Horizontal Rights in the Indian Constitution: An Analysis

Dissertation submitted to the Jawaharlal Nehru University
in partial fulfilment of the requirements for
the award of the Degree of

MASTER OF PHILOSOPHY

DEEPAK KUMAR

CENTRE FOR THE STUDY OF LAW AND GOVERNANCE
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI– 110067
INDIA

2017

JAWAHARLAL NEHRU UNIVERSITY
Centre for the Study of Law & Governance
NEW DELHI-110067. INDIA

Date: 26.07.2017

DECLARATION

I declare that the dissertation entitled **"Horizontal Rights in the Indian Constitution: An Analysis"** submitted by me for the award of the degree of **Master of Philosophy** of Jawaharlal Nehru University is an original piece of work. The dissertation has not been submitted for any other degree of this University or any other university.

Place: New Delhi

DEEPAK KUMAR

CERTIFICATE

We recommend this dissertation to be placed before the examiners for evaluation.

Prof. Amit Prakash
Chairperson
अध्यक्ष/Chairperson
विधि एवं अभिशासन अध्ययन केन्द्र
Centre for the Study of Law and Governance
जवाहरलाल नेहरु विश्वविद्यालय
Jawaharlal Nehru University
नई दिल्ली/New Delhi-110067

Prof. Jaivir Singh
Supervisor
पर्यवेक्षक/Supervisor
विधि एवं अभिशासन अध्ययन केन्द्र
Centre for the Study of Law and Governance
जवाहरलाल नेहरु विश्वविद्यालय
Jawaharlal Nehru University
नई दिल्ली/New Delhi-110067

ffice Tel. : 91-11-26704021, 26742506 • Telefax : 91-11-26742506 • Email : dir_cslg@jnu.ac.in; dir.cslg@gmail.com

ACKNOWLEDGEMENT

It is not a ritual but a heartfelt feeling that I wish to express my gratitude. I am indebted to many in the course of this dissertation. I would like to acknowledge first, **Prof. Jaivir Singh (CSLG)** who has not only inspired me in the first place to understand this dissertation topic, but also provided guidance, supervision, encouragement, support and convenience throughout the process, without which this dissertation would have been impossible. I also wish to repeat my appreciation for his generosity in sharing his useful expertise, knowledge and experience in such a new and unique topic of this dissertation amid his busy schedules.

I express my gratitude to **Dr. Pratiksha Baxi** (**Associate Professor**), **Prof. Amita Singh**, Chairperson at the CSLG and all other faculty member of the centre for their valuable insights to strengthen the dissertation**.** I am obliged to **Hon'ble Dr. Justice S. Murlidhar**, Judge, Delhi High Court for his valuable time and insights for my dissertation. I am obliged to **Prof. Mahendra Pal Singh** (Chancellor, Central University of Haryana and Chair Professor, Center of Comparative Law, National Law University, Delhi) for giving his valuable time and suggestions to make the dissertation successful. I also thank **Dr. Aditya Pratap Singh** (Associate Professor, Dr. Ram Manohar Lohiya National Law University, Lucknow) for his valuable suggestions.

I would like to express my propound gratitude to Jawaharlal Nehru University, New Delhi for providing me resources and inspiring environment. I thank to the entire non-teaching staff of CSLG for their help and generous support which helped me to increase the comprehensiveness and quality of this dissertation work.

I am deeply grateful to all my seniors, batch-mates and friends at CSLG and JNU among them I wish to mention particularly, Anurag Ekka, Avipsha Das, Purva R. Kartik, Khalid Yaqoob Mir, Kuldeep Kumar, Karamjit Kaur, Krittika Mondal, Nanuma Subba, Nitika Dhingra, Ramratan Dhumal, Rahul Bhandare and Ravi Shankar. This dissertation has always been supported by their solidarity and friendship.

I would like to sincerely thank my friends Anurag Bhaskar and Dr. Virendra for their valuable support. I would like to mention the significant contribution of *my parents* and my brother and sisters for their support throughout my research work and my career. I would like to extend my heartfelt appreciation to my wife Sandhya for her unwavering love and support throughout the completion of this dissertation.

Deepak Kumar

ABBREVIATIONS

BCCI: Board of Control of Cricket in India

CEDAW: The Convention on the Elimination of All Forms of Discrimination against Women

CERD: International Convention on the Elimination of All Forms of Racial Discrimination

CPPCG: Convention on the Prevention and Punishment of the Crime of Genocide

CSIR: Council of Scientific and Industrial Research

DPSP: Directive Principle of State Policy

FD: Fundamental Duty

FRs: Fundamental Rights

HC: High Court

HRs: Horizontal Rights

IC: Indian Constitution

ICCPR: International Convention on Civil and Political Rights

ICESCR: The International Convention on Economic, Social and Cultural Rights

ICSPCA: International Convention on the Suppression and Punishment of the Crime of Apartheid

OBCs: Other Backword Castes

SC: Supreme Court

SCs: Schedule Caste

STs: Schedule Tribe

UDHR: Universal Declaration of Human Rights

UK: United Kingdom

UN: United Nations

US: United States

CASES CITED

44. *New York Times v. Sullivan* 376 U.S. 254 (1964).

45. *Nisha Tyagi and Ors v Seema Model School and Ors* MANU/DE/0989/1997.

46. *P.A. Inamdar and Others v State of Maharastra and Others* (2005) 6 SCC 537.

47. *P.S. Charya v State of Madras* AIR 1956 Mad 541.

48. *Parduram Sahu and Ors v Biswamber Sahu* AIR 1958 Ori 259.

49. *Parmnand Katara v Union of India* (1989) 4 SCC 286.

50. *People's Union for Democratic Rights and Others v Union of India and Others* (1982) 3 SCC 235.

51. *PK Ramchandra Iyer v Union of India* (1984) 2 SCC 141.

52. *Pradeep Kumar Biswas v Indian Institute of Chemical Biology* (2002) 5 SCC 111.

53. *Rajbala v State of Haryana and Others* (2015) 1 SCC 463.

54. *Retail, Wholesale & Dep't Store Union v. Dolphin Delivery Ltd* [1986] 2 S.C.R. 573.

55. *Rodgers v ITGWG* [1978] ILRM 51 (HC).

56. *S. Vasudevan and Others v S.D Mital and Others* AIR 1962 Bom 53.

57. *Sabhajit Tewary v Union of India* (1975) 1 SCC 485.

58. *Saroj Rani v Sudarshan Kumar* (1984) 4 SCC 90.

59. *Sastri Yagnapurushadji and Ors v Muldas Bhudardas Vaishya and* Anr AIR 1966 SC 1119.

60. *Shelly v. Kramer* 334 U.S. 1 (1948).

61. *Shri Bodhisattwa Gautam v Miss Subhra Chakraborty* (1996) 1 SCC 490.

62. *Shri V.S. Rahi v The Lt. Governor of Delhi and Others* MANU/DE/0777/1994.

63. *Society for Un-aided Private Schools of Rajasthan v Union of India and Another* (2012) 6 SCC 1.

64. *State Board of Control for Cricket in India v Cricket Association of Bihar and Others* (2015) 3 SCC 251.

65. *State of Gujarat v Dinseh Ramanlal Pathak* Gujrat High judgement dated 20 June, 2012.

66. *State of Karnataka v Appa Balu Ingale and Others* AIR 1993 SC 1126.

67. *State of M.P. and Anr v Ram Kishna Balothia and Anr* AIR 1995 SC 1198.

68. *State of Madhya Pradesh v Puranchand* AIR 1958 MP 352.

69. *State of West Bengal v Union of India* AIR 1963 SC 1241 (at 1264).

70. *Suresh Koushal V Naz Foundation* (2014) 1 SCC 1.

71. *T. Sareetha v T. Venkata Subbaiah* AIR 1983 AP 356.

72. *The Manager, Government Branch Press and Another v D.B. Belliappa* (1979) 1 SCC 477.

73. *Unni Krishnan v State of Andhra Pradesh and others* (1993) 1 SCC 645.

74. *UP State Cooperation Land Development Bank Ltd. Chandra Bhan Dubey* AIR 1999 SC 753.

75. *Usha Handa v The Lt. GOvernaer Union Territory of Delhi Raj* Bhavan MANU/DE/0007/1998.

76. *Vishaka v State of Rajasthan and Othres* AIR 1997 SC 3011.

77. *Zee Telefilms Ltd. V Union of India* (2005) 4 SCC 649.

78. *Zorastarian Cooprating Housing Society Ltd and Another v District Registrar Cooprative Soceities (Urban) and Others* (2005) SCC 632.

Contents

Introduction

The Indian Constitution is a social document as described by a number of jurists. Granville Austin (2000: 50) and Gopal Guru (2008:230) described the Indian Constitution as a social revolution. Rajiv Bhragava (2008: 4) stated that the Indian Constitution is a moral document. There are reasons that why scholars have declared Indian Constitution as a social and moral document. It is because, it abolished thousands years old inhuman social evils in one single stroke. Citizens were divided on basis of various discriminatory grounds such as caste, class, religion, place of birth, creed, colour, etc. before the enforcement of the Indian Constitution. It makes all citizens a single entity without any discrimination before the eyes of the law.

Granville Austin (2000: xi) has aptly observed:

> India's founding fathers and mothers established in the Constitution both the nation's ideals and the institutions and processes for achieving them. The ideals were national unity and integrity and a democratic and equitable society. The new society was to be achieved through a social-economic revolution pursued with a democratic spirit using constitutional, democratic institutions.

The extent to which we have received this revolution seems to be debatable. However, it was the first time after the Buddhist era in India that all human beings were treated as human beings irrespective of the circumstances. When the Indian Constitution came into force on 26th January 1950, it was first time when all citizens began to possess equal rights and duties. Moreover, it was for the first time in India, that citizens had equal social, political and economic rights. Untouchability became an offence. The Constitution made guarantees of entitlements for the socially and educationally disadvantaged groups of the society i.e. SC/ST/women and children, etc.

The preamble of the Constitution laid out the vision of the new Republic. In this vision, the central place was occupied by justice - social, economic and political. The framers of the Constitution chose social justice first, before economic and political, which resulted in India's democratic governance taking the form of a social democracy rather than any other form of democracy. This was the result of the

acknowledgement of the long drawn-out historical injustice committed to certain sections of the society.

The Constitution guarantees that there shall be no discrimination on the basis of caste, class, religion, place of birth etc. The Indian Constitution (hereinafter IC) in Part III creates a negative duty on the State to not abrogate the fundamental rights of the citizen as well as non-citizen. In Part IV the Constitution imposes the positive obligation on the State to makes laws which eradicate the socio-economic and political inequality in the country. It also places the positive obligation on the State that the State shall make such laws which help to improve the socio-economic and political lives of historically disadvantaged groups of the society.

The framers of the constitution, in recognizing the historic injustices against various sections of the people, acknowledged that it was not only the State which violated their rights, discriminated, and committed crimes against the individual but it also includes the private citizen and non-state actors. Due to this, the constitutional framers chose to address the 2500-year-old inhuman practices of caste and untouchability in India. This practice forced certain sections of the society to live under conditions worse than an animal. These deprived sections of the society did not have any rights. They were just following the duty imposed on them by the might of the dominant sections of the country.

Manu the law maker of the Hindu social order codified the caste system and divided society into four groups on the basis of the birth. These three upper groups have rights, liberty, immunity and power. On the contrary the lowest group doesn't have any rights except to fulfil their duty imposed on them by dominant groups. This division, in practice, leads to a division of labour as well as the division of socio-economic and political status of an individual. It becomes a disease which newer comes to an end. The IC gives a hope that this fundamental social evil will be eradicated.

The Indian constitution framers bore in their minds the religious genocide at the time of partition and also the Second World War. In both incidents the fundamental rights were violated at large by the State as well as the non-State actors. The Constituent Assembly knew that the non-State actors play a key role to control the life and

liberty of an individual. That is why the constitutional framers were unanimously in favour to abolish all kinds of discrimination especially the caste practice, the untouchability, *begar* or forced labour, the human trafficking, and the child exploitation in hazardous works.

If the State violates the fundamental rights of the citizens, then the remedy available in the hands of the citizens is to enforce their rights through the judicial system. On the question of the non-state actors i.e. society, caste institutions, religions institutions, private individual, NGOs, private corporations etc., the constitutional framers had the vision that it is not only the State who control and govern the life of an individual but it is the non-state actor who also plays a key role as equal to the State in discriminating and violating the fundamental rights (hereinafter FRs) of the citizens. Do these non-state actors have any constitutional obligation under the constitutional scheme? The Constituent Assembly (hereinafter CA) inserted the provisions (Article 15 (2), 17, 23 and 24) under Part III which put the citizens under the constitutional obligation as equal as the State.

The constitutional framers made individuals liable under the constitutional obligation to not discriminate with the fellow citizens. There are Articles 15 (2), 17, 23 and 24 under which the private individual has the constitutional obligation as the State has in case. These are the unique feature of the IC that imposes constitutional duty on the private individual equal to the State. Though the application of fundamental rights of the individuals is available against the State, but these articles are the exception of this general rule.

The application of fundamental rights takes place at two levels. First, between the State and the individual called 'vertical application' of the fundamental rights, and second, those fundamental rights available against the fellow citizens called 'horizontal application' of fundamental rights. In the other words, in vertical application of fundamental rights, the parties are-the State and the individual, and in horizontal application the parties are-two private individuals. Thus, Article 15 (2), 17, 23 and 24 are known as horizontal rights (hereinafter HRs) under the Constitution.

The origin or emergence of the HRs comes from two perspectives; first, from the point of view of the lack or failure of the State in the enactment of laws in accordance with the need of the society, and the second, which makes an individual as liable as the State for respecting and protecting the fundamental rights of others under the ambit of the Constitution. The object behind the insertion of these articles or horizontal rights was that the society and the other social institutions which do not come under the definition of the State, should be made liable under constitutional obligation. This constitutional obligation has been placed upon the private individual in negative form as the State has.

Article 15 (2), 17, 23 and 24 are the HRs inserted in the Constitution to achieve social justice which leads towards social and economic democracy. In this discussion the words caste and untouchability are used as HRs which is available against the citizen. Beside Articles 15 (2), 17, 23 and 24, the Indian judiciary has developed the concept of horizontal rights in which the judiciary has enforced FRs against the citizen and non-State actors. This development of horizontal application of FRs majorly comes by Article 12, 14, 21 and 21A of the IC.

These articles 15 (2), 17, 23 and 24 are the essence of social democracy in India because these article or HRs put negative obligation on the individual to not discriminate with the fellow citizen. The constitutional framers had the dream that the practice of caste and untouchability, which exists in India for 2500 years, would be dealt with. It should not be left on the shoulders of the State to eradicate these social evils but the individual and the society also has some obligation. It makes collective responsibility on the State as well as the individual to make an egalitarian society in India.

The reason behind insertion of the horizontal rights is to share the duties and rights among the citizens. According to Hohfeldian analysis, the rights and duties are co-relative with each other. The new rights come into existence when the duties are violated by the State or individual. If the constitution framers make liable only the State under the Constitution, then it was the constitutional obligation only on the State to curb the social inequality but if they not put this obligation on the citizen then citizen was only under moral obligation which has no legal sanction. Moral

duty impels individual through the heart to do or to abstain from doing something which based on conscience of human being.

This discussion will address the reasons that prohibit fellow citizens to abide by the Constitution. This discussion will analyse the problems of society or individuals that allow them to discriminate between particular sections of the society. To attempt to tread towards a social democracy, HRs may be a strong prelude. Horizontal Rights, as in the application of rights horizontally, is converse to the current scenario.

Objectives and Scope of the Study

The aim and object of this discussion titled **"Horizontal Rights in the Indian Constitution: An Analysis"** is to analyse the concepts of horizontal rights (hereinafter HRs) in the Indian Constitution. The discussion undertakes the evolution of the concept of Horizontal Rights in the India as well as in the international scenario. In this regard, the discussion will highlight the constitutional history of HRs and the Constituent Assembly debates in respect of HRs. The discussions will also analyse the judicial discourse respecting HRs, new developments in HRs and the legislation which expands the scope of HRs in India, in other words, the legislations which intensify the social democracy that is the ultimate object of HRs.

Research Questions

For analysing the concept of HRs, there are few questions which have to be answered:

1. Whether the existing method of vertical application of fundamental rights is enough to fulfil the purpose of Part III under the Indian Constitution?

2. What is the relevance of Horizontal Rights in protecting the individual's Constitutional values in India?

3. What is the Indian judicial approach in the evolution of Horizontal Rights?

Research Methodology

The discussion will draw on doctrinal method. Constituent Assembly Debates, Parliamentary Acts and State Legislatures, decisions of the Supreme Court and High Courts, reports of various commissions and government orders among others primary sources along with secondary data like broad review of relevant literatures on the questions of rights and Horizontal Rights would be dealt with. It would also cover different debates regarding Horizontal Rights. Since very little has been written on Horizontal Rights in India, the proposed research would engage with diverse international debates and perspectives.

Chapterisation

In this discussion, there are five chapters to analyse the concept of horizontal rights HRs. Each chapter deals with the concept and idea of HRs separately.

Chapter one deals with the concept of rights, its theories, and classifications of rights. The chapter has analysed the concept of right with duty, liberty, morality and the utilitarian theory. The chapter has also analysed that to deal with the fundamental issue of citizens whether existing application of rights is enough or not.

Chapter two deals with the concept and origin of the horizontal rights in India. The discussion analysed the emergence of HRs in national as well as in other domestic constitution. The chapter also analyses that how the concept of HRs has been incorporated in various Conventions and Treaties at international level. The chapter also deals with the existence of HRs in the constitution of United Kingdom, United States of America, South Africa, Canada, Germany and Ireland. The chapter has critically analysed emergence and present condition of HRs in these countries with the judicial decisions.

Chapter three deals with the diverse understanding of HRs in the IC, it basically deals with the constitutional history of FRs, and the debates of Constituent Assembly on the Articles - 15 (2), 17, 23 and 24. These FRs are available to the historically socio-economic and politically deprived sections of the society. The Article 15 (2) and 17 directly deals with the provisions of the caste and untouchability and Article 23 is also a part of it. Article 24 deals with the prohibition

of child labour at hazardous work place that also has the same condition as the Article 15 (2), 17 and 23 have. That is why the chapter is limited only to the Article 15 (2), 17, 23 and 24. It highlights the history of caste and untouchability in India. These rights enhance the social democracy in India.

Chapter four explains the Indian position of HRs through judicial interpretations. The chapter discusses the State actions doctrine and the judicial approach towards HRs in general. The discussion focuses on the theory of HRs and development of HRs though various articles like Article 12, 14, 15, 21 and 21A. Indian judiciary developed HRs under these articles and made non-State actors constitutionally liable. The discussion will try to analyse the direct and indirect horizontal rights though various judicial decisions. The chapter will critically analyse the judicial decisions which deals with the HRs and how the judiciary interpret Articles 15 (2), 17, 23 and 24.

In last, chapter five deals with the working condition of HRs in India. The chapter tries to answer the question of the social problem whether it can be put into the legal domain or if there is any other solution available to it? It deals with the nature of the Indian society, caste discrimination, the object of PoA Act, the judicial attitude towards the Articles 15 (2) and 17 and the PoA/ SC/ST Act. It deals with the future of HRs in India and various developments in the field of HRs. The chapter further analysed the Social Boycott Act, 2017 passed by Maharashtra State Assembly and The Equality Bill presented as private member Bill by Member of Parliament Dr. Shashi Tharoor in Lok Sabha on March 2017. The object of these two Bills is to fulfil the goal of Article 15 (2) and 17 of the IC which are related to abolition of the discrimination by citizen or non-State actors.

Chapter 1

The Idea of Rights

Introduction

"Rights" in the 21st century has gained immense significance. Human being need to live a life with dignity which cannot exist without recognition and effective implementation of rights. The idea of rights is applicable to human beings before the birth[1] and even after the death[2]. For a civilised society the law provides each individual as well as the State certain rights and duties. Rights are the essential requirement of human being and it should be respected and protected by individuals as well as the State. Every individual in the world has some fundamental rights which should be respected by others irrespective of any differences (Sen 2009: 335).

Generally, rights serve as a means to seek the ends of justice. Sometimes, justice is viewed in terms of securing life, liberty and property. Rights are the mechanism through which individuals claim their existence from the State. Right imposes obligation on the State, not to interfere with other's right. Non-infringement of someone's rights is the base of others independent life. Without rights no one can enjoy their life freely (Raz 1986: 205). An individual can enjoy their freedom and liberty through rights. Rawls said that to achieve equality among the citizens there should be an assurance to freely exercise the rights and liberty of every citizen (Ralws 1999: xii).

Rights form the basis to claim someone's life, liberty and property; therefore, the State should respect individual's right. The infringement of these basic rights by the State and individuals leads to injustice. It is the rights through which an individual claims justice. Rights and the duties are determinant factors which ensure justice in social and economic opportunities (Rawls 1999: 7). It is a fundamental obligation of the State to apply the concept of rights while framing policies which affect

[1] Foetus rights as future generation rights. Foetus's right is a debatable issue. It was first time discussed at global level in the case of *Roe v Wade* (410 U.S. 113.) 1973 in US. In the instant case the central issue was whether a woman has personal choice to abort their foetus or foetus has right to life and liberty? In Indian, women have no absolute right to abortion, however, it is allowed under special circumstances, under section 312 of Indian Penal Code, 1860.

[2] Under section 499 Explanation (1) of Indian Penal Code, 1860, if someone defames the reputation of deceased person then the next friend or legal representative can file a suit for defamation on behalf of the deceased.

individual's life. Therefore, it is only the rights through which individual can get the justice or can claim their existence.

In general, meaning of rights is "legal rights" not moral or natural right which is available against the State. Therefore, the State is the only source which gives birth to the rights of its citizens. Rights make the State is accountable to fulfil its obligation towards the citizens. The State cannot deny rights of any individual because rights are not the donation of God, it is a composite exercise which makes State's obligation to protect and secure the individual's existence (Dworkin 1977: 198). The existence and value of rights depends on the gravity of fundamental fulfilment of the duty of the State and individual against other individual. It is a fundamental-moral speculation that an individual can possess rights only when other individuals are under the obligation to not infringe their rights (Raz, 1986: 193).

It can be said that rights are channels to facilitate every democratic and egalitarian society. At the present juncture, one has to relook on the definitions and scope of rights since the Universal Declaration of Human Rights in 1948, which initiated the discourse about rights. These initiatives at the international level, generated obligations for the member States of United Nations to implement human rights irrespective of caste, class colour, gender, race, ethnicity, language and others grounds. Through these developments new rights like animal rights, unborn rights, and nature rights, etc. comes into existence.

The objective of the present chapter is to study the traditional and contemporary debates on rights jurisprudence which is available against the State. The discussion covers debates featuring existing application of the rights between the State and individual, and between two individuals. The vertical application (between the State and individual) is to do justice or it has to distribute with the non-State actors or the private individuals (horizontal application, i.e., application of rights among the individuals or citizens). Though, there are various debates and theories exists (Will theory, Interest theory and Contract theory, etc.) in the rights jurisprudence. Yet the current chapter intends to look upon theory which is suitable for the concept of horizontal application of rights.

The emergence of the concept of horizontal rights is based on the lack of distribution of duties by the State to the non-State actors or citizens. In other words, the State is not only entity who violates or infringes the rights and liberty of individuals, but the non-State actors, private citizens and society also play a significant role for the same. In shrinking nature of the State, State is not only the one who performs which public function to fulfil the State's obligation towards society and the nation. The State function is largely performed by non-State actors or private bodies who have no constitutional obligation to respect and protect the rights of the citizens.

The ultimate idea of rights is to be as a means as well as an end to justice. But, the idea of justice turns out to be different, as it depends on construction of rights by the State and in substantive realisation in a discrimination free environment. So, to identify clear picture of the rights this chapter undertakes etymological understanding of rights, theories of rights, classifications of rights, conflict of rights, debate between rights and duties, rights and liberty, legal, natural and moral rights, then analyses the concept of utilitarian and significance of rights.

Etymological Understanding of Rights

The various scholars have defined rights according to the socio-economic and political structure of their countries (Raz 1986: 165). Simmonds stated that the mandatory requirement to have a right to make somebody's duty compulsory against such right. Right is the pre-condition to fulfil the duty of other person (Simmonds 1998: 216). Hillel Steiner argued that rights are the core application to get justice. Without rights it is impossible to deliver justice (Steiner 1994: 2).

Salmond recognised 'a legal right as an interest recognised and protected by a rule of justice'. There can be no right without a corresponding duty and duty without corresponding right in the same manners as there cannot be a husband without wife and a father without a child' (Jayakumar 2006: 192-93). John Lock defines right as "Men being….by nature all free, equal, and independence, no one can be put out of this State and subjected to the political power of another without his consent" (Edmundson 2012: 24).

Jeremy Bentham described rights from survival perspective as **"**Rights like "miracles" or 'causes' or what-have-you have to be put to this test, and are

meaningful only if they survive it-otherwise they are literally 'nonsense', noises without reference or truth-value" (Edmundson 2012: 45). Bentham further, identifies the survival of rights from the test of who creates and implements the rights. Rights cannot exist without the existence of law (Hart 2006:167). Bentham, the positivist jurist, treated the natural or moral rights as *nonsense*.

As against Bentham, Hart identifies rights from two perspectives, i.e., primary and secondary rights. Hart explains that every individual must not infringe the rights of others as the one he possesses. Every individual has the primary duty not to be killed or assaulted or coerced by someone. In case of the infringement of these rights the individual also have secondary rights to penalise for its violation and right to get compensation for such infringement upon himself (Hart 2006: 273).

Henry Shue (Shue 1996: 14) stated that there are three correlative duties of every basic right:

I. Duties to *avoid* depriving.

II. Duties to *protect* from deprivation.

III. Duties to *aid* the deprived.

Robert Nozick defines rights as:

> Rights are to be thought of as side constraint-limits on the actions that are morally available to any agent. They are essentially negative in character, requiring each agent to refrain from performing actions of the specified type: they never require anything other than omission. And they are the agent-relative in the sense that each agent is taken to be concerned only with her own observance of the constraint. Since each constraint present itself to her simply as a limit on her conduct, she is not required be a concern for the right to try limit the conduct of others to see that rights are respected by them, and so the question of whether she should violate some rights herself in order to prevent graver violations by others does not arise (Waldron 2006: 128).

Jeremy Waldron describes rights as: "the language of rights is not restricted only upto moral and political theory. It includes positive, negative, and also traditional rights (right to freedom of speech and expression, right to religion). Positive rights

like right health, shelter and standard lifestyle. Negative and positive rights both come under the ambit of special rights" (Waldron 2006: 119).

William Edmundson, adopted a more conceptual approach towards rights in a philosophical language. Edmundson sees it as an 'empirical concept' which teaches us how we could control our behaviours towards others (Edmundson 2012:10). Rights teach the way of living (Edmundson 2012: 160). J. Raz further extends the understandings of rights from individual to the artificial person:

"Definition: 'x has a right' if and only if x can have rights, and other things being equal, an aspect of x's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.

The Principle of capacity to have rights: An individual is capable of having rights if and only if either his well-being is of ultimate value or he is an 'artificial person' (e.g. a corporation)" (Raz 2006, 40).

Raz's concept of rights relies on the interest of individual who have capacity to enjoy a right. Rights impose duty on an individual to protect and respect the interest and well-being of others. He said that only the individual that is natural or artificial have the capacity of rights.

The whole idea of Dworkin's book *Taking Rights Seriously* is to establish a strong argument for individual rights. He defines rights as "trumps" which overrule the majority's injustice on the minority (Dworkin 1977: XI). Hohfeld stated, "right is used generically and indiscriminately to denote any sort of legal advantage whether claim, privilege, power, or immunity". It correlates to duty in narrowest sense, and accordingly this means right is equal to 'claim' (Hohfeld 2016: 117).

Henry Shue stated on rights as: "A right is the rational basis, then, for a justified demand. Rights do not justify merely requests, pleas, and petitions. It is only because rights may lead to demands and not something weaker that having rights is tied as closely as it is to human dignity (Shue 1996: 14). Henry Shue further stated that: "A proclamation of a right is not the fulfilment of a right; any more than an airplane schedule is a flight. A proclamation may or may not be an initial step toward the fulfilment of the rights listed. It is frequently the substitute of the promise in the place of the fulfilment" (Shue 1996: 15).

Henry Shue (Shue 1996: 31) stated about the basic rights and what is means necessary for that right:

1. Everyone has a right to something.

2. Some other things are necessary for enjoying the first thing as a right, whatever the first is.

3. Therefore, everyone also has rights to the other things that are necessary for enjoying the first as a right.

After analysis of all definitions of great thinkers, it can be concluded that rights are the guarantee to existence of living or non-living person or future generation, foetus, animal and nature. It is only right through which an individual can compel the State as well as other individual who is under the obligation to protect and respect that right.

In the etymological understanding of rights, the second part is who can hold the rights or have capacity to hold the rights. There are three categories by which rights are being enjoyed. First, Human being - human being is the very first category who can enjoy rights. These rights are available against the State as well as individuals. Human beings can directly approach to appropriate authority of legal enforcement mechanism to enforce their rights. Human being can sue and be sued by others. Second, Legal person - these categories are depended on the will of the State. It is the fundamental principle in jurisprudence that legal or artificial body can be treated as a legal person in the eye of law. The examples of these categories are company, partnership firms, Hindu Undivided Family[3], religious idol (Temple, trust, idol, Bible, Gurugranth Saheb, etc.). Legal person can sue and be sued through their director.

Third, Dependent on Legal or Human Being -these categories consist of the unborn child, deceased person, animal, future generation, nature and environment. This category always depends on some other person, third person or legal guardian for

[3] This kind of legal person's category exists only in India. Through this provision every male person of Hindu family can register himself as separate legal entity for the contract/ corporate purpose (Kaji and Kaji,2015).

claim to enforcing their rights. These categories impose legal duty on the State as well as individual to protect them.

Theories of Rights

There are two theories in the rights jurisprudence. First - "The Choice or Will Theory" and second - "The Benefit or The Interest Theory". The supporters of both theories argued on the nature of rights as they understand the practical application of rights. Steiner, Kelson, Kant, Savigny and Hart are the great defender of "The Choice Theory" of rights, and on the other hand Bentham, Austin, Raz, MacCormich, Lyons and Tuck are the major defenders of the Benefit Theory or Interest Theory (Steiner 1994: 57). The Choice Theory of rights discusses autonomous character of the right holder whether she has choice to enforce her rights or not. It is also the choice of the right holder that an individual makes liable or not the person who is legally bound to respect that individual's right. On the other hand, the defenders of "Interest theory" argued that it is the nature of right to serve the interest of individual who possesses or enjoys the rights.

Jeremy Waldron argues on the theories of right; philosophers have different views on the idea of rights. They even have distinctions and differences on what rights people should have (Waldron 1989: 127). Waldron, earlier had stated that some rights-theories restricts the liberty of individual in the "one choice", though, there may be other "choices" human being have which enlarge the scope of right to liberty. On the other hand, there are majority of rights-theories which put choice through a hierarchy giving some choices supremacy over the others (Waldron 1981: 120).

Choice or Will Theory

Simmonds argued that the 'Will Theory' is based on systematic nature of law which claim that rights are basically inherited and the concept of will in itself extract their validity from law (Simmonds: 135). Edmundson defines the "Will Theory" by two aspects: the first is conceptual, and second, justificatory aspect. According to the conceptual aspect, it is fundamental requirement of a right that without right-holder, right cannot exist, and if exists, then it must have the choice to implement or relinquish the legal duty on the other individual who is under obligation. According

to the justificatory aspects of the choice theory, the purpose of the right is to claim an individual's autonomy (Edmundson 2012: 98).

Mill stated that "A person should be free to do as he likes in his own concerns, but he ought not to be free to do as he likes in acting for another, under the pretext that the affairs of the other are his own affairs" (Mill 1956: 127). Hart define rights as choice: (1) This right is one which all men have if they are capable of choice; they have it qua men and not only if they are members of some society or stand in some special relation to each other. (2) This right is not created or conferred by men's voluntary action; other moral rights are" (Hart 2006: 62).

Edmundson further stated there is test of "The Choice Theory" through which a right only can be recognised a legal right if it has a choice. In the Anglo-American legal system, the judges and the legal authorities do not recognise any right as legal right unless and until it fulfils "The Choice Theory Test" (Edmundson 2012: 99), but in the case of foetus and minor, this argument becomes redundant thereby meaning to that choice theory does not deal with the rights of animal, unborn and nature other than person who can use their discretion to choice (Edmundson 2012: 100).

Dr. N.K. Jayakumar quotes Mac Cormick's criticism of "Will Theory". Jayakumar stated that children do not have right to sue, but this right may be executed through the next friend or legal guardian. The question which arises here is that: What happens if that person (next friend or legal guardian) denies or refuses to defend child's rights? It would depend on his/her choice or will to sue or not, and, there is no option left in the interest or favour of children. In this case, it would be great example of defeat of the very objective of rights (Jayakumar 2006: 210).

Interest Theory or Benefit Theory

J. Raz stated on the 'Interest Theory' of rights that the fundamental object of rights depends on the interest of that individual who possesses the rights. A right can only be justified morally if it protects the interest of the rights-holder and no other individual's interest (Raz 2006: 59). Edmundson argued on the "Interest Theory" of rights, the existence of rights is based on the interest of rights-holder. This theory does not mean that the interest of others individuals and society would not be considered, but it provides focus to the protection of right-holders' interest

(Edmundson 2012: 97). It has also been argued by J. Raz that a right only exists only if it has interest of right-holder and makes other under a duty to respect of that rights (Raz 2006: 54).

The defenders of the "Interest Theory" argued that, it is the fundamentally moral character of right; a right is not recognised as a right unless and until it has the interest of right holder's. Though the Interest Theory's central argument focuses only on the individual's right, it can't discard or deny the other individual's rights. For instance, it may be possible thatthe conflict arises between two or more rights. So, it is the duty of the State or the judicial body to resolve the conflict of rights. An individual has right to life not by the choice but by interest.

Both theories have their advantages and disadvantages. Like 'Choice theory' does not take into consideration on issue of unborn child, minor, animals, legal person and the nature because neither they have the right to claim before the court nor they have any choice. The defenders of the "Choice Theory" argued that a right is not a right in proper sense unless and until it does not have the choice of right holder. This theory would not apply in any criminal cases on the ground that a right holder does not have right to choice to enforce or relinquish her right against a person who is legally bound to protect her right.

The argument of this theory seems against the nature of criminal justice system. There may be some questions to critically analysis the 'Choice Theory'. Does a rape survivor have the right to choose to make her offender liable or not? Does the State have right to choose to sue or not sue a criminal who commits genocide? If the answers of both questions go into affirmative, then the concept of justice would be redundant.

Simmonds argued that both theories on rights "Will theory" and "Interest Theory" may be rebuild or recreate for their best material form like moral values of legal rights (Simmonds 1998: 134). No theories of rights are perfect, but it appears like it is the positive aspect of the "Interest Theory" that it respects the interest and existence of future generation (foetus), animal, legal person and the nature. All living human being are legally as well as morally duty bound to protect the interest of these categories irrespective of will or choice.

Classification of Rights

Before the enforcement of Universal Declaration of Human Rights (UDHR) in 1948, the classifications of rights were restricted only up to the Constitutional and legal rights. However, there were debates existing among the jurists with regards to natural and legal rights. The UDHR expanded the nature and scope of rights to all sections of human beings irrespective of race, caste, class, colour, ethnicity, language and birthplace. These Declarations makes all individuals equal in one world.

Through the great effort of United Nations, there were various Internationals Covenants held for the well-being of not only human beings but for the animals also, such as International Convention on Civil and Political Rights (ICCPR), The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979, Earth Summit (1992) and Geneva Convention (1949) etc., which changed the nature, definition and scope of the rights. After this change, rights are not confined only to man, but they covered women, children, nature and animal.

Classification of rights had begun for the centuries ago. Grotius divided rights as perfect and imperfect rights, perfect right meant the rights which are enforceable by law or self-help while imperfect rights meant the rights which are not enforceable by law (Edmundson 2012: 17). The rights are classified on the basis of its nature and enforcement. Right in *persona* are the rights those available against the particular person for example contractual rights. Right in *rem* available against the whole world for example right to life.

Just like perfect and imperfect rights some other thinkers classified rights into different types. J Raz classified rights as Core and Derivative rights, the scholar said that some rights are derived from others, but others are not. Therefore, those rights derived from others rights are called derivative rights, and non-derivative rights are called Core rights (Raz 2006: 42). For example, right to personal liberty is among the core rights, and others rights derived from the ambit of liberty called derivative rights (Raz 2006: 43). Like in Indian Constitution (IC), right to equality is a core right and special provisions for deprived sections of the society are the derivative rights.

In the IC, there are fundamental rights (FR) as well as Constitutional rights. Though the FRs is the part of the Constitution, but they are inalienable, on the contrary, the constitutional rights can be abrogated by the State. Among the FRs - rights to equality, right to freedom, rights against exploitation, religious rights, cultural rights and educational rights of minorities are there under Part III. The difference between FRs and the constitutional rights is that FRs is fundamentally inherent and inseparable to the human beings, and the constitutional rights are subject to change. For example, rights to equality cannot be taken away by the State but right to property which is a constitutional right can be taken away by the State under the doctrine of *Eminent Domain*.

There is classification between constitutional rights and statuary rights. The constitutional rights are the rights which are provided by the Constitution and can supersede all kinds of rights. On the other hand, statuary rights are the rights made by the Parliament and the States legislatures to govern the country. For instance, "right to equality" is a fundamental right where as right to property is a constitutional right and "right to contest election" is a statutory right.

There are some other classifications of rights exist in the legal and political jurisprudence, i.e., natural and legal rights. Natural rights are those rights which are provided by the nature not by the State like right to life. These rights are based on the nature not any other external forces therefore; these rights can neither be created by the State nor by the individual. For instance, right to life cannot created by the State, it exists even before the existence of the State. Sometimes, the State denies natural rights but it does not mean that natural rights do not exist. Legal rights are the rights which are enforceable by the law.

Moral rights are the rights which are not recognised by the law, as legal rights in strict sense but these rights exist as rights. These rights are based on the human conscience. These rights claim something which does not exist or beyond the reach of law. For example, sometimes the head of the State reigns from their post on the moral basis whereas, law does not allow for that. Due to several classifications of rights there could be possibility of conflict between two or more rights. Therefore, the next section discusses about the conflict of rights.

Conflict of Rights

The conflict of rights could be arising when two or more than two rights can be claimed at the same time.

For instance, "A" has right to smoke and on the same time "B" has right to live in a clean environment. Among the two, which right would supersede it would be matter of law and fact. Both are rights in the eye of law. Another instance, if two individuals have right to freedom of speech and expression on the issue of government policies, on religion, on homosexuality, on abortion laws, on sex work, on sedition laws and on the candidature for the post of the head of the State. If the arguments go beyond debate in all above instances and convert into violence, then one can say that it is just a fight between two individuals or a conflict of rights? No, it is not mere a fight, it is a conflict of rights at the same time by two individuals.

A situation could arise when three rights, i.e., natural, moral and legal rights come in conflict. For example, if an individual asserts homosexuality as his natural right, but at the same movement, society declines this right as being against the morality. While other individuals claim that act of homosexuality is against the order of nature and that is why it cannot exist in the society. Similarly, the State could claim for it as a legal right which prohibit the homosexuality. Therefore, in this situation these three rights are in conflict on a single issue. All three rights, ultimately, are made for the wellbeing of the individual as well as for the society. Therefore, the conflict must be resolved by considering all three aspects otherwise the object of rights would be defeated.

The answer to this situation can be provided by arguments and assertion of some thinkers. Raz has stated that it is possible that rights can have conflicts with rights, but in resolving the conflict, the existence of rights should not get destroyed (Raz 2006: 56) thereby, implying that for resolving the conflict, a harmonious approach to define rights and duties should be adopted. Jeremy Waldron pointed out that the conflict of rights arises when 'a right creates a duty and that duty will not be compassable to another's right' (Waldron 2006: 136).

Jeremy Waldron further stated, the conflict of rights can emerge on the two situations, first is *intra*-rights conflict and second *Inter*-right conflict. The *intra*-right

conflicts arise when one right conflicts in many occasions. The *inter*-rights conflict is when two rights are in conflict at the same occasion (Waldron 2006: 138). Hobbes stated on Conflict of Rights, it is unavoidable and impossible situation that conflict between rights never comes to existence. Conflicts of rights emerge when there is scarcity of resources; conflict would away remain always, unless and until individuals do not relinquish their rights and liberty to the State for resolving the conflict (Edmundson 2012: 19).

Individual Rights versus Groups Rights

The scope and development of rights depend on the socio-political status of a State. In India, the society is traditionalist as well as modernist at the same time. The society does not agrees to compromise with its traditional values but at the same time it accepts the modernity. Therefore, in some issues, the Indian society is modernist and on some other issues the society is still a traditionalist. For example, individuals spend huge amount of money in modern style to perform marriage ceremony but with traditional costumes, i.e., society does not allow inter-caste and inter-religion marriages as in general practices with huge amount of dowry. An individual right of self-choice marriage is against the social order of the society. This is twenty-first century and after the 68 years of enforcement of Indian Constitution, the status of inter-caste accounts for just 5 per cent (S: 2014).

Individuals are free to eat, drink or wear whatever they please. Right to wear a cloth/dress is a fundamental right of the citizen which should be enjoyable by every citizen. On contrary, the groups of peoples-caste panchayats, religious institutions and the educational institutions infringe that right of an individual. By imposing these extra-legal rules or laws, this right is not only freely enjoyable by the common citizen of this nation but a High Court judge also faced the same problem some times. A sitting judge of Madras High Court was not allowed to enter a private club because the judge wore the ‘dhoti’ not the western dress (Subramani 2014). Exercising individual rights are difficult in a hierarchical and traditionalist country.

Minority Rights versus Majority Rights

The IC provides its citizen minority as well as majority rights as a fundamental right under the Part III. Besides, the religious rights to citizen, the minority rights grantees by the IC are on the basis of language, script and culture. The conflict between the minorities and majority rights is more a serious conflict than other conflict of rights. In this section, the discussion tries to analyse the nature of conflicts between these two rights of the citizens.

