

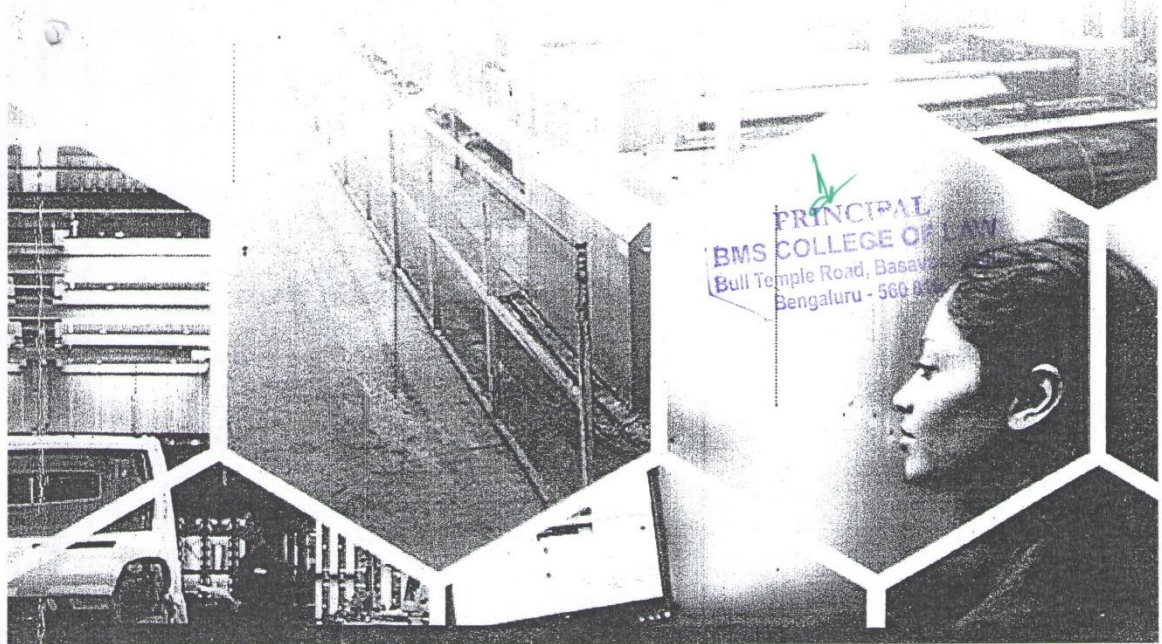
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INDEX

SR. NO.	PAPER TITLE	PAGE NO.
1	PEOPLE-CENTRIC GOVERNANCE Dr Ashwini Roy A.S	1
2	SOCIO-LEGAL STUDY OF DALIT WOMEN IN PANCHAYAT AREAS OF INDIA M.S.Jyothi	7
3	AN OVER VIEW OF LEGISLATIVE RESPONSE TO ADDRESSING THE TRAFFICKING OF CHILDREN IN INDIA Veerabhadraiah C.	10
4	UNVEILING THE REALITIES OF DOMESTIC WOMEN WORKERS IN INDIA : A HUMAN RIGHTS DISCOURSE. Mrs Dhanalakshmi C. V	13
5	A CRITICAL ANALYSIS OF THE IMPACT OF SRI. NARENDRA MODI GOVERNMENT'S DEMONITISATION POLICY M.S.Jyothi	17
6	"IMPACT OF GST ON HEALTHCARE AND PHARMACEUTICAL SECTOR" Suvarna S	20
7	PREFACING FORMAL ECONOMY BETWEEN INDIA AND CHINA: A SPECIAL STUDY ON BORDER TRADING Mr. Jaimine Vaishnav & Dr. Mrudul Nile	24
8	CO OPERATIVE COHESION OF TRADE DEFICIT BETWEEN INDIA AND CHINA Mr. Jaimine Vaishnav & Dr. Mrudul Nile	27
9	SOCIAL MEDIA IN INDIA- ISSUES AND PROSPECTS Mrs. Ashwini P & Anusree Manoj	30
10	E-BANKING SERVICES WITH SPECIAL REFERENCE TO SBI BANK, UNIVERSITY BRANCH, TUMKUR Vanajakshi. E	34
11	"FINANCIAL STATEMENT ANALYSIS OF KARNATAKA STATE ROAD TRANSPORT CORPORATION (KSRTC), TUMKUR DISTRICT" Dr.Pralhad.P.Rathod & Vanajakshi.E	40
12	REFORMIST DEVELOPMENT ON SOCIAL JUSTICE BY INDIAN JUDICIARY Dr. Shobha K	48
13	LEGAL ISSUES AND CHALLENGES: NEED FOR LAW TEACHING REFORMS IN THE ERA OF GLOBALIZATION Dr.N.Dasharath	52
14	RIGHT TO SAFE DRINKING WATER WITH SPECIAL REFERENCE TO BANGALORE CITY ESPECIALLY CHILDREN'S Chetana S B & Lathikanath	55
15	HEALTH INSURANCE AS A BASIC NEED OF CITIZEN IN THE REGIME OF PATENT ERA: A STUDY Dr.Kavyashree. N	58
16	"ROLE OF TECHNOLOGY IN COMMERCE EDUCATION" Mrs. Arshiya Khanum	62
17	INTERFACE BETWEEN INTERNATIONAL ORGANISATIONS AND CHALLENGES IN THE INTERNATIONAL COMMUNITY: AN ANALYSIS Dr. Anu Prasannan	65
18	IMPLEMENTATION OF RIGHT TO EDUCATION ACT Basanagouda Mulimani & Dr. N. S. Talawar	68

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AN OVER VIEW OF LEGISLATIVE RESPONSE TO ADDRESSING THE TRAFFICKING OF CHILDREN INDIA

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Introduction

Trafficking in children has become a matter of grave national concern today. Thousands of children falling into the hands of the traffickers every day. Trafficking in children is an abhorrent abuse of dignity and rights and is a severe commercialization of innocent lives involved in by the organized crime. Not only in India but all over the world it has become one of the most remunerative criminal trades, in arms and drug smuggling undertaken by highly organized criminals.

The researcher through this article, tried to analyze the existing legal mechanisms in India

Constitution of India

Under Article 23, it guarantees the Right against Exploitation and prohibits trafficking in human labour 'begar' (bonded labour) and other forms of forced labour. This right is enforceable against the State and private citizens. Any contravention of this provision is a punishable offence.

Article 24 of the Constitution prohibits employment of children below the age of 14 years in mines, factories or other hazardous employment.

Indian Penal Code, 1860

The most relevant provisions under the Code that deal with the offence of trafficking are:

- Section 110: it defines thug as a person habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder and punishment same with the life term with fine;
- Section 366A: procurement of a minor girl below 18 years of age from one part of the country to another is punishable;
- Section 366B: importation of a girl below the age of 21 years is punishable;
- Section 372: selling minor girls for prostitution;
- Section 373: buying minor girls for prostitution.

In March 2013, amendment was made to the Section 370 of the Code by the Criminal Law (Amendment) Act, 2013 and included India's first definition of human trafficking based on the UN Trafficking Protocol. Section 370, as amended; now defines exploitation as including "any act of physical exploitation or any form of sexual exploitation, servitude, slavery or practices, or the forced removal of organs" and in heightened sentences for perpetrators. Another Section that has been inserted in the Code is Section 370A which makes engagement of a minor who has been trafficked for sexual exploitation is punishable with imprisonment of 5 years which may extend to seven years including fine.

What is however interesting to note is that while it was an ordinance, the word child had been used in section 370A which has since been changed to minor following its adoption in Parliament as a law.

Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA)

The Act was originally passed as a result of the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, 1949 which was signed by India in 1950 and was under Article 35 of the Indian Constitution with the goal of abolishing the immoral trafficking in women and girls and to provide for the rescue and rehabilitation of the exploited women and girls, to deterioration of public morality and to eradicate the problem of prostitution.

In 1986, SITA was amended and changed, resulting in the Prevention of Immoral Traffic Act, 1986 known as PITA. The amended Act only discusses trafficking in relation to prostitution and not in relation to other purposes of trafficking for other purposes such as child labour, organ harvesting, domestic work



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Immoral Traffic (Prevention) Act, 1986 (ITPA)

It is a special legislation enacted in 1986 which deals exclusively with the offence of trafficking in human beings, including children, and lays down heavy penalties in case of contravention of its provisions.

The main objective of the Act was to curb or to abolish commercial sexual abuse, mainly the traffic in women and girls for the purpose of prostitution, as an organized means of living. The offences under the Act include keeping or allowing the premises to be used as a brothel, living on earnings of prostitution, prostitution in or in the vicinity of public places, seducing or soliciting for purpose of prostitution inducing and employing persons for the purpose of prostitution, procuring, detaining a person in premises where prostitution is carried on, and seduction of a person kept in custody.

The Act provides for stringent action against those involving children (below 16 years) and minors (16 to 18 years) in the offence of prostitution and for which the punishment is rigorous imprisonment for a term ranging from 7 years to life sentence.

The Act also provides for comprehensive framework for the rescue, rehabilitation and proper treatment of victims of prostitution. Furthermore, the ITPA does not address trafficking for any purpose outside of sexual exploitation and mentions little about prevention.

Child Marriage (Prohibition) Act, 2006

Though this law is essentially about prohibiting child marriage, recognizing that there is a lot trafficking for and through marriage, it specifically states under sections 12 (a), (b) and (c) that a child marriage is considered to be invalid and hence null and void especially where some of the means are used for the purpose of marriage are like use of force or inducement or kidnapping or sale or trafficking.

If after the marriage the child bride is sold or trafficked for immoral purposes, then such marriage is also held invalid and declared null and void.

Juvenile Justice (Care and Protection of Children) Act, 2015

It is a special legislation for children and defines 'child' as a person up to the age of 18 years. To address the issues of children with greater sensitivity, the Act separates children into two broad categories:

- a. Children in need of care and protection;
- b. Children in conflict with law

It defines 'child in need of care and protection' as "one who is found vulnerable and is likely to be inducted into drug abuse or trafficking and children in conflict with law as a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence." The Act clearly addresses trafficking in general as well as for begging and labour. The Act also recognizes certain offences as special offences such as "cruelty against a child by persons having the charge of child, employment, using or causing a child to beg, abetment of the employment or use of a child for begging or uses a child, for vending, supplying, or smuggling any intoxicating liquor, psychotropic substance or narcotic drug is liable for rigorous imprisonment for a term extending up to 7 years and fine up to 1 lakh rupees."

