentary democracy of the country. It is because the judiciary is not answerable to any other organ of the constitution.

Harlan F. Stone wrote in *United States v. Butler*: "... [W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." (297 U.S. 1, 78-79, 1936).

The higher judiciary is expected to exercise the power of judicial review where the executive or legislation is crossing their limit provided by the constitution. While acting as a judge one has to undertake the self-restraint principle that he also should not encroach in to the domain of other organ.

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criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candour, however blunt.” (Bridges v. California, 314 U.S. 252, 289)

The judges are the persons who hold the public office, they are the trustee of public faith hence they are answerable to the public for any kind of misconduct or breach of faith. Judges must maintain their dignity. Judges should act within their limitation to maintain the dignity and faith of the people.

➤ **Judicial Accountability on the point of corruption in judiciary.**

A Transparency International report released on Thursday says that 77 per cent of respondents in a survey in India believe the judiciary is corrupt. According to the Global Corruption Report 2007, the perception of corruption is higher in India and Pakistan in comparison to Hong Kong, Malaysia, Singapore and Thailand. In Pakistan, 55 per cent of the respondents said the judiciary was corrupt. “The degree of delays and corruption has led to cynicism about the justice system. People seek short cuts through bri-bery and favours, leading to more unlawful behaviour. A prime example is the unauthorized buildings in Indian cities. Construction laws are flouted in connivance with persons in authority,” the report says.

Former Law Minister Ram Jethmalani has questioned the survey’s sample size, did not agree. “I don’t think things are so bad. Compared to other segments of society, they are better. However, he added: “Judges are not angels. They are part of the same society.”

➤ **Judicial Accountability on the point of delay in justice and pendency of cases.**

According to the report, as of February 2006, 33,635 cases were pending in the Supreme Court with 26 judges; 3.34 lakh cases in high courts with 670 judges; and 2.5 crore cases in 13,204 sub-ordinate courts. “This vast backlog leads to long adjournments and prompts people to pay to speed up the process. In 1999, it was estimated that at the current rate of disposal of cases, it would take another 350 years for pending cases,” the report states.

It also points out that the ratio of judges is abysmally low at 12-13 per one million people compared to 107 in the United States, 75 in Canada and 51 in the United Kingdom. “If the number of outstanding cases are assigned to the current number of judges, caseloads would be 1,294 per Supreme Court judge, 4,987 per high court judge and 1,916 per lower court judge.” The report recommends judicial reforms including an independent judicial appointments

body, higher salaries for judges, limited impunity to actions relating to judicial duties and transparency in the functioning of judicial organisations. This petition is to seek redressal for crores of Indian citizens who are routinely denied justice because of its delayed and therefore, ineffective dispensation. It is to restore to them their fundamental and constitutional rights guaranteed under Articles 21, 14, 19 and the Preamble, and to enforce the constitutional obligations of State under Article 39A of the Constitution of India.

➤ **Judicial Accountability on the point of Appointment, Investigations and Removal**

The method of appointment of judges in India is criticized many times as it is not open to public scrutiny and lacks accountability and transparency. The impeachment provision in the Constitution for dealing with judicial misbehavior is impractical and unworkable. The past year has also seen the eruption of a large number of judicial scandals. The Justice Sabharwal case was followed by the Ghaziabad provident fund scam, involving more than 30 judges, including 10 from the higher Courts. Then came the Chandigarh case, where Rs. 15 lacks in cash were delivered by the clerk of the Additional Advocate General of Haryana to the residence of a High Court Judge. This was apparently meant for some other judge and was mistakenly delivered to another. The CBI is still investigating both these cases. Then there was the case of Justice Soumitra Sen of Calcutta who was found by a Committee of 3 judges to have misappropriated large sums of money, which he received as a court receiver. The Chief Justice has recommended his impeachment more than 6 months ago, but nothing has moved on that. Removal of Justice P.D. Dinakaran has brought to the surface the vexed problem of the arbitrary and totally unsatisfactory manner of selecting and appointing judges as well as the unresolved problem of dealing with complaints of misconduct and corruption against judges.

Article 124(4) of the Constitution provides for the removal of a judge only on the ground of proved misbehaviour or incapacity. The process

of impeachment is cumbersome and the result uncertain. Effective alternative measures are necessary because in a democracy governed by the rule of law under a written Constitution the Judiciary has been assigned the role of a sentinel on the qui vive to protect the fundamental rights and to hold even the scales of justice between the citizen and the state. As the Supreme Court has said, “judicial office is essentially public trust. Society is, therefore, entitled to expect that a judge must be a man of high integrity, honesty and required to have moral vigor, ethical firmness and impervious to corrupt or venal influences.”

Hundreds of years ago, Francis Bacon, in his essay on ‘Judicature’, emphasized that “the place of justice is a hallowed place; and therefore not only the Bench, but the foot pace and precincts and purpose thereof ought to be preserved without scandal and corruption.” But such is the irony that Bacon disgraced himself by indulging in acts of bribery and favoritism at the far end of his career. This highlights the complexities and the sensitivities in the matter of effective, implementation of judicial honesty.

Under Article 121 of the Constitution, the conduct of a judge cannot be debated in the Parliament. There is a separate procedure for impeachment; this is with the intention to secure the independence of the judiciary. An unelected judiciary which is not accountable to anyone except its own temperament has taken over significant powers of Indian Governance. India is a democracy and it has to be and should be governed by elected representatives and not merely judges, amicus curiae or committees and commissions that is accountable to the Supreme Court. There is need to enact a law which deals with the judicial accountability.

➤ **Recommendations for the improvement of standard and Accountability**

The judiciary is the fiduciary of people’s justice and has accountability to the country for scrupulously equal judicial process. Following are some suggestion for restoration of the faith.

1. Judges need to be more responsive.
2. They must be subjected to a judicial review.
3. They are obliged by the law to give reasons for decisions, i.e., it must be speaking order which complied with the mandate of Article 14.
4. They must follow a code of conduct.
5. There must be regular inspections.
6. High court judges are now drawn from either the Bar or subordinate judiciary. Firstly, an Indian Judicial Service (IJS) should be created. Judges may then be appointed through nation-wide competitive

examination. These officials could form the backbone of the subordinate judiciary at the level of District Judges.

7. Most of the High Court Judges can then be drawn from this cadre of competent District Judges.
8. There should be periodic training programs for judicial officers by practitioners, lawyers and senior judicial officers. Secondly, the proposed National Judicial Commission (NJC) should have the powers not only to recommend appointments, but also to remove judges in higher courts.
9. Presently there is no supervisory jurisdiction of Supreme Court on the High court to prevent the misuse of their power except in appeal by quashing the judgment, So Parliament should empower the Supreme Court to ask the explanation from a High court judge when it found that he had exercised his power illegally.
10. Need to implement the suggestions of The Law Commission of India, Chaired by Justice Dr. Justice AR. Lakshmanan, in its report no. 230 focuses on REFORMS IN THE JUDICIARY.

6.3 Questions for self learning

1. What is meant by judicial review? How is it important in delivery of justice?
2. How does a judge adjudicate?
3. Discuss the various tools and techniques in policy- making and creativity in constitutional adjudication.
4. What is judicial activism?
5. What are the problems of accountability and judicial law-making?

6.4 Let us sum up

The judiciary in the country today has come to enjoy enormous powers. It is not only the arbiter of disputes between citizens, between citizens and the State, between States and the Union, it also in purported exercise of powers to enforce fundamental rights, directs the governments to close down industries, commercial establishments, demolish jhuggis, remove hawkers and rickshaw pullers from the streets, prohibits strikes and bandhs etc. In short, it has come to be the most powerful institution of the State and the faith of people need to be protected by maintain its standard and adopting certain measure for its accountability.

6.5 Glossary

Judicial Process: The process to be followed in the court for delivery of Justice

Judicial Activism: The activism of judges going beyond 'what is' to achieve what 'ought to be'. For e.g. the creation of PIL, Interpretation of article 21 in Maneka's case etc.

6.6 References

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- 13 Note- All the topics submitted by Naresh S. Bari is subject to needful changes.

Unit-7

Judicial Process in India

7.0 Objectives

7.1 Introduction

7.2 Topic Explanation

7.2.1 Indian debate on the role of judges and on the notion of judicial Review.

7.2.2 The "independence" of judiciary and the "political" nature of Judicial process

7.2.3 Judicial activism and creativity of the Supreme Court - the tools and Techniques of creativity.

7.2.4 Judicial process in pursuit of constitutional goals and values - new Dimensions of judicial activism and structural challenges

7.2.5 Institutional liability of courts and judicial activism - scope and Limits.

7.3 Questions for self learning

7.4 Let us sum up

7.5 Glossary

7.6 References

7.0 Objectives

After studying this unit the student will be able to understand that...

1. Indian debate on the role of judges and on the notion of judicial review.
2. The "independence" of judiciary and the "political" nature of judicial process.
3. Judicial activism and creativity of the Supreme Court - the tools and techniques of
4. Creativity.
5. Judicial process in pursuit of constitutional goals and values - new dimensions of judicial
6. Activism and structural challenges.
7. Institutional liability of courts and judicial activism - scope and limits.

7.1 Introduction

The Judiciary plays a very important role as protector of the constitutional values that the founding fathers have given us. This is possible due to the power of judicial review and employing the judicial activism through the judicial process. A Principle of Judicial Review is a part of basic structure of the Constitution of India. The power of Judiciary to review and determine validity of a law or an order may be described as the power of “Judicial Review”. It means that the constitution is the Supreme law of the land and any law inconsistent with it is void. The term refers to “the power of a court to inquire whether a law executive order or other official action conflicts with the written constitution and if the court concludes that it does, to declare it unconstitutional and void.”

We see that present Indian judicial process is not working according to the constitutional and there is a need for revival of the ancient inquisitorial system which is also the mandate of article 14. Inquisitorial method alone guarantees parity of arms and disposal of matters on pure legal basis. Individuals cannot overcome disability created due to unequal power balances created due to personal qualification, legal knowledge, and finance and so on. Therefore, we can say that effective justice dispensation through the Courts requires three elements: access to courts, effective decision making by judges, and the proper implementation of those decisions because the primary responsibility of judiciary is policy control and dispute resolution is only incidental to it. Whatever may be the system the procedural laws must be minimum, simple and must be litigant friendly?

7.2 Topic Explanation

7.2.1 Indian debate on the role of judges and on the notion of judicial review.

➤ Judicial Review and Judicial activism.

Generally judicial review means the revision of the decree or sentence of an inferior court by a superior court. Judicial review has a more technical significance in public law, particularly in countries having a written constitution which are founded on the concept of limited government. Judicial review in this case means that Courts of law have the power of testing the validity of legislative as well as other governmental action with reference to the provisions of the constitution. The doctrine of judicial review has been originated and developed by the American Supreme Court, although there is no express provision in the

American Constitution for the judicial review. The power of judicial review was first acquired by the U.S. Supreme Court in *Marbury vs. Madison* case. 1803.

In U.S. Constitution the most distinctive feature of United States Supreme Court is its power of judicial review. As guardian of the constitution, the Supreme Court has to review the laws and executive orders to ensure that they do not violate the constitutional of the country and the valid laws passed by the congress.

