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CONSTITUTIONALISM, SOCIAL JUSTICE AND BLACK ECONOMY (JUSTICE DESAI ENDOWMENT LECTURE)

Justice (Retd.) B. Sudershan Reddy*

At the very outset, let me express my gratitude for the organizers of this memorial lecture in Honour of late Shri Justice Desai, former Judge of High Court of Karnataka and Vigilance Commissioner of the State of Karnataka. While I did not have the honour of interacting personally with Justice Desai, and I consequently believe I am poorer on account of that, I believe there is a personal connect, which I will explain in a short while. However, I have had the occasion to come across the work of Justice Desai, both as a lawyer and as a judge, and his scholarship and judicial wisdom always left me with a sense of admiration for him as both a man and a judge. Ultimately, as lawyers or as judges, we seek to find meaning of justice and the finer qualities of human beings, as individuals and as members of human collectives. Justice Desai's work clearly reflects such a striving. His reports on various commissions he has chaired, from the Moily to illicit Hooch cases, reflects his keen ability to distil evidence and make the right and judicious inferences from it. And that too without succumbing to the

* Former Judge, Supreme Court of India.

refined interrogation of evidence, and of ensuring that the State always upholds the majesty of the law and not the baying of the mob. Indeed it is an honour to be asked to speak at an event organized in the memory of such a judge.

But I sense another connect with Justice R.G.Desai, at a deeper level. This is on account of his agricultural family. Born in Katageri village, in the hinterlands of Bagalkot District, Justice Desai seemed to have also brought with him the innate humility, a sense of interdependence among people, and an intuitive sense of right and wrong that an agrarian background provides. I was also born and raised in a similar hardscrabble village of Ranga Reddy District, in your neighboring state of Telangana, prone to frequent droughts, and where people had little and yet developed a keen sense of community, and inter personal empathy. Such a background seems to make people intuitively appreciate the need to temper the sword of the law with softer, but in the long run more productive, edge of humanism. Whenever I read Justice Desai's works, that quality always came through and strengthened similar inclinations in me. Bagalkot is the cradle of an ancient civilization, and is marked by the remnants of incomparable aesthetics of that civilization. From the cave shrines of Badami to the sandstone masonry temples of Aihole and Pattadakal, Bagalkot stands as testimony to a syncretic culture, of cohabitation in peace of may peoples of many faiths without the harshness of the jingoistic and monotonic chest thumping that is increasingly being advocated as the sole platform for realization of national ideals. Justice Desai represented those finer qualities of the ancient civilization of Bagalkot. And we in the judiciary were all made better by his life of law and the civilizational ethos he brought to bear in his professional life.

To his family members, I must express my gratitude for sharing Justice Desai with the field of law, which is a very jealous mistress. Families of

dedicated lawyers are known to often chaff and grumble that the profession takes over lives and leaves little for the family. Let me assure them that their sacrifices have made the profession better. And the lives of many thousands of citizens of India better. Thank you for your forbearance during the life of Justice Desai and for helping organizing his memorial lectures.

There is yet another reason as to why I must thank the organizers. As I have repeatedly maintained when I was a judge and continue to do so as a common citizen after demitting office, it is always an honour to be asked to deliver lectures at platforms that further reasoned and reasonable debate and public discourse. In the theatre of democracy, and even as spaces for reasoned and reasonable debates shrink under the onslaught of politically and culturally organized gangs and when most major media outlets seem nothing more than cheap mouthpieces for this or the other political party, such events are of vital importance. And they cast a heavy burden on the organizers, the speakers as well as the audience. This would be so, because over and above any substantive discussions we might have, the fact that discussions are being kept alive should be viewed as a willingness to shoulder a civic responsibility. It is imperative that in a constitutional democracy, the freedom and the fearlessness to speak, appreciate, analyze and criticize the powers that be are both sustained and nurtured. Hence it is heartening to see the Karnataka State Law University, its Vice-Chancellor, faculty and the students are taking on such responsibilities with vigour. And I thank you all, for doing that.

I have strived to be a humble servant of our Constitution and the values that it seeks to promote and instantiate in our socio-economic and political the atres of individual and collective action. The contributions of my seniors in this profession, such as Justice Desai, and the fervor of youngsters has helped me remain that humble servant. So my acceptance of this invitation is an expression of that humility.

The organizers have asked me to speak about the constitutional implications of the Black Economy. It is with some unease that I agreed to speak on this topic. That is so because of the fact that I, as a judge of Supreme Court of India, authored what has come to be known as the "Black Money Case". There are certain traditions and norms that guide us as judges – both when we serve and after demitting office. They place restraints on us as to how and in what manner may we speak about issues that we had formerly delivered an opinion on. One of the primary concerns is about not attempting to further add any gloss to the decision itself, for: (a) the decision was of the Supreme Court, and not a personal one; and (b) it is for the Supreme Court (i.e., other judges and benches) to interpret that opinion. The judgment should speak for itself. So, the care that one needs to exercise on that count will substantially restrict the range of issues I would be speaking on.

Secondly, the topic itself covers a very vast field. Hence, in the course of 30-40 minutes one could at best only hope to paint a hazy picture in the broadest of brush strokes. Furthermore, topic also traverses many areas that could be deemed to be legitimately controversial. And many more areas that may be needlessly made controversial. These limitations, of course cannot be treated as fatal to our project of furthering reasoned and reasonable public discourse. If my lecture today can fuel further debate and disseminate a more nuanced, reasoned and reasonable debate about the issues that emerge under the topic on hand, I believe it would have served my responsibility as a citizen beholden to the Constitution of India.

The topic for today's lecture is **Constitutionalism, Social Justice and Black Money.** As I said earlier, the area is very vast – hence I will have to restrict myself to broadest of brush strokes of a small set of issues to highlight the nature of constitutional debate, and the balance that one needs to strike to achieve the values of modern constitutionalism. Yet, towards the

ending I will argue that not being able to propose a definitive end result, *ex ante* as it is a reflection of the fact that, while the specific consequences are not always in sight, an anxious fealty to the larger value premises of the Constitution necessarily need to guide us.

Let me start with what ought to be an unexceptional premise, but which unfortunately we seem to have lost along the way. That fealty to the Constitutional values is required of all the stakeholders and not just the Constitutional Courts alone. While the Courts are needed to resolve a genuine dispute of law, or to find minimal action as being normatively needed by the State when abdication of responsibility towards a citizen or a group of citizens is of such magnitude and of an egregious nature, the Constitution places an obligation on all the major players to ensure that Constitutional values are adhered to.

This point needs to be made explicit, because, of late there seems to be a tendency to assume that as long as a law, and the action by the state that law mandates or gives rise to have not been examined by a Constitutional Court and its vires or constitutionality not ascertained, the other stakeholders have no responsibility to assess the legality of their actions on the touchstone of Constitutional values. I was aghast recently, when I heard on television one prominent politician telling the anchor of a TV channel that he does not want to hear about how the decision by his party could be contrary to the Constitutional provisions. At first the politian blustered on about the law not being contrary to the Constitution, and when he realized that he was actually wrong he went on to claim that all of that does not matter as the people will support their move. The claim implicitly was that popular support itself is sufficient to make any kind of action lawful and moral. While we could all be spouting about Kenneth Arrow's insight, that barring a referendum on each issue, no one can ever know whether a majority/plurality of the populace actually supported one amongst the many

issues on which the individuals votes get cast on, there is a far simpler and preliminary reason to be aghast: it seems many of the powers that we have begun to assume that we are a majoritarian democracy and not a constitutional democracy.

The collapse of the distinction between the two, and incidence of such transgressions in an increasing number of arenas and assertions – rights of the minorities, re-subjugation of Dalits, safety of women, and high arenas of executive and even legislative action – point to the limits of constitutionalism. Yet, that only further underlines the importance of constitutionalism to protect the citizens from the vagaries and rapacity of the elites and the powers that dance not to the benefit of all the people, but to the interest of the few.

Modern constitutionalism is a product of a long historical debate of how to restrain collective power vested in a small group of people – restraining them against the collectives of people as a whole or against particular groups of them. The second facet of the debates, about vesting of collective power in rulers or institutional arrangements, revolves around what the scope of the work of the State needs to be. As we look at historical developments, we should not expect that when an idea, especially regarding liberty or justice, is first formulated it would be visualized as being universal in coverage. Who were expected to be covered by the permissive structure of a liberty or enjoy the benefit of the uplifting blanket of justice would depend on who were thought of as lesser or greater, who was deemed to be worthy or unworthy, who was deemed to be an insider or an outsider and who was deemed to be a freeman or a slave – these were all matters of intense contestation, and the scope of coverage expanded over long spans of time covering many centuries. However, a progressive idea applicable to some necessarily raises questions about its non-applicability in the case of others. The intrinsic nature of liberties and principles of justice is that they

are often founded on a core morality that speaks to essential aspects of humanity of all. The strength of a particular normative formulation would then depend on the robustness of its logic regarding the extent of its applicability. Extension of rights and principles of justice to groups hitherto excluded have occurred for multiple reasons, including but not limited to: (1) diffusion and spread of ideas, along with their adaptation; (2) spread on account of dominant cultures, both at the international level and also at the level of individual nations, whether involving colonialism or not; (3) adaptation of values and normative structures as a part of modernization of state and society; (4) struggles, both peaceful and violent, for inclusion by hitherto excluded groups, or by entire populations seeking new rights or measures of justice, etc.

Thus, one of the primordial modes of characterizing constitutionalism would be the degree to which the State has been enabled and / or achieved extension of equal rights: (a) to periodically vote in or vote out governments, beginning with restricted franchise to a model of universal adult franchise, along with a vertically and a horizontally divided branches of government; (b) equality before the law and equal (and effective) protections of the law (including but not limited to protection from economic forces, natural forces and foreseeing the potential risks and protecting the populace from them) and benefits of armed forces - both civil and armed; (c) the nature and kinds of freedoms conceived, their distributions across groups within the jurisdiction; (d) the nature of fundamental rights assured or guaranteed, and coverage across the entire populace and / or groups; and distributed across groups. But any way which we understand it, because of the relentless pressure from populaces in each nation for extension of values implicit in each of the organizing categories as listed by me above, all of them or some combinations of them, central normative theme of the debates in and about constitutionalism, and its progress, has been around the question of equality – equality conceived as both procedural and substantive, in actuality and as an ontological

assumption and a normative imperative.

What level and kind of equality, along with liberties and policies for substantive justice, do constitutions of modern democracies envisage in the modern world? It would be useful to begin this analysis from a conception of the state as a "nightwatchman", providing defence and possibly policing coupled with a legal system to protect property and enforce contracts. At the other end of the spectrum are collectivized communist models, with alleged intra-party democracy.[1]

The first model is often associated with Friedrich Hayek.[2] It is unfortunate that more often than not, our homegrown neo-liberal elites chant Hayek's name to propose a complete evisceration of any and all roles of the State in the market. While Hayek's orientation was generally informed by a suspicion of any form of coercive regulation of markets by the State, he recognized that in addition to the role of a night watchman, the State would be needed to regulate activities that destroy nature (protection of environment), activities that will endanger health (as for instant spurious and unverified drugs, or broadly speaking against fraud in markets and in favour of laws against deception) and efforts to provide a security net against hunger and bad health (as minimal charity in societies that have enough or can afford). The obvious problems associated with this model would be about what happens when there are no substantive improvements in the lives of those already poor, and competing with those with much. Could such a state of affair undergird a stable social and political structure? Why couldn't the elites capture governmental machinery, in the name of

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[1] I am deliberately avoiding the "anarcho-capitalist" model, because we have seen no modern society built on alleged principles which advocate such complete absence of the State and any kind of collective action that even protection against child kidnapping is seen as detrimental to individual liberty.

[2] Friedrich Hayek, "Road to Serfdom" and "The Constitution of Liberty".

greater liberties for themselves, eliminate any and all forms of regulation and suppress even the political freedoms of the poor? Who is to prevent the destruction of nature, and engendering of all sorts of externalities that destroy the political freedoms and liberties – including right to life – of the many? And if all that matters are the choices made by individuals – as those are to be considered to be the sole measure of goodness, then if the poor and the ones who have lost form a collective to topple the State controlled by elite, why shouldn't such an event also be treated as a natural expression of choice? For the youngsters here, I would recommend the works G.A. Cohen, particularly his "On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy", and "Rescuing Justice and Equality" to read and absorb the debates about what ought to be the purpose of the State.

The Second model is akin to the collectivized communist models in which groups of bureaucrats decide not just what gets produced but also how it gets produced, prescription of what is acceptable culture and is not, and distribution not according to what one "deserves" but according to what one needs (also to be determined by a bureaucrat). The obvious problems associated with this would be the destruction of freedoms and liberties, as individuals and being subjected to the whims and caprice of those deciding on behalf of the collective. Because vast powers are vested in small numbers of experts, and the coercive machinery of the State is in their hands, they could take wrong decisions (even if intentions were genuine). And this could happen, even if we assume that they are genuinely concerned about the welfare of the populace, because they do not take into account all the information available, and being used to centralized decision making process in which only small coteries are permitted they do not have any feedback loops of criticism and helpful critique. Moreover, the temptation to bureaucratize all decisions by inflexible rules is an all too tempting factor for the bureaucrat. For instance, it is speculated that China could have industrialized in the 12th century itself, but the Chinese bureaucrats,

comprised of the upper caste/upper class elites, decided that they knew everything that was all there to know, and prescribed specific ideals beyond which there was nothing to seek. And, if sought, the seeker to be punished. And China declined to become a colony where a vast majority of its people were made to be addicted to the opium being sent there by the British. For the students here, I would recommend that they also read Frank Dikotter's "The Tragedy of Liberation"that describes the horrific consequences, in which five million civilians were driven to their deaths by Mao and his unilateral decision to drag scores of millions of peasants away from agriculture to cottage industry. It is such experiences in governance that have informed modern constitutionalism to always be wary of the one policy as being the solution for all evils.

For India, neither of these models in their purer form were deemed to be ideal for us. At the time of independence, in our Constituent Assembly Debates, and in the early years of our Republic there was a significant debate amongst our founding fathers. It was about whether we would choose to adopt an evolutionary path to social justice, in which progressively we would eliminate conditions that kept us poor and living in a socially unjust society. The other option explored was the revolutionary path, in which all property and wealth would be taken over by the State or a more egalitarian structure be established through a massive redistribution of resources. The violence implicit in the latter options did not appeal to our founding fathers. And this was not just on account of some inherent incapacity for violence, as some chest thumping nationalists seem to think today, but because history seemed to support the idea that violence for equality only ends up promoting one set of new elites in the place of the old.

A glance at what India was emerging out of, and the problems it confronted at the time of independence and the framing of the Constitution would underline the necessity of the structure carved out by the

Constitutional pledges and mandate. For nearly fifty years prior to Independence, India's GDP had grown at less than 1% per annum and in no year in that period did it exceed 1 %. In the decade immediately preceding 1947, Indian's GDP grew at -3.5% per annum. India's economic surplus had been drained out by the imperial forces, and an essentially feudal structure implied that whatever little surplus was being generated was being enjoyed mostly by the indolent few. We slipped from the second largest economy, with a global product share of over 15% to less than 1% under the British rule. Our ancient crafts, and village industries were in shambles. A huge numbers of our artisans and skilled labourers were transformed into rural laboureres, unskilled and producing opium.[3]

Add to the above, our own problems that have plagued our societies for centuries. Of casteism, that divided the society and imposed horrific hardships on the lowered castes, of rampant illiteracy and ignorance, again largely due to casteist restrictions on knowledge acquisition, and absolute poverty rates were well over 75%. Of communalism that divided us on religious basis. From middle of 1800s India faced a succession of famines – one more devastating than the other, one every 7-8 years. Some were large enough to alter the demographic course itself and not which killed fewer than a few millions. Our per capita income was, in inflation adjusted 1973 rupee terms, Rs.7.20 per annum, while poverty ceiling was estimated at Rs.23 per annum! Many from our elite segments had willingly collaborated with the colonialists in denuding this country, for the sake of continuance of their domination. We were enslaved as a nation by a foreign power, and we had also managed to enslave and/or deprive most of our populace to serve a few of us.

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[3] Roy, Tirthankar: Economic History and Modern India, Redefining the Link. (Journal of Economic Perspectives 16(3):109-130 February 2002).

The above is of course a rather quick and a very rough image of what India was reduced to, and what most Indians were subject to at the time of independence. Whenever I listen to or read Panditji's speech after he took oath as independent India's first Prime Minister, and as the first sentence rolls through my mind, "Long years ago, we made a tryst with destiny, and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially", I am reminded that our Constitution is a continuing rededication to the task of liberating our people from the effects of not just the colonial past, but also the traits in our culture that hierarchizes and deprives. The words of Seamus Heaney, of course written well after India's independence, and written in the context of dismantling of apartheid in South Africa, sums up the moral and emotional foundations for a constitutional project of rebuilding a nation of pluralities into a just nation state:

"History says, Don't hope
On this side of the grave,
But then, once in a lifetime
The longed-for tidal wave
Of justice can rise up
And hope and history rhyme."[4]

In order to ensure that hope of justice is translated into reality, so that history begins recording the righting of wrongs and instantiation of a just society, we also need to be ever conscious of the risk of core national purposes being side-tracked, and the nation-state's endeavours subverted for the benefit of the few. In this regard we necessarily need to pay heed to Dr. Ambedkar's warning, at the ratification of the Constitution, that though we have instantiated a democracy based on notions of political equality, the

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[4] Heaney, Seamus: From the Cure atTroy,http://www.pbs.org/newshour/bb/entertainment-july-dec98-pinsky_10-29/.

continuation of systemic, deep and widespread inequalities, and unconscionable deprivation and oppression as a consequent result of graded inequalities in the social and economic contexts, will likely destroy the foundations of democracy. His prognosis was that the contradictions, if allowed to persist for long, will destroy the project of establishing, sustaining and nurturing a constitutional democracy in which social justice in all walks of life would be established.

It pays to cite extensively from that speech, because I believe Dr. Ambedkar's understanding of the tension between political economies that guarantee only empty political freedoms and the demands for social justice was one of the finest expositions in the annals of scholarship in this area. He said:

> *"On the 26th of January 1950, India would be a democratic country in the sense that India from that day would have a government of the people, by the people and for the people. The same thought comes to my mind. What would happen to her democratic Constitution? Will she be able to maintain it or will she lose it again. This is the second thought that comes to my mind and makes me as anxious as the first.*
>
> *It is not that India did not know what is Democracy. There was a time when India was studded with republics, and even where there were monarchies, they were either elected or limited. They were never absolute. It is not that India did not know Parliaments or Parliamentary Procedure. A study of the Buddhist Bhikshu Sanghas discloses that not only there were Parliaments-for the Sanghas were nothing but Parliaments – but the Sanghas knew and observed all the rules of Parliamentary Procedure known to modern times. They had rules regarding seating arrangements, rules regarding Motions, Resolutions, Quorum, Whip, Counting of Votes, Voting by Ballot, Censure Motion, Regularization, Res Judicata, etc. Although these rules of Parliamentary Procedure were applied by the Buddha to the meetings of the Sanghas, he must have borrowed them from the rules of the Political Assemblies functioning in the country in his time.*

This democratic system India lost. Will she lose it a second time? I do not know. But it is quite possible in a country like India – where democracy from its long disuse must be regarded as something quite new – there is danger of democracy giving place to dictatorship. It is quite possible for this new born democracy to retain its form but give place to dictatorship in fact. If there is a landslide, the danger of the second possibility becoming actuality is much greater.

If we wish to maintain democracy not merely in form, but also in fact, what must we do? ***The first thing in my judgment we must do is to hold fast to constitutional methods of achieving our social and economic objectives.*** *It means we must abandon the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non cooperation and satyagraha. When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods. These methods are nothing but the Grammar of Anarchy and the sooner they are abandoned, the better for us.*

The second thing we must do is to observe the caution *which John Stuart Mill has given to all who are interested in the maintenance of democracy, namely* ***not "to lay their liberties at the feet of even a great man, or to trust him with power which enable him to subvert their institutions".*** *There is nothing wrong in being grateful to great men who have rendered life-long services to the country. But there are limits to gratefulness. As has been well said by the Irish Patriot Daniel O'Connel, no man can be grateful at the cost of his honour, no woman can be grateful at the cost of her chastity and no nation can be grateful at the cost of its liberty.* ***This caution is far more necessary in the case of India than in the case of any other country. For in India, Bhakti or what may be called the path of devotion or hero-worship, plays a part in its politics unequalled in magnitude by the part it plays in the politics of any other country in the world. Bhakti in religion may be a road to the salvation of the soul. But in politics, Bhakti or hero worship is a sure road to degradation and to eventual dictatorship.***

> ***The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well.*** *Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Without fraternity, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them.* ***We must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality by which we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up."***

What the above meant, as India emerged after centuries of colonial oppression, was that the State necessarily had to take a lead role in building a

democratic polity and an executive apparatus that would ensure the rule of law, and also undertake the affirmative obligation of ensuring that at least some measure of resources are diverted for uplifting the people from the vicious cycle of ignorance, poverty and exploitation that they were stuck in. They needed to be protected from potential plunderers and exploiters within, and also invest in building up their capacities so that the masses could themselves be given the skills, resources and space to be able to use the machinery of the state in protecting their fundamental rights. And it needed to be done urgently, and it is this urgency that Dr. Ambedkar spoke so eloquently of when he talked about the dangers of the democratic experiment failing if the situation of graded inequality in economic and social spheres continued.

So, how did we do? How did we construct our tryst with destiny?

As a political democracy, we have certainly thrived. So far. At the time of framing the Constitution, many respected scholars from across the Globe ridiculed the idea that democracy could take root here. Especially, because of illiteracy and poverty, it was assumed that universal adult franchise would be a failure. Yet, we must largely admit that it is the poor, and those who have little, particularly in the rural areas, who vote in large numbers. They are the true believers and saviours of democracy in India. Yet, very little gets written about the fact that it is poor voting in large numbers have repeatedly voted out of power autocrats powers, and corrupt and the inept regimes.

This was no mean accomplishment. After all, having a say in the political process and about who gets to hold the reins of the State is a key feature of being an equal citizen (at least at some level). It meant that they could exercise some measure of control over what is deemed to be the main purposes of the nation-state itself were, even if the realization of those goals were to be in some indeterminate distant future. Political freedom is itself a

form of development, or rather one element of development, because it assures human beings an important measure/element of their human dignity.

However, when we come to evaluating how well we did, as a people and as a nation, in the social and economic sphere, we are immediately confronted with significant underachievements. Writing a bit over a decade ago, AmartyaSen in his book the Argumentative India assessed it as "measureable underachievement and not necessarily one of immeasurable failure" - characteristically muted academic criticism. However, a decade later, in *Uncertain Glory,* a book he co-authored with Jean Dreze his tone had changed to one of urgency. We are an increasingly younger nation, and instead of hoping to reap the windfall gains of the demographic dividend we seem to be staring at the sand that drops ever so faster into the bottom half of the developmental hourglass. The question that ought to be uppermost in our minds is: are we racing against time, and staring at a potential demographic disaster? Because of non-investments into social and economic sector to substantially reduce the horrific graded inequality that Dr. Ambedkar speaks about.

One does not have to reel off pages and pages of statistics to figure out we haven't done too well. While the votaries of neo-liberal political economy gloat about the most significant reduction in levels of poverty level, they essentially mean that the number of people below the starvation level have come down significantly. That would be true. However, from the perspective of social justice, would we think of a person who has just escaped starvation level poverty as not poor. Take one parameter – would a person who is just above the absolute poverty line be in a position to demand and protect his core fundamental rights? For instance – not to be assaulted by a policeman on the street? By what ethical standards could we possibly gloat about how much we have reduced poverty if most of the populace

cannot even begin to approach an authority, such as a court or for that matter even an elected politician, for redressal if an agent of the State chooses to grab a little from the meager earnings of a street vendor?

The point I am making is that we ought not to be misled nor mislead ourselves into thinking that we have made giant strides towards realizing constitutional goals by achieving goals of lifting people out of poverty. We have made giant strides, it would seem, in how we can keep redefining poverty to ensure that figures seem better and better for us. On every front: education, health and health care, who bears the consequences of externalities such as pollution, violence (random and deliberately perpetrated).....on every parameter that could be an indicia of Human Development we seem to be sorely lagging behind.

Our health indices are awful. Even though the average life span has gone up, we are sorely lagging behind on many key factors. We have the highest number of stunted children in the entire world. The impact of childhood nutritional deprivations on our populace is humongous, in terms of their overall health, their lifetime productivity, and yes even in terms of their cognitive and intellectual abilities. Barring the education that a few elite segments of the populace can afford, and most of the lower middle class may be able to afford only if they have staked all of their assets and leave nothing for the parents as they grown old, few can afford the world class primary education that is required to enable our children to truly revel in, explore and acquire knowledge along with abilities to discover or develop new knowledge. Education has been eloquently called the "cultural action for freedom" – freedom from the shackles of illiteracy and ignorance, and incapacity to think critically and grow up to be reasoning and reasonable citizens of the country and denizens of the world. Yet very few of our children receive such an education.

Black Money

One of the keys to achieving such objectives was to build appropriate state capacity. For this the State needed sufficient financial resources, which in turn would have depended on our investments in capital – both physical and social (which includes human resources as a subset) – and the systems we have to ensure that the amounts due to the State are actually received and spent on legitimate constitutional purposes. Most reasonable people would agree that we have failed significantly in this regard. While some part of the failure is on account of governmental wastage, leakages due to corruption, and wrong policy choices and program designs, a large part of the failure was on account of the State not receiving a significant portion of what is due to it as tax revenues, bulk of which is what is known in popular parlance as "black money".

There are many different estimates about the size of the black economy and the magnitude of black money. Prof. Arun Kumar estimates the black economy in India to be around 62 percent of the GDP, which would, in 2016-2017 prices amount to Rs 93 lakh crore(USD 1.4 trillion approximately). How large is that? To get a perspective Prof. Arun Kumar points out that it is much larger than the combined income generated by agriculture and industry. It is much larger than the combined spending of the central and all the state governments put together. Prof. Arun Kumar also estimates that the country's economy has been losing, on an average 5% growth from 1970s. He also estimates that if we hadn't seen such leakages our economy would have been seven times larger than the Rs 150 lakh crore GDP/annum economy we have at present. The loss to the Government's coffers, at the current rate of taxes is said to be to the tune of Rs. 36 lakh crores/ per annum, which means that after wiping out our fiscal deficit we would have had a surplus of Rs 30 lakh crores. Every year.[5]

[5] Kumar, Arun: "Understanding the Black Economy and Black Money in India" (2017)

According to C. Rammanohar Reddy, another scholar in this area, "the Government commissioned three studies from three independent organizations for the preparation of the 2012 White Paper. The results of those studies have not been made public, though media reports of the estimates of one of the studies place the black income in 2014 at as high as 75 percent…."[6] Arun Kumar finds that the black economy has grown from 21 percent of the GDP in 1980 to as much as 62 percent of GDP in 2012.[7]

A large black economy and huge stashes of black wealth in various forms would have a tremendous impact on how resources are distributed across the economy. Taxation is also expected to serve another purpose: redistribution of the benefits of social action and lessen the degree of inequality. Tax evasion, and illegal and undue rents from exploitation of natural resources or through operation of businesses, would necessarily reduce the efficacy of the tax system in achieving that goal. A little over two decades ago, Prof. Arun Kumar also estimated the numbers who controlled this black economy. According to him, it was mostly in the hands of the wealthiest 3% of the population. In his more recent book, he suggests that this number has not really changed much. In fact we would probably have to assess that the concentration has tightened considerably. In some recent reports it has been estimated that the wealthiest 1% of this country own nearly 58% to 60% of all the wealth of this country. In large part this increasing concentration of wealth in the hands of the few has been on account of the working of the black economy.

Obviously, the loss of tax revenues, insufficient realization of revenues from illegal exploitation of natural resources, and undue economic rents that are not properly accounted for by the avoidance of regulatory regimes implies that the State would have a lot less financial resources under its command

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[6] Reddy, C. Ramamanohar Reddy: Demonetisation and Black Money (2017)

[7] *Ibid,* p. 32..

We have already noted as to what impact it may have had on our economy, in terms of its size. It has been estimated that it could have been about seven times bigger than what it is. This would mean that an argument can be advanced that, but for the black economy, the State could have also been realizing greater revenues to undertake programs that would push forward the goal of social justice at a faster pace. And we would have also had less to do in terms of numbers of our citizens we would be protecting from deprivations.