Goa Children's Act, 2003

It is the only state legislation that defines the term 'Child Trafficking'. The Act under section 2 (d) defines child as "any person who has not completed eighteen years of age unless any other law in force specifies otherwise or unless otherwise indicated in specific provisions in this Act and in so far as a victim in an offence of rape is concerned. Child shall mean any person who has not completed sixteen years of age."

Under section 2 (z), the Act defines "child trafficking" as "procurement, recruitment, transportation, transfer, harbouring or [receipt of children] legally or illegally, within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person, for monetary gain or otherwise." Every type of sexual exploitation is included in the definition of sexual assault such as sexual touching with the use of any body part or object, showing pornographic pictures, exhibitionism, voyeurism, or films to minors, making children watch others engaged in sexual activities etc. It states that the responsibility of ensuring safety of children in hotel premises is assigned to the owner and manager of the establishment, photo studios owners are also directed to report regularly to the police that they don't circulate or keep obscene photographs of children.

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CRITICAL ANALYSES ON LEGAL FRAMEWORK OF AGENCY/CONTRACT WORKERS IN UK-AN APPRAISAL

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Introduction

This little work of research is an attempt to explore and understand the concepts relating to what is called Contract and Agency Labour, its status or rather stature in the global employment industry, its effects on the labour class employed under such arrangement and the legal framework governing it along with the evaluation of its sufficiency or deficiency with particular reference to its practices and legal framework operative in the United Kingdom. However, concepts and practices of this sort of employment is so structured that any analysis would be incomplete without also looking at it from the global perspective which requires peepin into the same system of employment as existing in other parts of the world. Statistics presented by various sources, opinions of some people deeply engaged into research as well as work in this field have been cited.

The Legislative framework on Contract labour/agency worker in UK

This portion of the work deals with the legislation regarding Contract and agency Labour in UK. United Kingdom agency worker law refers to the law which regulates people's work through employment agencies in the United Kingdom. Though statistics are disputed, there are between half a million and one and a half million agency workers in the UK, and probably over 17,000 agencies as mentioned in earlier part of this research. It should be noted at the outset that there is no proper statutory legislation protecting the agency workers. All we have is Judge made laws. As such these workers have more flexible pay and working conditions than permanent staff covered under the **Employment Rights Act 1996**.

For most of the 20th century, employment agencies were quasi-legal entities in international law. The International Labour Organisation in many Conventions called on member states to abolish them. However, the UK never signed up. The major piece of legislation which regulates agency practices is the **Employment Agencies Act 1973**, though it was slimmed considerably by the **Deregulation and Contracting out Act 1994**. This abolished licences, so agencies operate without governmental oversight, except for a small inspectorate and occasional court cases. After the 2004 Morecambe Bay cockling disaster, Parliament enacted the **Gangmasters (Licensing) Act 2004**, requiring agencies (gangmasters) in the agricultural, shellfish and food packing sectors to be licensed.

In January 2010, the Government passed **The Agency Workers Regulations 2010 (SI 2010/93)** which require, at least, equal pay and working time rights when compared with what a direct worker would be paid. This is designed to implement the **EU Agency Workers Directive**, which is the first transnational legal measure to ensure that agency workers are treated equally. The Directive was the culmination of initial resistance by the Government under Tony Blair, and a final surge of Parliamentary support for a Temporary and Agency Workers (Equal Treatment) Bill. The Regulations and the Directive are the third pillar of law, along with the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** and **Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002** to regulate atypical workers.

Employment Agencies Act 1973 and Gangmasters (Licensing) Act 2004

The Employment Agencies Act 1973 regulates the conduct of the 17,000 odd agencies operating in the UK. It prohibits most agencies charging upfront fees, makes it an offence to put out misleading advertising for jobs which do not exist, sets standards for assessing an employee's experience, and more. It was introduced after similar (though stronger) legislation was passed in France and Germany regulating agencies. The 1973 Act was amended by the Conservative government through the Deregulation and



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Contracting Out Act 1994, ostensibly to increase efficiency. It abolished the system of agency licensing, so that agencies can operate freely, unless inspectors find violations and closes them down.

Supporting the Act are **The Conduct of Employment Agencies and Employment Businesses Regulations 2003**. These regulations restrict agencies from,

1. selling other services (r.5)
2. sending workers to employers as strike breakers (r.7)
3. sharing the agency worker's personal details (r.28)
4. advertising jobs which do not exist (r.27)
5. withholding pay from workers, regardless of whether they have timesheets
6. charging any fees directly to a worker for their work
7. require agencies to document the health and safety standards of employers they send workers to
8. require agencies to give a written statement of the pay and hours they will have, and state their contractual status (see the common law section below)

In reality these requirements are not enforced, because there are minimal resources devoted to oversight. Regulation enforcement relies on individual workers bringing claims, and these claims are simply non-existent. There is no reported case of an agency worker claiming a breach of regulations. The watchdog, the Employment Agency Standards Inspectorate, has 15 inspectors and 4 call centre staff. This was increased by twelve inspectors after the **Employment Act 2008 ss 15-18**. In a £26 billion industry with 17,000 agencies, in 2004 the Inspectorate investigated 1,057 complaints, secured 8 convictions (solely in the entertainment industry, 2 agencies were banned for 10 years) and £5,735 in compensation for workers.[2]

The Gangmasters (Licensing) Act 2004 covers some of the lowest-paid workers in a more comprehensive way. It was introduced in the wake of the 2004 Morecambe Bay cockling disaster. It requires all agencies (commonly known as "gangmasters") which provide labour in the agricultural, shell fishing and food packaging sectors to operate under a licence. The Gangmasters Licensing Authority issues these (currently there are 1,159 licences) and it oversees and enforces standards requiring employees to be treated fairly.

Common law

The regulation of agency workers is affected by the interpretation by the courts of the word "employee" under s.230 of the Employment Rights Act 1996. If an individual is considered to be an "employee" then all the entitlements (such as a written statement of contract, reasonable notice before dismissal, time off for parenting, etc.) under the Employment Rights Act 1996 apply. But the courts have often held that agency workers fall outside of this definition, because they lack "mutuality of obligation" in their contracts.

The first important case was **O'Kelly v Trusthouse Forte**. Some waiters worked various dinner functions in the Grosvenor House Hotel. They tried to form a union. They were dismissed. They claimed that this was unfair, and to do that, they had to show they were "employees" within the meaning of the unfair dismissal legislation. The word "employee" had hitherto always been taken to mean someone who is obviously not in business on his own account (i.e. not "self-employed"), but recognised as subordinate labour, economically dependent on the employer. However, Alexander Irvine QC argued that the waiters had no "mutuality of obligation" with the employer: they were not bound to accept work engagements when they were called up, and the employer was under no obligation to call them up. They could leave, or be fired, at will. Sir John Donaldson accepted this argument and deemed the waiters to fall outside of the scope of unfair dismissal legislation.

Not all judges took the same view. In **Nethermere (St Neots) Ltd v Gardiner**, home-working ladies stitching flaps onto trousers were held to be employees within the meaning of the Act. The leading judge, Stephenson LJ, held that "mutuality of obligation" was nothing to do with the promise of future work, but simply the exchange of work for a wage, and control over one's job by the employer in the employment contract. Before the case reached the Court of Appeal, a young Tony Blair had been arguing the exact opposite in the Employment Appeals Tribunal, that O'Kelly's case should be followed. Agency workers were presumed to fall outside the scope of protective employment legislation. In 1997, when Tony Blair led New Labour to election victory, the approach to employment policy he brought was one of upholding labour market flexibility. The position of agency workers was reaffirmed when Derry Irvine was appointed Lord Chancellor, and he sat in on, and gave the leading judgment in, **Carmichael v National Power**. He reasserted his view of "mutuality of obligation". It is notable that the **Constitutional Reform Act**



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2005 removed the power of the Lord Chancellor to decide on cases in this manner; it now being an incursion on the separation of powers within government.

Current authority could be said to still be ambivalent. On the one hand, the recent case of **Dacas v Brook Street Bureau (UK) Ltd [2004] IRLR 358** held that an agency worker would be the "employee" of the end-employer. But then a slightly differently constituted Court of Appeal in **James v Greenwich LBC [2008] EWCA Civ 35** has held that a contract of employment only exists with the agency itself. A feature of this ongoing debate is that, despite the fact that court cases for the last five years have always found an agency worker to be an "employee" of at least someone, generally speaking, neither end-employers nor employment agencies regard themselves as the employer who is bound by the Employment Rights Act 1996.

Under UK law, a contractor can be found caught by the tax initiative IR35, that is to say there is a virtual ("deemed") employment because that would be the case had the contract between worker and hirer been direct and the worker is then subject to extra taxes to compensate the government in that regard, yet he still has no apparent employment entitlements. This is partly because the Tax Commissioners and the Employment Tribunals, and Tax and Employment Law, respectively allow for different treatment.

Temporary and Agency Workers Directive and Temporary and Agency Workers (Equal Treatment) Bill

The Temporary and Agency Workers (Prevention of Less Favourable Treatment) Bill, introduced by Paul Farrelly MP was talked out in 2007. Almost identical, the new (Equal Treatment) Bill has had real support and success in Parliament when introduced by Andrew Miller MP.

Even if agency workers had any of the entitlements under the Employment Rights Act 1996, there would still exist no requirement of equal pay for agency workers who do work of equal value compared to a permanent employer. An agency worker can be treated less favourably in his or her pay and conditions than someone doing exactly the same job, simply because they come through an agency. A proposed Temporary and Agency Workers (Equal Treatment) Bill sought to adjust this position, joining another ten pieces of employment discrimination law in the UK (on gender, race, disability, religion, sexuality, age, part-time work, fixed time work and trade union membership). After the Bill's second reading, the proposal was dropped and an older draft of a European Union Directive, the Temporary and Agency Workers Directive was revived, and passed by the European Parliament. This was possible for the first time in 2008 because the United Kingdom government dropped its opposition. In fact, the directive and the Bill are almost identical. It is understood that the law will be passed, but with a 12 week wait before agency workers will be eligible for equal pay and hours.