The constitution of India, in this respect, is more a kin to the U.S. Constitution than the British. In Britain, the doctrine of Parliamentary supremacy still holds goods. In the United Kingdom, statutes cannot be set aside under the doctrine of parliamentary sovereignty. No court of law there can declare a parliamentary enactment invalid. On the contrary every court is constrained to enforce every provision” of the law of parliament.

Under the constitution of India parliament is not supreme. Its powers are limited in the two ways. First, there is the division of powers between the union and the states. Parliament is competent to pass laws only with respect to those subjects which are guaranteed to the citizens against every form of legislative encroachment. Being the guardian Fundamental Rights and the arbiter of-constitutional conflicts between the union and the states with respect to the division of power between them, the Supreme Court stands in a unique position where from it is competent to exercise the power of reviewing legislative enactments both of parliament and the state legislatures. This is what makes the court a powerful instrument of judicial review under the constitution. As Dr. M.P. Jain has rightly observed; “The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the constitution.

In the frame work of a constitution which guarantees individual Fundamental Rights, divides power between the union and the states and clearly defines and the limits the powers and functions of every organ of the state including the parliament, judiciary plays a very important role under their powers of judicial review. The power of judicial review of legislation is given to the judiciary both by the political theory and text of the constitution. There are several specific provisions in the Indian constitution, judicial review of legislation such as Art 13, 32,131-136,143-226,145,246,251,254 and 372 (1) establishes the judicial review of the pre-constitutional legislation similarly. Article 13 specifically declares that any law which contravenes any of the provision of the part of Fundamental Rights shall be void. Even our Supreme Court has

observed, even without the specific provisions in Article 13.

The power of judicial review is specially enumerated under the article 13 of the constitution of India. According to Art. 13 the court would have the power to declare any enactment which violates a Fundamental Right as invalid. The Supreme and high courts are constituted the protector and guarantor of Fundamental Rights under Article 32 and 226. Articles 251 and 254 say that in case of inconsistency between union and state laws, the state law shall be void.

In *Shankari Prasad vs. Union of India* (1951) the first Amendment Act of 1951 was challenged before the Supreme Court on the ground that the said Act abridged the right to property and that it could not be done as there was a restriction on the amendment of Fundamental Rights under Article 13 (2). The Supreme Court rejected the contention and unanimously held. "The terms of Article 368 are perfectly general and empower parliament to amend the constitution without any exception whatever.

In the context of Article 13 law must be taken to mean rules or regulation made in exercise of ordinary legislative power and amendments to the constitution made in exercise of constituent power, with the result that Article 13 (2) does not affect amendments made under Article 368."

In *Sajan Singh's case* (1964), the competence of parliament to enact 17th amendment was challenged before the constitution Bench comprising of five judges on the ground that it violated the Fundamental Rights under Article 31 (A).

Supreme Court reiterated its earlier stand taken in *Shakariprasad's case* and held. "When article 368 confers on parliament the right to amend the constitution the power in question can be exercised over all the provisions of the constitution, it would be unreasonable to hold that the word 'law' in article 13 (2) takes in amendment Acts passed under article 368.

Thus, until 1967 the Supreme Court held that the Amendment Acts were not ordinary laws. An Act could not be struck down by the application of article 13 (2).

The historic case of *Golaknath vs. The State of Punjab* (1967) was heard by a special bench of 11 judges as the validity of three constitutional amendments (1st, 4th and 17th) was challenged. The Supreme Court by a majority of 6 to 5 reversed its earlier decision and declared that parliament under article 368 has no power to take away or abridge the Fundamental Rights contained in chapter III of the

constitution.

In *Minerva Mills* case (1980) the Supreme Court by a majority decision has struck down section 4 of the 42nd Amendment Act which gave preponderance to the Directive Principles over Articles 24, 19 and 31 of part III of the constitution, on the ground that part III and part IV of the constitution are equally important and absolute primacy of one over the other is not permissible as that would disturb the harmony of the constitution.

➤ **Principles of Judicial Review:**

In 1973, the Supreme Court in the landmark case '*Keshavananda Bharathi v. State of Kerala*' presented the basic principles of judicial review. Legislature can amend the constitution, but cannot change the basic principles of the Constitution.

Justice V.S. Deshpande in his book propounded a thesis that Judicial Review of legislation in India should rest merely on Article 245 (1) and not on Article 13. According to him, Article 245 (1) interpreted broadly would ensure the supremacy of the constitution over all kinds of laws.

Thus, a law to be valid must conform with the constitutional forms. The grave responsibility of deciding upon the validity of laws, is laid up on the judges of the Supreme Court. If a statute isn't within the scope of legislative authority or it offends some constitutional restriction or prohibition, that statute is unconstitutional and hence invalid.

A renowned author of Constitutional law H.M. Sheervai has enumerated following rules in this regard.

- (1) There is a presumption in constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; and the onus to prove that it is unconstitutional lies upon the person who challenges it.
- (2) Where the validity of a statute is questioned and there are two interpretations, one of which would make the law valid, and the other void, the former must be preferred and the validity of the law upheld.

- (3) The court will not decide constitutional questions of a case are capable of being decided on other grounds.
- (4) The court will not decide a larger constitutional question than is required by the case before it.
- (5) The court will not hear an objection as to the constitutionality of a law by a person whose rights are not affected by it.
- (6) Ordinarily, courts should not pronounce on the validity of an Act or part of an Act, which has not been brought into force, because till then the question of validity would be merely academic.

Indian judiciary has been able to overcome the restrictions that were put on it by the 42nd amendment, with the help of the 43rd and 44th amendments. Now the redeeming quality of Indian judiciary is that no future governments could dilute its wings or dilute its right of Judicial Review. In fact, the 'Judicial Review' is considered to be the basic feature of our constitution.

➤ **Judicial Review of Legislative Enactment and ordinances:**

One of the first major case A.K. Gopalan Vs. State of Madras. 1951 that came up before the Supreme Court in which the preventive Intention Act, 1950 was challenged as invalid. The court by a unanimous decision declared section 14 of the Act invalid and thus manifested its competence to declare void any parliamentary enactment repugnant to the provisions of the constitution.

In Champakan Dorairajan's case, the Supreme Court held that the order of the state government fixing proportionate scales, for different communities for admission to medical colleges was unconstitutional. The presidential order de-recognising privy purses was also challenged in the Supreme Court which declared the order as unconstitutional and void. Between 1950-1980 parliament passed as many as 1977 Acts and out of them, the Supreme Court invalidate laws passed on 22 occasions.

7.2.2 The "independence" of judiciary and the "political" nature of judicial process

The Indian judiciary is famous for being independent and impartial. The independence of the judiciary is of utmost importance in upholding the pillars of the democratic system and the fundamental rights. Judicial independence is the

idea that the judiciary needs to be kept away from the other branches of government. i.e. **Courts** should not be subject to improper influence from the other branches of government, or from private or partisan interests.

Justice should not only be done; it must also be seen to be done. This is a famous legal maxim which states that the justice must be there in real sense and justice be like that people should say that the justice is taken place. For the purpose of justice in real sense the authority or institute which gives the justice should be free from any kind of pressure or influences. Independence of judiciary is an international phenomena that the justice should be independent from the influence other state organs. Justice is a sacrosanct human right. No one should be the victim of denial of justice. The denial may be due to any reason should not be condemn at any cost because justice is faith of being a member of civilized society. If this faith is disturbed, the entire humanity and civilized system will also disturb. So for the protection of civilized society there should not be injustice with the member of civilized society. The noble work is given to judiciary, to do the justice and restore the faith of people to protect the society for long life and welfare of human being. It is a well-known fact that the independence of the judiciary is the basic requisite for ensuring a free and fair society under the rule of law. Rule of law that is responsible for good governance of the country can be secured through unbiased judiciary.

Independence of judiciary is a part of doctrine of Basic structure and essential features of the Constitution. *Sikri, C.J.* explained the concept of basic structure in the Kesavananda's case as follows. (KesavanandaBharati v. State of Kerala, AIR 1973SC 1461)

1. Supremacy of the Constitution
2. Republican and democratic form of government
3. Secular character of the Constitution
4. Separation of powers between the legislature, executive and the judiciary
5. Federal character of the Constitution

The doctrine of Separation of Powers which was brought into existence to draw upon the boundaries for the functioning of all the three organs of the state: Legislature, Executive and the Judiciary, provides for a responsibility to the judiciary to act as a watchdog and to check whether the executive and the legislature are functioning within their limits under the constitution and not interfering in each other's functioning. This task given to the judiciary to supervise the doctrine of separation of powers cannot be carried on in true spirit

if the judiciary is not independent in itself. An independent judiciary supports the base of doctrine of separation of powers to a large extent.

➤ **Reason for independence of judiciary.**

The basic need for the independence of the judiciary rests upon the

Following points:

- (a) **To check the functioning of the organs:** Judiciary acts as a watchdog by ensuring that all the organs of the state function within their respective areas and according to the provisions of the constitution. Judiciary acts as a guardian of the constitution and also aids in securing the doctrine of separation of powers.
- (b) **Interpreting the provisions of the constitution:** It was well known to the framers of the constitution that in future the ambiguity will arise with the provisions of the constitution so they ensured that the judiciary must be independent and self-competent to interpret the provision of the constitution in such a way to clear the ambiguity but such an interpretation must be unbiased i.e. free from any pressure from any organs like executive. If the judiciary is not independent, the other organs may pressurize the judiciary to interpret the provision of the constitution according to them. Judiciary is given the job to interpret the constitution according to the constitutional philosophy and the constitutional norms.
- (c) **Disputes referred to the judiciary:** It is expected of the Judiciary to deliver judicial justice and not partial or committed justice. By committed justice we mean to say that when a judge emphasizes on a particular aspect while giving justice and not considering all the aspects involved in a particular situation. Similarly judiciary must act in an unbiased manner.

➤ **Nature and scope-**

Independence of Judiciary means a fair and neutral judicial system of a country, which can afford to take its decision without any interference of executive or legislative branch of government. Independence of Judiciary depends on some certain conditions like mode of appointment of judges, security of their tenure in the office and adequate remuneration and privileges. The general concept of Judicial Independence is that a judge should be free from any pressure from the government or anyone else as to how to decide any particular case; for that reason, a judges salary is not dependent on the Executive decision and his conditions of service are

secured and not to be varied at the whim of the Executives. The judiciary has been defined as the last resort of the common people. It is the sector that actually protects and harmonizes the varying interest of the members of the society. The judiciary has been the major recourse of the human rights community in the enforcement of human rights. Litigation has been identified as one of the key means of protecting and enforcing the rights of the individual. No other institution of the state is bestowed with the duty but the courts and other ancillary institutions. Most of the monumental achievements of the human rights community the world ever have been through the courts. The judiciary comprises of all institutions established there under for the administration of justice to protect, vindicate and enforce the rights of the people. The judiciary is charged with the responsibility of dispensing justice and safeguarding the rule of law. In any civilized society, judiciary is the last resort for the people to seek shelter and get relief against the offenders and wrong doers. Independence of judiciary truly means that the judges are in a position to render justice in accordance with their oath of office and only in accordance with their own sense of justice without submitting to any kind of pressure or influence be it from the executive or legislative or from the parties themselves or from the superiors and colleagues. Independence of judiciary depends on some certain conditions like mode of appointment of the judges, security of their tenure in the office and adequate remuneration and privileges.