In 2016, Haryana State Assembly was addressed by a religious leader of Jain religion by Bhartiya Janta Party' Government (Wire: 2016). This incident is an example of *Hinduisation* of Indian legislature under the shadow of IC. It was a great violation of constitutional morality by the popular morality of Hindu social order of India. Through these kinds of activity, the majority wants to impose their ideology not only on the minorities but on the whole nation.

The majority of India is forcibly imposing their culture on the minorities to chanting the phrase "Bharat Mata Ki Jai" (Long live India). This comes in the conscience of Indian citizen. For instance, a Member of Legislative Assemblies (MLA) of Maharashtra State Assembly was expelled by the speaker for not chanting "Bharat Mata Ki Jai" (long live mother India) without any violation of law. On the contrary, neither the Constitution nor the laws allows such legal obligation on the citizen of India to chant this phrase (Deshpande: 2016).

The majority in India is imposing not only on the minorities but on whole nation, like Cow is mother of all Indians. The laws to protect cows are more stringent than the deprived sections of the Indian society, i.e., SC/ST, Minorities, Children's, etc. The cow supporters are called 'cow vigilantes' which is group of religious peoples who blatant by violate the FRs of the fellow citizens.

The Gujarat State on 31 March 2017 enacted the strictest law in the country on the matter of cow's protection which is non-bailable and has punishment from seven years to a life term and a fine of up to five lakhs. Now in 2017 in India, 84% States and Union Territories which is 99.38% of the total population of India comes under the cow prohibition laws. Haryana State declares cow protections laws cognizable,

non-bailable with maximum punishment of ten-year rigorous imprisonment and have maximum fine of 1 lakh (Saldanha: 2017).

In Nagaon district of Guwahati, a mob of cow vigilance killed two men on the basis of suspicions that they were cow cattle thieves (ToI: 2017). In 2017, on 1 April 2017 Pehlu Khan was killed by cow vigilant and on 23 June 2017, a young boy was killed by cow supporters in the train near Delhi (The Wire: 2017).

On 28 September 2015, Mohammad Akhlaq (50) was killed by a mob of Hindus on the rumour of consuming beef and one year later on Oct 7 2016; one of the accused of murder of Akhlaq was draped with the tricolour on his death (Vatsa: 2016). The death ceremony of an accused has celebrated in India however, as per with a soldier this is highly dangerous for the democratic nature of the India. The mobs of cow vigilantes got support from the State and on the behalf of it these mobs attack Schedule Caste and minorities every day.

In Una district of Gir Somnath of Gujarat, seven Dalits were beaten up by the so-called cow vigilant groups in which Dalit boy was tied with a car in public place. The group proudly made viral the video goes viral on the social media to terrorise in the society (Kateshiya: 2016). The conscience of the society or the community has begar to hate against the Muslims because beef is the food habit of Muslims. In India, it has economic implications for the minorities and Scheduled Caste peoples those who are doing the lather work.

The Indian majority is trying to control food habits of the minorities and other sections of the society on the basis of religion. It is highly debatable issue in the contemporary socio-political status of India. In a hierarchical society, like India, where the discrimination is in the air, the discrimination has its various forms. It can be in any form like food and drinking habit. Durkheim stated on the discrimination on the ground of eating: "we may well show that there is no reason for a society to forbid the eating of such and such meat, in itself inoffensive. But once the horror of this has become as integral part of the common conscience, it cannot disappear without a social link being broken, and that is what sane consciences obscurely feel" [sic] (Durkheim 1933: 75).

In the academic institutions of India, Hindu religious activities/Idols and temples are more omnipresent than of any other religion. This is a problematic practice being exercised in a democratic country, which can deal a severe blow on the secularism and democratic features of India, and thus it should be banned as soon as possible. According to the Indian Constitution, India is a socialist, democratic and secular country whereas in practice it seems like a Hindu country. For example, Banaras Hindu University Varanasi, Chaudhary Charan Singh University Meerut, Indian Institute of Mass Communication (IIMC) Delhi, etc. has exclusively Hindu temples in their campus premises. India is the only secular country where universities are named on the basis of religion and caste for example, Aligarh Muslim University (AMU) and Banaras Hindu University (BHU) and *Jaat* and *Jain* College in Meerut – a city in western Uttar Pradesh, India. India is the only secular country where the head of State (Prime Minister and President) are performing Hindu religious practices while they discharge their constitutional duties (Ranjan: 2014).

On judicial approach on the issue individual and group rights, the Supreme Court of India expends rights jurisprudence drastically under the phrase "life and liberty". On one hand, the Supreme Court of India enlarges the scope of "life and liberty" but on the other hand, simultaneously it deprived certain sections of the society of their basic rights. The essence of democracy is to make every individual part of it either directly or indirectly through election process. Sen argued that "Democracy is not just about elections, but the electoral process, obviously, is an important part of it" (Sen 2013: 249). Thus, Indian Parliament introduced 73rd and 74th Constitutional Amendments to introduce a three-tier system under the light of Art 40 of the Constitution, i.e., Panchayat Raj Institution.

The objective of above Amendments was to spread the participatory democracy down to grass root level, but few of the State legislatures and higher judiciary curbed the objective of those Amendments due to evidence of certain unconstitutional restrictions. Indian Supreme Court declare that constitution valid of 'two child policy' under section 175 (1) (q) and 177 (1) of Haryana Panchayati Raj Act, 1994.

The provisions of the Act allow only those candidates to contest election in Panchayat system who have only up to two living children[4].

Again in 2015, the Haryana State introduced amendment to fix educational (high school) and functional (toilets), qualifications to contest Panchayat Election, and the Supreme Court of India declared it constitutionally valid[5]. In both cases, the apex court has decided that the cases will be taking into consideration irrespective of socio-economic and political status of the society. Due to educational restrictions, 68 per cent of the Scheduled caste women and 41 per cent men disqualified from contesting Panchayat Elections. The learned academician Upendra Baxi described this judgement as a "Supreme Error" (Baxi: 2015). Why these restrictions are imposed only in the Panchayats? This is a core constitutional question which should be deals by the Supreme Court of India.

Except Civil and political right issues, there are other issues of relating dignity of human being such as LGBT's natural rights. These communities are the most vulnerable communities among all vulnerable communities. As the Supreme Court of India denied rights to contest election of disadvantaged sections, the same hands offs approach applies in the matter of LGBT's fundamental rights[6]. The apex court denied the rights of LGBTs just because they are not fit for under the pain and pleasure theory. Sen stated that "the special nature of Indian inequalities has an important bearing on the priorities of struggles for social justice" (Sen 2013: 281).

In all kinds of justice, the preamble and the Constitution of India has a goal to achieve social justice first than others. That is why the constitutional framers makes the provision under Part III which make private individual or non-State actors liable under the constitutional obligation equally with the State in the matter of social justice.

Debate between Rights and Duties

Rights and duties are correlative to each-others. The concept of rights is incomplete without the concept of duty. In other words, rights possess duty within itself. In

[4] Javed Khan V State of Haryana and Others (2003) 8 SCC 369.
[5] Rajbala v State of Haryana and Others (2015) 1 SCC 463.
[6] Suresh Kumar Kaushal v Naz Foundation (Civil Appeal No 10972 of 2013).

debate of rights and duty two theories exist, first -rights-based theory, and second - duty-based theory. Raz stated, 'A right-based morality is essentially a morality of rights and duties' (Raz 1986: 195). Rights-based theory is the theory of individualist moral theory based on humanitarian principles (Raz 1986: 198). The central argument or approach of rights-based theory is that it believes in independence of an individual than behaviour of individual's movement. It argued about the perception or choice of individual. The duty-based theory focused on the moral values of the human behaviour.

Kant rightly said that 'tell a lie' is wrong' at all irrespective whatever it is good or bad because wrong is wrong (Dworkin 1977: 172). Rawls stated that fundamental rights and duties are foundation of the society through which the social intercourse becomes healthy (Ralws 1999: 6). Mill stated that duty is like a debt, like a person is under the obligation to repay his debt same as duty is the obligation on every individual (Hart 2006: 172). Rights and duties are the fundamental principles on which the future of an egalitarian society depends. These are the egalitarian principles through which the ultimate goal of democracy could be achieved.

Dworkin argued that in a democratic system there should be respect and protection of every individual's right by others even if they do not like these laws or rights. It is the moral and legal duty of everyone to obey the laws and rights of other individuals recognised by the State. Though it is the fundamental duty of a citizen to obey the law, but it is not the absolute duty of a citizen because it may be possible that the State or society makes it on unjust, unfair and unreasonable laws. Individuals could deny their duty towards the State in that case (Dworkin 1977: 186).

Grotius stated that it is the supreme duty of human being to respect other person's life greater than himself (Edmundson 2012: 17). Some academicians give more importance on duty than rights and *vice versa.* It varies from person to person that what is great than others. Raz argued that there is no difference between duties and obligations. He said that rights are the basis of duties (Raz 2006: 41).

The nature of freedom and liberty is that every individual must respect each other's freedom and liberty otherwise; the object of these would be defeat. Every individual is under the obligation that not to deprive other's freedom (Mill 1956: 17). An

individual seems free up to the extent he does not violate or infringe other's freedom that he possesses (Mill 1956: 127). Bentham said, right to freedom does not go up to irrationality or to do wrong (Berlin 1969: 148).

Kant argued that it is the State that creates our rights and duties not any other corporal laws. The State secures us these rights and duties and we obey it because we are prudent person (Edmundson 2012: 29). In a democratic institution, it is the State which is capable to create or abolish rights and duties in practical sense. Raz argued that there can be possibility that the conflict between two rights and between rights and duties would emerge. In that situation if the duty overrules the right then there will no existence of both (Raz 2006: 56).

In general, conflicts emerge between two rights and between rights and duties in a society but for the adjudication of this conflict, the judiciary is the sole institution to resolve this conflict. A balanced approach which gives equal weightage to rights and duties will be the best approach for a healthy democracy. Dworkin said that both rights and duty can be justified through their applications. He does not believe that right and duties are correlated with each-others like one are opposite to others as a coin (Dworkin 1977: 171).

How far a society is egalitarian depends upon the society or citizen's attitude of how do they fulfil their duties? Untouchability and racial discriminations are become unconstitutional and crime in India and USA respectively, but unfortunately these inhuman practises still exist in both countries due to the dominant classes. These practices are existing in the society just because people do not agree to fulfil their duty or respect the constitutional obligations. Rights and laws are there but to what extent the State is willing to implement or execute these rights and laws is a question which the State needs to answer. Is mere proclaiming of a right enough to human being instead of effective implementations of these rights?

The State is under obligation to fulfil needs of the society or to deals with the crucial issues arising among the citizens and between the State and citizen. To being the State under constitutional obligation, the Indian Constitution framers inserted Part IV titled 'Directive Principles of the State Policy (DPSP) in the Constitution which

put the positive obligation on State to fulfil the socio-economic and political goals of the Constitution.

Part IV also states that it is the State obligation to reduce the socio-economic and political inequality among the citizens. The Indian Constitution framers impose the duty on the State but did not put this Part under the judicial subject because the Constitution framers had the bad experience of the colonial rule of 200 years, and they believed that Indian will do justice to the nation. Therefore, they might be thinking that after the independence the Indian politician must serve the nation.

The duty of the State was present in the original text of the Constitution. The Indian Parliament realised after 26 years later that the duty should be fulfilled by the citizens and the Parliament added 42 Amendment in the Constitution in 1976 Part IVA 'fundamental duties' of the citizen. Article 51A fills the gap of duties on the citizen while citizens enjoy only the Fundamental Rights. Article 51A (e) and (f) states that duty of the citizen to develop brotherhood humanism and scientific temperament. Interestingly, the duties of the State as well as the citizen are not enforceable by any court of law in India.

In Part III of the IC, there are negative duties (or negative rights) of both the State as well as the citizen which can be enforceable by the court. On the other hand, Part IV and IVA make positive duty on the State and the citizen. In Part III, the entire FRs can be enforced against the State but not all FRs are available against the citizen. Only certain Articles[7] are available against the citizen under Part III of IC. These are the negative rights on the citizen to control their action against certain rights.

The negative rights can be enforceable by the court directly. On contrary, positive rights can be enforceable only after the positive rights or duties are converted into the law. It can be asked that when fundamental duties are not enforceable then what the relevance of it in the Constitution is. Are these provisions a mere pious obligation on the State and the citizen? The answer to this question would be

[7] Articles 15 (2), 17, 23 and 24 are directly available against the citizen or the non-State actors. On the other hand, the Indian judiciary through its interpretation also make the Article 12, 14, 21 and 21 A enforceable against the citizen. See Chapter 4 which deals on the issue in detail.

negative in the eye of Indian Constitutional framework because the Indian judiciary enforced some duties through its jurisprudential interpretations[8].

This might be a rare example of the implementation of the fundamental duty of the citizens but reason behind to enforce this duty the law by the apex court u/a 141 is simple that the citizens do not fulfil their duty and thus the court takes a stand to make a law. The breach of the duty leads to emergence of new law or rights which has object to restore the prior duty which had been violated. The human being has to have some sense of duty like duty to take care of others, duty to not to torture or kill others, duty to have peaceful society and duty to maintain scientific temperament and common brotherhood. The purpose of law and rights is to maintain security and peace among the individuals and society. For violation of these duties by the citizens, it is the State's duty to make these moral duties into legal duty to control the discriminatory and violent behaviours of the citizens.

The emergence of new rights depends on the breach of duties. For example, if an individual is willing to fulfil his duty towards his wife and children then the question of right to maintenance of his wife and children will never arise. If the State is willing to fulfil its duty towards citizens regarding welfare, then there is no need of positive rights of citizens. If the Government is honest for doing its job with the bonafide intention, then there is no need of citizen's right to information. There was no need of feminist jurisprudence if the men were fulfilling their obligation to treat women equally. From the ancient to till date, women are fighting for their existence as a human being like man. For example, in India, women still not allowed in certain temples due to pure and pollution policy of religion.

Raz took a strong stand on the rights and stated that it is the nature of rights to create duties, not duty creates the rights. The correlative theory of rights does not consider this fundamental aspect of rights (Raz 2006: 45). It is the duty of the State or individual to respect other individual's right to life, liberty and property even before the State recognises it as a right. We need both rights and duty for the democratic

[8] The expansion of the Article 21 of the Constitution is the result of the enforcement of the fundamental duty of the State under the phrase of 'life and liberty'. On 30 November 2016, the Supreme Court of Indian in writ petition 855/2016 *Shyam Narayan Chouksey v Union of India*, enforced Article 51A (a) and held that in every cinema there shall be played National Anthem. The apex court enforced the fundamental duty of the citizen to show respect to National Anthem.

institution. It is not possible that individual and the State pay more attention to their duty rather than rights. For such problem, the sole remedy is available in the hand of citizen is 'rights'. It will be injustice to say that rights are supreme over duty or *vice-versa*. Both are necessary for the development of the society.

Rights and Liberty

Rights and liberty are fundamentally two different concepts and both are essential for the individuals. Rights and liberty make an individual free or self-government. Certain rights and liberty make an individual autonomous therefore, an individual is free to do whatever his mind or body pleases (Mill 1956: 13). Bentham stated that the foundation of rights depends on the principle of liberty (Edmundson 2012: 47). Mill stated that the liberty is the concept which individual can use it as 'a protection against the tyranny of the political rulers' (Mill 1956: 3). Berlin Stated that an individual is free as far as she should not restrict the other's liberty or freedom to do whatever she wants to do (Berlin 1969: 122).

It is true that liberty is the basic elements of the human being through which one can survive and claim a dignity full life. The question arises here as to what are the means through which an individual can claim their liberty? It is only the rights through which individuals can claim their life and liberty.

Mill strongly defended the principle of liberty. Mill argued that human being have liberty to conscience, liberty to absolute freedom and expression on all issue relating to him whether they are legal, moral, practical and religious or related to science (Mill 1956: 16). The principle of liberty treats an individual as an autonomous on her body and mind. The individual can claim to be a part of any social or religious group because of liberty.

Kant argued that there is no greater value in the world than individual (Berlin 1969: 137). Rights and liberty are what the State recognised therefore, the State is the sole source which makes rights and liberty legal. In the other words, it depends on the socio-political structure of the State to legalise certain rights. For examples, in the debate of "homosexuality" the central issue is liberty which id claimed by individuals and denied by the State. It is the argument from the supporter of homosexuality that an individual is sovereign on their body and mind that is why it

is the State's obligation to protect individual's liberty. On the other hand, the State denies this liberty on the basis of public health and morality.

Another instance of liberty could be "sex work". Advocates of sex work defend it on the basis of individual's liberty and they want to put sex work into the category of "work'. On the other hand, there are advocates of anti-sex work and to legalise sex work (Shah 2003: 80). It is a continuing ting debate whether "sex work" should be treated as a work or not.

There can be another example of rights and liberty, i.e., "abortion". This is a highly debatable issue since *Row v Wade*[9] in the rights jurisprudence. In this case the life and liberty of women as well as foetus are important. It could be claimed by the women's point of view that for the sake of women's life the decision of abortion could be permissible in exceptional circumstances. On the other hand, foetus also has right to life and liberty. Here the central argument is that whether abortion could be treated as right or not.

There is another debatable instance on this issue, i.e., "right to suicide". Individuals can claim that "suicide" is their right because they are the owner of their body and they can do what they wish. There is a claim from the side of suicide defenders that it is individuals' liberty to take her life or not. They claim that the State has no power to take their rights to kill themselves. The natural rights theories claim that people cannot kill themselves because it is God who gives birth and who only have right to take it.

Above all, instances are based on the central argument of liberty. Liberty to do (positive liberty) something is a subject to law which recognised and protect by the State. The State makes some liberty to do something and some liberty (negative liberty) not to do something. Like rights can be positive and negative, liberty is also of two kinds, positive liberty and negative liberty. Isaiah Berlin describe that negative liberty is the liberty that depends on the choice because the choice cannot be free in all time, and negative liberty is not easy to calculate (Berlin 1969: 130). Positive liberty means a liberty which makes an individual independent on his body and mind, in the other words an autonomous nature is a

[9]410 U.S. 113. 1973.

sense of positive liberty. For example, 'A' is free to do whatever he wants to do (Berlin 1969: 131).

Isaiah Berlin in his classic text "Two Concept of Liberty" stated that libertarian like Locke and Mill in England, and Constant and Tocqueville in France argued that there ought to be minimum area of personal freedom which must not be violated. They argued that there must be a clear demarcation between individuals' private life and public authority. Berlin stated that all Western Liberals think that it is the only thing (liberty) which should not be deprived at any cost, but in this process some enjoy more liberty on the price of others. Berlin argued that 'liberty is not the only goal of men' (Berlin 1969: 125).

Liberty in absolute manner leads to tyranny. It must be there but not in absolute manner. Some accountability must be there when the State or judiciary recognised any liberty like judges of the Supreme Court enjoy full liberty while they interpret the constitution and laws. It is not any accountability or responsibility on the judges to decide a case even they can interpret law against the sprite of the constitution. Liberty should not be greater than rights because it is nature of liberty that individual demand absolute liberty and absolute liberty leads towards tyranny.

In the debate of rights and liberty, it can be seen that majority of the authorities are demands more absolute liberty to an individual than rights. Liberty should be there but it should respect other's liberty and freedom. It is only rights through which liberty can be claim against the State.

Rights in Law and Morality

This section further discusses the concepts and debates on legal, natural and moral rights. Amartya Sen articulated that human rights are derived from the human being not from any nation (Sen 2009: 143). The concept of natural rights includes the idea that these rights are assigned in the first instance to persons, and they are given a special weight (Rawls 1999: 442). This debate is primarily based upon two school of thoughts; first, positive school, and seconds the natural school. The positive school believed that law is law; it does not matter whether the law is good or bad. This school focuses on 'what it is' not 'what ought to be'. The approach and philosophy

of positivist school is as an executive body of the State. The world is subject to change and the change comes through only natural school not positivist school.

There was a time when blacks were sold and purchased as an article under the preview of "law" in the West, and the untouchability was valid "law" in India. These inhuman laws were born and brought up within the philosophy of positivist and therefore, these laws were never challenged by this school. In United States, there was very settled law called "separate but equal" which was ultimately scrapped by the US Supreme Court in the case of *Brown v Board of Education*[10], where it was declared that all blacks and white are equal. On the other hand, the Indian Constitution in 1950, for the first time makes untouchability unconstitutional under Article 17 of the Constitution.

There is another debate between legal and natural rights, i.e., abortion right. The case of *Roe v Wade*[11] started the debate on the abortion rights of a mother versus right to life of a foetus, and this debate is still going on. The concept of "surrogacy" is expansion of several new rights like right to surrogate mother and father, and right to biological mother and father. It is the need of society that every individual should have the right to parenthood.

At the present juncture, a debate on LGBT's rights is going on around the globe which also enhanced the natural law and the concept of morality because every individual has right to live with dignity while the positivist school said that it is against the law as well as God. Raz stated on homosexual: "Homosexuals cannot do that if their society does not recognize and regulate a pattern of relationship which could apply to them. They can imitate some others recognized relationship but essentially they have to develop their relations as they go along, and do not have the option of benefiting from existing social frameworks" (Raz 1986: 206).

The nature of law is subject to change according to the need and circumstances of the society. It is a philosophical question that from where this "change" comes. What is source of this change and how it becomes a law? The answers of these questions exist in the natural school not in positivist school because positivists do

[10]Brown v Board of Education, 347 U.S. 483, (1954).
[11] 410 U.S. 113.

not think and believe about gravity of word “why” instead of “what”. Means the word “why” is sole responsible for the change of the society instead of “what”.

Bentham’s theory of natural rights states that “Rights are the fruits of the law and of the law alone; there are no rights without law - no rights contrary to law - no rights anterior to law”. Hart supports Bentham’s position on natural rights and states that rights mean legal rights and admit that natural law is just like ‘a son that never had a father’ (Hart 2006: 166). Jeremy Bentham said that natural rights are nothing but delusion. These rights do not stand in any legal system and they are just metaphorical. The natural rights are simply nonsense (Edmundson 2012: 45). Hart defines Bentham’s two kinds of legal rights as liberty rights and right to service. According to him, liberty rights refer to the right to do an act which is free from any legal duty. Right to service means these rights which come under the legal duty to do something or abstain from doing something (Hart 2006: 169).

Dworkin argued that the positivist cannot understand the nature and gravity of pre-legislation rights. They just decline the existence of any rights or natural rights which could be in existence prior to legalising them (Dworkin 1977: XI). Hart describes that natural rights are the rights of all human beings. He had two reasons to define natural rights first-these are rights for all human beings those who have the capacity to choice, and second - these are the rights which cannot be created by human beings (Hart 2006: 62).

Hobbes’s theory of natural rights argues that natural rights are the protection of human being. It is a liberty and capacity through which individual can preserve. Natural rights provide freedom to do anything which would depend on the conscience and wisdom of individuals (Edmundson 2012: 19). Every individual should respect other’s rights as both come under one universal domain equally (Sen 2009: 111). Dworkin argued that substantial contemporary theories are against the concept of natural rights just because of the influence of Bentham’s argument that natural right are non-sense (Dworkin 1977: XI).

The eighteenth century’s natural rights now treated as human rights. It is only the time and words change but the subject matter and the nature is remaining same (Edmundson 2012: 155). In the first history of rights, the French National Assembly

announced the rights of man and citizen as human rights and also declared them ‘natural, imprescriptible and inalienable (Edmundson 2012: 34).

In the 21st century, everyone is asserting and fighting for their right to existence. The scope or periphery of rights is not limited only to the living or legal person but now it covers the rights of future generation and animals. In the contemporary times, there is extraordinary jurisprudence which emerged for protection of the life of animals and environment. The international organizations are consistently trying to save this planet by imposing certain duties and obligations on both developed and developing countries. In our understanding, rights are the guarantee to existence of human and animals. It is universal law that all living species have right to life which is not specifically available only to human being. Humans proved to be supreme species on the earth therefore, human being is fundamentally duty bound to protect environment and animals.

Though Bentham never recognised natural rights of human being but he had foresight and soft corner for the future of animals. Bentham argued that question is not whether that animals can talk or be rational but the question is, they feel hurt? He had the vision that the day will come when animals have all rights which could never been taken from them (Edmundson 2012: 50). United Nations’ Declaration held in 1980 for the protection of animal rights that all animals are born equal and have the right to life and existence. Declaration banned the exploitation of animals by human being. It also banned the practice of animal abuse and violence in the cinema and television. This was the milestone for the animal rights. This Declaration is solely responsible for the emergence of animal jurisprudence. The highly appreciable decision taken by the authority was that treat mass killing of animal as genocide (Flew 1989: 36).

The reaches of rights are not restricted only to the human being but it also covers the animals and environment. Through effort of United Nations, the natural rights have become legal rights not only for human beings but for the animal and environment also. In last few decades, there was not such kind of jurisprudence developed which talked about animal rights. At this point of time, democratic countries have laws for the protection of animals and environment and violation of these rights or protection

has become crime. It is the State obligation which protects the rights of animals and environment.

To analyse the significance of moral rights I have taken help of following four examples-The first is- if "A" an individual is driving a car at highway and found "B" an injured person on the way, which required instant treatment to save the life, and "A" could not help "B", and consequently "B" died. In this case, there is no legal obligation on "A" to save "B", therefore "A" could not commit any crime but "A" did an act which is a nature of morally wrong.

Second, if a person "A" who is well trained swimmer stands on the bank of a river and did not save the life of a person "B" who is drowning in the river. Consequently, "B" died.

Third, if lawyer "A" deliberately does not argue in front of the court in the defence of their client and in consequence, the client "B" loses his case.

Fourth, if the State intentionally does not provide minimum means of livelihood to its citizen, consequently people die of are starvation. Does the Statesman become legally liable for the same?

All these cases do not make an individual criminal just because of lack of legal status. There is not a legal duty on any individual in all above examples. All individual only enjoy their legal right as they please. The legal rights theorists' end the debate just by saying that there is no legal obligation on the individual to save the other individual.

In all examples, there is something wrong (morally wrong) on the humanitarian ground. There is a well settled law that every person has fundamental rights to life but this right does not mean freedom to murder or injure another person. The phrase 'not torture or kill to other' should include 'save the others'. It is the individual's duty to save the life of every individual, this moral duty of individual should be changed into legal duty because "if you want to save your own life than you must save the others life as well". In these cases, if the victim "B" died and "A" does not realise their moral duty then there is the only way to convert this moral duty into

legal duty because “B” also has the right to life, and “A” become the killer in moral sense.

Dworkin strongly argued that it is the duty of the State to give legal status of moral rights either through statutes or through judiciary (Dworkin 1977: 197). Raz argued that morality is the foundation of rights. Moral rights bring individual’s interest and objectives under the limitation for the interest of another individual (Raz 1986: 214). According to Nozick’s account on moral rights, morality is the basis of rights through which the absoluteness of rights restraint. These rights make the individuals to respect or not violate others rights or freedom (Hart 2006: 273). Dworkin argued that ‘political morality is rights-based’. J.L. Macki also stated that the concept of morality is right-based (Raz, 1986: 193).

The moral rights are as necessary as legal. It is impossible to make everything legal that is why moral rights should exist in the society. Moral rights must be in accordance with the morality of the constitution. If the moral rights are against the spirit of the Constitution, then society as well as individual makes everything moral as their choice. For example, people who believe in patriarchy may say women do not have equal right to men. Those who believe in racism and untouchability may torture people as their moral rights. It is the fundamental duty of the State to impose legal as well as moral duty on the individuals to respect the other’s rights.

The morality is varying from place to place and person to person. In Britain, the adultery is not a crime but in India it is. In western countries parents are not allowed to beat their children. On the contrary, Indian parents do it. In India the morality among the Hindus is that every younger or inferior has to touch the feet of elders or superior to them but this practice is not followed by Muslims and Christians. Tell a lie is a matter of moral value which has now becomes a crime as law recognised it. Theft was a moral wrong which became crime. These examples show that morality is the foundation of law. Or sometimes it has the prior condition of law because moral values are treated as a usage and custom by the society which is socially recognised law and later on the legislation legalise it.

After the analysis, the debate of natural, legal and moral rights in this section, the discussion will highlight the debate of utilitarian and the significance of rights in

next section. The objective of this analysis is to understand the significance of rights in the theory of utilitarian.

The Concept of Utilitarian and Significance of Rights

Bentham and Mill, the great defenders of the Utilitarianism argued that utilitarianism means "Everybody is count for one, nobody for more than one". This theory depends on the concept of pain and pleasure of maximum number of individuals. That means the State should provide maximum pleasure to individual and reduce the pain (Hart 2006: 271). In this theory, individual counts as either for pleasure or for pain neither more nor less. In strict sense, the value of rights has no place in case of utilitarian approach. For example, in a country where majority of the State made a law which do not take into account the minority's rights, then such law would have justified because it make majority happy on account of minority.

According to utilitarian theory it is justified principle because it gives maximum individual pleasure. Mill argued that the utility is the fundamental object for the individual progress (Mill 1956:14). Raz strongly declined the concept of utilitarian; he argued that this theory is essentially against the concept of equality. According to Raz, universality should be the primary condition for any egalitarian principle and the principle of utilitarian is not justified on the parameters of universality (Raz 1986: 222).

John Rawls rejected utilitarian as an adequate means to protect the rights and liberties of citizens in a democratic setup. Rawls preferred the principle of social contract than utilitarian and also stated that rights, liberty and equality are the sole features of a democratic institution (Ralws 1999: XII). Hart argued that for the development of human being, liberty is highly valuable thing and it should be protected only if the "anti-utilitarian rights" will exist in the society (Hart 2006: 286).

Dworkin stated that citizens can oppose the government's decisions which do not take into consideration the general welfare (Dworkin 1977: XI). John Rawls argued in his famous work *A Theory of Justice* that "Utilitarianism does not take seriously the distinction between the persons" (Hart 2006: 270). Dworkin argued that for claiming individual rights it is necessary to go beyond the concept of utility

(Dworkin 1977: 271). Dworkin further argued that the concept of utilitarian claims external preference of the individuals. In utilitarianism, there are no possibilities that individuals treated as equal (Dworkin 1977: 275).

It is the essential and fundamental principle of democracy that every individual have same value. In the utilitarian theory, the central argument is to make majority happy and rest (the minority) of the people do not have any space. Minority's right and liberty can only survive in a majority State when majority supports their dissent voice (Sen 2009: 337). Dworkin defend the minorities' rights against the majority rule: "The institution of rights is therefore crucial, because it represent the majority's promise to the minorities that their dignity and equality will be respected" (Dworkin 1977: 205).

Utilitarian argument of the rights does not provide any space for the minority. The majority of any country draws their power from particular religion, race or caste. The power of that particular religion or race or caste cannot support the other disadvantage or minorities. The conflict of the minority and majority's interest defiantly emerged on the issue of race or religion. There are chances when minorities' personal laws are conflict with the Constitution. For example, whether a Muslim soldier has right to have beard (this is a fundamental practice of Muslim religion) in any democratic (or non-Islamic) countries' army like US, UK and India? The answer would be in negative[12] because it is religious right and it will be allowed in particular religious countries only. Then in that circumstance the argument of utilitarian would curb the religious right of a Muslim Soldier on the happiness of majority.

In a democratic country, the existence of individual or minority's rights should be protected by the State. Their rights should not be sacrificed for the interest of majority or the State's decision which is fundamentally against the spirit of rights. Dworkin strongly attacked utilitarian concept and said that 'individual rights are politically trumps'. Right as a trump can overrule the decision of majority or the State if the decision defeats the autonomy of that right holder (Dworkin 1977: XI). Though, there is a huge development which has been materialized by various

[12] Negative means, a secular country cannot practice any religious practise in the State functions, but can we say that a religious right is less important than any other rights? It is debatable question.

authorities in the contemporary rights jurisprudence, but among all, Dworkin is the greatest defender of individual's right.

The Development of Rights

Like all things have its past, present and future, rights also have the same. In the 21st century, everyone is asserting and fighting for their right to existence. The scope or periphery of rights is not limited only to the living or legal person but now it covers the rights of future generation and animals. In the history of rights, rights were only enjoyable by the dominant sections of the community. The philosophy of do's and don'ts was well recognised in ancient India which allow lower stratum of the society to follow duty to serve to the higher stratum without enjoying any rights.

In America, the Bill of Rights did not recognise blacks as human. There was a famous doctrine established by the US Supreme Court "Separate but Equal" (*Plessy v Ferguson*[13], 1896), meaning blacks have rights but only among blacks not with White man. American Supreme Court ended this racial doctrine in 1954 (*Brown v Board of Education*[14]) where the court admitted that Blacks have right to study with white. Right to vote is the basis of democracy but America denied Black's rights to vote till the end of 1970. On the other hand, Indian Constitution makes untouchability unconstitutional under Article 17 (1950) and provides voting right to every citizen irrespective of caste, class and religion. Unfortunately, Blacks in west and Untouchables in India are still fighting for their fundamental right.

Now the question arises here that if the constitution and laws are there then what are the reasons behind existence of untouchability and racism in the society? Why the Black's and Untouchables are still fighting for their dignity? The answers to these questions depend on the intention of dominant class who have the whole resources of the countries. These dominant classes and castes do not take seriously the concept of rights of every individual. That is why the issue of non-implementation of rights comes to existence which leads to injustice.

William Edmundson stated that there are two periods in the history of rights, first and second expansionary era. He said that the 'first period was started in the late

[13] 163 U.S. 537, 1896.
[14] 347 U.S. 483, 1954

eighteen century, about the American Declaration of Independence in 1776 and the end of the French Reign of Terror in 1794'. The second period begins with the Universal Declaration of Human Rights in 1948 just after the Second World War. About the end of second period the author said, "we do not know whether the second expansionary period will end, or has ended, or when" (Edmundson 2012: 11).

In the development of rights one thing changed the nature of rights, i.e., gender issue. What we call now "human rights" the same was called "natural rights" in eighteenth century (Edmundson 2012: 155) and the term human right is more gender-neutral than "rights of man" (Edmundson 2012: 158). Upendra Baxi stated that the term 'human' denote to man not women and same as the term 'person' denote to son not daughter that is why these words are sexist and not gender neutral. Baxi has strong argument that the word 'huper' which is combination of first letters of the words 'human' and 'person' would replace these gender biased words. In the other words, Baxi defines human rights as 'huper rights' (Baxi 2012: 1).

India is a country where majority of the people are fighting for their first and second generation's rights, and there are only few who talks available about third generation rights. However, Indian Constitution provides many rights under Part III (Fundamental Rights) which are enforceable before the court. Part IV (Directive Principles of State Policy) of the Constitution talks about the socio-economic rights of the citizens but these rights are non-enforceable before the court. The Supreme Court of India indirectly implements these principles under the preview of article 21 of the Constitution.

The "first generation" human rights are civil and political rights, and second generation rights are economic, social and cultural rights (Edmundson 2012: 141). The third generation rights deal with the rights of future generation, right to environment which are not the form of individual rights but group rights which denotes to humankind (Edmundson 2012: 143). Ralws states that rights and opportunities are the fundamental features of a society through which individuals flourish their aim (Ralws 1999: 28).

It is the philosophical question that what would be the periphery of rights or how can an individual enjoy their rights in an absolute manner? Can the State abrogate the

rights of individuals if so, in what circumstances? Dworkin has answered all these questions that the government has right to abrogate personal rights of its citizen in case of emergency or State of war but this emergency or war must be genuine (Dworkin 1977: 195). It means that no one is in favour to make rights as absolute but the State should not interfere in the life of individual without any cause.

Conclusion

Throughout the discussion, it came up very clearly that all thinkers and philosophers admitted that the concepts of rights are to protect the individual's life and liberty against arbitrary and discriminatory actions of the State. Dworkin argued that the concept of rights is against the State not private individual (Dworkin 1977: 184). One can be disagree here with Dowrkin's explanations that rights are available only against the State. Not only Dworkin, but all other philosophers also focused only on vertical application of rights and ignored horizontal applications of the rights which need to be reconsidered. Though at that time the nature of the State was no shrinking like as it has but now the non-State actors very often perform the State's function without any constitutional limitation. Therefore, there is a need to relook on the application of rights to choose which method, i.e., vertical or horizontal is more suitable at the contemporary juncture.

Human being cannot survive without society and it is also truth that individual's lives cannot be governed only by the rules and regulations. Societies have their own rules and regulations which affect private and public life of individuals. There are many other factors which exist in all societies through which the human governed like social, cultural, religious, moral, political, economic, and political factor. It is may be possible that societies' laws and moralities goes against morality of the constitution. Then in this situation the rights are the only weapon through which human being could survive in public and private sphere.

Beside individual's rights, a human being is ultimate live in a social group through which she develops herself socially and morally. It is the fact that each group does not have equal status in the society. In every society, there are some dominant social group exists, and they capture whole resources of the society. Therefore, individual need rights as well as social rights, because individuals spend a major part of their

life in the society. Rawls's concept of justice depends on the allocation of rights and duties, and how they adequately define to get social benefits (Rawls 1999: 9). Rawls argued for social rights that for a just society there should be basic rights and duties assigned to the citizens, and they (citizen) have to decide that how they should maintain and respect of these rights and duties against each other to establish their society (Ralws 1999: 10).

Though the Choice and Interest Theory on rights exist but there is a need of more philosophical debate on it. Presently, the debate is stuck at this point, but it has to initiate in this particular direction. It is necessary that the conflicts of rights should arise but question is whether it can be solved by the judiciary or the State. The individual interest can create conflict due to moral and political matters (Waldron 2006: 129), but it the duty of the State or the judiciary to solve the conflict. This approach of rights would restrict the scope and future of rights.

Ultimately individuals are the subject of the democracy and the society. For that, the State as well as individual both has rights and duties to maintain the democratic values of the egalitarian society. In that structure neither the State nor individual should breach their duty to build a healthy society. Neither the State nor the individual should possess the absolute right or liberty. Rights should not be absolute but the object of rights must not be diluted by the State or any other individual.

As Dworkin strongly argued that, "If the Government does not take rights seriously, then it does not take law seriously either" (Dworkin 1977: 205). The chapter also finds that rights and duties should be respected and protected by the State and the individual. It is the duty of the State to recognise the moral and natural rights as legal rights as per the needs of the society on the parameters on universality. The failure of the duties by the State to do justice to the citizens gave birth to new rights because of the existing debate and application of rights, which is between the State and the individual (vertical application of rights) and does not seem sufficient to do justice.

Therefore, it can be concluded that traditional application of rights, i.e., vertical between State and the individual is not enough to do justice to the citizens. The horizontal application of rights has to control the discrimination or violation of the

FRs by the non-State actors or private individual. In above discussion the scope and development of rights has been discussed but at the present juncture there is a need to relook at the application of the rights or in other words the distribution of duties of the State with the non-State actors or individuals.

The standard rights based approach has not been able to emphasise duties adequately. Therefore, it is a high time to make application of the rights horizontally as well as vertically because in the changing nature of the State's function leads to injustice with the citizens. Finally, at the end of the discussion it can be concluded that our rights depend on everyone's rights.

Chapter 2

Horizontal Rights across Jurisdictions

Introduction

This chapter will discuss the idea of horizontal rights (hereafter HRs), as well as the origin of HRs. Along with Indian Constitution, it will also look at the concept of HRs at global level. In the other words the chapter tries to trace the origin and the development of HRs in the Indian Constitution as well as in developed nations like US, UK, Germany, South Africa, Ireland and Canada. The chapter will also trace the concept of HRs in the international covenants, conventions and treaties. The chapter will be divided into three parts, first consisting of an exploration of the development of HRs found in the contents of Internationals Convents, Conventions and Treaties; the second section surveys the origin and development of HRs in domestic Constitutions; and the third part concentrates on the Indian experience in this regard.

The previous chapter have already discussed the idea of rights in the previous chapter and the general understanding about the rights, theories of rights, and existing debate of rights, status of rights in India and about the future of rights. In that sense the research is come to the conclusion that the existing application of rights is not enough in the era where the scope and the nature of the State goes limited gradually. The State, limited up to the police, army and the railways and others national emergence services, on the contrary, all other services fulfil solely either by the private individual or organization or under the Public Private Partnership schemes.

In that case if the non-State actors acquire the larger space than the State in the society without any constitutional obligation. Therefore, it is needed to look upon other way that how to tackle the issues rise before the nation regarding the application of fundamental rights. That is why the object of this chapter is to look into the new jurisprudence of fundamental rights and how it works. The research will find out answers of these problems in this chapter.

Epistemological definition of Horizontal Rights

The discussion in the section will deal the definition of the HRs as the contemporary authorities define.

Gardbaum stated that there are "two polar poisons" regarding the application of fundamental rights in the Constitution. The first is, "purely vertical"; in that case the relation of fundamental rights is limited to as being between the State and the individual, and in case of infringement of fundamental rights, the State machinery is liable for the same. In that approach the application of rights is against the State in a strict sense and it is the State's duty to protect the rights of individual not the duty of the other private individual to function as the State. On the contrary, the second approach is "horizontal application fundamental rights"; in that case, in the scheme of the fundamental rights under the Constitution, the fundamental rights are available not only against the State but the private individual also. It can be said that in contemporary times given the traditional prominence of the vertical approach, private individuals, institutions or organizations violate fundamental rights more than the state (Gardbaum, 2003: 395).

There are three kinds of verticals positions of constitutional rights. First, 'Strong vertical effect' which primarily regulates the relation between the State and the individuals, in other words it is applicable only against the State and not the private individual. The second, 'weak indirect horizontal effect', which is applied through private law under the ambit of constitutional rights indirectly not directly - through the application of constitutional values by the courts. Third, 'strong indirect horizontal effect', which takes the position that all law whether public or private, are subject of constitutional rights and may be invoked as so by a private individual in a court. All of these are in contrast to 'direct horizontal rights' which are available against the State as well as the private individual for protecting the constitutional rights directly (Gardbaum, 2003: 436-37).

Gardbaum defines 'direct horizontal rights' rights as being enforceable against private actors. 'Indirect horizontal rights' are two kinds, first is the case where vertical rights impose a positive obligation on the state to protect the fundamentals rights of the citizens through various actions. These rights require a positive duty not only on the State but also on the private bodies. Second, indirect horizontal rights emphasise the impact of fundamental rights on private individuals to the extent that

private law depends on fundamental rights. To quote Gardbaum "whereas under direct horizontal effect a bill of rights governs all actions, under indirect horizontal effect it governs all laws (Gardbaum 2016: 601).