European directives have to be implemented by a UK law before they take effect in the country. This will mean that the UK government will either introduce an Act of Parliament or create a statutory instrument under the **European Communities Act 1972** which puts the directive's required rules in place. In fact, the proposed 2008 Bill was based on the directive, and serves as a very good guide indeed as to what any implementation will look like. All the essentials are identical. The core of the new law is to oblige employers to treat agency workers and permanent staff equally in their contract terms, but only regarding hours and holiday time, Pay, including sick pay, Time off for parenting (for women only), Discrimination law (though this is unnecessary because agency workers are already explicitly covered in existing laws)

The bill does not protect agency workers from being fired at the will of the employer. The courts are of two minds about whether agency workers should be considered "employees" (under s 230 ERA) and importantly whom they should be considered "employees" of. Confusion in the courts has encouraged more claims, and has prevented the enforcement of clear rights. Agency workers have almost none of the main entitlements under the Employment Rights Act 1996. None of this is covered in the directive. That means agency workers may potentially be left without the following rights:

1. Right to reasonable notice before dismissal (s 86 ERA)
2. Right to written statement of contract (s 1 ERA, these two rights form the bedrock of individual labour law, since they were the first national minimum standards to be introduced in the Contracts of Employment Act 1963)
3. Right to request flexible working time (s 80F)
4. Right to parental and paternity leave (in Part VIII)
5. Right to redundancy payments (s 135)
6. Compensation from the government for lost earnings when an employer goes insolvent (s 182)

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Conclusion and Suggestion

The researchers respectfully conclude by submitting that, though Legislations, European Directives and Regulations both under the legislations and European Directive are framed, yet the law relating to protections of contract or agency workers in UK and other countries of the glob has not made full circles. However the discrimination between agency workers and permanent workers still continuing hence, there is a need to relook at the emerging jurisprudence both by legislations and common law in UK and other countries for protecting the rights of agency/contract workers.

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Vol. VII, Issue 4 (I) August ,2017



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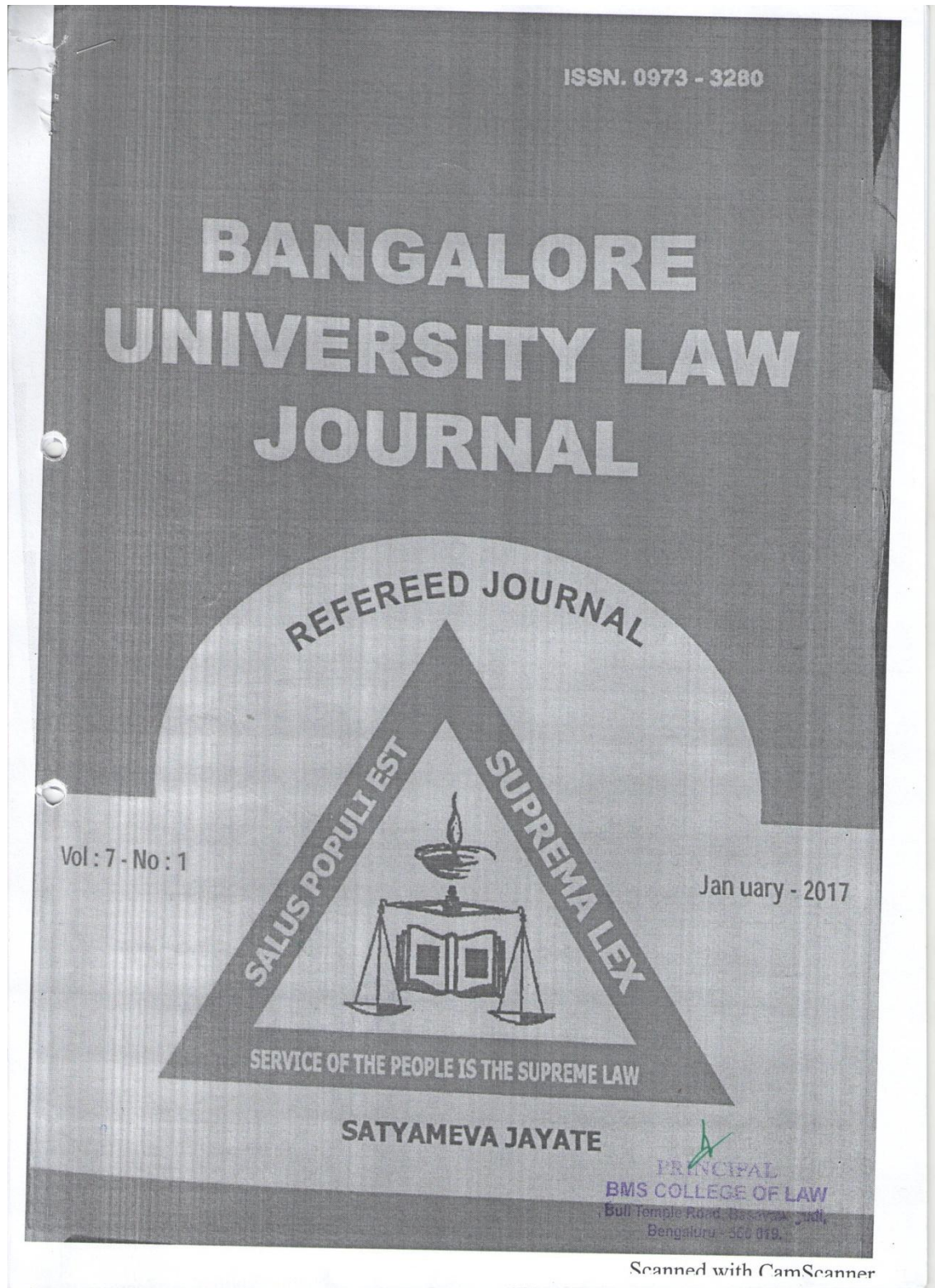
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Sl. No	Title of the Article & Author's Name	Page Nos.
11.	Rights of Transgenders in the Contemporary Society: A Critical Analysis <i>Sneha Balaraj</i>	105
12.	Right to Nutritional Standards for Persons with Disabilities as a Human Right in View of Indian 'Rights of Persons with Disabilities Act, 2016' <i>Veerbhadrarajah C.</i>	115
13.	A Shift from Traditional Parliamentary Legislation to Judicial Legislation With Reference To Residuary Power <i>Dr. N. Sathish Gowda & K. S. Satisha</i>	128
14.	State Of Children Rights in India after the Constitution: A Brief Analysis <i>Ambedkar N.S. & Dr. M. Suresh Benjamin</i>	141
15.	Judicial Response towards the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 <i>K. L. Chandrashekhara</i>	150
16.	Sentencing Policy Vis-À-Vis Sexual Harassment Law <i>Srinivas C. Palakonda</i>	162

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135

A SHIFT FROM TRADITIONAL PARLIAMENTARY LEGISLATION TO JUDICIAL LEGISLATION WITH REFERENCE TO RESIDUARY POWER

Dr. N. Sathish Gowda * & K.S. Satisha **

Introduction

At the outset our Constitution seems to be a Federal. The distribution of legislative powers between the Union and States is the sine-qua-non of a federal Constitution¹. These powers are divided between the Union and States not by any law passed by the Union, but by the Constitution itself.

Union-State relations have been a critical issue for a long time, from the very beginning when the Constitution was drafted and came into force; this issue came into light for discussions. Of course, the relations between the Union and States have been established and incorporated under the provisions of the Constitution, but it seems that either the provisions are not sufficient or the implications of the same has not been made out properly. But it is a fact that there is something wrong somewhere, which has created the complications between the States and also between the Union and States. Because of these complications, relations between these two agencies have not been harmonized. It is also true that to sort out this problem a lot of efforts have already been made out. But still today this position is not resolved. One of such problem is residuary power of legislation.

Therefore, researchers herein is keen to research on residuary power by comparing it with India & U. S. A, further analyzing the concept of residuary power through judicial interpretation and justifying the shift from parliamentary legislation to judicial legislation in respect with residuary power.

The Nature of Residuary Power

One of the hallmarks of the federal system is distribution of legislative powers between the Centre and the States (or federating units). It becomes necessary to provide some blanket clause which will determine which of the two levels of government shall get those new powers. This provision is known

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2017

BANGALORE UNIVERSITY LAW JOURNAL

136

as the residuary powers clause and such power to legislate is known as 'residuary legislative power'. Who will have the legislative competence to legislate on residual subjects? These provisions are based not on shared experiences in the working of a republic but were drafted by the Constituent Assembly after studying the constitutions of other leading federations of the world.

In the famous *I. C. Golaknath v. State of Punjab*², the Supreme Court had held that the power of the Parliament to amend the Constitution was derived from Article 248 read with entry 97 of List I and that Article 368 dealt only with the procedure for amendment. However, in view of the 24th Amendment of the Constitution and the Supreme Court's pronouncement in *Keshavanand Bharti v. State of Kerala*³, Article 368 should be held to include both the power and procedure for amendment and there is no case for invoking a residuary power for constitutional amendment.

Prior to *Dhillon*⁴, the judicial view was that recourse to entry 97, List I, ought to be had only when the impugned legislation did not fall in any of the three Lists. The argument was that if the impugned legislation fell under any entry in List II, residuary power could not be invoked. Further, if the impugned legislation fell under an entry in List I or List III, there recourse to the residuary would be unnecessary.

It was said that entry 97, List I, was not the first step in the discussion of such problems, but the last resort⁵. But *Dhillon* seems to have changed this position. The Supreme Court has ruled in this case by majority that once it is found that the subject-matter of the impugned legislation does not fall under any entry in List II or III then Parliament can take recourse to the residuary power, or it can be combined with any entry in List I.

History of Doctrine of Residuary Power

The federal scheme in the Constitution of India is adopted from the Government of India Act, 1935. This Act made an innovation upon several precedents to make a treble enumeration of powers, in order to make it as exhaustive as possible and also to minimize judicial intervention and litigation. The three legislative lists (I, II and III) respectively enumerated the

² 1967 AIR 1643, 1967 SCR (2) 762

³ AIR 1973 SC 1461

⁴ (1971) 2 SCC 779 : AIR 1972 SC 1061

⁵ *Hari Krishna Bhargava v. UOI*, AIR 1966 SC 619

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2017
BANGALORE UNIVERSITY LAW JOURNAL 137
powers vested in the Federal Legislature, the Provincial Legislature and to both of them concurrently (Section 100). If however, a matter was not covered by any of the three Lists that would be treated as a residuary power were not allocated either to the Federation or to the Provinces but was under Section 104 of the Government of India Act, 1935, reserved to be allocated by the Governor-General in his discretion to the Federation or to the Provinces⁶ and Section 107 provided for predominance of federal law in case of inconsistency with a Provincial Law, in the concurrent sphere⁷.