We need to firmly grasp that a black economy necessarily implies that the resources needed for building state capacities have been severely restricted. Even with respect to the numbers of police personnel we employ, and the training that is giving to them, has been adversely impacted on account of funds crunch. We simply have not invested enough in our legal system to be able to provide our citizens with speedy justice. And in many instances our capacity to project our strengths in the geo-strategic sphere has also been severely restricted by virtue of paucity of financial resources at our command.

Let us take note of the text of just a few of the Directive Principles of State Policy, that are said to be foundational to governance and see what the impact of black economy has been on the State's primordial promises:

> **Article 38(1)** provides that "The Stated shall strive to promote the welfare of our people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life.
> **Article 39(b)** mandates that the State shall direct its policy towards securing... "the ownership and control of the material resources of the community are so distributed as to sub-serve the common good"
> **Article 39 (c)** mandates that the State shall ensure "that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment..."

Article 39(f)provides mandates that the State should seek to ensure "that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity, and that children and youth are protected against exploitation and against moral and material abandonment."

Article 41 provides that "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want."

Let me reiterate that I am only mentioning a few of the Directive Principles to provide us with a broad picture of important areas of human Welfare that we have failed in.

Take article 38(1), which mandates that the State shall undertake such steps as to ensure that all institutions of our national life are informed and guided by principles of complete justice – social, economic and political. Now consider the issues faced by our women, our female children and even our female fetuses. How horrific is the scale of injustice that is being perpetrated on a daily basis? How many millions of fetuses are aborted in India every year, primarily because of our preference for boys? How many new born female infants are being killed every year, again on account of preference for boys? Look at the horrendous sex ratios in our population. The shocking fact is that our sex ratio today is worse than what it was in the early 1900s. And then consider the incidence of sexual violence against our women. Every day, a new headline screams about one more horrific instance of rape, gorier than the previous one.

Obviously, the issue is on one plane also a matter of law and order – an institution that affects our national life. What are the resources we have been able to allocate to tackle these problems, given that they place at risk nearly 40% of our people? A few years ago there were promises made that every

district would get a centre to handle the issues of battered and sexually assaulted women. Apart from providing shelter to victims for a few days, these centres were also to help the victims secure medical attention, get justice by interfacing with the police to ensure that action is quickly taken against perpetrators and the guilty brought to justice, and also undertaking locally contextualized programs to change the attitudes about women. Each of these centres were envisaged to be independent and to be developed at a cost of about Rs. 10 to 11 crores. The promise was that these centres would be developed rapidly. However, it seems that powers that be have decided to pare down the program considerably, and while the development of the centres is still being pursued it is moving at a much slower pace than what the nature of the issue warrants. Obviously budgetary issues have a constraining impact. And then we have not really begun to bring to the table the resources that would be consonant with the urgency with which we would be treating female infanticide and feticide. An argument could be made that if the black economy had been curtailed, then people and policy makers would have been less lax in taking steps to combat such issues.

Take Articles 39(f) and 41. How do we expect poor children to grow in a healthy manner, and in conditions of freedom and dignity, if we do not invest in building good schools with proper facilities and well trained teachers? Especially in the rural areas? Article 41 talks about "undeserved want". What can be more undeserved than deprivation of education to a child. Article 41 recognizes that we can undertake such activities only to the extent that the State has the economic capacity. However, the case here, with the size of the black economy and wealth being what they are, is that the State's economic capacity is being undercut severely, and is being prevented from undertaking those activities that can secure a better future for our children.

I have already observed how natural resources can be exploited in a manner that deprives the State of revenues. In fact many forms of illegal

exploitation of natural resources lead to other problems, especially where they affect the lives of the locals adversely, Mining mafias have often spawned revolutionary counters thereby creating major threats to the welfare of the people of that area, and their fundamental rights. This in turn also imposes huge financial burden, among other things, upon the State in combating revolutionary activities and getting embroiled in a never ending saga of tussle with the local populace too. Article 39 (b), which I readout a few minutes ago mandates that the State shall endeavour to ensure that ownership and control of material resources, such as natural resources, be vested in a manner that subserves the common interest. The operation of mining mafias, and other forms of illegal mining/extraction of natural resources generates huge amounts of black money and black wealth, attracting more people to such activities, so much so that it begins to appear like a vicious cycle. And the "common interest" that the Directive principles sought to protect are thrown by the wayside.

As pointed out earlier, Article 39 (C)mandates that the State shall not allow the economy to function in such a manner that it leads to concentration of wealth. This principle has obviously been violated, as 58% to 60% of all national wealth is now held by the top 1% of our country. And black economy has contributed towards intensifying such concentration. This would have implications for our democracy as the 1% funds political parties, and in return get more opportunities to further corner nation's resources even more. The ordinary political freedoms then might just become inconvenient customs to be squashed when exercise of such freedoms is uncomfortable to the 1%.

In summumbonum we would have to categorically assert that to a significant extent we have not really adhered to the guiding principles our Constitution and in fact a legitimate conclusion would be that we have actually abandoned the Directive Principles. It is almost as if we have read

the Directive Principles out of the Constitution, an excision of the soul of the Constitution without any constitutional amendments. And that too, notwithstanding the fact that the judiciary used the text of the Directive Principles in flushing out the content of Fundamental Rights in general, and Article 21 in particular, and mandating that the State shall fulfill at least some obligations.

How did this happen? The easy answer would be to suggest that if the Directive Principles had been judicially enforceable, fully, then litigation against the State would have compelled the politicians and the permanent establishment to pursue policies that would have hastened the achievement of the goals set forth in the Directive Principles. I would submit that would not only be an easy answer, but in fact an incorrect answer. The fallacy of such claims is easily demonstrable: the judiciary has, albeit not very consistently, read many of the Directive Principles of State Policy into the Fundamental Rights and issued orders from time to time. One famous one, and which is critical to any notion of social justice, was the declaration of right to education until the age of 14 as a fundamental right. It took the political dispensation 20 years to enact a statute to give that decision legislative legitimacy and I am sure most reasonable people would accept the fact that its implementation is shoddy at best. Even today. Twenty years ago, Justice B.P. Jevvan Reddy, in his pragmatic idealistic approach , posited that this would be a part of the minimal moral content of Article 21. Most analysts agree that implementation of the Right to Education laws are spotty at best. We are entering a world in which many people speculate that Artificial Intelligence is likely to be the next big revolution, and that it would make many or even most human skills obsolete. Only those who have developed the skills at much higher levels of artistic and cognitive skills could find themselves useful and fulfilling work. How will our children even attempt scaling such heights, if they are deprived of basic education? And we still have elites, who control almost all of the black money and

nearly 58 to 60% of the nation's wealth, grumbling about how any attempts by the State to raise revenues to educate our masses, to get them to be barely functionally literate would mean economic disaster, and how their incentive structures to be "productive individuals" and their "animal spirits" would be dampened.

Over the past two and half decades, increasingly the discourse has been against the State undertaking any welfare and social justice programs even as subsidies after subsidies and tax breaks after tax breaks were being extended to the big players in the private sector. With the discourse increasingly turning neo-liberal, the attitude of powers was that they could turn a blind eye to the tax evasion issues, and also issues relating to realizing appropriate revenues from exploitation of natural resources.

Given the impact that black economy and black money has on the State capacity, and the extent to which the constitutional responsibility of ensuring social justice informs all walks of national life was compromised, I believe that it would be amoral, and socially and constitutionally irresponsible to suggest that tax collection regime, and the regime of allowing private players to exploit natural resources, both under and outside contracts and without the state realizing appropriate revenue from them, be allowed to continue in the same fashion.

Post the decision by the Supreme Court in ordering a SIT, because the Court felt that the State was not being sincere in its efforts to prevent illicit outflows of black money, and tackling black economy in general, it appears that the GoI has taken some steps to address the issue with greater urgency and focus. While ordering the SIT, the Supreme Court also cautioned the Government and the people of two things: (a) the first was that the issue was extremely complex, especially with regard to identifying and attempting to bring back black money from abroad; and (b) that the battle would be a long one, with hits and misses and hence requiring patience. In order to ensure

that, in the long and hard road ahead the enthusiasm of the Government does not flag, the Supreme Court converted a High Level Committee looking into the issues surrounding black money and black economy into a Special Investigation Team.

I would not like to go into a number of steps, and some may say even missteps, by the GoI to tackle this issue. That would make my lecture unnecessarily long. Yet, I suppose the thousand pound elephant in the room has to be touched upon- "Demonetisation"

Let me start with a word of caution, after asserting a fact. Given the magnitude of currency withdrawn, and the numbers of people affected at one go, irrespective of whether we agree with the decision of the GoI on November 8, 2016 or not, we have to admit that it was a historic and an unprecedented move. It is not as if others had not spoken of demonetization as a means to combat the black economy. In recent years, Kenneth Rogoff, a professor of Economics at Harvard University, and the author of a book "the Curse of Cash" has been one of the strongest voices in favour of limiting or elimination high denomination currency from circulation, permanently, as an effective means of combating criminal activities and tax evasion. In his interviews about demonetization decision in India, Professor Rogoff, taking on board the stated claims of Government of India, noted that the motivations seemed to be similar to the ones he advocated in his book the "Curse of Cash." However, he also outlined two specific ways the demonetization in India was proceeding differently from what he had advocated - the first was that he had advocated that demonetization be done over a long period of time, some seven years, and that too with respect to large notes; and the second was that he had recommended that large notes be done away with all together, whereas India was issuing an even bigger denomination note than the one demonetized.

From the available record, it seems that the White Paper of 2012 of the

Government of India did contemplate the possibility of using demonetization as a means of combating the black economy. In particular the White Paper of the Government of India says:

> "...given the primary importance of cash in relation to both the generation and use of black money, there is no alternative but to target cash transactions in a way that will not affect those complying with the law, while making it difficult for those intending to generate and utilize black money."[8]

So at a broad level it would appear that an internal study of the Government had indicated that demonetization could be a legitimate policy tool, provided however it was effectuated in a manner that it would not affect those complying with the law. Given the secrecy, scale and speed with which the Government of India proceeded on November 8, 2016, we would have to conclude that the Government of India decided on a course of action that was not in consonance with what a study commissioned by it had recommended. This is so because demonetization affected not just or mostly the ones who were suspected as hoarding black wealth in cash, but also everyone else. And it affected the poor the most adversely.

The chief concern obviously was with the impact of demonetization on such a massive scale would be on the weaker segments of the population who essentially depended on cash transactions, both to earn a livelihood and to sustain themselves. As most of you are aware, there were many, many reports in the media, both print and electronic, that there was disruption in the lives of the people at a massive scale and that suffering was also wide and intense. There have been many reports of entire industries in certain regions having to shut shop, and many economists have opined that the negative impact from demonetization and the time taken to inject cash back into the system in new notes, would be extensive and deep.

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[8] White Paper 2012, GoI. p. 55, cited in Reddy, Ramamanohar C., *supra* note 4, p. 62.

My own impression are that ordinary citizens have suffered a lot more than the better off, the salaried classes and the rich. Whatever our own estimates may be as to the extent of black wealth stored in cash, when demonetization was announced, surely we would have to agree that the largest numbers feeling the pinch were the ones least likely to have black money/ black wealth. And it is my belief that any policy decision that seems to affect the poor the most, and especially on this scale and intensity needs to be subjected to intense analysis, prior to its implementation with regard to what elements went into the decision making process, with regard to the impact on the people during the implementation phase, and also after the process has been completed. In fact, we are not yet sure whether the process has really been completed even now, because we still keep hearing about cash shortages for days on end, in at least a few ATMs and banks.

What the gains are, of course we will have to wait and see. The early indications are not

very encouraging: however, we need to wait and see what follow on and collateral benefits there might be. However, the situation with the poor, or at least a large number that I have interacted with, is that they have suffered a lot but still believe that it may do good for the country. And many of them have consistently stated that even if they suffered more than the ones with black wealth, it would still have been worth it. Because it sends a message that accumulation of black wealth is not acceptable to them. Dr. Y.V. Reddy argues that the decision by the Government is questionable merit; he nevertheless finds that the more important message from the manner in which the poor have behaved may be that the people are unwilling to abide by the amoral conduct of the well to do and agents of the state with regard to the black economy.[9]

[9] *Ibid,* Foreword p. xviii.

It is my belief that the manner in which then poor have taken on the burdenof demonetization raises some very important moral questions about what is to happen next. I will try to raise a few, to give a sense of what has been engrossing me for the past three months or so:

(1)Are there any attempts by the Government to assess as to the full extent of suffering and damage to the sectors and economic spheres in which the lives of the poor are most implicated? And the steps to be taken to make sure that the poor do get the succor and help to be made whole again rapidly?

That the poor have shown immense forbearance cannot be taken to mean that those of us who are better off, and the powers that be who have taken the policy decision are off the hook in being solicitous of their welfare. Nor does a victory in election absolve the ruling party of the responsibility of taking all the steps necessary to attempt ameliorating the continued negative impact on the poor. The message by the Government of India to the poor was that their suffering was in aid at reclaiming the soul of our country. To not truly reclaim that soul, in terms of the constitutional morality, would be a betrayal of the trust that the poor have placed, again, in the State, and those who control it. That should not and cannot be allowed to happen.

Is the Government of India doing everything possible on this front? I don't know. We need to ask, and it is imperative that the Government of India explain what is being done.

(2)It has become clear that whatever gains we may reap, in terms of reducing the size of the black economy because of demonetization, there are many other segments of the population which hold and enjoy immense amounts of black wealth and who have not been affected by demonetization. In fact, many reasonable people would probably say that demonetization, even if one were to assume it to be well intentioned, has not even really dented the real holders of black wealth. The battle of black economy now really needs to move to the big players in this.

India cannot afford to perpetuate the sense that crony capitalists, the big babus and the political operatives and parties looting this country have been allowed to get away scot free. The suffering that the poor have undergone and undergo everyday implies that the goal of social justice cannot be compromised.

Yet we hear about strange things. For instance the reported new law that sources of political funding need not be revealed. How do we even begin to conceive the nature of such a move to make political funding less transparent when it is widely acknowledged that political funding plays a key role in how the power of the people vested in elected representatives and the permanent establishment gets exercised in a manner that is detrimental to public interest? And that political funding is the fount of black economy? I am at a loss as to what I should say about the contradictions in public values and destruction of constitutional morality by such a step. Can such a cynical move be the grand gilt edging for our Constitution?

There are yet other questions that rise about maintenance of integrity of institutions and bodies of governance. The houses of parliament, the judiciary, the army, the RBI etc., are intricately implicated in a finely wrought fabric of governance by our Constitution. They cannot be compromised willy nilly. So we need to ask questions such as:

(1)Were there consultations with a wider array of experts and/or heads of various institutions as to whether such a massive policy step ought to be taken, under what circumstances, and with what sort of preparatory steps being taken?

(2)Given that a Government of India commissioned White Paper cautioned against inflicting a burden on those who abide by the law, in the course of demonetization exercise, the sheer scale of demonetization effected on November 8, 2016 implies that everyone was caught up in the maelstrom. Surely, the Government would not have been unaware that even the law abiding citizens, and especially the poor were also going to be hit. What are the reasons and rationale by which the Government of India convinced itself that the warning in the White Paper need not be heeded?

From the perspective of constitutionalism, irrespective of whether the demonetization exercise turns out to be a roaring success or not, questions need to be asked about whether Indian constitutionalism ought to countenance such a mode of policy making and implementation. From all accounts, this was a big step, a big decision. With potentially humongous implications for the lives and welfare of the people of India. The questions then would have to be about whether such a decision ought to be taken without wide consultations, and obtaining the inputs of the widest range of experts? Constitutionalism implies a wariness of decision making by one person or even a small coterie of people surrounding the main power centers. This is so because the risk of failure, and catastrophic consequences goes up exponentially as the scale and complexity goes up, and the coverage extends to most of the populace. Moreover, once such decisions are accepted, they become a precedent. Modern constitutionalism is always worried about the exercise of unquestioned power by any individual/s unwilling to be stopped by the magnitude of negative consequences. We need to be worried about what exercise of power on this scale, and apparently without involving other institutions, would mean to making elected officials accountable to constitutional principles.

I think most of the answers to the questions I have raised above are covered by Babasaheb Ambedkar's speech at the ratification of the Constitution. He cautioned us that if we were to succeed as a constitutional democracy, we would need to do the following three things:

(a)Forswear unconstitutional means of pressurizing the State to do something or not do something and hold fast to constitutional methods of achieving our social and economic objectives.

(b)Not engage in such hero worship of the big man, or believe that one big man will solve all of our problems, that we end up suspending our faculties to see, observe, analyse, and critique the decisions being made by the big man.

(c)Finally, never waver from the goal of instantiating social justice in all

walks of life, and being particularly solicitous of the welfare and progress of the weakest among us, and reduce inequalities. And bring an urgency to our endeavours in pursuing the goals set forth in our constitution. If we do not genuinely do that, and show concrete results, the poor might stop believing in the promise of democracy. And that would be disastrous for our country.

The broad contours of responsibilities of citizens, in how they should evaluate social and political action initiated by powers that be, as summarized by Dr. Ambedkar do not give us a specific road map. Obviously, generalizations at such a high level of abstraction necessarily imply that citizens have to think, question, debate, and seek answers. Such responsibilities are not easy to bear, and it might be very tempting into thinking that we should abandon them. Nothing could be more disastrous than that. If we were to do that, then surely the Constitution would fail, and as Dr. Ambedkar pointed out, the failure would not be because the constitution is bad, but that man was evil.

I see many young faces in the audience. Most of you I believe are aspiring lawyers. On your shoulders would lie even greater burdens of ensuring the success of our Constitution. That is the bargain you struck when you elected to study law. Your profession cannot only be about making money, nor even just dabbling in ordinary law. Your training is meant to equip you with the tools necessary to interrogate the powers that be, and help our people shoulder their constitutional obligations. I am sure each one of your would take this nation forward, and help in delivering constitutional promises to our people, starting with the weakest amongst us first.

Thank you all.
Jai Hind.

STRENGTHENING HUMAN RIGHTS IN INDIA THE WAY FORWARD (SRI L.G.HAVANUR ENDOWMENT LECTURE)

Hon'ble Mr. Justice Mohan M. Shantanagoudar*

As you all know, Sri L.G. Havanur was born at Ranebennur in erstwhile Dharwad District, presently Haveri. He was born in a humble family that survived on a meagre income, but became an advocate of repute with a flourishing practice in Bangalore. I am from Hirekerur the Taluka adjoining Ranebennur. My father, who was also an advocate practising in Dharwad, briefed Sri Havanur regularly, mostly in criminal matters. I used to have interaction with him since my age of 10-12 years. He was very fond of me. Although there was an age gap of more than 30 years between us, he always treated and respected me as his fellow junior friend at the Bar. He was one of the persons who dragged me back to advocacy, when I felt like diverting to a different field. It was his advice and persuasive motivation that enabled me to spring back and climb up in the profession. In 1995 itself, he planted the idea of becoming a judge of the High Court in my mind.

Sri. Havanur was a man of integrity and extraordinary self-conscience who dedicated his career to the cause of social justice and human rights.

* Judge, Supreme Court of India.

Whether as a practising litigator, or as a State Minister, or as the first Chairman of the Karnataka Backward Classes' Commission, his contributions to society have been invaluable.While he is well-known for his outstanding legal acumen in Constitutional Law as a Senior Counsel of the High Court of Karnataka, Sri. Havanuris also widely recognized as the vanguard of affirmative action in India. He is responsible for India's steps towards a casteless society, such as the one that Lord Basavanna conceived of in 12th century. As advocate, he effectively participated and contributed in National and International Conferences and Seminars

The report of the Commission headed by Sri. Havanur, popularly known as the Havanur Report, was the first of its kind. It was presented in 1975 and implemented by the Karnataka government in 1977 – it immediately succeeded in changing the lives of several members of marginalized communities for the better. As part of its methodology, it meticulously detailed 13 different backward communities, 128 backward castes, and 62 backward tribes: such a detailed classification had never been attempted before. By reserving 32% of the seats in professional colleges and State government services, it provided members of the backward classes with opportunities in education and employment that they were hitherto denied. Those who were underrepresented in society were given the visibility that they needed to fulfil their ambitions. The State of Karnataka saw great progress in the attainment of human rights, and a marked reduction in socio-economic inequality. It is no wonder, then, that the Havanur Report is hailed as the Bible of the backward classes.The report finds relevance in the landmark decision of the Supreme Court in *K.C. Vasanth Kumar* v. *State of Karnataka* [1985 SCR Supl. (1) 352], where it has expounded upon the report in great detail. Moreover, Sri Havanur's work received international acclaim. He was invited by the African National Congress to serve as an advisor in drafting the new South African Constitution. His expertise on affirmative action in India was essential to the Congress in framing the

affirmative action policies for the Draft Constitution of South Africa. The Constitution of South Africa is well-known for its comprehensiveness and steadfast commitment to human rights, especially with regard to affirmative action. The fact that Sri Havanur's model of affirmative action in India contributed to the framing of the Constitution of another democracy, is an achievement that has made India proud.

Sri Havanur sought to further the cause of human rights in all positions occupied by him. As Minister for Law, Social Welfare, Backward Classes and Minorities in 1978, Sri Havanur brought about several changes in the system. He ensured the right to equality even in the upper echelons of the government of Karnataka, by extending reservations to promotions in government services. He also opened over 2000 hostels for members of the backward classes in educational institutions. In short I can say that *"He is an inspiration and an achiever in real sense"*

Sri Havanur was bold enough to put his ideas and arguments before not only the Court, but also society at large. He stood for the truth even in times when he was estranged. He did not shake even when he faced contempt proceedings before the High Court of Karnataka. He did not budge an inch since he knew very well that he did not commit any such contempt. I will always cherish the memories of the past times that I spent as his junior friend. Although we had some differences in opinion on certain points, and he tried to convince me, our friendship continued. I am proud to honour the memory of Sri Havanur through this lecture. The subject of the lecture focuses in **"Strengthening of Human Rights in India- The way forward".** A subject that draws its spirit and allegiance to the work and efforts of late Sri Havanur.

II. What are Human Rights?

What are human rights? The meaning of human rights is a matter of

common sense. When we think of the term, we think of equality, fairness, the right to have three square meals a day, the ability to live a life free from unwarranted restrictions. Human rights, most simply put, are those rights which are essential to human beings. They cannot be created or taken away by the State – they can only be defined, upheld and safeguarded.

We need not look far beyond our subcontinent to understand what human rights mean. Human rights have been deeply entrenched in the Indian socio-cultural context for several years. The Vedas and Upanishads state that, *"The yoke of the chariot of life is placed equally on the shoulders of all. All should live together in harmony supporting one another like the spokes of a wheel for the chariot connecting its rim and the hub."*

The great Basaveshwara, too, spoke of equality for all. He was far ahead of his years – he was, in a sense, one of the first advocates for human rights in the Indian subcontinent. He did start his movement being highly influenced by the social, religious, economic and political conditions prevailing in his time that made him think in terms of equality, liberty and fraternity. It was a movement that was towards securing human rights a movement for self respect and dignity. He strongly condemned the socio-economic inequalities and general ill treatment of woman and other inhuman practice professed under the guise of superstitions contributing to the deprivation of human rights. According to Basaveswara, the spirit within the body knows neither the difference of male and female nor that of master and servant. This common humanity implied according to him that all men have equal rights and belong to one religion that is humanity. As can be implied he was a stoic and stance believer of naturalist law and rights that he formulated was something that belonged to men at all times. In one of his vachananas he says, *"there is no religion without Compassion; Compassion is the sole root of all religious faiths."*

A renowned leader like Madan Mohan Malviya was expelled from the

Brahmin community for his views on caste discrimination. He was a benevolent ideologist on eliminating caste systems and proposed the establishment of an egalitarian society. In his presidential address at Indian National Congress's Calcutta session in 1933, he argued *to sink all communal differences and to establish political unity among all sections of the people. To quote "In the midst of much darkness, I see a clear vision that the clouds which have long been hanging over our heads are lifting.* In later pre-Independence India, it was the actions and preaching of Father of the Nation M.K Gandhi whose ideas on civil disobedience marked a rise against fighting social injustice and equality. Admittedly, Gandhi's ideals gave a newer dimension, necessitating a social synthesis in humanity. In the context of human rights, he coined the word *"constructive non-violence"* for inducing a change in the society and a fight against the discriminative practices rendering severe violation of the sanctity of life.

Human rights have always been an important subject of international decision and action. International Law recognises Human Rights like equality, justice, political independence, torture and discrimination as a *jus cogens* norm *(peremptory and non-derogable)* necessitating an *obligation ergaomnes (obligations flowing to all)* on all member States. The General Assembly of the United Nations, in its quest to ensure human rights to all, adopted the *Universal Declaration of Human Rights* on December 10, 1948 with 48 votes and 8 abstentions. While it is not binding upon the signatories, it is representative of the aspirations of the global community as to what it wants the world to become. Two other important instruments emanate from this Declaration, and are today part of the *International Bill of Human Rights:* the *International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights, 1966. This International Bill of Human Rights* prescribes recognition of inherent dignity and equal and inalienable rights of all members of the human family that forms the foundation of freedom, justice and peace in the world. India

is a signatory to this esteemed Declaration, as well as the ICCPR and the ICESCR. Further, India is a signatory to several other international instruments relating to Human rights including the *International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child.* It is also among 189 countries which have adopted the Millennium Development Goals (MDGs) that emanate from the Declaration. These goals seek to end human poverty, promote human dignity and equality, do away with gender inequality, environmental deterioration and lack of education, provide health care and clean water, among other aims.

Our founding fathers were intent on safeguarding the principles of the UDHR in the foremost document of the Republic. Our country's commitment to the cause of human rights can be seen in Parts III and IV of the Constitution of India. The Fundamental Rights and Directive Principles of State Policy have imported many important Articles of the UDHR, thus imposing an obligation upon the State to protect human rights. An instance is the wording of Article 21, to safeguard the right to life and personal liberty. In fact, even the Preamble to the Constitution stands strongly for human rights, such as justice, equality, liberty and dignity. *"WE THE PEOPLE OF INDIA resolved to give to ourselves a Constitution aimed at securing– Justice, social, economic and political; Equality of status and opportunity besides Liberty of thought, expression, belief, faith and worship and Fraternity assuring the dignity of the individual and the unity and integrity of the Nation."Today, the Protection of Human Rights Act, 1993 defines human rights as "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India."*

It has been 67 years since India became a Republic. Sixty-seven years, and countless statutes, executive orders and judicial decisions later, it is

regretful that the situation has not changed much. It has in fact deteriorated. People in India are still grappling with poverty and a lack of basic facilities. The number of people who qualify for BPL status is increasing every day. The inequality between the rich and the poor is rising. India ranks 130th in the Human Development Index. India is in the news for being one of the most unequal nations of the world. According to a report by the Johannesburg-based company New World Wealth, India is the second-most unequal country globally, with millionaires controlling 54% of its wealth. With a total individual wealth of $5,600 billion, it is among the 10 richest countries in the world – and yet the average Indian is relatively poor. The top 1% of the country's population now hold 58.4% of its wealth, up from 53% in 2015, according the 2016 Global Wealth Report by the Credit Suisse Research Institute. In all, 248,000 ultra-rich individuals from India are part of the world's richest 1%.

Oxfam has calculated that if India stops inequality from rising further, it could end extreme poverty for 90 million people by 2019. If it goes further and reduces inequality by 36%, it could virtually eliminate extreme poverty. India – along with all the other countries in the world – has committed to attain the Sustainable Development Goals by 2030, and to end extreme poverty by that year. But unless we make an effort to first contain and then reduce the rising levels of extreme inequality, the dream of ending extreme poverty for the 300 million Indians – a quarter of the population – who live below an extremely low poverty line, will remain a pipe dream.

Clearly, most of the population is unable to even access their human rights. I wonder if this is because we, as the State, have not been taking the right approach towards economic, social and cultural rights. As these are in the Directive Principles of State Policy, they are not justiciable. That does not mean, however, that these rights are unimportant. There is a need for understanding the scope of these rights better and taking them more seriously. At the same time, civil and political rights that are in Part III

should not be ignored. After all, it is the duty of the State to use the Directive Principles in the governance of the country, as per Article 37 of the Constitution.