Gautam Bhatia has argued on the concept of horizontal rights in two ways. First, he says that it should be clear in a horizontal application of fundamental rights as to against whom the remedy is available. This may be done either directly by making a private individual the respondent or by making the respondent state control the actions of private actors. Second, the question needs to arise-"what is the remedy being sought against? This second enquiry proceeds parallel to, but is not identical with, the first. What is impugned might be private *action,* or it might be State action that *allows* certain kinds of private action which are at issue" (Bhatia: 2015).

On the basis of above analysis on the definition of HRs, it can be said that it simply a horizontally application of the fundamental rights or the bill of rights envisaged under the constitution. The application of the HRs further can be divided into direct or indirect application of HRs. In direct HRs the private parties or non-State can be compel to protect and respect the fundamental rights (hereinafter FRs) of the individual. On the contrary, in the indirect HRs the individual or non-State actors not compel to enforce FRs of the fellow citizen but can be cover through private law. In other words, the idea of the concept of HRs is to put individual or citizen or non-State actors under the constitutional obligation.

Why Horizontal Right?

This section has a significant place in the chapter to analyse the fundamental questions regarding the need of HRs as:

Why are the Horizontal Rights needed in contemporary fundamental rights jurisprudence?

Whether existing vertical application of fundamental rights is sufficient to protect the individual's freedom from discrimination caused by other individual or non-State actors?

The roots or foundation of the origin of HRs lies in the failure of the State's obligation to deal with discrimination between two individuals. Rights and duties are the primary fundamental instrument through which a society achieves the essence of democratic values. Rights and duties are available against both the State as well as individual to perform certain obligations. It is the duty of the State to not discriminate or violate the FRs of its citizen. As the State has under the constitutional obligation to not discriminate, the citizen or non-State actors also have the duty to not discriminate to the fellow citizen.

The State is a sovereign body that has an obligation to deal with every social, political, economic, legal, constitutional issue and even moral issues through its organ i.e. the legislature, the judiciary and the executive. The emergence of a particular issue between individuals and society regarding fundamental rights basically comes before the court in the first instance. The judiciary through its interpretations make suggestions or give direction to the State that makes laws on that particular fundamental rights issue[15]. Then it will become the duty of the legislature or the Executive either to make laws or some regulation that deals the questions which affects the public at large.

When neither the legislature nor the executive nor the judiciary deals with such issues that has a larger impact on the public at large in that circumstances the concept of HRs comes into existence. In the other words, it could say that the HRs is the result of the failure of the State's obligation to enact laws on highly debatable/crucial issues. The Indian constitutional framers make such provision which eradicate the existing social evils and injustice in the Indian society. In the Indian Constitution (hereinafter IC) objective behind the concept of HRs is to fulfill the idea of social justice towards the historically marginalised sections of the society.

There are some issues where the State has failed to secure individual's fundamental rights from other individuals:

[15] See *Vishaka v State of Rajasthan and Others*, MANU/SC/0786/1997 that issue 11 guidelines to protect women at the work place in the absence of any law on that issue.

1. The shrinking scope of the definition of the State due to new economic policies has caused private entities to play a role similar to that of the State but without any constitutional obligation;

2. There are social issues which are not covered directly by the Constitution or any law, and rules and regulation such as social boycott in India/ Ex-communication;

3. The demand for equal social status in Army- contesting terminologies like *Jaat/ Rajput* Regiments;

4. Equal religious' rights in academic spaces;

5. Women's entry at religious places, equal rights of men and women in the matter of marriage and divorce.

6. Right of equal representation in private sphere because private entities take over the public domain;

7. There is persistent infringement of fundamental rights of health and environment of the citizens by the Private Corporations/Companies;

8. The specious logic behind different age limits for marriage for men and women in India;

9. While the Indian Constitution clearly mentions that caste practice is prohibited in any form, the newspapers and matrimonial sites advertise the caste identity among the citizens and encourage the practice of caste through their advertisements;

10. Violation of fundamental Rights to freedom of speech and expression on the basis of language[16], people faced discrimination due to insufficient command on the English in education institutions; academia, job profession which is dominate by private bodies more than the State.

[16] Sen argued that the English language is the one of the major source of inequalities in India. Sen stated that major schooling system, Higher judiciary, higher education and all work on internet are done only by English language which essentially deprived large section of the country who do not know English. Sen further argued that "knowing English opens all sorts of doors in India, even to someone who may not be particularly qualified otherwise" (Sen 2013: 16).

11. In India, there are various T.V. serials which are based on the caste pride and some of them glorify the child marriage (Sen: 2017) and even some the serial's name is based on the caste for example- "*Jaat ki Jugni*" (Sony TV: 2017).

12. Delhi government, in March 2017 passed a regulation that allow public to use private restaurant and hotel's toilet. It is radical step by the government makes private individual liable as the State (Sharma: 2017);

13. Havel's a corporate company makes an advertisement which shows that persons who do use reservation policy are "khuddar" or "self-respectful person" and those who use it, they are "not khuddar" or "disrespectful person" through this kind of intervention i.e. anti-reservation and casteiest advertisement by the private corporation in a social policy is a violation of constitutional values (Gopalkrishnan: 2016);

14. There are so many songs in the Bollywood and music industry which based on caste pride and glorified caste system like *Jaat* and *Gurjar*.

15. Matrimonial advertisement in the newspapers and matrimonial sites are based on caste, violates the fundamental rights envisaged under article 15 (2) of the Constitution.

These are not the only grounds with deals the FRs issues among the citizens which have to be taken serious by the State.

The origin or we could say need for HRs comes from two broad philosophical perspectives:

1. The failure of the State to enact laws according to the needs of the Indian constitutional morality

2. The idea that under the umbrella of a Constitution, individuals or non-State actors acting as the State should have to respect and protect the fundamental rights of others.

The above two broad perspectives are based on the idea of equality and fraternity which is the core objective of the Indian Constitution which is envisaged in the

Preamble of the constitution that has to achieve. The Indian Constitution has right and duties on both the State (negative right in Part III and positive duty under part IV) as well as the citizen (negative rights under Part III and fundamental duty under part IVA).

It is the nature of 'right' that it has duty as well because in rights jurisprudence rights and duty are correlative with each other. Hohfeld, on the concept of right and duty stated that:

> Recognizing, as we must, the very broad and indiscriminate use of the term, "right", what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning. That clue lies in the correlative "duty", for it is certain that even those use the word and the conception "right" in the broadest possible way are accustomed to thinking of "duty" as the invariable correlative (Hohfeld, 1913: 31).

Hohfeld further added that "A duty or a legal obligation is that which one ought or ought not to do. 'Duty' and 'right' are correlative terms. When a right is invaded, a duty is violated" (Hohfeld, 1913: 32).

It is the state, which has duty not to discriminate against anybody on any grounds and if the state does not follow this mandate then the judiciary under the constitutional mandate has to compel the state to follow its own duty. This is the ideal application of rights against the state, but the question arises with this vertical application that if the private individual or society violation the citizen's FRs then it is also the duty of the State to make liable the citizens for the same.

The Corporations, private companies, NGOs, private educational institutions, individuals, religious institutions, caste institutions and society have acquired a larger space in private life than the State. The Indian Constitution defines justice as social, economic and political in the Preamble, all of which is ensured to all the citizens irrespective of any other concern. In a strict sense economic and political justice can only be delivered by the state but social justice can be the subject of society/ individual as well as the state. In other words, the State gains legitimacy from individuals and society.

The idea of horizontal rights comes into existence and its importance can be emphasised when the violations of FRs committed by a body of the State, society,

religious institution, a private corporation, private company, an individual or family– all of which can violate fundamental rights of individuals substantially. One has to raise the question as to whether these institutions and individuals (other than the State) have more power than the State. Can these institutions control the stance society more than the State? Or is it the case that these institutions get an exemption from the duty towards other fellow individuals or society under the umbrella of the Constitution? The answer to these fundamental questions depends on the nature of the Constitution and on the approach of the judiciary in interpreting the constitution, how inclusive and open they are to accepting the changing nature of the society as well as the constitution.

To bring home this point it may be noted that everyday there are news headlines detailing crimes against women by fathers, husbands and employers. The father, brother, and husband, society and religious institutions rather than the State commit the violations of the fundamental rights of women. An echo of this can be found in the fact that the corporation enjoys rights as a citizen in both under domestic as well as international law but when a corporation violates human rights on a large scale, it is not considered as human rights (Knox, 2008: 40). Knox argued that the governments are often controlled by the elites with little interest in protect the rights of minorities. There is need, then, for international human rights law to play a role (Knox, 2008: 20).

Individual Autonomy versus State Responsibility

The traditional approach i.e. viewing rights as being vertical is not sufficient for the development of constitutional rights. Such rights should be redefined by including a sense of the horizontal effect of the constitutional rights. It is well-established argument that in a democratic system that there should be minimum autonomy in the hands of an individual that can be used against the State when it violates the fundamental constitutional rights. Though it is well recognised rule but at the contemporary juncture when the private individual acquires more power (some field[17]) than the State, such individuals regulate State policy some times[18]. The idea

[17] In the field of employment, education, health, transport etc.

[18] Top Businessmen funded the political parties for making rules, regulations and laws in their favour. See "Gas War Crony Capitalism and the Ambanis" (2014), written by Pranjoy Guha Thakurta, Subir Ghosh and

of exempting the private individual from conforming to constitutional values will lead to a disaster in the field of constitutional rights. Dawn Oliver (Oliver, 2007: 67) stated that:

> The need to protect weaker parties in situations where there is an imbalance of power. There has, in the last 100-odd years, been an increasing awareness that private bodies exercise power that can undermine the dignity, autonomy, status and security of individuals in ways that may be as objectionable as, or more so than, state interference.

Is it possible to make water type compartment between public and private sphere?

It is impossible to make a clear-cut demarcation between the public and the private in the twenty-first century when the State depends on private bodies to deliver services associated with public welfare. The State is contracting with the private bodies to fulfil their obligation through contract, for example – the Public-Private Partnership model. Many essential State obligations are delivered by private entities in the fields of education, medical, electricity, transport, banking, security services etc.

Andrew Clapham (1998: 137) has defined the public and private sphere as:

> The emergence of new fragmented centers of power, such as associations, pressure groups, political parties, trade unions, corporations, multinationals, universities, churches, interest groups, and quasi-official bodies, has meant that the individual now perceives authority, repression, and alienation in a variety of new bodies, whereas once it was only the apparatus of the State which was perceived in the doctrine to exhibit these characteristics. This societal development has meant that the definition of the public sphere has had to be adapted to include these new bodies' activities.

D. Kairys has the following to state on the public and private sphere in contemporary times:

> In the public sphere, which includes selection of government officials and political expression, basic concepts of freedom, democracy, and equality are applicable. However, in the private sphere, which encompasses almost all economic activity, we allow no democracy or equality, only the freedom to buy and sell.... Fundamental social issues, such as the use of our

---

Jyotirmoy Chaudhuri, ISBN: 97-881-92855-127. The book states that how a private company control the gas price in India and how the government favour an individual to do so.

resources, investment, the energy problem, the work of our people, and the distribution of our goods and services, are all left to 'private'-mainly corporate-decision makers (Clapham 1998: 137).

The international community came to be deeply concerned about human rights for the first time, after the Second World War (hereafter SWW) due to experience of great violation of human rights by the state as well as non-state actors. A series of international conventions and treaties came into existence for the protection of human rights at the national as well as the international level. In that era (post SWW) it was the state that abuse perceived as the violator of human rights rather than powerful private bodies.

Consciousness of the dangers of abuses by the state was higher than that of abuse by the powerful private bodies at that time, though the human rights infringements by professional bodies, schools and universities, commercial and industrial enterprises, and scientific and cultural institutions in Hitler's Germany and Mussolini's Italy had already shown the significant dangers that human rights are exposed to in the private sphere. States are, however, the parties to international instruments, individual are not (Oliver and Fedtke, 2007: 10).

In the others words, though the private individuals cannot be directly liable for the violation of human rights but the individuals were not less liable for the violation of human rights than the State (Oliver and Fedtke, 2007: 10).

Oliver and Fedtke further stated that "The application of human rights protections in the private sphere may be 'direct' as in Indian and Ireland, among our examples or 'indirect' as in most of the jurisdictions in our study, notably Canada, Denmark, Germany, Israel, New Zealand and the United Kingdom" (Oliver and Fedtke, 2007: 14). At the time of post war-era, the imposition of a duty on private individual or non-State actors was objectionable but in the contemporary era, the scenario has been changed (Oliver and Fedtke, 2007: 17). Oliver and Fedtke go on to state that:

The power of private bodies over individuals has increased over the last few decades with globalization, concentrations of monopolistic power locally, nationally or internationally, technology, and the increasing dependence of individuals on bodies such as banks, buildings societies and insures for their security , which has grown as state bodies have shifted some of the responsibilities they took on in the second half of the twentieth century (for providing housing, health services, education and so on) to the private sphere. Appreciation of the vulnerability of people in private relationship is one of the factors that have contributed to the

interest in the protection of human rights in the private sphere in some of the jurisdictions in our study. The imposition of duties to respect the rights of individuals in private relationship may therefore be regarded as a technique for reducing inequality (Oliver and Fedtke, 2007: 20-21).

Horizontal Rights in International Conventions and Treaties

It is well recognised fact an individual (natural and juristic) is a subject of international law; therefore, an individual can enjoy rights as well as be subject to a duty under the international law not only with respect to the international institutions and domestic governments but also with respect to other individuals and the society. Examples include not committing genocide, war against the humanity and preserving the social and cultural rights of others.

On the issue of enforcing the private duty or HRs through international institutions, Knox has argued that neither is it practical nor politically possible to impose a private duty on individuals because in practical sense it is not possible to replace whole domestic autonomy of a State by internationals bodies (Knox, 2008: 19).

Knox stated that the application of human rights is generally vertical but in recent time the discourse has changed. In 2003, two proposals/drafts made before the United Human Commission on Human Rights, the first, that private individual have a duty since they possess rights, the second that the duty is due from the individual or society. The first draft was named as 'Promotion and Protection of Human Rights: Human rights and Human Responsibilities', and the second as 'Norms on the Responsibilities of Transnational Corporation and Others Business Enterprises with Regard to Human Rights' (Knox 2008: 1).

Knox stated that the effort to incorporate a private duty in the Human Rights law is not a new thing. The application of these duties comes first as a converse duty (vertical) which is available against society or the state, and second as the correlative duty (horizontal) which is available against the private individual. Knox further argued that due to practical and political reasons the correlative duty could not be enforced directly because it is a matter largely covered by state laws and not by internationals bodies (Knox 2008: 2).

Knox describes private duties in internationals treaties as a pyramid of correlative private duties. Knox states that three kinds of private duties in four ways:

> At its lowest level of involvement, human rights law contemplates that states have general duties to restrict private actions that interfere with the enjoyment of human rights, but leaves to governments the task of specifying the resulting private duties. At the next level, human rights law itself specify the private duties that governments are obliged to impose. At both of these levels, international law imposes private duties indirectly, as a secondary effect of the duties it places directly on states. At the higher level of involvement, human rights law directly places duties on private actors but continues to leave of involvement of those duties to domestic law. Finally, at the highest level of involvement, human rights law enforces private duties at the international level, through international tribunals or other institutions (Knox 2008:18).

Knox stated that "The First draft of the Universal Declaration, prepared by John Humphrey, the director of the UN Human Rights Division, does not include a long list of duties, but it does place them prominently. One of the four principles with which the draft begins states "[t]hat man does not have rights only; he owes duties to the society of which he forms part," and its first article states: "Everyone owes a duty to his State and to the [international society] United Nations. He must his just share of responsibility for the performance of such social duties and his share of such common sacrifices as may contribute to the common good" (Knox 2008: 5).

The author stated that at the last session of Human Rights Declaration in 1948, Eleanor Roosevelt, the chair of the Human Rights Commission, proposed to the subcommittee to deal with the question of duties and limitation on rights: "Everyone has duties to the community which enables him freely to develop his personality. In the exercise of his rights, everyone shall be subject only to such limitations as are necessary to secure due recognition and respect for the rights of others and the requirements of general welfare in a democratic society" (Knox 2008: 7).

The Knox argues that "the day before the General Assembly adopted the Universal Declaration; it adopted the Genocide Convention, which prohibited everyone, not just states, from committing genocide." The drafter of the Universal Declaration decided to not list the private duty because they think that the State or the governments might curtail the scope of right and impose the duties on the individuals as they please (Knox 2008: 9).

Knox further argues regarding duties saying:

> As social creatures, humans must comply with duties to one another individually and collectively for society to work. Every society must therefore impose some duties on private actors, and would do so even without the encouragement a list of such duties in an international declaration might offer. The refusal to list duties meant that the duties imposed by the society would continue to be the creatures of domestic, rather than international, law (Knox 2008: 10).

One view says that the claims made in the Universal Declaration are in the interest of Western nations and it is this interest, which dominates the Declaration and imposes an individualist approach as the relation between an individual and the State rather than the duty oriented approach. Oscar Arias Sanchez, the president of the Costa Rica stated:

> [M]any societies have traditionally conceived of human relationship in terms obligation than rights. This is true, in general term, for instances, for much of Eastern thoughts. While traditionally in the West the concept of freedom and individuality has been emphasized, in the East the notion of responsibility and the community have prevailed. The fact that a Universal Declaration of Human Rights was drafted instead of a Universal Declaration of Human Duties undoubtedly reflects the philosophical l and cultural background of document's drafters who, as is known, represented the Western powers who emerged victorious from the Second World War (Knox 2008: 10).

After the Universal Declaration of Human Rights four other international human rights treaties have come into existence and the states have adopted them for the development of the rights and duties of the state and society as well as individuals. The European Convention does not mention private duties of individuals. The American Convention mentions duties in general terms - in article 32(1) it is stated: "Every person has responsibility to his family, his community, and mankind". The two covenants (ICCPR and ICESCR) mention the private duties only in their preambles (Knox 2008: 14).

Turning to the issue of the violation of international law, Steven Ratner and Jason Abrams have argued that "a violation of international law become an international crime if the global community intends through [either of these approaches or through authorizing the prosecution of the offences such as piracy] to hold individuals directly responsible for it" (Knox 2008: 29).

In this context Knox has quoted Nicola Jagers who says "[t]he absence of direct enforcement for private parties at the international level does not necessarily bar horizontal effect; it merely means that the enforcement of the obligations for non-State entities is indirect, i.e. through the obligations that States have under the provisions concerned" (Knox 2008: 2).

Universal Declaration of Human Rights (UDHR), 1948

United Nation General Assembly adopted Universal Declaration of Human Rights (hereafter HUDR) on 10th Dec 1948 as a common standard of achievement for all person and nations. Art 29 of the UDHR deals with idea of horizontal application of rights and imposes the duty on everyone towards the community. Article 29 (1) "Everyone has duty to the community in which alone the free and full development of the personality is possible".

Art 29 (2) imposes the limitation of the rights and freedom of everyone subject to the respect of other person's rights and freedom as the law determined, "In the exercise of his rights and freedom, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society" (UDHR: 1948).

The International Convention on Civil and Political Rights, 1966

The preamble of the International Convention on Civil and Political Rights (hereafter ICCPR), 1966 mentions HRs or duties of every individual to secure and respect the rights of other individuals. The preamble guarantees that; "Realizing that the individual, having duties to others individuals and to the community which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant". This means the drafters of the Covenant had the sense that the individual has more or less the same responsibility as the States has; therefore, the drafters imposed duties on individuals to respect the rights of others.

Article 5 of the Covenant specifically directs that the application of rights envisaged under the Covenant will not be restricted to the State but cover groups or persons who violate these rights: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant."

Article 8 of the Covenant imposes the prohibition of slavery [Art 8 (1), slave-trade [Art 8 (2)], servitude and forced or compulsory labour [Art 8 (3 a)].

Article 17 (1) of the ICCPR prohibits the interference with the privacy of individual, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".

Article 23 (1) of the ICCPR direct applies the horizontal approach to rights envisaged in the Covenant and makes it a duty of society as well as the state to protect the family, "The family is the natural and fundamental group unit of the society and is entitled to protection by the society and the State".

In article 24 (1) of the ICCPR the Covenant drafter imposes the duty on the family and society as well as the State, "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protections as are required by his status as a minor, on the part of his family, society, and the State" (ICCPR: 1966).

The International Convention on Economic, Social and Cultural Rights, 1966

The International Convention on Economic, Social and Cultural Rights (hereafter ICESCR) also incorporated the concept of HRs through various articles. In the preamble of the Covenant the duty of the individual and community took places for the promotion of the rights; "realizing that the individual, having duties to others individuals and to the community, to which he belongs, is under a responsibility to strive for the promotion and observation of the rights recognised in the present Covenant" (ICESCR: 1966).

Article 5 (1) of the Covenant makes the individual and society liable for the recognition of the rights enumerated in the Covenant; "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant" (ICESCR: 1966).

International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973

The International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 in Article III imposed a duty on the individual horizontally prohibiting the crime of apartheid in any form; "International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representative of the State, wherever they: (a) commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention; (b) directly abet, encourage or co-operate in the commission of the crime of apartheid" (ICSPCA: 1973).

Convention on the Prevention and Punishment of the Crime of Genocide, 1948

Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, directly mentions the duty of the individual under international law not to commit genocide alongside the same duty that is placed on the State. The article says; "persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public official or private individuals" (CPPCG: 1948).

Slavery Convention, 1927

Article 2 of the Slavery Convention, 1927, imposes a duty on the High Contracting Parties[19] to take appropriate steps for the abolition of slavery in all forms. The Article says "The High Contracting Parties undertake, each in respect of the

[19] High Contracting Parties means the signatory parties of the Convention.

territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, so far as they have not already taken the necessary steps;(a) To prevent and suppress the slave trade; (b) To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms" (Slavery Convention: 1927).

International Convention on the Elimination of All Forms of Racial Discrimination, 1965

The International Convention on the Elimination of All Forms of Racial Discrimination, (CERD) 1965, prohibits of all kind of racial discrimination. Article 5 of the Convention makes private individuals, institutions and the State directly liable for practicing all kinds of discrimination; (b) "The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government official or by any individual group or institution"; (f) "The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks" (CERD: 1965).

Convention on the Elimination of All Forms of Discrimination against Women, 1979

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 prohibits discrimination against women from the State as well as private individual. Art 2 (e) imposes the duty on the individual as well as the State; "To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise". Article 7 (c) imposes the duty to take appropriate measures to make women's political and public life equal to men; "To participate in non-governmental organizations and associations concerned with the public and political life of the country" (CEDAW: 1979).

African Charter of Human and Peoples' Rights, (known as Banjul Charter) 1981

African Charter of Human and Peoples' Rights, (known as Banjul Charter) 1981, has played a significant role in the development of Horizontal Rights emphasising the duty of private individuals as well as the State, more than other regional Conventions. The preamble of the Charter clearly mentions that the enjoyment of the

rights and freedom depends on the duty performed by everyone whether it is the State or other individuals; "Considering that the enjoyment of rights and freedoms also implies the performance of the duties on the part of everyone; Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural right in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights".

Article 19 of the Charger deals the equality of the people horizontally, which clearly emphasises that no one is above another; "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another".

Article 27 deals with the duties of individuals; (1) "Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community". Article 27 (2), "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest". Article 28 stated: "Every individual shall have the duty to respect and consider his fellow beings without discrimination and to maintain relation aimed at promoting, safeguard and reinforcing mutual respect and tolerance" (African Charter: 1981).

Knox argued that the African Charter on Human Rights and Peoples' Rights, 1981 deviates from the course taken by the earlier general human rights treaties, in that it lists private duties and includes much looser restrictions on governments' authority to limit the exercise of rights (Knox 2008: 14). Knox (Knox 2008:15) quotes the President Leopold Senghor of Senegal on the importance of rights and duties, he stated:

> In Europe, Human Rights are considered as a body of principles and rules placed in the hands of the individual, as weapon, thus enabling him to defend himself. In Africa, the individual and his rights are wrapped in the protections of the family and other communities ensure everyone. Rights in Africa assume the form of rite, which must be obeyed because it commands. It cannot be separated from the obligations due to the family and other communities. Therefore, contrary to what has been done so far in other regions of the world,

provision must be made for a system of "Duties of individuals", adding harmoniously to the rights recognised in them by the society to which they belong, and by other man.

The Convention for the Protection of Human Rights and Fundamental Freedom (known as European Convention on Human Rights), 1950

Immediately two years after the adoption of UDHR the Convention for the Protection of Human Rights and Fundamental Freedom (known as European Convention on Human Rights), 1950 comes into existence. Article 4 of the Convention prohibits the slavery and forced or compulsory labour. Article 17 of the Convention prohibits the abuse of rights by the State as well as individual:

Prohibition of abuse of rights of rights nothing in this Convention may be interpreted as implying for any State. Group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention (European Convention: 1950).

American Convention on Human Rights, 1969

The American Convention on Human Rights, 1969 like the European Convention was a regional Convention for the protection of Human Rights. Article 6 of the Convention provides freedom from Slavery. Article 32 of the Convention mentions the relationship between and rights duties; (1) "Every person has responsibility to his family, his community, and mankind"; (2) "The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society" (American Convention: 1969).

Concept of Horizontal Rights in Global Perspective

In this section the chapter will focus on the origin and development of horizontal approaches of fundamental rights in an international context – limiting ourselves to the United States, Ireland, Canada, South Africa, Germany and the United Kingdom. The chapter will try in all these cases to list out the constitutional provisions and judicial approaches that have played a role in the implementation of fundamental rights horizontally.

Stephen Gardbaum in The New Commonwealth Model of Constitutionalism argued that "when countries adopted new constitutions after World War II, "[i]n order effectively both to protect, and express their commitment to, fundamental human rights and liberties, country after country abandoned legislative supremacy and switched to an entrenched, supreme la bill of rights that was judicially (or quasi-judicially) enforced" (Knox 2008: 20).

United Kingdom

The Human Rights Act 1998 started the debate in United Kingdom about the applications of fundamental rights available under the Act and whether they can be enforced horizontally. Prior to the enactment of this Act no issue had arisen in the United Kingdom regarding HRs. Section 6 of the Act defines the "Acts of Public authority" and sub section of section 3 says that public authority includes, (a) a court or tribunal and (b) any person certain of whose functions are functions of public nature. This provision is responsible for starting a debate on the horizontal application of human rights envisaged in the Act.

In the United Kingdom, the Parliament enacted the Human Rights Act, 1998 which came into force in 2000. The Act is not clear about the application of the rights in a strict sense as to whether it applies direct horizontally or indirect horizontally or purely vertically.

The United Kingdom enacted 'The Human Rights Act 1998' which provides protection of the rights of the individual against the State as well as private individuals (section 6 of the Act). Provisions of the act called 'Convention rights'. The objective of the Act was to enforce the convention rights against the public authorities and private bodies those exercise the public function. This Act makes emergence of horizontal effect of rights in the United Kingdom in the first time. Sir William Wade in "Horizons of horizontally" (2000) states that the Human Rights Act have full horizontal effects (Oliver, 2007: 69).

In conclusion the United Kingdom has the indirect horizontal effect under Human Rights Act.

Canada

The Constitution Act of Canada, 1982, Part I "Canadian of Charter Rights and Freedoms" includes the indirect horizontal effect of the fundamental rights. In this, Section 24 talks about the enforcement of the charter in terms of against whom these rights can be enforced. The section 24 (1) says "anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considered appropriate and just in the circumstances". Section 24 (2) says "Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedom guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute (Canadian Constitution: 1982).

In the Canadian Charter, there are two significant provisions, which specify the application of the Charter. First Section 51 (1) deals with the 'Supremacy Clause', which makes the Canadian Constitution the supreme law of the land all laws need to be consistent with it. On the contrary, Section 32 (1) deals with the provision of applicability of the Charter, in short, according to this section; the Charter applies only to the Government rather than private individuals.

However through judicial interpretation it can be said that the Canadian Charter of the Fundamental Rights and Freedoms 1982 has an indirect horizontal effect in terms of constitutional rights. In Retail, *Wholesale & Dep't Store Union v. Dolphin Delivery Ltd,* [1986] 2 S.C.R. 573, the Supreme Court of the Canada dealt with a matter between two private individuals but related to constitutional rights. The Supreme Court held that the Charter does not apply to litigation between the private individuals. The Court held that:

> Where...private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported

assertion of Charter causes of action or Charter defences between individuals (Gardbaum, 2003: 399-400).

In the case of *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1170, the Canadian Supreme Court held that the Charter does not apply to the private litigations. It applies only against the governmental actions (Gardbaum, 2003: 400).

Germany

Germany has a history of totalitarian Nazi rule 1933 to 1945 and violation of fundamental rights not only by the State but also by private individuals and organizations. The Basic Law in Germany has been designed to cover the use of general conscience of society to protect fundamental rights and is not restricted only to the State and citizen' relationship (Fedtke, 2007: 128-29). Jorg Fedtke stated that in Germany, horizontal jurisprudence of rights came into existence post 1945, developing a relationship between human rights and private law with a word Drittwirkung, which means the effect of third party (Fedtke, 2007: 125). In Germany, the Constitution, well known as the Basic Law 1949 inserted the Bill of Rights (u/s 9 (3) BL) that expressly covered the private individual under the umbrella of the Constitution as well as the public authority or the State in relation to violation of fundamental rights (Fedtke, 2007: 126).

Gardbaum stated that the German Basic Law is 'largely ambiguous on the issue of whether its rights provisions bind only the government or also private individuals, as they are typically expressed in declaratory and universalistic terms". Greg Taylor argued that in Germany all statutory private law is directly subjected to the basic law (Gardbaum, 2003: 402). The German Federal Civil Court developed the doctrine Drittwirkung, which means third-party effect of the constitutional rights.

Basil Markesinis commenting on Germany and the concept of horizontal rights says:

> [i]n a public law action between an individual and the state, a constitutional right will directly override an otherwise applicable rule of public law. The constitutional right will also override a statutory provision of private law if it contravenes a constitutional right.....However, in private law disputes between individuals where the applicable provisions are not unconstitutional as such constitutional rights [are] said to "influence" rules of civil law rather than actually to override them. It is duty of the court to adopt an interpretation of private law provisions which is in conformity with the constitutional rights. A certain intellectual content

"flows" or "radiates" from the constitutional law into the civil law and affects the interpretation of existing civil law rules. In such cases the rules of private law are to be interpreted and applied in [the] light of the applicable constitutional norms, but it is nonetheless the civil law rules that are ultimately to be applied (Gardbaum, 2003: 406).

Jorg Fedtke on the Germany Constitution stated that:

According to German constitutional theory, however, human dignity is not subject to any restriction or, indeed, constitutional amendments, and there is evidence that the authors of the Basic Law, though failing to articulate their approach *expressis verbi*, wanted to protect this value against both public and private interference. Article 1 (1) BL is phrased 'in absolute terms', as Adolf Susterhenn, Member of the Constitutional Council and one of the leading architects of the Federal Republic, put it, and 'designed to protect against everyone, whether public authority or private person' (Fedtke, 2007: 127).

In the landmark decision *Luth* in 1958, the Federal Constitutional Court held that:

Erects an objective system of values in its section on basic right...This system of values, centering on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit (Fedtke, 2007: 129).

Therefore, the constitutional position of Germany regarding the application of rights is indirect horizontally because all private law in Germany is directly subject to the Basic Law.

Ireland

The Constitution of Ireland enacted on 1 July, 1937, came into operation on 29 December, 1937. The Irish Supreme Court makes horizontal effect of Constitutional rights not only against the State but private individual as well. In *Meskell v. Coras Iompair Eireann* ([1973] I.R. 121, 133.) the Supreme Court held that "[I]f a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who infringed that right" (Gardbaum, 2003: 396).

Colm O'Cinneide stated that**:** "Its application by the Irish courts has been often cited to demonstrate that the 'direct horizontal effect' of constitutional rights is possible, practicable and even desirable" (O'Cinneide 2007: 214). O'Cinneide states that the Irish Constitution 1937 had a controversial right inserted in 1983 (Art 40.3.3) "right to life of the unborn child" through a constitutional amendment. This can be seen as having a horizontal effect on fundamental rights (O'Cinneide 2007: 216).

Irish constitutional law has adopted the legal method through which any infringement of a fundamental right can be subject to the constitutional scheme whether they come under the state authority or private individual or corporate bodies. The Irish courts treated all private action as the State under the doctrine of "constitutional tort". Using this doctrine the court can directly apply the idea of a constitutional obligation on the private individual to protect rights. O' Cinneide (O' Cinneide 2007: 219) stated that:

> The existence of this 'constitutional tort' as a mechanism for giving 'direct horizontal effect' to provisions of the constitution confirmed by the Supreme Court in a sequence of decisions in the early 1970s, including *Meskell v CIE* (1973) and *Glover v BLN Ltd* (1973). These decisions held that the interference with constitutional rights of individuals by private individuals, companies or trade unions constituted a 'constitutional tort', to which the Irish courts will provide a remedy via injunctive relief and/or damages.

Justice Wash in *Meskell v CIE* ([1973] I.R. 121, 133.) stated the reasoning behind the judgement that why private individual comes under the same obligation as the State: "....if a person has suffered damages by virtue of breach of a constitutional rights or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed the that right" (O'Cinneide 2007: 220).

In subsequent judgments of the Supreme Court of Ireland the doctrine of 'constitutional tort' has been followed. In *Glover v BLN Ltd* [1973] IR 388, the court applied constitutional rights directly to the internal affairs of a private body. In *Rodgers v ITGWG* [1978] ILRM 51 (HC), the court applied the constitutional obligation to the issue of internal governance in a trade union. O'Cinneide stated that "private bodies, including limited companies and trade unions, are therefore bound by the requirement of procedural fairness, which have been established by judicial

interpretation of the provisions of the Constitution governing fair trial and the administration of justice" (O'Cinneide 2007: 221).

On the contrary a few authorities writing on the Irish constitution have declared the 'constitutional tort' doctrine as being uncertain. Frode, McMahon and Binchy suggest that this doctrine is not clear on how private bodies come under a constitutional obligation; therefore, it is extremely uncertain (O'Cinneide 2007: 228). John Kelly suggested that the Irish court should apply the German approach that guarantees equality in the private sphere as the public. In 1995, the 'Constitutional Review Group' also mentions that it was inappropriate to give direct horizontal effect of constitutional rights and it would 'constitute an unjustified intrusion upon individual autonomy' (O'Cinneide 2007: 230-31). O'Cinneide argued that the 'direct horizontal effect' is incompetent in making private bodies liable under the constitutional obligations (O'Cinneide 2007: 251).

Though, the Ireland Constitution as well as the Supreme Court has the concept of direct horizontal effect of under the doctrine of 'constitutional tort' but the authorities are not happy with it. Might be the authorities do not allow to impose constitutional cap on the private individual or non-State actors, or they want to provide more freedom and liberties to the non-State actors. The approach that restricts the non-State actor to come under the constitutional obligation will be stopping the living nature of the Constitution of Ireland. The Constitution is the living document if it not accepts the changes on the society then it will become rigid Constitution. It might be changed the position of application of the constitutional rights in future.

South Africa

The Constitution of the Republic of South Africa comes into force on 4 February, 1997, which was called as Final Constitution. Prior to the Final Constitution 1997, there were two previous constitutions in South Africa one 'Tricameral Constitution 1983'and another Interim Constitution 1993. In South Africa, the Constitution is the supreme law of the land and no other law can override the provisions of Final Constitution of 1997 (South African Constitution: 1997).

South Africa has envisaged under its Final Constitution of 1996, Horizontal effect of Bill of Rights. Section 8 of the Bill of Rights discuss the application of the charter and sec 8(2) declares that "A Provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. Section 9 (4) of the Bill of Rights imposes a duty on private individual as well as the State not to discriminate against anyone directly or indirectly (Constitution of the Republic of South Africa 1996).

In the South African' Constitution 1993 and 1996 (Final Constitution), the constitutional drafter crafted the Bill of Rights in way that covers or makes a private individual liable for the violation of constitutional rights. This approach of the constitutional drafter comes from the experience of the history of apartheid that was followed by the private individuals as well as the State (Oliver and Fedtke, 2007: 12).

Fedtke stated two things, first, that the Final Constitution 1996 does not expressly deal clearly with the position of the fundamental rights in case of private sphere. In other words, there is no specific remedy available in the constitution in case the infringement of the fundamental rights by the private individual and there are no clear steps for a person whose rights have been infringed to approach the constitutional court for seeking a remedy. It is the court which through common law interprets the horizontal effect or the application of fundamental rights between individuals. Second, "the South African legislator, too, is (vertically) bound by the Bill of Rights. The mere existence of a supreme constitution will itself have a strong impact on the private sphere through judicial review of an ever increasing amount of parliamentary legislation regulating private relationship" (Fedtke, 2007: 376-77).

Khaitan has stated that generally the constitutional duties are imposed on the governments and public authorities but the exception to this rule can be found in the text of the South Africa's Constitution and European Union which imposes duties on not-state actors (Khaitan 2015: 63).

In the case of *Du Plessis v. De Klerk* 1999 (3) SA 850 (CC), the court held that the application of Bill of Rights is indirect horizontally rather than directly horizontal.

On the contrary, the dissenting opinion of J. Kriegler on the horizontal application of the constitutional rights said:

> Unless and until there is resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms are concerned ...a landlord is free to refuse to let a flat to someone because of race, gender or whatever; a white bigot may refuse to sell property to a person of colour; a social club may black-ball Jews, Catholics or Afrikaners if it so wishes. An employer is at liberty to discriminate on racial grounds in the engagement of staff; a hotelier may refuge to let a room to a homosexual; a church may close its doors to mourners of a particular colour or class. But none of them can invoke the law to enforce or protect their bigotry.

Gardbum describes J. Kriegler's dissenting opinion on the application of the rights as indirect horizontal effect as it exists in Germany (Gardbaum, 2003: 410). Gradbum stated that the state action doctrine should be abolished because it "misstates the existing constitutional position on the reach of individual rights, properly understood" (Gardbaum, 2003: 421).

Jorg Fedtke stated that there were three arguments raised in favour of direct effect of constitutional rights in the Interim Constitution of South Africa:

> First, much criticism of uneven distribution of (private) power and wealth in post-apartheid South Africa, and coupled with this, the fear that past discrimination by the state could continue within the sanctuary of private law. Full application of the human rights in the private space was regarded as the most appropriate safeguard against 'privatised apartheid'. Direct effect was, second, regarded as preferable in terms of legal certainty because it renders unnecessary the difficult distinction between public and private action. Finally, supporter of direct effect felt that a limited impact of human rights on judge-made common law would be a contradiction to the full subordination of the legislator to human rights considerations: [T]he mere form of law should not dictate a difference in result (Fedtke, 2007: 361).

Justice Madala argued that "the question of direct or indirect effect should be reviewed on a case-by-case basis and with a view to the particular constitutional right involved" (Fedtke, 2007: 368).

The text of the Final Constitution specifically envisaged the direct horizontal application of the Bill of Rights but the Supreme Court has not agreed with direct application of the Bill of Rights between individuals before the constitutional courts.

The United States

The United States has restricted itself to the vertical approach in a strict sense in relation to the constitutional rights question and does not take up the horizontal position. On the contrary, Canada and Germany, allow a much more horizontal approach more than the United States's vertical position (Gardbaum, 2003: 391). In the United States the application of constitutional rights arises when government or state action is in violation of the fundamental rights through any means but when the issue is between private individuals. Eric Barendt stated that "it is clear constitutional law in the United States, both from the text of the Amendments and the jurisprudence of the Supreme Court, that constitutional right binds only government and public authorities" (Barendt, 2007: 400).

Eric Barendt argues that individuals, private entity, corporation, private universities, private employer, media and deductive agencies are not under the obligation to follow the constitution in sense as the government or the public authority bound to do. These private bodies simply do not follow the due process of law under equal protection clause and they are free to discriminate anybody as they can, but the Supreme Court in Washington, said that constitutional rights can be claim against the private person only if the state action's doctrine involved in that matter (Barendt, 2007: 400-1). Barendt further stated that the 'state action' doctrine protects the individual autonomy or freedom from constitutional obligation and the doctrine protects the state rights and federalism (Barendt, 2007: 403-4).

In *Burton v Wilmington park Authority* (365 US 175 1961), the American Supreme Court held by the 6:3 majorities that a private restaurant owner practised the racial discrimination and denied to serve black peoples. It was a clear violation of the 14th Amendment of the United States Constitution that prohibits racial discrimination. The court found that, though in that case the state is not directly involved but the land used by the restaurant was on rented out by the government, and therefore, on account of the state's involvement the restaurant owner was liable not to discriminate on racial ground against anyone. In the subsequent decisions by the US Supreme Court this approach was denied. In *Mosse Lodge v Irvis* (1972) the court

held that "there was no state action when a licensed private club refused service to blacks" (Barendt, 2007: 406).

Gardbaum stated that in the US the jurisprudence of Horizontal Rights is an end story because the "state action" doctrine is cover issue regarding fundamental rights in the Constitution. In *New York Times v. Sullivan* 376 U.S. 254 (1964), the court held that matter of private affairs does not come under "state action" doctrine so the private body is not bound under the equal protection clause (Gardbaum, 2003: 389).

Murray Hunt describes the situation of the application of fundamental rights in the U.S. Constitution:

> The jurisdiction which is close to the position favoured by the verticalists is the United States. As is well-known, U.S. constitutional law requires there to be "state action" in order for the constitutional protections in the Bill of Rights to apply. The text of the Constitution itself makes clear that those protections apply only to the activities of either the state or federal governments, and where a constitutional right is relied on in litigation between private parties and the Supreme Court has made clear that courts must determine whether the activities of the private party alleged to have infringed the protected right are sufficiently connected to the government to constitute state action to which the Constitution applies (Gardbaum, 2003: 395-6).

The United States has the strong vertical effect of constitutional rights. Neither the Constitution nor the Supreme Court allows the application of constitutional rights in cases between two private individuals.

Conclusion

In this chapter the discussion has critically analysed the concept of HRs, its definition and the presence of HRs in International as well as at the national level. The discussion finds out the all kinds of HRs that exist in current debates on Constitutional law across the countries like 'purely vertical', 'strong vertical effect', 'weak indirect horizontal effect', 'strong indirect horizontal effect' and 'direct horizontal rights effect'. After that the chapter tried to give the answer of the questions that why the need of HRs in the world? For the answer of this question the discussion highlights the changing concept of the State and that non-State actors have become more powerful than the State.