In the Constituent Assembly, though the initial proposal was to have Union of enumerated powers with residuary powers to the Provinces and States, after the decision for partition of India, it was decided to have a strong centre and as one of the steps for that purpose to allocate residuary powers to the Centre⁸.

Borrowing the pattern of treble enumeration from the Government of India Act, 1935, the framers of our constitution added the distribution of legislative powers between the Union and states in Part XI of the Indian Constitution, commencing from the Articles 245-255 and VII Schedule.

Constitutional Provisions

The Indian Constitution, based on the principle of federalism, has a scheme of two fold distribution of legislative powers-with respect to territory, and with respect to subject matter. The constitutional provisions are spread out over Articles 245-255. Article 245 talks about distribution of legislative

⁶ Section 104 of the government of India act states that The Governor-General may by public Residual notification empower either the Federal Legislature or a powers of Provincial Legislature to enact a law with respect to any legislation matter not enumerated in any of the Lists in the Seventh Schedule to this Act, including a law imposing a tax not mentioned in any such list, and the executive authority of the Federation or of the Province, as the case may be, shall extend to the administration of any law so made, unless the Governor-General otherwise directs.

⁷ Section 107 of the Government of India Act states that If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions- of this section, the -Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

⁸ Constituent Assembly Debates, Vol. IX, p. 856

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BANGALORE UNIVERSITY LAW JOURNAL

138

power between Union and State with respect to territory. In terms of Article 246, The VII Schedule of the constitution contains 3 lists. The Union List, State List and Concurrent list. However, In case of conflict between a central law and a state law on a subject in concurrent list, the union law should prevail. If any subject does not fall under any of these three lists In such a situation Parliament would have the power to legislate on the subject in the exercise of residuary powers under Article 248 and under Article 246(1) read with Entry 97 of List I.

Article 248 deals with the concept of residuary power. According to which, the Parliament can legislate laws as to residue, which indicates the strong centre with federal feature. The concept of residuary power differs from country to country, it means differently in India and U. S. A respectively. The residuary power as laid down under Article 248 of Indian Constitution has been widely interpreted by the Indian judiciary. In order to bring "complete justice" honorable Supreme Court, through various judgments laid down the laws on subject being the residue. Judiciary with changing needs of the society has laid down guidelines on subjects not enumerated in any lists of seventh schedule as well as on those subjects where parliament has never touched. This indicates that there has been judicial legislation as residuary matters.

Scope of the Residuary Power

The scope of Residuary Powers of Legislature in the Indian Constitution is very wide. Since the commencement of the Constitution the Residuary Powers of Parliament have been exercised several times. The expression "any matter not enumerated the Concurrent List of State List" in Article 248 must mean, in the context of Clause (1) of Article 246 which gives Parliament exclusive power in respect of matters in List I, any matter other than those enumerated in any of the three Lists. Obviously, the residuary power given to Parliament in Article 248 cannot include power which is exclusively given to Parliament on matters in List I already conferred under Clause (1) of Article 246, and which is a clear attempt to distinguish the words "any matter" in Article 248 and "any other matter" in Entry 97 in List I which is a distinction without difference. The fact that the residuary power has been vested in the Central Legislature under Article 248 and its consequence translated in Entry 97 in List I, there can be no gainsaying that the idea was to assign such residuary power over matters which at the time of framing the three Lists could not be thought of or contemplated. This is clear from the fact that the Lists contain as many as 209 matters which are couched

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BANGALORE UNIVERSITY LAW JOURNAL

139

2017
in careful and elaborate words with inclusive and excluding language in the case of some, which has made the Constitution, to use words of Gwyer, C.J., "Unique among Federal Constitutions in the length and detail of the legislative Lists".

In the layout of such elaborately worded matters in the context of Article 246(1), the residuary power contained in Article 248 read with Entry 97, List I must be interpreted as power in respect of matters not enumerated in any of three Lists. If no entry in any of the three Lists covers a particular matter then it must be regarded as a matter not enumerated in any of the three Lists then it belongs exclusively, to Parliament under Entry 97 of the Union List as a scope of legislation. Such a residuary power cannot therefore, be ordinarily claimed in respect of a matter already dealt with under an Article or an entry in any one of the three List as the Art 248 declares that the Parliament has the exclusive power to legislate on matters not enumerated in List III or List II and to impose a tax not mentioned in either of those Lists. To avoid any doubts, Entry 97 is inserted in List I, which sets out the field of legislation there under as follows:

"Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists".

Thus, Art.246 lays down the powers of the respective legislatures in respect of the matters enumerated in three Lists and where those Lists come into conflict, the non obstante clause in Clauses (1), (2) shows that List I has priority over Lists III and II, and List III has priority over List II. Despite the dominant part given to Parliament in this Article, the State Legislatures, however have the exclusive jurisdiction over matters set out in List II and the principle underlying the non obstante clause can be resorted⁹. This has been observed in *In Re C.P. and Berar Sales of Motor Spirit and Lubricants Taxation Act*¹⁰. When dealing with a Central Act, we should enquire whether it was legislation in respect of any matter in List II for this is the only field regarding which there is a prohibition against Parliament. If a Central Act does not enter or invade these prohibited fields there is no point in trying to decide as to under which entry or entries of List I or List III a Central Act would rightly fit in.

⁹ Union of India v. H.S.Dhillon, AIR 1972 SC 1061: (1972) 2 SCR 33: (1971) 2 SCC 779: (1972) 83 ITR 582.
¹⁰ AIR 1939 FC 1: 1939 FCR 18(38)

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140

Judicial Interpretation of Residuary Power

Judiciary has played vital role in expanding the horizons as to provisions of residuary power.

In *Hari Krishna Bhargava v. Union of India*¹¹ in this case the incorporating Ch. XXII-A in the Indian Income-tax Act, 1961 an annuity deposit scheme was challenged on the ground that it is a state subject but parliament enacted a law but court held that the scheme of Ch. XXII-A is for borrowing money by the Central Government from the tax payers in the higher income group which is repayable in installments, power to legislate in that behalf is still within the competence of Parliament by virtue of Entry 97 of List I of the Seventh Schedule.

In *Union of India v. H. S. Dhillon*¹² court observed that "However, assuming that the Wealth Tax Act, as originally enacted, is held to be legislation under entry 86 List I, there is nothing in the Constitution to prevent Parliament from combining its powers under entry 86. List I with its powers under entry 97. There is no principle that we know of which debars Parliament from relying on the powers under specified entries 1 to 96, List I, and supplement them with the powers under entry 97 List I and art. 248, and for that matter powers under entries in the Concurrent List."

*Sat pal & co. v. Lt. Governor of Delhi*¹³ the Punjab Excise (Delhi Amendment) Ordinance, 1979 empowering the Government under the Punjab Excise Act, to levy "special duty" of the import of country liquor into Delhi and the Delhi Fiscal Duty Order, 1979 levying "special duty". Validity of. Powers of Parliament to legislate exclusively for Union Territory of Delhi, a part of the Territory of India not included in a State-Constitution of India Articles 246 to 248 and Entry 97 of the Union List.

*International Tourist Corpn. V. State of Haryana*¹⁴ The State of Haryana levies a tax on passengers and goods carried by motor vehicles, which we may call, for brevity's sake, 'passengers and goods tax'. The levy is made under the provisions of the Haryana Passengers and Goods Taxation Act 1952. Sec. 3(1) of the Act empowers the levy of a tax, to be paid to the

¹¹ AIR 1966 SC 619:(1966) 2 SCR 22 (1970) 1 SCC 749: AIR 1970 SC 999:(1971) 1 SCR 195.

¹² (1971) 2 SCC 779: AIR 1972 SC 1061

¹³ (1979) 4 SCC 232: AIR 1979 SC 1550

¹⁴ (1981)2SCC 318: AIR 1981 SC 774

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141

State Government, at such rates not exceeding 60% of the value of the fare or freight as the case may be, on all passengers and goods carried by a motor vehicle other than a private carrier. In the case of contract carriages and stage carriages the State Government is authorised to accept a lump-sum in lieu of the tax chargeable on passengers and goods respectively, in the manner provided. Sec. 3(3) deals with situations where a route lies partly within and partly outside the State of Haryana. It reads as follows :

The Disruptive Activities (Prevention) Act, 1987 were upheld under Article 248 read with entry 97 of list I.¹⁵

In *Naga People's Movement of Human Rights v. Union of India*¹⁶, the Supreme Court ruled That Parliament was competent to enact the Armed Forces (Special Powers) Act, 1958 in the exercise of the legislative power conferred on it under Entry 2 of List I and Article 248 read with Entry 97 of list I.

Validation of Invalid State Laws

Whenever States lack legislative competence with respect to a subject-matter, Parliament will have such competence. At times, when a State law is declared invalid because of the State's legislative incompetence, Parliament may come to the rescue of the State by way of validating the law in question.

Here, the principle is that the Parliament cannot merely pass an Act stating that such and such State Act is declared as valid. This amounts to delegation of legislative power on the State Legislature on a do. As the Supreme Court has explained:

"Where a topic is not included within the relevant list dealing with the legislative competence of the State Legislatures, Parliament by making a law cannot attempt to confer such legislative competence on the State Legislatures."