The concept of welfare State, in post colonised and democratic India, presupposes a guarantee of right to life, liberty, freedom from slavery or servitude, discrimination on basis of caste and religion etc. and ensuring equality before law and equal protection of law. Parts III and IV of Indian Constitution along with preamble to the constitution embodies the concept of human rights as inherent, unalienable and a privileged right.

III. What are some human rights violations in the country?

The extent of human rights violations in the country is widespread. I need not delve into every single one of them. However, I do wish to highlight some prominent instances of violations of freedom, dignity and equality that are rampant in India.

a) Forced labour and sex work

"It is a matter of bitter shame and sorrow and deep humiliation that a number of women have to sell their chastity for men's lust. Man, the law giver, will have to pay a dreadful penalty for the degradation he has imposed upon the so-called weaker sex. When woman freed from man's snares rises to the full height and rebels against man's legislation and institution designed by him, her rebellion, no doubt, non-violent, will be nevertheless effective"

-Mahatma Gandhi

The phenomenon of human trafficking and associated commercial sex work has increased significantly over the past two decades both globally and in South Asian countries. India has become a hub for the trafficking of men, women and children who are used for forced labour and commercial sex work. Several individuals spend their lives undertaking forced labour,

as they have nowhere else to go. The same is seen in instances where trafficked persons are forced into commercial sex work. Women are treated as a quantifiable commodity and are shipped across the country to families in need of brides. Most trafficked women are lured into the business due to false promises that they will be able to get a job and tide over their economic hardships. The commercial sex work that is carried out in India today is born out of intense poverty and thrives on deception, force, and plain cruelty to women and children. Prostitution in India is a Rs 40,000 crore annual business. It has been estimated that 30% of the sex workers are children, who earn Rs.11, 000 crore. This has been reported by a study by the Centre of Concern for Child Labour (CCL).[1] At present the number of child prostitutes in India is between 270,000 and 400,000, with the number of children in "commercial prostitution" increasing at the rate of 8-10% per annum.

The history of the subcontinent shows us that women have historically been exploited in the name of sex work. The *Devadasi* system was decried only in modern times as being exploitative and casteist. Still, I do not believe that modern times are any better. Globalisation and modernisation has aggravated this problem, commodifying the bodies of men, women and children against their will. There is one singular reason for which persons take to commercial sex work – poverty and the need for money. This economic backwardness strong-arms such persons into tolerating unhealthy working conditions, coercion and underage employment.

It is not that the law has done nothing. The *Immoral Trafficking (Prevention) Act (ITPA), 1956* criminalizes trafficking and tries to rehabilitate women in Protective Homes. Under this Act, any activity associated with sex work is considered a criminal offense. Soliciting sex is considered to be a crime; standing on a public property to solicit sex is a

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[1] The Times of India, 10 Nov 1998.

crime, and so is living on the income of sex workers. However, a 2007 review of the conditions in a well-known Protective Home in Delhi indicates little success in meaningful rehabilitation of its inmates. This has the effect of depriving sex workers of their income without properly rehabilitating them. The children of the sex workers cannot stay dependent on their mothers after they turn 18. This leads to a situation where the individuals involved cannot lead their life properly.

b) Child trafficking

In India, the manifestations of violations against children are various, ranging from child labour, child trafficking to commercial sexual exploitation. Although poverty is often cited as the cause underlying child labour, other factors such as discrimination, social exclusion, the lack of quality education or existing parents' attitudes and perceptions about child labour and the role and value of education are also areas of concern. The nature and scope of child trafficking ranges from industrial and domestic labour, to forced early marriages and commercial sexual exploitation. Existing studies show that over 40 per cent of women sex workers enter into prostitution before the age of 18 years. Moreover, for children who have been trafficked and rescued, opportunities for rehabilitation remain scarce and reintegration process arduous.

According to the National Crime Records Bureau (NCRB), child trafficking is rampant in underdeveloped villages, where "victims are lured or abducted from their homes and subsequently forced to work against their wish through various means in various establishments, indulge in prostitution or subjected to various types of indignities and even killed or incapacitated for the purposes of begging, and trade in human organs."

Several legal provisions attempt to tackle the menace of child trafficking. Article 24 of the Constitution prohibits employment of children

below 14 years of age in factories, mines or other hazardous employment. The *Child Labour (Prohibition and Regulation) Act, 1986* prohibits employment of children in certain specified occupations and also lays down conditions of work of children. *The Juvenile Justice (Care and Protection of Children) Act, 2015* adopts a child-friendly approach in the adjudication and disposal of matters in the best interest of children and for their rehabilitation. The *Indian Penal Code* also criminalizes kidnapping, among other offences.

The judiciary has also intervened in many instances. In the case of *Public at Large v.The State of Maharashtra &Ors.*[1997 (4) BomCR 171], the Hon'ble High Court of Bombay, laid out appropriate guidelines to be implemented for the protection and rehabilitation of the victims of child trafficking and sexual violence against women and children. It directed the State government to see that strict vigilance is maintained in the areas where sex workers normally operate and to rescue the child sex workers.

However, that is not where we should stop. Considering as priority goals the fostering of social, economic and political stability, improving children's access to educational and vocational opportunities, involving the NGO community and the media in raising awareness and combating trafficking. Only a change in attitudes can improve the situation. Trafficking in human beings, especially children, is a form of modern day slavery which requires a holistic, multi-sectoral approach to address the complex dimension of the problem. Trafficking not only violates the rights but also the dignity of the victims and therefore while working on it's eradication a child rights perspective need to be taken into consideration. In the fight against trafficking, the government organizations, non-governmental organizations, civil society, pressure groups, international bodies, all can play an important role (efforts are being made at present too). We cannot rely on law every time to solve our problems as law can not be the only

instrument to take care of all problems. Prevention of child trafficking requires several types of interventions.

c) Rape

It is trite to say that women are not safe in the world today. Their human rights are continually sidelined by society. They have to face assaults on their freedom and dignity, in forms of both physical and mental attacks upon them. At least one out of three females in the world has been physically or sexually abused, often repeatedly, by a relative or acquaintance.A large range of sex related crimes take place, including sexual assault, forcible rape, sexual abuse of mentally or physically disabled people, sexual abuse of children, adultery, fornication and trafficking of people for the purpose of sexual exploitation. The United Nations continues to promote democracy as the best system to secure women's dignity and rights, through several declarations. Unfortunately, India, the world's largest democracy fails to help and empower the nation's women. Thousands of women have their basic rights violated regularly for no fault of their own. A rapist not only causes physical injuries but traumatizes the victim mentally. The result of rape is often social ostracization of the victim by other members of society.

In the modern world, India is fast emerging as a global power but for half of its population, the women across the country, the struggle to live life with dignity continues. Women, irrespective of their class, caste and educational status do not feel safe. In the modern society women have been the victims of exploitations since long time in different fields of life be it physical, social, mental or financial. There are several causes of sexual as well as moral abuse which are very often highlighted by the media in Indian modern society, and a lot of those also remain unexplored.

Rape is a total violation of a woman's rights over her own body dignity and of her ability to make a sexual choice. Rape is an attack not only on a

woman's body, but on her sense of who she is and how she functions in the world. Rape leaves a permanent scar on the mind and body of the victim. Child victims suffer the greatest. Not only the victims but also her entire family is put to shame and humiliation. Victims of rape happen to be of different age groups but children, adolescents and young women constitute the main target group. The Supreme Court has, innumerable times, declared that "Right to Life" does not merely mean animal existence but means something more, namely, the right to live with human dignity. Right to Life would, therefore, include all those aspects of life which go to make a life meaningful, complete and worth-living. However, women's lives are far from meaningful when everything they do has to be regulated and policed, failing which their lives will constantly be threatened.

According to the data collected by the National Crime Records Bureau, reported cases with regards to Cruelty by Husband and Relatives (Section 498A IPC); Assault on Women with Intent to Outrage Her Modesty (Section 354 IPC); Kidnapping & Abduction of Women (Section 363,364,364A, 366 IPC); Rape (Section 376 IPC); Insult to the Modesty of Women (Section 509 IPC); Dowry Deaths (Section 304B IPC) has been on a constant rise from 2005 to 2014. Acid attacks have also gained a steep rise albeit government rules regarding ban of sale of acids.

However, the Delhi gang rape brought matters to a head. The Indian Judiciary has intervened in public interest wherever the scope for filling up the lacunae was felt by it. In the Nirbhaya case *State* v. *Ram Singh,* [2014 (2) ACR 1615 (SC)], Hon'ble Justice R. Banumathi held:

> *"We have a responsibility to set good values and guidance for posterity. In the words of great scholar, Swami Vivekananda, "the best thermometer to the progress of a nation is its treatment of its women." Crime against women not only affects women's self esteem and dignity but also degrades the pace of societal development. I hope that this gruesome incident in the capital and death of this young woman will be*

an eye-opener for a mass movement "to end violence against women" and "respect for women and her dignity" and sensitizing public at large on gender justice. Every individual, irrespective of his/her gender must be willing to assume the responsibility in fight for gender justice and also awaken public opinion on gender justice. Public at large, in particular men are to be sensitized on gender justice. The battle for gender justice can be won only with strict implementation of legislative provisions, sensitization of public, taking other pro-active steps at all levels for combating violence against women and ensuring widespread attitudinal changes and comprehensive change in the existing mindset."

In keeping with the public outrage over the event, Justice J S Verma Committee raised the bar of punishment for a wide range of existing and proposed sexual offences. The report, released on 23rd January, 2013, proposed codification of a stringent alternative to the life sentence, evolved through judicial activism in the last five years. The Parliament has adopted most of its recommendations and amended the *Code of Criminal Procedure through the Criminal Laws (Amendment) Act, 2013.* Rape is now punishable by death.

d) Religious fundamentalism

Of all the challenges to our democracy to my mind, the gravest is the rise of fanaticism and intolerance which has assumed menacing proportions. One trend in violations of human rights is ever-growing fundamentalism in all its forms and manifestations and use of terrorist activities for imposing their "so called religious or ideological will". While all faithful believe in harmony and brotherhood in religion, it is the misguided fanatics who do not value human life and in the name of religion resort to all types of attacks on human rights. These include forcible imposition of self-righteous social code and undermining of freedom of expression and belief. Fundamentalism is sometimes used to exploit innocent citizens in the name of religion to secure "political" advantage over the rivals, unmindful of the

harm their actions may cause to the nation by such exploitation. They contribute to a climate of religious bigotry, which leads to discrimination, harassment and attacks on all those who do not follow their dictates which may be right or wrong, on believers of other faiths. In doing so, they violate human rights of fellow citizens without any justification whatsoever. Society's response to such type of fundamentalism has to be clear and effective. Indifference of the society to such acts encourages fundamentalists – Loud and positive condemnation of their activities by the society, on the other hand is bound to discourage them. A violent group, whatever its politics has no right to kill, and no claim to such a right must ever be allowed. What more fundamental attack on human rights can there be than to deprive the innocent of the right to life? Does murder cease to be murder just because the killer believes human life is expendable in pursuit of some particular species of fanaticism?

In a free democratic society tolerance is vital, because firstly, it promotes receiving or acknowledging new ideas and helps to break the *status quo* mentality. Secondly, tolerance is particularly needed in large and complex societies comprising people with varied beliefs and interests.

It is not sufficiently realized that intolerance has a chilling, inhibiting effect on freedom of thought and discussion. Development and progress in any filed of human endeavour are not possible if any thought or opinion which questions the current ideology incurs the ire of the authorities or a certain section of the population and is visited with dire consequences. Without free and frank discussion there can be no progress in any filed of human endeavour. The consequence is that dissent dries up. Healthy and vigorous debate is no longer possible. And when that happens democracy is under siege and under threat. And that is the challenge we must counter fully with all our might. We must realise the urgent need to combat intolerance and the deadly threat it poses to the democratic fabric of our nation.

e) Discrimination

India has a diverse historical background, with a population that is highly segregated. As second most populated country in the world, India also has an extremely diverse population in terms of cultures, religions and languages. Differences arise amongst the people of the country on various grounds: sex, religion, class, caste, and physical and mental disability. In the Indian subcontinent, as in most places, women are not seen as equal to men in all spheres of life. On account of a significant majority of the population being Hindu, communities from other religions find themselves relegated to the lower echelons of society. Class differences based on the socio-economic status of individuals operate insidiously within society. The country is most deeply ensnared in the hierarchies of caste – a term unique to Indian society, which means a complex hierarchical societal structure that categorizes persons on the basis of which family she is born in and, more often than not, the type of occupation her family has been carrying on for generations. Successive governments have made policies and enacted legislation in order to attempt to undo years of discrimination against the marginalized. Each of these laws sets a variety of enforcement mechanisms to ensure that the victims of discrimination are granted redress, and attempt to deter such instances of discrimination from occurring in the future. However, caste continues to remain a deeply entrenched problem in society.

Today, 37% of Dalits and others live below poverty in India. 54% of Dalit children are undernourished. 45% of Dalits do not know how to read and write. Moreover, India has suffered from caste based violence since its ancient past. Even today, we are unable to surpass such violations. The present millennium has seen a plethora of such caste based violations. In a case of caste violence in 2012, Akbar Ali, a disabled man, was brutally attacked by a gang at Rampur Bairiya village in Bihar's East Champaran district. In the area, there have been continual tensions between the upper

caste Muslims, comprising the Pathans and Sayyeds, and the Pasmanda Muslims, comprising various sub-castes. There have been incidences of violence in Saharanpur, where one person was killed and at least 15 others were injured, as members of two castes clashed over loud music being played during a procession. Such injustices and illegalities continues till today.

f) The Right to Health

Good health is extremely important to human living. The growth and development of a country depends to a large extent upon the health of its citizens. No doubt, the right to life includes the right to health, as held by the Apex Court in the case of *Parmanand Katarav* v. *Union* of India [AIR 1989 SC 2039].There, the Court held that a doctor of a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting the life of a patient. Whether a patient is innocent or guilty is only a question of law, and thus the doctor is obliged to uphold his right to health irrespective of his status as guilty or innocent. We must ensure that this constitutionally provided right must also be given to those who are economically backward, and give them access to better healthcare facilities.

Further, those who are affected/infected by HIV/AIDS – more particularly the children –suffer for no fault of their own. The discrimination perpetuated upon them by society takes extreme forms: they are denied healthcare, removed from employment and denied the status of a functioning human in society.

Another issue in terms of a denial of the right to health is seen in the way persons with disabilities are treated. Despite international and domestic actions taken, the physically and mentally challenged persons in our country continue to face several obstacles in leading their life with dignity.

Today, as it stands, their rights are more a myth than reality because disability is still, by and large, regarded as a "welfare" issue and has remained a subject matter laced with discourse of 'favours' and 'entitlements'. Adopting a human rights approach, and treating this discrimination as violence, is the only way to ensure that such persons get to live their lives with dignity. Evidence suggests that the quality of life of persons with disabilities, and of their broader community, improves when disabled persons themselves actively participate in decision-making process. We have failed in including their expertise into the organs of the State. It is for this reason that persons with disability are still suffering. This situation needs to change. If access is guaranteed, persons with disabilities can use, interact and participate in social institutions and environments in the same manner as others.

By all counts, India is home to the largest number of persons with disability in the world. The 2001 census of the country estimated their number at 22 million. However, according to many observers the actual numbers could be as high as 50 million. Over the last decade, Government of India has introduced several measures for equalizing opportunities for full participation by persons with disabilities in all aspects of life. These measures include an impressive legal framework with a clear focus on disability. On the global scale the debate on disability and human rights is gaining momentum, and is likely to result in a new *Human Rights Convention* on the theme of disability. In the proposed International Convention on Disability, the Special Rapporteur of the National Human Rights Commission, India has been nominated as representative of the International Coordinating Committee of national human rights institutions (ICC). In fact, it is for the first time that national institutions have been asked to and actively associated with the development of an international Convention.

Since better protection of human rights is an important task of the Commission, it has relentlessly endeavoured to be at the vanguard of the battle to curb violation of human rights happening anywhere in the country when brought to its notice or which otherwise come to its notice by *suo-motu* actions. An idea of the magnitude of the task before the Commission can be judged by the fact that almost 75,000 complaints were received by the Commission during the last year. This also indicates the faith and confidence which the citizens have been reposing in the Commission to protect and promote human rights. To rise to the hope and aspiration of the citizens, by making serious efforts the Commission disposed of about 84000 pending complaints during the year. The Commission has found with satisfaction that in undertaking the herculean task before it, it has been receiving tremendous support from the Media, Non-governmental fraternity, the Representative of the People and members of the civil society. It is seen that during every session of Parliament, the Commission gets several questions from various departments of the Government, which are raised by the Members in both Houses of the Parliament, on allegations of, custodial deaths, torture, fake encounters, human rights violations of women and other weaker sections of the society, etc. The questions reveal a genuine interest among the MPs to highlight various issues concerning violation of human rights of the citizens. It is also very heartening that several questions raised in Parliament are based on statistics and information provided in the Annual Reports of the Commission as well as other documents released by the Commission from time to time during the course of its work. This is cause for optimism, because, so long as the elected representatives of the people take an abiding interest in the protection of human rights of the citizens, the executive government in power, shall have to account for, both, its acts of omission and commission.

g) Corruption: a violation of human right

Ronald Dworkin in his book "Taking Rights Seriously" expounds that *"To take rights seriously, It must accept, at the minimum, one or both of two important ideas. The first is the powerful idea of human dignity and second is the more familiar idea of political equality."*

Thus, Dworkin's argument converges on the fact that a person has a fundamental right against the government only if that right is necessary to protect his or her dignity or standing as one who is equally entitled to concern and respect. The phenomenon of Corruption in India not only poses a significant danger to the quality of governance but also threatens in an accelerated manner the very foundations of its democracy and statehood.

From a concept of Leviathan State we have travelled to a regime of egalitarian and welfare republic model. Thereto, modern State today is wedded to the principle of not only protect but also ensure a fairness, justice and good governance guaranteed to one and all without discrimination. Thus, under the basic human rights principle a State has three levels of obligations a) to respect, b) to protect and c) to fulfil. The obligation to respect requires the State to refrain from any measure that may deprive individuals of enjoyment of their rights, the obligation to protect requires the state to prevent violations of human rights by third parties and the obligation to fulfil requires the state to take measures to ensure the people under its jurisdiction can satisfy basic needs.

Corruption discretely attacks the fundamental values of human dignity and political equality of the people. *Inter alia* the definition of the term corruption is the *offering, giving, soliciting or acceptance of an inducement or reward, which may influence the action of any person.* Corruption deeply, disturbs the moral constitutional fabric and possessing a cosmic challenge before India today to establish a Rule of law society. While there are

legislations to the effect of corruption and Human Rights but the gap between the books and practice stands wide. A society guaranteeing rule of law principally premises on trust embodying sense of fairness, just and reasonableness. Corruption as such undermines the basic substratum of a democratic society.

While analysing the link between corruption and the violation of human rights therein it is of two fold; corruption may amount to direct violation of human rights, when the State official acts or omits in a way that prevents individuals from having access to rights guaranteed otherwise. It may be an indirect violation when de hors a direct connection; corruption is a contributing factor in the chain of events finally leading to violation of human rights for instance say when the corrupt authorities prefer to turn a blind eye to ensure implementation of a government scheme.

Having recognized that corruption affects human rights and the rule of law, it is important to develop the right to corruption-free governance through a number of rights-based strategies in India. Rights-based approaches to governance are those strategies that rest on the conceptual foundation that social and economic goals do not remain policy objectives, but get transformed into rights that are vested with the citizenry. The claims that are in effect guaranteed under the Part IV of the Constitution Directive Principles of State Policy, by the very nature are what I would say claims on the government or its representatives to act in a particular manner. The struggle for the promotion and protection of human rights inevitably requires the elimination of such aberrations that, over the time, have wounded and fractured our society, leaving some more equal than others. In my opinion such a rights based approach to the anti-corruption measure is an effective measure against the anti-corruption drive.

The concomitant question which falls is whether rights ought to be expanded to include economic, social and cultural rights. *Ipso facto,* the

development of the "right to life" jurisprudence is one such example in which the courts have not hesitated to include new right as a part of the evolving nature of human rights and human dignity extending the sphere of part III to even include socio-economic rights. To pin down a few, *Hussainara Khatoon* v. *State of Bihar* [(1980) 1 SCC 98], *Rudul Sah* v. *State of Bihar* [AIR 1983 SC 1086], *Olga Tellis* v. *Bombay Municipal Council* [1985] 2 Supp SCR 51], *PUCL* v. *Union of India* [(1997) 3 SCC 433], *Paschim Bangan Masdoor Khet Samity* v. *State of West Bengal* [(1996) AIR SC 2426], *Bandhua Mukti Morcha* v. *Union of India* [(1997) 10 SCC 549].To this I believe there is a case for developing a fundamental right to corruption-free environment in the governance and administration in India.

The idea of reconciling corruption and human rights violation can be seen in several human rights instruments like UDHR, ICCPR, ICESCR etc. These instruments reveal that *"right to corruption free governance is a basic human right and corruption is really a human rights violation especially right to life, liberty, equality and non discrimination, right to political participation, right to information, several economic, social and cultural rights like, right to food, water, housing, education, environment, right to law enforcement and fair trial and access to justice."*

As a first measure against the illicit enrichment of corruption, *"The Prevention of Corruption Act* was passed in 1947 and an Administrative Vigilance Division ("AVD") was formed in the Ministry of Home Affairs in 1955.Subsequent to which continuous amendments statutory bodies like Central Vigilance Commission ("CVC")& Central Bureau of Investigation ("CBI") were formed. However, the control and intervention of the legislative and executive thereby the independence of such bodies remains blotted and under question. In the wake of the Supreme Court judgment in *Vineet Narain* v. *Union of India* [(1996) 2 SCC 199] it is a step in the right direction to ensure that investigative agencies are not directly subject to

pressures from the political class while dealing with cases of corruption. Since the fact remains that realization of rule of law requires a certain level of predictability that violations of law will be met with certain consequences.

IV. Need to view Corruption as a violation of Human Right.

A clear understanding of the practical connections between acts of corruption and human rights may empower those who have legitimate claims to demand their rights in relation to corruption, and may assist States and other public authorities to respect, protect and fulfil their human rights responsibilities at every level. Connecting acts of corruption to violations of human rights also creates new possibilities for action, especially, as, acts of corruption can be challenged using the different national, regional and international mechanisms that exist to monitor compliance with human rights. When acts of corruption are linked to violations of human rights, all these institutions could act to force accountability and so as to create disincentives for corruption. A human rights perspective requires policy-makers to ask how the design and/or implementation of anticorruption programs will affect people who are marginalised or impoverished, subject to social discrimination, or disadvantaged in other ways. Analysing anti-corruption programs from a human rights perspective may assist States to comply with human rights standards when they draft and implement laws and procedures to detect, investigate and adjudicate corruption cases.

In the past few years, the press had been reporting various scams like, The Bofors scam, Bihar fodder scam, Hawala scam, CRB scam etc and lastly 2G Spectrum scam. As per Transparency Internationals 2010, Corruption Perception Index, India ranks 87 out of 178 countries. Corruption in India threatens derailment of its growth and development. However, India's ratification of UN Convention against corruption is a step forward in the battle corruption by introducing a slew of administrative and

legislative measures to strengthen legal and regulatory regime. Several anticorruption legislations like *Prevention of Corruption Act, Right to Information Act, Money Laundering Act, Public servants (Forfeiture of Property Act) 1999, Whistle blowers Protection Act, Benami Transactions legislations, Foreign Exchange Management Act,* etc are some to curb the menace so prevalent.

Good law and strong institution alone are not sufficient to tackle the problem of corruption. We need to focus on simplifying procedures, reducing discretion, eliminating arbitrariness, and increasing transparency in the way of Government functions. Recent Indian political scenario has witnessed the development of a vigorous civil society involving a plurality of independently organized groups progressively working towards the goal of good governance transcending to the level of human governance as enshrined in the Constitution of India.

It remains one of the biggest threats to 'full human development' and 'human rights for all'. It undermines the rule of law. It distorts the development process and also poses a grave threat to human security. It has spread its tentacles to every sphere of national life. It enriches the rich and disproportionally affects the poor, unprotected and the underprivileged and thereby it deepens their deprivation. This consequently contravenes the equality clause of Article 14 of the Constitution.

It is unfortunate, but true, that growing politicization of public services and criminalization of politics have contributed in no small measure to let corruption flourish and the corrupt not only go scot-free but even earn a position of false respectability! To have corruption free governance is therefore a basic human right and the need to recognize it as such and to take steps to eradicate it, is the need of the hour. We have cried ourselves hoarse about the persistent evil effects of corruption and talked about it, yet it flourishes with impunity. The need of the hour is to bring about a change in

our political morality and society's sense of values. What is more unfortunate, today is the growing tolerance and our acceptance of corruption as an inevitable and integral part of the civil society. Unless an alert and active citizenry adopts zero-tolerance to corruption and shuns the corrupt, it may not be possible to meet the challenge with any amount of sincerity – remedy, therefore, to a large extent, lies with us – WE THE PEOPLE. Internationally also the world community has been concerned about the growing phenomenon of corruption.

V. How to improve the situation?

a) Human rights and education

In the last few decades there has been a worldwide growing awareness and explosion of interest in human rights education, which means that *"all learning that develops the knowledge, skills and values of human rights"*. The United Nation proclaims that human rights education is "training, dissemination and information efforts aimed at the building of a universal culture of human rights through imparting knowledge and skills and the moulding of attitudes".

Human rights education, training and public information are, therefore, necessary and essential for the promotion and achievement of stable and harmonious relations among the communities and for fostering mutual understanding, tolerance and peace. Through the learning of human rights as a way of life, fundamental change can be brought about to eliminate or eradicate poverty, ignorance, prejudices, and discrimination based on sex, caste, religion, and disability and any other forms among the people at large. The major International Instruments on Human Rights include education as integral part of the right to education and have gained of late larger recognition as human right in itself. Human rights education implies the learning and practice of human rights.[2]

[2] Address by Justice Shri S. RajendraBabu, Chairperson, NHRC atNational Consultation on "Incorporating Human Rights Education in the School and University Education System" organized by NHRC on 6th July 2007.

Human rights education is needed to everyone, whose decisions or policies affect the lives of other human beings. Human Rights Education serves as means of understanding and embracing principles of human equality, dignity and commitment to respect and protect the rights of all. Once the people grasp human rights concept, they begin to look for their realization in their own lives, examining their communities, families and personal experiences through the human rights lens.

Dissemination of knowledge of human rights and duties must therefore, aim at bringing about attitudinal changes in human behaviour. It is commonly acknowledged that students are the dynamic and progressive component of citizenry. Similarly, teachers have a crucial role in developing awareness among the students to translate human rights into social and political realities.

Human rights education has to grapple with three important concerns: one, clarification of contemporary civilizational dilemmas; two, intergenerational transmission of experience; three, acceleration of the process of transformation. The contemporary civilization faces several dilemmas arising from different contradictions. These contradictions at an individual level are located in selflessness vs. selfishness, at institutional level at individual vs. collective, state power vs. democratic culture. Despite the crisis, the potentialities and possibilities of nobility inherent in human nature will have to be rediscovered and realized. A critical reflection of the past heightens the consciousness, which, in turn can create necessary climate for not only democratic governance but a democratic way of life. This effort has to be continuously made at the individual, group, national and international levels. Human rights education can be a catalyst in this process.[3]

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[3] *Id.*

In any case, if there is a sustained effort made to disseminate human rights concerns through the process of education in the society, it would certainly bring about sustainable conspicuous results and will lead to positive change in the society in 21st century. Finally, the ultimate goal of education for human rights is empowerment, giving the knowledge and the skill to take the control of their own lives and decisions that affect them.

b) The Right to Legal Aid

The concept of seeking justice cannot be equated with the value of dollars. Money plays no role in seeking.

-Justice Blackmun in *Jackson* v *Bishop*[4]

I strongly believe that one of the means to improve the situation of human rights in the country is through legal aid. Legal aid to the poor and weak is necessary for the preservation of rule of law which is necessary for the existence of the orderly society. Until and unless poor illiterate man is not legally assisted, he is denied equality in the opportunity to seek justice. Therefore as a step towards making the legal service serve the poor and the deprived; the judiciary has taken active interest in providing legal aid to the needy in the recent past.