The chapter tried to justify the origin of the concept of HRs through various examples and pointed to historical developments in the field of rights and constitutional law. It is not only the State who can discriminate against the citizen but non-state actors or private individuals can end up violating the fundamental rights of individuals more than the State become there is no constitutional obligation not to do so. With the shrinking nature of the State, private companies, NGOs, private institutions like educational institutions, individuals and religious institutions, caste institutions have acquired a large space to regulate the individual's life than the State.

In that situation where the non-state actors acquire more or less same space as the State then it is impossible to draw clear-cut line between the 'public' and 'private' space. The reason behind it is that the non-state actors play the role of the state's functions - for example private bodies provide certain facilities which ideally should be delivered by the State like education, health, transport, communication, electricity, gas, water, mill, food, insurance, security, housing etc. and this is not even an exhaustive list of services provided by non-state actors.

The chapter has critically analysed various internationals Conventions and treaties which deal the concept of HRs. Especially after post Second World War, the international community was serious about future of the world and formed United Nation in 1945. Soon after the formation of UN the General Assembly of the UN there was the Universal Declaration of Human Rights, 1948, which sparked human rights across the globe. The international community had the sad experience of genocide over the two World Wars. Based on this experience it was felt that it is not only the State that can violate human rights but private individuals or non-State actors can also play a role as big as that of the State. This pushed for thinking that put non-state actors under as much obligation to protect individual rights as the obligation put on the State.

Finally, in the last section of the chapter, the research traced the HRs in US, UK, South Africa, Ireland and Germany's Constitution with help of judicial approach. The research finds out that in United State there no scope of the HRs, neither the Constitution nor the judiciary allow to the implementation of fundamental rights

horizontally. The US followed State Action doctrine in highly strict sense, therefore the US follow 'strong vertical' approach.

United Kingdom adopts a liberal approach in this regard. The Human Rights Act, 1998 and Equality Act 2010 have certain provisions that deal with the application of fundamental rights horizontally. Though, in United Kingdom there is concept of HRs but that concept is 'indirect horizontal rights' that majorly deals with common law system.

In the Canadian Constitution the application of fundamental rights is geared towards an indirect horizontal effect. Similar to the Canadian position on fundamental rights, the German Constitution as well as the German Supreme Court allows the application of fundamental rights invoking indirect effect of horizontal rights. Ireland has direct horizontal rights but the use of this seems contested. The Final Constitution of the South Africa allows the application of Bill of Rights horizontally but the Supreme Court and the constitutional authority are not in favour of direct horizontal application. The United States takes a strong vertical position on fundamental rights because of State Action doctrine.

The discussion is come the conclusion that the concept of horizontal rights emerge at large scale in international law as well as domestic constitutional also. Countries that have had a bad experience such as that of the Second World War or been effected by other social evils like caste system[20] (in India), apartheid and genocide, have tended to incorporate the concept of horizontal application of fundamental rights. Some countries have direct and some countries have indirect horizontal application but the fundamental essence of the concept of horizontal application is there. The research finds that the US is the only country that is rigid (not allow direct or indirect HRs) and not open to accept the changing circumstances of the world.

[20] Sen stated that there are different kinds of inequalities in the world but caste system in India is the unique system. This system has different kind of inequalities through which it have the multiple layers of oppressed and disadvantage lives (Sen 2013: 213).

Chapter 3

Horizontal Rights in the Indian Constitutional Framework

"If you ask me, my ideal would be a society based on Liberty, Equality and Fraternity.....Democracy is not merely a form of government. It is primarily a mode of associated living, of conjoint communicated experience" (Ambedkar 2014a: 57)

Introduction

The true spirit of social justice as envisaged in the Preamble of the Indian Constitution is reflected in Parts III and IV of the Constitution. There are six kinds of fundamental rights available to citizens of India: first, Right to Equality; second, Right to Freedom; third, Right against Exploitation; fourth, Rights to Religious Freedom; fifth, Cultural and Educational Rights; and the sixth, Right to Constitutional Remedies. The Right to Equality and Right against exploitation are at the core of the idea of social justice as these rights guarantee equal status to all citizens which were essentially unequal before the implementation of the Constitution. These rights were adopted to provide justice to historically disadvantaged groups entrusting extraordinary power in the hands of Indian citizens to enforce these rights against the State as well as against fellow citizens.

The Constitution framers in the Constituent Assembly (hereafter CA) had foreseen that the State can be controlled by its citizens only when their fundamental rights are guaranteed with a law enforcing mechanism and a fair justice system. It thus becomes important to consider remedies available in the hands of the citizen if the fundamental rights were violated by the non-State actors. It would be not wrong to say that, CA had vision that the non-state actors i.e. the individual, society and other non-state institution, which govern the individual's life, should be covered under the constitutional obligation.

This chapter deals with the constitutional history through which the concept of Horizontal Rights (hereafter HRs) was adopted by the Constituent Assembly. The chapter focuses on the CA debates on Articles 15 (2), 17, 23 and 24 of the Indian Constitution. The following discussion will focus on various arguments that

critically examine the intentionality[21] of the constitutional framers, which we see was majorly to keep these rights immune from the State action doctrine. The discussion will further examine that if the constitutional courts need to follow the 'State' definition of Article 12 while interpreting the HRs? If these rights are a self-content code or do, they depend on some other rights? What are the spaces, within the domain of public or private law, where these rights can be exercised?

This chapter thus seeks to understand the above mentioned questions. The discussion is however, limited to the Article 15(2), 17, 23 and 24 as these provisions form the core idea of social justice which the IC envisaged.

Historical background of Horizontal Rights in the Indian Constitution

In the context of these HR's, Gardbaum argued that article 17 (abolishing untouchability), Art 23 (prohibition human traffic and forced labour), and article 24 (prohibition of employment of children below the age of 14 in hazardous works) of the Indian Constitution are available against everyone. Gardbaum (2016: 603) elaborates that:

> [B]oth the text and the Constituent Assembly debates of 1947-48 make clear that Article 15 (2) prohibits certain types of *private* discrimination on the basic of religion, caste, race, sex, or place of birth; namely by licensed individuals regarding 'access to shops, public restaurants, hotels and places of public entertainment...It is an entirely different idea, and therefore, it is absolute essential.

On similar lines, Granville Austin, jurist and constitutional expert, stated on the Indian Constitution that:

> India's founding fathers and mothers established in the Constitution both the nation's ideals and the institutions and processes for achieving them. The ideals were national unity and integrity and a democratic and equitable society. The new society was to be achieved through a social-economic revolution pursued with a democratic spirit using constitutional, democratic institutions. I later came to think of unity, social revolution and democracy as three strands of a seamless web. The founders believed that none of these goals was to be pursued, nor could any be achieved, separately. They were mutually dependent and had to be sought together (Austin 2000: IX).

[21] In the discussion it is finds that the majority of the members of the CA was in favour to abolish caste and untouchability from the country. No member in the CA was in favour to restore it or celebrate of the caste.

Granville Austin further stated that the social revolution in the India Constitution lies in Part III and Part IV, the author says: "The core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution" (Austin 2000: 50). Gopal Guru in *Constitutional Justice Positional and Cultural*, stated:

> The Indian Constitution, as a document of social revolution, is aimed at annihilating man-made hierarchies based on caste, gender, culture, etc. To put it differently, social revolution 'textualized' in the form of document seeks to flatten all cultural hierarchies, as seen, for example, in the various titles that existing during the pre-modern period...The differential social and cultural values that prevailed in earlier times have now been progressively dissolved in the universal principle of one-person-one-value (Guru 2008:230).

Rajeev Bhargava stated that "Indian Constitution is a moral document as embodying an ethical vision" (Bhargava 2008: 4). The Constitutional and other authorities describe the Indian Constitution as a social and moral document. It is the IC that equalises the human beings of all castes, class and religions for the first time. It is the Indian Constitution for the first time that eradicates the socio-economic and political inequality and guarantees rights to its citizens. It is the Indian Constitution that brings society as well as private individuals under the constitutional obligation so that discrimination does not happen to the fellow citizen on any ground. For fulfilling the social justice, Indian Constitution has various provisions, which can be traced in Part III and Part IV of the Constitution.

The objective of this chapter is to deal with the constitutional history of Articles 15 (2), 17, 23 and 24. These provisions were incorporated in the Constitution to eradicate social evils from the country. The essence of Articles 15 (2), 17, 23 and 24 is discrimination and exploitation of a certain section of the society by the dominant section on the basis of caste and untouchability. Articles 15 (2) and 17 deal with the caste and untouchability and Article 23 also states to abolish forced labour and *begar* which is the result of caste system. Article 24 protects the children below the age of fourteen years from the employment which in turn protects the socio-economic disadvantages groups of the society. Before the analysis of the Constituent Assembly Debate of the HRs the discussion would try to understand the concepts of "caste" and "untouchability" because it is the objective behind insertion of HRs in

the Constitution. Thereafter the discussion will deal the CAD to analyse how the HRs were incorporated in the Constitution?

History of caste and untouchability in India

Since the CA was highly concerned about the future of India, the members of CA or the Constitution drafter envisioned a free India where all citizens would be treated equal irrespective of any grounds of caste, creed, classes, religion, place of birth, gender, age, and language etc. Amongst all kinds of discrimination grounds, the caste based discrimination was key concern in the Assembly because the caste had religious sanction and was well accepted by the majority dominant castes of India. For its (caste) uniqueness, India was ruled by Muslims for about 12 centuries and by the Britisher for about two centuries but it is still alive as it was 2500 years before.

The main concern of the CA was to protect the FRs of historically, socially, educationally, economically and politically disadvantage groups of the society. In order to make the application of the FRs effective in the Part III, the constitutional framers make untouchability and forced labour or *begar* a crime under the Constitution and enforceable these FRs against the fellow citizens. Therefore, before undertaking discussion of the CAD, a look into the history of these provisions is necessary for understanding the arguments of the members of the CA.

Dr. Ambedkar stated that "As for myself I do not feel puzzled by the Origin of Caste in India for, as I have established before, endogamy is the only characteristic of Caste and when I say Origin of Caste I mean *The Origin of the Mechanism for Endogamy"* 2014a: 14). Ambedkar defines caste as the superposition of endogamy on exogamy which controls the behaviour of individuals to not make any social-intercourse with individuals of the other caste.

Dr. Ambedkar (2014a: 9) in *Caste in India* stated that:

> Caste in India means an artificial chopping off of the population into fixed and defines units, each one prevented from fusing into another through the custom of endogamy. Thus the conclusion is inevitable that *Endogamy is the only characteristic that is peculiar to caste*, and if we succeed in showing how endogamy is maintained, we shall practically have proved the genesis and also the mechanism of Caste.... *Thus the superposition of endogamy on exogamy means the creation of caste.*

To trace the history of caste, Dr. Ambedkar finds the roots of caste in ancient Hindu religion which had the codified law of caste. Dr. Ambedkar (Ambedkar 2014a: 16) highlighted the codification of caste in India:

> Every country has its law-giver, who arises as an incarnation (avatar) in times of emergency to set right a sinning humanity and give it the laws of justice and morality. Manu, the law-giver of India, if he did exist, was certainly an audacious person. If the story that he gave the law of caste be credited, then Manu must have been a dare-devil fellow and humanity that accepted his dispensation must be humanity quite different from the one we are acquainted with. It is unimaginable that the law of caste was given.....One thing I want to impress upon you is that Manu did not give the law of Caste and that he could not do so. Caste existed long before Manu. He was an upholder of it and therefore philosophised about it, but certainly he did not and not ordain the present order of Hindu Society. His work ended with the codification of existing caste rules and the preaching of Caste Dharma.

Dr. Ambedkar traced the history of origin of caste and how it was codified by Manu; the law maker of ancient Hindu social order. Dr. Ambedkar stated that caste existed before Manu. Dr. Ambedkar (Ambedkar 2014b: 15) compared untouchables with slavery to show the gravity of inhumanity and inequality.

> Slavery, it must be admitted, is not a free social order. But can untouchability be described as a free social order? The Hindus who came forward to defend untouchability no doubt claim that it is. They, however, forget that there are differences between untouchability and slavery which makes untouchability a worse type of an unfree social order. Slavery was never obligatory. But untouchability is obligatory. A person is permitted to hold another as his slave. There is no compulsion on him if he does not want to. But an untouchable has no option. Once he is born an untouchable, he is subjected to all the disabilities of an Untouchable.....Once an Untouchable always an Untouchable. The other difference is that untouchability is an indirect and therefore the worst form of slavery.

Gopal Guru in *Archaeology of Untouchable* stated that "According to Manusmriti, the physical association of the upper castes-which are still under social influence of ritual orders-with the earth, is considered to be ritually polluting. Manusmriti, further prescribe that member of the top layer in the social hierarchy are not supposed to soil their hands with either earth or mud" (Guru 2012: 207). Gopal Guru further stated that:

> The upper caste, taking their cue from Manu's code, use water for constructed a perennial division, thus rendering some bodies ritually pure and other as eternally impure….According to this understanding, water-unlike earth-become a standard, by which it then becomes possible to measures how deeply the essence of caste has penetrated and perverted the social relations across the castes….Just imagine if there was no water: untouchability would not have originated in the first instances or it would have disappeared long ago if the water resources had dried up. Thanks to the water sources or long-living Himalayas, water is still available for practising untouchability! (Guru 2012: 208).

Guru highlights the facts that how the Manu's code controls the untouchability and through it untouchables were not allowed to access the natural resources. Water and fire were the major sources which direct by connected with the life of untouchables. Gopal Guru (Guru 2012: 209) further stated that:

> Fire, according to Manu's Dharmashastra, also acts as the purification agent. The rituals practice among Hindus known as Agni Pariksha underscores the point. Within Hindu social or cultural practice, untouchables and women are forced to take this Agni Pariksha for different reasons. The upper castes use fire not only to punish untouchables but also to purify the vicinity through seeking displacement of the untouchables as 'walking carrion'

Gopal Guru further stated that: "It might look completely bizarre to believe that at least a few decades ago; the sound created by untouchables was considered as a source of ritual pollution. During the feudal social set-up, the untouchables in most parts of India were forced to announce their arrival before they could enter the main village" (Guru 2012: 210). Guru highlights Manusmriti's provisions which are the codified text of caste system in India that how this text makes one individual supreme by birth and other individual untouchable by birth. The caste law had the heinous punishments under the code if any untouchable breaks its norms.

Dipankar Gupta defines the caste system as "caste system as a form of differentiation wherein the constituent units of the system justify endogamy on the basis of putative biological differences which are semaphored by the ritualisation of multiple social practices" (Gupta 2015: 49). Surinder S. Jodhka in *Caste and Politics* quotes Jawaharlal Nehru's statements on caste from his book *The Discovery of India:* "In the context of society today, the caste system and much that goes with it are wholly incompatible, reactionary, restrictive, and barriers to progress. There can

be no equality in status and opportunity within its framework, nor can there be political democracy…Between these two conceptions conflict is inherent and only one of them can survive" [sic] (Jodhka 2015: 154). Jodhka further stated that:

> Caste was not merely an institution that characterized the structure of social stratifications; it represented the core of India. It was both and institution and an ideology. Institutionally, 'caste' provides a framework for arranging and organizing social groups in terms of their statuses and positions in the social and economic system. As an ideology, caste was a system of values and ideas that legitimized and reinforced the existing structures of social inequality. It provided a worldview around which a typical Hindu organised his/her life (Jodhka, 2015: 156).

There are fundamental differences between caste and class in India. While the caste exists only in India on the basis on birth and it is not subject to change, but in the matter of class one can change it. While caste is the result of social inequality on the contrary, class is the result of economic status of the individual. Jodhka makes differences between caste and class as: "while caste was traditional, class was to emerge with the process of secularization of occupations and industrialization/ urbanization. While caste is seen as a social institution, class represented an open system of economic opportunities" (Jodhka, 2015: 158). Sunder Sarukkai (Sarukkai 2012: 157) in *Phenomenology of Untouchability*, on untouchability stated that:

> Untouchability as a social practice is simple enough to describe. It refers to certain practices of 'higher' castes such as refusing to touch or share water and food with people who have been called the 'untouchables' and who are today collectively called Dalits. These sets of practices involve not only proscriptions on both groups of people but are often justified through notions of purity and related concepts.

Gopal Guru highlighted Dr. Ambedkar's method to annihilate caste system. Guru stated that Dr. Ambedkar followed archaeological method to eradicate caste and untouchability:

> Ambedkar's politics seek to annihilate caste. But before he attacks its roots, he very systematically seeks to prune its branches- the various untouchability practices. For carrying out this attack against casteism through untouchability, Ambedkar does follow an archaeological method. That is to say, through the social struggle, he first seeks to question untouchability practices that are the manifestation of the essence of caste. Also, for Ambedkar, the solution lies not in morality; on the contrary, it is fundamentally politically (Guru 2012: 215).

Dr. Ambedkar in *Annihilation of Caste* described the state of untouchability in the era of Brahmins Rule/Peshwas Rule in Maharashtra as:

> Under the rule of Peshwas in the Maratha country the untouchable was not allowed to use the public streets if a Hindu was coming along lest he should pollute the Hindu by his shadow. The untouchables was required to have a black thread either on his wrist or in his neck as sign or a mark to prevent the Hindus from getting themselves polluted by his touch through mistake. In Poona, the capital of the Peshwa, the untouchable was required to carry, strung from his waist, a broom to sweep away from behind the dust he treated on lest a Hindu walking on the same should be polluted. In Poona, the untouchable was required to carry an earthen pot, hung in his neck wherever he went, for holding his spit lest his spit falling on earth should pollute a Hindu who might unknowingly happen to read on it (Ambedkar 2014a: 39).

Amebdkar describes the state of untouchables in the Peshwas rule in Maharashtra. The Hindu rulers did not allow untouchables to use the common path even the shadow of untouchables. V. Geetha in *Bereft of Being the Humiliations of Untouchability* stated that "Untouchability, as most of us know, is both a condition of existence, as well as a violent expression of power. To B.R. Ambedkar, this system embodied the principle of 'graded inequality' and to E.V. Ramasany Periyar, untouchability was a norm that informed the caste system, at every level of its hierarchical existence" (Geetha 2011: 96). V. Geetha (Geetha 2011: 97) further stated that:

> The unjust nature of the caste order may be variously understood-in terms of the imperatives of productions and reproduction, discipline and punishment, sexual control and regulation. Yet, none of these help us comprehended the grit and grime of actual practices of untouchability-the segregation of living spaces, the taboos against sharing water points, burial grounds, temples, the ban adornment, the consigning of an entire group of people to deadening labour, the hunting of their existence by the fear of punishment, should they fudge norms, cross limits. This punishment is as soul-wounding as it is gratuitous: the forcible eating excreta, punishment by fire-branding, the rape and mutilation of bodies. Whatever its structural correlates, untouchability is essentially an experience of wounding, of wilful hurt, through which the outcaste body becomes a stranger to itself, and is ever ready to fall off the edge, give into anomie and fragmentation…Untouchability however is not as act of dramatic horror-it exists most powerfully in the everyday, is at home in the quotidian, and sustained and legitimized by a tortuous semantics of tactility

V. Geetha maintains that untouchability is alive and it rises everyday than decline. This growing notion of untouchability is dangerous to the socialist and democratic nature of the constitution. Dr. Ambedkar (Ambedkar 2014a: 5-6) in *Caste in India* said that though caste system is an Indian problem but wherever Hindus go, caste is carried by them. Dr. Ambedkar stated that:

> The problem of caste is vast one, both theoretically and practically. Practically, it is an institution that portends tremendous consequences. It is a local problem, but one capable of much wider mischief, for "as long as caste in India does exist, Hindus will hardly intermarry or have any social intercourse with outsiders; and if Hindus migrate to other regions on earth, Indian caste would become a world problem

In the Indian context Dr. B.R. Ambedkar in *Annihilation of Caste* suggests to the Indian that "caste is the monster that crosses your path. You cannot have political reform. You cannot have economic reform, unless you kill this monster" (Ambedkar 2014a: 47). M.N. Srinivas stated that how the intellectuals failed in eradicating the caste:

> Caste and anti-caste are both part of a single phenomenon, and those who wish to root the idea of human dignity and equality in India soil would do well to go these historical sources of protest and build on them. But the pity of it is that our intellectuals are not only alien to rural India but both contemptuous and patronising in their attitude towards rural people and their culture. Educating our intellectuals ought to be a task of high priority.

Srinivas argues a relevant point that how the intellectuals have failed to maintain dialog with the downtrodden people. Anand Teltumbede states on the caste system of India:

> The Indian caste system is a unique institution...The caste system has survived the myriad changes encompassing feudalism, colonialism, capitalism, and continues with resilience today in the neo-liberal era. This does not mean that the caste system has remained unchanged or resistant to time. Perhaps the resilience of the Indian caste system can be explained by its adaptability, its self-organising as well as self-regulating character (Teltumbde 2016e: 34-35).

Teltumbede's argument about the self-organising and self-regulating nature of caste system shows that caste has such an element which is not subject to end. Caste can survive and regulate by itself. Shah stated that the practice of caste is not necessarily brought up in India but it can flourish in abroad also, Shah said:

> The idea of caste endogamy persists in the Indian diaspora. Caste associations which are active in the US, Australia, Africa, Britain and Canada, promote caste endogamy. These associations are in active interaction with caste associations in India. And all kinds of stratagems are employed to arrange intra-caste marriages across continents... It would be a mistake to think that caste does not exist in the city, or that the idea of caste endogamy has disappeared from the castes that exist in the city. In fact, the city is the centre of activities of caste associations, and provides leadership to the members of the horizontal unit spread in villages and towns all over the country (Shah 2017: 65).

A. M. Shah through research found that caste practice is well established in Indian society not only in rural but also in urban settings. Shah argued on the future of Indian caste system as: "the space for a caste-less society is thus shrinking. A caste-less society is a mirage, and the mirage is moving further away" (Shah 2017: 66).

Dr. Ambedkar in Annihilation of Caste, states that: "Caste is no doubt primarily the breath of the Hindus. But the Hindus have fouled the air all over and everybody is infected, Sikh, Muslim and Christian" (Ambedkar 2014a: 80). It is the power of the caste system that attracts anybody who believes in inequality, discrimination and injustice. The core idea of Sikh, Muslim and Christian religion is to possess humanity not the inhuman social practises like caste system which make persons' unequal.

Dr. Ambedkar stated that "So long as the Hindu Social Order lasts, discriminations against the Untouchables continue to exist" (Ambedkar 2014b: 111). It is a radical argument given by Dr. Ambedkar which has truth. In *Indian Medical Association v Union of India and Others,* AIR 2011 SC 2365, the Supreme Court states on the caste system in Indian society:

> Our societal hierarchy, and in fact one of the sustaining forces of caste system, and caste like structures in even other religious groups, apart from endogamy, lack of relative vertical and occupational mobility, has been the normative assumption that only some amongst us, belonging to certain social groups, deserve to study and gain the knowledge that truly provides ability to critically evaluate and attempt to change their world. Caste system may have been many things, but it was also about systematic exclusion from portals of knowledge. To allow that to happen again, now, in the garb of a right of the educator to choose his/her own students, and a formal pretense of non-discrimination while turning a blind eye to the discrimination inherent in the system of selection for entry, which does not test real talent or ability would tantamount to a desecration of all constitutional values.

Dr. B.R. Ambedkar in *Caste in India* (Ambedkar 2014a: 22) found problems in caste systems: "(1) that in spite of the composite make-up of the Hindu population, there is a deep cultural unity; (2) that caste is a parcelling into bits of a larger cultural unit; (3) that there was one caste to start with and (4) that classes have become Castes through imitation and excommunication".

Dr. B.R. Ambedkar (Ambedkar 2014a: 67-69) suggests the ways to annihilate the caste system in India:

(1) If you abolish caste, first abolish sub-castes.

(2) To have inter-caste dinners.

(3) To have inter-marriage because 'fusion of blood can alone create the feeling of being kith and kin and unless this feeling of kinship, of being kindred, becomes paramount the separatist feeling-the feeling of being aliens-created by castes will not vanish. The real remedy for breaking Caste is inter-marriage. Nothing else will serve as the solvent of Caste.

(4) Must destroy the authority of the Shastras and the Vedas.

The above discussion finds that caste and untouchability occupy socio-economic and political sphere in India, with reference to the Hindu religion from ancient times. All these reasons made it inevitable for the Constituent Assembly to address the issues of caste and untouchability. Due to casteism people have not been able to lead their lives with dignity. Because of caste and practice of untouchability peoples from lower strata were not allowed to any public place, access transportation, entertainment and worship etc. Social intercourse remained low among the citizens because of this inhuman practice.

Constituent Assembly Debate

The discussion in this section highlights the debate of the CA on the HRs Article 15(2), 17, 23 and 24 of the IC. The discussion will deal with the opinion of the members of the CA on the provisions of FRs especially regarding the rights to equality and freedom. As the previous section highlights how the issue of caste and untouchability affects the life of a large section of the society which has forced them

to live a life worse than animal[22]. The CA debate and insert the provision which prohibits the discrimination on the basis of caste, class, religion, place of birth, gender, creed etc. from the State as well as the citizen.

Constituent Assembly Debate on Article 15 (2)

Dr. B.R. Ambedkar presented his Memorandum and Draft Articles on the Rights of States and Minorities on March 24, 1947. The Article II-Section I clause 4 of the draft states:

Fundamental rights of Citizens

> Whoever denies to an person, except for reasons by law applicable to person of all classes and regardless of their social status, the full enjoyment of any of the accommodations, advantages, facilities, privileges of inns, educational institutional, roads, paths, streets, tanks, wells and other watering places, public conveyances on land, **air or water**, theatres, or other places of public amusements, resorts or convenience, where they are dedicated to or maintained or licensed for the use of public, shall be guilty of an offence (Rao 2004: 86).

Sardar Vallabhbhai Patel in 29 April 1947, moved clause 4 (now Article 15) of the interim report of Fundamental Rights:

> 4. (1) The State shall make no discrimination against any citizen on grounds of religion, race, caste or sex. (2) There shall be no discrimination against any citizen on any ground of religion, race, caste or sex in regard to-a) access to trading establishments including public restaurants and hotels; (b) the use of wells, tanks, roads and places of public resorts maintained wholly or partly out of public funds or dedicated to the use of the general public: Provided that nothing contained in this clause shall prevent separate provision being made for women and children.

Sardar Patel highlighted the significance of this Article before the CA

> This is a non-discriminatory clause which is provided in almost all constitutions and adjustments have been made here to suit the special conditions of our country. There may be various points of view and in the Committee also there was a full discussion on this question and I am sure there will be discussion in this House also. A proviso has been made which was found to be necessary because even in a non-discriminatory clause it would be necessary in the present condition of our country to make special provision for women and children (CAD Vol. III, 29 April, 1947: 20).

[22] For example today, cow is safer than human being. The laws are very stringent relating to the protections of caw than human being. The discussion relating to caw vigilant groups who lynch human being in the name of protection of caw, is done in first chapter in the section of 'conflict of rights'.

Sardar Vallabhbhai Patel also made statements on the application of fundamental rights against non-state actors and the object of sub clause 2. He stated as follows:

> It is very simple. The first clause is about the State obligation; the second clause deals with many matters which have nothing to do with the State such as public restaurants they are not run by States; and hotel they are not run by State. It is an entirely different idea, and therefore, it is absolutely essential (CAD Vol. III, 29 April, 1947: 20).

Patel inserted an entirely different provision in the Part III which was different from the State action which made FRs enforceable against the citizen. In the other words, idea behind this article was to make citizen equal to the State in the matter relating to discrimination. This clause is the responsible for the emergence of the concept of HRs in the Indian Constitution. It leads to idea of the social democracy with the political democracy. Mahvir Tyagi on sub-clause 2 argued very conservatively that:

> It does not satisfy me. The second clause pertains to hotels and restaurants. To say that restaurants and hotels shall do this or that and there shall be no discrimination against any citizen on any ground of religion, race, caste or sex in regard to access to trading establishments including public restaurants and hotels, is including such establishments which are not included in the State. It is their outlook. But if we are also to enact for those which are not included in the State, then we should make it clear. Could we not put it in one clause that no discrimination shall be allowed against any citizen in regard to restaurants, hotels, well, tanks, roads, and so on? The clause as it stands does not mean this. Either the language should be slightly different, or perhaps I have not exactly followed the meaning of this clause (CAD Vol. III, 29 April, 1947: 20-21).

Mahavir Tyagi was confused about the sub-clause 2 and wants to make more clear and separate article on the same. R.K Sidhwa stated that:

> The words 'Hotels and public restaurants' have been mentioned for special reasons and specific purposes. They are used by the public and even at present licence from the local bodies is necessary before they are allowed to function. It is very necessary that these public places of entertainment hotels, and restaurants should be specifically mentioned, so that the owners may not say that A shall be allowed and B shall not be allowed. These words have a definite and special meaning, and they are absolutely necessary. I, therefore strongly suggest that the words be retained as the Hon'ble Sardar Patel has moved (CAD Vol. III, 29 April, 1947: 21).

Somnath Lahri argued to include the word ‘political creed’ as a ground of discrimination in the clause (CAD Vol. III, 29 April, 1947: 21). Srijut Rohini

Kumar Chaudhari wanted to add ‘dress style’ in the clause. Chaudhari further stated that:

> It seems almost a laughing matter. But even today when we are on the threshold of independence there are hotels which do not welcome people dressed in Indian style. I know of an instance which recently occurred when four Indian gentlemen of my province were not allowed to live in a hotel because they wore Indian dress. I am not afraid that in future the same restriction will be observed by any hotel owners. Today of course unfortunately there are some European owned or European managed hotels which do not take in Indians in Indian dress or make it a condition that they must not come to their dining rooms in that dress. I am not afraid of the future, because I believe that when India is independent such restriction would disappear. But what I am afraid of is a reprisal or a revenge taken against such European minded people and people in European dress may not be allowed to come into hotels. For that reason particularly I want that this amendment should be accepted by this House (CAD Vol. III, 29 April, 1947: 22).

V.C. Kesava Rao wanted to insert the ‘schools, hotels, temples or place of worship’ in sub-clause 2 (b):

> I want to say that though some schools are thrown open to the Harijans in the villages, they are not allowed to sit along with the caste Hindu students. They are asked to sit on the floor or at a distance. I would like to say in this connection that education is the birthright of every citizen. So a Harijan or an untouchable should be given the same right as every other citizen. As regards temples, I may submit that untouchables are made to worship God only from a distance and not before God. Even though the untouchables are saying that they are Hindus for the last so many centuries, they are being denied this right and they are made to worship God only from a distance and not within the temple itself. I think that untouchability is the sole cause for the non admission of untouchables into temples. I request that these things may be taken into consideration (CAD Vol. III, 29 April, 1947: 22).

Ajit Prasad Jain wanted to insert words ‘educational institution, hospital or dispensary’ (CAD Vol. III, 29 April, 1947: 22). M. Ananthasayanam Ayyanger wanted to insert the other sources of water supply in the clause: “I would like to submit that there are sources of water supply other than wells, tanks, etc., such as channels, and I think these also should be covered by clause No. 4. Therefore, I think it necessary to add the words ‘and other sources of water supply’ after the word ‘tank’. Otherwise, there will be a lacuna”(CAD Vol. III, 29 April, 1947: 24).

Sardar Vallabhbhai Patel did not accept the amendment moved by Somnath Lahiri that the word 'political creed' should be inserted. He also did not accept the amendment moved by Srijut Rohini Kumar Chaudhari that 'dress style' should be inserted in the clause. Sardar Vallabhbhai Patel had stated that:

> All the foreigners are going. You need not be obsessed on that account such things as dress cannot be put in the fundamental rights. If the world at large should read such provisions in our fundamental rights, then they would naturally conclude that we do not even know how to treat our nationals and how to treat our fellow beings. I may assure my friend that there is no discrimination now on account of dress. I do not think such things should be provided for in fundamental rights (CAD Vol. III, 29 April, 1947: 24).

Patel was limited only to the Britishers in his reply on the move of 'dress style' than analysis of the nature of Indian societies. In a hierarchical society it is easy to discriminate on various grounds including 'dress style'. Here it is necessary to take example of discrimination on the basis of 'dressing style' in twenty-first century even after the 67 years of independence of India. A sitting judge of Madras High Court was denied entry into 'Tamil Nadu Association Club' at Chepauk on the basis that judge was wearing a 'dhoti' (Subramani 2014).

After one year later, in Constituent Assembly, C. Subramaniam moved an amendment in Article 9 to make separate a new article 9 (1a) from Article 9 (1) (a):

> It would look as if, after a general clause saying that the State shall not discriminate, we give instances where in the State shall not discriminate by using the words 'In particular'. As a matter of fact it is not so. After the words 'In particular' that clause refers to access to shops, etc. That is not a case where the State has the power to discriminate. Therefore it should read as a separate clause. That is why I have suggested that the words 'In particular' should be removed and it should form a separate clause as 9(1a) thus: "No citizen shall, on grounds only of religion, race, caste, sex or any of them be subject to any disability" (CAD Vol. VII, 29 Nov, 1948: 7-8).

Syed Abdur Rouf moved an amendment in Article 9 that the word "place of birth" should be inserted because of local patriotism the discrimination could be happen in India (CAD Vol. VII, 29 Nov, 1948: 8).

Prof. K.T. Shah moved an amendment to substitute certain grounds of discrimination in Article 9 (1) (a) (b):

any place of public use or resort, maintained wholly or partly out of the revenues of the State, or in any way aided, recognised, encouraged or protected by the State, or place dedicated to the use of general public like schools, colleges, libraries, temples, hospitals, hotels and restaurants, places of public entertainment, recreation or amusement, like theatres and cinema houses or concert halls; public parks, gardens or museums; roads, wells, tanks or canals; bridges, posts and telegraphs, railways, tramways and bus services; and the like (CAD Vol. VII, 29 Nov, 1948: 9).

Guptanath Singh wanted to insert the word "bathing ghats" in Article 9 (1) (b) (CAD Vol. VII, 29 Nov, 1948: 10). S. Nagappa asked a question about the scope of the word "shop" and "places of public resort", he said: "Whether places of public resort include places like burial or cremation grounds. These are not maintained out of public revenues or by public bodies, they being generally maintained by religious bodies. I would like to know whether there is to be a separate burial or cremation ground for these unfortunate sons of the soil, or whether all aspects are covered by this clause" (CAD Vol. VII, 29 Nov, 1948: 14).

Mohd Tahir moved an amendment in Article 9 that the words "Dharamsalas" and "Musafirkhanas" should be inserted because the owner of "Dharamsalas" and "Musafirkhanas" do not allow the people from the Scheduled Castes or any other caste peoples for stay on the basis of their caste (CAD Vol. VII, 29 Nov, 1948: 15).

Dr. B.R. Ambedkar accepted only Subramaniam's amendment and replied to the Assembly:

Then I come to may Friend Mr. Nagappa. He has asked me to explain some of the words which have been used in this article. His first question was whether "shop" included laundry and shaving saloon. Well, so far as I am concerned, I have not the least doubt that the word 'shop' does include laundry and shaving place. To define the word 'shop' in the most generic term one can think of is to state that 'shop' is a place where the owner is prepared to offer his service to anybody who is prepared to go there seeking his service. A laundryman therefore would be a man sitting in his shop offering to serve the public in a particular respect, namely, wash the dirty cloths of a customer. Similarly, the owner of a shaving saloon would be sitting there offering his service for any person who enters his saloon (CAD Vol. VII, 29 Nov, 1948: 17-18).

Further, on the same day 29 November 1948, after the reply of Dr. B.R. Ambedkar to the CA, B.G. Kher asked a question to Dr. Ambedkar: "Does it include the offices of a doctor and a lawyer?"

Dr. B.R. Ambedkar replied:

> Certainly it will include anybody who offers his services. I am using it in a generic sense. I should like to point out therefore that the word 'shop' used here is not used in the limited sense of permitting entry. It is used in the larger sense of requiring the services if the terms of service are agreed to.The second question put to me was whether 'place of public resort' includes burial grounds…But, as my Friend Mr. Nagappa is interested in the point should say that I have no doubt that a place of public resort would include a burial ground subject to the fact that such a burial ground is maintained wholly or partly out of public funds…
>
> Then my Friend asked me whether ponds are included in tanks. The answer is categorically in the affirmative. A tank is a larger thing which must include a pond. The other question that he asked me was whether rivers, streams, canals and water sources would be open to the untouchables. Well, rivers, streams and canals no doubt would not come under article 9; but they would certainly be covered by the provisions of article 11 which make any interference with the rights of an untouchable for equal treatment with the members of the other communities an offence(Guru 2012: 208).

Then S. Nagappa asked "What about the courses of water?" Dr. B.R. Ambedkar replied, "I cannot add anything to the article at this stage. But I have no doubt that any action necessary with regard to rivers and canals could be legitimately and adequately taken under article 11". Here, Dr. Ambedkar mentioned that Article 11 (now 17) would cover all things which could not come under the ambit of present article 9.

R.K. Sidhwa asked about the definition of the word 'public', "What about the interpretation of the word 'public'?" Dr. B.R. Ambedkar replied:

> My Friend Mr. Sidhwa read out some definition from the Indian Penal Code of the word 'public' and said that the word 'public' there was used in a very limited sense as belonging to a class. I should like to draw his attention to the fact that the word 'public' is used here in a special sense. A place is a place of public resort provided it is maintained wholly or partly out of State funds. It has nothing to do with the definition given in the Indian Penal Code (CAD Vol. VII, 29 Nov, 1948: 18-19).

The CA passed the amendment moved by Patel which makes citizen liable under the Constitution for violation of FRs of the fellow citizens. Adopted this extraordinary provision (Article 15 (2)) as the fundamental rights under the Constitution, India make its citizen equal to the State in the matter relating to discrimination.

Constituent Assembly Debate on Article 17

The Interim Report on Fundamental Rights was presented by Sardar Vallabhbhai Patel before the Constituent Assembly. Patel stated that the interim report of the Fundamental Rights is divided into two parts, first part is justiciable (Part III) by the court and second, non-justiciable (Part IV) (CAD Vol. III, 29 April, 1947: 1). The clause 6 of the report deals with the untouchability. Mr. Promatha Ranjan Thakur hit the root cause of the untouchability and stated that:

> I do not understand how you can abolish untouchability without abolishing the very caste system. Untouchability is nothing but the symptom of the disease, namely, the caste system. It exists as a matter of caste system. I do not understand how this, in its present form, can be allowed to stand in the list of fundamental rights. I think the House should consider this point seriously. Unless we can do away with the caste system altogether there is no use tinkering with the problem of untouchability superficially. I have nothing more to say. I hope the House will consider my suggestion seriously (CAD Vol. III, 29 April, 1947: 4).

Srijut Rohini Kumar Chaudhury (CAD Vol. III, 29 April, 1947: 10-11) on the definition of untouchability argued that:

> 'Untouchability' means any act committed in exercise of discrimination on, grounds of religion, caste or lawful vocation of life mentioned in clause 4."
>
> Sir, in the fundamental rights, it has been laid down that untouchability in any form should be an offence punishable by law. That being so it is necessary that the offence should be properly defined. As it stands, the word 'untouchability' is very vague. It should be defined in the manner in which I have put it, or in some other better form which may be decided upon by the House

On the definition of untouchability, Dr. S.C. Banergee argued that:

> Mr. President, the word 'untouchability' actually requires clarification. We have been accustomed to this word for the last 25 years; still there is a lot of confusion as to what it connotes. Sometimes it means merely taking a glass of water and sometimes it has been used in the sense of admission of 'Harijans' into temples, sometimes it meant intercaste dinner,

sometimes intercaste marriage. Mahatma Gandhi who is the main exponent of 'untouchability', has used it in various ways and on different occasions with different meanings. So when we are going to use the word 'untouchability', we should be very clear in our mind as to what we really mean by it. What is the real implication of this word? (CAD Vol. III, 29 April, 1947: 11).

Mr. K.M Munshi stated that:

The definition is so, worded that if it is accepted it will make any discrimination even on the ground of place of birth or 'caste or even sex Untouchability. What does the definition say?

"Untouchability' means any act committed in exercise of discrimination on grounds of religion, caste or lawful vocation of life mentioned in clause 4."

Now, Sir, clause 4 does not deal with untouchability at all. It deals with discrimination regarding services various other things. It may mean discrimination even between touchables and untouchables, between people of one province and another. The word 'untouchability' is mentioned in clause 6. The word 'untouchability' is put purposely within inverted commas in order to indicate that the Union legislature when it defines 'untouchability' will be able to deal with it in the sense in which it is normally understood (CAD Vol. III, 29 April, 1947: 11).

Mr. Dhirendra Nath Datta argued on the ambiguity of the word ‘untouchability’ and that in future it can be interpreted as the magistrate pleased. It will vary from person to person whether someone thinks that something is a practice of ‘untouchability’ or not. Datta argued with the CA to define ‘untouchability’:

A magistrate or a judge dealing with offences shall have to look to the definition. One magistrate will consider a particular thing to be untouchability, while another magistrate may hold a different thing to be untouchability, with the result there will be no uniformity on the part of the magistracy in dealing with offences. It will be very difficult for the judge to decide cases. Moreover, untouchability means different things in different areas. In Bengal, untouchability means one thing, while in other provinces, it means an entirely different thing. So, unless a definition is put in, it would be impossible for the judiciary to deal with offences coming under untouchability...I strongly feel that unless there is a definition it cannot be dealt with as an offence…Unless the caste system is abolished, untouchability will persist in some form or other. It has been said times without number by our leaders that unless Hindu society is drastically reformed by abolishing the caste system, it is bound to perish. Caste system should be abolished. So, if we are to deal with 'untouchability' as an offence, there should be some definition and I hope it would be left to the Drafting Committee to frame suitable definition so that it will be placed before the House for discussion. With these words, I support the amendment (CAD Vol. III, 29 April, 1947: 11).

H.V. Kamath stated that moved an amendment that after the word “untouchability” the word “unapproachability” should be inserted and after the word ‘any’ the words ‘and every’ should be inserted but Vallabhbhai Patel did not accept Kamath’s amendments (CAD Vol. III, 29 April, 1947: 26-27).