It is for the Constitution and not Parliament to confer competence on State Legislatures, Parliament cannot arrogate to itself any omnipotence to withdraw Legislative Lists so as to confer competence on the State to legislate on a topic within its power, it can re-enact the invalid State law. As a

¹⁵ Kartar Singh v. State of Punjab, (1994) 3 SCC 569

¹⁶ Naga People's Movement of Human Rights v. Union of India (1998) 2 SCC 609

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convenient legislative device, Parliament can, instead of repeating the whole of the State Act, can legislate referentially. 142

In *Bajjnath Kedia v. State of Bihar*¹⁷, the Supreme Court held a statutory legislation made by a State Legislature unconstitutional on the ground that the State Legislature had no power to enact it and that only Parliament was competent to legislate in that behalf. Thereafter, Parliament enacted a Validation Act. The act was upheld as valid by the Supreme Court.¹⁸ The court ruled that Parliament could validate retrospectively what a State Legislature had no power to enact. Most of these validating Acts have been enacted by Parliament under its Residuary Power. A number of validating Acts have been passed by Parliament to validate judicially invalidated State taxing measures. In *Shree Vinod Kumar v. State of Himachal Pradesh*,¹⁹ the Supreme Court invalidated an Act passed by the Himachal Pradesh Assembly on the ground that the Assembly was not validly constituted and, as such, it was incompetent to pass the law in question. Parliament then passed a validating Act validating the proceedings of the Legislative Assembly of Himachal Pradesh. The courts were prohibited from questioning the validity of any Act or proceeding of the Assembly on the ground of defect in its constitution. The Supreme Court upheld the competence of Parliament to enact the validating Act under its Residuary Powers.²⁰

Committees and Commissions on Residuary Powers

For cultivating better Union- State legislative relations and to facilitate effective implementation of laws in India, many committees and commissions have been constituted for the purpose of recommend workable suggestions to resolve the problems of Union State legislative relations.

Rajamnir Committee

The Centre-State Relations Inquiry Committee was set up by the Government of Tamil Nadu on 2nd September, 1969 to consider the entire question regarding relationship that should subsist between the Centre and the

¹⁷ (1969) 3 SCC 838 : AIR 1970 SC 1436

¹⁸ Krishna Chandra Gangopadhyaya v. Union of India, AIR 1975 SC 1389 : (1975) 2 SCC 302.

¹⁹ AIR 1959 SC 223 : (1959) Supp 1 SCR 160

²⁰ *Jadab Singh v. Himachal Pradesh Administration*, (1960) 3 SCR 75: AIR 1960 SC 1008

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143

2017
States in a federal set up²¹. The Centre-State Relations Inquiry Committee analyzed the scheme of distribution of legislative powers under the Constitution and recommended the Residuary power of legislation and taxation should be vested in the State Legislature²².

Commission on Centre-State Relations (Sarkaria Commission) 1984

With a view to reviewing the working of the existing arrangements between the Union and the States, in the light of changed socio-economic scenario, the Government constituted a Commission in 1983 under the Chairmanship of Justice R.S. Sarkaria²³.

The Sarkaria Commission rejected the suggestion that the residuary powers should be vested in the States but it is recommended that Residuary powers of legislation in regard to other than taxation matters should be placed in the Concurrent List²⁴. The Constitution may be suitably amended to give effect to this recommendation²⁵.

²¹ The Centre-State Relations Inquiry Committee was set up by the Government of Tamil Nadu on 2nd September, 1969 under the Chairmanship of Dr. P.V. Rajamanar to consider the entire question regarding relationship that should subsist between the Centre and the States in a federal set up. The other two members of the Committee were Dr. A. Lakshmanaswami Mudaliar and Mr. P. Chandra Reddy. The Committee submitted its report in 1971. The report comprises of 21 Chapters. The IV chapter deals with the legislative relations between the Union and States.

²² The Commission after conducting several studies, eliciting information, holding discussions and after detailed deliberations submitted its 1600-page report in January 1988. This report contains 247 recommendations spreading over 19 Chapters. The second chapter deals about Union States Legislative relations. In this chapter the commission discusses the existing arrangement in the legislative relations between the union and states and problems in the respective field. After examining the problems it suggested many suggestions to overcome from those problems.

²³ i.e. transfer Entry 97 from the Union List to the Concurrent List. the residuary power of legislation in regard to taxation remain with Parliament because, it said, the Constitution-makers did not include any entry relating to taxation in the Concurrent List so as to avoid Union-State frictions, double taxation and frustrating litigation. The Commission said that the power to tax might be used not only to raise resources but also to regulate economic activity, and warned that there might be situations in which a State, in the garb of introducing a new subject of taxation, may legislate in a manner prejudicial to national interest. But it justified the transfer of other residuary powers to the Concurrent List because, it

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144

2017

Comparative Study

The concept of residuary power differs from country to country. The residuary power of legislation and taxation is expressly vested in the units by the Constitution of the USA, Australia and Switzerland. Residuary power in India and of U. S. A differs too much extent. India has adopted the Canadian model for the concept of residuary power. The position of residuary power in various countries has been enumerated herein below:

- 1) U. S. A: The Federation under the American Constitution has got only enumerated powers, while the residue is vested in the States. The Tenth Amendment provides— "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the State respectively..." As Tocqueville observed— "Government by the Centre was the exception while Government by the States was the rule. " But judicial interpretation has reversed this plan and Federal power has been expanded at the cost of what would have been regarded by the framers of the Constitution as residual State power.
- 2) Australia: Australia adopted the American plan of vesting the residuary power in the State Legislatures, s. 107 of the Australian Constitution Act provides— "Every power of the Parliament of a Colony which has become or becomes a State; shall unless it is by this constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State; continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State as the case may be. So, the Commonwealth has only enumerated powers like the American Congress. Among the residual powers of a State in Australia have been mentioned education, local Government, police, criminal law, company law, railways, irrigation, price control; general control over the liberty of the subject. But as in the U. S. A. , there has been intrusion of Federal legislation into the State sphere, by virtue of liberal interpretation by the Court of the enumerated Federal powers, such as defence, posts and telegraphs, fiscal powers, industrial disputes.

felt, the exercise of such power by the States would be subject to the rules of Union supremacy that have been built into the scheme of the Constitution, particularly Articles 246 and 254.

²⁵ Discussed in Para 2.6.18 and recommended in Para 2.43.01 by the Sarkaria Commission Report 1984



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145

3) **Canada:** The framers of the Canadian Constitution supposed that the American system of vesting residuary powers in the State resulted in weakness of the Federal Government; so they reversed the process, by leaving the residue to the Dominion Parliament, conferring on the Provincial Legislature only such powers as might be required for local purposes.

4) **Indian Constitution, 1950:** The framers of the Constitution were conscious of the fact that human knowledge is limited and human perception imperfect and no one could foresee what contingency may arise in future needing legislation. Therefore, the residuary power is intended to take care of such matters as could not be identified at the time of the constitution-making. Further, the framers of the Constitution were designedly devising for a strong Centre. Moreover, the present is an era of fast technological advancement, and no one can visualize future developments and exigencies of government.

Something unforeseen may happen and some new matter may arise calling for governmental action. A question may then arise as to which government, Central or State, is entitled to legislate with respect to that matter. To meet this difficulty, the Constitution provides that the residue will belong exclusively to the Centre. This is provided for in Art. 248 read with entry 97, List I. These provisions take care of any unforeseen eventuality. Art. 248 reads as- (1) Parliament has exclusive power to make law with respect to any matter not enumerated in Concurrent List or State List. 2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists. Therefore, it can be summarized that, residuary power under U. S. Constitution vests with the states and not with the centre. In Canada, the residuary power vests with the centre and not with the states, the same model has been followed by the India as reflected in Art. 248 of Indian Constitution. Judiciary has given wide interpretation to the provisions of residuary power in India as well in U. S. A which has changed the scope of residuary power in respective countries.

Issues and Challenges

As per Article 248 and Entry 97 of Union list the residuary powers of legislation vests in Parliament²⁶. The corresponding provision under the Government of India Act, 1935 is section 104. In the discharge of functions

²⁶ Doctrine of residuary powers

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BANGALORE UNIVERSITY LAW JOURNAL

2017

146

under Section 104 the Governor General was subject to the ultimate control of the British Cabinet and through them to the British Parliament. The Governor General could authorize either the Federal Legislature or the Provincial Legislature to exercise the residuary powers with respect to any matter. But under the Constitution residuary power of legislation vests in the Parliament and there is no safeguard to protect the interest of the States²⁷. Hence the confirmation of residuary powers only to the Union Legislature is not justifiable under all the circumstances in the cases where the subject is the local importance.

Conclusion

Federalism leads to the setting up of a composite institution where there is a separate and distinct union government, and state governments. The pattern of relationship is never rigidly defined in the Indian Constitution. The fact that the relationship is based on an elastic set of norms has always gone to the advantage of successive powerful union governments. The concept of federalism in India is built upon the substructure of power sharing in a set up of parliamentary democracy. In speaking about the concept of federalism-in-practice, we should be sharply aware of the fact that from the moment the Constitution started to be drafted, the concept of unity rather than diversity had a marked influence on the process of federalism. The drive to create an 'indestructible union' was also accompanied by the urge to foster and foist on the nation, a driving supremacy of the Union over the State, in matters that concerned the nation's interests. Residuary Power of the Legislation is one such concept introduced in the Indian Constitution by the framers of the Constitution who were able to perceive the future legislative needs which would arise in future through their far sightedness has proved to be a boon in keeping the federal character of our Constitution intact with a stronger Centre.