The concept of judicial independence as recent international efforts to this field suggests, comprises following four meaning of judicial independence.

1. Substantive Independence of the Judges: It referred to as functional or decisional independence meaning the independence of judges to arrive at their decisions without submitting to any inside or outside pressure.
2. Personal independence: That means the judges are not dependent on government in any way in which might influence them in reaching at decisions in particular cases.
3. Collective Independence: That means institutional administrative and financial independence of the judiciary as a whole vis-à-vis other branches of the government namely the executive and the legislative.
4. Internal Independence: That means independence of judges from their judicial superiors and colleagues. It refers to, in other words, independence of a judges or a judicial officer from any kind of order,

indication or pressure from his judicial superiors and colleagues in deciding cases.

Independence of judiciary depends on some certain conditions like mode of appointment of the judges, security of their tenure in the office and adequate remuneration and privileges. Satisfactory implementation of these conditions enables the judiciary to perform its due role in the society thus inviting public confidence in it.

The administration of justice is the vital task of judiciary. Justice which is the soul of the state must be administered without fear or favour. Hence judiciary should remain as far as possible outside politics. In interpreting laws and administering justice the judges must be impartial and honest. The vital need is to organize the judiciary properly. The appointment and tenure of the judges, their relation to other agencies of government— these and other similar considerations are important in maintaining the independence and integrity of the judiciary. Whenever there is a talk regarding the independence of the judiciary, there is also a talk of the restrictions that must be imposed on the judiciary as an institution and on the individual judges that forms a part of the judiciary.

Higher judiciary is many times criticized by other organs of state for the judge's politics. Judges are indulging them for judicial legislation. The excessive encroachment of judges in the domain of executive result the criticism of judge's politics. On the other hand political interference or politics the judge's appointment, removal and the matter concerning thereto.

The Judiciary of India is an independent body and is separate from the Executive and Legislative bodies of the Indian Government. Indian Constitution makes Indian judiciary a self-regulatory body. The Supreme Court and High Courts exercise powers of superintendence and also lay the procedures for conduct of business in the courts. It is clear from the historical overview that judicial independence has faced many obstacles in the past especially in relation to the appointment and the transfer of judges. Courts have always tried to uphold the independence of judiciary and have always said that the independence of the judiciary is a basic feature of the Constitution. Courts have said so because the independence of judiciary is the pre-requisite for the smooth functioning of the Constitution and for a realization of a democratic society based on the rule of law.

7.2.3 Judicial activism and creativity of the Supreme Court - the tools and techniques of creativity.

The mind of creative judge is never free. His mind is always working for innovation in law. That makes to pass the judgment going beyond the for-corner of traditional decisions.

Robert Jennings. J , ‘perhaps the most important requirement of the judicial function (is to) be seen to be applying existing, recognized rules or principles of law’ even when it creates law in the sense of developing, adapting, modifying, filling gaps, interpreting or even branching out in a new direction”.

Likewise The Indian judiciary, at times, is forging new tools, devising new strategies for the purpose of making fundamental rights meaningful for the large masses of the people. While treating a letter, addressed to the Supreme Court seeking release of bonded labours in the country, as a writ petition under Article 32.

In *Bandhua Mukti Morcha v. Union of India*, (A.I.R. 1984 S.C. 802) it was held that when the poor comes before the court, particularly for enforcement of their fundamental rights, it is necessary to depart from the adversarial procedure and to evolve a new procedure.

Judiciary has invented novel forms of action to provide relief to the poor, underprivileged, downtrodden sections of the society. Epistolary jurisdiction allows access to justice to the poor and the weaker section of the society. The court entertains a letter as writ petition ignoring all procedural norms and technicalities. The epistolary jurisdiction is a new strategy adopted by the judiciary for protection of the human rights of the vulnerable sections of the society.

There is no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life and personal liberty. But the judiciary has evolved a right to compensation in cases of illegal deprivation of personal liberty. *Rudal Shah v. State of Bihar* (A.I.R. 1983 S.C. 1086.) is an instance of breakthrough in Human Rights Jurisprudence. The Court granted monetary compensation of Rs.35, 000 against the Bihar Government for keeping a person in illegal detention for 14 years even after his acquittal. The Court departed from the traditional approach, ignored the technicalities while granting compensation.

➤ **Techniques of creativity**

Followings are the different techniques of creativity implemented by the higher judiciary for giving a justice in true sense by moulding the judicial process.

- 1) Judgment by going out of box for integrity of nation i.e. Ayodhya case
- 2) Epistolary jurisdiction
- 3) Compensatory jurisdiction
- 4) Relaxation of rule of locus-standi
- 5) Public interest litigation or socio-action litigation.
- 6) Expansion of scope of article 21.
- 7) A letter treated as P.I.L
- 8) Order against the executive to enforce the fundamental rights.
- 9) Taking a step as legislator.
- 10) Environment protection with reference to compensation and polluter pay principle, etc...
- 11) Rule of absolute liability and strict liability.
- 12) Writ jurisdiction
- 13) Issue of guidelines in the field where law is not enacted or the existing law is unable to provide remedy.

➤ **Tools of creativity**

The above new techniques are created with the help of following tools. The higher judiciary has used the following Articles as a tool for creation of new way of justice delivery called techniques of judicial creativity. Precedents with reference to the Obiter-dictum and ratio decedendi are binding over all the country and treated as law.

1. Under Article 32. Anybody can move to Supreme Court for redress against the violation of the fundamental rights.
2. Under Article 226 Anybody can move to High court for redress against the violation of the fundamental rights as well as other legal rights.
3. Under Article 227, 141, 142, 136 of the Constitution.
4. Section 134, 144 and 482 of Cr.P.C.
5. Section 151 of C.P.C.

In *Olga Tellis v. Bombay Municipal Corporation* (A.I.R. 1986 S.C. 180), one Journalist of Bombay claimed relief against demolition of hutments of pavement dwellers by the Municipal Corporation of Bombay. His letter to the Supreme Court was treated as writ petition and the court granted interim relief to pavement dwellers.

In *Bandhua Mukti Morcha v. Union of India* (A.I.R. 1984 S.C. 802.), an organization dedicated to the cause of release of bonded labours informed the Supreme Court through a letter that there were a large number labours working in the stone-quarries situated in Faridabad District under inhuman and intolerable conditions and many of them were bonded labours. The court treated the letter as a writ petition. The court after inquiry ordered release and rehabilitation of bonded labours.

In *Sunil Batra v. Delhi Administration* (1980 Cri.L.J. 1099.), the epistolary power had been invoked when a prisoner Sunil Batra had written a letter from Tihar Jail, Delhi to the Supreme Court informing about the torture in prison. In the case of *Upendra Baxi v. State of U.P.*, (1986 (4)SCC 106) A letter of two Law Professors of Delhi University informing the Supreme Court about inhuman and degrading conditions under which inmates of the protective home at Agra were living was treated as writ petition. Directions given by the judiciary containing the manner in which protective home would be run is akin to legislative provisions and different from adjudicating of rights and duties of the parties.

In another case *Bhim Singh v. State of Jammu and Kashmir*, 1985 (4) SCC 677), a member of the Legislative Assembly of Jammu and Kashmir was arrested by the police mala fide and he was not produced before the Magistrate within the required time. Holding that his fundamental rights under Article 21 and 22 (1) were violated, the Court observed that when there is mala fide arrest, the invasion of constitutional or legal right is not washed away by his being set free and in 'appropriate cases' the Court has jurisdiction to compensate the victim by awarding suitable monetary compensation. The Court awarded Rs.50,000 as monetary compensation by way of exemplary costs to the petitioner to compensate him.

In *M.C. Mehta v. Union of India*(A.I.R. 1987 S.C. 1086), the Supreme Court held that the power of the Court under Article 32(1) is not only injunctive in nature, that is, preventing the infringement of a

fundamental right, but it is also remedial in scope. The power of the Court to grant such remedial relief may include the power to award compensation in appropriate cases. The 'appropriate cases' are those cases where the infringement of fundamental right is gross and patent. It is considered unjust to ask the victim to go to the civil court for claiming compensation as it may take many years for the victim to get relief in a civil court.

In *Nandini Satpathy v. P.L. Dani* (A.I.R. 1978 S.C. 1025), the Supreme Court observed that Article 22(1) directs that the right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right. The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near-custodial interrogation. If an accused person expresses the wish to have his lawyer by his side when his interrogation goes on, this facility shall not be denied to him. *Nandini Satpathy's* case makes a clear departure from the literal interpretation stance of the Supreme Court taken in earlier cases. The case added an additional fortification to the right to counsel. Article 22(1) does not provide to arrested person, right to be provided with a lawyer by the State.

However, in *M.H. Hoskot's* case (A.I.R. 1978 S.C. 1548.) the Supreme Court did not hesitate to imply this right in Article 22(1) and Article 21 jointly while pressing into service application of a Directive Principle of State Policy under Article 39-A of Equal Justice and free legal aid. The Court observed that where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the Court shall, if the circumstances of the case, the gravity of the sentence and the ends of justice so require, assign competent counsel for the prisoner's defence, provided the party does not object to that lawyer. The State shall pay to assigned counsel such sum as the court may equitably fix.

Hussainara Khaton's case (A.I.R. 1979 S.C. 1377) reiterates the right of every accused person who is unable to engage a lawyer due to poverty, indigence or incommunicado situation, to have free legal services provided to him by the State for obtaining bail as well as for defence at the time of the trial. The court added a further protection to this right by holding that if free legal services are not provided to such an

accused, the trial itself may run the risk of being vitiated as contravening Article 21.

The Supreme Court, while elaborating the scope of the right guaranteed under Article 21 observed in *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (A.I.R. 1981 S.C. 746) that right to life cannot be restricted to mere animal existence. It means something more than just physical survival. Right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings. The Supreme Court ruled that the detainee should be treated with more humanity and dignity than the under trial or a convict. He should be allowed greater freedom than allowed to an under trial or a convict as he stands on the higher rung of the ladder.

In *Chameli Singh v. State of U.P.* (A.I.R. 1996 S.C. 1050) it was held that the right to life as a human being is not ensured by meeting only the animal needs of a man. Right to life guarantee in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. Right to shelter includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all infrastructure necessary to enable them to live and develop as a human being.

➤ **Criticisms on Judicial creativity.**

The judiciary must provide the justice when the aggrieved party knocks its door and not try to compromise the dispute as it did in *Maneka Gandhi* case, because art 14 guarantees recitative Justice. Higher judiciary is many times criticized by other organs of state for the judge's politics. Judges are indulging them for judicial legislation. The excessive encroachment of judges in the domain of executive result the criticism of judge's politics. On the other hand political interference or politics the judge's appointment, removal and the matter concerning thereto.