Therefore, the main object to provide equal justice is to be made available to the poor, down trodden and weaker section of society. In this regard Justice P.N. Bhagwati rightly observed that:

> *"The legal aid means providing an arrangement in the society so that the missionary of administration of justice becomes easily accessible and is not out of reach of those who have to resort to it for enforcement of its given to them by law, the poor and illiterate should be able to approach the courts and their ignorance and poverty should not be an*

4 *404F, 2d 571 Court of Appeals, 8th Circuit, 1968.*

impediment in the way of their obtaining justice from the courts. Legal aid should be available to the poor and illiterate, who don't have access to courts. One need not be a litigant to seek aid by means of legal aid."

The Indian Constitution provides for an independent and impartial judiciary and the courts are given power to protect the Constitution and safeguard the rights of people irrespective of their financial status. Article 39A of the Constitution of India provides for free legal aid to the poor and weaker sections of the society and ensures justice for all. Articles 14 and 22(1) of the constitution also make it obligatory for the State to ensure equality before law and a legal system which promotes justice on the basis of equal opportunity to all. Since the aim of the Constitution is to provide justice to all and the directive principles are in its integral part of the Constitution, the Constitution dictates that judiciary has duty to protect rights of the poor as also society as a whole. Public Interest Litigation is one shining example of how Indian judiciary has played the role of the vanguard of the rights of Indian citizens especially the poor. It encouraged the public spirited people to seek justice for the poor. Apart from Public reforms in the judicial process, where it aims to make justice cheap and easy by introducing *Lok Adalat* system as a one of the methods to provide free legal aid and speedy justice at the door steps of the poor.

Contribution of Judiciary

The Supreme Court of India got a major opportunity to make an emphatic pronouncement regarding the rights of the poor and indigent in judgment of *Hussainara Khatoon* v. *State of Bihar* [(1980) 1 SCC 98],where the petitioner brought to the notice of Supreme Court that most of the under trials have already under gone the punishment much more than what they would have got had they been convicted without any delay. The delay was caused due to inability of the persons involved to engage a legal

counsel to defend them in the court and the main reason behind their inability was their poverty. Thus, in this case the court pointed out that Article 39Aemphasized that free legal service was an inalienable element of reasonable, fair and just' procedure and that the right to free legal services was implicit in the guarantee of Article 21.

Two years later, in the case of *Khatri* v. *State of Bihar,* [1981 SCR (3) 145], the court answered the question the right to free legal aid to poor or indigent accused who are incapable of engaging lawyers. It held that the State is constitutionally bound to provide such aid not only at the stage of trial but also when they are first produced before the magistrate or remanded from time to time and that such a right cannot be denied on the ground of financial constraints or administrative inability or that the accused did not ask for it. Magistrates and Sessions Judges must inform the accused of such rights. The right to free legal services is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require. The State cannot avoid this obligation by pleading financial or administrative inability or that none of the aggrieved prisoners asked for any legal aid.

This consequently has affected in the enactment of *The Legal Services Authority Act, 1987* devising a schematic series of bodies starting from the National Legal Aid Authorities, The State Legal Services Authorities and thereafter in district and taluk level. However, the legislation has failed to meet and remedy the constraints of injustice. The way forward is thus not legislation making but awareness and cooperation.

Judicial Interpretation

There are several judicial decisions where the importance of Art.39A read with Art.21 of the Constitution were interpreted and explained.

"Procedure established by law" as envisaged in Article 21 guarantees fair procedure which necessarily includes observing of the principles of natural justice which includes right to appeal on fact, in cases of criminal conviction.

A three judge bench of Supreme Court consisting of V. R.KrishnaIyer, D. A. Desai and O. Chinnappa Reddy, JJ.lays down the following principles in the field of legal aid in the case of *Madhav Hoskot* v. *State of Maharashtra,* [1978 SCC (3) 544].

a) The Court shall forthwith furnish free transcript of the judgement when sentencing a person to prison.
b) A copy of the judgement shall be delivered to prisoner by the jail authorities with quickness and shall contain written acknowledgement from him.
c) If the prisoner seeks to file an appeal or revision, every facility for exercise of that right shall be made available by the jail administration.
d) If a prisoner is unable to engage a lawyer on the ground of his indigence or incommunicable situation, then the court in the interest of justice and based on the gravity of sentence shall assign a competent lawyer for prisoner's defence subject to his approval.

A procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would therefore, have to go through the trial without legal assistance, cannot possibly be regarded as reasonable fair and just. It is an essential ingredient of reasonable, fair and just procedure to a prisoner that the legal services should have been made available to him who is to seek his liberation through the courts process. Legal aid is a Constitutional right of every accused person who is unable to engage a lawyer and secure legal services because of reasons such as poverty, indigence. State is under a constitutional mandate to provide a lawyer to such accused person if the needs of justice so require. Further, the State is under a constitutional mandate to provide a lawyer to an accused

person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer.

c) The role of NGOs in upholding human rights

NGOs put issues on the agenda, provide vital information about human rights on the ground, and give a voice and face to human rights. NGOs assist to implement and monitor the implementation of the decisions and resolutions of the Council at the national level. NGOs are thereby often bridging the gap between the international, regional and national levels, by helping to translate our work into action, by triggering change, and by reminding us to strive for accountability.

Human rights NGO's play an important role in upholding human rights, as envisaged under the United Nations Declarations of Human Rights and other human rights instruments. Predominantly pressurising Government compelling them to enforce human rights of persons and be vigilant in order to prevent infringement of these rights. Further, these organizations have helped in bringing instances of human rights violations to the notice for its redressal.

In the international crusade against human rights violation, the role of NGOs, the development of international norms, institutions and procedures for the promotion and protection of human rights has gone hand in hand with the proliferation of Non-Governmental International Organizations working in the field of human rights. As for instance the incorporation of Article 71 of the UN Charter which provides that "the Economic and Social Council may make suitable arrangements for consultation with Non-Governmental Organizations which are connected with matters within its competence...".

"The 21st Century will be an era of NGOs." —

NGOs functioned as the conscience of the nation in the field of human right by taking prompt action to investigate human rights violations by undertaking spot studies and publishing observations.

Roles NGOs play:

The Social Welfare Role - where relief and charity are key actions. NGOs in this role can be seen as initiating internal programs and projects.

The Mediatory Role - where communication as a skill is important for development and social action. NGOs in this role can be seen as participating or taking up external programs and projects.

The Consultative Role: where support documentation and dissemination of information and expertise is critical. NGOs in this role can be seen as working in collaborative programs. Local experts/ professionals/ resource persons play major secondary roles.

Facilitating Communication: The significance of this role to the government is that NGOs can communicate to the policy-making levels of government, information about the lives, capabilities, attitudes and cultural characteristics of people at the local level. NGOs can facilitate communication upward from people to the government and downward from the government to the people.

Advocacy for and with the Poor: In some cases, NGOs become spokespersons or ombudsmen for the poor and attempt to influence government policies and programs on their behalf. This may be done through a variety of means ranging from demonstration and pilot projects to participation in public forums and the formulation of government policy and plans, to publicizing research results and case studies of the poor. Thus NGOs play roles from advocates for the poor to implementers of

government programs; from agitators and critics to partners and advisors; from sponsors of pilot projects to mediators.

Role of NGO at International level in protecting human rights: At the international level, the status of human rights is watched by many NGOs. Amnesty International is one such organization. This Organization is dedicated to publicize violation of human rights, especially freedom of speech and religion and right of political dissent. It also works for the release of political prisoners and, when necessary, for the relief of their families. For its commendable services in the field of human rights, Amnesty International was awarded the Nobel Prize for peace in 1977.

d) Role of Media

It is here that the media also plays a salutary role in creating larger awareness of the concept of human rights. Basic human rights that would constitute the right of every individual to his fundamental freedom without distinction as to race, sex, language or religion. Human society has transformed and developed from Stone Age to space age. But while some nations or societies have developed a pace the others seem to be nowhere in the race. The rights which citizens enjoy vary depending upon the economic, social, political and cultural status and divisions.

In view of the fact that there is a revolutionary change and growth in every sphere of life and mainly in the communication and media world, media today, plays a decisive role in the development of society.

The impact of media on society today is beyond doubt and debate. The media has been setting for the nation its social, political economic and even cultural agenda. The media can perform this role in different ways. It can make people aware of their rights, expose its violations and focus attention on people and areas in need of the protection of human rights and pursue their case till they achieve them.

It can be argued that it is today not only the government but also the public and society at large that should work together in cooperation and in partnership. The media therein plays a pivotal role in creating awareness and spreading the same to nook and corners in effect ensuring and check on abuse and bringing the offenders to task.

VI.The importance of good governance in ensuring access to human rights

India is the biggest democracy. Upholding human rights is compulsory for a democracy, and more so for India. We must lead by example in a time when liberal democracies the world over are passing through a tense and chaotic stage. Good governance, therefore, assumes great relevance. The very concept of Govt. of the people, for the people and by the people, puts human beings at the centre stage and unless the State makes Human Rights its focal point, it cannot provide good governance.

Democratic governance basically refers to the management of societal affairs in accordance with the universal principles of democracy, based on popular consent, participation, and accountability of rulers. Human rights, which are basic to civilized existence, are conceived primarily as protection against tyranny and ensuring prevalence of the rule of law.

The victims in regard to the violation of such privileged inherent rights are mostly the poor and deprived sections of the society. However, inspite of the claim of universality of human rights, their contents, perspectives and priorities differ from society to society. It needs to be recognized and accepted that protecting and promoting human rights sustains rule of law and political stability which is *sine-qua-non* of good governance.[5]

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[5] 'Inagural Address by Dr. Justice A.S Anand, Chairperson, NHRC at Seminar on *"Human Rights Sine-Qua-non of Democracy"*, organized by Merchants Chamber of Commerce At Kolkata on 8th Sep',2006.

Predominantly, the State is primarily responsible for both formulating and enforcing polices relating to good governance and human rights. Unless human rights are best assured and ensured, good governance remain only a distant dream.

The Supreme Court of India has played a pivotal role in balancing the civil and political rights on the one hand and the social and economic rights on the other so as to develop human rights both horizontally and vertically. We must realize that there can be no good governance, if Directive Principles are flouted and neglected. Failure to implement and effectuate directive principles is a serious drawback and poses constant problems to the functioning of our democracy.[6]

Securing economic and social justice is a moral imperative for any and every democracy. Failure in that effect results in disillusionment with democracy and leads to an ultimate acceptance of authoritarian and totalitarian regime, upon which the society loses its democratic character.

The inter-dependence of both sets of rights is essential for full development of human personality. Governments have so far contented themselves by chalking out only strategies for promotion of economic and social rights. Even those strategies have hardly borne any fruits because of rampant corruption in implementing the same. Millions of people in this country live in a state of abject poverty, without food, shelter, employment, health care and education.

Dr. Ambedkar winding up the debate in the Constitutional Assembly pointed out the perils of a life of contradictions in these memorable words:

> "In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one

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[6] *Id.*

man one vote and one vote one value. In our social and economic life, we shall by reason of our social and economic structure, continue to deny the principle of one man one value. If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment else those who suffer from inequality will blow up the structure of democracy which this Constituent Assembly has so laboriously built up."

It cannot be ignored, that far too many people continue to live in conditions where there is wide spread neglect of human rights and people are denied hope of better future. The existence of social, economic and political disparities to a large measure contribute to the eruption of conflicts within the State and beyond which are threatening the democratic societies worldwide.[7]

It is undisputable that society grappled with exploitations and prevailing inequalities in practice fail drastically in securing justice and remain breeding grounds for conflicts, which more often than not thrives in environments where human rights and more particularly Economic, Social and Cultural Rights are denied by the State organs.

The protection and promotion of Economic, Social and Cultural Rights must go hand in hand. Worthwhile strategy thus must be devised to resolve such conflicts ensuring enjoyment of Economic, Social and Cultural Rights in full flare which is *inter alia* the worthy objective for democratic governance.

The Twenty-first century, marked the Declaration adopted by 189 countries at the United Nations Millennium Summit on 8th September, 2000: (i) the new initiatives by poor and rich nations in fulfilling a long unfinished agenda of "full human development" and "human rights for all"; and (ii) the

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[7] *Id.*

Millennium Development Goals. The UN Millennium Development Goals are in a way value based resolves among nations to end human poverty, promote human dignity and equality, and to take steps in furtherance of the attack on inadequate incomes, widespread hunger, gender inequality, environmental deterioration and lack of education, health care and clean water, towards the convergence of human development and human rights in action.

Let me; however, hasten to add that citizens' obligation in a democracy is not discharged by the exercise of franchise once in five years and thereafter retiring in passivity. An alert, active and educated citizenry is however quintessential to meet the challenges to democracy and to ensure its successful functioning. Accountability is a *sine-qua-non* of democracy, as Benjamin Disraeli rightly reminds us "all power is a trust – that we are accountable for its exercise that, from the people and for the people, all springs, and all must exit" at the same time awareness and participation of the masses remains indispensable. This accountability is to be enforced not merely at the time of elections but during the life of the government in power.[8]

Democratic governance being a form of practice based on universal principles of rule of law provides a means towards development and human security. Therefore, ignoring protection and promotion of human right is a threat to democratic governance, which is a continuing process of expanding the political space to ensure for everyone equal access to basic rights and liberties. It is in a way a Fundamental Human Right essential for the realization of dignity and worth inherent in the human beings. The time has come to make human rights as *sine-quo-non* of democratic governance. Just a constitutional democracy will not ensure prosperity and equitable

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[8] *Supra note,* 4.

distribution of opportunity to the citizens. Ensuring protection and promotion of human rights will enable the most vulnerable to exercise true democracy not just in letter but also in spirit.

VII. CONCLUSION

India is the biggest democracy in the world. We are supposed to have the largest instances of *enforcement* of human rights. Why then do we have such a high number of unchecked, unabated human rights violations? Differences arise in every society. What can India do to improve upon its record of violations?

Truly, there is a lot that can be done by all the organs of the State. Each organ of the State plays its own role in upholding and enforcing Parts III and IV of the Constitution. Good governance is an essential aspect of democracy, and the mandate of the Fundamental Rights and Directive Principles must be upheld. But the duty of upholding *human* rights does not stop at the State. We, State and society, must work in conjunction with each other to make the world a better place. The media, for instance, has brought several issues to light upon which the Parliament has enacted laws, or the Courts have taken *suomotu* action. Such a concerted effort on the part of the State and the media will go a long way in giving the powerless a voice and ensuring them their rights. There is also a need to increase awareness at the grassroots in society by talking about gender, race, caste and class discrimination at schools and colleges. Human rights must be made an integral part of the school curriculum from the very first day. Families can also take the first step by giving their girls the same status as their boys. Voters must recognize and take possession of the massive power they wield, and hold their representatives accountable.

Once sensitization at the grassroots level is underway, there must be a strong system of legal aid in place to deal with instances of human rights

violations.Our system is nascent, but it is going a long way in assisting those who do not have the means to access justice, or even free themselves from the sticky web of the justice system.

Today, on the auspicious occasion of this Lecture, let us resolve to take steps together to stand for what Sri. Havanur believed in.

DEMONITIZATION AND BLACK MONEY

Prof. Nandimath Omprakash V.*

"There is no doubt that manifestation of black money is social, economic and political space of our lives has a debilitating effect on the institutions of governance and conduct of public policy in the country. Governance failure and corruption in the system affect the poor disproportionately. The success of an inclusive development strategy critically depends on the capacity of our society to root out the evil of corruption and black money from its very foundations. Our endeavor in this regard requires a speedy transition towards a more transparent and result oriented economic management systems in India".[1]

INTRODUCTION

Demonetization and implementation of Goods and Service Tax (hereinafter referred to as GST) are the two historical and unprecedented political decisions taken by the Government in recent times.These areeasily calculable to equal, the erstwhile decision of 'bank nationalization'.[2] I

* B.Com., LL.M., Ph.D. (Law), Professor of Law at National Law School of India University, Bengaluru-560 072.

[1] Mukherjee Pranab, White Paper 2012, Ministry of Finance, Government of India.

[2] Fourteen major banks were nationalized from the midnight of July 19, 1960. These banks held 85% of the total banking deposits in the country. The second installment of nationalization occurred in 1980, wherein six more commercial banks were nationalized.

untiringly compare bank-nationalization and demonetization, as both of them took the entire nation by surprise. Mrs. Indira Gandhi, the then Prime Minister of India, had articulated her stray thoughts about nationalization in All India Congress Meeting once prior.[3] On this count it can be said that, demonetization scales higher than nationalization-decision, as it was top guarded secret till it was publically announced by way of PM's address to nation![4] Unexpectedly no one could have guessed that Mrs. Gandhi would move so swiftly and suddenly to nationalize the banks. Both of these decisions were highly politicized. During the Parliamentary debate, Jayaprakash Narayan, dubbed nationalization as 'masterstroke of political sagacity'.[5] Both of these executive moves were tested for constitutionality in the Supreme Court of India.[6] While bank-nationalization passed this test, the judgment of the Supreme Court is being awaited on demonetization. Experts and economists are still divided on the success of bank-nationalization. The debate among them continues even today. I am sure the issue of demonetization will also hold the attention of people for years to follow.

The present paper delves in the few legal, non-legal and mixed legal issues pertaining to demonetization in its first part, which is nothing new, as much of think and ink has been invested by many. To keep the focus, the

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[3] See generally, Austin, Granville (1999), *Working a Democratic Constitution – A History of the Indian Experience,* Oxford University Press, New Delhi.

[4] It is officially revealed little later to demonetization that, the proposal to demonetize the high denomination notes had been contemplated at the highest levels since February 2016, but when it happened it was a bolt from the blue.

[5] Parliament debate while passing the *Banking Companies (Acquisition and Transfer of Undertaking) Bill.* The Bill was passed and received the Presidential assent on August 9, 1969.

[6] Bank Nationalization was challenged in *Rustom Cavasjee Cooper* v. *Union of India,* 1970 SCR (3) 530; and some petitions questioned the constitutional validity of demonetization', while others have sought more time to deposit the demonetized notes. Many petitions were before many High Courts it may not be possible to list the citations.

paper concentrates more upon the issue of 'black money'.[7] The foundation of the paper is my strong belief that, unless the attempt is reinforced with legal and other reforms, the objective of black money irradiation can't be achieved. There fore, the paper, in its second part, proposes few follow up action to be undertaken to achieve the ultimate goals of demonetization.

REMEMBERING DEMONETISATION

I am skeptic as to whether, demonetization deserves to be remembered again here, as part of this paper, as it is not too old an event. But somehow, I am committed to write few lines introducing demonetization to the reader, so that we both come on to the same platform and proceed further. Random (but extensive) literature survey enhances my commitment, for a precise reason that, there are far and few apolitical publications, objectively dealing with the issue. The sharp divide between publications, some lament the executive move; and some laude the effort. Therefore, an objective and factual start becomes an imperative.

The Gazette Notification dated November 8, 2016 demonetized the value of five hundred and thousand rupees.[8] This is the executive (and legal) document through which demonetization was imposed. This exercise is under the powers conferred upon the Central Government under Sub-section (2) of Section 26 of the Reserve Bank of India Act (hereinafter referred as RBI Act).[9]It must be, therefore said, that Central Government had a legal authority to recourse to demonetization. This

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[7] And not much upon other two aspects viz., fake-currency and terror funding, of demonetization.

[8] S.O. 3407 (E), Gazette Notification on Demonetization by Ministry of Finance (Department of Economic Affairs).

[9] Sec. 26(2) – "On recommendation of the Central Board, the Central Government may, by notification in the Gazette of India, declare that, with effect from such date as may be specified in the notification, any series of bank notes of any denomination shall cease to be legal tender save at such office or agency of the Bank and to such extent as may be specified in the notification".

executive decision was announced by the Prime Minister himself by way of addressing the nation. Curbing corruption & black money, eradication of fake-currency and prevention of terror funding; are described to be the main causes for demonetization. Some exceptions were allowed, where limitedly these designated notes were allowed to be used. Public were allowed to swap their high denomination notes in to their bank account, after going through the process of identification and verification. But for better focus, we may ignore these parts.

This executive action rendered 86% of Indian currency invalid, which impacted every single one of us, more so the 'common man' or an 'ordinary man'.[10] In the weeks and months after 8th November 2016 all Indians, cutting across society, rich and poor, urban and rural, formed serpentine queues to deposit money and get hold of some precious but rationed cash for much needed daily use. Undoubtedly, in a country dominated by cash transactions, demonetization was a drastic attempt to change the behavior, moving them away from the use of currency notes towards electronic modes of transferring money. The immediate effect was on markets. Trade and commerce shrink beyond one's expectation. Overall economic growth slowed down. In the last quarter of fiscal year 2016-17, the rate of Gross Domestic Product (GDP) growth fell to 6.1 per cent, compared with 7.9 per cent in the same quarter of 2015-16. An even worse number awaited the country for the first quarter of fiscal of 2017-18, when growth fell to 5.7 per cent compared to 7.1 per cent in the same quarter of the previous year. It was rather expected, as remonetisation would have taken time considering the country of India's size. The initial numbers on industrial production, areas sowed for the winter *rabicrop,* tax collections and firm sales made for an unclear picture. By early 2017, it was clear that economic activity had been

[10] It is estimated that INR 14.18 lakh crore (trillion) of the total INR 16.41 lakh crore (trillion) of currency was rendered invalid.

affected across the board. The cash dependent informal sector, which was home to 85 per cent of the workforce, was the most ill affected. The informal sector comprises agriculture, micro enterprises in rural India, micro enterprises in industry and services in urban India, and a variety of low productivity activities in both rural and urban areas. It has self-employed family enterprises and small units working with a limited amount of hired labour. These were also the people who had only limited familiarity with and access to digital forms of payment. The hardship of the people in the informal sector was felt in myriad ways, including in a loss of employment, and therefore of income and consumption. One impact which came to light later is that the loss of employment and delays in payment have led to a higher level of personal debt.

With no surprise, the political opposition smelt an instant opportunity in the disruption caused by the event, and began to forecast doom and gloom for the country. Government agencies, as expected were, slow to measure the impact of demonetization on the ground. If my understanding is correct, the Planning Board of the Government of Kerala has been the only one to have undertaken a quick and detailed study of the impact of demonetization on the local economy.[11] Media did attempt to document the hardships, people were undergoing due to the event, but were not scientific as usual. There was a flowering of satire on social media. The frequent changes in the rules and regulations on demonetization and the extravagant claims at times by Government of India (GOI) together offered material for much biting satire referred above. There was, unfortunately, good amount of rumors and fake news as well in the social media.[12]

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[11] Published in February 2017.

[12] There were hilarious ones like news of chip being embedded in the new 2000 note which would allow authorities to track black money movement.

Being a lawyer, I just can't resist the temptation of writing regarding the litigation about demonetization. As stated earlier, the final verdict about demonetization is yet to come. Aftermath of a year, the decision is more or less predictable and does not hold any interest from common man's perspective. Many petitions arguably touching upon almost every aspect of demonetization were challenged in all the constitutional courts. Listing them here is futile, and does not add much value. Supreme Court, constituted a five-judge constitution bench to test the constitutionality and other related issues arising out of the executive decision of demonetization. It also said the issue of demonetization is of public importance and has a far-reaching consequence, therefore, requires a closer scrutiny. Following are the nine questions, the bench is enquiring into:

1. Whether the Notification dated November 8, 2016 is ultra vires Sec. 26(2) and other relevant provisions of the RBI Act, 1954?
2. Whether the Notification is violative of Art. 300A of the Constitution?
3. Whether the Notification is ultra vires Article 14 and 19 of the Constitution?
4. Whether limited withdrawal of one's own money caused by demonetization is violation of Arts. 14, 19, 20 and 21 of the Constitution?
5. Whether implementation of the Notification is in substantive and procedural violation of the law of the land?
6. Whether Sec. 26(2) of the RBI Act is itself a piece of excessive delegation of legislative powers?
7. What is the scope of judicial review into a fiscal and economic policy of the government?
8. Can political parties file writ petitions in the Supreme Court under Art. 32 of the Constitution?
9. District Cooperative Central Banks (DCCBs) subjected to discrimination when they were stopped from accepting deposits and allowing withdrawals?

All these questions can be collapsed into two major parts. The first being – whether there is an authority stemming from a statute (in this case *RBI Act*) for government to have recourse to demonetization?[13] And the second part – if such authority exists, whether the executive is reasonable and justified in exercising such power. Therefore, it is my prediction that answer to both these questions would be in affirmative. There are few related non-substantive questions like 7, 8 and 9 which may lay down interesting interpretation of law (or guiding principles on judicial review on core economic/fiscal issues). Lawyers like me would eagerly await answers to these questions, more than the substantive ones.

REMONETIZATION AND AFTERMATH

Immediately after the demonetization drive, more particularly after presenting the 2017-18 union budget, Finance Minister, Prime Minister and other Ministers stated that demonetization was just only the first of series of measures that would address the issue of black money. 14 months past, those eternal queues to swap the currency are faded from our memory, the country has been remonetized adequately, and other policy measures such as GST have been implemented by the Government. By the end of 2017 – 99 per cent of banned currency was deposited in to the Banks, leaving around INR 14,000 Cr. of the total demonetized. In a democracy, public sentiment is gazed by elections generally. If demonetization was bad, then Indian voters would exact vengeance from currency discarded, the ruling BJP for this act of large-scale inconvenience caused to them in their economic affairs. But nothing of that sort was visible in the Uttar Pradesh (UP) and other elections, where Bharatiya Janata Party (BJP) was elected into power.

[13] In fact, the plain reading of the sub-section (2) of Section 26 does confer the power to Central Government.

There are two prime points that need to be taken note of. Probably Government never expected such an amount of black money to enter the banking system, as most of it would be unaccounted money. This clearly indicates as to how, many mighty in our society (who hold black money predominantly) perceive that the system can be manipulated easily. Economic/policy studies indicate that countries with relatively poor implementation of regulations tend to have a higher share of unaccounted economy, whereas countries with properly implemented regulations and sound deterrence have smaller black economies.

Unless the noose of our regulation is tightened, there is not much we can leverage upon the episode of demonetization. It is known that a strong political resolve to curb the menace of black economy and lax in enforcement systems are the prime reason for accumulation of black money. From this perspective, demonetization by the Government is a stern message, that it is not just about economic sense; but an issue of moral stance. Even people of India (at least the majority) support this moral stance. This was evident from the polling results, where BJP was elected into power. However, I state repeatedly, unless the moral stance of 'demonetization' is further consolidated, we would plausibly miss a great opportunity.

Black money, fake currency and terror funding are the prime underpinning points for demonetization. But, no one can deny the fact that, larger focus rested (both pre and post-demonetization) upon 'black money' only. The popular support which the present BJP government garnered is due to their effort to irradiate black money and one of their assurances to bring money in Swiss and other foreign banks back to India. Digitization of currency and development of digital payment systems is another strategy, completely unarticulated either in the Notification or policy papers, taking enormous predominance in the later months. Therefore, we need to focus upon these points little more elaborately.

BLACK MONEY OR BLACK ECONOMY

There are two broad categories of scholastic writings in economics relating black money/economy. One is to define 'black money' - and what and what not to be included into it; and the second being computation of black money in its quantity. Black money can be defined as assets or resources that have neither been reported to the public authorities at the time of their generation nor disclosed at any point of time during their possession.[14] Thus, in addition to wealth earned through illegal means, the term black money would also include legal income that is concealed from public authorities. The criminal component of black money (like proceeds from trade of narcotics, illicit liquor trade, kidnapping, human trafficking, sexual exploitation and prostitution etc.,) constitutes major component of black money in the economy. This would also include the proceeds from 'corrupt' component. This stems from bribery and theft by those who hold public office and authority, and would misuse or abuse the same. On the other hand, the black money generated from legal practices (like a lawyer or doctor, who under reports his income to the tax authorities) is considerably less. My research did not yield correct assessment of this fact, as to how much per cent age of black money comprises of legal and illegal means. But it can be safely assumed that the black money by legal means is considerably less.

There is no reliable estimates of black money generation or accumulation, neither is there an accurate well accepted methodology for making such an estimation.[15] There are many studies, with wide variations in the figures reported, which are based on different methodologies. Even the basic definition of black money for their calculation is also very different in these studies. I am not really interested in estimating the exact amount of

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[14] White Paper on Black Money, Ministry of Finance, 2012, p. 2.
[15] *Ibid.* p. 9.

black money which exists in our economy, but would like to take assistance of this point to show how grave the situation is, and if not curbed, how this would impact the economy negatively. As per different study estimates predict the existence of black money ranging from as low of 19 percent to whooping 42 per cent of India's GDP.[16] The World Bank Development Research Group on Poverty and Inequality and Europe and Central Asia Region Human Development Economics Unit in 2010 estimated 'shadow economies' of 162 countries from 1999 to 2007.[17] As per this study, the Indian black money is estimated to be between 20.7 percent to 23.7 percent. Whether it is about 20 per cent (as the lowest and conservative estimate) or exaggerated 42 per cent of GDP, it is still a considerable amount of money.