Recommendations

- As per the Constitutional text, residuary powers are confirmed to the Union Legislature. But, it is not justifiable under all the circumstances. There is no rationality behind confirming residuary powers to the Union Legislature, where the subject is local importance.
- Under the Constitution residuary power of legislation vests in the Parliament and there is no safeguard to protect the interest of the States. Hence it is suggested to appoint a commission/committee comprising of representatives of both states and centre for the purpose of recommending

²⁷ Rajmenar committee report chapter IV legislative relations at p.44



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15th Dec -

18	WOMEN EMPOWERMENT—EDUCATION AND ENTREPRENEURSHIP Vineeta Arunendu	
19	"A STUDY ON JOB SATISFACTION OF TEACHERS IN SELECTED PRIVATE SCHOOLS OF SURAT CITY" Priti Desai & Dr. Digvijaysinh G. Thakore	
20	IMPLEMENTATION OF THE PROGRAMMES FOR THE RURAL DEVELOPMENT IN INDIA Dr.S.M.Bhowate	73
21	ISSUES OF DEVELOPMENT OF SCHEDULED TRIBES AND THEIR TERRITORY: CASE STUDY OF MAHARASHTRA Prof. Udhav Zarekar	76
22	A STUDY OF VEGETABLE VENDORS OF MUMBAI Dr. Moushumi Datta	81
23	COMMUNICATION SKILLS STRUGGLES FACED BY THE STUDENTS R. Kumara Balaji	84
24	PUBLIC GOVERNANCE Dr. C. Lingappa & Dr. M. S. Patil	87
25	INFLUENCE OF NUTRITIONAL STATUS ON HEALTH OF PERIMENOPAUSAL WOMEN IN THE RURAL AREAS OF NORTHERN KARNATAKA. Suma G Patil & Dr.Saraswati C. Hunshal	93
26	STRATEGIC MARKETING TO CARVE A NICHE: A CASE STUDY OF MARUTI SUZUKI LIMITED Monica Daniel Penkar	97
27	JUDICIAL ACTIVISM AND ITS IMPACT ON THE DOCTRINE OF SEPARATION OF POWER IN INDIA —AN ANALYSIS Veerabhadraiah C.	101
28	SOCIAL AUDIT IN INDIA: NEED AND IMPORTANCE Dr N B Jadhav & Mr. Shahuovhal	105
29	TECHNOLOGY PAVING THE WAY FOR CASHLESS ECONOMY : INDIA Mr. Ajit N. Jadhav & Mrs. Amrita A. Jadhav	108
30	"HISTORICAL REVIEW OF DENOTIFIED TRIBES IN MAHARASHTRA - THEIR QUEST FOR SURVIVAL AND IDENTITY" Mr. Ronald George	112
31	ROLE OF NGO'S IN DEVELOPMENT OF WOMEN SHG'S WITH REFERENCE TO RATNAGIRI DISTRICT Darshana D. Kadwadkar & Dr. Ms. Thankam Ghule	116
32	AN ANALYSIS OF CYBER CRIME OF LAST DECADE FOR CONTROL & IMPLEMENTATION OF INFORMATION TECHNOLOGY ACT 2000 IN MAHARASHTRA Dr. Rashid Rehman Pansare	121
33	STRATEGIC PLANNING AND EFFECTING OF PERFORMANCE ON PRIVATE UNIVERSITY SANA'A YEMEN Abdullah Abdurrahman Alyadumi	127
34	THE AWARENESS OF PRICING POLICIES IN BANKS OPERATING IN YEMEN Professor. Syed Azharuddin & Mr. Amr Ahmed Al-Mogahed	131

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JUDICIAL ACTIVISM AND ITS IMPACT ON THE DOCTRINE OF SEPARATION OF POWER IN INDIA - ANALYSIS

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Introduction

Today, one of the most debated issues among Academics, Statesmen, Jurists, journalists and ordinary people is judicial activism in India. That Indian judiciary is assuming a more and more active role is a reality. Some of them welcome it as a very positive approach for dispensing socio-economic justice, while some others call it judicial despotism, judicial terrorism, or even judicial intimidation. Judicial activism points to the constitutional principle of separation of powers (the division of power among the executive, legislative, and judicial branches of the federal government) and federalism (the division of power between the states and the federal government) to justify judicial restraint. They claim that judicial activism leads to unconstitutional intrusions of federal judicial power into the duties and powers of the executive and legislative branches of government and into the state governments. In *Griswold v. Connecticut* (1965), Justice John M. Harlan wrote, "Judicial self-restraint... will be achieved... only by continual insistence upon the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms." In 1796, in *Ware v. Hylton*, the Supreme Court held a Virginia statute void because it violated a 1783 peace treaty with Great Britain. In *Marbury v. Madison* (1803) the Supreme Court declared a federal law unconstitutional. These cases established the power of judicial review in the Supreme Court—the power to declare acts of the state governments and of the legislative and executive branches of the federal government null and void if they violate provisions of the Constitution. Since the early 19th century, debate has continued over how federal judges should use their powers. Should they practice restraint, or should they actively expand the scope of the Constitution in their interpretations of law, treaties, and constitutional provisions? Judicial activism Supporters of judicial activism argue that it is necessary to correct injustices and promote needed social changes. They view the courts as institutions of last resort for those in society who lack the political power to influence the other branches of government. Supporters of judicial activism point out that the courts often step in only after governors and state legislatures have refused to do anything about a problem. For example, neither state legislatures nor Congress acted to ban racially segregated schools, trains, city buses, parks, and other public facilities for decades. Segregation might still exist legally if the Supreme Court had not declared it unconstitutional in 1954. Alexander Hamilton, in *Federalist* has observed that, "The judiciary by the nature of its functions, will always be the least dangerous to the political rights of the Constitution, because, it will be least in capacity to annoy or injure them. The executive not only dispense the horrors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary, has no influence over either sword or purse; no direction either of strength or of the wealth of the society and can take no active resolution whatsoever it may truly be said to have neither force nor will, but merely judgement." The Court has for all practical purposes disregarded the separation of powers under the Constitution, and assumed a general supervisory function over other branches of governments. The temptation to rush to the Supreme Court and High Courts for any grievance against a public authority has also deflected the primary responsibility of citizens themselves in a representative self-government of making legislators and the executive responsible for their actions. The answer often given by the judiciary to this type of overreach is that it is compelled to take upon this task as the other branches of government have failed in their obligations. On this specious justification, the political branches of government may, by the same logic, take over the functions of the judiciary when it has failed, and there can be no doubt that there are many areas where the judiciary has failed to meet the expectations of the public.

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101



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The Constitutional Provisions for Judicial Review and Separation of Powers

The significant feature of Indian Constitution is partial separation of powers. -The doctrine of separation of powers was propounded by the French Jurist, Montesquieu. It is partly adopted in India since the executive powers are vested in the president, Legislative powers in the Parliament and the judicial powers in the Supreme Court and subordinate courts. The role of separation of powers in India is simple. The three organs of the Government viz. the Executive, Legislature and the Judiciary are not independently interdependent. (The executive encroaches upon judicial power, while appointing the judges of Supreme Court and High Courts. Similarly the Judiciary, by its review power examines the law passed by the legislature, parliament and the legislature also, intervenes in respect of impeachment of the president. The Indian Supreme court (judiciary) under article 13(2) of the Constitution has been specifically vested with the power of judicial review. The state cannot take away or abridge any of the fundamental rights of any such infringement of the court can intervene. The right to move supreme court for the enforcement of fundamental rights is itself a fundamental right (Art.32). High Courts are also empowered to issue writs for their enforcement (Art.226), Furthermore 'the law declared by the supreme court shall be binding on all courts within the territory of India' (Art.141) and Article 144 enjoins that "all authorities, civil and judicial within the territory of India shall act in aid of the supreme court". All these clearly establish the principle of judicial review for Indian judiciary. The affirmative activism on the part of judiciary was not envisaged by the framers of constitution. It is evident from the following arrangements,

1. The courts power of judicial review has not been mentioned in the body of our Constitution. It has been derived from Art.13 (2) where the Supreme court can determine the validity of a legislation only in the limited circumstances as imposed by the Constitution. If any legislative or executive action transgresses such limitations and then only the judiciary can sit in judgement over it.
2. Our Constitution has inducted the phrase "procedure established by law" from the Japanese Constitution replacing 'due process of law' of the USA. Accordingly, our judiciary has to interpret laws as written and cannot declare a law void on the ground that it is unjust. Thus it cannot till legislative authority with a crusader's spirit.

3. Indian Constitution can be amended easily. This enables our Parliament to override adverse judicial decisions by suitable amendments. This curbs the court's power of judicial review. Constitution framers through these devices hoped and believed that they had removed the possibilities of abuse of process.

The adoption of parliamentary democracy as the form of the government and non inclusion of judicial review in the definition of State in Art.12 are the clear manifestations that our Constitution did not envisage an independent judiciary like America. Our Supreme Court is expected to play a negative activist role and that to a restricted way.

But the expectations of the Constitution makers were not fully vindicated. There are certain loopholes in the Constitution which have allowed our judiciary to become more powerful than was envisaged by the founding fathers. They are as follow,

1. The first loophole lies in the very Constitutional arrangement for Constitutional interpretation. According to our Constitution the Supreme Court is the final interpreter. But our Constitution nowhere has laid down any objective guideline or any catalogue of values which the court should follow for interpreting the Constitution. This gives the judiciary a vast scope for exercising subjective discretion and thereby becoming more powerful.

2. Our Constitution lays down that judicial reasoning should follow "procedure established by law". This very phrase has become a double-edged sword. On the one hand this would mean that the court has to examine legislations strictly in terms of narrow legal niceties. On the other, our Constitution has laid down any definite social objective which would act as a legal imperative for the court to abide by. It has provided a vast latitude to the court to indulge in judicial discretion thereby importing the substantive process.

Moreover 'supremacy of Constitution' is a vague expression. A Constitution actually is nothing more than a document that specifically lays down the relationship between the organs of the government. Supreme Constitutional Supremacy can only mean that this relationship cannot be altered without amending the Constitution. In practice supremacy is ascertained from the fact that which of the organs has been given a relatively pre-eminent footing in the power structure. In the Indian Constitution, the judiciary has been vested with the



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authority to interpret the Constitution and thereby determine the relationship between the three organs of the government. It can invalidate any legislation or executive action if it feels that the same is not in accordance with the constitution. Thus the judiciary enjoys practical supremacy over two organs although theoretically the Constitution speaks of equality among the three.

The Activist role judiciary and Important Instrumentalities

The activist role of the Indian judiciary has been accelerated during 1980s and 1990s. In doing so, it is backing upon several instrumentalities. Some of them are as follow

1. Emphasis on Basic structure doctrine

It has been mentioned earlier that KeshavanandaBharti's case armed the Supreme Court to review all Constitutional amendments on substantive grounds. Since then the court has been emphasising very cautiously the basic structure. In the Minerva Mills case (1980) the court struck down the 42nd amendment Act which made constitutional amendments unchallengeable in courts. Thus the court has extended its power over the legislature.

2. Liberal and wider interpretation of constitutional provisions.

This process started with the Meneka Gandhi case. It may be referred to here that in 1950 in the A.K.Gopalan v. State of Madras A.I.R.1950, the Supreme Court interpreted art.21 from the stand point of procedure established by law as embodied in the provisions itself. But in the Maneka Gandhi v.U.O.I. A.I.R.1978, the court reinterpreted the provision and introduced due process clause. The court was of the opinion that the procedure must conform to natural justice, fairness and equity.