The judiciary is subjected to criticism like 'a post-card is more important than a fifty page affidavit'! Epistolary jurisdiction should be confined to exceptional cases of gross injustice. The people who have genuine public cause of sufficient gravity should only be permitted to utilize the precious time of the judiciary.

The Supreme Court did not hesitate to assume direct legislative function in the case of *Vishaka v. State of Rajasthan*. (1997 (6) SCC 241) In this case, the Supreme Court has virtually enacted a piece of legislation on the ground that there is a vacuum in the legislative field of sexual harassment of working women. There is a paragraph similar to the statement of objects and reasons. There is a definition clause and there are 12 points similar to 12 sections. The Supreme Court laid down some guidelines and norms which are directed to be treated as law. It is submitted that these guidelines cannot be treated as laying down a precedent under Article 141, but this should be treated as unauthorized *ad hoc* legislation by the judiciary. Interpreting certain provisions of the existing law and laying down certain principles in the form of the precedent is what is envisaged under Article 141 and not *ad hoc* legislation by the judiciary when there is vacuum in the field. *Vishaka* is an example of judicial trespass in legislative domain. The role of judiciary in the protection of human rights is certainly commendable.

However, in the quest for socio-economic justice the judiciary seems to overstep the limits of its judicial function and trespass into the areas assigned to the executive and the legislature. The need of the hour is to properly balance the judicial activism with judicial restraint!

In an unprecedented manner the Supreme Court, in *D.K. Basu v. State of W.B.* (A.I.R. 1997 S.C. 610) issued 11 requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf. The requirements were held to be flowing from Articles 21 and 22(1) of the Constitution. In its anxiety to protect the interests of the arrested person, the court has exhibited an instance of judicial hyper-activism rather than judicial waywardness. The case sounds death-knell to Montesquieu's theory of separation of powers amongst three organs of the State. The Supreme Court arrogated to itself the constituent or at least legislative power in laying down these requirements. The Supreme Court while interpreting a provision of the Constitution may fill in the interstices but the zeal to create such interstices and then fill them should be deprecated. The judiciary should restrain from trespassing in the field of

another organ under the guise of interpretation of the Constitution or doing complete justice. Though these eleven requirements comprise human rights jurisprudence and it would be in the fitness of the things, if these were law, these sweeping eleven requirements laid down by the Supreme Court, it is submitted, cannot have the status of law as its source is not legislature but judiciary.

7.2.4 Judicial process in pursuit of constitutional goals and values - new dimensions of judicial activism and structural challenges.

1. The Judicial process in pursuit of constitutional goals and values

Judicial process is to be followed by one of the organ of democracy called as judiciary.

Judicial process is a process followed by courts while deciding a case. It is very wide concept. It includes all the things which court perform or has to perform while giving judgment.

Justice Cardozo states that, “In judicial process, a judge has to follow a fair process, which law is applicable, which is not, what is logic behind the statutes, facts of the case, admissibility & reliability of evidence, circumstances of fact, reasoning behind each & every issue or fact in issue, applicability of precedents, consequences of his judgment, the social & legal aspect of the case, etc. all the thing which are necessary for fruitful judgment”. He described that “all the facts & legal aspects should go through the machine & the outcome will be judgment”.

In short the judicial process is a process followed or which have to follow by court as well as judges while delivering of justice. If one of part of chain of judicial procedure is missed, then the outcome may not be called as justice. It may be sometimes turn to give injustice. Nowadays, there are codified laws which are more clear i.e. CPC, Cr. PC, Evidence, etc. Evidence Act is helpful regarding reliability & admissibility of evidence.

In our democracy, the Constitution is supreme law & the judiciary is safe guarder of constitution. The constitution has envisaged the different goals like

- Democracy

- secularism
- socialism
- sovereign
- republic
- Freedom
- Equality
- Dignity
- Equity and
- Fairness.

The goal of the judiciary should therefore be defined as securing human conduct consistent with acceptable normative standards. To achieve this goal judicially has been playing a very active role since the post Maneka Gandhi's era by giving the judgments. Democracy is one of the goal of our Indian constitution, which have to achieve through various organ of government i.e. Judiciary, Executive and Legislature with the participation of people. There are certain goals & values, which incorporated in our preamble & various articles of our constitution like equality, democracy, fraternity, justice, integrity, freedom, etc. If any problem is created by any individual or govt. body while achieving these goals & values, the redresses is given by the judiciary. There are various cases decided by the supreme court for perseverance of these constitutional goals & values, as under;

In judicial process one of the main functions is delivery of judgment, because judgment of Supreme Court & high court termed as precedent for all other subordinate authority. Precedent also called as judge made law. According to art. 141 & 142, its decision is binding in all over the citizens. Upendra Bati has described Indian Supreme Court is most powerful court in the world.

1. Nilabati Behras case – In which compensation of Rs. 150000 / -has given to the mother of victim of custodial violence's.
2. Maneka Gandhi's case – In which right to abroad is considered as right to life & liberty.
3. Various decisions given in MC Mehta's Writ Petition concerning the pollution of air & water under the purview of right to life u/art 21 of constitution.

4. Right to speedy trial is recognized in HussainaraKhatoonVs. Chief secretary of Bihar's case.
5. SheelaBorseVs. State of Maharashtra & D.K .Basu Vs. State of West Bengal in which prisoner's right to consult & appoint legal practitioner of his choice & right to free legal aid is recognized.
6. In Sakal Paper case &BannetColleman case right to freedom is recognized as right to freedom of speech & expression.

Likewise Supreme Court of India has always safeguarded the constitutional goals & value through their judgment which is one of the parts of judicial process.

2. New dimensions of judicial activism & structural challenges.

Judicial activism is a concept firstly established in America in 1959, where in Mebury vs. Madison's case, chief justice Marshall has recognized the right of Negros against discrimination .InIndia, justice Krishna Ayer& Justice PN Bhagwati has developed this trend from 1979. Thefirst PIL is recognized in the case of HussainaraKhatoon vs. Chief Secretary of Bihar. In this case a writ is filed concerning the prisoners who were behind the bars more than a period which they may suffer if the maximum sentence awarded. The Supreme Court has given guidelines to release all the prisoners who were behind bars more than a period which they may suffer if the punishment is awarded & also issue a commission to see the actual situation of jails in Bihar state. This judgment recognized the right to speedy trial as a part of right to life &personal liberty u/art 21 of the constitution. This active and creative act of the judiciary is called as judicial activism.

There are various concepts coming before the new era, like,

1. Surrogacy
2. Right to die
3. Cyber crime
4. Helpless government to provide basic human rights
5. Failure of Government; various scams are taken place in govt.

Judicially has time to time actively responded these new concepts under the term judicial Activism.

Indian constitution has provided a structure to achieve the constitutional goals & value by forming three organs; judiciary, executive & legislation.

Legislature is makes Law.

Executive implements the law, &

Judiciary interprets the law & delivers justice.

This structure is formed with the application of theory of separation of power by which all these organ is vested different jurisdiction & no one have to interfere with the working of the other organ. Though there is impossible a watertight separation, but each organ have to work in their jurisdiction with certain limits. There is structural balance made by imposing certain limits on each organ & also by way of observation of each organ by other organ. But the Indian judiciary is more powerful because of its independent nature. Indian Supreme Court is vested with wide jurisdiction & vast discretion for protection of the constitution. If any organ cross his limit & encroach in the jurisdiction of another organ, the structural balance will shake & automatically structural challenges come forward.

Nowadays one of the main structural challenge before India is judicial tyranny that whether;

- Judiciary is acting as legislator & the governance by judiciary.
- Judiciary has used his power by way of activism & applied their decision as law.
- There are charges at the Indian Supreme Court that its judges continually indulge in judicial legislation.
- The another contention is that supreme court of India has by entering into domain of executive or taken over the administration of the country.

In June 2011, Supreme Court has directed the govt. to sale out the wastage wheat to people at lower price. This direction is too much criticized by the constitutionalist and by the executive of the country.It's

a government, executive to decide the policy of selling or purchasing the wheat.

- SC has issued a direction to govt. & TRAI to cancel the license given to companies in A Raja 2 G Spectrum Scam. Now the question arisen before the executive that who will be responsible for the losses of companies due to cancellation of licenses. Here the judiciary is entered into the domain of executive which is harmful to the parliamentary democracy of the country. It is because the judiciary is not answerable to any other organ of the constitution.

In the classic text, the nature of judicial process, Justice Benjamin Cardozo, accepted the fact that judges do make law. However he stated that;

“The judges legislate only between gaps. He fills the open space in the law. How far he may go without travelling beyond the wall of the interstices, cannot be staked out for him on a chart. He must learn it for himself as he gains the sense of fitness & proportion that comes with years of habituate in performance of an art.”

It means judge has to make a law for filling the gaps, loopholes of the law made by legislator. Judges have their own limitations, they have to work within that limitation which will helpful for maintain the structural balance & for the running of healthy democracy. But the above example shows that judiciary is crossing there limits by entering into the domain of legislative and executive. This has created the big structural challenge before India.

7.2.5 Institutional inability and liability of courts & judicial activism. Scope & Limit.

Courts are the institutions which deliver a justice. It has its own limitation. Sometimes courts also unable to provide a justice. Because the boundary of jurisdiction & exercise of power has made by constitution. Constitution has provided that jurisdiction of SC & HC of various states. Central laws have prescribed the limitation over a subordinate judiciary.

Though the higher judiciary is vested with discretion, but it shall not be excessive, unreasonable or against the justice. All are very wider terms depending upon the circumstances of the case & different from case to case.

The courts while delivering a justice, judiciary have to use a self-restraint principle.

Justice Cardozo has stated that “judges should not act with his spasmodic sentiments to vague an unregulated benevolence. He exercised the discretion informed by the tradition, discipline by the system, & subordinate or pre cordial necessity of order in the social life”. It means judges has to not act with the prejudice mind or with their feelings, sentiments, while delivering a justice, but he has to act fairly & with disciplined system as required for maintaining peace in social life of person.

Scope of judicial activism is very wide. They can pass any order for safeguarding a constitutional goals & values & for end of justice.

➤ **Limitations on institution:**

1. Jurisdiction – jurisdiction means the authority to try the matter and give judgments. Every courts has definite and defined jurisdiction and the court should try the matter which is coming under their authority.
2. No one can be judge of his own cause.
3. Audi alters am partum.
4. Limitation law
5. Judicial self -restraint principle that judicial should not enter into the domain of legislator or executive.

In many instances the judicial institutes are unable to provide justice. Many instances are coming before the court where violation of rights is taken place court is unable to provide the justice due to the absence of remedy provided in the statute. For example i.e. Surrogacy. The law relating to the matter connected with surrogacy is not yet enacted in India. India is looked as hub for surrogate mothers. The British countries ban the commercial surrogacy. So the foreigners are coming to India in search of surrogate mother. Some hospitals in Delhi and Rajasthan are famous for providing the facility of surrogate mother. There are complaints about the surrogacy agreements, the rights of surrogated mother, the rights of the surrogated child if the persons denied him, who will look after his welfare? , the rights and liability of the parties in surrogacy agreement, these kind of questions are coming before the court and the court is unable to provide the adequate remedy due to the absence of law and absence of remedy in statute. To deal with this kind of problem the higher judiciary is

exercising the inherent power and forms the new techniques. Supreme Court has provided the guidelines to deal with matter connected with surrogacy in one of the famous case taken place in Rajasthan. In D.K. Basu vs. State of W.B. Supreme Court has given guidelines for the arrest of person. In the Vishakha's case also Supreme Court has given the guidelines for the protection of working women from the sexual harassment at work place.