Naziruddin Ahmad wanted to define untouchability in legal sense, though it is a political word, Ahmad stated that:

> The word "untouchability" has no legal meaning, although politically we are all well aware of it; but it may lead to a considerable amount of misunderstanding as in a legal expression. The word 'untouchable' can be applied to so many variety of things that we cannot leave it at that. It may be that a man suffering from an epidemic or contagious disease is an untouchable; then certain kinds of food are untouchable to Hindus and Muslims. According to certain ideas women of other families are untouchables…Then, Sir, I have one more word to say in this connection and that is that in line 3 of this clause in the midst of the sentence, the word 'Untouchability' begins with a capital letter. This is a matter for the Drafting Committee (CAD Vol. VII, 29 Nov, 1948: 21-22).

V. I. Muniswamy argued that:

> Sir, under the device of caste distinction a certain section of people have been brought under the rope of untouchability, who have been suffering for ages under the tyranny of the so called caste Hindus and all those people who style themselves as landlords and zamindars, and were thus not allowed the ordinary rudimentary facilities required for a human being. The sting of untouchability went deep into the hearts of certain sections of the people and many of them had to leave their own faiths and seek protection under religions which were tolerant. I am sure, Sir, by the adoption of this clause many a Hindu who is a Harijan, who is a scheduled class man will feel that he has been elevated in society and he has now got a place in society. I am sure that the whole country will welcome the inclusion of article 11 in this Constitution (CAD Vol. VII, 29 Nov, 1948: 22).

Dr. Monmohon Das argued that:

> Today the 29th November 1948 is a great and memorable day for us the untouchables. This day will go down in history as the day of deliverance, as the day of resurrection of the 5 crores of Indian people who live in the length and breadth of this country. Standing on the threshold of this new era, at least for us, the untouchables, I hear distinctly the words of Mahatma Gandhi, the father of our nation, words that came out from an agonized heart, full of love and full of sympathy for these downtrodden masses.

Gandhiji said: "I do not want to be reborn, but if I am reborn, I wish that I should be born as a Harijan, as an untouchable, so that I may lead a continuous struggle, a lifelong struggle against the oppressions and indignities that have been heaped upon these classes of people." The word Swaraj will be meaningless to us if one fifth of India's population is kept under perpetual subjugation (CAD Vol. VII, 29 Nov, 1948: 22-23).

Shantanu Kumar Das on clause 11, stated that,

This clause is intended to abolish the social inequity, the social stigma and the social disabilities in our society. Everybody desires that the practice of untouchability should somehow be abolished but nobody appears to be very helpful in its abolition. When everybody desires that this practice should be abolished, I fail to see why so much time should be wasted in a long discussion over it. The fact is that we merely want to enact laws about it and expect the rural people to observe these laws. We must ourselves first observe the law for otherwise there would be no sense in asking others to act upon it. If we fail to observe it, it would be impossible to root out this evil (CAD Vol. VII, 29 Nov, 1948: 23).

H.J. Khandekar (CAD 21 Nov, 1949) on the draft of the Constitution stated (Article 17) that:

Now today, Sir, we are enacting a law of Independent India under the genius of Dr. Ambedkar, the President of the Drafting Committee. If I may do so, Sir, I call this Constitution the Mahar law because Dr. Ambedkar is a Mahar and now when we inaugurate this constitution on the 26th of January 1950 we shall have the law of Manu replaced by the law of Mahar and I hope that unlike the law of Manu under which there was never a property in the country the Mahar law will make India virtually a paradise…

Now, Sir, we have embodied an article No. 17 in this Constitution to remove untouchability and I am sure that untouchability will be removed, but I have seen Act for removing untouchability in the Provinces, the Temple Entry Act and the Removal of disabilities Acts passed by the different Provinces in this country. **What is the effect of these laws? Not an inch of untouchability has been removed by these laws and, therefore, if this law of removing untouchability remains in the book of Constitution itself, I do not think that untouchability will be removed. If at all the ghost of untouchability or the stigma of untouchability from India should go the minds of these crores and crores of Hindu folks should be changed and unless their hearts are changed, I do not hope.**

Shankarrao Deo on the Draft Constitution stated: “But if we all work and try to remove this blot of untouchability, not from the Constitution but from our hearts, if we destroy it not in law but in spirit, then I am sure this last blot or the sign of it will

also go. This unity has also another feature"(CAD 21 Nov, 1949). S. Nagappa (CAD 21 Nov, 1949) on the Draft Constitution Article 17:

We are abolishing untouchability today, but I would request the framers of this Constitution and those who are going to work this Constitution from the 26th January 1950 to see that in every bit of it, every letter and word and spirit this untouchability is removed from this country. The responsibility lies more on your shoulders, as you have taken the pledge that you should bring us upto your level within 10 years' time. I hope with this goodwill, with your generosity, we will be able to come to that level. We will also endeavour on our part to come to that level at the earliest opportunity that is possible.

V.I. Muniswamy Pillai (CAD Vol. VII, 8 Nov, 1948: 12-13) stated on the Draft Constitution:

Reading this constitution, one finds that there are two novel things that are not obtaining in any of the constitutions of the world: first of all, the eradication of untouchability. As a member of the so called Harijan community, I welcome it. Untouchability has eaten into the vitals of the nation, and with all the pride and privilege of the Hindu community, the outside world have been looking at India with a doubtful eye…The second feature is the abolition of forced labour (begar). If there is any labour required for common purposes in the village, this most unfortunate fellow, the Harijan, is always caught hold of to do all menial and inferior service. By the provisions in this Constitution, I am sure you are elevating a community that has been outside the pale of society. Sir, in the Draft Constitution, they have stated that the eradication of untouchability can be made by laws. I plead that mere laws are not enough. Special laws have to be made. In my own province the legislature was good enough to pass an Act to remove the civil disabilities; but in putting the Act into operation, it was not possible even for the Government to enforce the facilities that were sought to be conferred by the Act. Therefore, I plead that there ought to be special laws if you really want to do away with untouchability and forced labour.

Constituent Assembly Debate on Article 23

Sardar Vallabhbhai Patel introduced the Interim Report of Fundamental Rights on the floor and read Clause 11 of Rights of Freedom:

11. (a) Traffic in human beings, and (b) forced labour in any form including begar and involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, are here by prohibited and any contravention of this prohibition shall be an offence. "Explanation" Nothing in this sub clause shall prevent the State from imposing compulsory service for public purposes without any discrimination on the ground of race, religion, caste or class (CAD Vol. III, 1 May, 1947: 4).

K. M. Munshi (CAD Vol. III, 1 May, 1947: 5) moved an amendment stating,:

That for clause II the following be substituted: "Traffic in human beings, and begar, and other similar forms of forced labour are prohibited, and any contravention of this prohibition shall be an offence." The object is to deal in one sentence with both subjects. The Explanation has to be dropped because in view of the shortening of the whole sentence, the Explanation is not necessary at all. The object of this is that if there is any sort of forced labour like begar, it will be prohibited. Traffic in human beings will be prohibited. But the other forms of labour e.g. labour for educational purposes or for any other purpose of public service, will be regulated by legislation.

P.R. Thakur moved and amendment that the word 'begar' should be in italics (CAD Vol. III, 1 May, 1947: 5). Dr. B. R. Ambedkar (CAD Vol. III, 1 May, 1947: 5-6) stated that,

The point that I want to make is this, that, while I have no objection to the redrafting of sub clause (a) and (b) in order that they may run in a compact manner, I have a certain amount of doubt as to whether the dropping of the Explanation is in consonance with the desire of the majority of the members of the Advisory Committee that the State should not have power in any way for introducing compulsory service. Mr. Munshi suggests that, if the clause stands as redrafted and if the Explanation is omitted, nonetheless, the State will have the right to introduce compulsory military service….Because 'begar' is also something which is imposed by the State. So far as I know, in Bombay, 'begar' is demanded by the State for certain public purposes, and if the State is prohibited from having 'begar' it is perfectly possible for anybody to argue that even compulsory military service is begar….MY suggestion would be that at this state we should not drop the Explanation, but leave it as it is and have the whole matter reconsidered the Provincial Constitution and he Federal Constitution are when drafted in their final form.

Shrimati Dakshayani Velayudan (CAD Vol. III, 1 May, 1947: 6) stated,

I have great pleasure in commending Clause 11 because it is a clause which mostly relates to a community, a vast regiment of people who are subjected to untold miseries for so many centuries. Sir, even nowadays we find traffic in human beings in some parts of India and this clause will have a great effect on the underdogs of this land who will have a voice when India gets her independence. This clause will bring about an economic revolution in the fascist social structure existing in India. All the disabilities of the underdogs of this land are mainly due to the economic backwardness of the unfortunate brethren of the neglected community.

B. Das (CAD Vol. III, 1 May, 1947: 6-7) stated that:

Sir, I have studied a good deal of forced labour problems since 1929. I was a member of the Forced Labour Convention in Geneva in 1929. India accepted the Forced Labour Convention in 1930, but the Indian States, with certain exceptions, did not accept it. That practice does not exist among the major States whose representatives I find today in this House. Sir, in my part of the country forced labour has been taken advantage of by most of the small Indian States.

Sir, one point I am not satisfied with is whether traffic in human beings includes women traffic...Sir, we had the painful experience during the Bengal famine when lakhs of women were spirited away. Whether these women were taken to the provinces where there are less women or whether they were used to supply women to the huge British army that was then in the eastern part of India, that is a problem that social workers must work out, But I would have been happy to see "traffic in women" being specifically mentioned in the clause.

Dr P.K. Sen (CAD Vol. III, 1 May, 1947: 7) argued that:

First of all, there can be no question, nobody can doubt for a moment that forced labour in any form must go. But there were certain qualifying explanations in the original form of the clause which have now been omitted. Those are "involuntary servitude except as punishment for crime whereof the party shall have been duly convicted."

Now, it is well known that it is not only from children in the reformatory schools or from adolescents in the Borstal institutions, but also from adults grown up people who may be regarded as under State tutelage, during their incarceration it is right and legitimate, in fact, necessary, to exact labour according to the rules of the prisons. All that may really become very difficult if we put the clause in the form, that begar or forced labour shall be prohibited and any contravention of this rule would be regarded as an offence.

K.M. Munshi argued to add the words “other similar forms” (CAD Vol. III, 1 May, 1947: 7)

Dr. P.K. Sen replied to K.M. Munshi (CAD Vol. III, 1 May, 1947: 7) that:

'Similar' is a very vague word. I really cannot imagine what difficulty or objection there can be in the way of retaining the Explanation. The Explanation is quite innocuous, and it only says that for certain public purposes as in all civilized countries, it is necessary to get compulsory service from the citizens, for their own good and for the good of the State. I, therefore, submit that the Explanation either in the form as it stands or with any requisite modification may be accepted. Otherwise, all sorts of complications might arise.

Sir Alladin Krishnaswami Ayyar (CAD Vol. III, 1 May, 1947: 7-8) stated that:

Mr. President, going into the question as to whether there is necessity for the retention of the Explanation or not, I am quite clear in ray mind. So far as the first sub-clause is concerned, it will not preclude military conscription…Therefore, the words *'begar* and similar forms of forced labour' cannot possibly be interpreted as excluding conscription. That is my view and I do not think that the future legislatures will be precluded from introducing conscription by reason of a clause like this. The word "similar" occurring in the clause makes it quite clear that it cannot have in view a military conscription law. Therefore, under those circumstances, there need not be any apprehension. That does not, however, mean that I am opposed to the retention of the Explanation.

M. Ananthasayanam (CAD Vol. III, 1 May, 1947: 8) stated that:

Two points referred to in the clause are, one, traffic in human beings is prohibited, and, secondly, forced labour ought not to be allowed. Both these are already provided for in the Penal Code. Section 370 of the Indian Penal Code prohibits traffic in human beings, and section 374 makes it an offence to compel any person to labour against his will, but the word "unlawful" is used there. "Unlawful" means, it is lawful for any legislature to pass a law that for particular purposes labour may be enforced, as when a person is convicted of a crime and he is sentenced to penal servitude. Or in the interests of village administration when there are floods, the villagers may be obliged or forced to repair breaches in tanks, etc. it also allows compulsory military service...Now, that we are making a statute, why should we rely upon the future interpretation and leave it to the judges to decide? I oppose the amendment and I am in favour of retaining the original clause.

Dr. B. R. Ambedkar (CAD Vol. III, 1 May, 1947: 8-9):

Fortunately, for me I also happened to look into the very same cases which I am sure Sir Alladi has in mind. I think he will agree with me, if he looks at the reasoning of the judgment given by the Supreme Court, he will find that they proceeded on the hypothesis that in a political Organisation the free citizen has a duty to support the Government and as every citizen has a duty to support the Government therefore compulsory military law was doing nothing more than calling upon the citizen to do the duty which he already owes to the State. I submit that that is a very precarious foundation for so important a subject as the necessity of compulsory military service for the defence of the State.

I submit that we ought not to rest content with that kind of reasoning which the Supreme Court in India may adopt or may not adopt. Therefore, my, suggestion is this, that, just as in the case of the other clause dealing with citizenship you were good enough to remit the matter to a small committee to have it further examined. It will be desirable that this question as to whether the Explanation should be retained or not may also be remitted to a small committee

which should report to this House. It will then be possible for the House to take a correct decision in the matter.

The President of the Constituent Assembly stopped the discussion by saying that, “I think it is not necessary to have any further discussion if the suggestion which has been made by Dr. Ambedkar is acceptable to the House” (CAD Vol. III, 1 May, 1947: 9).

On 3 December 1948 the draft article clause 11 of the Interim Report on Fundamental Rights had changed into Article 17 and the Assembly debate further on it. Kazi Syed Karimuddin (CAD Vol. VII, 3 December, 1948: 11) moved an amendment in Article 17: “That for article 17, the following be substituted: 17. Neither slavery nor involuntary servitude such as begar except as a punishment for crime shall exist within the Union State.”

Damodar Swarup Seth moved an amendment: “that the following words be added at the beginning of clause (1) of article 17:' Servitude and serfdom in all forms as well as'” (CAD Vol. VII, 3 December, 1948: 11). Prof K.T. Shah (CAD Vol. VII, 3 December, 1948: 11-12) moved an amendment that:

"That in clause (1) of article 17, for the words Traffic in human beings and begar', the words `Traffic inhuman beings or their dedication in the name of religion to be Devadas is or be subject to other forms of enslavement and degradation and begar' be substituted."

I have, no doubt, worded my amendment with reference to a particular form of slavery which prevails in this country to a large extent, namely, dedication, in the name of religion, of young women to be Devadasis, and as such devoted to immoral traffic almost from an immature age. This also I think ought to be stopped. The name or cloak of religion should not help all those who indulge in such traffic; and the Constitution should make no bones about prohibiting this, if I am right in reading the spirit of this article which would prohibit all kinds of traffic inhuman beings. Forced labour is no doubt an evil; and the peculiar form of it, which is known by the word "begar", that is to say of compulsory work without payment, and work at command, should also be stopped. But more than anything else. I would like by this amendment to emphasize this highly immoral, and; I was going to say, inhuman traffic, which prevail on a very large scale, much larger than perhaps the House realizes, and as such I commend this amendment to the House.

Giani Gurmukh Singh Musafir moved an amendment that: "That in clause (1) of article 17, after the words, human beings' the words `including prostitution' be

inserted" (CAD Vol. VII, 3 December, 1948: 12). Sardar Bhopinder Singh Man (CAD Vol. VII, 3 December, 1948: 13) moved an amendment as:

That in clause (2) of article 17, after the words" caste or class" the words "and shall pay adequate compensation for it" be inserted."

Sir, with the addition of my amendment clause (2) will read thus:

"Nothing in this article shall prevent the State from imposing compulsory service for public purposes and shall pay adequate compensation for it."

Begar is a sort of forced work from labourers and we have sought to abolish it and prohibit it in the country. The idea is that the worker should not be made to work against his will, but however an exception is made that the State can impose compulsory service for public purposes.

H.V. Kamath (CAD Vol. VII, 3 December, 1948: 13-14) moved an amendment:

That in clause (2) of article 17, for the word" public" the words "social or national be substituted."

At the outset, may I just say that the non English word in this article begar has nowhere been defined and it will be better if we define it somewhere in the constitution, if not in this article itself. Now, coming to the amendment, to my mind the word "public" does not bring out the meaning or significance of the purport of clause (2) of this article as much as the word "social" or "national" will. We all know that the services of the State Government services are referred to as "public services", but "national service" or "social service" has got a wider and a higher, a more comprehensive connotation than the word "public service…

Here, I would also suggest that not merely there should be no discrimination of religion, race, caste or class, but there should be no discrimination of sex either.

Prof K.T. Shah moved an amendment: "that in clause (2) of article 17, after the words "discrimination on the ground" the word "only" be added" (CAD Vol. VII, 3 December, 1948: 14). Giani Gurmukh Singh Musafir (CAD Vol. VII, 3 December, 1948: 124-15) moved an amendment:

I would like to say that prostitution is not in accord with the Indian civilization.

It was imported from the West and with the departure of Western rulers it must come to an end. In clause (1) of article 17, after the words "Traffic in human beings" the word "Prostitution" must be included, for then alone the dignity of this clause will be increased, and

defect removed. Another suggestion has been moved by Sardar Bhopendra Singh Man. It is a very good suggestion that, if the Government imposes compulsory service in the public interest, then the workers must get adequate compensation… I shall mention only two points, firstly that the curse of prostitution should go from this country and secondly, compensation must be paid for compulsory service.

Shrimati G Durgabai (CAD Vol. VII, 3 December, 1948: 15) moved an amendment:

There is the amendment of Professor Shah intended to substitute in clause (1) `Traffic in human beings or their dedication in the name of religion to be Devadasis or be subject to other forms of enslavement and degradation as well as begar', for the words `Traffic in human beings and begar.' Sir, if any province has suffered from this bad practice of dedication of devadas is in the name of religion, it is the province of Madras. The worst form of this custom existed in Madras for a long time. I do not know whether this custom of dedication exists in any other province in any form. But we all know that in several ways this was practised. But, I do not think, while appreciating the object of Professor Shah in bringing forward this amendment and while being thankful to him for having realised the necessity for removing this evil, that this amendment is necessary.

B. Das (CAD Vol. VII, 3 December, 1948: 15) stated that:

Sir, I bow to the decision elsewhere that I should not move my amendment which sought to add the words 'particularly in women' after the words `Traffic in human beings'. Sir, let us confess and admit that there is this traffic in women for which men everywhere are responsible. Women were often removed from Orissa. I pointed out that in the great Bengal disaster in 1943 44, lakhs of women were spirited away to the Punjab and North West Frontier Province. Sir, young women were taken away by the alien Government into the camps of soldiers and they were thus lost to humanity, lost to family, lost to us as good citizens. So, we mere men should not fight shy of this and feel that by including an amendment of this kind we will be confessing the existence of this traffic in women in this country.

B. Das further stated that, "I am sorry, I misunderstood. However, I think we will not be justifying our constitution on fundamental rights if we do not accept and admit our great sins by including the words "traffic in women" and try to save the situation now and hereafter" (CAD Vol. VII, 3 December, 1948: 16)

Raj Bahadur (CAD Vol. VII, 3 December, 1948: 16) stated on slavery:

Sir, begar like slavery has a dark and dismal history behind it. As a man coming from an Indian State, I know what this begar, this extortion of forced lab our, has meant to the downtrodden and dumb people of the Indian States. If the whole story of this begar is written,

it will be replete, with human misery, human suffering, blood and tears. I know how some of the Princes have indulged in their pomp and luxury, in their reckless life, at the expense of the ordinary man, how they have used the downtrodden labourers and dumb ignorant people for the sake of their pleasure…This begar has been a blot on humanity and has been a denial of all that has been good and noble in human civilisation. Through the centuries this curse has remained as a dead weight on the shoulders of the common man like the practice of slavery.

Shrimati Renuka Ray (CAD Vol. VII, 3 December, 1948: 16-17) argued that:

I want to stress the fact that women are fully alive to the fact that it is the dual standards of morality that have led to traffic in women. It is when society realises fully the need for doing away with dual standards of morality that this article that is being adopted can really come into effect and become a reality and not merely a paper provision in the Constitution.

Acts for the prevention of immoral traffic in women do exist already in this country but their operation is not effective and even if legal flaws are amended, these can only become really effective when men's minds change towards this problem, whereby a section of women are at the mercy of exploiters whereby the very dignity of women hood is lowered.

S. Nagappa (CAD Vol. VII, 3 December, 1948: 17) argued that:

This practice of begar is prevalent in my own part of the country, especially among the Harijans. I am glad that the Drafting Committee has inserted this clause to abolish begar. Sir, whenever cattle die; the owner of the cattle wants these poor Harijans to come and remove the dead cattle, remove the skins, tan them and make chappals and supply them free of cost. For this, what do they get? Some food during festival days. Often, Sir, this forced labour is practised even by the government. For instance, if there is any murder, after the postmortem, the police force these people to remove the dead body and look to the other funeral processes. I am glad that hereafter this sort of forced labour will have no place. Then, Sir, this is practised in zamindaries also. For instance, if there is a marriage in the zamindar's family, he will ask these poor people, especially the Harijans, to come and white wash his whole house, for which they will be given nothing except food for the day. This sort of forced labour is still prevalent in most ports of the presidency.

T.T. Krishnamachari (CAD Vol. VII, 3 December, 1948: 17-18) asserted that:

My honourable Friend Shrimati Durgabai pointed out that this system of Devadasis obtaining in India has been abolished by legislation in Madras. There is nothing to bar other provinces from following suit and I think public opinion is sufficiently mobilised for all provinces undertaking legislation of that type. Why then put it into the fundamental rights, a thing which is vanishing tomorrow? I think the same principle might be adopted in the rest of the article that would come before the House in this particular part, namely, what we could achieve in the

matter of social reform by normal legislation, we need not seek to put into the fundamental rights, but if it is a matter where the vested interests for purposes of economic gain want to perpetuate a particular antisocial custom that obtains amongst us, well, I think, it is perfectly right that we should put it into the Fundamental Rights.

Dr. B.R. Ambedkar replied to the Assembly to accept or decline the amendments in the Article: “Of the amendments that have been moved, the only amendment which I am prepared to accept is the amendment by Prof. K. T. Shah, No. 559, which introduces the word "only" in clause (2) of article 17 after the words "discrimination on the ground"” (CAD Vol. VII, 3 December, 1948: 18-19).

S. Nagappa on the Draft Constitution Article 23: “Sir, another unique feature of this Constitution is that you have been good enough to abolish forced labour. That was one of the features under which these poor classes were suffering all these ages. You have now abolished it under Article 23” (CAD 21 Nov, 1949).

Constitutional Assembly Debate on Article 24

Clause 12 of Rights of Freedom under the Interim Report of Fundamental Right presented by Sardar Vallabhbhai Patel before the Constituent Assembly: “"No child below the age of 14 years shall be engaged to work in any factory, mine or any other hazardous employment." It is proposed to delete the Explanation. But I move the clause as it is, and deletion of the Explanation may be moved as an amendment” (CAD Vol. III, I May, 1947: 9).

K.M. Munshi (CAD Vol. III, I May, 1947: 9) moved an amendment to deleting the Explanation, the Explanation says: "Nothing in this shall prejudice any educational programme or activity involving compulsory labour."

H.V. Kamath (CAD Vol. III, I May, 1947: 10) stated that: “I am told that this clause deals only with children below 14, and that, therefore, expectant mothers and old people are out of place. I shall reserve my right to move my amendment at a later stage. I do not move it now”. The amendment moved by Munshi was adopted by the Assembly (CAD Vol. III, I May, 1947: 10).

In 1948 the Clause 12 had changed into Article 18 by the Constituent Assembly. Damodar Swarup Seth (CAD Vol. VII, 3 Dec, 1948:21) moved an amendment:

"That the following be added at the end of article 18:

'Nor shall women be employed at night, in mines or in industries detrimental to their health.'"

Sir, it is a matter of great satisfaction that in article 18 protections has been afforded to children of minor age. But, unfortunately, for reasons not known to me, no protection has been provided for the fairer and softer sex, who had been in the past, employed in mines even at night time and in industries which are injurious to their health. I therefore think,

Sir, that it is just and desirable that the addition suggested should be made in this article so that women may also be provided with due protection and may not be employed in mines at night and in industries which are not suited to their delicate health and position in society. I therefore hope that the House will accept this amendment of mine.

Prof Shibban Lal Saksena (CAD Vol. VII, 3 Dec, 1948:21) stated that:

I feel, Sir, that the age should be raised to sixteen. In other countries also the age is higher; we want that in our country also this age should be increased; particularly on account of our climate, children are weak at this age and the age should be raised.

So also, I want that women should not be employed in the night or after dusk and before dawn in the factories. In fact all the progressive countries in the world have forbidden female labour after dusk and before dawn. This question was debated at length during the discussion on the Factory Act in the Parliament. I think that this is a question of very fundamental importance and this should be laid down in the Fundamental Rights that the States shall not employ women after dusk or before dawn.

Dr. B.R. Amendkar did not accept Damoder Swarup (CAD Vol. VII, 3 Dec, 1948:21). At the end the motion the Assembly adopted Article 18 (now Article 24) added to the Constitution (CAD Vol. VII, 3 Dec, 1948: 22).

The CA discussed a lot on the subject of caste discrimination and untouchability and in conclusion all members agreed to abolish caste and untouchability in free India. The constitutional framers placed constitutional obligation on private individuals to not discriminate fellow citizens. Though more members wanted that there should be a definition of the term ‘untouchability’ but CA did not define it and left it on the will of the legislature. In a way, the CA undid the historical injustice done to the certain sections of the society, women and children.

Article 13 the definition of law and Horizontal Rights

Article 13 of the Indian Constitution defines the 'law' and 'law in force' for the purpose of the Part III. It states that law must not be contrary to Part III of the Constitution. Article 13 (1) states the laws which were pre-constitution, (2) maintains that the State cannot make the laws contrary to this Part. Though this clause (2) of Article 13 states about 'the State' but it cannot specifically mention that Article 15 (2), 17, 23, 24 and 27 do not fall under the ambit of the article. In the other words, the definition of law under article 13 includes 'any kinds of discrimination, exploitation'. It does not include the State made laws in the definition of law but it includes the discrimination on various grounds and the practice of untouchability as societies' law.

H.M. Seervai at Para 7.54 in his famous book Constitutional Law of India stated that:

> Our Constitution has been framed on the basis that limitation s should exist on the exercise of power by the State; but the essential problem of liberty and equality was freedom from arbitrary restrictions. The Constitution should be so interpreted that the governing power, wherever located, must be subjected to fundamental constitutional limitations. The tendency in the United States is to bring more and more activity within the reach of constitutional limitations as is evidenced by Marsh v Alabama. But how far can this expansion go? Under Art. 13 (2) it is State Action of a particular kind that is prohibited. Individual invasion of individual rights is not, generally speaking, covered by Art. 13 (2). For, although Arts. 17, 23 and 24 show that fundamental rights can be violated by private individuals and relief against them would be available under Art. 32, still, by and large, art 13(2) is directed against State Action. A public corporation being the creation of the State, is subject to the same constitutional limitations as the State itself. Two conditions are necessary, namely, that the Corporation must be created by the State and it must invade the constitutional rights of individuals (Seervai 2005: 374-75).

On the definition of 'law', H M Seervai said that "this is a very broad definition that covers subordinate delegated legislation as well as law that has not been enacted by the legislature, that is, long-held custom" (Padmanabhan 2016: 597).

Usage and custom

Article 13 (3) (a) has specifically recognised usages and customs as 'law'. According to the historical school of jurisprudence, the usage and custom are the prior conditions of law which are made by the caste or society for their existence and

governance. The caste and society made laws, rules and regulation in the form of custom and usage before the codification of law. In the Indian society, no one has the right to ask if these customs and usages are just, fair and reasonable. Indian society is divided among thousands of castes, different classes, different religions and hundreds of languages and they have their own rules and regulations in social milieu to govern themselves.

With so many customs existing in each and every corner of India, every caste has its own legal, executive and judicial system parallel to the State. In all panchayats, the Khap Panchayat in Northern Indian (especially in Western Uttar Pradesh and Haryana) is well-known examples of the caste panchayats system in India. These caste panchayat makes their own usages and customs and peoples followed these as the law of community to govern personal relations like marriage, dressing code, food habits and social inter-course.

In ancient times, there were highly inhuman customs and usages prevailed in India. Unfortunately, some of them exist till the mid of the twentieth century. Dr. B. R. Ambedkar in *Caste in India* highlighted the three customs exiting in Hindu Society in early twentieth century, first Sati custom; second, enforced widowhood; and third child marriage (Ambedkar 2014a: 14). Durkheim (1933: 75) emphasised the significance of custom and law:

> When a law of custom becomes written and it codified, it is because questions of litigation demand a more definite solution. If the custom continues to function silently, without raising any discussion or difficulties, there is no reason for transforming it. Since penal law is codified only to establish a graduated scale of punishments, it is thus the scale alone which can lend itself to doubt. Inversely, if rules whose violation is punished do not need a juridical expression, it is because they are the object of no contest, because everybody feels their authority.

Durkheim pointed towards the religious law, "In lower societies, law, as we shall see, is almost exclusively penal; it is likewise very stationary. Generally, religious law is always repressive; it is essentially conservative" (Durkheim 1933: 75).

Is the State Action doctrine (Article 12) necessary to enforce fundamental rights horizontally under Indian Constitution?

Granville Austin stated that there are some exceptions of the point of implementation of fundamental rights in the Part III of the Indian Constitution, the author said:

> Although the Fundamental Rights primarily protected individuals and minority groups from arbitrary, prejudicial, state action, three of the articles have been designed to protect the individual against the action of other private citizen. Article abolishes untouchability; Article 15 (2) lays down that no citizen shall suffer any disability in the use of shops, restaurants, well, roads, and other public places of birth; Article 23 prohibits forced labour-which, although it had been practised by the state, was more commonly a case of landowner versus peasant (Austin 2000: 51).

The Constitutional remedies available for the infringement of the FRs in the Constitution, Article 32 (though it itself is a fundamental rights) and Article 226 provides remedies for the infringement of any provision of Part III and can be enforced by the Supreme Court and the High Court. This then means, there is no need to take the help of State Action doctrine of Article 12 for the enforcement any fundamental rights under article 15 (2), 17, 23 and 24.

Supremacy clause i.e. "State Action" is not universal rule to apply in all the State constitutions; rather it is specifically US Constitution provision. For example, in the Indian constitution the definition of State under article 12 includes "other authority" in which the Supreme Court of the India inserted various private individual institutions. On the other hand, Article 13 deals with the definition of law which is far more inclusive than any other domestic or constitutionals usage or custom for the enforcement of the fundamental rights. There are certain Articles in Part III i.e. 15 (2), 17, 23 and 24 in the Indian Constitution that makes the "State Action" doctrine immaterial. Not only the Indian Constitution has such provisions that render State Action irrelevant but the Indian judiciary passed many landmark judgments which make the concept of State Action an exception.

The *Report of the National Commission to Review the Working of the* Constitution headed by Justice Shri M.N. Venkatachaliah in 2002, the report said: "The commission stated that the definition of 'the State' under Article 12 of the Constitution is 'inclusive'. The Commission recommended that in Article 12, an

explanation should be added: 'Explanation- In this article, the expression "other authority" shall include any person in relation to such of its functions which are of a public nature'" (Kasyhyap 2004: 320).

Public-Private Space and Horizontal Rights

It is difficult to find a difference between public and private space for the purpose of HRs under Indian Constitution. Any person on any space can practice any kinds of discrimination, practice untouchability and exploitation mentioned in sub-clause 2 of Article 15, 17, 23, 24 and 27. Dr. B.R. Ambedkar the chief architect of the Indian Constitution and chairman of the drafting committee of the Constitution had replied to the Constituent Assembly on the question of what is public place for the purpose of Article 15 (2) and 17- "I should like to draw his attention to the fact that the word 'public' is used here in a special sense" (CAD Vol. III, 29 Nov, 1948: 18-19).

If we take the example of 'public place' with reference to the state funded place and not include the place of 'private actors', it will be against the spirit of the Constitution. The violation of all HRs is still being committed in both public and private place. The language of all HRs make it clear that HRs are to be enforces at both public and private places, therefore, these definitions should be wide. Article 15 (2) (a) includes shops, public restaurant, hotels and places of public entertainment. Article 15 (2) (b) includes the use of wells, tanks, bathing ghats, roads and 'places of public resort' maintained wholly or partly out of State funds or dedicated to the use of general public.

Valerain Rodrigues (Rodrigues 2011: 110) on the public and private spaces states that:

> Untouchability, Filth, and the Public Domain stated that the idea of the public domain came to mark social space, and unborn space, in particular, as it come to shape social, cultural, and political life under conditions of modernity. It specified the relations between the public and private, religious and secular domains. The public domain had an intimate relationship to the reconstruction of the notions of citizenship, rule of law, and democratic polity. The conception of universal citizenship is closely bound with rise of the public domain and gets sustained by it

Rajeev Bhargava elaborates on the public space,

> by 'public sphere' I mean a common space, in principle accessible to all, which anyone may enter with view on the common good realized wholly or partially: a maidan, a coffee house, an exhibition hall, the paanshop on the road side, the sweet shop in the locality as also the discursive and representational space available in newspapers, magazines, journals, ratio, television and now the internet (Rodrigues 2011: 110).

Neera Chandhoke (Chandhoke 2011: 156-157) in '*Equality for What?' Or the Troublesome Relation between Egalitarian and Respect* stated that:

> If Dalits continue to be discriminated against in the private sphere, their chances in the sphere may amount to little…Dalit community has sidelined visions of an egalitarian society, marginalized the idea that everyone has an equal share in the resources of a society, whether material or non-material, and reinforced the divisions in society between 'us' and 'them'. There is always danger that all this can have a decidedly negative impact on the self-respect of the members of the group.

In rural India, the democracy, fraternity and equality are neither practiced nor can be discussed in any public or private sphere. Social intercourse among the castes and religious groups is still treated as 'destruction of the ancient Hindu social order'. The foundational idea to maintain and preserve the unequal society is based on the concept of 'purity and pollution' which depends on 'endogamy' and 'exogamy'. These concepts are solely responsible for not continuity of caste and untouchability in India. Through the power of the society, these usages and custom flourished in air and public and private places.

A Dalit woman in a village Khaira district of Kanpur, Uttar Pradesh, forced to consume human excreta and urine by dominant caste persons of the village on a land dispute (Ghosh :2017). In rural India, a lower caste person, even if she is highly educated, not have any space in the village society to share her views or to oppose any discriminatory practice by the upper caste. In rural India, a lower caste man cannot marry an upper caste woman. Furthermore, lower castes do not have a right to celebrate any events as they please. In such cases, the distinction between public and private place becomes irrelevant. Sometimes a private space becomes the first step to reach up to public space.

Private space is a prior condition to utilise the public space. Regarding the lower caste or untouchable, what kind of existence do they have in society if they are not allowed to enjoy even in private space? The nature and scope of the State is shrinking and the private space is acquiring the public sphere. Therefore, it becomes need of hour to impose the duty on the private individual to respect the dignity of other individual in private space if any private place or space cannot be covered by the definition of public place. To conclude, private sphere is as necessary as public sphere because it is the first step to reach up to public sphere.

Are the Horizontal Rights a Self-Contained Code?

The President of the Constituent Assembly Dr. Rajendra Prasad stated that the Constitution of India should be self-contained: "Our Constitution should be selfcontained as far as possible. We should not depend on the interpretation of clauses in other constitutions, as it may lead us to any amount of confusion" (CAD Vol. III, 29 April, 1947: 15). M.P Jain stated that 'Art 14 is the genus while Art. 15 and 16 are the species. Arts 14, 15 and 16 are constitutes of a single code of constitutional guarantees supplementing each other' (Jain 2008: 855).

In *Indian Medical Association v Union of India and Others*, MANU/SC/0608/2011, the Supreme Court define the scope of article 15 (2) as:

> There are two potential interpretations of the use of the word "only" in Clause (2) of Article 15 Mahendra P. Singh, "V.N. Shukla's Constitution of India", 11th Ed. (Eastern Book Company, 2008). One could be an interpretation that suggests that the particular private establishment not discriminate on the basis of enumerated grounds and not be worried about the consequences. Another interpretation could be that the private establishment not just refrain from the particular form of overt discrimination but also ensure that the consequences of rules of access to such private establishments do not contribute to the perpetration of the unwarranted social disadvantages associated with the functioning of the social, cultural and economic order. Whether Sub-clause (a) of Clause (2) of Article 15 is self-executory or not is irrelevant in the context of reservations. If the State does enact "special provisions" for the advancement of socially and educationally backward classes, it does so in order to prevent the perpetuation of social and educational backwardness in certain classes of people generation after generation.

Article 32 (Constitutional Remedies) of the Indian Constitution states that 'Remedies for enforcement of rights conferred by this Part-(1) 'The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights

conferred by this Part is guaranteed' that means a person can approach the apex court for enforcement of her rights. Article 32 (2) states that 'Supreme Court shall have power to issue directions or orders or writs, including writ in the nature of *habeas corpus, mandamus, prohibition, quo warranto,* and *certiorari,* whichever may be appropriate, for the enforcement of any of the right conferred by this Part.

Article 226 states that "Power of High Court to issue certain writs-(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories, directions, orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari,* or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose".

Both the Articles 32 and 226 provide constitutional guarantee to the citizen as well as non-citizen to enforce their fundamental rights against the State as well non-state actors. The last sentences of both articles clarify that any person can approach the Supreme Court and the High Court for enforcement "any rights conferred by Part III". In the other words, it is clear that each and every rights of Part III are self-contained and can be enforced by the Supreme Court and High Court.

Conclusion

In this chapter we traced the constitutional history of HRs especially Articles 15 (2), 17, 23 and 24. The CA wanted to do justice with the historically disadvantaged sections of the society by making protective provisions against the State as well as non-State actors. The CA spent a significant amount of time on the problem of social inequalities like caste and untouchability and the CA was unanimously agreed to annihilate these social evils. For the debate of Article 15 (2) the CA had clear the grounds of discrimination but the term 'untouchability' was not defined and left on the will of future legislature to define it. There can be a reason for not defining 'untouchability' because it has multiple forms of inhuman practises. It is evident from the discussion finds that the CA took it seriously and thought that it would stop

the progress of a healthy democratic society. Hence constitution framers made it offence under the Constitution.

It is now the discretion of the judges to analyse and define the term 'untouchability'. There is a necessity that the judiciary develops new method to expand the scope of the "State" for the betterment of the fundamental rights' application. On the contrary, there is no need to touch the article 12 while the violation of FRs comes under the preview of Article 15 (2), 17, 18, 23 and 24. Individual can directly approach the constitutional court, against the private individual or non-state actors for enforcement their rights.

The discussion points out the debate of public and private space for the purpose of Article 15 (2) and 17, 23 and 24 which suggested that these practises can be exercised in any place either public or private. In other words, the demarcation between public and private space becomes irrelevant for the application of HRs. On the issue of State action for the implementation of HRs, there is no need to rely on the State Action doctrine. Everybody can move the Supreme Court or the High Court for enforcement of his/her fundamental rights against anybody.

Chapter 4

Indian Constitution and Judicial Interpretation

Introduction

The Indian Constitution has unique features that incorporate direct, indirect and a combination of both direct and indirect HRs in Part III (Fundamental Rights). Article 15 (2), 17 and 23 are the articles than can be associated with direct HRs. Indirect HRs can be envisaged under the purview of Article 12[23] (State's definition) and 21[24](right to life and personal liberty). Article 14 deals with a mixed combination[25] of both direct and indirect HRs. Prof Singh has argued that, though Part III of the Indian Constitution provides Fundamental Rights against the State, but there are certain rights (Articles 15 (2), 17, 23, 24, 25, 26, 29 (1) and 30 (1)) which can be enforced against private individuals or no-state actors (Singh 2007: 183).

Article 14 guarantees the right to equality to citizen as well as non-citizen in two forms -first "every person has right to equality before the law", and second "every person has equal protection of laws". Article 14 is the *grundnorm* or foundation for the equality whether it is vertical or horizontal form of application. As Delhi High Court states very well in the *Naz Foundation v NCT Delhi and Others,* (MANU/DE/0869/2009), "Article 14 is the genius and 15(2) are the species of the fundamental rights of equality"[26].

As the previous chapter analyse the constitutional framework of HRs, the main objective of the present chapter is to analysis the judicial interpretation of HRs in India. The chapter will limit to examine the judicial decision of the Supreme Court

[23] The two expression of Article 12, fist "unless the context otherwise requires" and second "other authority" makes clear that our constitutional drafter had sense that the State's definition include the non-State actor as per the need of the time.

[24] The Indian judiciary makes several judgements in the light of Article 21 and make liable non-State actors under the phrase "right to life".

[25] Article 14 states the right to equality against the State discrimination that is a vertical application. On the contrary, it can be enforced horizontally when the non-State actor or citizen discriminate against the citizen.

[26] However, the judgement of Delhi High Court overrule in Suresh Koushal V Naz Foundation in 2013 by the Supreme Court of India.

and the High Courts of the India of the application of the fundamental rights against the citizen or non-State actors. The discussion will highlight the ongoing debate of 'State' definition which is responsible to the enforcement of the Part III of the. From the enforcement of the Constitution till the date it is the constitutional question exist before the court to decide that what authority or institution or bodies can be come under the periphery of the State? To deals this question the Indian judiciary applies two tests for defining State, first is 'control test' and second is 'functional test'. In the light of these two judgements, the Indian judiciary through various cases include non-State actors under the definition of the State.

The chapter will examine the judicial decisions to finds out the HRs on the basis of direct and indirect effects of HRs.

Judicial Interpretation of Article 15 (2), 17, 23 and 24

Gopal Guru has stated that the Indian Constitution has inserted certain provision to make free the lower caste from the domination of upper castes and therefore Article 17 has abolished untouchability and made it a crime (Guru 2008:236). Article 15 (2) provides special application of the injunction which makes citizens liable under the constitutional obligations not to discriminate against any other fellow citizen. This unique provision of the constitution prohibits both the State as well as the citizen at large not to discriminate to the citizen (Kahyap 2015:107).

Zia Mody stated that though, in Indian Constitution the application of fundamental rights is stated vertically but there are certain articles that make exceptions to this rule. Article 17 of the constitution provides fundamental rights to every citizen against the practice of untouchability which are enforced horizontally rather than vertically (Mody 2013: 195). Kashyap on Article 17 states that it is the obligatory duty of every citizen to ensure that untouchability in any form should not be practiced. The author further said that "The objective of the article was to end the inhuman practice to treating certain fellow human being as dirty and untouchable by reason of their birth in certain castes" (Kahyap 2015:117).