3. Enforcing non-justiciable principles through the window of the fundamental rights.

It may be recalled that Art.31(C) as amended by the 42nd Amendment Act laid down that any law made in pursuance of any of the Directive Principles was to be protected from attack with reference to Art.14, 19 and 21. But by striking it down in the Minerva Mills case, the court upheld the Constitutional position of the primacy of fundamental rights over Directive principles.

4. Innovation of certain arrangements for facilitating access to judicial process.

Several arrangements have been made by the court to facilitate more persons to have easy access to judicial process. Most important of them are Public Interest Litigation (PIL) and Letter Petition.

5. Creation of new legal forums

Our judiciary has created various new forums with legal footing like Family Courts, Lok -Adalat, Green Bench, Consumers Redressal forums, Human Rights Commissions etc. Through these devices our judiciary become more powerful.

Our judiciary, in some cases has breached trust. Since what the final judge says law, our apex court on many occasions has used constituent power in such way that it has placed itself at a much higher position. In KesavanandaBharati's by introducing the basic structure doctrine, it has placed itself above the legislature.

There are many instances where our judiciary has encroached upon the jurisdiction of administration. The Court has for all practical purposes disregarded the separation of powers under the Constitution, and assumed a general supervisory function over other branches of governments. The temptation to rush to the Supreme Court and High Courts for any grievance against a public authority has also deflected the primary responsibility of citizens themselves in a representative self-government of making legislators and the executive responsible for their actions. The answer often given by the judiciary to this type of overreach is that it is compelled to take upon this task as the other branches of government have failed in their obligations. On this specious justification, the political branches of government may, by the same logic, take over the functions of the judiciary when it has failed, and there can be no doubt that there are many areas where the judiciary has failed to meet the expectations of the public.

Conclusion and Suggestions

However, the governance cannot be replaced by the judicial institutions. There is a need to discover a balance between judicial and executive institutions. We need to reassert the balance between reforms, development and institutions. Judicial activism should not be used to lead to the Constitutional principles of separation of power getting eroded. Our Hon^{ble} Judges should not cross their limits in the name of judicial activism and not to try to take over the functions of other organs of administration. Judicial pronouncements must respect the boundaries that separate the Legislature, Executive and Judiciary. Frequent confrontation between the Legislature, Executive and the judiciary will also damage our well established democratic system of governance. The members of every institutions sworn to uphold the constitution, which alone is



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supreme. Both sides will maintain and respect the line of demarcation of power under the constitution will not allow a conflict to develop between them. There for the author humbly submits that, a proper harmonious balance of all the three organs, each playing its own role well within limited jurisdiction, appears to be the viable solution. Further the writer states that, this way, judicial activism has a negative effect on the fundamental 'Doctrine of Separation of Power'. This is extremely alarming situation, the solution which can be found in nothing but in judicial-self-restraint.

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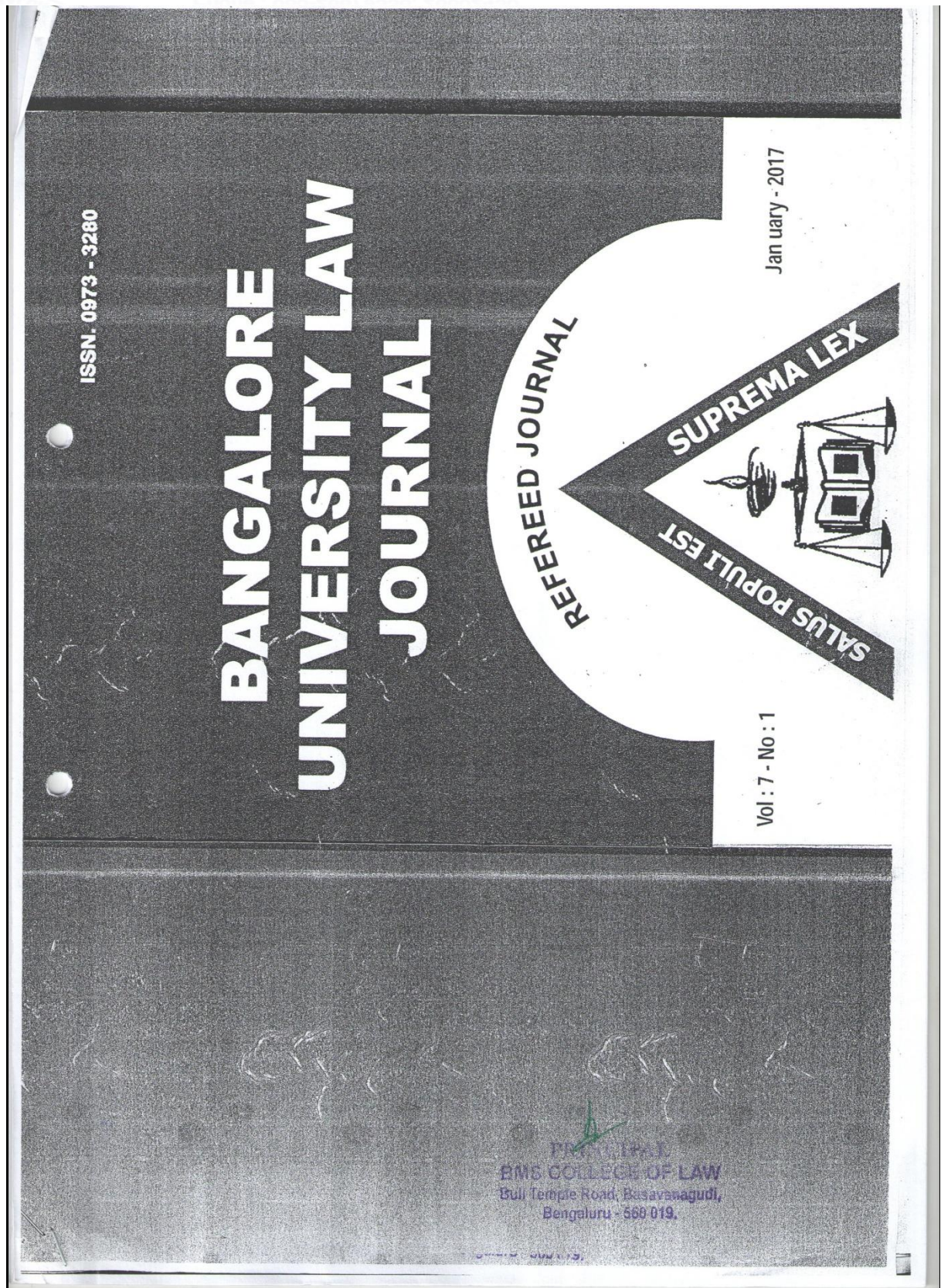
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CONTENTS

Sl. No.	Title of the Article & Author's Name	Page Nos.
1.	Analysis of Legal Reforms for Democratic Controlled and Autonomous Functioning of Cooperative Societies pursuant to 97 th Constitutional Amendment <i>Dr. N. Dasharath</i>	1
2.	Celebrities, Media Trial and Media's Freedom of Expression: An Assessment <i>Dr. Jyothi Vishwanath</i>	11
3.	Doctrine of Sustainable Development: An Assessment in Judicial Perspective <i>Dr. Chandrakanthi L.</i>	23
4.	Enabling the Information Communication Technology: Constitutionalizing the Right of Accessibility of Disabled Persons in India** <i>Sanjay S. Jain</i>	32
5.	United Nations Convention on Rights of Persons with Disabilities: Some Reflections. <i>Dr. Krishna R. Hombal</i>	46
6.	A Critical Analysis of Acid Attacks against Women in India: A Socio- Legal Perspectives <i>Kavitha Balakrishnan</i>	57
7.	Protection of Minorities under International Law and Indian Law: A General Discourse <i>Dr. Aneesh V. Pillai</i>	65
8.	Patients' Rights - An Indian Legal and Judicial Perspective <i>Dr. Sunitha Abhay Jain & Priyanka Vaidyanath</i>	78
9.	Supreme Court Decision on Triple Talaq is a Catalyst to Reform the Muslim Personal Law <i>Dr. Janhavi S. S.</i>	91
10.	The Application of Precautionary Principle by the Courts	98

Editorial Note

We are extremely happy to note that the first issue of the Bangalore University Law Journal has received appreciation from many eminent academicians, scholars, judges, and students and several institutions have subscribed to the Journal.

Research is an important aspect of the academic and professional life of every individual. The ever changing socio-legal dynamics provide an opportunity to all those interested to undertake research by writing scholarly articles on different issues and thereby contribute in furthering knowledge and promote future research.

We place on record the perennial support extended by the authorities of the University and kind guidance of the eminent advisory committee in publication of the Journal. We profusely thank all those academicians and scholars who have contributed their scholarly articles on different areas of socio-legal issues of current relevance and hope this issue of BULJ would benefit the readers.

Dr. V. Sudesh

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ANALYSIS OF LEGAL REFORMS FOR DEMOCRATIC CONTROLLED AND AUTONOMOUS FUNCTIONING OF COOPERATIVE SOCIETIES PURSUANT TO 97TH CONSTITUTIONAL AMENDMENT

Dr. N. Dashar

Introduction:

The 97th Constitutional Amendment¹ has brought out radical change in the concept of the Cooperative Societies. Democratic functioning of Cooperative Societies have now become the core constitutional values of a Cooperative Society. Such Societies are to be registered only if they are founded on Cooperative principles of democracy, equality, equity and solidarity.

Whenever, in any Cooperative society if there is professional mismanagement, lack of democratic control and threat to autonomy functioning than the spirit of Cooperativeness which is the sheet anchor of Cooperative society is destroyed. Question arises what should be done to ensure the spirit of Cooperativeness and democratic control in a Cooperative society? If there are legislative provisions in any State Cooperative Societies Act for removal of office bearers of the board through moving no confidence motion then the solution is found for restoring Cooperativeness. However, there are no such legislative provisions, than question arises what should be done?

The author through this article focuses the solution for at questions. The author also discusses in brief the position of Cooperative society in UK for the purpose of reforms in our country for autonomy functioning and democratic control of the Cooperative Societies.