At present there is no law which fixes the liability of court for its erroneous decision or mistakes resulting in to injustice. An accountability of judiciary has always being in question. Many debates are been seen on the issue of judicial accountability. There are credible complaints against the higher Judiciary regarding the corruption, excessive use of power, arbitrary exercise of judicial discretionary etc. The propose The Judicial Standards and Accountability Bill, 2010 is not yet passed. The Bill seeks to (a) lay down judicial standards, (b) provide for the accountability of judges, and (c) establish mechanisms for investigating individual complaints for misbehaviour or incapacity of a judge of the Supreme Court or High Courts. It also provides a mechanism for the removal of judges.

The procedure of removal of judges is presently regulated by the Judges (Inquiry) Act, 1968. The Bill seeks to repeal the Act. The Bill requires judges to practice universally accepted values of judicial life. These include a prohibition on: (a) close association with individual members of the Bar who practice in the same court as the judge, (b) allowing family members who are members of the Bar to use the judge's residence for professional work, (c) hearing or deciding matters in which a member of the judge's family or relative or friend is concerned, (d) entering into public debate on political matters or matters which the judge is likely to decide, and (e) engaging in trade or business and speculation in securities. Judges will also be required to declare their assets and liabilities, and also that of their spouse and children. Such declaration has to take place within 30 days of the judge taking his oath to enter his office. Every judge will also have to file an annual report of his assets and liabilities. The assets and liabilities of the judge will be displayed on the website of the court to which he belongs.

7.3 Questions for Self Learning

1. What is judicial review? Discuss with the help of famous case laws.
2. Why is the independence of judiciary important?
3. Do you believe that judicial activism is creativity of the Supreme

Court

4. What are the tools and techniques of Creativity of Judicial activism?

7.4 Let us sum up

In India, the judiciary is separate and independent organ of the state. The legislature and the executive are not allowed by the constitution to interference in the functioning of the judiciary. The functioning of the judiciary is independent but it doesn't mean that it is not accountable to anyone. In a democracy the power lies with the people. The judiciary must concern with this fact while functioning.

It is satisfying to see that achievements of Judicial process in respect of maintaining the balance and social order has been significant. Judiciary has not shed away from its responsibility in creating faith. In this process the judiciary has innovated various tools and techniques. One can see how the Supreme Court of India has innovated, case after case, various Justice Principles and doctrines for upgrading social order. Needless to say that, Articles 14, 15, 16, 17, 38, 39A and 42 of the constitution deal with facets of social Justice, Courts have played very wide role in interpreting the constitution for achievement of social justice.

7.5 Glossary-

Judicial Process: Judicial process means the rules which determine the role of judge and jury in the courtroom as well as the jurisdiction of the individual over specific areas of law.

7.7 References

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Unit-8

The Concepts of Justice

8.0 Objectives

8.1 Introduction

8.2 Topic Explanation

8.2.1 The concept of justice or Dharma in Indian thought

8.2.2 Dharma as the foundation of legal ordering in Indian thought.

8.2.3 The concept and various theories of justice in the western thought.

8.3 Questions for self learning

8.4 Let us sum up

8.5 Glossary

8.6 References

8.0 Objectives

After studying this unit, the students will be able to understand...

1. The concept of justice or Dharma in Indian thought
2. Dharma as the foundation of legal ordering in Indian thought.
3. The concept and various theories of justice in the western thought

8.1 Introduction

Dharma is a Sanskrit word, this word according to dictionary meanings are ordinance, usage, duty, right, justice, morality, virtue, religion, good works, function or characteristic. In most cases the meaning of dharma is religious ordinances or rites. In fact the term dharma in Hindu jurisprudence passed through several transitions of meaning: in its most prominent significance it stands for the privileges, duties and obligations of man, his standard of conduct and so on. Dharma acquired a meaning of what is just and customary.

An enquiry into the concept of justice in ancient India will require us to grasp correct rendering of the term dharma as used by ancient Indian law givers like Manu and others. It is so because the ancient Indian law givers had a definite goal in view to achieve. The scheme of the Codes was so framed as to be conducive to attaining the prescribed goal.

The ancient Hindu jurists did not separate the socio-legal aspect of human life from its ethical or spiritual aspect. According to them a separation of law from sociology, ethics or spirituality would render the former incomplete and barren. In other words a viable legal code is a representation of all the aspects,

traditions, manners, and ideas of a particular society. It is rather a compendium of view-the society was expected to follow in life. Therefore, the end of dharma that the ancient law givers had in view must be studied in the context of the attitude of the society towards life and its various aspects. Consequently, the inclusion of social, ethical and spiritual values in a law code is inevitable.

The jurists of Analytical school namely, Bentham, Austin, Kelsen and Hart believe in the separation between law and the ideology of law. They consider the latter unnecessary for the study of jurisprudence. However, for jurists of Historical, Sociological and Realist schools, the study of the different branches of learning, like philosophy of law, ethics and economics etc... is inevitable for the proper understanding of law. According to the jurists of these schools law cannot be understood in isolation of the society it operates in.

8.2 Topic Explanation

8.2.1. The Concept of Justice or Dharma in Indian thought

Law or Dharma is not a body of rules practiced for its own sake. Dharma has a definite end. When it is used in the sense of obligation its purpose is to keep everybody within his assigned role prescribed by the Dharmashastras.

The legal philosophy of ancient India was directed towards individualistic socialism or socialistic individualism. It enunciated the middle path which was the golden path. Neither was the individual neglected nor was the society. The concept of dharma in Manu is directed towards the realization of secular and spiritual ends which certainly includes the realization of the idea of justice in human society. It is with this aim that the aforesaid classifications have been made. The sagacity and importance of Manu's views may be grasped only if we keep in mind his socio-philosophical views.

In administering justice the king aimed at putting those people back on the right path that transgressed Swadharma (Personal duties) and thus essayed to maintain perfect peace and harmony in the society. But the administration of justice is not possible without a body of rules. The king cannot administer justice arbitrarily. Many enjoins upon a king to follow the established law in administering justice. He should administer justice according to the established law (Dharma). Thus the primary end of dharma, when we use the word dharma in, the sense of Rajya dharma, means to maintain status quo; and provide opportunities of self development.

The idea to help the weak and to bring the lower to the higher level of life lies in the domain of both morality and law. This idea is the moral part of man's nature and the instinct for justice is part of it. The most important of virtues in Manu which is an administrator of justice must possess in humility or modesty. "Let a King, though he may already be modest, constantly learn modesty from the Brahmans, learned in the Vedas, because a king who is modest never perishes. Manu cited precedents of several Kings who perished together with their belongings because of the want of modesty and through modesty, hermits gained kingdoms.

The term dharma is interchangeably used according to context for virtue, justice and law. So dharma is a moral part of judge's nature. Justice as a virtue of the judges has been attributed Eternal divine character. It is the highest type of virtue which cannot be subordinated to anything in this world. In as much as justice is the only friend even during life. Even in the case of those who are very great friends, the friendship lasts only till death. Justice on the other hand follows friendship: one should not either pervert justice or conceive its perversion. This warning of Manu to judge is of great significance. The concept of justice in Hindu jurisprudence and especially according to Manu was understood and realized in a way not inferior to any legal system in the modern World. It is this aspect of justice in ancient Indian legal philosophy which is relevant in modern times in relation to administration of justice and appointment of judges. It has double effect: first it makes justice the basis of the social order. Secondly, it subordinates the judge to dharma or law.

The concept of justice as understood in Hindu jurisprudence in a sense does not encourage judicial activism, which has a tendency to make a judge above the law, creator and transformer of law. It is difficult to reconcile judicial activism with the doctrine of 'Rule of Law' as it generates retro-legislation. Judicial activism can be compared with the concept of administration of justice in Equity Courts in England. In ancient Indian jurisprudence the concept of justice carried with it, by necessary implication, the underlying philosophy of the modern doctrines, like 'Rule of Law', justice according to law and doctrine of separation of power. An all other allied doctrines including the concept of 'natural rights' etc.

Even the principles of equity owe their origin to this pure virtue. Though there is a direction laid down by Manu that the king was to administer justice according to dharma, yet in inflicting punishment the doctrine of relativity was to be applied which was in keeping with social order conceived under Hindu jurisprudence. The Varna of the offender also determined the nature and extent of punishment. The higher was the Varna of an individual the more was his responsibility to observe the rules of dharma.

In case of theft, the guilt of a Sudra shall be eight fold. That of the Vaisya sixteen-fold and of the Ksatriya thirty-two-fold and of the Brahmana sixty-four-fold or quite a hundred-fold, or (even) twice sixty four-fold, each of them knowing the nature of the offence. Neither a father nor a teacher, nor a friend, neither another nor a wife nor neither a son nor the priest shall go unpunished by the king if they do not keep within their duty. Not only was this even the king subject to punishment if he committed an offence and that too more severely. Where common man would be fined one 'pana, the king shall be fined one thousand, that is the settled rule.

8.2.2. Dharma as the Foundation of legal ordering in Indian thought.

a. Dharma is not religion.

Religion is only a method of worship and is a word which came into use in the nineteenth century. The word is based on a Christian concept and rooted in a Christian background of affiliation. Dharma is a very ancient word. Dharma is non-divisive, Non-exclusive, and non-conclusive. Dharma is a quest for understanding cosmic order of the universe and consciousness order at a personal level. Dharma unites; Religion and its obverse secular are divisive. Religion is a restrictive canvas relate to modes of worship of a divinity called by a variety of names. Religion and its obverse secular is restrictive in relating to parts of society and parts of social conduct.

b. What is Dharma?

Dharma is a complex word. It has no equivalent in English. To understand dharma, we have to inquire into ancient text of India.

Dharma is the essence of the perception of the rishis. Who laid the early foundations of the Bharatam Janam (Rigveda), the Nation of Bharata. Dharma sets forth an ideal to strive for, an ideal for all

humanity: dharma is a universal ethic, which evolved over time as an eternal satyam (truth) which should govern every human endeavor which result in the good of all living entities bhulahitam. Dharma is sacred duty. The very performance of one's duty makes it sacred. This is a metaphysical concept which has to be elaborated further given the problem of bhashapariecheda, of explaining the sanatna dharma idiom which evolved in the cultural domain of Bharatam. Into English, Dharma is inviolate; dharma is divine, as one attains the full potential of his aatama, one attains divinity.

The very performance of one's responsibility makes the action, the motion, and divine. Sacredness inheres in the responsibility. That is why, dharma is sacred. Within this all-enveloping framework dharma as applied to governance, called rajadharma³ is explained as the affiliation of individuals of the samajam attaining the purushartha of dharma, artha and kaama without transgressing dharma, the ethical principles of conduct and inter-personal relationships. This is affirmed by Barhaspatya sutra. 11-43-44: "The goal of rajaniti (polity) is the accomplishment of dharma, artha, kaama. Artha and Kaama must be subject to the test of dharma. Dharma was supreme law of the state and rulers and subject alike were subservient to this law.