In a landmark case, *State of Karnataka v Appa Balu Ingale* AIR 1993 SC 1126, the apex court states on Article 15 (2) and 17 of the Constitution:

12. It is trite that the Caste system among the Hindus has been structured on graded hierarchy of Chaturvarnya and the Dalits and Scheduled Tribes (for short 'tribes') from among whom Sudras occupy the last rung in the social ladder. Impregnable walls of separation with graded inequalities has, thus, been erected between different sections among Hindus. The Dalits are made to serve the society in menial jobs as slaves and serfs. Caste system segregated them from the main stream of the rational life and prevented the Hindus from becoming in integrated Society with fraternity and affinity.

21...Untouchability and birth as a scheduled caste are thus intertwine root causes. Untouchability, therefore, is founded upon prejudicial hatred towards Dalits as in independent institution. It is an attitude to regard Dalits as pollutants, inferiors and out-castes. It is not founded on mense rea. **The practice of untouchability in any form is, therefore, a crime against the Constitution.** The Act also protects civil rights of Dalits. The abolition of untouchability is the arch of the Constitution to make its preamble meaningful and to integrate the Dalits in the national main-stream.

22. In furtherance thereof Article 15(2) removed disabilities that no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subjected to any disability, liability, restriction or condition with regard to - (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. Article 23(1) prohibits begar and other similar forms of forced labour, (bonded labour). Article 23 also prohibits traffic in woman (Jogins and Devadasi system thrive on cruel monster of custom). Article 29(2) prohibits denial of admission into an educational institution maintained by the State or receiving aid out of State funds on grounds only of...caste or any of them.

36. The thrust of Article 17 and the Act is to liberate the society from blind and ritualistic adherence and traditional beliefs which lost all legal or moral base.

The Indian judiciary evolved the concept of Horizontal Rights against the private individuals in a various cases but the real jurisprudence is developed in the case of *Naz Foundation v. Government of NCT Delhi And Others* (MANU/DE/0869/2009). In this case the constitutionality of section 377 of Indian Penal Code, 1860 (IPC) was challenged before the Delhi High Court which criminalise the sexual intercourse among the same sex. The court in para 104 the court held that:

We hold that sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15. Further, Article 15(2) incorporates the notion of horizontal application of rights. In other words, it even prohibits discrimination of one citizen by another in matters of access to public spaces. In our view, discrimination on

> the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined in Article 15…There is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. These are rights which belong to individuals simply by virtue of their humanity, independently of any utilitarian calculation.

Though the Indian Constitution has direct provisions of Horizontal Rights but the Supreme Court largely evolved it through its interpretations. The Supreme Court of India is the guardian of the peoples but in certain matters it does not fulfil the aspirations of the common peoples. The Supreme Court overruled the Delhi High Court's judgement in *Suresh Koushal V Naz Foundation* (2013).

In a landmark judgement on the gender identity, *National Legal Service Authority v Union of India and Others,* MANU/SC/0309/2014, the apex court of India recognised socially, politically, economically and historically disadvantage community i.e. transgender/hizra as "third gender" under the Constitutional framework as equal as 'male' and 'female'. In the writ petition the identity of these community challenged under Articles 14, 15, 16, 19 and 21, and other national and international treaties and conventions. The petitioner seeking direction from the Centre Government and the State Governments to make transgender/hizras' life dignified life in social and economic aspect of life in the country. Justice K.S. Paniker and Justice Radhakrishan in para 1 said:

> Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are side-lined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mind-set which we have to change.

In *Indian Medical Association v Union of India and Others,* MANU/SC/0608/2011, the Supreme Court in para 113 defined the scope of Article 15 (2) word 'service' with Article 19 (1) (g) as education is also providing service as:

As much as education, pursuant to TMA Pai, is an occupation under Sub-clause (g) of Clause (1) of Article 19, and it is a service that is offered for a fee that takes care of all the expenses of the educational institution in rendering that service, plus a reasonable surplus, and is offered to all those amongst the general public, who are otherwise qualified, then such educational institutions would also be subject to the discipline of Clause (2) of Article 15. In this regard, the purport of the above exposition of Clause (2) of Article 15, when read in the context of egalitarian jurisprudence inherent in Articles 14, 15, 16 and Article 38, and read with our national aspirations of establishing a society in which Equality of status and opportunity, and Justice, social, economic and political, would imply that the private sector which offers such facilities ought not to be conducting their affairs in a manner which promote existing discriminations and disadvantages.

In *Bandhua Mukti Morcha v Union of India and Ors*, (1984) 3 SCC 161, a Public Interest Litigation was filed before the Supreme Court against the inhuman treatment of several workers in the country - those living as bonded labour. The court discussed socio-economic rights and the fundamental positive obligation of the State under Articles 21, 32, 39, 41, 42, 226 and 256 to protect the fundamental rights of every citizen of the country. Justice P.N. Bhagwati commenting on the historical importance of the enactment of Article 23 held that:

This pernicious practice of bonded labour existed in many States and obviously with the ushering in of independence it could not be allowed to continue to blight the national life any longer and hence, when we framed our Constitution, we enacted Article 23 of the Constitution which prohibits "traffic in human beings and beggar and other similar forms of forced labour" practised by any one. The system of bonded labour therefore stood prohibited by Article 23 and there could have been no more solemn and effective prohibition than the one enacted in the Constitution in Article 23. But, it appears that though the Constitution was enacted as far back as 26th January, 1950 and many years passed since then, no serious effort was made to give effect to Article 23 and to stamp out the shocking practice of to bonded labour. It was only in 1976 that Parliament enacted the Banded Labour System (Abolition) Act, 1976 providing for the abolition of bonded labour system with a view to preventing the economic and physical exploitation of the weaker sections of the people.

The court further highlighted the power of the Supreme Court under Article 32 to adopt any procedure for the protection of fundamental rights. Justice Bhagwati held that:

And this is clearly permissible on the language of Clause (2) of Article 32 because the Constitution makers while enacting that clause have deliberately and advisedly not used any words restricting the power of the court to adopt any procedure which it considers appropriate

in the circumstances of a given case for enforcing a fundamental right. It is true that the adoption of this non-traditional approach is not likely to find easy acceptance from the generality of lawyers because their minds are conditioned by constant association with the existing system of administration of justice which has become ingrained in them as a result of long years of familiarity and experience and become part of their mental makeup and habit and they would therefore always have an unconscious predilection for the prevailing system of administration of justice. But if we want the fundamental rights to become a living reality and the Supreme Court to become a real sentinel on the quivive, we must free ourselves from the shackles of outdated and outmoded assumptions and bring to bear on the subject fresh outlook and original unconventional thinking.

Here in this paragraph Justice Bhagwati said that the Indian Constitution has unique features for the protection of fundamental rights and it is in the power of the court to follow its own procedure to deliver justice. We can interpret the words of Justice Bhagwati to say that it is not necessary for us to follow old traditions to protect fundamental rights, when they have to be implemented the court will have to develop new traditions instead of following the old.

Justice R.S. Pathak said:

I have no doubt in my mind that persons in this country obliged to serve as bonded labour are entitled to invoke Article 23 of the Constitution. The provisions embodied in that clause form a vital constituent of the Fundamental Rights set forth in Part III of the Constitution, and their violation attracts properly the scope of Article 32 of the Constitution.

In the conclusion, the Supreme Court gave direction to the State to secure fundamental rights of the citizens by the State as well as non-State actors under Article 23 of the Constitution because Article 23 is available against all.

In the land mark case *People's Union for Democratic Rights and Others v Union of India and Others*, (1982) 3 SCC 235, the apex court entertained a writ petition under Article 32 against violation of rights of workers involved in the construction work for the Asian Games in Delhi. The petition filed under Articles 14, 17, 21, 23 and 24 of the Constitution. In this case the fundamental rights of workers were violated since they were not receiving wages. Invoking Article 23 of the Constitution P.N. Bhagwati, J. said:

So far as Article 24 of the Constitution is concerned, it embodies a fundamental right which is plainly and indubitably enforceable against every one and by reason of its compulsive

mandate, no one can employ a child below the age of 14 years in a hazardous employment and since, as pointed out above, construction work is a hazardous employment, no child below the age of 14 years can be employed in construction work and therefore, not only are the contractors under a constitutional mandate not to employ any child below the age of 14 years, but it is also the duty of the Union of India, the Delhi Administration and the Delhi Development Authority to ensure that this constitutional obligation is obeyed by the contractors to whom they have entrusted the construction work of the various Asiad projects.

... Now many of the fundamental rights enacted in Part III operate as limitations on the power of the State and impose negative obligations on the State not to encroach on individual liberty and they are enforceable only against the State. But there are certain fundamental rights conferred by the Constitution which are enforceable against the whole world and they are to be found inter alia in Articles 17, 23 and 24.....Article 23 with which we are concerned and that Article is clearly designed to protect the individual not only against the State but also against other private citizens. Article 23 is not limited in its application against the State but it prohibits "traffic in human beings and begar and other similar forms of forced labour" practised by anyone else. The sweep of Article 23 is wide and unlimited and it strikes at traffic in human beings and begar and other similar forms of forced labour" wherever they are found. The reason for enacting this provision in the chapter on fundamental rights is to be found in the socio-economic condition of the people at the time when the Constitution came to be enacted…The prohibition against "traffic in human beings and begar and other similar forms of forced labour" is clearly intended to be a general prohibition, total in its effect and all pervasive in its range and it is enforceable not only against the State but also against any other person indulging in any such practice.

... **whenever any fundamental right, which is enforceable against private individuals such as, for example a fundamental right enacted in Article 17 or 23 or 24 is being violated, it is the constitutional obligation of the State to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same**.

Gardbaum on *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235 has aptly stated that "It is true, as we have seen, that the court also applied Article 21 directly against private employers in this respects-and indeed placed the same duty on them-but this duty on the State appears to be an independent one, and may well be more extensive than the one imposed on private actors" (2016: 606).

In *Bandhua Mukti Morcha v Union of India*, MANU/SC/1524/2000, a writ petition was filed as PIL under Article 32 of the Constitution for enforcement of Article 24 of the Constitution, seeking the court to issue directions to the Central Government

to stop the employment of children below the age of 14 years in carpet industry in the Uttar Pradesh. The court held that in this hazardous work, the preamble, article 24, Article 39 (e), (f) and 45 was violated due to employment the children below the age of 14. Therefore, it is the duty of the State to regulate these private factories and industries.

Judicial approach of Articles 12, 14, 21 and 21A

In this section the discussion will critically analyse the verdicts of the Supreme and High Courts of India in which the judiciary have evolved the concepts of HRs and put private individuals under constitutional obligations. Traditionally the application of fundamental rights is in a vertical form i.e. against the State action. In the Indian Constitution, because of the existence of Articles 15 (2), 17, 23 and 24 the State Action doctrine becomes irrelevant.

Definition of the State

To analysis the development of HRs, it is necessary to trace the judicial approach that how it include the non-State actors under the definition of the State. Article 12 of the Constitution defines the State which makes it liable for the infringement of the fundamentals envisaged in Part III. The definition of the State (Article 12) is applied in the same manner for the Part IV which puts positive obligations on the State to make certain laws which enhance the ideals and goals of the Preamble i.e. social, economic and political, liberty, equality and freedom of expression, religions and so on.

Though, prima facie, the definition of the State is clear that fundamental rights enforce against the State but the phrase "other authorities" becomes a debatable issue from the inception of the Constitution till today. The Indian judiciary from time to time has defined the phrase "other authorities". While, sometimes the judiciary include the non-State actor under the State definition but sometimes *vice versa*.

The text of Article 12 states:

Definition-In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all Local or other authorities within the territory of India or under the control of the Government of India.

n this article two phrases, first "unless the context otherwise require" and second "other authority" makes clear the intention of the Constitution drafters that the

application of the fundamental rights is not limited only to the State. These two phrase are makes the State definition inclusive which can be add non-State actors.

The Fundamental Rights available in the India Constitution are available to first, 'person' and second 'citizen'. The term person has much wider scope than citizen because the term person includes both citizen and non-citizens, and the term 'citizen' only denotes Indian citizens. The remedy under the Indian Constitution regarding the FRs is basically available through judicial review via writs, PILs, directions and through others methods used by only the Supreme Court and High Courts, and these remedies are available in terms of public law and not private law in a strict sense (Singh 2007: 185).

Dr. B. R. Ambedkar (CAD Vol VII, 19 Nov, 1948: 5) replied to the Constituent Assembly on the nature and scope of the "State" under the Part III of the Constitution:

> The words "the State" in Article 28 have been used deliberately. In this Constitution, the word "State" has been used in two different senses. It is used as the collective entity, either representing the Centre or the Province, both of which in certain parts of the Constitution are spoken of as "State". But the word used there is in a collective sense. Here the words "the State" are used both in a collective sense as well as in the distributive sense. If my friend were to refer to part III, which begins with article 7 of the Constitution, he will see in what sense the word "State" is used. In this part, unless the context otherwise requires, "the State" includes the Government and the Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India. So that, so far as the Directive Principles are concerned, even a village panchayat or a district or local board would be a State also. In order to distinguish the sense in which we have used the word we have thought it desirable to speak of 'State' and also 'the State'.

In *State of West Bengal v Union of India* AIR 1963 SC 1241 (at 1264), the Supreme Court of India held that:

> Prima facie, these declarations [FRs] involving an obligation imposed not merely upon the 'State', but upon all persons to protect the rights so declared, and the rights are enforceable unless the context indicates otherwise against every person or agency seeking to infringe them. The rights declared in the form of prohibition must have a concomitant positive content; without such positive content they could be worthless. Relief may be claimed from the High

Court or from this Court, against infringement of the prohibition, by any agency, unless the protection is restricted to State action.

Ananth Padmanabhan stated that the interpretation of Article 12 is not satisfactory because of three reasons; first, it cannot cover the larger number of the bodies against whom the fundamental rights can be enforced. Second, it takes lesser time than original suit in the Indian Judicial system to finalise the issue and "Moreover, with less procedural and evidently constraint binding the Court, it would have greater flexibility to innovate as regards speed tracking the case and fashioning effective remedies". Third, Article 226 is not only limited to the State "Non-State actors could, with relatively greater ease, challenge maintainability by contending that their actions were in the purely private realm" (Padmanabhan 2016: 583).

The Constitution framers had the vision at that time that the limited definition of the State would be injustice to the Part III of the Constitution that is why they made the definition of State inclusive. The constitutional framers had thought that it is not only the State that violates the fundamental rights but the non-state actors or private individual can also infringe the fundamental rights. To make fundamental rights horizontally applicable the constitutional framers incorporate Art 15(2), 17, 23 and 24 under Part III.

Prof M.P. Singh (Singh 2007: 189) on the relevance of State definition for the application of fundamental right stated that:

The Definition of the state in Article 12 cannot be employed to restrict the scope of those FRs which have no reference to 'the state'. As the Constitution of India expressly departs from the traditional notion that the FRs are available only against the state action, there is no scope or justification for any presumption based on any theory or traditional understanding that FRs are confined to state action only. The Constitution must read as an evolving organic law in the light of its own freedom from the shackles of any theories and understanding developed in different context.

Though the judiciary include various bodies and institution under the periphery of the State but it did not put itself under the definition of the State. HM Seervai eminent jurist and constitutional expert states on Article12 "better position in India is that courts are the State for Article 12 purposes, although he acknowledges that the leading case on the subjects does not squarely answer the question" (Gardbaum

2016: 609). Gardbaum argued that "the Court has also interpreted Article 21 to apply to private actors in the context of occupational health hazards, and perhaps also the right to privacy. These last two developments in particular produced indirect and direct horizontal effect, respectively" (Gardbaum 2016: 613).

Prof M. P. Singh has stated that Indian Constitution framers had the experience of colonial rule in which certain sections of the people violated the rights of others whether they were the parts of state agencies or private individuals. Therefore, the Constitution framers made provisions for the safeguard of the fundamental rights of citizens not only against the state but the non-state actors that could violate the FRs *because of the not-action or connivance of the state* (Singh 2007: 191).

Prof M. P. Singh (Singh 2007: 192) further stated that

> Privatization and liberalization aim at reducing the size of the state in order to create more space for individual enterprise and for getting more efficient and less expensive public services, and not at reducing the scope and reach of FRs which are the foundation of private enterprise...Privatization can no more return to the exploitation of past centuries. We must remember that recognition and protection of rights has brought us to the present stage of freedom and liberty. We have to move forward towards lager freedom and not return to serfdom. Development is not just profits but freedom.

In the definition of the 'State' the Supreme Court of the India includes several bodies and the agencies under the phrase 'other authority'. In the earlier judgments the judiciary focused on the 'structural or instrumentality test' or 'control test' while defining the definition of State that whether a body is coming under the control of the State or not. In latter decisions the judiciary shifts its approach form 'control test' to 'functional test' which deals the function of a body that whether its functions treated as the State's function or not.

The judiciary has included research and educational institutions in the definition of 'other authority', in *BS Minhas v Indian Statistical Institute* (1983) 4 SCC 582. In this case the court held that Indian Statistical Institute registered under the Society Registration Act, which is under the control of the Government of India, it is an instrumentality of the Central Government, therefore, it the State under Article 12 of the Constitution.

In *PK Ramchandra Iyer v Union of India,* (1984) 2 SCC 141, the court applies control test and held that Indian Council of Agriculture Research is a State under Article 12 of the Constitution. In *All India Sainik School Employees' Assn v Sainik School Society,* AIR 1998 SC 88, the court held that the Sainik School Society is the part of the State. In *Dinesh Kumar v Motilal Nehru Medical College, Allahabad,* (1986) 3 SCC 727, the court held that a medical college run by the municipal corporation is a State. In *Sabhajit Tewary v Union of India,* (1975) 1 SCC 485, the Supreme Court held that Council of Scientific and Industrial Research (CSIR) is a State under Article 12 of the Constitution.

In the landmark judgement on the definition of the State *Ajay Hasia and Other v Khalid Mujib Sehravardi and Ors* MANU/SC/0498/1980, the Supreme Court of India defined the nature and scope of 'other authority' under Article 12 of the Constitution to end the controversy that what is the State or what is not. The court declared that registered society is the State. The court in this case limited the scope and nature of the State's definition as an instrumental or control of the State. The court established certain points to define the State as:

(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor ... whether the corporation enjoys; monopoly status which is State-conferred or State-protected.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) 'Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government.

Prof M.P. Singh (Singh 2007: 193) stated on the interpretation of the Supreme Court in *Ajay Hasia* that:

On the consideration of these factors, it is found that the corporation is an instrumentality or agency of government; it would be an authority and, therefore, the state within the meaning of Article 12. The Expression 'corporation' is not confined to statutory or non-statutory corporations but also cover societies and other bodies.

In *Mahabir Auto Stores v Indian Oil Corporation*,(1990) 3 SCC 752, the question before the court was that whether the instrumentality of State can arbitrarily stop the supply of product of consumer goods, the court held that public limited companies that produces consumer goods comes under contractual liability and therefore comes under the definition of the State. In *UP State Cooperation Land Development Bank Ltd. Chandra Bhan Dubey,* AIR 1999 SC 753, the court held that co-operative banks are the part of the State.

In *Pradeep Kumar Biswas v Indian Institute of Chemical Biology* (2002) 5 SCC 111, the Supreme Court stated that:

Simply by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of 'other authorities' in Article 12, To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to public. Further the statute creating the entity should have vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs of other people --their rights, duties, liabilities or other legal relations. If created under a statute, then there must exist some other statute conferring on the entity such powers.

In either case, it should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. Such authority would be the State, for, one who enjoys the powers or privileges of the State must also be subjected to limitations and obligations of the State. It is this strong statutory flavour and clear indicia of power -- constitutional or statutory and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority; though in a even case, depending on the facts and circumstances, an

authority may also be found to be an instrumentality or agency of the State and to that extent they may overlap.

The Supreme Court relied on the control test of the State definition and held by 5:2 majorities that Council for Scientific and Industrial Research (CSIR) is not the State under Article 12.

In *Zee Telefilms Ltd. V Union of India* (2005) 4 SCC 649, the question before the Supreme Court was, whether the Board of Control for Cricket in India comes under the Article 12 of the Constitution? The Supreme Court relied on the control test and *Pradeep Kumar Biswas v Indian Institute of Chemical Biology* (2002) 5 SCC 111, judgement and the court states that BCCI is not under the direct control of the State on the BCCI.

The majority of the court with 3:2 held that just because an organization function public duty, it cannot make a ground that the private body become the part of the State. The court held that BCCI is not a State under Article 12, but on the contrary, the minority at para 252 had a different opinion on the issue and relied on 'functional test':

Applying the test laid down herein before the before the fact of the present case, the Board, in our considered opinion, fits the said description. It discharges a public function. It has its duty towards the public. The public at large look forward to Board for section of the best team to represent the country. It must manage its housekeeping in such a manner so as to fulfil the hopes and aspiration of the millions. It has, thus, a duty to act fairly. It cannot act arbitrarily, whimsically or capriciously. Public interest is, thus, involved in the activities of the Board. It is, thus, a state Actor.

In *Zorastarian Cooprating Housing Society Ltd and Another v District Registrar Cooprative Soceities (Urban) and Others*, (2005) SCC 632, the question arise before the Supreme Court that whether right to form association excluding others on the basis of religion, sex, persuasion or mode of life is constitutional under the Article 14, 15 (2), 19 (1) (C) and 29 (1)? In this case a Parsi community formed a society from which they excluded all other religions. The apex court declared it valid. The court in para 38 held that

It is true that our Constitution has sets goals for ourselves and one such goal is the doing away with discrimination on the basis on religion or sex. But that goal has to be achieved by

legislative intervention and not by the court coining a theory that whatever is not consistent with the scheme or a provision of the Constitution, be it under Part III or Part IV thereof, could be declared to opposed to the public policy by the court.

The court further held:

The cooperative movement, by its nature, is a form of voluntary association where individual unite for mutual benefit in the production and distribution of wealth upon principle of equity, reason and common good. No doubt, when a cooperative group gets registered under the Cooperative Society Act, it is governed by the provision of Cooperative Society Act and the rule framed there under. Running through the Cooperative Society Act, is the theory of the area of operation. That means that the members could be denied to a citizen of this country who is located outside the area of operation of a society.

In this case, the court relies on the provisions of the Cooperative Society Act which was essentially against the spirit of the Preamble, Part III and Part IV of the Indian Constitution. The court unfortunately undermines the philosophy behind the Article 15 (2) and declare verdict beyond the concept of equality. The court should interpret the Statues provisions accordance with the Constitution.

Ashish Chug stated that 'it would be dishonest if private individuals are not governed by the same set of standard and values that the State is bound by against a private individual'. Chug further stated that Article 15 (2) makes State Action doctrine irrelevant because it applies horizontally not vertically. Chug stated that in *Zorastarian* case the apex court allows housing societies to legitimately discriminate not only on the criterion of religion but also race, caste, sex and place of birth (Chug: 2005).

In recent landmark judgement on the definition of the *State Board of Control for Cricket in India v Cricket Association of Bihar and Others,* the court has adopted a new approach to dealing with the issue of 'other authority' under Article 12.

The functions of the Board are clearly public functions, which, till such time the State intervenes to take over the same, remain in the nature of public functions, no matter discharged by a society registered under the Registration of Societies Act. Suffice it to say that if the Government not only allows an autonomous/private body to discharge functions which it could in law takeover or regulate but even lends its assistance to such a nongovernment body

to undertake such functions which by their very nature are public functions, it cannot be said that the functions are not public functions or that the entity discharging the same is not answerable on the standards generally applicable to judicial review of State action. **Our answer to question No.1, therefore, is in the negative, qua, the first part and affirmative qua the second. BCCI may not be State under Article 12 of the Constitution but is certainly amenable to writ jurisdiction under Article 226 of the Constitution of India.**

The approach of Indian judiciary is in defining the 'other authority" under Article 12 adopting two approaches - the first is the 'control' or 'structural test which asks whether the private body is under the control of the State or not? The second test is the 'functional test' which deals the function of the private body that asks whether the non-state actor acts like the State or not? In *Pradeep Kuamr Biswas* case the apex court settled the debate of "functional or structural" and held that only bodies that "functionally, financially and administratively dominated by or control of the Government comes within the definition of Article 12" (Bhatia: 2015).

In the earlier decisions of the court the judiciary was limited to the control test to define that whether a particular institution, body or entity is a State or not? The recent judgments of the courts state that the courts are open to accept the changing nature of the State. In the present context there are various non-State actors they provide the State facilities and function as the State. These non-State actors are enjoying the full immunity from the constitutional obligation and work for their profit in the name of 'public function'. Therefore, the judiciary's approach towards evolve the 'functional test' is a welcome step in rights jurisprudence in India.

So, on the analysis of these few landmark judgements of the apex court on the issue relating to the "other authority" under Article 12 of the Constitution, it has been found that the court sometimes considers the Constitution as a living document and at other times it adopts a positivist approach while deciding cases. The court should understand the shrinking nature of the State due to globalization and liberalization. The non-state actors play a key role at the contemporary juncture and are performing public functions conventionally attributed to the State.

It is a constitutional question that whether the non-state actors are free to enjoy absolute freedom and to do anything? This is a core constitutional and

jurisprudential question arising not only before India but all over the word and needs serious thought.

Direct Horizontal Rights in the Indian Constitution

In *MC Mehta v Union of India,* MANU/SC/0092/1986 the Supreme Court of India entertained a PIL against a private company or non-State actor for violation of a people's fundamental right- right to life. In this case the first question before the court was that can a people reach the constitutional court for enforcement of their fundamental rights against a private body? The answer of the court was in affirmative. The second question was about the enforceability of Article 21 against Shriram Fertilizer a private Corporation which was not a State under "other authority" under Article 12 of the Constitution. The court held that:

> We were during the course of arguments, addressed at great length by counsel on both sides on the American doctrine of State action. The learned Counsel elaborately traced the evolution of this doctrine in its parent country. We are aware that in America since the Fourteenth Amendment is available only against the State, the Courts, in order to thwart racial discrimination by private parties, devised the theory of State action under which it was held that wherever private activity was aided, facilitated or supported by the State in a significant measure, such activity took the colour of State action and was subject to the constitutional limitations of the Fourteenth Amendment. **This historical context in which the doctrine of State action evolved in the United States is irrelevant for our purpose especially since we have Article 15(2) in our Constitution.** But it is the principle behind the doctrine of State aid, control and regulation so impregnating a private activity as to give it the colour of State action that is of interest to us and that also to the limited extent to which it can be Indianised and harmoniously blended with our constitutional jurisprudence. **That we in no way consider ourselves bound by American exposition of constitutional law.**

In this paragraph Justice Bhagwati draw attention that how the Indian Constitution is different from United Stated Constitution and Indian Constitution has provisions that directly cover the private or the non-State actors under the constitutional obligation. The judge strongly argued that it is not obligatory for India to follow the US Constitution. In the conclusion of the judgement the court decided that:

> Since we are not deciding the question as to whether Shriram is an authority within the meaning of Article 12 so as to be subjected to the discipline of the fundamental right under Article 21, we do not think it would be justified in setting up a special machinery for investigation of the claims for compensation made by those who allege that they have been the

victims of Oleum Gas escape. But we would direct that Delhi Legal Aid and Advice Board to take up the cases of all those who claim to have suffered on account of oleum gas and to file actions on their behalf in the appropriate court for claiming compensation against Shriram.

That was a radical step ever taken by the Supreme Court of India in the history of Indian judicial system when it made a private body come under the constitutional obligation to deliver justice. The intention of the court was to do justice with the victim.

In *M.C. Mehta v Kamal Nath and Others,* AIR 2000 SC 1997, the apex court enforced the fundamental right to life (Article 21) under Article 32 against a private corporation that polluted the environment and damages were awarded for the same. Justice Saiyed Saghir Ahmad in para 10 held that:

In the matter of enforcement of Fundamental Rights under Article 21, under Public Law domain, the Court, in exercise of its powers under Article 32 of the Constitution, has awarded damages against those who have been responsible for disturbing the ecological balance either by running the industries or any other activity which has the effect of causing pollution in the environment. The Court while awarding damages also enforces the "POLLUTER PAYS PRINCIPLE" which is widely accepted as a means of paying for the cost of pollution and control. To put in other words, the wrongdoer, the polluter, is under an obligation to make good the damage caused to the environment.

In *Vishaka v State of Rajasthan and Others*, MANU/SC/0786/1997, the Supreme Court has put out guidance for the safety of women at the work place in the absence of legislation at all public as well as private places. This case resulted from a writ petition filed by an NGO named Vishaka for the enforcement of fundamental rights of women under Article 14, 19 and 21. The reason of filing the writ petition before the court was that a social worker gang raped in a village of Rajasthan. CJI J.S. Verma held that:

Each such incident results in violation of" the fundamental rights of 'Gender Equality' and the 'Right to Life and Liberty'. It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim's fundamental right under Article 19(1) (g) 'to practice any profession or to carry out any occupation, trade or business'. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women....The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, instances of sexual

> harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.

Justice Verma admitted the writ petition under Article 32 to issue some guidelines. In para 5 of the judgement Justice Verma cited Article 51 A, the fundamental duty of every citizen (a) to abide the constitutional goals. In para 6 the judge cited Article 51 and 253 of Indian Constitution in relation to international law and treaties, Seventh Schedule and Union List Entry 14 to implement international covenants and treaties. The court took the help of several international Conventions to frame the guidelines such as in para 11, the court held that it was the court's obligation to enforce fundamental rights in the absence of legislation. Most importantly the court implemented the CEDAW recommendation- Article 11, 22, 23 and 24. The court in para 16 said that:

> In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose.

At the conclusion the court made 11 guidelines to protect women at every public or private work place. The court held that: "The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector."

Gardbaum on the *Vishaka judgement* states that in this case the court did not impose a direct horizontal effect of fundamental rights; instead it imposed the positive duty on the State to protect its citizen from sexual offences. The author said that in the absence of State legislation on the sexual violation of work place, the court filled the gap of law until the State made a law on that issue (2016: 607).

India not only after independence, but before the independence as well, was a signatory to the Internationals Treaties and Conventions. India was a member of the

League of Nations and International Labour Organization, and actively participated in the drafting of the UDHR. India has ratified major Conventions and treaties like International Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All forms of Racial Discrimination, the International Covenants on Economic, Social and Cultural Rights, the International Convention on Civil and Political Rights, the Convention on the Elimination of All forms of Discrimination against Women and Convention on the Rights of Childs. The Indian Supreme Court in *Vishakha v State of Rajasthan* AIR 1997 SC 3011, implemented some of these Conventions alongside invoking fundamental rights in Part III (Singh 2007: 184-5).

In *Common Cause v Union of India and Others,* (1996) 1 SCC 753, a PIL was filed by a NGO named Common Cause under article 32 before the Supreme Court to highlight the serious deficiency in the matter of collection, storage and supply of blood by blood centers in the country. The petition seeks to direct the Union of India, the States and Union Territories to take the steps to stop malpractice in and inadequacies of the blood centre in the country.

> According to the report of M/s. A.F. Ferguson & Co. out of the total number of 1018 blood banks in the country, 203 are commercial blood banks and the rest are controlled by the Central Government, State Governments, Private Hospitals and voluntary organisations. The volume of the blood collected by the commercial blood banks is 4.7 lakhs units out of the total of 19.5 lakhs unit by all blood banks and that commercial blood banks are collecting blood mostly from professional donors while the other blood banks under the control of the State Governments, Central Government, Private organisations and voluntary organisations are collecting blood mostly from the relatives of the patients or from the voluntary donors.

The court directed the State to take appropriate action against all public, commercial and private blood banks to function well.

In *Mohini Jain V State of Karnataka and Others,* AIR 1992 SC 1858, a writ petition was filed by Miss Mohini Jain who challenged the capitation fee imposed by a private medical college, invoking the Article 14 of the Constitution. The petitioner challenged Section 3 of Karnataka Educational Institution (Prohibition of Capitation

Fee) Act, 1984 that allowed capitation fee to be charged from students who did not come under the "Government Seats" category. The court in para 8 said:

> The preamble promises to secure justice "social, economic and political" for the citizens. A peculiar feature of the Indian Constitution is that it combines social and economic rights along with political and justiciable legal rights. The preamble embodies the goal which the State has to achieve in order to establish social justice and to make the masses free in the positive sense. The securing of social justice has been specifically enjoined an object of the State under Article 38 of the Constitution. Can the objective which has been so prominently pronounced in the preamble and Article 38 of the Constitution be achieved without providing education to the large majority of citizens who are illiterate. The objectives flowing from the preamble cannot be\ achieved and shall remain on paper unless the people in this country are educated. The three pronged justice promised by the preamble is only an illusion to the teaming million who are illiterate. It is only the education which equips a citizen to participate in achieving the objectives enshrined in the preamble.

The court makes it clear that there is a constitutional obligation on the State as well as on private institutions to provide education to all citizens. In this case the matter before the court was against a private institution that imposes capitation fee in an arbitrary manner and the court in para 21 held that: "We, therefore, hold and declare that charging of capitation fee by the private educational institutions as a consideration for admission is wholly illegal and cannot be permitted".

This landmark judgment in the Indian Judicial system becomes a milestone for the subsequent courts judgments on the matter of education. The approach adopted by the court, which enforced the fundamental rights horizontally against the private collage is highly appreciable.

In *Society for Un-aided Private Schools of Rajasthan v Union of India and Another*, (2012) 6 SCC 1, the society of un-aided private schools challenged Section 12 of Right to Education Act, 2009 that imposed regulations on State funded and private schools to admit 25% of students from economically weaker and socially disadvantaged background. The question was that whether the private schools come under the constitutional obligation to implement Article 21A? The court discussed Articles 21A, 45, 51A (k) and various International Conventions that deal with the positive obligation of State as well as non-State actors to provide education to children. The court held that:

The obligation to protect implies the horizontal right which casts an obligation on the State to see that it is not violated by non-state actors. For non-state actors to respect children's rights cast a negative duty of non-violation to protect children's rights and a positive duty on them to prevent the violation of children's rights by others, and also to fulfill children's rights and take measures for progressive improvement. In other words, in the spheres of non-state activity there shall be no violation of children's rights.

The Court highlighted the role of non-State actors' in the light of the constitutional obligations and the court held that if the non-State actors plays the State function, then they cannot be excluded from the States' responsibility. The court drew attention to the silence of the State and that it is the fundamental obligation of the State to provide education to children and on the other hand if a non-State actor does this work then the State has to regulate them accordingly:

Primary responsibility for children's rights, therefore, lies with the State and the State has to respect, protect and fulfill children's rights and has also got a duty to regulate the private institutions that care for children, to protect children from violence or abuse, to protect children from economic exploitation, hazardous work and to ensure human treatment of children. Non-state actors exercising the state functions like establishing and running private educational institutions are also expected to respect and protect the rights of the child, but they are, not expected to surrender their rights constitutionally guaranteed.

Article 21A requires non-state actors to achieve the socio-economic rights of children in the sense that they shall not destroy or impair those rights and also owe a duty of care. The State, however, cannot free itself from obligations under Article 21A by offloading or outsourcing its obligation to private State actors like unaided private educational institutions or to coerce them to act on the State's dictate. Private educational institutions have to empower the children, through developing their skills, learning and other capacities, human dignity, self-esteem and self-confidence and to respect their constitutional rights.

In conclusion, the majority held that Article 21A and RTE Act, 2009 is child-centric not institution centric, therefore it does not violate Article 19 (1) (g) and it applies to all State funded and non-funded private schools. This is the great example of indirect horizontal effect of fundamental rights against non-State actors.

In this section the cases were dealing with the direct HRs which makes the non-State actors under the constitutional obligation directly. The discussion shows the

intention of the Indian judiciary in these cases that the judiciary is adopt a liberal view in evolving the concept of HRs through make expansion the periphery of State definition and Article 21.

Indirect Horizontal Rights in the Indian Constitution

The chapter 2 discussed the definition of the indirect HRs in detailed which states that the application of fundamental rights between the citizens through private laws. The object of this present chapter deals the judicial interpretations of fundamental rights and their application. This section will try to find out the cases in which the judiciary enforced fundamental rights horizontally (indirect).

In *Mr. X v Z Hospital,* (1998) 8 SCC 296, the appellant claimed the violation of his fundamental right of privacy against a private hospital on the ground that the doctor disclosed his HIV (+) fact to a woman with whom, he was supposed to get married. Due to the disclosure of this fact, his marriage was called off. The appellant challenged the violation of his fundamental right of privacy which was termed as the violation of the fundamental duty of the doctor not to disclose his medical status to anyone.

In the conclusion, the court held that a person cannot have a right to privacy if that right put other person's life in danger. In this case, the appellant did not get the relief from the court but the purpose behind this case mention here is that the court entertains a case of fundamental rights against a private body. It is the essence of the concept of HRs that the constitutional court must entertain the case related to the fundamental rights between two citizens.

In *Parmnand Katara v Union of India,* (1989) 4 SCC 286, a PIL was filed under article 32 for seeking to direct the Union of India to ensure that every injured patient should get instant medical treatment without any procedural inquiry by the police. Due to technicalities legislated in law the procedural mechanism said that there has to be a police inquiry before a treatment was started, causing a numbers of people to die. The court in para 8 said that:

> Article 21 of the Constitution casts the obligation on the State to preserve life. The provision as explained by this Court in scores of decisions has emphasised and reiterated with gradually increasing emphasis that position. A doctor at the Government hospital positioned to meet this

State obligation is, therefore, duty-bound to extend medical assistance for preserving life. **Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life.** No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession.

In para 14 the court highlighted the miserable condition of injured person and the positive obligation of a doctor to save the life of an injured person:

It could not be forgotten that seeing an injured man in a miserable condition the human instinct of every citizen moves him to rush for help and do all that can be done to save the life. It could not be disputed that in spite of development economical, political and cultural still citizens are human beings and all the more when a man in such a miserable state hanging between life and death reaches the **medical practitioner either in a hospital (run or managed by the State) public authority or a private person or a medical professional** doing only private practice he is always called upon to rush to help such an injured person and to do all that is within his power to save life. So far as this duty of a medical professional is concerned its duty coupled with human instinct, it needs no decision nor any code of ethics nor any rule or law.

Therefore, the apex court in this judgement gave directions to the State that the State is under the constitutional obligation to protect the fundamental rights of the citizen against the State as well as non-State actors.

In *T. Sareetha v T. Venkata Subbaiah,* AIR 1983 AP 356, the appellant challenged sections 9 and 19 of the Hindu Marriage Act, 1955 on the ground that these provisions regarding the restitution of conjugal rights are against Articles 14, 13 and 21 of the Constitution. The apex court in para 25 cited academicians for clarifying the concept of conjugal rights, said that:

Applying these definitional aids to our discussion, it cannot but be admitted that a decree for restitution of conjugal rights constitutes the grossest from of violation of an individual's right to privacy. Applying Prof. Tribe's definition of right to privacy, it must be said, that the decree for restitution of conjugal rights denies the woman her free choice whether, when and how her body is to become the vehicle for the procreation of another human being. Applying Parker's definition, it must be said that a decree for restitution of conjugal rights deprives a woman of control over her choice as to when and by whom the various parts of her body should be allowed to be sensed. Applying the tests of Gaiety and Bostwick, it must be said, that the woman loses her control over her most intimate decisions. Clearly, therefore, the right to

privacy guaranteed by Article 21 of our Constitution is flagrantly violated by a decree of restitution of conjugal rights.

In the conclusion Justice P.A. Choudhary held that

On the basis of my findings that Section 9 of the Hindu Marriage Act providing for the remedy of restitution of conjugal rights violates the right to privacy guaranteed, by Art. 21 of the Constitution, I will have to hold that Section 9 of the Hindu Marriage Act is constitutionally void. Any statutory provision that abridges any of the rights guaranteed by Part III of the Constitution will have to be declared void in terms of Article 13 of the Constitution.

Unfortunately in the subsequent judgements *Harvinder Kaur v Harmander Singh,* AIR 1984 Del. 66 and in *Saroj Rani v Sudarshan Kumar* (1984) 4 SCC 90, the Court disagreed with *T. Sareetha's* decision and held that section 9 of the Hindu Marriage Act, 1955 is constitutionally valid and 'serves the social purpose as an aid to the prevention of break-up of marriage' (Singh 2007: 206).

In *AIR India v Nergesh Meerza,* (1981) 4 SCC 335, constitutional validity of Service Regulation 46 and 47 for air hostesses was challenged before the Supreme Court under Article 14 of the Constitution. The Regulation 46 states that the service of an air hostess will be terminated if the Air hostess attains the age of 35 years or if she marries within 4 years of service or on first pregnancy whichever occurs earlier. The apex court in para 104 held that: "we strike down the last portion of Regulation 46(i) (c) and hold that the provision 'or on first pregnancy whichever occurs earlier' is unconstitutional, void and is violative of Article 14 of the Constitution and will, therefore, stand deleted."

In *Ms Gita Hariharan and Anr v Reserve Bank of India and Anr*, (1999) 2 SCC 228, the constitutional validity of section 6 of Hindu Minority and Guardianship Act, 1956 and section 19 of Guardian and Wards Act, 1890 was challenged under the Article 14 and 15 of the Indian Constitution before the apex court. The issue was whether a mother can become the natural guardian of minor children while her husband was alive. In this case the Reserve Bank of India (RBI) questioned the authority of a mother as a natural guardian of a minor child. Chief Justice A.S. Anand and Justice M. Srinivasan held that both sections of the Act were unconstitutional because these provisions are against the gender equality and discriminates on the basis of sex and violates Article 14 and 15 of the Constitution.

In *Assn. of Victims of Uphaar Tragedy and Others v Union of India and Others* MANU/0136/2003, a writ petition was filed before the Delhi High Court under Article 226 for the grant of damages to the victims and the victim's families for the Uphar tragedy. Due to Uphar Cinema tragedy (fire) many people died and several people were injured. The question before the High Court was whether a writ petition can be filed against a private body or non-State actor. The court gave an answer to this fundamental question in the affirmative, though; in this case the issue was a violation of Delhi Cinematograph Rules, 1981 that resulted in causing the death of several persons who were watching the movie in the cinema. Justice S.K. Mahajan and Justice Mudgal entertained the writ petition and imposed a fine on Cinema owner, a private individual.