Many mechanisms and methodologies are devised to launder this money. Transferring black money out of India is one of the popular methods. An International Monetary Fund (IMF) study estimates the flight of capital from India during 1971 to 1986 was to the extent of US $20 to $30 billion.[18] Later it was readjusted and estimated to be $88 billion during 2001. It is not clear how much of such shifted money has returned back to India. However, it is just a common-sense guess, that considerable amount of such money would be brought back to India. This is popularly known as 'road-tripping' money. The single most important issue in dealing with black money or black economy is no unanimity regarding its correct estimate.

It is also to be noted that, black money is intertwined with white money and keeps changing its color depending upon the scenario. Economists rightly describe that there would be a constant flow of money between white

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[16] National Institute of Public and Policy (NIPFP) estimates 19 to 21 per cent of black money in the GDP (1983-84); and a Study by noted economist Suraj B. Gupta, estimates it to be 42 per cent (1980-81), and about 35 per cent for the year 1995-96.

[17] Policy Research Working Paper 5356, "Shadow Economies All over the World: New Estimates for 162 Countries from 1999 to 2007", Friedrich Schneider, Andreas Buehn, and Claudio E. Montenegro.

[18] M. Rishi, and J. K. Boyce (1990), "The Hidden Balance-of-Payments: Capital Flight and Trade Misinvoicing in India, 1971-1986", *Economic and Political Weekly,* July, pp. 1685-8.

and black streams. For instance, a real estate developer, who is paid partly in cash for his sales, does not report this income to the tax authorities, may use these unaccounted funds in a variety of ways. He might use one part of this to pay his vendor (say a cement supplier) in cash, who too may not report this transaction to tax/public authorities. This part continues to be part of black or shadow economy. On the other hand, some part of the cash paid may be used to build other residential flats, by the builder, with all legal sanctions and sold to genuine buyers. This part converts itself into white currency. This chameleon feature further enhances the difficulty of the Government, who is intending to deal with black money.

The generating point of black money is generally seen to be very crude. But as it grows in volume then the transactions of black money take a degree of sophistication. This is a stage where money-laundering would be done. Money laundering architecture is generally created with professional minds, making legal enforcement very difficult. This would include transfer pricing in trade, money laundering through trade, use of tax havens or off-shore financial centers and investment through derivative instruments like participatory notes etc. World Bank which got 150 big corruption cases investigated (as a part of its Reporting) found all such cases include misuse of corporate vehicles, such as companies and trusts. As a response to such a blatant misuse of legal privileges, many countries are now demanding meaningful information about beneficial ownership.[19] With increasing realization about the harmful effect of ownership being concealed behind complicated corporate ownership structure, such structure is coming under scrutiny. In the Indian context, it is one of the reasons for the fact that tax authorities have not been able to take action in cases where money is *prima facie* brought back to India through round tripping and other legitimate means and it is expected that efforts taken by India in this regard as also

[19] See generally World Bank Report, "The Puppet Masters", 2011.

global pressure will provide a check on these tendencies. Therefore, mutual cooperation between all enforcement agencies at national level and also at international level is very much essential.

There are many institutions and instruments created to deal with this issue of black economy. Enforcement Directorate (ED), Financial Intelligence Unit (FIU), Economic Offences Wing of the State Police, Central Bureau of Investigation (CBI), Serious Frauds Investigation Office (SFIO), Narcotics Control Bureau (NCB), National Investigation Agency (NIA) etc., are among the institutions in India. *Foreign Exchange Management Act, 1999; Prevention of Money Laundering Act, 2002 (PMLA); Benami Transactions (Prohibition) Amendment Act, 2015; Foreign Contributions Regulation Act, 2010 etc.,* are the prime instruments to deal with the issue of black money.

NEED FOR LEGAL REFORMS

Quickly getting back to the point of focus, mere demonetization alone would not be sufficient to address the issue of black money. Further consolidation is certainly needed, otherwise, the attempt would prove futile. Following are the few points worth noting in this regard:

1. Black money and corruption is interlinked, as noted earlier. *The Lokpal* and *Lokayukta* Act, 2013 is passed, without the necessary appointments. Lokpal is to be appointed as early as possible;
2. We have *Benami Transactions (Prohibition) Act, 1988 and Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.* But clear strategy to implement these two statutes is to be created;[20]
3. The *Prevention of Corruption (Amendment) Bill, 2013* is still pending to

[20] Rules under *Benami Transactions (Prohibition) Amendment Act, 2015* is to be created.(can it be like rules are yet to be framed).

become law. It is rather imminent that it has to be passed.[21]

4. *The Right of Citizens for Time Bound Delivery of Goods and Services and Redressal of their Grievances Bill,* lapsed in 2011. The bill sought to create a mechanism to ensure timely delivery of goods and services to citizens.[22] Commencement of multipronged strategy to install 'good governance' is very much needed. This is a long term solution to curb corruption at operational level.In this regard, the lapsed bill would have been a baby step.
5. In 2009 Hon'ble President in his address called for a 'model public services law'.The law intended to cover functionaries providing important social services like education, health, rural development, etc., and commit them to their duties. In this regard, a tentative Bill titled the Public Services (Protection and Regulation) Bill, 2010 is being circulated by Ministry of Law and Justice (Legislative Department). This is yet another step in achieving good governance. However, this initiative is languishing. It is important that such initiatives (either in the present or modified ways) are to be implemented in a time bound manner.
6. Public procurement expenditure in India is estimated to be approximately between 10 to 11 lakh crores. Therefore, the domain of public procurement, is one of the breeding grounds for black money. Public procurement has grown phenomenally over the years not just in volume and scale, but in its verity and has become more and more complex.[23] To streamline the public procurement activities an attempt was made by the Public Procurement Bill, 2012. But the attempt

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[21] *Inter alia,* this Bill covers the offence of giving a bribe to a public servant under abatement. The Bill also makes specific provisions related to giving a bribe to a public servant, and giving a bribe by a commercial organization.

[22] Every public authority, *inter alia,* is required to publish a citizen charter within six months of the commencement of the Act. The Charter will detail the goods and services to be provided and their timelines for delivery. It also had some grievance redressal mechanism.

[23] Organization for Economic Cooperation and Development (OECD) estimate puts the figure for public procurement in India at 30 per cent of the GDP. The Competition Commission of India had estimated in its paper that the annual public-sector procurement in India would be of the order of 8 lakh crores.

did not succeed.[24] This law or such other non law strategy to streamline the public procurement activities has to be undertaken.

CONCLUSION

As indicated above, the issue of black money has direct bearing upon enforcement mechanisms and emphasis upon rule of law. Unfortunately, the current investment to develop enforcement culture is insufficient. Law both the existing ones and the one which are being proposed above alone can't bring the deserving change, unless enforced in both letter and spirit. It needs investment beyond money. Education, sensitization, capacity enhancement are the key components, where our attention needs to be turned. Building high moral conduct, should be the overall aim of our institutions.

I am of the opinion that the biggest challenge in dealing with black money/corruption is the 'belief system', that it is just not possible to irradiate black money from the economy. How do we spread the belief and conviction? I am sure every one of us agree, that it can happen only by proper education. History is evident of such monumental changes. For instance, slavery was made obsolete, by passage of 13th Amendment in America. Many developed countries have successfully dealt with the issue of corruption, at least at the grass root levels. India adapting 'secular constitution' is yet another example. Therefore, the role of academicians and academic institutions is ample in creating such a culture of zero to lerance towards black money/corruption. However, it is also to be agreed

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[24] The bill sought to regulate and ensure transparency in procurement by the Central Government and its entities. It also exempts procurements for disaster management, for security or strategic purposes, and those below INR 50 lakh. The government can prescribe a code of integrity for the officials of procuring entities and the bidders. The bill also empowered the government and procuring entity to debar a bidder under certain circumstances.

that, many historical changes in the world history are initiated vide political leaders of eminence, today, we need to implement it by ourselves!

Before I conclude, some special mention needs to be made regarding the effort of digital payments etc. This is another element which gained huge popularity and is being perceived as the single point of solution to irradiate black money. Few initiations are also taken by the Government in this regard. However, the effort would take still some time. Not only the mammoth issues of scale (considering the magnitude of India) it amounts to changing the behavioral pattern of the people. Differentiated license system by RBI, which has paved way for new payment banks (along with small savings bank) is among the strong initiatives in this regard.

INTERFACE OF LAW AND PUBLIC POLICY IN THE CONTEXT OF TRANSFORMATIVE CONSTITUTIONALISM FOR INSTITUTIONALISATION OF PANCHAYAT RAJ SYSTEM

Prof. (Dr.)G.R.Jagadeesh*

I. Introduction

The Process of making of the Constitution of India is what makes law inseparable from public policy questions that Union of India has to face. The nature of the formation of the Union of India is significant to the role and function of public policy for Transformative Constitutionalism in India.

The concept of 'power to people' finds an important place in Gandhiji's view[1] on *Panchayat Raj*. Article 40 of the Constitution of India legitimizes

* B.Sc., LL.M., Ph.D., Principal, C.B.R National College of Law, Shivamogga.

[1] He had dreams of democracy commencing from the villages. He believed that democratic freedoms have to be founded in institutions of self governance in every village of India. It was essential creed of Gandhi's manifesto for freedom that free India's democratic institutions would be built from our villagers upwards to the highest tier in the nation's capital. As a matter of fact, *Panchayat Raj* was an important component in Gandhi's vision of future India in which economic and political power was decentralized and each village was economically self reliant. The rural character of the economy and the need for regeneration of rural life was stressed by Gandhi. He was in favour of giving power to the people in the villages and seeking participation in governing the country.

the rural self government as a high objective of legislative and executive endeavour of the State. This ideology was further strengthened by the Constitutional (73rdAmendment) Act 1992 and has conferred the Constitutional status to the Panchayat Raj institutions, with a mandate that all the States should enact laws relating to *Panchayat Raj* institutions. Thus, the Constitution (73rdAmendment) Act 1992 was a landmark in decentralised governance. It made Panchayats the third tier of the Government with reasonable substance and contents in terms of power and authority.

The 73rd Amendment, which in a way took into account the cumulative assessment of *Panchayat Raj* over the years, was a culmination of earlier attempts to improve the working of *Panchayat Raj* and removed some of the defects and shortcomings identified by various committees.

The Constitution (73rdAmendment) Act contained both 'binding and discretionary' features as under:

1. Constitutional status to *Panchayat Raj* institutions[2] including the *Gram Sabha*[3]
2. Seats have been reserved for Scheduled Castes and Scheduled Tribes in proportion to their population.
3. Direct elections of members at all the three levels of *Panchayat* for every five[4] years with fresh elections being mandatory before ending the term or within six months in case of dismissal.[5]
4. State Finance Commissions[6] to suggest ways of devolution of funds and of financing *Panchayat Raj* institutions.
5. State level Election Commission to conduct elections for *Panchayat Raj* institutions.

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[2] Art. 243 B of the Constitution of India.
[3] Art. 243 A of the Constitution of India.
[4] Art. 243 E (1) of the Constitution of India.
[5] Art. 243 E (1) of the Constitution of India.
[6] Art. 243 I of the Constitution of India.

The State legislatures have been also given discretion to provide, *in teralia,* for:

1. Reservation for Other Backward Classes (OBCs) and association of Members of Parliament and Members of Legislative Assemblies in *Panchayat Raj* institutions in *ex-officio* capacity.[7]
2. Associating chairpersons of *Panchayats* at intermediate level and *Taluk Panchayat* chairpersons at *Zilla Panchayat* level.[8]
3. Endowment of *Panchayat Raj* institutions with powers, authority and responsibilities, especially for the suggested 29 activities listed in the Eleventh Schedule[9] of the Constitution of India.
4. Imposition of taxes and fees and duties by *Panchayat* and assignment of a share in State government taxes and grant in aid.
5. Committee system in *Panchayats* which is a distinguishing feature of the *Panchayat Raj* Institutions (PRIs).

We have by now two and half decades of experience of the functioning of *Panchayat Raj* institutions in the post 73rd Amendment of the Constitution. An assessment of the legal structure with special reference to the implementation of the 1993Act and the functioning of *Panchayats* has been in order. In the backdrop of experience suitable Constitutional/ Legislative amendments and social moblisation appears to be imperative as a task ahead for strengthening the *Panchayats*. The amendments should aim at removing discrepancies in the allocation of functions, finances and functionaries and establishing organic links between and among the *Panchayats.*

The 73[rd]Constitutional Amendment, which gave birth to the third generation of *Panchayats,* has not clearly specified the functions and powers of *Panchayats.* Instead, it has left it to the discretion to the State

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[7] Art. 243 C (2) (c) and (d) of the Constitution of India.

[8] Art. 243 C (3) (a) and (b)of the Constitution of India.

[9] Art. 243 G read with 29 subjects in the Eleventh Schedule empowers the legislature of a State to endow the *Panchayats* with such powers and authority necessary to function as institutions of self-government.

Governments. It is clear from the Article 243 G, which says that the legislature of the State may, by law, endow the *Panchayats* with such powers and authority as may be necessary to enable them to function as institutions of self governance. Such a law may also contain provisions for the devolution of powers and responsibilities upon *Panchayats* at the appropriate level subject to such conditions as may be specified therein.

On the basis of experience gained so far, from the inception to what extent certainty, continuity and strength have been imparted to the *Panchayat* raj institutions through the provisions of law has to be taken note of. The foundation of public policy is composed of national Constitution and laws. Further it includes judicial interpretations also. Public policy is considered strong when it solves problems efficiently and effectively, serves justice, supports governmental institutions and policies, and encourages active citizenship. This concept refers not only to the result of policies, but more broadly to the decision-making process. The evaluation of the functioning of the *Panchayatshas* to be made on the basis of periodically holding of *Panchayat* elections[10] and participation of people in these elections, extent of devolution of powers and responsibilities on *Panchayats,* constitution and functioning of the District Planning Committee and participation of marginalized people and women in decision making process at local levels.

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[10] It has however, been seen that in most of the cases the delay in holding election was due to court cases, natural calamities or law and order problem. In most of the court cases, the grievances of aggrieved parties related to reservation of seats forSC/ST/OBC/ women/ delimitation of constituencies, percentage of reservation of chairpersons of lower tier to higher tier.

In view of this, it is intended:

(i) To trace the interface of law and public policy in the context of transformative Constitutionalism;
(ii) To study and examine the existing 'policy making', 'policy implementing' and 'policy controlling' pertaining to the decentralised democratic structure governing *Panchayat Raj* institutions;
(iii) To discuss and evaluate the functioning of *Panchayats'* experience gained so far since *Karnataka Panchayat Raj Act, 1993* as to what extentcertainty, continuity and strength have been imparted to *Panchayat Raj* institutions as a matter of public policy.
(iv) To suggest for Constitutional/ legislative amendments and social mobilizations to improve the relevance and efficiency of decentralised democratic governance.

On the basis of the intended objectives set out, the following issues have to be addressed in this paper:

1. Legal structure governing Panchayat Raj Institutions;
2. Extent to which certainty, continuity and strength have been imparted to Panchayat Raj institutions;
3. Devolution of powers and functions of thePanchayat Raj;
4. The political space given to marginalized section for their participation and involvement in decision making process.
5. Functioning of district planning committees.

Democratic Decentralisation vis-a-vis Modern Form of *Panchayat Raj*

Article 40 of the Constitution of India says "the State should take steps to organize village *Panchayats* and endow them with such powers and authority, as may be necessary to enable them to function as units of self government. Article 246 read with 7th Schedule of the Constitution lists the subject 'local government legislation' under the State list. This entry is very wide and empowers the State legislatures to legislate with respect to any subject relating to local government.

The Committee on Plan Projects (CPP), 1957[11] came out with its report containing an idea of *Panchayat Raj* as a means of people's participation in community development. Jawaharlal Nehru preferred the term *Panchayat Raj,*[12] to 'democratic decentralisation' because it conveyed the essential message to the people of rural areas. The development of *Panchayat Raj,* therefore, can be said to be logical outcome of the community development programme. The objectives of *Panchayat Raj* are decentralization, development, social change and institutional leadership under its aegis. This forms the nucleus of new emerging elite in rural India.

The modern form of *Panchayat Raj* has passed through various phases within a short span of three decades of its coming into existence in the post independent India. Distinct phases[13] are: (i) The phase of ascendancy- 1959 to 1964; (ii) The phase of stagnation- 1964 to 1969; (iii) The phase of decline- 1969 to 1983; (iv)The phase of revival- 1983 to 1993; (v) The Phase of advent of Constitutionalism 1993 to 2016; (vi)The Phase of Swaraj 2016 onwards.[14]

The State of Karnataka in 1952 took its first step on the road to *Panchayat Raj* by enacting the *Mysore Village Panchayat and District*

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[11] Popularly known as Balwant Rai Mehta Committee.

[12] It is worth mentioning that while all the talk and idealism of self-governance and local autonomy and decision making centered on the concept of village *Panchayat,* what eventually evolved was *Panchayat Raj.* The latter word almost has implications of rule and power sounding almost like an alternative to the British Raj; as if to say and suggest that we had British Raj earlier, now it is time for *Panchayat Raj.* The term *'Panchayat Raj'* came into vogue conceptually as process of governance-it refers to a system organically linking people from the GramaSabha to the LokSabha. Etymologically, it is derived from URDU-Explanation given in Institute of Social Science.

[13] Ashok Mehta Committee broadly categorized the history of *Panchayat Raj* in to three Phases (i) The Striking Roots:1959 to 1969, (ii) The phase of corrosion: 1964 to 1969 and (iii) The stage of non- performance: 1969 to 1977.

[14] The Period between 1983 to 2016 reflect that the law relating to local self government could be electoral instrument for the political empowerment of the deprived

Boards Act, 1952 to meet its own needs of integrating and consolidating the rural local government system in the State after the States'reorganization in1956. The Mysore government enacted the *Mysore Village Panchayats and Local Boards Act, 1959,*which established the *Panchayat Raj* system in the State. The dawn of Panchayat Raj in 1959 heralded the establishment of fully democratic and vastly decentralized institutions of local self–government in rural Karnataka.[15] This Act was to govern the establishment and working of local governments in the rural areas of the entire new Mysore State.[16] The government of Karnataka has amended the Act of 1959 twice, once in 1969 and again in 1978 and effected many changes in the *Panchayat Raj* legislation. In the post emergency period of 1977, breakthrough has come by means of appointment of various committees for suggesting modalities to be adopted in *Panchayat Raj* institutions.

In 1983, the Karnataka Government did pass a law[17] which would transform *Panchayat Raj* from being only a Gandhian instrument of social reform to becoming an electoral instrument for the political empowerment of the deprived.[18] Most of the principles enunciated by the national committee[19] on *Panchayat Raj* institutions became the basis of *The Karnataka Zilla Parishads, Taluk Panchayat Samitis, and Mandal Panchayats and NyayaPanchayat Act,1985.* The law also became the first experiment in the country in adding to what was till then a two tier Union-State federal system, a third tier in the form of an intra-State federal relationship, between the State Government and the *Panchayats.*[20]

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[15] *Panchayat Raj* has been established since 1959 not only in Karnataka, but almost all over the country.

[16] Now, Karnataka.

[17] Sri. Ramakrishna Hegde, the former Chief Minister of Karnataka who was the initiator of Decentralised Governance in the State of Karnataka.

[18] Pran Chopra, "Panchayat Raj in Karnataka-I", *Indian Expressdt.* 30.12.2003.

[19] Ashok Mehta Committee.

[20] *Ibid.*

In 1986, the Consultative Committee of the Indian Parliament urged for Constitutional status to the *Panchayat Raj* institutions. Constitution of India legitimizes the rural self-government as a high objective of legislative and executive endeavor of the State.[21] This ideology was further strengthened by the Constitutional (73rd Amendment) Act 1992. The Amendment Act has conferred the Constitutional status on the *Panchayat Raj* institutions.[22]

In view of the Constitution (73rd Amendment) Act, 1992, the *Karnataka Zilla Parishads, Taluk Panchayat Samitis, and Mandal Panchayats and Nyaya Panchayat Act,1985*was repealed.[23] In its place, *The Karnataka Panchayat Raj Act, 1993* came into force. This Act incorporated the essential features of the Constitution 73rd amendment and established elected bodies at the three tiers– the village, taluk and district levels, – so that there is "greater participation of the people".

The Decentralised governance system under the 1993 Act which distinguishes it from the previous one is as follows:

(i) A fully elected three-tier *Panchayat Raj* system is provided for;
(ii) Enhanced scale of reservation for women and for backward classes in the memberships;
(iii) Reservation principle is extended to the office of the chairpersons of all the three tier Local-self governments;
(iv) Holding of *Gram Sabha* twice a year is made mandatory;
(v) There will be State election commission;
(vi) Elections are to be held on non-party basis for *Gram Panchayats;*
(vii) The administrative head of *ZillaPanchayat* is re-designated as the chief officer and will not be senior in rank to the deputy commissioner as before.

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[21] Art. 40 of the Constitution of India.

[22] Articles 243, 243A to 243-O in part IX of the Constitution of India are dealing with *Panchayat Raj* institutions.

[23] A study of historical local self government in rural Karnataka in the context of the present day *Panchayat* Raj institutions in Karnataka has to be made to know how the *supra* legal structure for PRIs have been built and on what basis.

Due to Constitution (73rd Amendment) Act 1992 *Panchayat Raj* institutions have become the third layer of the governmental system. They have, for the first time, come on par with the central and State governments as far as constitutional status is concerned. The State of Karnataka has enacted legislations relating to *Panchayats* and carried periodical amendments to build the legal regime for the *Panchayat Raj* system within the Constitutional frame work.

Because of the 73rd Constitutional Amendment, a third level institution has come into being as institution of self governance with distinct and categorical political, financial and administrative powers to administer development and social justice. Thus, the concept of federalism brings in the interrelationship between union, State and local self governing institutions.

Article 243 G of the Constitution of India envisages *Panchayats* as institutions of self governance, which means that they should enjoy functional, financial and administrative autonomy. A key motivation for the 73rd amendment was the belief that local government may be better placed to identify and respond to villagers' needs. It was also felt that villagers may find it easier to monitor local politicians/ elected representatives. Democratisation of public service delivery system has, thus, been a central element of the Indian decentralization experiment.[24]

State of Karnataka was the first State to hold elections to the *Panchayats* under the new Act of 1993 which establishes a three-tier *Panchayat Raj* system with elected bodies at *Gram, Taluk* and District level for greater participation of the people and for more effective implementation of rural development programmes. These *Panchayat Raj* institutions are operating

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[24] Timothy Besley and others, "Political Economy of Panchayats in South India", *Economic and Political Weekly,* Feb 2007, p. 661.

in their respective spheres carrying out defined functions. All the three units are independent in certain respects and interdependent in certain aspects.

Gram Sabha or people's forum has always been an integral part of the concept of a village government or *Gram Panchayat.* Decisions of the *Gram Panchayat* are valid only if the gram sabha endorsed them. Therefore, the *gram sabha*[25] is an institution of direct democracy[26] rather than representative democracy.

Article 40 of the Directive Principles of State Policy requires the State to take steps to organise village *panchayats* and endow them with such powers and authority as may be necessary to enable them to function as units of self-government.[27] There must have been an option for the States to constitute, in addition to village-level *Panchayats* either the intermediate-level or the district- level *Panchayats* or both. As the subject of 'local government' is retained in the State list, the State Governments cannot be divested of their power to determine the structure, functional domain and the resources base of their local governments. It is to be noted that Article 243-G is subject to other provisions of the Constitution of India. This means that the normal distribution of powers under Articles 245 and 246 cannot be affected by the State legislature while vesting the powers and authorities upon the *Panchayats.*

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[25] Art. 243 A, of the Constitution of India defines *Gram Sabha* as a body consisting of persons registered in the electoral rolls related to a village within the area of the *Panchayatat* the village level.

[26] Where each individual has the opportunity, guaranteed by the Constitution, to play a role in deciding his/her own destiny. Hence, if the participation is high, it is indicative that the level of democratic governance is high.

[27] Constitution makers did not envisage *Panchayatsat* levels above the village, as they were keen on strengthening the basic unit of rural local government, namely the village *Panchayats* as units of self- government.. However, this Article was later interpreted in a broader sense to include *Panchayats* at higher levels also.

Transfer of Functions

As regards the transfer of functions, the basic principle has not been adhered to by the States while allocating functions among the three tiers of *Panchayats*. As mentioned earlier, the State Governments were supposed to transfer to *Panchayats* functions pertaining to 29 subjects listed in the Eleventh Schedule of the Constitution of India. State Government of Karnataka has transferred 29 subjects to *Panchayats*. However, though State has given number of responsibilities to the *Panchayats*, these have not been put into practice. Departments of Governments still exercise the power of supervision and control over the schemes of subjects transferred to the *Panchayats*. This in turn has adversely affected the efficiency and effectiveness of the *Panchayats* in Karnataka.

The State Government of Karnataka is implementing even decentralised programmes mainly through bureaucratic structure, which is against the spirit of the 73rd Constitutional (Amendment) Act. Where the programme was a content of people's participation and social mobilization, bypassing *Panchayat* bodies by bureaucracy poses a serious challenge to the system of *Panchayat* due to its poor involvement.

Transfer of Functionaries

Regarding the transfer of functionaries, the State *Panchayat Acts* present a gloomy picture. These Acts provide power for inspection, inquiring into their affairs, suspension of *Panchayat* resolutions and issuing directions to State governments. Besides, the key functionaries, namely, Secretaries and Executive officers at all levels of *Panchayats* are State Government employees.[28] For ensuring Administrative autonomy, the *Panchayats* should have their own service cadre. State Government of

[28] A separate common notification for the post of Panchayat Development Officers respectively for each district has been issued by Panchayat Department of Government of Karnataka in July 2009.

Karnataka has transferred functionaries pertaining to all 29 subjects to the *Panchayats*. However, it is also pertinent to mention that many officials of State Government posted at the district and taluk levels did not want to work under the administrative control of elected *Panchayats*.

The biggest obstacle continues to be the opposition of MLAs and MPs who see *Panchayats* as poachers on their traditional powers. They were able to defeat an attempt made to keep MLAs and MPs out of the *Panchayat* system. In the present circumstances, they can continue to defeat them. Added to that there is a large overlap between what legislator can do with the power of patronage given to them through their discretionary funds, and what *Panchayats* are supposed to do according to the 73rd Constitutional Amendment. Can these circumstances be changed? Where exactly the problem lies? This has to be studied though the solution to the problem is not anytime soon.

Giving functions to *Panchayats* without providing adequate funds is meaningless. The *Karnataka Panchayat Raj Act, 1993* provides for a grant arrangement for the *gram panchayat* under which a grant of Rs 5 lakhs[29] is to be given by the State Government. A study as to its utilization in a *Gram Panchayat* to assess the performance of decentralised democracy may also be made.

The National council of Applied Economic Research and the Ministry of *Panchayat Raj* have prepared an index to measure and assess how far the States have progressed in "empowering" *Panchayat Raj* institutions. The 'devolution index' measures the functions, finances and functionaries of the*Panchayat Raj* institutions as also accountability in the institutions, and accordingly rank States.[30] The task force stressed that functions, finance and

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[29] *Karnataka Panchayat Raj Act, 1993;* Sec. 206-Grant to Gram Panchayats. - A grant of five lakhs rupees in place of two lakhs rupees was incorporated by Act no 37 of 2003 w.e.f. 1.10.2003.

[30] M.A.Oommen, "Limits of a devolution index", Economic *and Political Weekly,* 18.07.2009, p, 17.

functionaries are complementary and that they have to be transferred simultaneously so that the transfer of political power from the higher level to the local governments can be real.