Dharma is the constitutional law of modern parlance, explaining the contours of the functions and responsibilities of the state, constraining the ruler by regulations which restrain the exercise of sovereignty by the ruler- a parallel to the paradigm of checks and balances enshrined in modern constitutions to prevent abuse of power while ensuring equal protection to the subjects without discrimination. "Just as the mother earth gives an equal support to all the be living, a king must give support to all without no discrimination."(Manusmriti).

"The king must furnish protection to associations following ordinances of the Veda (Naigmas) which protection should extend to all those non-believers (paashandi) and to others as well." (Naradasmrui, Dharmakas' a.P.870), the absence of discriminations, provisions to check abuse of power and enjoining the state to promote the individual's and samajam's activities for the attainment of purushartha [achieving the goals of life—of dharma (righteous conduct), of artha (economic well-being) and of kaama (mental well-being) are the key facets of rajadharma. Such a rajadharma is beyond secular and is a sacred trust to be administered with diligence and commitment.

Such arajadharmas exemplified by ramarajyam which is evoked by any rulers of Bharatam in many parts of the nation in their references to Sri Ramchandra as the ideal ruler whose example the rulers hoped to emulate in rendering social justice and in regulating the affairs of the state. Ramarajyam is a dharma polity, governed by a dharma constitution. This is the reason why Valmiki refers to Rama in eloquent terms: Ramovigrahaandharmah. (Rama is the very embodiment of dharma). The two great epics Ramayana and Mahabharata and the BhagavataPurana explain dharma in action, the application of the 'ordering principle's' in specific real-life situations, in moments of relative tension such as when a proponent like Arjuna had to decide to fight against his own kith and kin. Members of his own kula.

This moment of decision results in the delineation of the Dharmakshetra (the domain of dharma) in that Song Celestial, Bhagavad Gita. An enduring metaphor of the Bhagavatam is samudramanthanm: deva and asura apparently in conflict work together to harness the resources of the ocean by enduring the ocean together. This togetherness to achieve artha and kaama is a dharmic cooperative endeavor, an example of a samajam in harmony. Pulling together for a common purpose-that purpose is okahitam. 'Well-being of Loka-hitam is the touchstone which determines the dharmic nature of positive action. Just as satyam is truth that is pleasing, dharma is action which is loka-hitaaya 'for the well-being of the society'. How should such action be performed or such responsibility be discharged? Dharma governed by ethical conduct, a social ethic which respects the responsibility being discharged by everyone in society. Dharma is sacred because it is the divine ordering principle. Dharma is the principle which recognizes the way things are or the nature of things or phenomenon.

In Thai language, the compound dharmacarth (dharma carati) means 'nature'. Hence the compound Sva-dharma in the evolution of sanatana dharma in Bharatam means 'law and responsibility, according to one's nature'. Rigveda notes that ritam 'occurrence of phenomena's or 'order' is dharma. Atharva Veda notes: Prithivim dharman.a_dhr.tam 'the world is upheld by dharma'. Sanatana Dharma in bhartiya metaphysics (elaborate further in Buddha, Jaina, Khalsa thought) is not a moral connotation. It is an inexorable organizing. Creative principle which operates on the plane of the aatman and the cosmos. Sanatana dharma is

thus beyond a law regulating an individual's action. It is the very expression of the divine. Such adherence to the principle is the purusharta, the purpose of life.

Dharma is an ordering principle which is independent of one's faith or methods of worship or what is understood by the term the 'religion'. Thus providing for total freedom in the path chosen or ethical norms employed, in an eternal journey from being to becoming. Hence, it is truly universal, sanatna dharma, the ordering principle eternal, since it is an ordering principle. The word is applied across many facets of life. For example to rajadharma as an ordering principle for governance, swadharma as an ordering principles of one's spiritual quest or life in society or as 'rajadharma denoting responsibilities associated with one's station in life's progress from childhood, through studentship, marital life and to old age.

Dharma is elaborated with the use of terms such as satyam, rita, rinam, vrata to defining ethical responsibility performed in relation to social and natural phenomena. Dharma can be the defining paradigm for a world as a family, vasudhaiva kutumbaam. Aano bhadraah kratavoyantuvis' vatah. Let noble thoughts flow to us from all sides. These thoughts from Vedic times are as relevant today as they have been over millennia of pilgrims' progress and exemplified by the progress and abiding continuum of Hindu civilization, Jaina, ariaya, dhamma and Bauddha dhamma. In such an ordering, Dharma-dhamma becomes a veritable celebration of freedom, freedom in moving from being to becoming

8.2.3. The concept and various theories of justice in the western Thought.

➤ Western Theories of Justice

a) Plato:

Plato applies theory of justice to a particular social issue. In a remarkably progressive passage in Book V of his Republic, Plato argues for equal opportunity for women. He holds that, even though women tend to be physically weaker than men this should not prove an insuperable barrier to their being educated for the same socio-political functions as men including those of the top echelons of leadership responsibility. While the body has a gender, it is the soul that is virtuous or vicious. Despite their different roles in procreation, child-bearing, giving birth, and nursing babies, there is no reason, in principle, why a woman should

not be as intelligent and virtuous including as just as en, if properly trained. As much as possible, men and women should share the workload in common (Republic). We should note, however, that the rationale is the common good of the community rather than any appeal to what we might consider women's rights. Nevertheless, many of us today are sympathetic to this application of justice in support of a view that would not become popular for another two millennia.

His conception of justice reduces it to order. While some objective sense of order is relevant to just, this does not adequately capture the idea of respecting all persons, individually and collectively, as free rational agents. Plato's theory is far more impressive than the impressionistic view of the Sophists; and it would prove extremely influential in advocating justice as an objective, disinterested value. Nevertheless, one cannot help hoping that a more cogent theory might yet be developed.

b) Aristotle:

After working with Plato at his Academy for a couple of decades, Aristotle was understandably most influenced by his teacher, also adopting, for example, a virtue theory of ethics. Yet part of Aristotle's greatness stems from his capacity for critical appropriation, and he became arguably Plato's most able critic as well as his most famous follower in wanting to develop a credible alternative to Sophism. Book V of his great *Nicomachean Ethics* deals in considerable depth with the moral and political virtue of justice. It begins vacuously enough with the circular claim that it is the condition that renders us just agents inclined to desire and practice justice. But his analysis soon becomes more illuminating when he specifies it in terms of what is lawful and fair. What is in accordance with the law of a state is thought to be conducive to the common good and/or to that of its rulers. In general, citizens should obey such law in order to be just.

The problem is that civil law can itself be unjust in the sense of being unfair to some, so that we need to consider special justice as a function of fairness. He analyzes this into two sorts: distributive justice involves dividing benefits and burdens fairly among member of a community, while corrective justice equals us, in some circumstance, to try to restore a fair balance in interpersonal relations where it has been lost. If a member of a community has been unfairly benefited or burdened with more or less than is deserved in the way of social distributions, then corrective justice can be required, as, for example, By a court of law.

Notice that Aristotle is no more an egalitarian than Plato was-while a sort of social reciprocity may be needed, it must be of a proportional sort rather than equal. Like all moral virtue for Aristotle. Justice is a rational mean between bad extremes. Proportional equality or involves the “intermediate” position between someone’s unfairly getting “Less” than is deserved and unfairly getting “more” at another’s expense. The “mean” of justice lies between the vices of getting too much and getting too little, relating to what one deserves, these being two opposite types of injustice. One of “disproportionate excess.” The other of disproportionate “deficiency”,

Political justice of both the lawful and the fair sort, is held to apply only to those who are citizens of a political community (a *polis*) by virtues of being “free and either proportionately or numerically equal”, those whose interpersonal relations are governed by the rule of law. For law is prerequisite of political justice and injustice. But since individuals tend to be selfishly biased, the law should be a product of reason rather than of particular rulers. Aristotle is prepared to distinguish between what is naturally just and unjust, on the one hand, such as which one may legitimately kill, and what is merely conventionally just or unjust. On the other, such as a particular system of taxation for some particular society, but the Sophists are wrong to suggest that all political justice is the artificial result of legal convention and to discount all universal natural justice.

In his politics, Aristotle further considers political justice and its relation to equality. We can admit that the former involves the latter but must carefully specify by maintaining that justice involves equality “not for everyone, only *for equal*” He agrees with Plato that political democracy is intrinsically unjust because, by its very nature, it tries to treat unequal’s as if they were equals. Justice rather requires *inequality* for people who are unequal.

Thus political justice must be viewed as a function of the common good of a community. It is the attempt to specify the equality or inequality among people he admits, which constitutes a key “problem” of “political philosophy.” He thinks we can all readily agree that political justice requires “proportional” rather than numerical equality. But inferiors have a vested interest in thinking that those who are equal in some respect should be equal in all respects. While superiors are based, in the opposite direction to imagine that those who are unequal in some

way should be unequal in all ways. Thus, for instance, those who are equally citizens' are not necessarily equal in political virtue, and those who are financially richer are not necessarily morally or mentally superior. What is relevant here is 'equality according to merit.' Though Aristotle cannot precisely specify what, exactly, counts as merit, for how much it must count. Who is to measure it and by what standard. All he can suggest, for example in some of his comments on the desirable aristocratic government, is that it must involve moral and intellectual virtue.

c) **Augustine:**

Aurelius Augustine was born and raised in the Roman province of North; during his life, he experienced the injustices the corruption and the erosion of the Roman Empire. This personal experience in dialectical tension with the ideals of Christianity provided him with a dramatic backdrop for his religious axiology. Philosophically, he was greatly influenced by such Neo-Platonists as Plotinus. His Christian Platonism is evident in his philosophical dialogue *On Free Choice of the Will*, in which he embrace Plato's view of four enteral moral virtues (Which came to be called "Cardinal," from the Latin word for hinges thee being metaphorically imaginable as the four hinges on which the door of morality pivots). These are prudence (substituted for wisdom), fortitude or courage temperance, and justice.

His conception of justice is the familiar one of "the virtue by which all people are given their due" but this is connected to something new and distinctly Christian the distinction between the temporal law, such as the law of the state, and the eternal, divine law of God. The eternal law establishes the order of God's divine providence. Thus a civil law of the state that violates God's eternal law is not morally binding and can be legitimately disobeyed in good conscience. This was to have a profound and ongoing influence on Christian ethics. In his masterpiece, *The City of God*, Augustine draws the dramatic conclusion from this position that the Roman Empire was never a truly just political society. He expresses his disgust over its long history of "revolting injustice." Rome was always pagan, earthly city, and "true justice" can allegedly only be found in a Christian "city of God."