In *Unni Krishnan v State of Andhra Pradesh and others*, (1993) 1 SCC 645, a writ petition was filed before the Supreme Court just after the *Mohini Jain* verdict that declared the capitation fee imposed by a private college was unconstitutional. In this particular case, section 4 and 15 of Andhra Pradesh Educational Institution (Regulation of Admission) Order 1974 was challenged asking whether the professional degree comes under the right to education as declared in *Mohini Jain.*

The court restricted the scope of *Mohini Jain* verdict and made right to education as a fundamental right only up to the age of fourteen years. Now, the right to education is comes under the limits of economic capacity and development of the State. The court held that:

> The emphasis in this case is as to the nature of duty imposed on the body. It requires to be observed that the meaning of authority under Article 226 came to be laid down distinguishing the same term from Article 12. In spite of it, if the emphasis is on the nature of duty on the same principle it has to be held that these educational institutions discharge public duties. Irrespective of the educational institutions receiving aid it should be held that it is a public duty. The absence of aid does not detract from the nature of duty.

It can perhaps be said that on account of this judgement the scope of private education has become larger in India. The case declares that a private institution has the right to impose such fee on students as the governments thinks fit. The court in para 180 held that:

> The obligations created by Articles 41, 45 and 46 of the Constitution can be discharged by the State either by establishing institutions of its own or by aiding, recognising and/or granting affiliation to private educational institutions. Where aid is not granted to private educational institutions and merely recognition or affiliation is granted it may not be insisted that the private education institution shall charge only that fee as is charged for similar courses in governmental institutions. The private educational institutions have to and are entitled to charge a higher fee, not exceeding the ceiling fixed in that behalf. The admission of students and the charging of fee in these private educational institutions shall be governed by the scheme evolved herein - set out in Part-Ill of this Judgment.

In this case the intention of the court was to put private educational institution under the umbrella of the State. On the one hand, the court allowed to the private institutions to impose fee, but on the other hand the court required the State to put a cap on such fees.

In *Indian Council for Enviro-Legal Action and Others v Union of India and Others,* (1996) 3 SCC 212, a writ petition was filed before the Supreme Court to control pollution under Article 12, 21, 32, 48A and 51A (g) and several other legislations . The writ petition highlighted the critical condition of the chemical industries' plants in several parts in India. Those industries used hazardous chemical which was dangerous to human beings. The major concern of the writ petition was a small village Bichhri in Udaipur district of Rajasthan where the private chemical industries were setup. The petition filed against the private chemical companies sought to direct the Central Government to regulate them immediately and impose fine as damages. The purpose of this case cited here that the court entertained the writ petition against the non-state actors.

In *Shri Bodhisattwa Gautam v Miss Subhra Chakraborty,* (1996) 1 SCC 490, the apex court held that under Article 32, the Supreme Court of India has jurisdiction to enforce fundamental rights though issuing writs against private bodies and individuals. The court in para 6 held:

> This Court, as the highest Court of the country, has a variety of jurisdiction. Under Article 32 of the Constitution, it has the jurisdiction to enforce the Fundamental Rights guaranteed by the Constitution by issuing writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-Warranto and Certiorari. Fundamental Rights can be enforced even against private bodies and individuals.

The apex court in this verdict states the nature and scope of the application of the fundamental rights which cover the State as well as the non-State.

In *P.A. Inamdar and Others v State of Maharastra and Others*, (2005) 6 SCC 537, The question before the Supreme Court was that whether the State can impose its positive obligation of reservation on the unaided minority or non-minority educational institutional? The apex court held that the State cannot impose the reserve the seats in private institution but the court allowed 15 per cent quota for Non-Resident Indian (NRI). The court said that the private unaided professional institution has its own freedom and autonomy in the matter of administration which should not be dilute by the State. The Court in para 122 of the judgement said:

> Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions is acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidate. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions if fair, transparent, non-exploitative and based on merit.

The Supreme Court of India through this judgement reverses the constitutional position of State's obligation as it was in 1950 before the First Amendment. The court nullified the object of the Article 15 (4) of Constitution which is the basic features of the Constitution. The purpose of citing this case is that the judiciary did impose positive obligation on the private institution.

In *Usha Handa v The Lt. GOvernaer Union Territory of Delhi Raj Bhavan*, MANU/DE/0007/1998 the Delhi High Court entertained a writ petition under Article 226 against a private institution recognised by Delhi School Education Act, 1973. The Delhi High Court entertained a writ petition against a private school. In *Miss Raj Son v Air Officer in Charge and another* MANU/SC/ 0250/1990, a private school arbitrarily deprived a teacher from his service at the age of 58 while the retirement age was 60. The Supreme Court entertained a writ petition against a private school under Article 32 and held that:

It is not necessary and we do not propose to go into the question in this case as to whether the petition is maintainable under Article 32 of the constitution, because this petition has been pending in this Court since 1981. The petitioner's claim is just. It will, therefore, be a travesty of justice to send her to any other forum at this stage.

In *Shri V.S. Rahi v The Lt. Governor of Delhi and Others,* MANU/DE/0777/1994, the division bench of Delhi High Court admitted a writ petition seeking a mandamus for pension against a private school. In *M/s Sanghi Technologies Pvt. Limited v Union of India and Others,* in that case the full bench of Delhi High Court declared a private company as the 'State' under the expression of "other authority". The court held that:

The sum total, broadly speaking, is that constitutional or statutory bodies set up under a statute - whether as a Government body or undertaking or as corporation - a Government company or public company or a private company under the Companies Act, 1956, or in the form of a society registered under the Societies Registration Act or any other form constituted under a similar statute or a body or a person performing the functions of a Government character will be included in the expression "other authority".

In *Ms Urmil Sharma v Director of Education* 1996, the Delhi High Court issued a writ petition under Article 226 against a private management. In *Anand Dev Tyagi v Lt. Govrenor of Delhi and Others,* 1996, the Delhi High Court issued a writ petition against suspension by a private school of a teacher. In *Nisha Tyagi and Ors v Seema Model School and Ors,* MANU/DE/0989/1997, the court entertained a petition under Article 226 against a private school.

In *H. Singh v Govt of N.C.T Delhi Vol. 119 (1*), the Delhi High Court issued a writ against the Management of a private school to revoke suspension of Principle of the school. In *K.Krishnamacharyulu and Ors v Sri Venkateshwara Hindu College of Engineering and Another,* MANU/SC/1113/1997, the Supreme Court held that a private collage cannot be denied the equal pay principle of Article 39 (d) of the Indian Constitution. In *Harish Sabharwal and Others v Lt Governor of Delhi and Others, MANU*/DE/0558/1996, the Delhi High Court relied on the *Unnikrishan* case and entertained a writ petition against a private body.

In *Consumer Education and Research Centre and Others v Union of India and Others*, MANU/SC/0175/1995, the Supreme Court entertained a writ petition filed in the nature of PIL under Article 32 against pathetic condition of workers in the asbestos industries. The Court in para 27 held that:

> We hold that right to health, medical aid to protect the health and vigour to a worker while in service or post retirement is a fundamental right under Article 21, read with Articles 39(e), 41, 43, 48A and all related Articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person.

In this case, the court directed the Central and State Governments to implement effective measures to take care of the health and medical facilities for all workers, irrespective of whether they are employed in the public or private sectors. The judiciary direct to the State to implement its positive obligations which envisaged under Part IV DPSP of the Constitution.

This judgement is an illustration of the implementation of fundamental rights as indirect horizontal rights though the State.

In *Medha Kotwat Lele and Others v Union of India*, (2013) 1 SCC 297, the Supreme Court of India after 15 years of the *Vishaka* judgement, spoke out on the non-implementation of the guidelines by various States and the Central Government. The Supreme Court again, gave directions for effective implementation of the *Vishaka* guidelines which states the protection and security of women on at the public and private work place. The court held that these guidelines must be implemented at public as well as private work places and held that the aggrieved person can approach the High Court to get justice.

Conclusion

On the basis of constitutional provisions and judicial interpretations by the Supreme Court and the High Courts, it is clear that the framers of the Indian Constitution had a vision about the future, anticipating that it is not only the State that discriminates but a citizen can also do so. It is a unique feature of the Indian Constitution that the definition of the State is 'inclusive'. It is the duty of the Courts to include other non-state actors under the definition of the State. The two sentences of Article 12 "unless

the context otherwise requires" and "other authorities" open the scope for the judiciary to include non-State actors as the judiciary thinks fit.

After the analysis of the above judicial decisions in detailed, the discussion shows that the concept of the State Action doctrine plays a key role in deciding the matter by the constitutional courts in India. The Courts sometime do not declare a private body as a State under Article 12 but entertain the writs petitions to provide justice to the aggrieved parties. Its shows the intention of the Indian judiciary, that it is concerned enough to apply the concept of HRs in India.

In some cases the judiciary has evolved the idea of 'structural' mechanism, while in other cases it has also conceptualized the 'control' mechanism to define the State. Though, there are various cases on the definition of the State but some of them are treated as landmark judgments in which the judiciary has evolved certain principals or tests to define the State i.e. 'control test' and 'function test' . In majority of the landmark judgements the judiciary relied on the 'control test' like *Ajay Hasia* (1980), *Pradeep Kumar Biswas* (2002) and *Zee Telefilms* (2005).

In a recent landmark judgement *State Board of Control for Cricket in India v Cricket Association of Bihar and Others* 2015, the court held that BCCI is not a state. The court adopted a new approach saying that if non-State actors or private organizations performing the State' functions could be treated as the State function but not the State. The court adopts a liberal approach and held that the writ petition can be maintainable against the non-State actors in case of malpractice committed by those non-State actors.

The discussion in this chapter has analysed the concept of HRs with the judicial interpretation of the articles 12, 14, 15 (2), 17, 23 and 24 of the Indian Constitution. In terms of direct HRs, there are land mark judgments of the Supreme Court and High Courts of India. An example is the *M.C. Mehta v Union of India* (1986) judgment, in which the Supreme Court of India deviated from the State action doctrine and entertained a writ petition under article 32 against a private company. This was a highly radical step taken by Justice P.N. Bhagwati that applied fundamental rights in a directly horizontal manner.

In *Vishaka v UOI* 1997, CJI Justice Verma directed the government to implement fundamental rights under Articles 14, 15 and 21 in all public and private work places. In *Common Cause v UOI* 1996 the Supreme Court directed the implementation of fundamental rights horizontally in all government and private blood banks. In the *Mohini Jain* 1992 case, the Supreme Court entertained a writ petition against a private medical college. In one of the latest judgement on HRs *Society for Un-aided Private Schools of Rajasthan v UOI* 2012, the Supreme Court enforced the fundamental right to education against private schools and reserved 25% seats for children who are economically weak and have a socially disadvantaged background.

Krishnasawamy argued three things for HRs , first, that the Indian courts have not developed direct HRs, second, the court should be comes under the scope of 'the State' in Article 12 and third through the modification of the public law in the light of writs jurisdiction the indirect HRs developed effectively (Krishnasawamy 2011: 70-71). This is evident in the cases of indirect effects of HRs, where various judgments of the constitutional courts shows that the Indian judiciary is highly concerned about abuse of fundamental rights by the non-State actors or private citizens. It can be said that India has great space for the concept of HRs in the Constitution and the judiciary makes it better day by day. The time has come when the judiciary has to take strong stand against non-State actors who enjoy full rights and liberties but without any constitutional obligations.

To conclude, in this discussion it is finds that the Indian judiciary in some area/aspects there is some success make regarding HRs and in other area/aspects such as caste inequalities things are not very successful. While the caste and other social inequalities are the core basis of the existence of HRs in the IC the judiciary ignore the spirit of Article 15 (2), 17, 23 and 24. The judiciary not fulfill the constitutional morality to make justice with the intention of the constitutional framers that alive in these articles, to make Indian political democracy into social and economic democracy .The Indian judiciary has pushed for HRs only in some areas and other areas have been ignored.

Chapter 5

Horizontal Rights: An Appraisal

"Unless you change your social order you can achieve little by way of progress. You cannot mobilise the community either for defence or for offence. You cannot build anything on the foundations of caste. You cannot build up a nation, you cannot build up morality. Anything that you will build on the foundations of caste will crack and will be a whole" (Ambedkar 2014a: 66).

Introduction

The idea and the objective behind insertion of HRs in the Indian Constitution were to eradicate social inequality. In India, the social, caste, religious and other institutions controlled the socio-economic, cultural and political activity of the individual with or without the support of the State. In India, these groups and private individuals or non-State actors function similar to the State; sometimes they even have more power than the State[27]. These private individuals and others groups make their own law, rules and regulation some of them even have their own executive, legislative and judicial function[28]. There are the extra judicial, legislative and executive functions of non-State actors to govern the society under the shadow of the Constitution.

The broad area of this chapter is to analyse the working condition of the HRs through the implementation's point of view. The objective of the chapter is to critically examine the socio-economic status of the marginalised sections of society for whom these provisions had been inserted in the Constitution. The Chapter will examine the laws which were enacted to fulfill the objectives of the HRs.

The chapter will critically analyse the working nature of the HRs in India. The present chapter will deal with the position of Article 15 (2) and 17 of the Indian Constitution. This is because caste directly affects the psyche of India's citizens[29].

[27] See Gas War Crony Capitalism and the Ambanis (2014), written by Pranjoy Guha Thakurta, Subir Ghosh and Jyotirmoy Chaudhuri, ISBN: 97-881-92855-127. The book states that how a private company controls the gas price in India and how the government favours an individual to do so.
[28] See the function of Khap Panchayats in North India and Khatta Panchayat in South India.
[29] In chapter 3, it has been discussed in the CAD in details.

The Articles 15 (2) (discrimination by the citizens) 17 (untouchability) and 23 (Prohibition of human traffic and forced labour) deal with the same social evil and Article 24 (prohibition of children in mines and factories) too have its roots under the ambit of that problem. Therefore, in order to deal with implementation of HRs, the discussion of implementation of Untouchability (Offences) Act, 1955, Protection of Civil Rights Act, 1955 and Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 would be the most relevant. The chapter will try to seek the fundamental answer to a social problem whether the criminalization or legalization of a social problem is the only solution or it can be resolved elsewhere beyond the law. The chapter will also deal with the emerging developments in the field of HRs.

On the working condition of the Indian Constitution, the Indian judiciary is the most powerful judiciary on the earth (TOI: 2013). In addition, the Indian Constitution is the longest Constitution in the world and it is presumed that laws are non-discriminatory. Thus, the question arises here as to what are the reasons behinds the existence of all major social evils like discrimination on the basis of class, religion, place of birth, gender, dressing code, drinking and eating habits, political ideology and especially caste atrocities and untouchability? Why is the Constitutional spirit not followed by the citizen of India? Why do the thousands years old social inequalities exist till the date? Whether the HRs failed in India? Why has the SC/STs Act not been implemented? The chapter aim to discuss these questions in order to contemplate upon the future of HRs in India.

The Nature of the Indian Society

The Indian Constitution gives guarantee to all its citizens as a single unit which is not supposed to be diluted by the State as well as by the non-State actors. Both, the State as well as non-state actors can be brought under the purview of law of the land for interference in the life and personal liberty of the citizen. On the contrary, the society, religious institution and an individual who violate the fundamental rights of the fellow citizen defy the law because of lack of effective implementation of laws. The society controls the socio-economic and political life of the citizen. The Indian society[30], regulates the freedom and liberty of the citizens through its own

[30] In this conversation, the nature of society is only limited to the concepts of HRs. Here the 'society' includes caste institutions, religious institution, family and an individual.

mechanism which is acceptable to the large sections (majority) of the society. Such society draws its power from particular ideology or religion.

If the foundation of the society depends on discrimination or inequality, how can it assume that the principle of fraternity shall prevail? What is the nature and scope of the society? From where does the society enter into the individual's life and where does it end? Where does the society play a role as the State to control individual freedom, liberty and why does the society not have the duty as the State? Why does an individual surrender his authority before the society? The answers to these kinds of questions will depend upon the nature of the society that how it practices fraternity among the citizen. The discussion will try to answer of these questions.

Ambedkar stated that "Indian society still savours of the clan system, even though there are no clans; and this can be easily seen from the law of matrimony which centers round the principle of exogamy, for it is not that Sapindas (blood-kins) cannot marry, but a marriage even between Sagotras (of the same class) is regarded as a sacrilege" (Ambedkar 2014a: 9).

Granville Austin stated on the Characteristic of Indian Society and caste hierarchy:

> Of the characteristics of Indian society affecting governance, the most significant is hierarchy. Caste is its most visible and best known manifestation. Next come social oppression and economic deprivation derived hierarchy. Hierarchy begin at the home and surrounds the son even when he ventures outside it. Within the family, his father is autocratic, choosing his wife and his job, and he maintains a high degree of authority over the son even when he is adult. Loyalty to and the responsibility for one's family, and secondarily, one's 'in-group' is central to the culture (Austin 2016: 638).

Granville Austin highlights the nature of Indian society which is based on the hierarchical and this hierarchy starts from the family. Austin further stated:

> The Constitution's greatest gift to the social revolution and democracy has been an open society-if that is not a tautology. Open societies grow more open for all their citizens, although among them at varying rates. Speech and expression in India are free and communications widespread-although landlords still regularly arrange the detention of lower caste individuals or local activist, and a low caste villager who insults an upper caste member may find himself beaten or even murdered (Austin 2016: 647).

Granville Austin, the eminent jurist and constitutional expert, states about the hierarchical nature of Indian society and the social evils which exist in the country. Though the IC make a social revolution and provides all citizens equal rights irrespective of anything but the feudal nature of the citizen which is based on caste, not allow the citizen to exercise their rights freely.

Dr. B.R. Ambedkar (Ambedkar 2014a: 47) in *Annihilation of Caste* argued on the nature of Indian society in terms of division of labour that:

> Caste system is not merely division of labour. It is also a division of labourers. Civilised society undoubtedly needs division of labour. But in no civilised society is division accompanied by this unnatural division of labourers into water-tight compartments. Caste system is not merely a division of labourers which is quite different from division of labour-it is an hierarchy in which the divisions of labourers are graded one above the other. In no other country is the division of labour accompanied by this gradation of labourers.

Dr. Ambedkar describes the caste system in socio-economic terms and points out that the division of caste is not only a social division but it also has economic aspect which controls the lower caste peoples economically. Ambedkar (Ambedkar 2014a: 48) further added that:

> The division of labour brought about the Caste System is not a division based on choice. Individual sentiment, individual preference has no place in it. It is based on the dogma of predestination....What efficiency can there be in a system under which neither men's heart nor their minds are in their work? As an economic organization Caste is therefore a harmful institution, inasmuch as, it involves the subordination of man's natural powers and inclinations to the exigencies of social rules.

Ambedkar traced the root cause of the caste division that this division is based on the birth rather than the choice of the labour because in India, caste division is also a labour division.

In India, the society is divided into various castes groups and each caste has its own traditional occupation which is decided by the Hindu social order. The social division turned into economic and political divisions. Durkheim (Durkheim 1933: 374) in *Division of Labour* stated that:

> The institution of classes and of castes constitutes an organization of the division of labour, and it is a strictly regulated organization, although it often is a source of dissension. The lower

> classes not being, or no longer being, satisfied with the role which has developed upon them from custom or by law aspire to functions which are closed to them and seek to dispossess those who are exercising these functions.

Durkheim argued that caste and class are the institution within itself and they organised the division of labour in the society. It could be seen in Indian scenario that every caste has its separate profession. Gopal Guru in *Social Justice* stated that due to the Brahmainical ideology as core ideology, In Indian society each caste has its own panchayat for monitoring the untouchability and begar. This purity and pollution's theory of Brahmainical ideology makes each caste and sub caste an autonomous body for dispensing justice. If any attempt happens to crack this watertight compartment of caste system through inter-caste marriage or inter-caste dining, it is considered violation of social norms (Guru, 2015: 363).

Durkheim states that the caste institution can be alive through its juridical force i.e. custom even after it ceases into force (Durkheim 1933: 378).

A. M. Shah highlighted the vertical and horizontality of caste in India:

> Every caste is a community with a name. Its members are spread over a number of villages and towns in an area; hence sociologists call it a horizontal unit. The relations between various castes in the context of a village, town, or local area are hierarchical and therefore called vertical. These vertical relations dominate thinking on caste so much that the entire caste system is usually considered as the extreme form of inequality in the world. In social sciences also these inter-caste relations have received overwhelming attention while the horizontal unit has been relatively neglected (Shah 2017: 61).

Indian society is having the custom and culture of caste practice that makes the boundaries among the citizens. These boundaries help to stop the social intercourse among the citizens. The reason behind this practice is the concentration of the socio-economic and political power in the hands of upper castes which govern the society. The Indian village system is the foundation of caste and untouchability practice. Dr. Ambedkar (Ambedkar 2014b: 20) on the Indian Village System:

> The Indian village is not a single social unit. It consists of castes. But for our purposes, it is enough to say-

1. The population in the village is divided into two sections-(i) Touchables and (ii) Untouchables.

2. The Touchables form the major community and the Untouchables a minor community.

3. The Touchables live inside the village and the Untouchables live outside the in separate quarters.

4. Economically, the Touchables form a strong and powerful community, while the Untouchables are a poor and a dependent community.

5. Socially, the touchables occupy the position of a ruling race, while the Untouchables occupy the position of a subject race of hereditary bondsmen.

Dr. Ambedkar further stated that "In the Village Republic on which the Hindus are proud but what is the position of untouchable in that Republic? *They are merely the last but also the least.* There are no rights available to the untouchables against the untouchable" [sic] (Ambedkar 2014b: 25). Dr. Ambedkar (Ambedkar 2014a: 45) in *Annihilation of Caste* on the social reform stated that:

> Religion, social status and property are a source of power and authority, which one man has, to control the liberty of another. One is predominant at one stage; the other is predominant at another stage. That is the only difference. If liberty is ideal, if liberty means the destruction of the dominion which one man holds over another then obviously it cannot be insisted upon that economic reform must be the one kind of reform worthy of pursuit. If the source of power and dominion is at any given time or in any given society social and religious then social reform and religious reform must be accepted as the necessary sort of reform.

Dr. Ambedkar discusses an important point here which brings in the concepts of liberty and right in relation to the concepts of power and domination. The interrelatedness between these concepts further explains the need for social and religious reform. The idea of reform thus explains the existence of social discrimination and inequality which the law has to deal with while seeking to provide justice.

The Report of the National Commission to Review the Working of the Constitution (2002) headed by Justice Shri M.N. Venkatachaliah stated:

> In the changing context of globalised economy, the Fundamental law should address itself in action to relocate the sources of the social obligations of the State. This is a complicated

> exercise. Central to the process of development is the realization of rights. It means that consideration of human rights, equity, equality, equal justice and the accommodation of diversity and central to the conceptualization, design, implementation, delivery, monitoring and evaluation of all developmental processes. The problems of social exclusion, more virulent in India on account of the hierarchical structure of its society, need systematic solution (Kasyhyap 2004: 282).

The Report of the National Commission to Review the Working of the Constitution stated that the State should reduce the social exclusion and should fulfil the social obligation. This report suggests these things to the State after the 52 years of implementation of the Constitution which means that the State is not complying with the spirit of the Constitution.

In the above discussion on the nature of Indian society it can be conclude that Indian society is hierarchical and casteiest which divides society into various institutions.

Has the object of HRs become Prominent or Redundant?

Article 15 of the Indian Constitution is available only to its citizens, the marginal note of the article says: Prohibition of discrimination of grounds of religion, race, caste, sex or place of birth. Article 15 (1) directs the "State" not to discriminate any citizen on ground of only religion, race, caste, sex, place of birth or any of them. On the contrary, Article 15 (2) specifically directs the "citizen" not to discriminate to the fellow citizens on the basis of religion, race, caste, sex, and place of birth or any of them.

Articles 15 (2) states certain kinds of discrimination but these grounds are not the only kinds of discrimination. This list of 7 grounds of the discrimination of Article 15 (2) is inclusive, not exclusive. The Indian Parliament can add more discrimination grounds on the basis of skin tone, food habit, drink habit, cloth habit (a high court judge was denied entry in a club for wearing lungi), outer faith and religious symbols (like *turbon, cap, beard, tilak*), pregnancy, singing habit, mode of celebration, numbers of children, any misconduct or crime commit by the family member, any physically incapability's, height, social or political organization and marital status etc.

On the word "only" mentioned in the Sub clause (1) and (2) of Article 15, Prof M.P. Singh stated that there should be two interpretation of this word. First, the word "only" should not be a sole ground of discrimination, in other word; it is not the only grounds which are mention in Article 15. Second, "it is the effect or operation of the statute which is the determining factor and not its purpose or motive" (Singh 2017: 91).

The philosophy behind the concept of HRs is to protect the citizen from the discrimination committed by the fellow citizen. In the other words, the HRs is available for the particular sections of the society against the particular sections of the society. The Indian Constitution recognised both kinds of rights i.e. group rights as well individual rights in the Part III. The group rights are of religious, socially and educational backward communities (SC/ST/OBC), women and children, minorities on the basis of religion, languages and script or culture[31]. On the other hands, Articles 14, 15 (1), 15 (2), 16 (1)-(3), 18-25, 27, 28 and 32 are the examples of the individual rights.

Rajeev Bhargava (Bhargavav 2008: 10) stated on the group rights and the individual rights under the Constitution:

> Does the Constitution prioritize individual rights or groups? in India both sets of rights were recognised and no clear guideline was provided for just when one is override the other, and no general criteria were provided to resolve conflicts between the divergent types of rights. An attempt was made instead to balance them, with the scales tilting marginally in favour of individual rights.

The Indian Constitution clears the periphery of both kinds of rights. One individual can exercise her individual rights at one time, and at the same or other time, she can also enjoy her group rights. Neither group right nor the individual rights can override each other's. It is the scheme of Part III of the Constitution which strikes effective balance between the groups and individual rights. Upendra Baxi (Baxi 2011: 72) in *Humiliation and Justice* stated that:

> Despite constitutionally enunciated people's rights, Dalits communities have no effective right to dignity and livelihood, after fifty plus years of the Indian constitutionalism. And, for all practical purposes, they remain *subject*, not *citizen*. The collapse of normative Indian legal

[31] See the Articles 15, 16, 25 and 29 of the Indian Constitution, 1950.

> order is only a part of the problems. …Institutions, agencies, and practices of popular justice, especially the caste (*biradari* and *jati*), tribal/indigenous, and religion-based panchayats systematically make use of shaming punishments (often even with fatal impact) that impose destructive humiliation beyond redress.

Upendra Baxi attributes failure of the constitutional values to the inaction of the State machinery. Baxi shows how far the State is ready to provide effective constitutional rights and a dignified life to the citizen of Indian. Baxi also clearly says that popular justice or popular morality which is based on Hindu social order denies the constitutional justice to the Dalits even after the long years of its implementation. Marc Galanter (Galanter 2015: 96) quotes D.D Basu as:

> Since Untouchables are protected from caste discrimination specifically in regard to wells supported by or dedicated to the public by Article 15 (2), it might be though that Article 17 would avoid superfluity in this regard only if it covered facilities beyond those covered by Article 15 (2). Such a reading would comply with the general principle of giving effect to all provisions of an enactment. So that none of them are nugatory.

H.M Seervai, the constitutional expert and jurist in *Constitutional Law of India* at para 9.1 stated that: "Our founding fathers not only put Liberty and Equality in the Preamble to our Constitution but gave them practical effect in Art 17 which abolished "Untouchability," and in Art 14 which provides that "the State shall not deny to any person equality before the law and equal protections of laws in the territory of India" (Seervai 2005: 434).

The Report of the National Commission to Review the Working of the Constitution (2002) headed by Justice Shri M.N. Venkatachaliah, states: "The promise has remained unredeemed. There are 270 million Schedule Castes and Schedule Tribes measures for whose welfare and uplift have not been implemented with sincerity" (Kasyhyap 2004: 309). M.P. Jain stated that the State is under constitutional obligation to protect its citizen whenever Article 17 is violated by the private individuals (Jain 2008: 978). Granville Austin (Austin 2016: 636) stated on the working of the Constitution that:

> A Constitution, however 'living', is inert. It does not 'work', it is worked-worked by human beings whose conduct it may be shape, whose energies it may canalize, but whose character it cannot improve, and whose tasks it cannot perform. The expectation that, by some magic, reform would spring from the Constitution, rather than from the efforts of those using it

wisely, was but one of the notions of which many citizens and politicians had to disabuse themselves

Discrimination on the ground of caste and untouchability

The discussions in this section will try to understand the discrimination and atrocities on the basis of caste and untouchability. The Part III of the IC states seven to eight grounds of discrimination which are mentioned in Articles 14, 15, 16, 17, 23, 25, 29 and 30 but the discrimination on the basis of caste is more severe than others. The caste discrimination opens the door to other kinds of discrimination like gender, sex, place of birth and class etc. this is the reason to discuss the discrimination of caste and untouchability in this conversation.

Sukhadeo Thorat and Katherine S. Newman argued that:

> Social exclusion-in its more specific manifestation as discrimination-refers to the processes through which groups are wholly or partially restricted from full participation in the economic, educational and social institutions that define social membership. Exclusion involves both the act of restricting access and the consequences that follow, principally forms of deprivation. In the Indian context, exclusion revolves around institutions that discriminate, isolate, shame and deprive subordinate groups on the basis of identities like caste, religion and gender... Caste has long been used to regulate economic life in India (Thorat and Newman 2015: 83).

Thorat and Newman argued on social exclusion in India, which restricts the citizen from exercising their socio-economic activity on the basis of caste, religion and gender. On the contrary, Andre Beteille gave three reasons to show that the caste has become weak*:*

> First, the observance of the rules relating to purity and pollution were become weaker. Second, the regulation of marriage according to the rules of caste, was becoming less stringent. And third, the relation between caste and occupation was becoming more flexible. If one kept one's eyes on these three aspects of caste, one would have reason to believe that caste was on the whole becoming weaker (Beteille 2015: 54).

Rajni Kothari (Kothari 2015: 63) stated on the caste atrocities on Dalits and other lower caste that:

> Acts of brutality and terror continue to be part of the atrocities perpetuated on the Dalits and other lower classes, the more so the more they become conscious of their rights and begin to assert themselves. Entire communities are found to be in deep turmoil, face constant

humiliation and growing erosion of their identity and sense of being part of civil society, the nation and the state. Ever so often we hear ghastly tales of these atrocities place in one or another part of the country.

Kothari argued about caste atrocities in a very articulate manner that as soon as the Dalits are aware of their rights and they assert and claim, the upper caste humiliates them, terrorise them and inflict atrocities on them. This approach of the upper caste shows that they are not ready to share the socio-economic and political power with the fellow citizens. Rajni Kothari further stated that "In the post-Independence period various efforts have been made to reduce the potency of caste in the social process and in time eliminate in from the operation of the same. These efforts have not succeeded" (Kothari 2015: 65).

The caste discrimination is not only committed by the non-state actors but it is also committed by the State. In Viluppuram and Cuddalore, Tamil Nadu, 2015, when the several costal districts affected by the floods due to extraordinary rainfall, there was discrimination in the distribution of the relief materials against Dalits by the administration (EPW: 2015). Hanna and Linden (2012) found in their research in India that teachers discriminate on the basis of caste while grading the answer sheet.

Thorat and Attewll (2007) stated in their research that there is discrimination on the basis of caste and religion in the matter of job. While applicant applies for the job the caste and religion factor play a role (Spears 2016: 12). Dean Spears stated that 'lower caste people in rural North India evaluate their lives to be worse than higher caste people' because due to poor socio-economic status in the society they have less life satisfaction than others. Omprakash Valmiki, in 'Jhootan', in its preface, he describes the life of Dalits as "Dalit life is extremely painful, charred by experiences" (Spears 2016: 14).

Sanjana Krishnan and Rahul Jambhulkar stated that 'caste categories were constructed through a complex interactive process. It involved the use and misuse of power manipulations by different castes and sub-castes to advance different social and political claims' (Krishanan and Rahul 2015: 15). Anand Teltumbde highlighted

the caste atrocities in the educational institutions after Rohith Vemula incident at Hyderabad Central University that:

> There was harassment and brutalities unleashed on Dalit students in higher education. There was deliberate delay in scholarships to Dalit students and institutional attempts to smother voices of radicals among them, eventually exposed by the institutional murder of a bright research scholar Rohith Vemula. As such, discrimination is nothing new to Dalits but the institutional manner in which it has been perpetrated in the past two years is certainly conspicuous (Teltumbde 2016a: 10).

Anand Teltumbde stated that from the 2010 to 2014, the atrocities against the Dalits increased up to 19% in recent years (Teltumbde 2016a: 11). Anand Teltumbde argued that the numbers of atrocities gone up 74% from 27,070 in 2006 to 47,064 in 2014 at the national level. In the serious category of atrocities like murder and rape it went up to 105%, though the revealed data is not sufficient and does not give the complete picture of the atrocities (Teltumbde 2016b :10). Anand Teltumbde stated that:

> In Kilvenmeni, the inaugural case of the new genre of atrocities, which happened in 1968, the Madras High Court had acquitted all 23 landlords simply saying that the gentlemen could not commit such a ghastly crime as killing 44 Dalits. Incidentally, eight Dalit farm labourers had undergone punishment, one, a life sentence, and others from one to five years of imprisonment for the alleged murder of P Padaiyacchi, the hitman of the landlords (Teltumbde 2014)…In the infamous Tsunduru case (in which eight Dalits were brutally massacred by the upper-caste people on 6 August 1991) the Andhra Pradesh High Court had qua shed the trial court's order sentencing 21 persons to life terms and 35 others to one-year imprisonment, simply saying that the prosecution failed to produce sufficient evidence before the court. It is incidental that the Supreme Court has stayed it. In the previous case of a massacre of six Dalits in Karamchedu on 17 July 1987, the Andhra Pradesh High Court had similarly struck down the Ongole trial court's conviction of 159 people to life imprisonment. It is only recently, after 23 long years that the Supreme Court has delivered its final verdict—a life sentences to the main accused, Anjaiah, and three years of jail for 29 others (Teltumbde 2016b:11).

> In the 1990s, there were bloody caste atrocities by upper-caste armies, though these were more or less ignored by Dalits because of their association with communists. Three Dalits were awarded death sentence and six life imprisonment for killing 35 Bhumihar–Brahmins in Bara in February 1992, which was confirmed by the Supreme Court within a year in 2002, and three more Dalits were given death sentences by the TADA court as members of the Maoist Communist Centre, while in cases of massacre of Dalits by the upper castes, there have been a series of summary acquittals before the Patna High Court. In quick succession, the court

acquitted all Ranvir Sena convicts in Bathani Tola, Laxmanpur Bathe, Miyapur, Nagari Bazaar, and Khabra Muzaffarpur cases (Teltumbde 2016b:11).

In 2015, more than 47,000 atrocities recorded against SC/ST which shows that on an average more than 2 Dalits are murdered, and 5 Dalit women are raped every day in India (Teltumbde 2016c: 10). Anand Teltumbde (Teltumbde 2016d: 11) stated on the justice system for the Dalits in India:

> The law in India is inaccessible to the poor. The money-driven judicial system forces over 90% of Indians to silently endure injustice…It is tom-tommed that India is the largest democracy in the world but in reality it acts as the worst form of plutocracy. The rich in India can buy justice at every mode of its delivery. The misdemeanour of the police vis-à-vis poor is legend. But the legal system is also not immune to the influence of money.

Teltumbde states about the justice system in India as a money-driven which accessible only by the reach peoples. Sukhdeo Thorat in interview with Seema Chishti describes the data of the crime against the untouchability in India as:

> Official data from Crime in India indicate that during 1995-2014, 2.43 lakh cases of caste discrimination and atrocities were registered [by people who used to be treated as untouchables] under the Protection of Civil Rights Act 1955 and Atrocity Act 1989 — an average of about 13,000 cases per year. This is only the tip of the iceberg, as only serious cases get registered. Primary studies have revealed that the discrimination is deeply embedded in social relations and persists in a significant measure. The India Human Development Survey 2011-12 of over 42,000 households revealed one-third of persons admitting practising untouchability. The Action Aid Survey 2010 of 565 villages in 11 states revealed the practice of untouchability in 80 per cent of the villages… The Indian Institute of Dalit Studies in 2015 revealed economic discrimination in various markets, including the labour market, supply of inputs and services and in the sale of products by the erstwhile untouchables among farmers and non-farm-producers/businesspersons, and also in non-market institutions (Chishti: 2017).

Sukhdeo Thorat further stated on the continuous violence and discrimination on Dalits:

> What is disturbing is that the efforts by Dalits to enjoy equal citizenship rights are opposed not through discussion or democratic methods but by violent ways. In fact, out of the 2.80 lakh cases of discrimination, almost 96 percent are under the Atrocity Act and only 4 per cent under Protection of Civil Rights Act. Unlike in the 1950s and ’60s when opposition was mainly by individuals, now the violence is by a community as whole. The recent cases of Una in Gujarat,

then in Maharashtra, Haryana and now Saharanpur in UP are examples of mass violence (Chishti: 2017).

Thorat highlighted the factual data of the caste atrocities on Dalits in India which shows that the crime against Dalits has risen than declined and the State has failed to provide justice to them. Ishan Anand stated that Indian society is historically unequal and hierarchical and Dalits are at the bottom of the caste hierarchy. Dalits are continuously facing violence, oppression and discrimination in its worst form. One of the reasons for that oppression and violence is landlessness of Dalit community in the country. At the national level 58.40% of rural Dalit are landless. It is substantially larger than other social group of Indian society (Anand 2016: 12).

In May 2017, in a village Shabbirpur in Saharanpur, Uttar Pradesh in caste violence between Thakur community and Dalits community, 1 Thakur boy killed and 55 house and five shops of Dalits were burnt (Jeelani: 2017) and in continues violence, one Dalit man killed and 13 were injured (Masih: 2017).

P.S. Krishnan on the root cause of suicide of Dalits students in academics, states that suicide among SCs/STs and OBCs students is due to atrocities committed against them. P.S. Krishnan suggested for curbing the atrocities and suicide towards the SC/ST students in the educational institutions and suggested that human rights education which has anti-caste orientation should be included in all educational institutions, teachers trainings and trainings of IAS, IPS etc. Krishnan further suggested that an independent Ombudsman/Lokpal should be appointed which is not accountable to vice chancellor and minster and which takes the sue moto cognizance of the atrocities in educational institutions (Krishnan 2016).

Vivek Kumar strongly points out to the dominance of upper caste in Indian academia and said that sociology is dominated by the upper caste. Kumar quotes Oommen who stated that the evidences show that profession of sociologists is dominated by the so-called upper caste i.e. twice-born caste. Kumar said that in Indian Sociology Society established in 1951 and from its beginning till 2011, the post of President has been occupied mostly by upper castes and even in publications

by Indian Sociology, the contributors were mostly from upper castes (Kumar 2016: 34-39).

Kumar further adds that: "Indian sociology is inegalitarian and exclusionary in nature. Sociology has been practised in the milieu of the domination of the so-called upper caste males for the last century" (Kumar 2016: 34-39). Ashwini Deshpande and Katherine S. Newman stated that "Social and cultural capital (the complex and overlapping categories of caste, family background, network and contacts) play a huge role in urban, formal sector labour markets, where hiring practices are less transparent than appears at first sight" (Deshpande and Newman 2015: 161).

Gopal Guru stated that social sciences in India are not egalitarian because of hierarchical society and it is dominated by the Brahmins (Guru 2015: 107). Gopal Guru (Guru 2015: 111) further stated that:

> Cambridge, Oxford, Harvard and several other universities abroad and privileged institutions and premier universities at home are monopolised by the TTB[32]. The doors of certain premier institutions in the country like Nehru Memorial Museum and Library (NMML) in Delhi, and Institute of Advanced Study in Shimla were completely closed to the Dalits. It is only in recent years that Dalits are accommodated in these institutions.

Guru further stated that language was used as weapon against the Dalits to restrict them from academic space (Guru 2015: 111). Guru highlighted the systematic discrimination against Dalits in premier academic institutions in India by the upper castes. Thomas Pantham stated that recent study narrates how the practice of untouchability still exists:

> many Dalits are still confined to those occupations that were traditionally assigned to anti-shudras ….Limited occupational mobility has meant that, in almost all parts of rural India, Dalits continue to dispose of animal carcasses, collect human filth and clean toilet and streets…untouchability is practiced in one form or another in almost eighty percent of the village. It was most extensive in the private and religious spheres, and least present in the public and political spheres. Though the most blatant and grotesque practices have significantly declined, they have not yet been relegated to the yellowing pages of history. Every other day, untouchability-related instance make news stories in the media (Pantham 2011: 180).

[32] Gopal Guru in this article use this term as "the twice born".

Pantham argued that the practice of untouchability exists eighty per cent of villages in India though various forms even the Dalits are still confined with their caste occupation.

Sirinivas stated that because of raising self-consciousness among the Schedules Castes, the higher caste takes it very critically. In the other words, there is anger in the higher caste towards those lower castes which claim their constitutional rights and assert themselves as equal to the upper caste. The author further added that "I envisage in the immediate future increased conflict between caste Hindus and SCs in every part of India irrespective of the party in power. I am afraid the Indian road to equality is going to be marked by bloody clashes between different castes, though caste may to some analysts appear to be 'false' category unlike class" (Srinivas 2015: 40).

Dr. B.R. Ambedkar stated that the offences against the Untouchability did not cover under the Indian Penal Code enacted by British Government. If an individual from an untouchable community commits an offence against the Hindu social order, that fellow faces the punishment that offence collectively imposed by the whole untouchability community (Ambedkar 2014b: 23). Kamble in 1982 stated that laws are not adequate to address the crime against the Dalits:

> ....every offence stems from the inordinate lust for power that dominates the Hindu mind and vitiates the caste Hindu relations with the untouchables. The caste Hindu's mind is conditioned from early childhood by caste and the concept of untouchability. Therefore, in every offence committed by a caste Hindu against a scheduled caste person the practice of untouchability should be presumed and should be left to the caste Hindu to prove that contrary" (Baxi 2014: 286).

Pratiksha Baxi stated that "Teaching a lesson means to put individuals and communities, in 'their' place-in the instances of women, their bodies literally forced under rapacious bodies-to transacts power over despised and inferior communities" (Baxi 2014: 287).

Till date, there are certain customs or laws which do not allow any lower caste people to celebrate or live with dignity. For example- the upper caste people do not allow a lower caste groom to sit on horse during marriage. In Nefrun district of

Madhya Pradesh a Dalit groom was not allowed to celebrate his marriage and stones were thrown at him when he was riding horse (The Hindu 2016). In Sanjarwas village in the district of Charkhi Dadri of Haryana, a Dalit groom was pushed down from the horse at the time of 'ghurchari' by the Rajput (upper caste) community (Hindustan Times: 2017).