The electorate has exhibited support for *Panchayats* with its high turnout in *Panchayat* elections. It has shown political maturity by electing more women and backward (lower) caste candidates than their prescribed quota. Visible changes in their status within their family and outside are noticeable after they have been elected. One of the significant achievements of the 73rd Amendment concerning reservation seats and political offices in favour of women and the disadvantaged sections of the rural community is that it had improved their awareness and perception levels and has created an urge in them to assert their rightful share in the decision making process at the local level.[31]

Political space is provided for marginalized groups and women[32] in *Panchayat* and for subsequent exposure to decentralised governance, planning, development and capacity building to some extent through imparting training is provided. There is a necessity to verify whether the political space given to marginalized section has changed the asymmetrical social structure at the local level and given greater space for their participation and involvement in decision –making.

District Planning Committees

Article 243 ZD of the Constitution envisages the constituting of District Planning Committees for integrating rural and urban plans prepared by *Panchayats* and Municipalities and also to take into considerations the

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[31] Report of the Task Force on *Panchayat Raj* Institutions (2001)-Planning Commission available at http://planningcommission.nic.in/aboutus/taskforce/tsk_pri.pdf

[32] There is a proposal for increasing the reservation up to 50% in *Panchayat Raj* Institutions of Karnataka.

necessary for the States having a rural population of not exceeding 25 lakhs unless the State legislature concerned opts for it.[33]

2. The composition of a Panchayat and the mode of election of its Chairperson deserve to be revised.

I. As regards the composition of the *Panchayats,* it may be stipulated that not less than fifty percent of the total number of seats in each *Panchayat* at the intermediate and district levels should be filled by persons chosen by direct election from the territorial constituencies in the Panchayat area concerned.

ii. Similarly, not more than fifty percent of the total number of seats in these *Panchayats* should be held by the chairpersons of the *Panchayats* at the village and intermediate levels respectively. Thus, the intermediate and district-level *Panchayat* comprise both directly-elected members and ex-officio members consisting of the chairpersons of the village-level and intermediate level *Panchayats* respectively.

iii. MLAs, MPs, and persons with specialized knowledge or experience may be given representation only in the district-level *Panchayats* with no voting rights.[34]

iv. Indirect election restricted only to the chairpersons of the immediately preceding level of *Panchayats* results in a *TalukPanchayat* President / Adhyaksha becoming the chairperson of a district-level *Panchayat,* is a situation that should be avoided.[35]

3.Need for prescribing criteria for seat of a person to be elected directly to taluk and district *Panchayat*

For instance, rural population covered by a territorial constituency of a directly elected person of the district-level *Panchayat* could be made

[33] DrK Siva Subramanyam, "Reforms in Panchayat Raj Mending the Amendments," *Kurukshetra,* Nov 2000,P.15.

[34] *Ibid.*

[35] *Ibid.*

integrated development of infrastructure and environment conservation in the district. These important functions of the Committees, facilitates interface between *Panchayat* and Municipalities. An attempt has thus been made to integrate rural and urban areas, which is essential for preparing a meaningful plan for the district as a whole. This has to be studied as to its effectiveness in implementation.

Consequently, pressure for greater autonomy for the *Panchayats* is not coming from the grass roots because on the one hand villagers do not consider *Panchayats* as their problem solving institutions, and on the other hand, elected representatives of *Panchayat* consider themselves helpless in solving people's problem due to lack of control with them on issues affecting the villagers. Until, the political parties are prepared to accept effective decentralisation as one of the issues in their election manifestos, the *Panchayats* will remain at the mercy of the central and State governments even after any number of amendments.

Reforms Urgently Called for

Considering the difficulties faced by the States in implementing the provisions of the 73rd Constitutional Amendment Act 1992, certain important reforms are urgently called for. Some of these demand further amendments to the existing Constitutional provisions, viz:

1. Article 243-B may be amended to provide for mandatory constitution of a Panchayat at the village level.

Panchayats at the intermediate or district level or at both levels may be left to the discretion of the State legislature concerned. Considering the geographical area of an average district in the country, States should not however be allowed to have a single tier *Panchayat* system. Also it may be specified that Constitution of *Panchayats* at the district level may not be

smaller than the population of the intermediate level *Panchayat.* In regard to the directly elected members of the intermediate–taluk level *Panchayat,* population covered by their territorial constituency could be made smaller than the average rural population of a village *Panchayat* in the block.

4. Chairpersons of the village and *taluk Panchayats* may be elected directly by the people.

For the *Panchayats* at the district level, the person may be elected by and from among its members whether or not chosen by direct election from the territorial constituencies. In short, the chairperson of a district-level *Panchayat* should be elected by all the members of the *Panchayat* concerned.

5. Prescribing duration and manner of removal of the chairperson of a *Panchayat.*

No resolution by the *Panchayat* for removing its chairperson from office should be declared valid and effective unless such resolution is passed by a majority of not less than two-thirds of such members present and voting. There shall be an intervention of six months between resolutions of no-confidences.

6. The "matters" listed in the Eleventh Schedule to the Constitution may be replaced by specific "matters".

Though the new 'matters' do not constitute the "local list" analogous to Union and State list, it can contain a few basic services and revenue entries to be reserved for the *Panchayats.* For instance, planning and implementation of schemes relating to drinking water supply, sanitation and drainage, lighting of streets and other public places, primary education, primary health care, rural roads, including internal roads, inter-village block roads, poverty alleviation or social welfare programmes etc., in the rural

areas could be in the eleventh schedule.[36] Similarly, tax on buildings and non-agricultural lands, professional tax, entertainment tax, advertisement tax, tolls license fees, etc., could also find a place in the schedule. Article 243-G may be suitably amended in such a way that these matters are reserved by the State legislatures exclusively for *Panchayats.*[37]

In addition to these matters, States could devolve/entrust any power, authority or responsibility, to the *Panchayats in* respect of schemes pertaining to any of the matters included in the State list of the Constitution. In fact, inclusion of as many as 29 'matters' in the existing Eleventh schedule is not necessary in as much as the States enjoy total freedom to entrust to or devolve on their respective *Panchayats* responsibility or power in respect of any matter in the State list.

7. Grant in aid to States for *Panchayat* activities

The States are saddled with the responsibility of conducting periodic elections, making arrangements for district planning, and capacity building of the elected functionaries of the *Panchayats* through training. It is both appropriate and necessary to ensure that the additional financial commitment cast on the states in this regard is shared with the Union government in a mutually agreed manner.

8. Amending provisions relating *Panchayats*

It must be pointed out that frequent tinkering with the Constitutional provisions concerning the *Panchayats* at the behest of individual States presages future difficulties.[38] The hapless local political elite are getting

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[36] *Ibid.*

[37] *Ibid.*

[38] The Constitution (87th Amendment) Bill 1999 seeks to amend clauses (2) and (5) of Article 243-C.Local Government being a State subject, no Constitutional amendment is required for empowering the State legislaturessubject, no Constitutional amendment is required for empowering the State legislatures to exercise their option in matters of composition and manner of election of members and chairpersons of their *Panchayats,* unless such amendment seeks to provide for a new system which mitigates, if not eliminates, the deficiencies and defects of the system in vogue.

disillusioned as they are not being consulted before proposing amendments that concern them.[39] Against this backdrop, it is essential that a comprehensive review of the various Constitutional provisions relating to the *Panchayats* is made and suitable correctives applied, wherever necessary.

To overcome lacunae and for rendering *Panchayat* Raj institutions more effective units of local self government at all tiers, the State government of Karnataka has appointed the committee to suggest for better administration and functioning of the *Panchayat Raj* institutions. On the basis of recommendations of the committee many amendments were made to *Karnataka Panchayat Raj Act, 1993.*[40]

The Karnataka Gram Swaraj And Panchayat Raj (2nd Amendment) Act 2016

Karnataka Panchayat Raj Act 1993 has been amended in 2016 and renamed as *Karnataka Gram Swaraj and Panchayat Raj (2nd Amendment) Act 2016.*

In view of the recommendations made by Ramesh Kumar[41] Committee the Department of Rural Development and *Panchayat Raj* has fixed five years complete term for the presidents of *Gram Panchayat, Taluk Panchayat* and also even for *Zilla Panchayat.*[42] This is essential as stability is required for local self governments to undertake developmental worksconsistently. Elected representatives must submit to the appropriate authority the details of their assets within three months from the date of

[39] Karnataka State Legislature attempted twice in 2007 and 2009 to amend Karnataka *PanchayatRaj Act* against the interest of Panchayat members.

[40] These progressive amendments to *Karnataka Panchayat Raj* Act have been appreciated by the National Commission for Reviewing of working of Constitution.

[41] Formerly Speaker of Karnataka State Legislative Assembly and Presently (2016) Minister for Health.

[42] At present for a complete term of five years.

being elected. They have to disclose if any property is purchased afresh or property disposed off. Non-disclosure within the stipulated time or wrong information if proved shall be a ground for disqualification from *Panchayat* membership. To control repeated no-confidence motion resolutions in the *Zilla Panchayats,* the committee was of the view that in case the president is defeated in the no-confidence motion, for the remaining term the social justice committee chairman should be made as the president of *ZillaPanchayat* and the chairman should be from the category of scheduled caste or scheduled tribe.

Regarding holding of compulsory meeting on a particular day of the month law was amended. For instance, *Gram Panchayat* shall meet on 10th day or 10th working day of every month. Similarly *Taluk Panchayat* shall have its meeting on 15th day and *Zilla Panchayat* should meet on 20th day of every month. The *Gram Panchayat* shall hold *'Gram Sabha'* for every three months.[43] Re division of *Gram Panchayats* on the basis of population was made and elections were conducted. There shall be constituting of *Gram Panchayat* for a population between 10000 and 15000. There shall be one representative for each one thousand population and only one representative for each constituency.[44]

Conclusion

The provisions of the Constitution of India, Constitution *(73rd Amendment) Act 1992,* and *The Karnataka Panchayats Raj Act 1993* have been subjected to review to see how far these provisions have moved towards the normative goal- that is responsive and efficient local

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[43] Presently for every six months under the KPR Act 1993.

[44] This is to avoid candidates contesting from different constituencies of the same Gram Panchayat for different reasons.

governance system. However, Union & State Enactments and rules[45] which have nexus with the working model of *Panchayats* have to be periodically analysed in view of the legal structure as to the need and scope for modification in relevant sections to reflect the mandate of the Constitution of India for functional approach of *Panchayats* envisaged under Articles 243G and 243N.

The central problem that has dogged the establishment of truly autonomous local governance through effective devolution to *Panchayat Raj* institutions is the reluctance of State governments to part with the powers of governance that they enjoy. State governments have just completed the formality of devolving functions and mapping activities through laws, rules and executive orders but have not followed this up with effective devolution of functionaries and funds.

Panchayat Raj manifests the essence of democratic governance. It is an enormous project of decentralisation and has the potential of transforming the entire political, social and economic set-up of the country. Unfortunately, it is still entrapped in the labyrinth of orders, circulars and bureaucratic control. After 25 long years of their incarnation with Constitutional status, *Panchayats,* by now, should have become effective instruments of reconstruction of our nearly half a million villages and assertion of the ordinary man's power. But they remain deprived of the role they immensely deserve.

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[45] *The Indian Forest Act, 1927, the Forest (Conservation) Act, 1980, the Forest Conservation Rules, the wildlife (protection) Act. The Water (Prevention and Control of Pollution) Act, 1974, the Environment Protection Act, 1986 ,The Environment (Protection) Rules, 1986, Rules for the Manufacture, Use, Import, Export and Storage of Hazardous Micro Organisms Genetically Engineered Organism or Cells, 1989, The Protection of Plant Varieties and Farmers' Right Act, 2001, The Registration of Births and Deaths Act, 1969, The Cattle Trespass Act, 1871, The Indian Fisheries Act, 1897, The Juvenile Justice (Care and Protection of Children) Act, 2000, The Mines and Minerals (Regulation and Development) Act, 1957.*

The Constitutional framework and legal structure governing *Panchayat Raj* institutions have failed to ensure certainty, continuity and strength to *Panchayat Raj* institutions. In the back drop of 25 years of experience suitable Constitutional amendment and social mobilization appears to be imperative task ahead for strengthening the *Panchayats*. The Constitutional amendment should aim at removing discrepancies in the allocation of functions, finances and functionaries and establishing organic links between and among the three/two tier of the *Panchayats* and composition of District planning committee (D.P.C). The decentralized democracy for rural governance is purposive and its content should genuinely promote the purpose of "transparency, accountability, and participation" for good governance in a rule of law set up.

It should be kept in mind that Constitutional amendment alone cannot be effective if demand for de facto decentralization does not arise from the gross roots. For this, social mobilization is required although NGOs have been organizing training programmes for capacity building of *Panchayats*. They have neither been able to create an environment for social mobilization, nor initiate social movements by themselves because of their operational constraints. Social mobilization could be done only through a social movement for greater autonomy of the *Panchayats* in discharging their responsibilities. In this context, initiative has to be taken by the elected representatives of *Panchayat Raj* institutions to organize themselves for putting pressure on Governments.

ASSESSING THE DRAFT NATIONAL ENERGY POLICY, 2017

Dr. Sairam Bhat*
and Raagya Zadu**

Introduction

Development of a progressive country is ensured when the governance is uninterrupted by increasing challenges. This becomes possible once the law and the policy governing the important sectors of infrastructure are complimentary to each other. It becomes a daunting task to bring the policy and law-making on a similar timeline, if not the same, with the technological and economic advancement as the latter is more dynamic than the former. The Energy Sector in India is one such sector which is experiencing a similar situation. Economic development is directly proportional to the efficiency of the Energy Sector and vice-versa. It gives all the more impetus on the government to facilitate seamless coordination between evolving policies which are in conformity with the developing technology and economic conditions.

* Associate Professor of Law, National Law School of India University, Bengaluru.
** Raagya Zadu, Teaching Associate, CEERA, NLSIU, Bengaluru.

Since the year 2000, the energy sector in India has seen a robust change towards the development and advent of state of art technology coming to energy efficiency and modern techniques of generating electricity in a more efficient manner. However, the dependence on conventional sources has also pushed India to the third position as the country with the highest carbon contribution. The starting point, for India in the least, must be reforming the Energy Sector. This sector has a salient feature that it isn't regulated by one authority. Various departments are involved in the regulation of the energy sector like the Ministry of Coal, Ministry of Oil and Gas, Ministry of Petroleum, Ministry of New and Renewable Energy, The Department of Atomic Energy etc. Therefore, the policy regulation must be done which is in harmony with all such departments without overreaching or underestimating any of these sectoral hierarchies. Thus arises the need of an institutional reform by developing an Integrated Energy Policy for the country which shall not only propose sectoral reforms for various energy resources, but shall also keep in mind the various technological developments in each of those resource utilization techniques and the economic implications they would have upon their exhaustion. The Planning Commission when it existed proposed and brought into notification the Integrated Energy Policy (I.E.P) of 2006, which aimed at reforming the energy sector. However, because of its undermining nature towards Renewable Energy and towards the prospects of developing New and Alternative Energy resources, the Integrated Energy Policy failed to make an impact with the environmental or economic experts as it furthered the development and dependency on Coal based thermal energy. Also, this IEP had very ambitious propositions of gaining very high outputs from development of Civil Nuclear Facilities, disregarding the fact that India was legislatively, administratively and economically not ready for such great advancements in generating Nuclear Energy.

The Draft National Energy Policy, 2017: Understanding the Preamble

With the change of government and governance, the current government after much deliberation and study has proposed through the National Institution of Transforming India Commission or the NITI Aayog, Draft National Energy Policy, 2017. This Policy (hereinafter referred to as NEP) aims to bring together for the first time, as stated in its Preamble, *"a strategy which would be adopted to attain consumption levels of the developed countries without negating the present small base which currently exists in the country."*[1] This seems to be a fair challenge as the current policy would strengthen the energy infrastructure and gear up for the long term development of a sustainable demand. It is only logical to have a strong foundation before establishing a very competitive sector, which is why the NEP aims not a small or long term agenda, but keeps a mid-term target which would enable it to develop the current infrastructure and demand pool, while simultaneously building capacity for the long term demands, not only for the public utility services but also cater to the demands of a technologically advanced energy generation system.

The second important and distinctive feature of the Preamble happens to be the imperative given on a reduced foreign import dependency. Currently being heavily dependent on Oil and Gas imports, the policy makers have recognized the potentiality of undermining the energy security of India. Any kind of disruption in the imports can cause the entire sector of energy generation into the looms of uncertainty. The commendable part of this proposition is that not only it discusses the problem, but proposes a solution by creation of a Strategic Reserve as an insurance against imported supplies.[2]

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[1] Paragraph 1.5 of the Draft National Energy Policy, NITI Aayog, Government of India, (Version as on 27.06.2017).

[2] Paragraph 2.3 of the Draft National Energy Policy, NITI Aayog, Government of India, (Version as on 27.06.2017).

The progressive demeanour of the policy-makers is evident from the fact that within the introduction to the NEP, adequate recognition has been given to the maturity of renewable energy technologies available in India and to the ones which are accessible. Drawing advantage from the tropical geography of the Indian Sub-continent, the availability of solar, wind and tidal energy must be worked at as an advantage. Much in contrast with the previous Integrated Energy Policy by the Planning Commission, the NEP expressly states the graduation from Oil based energy generation to the successful exploration of large reserves of Natural Gas and the high prospects of utilizing them as means of Clean Energy. This appears to be a feasible strategy of the government to finally devise a way to achieve Green Solutions and focussing to develop such energy so as to achieve the ambitious targets of Paris Convention and gradually phase-out the dependency on conventional sources of fossil fuel energy.

Setting Objectives: Rural Electrification and Clean Cooking Access:

A new approach has been adopted while framing this policy and that is to define and segregate the areas of required intervention of the supply sector. Divided into three; namely Upstream [Generation of electricity], Midstream [Transmission of electricity] and Downstream [Distribution of electricity]; the policy makers have precisely allocated where all interventions are required. This bifurcation of supply sector intervention and similar demarcation of the demand sector intervention in a major way simplifies the understanding of problems where they arise. Stepwise there is understanding that which sector requires what extent of intervention. Decarbonisation and Energy Efficiency have been regarded as fixed concerns and every area such as Transport, Industry, Agriculture, Cooking etc. is discussed in regard with investment and the kind of infrastructure which would be required. The key objectives as set out by the NEP are *"Access of energy at affordable prices; improved energy security and*

reduced import dependence; Greater Sustainability and Economic Growth". In order to facilitate achieving these key objectives, the Policy puts forth a well-balanced strategy to achieve Energy Security by improving domestic cost balances by way of meticulous interventions in select sectors, aiming to establish independent regulators for Coal, Oil and Gas and Nuclear among other renewable energy sources like wind. Also, internalizes costs by ensuring that the renewable energy projects are not outrun by costs. For the short-run it provides guideline for the State to compulsorily buy the energy produced at a certain cost and later on let the market decide the prices.

However, one place where the policy recedes to make certain is on how in volatile times of International Diplomatic channels, does the Energy Sector engage in Oil and Gas import from the Middle East and Arabic countries. It speaks of creating a strategic reserve as insurance from import insecurities, but seems to overlook the fact that the current domestic production and the imports are barely enough to break ice and still spare some for purposes of a reserve.

In its strategy to attain greater sustainability policy's focus becomes decarbonisation and reduced dependence on fossil fuels. Simultaneously it points out the synonymous use of sustainable energy with energy security and in the later chapters defines how the energy sector shall develop itself according to the challenges of the present and future like that of finance, cost-efficiency, adequate human resources and development of incidental infrastructure. It must be commented that it is very ambitious on the part of the policy-makers to suggest such reforms as it would be difficult to implement them in such short term. On the point of keeping economic growth as a key objective, there are provisions for introducing new efficient norms for creating independent regulators which shall aide in quicker development and management, construction of supportive infrastructure

for the development of newer energy like 2nd Generation Ethanol and also aims at simplifying foreign investment into the energy sector while facilitating best practices for environmental clearances. Keeping in mind the practical and ground realities, this seems to be a far-fetched goal which all previous governments have tried to achieve but have been unsuccessful.

One of the most peculiar facets of the NEP is the content on Rural Electrification. Aiming at 100 percent electrification, the government's principal vehicle for this program happens to be Deen Dayal Upadhyay Gram Jyoti Yojna (DDUGJY) which aims at providing access to electricity to the approximate 304 million energy-starved people in the country. The policy-makers have identified challenges of electrification in the rural sector such as non-commerciality, outreach from the Main Grid, affordability, different economic growth pattern of States etc. to be a few. However, there is rational analysis of the problem that it is erroneous to state that the rural Indian does not value electricity. The real issue happens to be that of being able to afford electricity and power in a sustained manner. The policy brings forth the need to re-define what is meant by 'electrification' under DDUGJY as various stages have to be identified in the Electrification of villages where the identified villages get uninterrupted supply of electricity for a fixed number of hours everyday. Where Above Poverty Line (APL) families are able to afford some kind of electricity access, there are Below Poverty Line (BPL) families who are unable to access, for them, to ensure access to energy, the policy proposes that the Centre shall constitute an 'Energy Access Fund' which shall address the issue of converting Capital Subsidies into Operational Incentives. What seems to be a very powerful move, this Fund if established and is made accessible for the real purpose, it would lead to setting aside a large corpus of fund which would ensure that the needy get the benefit of governmental schemes and are able to enjoy the benefits of a Welfare State in the actual sense. The policy reiterates the agenda of the DDUGJY while commenting on utilizing the 'Micro-Grids'

for remote areas while also recognising the intervention through private players, NGOs and small scale social business houses; this proposition makes a lot of sense and happens to be a very practical and wise proposal as the advent of the private sector/small business houses and also of the Non-Governmental Organisations in providing electricity access would ensure timely facilities which would be economically sustainable models.

Clean Cooking Access is still a far-fetched dream seven decades after independence. This distant reality is aimed to be achieved by this policy as it professes to identify key issues and simultaneously provide solutions for those issues. As cooking fuel is distributed and governed under the ambit of various departments of the government, this policy aims at bringing all of them together under one umbrella jurisdiction. A poor market ecosystem, failed after-service facilities to LPG cookstoves and high fiscal incentives for biomass pellets (which still do not find place as viable sources of clean cooking fuel) are some real challenges which are genuine concerns and have not been raised earlier under a Government Policy. The proposed solutions however fail to cut edge as it focuses on making clean fuel accessible by chiefly flagging off a National Mission on Clean Cooking which shall bring together authorities from all departments dealing with fuel supply. Keeping in mind the practical achievements of Missions in the past, it is highly debatable whether this would be successful in order to achieve 100 percent targets by 2022. Also, encouraging 'induction cook stoves' in a time when access to electricity itself is dubious does not seem to be a feasible option. Taking the example of providing LPG subsidies to the BPL families in the rural sector, in the past, it took about three years to allocate one crore subsidised LPG connections to the rural and urban poor on the condition that the privileged social strata gave up their subsidy. There also arises the already existing problem of making available the after-sales maintenance of those advanced cook stoves to people in the remote areas. The Policy also hints at the major option being considered as Biomass and Biofuel which

seems to be the only reliable cheap option which can be made readily available to the rural sector in order to achieve the set targets in the stipulated time period.

Conventional and Non-Conventional Sources of Energy:

a)   Oil and Gas:

At one hand where the NEP has unmistakably covered all possible aspects of maintaining a realistic approach in terms of development, the few gains that are evident are the *separation of upstream regulatory regimen*[3] *and contract administration.* The former is distanced from the government while the latter remains with it for it requires technical competent advice for which a specialist wing may be created from the existing Director General of Hydrocarbons; possibility of outsourcing data business to private sector which would mean improved access of resources through accurate and timely dissemination of information; the introduction of a fiscal regime designed according to the risk profile of the basin. This mode of intervention is sign of a very well planned methodology as merely a fiscal measure of improvement would not suffice the dynamic needs of the energy sector. Earlier, this was a common mistake which did not find place in this policy. The NEP admittedly has addressed another potent issue very carefully by providing for the issues of smaller enterprises who are engaged in smaller discoveries of Oil and Natural Gas by calling for *'compulsory sharing'* of infrastructure on the lines of 'common carrier' for downstream (transmission) infrastructure. This saves time, money and effort in creation of new supportive infrastructure. Also, outlines a proposal of identifying those discoveries which have not gone into production by either monetizing them or surrendering them within 2-3 years of them lying unused. In order to

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[3] Paragraph 4.3.7 of The Draft National Energy Policy, NITI Ayog, Government of India, (Version as on 27.06.2017).

gain from the older nationalised oil companies and from the new players, the policy directs the private players to work in close association with the National Oil Companies to rejuvenate older matured fields and simultaneously introduce *new forms of contractual arrangements on risk sharing*. On the other hand, the one prominent setback that is anticipated is the increased risk and stress on the coastal and marine ecosystem on sites of setting up Greenfield Refineries as aimed under the NEP. It structures the setting up of new refineries in new off-shore sites to include more resources while facilitating support to the investors in terms of land acquisition and infrastructure. Keeping in mind the current environmental sensitivity of the coastal areas, most of the refineries are situated on the west coast which are biodiversity hotspots and introducing new greenfield projects would indicate new stress on the already distressed ecosystem. The suggestion here would be that the 22 slated identified acreages must be utilized to the fullest instead of opening more areas for off-shore exploration and refinery purposes. In the midterm projections, full utilization of the available resources would be a challenge enough.

b) Coal:

To begin with, it is important to note here that the two projections, BAU i.e. 'Business As Usual' and 'Ambitious' are based on two factors; A transition towards cleaner source of energy for increased energy security, presuming that the government's target of adding 175 GW of renewable energy by 2022 is met; and continued addition of renewables post 2022, even if there are no targets set. A major source of energy in India, Coal is projected to remain in the majority in the energy mix till 2040. The Indian Energy Security Scenario (IESS) estimates a fixed contribution of 48-54 percent of coal towards the current energy mix. Various sources have already started to condemn this particular aspect however, if a rational approach is applied, *the population of this country is also a factor that shall*

only increase many fold till 2040, thus the calculation of increase in the per capita consumption of thermal energy shall also rise, which would later balance itself out in the calculations. The end result is that Coal as a conventional source which must be projected at phasing out, owing to the various Climate Change agendas as ratified and undertaken by the Government of India, this policy is only fostering regulated and consistent growth in the Coal mining and production. Despite the point that has been raised about Renewable Energy being easily made available due to increased storage capacity and its falling prices, the NEP bolsters the aspect of increased coal mining and overcoming the environmental challenges of coal mining in India; increasing the capacity of coal washeries and curtailing the amount of fly-ash through efficient technological interventions, this NEP has taken a rather humorous stance on defending its position of coal; it states that Coal has large thermal power capacity, is a large employer and has negligible price volatility. Consideration has not been given to the fact that the Civil Nuclear Facilities and the thrust given to them has the capacity to overtake the power generation capacity of coal by almost 200 percent as for inference, one kilogram of nuclear fuel produces one million more times of energy than one kilogram of coal. However, the trend towards coal has been more encouraging than meaning to phase out the dependence on thermal power.

It goes on to state that the six subsidiaries of Coal India Limited (CIL) shall be made independent companies and would compete in the market and implying that competition has been identified as medium to achieve efficiency in this sector. An optimistic view would suggest that the policy-makers have projected a very hopeful future in the trend of coal by suggesting that the future of thermal would prosper by methods of maximum utilization of the available coal resources by stressing on Efficiency and Low Emission. The practical ground reality however differs majorly as most thermal power stations lack basic requirements of air

quality filters and sewerage/sludge disposal and recycling plants. Apart from making use of environmental challenges at hand, the policy gives a push on the Underground Coal Gasification method which has added environmental challenges. *The comment on the Coal chapter of this policy is very grim as the reasonable expectation from the Government's think tank was a reduced enthusiasm on further development of coal based energy sources and shift the focus on the gradual strength of the Renewable Sector which gives the impression of a beginning of a paradigm shift in the base-load energy production in India.*

c) Hydro, Solar and Wind Power:

No growth targets are projected beyond 2022 for Renewable Sector as it is estimated to grow autonomously. The NEP's opinion on Renewable Sector seems to be based on dubious grounds and the precise nature of this chapter further establishes this claim. The policy reiterates the figures of reduced tariff in solar and wind projects and owes this to two factors; namely exposing solar and wind to market discipline and the need to address 'lagging' resources like Hydro and Bio-fuels. It only seems unfair to address Hydro as the lagging resource as the situation it is in right now is only because of tedious and faulty clearance regimes, politically influenced public demonstrations and incapable management of projects which have been undertaken and had to be abandoned halfway due to either legal hurdles or public agitations. The State of Uttrakhand is one example whose hydropower capacity has been stubbed in a rather ugly fashion as the project proponents could not manage to achieve political risk insurance. However, solar and wind are being allowed to flourish again owing to foreign diplomatic channels with the Chinese holding almost 80 percent of imported technology in the Indian Solar Industry and the Wind Power being dominated by German and American companies like Suzlon and SunEdison; investments by Goldman Sachs, International Finance

Corporation and the Government of India itself investing hundreds of millions of rupees in the Wind and Solar Power projects.