The just rather than the powerful should rule for the common good, rather than serving their own self-interest. He strikingly compares unjust societies, based on might rather than on right, to "gangs of

criminals on a large scale,” for, without justice, a kingdom or empire is merely ruled by the arbitrary fiat of some leader(s). A genuinely just society must be based on Christian love, its peaceful order established by the following of two basic rules that people harm nobody and that they should try to help everyone to the extent that they can do so. While this is a very valuable application of his theory of justice, this doctrine of the just war standing the test of time to this very day, the general theory on which it is based is more problematic.

d) **Aquinas:**

As Augustine is arguably the greatest Christian Platonist, so Thomas Aquinas, from what is now Italy, is the greatest Christian Aristotelian. Nevertheless, as we shall see, his theory of justice is also quite compatible with Augustine's. Aquinas discusses the same four cardinal moral virtues, including that of justice. In his masterpiece, the multi-volume *Summa Theologica*. No more a socio-political egalitarian than Plato, Aristotle or Augustine. He analyzes it as calling for proportional equality or equity rather than any sort of strict numerical equality and as function of natural right rather than of positive law. Natural right ultimately stems from the eternal, immutable will of God, who created the world and governs it with divine providence. Natural justice must always take precedence over the contingent agreements of our human convention. Human law must never contravene natural law, which is reason's way of understanding God's eternal law

He offers us an Aristotelian definition, maintaining that “justice is a habit whereby a man renders to each one his due by a constant and perpetual will.” As a follower of Aristotle, he defines concepts in terms of genus and species. In this case, the general category to which justice belongs is that it is a moral habit of a virtuous character. What specifically distinguishes it from other moral virtues is that by justice, a person is consistently committed to respecting the rights of others over time. Strictly speaking.

The virtue of justice always concerns interpersonal relations so that it is only metaphorically that we can speak of a person being just to himself. In addition to legal justice, whereby a person is committed to serving the ‘common good’ of the entire community, there is a rational mean between the vicious extremes of deficiency and excess, having to do with our external actions regarding others. Like many of his predecessors, Aquinas considers justice to be preeminent among the moral virtues. He agrees with Aristotle in analyzing particular justice

into two types. Which he calls “distributive” and “commutative”; the former governs the proportional distribution of common goods.

While the latter concerns the reciprocal dealings between individuals in their voluntary transactions. Aquinas applies this theory of justice to many social problems. He maintains that natural law gives us the right to own private property. Given this natural right, theft (surreptitiously stealing another’s property) and robbery (taking it openly by force or the threat of violence) must be unjust, although an exception can arise if the thief and his family are starving in an environment of plenty, in which case, stealing is justified and, strictly speaking, not theft or robbery at all. Secondly, Aquinas refines the Augustinian just war theory by articulating three conditions that must jointly be met in order for the waging of war to be just:

- (a) it must be declared by a leader with socio-political authority.
- (b) it must be declared for a ‘just cause,’ in that the people attacked must be at fault and thus deserve it; and
- (c) those going to war must intend good and the avoidance of evil.

It is not justifiable deliberately to slay innocent non-combatants. It is legitimate to kill another in self-defense though one’s intention should be that of saving oneself, the taking of the other’s life merely being the necessary means to that good end (this, by the way, is the source of what later evolves into the moral principle of “double effect”). Even acting in self-defense must be done in reasonable proportion to the situation, so that it is wrong to employ more force than is necessary to stop aggression.

Even killing another unintentionally can be unjust if done in the course of committing another crime or through criminal negligence. Thirdly, while Aquinas thinks we should tolerate the religious beliefs of those who have never been Christian, so that it would be unjust to persecute them, he thinks it just to use force against heretics who adhered to but then rejected orthodox Christianity, even to the point of hurting them, as in the inquisition, for the good of their own souls.

In an extreme case of recalcitrant heretics who will not be persuaded to return to the truth of Christianity, it is allegedly just that they should be “exterminated” by execution rather than being allowed to corrupt other Christians by espousing their heterodox religious views. Fourth, like Augustine, Aquinas accepts slavery, so long as no Christian is the slave of a non-Christian and considers it just that those women should be

politically and economically “subject” to men. Although he considers women to be fully human, he agrees with Aristotle that they are “defective and misbegotten,” the consequence allegedly being inferior rational discretion.

From a critical perspective, his general theory of justice is, by now, quite familiar, a sort of blend of Aristotle’s and Augustine’s, and marked by the same flaws as theirs. Its applications of the theory can be regarded as indicative of its problematic character

- (a) Given the assumption of a right to own private property, his discussion of the injustices of theft and robbery seems quite reasonable;
- (b) Assuming that we have a right to self-defense, his analysis of the legitimacy of killing in a just war does also
- (c) His attempted defense of the persecution of religious heretics, even unto death, invites suspicions of dogmatic, intolerant fanaticism on his part; and
- (d) His acceptance of slavery and the political and economic subjection of women as just is indicative of an empirical orientation that is too uncritically accepting of the *status quo*.

e) Hobbes:

Whereas Plato, Aristotle, Augustine, and Aquinas all offer accounts of justice that represent alternatives to Sophisms, Thomas Hobbes, the English radical empiricist can be seen as resurrecting the Sophist view that we can have no objective knowledge of it as a moral or political absolute value. His radical empiricism does not allow him to claim to know anything not grounded in concentrate sense experience. This leads him in *Leviathan*, his masterpiece, to conclude that anything real must be material or corporeal in nature, that body is the one and only sort of reality; this is the philosophical position of materialistic monism, which rules out the possibility of any spiritual substance.

On this view, “*a man is a living body*,” only different in kind from other animals, but with no purely spiritual soul separating him from the beasts. Like other animals, man is driven by instinct and appetite, his reason being a capacity of his brain for calculating means to desirable ends. Another controversial claim here is that all action, including all

human actions, are causally determined to occur as they do by the complex of their antecedent conditions; this is causal determinism. What we consider voluntary actions are simply those we perform in which the will plays a significant causal role, human freedom amounting to nothing more exalted than the absence of external restraint.

Like other animals, we are always fundamentally motivated by a survival instinct and ultimately driven by self-interest in all of our voluntary actions; this is psychological egoism. It is controversial whether he also holds that self-interest should always be our fundamental motivation which is ethical egoism. In his most famous Chapter XIII, Hobbes paints a dramatic and disturbing portrait of what human life would be like in a state of nature that is beyond the conventional order of civil society. We would be rationally distrustful of one another, inclined to be anti-social, viewing others as threats to our own satisfaction and well-being. Interpersonal antagonism would be natural; and since there would exist no moral distinctions between right and wrong, just and unjust, violent force and fraudulent deception would be desirable virtues rather than objectionable vices.

In short, this would be a state of “war of every man against every man,” a condition in which we could not reasonably expect to survive for long or to enjoy any quality of life for as long as we did. We are smart enough to realize that this would be a condition in which, as Hobbes famously writes, “the life of man” would inevitably be ‘solitary, poor, nasty, brutish and short.’ Fortunately, our natural passions of fear, desire, and hope motivate us to use reason to calculate how we might escape this hellish state. Reason discovers a couple of basic laws of nature, indicating how we should prudently behave if we are to have any reasonable opportunity to survive, let alone to thrive.

The first of these is double-sided: the positive side holds that we should try to establish peace with others, for our own selfish good, if we can: the negative side holds that, if we cannot do that, then we should do whatever it takes to destroy whoever might be a threat to our interests. The second law of nature maintains that, in order to achieve peace with others, we must be willing to give up our right to harm them. So long as they agree to reciprocate by renouncing their right to harm us.

Even apart from the issue of slavery, in the absence of any substantive human rights, minorities in civil society might be denied any set of civil liberties, such as the right to adopt religious practices to

which they feel called in conscience. Hobbes's conception of justice is reductionist reducing it to conventional agreements that seem skewed to sacrifice too much liberty on the altar of law and order.

f) Hume:

In his masterful *Second Treatise of Government*, Locke describes a state of nature governed by God's law but insecure in that there is no mechanism for enforcing it, when the natural rights of property comprising one's life, liberty and estates are violated. In order to protect such property rights, people agree to a social contract that moves them from that state of nature to a state of political society, with government established to enforce the law. Another great social contract theorist between Hobbes and Hume who is worth mentioning here is Jean-Jacques Rousseau.

In *The Social Contract*, he maintains that in a well-ordered society, the general will (rather than the will of any individual or group of individuals) must prevail. True freedom in society requires following the general, and those who do not choose to do so can legitimately be forced to do so. A human being is allegedly so transformed by the move from the state of nature to that of civil society as to become capable of such genuine freedom as will allow each citizen to consent to all the laws out of deference to the common good. David Hume, an eighteenth-century Scottish thinker, who is very influenced by Locke's focus on property while rejecting the social contract theory of Hobbes, Locke, and Rousseau, is an interesting philosopher to consider in relation to Hobbes. Like Hobbes, Hume is a radical empiricist and a determinist who is skeptical of justice as an objective absolute virtue.

In the third section of his *Enquiry concerning the Principles of Morals*, Hume argues that "public utility is the sole origin of justice." To place that claim in context, we can note that like Hobbes, Hume sees all values, including that of justice, as derived from our passions rather than (as Plato, Aristotle, Augustine and Aquinas thought) from reason.

Hume offers us a unique and fascinating argument to prove his point. He imagines four hypothetical scenarios, in which either human nature would be radically different (utterly altruistic or brutally selfish) or our environment would be so (with everything we desire constantly and abundantly available or so destitute that hardly anyone could survive). Allegedly showing that, in each of them, justice would not be a virtue at

all. His conclusion is that justice is only a virtue because, relatively to reality, which is intermediate among these extremes, it is beneficial to us as members of society. He also refuses to identify justice with “*perfect equality*,” maintaining that the ideal of egalitarianism is both “*impracticable*” and extremely *pernicious* to human society.” For Hume, the rules of justice essentially involve protecting private property, although property rights are not absolute and may be abridged in extreme cases where “public safety” and the common good require it. Even international relations normally require that “rule of justice” be observed for mutual advantage, although public utility can also require that they should be suspended. Though different from Hobbes’s theory, this one also leans towards the Sophist view of justice as conventional and relative.

In his masterpiece, *A Treatise of Human Nature*, Hume makes the striking claim, “reason is, and ought only to be the slave of the passions,” which rules out all forms of ethical rationalism. He also makes remarkable distinctions between descriptive language regarding what “*is*, and *is not*,” on the one hand, and prescriptive language concerning what “ought, or ought not” to be, on the other, challenging the possibility of ever justifying value claims by means of any factual ones, of logically inferring what should be from what is.

The second part of Book 3 of Hume’s *Treatise* deals extensively with justice. Here he calls it an “*artificial*” but “not arbitrary” virtue, in that we construct it as a virtue for our own purposes, relative of our needs and circumstances, as we experience them. It is valuable as a means to the end of social cooperation, which is mutually “advantageous”. An especially beneficial, if unnatural, convention is rejecting others’ property, which is what the rules of justice essentially require of us. The psychological grounds of our sense of justice are a combination of “self-interest” and “sympathy” for others. He holds a very conservative view of property rights, in that, normally, people should be allowed to keep what they already have acquired.