1. Constitutional Delineation on the law relating to Cooperative Societies in India:

The Constitution (Ninety-seventh (Amendment) Act, 2011 inserted Part-IXB in the Constitution consisting of Articles 243Z to 243ZT providing constitutional status to the Cooperative Societies.

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Sl. No	Title of the Article & Author's Name	Page Nos.
11.	Rights of Transgenders in the Contemporary Society: A Critical Analysis <i>Sneha Balaraj</i>	105
12.	Right to Nutritional Standards for Persons with Disabilities as a Human Right in View of Indian 'Rights of Persons with Disabilities Act, 2016' <i>Veerbhadraraj C.</i>	115
13.	A Shift from Traditional Parliamentary Legislation to Judicial Legislation With Reference To Residuary Power <i>Dr. N. Sathish Gowda & K. S. Satisha</i>	128
14.	State Of Children Rights in India after the Constitution: A Brief Analysis <i>Ambedkar N.S. & Dr. M. Suresh Benjamin</i>	141
15.	Judicial Response towards the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 <i>K. L. Chandrasekhara</i>	150
16.	Sentencing Policy Vis-À-Vis Sexual Harassment Law <i>Srinivas C. Palakonda</i>	162

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Bengaluru - 560 019.



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those women and children at increased risk. Earlier to the aforesaid report the United Nations Development Programme, 2014, India was ranked at 135. There is an increase in ranking at 135 to 130. This increase is due to the rise in per capita income and expectancy.

As per the World report on disability revealed by WHO June 9th there are around one billion persons with disabilities. Out of approximately 30% are women with disabilities. In Asia Pacific region 80% of persons with disabilities live in rural areas. In India as per the PwD Act, 2016, statistics around 12.6 million people are male and 1.4 million are female out of total 21 million. It is estimated that the population with disabilities in India has increased to 70 millions in the year 2016.

Enormous ink and heaps of pages are spent for deliberating upon the problem of poverty in different international conferences. However, there is no major literature to show the relationship between poverty and disability. In this connection it is relevant to mention the meaning of poverty has said by the noble laureate Dr. Amartya Sen according to him poverty refers to the lack of what we can or cannot do. This includes but goes beyond the material lack or want to include human capabilities, for example skill, physical abilities, and also self-respect in society.

India has not lagged behind in addressing the problem of malnutrition in the persons with disabilities. This is evident when one looks at the provisions of the Rights of Persons with Disabilities Act, 2016 which contains provisions for addressing the issue of malnutrition in persons with disabilities.

On 22.05.2011, TV-9 Kannada News Channel telecasted on the news of the children not only suffering from starvation but also death of children on account of starvation and lack of timely medical treatment in the State of Karnataka, especially, in Markandinni village of Devadurga Taluk, Raichur District. After watching the said news item, NGO by the name Vimochara Sangha, Athani, Belgaum District, through its President addressed a letter to Hon'ble the Chief Justice, High Court of Karnataka to intercede in the matter. Hon'ble the Chief Justice, High Court of Karnataka, after perusing the letter directed Registrar (Judicial), High Court of Karnataka, to take necessary steps to ensure the welfare of the children.

RIGHT TO NUTRITIONAL STANDARDS FOR PERSONS WITH DISABILITIES AS A HUMAN RIGHT IN VIEW OF INDIAN 'RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016'

*Veerabhadraiah C**

Introduction

All children, including children with disabilities, have the right to adequate nutrition, as stated in the Convention on the Rights of the Child (CRC). Moreover, the Convention on the Rights of Persons with Disabilities (CRPD) highlights the duty of States Parties to prevent discriminatory denial of health services or food and fluids on the basis of disability. Nutrition and disability are intimately related: both are global development priorities; and both can only be addressed by also tackling issues of poverty, ensuring equity and guaranteeing human rights.

Malnutrition and disability are both major global health problems. There are an estimated one billion people worldwide living with a disability of whom some 93 million are children aged under 14 years. Worldwide, almost one billion people are malnourished. Malnutrition remains a major cause of child mortality, with the latest estimates suggesting that under-nutrition causes 3.1 million child deaths annually; 45% of all child deaths.

Children and adults with disabilities often do not benefit from the same level of services, as the non-disabled population. This is due to a variety of reasons, including inaccessible premises and professionals that are not able to communicate adequately with persons with disabilities. In situations of limited resources, the exclusion of children with disabilities may be based on the incorrect belief that preserving the health and welfare (and even life) of children with disabilities is a lower priority than preserving those of a non-disabled child.

Access to sufficient nutritious food is often an issue of concern to families having a member with disabilities because of poverty and unequal distribution of resources within the household. As per the Human Development Report published by the United Nations Development Programme, agency of the United Nations, 2015, India has been placed at 130th amongst 188 countries.

Access to nutritious food for women with disabilities and their children



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Malnutrition can also cause structural damage to the brain and al motor and exploratory skills as well as future cognitive development schooling. For example, stunting is defined as height for age lower than standard deviations below the median. It is caused in very early childhood a range of determinants related to nutrition, lack of essential mineral vitamins, and diarrhea and can lead to cognitive delays which later affect educational performance.

Evidence from high income countries, and increasingly also from and middle-income countries suggests that malnutrition in infancy childhood also has adult sequelae, such as high blood pressure and mental disease. These are key risk factors for disabling conditions such as diabetes heart disease and stroke.

III. Right to Food as Human Right to address Malnutrition

By now sufficient jurisprudence has evolved transforming difficult models and rights for protecting the life and dignity of persons with disabilities at the United Nations level. This is evidence from the fact that the approach for protecting the rights, life and dignities of persons with disabilities transformed from charity model to medical model and from social model right based model so also the transformation began with right based model human rights model ultimately leading for treating the issue of 'disability human right'.

There is a close nexus between right to food and addressing problem of poverty. When a man is fed well in society 60% of his poverty solved. When the problem of poverty is solved the problem of malnutrition also solved to greater extent. Therefore there is a need to focus and light on international and domestic standards for providing right to food context with disability.

1. Right to Food as a Human Right issue

The right to food is guaranteed in the International Covenant Economic, Social and Cultural Rights (ICESCR), Convention on Elimination of all Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC). Article 11(1) of the ICESCR includes adequate food as a component on an adequate standard of living and Article 11(2) refers to 'the fundamental right

Existence of disability in any person is also a cause for malnutrition furthermore another important cause for malnutrition is due to malnutrition in mothers especially during the time of pregnancy. In this connection the author now wish to focus upon the relationship between malnutrition and disability, disability and malnutrition or impairment and malnutrition.

II. Relationship between Malnutrition and Disability

There is a close nexus between disability and malnutrition as a result the problem of malnutrition founding pregnant women, new born children and persons born with impairment suffer from malnutrition it will be appropriate to focus on the consequences of malnutrition in pregnant women and children.

1. Maternal Malnutrition

Maternal malnutrition can affect the development of the fetus, cause intrauterine growth delays and increase the risk of the infant developing impairments. For example, low maternal folate levels are associated with increased risk of the child being born with a neural tube defect.

Mothers who are malnourished are more likely to give birth to low birth weight babies, a risk factor for mild intellectual disability. Iodine deficiency during pregnancy has been reported to increase incidence of poor foetal growth and low birth weight babies. Anaemia - a deficiency of iron - prevalent in 42% of pregnant women in low- and middle-income countries.

Maternal obesity can also lead to adverse birth complications such as increased risk of infection and trauma during delivery which may increase the likelihood of the infant developing a disability. Maternal overweight at conception can also lead to the child being overweight and developing chronic diseases in later life.

2. Child Malnutrition

Specific micronutrient deficiencies, including lack of iodine, iron and vitamin A, and malnutrition related to lack of protein and energy, are considered risk factors for physical, sensory and cognitive impairment. There is also evidence to suggest that iodine deficiency may affect the motor development of young children under age four, and less consistently their cognitive development, with effects on very young children being irreparable.

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Article 10: Right to Life

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment, persons with disabilities on an equal basis with others.

Article 25: Health

One of the highlights of the aforesaid article no. 25 of UNCRPD is that the state should prevent discriminatory denial of health care or of services or food and fluids on the basis of disability.

India is one among the earliest countries in the world to sign and ratify the UNCRPD. By doing so, India has taken a lead in fulfilling its obligation set by UNCRPD at domestic level. It will be now appropriate to focus the Indian response on the implementation of policies, law, programmes in addressing the issue of malnutrition.

IV. Indian Response to address the issue of Malnutrition

One of the significant and excellent development in Indian jurisprudence is by way of enacting the National Food Security Act, 2013. The said act has fulfilled the mandates laid down in directive principles of policy under part IV especially Article 47 of the Constitution of India which lays down that — the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. Furthermore the Right to Food Security Act, 2013 through its statement of reasons and objects reflect the theme of the National Convention on the Rights of Persons with Disabilities, 2008 which obligates for protecting the right and dignities of children with disabilities. The Food Security Act, 2013 consists of 45 sections and 4 schedules. The aforesaid Act does not use the term persons with disabilities provisions except in the definitional part and schedule 3 yet the said Act apply for providing entitlement of the right to food for persons with disabilities. It is worth to mention few provisions of the said Act for the purpose of this article.

Sec. 4. Subject to such schemes as may be framed by the Government, every pregnant woman and lactating mother shall be entitled to—

part of an adequate standard of living in Article 14. Article 24 (2) (c) of the CRC specifically mentions rights to both food and water.

In General Comment No.12, the ICESCR confirms that the right to adequate food applies to everyone without discrimination and 'is of crucial importance for the enjoyment of all rights'.

Though the above said International Standard provision do not use the word persons with disabilities in their provisions but still it could be construed that the provisions do apply to persons with disabilities. For example, the general comment on ICESCR not only ensure right to food without any discrimination but also signify that there should be physical access to the right to food for infants and young children, elderly people the physically disabled the terminally ill and persons with persistent medical problems including the mentally ill.

As earlier mentioned right to food by now is a human right issue, so also by adopting the United Nations Convention (to promote and protect the rights and the dignities) of persons with disabilities 2008, the rights of persons with disabilities are treated as human rights issue. In this context it is worth to discuss how the UNCRPD promotes the right to food, and livelihood, right to health for addressing the problem of malnutrition. The provision relating to protection of child rights in the UNCRPD is also relevant for the purpose of this article.

Article 7: Children with Disabilities

1. States Parties shall take all necessary measures to ensure the full and enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.