The focus of this Policy could have been on devising ways to allow Renewable Energy an increased share on the energy mix by providing for increased intervention in bailing out the stranded private players in the arena of Hydro power as after Coal, it is Hydro plants in the country which are producing a significant share of electricity while being cost effective and having a minimal carbon footprint.

The primary intervention proposed for the renewable sector is to promote it and make it available through micro and mini-grids. The unattractiveness of this sector shall be done away with once the price of this energy comes down eventually, the main concern here becomes the instability of the grid due to low uploading load of renewable energy on it. For reference, in order to be able to get on the grid successfully, the load being uploaded must be at least 25 percent of that of the total power being transmitted.

An off-shore wind policy has been floated in 2015, the Policy aims an integrated approach with the cooperation of the respective State Governments to facilitate this initiative. Contrastingly, the requirement of land for Large Renewable Projects is viewed in a negative or a disabling manner whereas promotion of land acquisition for Oil and Gas and Coal has been proposed. This furthers the hesitant approach of the policy-makers towards a future which encompasses a major share in the country's energy mix. Further, in the Large Hydro Projects, the policy offers a financial bailout and financial aid in form of tax-deferrals to old projects and aims at increasing the life-cycle of a hydro power plant from current 35 years up to 60 years. The other proposed option is to enable a Renewable Purchase Obligation (RPO) on the State government over time to let the renewable project establish itself and later on recover costs by allowing the market forces to determine its prices.

A separate Bio-Energy Policy is proposed that would encompass all forms of biomass based energy and continue the present strategy of promoting ethanol and bio-diesel. Second Generation Ethanol Technology and its supply shall be pursued vigorously. It is interesting to note here that *the first such bio-refinery has come up in Punjab and twelve more are proposed in various states in the country. The truth of this energy which is being promoted is that there is negligible supportive infrastructure available for the transport of this energy to places where the grid cannot reach. This fuel being hygroscopic (absorbs almost 60 percent of water) and highly corrosive in nature, cannot be transported through pipeline system and has to rely on Rail and Truck transport which shall make the costs of this energy very high. It does not seem economically viable just yet as under the above stated RPO mechanism, it would only become a huge burden on the State's exchequer.*

d) Nuclear:

Considered as the most crucial yet sensitive source of energy, Nuclear Energy is the sole contender of being able to sustain baseload electricity with uninterrupted clean energy supply for centuries. The Nuclear capacity of India has drastically improved since 2008. Without getting into the past, and picking up from the year 2012, the generation capacity of the Indian Reactors has greatly improved with a latest contribution of approximately 6000 MWe to the energy output. The older plants provide the cheapest electricity to the grid and with the commercial status of the Kundakulum Plant in Tamil Nadu, the Centre has all the more incentive to further expand its capacities. With the addition of almost 12 new reactors, the nuclear energy sector alone stands to contribute approximately 22480 MWe by 2030 alone. The NEP disheartens a little while mentioning that despite the US-Indo Nuclear Accord, there has been negligible progress on the Light Water Reactor Programme with USA and France, without mentioning (in

chronological order) that the Civil Liability Nuclear Damage Act rolled out only in 2010, could come up to International Standards of Nuclear Safety, Security and Insurance only in 2015and that the Document of Ratification of the Convention on Nuclear Safety (CNS) was ratified only in 2016. The primary reasons for negligible progress were due to slow working of the Central Government.

NEP however correctly mentions the maturity of the Pressurized Heavy Water Reactors (PHWR) which are now producing the cleanest energy and the Fast Breeder Reactor which is now reaching criticality. With that, India would have progressed to a successful second stage of the Indian Nuclear Energy Programme with the induction of 500GWe of supply by harnessing the capability of the FBR technology which would utilize technique of Neutron capture and be more economically and environmentally sustainable. India being the world leader in Thorium Technology has invested some of the best minds in Thorium Research and Development and aims at achieving technological superiority in the development of thorium based reactors which would not only use thorium as a fuel but also generate fuel by means of its efficiency which would imply a successful Closed Fuel Cycle and ensure energy security for the coming centuries.

The shortcoming of this chapter on Nuclear Energy in the NEP is that less focus has been given on the part of Economic Viability of this energy which seems to be in disregard of the fact that *the nuclear generation has only seen an upward graph and has been a successful model so far within a very small period of time.* Also, the looming question has been two fold, one on the Liability aspect the other on Public Confidence. The reasons cited are that the liability regime still requires statutory reforms while disregarding *the progress of the Indian Nuclear Liability Regime on to the International Standards as prescribed by the International Atomic Energy Agency (IAEA) and the advance Insurance Pool of 1500 Crore as means of Operator*

Insurance. So far as Public Confidence is concerned, *the Nuclear Power Corporation of India Ltd (NPCIL), the Atomic Energy Regulatory Board (AERB) and the Department of Atomic Energy (DAE) have already launched Public Information systems by means of which they are gaining public confidence through making as much information as is possible through seminars, public consultations and workshops. In fact the lack of transparency is from the Central Government itself which still has not devised a way to make the Environmental Clearance Procedures of the Civil Nuclear Facilities public in reasonable manner or interact with the project affected local population which shall be impacted most by the proposed power projects. The policy contains no means of strategy to demystify the secrecy in a reasonable manner which actually must have been a major inclusion in this 'omnibus' policy.* The Strategy per se which the policy in Paragraph 7.1 states, seems to be a compilation of the work which is already being done and nothing new has been proposed in the policy.

Facilitating Mechanisms and Independent Regulators:

First and foremost, as the very first facilitating mechanism, this policy proposes to separate distribution of the electricity from the ownership of the distribution grid. This leaves the distribution of electricity to the pressures of commercial factors. The Distribution Companies (Discom) continue to own the grid while the actual distribution of electricity becomes responsibility of the private actors. Like in the case of telecom sector, the end consumer can have the option of choosing his distributor from the wide range of prices as would be determined by the independent regulators. Electricity distributors will thus compete for customers. Discoms will give open access to distributors to haul electricity on the grid for a charge. While the recent reform under the Ujjwal Discom Assurance Yojana (UDAY) has outlined a path to restoring the health of discoms in the immediate future. This reform also attempts to bring down AT&C losses. The only facilitating

issue that arises is ensuring the separation of the distribution grid in order to help make the sector self-sustaining in the near future.

To strengthen the State Electricity Regulatory Commissions (SERC), the policy proposes that the SERC segregate the tariffs between the various consumers like domestic, agricultural, commercial, etc. *This is actually a very promising mechanism which would benefit the end consumer as that way, the government would be able to identify the kind of subsidy which is to be given in one way saving money of the government and ensuring that the scheme's benefit actually reaches those who need it the most. Another plus point of this policy happens to be that due to descriptive compartmentalising of the needs of the energy sector, the policy-makers have been fairly successful in the setting up of a strong foundation upon which the projected future of 100 percent electrification and the sustainability of the generated 175 GWe could be ensured. Yes, the capex (Capital Expenditure) seems to be one big issue in itself that how that kind of finance could be generated, but even if the Central Government comes true to its words and develops even two-thirds of these promises, the near future, till 2022 shall see a huge sectoral reform as concerns the energy sector.*

The Policy giving equal importance to the commercial viability as to fixating targets for the mid-term and long-term gains, in itself is proof of the fact that the policy has been drafted after due diligence, something which had not been done earlier in the previous government's Integrated Energy Policy. This Policy also understands the basic economic problem that unless the undertakings are commercially viable and start making initial gains, the energy sector would not be able to become investor friendly, especially when the Government is proposing a plethora of fiscal incentives which it would not be able to roll out without financial investment from domestic as well as foreign sources. "Financing will continue to pose a challenge to the Indian electricity sector. As per IEA, the Indian energy sector will require an

investment upwards of $3.6 trillion between 2015 and 2040. With India's infrastructure poised for all-round growth, funds will be allocated to the sector that minimizes risk for the given return. Because we have not allowed various segments of the supply chain to operate on commercial basis, private investors have been hesitant to enter them. As the NEP proposes to change it along the lines described in the previous paragraphs, this would change. Attracted by commercial returns, private investors may be expected to enter the sector on substantial scale."[4]

Independent Regulators: One of the boldest outcomes of the NEP is that it proposes a never before scenario of creating independent regulators for the energy sector. That is, like CIL, Oil shall have a separate regulator so will Natural Gas. *Considering the technically conjecture of having one single regulator to govern the end-product i.e. Energy, the policy-makers come to be understood as correct, however, considering the overlapping nature of resources, this possibility has been kept on hold for certain valid reasons of giving too much power to corrupt absolutely. India has seen much monopoly in terms of Single Regulators thus creating one Regulator for all is not suitable.* The delegation of Regulatory functions might be rolled out for independent regulators but keeping the areas of Policy-Making, giving fiscal benefits, creating financial corpuses for sectors and awarding the exploration rights has been retained by the Government bodies rightfully. Fixing the role of the Regulator has been confined to development (grids, pipelines etc.), attracting investments and sustaining them, managing consumer welfare and balancing their rights over consumption and related issues, and other regulatory activities. *This is a fair distribution as there would be balanced distribution of responsibilities between the government and the regulator. The benefit here would be that*

[4] Paragraph 8.8.5 of The Draft National Energy Policy, NITI Ayog, Government of India, (Version as on 27.06.2017).

due to such delegation, the energy sector would be able to attract more investment as the investors would be assured of efficient working and would not be deterred by untimely or unruly management. It gives a legitimate idea of commercialism in the energy sector thus ensuring effective implementation of 'common carriers' agenda and the prospect of the consumers getting to choose between distributors, implying market forces to decide on the pricing.

Way Forward

1. Transport towards rail and electric vehicles in a feat to reduce pollution in the city by at least half, the NEP must contain some strategy about incorporating this aspect and also mention in a little more detail about how the directive must go for the collaborating sectors.
2. There has been the suggestion on an increased tax on SUVs and large cars in a feat to direct people to use more of public transport such as metro rail, however there is no strategy for the management of this increased traffic and the resultant effect of an increased pressure on the available public transportation system as the development of more infrastructure would take a significantly long period of time.
3. The Draft National Energy Plan as drafted by the Central Electricity Authority, 2016 states that India would not require any addition to its coal capacity till 2027, this is very much in contrast to the suggestive measures in the NEP which aims at increased demand for coal based energy and aims at revamping the coal sector by increasing efficiency of production and its exploitation.
4. The policy throughout refers to a series of fiscal incentives and financial aid to all sectors in millions of rupees, also of various capital investments by the Central Government by means of strategically planned sectoral interventions. However, there is not much about how in the mid-term and short-term the government is aiming at increasing its revenue from the energy sector. This is one sector which can prove to be very heavy on the exchequer asdevelopment of Energy Infrastructure is very expensive. It might

turn out to be taxing to the common man through increased amount of tax which would prove to be a burden.

5. Suggestive of Viability Gap Funding, the NEP is a little frayed on the edges while describing the manner in which the State or Central Government shall provide for this in its Public-Private Engagement while incorporating those really promising interventions while developing technical and structural infrastructure in Coal Gasification, Oil Exploration in offshore sites and mostly Natural Gas.
6. Skill development is key for a robust and technologically advanced energy sector. In its chapter dealing with 'Human Resource Development', the NEP at various other places has also suggested bringing a holistic approach towards Industrial-Academic relations. As is the general trend, the sector of engineering is directly included in the energy sector whereas more important educational institutions like premier Law Universities and Management Institutes only play an advisory role. It would be a very emboldening suggestion if in the development of newer contractual arrangements or training of staff in the energy sector is compulsorily conducted in prominent educational institutes, it would ensure informed efficiency which would prove conducive in realising skill development in the dynamic energy sector. It would not be entirely incorrect to say that the Energy sector is evolving much faster and the kind of technological reforms the NEP is slating to bring, there would be huge requirement of training the current and prospective cadres of employees in Sustainable Technology.
7. Most importantly, while speaking of establishing independent regulators, the NEP must necessarily give attention to the development of an independent Nuclear regulatory body which is now very important. The Nuclear Safety Regulatory Authority Bill, which lapsed in both Houses of the Parliament must be given an incentive to be revised and established. The Nuclear Industry which is currently reeling under the complete control of the government, needs technical experts to take charge of its regulatory functions. The present AERB (Atomic Energy Regulatory Authority) is highly influenced by the Department of Atomic Energy which has non technical people on the Board and also does not have financial

autonomy. Taking lesson from the Fukushima Disaster which was majorly a regulatory malfunction, India must stress for an independent nuclear regulator.

8. It is also a viable suggestion that the NEP may also include setting up of an Environmental Regulator specially for the Energy Sector. As the Energy Policy till 2022 and 2040 suggests some extravagant developmental plans, having in place a body of experts with expertise in Coal, Oil and Natural Gas, Nuclear Energy and other Alternative and Renewable Technologies would facilitate quicker and more efficient environmental regulatory norms which would aid in better decisions and well found decisions as the current Environmental Impact Expert Panels are nominated by the Central Government and not always do the experts so assigned have detailed knowledge about the nitty-gritties of the advanced technology.
9. Like the 'Energy Access Fund', if not an extension to it, there could be a special fund which can be assigned for use only for the Research and Development of Sustainable Technologies in and for the Energy Sector.
10. There can be a suggestion to identify those industries which are majorly fed by the Thermal Power Plants due to the increased efficiency of sustainable power and they could be substituted by Small Modular Reactors (300MWe or less) which are gaining acceptance in the USA and UK for having enhanced containment safety and heightened nuclear materials safety. This could reduce the dependence on coal based power in the mid-term projections of energy requirements.

Conclusion

The Draft National Energy Policy is very positively motivated with very little to critique about. However, the criticism wherever provided is based on practical terms. The Policy focus must be, taking into consideration the current sequence of events, on the improvement of efficiency of the working model of energy production, generation and transmission. The very basic infrastructure of electricity transmission is still inefficient with almost half the electricity being produced getting lost due to pilferage. Therefore, such

improvement in efficiency must be the short and mid-term goal while gradually reducing demand for thermal based energy must be the long term goal. The energy mix may not be very diverse and complicated but must be seamlessly coordinated in terms of upstream, midstream and downstream categories. It is a question of matter of time which shall determine whether or not the NEP provides solutions to the current issues of fuel reforms, the increased financial facilities, an investor friendly climate and newer models of Public-Private Partnerships in the Energy sector.

COMPENSATION FOR VICTIM OF CRIME: MYTH OR REALITY?

Dr. D. Rangaswamy*

INTRODUCTION

Justice is the fundamental virtue of the society.[1] The predominant feature of the justice is recognition of conflicting interests and ends, and adjudication upon them.[2] Mitigation of injustice and acceleration of justice is the philosophical foundation of law.[3] The antecedents of justice include oppression, misuse of power, discrimination etc. Crime, being an unacceptable attitude and condemned behaviour of individual, is core concern of justice system since earliest period.[4] Human society seriously dealt with the prevention, prosecution and punishment of such kind of

* Assistant Professor karnataka State Law University Hubbali. This paper is based on the study undertaken for the Major Research Project titled "Victim Compensation Scheme: A Critical Analysis of Its Efficacy in the State of Karnataka" awarded by Indian Council for Social Sciences, New Delhi.

1 Roger A.Shiner. "Aristotle's Theory of Equity." Loy.L.A.L.Rev., Vol.27, No.4,1994: 1245-1264, p.1247; Anton-Hermann Chroust & David L.Osborn. "Aristotle's Conception of Justice." *Notre Dame L.Rev,* Vol.17, No.2, 1942: 129-143, p.130.

2 Alexander H.B. "Justice and Progress." *The Journal of Philosophy, Psychology and Scientific Methods,* Vol.12,No.8, 1915: 207-2012, p.207.

3 Amartya Sen. *The Idea of Justice*. Cambridge: Harward University Press, 2009, p.ix.

4 For Aristotelian analysis of the crime in the context of corrective justice system, see, Glueck, Sheldon. "Crime and Justice." *Am.J.Med.Jurisprudence,* 1938: 217-237. See also, Chroust & David L. Osborn, *supra* note1 at p.141.

crimes.[5] In fact, underlying reason for origin of State was to protect individual against aggressive behaviour of members of the society. In the context of this kind of fundamental nature of indigenous stages of origin of States, they were called as police States as against modern concept of Welfare State.

The fundamental goal of criminal justice system is prosecution and prevention of crime, and protection of society against these anti-social elements. The fundamental objectives of the administration of criminal justice are delineated in various theories of criminology.[6] These theories warrant State to deal with crime in the backdrop of divergent philosophies. Traditionally, preventive principle of criminal justice system intended to prevent crime and punish the wrong doer. However, the modern philosophy of the State has moved criminal justice system from criminal oriented to victim oriented system. As aptly pointed out by *Sheldon Glueck* "the introduction of humanitarian ideals of reform, together with the increasing call for the participation of the biologic and social sciences inthe administration of justice, and the resultant internalconflict of the criminal law, have rendered its problems much more complex than they were in thepast."[7] Victim compensation would be a concomitant aspect of such a humanitarian ideals of correctiv justice system. Corrective justice being an ideal and emerging principle of criminal justice system requires that the victim of crime and his rights are to be adequately protected along with punishment to the offender. It should equally reflect commitment towards

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[5] *See generally,* Clive Emsley & Louis A. Knafla (eds). *Crime Histories and Histories of Crime: Studies in the Historiography of Crime and Criminal Justice in Modern History.* Westport, Conn: Greenwood Press, 1996.(Discussing historical accounts of crime).

[6] *See generally* Ronal L Akers. "Rational Choice, Deterence, and Social Learing Theory in Criminology: The Path Not Taken." *Journal of Criminal Law and Criminology,* Vol.81, No.3, 1990: 653-676 (states the fundamental theories of the criminal law); C.R.Jeffery. "Criminal Behaviour and Learning Theory." *Journal of Criminal Law and Criminology,* Vol.56, No.3, 1990: 294-300 (states the nexuses between criminal behaviour and psychology of learning); H.Sutherland, Edwin. *Principles of Criminology.* United States : J.B.Lippincott Company, 1947, pt.1-9 (analysing various theories of criminology)

[7] Sheldon Glueck, *supra* note 4, p.217.

both the rights of the accused and victims.[8] The efficiency, effectiveness, and fairness of the criminal justice system could be assessed by looking into the conducive and feasible environment provided by the State to ensure this kind of integrated approach towards various stakeholders of the system.

Fundamental changes have been introduced to Indian criminal jurisprudence to infuse new blood to criminal law in order to effectively protect the interest of stakeholders of criminal justice system in a sustained manner. In each case, these efforts have been triggered with the sense that the conservative criminal law system was overly inefficient, inadequate and poorly devised to achieve intended objectives of the criminal law system. The distinct features and basic tenets of these changes are to uphold the spirit of the humane rights under criminal law justice system. Initially, fair trial principle was such a sound criminal law principle intended to stretch the human rights jurisprudence to criminal justice system. The commitment to the concept of fair trail furtherrepresented and buttressed by the international[9] and regional[10] human rights instruments and

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[8] United Nations Organisations. *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Socities* . Report of the Secretary General , Washington D C : United Nations Organisation , 23 August 2004, S/2004/616, p.2.

[9] *See* Art.10 of the Universal Declaration of Human Rights, 1948, 217A (III), UN Doc A/810 at 71; Art. 14 of the International Covenant on Civil and Political Rights, 1966, 999 UNTS 171; Art.40 (2) (iii) of the Convention on the Rights of the Child, 1989, 1577 UNTS 3; Art.18 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, 2220 UNTS 3.

[10] See Art.10 of the Additional Protocol of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); Art.18 of the American Declaration of the Rights and Duties of Man, 1948; Art.11 of the European Social Charter of 1961; Art.7 of the African Charter on Human and Peoples' Rights of 1981; Art.8 of the American Convention on Human Rights, 1969 (Pact of San Jose, Cost Rica); Art.6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

Constitutions[11] of various States. It is evident from the text and context of all these instruments that they are intended to safeguard the interest of the offender and to elevate principle of natural justice to the greater height.

Of greater note, unlike human rights of the accused, a comprehensive array of human rights of victim of crime was thinly projected till recently. The criminal law's neutralization of the victim is characteristic of liberal State theory and fundamental law theory, both of which are interested in a reduction of State and social enforcement of power.[12] In fact, the criminal justice system is duty bound to maintain the delicate balance between the fair trail principles of accused and rights of a victim focusing on remediating victim against the several crime inflicted on him. Twenty first century criminal law has emerged with number of legislative attempts to devise innovative strategies for the administration of criminal justice system in the context of human rights of victim. This strategy has vividly been manifested in the backdrop of gross and systematic violation of human rights cases which as expose the victim for worst physical, mental and psychological depression. In essence, the present trend requires that criminal law should be designed to achieve corrective justice goals by addressing ill-mapped strategies of the traditional legal system.

Specifically, author would like to emphasise upon three important unattended issues of victims of crimes, for considerable period, are neglected by the Indian jurisprudence. Firstly, though some of the

[11] Art.35 of the Constitution of the Republic of South Africa, 1996; Art.13 and Art.14 of the Constitution of the Republic of Fiji, 2013; Art.2 (3) (e) of the Constitution of Bosnia and Herzegovina, 1995; Art.13 (3) of the Democratic Socialist Republic of Sri Lanka, 1978; Art.19 and Art.20 of the Constitution of the Federal Democratic Republic of Ethiopia, 1994; Art.136 of the Constitution of the German Democratic Republic, 1949; Art.49 and Art.50 of the Constitution of Kenya, 2010; 5th amendment of the Constitution of United States, 1776.

[12] Albrecht Peter-Alexis. "The Functionalisation of the Victim in the Criminal Justice System." *Buffalo Criminal Law Review*, Vol.3, No.01, April 1999: 91-107, p.95.

legislations provided provision for compensation to the victim of crimes, the rights of the victims of crimes for compensation in its extensive sense was limited. Secondly, the participation of the victims in the investigatio: and persecution of crimes, which is crucial to tone up the administration c. justice system, is utterly dismantled under Indian criminal justice system. Finally, the judicially enforceable rights of the victims of crime available against unjust and unfair treatment to the victim during prosecution of the case is thinly projected and rarely enforced by the judiciary.[13]

Towards the last quarter of the twentieth century, the common law world realized the adverse consequences arising from this inequitable situation and enacted laws to protect the rights of the victims.[14] In the background of the these issues, the countries across the globe have created and adopted advanced criminal law principles to address the human rights aspects of victim of crimes.[15]As it is apparent in the efforts of international community that the effective administration of criminal justice system cannot be

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[13] In India, this right is guaranteed under Sec.372 of the Code of Criminal Procedure. It says; "... the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or *imposing inadequate compensation,* and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court."

[14] Government of India. *Report of Commitee on Reforms of Criminal Justice System (Justice V.S.Malimat Report)*. Vol.1, New Delhi: Ministry of Home Affairs , March 2003, p.82. (Hereinafter Justice *Malimat* Report).

[15] *See, fore.g.,* the Criminal Injuries Compensation Act, 1995 of the United Kingdom; The Victims of Crime Assistance Act, 1996 of Victoria; In U.S.A., the Victims and Witnesses Protection Act, 1982, the Crime Victim Rights Act, 2004 and the Victims of Trafficking and Violence Protection Act, 2000; the Victims Compensation Act, 1996 of New South Wales; In Canada, the Manitoba's Justice for Victims of Crime, 1986 and Ontario's the Victim's Bill of Rights, 1995; New Zealand's the Criminal Injuries Compensation Act, 1963.

achieved unless the system equipped with adequate techniques which ensure the accountability and fairness in the protection and vindication of rights victims of crimes.[16]

So far as status of victim compensation under Indian context is concerned, it is important to note that while drafting of *Cr.*P.C, the law makers consciously decided to adopt the idea of victim compensation.[17] Though provision for victim compensation was incorporated under *Cr.*P.C, it failed to express its excessive zeal to protection of victims and jeopardised the objectives indented by the lawmakers. The Supreme Court of India also persistently attacked the ignorance of the compensatory jurisprudence and place of the victim in the criminal justice system.[18] On account of this, the ideology of victim compensation, as spelled out in the *Cr.*P.C was slowly discredited in the public image and miserably failed to deliver its most noble objectives. Taken to its logical conclusion, the inefficiency of provision paved way for amendment of the existing law. As aclassic instance of compensatory jurisprudence of the country, in the year 2008 by amending

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[16] UN Convention against Transnational Organised Crimes, 2003,2225 UNTS 209; Rome Statute of the International Criminal Court, 1998, 2187 UNTC 3; Draft *UN Convention on Justice and Support for Victims of Crime and Abuse of Power,* 2010 (herein after convention on victims of crime); Council of Europe, Convention on preventing and combating violence against woman and Domestic Violence, 2011, CETS-210. U.N. Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power, 1985, GA.40/34, 29th November 1985.

[17] Sec.250 and Sec.357 are the original provisions of the Code of Criminal Procedure, 1973 to provide compensation to the Victim of Crimes.

[18] *See Sarwan Singh and others* v. *State of Punjab* (1978) 4 SCC 111; *Balraj* v. *State of U.P.* (1994) 4 SCC 29; *Baldev Singh and Anr.* v. *State of Punjab* (1995) 6 SCC 593; *Dilip S. Dahanukar* v. *KotakMahindra Co.Ltd. and Anr.* (2007) 6 SCC 528.*Delhi Domestic Working Women's Forum* v. *Union of India* (1995) I SCC 14;*Manohar Singh* v. *State of Rajasthan and Ors.* 2015 (89) ACC 266 (SC); *AnkushShivajiGaikwad* v. *State of Maharashtra* (2013) 6 SCC 770; *Suresh and Anr.* v. *State of Haryana,* 2015 (2) SCC 227; *Maru Ram &Ors.* v. *Union of India and Ors.* (1981) 1 SCC 107;*Ankush Shivaji Gaikwad* v. *State of Maharashtra,* (2013) 6 SCC 770; *Laxami* v. *Union of India* (2014) 4 SCC 427; *Mahommad Haroon* v. *Union of India,* (2014) 5 SCC 252.

*Cr.*P.C Sec.357 A was inserted in order to rejuvenate compensatory jurisprudence of the nation. This pattern captured the imagination of public and targeted towards the ignorant section of the criminal justice system. Though it is regarded as a hallmark of emerging criminal jurisprudence of the country, utter breakdown of the amendment has resulted in legislative paralysis and paving way for denial of the benefits of new legislative scheme of the needy victims. Against the backdrop of the promising characteristic of the international instruments and potential weakness of the execution of these instruments under domestic legal regime, the paper will describe the desirability of the reassessment and rejuvenation of victim compensation scheme in India.

CONCEPTUAL ANALYSIS

Clarity as to the claimant is a crucial fact for the success of victim compensation scheme. Figuring out of a person claiming for compensation as a victim of the crime is a deciding factor in administration of victim compensation scheme. The scheme of the State should not result in unjust enrichment of a person or cause for immoral practice. Victim of a crime should be characterised as entitled persons with adequate standards and fair principles. According to U.N. Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power, 1985 "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member States, including those laws proscribing criminal abuse of power.[19] A person may be considered as victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term

[19] Art.1, U.N. Declaration, 1985, *Supra* note 16.

"victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[20] The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.[21]

According to *Code of Criminal Procedure,* "Victim" means "a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir."[22] The definition has authorised legal heirs of a person who has died or suffered severe injury due to crime committed on him. In order to protect the interest of victim of the crime under the 18 years of age, the guardians of the child can step into the shoes of the child victim and claim the compensation. The effort of the new scheme to protect the interest of the victim of the crime in its highest possible sense is ideal. However, this statutory definition is defective relating to certain aspects of the victim rights.

As it is evident in the definition of UN, the collective rights of the victims is denied under Indian legal system. It is undeniable fact that as a victim of a crime, he can claim compensation in his individual capacity in relation to a crime committed against a group. But such kind of effort may not strengthen the claim of the individual which could be claimed by the collective claim. Absence of the scope for *proximity injury rule* is another lacuna of the definition. It is quite conceivable that proximity rule is integral part of jurisprudence in deciding rights and imposing liability on a person. The importance of proximity rule is rightly said by *Adam J.Hirsch and*

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[20] Art.2, *Ibid.*
[21] Art.3, *Ibid.*
[22] Sec.2 (wa), Code of Criminal Procedure, 1973.