Indeed, justice normally comprises three principles “*of the stability of possession*, “*of its transference by consent* and *of the performance of promise*.” He rejects the traditional definition of justice as giving others their due, because it rashly and wrongly assumes that “right and property” have prior objective reality independent of conventions of justice. Internationally, the rules of justice assume the

status of “the *law of nations*.” Obliging civilized governments to respect the ambassadors of other countries, to declare war prior to engaging them in battle, to refrain from using poisonous weapons against them, and so forth. The rules of justice that are normally conducive to public utility are never absolute and can be legitimately contravened where following them would seem to do more harm than good to our society.

g) Kant:

Immanuel Kant, an eighteenth-century German professor from East Prussia, found his rationalistic philosophical convection profoundly challenged by Hume’s formidable skepticism, even though he was not convinced by it. Kant was sufficiently disturbed by it that he committed decades to trying to answer it. Creating a revolutionary new philosophical system in order to do so, this system includes, but is far from limited to, a vast, extensive practical philosophy, comprising many books and essays, including a theory of justice.

It is well known that this practical philosophy including both his ethical theory and socio-political philosophy is the most renowned example of deontology (from the Greek, meaning the study or science of duty). Whereas teleological or consequentiality theories (such as those of Hobbes and Hume) see what is right as a function of and relative to good ends, a deontological theory such as Kant’s sees what is right as independent of what we conceive to be good and thus, as potentially absolute. Justice categorically requires a respect or the right, regardless of inconvenient or uncomfortable circumstances and regardless of desirable and undesirable consequence. Because of the “is-ought” problem, the best way to proceed is to avoid the empirical approach that is necessarily committed to trying to derive obligations from alleged facts.

This is precisely Kant’s approach in the foundational book of his system of practical philosophy, his *Grounding for the Metaphysics of Morals*. He argues, in its Preface, that, since the moral law “must carry with it absolute necessity” and since empiricism only yields “contingent and uneaten” results, we must proceed of everything empirical,” such as physiological, psychological, and environmental contingencies. On this view, matters of right will be equally applicable to all persons as potentially autonomous rational agents, regardless of any contingent differences, of gender, racial or ethnic identity, socio-economic class status, and so forth. If Kant can pull this off, it will take

him further in the direction of equality of rights than any previous philosopher considered here. In order to establish a concept of right that is independent of empirical needs, desires, and interests, Kant argues for a single fundamental principle of all duty, which he calls the “categorical imperative,” because it tells us what, as persons, we ought to do, unconditionally.

It is a test we can use to help us rationally to distinguish between right and wrong; and he offers three different formulations of it which he considers three different ways of saying the same thing:

- (a) The first is a formula of universalizability that we should try to do only what we could reasonably will should become a universal law;
- (b) The second is a formula of respect for all persons, that we should try always to act in such a way as to respect all persons, ourselves and all others, as intrinsically valuable “ends in themselves” and never treat any persons merely as instrumental means to other ends; and
- (c) The third is a “principle of autonomy,” that we, as morally autonomous rational agents, should try to act in such a way that we that we could be reasonably legislating for a (hypothetical) moral republic of all persons. For the dignity of all persons, rendering them intrinsically valuable and worthy of respect, is a function of their capacity for moral autonomy. At the very end of his *Metaphysics of morals*, Kant briefly discusses “divine justice.” whereby God legitimately punishes people for violating their duties.

In his *Metaphysical Elements of Justice*, this constitutes the first part of his *Metaphysics of Morals*; Kant develops his theory of justice (His concept of *Rechtslehre*-literally, “doctrine or right”- has also been translated as “doctrine of justice” and “doctrine of law.”) for Kant, justice is inextricably bound up with obligations with which we can rightly be required to comply. To say that we have duties of justice to other persons is to indicate that they have rights, against us that we should perform those duties-so that duties of justice and rights are correlative.

Three conditions must be met in order that the concept of justice should apply: (a) we must be dealing with external interpersonal behavior; (b) it must relate to willed action and not merely to wishes

desires, and needs; and (c) the consequences intended are not morally relevant. A person is not committing an injustice by considering stealing another's property or in wanting to do so, but only by voluntarily taking action to appropriate it without permission; and the act is not justified no matter what good consequences may be intended.

According to Kant, there is only one innate human right possessed by all persons; that is the right freely to do what one wills, so long as that is "compatible with the freedom of everyone else in accordance with a universal law." Thus one person's right freely to act cannot extend to infringing on the freedom of others or the violation of their rights. This leads to Kant's ultimate universal principle of justice, which itself is a categorical imperative: "every action is just [right] that in it or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law." Although the use of coercive force against other persons involves an attempt to restrict their freedom, this is not necessarily unjust, if it is used to counteract their unjust abuse of freedom for example, in self-defense or punishment or even war. Kant approvingly invokes three ancient rules of justice:

- (1) We should be honest in our dealings with others;
- (2) We should avoid being unjust towards others even if that requires our trying to avoid them altogether; and
- (3) If we cannot associating with others, we should at least try to respect their rights.

h) Mills

Usually thought to stem from the publication of Jeremy Bentham's *Introduction to the Principles of Morals and Legislation* in 1789, he there proposes the "*principles of utility*," which he also later calls the "*greatest happiness*" principle as the desirable basis for individual and collective decision-making: "By the principles of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to argument or diminish the happiness of the party whose interest is in question." That single sentence establishes the ultimate criterion for utilitarian reasoning and the root of a great movement.

A famous lawyer named John Austin, under whom Mill studied, wrote a book of jurisprudence based on Bentham's "principle of general utility." Mill's father, James Mill, was a friend and disciple of Bentham and educated his only son also to be a utilitarian. Near the end of his life, Mill observed that it was the closest thing to a religion in which his father raised him. And, if he was not the founder of this secular religion, he clearly became its most effective evangelist.

In *Utilitarianism*, his own great essay in ethical theory, Mill gives his own statement of the principle of utility (again employing a curiously religious word): "The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness." He immediately proceeds to interpret human happiness and unhappiness (as Bentham had done) in hedonistic terms of pleasure and pain.

Mill acknowledges that concern about a possible conflict between utility and justice has always been "one of the strongest obstacles" to the acceptance of utilitarianism.

Mill lays out five dimensions of justice as we use the term:

- 1) Respecting others' "*legal rights*" is considered just, while violating them is unjust;
- 2) Respecting the "*moral right*" someone has to something is just, while violating it is unjust;
- 3) It is considered just to give a person what "*he deserves*" and unjust to deny it;
- 4) It is thought unjust to "*break faith*" with another, while keeping faith with others is just; and
- 5) In some circumstances, it is deemed unjust "*to be partial*" in one's judgments and just to be impartial.

People commonly associate all of these with justice, and they do seem to represent legitimate aspects of the virtue. Mill thinks all this boils down to the idea that justice is a term "for certain moral requirements, which, regarded collectively, stand higher in the scale of social utility," being more obligatory "than any other." But this means that justice, properly understood, is a name for the most important of "social utilities"

The main goal here is to reduce justice to social utility, in such a way as to rule out, by definition, any ultimate conflict between the two.

Thus, the social role played by our sense of justice is allegedly that it serves the common good.

i) Rawls:

Rawls burst into prominence in 1958 with the publication of his game-changing paper, “Justice as Fairness.” Though it was not his first important publication, it revived the social contract theory that had been languishing in the wake of Hume’s critique and its denigration by utilitarian’s and pragmatists, though it was a Kantian version of it that Rawls advocated. This led to a greatly developed book version, *A Theory of justice, published in 1971.*

Arguably the most important book of American philosophy published in the second half of the last century. Rawls makes it clear that his theory, which he calls “Justice as fairness,” assumes a Kantian view of persons as “free and equal,” morally autonomous, rational agents, who are not necessarily egoists. He also makes it clear early on that he means to present his theory as a preferable alternative to that of utilitarian’s. He asks us to imagine persons in a hypothetical “initial situation” which he calls “the original position” (corresponding to the “state of nature” or “natural condition” of Hobbes, but clearly not presented as any sort of historical or pre-historical fact.) This is strikingly characterized by what Rawls calls “the veil of ignorance.” A device designed to minimize the influence of selfish bias in attempting to determine what would be just

Like Kant, Rawls is opposed to the teleological or consequentiality gambit of defining the right (including the just) in terms of “maximizing the good”; he rather, like Kant, the deontologist, is committed to a “priority of the right over the good.” Justice is not reducible to utility or pragmatic desirability. E should notice that the first principle of justice, which requires maximum equality of rights and duties for all members of society, is prior in ‘serial or lexical order’ to the second, which specifies how socio-economic inequalities can be justified.

Again, this is anti-utilitarian, in that no increase in socio-economic benefits for anyone can ever justify anything less than maximum equality of rights and duties for all. Rawls applies his theory of justice to the domestic issue of civil disobedience. No society is perfectly just. A generally or “nearly just society” can have unjust laws. In which case its citizens may or may not have a duty to comply with them, depending on how severely unjust they are. If the severity of the injustice is not great,

then respect for democratic majority rule might morally dictate compliance. Otherwise, citizens can feel a moral obligation to engage in civil disobedience, which Rawls defines as “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of government.” Certain conditions must be met in order that an act of civil disobedience be justified:

- (1) It should normally address violations of equal civil liberties (the first principle of justice) and/or of ‘fair equality of opportunity’ (the second part of the second principle). With violations of the difference principle (the first part of the second principle) being murkier and, thus, harder to justify;
- (2) The act of civil disobedience should come only after appeals to the political majority have been reasonably tried and failed;
- (3) It must seem likely to accomplish more good than harm for the social order. Yet, even if all three of these conditions seem to be met and the disobedient action seems right, there remains the practical question of whether it would be “wise or prudent,” under the circumstances, to engage in the act of civil disobedience. Ultimately, every individual must decide for himself or herself whether such action is morally and prudentially justifiable or not as reasonably and responsibly as possible.

8.3. Questions for Self Learning:

After studying this unit, the students will be able to understand-

1. What is Dharma in Indian thought? How do you understand it in legal context
2. Do you agree that dharma as foundation of legal ordering in Indian thought?
3. Discuss the concept and various theories of justice in the western thought.

8.4. Let us sum up

Legal justice is the most important of virtues in the life of a social order and if this virtue is sacrificed then the whole social order would collapse. But here justice wounded by injustice, approaches, and the judges do not extract the dart, they (they also) are wounded (by the dart of injustice). Justice is the virtue which is both individual and public

because it resides in the hearts of the individuals, i.e. depending on one's attitude towards it, it is public since it can be realized only in social or legal relations if there is only one man in the world no action of that and would be called just or unjust, fair or unfair.

He could not be called moral or immoral, because morality and justice are always manifested in the attitudes of en towards others. As they are manifested in the attitude of individuals they are private virtues because in morality of a person is judged through is attitude towards life and others. It is in the sense that morality and justice are called virtues. But justice is necessarily a public virtue and therefore, it is an inseparable, constituent of both the law and the morality.

8.5. Glossary:

Justice: the act done with Impartiality, Integrity, reasonableness, righteousness, Fairness toward the person seek his right which according to him are abused and he want to remove the abuse such an act is called as Justice.

8.6. References:

1. Malik and Rayal, *Law and Social Transformation in India* Allahabad law Agency. Delhi2007.
2. P. Ishwar Bhat, *Law and Social Transformation in India*. Eastern Book Co. Lucknow, 2004.