Gregory Mitchell in following words; "Perceptions of proximity matter to people. When they come close to getting something they want, or when they nearly avoid something that harms them."[23]As viewed by the Supreme Court of California, "[F]ears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost."[24] There appears to be no good to exclude this crucial principle from the purview of the victim compensation scheme while deciding the indirect consequences of the crime.[25]

VICTIM COMPENSATION- INDIAN APPROACH

The concept of victim compensation is age old phenomenon.[26] Referring to old Greece city politics, *F. W. Fitzpatrick* viewed that "The people governed themselves and judged themselves. There could be no tyranny;

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[23] Adam J.Hirsch and Gregory Mitchell. "Law and Proximity ." *U.Ill.L.Rev,* Vol.2008, No.2, 2008: 557-598, p.557.

[24] Bacich v. Board of Control, 23 Cal. 2d 343, 350, 144 P.2d 818, 823 (1943). 16. S, Cited in; Christopher, Charles D. "The Equitable Servitude: A Basis for Just Compensation of Proximity Damages ." Cal.W.L.Rev., Vol.10, No.03, 1974: 628-645, p.630.

[25] See, e.g., Sec.3771 (e) of the Federal Crime Victim Rights Act, 2004 of the USA provides provision for such proximate harm principle.

[26] For historical accounts of victim compensation symptoms, *see generally,* Henry Cheeseman. "Victim Compensation: Law and Economic Analysis ." *Hamline.L.Rev,* Vol.4, No.3, June 1981: 451-476; Schafer Stephen. "Compensation to Victim of Crimes of Personal Violence: An Examination of the Scope of the Problem ." *Minn. L. Rev,* Vol.50, No.2, 1965: 243-254; McGee Leonard. "Victim Compensation ." *J.Contemp.L,* Vol.5, No.1, Winter 1978: 67-82; Drobny Pablo J. "Compensation to Victims of Crime." *St.Louis.U.L.J,* Vol.16, No.2, Winter 1971: 201-217; Stephen Schafer. "Victim Compenation and Responsibility." *S.Cal.L.Rev,* Vol.43, No.1, 1970: 55-68; Wolfgag Marvin E. "Victim Compensation in Crimes of Personal Violence." *Minn.L.Rev,* Vol.50, No.2, 1965: 223-242.

the rights of all were guaranteed by all: each victim of a crime had the entire city behind him to punish the criminal; justice was absolutely gratuitous and was oftener invoked by the poor than by the rich."[27] So far as modern States are concerned, the principle governing the compensation to the victim is specifically emphasised under Constitutions of the some of the countries.[28] However, many of the countries, whose Constitution lacks specific provision on victim compensation, have incorporated this victim compensation scheme as the social security measures. Though the Constitution of India lacks specific provision relating to compensation of victim, the philosophical foundation of the victim compensation can be traced out under directive principles of the State policies. Specifically, Art.41 of the Constitution mandates that "The State shall, within the limits of its economiccapacity and development, make effective provision forsecuring the right to work, to education and to *publicassistance* in cases of unemployment, old age, sicknessand disablement, and in other cases of *undeserved want.*"It appears desirable that the Constitution should express explicit zeal to ensure proper protection to victims. As there is no such provision under the Indian Constitution, author would analyze the legal regime of the country in the backdrop of the *Code of Criminal Procedure, 1973.*

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[27] F.W, Fitzpatrick. "Justice ." *The Monist,* Vol.14, No.4, July 1904: 541-561, p.543.

[28] *See, e.g.,* Art.3 (12) (4) of Philippines Constitution, 1987, runs as follows "The law shall provide for penal and civil sanctions for violations of this section as well as compensation to the rehabilitation of victims of torture or similar practices, and their families." Art.21 (2) of the Constitution of Nepal, 2005, says that "A victim of crime shall have the right to justice including social rehabilitation and compensation in accordance with law." *See also* Constitution of following States of USA; Louisiana, Maine, Michigan, Texas, Vermont, Washington, West Virginia, Minnesota California, Colorado, Idaho, Kentucky, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Wisconsin.(Constitution of these States consist provisions relating to victim rights).

Position prior to Code of *Criminal Procedure (amendment) Act, 2008*

Though the Indian legal system bypassed compensatory jurisprudence for significant period, it doesn't mean that the system completely ignored the compensatory jurisprudence. There are many corroborative legislative evidences to demonstrate that victim compensation scheme was introduced during pre-constitution period itself under civil and criminal law system of the country.[29] After independence the enactment of some of the crucial legislation laid stone for the development of compensatory jurisprudence.[30]

It is pertinent to note that during the drafting of *Code of Criminal Procedure (Cr.P.C), 1973* the law makers consciously decided to adopt idea of victim compensation by incorporating Sec.250 of Cr.P.C. This provision authorises the Magistrates to award compensation to the victim of crime in the cases filed before magistrate or complaint, cases instituted upon the information given to police officer. One of the preconditions for awarding compensation for victim under this section was subjected to accusation against victim without any reasonable ground. The provision requiresshow cause notice to the complainant in this regard. As it is evident from the provision, vast discretion is given under the Code to consider the compensation claim of the victim under this provision. Though the

[29] *See,e.g. Fatal Accidents Act, 1855, the Police Act, 1861 and Motor Vehicles Act, 1939.*

[30] *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation And Resettlement Act, 2013; The Protection of Children from Sexual Offence Act, 2012; The Maintenance and Welfare of Parents and Senior Citizens Act, 2007; The Schedu... Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006; The Commissions for Protection of Child Rights Act, 2005; The Protection of Women from Domestic Violence Act, 2005; The Juvenile Justice (Care and Protection of Children) Act, 2000; The Dowry Prohibition Act, 1961; The Immoral Traffic (Prevention) Act, 1986; The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994; The Indecent Representation of Women (Prohibition) Act, 1987; The Information Technology Act, 2000; The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.*

provision is inserted with noble objective to compensate victim against baseless allegation against victim, prerequisitesof Sec.250 of Cr.P.C such as vast discretionary power of the judges to consider case for compensation and equalising the compensation with fine dismantled the very rationality of the Sec.250 of Cr.P.C. Much importantly, it is evident from the practices of the magistrate courts that they have completely ignored this provision in their adjudication.

One more relevant provision relating to compensation under the Cr.P.C is Sec.357. It would be noticed that under Sec.357 of the Code of Criminal Procedure code authorised magistrates to pay the compensation to the victim out of the fine imposed on accused to compensate loss or injury caused by the offence. The court while passing its final judgement may pass the order to the effect that whole or part of the fine amount shall be utilised for the compensation. Under Sec.357 the extent of the liability of the accused to pay the compensation is the same that of a civil suit. The provision is noteworthy as laying down a fair principle which can be utilised for compensating victim by imposing suitable fine on the accused.

The above mentioned provisions sustained the symptoms of law relating to compensation in many aspects. However, these provisions failed to express an excessive zeal to victim. The Supreme Court of India also persistently attacked the ignorance of the compensatory provisions and place of the victim in the criminal justice system.[31] As a result, the ideology of victim compensation as spelled out in the Cr.P.C was slowly but surely discredited in the public image. It had miserably failed to deliver its most noble objectives.

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[31] *See, Supra* note 18.

Position after Code of Criminal Procedure (amendment) Act, 2008

Realising the nonconductive environment for victims of crime, Indian policy makers began to realise the gravity of the problems and reacted to the needs of victim of crime under Indian legal system. One of the most far-reaching of these initiatives has been focus from accused to victim and reversal of the earlier trend of victim to the accused. These initiatives are stimulated by the revolutionary movement initiated by the human rights instruments and domestic compulsions.

The inadequacy of the criminal law system on compensation is severely attacked by the justice *Malimat* Committee in its report. Thus, the committee pointed out the remarkably planted compensatory jurisprudence under Cr.P.C and termed that "...only the victim's right to compensation was ignored except a token provision under the Criminal Procedure Code..."[32] Committee by taking note of the default of a person to pay the compensation and possible injustice to victim in such a default emphasised that "A person who fails to pay the fine/compensation is normally required to undergo imprisonment in default of the said payment. There are many cases of default for a variety of reasons. The result is again denial of compensation for the victim even in those few cases which end in conviction. The hopeless victim is indeed a cipher in modern Indian criminal law and its administration."[33] The issue of strengthening of victims' rights under criminal justice system further is triggered by the studies undertaken and reports submitted by the law commission of India.[34]

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[32] Justice *Malimat* Report, *Supra* note 14 at p.78.

[33] *Ibid,*. at p.81.

[34] *See, e.g.,* Law Commission of India. 152nd *Report on Custodial Death. New Delhi:* LCI, 1994, pp.44-47; Law Commission of India. *164th Report on the Code of Criminal Procedure,* 1973. New Delhi: LCI, 1996, Vol.II, p.19; Law Commission of India. *226th Report on the Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a Law for Compensation for Victims of Crime.* New Delhi: LCI, July 2008, pp.16-21.

A particular focus on compensatory jurisprudence was given by the Justice *J.S. Verma* Committee to consider need of improvement of legislation and practical support to victims of crimes.[35] Paradigm shift in the approach towards victims of crimes has further manifestly advocated by the judiciary in series of cases.[36] In lieu of all these developments the Parliament of India amended the Code of Criminal Procedure and a guiding provision was inserted to Code.

The Criminal Procedure Code (amendment) Act, 2008[37] signalled one of the first legislative responses to perceived deficiencies of the criminal law system of the country in dealing with victim compensation. The parliament of India passed the code in 2008 with the express intent of encouraging implementation of the right to compensation daunted by the international instruments. Section 357A, being incorporated through amendment, proposes a new scheme of compensation which reveals emergence of a victim oriented approach of criminal justice system of the country. It runs as follows:

Sec. 357 A : Victim Compensation Scheme

1. Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents, who have suffered loss or injury as a result of the crime and who, require rehabilitation.
2. Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

[35] Government of India. *Report of the Committee on Amendments to Criminal Laws(Justice J.S. Verma Committee Report).* New Delhi: Ministry of Home Affairs, January 2015, pp.125 & 129.
[36] *See supra* note 18.
[37] No. 5 of 2009.

3. If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.
4. Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.
5. On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.
6. The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer incharge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

This provision imposes a set of statutory obligations to provide compensation to victim in the event of crime inflicted on him/her and secures a victim financially during the time of his distress. Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents, who have suffered loss or injury as a result of the crime and who, require rehabilitation.[38]

The new scheme has devised two ways to ensure compensation to the victim of the crime. Firstly, the compensation to victim with the intervention of the Court, and Secondly, without intervention of the Court or directly

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[38] Sec.28 (1) *Code of Criminal Procedure (amendment) Act,* 2008 and Sec.357 (1) of *Code of Criminal Procedure Code, 1973.*

claimed by the victim of the crime from Legal Services Authority. The power of the Court to award compensation under Sec.357A closely connected with Sec.357 of Code of Criminal Procedure, 1973. After the trail, if the Court satisfied that the compensation awarded under Sec.357 is not adequate for rehabilitation, it may make recommendation for compensation. On the basis of the recommendation made by the trial Court, the District Legal Service Authority or State Legal Service Authority has to decide the quantum of the compensation to be awarded to the victim.[39] Once the recommendation of trial Court received by the Legal Service Authorities, the eligibility of the victim for compensation and acceptability of the case for compensation are to be enquired by Legal Services Authorities before accepting an application for compensation.[40]

The second way to obtain compensation under the new scheme is by filling an application before the District Legal Services Authority or State Legal Services Authority for compensation. This provision will come to picture when the offender is not identified and no trial takes place relating to the crime for which compensation is claimed. The victim or his dependents may make an application to the State or District Legal Services Authority for award of the compensation. After due enquiry relating to the nature of crime and eligibility of crime for the compensation, the Legal Service authorities can award compensation to the victims.

However, the Code is silent about the fact that whether requisition for the compensation to trial court is to be made by the victim, prosecution or any other person on behalf of the victim. Normally, the District Legal Service Authority decides the quantum of compensation to be awarded to the victim or his dependents on the basis of loss caused to the victim, medical expenses to be incurredon treatment, minimum sustenance amount

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[39] 357A(2), Cr.P.C, 1973

[40] 357A(5), Cr.P.C, 1973.

required for rehabilitation including such incidentalcharges as funeral expenses etc. According to the gravity and severity of the cases the compensation may vary from case to case. The unique nature of new schemes is that the immediate relief can be provided by the Legal Services Authorities in terms of first-aid facility, medical benefits or any other interim relief to the victims. The victims have to produce certificate from the police officer or a magistrate of the area concerned.

GREY AREA TO BE ADDRESSED

The core object of victim compensation scheme is to assist the victim of crime to recover from the devastating impact of crime by paying adequate financial assistance to victim. This kind of assistance is to compensate the expenses incurred or likely to be incurred by the victim as the consequences of the crime committed on him. It is out of this kind of policy and law which recognizes the rights and sentiments of the victim can only create sense of credibility about the criminal justice system of the country. But while this kind of response of the legal system is perhaps the most crucial in the strengthening of the criminal justice system, it is after all casual matter for Indian. Integrated approach towards the victim rights could only be a solution to raise the effectiveness of criminal justice system to the higher degree. Paradoxically, India lacks such a idealist and revamped approach to address it. This part of the paper analyses the crucial areas to be addressed by the Indians, to modify the legislative response with a new field of operation which India lacks since considerable period.

Victim Impact Statement (VIS) and Victim Statement of Opinion (VSO)

Recognition of VIS and VSO, and use of the same in prosecution and disposal of the case makes criminal law system

distinctive.[41] These two focus on right of the victim or his relative to record their statements relating to the impact of crime committed on him and require the magistrate to consider those statements in the disposal of the case.[42] It may consist statement of the victims relating to physical, mental psychological impact of crime on victim and his family members. It also states financial loss or damages caused to victim. It represents the views of victim to be considered by the court while imposing punishment on offender. Many of the legal system and country practices reflect and affirm VIS and VSO as a pragmatic tool for the reformation of criminal justice system.[43] This sounds more appropriate for victim compensation schemes as it could present victims compensation claim in an explicit and undisputed manner. It is evident from the Indian perspective that neither Code of Criminal Code, 1973 nor any other special criminal law of the country embedded the sekinds of VIC and VSO. The author is of the firm opinion that the criminal law system of the country cannot be idealistic and fully just without the idea of VIS and VSO. These are the very effective tool for victim to express his claim in a clear, precise, definitive manner and, it would be a tremendous way for the judges to assess the loss caused to the victims.

Independent Authority

The entitlement of the victims should promptly be enforced and monitored by the appropriate authority to achieve greater success in victims assistance provided for the injuries and loss caused to victim due to

[41] For the elobrative conceptual analysis of these two concepts, see EdwardF.Jr.Harney. "Victim Participation and Lex Talionis Constitutionality under Sec.18 of the Indiana Bill of Rights." *Val. U.L.Rev,* Vol.27, No.3, 1993: 733-767, p.735.

[42] For statutory definition of Victim Impact Statement, *see* Sec.17AA of *Victims Rights Act, 2002* of New Zealand.

[43] The purposes of the Victim Impact Statement according to Sec.17AB of *Victims Rights Act, 2002* of New Zealand is to - (a) enable the victim to provide information to the court about the effects of the offending; (b) assist the court in understanding the victim's views about the offending; and (c) inform the offender about the impact of the offending from the victim's perspective.

commission of the crime. Much importantly, the participation of victim and recognition of their concern for prosecution of the crime should properly be considered by the court in order to create ideal system for rights of the victim. The role to be played by the independent authority to ensure participation of victim in criminal justice system and to execute, supervise and administer the victim compensation scheme is vitally.[44]

Under current system, Legal Services Authorities are entrusted with the task of the implementation of the victim compensation scheme. The vibrancy of our legal services authorities is evident in achieving the mandates of the *Legal Services Authorities Act, 1984*. Many of the programs stipulated under the Act are still waiting for execution. In addition to these statutory obligations on Legal Service Authorities,[45] the responsibility of these authorities to act as the custodian of the victim compensation scheme would be diluting the very object of the scheme. In fact, it is evident that countries across the globe have already come out with independent and separate mechanism to address this victim compensation scheme.[46] It is heartening to note that despite his short speech on the new scheme, the Communist Party of India member of the parliament made a very pertinent

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[44] To understand the role which can be played by the separate and independent authorities for victim compensation schemes, *see* Sec.6, Victims of Crimes Act, Alberta; Sec.11 and Sec.22B, Victims of Crimes Act, Australia; Sec.9, Sec.10 and Sec.111, Victims Rights and Support Act, 2013, New South Wales; Sec.16 (3) and Sec.15 (1), Victims of Crime Act, 2001, South Australia; Sec.49 (1) and Sec.50 (2), Domestic Violence, Crime and Victims Act, 2004.

[45] For powers and functions of State Legal Services Authority and District Legal Services Authority, *see* Sec.7 and Sec.10 of Legal Service Authority Act, 1987 respectively.

[46] Victims of Crime Programs Committee and Criminal Injuries Review Board of Alberta; Victims of Crime Commissioner and Victims Advisory Board of Australia; Commissioner of Victims of New South Wales and Victims Advisory Boards of New South Wales; Commissioner for Victims Rights and Victims of Crime Advisory Committee, South Australia; Commissioner for Victims and Witnesses and Victims' Advisory Panel of England.

observation while debating on the Code of Criminal Procedure (amendment) Bill, 2008 in the Parliament.[47] He attacked the Bill for not providing any provision relating to independent Commission and advocated for setting up of separate committee for woman subjected to violent crimes.

Victim Service Providers

The role of the Non-governmental organisation in ensuring the implementation of victim compensation scheme is well recognised under draft Convention on Justice and Support for Victims of Crime and Abuse of Power.[48] The partially governmental and non-governmental organisations can play proactive role in identification of the eligible victims for compensation and providing incidental service to them. They may provide most conducive environment for the protection of rights of the victims in terms of crisis intervention, counselling and advocacy for victims. Active support of the victim service providers in terms of assistance for investigation, prosecution and disposal of the case from the point of view of

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[47] The words of *Smt.Brinda Karat in LokSabha* were as follows- "...we have asked for separate Commission to be set up for compensation both at the Centre and in the States. In this amendment, what they are suggesting is that the District Legal Service Authority or the State Legal Service Authority should be the Committee which can decide on the compensation. If it is possible -- I mean, I don't accept the Home Minister to immediately respond now -- and if he could consider that we require a separate Committee to deal with this issue of compensation, it would be really helpful." See Uncorrected version of *LokSabha* debate held on 18th December 2008, pp.139-140.

Art.8(2) of the Convention on Victims of Crime says – " State Parties should be ncouraged to develop networks of criminal justice, social services, health and mental health services, *victim assistance services* and other relevant groups or institutions in order to facilitate referrals, coordination and planning among those providing assistance."

the victim rights would be a most patent value of criminal justice system. The State sponsored private agencies or non-governmental organisations b providing these services to victims may raise the victims' rights to a impressive height.[50] Many of the countries have recognised the role of non governmental organisations or other agencies in implementation an supervision of victim compensation schemes.[51]

Commitment of the Government

The commitment of the government is crystal clear since the inceptio of the scheme. During the research it comes to know that the Parliament o India has passed the Code of Criminal Procedure (amendment) 200 without any constructive discussion and deliberation on this importan reformative step.[52] As mentioned in the previous part of this pape introduction of the Victim Compensation Scheme was the part of 2008 Bil

[49] For details of the Victim Services, *see* United Nations Office for Drug Control and Crim Prevention. *Hand Book on Justice for Victims*. Report on the Use of and application of th Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Nev York: UNODC, 1999.

[50] Art.12 (3) of the *Convention Victims of Crime* emphasizes the role of other stakeholder in following terms- "State Parties shall ensure the building of partnerships among local national and international stakeholders, including intergovernmental and no governmental organizations, civil society as well as the private sector in th implementation process. To this end, all stakeholders shall be encouraged to contribute t the resources required for implementation."

[51] *See, e.g.*, Sec.2(1) and Sec.7(3) of the *Victims' Rights and Support Act 2013*, New South Wales; Sec.31 of the Victims of Crime Act, 2001, South Australia.

[52] The time fixed for the discussion on Victim Compensation Scheme of the Code o Criminal Procedure (amendment) Act, 2008 was very limited and 26 minutes v allotted to BJP. Three Member of Parliament including *Mr.Gyan Prakash Pilani* matured politician and Bharathiya Janata Party M.P, from Rajasthan were slated to sp on the Bill. The time was reminded by the Deputy Chairman and same was objected *Shri.S.S.Ahluwalia* a membership of parliament. It is evident from the debate of th parliament that without any rational deliberation the Bill was finalised by the parliament. *See* Uncorrected debate of *Rajya Sabha, supra* note 47, pp.92-149.

The Bill contained many more crucial criminal law issues[53] and these issues dominated over this core subject and passed by the houses without any rational discussion. Government did not yield adequate time either to frame the ideal law or to solicit the suggestion for strengthening of the law.

The commitment of the Central government can also be found from its guidelines prepared for the enforcement of the scheme. In fact it was suggested in the discussion of the floor of the house that guidelines for whole country should be drafted in order to bring uniformity of the scheme in the country and to guide the States in this regard. The guidelines were issued by the Government in the year 2015 after 6 years of the adoption of the scheme.[54] Similarly, the role played by the central government in terms of contribution to the victim compensation fund is far satisfactory. The whole scheme is managed by the state government with their own fund and the central government has not provided any such satisfactory financial assistance to the State. The commitment of the State governments is evident from their lethargic approach in adopting victim compensation scheme. Though the scheme was introduced and adopted by the Central Government in the year 2008 itself, the reluctant attitude of the States in adopting the central scheme is dissatisfactory.[55] Different States have adopted divergent schemes in providing compensation to the victim of the Crime.

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[53] The following are the other crucial parts of the *Cr.P.C (amendment) Act, 2008* incorporated to Cr.P.C,1973- Notice of appearance before police officer(41A), Procedure of arrest and duties of officer making arrest (Sec.41B), Police Control Room (41C); Right of arrested person to meet an advocate of his choice during interrogation (41D); Health and Safety of arrested person (55A); strict compliance of Cr.P.C in arrest (60A); Procedure for witnesses in case of threatening (195A).

[54] Government of India. *Central Victim Compensation Fund Scheme (CVCF) Guidelines.* New Delhi: Ministry of Home Affairs, No.24013/94/MISC./2014-CSR.III, July 2016.

[55] The sequences of the Victim Compensation Schemes introduced by the States are as follows:Arunachala Pradesh Victim Compensation Scheme, 2011; Karnataka Victim Compensation Scheme, 2011. Manipur Victim Compensation Scheme,2011; Mizoram Victim Compensation Scheme,2011; Assam Victim Compensation Scheme, 2012; Bihar Victim compensation Scheme, 2011, Chhattisgarh Victim Compensation Scheme-2011; Goa Victim Compensation Scheme, 2012; Himachal Pradesh Victim Compensation

Separate legislation for victim rights

The victims of crime should be treated with courtesy, compassion and due respect to the victim as they hurt by the crime. In fact, this is the fundamental foundation of morality and good conscience. The State being a custodian of the incapable has to take up all the reasonable steps to minimize the insult and desperation of the victims. The law being a primordial instrument for reformation of the society against Crimes plays a critical role in addressing the consequences of the crimes. The present legal regime relating to administration of the criminal justice system much concentrated on prosecution and punishment of the criminals. Indian legal system lacks separate law relating to victim compensation except a few provisions of the Code of Criminal Procedure. The specific law to address the core and incidental aspect of victim compensation scheme and contemplating ideal procedure to avail victim services is inevitable for the successful execution of the victim compensation scheme. India lacks such as a separate law for the victim compensation.

In fact the legislative history of the current 357 A of the Code of Criminal Procedure is also originated out of unsatisfactory way of law making process. In adition to victim compensation scheme, the Code of Criminal Procedure (amendment) Bill, 2008 had intended to amend various provisions of the Code.[56] The discussion on the Bill relating to rationality and viability of the victim compensation scheme was highly unacceptable. It is evident from the parliament debate on the victim compensation scheme

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Scheme,2012;Jharkhand Victim Compensation Scheme,2012; Nagaland Victim Compensation Scheme,2012; Odisha Victim Compensation Scheme,2013; Gujarat Victim Compensation Scheme,2013; Haryana Victim Compensation Scheme,2013; Jammu and Kashmir Victim Compensation Scheme,2013; Kerala Victim Compensation Scheme,2014; Maharashtra Victim Compensation Scheme,2014.

[56] *Supra* note 53

highly unacceptable. It is evident from the parliament debate on the victim compensation scheme that much time was devoted to allied issues of the Cr.P.C instead of this crucial issue. The time frame allotted for the discussion on this Bill was 26 minutes, out of which considerable amount of the time was spent on other parts of the Bill except victim compensation scheme. Despite the request by the some of the members of the Parliament for intensive debate on the Bill, it was adopted with in short span of time without any meaningful discussion relating to the Bill.

CONCLUSIONS AND FINDINGS

The victims of the crime have been treated in an undignified manner and their needs are addressed without due diligence. The entire manner of receiving the complaint, treatment of the victim and listen to the views of the victim during reporting of the case is done in a casual manner and very impersonal. In spite of existence of State, Police, Prosecution and abundant law, they remain ignorant as to the status of the crime and services available for the victims of the crime.

Many recent emerging international human rights instruments and models of compensatory criminal jurisprudence of various countries vehemently assert that victim compensation would be a powerful weapon to reconstruct the status of victim of crime and cement the intimacy between State and victim. The less-than-admirable track record of the criminal justice system of the country to deal with right to compensation of victim indicates the desirability of seriously exploring the present status of the compensatory jurisprudence of the country. The present conditions illustrate that there is a need of independent and comprehensive piece of legislation to deal with compensation cases and effectively monitor various facets of compensatory jurisprudence. The government needs to undertake reforms in terms of constitution of independent authority to structurise, execute, monitor, and prevent misuse of the victim fund. It can act as an

advisory authority to the government as to the intended schemes and program of the government. It would be matured step to regenerate and revamp compensatory system.

Another grey area of compensatory jurisprudence is calculation of the compensation under irrational conditions. Victim participation in the calculation of the compensation is significant. Under the present scheme, legal services authority consisting technical experts has been given power to assess the compensation to be paid to the victim. While, the present system seems to be appropriate as technical experts are better equipped to calculate the loss to the suffered, the participation of victim is equally important for gauging physical, psychological or emotional consequences of the crime. It may be useful for the assessing authorities to figure out impact of crime on family relationship which would be essential for fixing the compensation for victim. Another defective area of the Indian compensatory judiciary is recognising compensation as statutory right.

Insertion of Sec.357 A to Cr.P.C has boosted possibilities of the victim of the crime to claim compensation.Nevertheless, discretionary power of the judges to refer the cases to legal services authorities' limits the right to victims. In addition, there are grisly side effects of violent crimes on victim. It may affect employmentability of victim. Particularly, low paid workers suffer the most. Quite often, those who are not able to work on account of crime would expect temporary supportive benefits from the State. Onetime compensatory amount paid by the offender or State is inadequate to address this distress of the victim. State sponsored schemes and programs could contribute a lot for State in moulding victim centred criminal law approach. It is true that victim compensation alone cannot wipe the slate of all defects of the criminal justice system. But, comprehensive victim compensation legislation loaded with different provisions such as Victim Impact Statement, Victim Services and independent authoritycould iron out the above mentioned issues and heighten legitimacy and intimacy of the State in rendering justice to victims.

LIST OF CONTRIBUTORS

Name		Affiliation
Hon'ble Mr. Justice B. Sudershan Reddy	:	Former Judge, Supreme Court of India
Hon'ble Mr. Justice Mohan M. Shantanagoudar	:	Judge, Supreme Court of India
Prof. Nandimath Omprakash V.	:	Professor of Law and Registrar, National Law School of India University, Bangalore
Prof. (Dr.) G. R. Jagadeesh	:	Principal, C. B. R. National College of Law, Shivamogga
Dr. Sairam Bhat	:	Associate Professor of Law, National Law School of India University, Bengaluru
Raagya Zadu	:	Teaching Associate, CEERA, National Law School of India University, Bengaluru
Dr. D. Rangaswamy	:	Assistant Professor of Law, Karnataka State Law University, Hubballi

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