In rural area of Jaipur district of Rajasthan, it was first time (2015) that a Dalit bridegroom was able to ride a horse during his marriage procession under the supervision of 125 policemen and other senior officer and district administration. It was custom that Dalits have no rights to ride a horse during marriage ceremony (Sharma: 2015). In Tamil Nadu more than 25 Dalits right activists were murdered within a year 2016-2017. They had fought for Dalits' fundamental rights (Govindarajan: 2017).

These examples may be just news for many but this is a question of self-respect and right to dignity for a certain sections of the society, which is guaranteed under the Indian Constitution. It is 2017, twenty-first century; therefore, it is unworthy for a democratic nation that till the date certain sections of the society cannot enjoy their fundamental rights.

Judicial interpretation of legislations made under Article 17

Parliament in 1955, enacted the 'Untouchability (Offences) Act, 1955' to fulfil the object of Article 17 of the Constitution but this Act failed to achieve the object. In 1965, the Committee on Untouchability, Economic an Educational Development of the Scheduled Caste, was appointed to examine the working condition of the Act and to make recommendations. In 1976, The Parliament on the recommendation of the Committee amended and renamed the Act as 'Protection of Civil Rights Act, 1955'. Parliament in 1989 enacted the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 in the light of Article 17 of the Constitution.

To curb the untouchability in the society, Parliament enacted the 'Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993' but the Act did not provide effective provisions of rehabilitation and alternative employment to manual scavengers. In 2013, the Parliament made an act the

'Prohibition of Employment of Manual Scavengers and their Rehabilitation Act, 2013' to eradicate the untouchability from the country.

The conversation in the section will be limited to the judicial discourse regarding the Acts which were made to fulfil the object of Article17 of the IC.

In *Manna v Ram Ghulam and Anr* AIR 1950 All 619, the Lucknow Bench of Allahabad High Court validated an excommunication or social boycott. The fact of the case was that complainant Manna was excommunicated by the caste Panchayat on March 1949. On the same day at the house of the opposite parties, Ram Gulam and Ram Charan, there was a caste dinner party and the complainant went there for the dinner but the opposite parties did not allowed him to dine because he was excommunicated by the Panchayat.

The Session Court acquitted Ram Gulam and Ram Charan under section 504 of IPC and held that the case covered by the exceptions 9 and 10 of section 499 of IPC. The High Court held that "The contention which has been urged on behalf of the applicant is that the accused did not have any duty caste on them to make the imputation which they did and that if they desired not to interdine with the complainant they could have either left the dinner or have taken it separately". The High Court further held that:

> A caste resolution published to the members of the caste in the discharge of a social duty would normally fall within the rule since the member who makes the publication is bound both in his interest and in the interest of his caste to publish it for saving himself and the caste from the defilement which would take place by acting against the verdict of ex-communication. The statement would, therefore, definitely fall within Excep. 9. The High Court as a rule does not interfere with an order of acquittal at the instance of a private party except where such interference is demanded in the interests of justice. I can find no justification whatever for interfering with the decision of the learned Sessions Judge.

Finally, the Single Bench of the High Court dismissed the application of the complainant.

In *P.S. Charya v State of Madras*, AIR 1956 Mad 541, the Madras High Court held that preventing 'Depressed Classes' of Hindu community from entering in temple was a practice of untouchability. In *State of Madhya Pradesh v Puranchand* AIR

1958 MP 352, the court held that denying a non-Hindu an entry in the Jain Temple but on the ground that a *Harijan* is not allowed enter amounts to a crime of untouchability.

In *Parduram Sahu and Ors v Biswamber Sahu* AIR 1958 Ori 259, the High Court in revision petition set aside the Session Judge decision of a conviction of the petitioner under section 500 of Indian Penal Code with fine of Rs 60. The fact of the case was that petitioner was excommunicated by the caste people for two and half years.

In *Devarajia v Padmanna* AIR 1961 Mad 35, 25, the court held that instigating to social boycott does not come under the preview of Article 17. In *Kahaosan THangkhul v Simirei Shailei* AIR 1961 Manipur 1, the Manipur High Court invalidated a customary practice requiring each of households in the village to offer one day's free labour to the village headman.

In *Hadibandhu Behera v Banamali Sahu* AIR 1961 Ori 33, the Orissa High Court set aside a session court's order under section 500 of IPC and fine of Rs 50. The fact of the case was that complaint reached the Caste Panchayat to resolve the dispute which he had with his wife. The complainant did not agree with the panchayat's decision and did not pay Rs 5 to the headman of the Panchayat; therefore, the Panchayat excommunicated him from the caste. The court tried to find out the real solution of excommunication or out casting a person, the court observed that:

> The expression "untouchables" has not been defined and is usually used with reference to those persons who are born in those castes and communities that are classed as Harijans or outcastes. The expression may also be so interpreted as to include persons who are made untouchables even though they might have been born in a higher caste. In the Hindu Dharma Shastras there was always a sharp distinction between 'Jathi Chandalas' (born untouchables) and 'Karam Chandalas' (those who become Chandalas on account of their own conduct).
>
> If a person born in a higher caste is effectively ex-communicated he becomes, for all practical purposes, an untouchable and has no place in the society in which he is born. It is also not clear whether Article 17 is intended to prohibit the outcasting or excommunication of person -- which is still in vogue in some parts of Orissa. The debates of the Constituent Assembly when draft Article 11 (corresponding to the present Article 17) was under discussion show that the

difficulties arising out of the absence of a proper definition of the word "untouchable" were noticed, though eventually no definition was adopted.

In *Sastri Yagnapurushadji and Ors v Muldas Bhudardas Vaishya and Anr* AIR 1966 SC 1119, the Supreme Court of India, upheld the decision of Bombay High Court that permits all Hindus in temples irrespective of sects or Satsang. The fact of the case was that few peoples following Swaminarayan sect, wanted to prohibit non-Satsangi Harijans to enter in the temple. The High Court held that Bombay Hindu Places of Worship (Entry Authorization) Act, 1956 allows every place of worship for all Hindus and any sections thereof.

The Supreme Court dismissed the appeal and held that: "in conclusion, we would like to emphasise that the right to enter temples which has been vouchsafed to the Harijans by the impugned Act in substance symbolises the right of Harijans to enjoy all social amenities and rights, for, let it always be remembered that social justice is the main foundation of the domestic way of life enshrined in the provisions of the Indian Constitution".

In *Jai Singh v Union of India and Ors* AIR 1993 Raj 177, before the full bench of Rajasthan High Court the question was of the constitutionality of Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 with reference to Article 21 of the Constitution or whether the Act is ultra vires to the Constitution of India? The petitioner challenged the section 18 of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 that exclude section 438 (anticipatory bail) of Cr.P.C, under Article 21 of the Constitution. The court said that the object and reasons of Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 is fulfilling the object of Article 17 of the Constitution.

The High Court compared Article 17 of the Indian Constitution with the United States' Constitution: "This Article is similar to the 13th Amendment of the Constitution of the United States of America which abolished slavery and empowered the congress to enforce the abolition by appropriate means". On the nature and scope of Article 17 the court said that:

> Article 17 of the Constitution was self-operating and if read with Article 35(a)(ii) irresistible conclusion follows that untouchability has been abolished and its practice in| any form is forbidden…The present Act is a legislation falling within the field of the aforesaid provisions of the Constitution. It is self-operating for anybody indulging in any of the activities committing offence which could be considered as untouchability would be liable to be punished.

On the history of section 3 of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 the court said that: "If the history is kept into account while interpreting Section 3 of the Act, the interpretation made by the petitioners would have no merit. What has been prescribed is that caste Hindus should not indulge in activities which may be considered as having not treated the Shudras or persons of Scheduled Tribes on unequal level".

On the relation of Article 17 and 15, the court said that: "We have already held that as the Act was passed in order to give effect to Article 17 of the Constitution and thus, we do not consider it necessary to deal with the submission of the petitioners that the Act does not since achieve the object of Article 15 of the Constitution, it is liable to be declared ultra vires".

In conclusion, the full bench of the Rajasthan High Court dismiss the writ petition and held that the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 is constitutionally valid and not violate any fundamental rights of the Constitution.

In a landmark case, *State of Karnataka v Appa Balu Ingale* AIR 1993 SC 1126, Justice Kuldip Singh and Justice Ramaswamy upheld the trail court verdict and set aside the High Court's verdict under section 4 and 7 of the Protection of Civil Rights Act, 1955. In a free country like India, Supreme Court of India took 42 years to discuss the caste issue; therefore, it was the first time when a case under Protection of Civil Rights Act, 1955 reached before the apex court.

This is a historical verdict therefore, it requires discussion in details. The fact of the case was that Appa Balu Ingale and four others were tried under sections 4 and 7 of Protection of Civil Rights Act, 1955. The accused were Hindu and practiced 'untouchability' and forcibly peoples of Mahar/Harijans community from taking the water from a public well. The complainant told the accused that he also have right to

take water from the well but accused did not allow them by saying that "Harijans not to persist on taking water from the well otherwise the consequences would be serious".

The trail court convicted all accused under section 4 of the Act and sentenced them a simple imprisonment for 1 month and fine Rs 100. The Session Judge also upheld the conviction. Against the conviction, the accused went to the High Court. The High Court acquitted all the accused just rejecting the prosecution witness. Therefore, the case went before the Supreme Court by Special Leave Petition against the Karnataka High Court judgement.

Justice Kuldeep Singh held that "We are of the view that the High Court fell into patent error in rejecting the prosecution evidence. We have examined the statements of eye witnesses as dealt with in detail by the appellate court. We are of the view that the charge against the respondents has been proved beyond doubt."

Justice Kuldeep Singh further held that "The High Court lost sight of the fact that the social disability of the Harijan community was enforced on a threat of using a gun. It is proved beyond doubt that the complainants were stopped from taking water from the well on the ground that they were untouchables".

Justice K. Ramaswamy discussed the issue of caste and untouchability in details. The judge said:

> Article 17 of the Constitution of India, in Part III, a Fundamental Right, made an epoch making declaration that "untouchability" is abolished and its practice in any form is forbidden…
>
> Abolition of untouchability in itself is complete and its effect is all pervading applicable to state actions as well as acts of omission by individuals, institutions, juristic or body of persons. Despite its abolition it is being practised with impunity more in breach. More than 75% of the cases under the Act are ending in acquittal at all levels. Apathy and lack of proper perspectives even by the courts in tackling the naughty problem is obvious. For the first time after 42 years of the Constitution came into force this first case has come up to this Court to consider the problem. The Act is not a penal law simpliciter but bears behind it monstrous untouchability

relentlessly practised for centuries dehumanising the Dalits, constitution's animation to have it eradicated and to assimilate 1/5th of Nation's population in the main stream of national life.

The Supreme Court in the judgement reverses the High Court judgement and interestingly states that it was the first case before the apex court to discuss the issue of caste and untouchability.

In *State of M.P. v Ram Kishna Balothia* AIR 1995 SC 1198, the special leave petition filed before the Supreme Court of India to challenge the constitutional validity of section 18 of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 on the ground that this section violates Articles 14 and 21 of the Constitution. Section 18 of the SC/ST Act says that Section 438 of Cr.P.C does not apply on the Act. Section 438 deals with the provision of "anticipatory bail" that means a person can apply for the bail if he is apprehending his arrest. The Supreme Court highlights the object and reasons of the Act as:

Despite various measures to improve the socioeconomic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons.

When they assert their rights and resist practices of untouchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them. When the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty. Occupation and cultivation of even the government allotted land by the Scheduled Castes and Scheduled Tribes is resented and more often these people become victims of attacks by the vested interests. Of late, there has been an increase in the disturbing trend of commission of certain atrocities like making the Scheduled Castes persons eat inedible substances like human excreta and attacks on and mass killings of helpless Scheduled Castes and Scheduled Tribes and rape of women belonging to the Scheduled Castes and the Scheduled Tribes…A special legislation to check and deter crimes against them committed by non-Scheduled Castes and non-Scheduled Tribes has, therefore, become necessary.

In the conclusion the apex court relied on the case of *Jai Singh v Union of India* AIR 1993 Raj 177 and held that section 18 of Scheduled Castes and Scheduled Tribes Act does not violate Articles 14 and 21 of the Constitution.

In *Mariswamy and Others v State by the Police of Kuderu Police Station* 2000 (3) KaeLJ, the High Court of Karnataka quoted Henry Meine while deciding the matter relating in section

4 (IV) of the Protection of Civil Rights Act, 1955:

> Henry Maine in his "Ancient Law" has called this act as the most disastrous and demeaning of all human institution. The people who were called as 'Chandalas' in Manusmruti were renamed as Harijans by Mahatma Gandhi. This system practiced in this country by upper caste people as most baneful, hard hearted and cruel social system that could possibly be invented for damning the human race.

In *State of Gujarat v Dinseh Ramanlal Pathak*[33], judgement dated 20 June, 2012, thirty-five years old Dalit women complained against a doctor that he raped her in his clinic. The Gujarat High Court held:

> The conduct of the prosecutrix is not believable as she did not inform her husband for two days about the serious incident which took place in broad day light in a clinic of a Doctor. It is proved in the deposition of the Investigating Officer that she had lodged the complaint as per the advice of her husband, so that she can get Rs. 10,000/- from the government.

The Gujarat High Court did not consider caste atrocities in this case and raised the question on the character of Dalit women. The treated the women as an extortionist than a victim.

Vishakha judgement: A shifting approach of Supreme Court from Caste to Gender

The story behind the judgement was that a lower caste (Schedule Caste) social worker named Bhanwri Devi worked in a village Bhateri, Jaipur district of Rajasthan. She worked for stopping the child marriage in her area. Once she opposed a child marriage in an upper caste family who were organising a marriage of a 9 months old baby. As she belonged to lower caste women, the family which was the upper caste dominating family in the village, in order to teach her a lesson,

[33] https://indiankanoon.org/doc/19580500/ accessed on 29 May, 2017.

the upper caste men raped her. The upper caste people beat her husband in front of her and raped her one by one. The rapists were from one family- uncle and nephews.

In *Vishaka v State of Rajasthan and Othres* AIR 1997 SC 3011, the Supreme Court itself recognised the fact that it was the case of a brutal and caste based gang rape, the court said that:

> The immediate cause for the filing of this writ petition is an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. That incident is the subject- matter of a separate criminal action and no further mention of it, by us, is necessary. The incident reveals the hazards to which a working woman may be exposed and the depravity to which sexual harassment can degenerate; and the urgency for safeguards by an alternative mechanism in the absence of legislative measures. In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfil this felt and urgent social need.

Even though the court recognised 'brutal gang raped', it did not mention the real cause of the problem, that is, it was *'brutal caste based gang raped of a lower caste social worker by upper caste men'.*

As the rural India is known for the feudal system, the whole State machinery was with the rapists because they all belonged to high caste. The rapists were belonging to a landlord family and were the dominant in that area. The police was not filing a complaint and was not collecting her vaginal sample. After two days, she reached Jaipur city and underwent medical examination. The district court and the government advocates all belonged to the upper caste; the result was that she did not get justice from the village to the High Court.

In the district court, 5 judges did not have courage to deliver judgement because of upper caste pressure and at the end 6th District Session Court Judge held that "an upper caste men cannot rape a lower caste women because she is untouchable" and "in the presence of his sons and nephew a men cannot commit rape" and "a husband, beaten or not, could never possible sit around and watch his wife being raped by other men".

After the High Court decision, Bhanwari Devi did not get justice and all accused became free from all charges, a women rights organisation namely Vishaka who

employed Bhanwari Devi as social worker took her case before the Supreme Court of India to get justice (Ganesh: 2014).

Why the object of SC/ST Act defeated?

The aim of this conversation will trace the reasons responsible for failure of the SC/ST Act, 1989. Henry Shue stated that "No one can fully enjoy any right that is supposedly protected by society if someone can credibly threaten him or her with murder, rape, beating, etc., when he or she tries to enjoy the alleged right. Such threats to physical to physical security are among the most serious and-in much of the world-the most widespread hindrances to the enjoyment of any right" (Shue 1996: 21).

Marc Galanter in *Untouchability and the Law* stated that "No case involving the Untouchability Offences Act (UOA) has the Supreme Court and, since few petty criminal appeals do, it is not likely that the Supreme Court will play a significant role in interpreting the UOA" (Galanter 2015: 89). The Act penalises exclusion only 'on grounds of untouchability', not on the ground of caste or sectarian exclusiveness (Galanter 2015: 93).

Pratiksha Baxi in *Public Secrets of Law Rape Trail in India* stated that how the judges failed to trace caste atrocities against Dalit women in case of committing rape:

> The parliamentarian highlighted the fact that judges fail to recognize that Dalit women are not only stable targets of sexual violence, but also that there has historically been a widespread toleration of violence against Dalit women. In other words, judge do not acknowledge that men prefer to rape women belonging to specific classes or castes (Baxi 2014: 283).

How the atrocities treated in the law, Pratiksha Baxi cited Bureau of Police Research and Development (1979): "In order to constitute atrocity, there must be an element of cruelty or brutality, or wickedness in the commission of a particular offence, or it should have the background of having been committed with the view to teach the Harijans a lesson*"* (Baxi 2014: 285). The statement of Objects and reasons of the PoA Act stated by the Parliament:

> Of late, there has been as increase in the disturbing trend of commission of certain atrocities like making the Schedule castes persons eat inedible substances like human excreta and attacks and mass killing of helpless Schedule Castes and the Schedule tribes....A special legislation to check and deter crimes against them committed by the non-schedule Castes and non-Scheduled tribes has, therefore, become necessary (Baxi 2014: 286).

Pratiksha Baxi (Baxi 2014: 343) stated that:

> The positioning of Dalit or tribal women under the PoA Act as extortionists, rather than legal subjects aware of their rights, implies an investment in conceiving of Dalit and tribal women as sexually immoral subjects. Such precedents of injustice systematically disregard the use of rape as a means of domination, especially of young, working-class, poor, Dalit, tribal, and Muslim women.

Granville Austin stated that: "Among the upper castes-classes, 'individual rights' and 'economic comfort' have meaning; among the bottom castes-classes, who constitute upwards of forty per cent of the population, they mean little or nothing. It must be acknowledged that conditions very greatly throughout the country and from individual to individual" (Austin 2016: 649).

Sukhdeo Thorat give answer of the question that why the law relating to the untouchability is failed states that:

> As back as 1943, Ambedkar has argued that laws are necessary. In fact, he worked hard for enactment of the Untouchability Offence Act of 1955, but at the same time he argued that rights are not protected by law but by the social and moral conscience of society. If social conscience is such that it recognises the rights that law chooses to enact, rights will be safe and secure. But [when] the fundamental rights are opposed by the community, no law, no Parliament, no judiciary can guarantee them rights in the real sense of the word. Law can punish a single solitary recalcitrant criminal. It can never operate against a whole body of people who are determined to defy it. Social conscience is the only safeguard of all rights fundamental or non-fundamental (Chishti: 2017).

Former Chief Justice of India Justice T.S. Thakur on the poor implementation of SC/ST Act, asked the authority to discharge their duty to protect the SCs/STs rights and said: "The constitutional goal of equality for all the citizens can be achieved only when the rights of the Scheduled Castes and Scheduled Tribes are protected. The abundant material on record proves that the authorities are guilty of not enforcing the provisions of the Act" (Hindu: 2017).

Henry Shue (Shue 1996: 179) argued on the implementation of rights at the world and how the institution fails to protect the rights of the individuals: "I think it is clear that this world's institutions for the protection of rights are grossly inadequate. Conceiving of institution that could function more effectively while making only reasonable demands upon those who would make them function is challenging and controversial".

The failure of the SC/ST Act is not only the failure of the Act but it is also the failure of the Constitution. It has not failed because it has bad laws, but due to poor implementation. The filing an F.I.R under the Act is not an easy task for the deprived sections because neither they have enough power to fight against the upper caste and nor the police wants to do proper investigation. Under the SC/ST Act, it has the less than 6 per cent conviction rate in India (Sibal: 2017). In the majority of the judgements, if the session court convicted the victims for the crime defined under the Act, the High Court has acquitted the convicts. It is the 'Hindu social order' behind the failure of the Act than the 'law'.

Is the criminalising or legalising a social problem the only solution?

Social problem exists in every corner of the word. Human beings are always trying to curb the social inequality through various ways. Societies as well as the State through various mechanisms control the human behaviour for the betterment of the society. Social reformers also play a significant role in making egalitarian society but not all succeeded in their movement. The success and failure of the movement depend on the method which was followed by the State or the individual for change the society.

In the modern State there are two kinds of methods to eradicate the social evil: first, by law; and second, by changing the conscience of the individual. It is fundamental philosophical question before the world what is the best solution to address a social issue? Should the social problem be brought in legal sphere and criminalized or legalised? Or is there any other way? The discussion will try to find out the answer to these questions in this section.

In India, in mid-twenties, there was a debate between two notable personalities Dr. Ambedkar and M.K. Gandhi to eradicate caste and untouchability from the society. Gopal Guru stated that "However, Gandhi and Ambedkar differ from each other quite substantially on the other counts. Unlike Gandhi, who finds the solution of untouchability in the moral surgery of the heart, Ambedkar suggests the annihilation of caste of which untouchability is just the existence" (Guru 2015: 414).

These two models exercised in India by M.K. Gandhi and Dr. B.R. Ambedkar to remove social inequality. Dr. Ambedkar's method was that law is the only solution to change the mind-sets of the peoples and control the discrimination on the basis of caste, untouchability. Dr. Ambedkar believes that the nature of Indian society is essentially undemocratic and based on inequality and hierarchal that can be only controlled by the application of law. Dr. Ambedkar thought that change of heart is not easy without the interference of law.

On the contrary, Gandhi believes that it is only the method to change the society through change the heart of the peoples not the law. Law compels the people from doing something and force to act in a certain manner. According to the Gandhi's approach law can't change the general conscience of the people and it should not be brought in the personal relations of the individuals. Gandhi believed that it should be left on the will of upper castes to change the attitude towards the untouchables than enact the laws to eradicate the untouchability.

Dr. Ambedkar strongly believed that a community (Hindus) who had long history (2,500 years) to discriminate to a certain sections of the society on the basis of caste and untouchability. Law is the only solution to annihilate the caste system and untouchability. On Dr. B.R. Ambedkar's point of view i.e. 'law', the human being is living in social primacies that need some rules, regulations and laws to govern them without which the society will turn into anarchy. The oppressor cannot become a protector because he/she enjoy only rights, freedom, liberty, immunity and power to control minority or the lower strata.

On Gandhian method, through law, people can be controlled by the State to act in certain manner and the State has punishment for its violation. Gandhi stated that, through this means an individual is forced to do or not do certain act. In the other

words, by the law, the conduct of human being can be controlled but the heart or the conscience cannot be changed. If the conscience of an individual does not allow doing certain act then an individual cannot do that act. The law has failed to change the conscience of the human being in India because the crime level against the lower castes or minorities has arisen rather than declining.

According to Hofildian analysis, right is correlative to the duty, which means if A has right against B, then B has duty not to violate the right of A. If this concept is analysed in Indian situation, there was and is group of the people who have always enjoyed their rights and on the other hand a community called Shudra/Untouchable/ SC/ST or Dalits[34] had only duty. The upper caste has oppressed the lower strata community because they do not provide them any rights, instead have subjected them only to follow the duty. The oppressor community never had any obligation to anyone except enjoying their rights.

In India, Caste Hindus never come under any legal obligation to treat untouchable as human being until the Constitution of India was enacted. Most of them still do not believe in the concept of equality and fraternity because they are fundamentally believer of an unequal, hierarchical, patriarchal and a division of society on the basis of birth.

In the light of Article 17, the Parliament passed Prevention of Atrocities Act, 1955 laying down the provisions that untouchability in any form shall be a criminal offence. Firstly, the intention of the first Indian Parliament can be critically analysed as it took 5 years to make a law that criminalises untouchability. It shows the priorities of the government that how seriously it was concerned about the problem. This Act twice has been amended (first 1989 and second 2015), but it could not cover the issue of social boycott. Now the question arises if the Constitution and laws are there, then why the problem atrocity in society is not ending? The answer to this fundamental question lies in the philosophy of Hindu religion which is essentially based on the principle of unequal society.

[34] The term 'Shudra' was traced in ancient Indian society particular in Hindu Religious texts. Later on, from the nineteenth century till the mid-twentieth century it converts into 'Untouchables' or 'Deprived Sections/ Deprived Class'. The Constitution of India denote these community as 'Schedule Caste/Schedule Tribe' and at last post enactment of the Constitution the term 'SC' denote as 'Dalits' which means the broken peoples in political sphere. At the present the term 'Dalit' become an academic as well as a social word to denotes Schedule Castes.

Do we assume that both the approaches have failed in case of caste and untouchability? It seems that neither the heart has changed of the upper caste nor the law controlled their behaviour to stop the atrocities and discrimination. The reason behind for no change in the heart can be that the community enjoy rights from thousands of years; therefore they are not willing to fulfill their duty. These communities enjoy only rights and the untouchables were only forced to fulfil their duty towards upper caste. It is difficult to change the attitude, the heart and mind of the dominate/forwards/ and upper caste to share the power, liberty, and rights with the people who are lower than him by birth.

These are the reasons that law cannot abolish or curb the caste atrocities in India: first, the upper caste is dominating all influential positions and they do not want implementation of laws. These law-caste communities are not getting justice from the level of police up to the court as they ought to get justice. Justice J.S. Verma Committee Report on Reforms in Criminal Law states that: "Faithful implementation of the laws is of the essence under the rule of law for good governance. In the absence of faithful implementation of the laws by efficient machinery, the laws remain mere rhetoric and a dead letter"(2012:4).

Law can change the heart and mind of the general conscience of the society if it is just, fair and reasonable and with effective implementation. It will be a disaster to leave the social problems on the will of the people and wait till their heart changes with enactment and effectively enforced the law. Durkheim on the relation of law with social stated as: "Law is, above all, a social thing and has a totally different object than the interest of the pleaders" (Durkheim 1933: 113).

Form the implementation point of view, today, we can see that there is a place where the law is implemented effectively; that is traffic laws. People follow the traffic laws not by their willingness but there are effective measure of the implementation part of that law. Individuals are wearing the seat belt and helmet while they drive only because of the fear of punishment. There is effective punishment for violation of the laws i.e. heavy economic penalty, cancel the driving licence, cease the vehicle and etc. This is the reason behind it that people follows the traffic laws.

One more example we can take with respect to the implementation of part of law in contemporary time. In India, in the Metro train, there cannot be found any spit neither on the floor nor on the wall of the train. On the contrary, in any Indian train you can easily find the same. The passengers are the same in both kinds of trains but their behaviour suddenly changes when they enter into a place where they can be punished. Therefore, people change their attitude towards the laws and its implementation according to their convenience.

The difference between two principles 'change of the heart' and 'law' is a difference between morality and law. Morality is subjective which varies from person, place and times. Moral value states not to discriminate, torture or anybody, on the other hand law enforces the same thing with a fear of punishment. Durkheim said on Law and Morality:

> Law and morality are the totality of ties which bind each of us to society, which make a unitary, coherent aggregate of the mass of individuals. Everything which is a source of solidarity is moral, everything which force man to take account of others men is moral, everything which forces him to regulate his conduct through something other than the striving of his ego is moral, and morality is as solid as these ties are numerous and strong (Durkheim 1933: 398).

It is true that the existence of law and morality is necessary in the society but the question arises here: what kind of morality? If the morality is based on unequal, discrimination and hierarchical, what could be aspect from that kind of morality? In India from the ancient till the implementation of the Indian Constitution, there was Hindu social order morality existing. Dr. B.R. Ambedkar called it "popular morality" which is against the "constitutional morality".

Dr. B.R. Ambedkar (Ambedkar 1994:61).warned the constituent Assembly and quoted Grote, the historian of Greece, who stated about the significance of the constitutional morality that

> The diffusion of Constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensable condition of government at once free and

peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendancy for themselves.

Thereafter, Dr. Ambedkar asked a question to the Assembly- can we presume such diffusion of Constitutional Morality? "Constitutional Morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an India soil, which is essentially undemocratic"[sic] (Ambedkar 1994:61).

Dr. Subhash C. Kashyap (Kashyap 2004: 183) commented on the contribution of Dr. Ambedkar in the Constituent Assembly to abolish the social inequality:

Ambedkar observed that discrimination was a menace to be guarded against if the fundamental rights were to be real. In a country like India, he said, where it was possible for discrimination to be practised on a vast scale and in a relentless manner, fundamental rights could have no meaning unless provision was made for protections against discrimination on the ground of race or creed or social status.

The IC in 1950, abolished the popular morality in one stroke on the paper, but it exists in the hearts and minds of the Indians. The Constitutional morality established the Indian society on the basis of equality and fraternity. Equality and fraternity mentioned in the Preamble of the Constitution, is the key of intention of the CA as they had dreamt for Indian society.

The absence of the idea of fraternity in the Indian society is the sole reason for the existence of the practice of caste and untouchability. Therefore, the reason of failure of both models in the matter of caste and untouchability is due to unacceptance of the constitutional morality by the Indian society especially the upper castes. They are still preserving the popular morality but in India both kinds of models i.e. 'law' and 'morality' are needed to address such social problems.

Legislation towards enhancing Social Democracy

Social Boycott

India needed the legislation on social boycott long time ago since the Constitution was framed because this inhuman practice forced many to live in isolation, segregation and without social intercourse. For violation or non-compliance of

societal norms, many people in India face social boycott. The family has to face social boycott even if an individual of a particular family happens to breach any societal law. Such boycott amounts to clear violation of fundamental rights.

Dr. B.R. Ambedkar presented his Memorandum and Draft Articles on the Rights of States and Minorities before the Assembly on March 24, 1947. Article II-Section III-Provisions for the protections of minorities Clause 3 states:

> (1)The social boycott, promoting or instigating a social boycott or threating a social boycott as defined below shall be declared to be an offence. (sic) Boycott Defined- A person shall be deemed to boycott another who- (a) refuses to let or use or occupy any house or land, or to deal with, work for hire, or do business with another person, or to render to him or receive from him any service, or refuses to do any of the said things on the terms on which such things should commonly be done in the ordinary course of business, or (b) abstains from such social, professional or business relations as he would, having regard to such existing customs in the community which are not inconsistent with any fundamental right or other rights of citizenship declared in the Constitution, ordinarily maintain with such person, or (c) in any way injures, annoys or interferes with such other person in the exercise of his lawful rights (Rao 2004: 91-92).

Ambedkar presented strong rights of memorandum which prohibited the heinous punishment i.e. social boycott of an individual or family by the society or caste in the name of social order. That argument of Dr. Ambedkar was not accepted at that time by the CA but not is become the need of hour. Dr. Ambedkar on Excommunication stated that:

> A novel way of thinking will create a new Caste for the old ones will not tolerate it. The noxious thinker respectfully called Guru (Prophet) suffers the same fate as the sinners in illegitimate love. The former creates a caste of the nature of a religious sect and the latter a type of mixed caste. Castes have no mercy for sinner who has the courage to violate the code. The penalty is excommunication and the result is a new caste. It is not peculiar Hindu psychology that induces the excommunicated to form themselves into a caste; far from it. On the contrary, very often they have been quite willing to be humble members of some caste (higher by preference) if they could be admitted within its fold (Ambedkar 2014a: 21).

Dr. Ambedkar quoted Starte Committee Report of 1928 on ‘social boycott’ at the Round Table Conference

[the social] boycott is often planned on such an extensive scale as to include the prevention of the Depressed Classes from using the commonly used paths and the stoppage of sale of the necessaries of life by the village Bania… cases have been by no means rare where a stringent boycott has been proclaimed simply because a Depressed Class man has put on the sacred thread, has bought a piece of land, has put on good clothes or ornaments, or has carried a marriage procession with the bridegroom on the horse through the public street (Bhatiya: 2016).

M.P Jain (Jain 2008: 977) stated that:

The subject-matter of Art 17 is not untouchability in its literal or grammatical sense but the "practice as it had developed historically in this country"'. Therefore, treating of persons as untouchables either temporarily or otherwise for various reasons, e.g., suffering from an epidemic or a contagious disease, or social observance associated with birth or death, or social boycott resulting from caste or other disputes do not come within the purview of Art. 17

M.P. Singh did not consider the essence of the Article 17 and the problem of social boycott. Social boycott can come under the periphery of Article 17 because if somebody is boycotted by the caste or the society that person is treated as an untouchable. The untouchability and social boycott has a common thing that boycotted individual is denied social intercourse. It is unworthy for India that it took 67 years to rethink about the problem of social boycott. In 2016, the Maharashtra Government passed a Bill on 'social boycott'. The demand to make law on social boycott is also emerged in the Chhattisgarh State.

Article 35 states that it is only the Parliament which made laws that under the Part III of the Constitution which declared punishment for the offences defined under the Part. Article 35 (a) (ii) states that: 'for prescribing punishment for those acts which are declared to be offences under this part; and the Parliament shall, as soon as may be after the commencement of this Constitution, makes laws for prescribing punishment for the acts referred to in sub-clause (ii)'. Therefore, only Parliament can make laws Under Article 17 and 23.

Maharashtra Protection of People from Social Boycott (Prevention, Prohibition and Redressal) Bill, 2016

The Maharashtra State became the first state which made an effort towards the prohibition of social boycott by introducing the *Prohibition of Social Boycott Bill*.

The Maharashtra Assembly passed the bill on 14 April, 2016. The object of this law is the prohibition of social boycott of person or group of person by extra-judicial bodies such as an individual or a group like caste, community Panchayat. The offence is defined under law, as a cognizable, but bailable offence. The legislation had provisions for disbursing the fine amount to the victims and their rehabilitation (Hindu: 2016).

The Preamble of the Bill states that:

> To provide for the prohibition of social boycott of a person or group of persons including their family members, and for matters connected therewith or incidental thereto. WHEREAS promoting amongst the citizens fraternity assuring the dignity of individual is enshrined as one of the goals in the preamble of the Constitution of India; AND WHEREAS a right to live with human dignity is a recognized fundamental right of a person enshrined in article 21 of the Constitution and also a basic human right inherent in human existence; AND WHEREAS it has been observed that the dehumanizing practice of social boycott of a person or group of persons including their family members still persists in various parts of the State.

Section 2 (1) (a) of the Bill define the 'caste panchayat' as:

> "Caste Panchayat" means a Committee or a body formed by a group of persons belonging to any community, whether registered or not, which functions within the community to regulate various practices in the same community, controls personal and social behaviour of any member and collectively resolves or decides any disputes amongst their members including their families, by issuing oral or written dictums, whether called as a "panchayat" or a "gavki" or by any other name or description.

Section 3 of the Bill defines 16 ways in details which determine whether a member of a community is social boycott. The definition of social boycott covers civil, political, religious, cultural and minority's rights of an individual effectively. Section 6 makes provision of punishment for the offence of social boycott which may extend up to 7 years of impressment, or with fine which may extend up to 5 lakhs rupees, or both. In addition, the Bill makes provision that liable to any person who aids or abets the offence defined under the Bill, shall be liable to imprisonment which may extent to 3 years, or with fine that may extend to 3 lakhs rupees, or both.

Section 12 of the Bill gives a right to the victim who can directly approach the police or the Magistrate to get justice. Section 14 ensures speedy justice to the victim and

the Bill states that the trail shall be completed within six months from the date of filing the charge sheet. Section 18 of the Bill states the compensation scheme for the victim. Section 19 states that the burden of the proof shall rest on the accused.

The negative aspect of the Bill is that it is amateurish, clumsy and crude which makes offence compoundable under section 11:

> The offence punishable under this Act may, with the consent of the victim and with the permission of the court, be compoundable: Compounding of offence. Provided that, the Court shall, by an order, grant permission for compounding of the offence subject to the condition of performance of community services to be rendered by the accused person, as the court thinks fit

This provision can defeat the purpose of the Bill because if a caste or community have power to excommunicate or social boycott any person of that community, then that community also has power to make pressures on the victim to make compromise for restoration of their social status. The provisions of the Bill should be non-compoundable which could fulfil the true object of Article 15 (2) and 17 of the Constitution.

Gautam Bhatiya states that the Bill is the result of long historical struggle for the social justice that envisaged under Article 15 (2) and 17. Soon after the independence the Bombay Prevention of Excommunication Act 1949, was came into force but in *Dawoodi Bohra* case (1962) the Supreme Court struck down the Act. On the contrary, the CJI B.P. Sinha stated that the Act served the purpose of constitutional scheme, the CJI said: "individual freedom to choose one's way of life and to do away with all those undue and outmoded interferences with liberty of conscience, faith and belief… it is also aimed at ensuring human dignity". (Bhatiya a: 2016).

While the Bill was passed by the State Assembly it had to wait for longer than a year for the approved from the President's nod, the peoples continued to suffer due to caste laws and there was not relief from caste atrocities by the jaat panchayat's across the Maharashtra (Jadhav: 2017). Finally, on 13 July 2017, President Pranab Mukherjee gave nod to the Bill. Therefore, the Maharashtra State became the first

State in India post enactment of the IC that makes social boycott a crime (Khapre: 2017).

Demand to make law on Social Boycott in Chhattisgarh

Dr. Dinesh Mishra a social activist in Raipur who is demanding from Chhattisgarh State a law on social boycott. He states that neither the National Crime Records Bureau (NCRB) nor the State Government provides any data on social boycott. Despite this, a survey finds that:

> At least 25,000 individuals or families were facing social boycott imposed by local caste/community groups or panchayat bodies due to several reasons, like inter-caste marriage, not following diktats of community heads and raising voice against orthodox beliefs….the Cases of suicides, murder, exploitation and migration due to social boycott frequently appear in media not only from remote parts but also from Raipur and other cities (I Express: 2016).

Dr Mishra on the practice of social boycott states that

> Living in rejection is worse than punishment of death… the lines of Khap Panchayat, head of the village, the panchayat or a community declare 'farman' of 'hukka pani bandh' whenever a person or his family marries out of community, refuses to marry after engagement, doesn't choose to follow certain rituals or raises voice against old beliefs. They die everyday in isolation as they are either ostracized from village or they aren't allowed to use hand pump, ponds and restricted from participating in village gatherings (Drolia: 2016).

It is the fundamental obligation of the State to make laws to reduce inequality among the citizen but the State is not willing to perform its duty. It is the duty of the Parliament to make a law for the nation to eradicate the social boycott evil from the nation.

Anti-Discrimination and Equality Bill 2017

The Private Member Bill "Anti-Discrimination and Equality Bill 2017" (hereinafter the Bill) 289 of 2016 was presented by Dr. Shashi Tharoor, Member of Parliament,

in the Lok Sabaha on 10 March of 2017. The Bill has five chapter, 46 sections and one Schedule. The chapter I deal with the title and definitions and chapter II deals with 'Protected Characteristic Prohibited Acts and Duties'. The chapter III deals with commission, chapter IV deals with the remedies and the last chapter V deals with miscellaneous provisions of the Bill.

The Statement of Objects and Reasons of the Bill states that:

> Cases of discrimination continue to be witnessed in all spheres of social, economic and political life. They are frequently directed against dalits, muslims, women, persons of different sexual orientations 'hijras' persons with disabilities, persons from North-Eastern States unmarried couples and non-vegetarians, among others.
>
> Existing constitutional protections against discrimination under articles 14, 15, 16 and 17 are not sufficient and need to be strengthened with additional statutory protections in order to realize their intended purpose. The constitutional directives under articles 38, 39 and 46, as well as the Fundamental Duty of all citizens under clauses (c) and (e) of article 51A are also intended towards ensuring equality among all.

The preamble of the Bill states: "to ensure equality to every citizen of the country by providing protection against all forms of social discrimination".

Section 2 (iv) defines 'aggravated discrimination' that means "engaging in or attempting to engage in boycott, segregation or discriminatory violence. Section 2 (v) define 'aggrieved person' that means "any person who alleges that he has been subjected to direct or indirect discrimination, harassment, boycott, segregation, discriminatory violence or victimization".

On the discrimination by the service provider section 2 (vii) define 'consumer' which include any service. On the issue of employee and employer the Bill defines it in broader sense and tries to cover all kinds of employee and employer under section 2 (viii) and (ix) which define 'employee' and 'employer'.

Section 2 (x) defines 'landlord', which is one of the broad definition of the Bill: ""landlord" includes, but is not limited to, any person who is a landholder, seller, lessor, proprietor, housing society, hotel, motel, innkeeper, owner, estate or letting agency, board and lodgings provider or any other person providing residential,

commercial, agricultural, or industrial property, for sale, lease or rent for temporary or permanent occupation or use;"

Section 2 (xii) define person in broader sense as:

"person" includes, but is not limited to, an individual, company, business, authority, institution, organization, venture, undertaking, enterprises, institution, establishment, *panchayat,* personal law board, senior citizen's council, *jamaat,* political party, club, society, trustee, non-Governmental organization, department, office, branch or unit, whether Government or private, whether incorporated or registered or not, whether formal or informal, and whether for a profit motive or not.

Section 2 (xvi): "service provider" means any person who is a provider of any service, including hospitality, entertainment, education (including primary, secondary, vocational and university education), healthcare, advertising, insurance, banking, consultancy, commercial, voluntary, charitable, professional, vocational, legal, transport, cultural, religious, industrial and financial services".

Section 3 of the Bill covers the larger sanctions of the marginal, deprived and other minorities of the society. Section defines the 'protected characteristic' as: ""protected characteristic" in relation to a citizen of India means—(i) caste, race, ethnicity, descent, sex, gender identity, pregnancy, sexual orientation, religion and belief, tribe, disability, linguistic identity, HIV status, nationality, marital status, food preference, skin tone, place of residence, place of birth or age; or (ii) any other personal characteristic".

Section 6 of the Bill deals 'direct discrimination', section 7 with 'indirect discrimination'. Section 8 covers the 'harassment', section 9 'boycott', section 10 'segregation' and section 11 covers 'discrimination violence'. Section 15 deals with the public and private duty. The Bill states that a housing society which has more than fifty residents and a private company has more than hundred employees have to prepare and submit its annual Diversity Index reports to the State Equality Commission.

Section 17 deals 'Central Equality Commission and section 25 'State Equality Commission'. Section 34 provides the remedy to the aggrieved person against

aggravated discrimination by the Judicial Magistrate First Class or Metropolitan Magistrate.

Section 33 states the damages to the aggrieved person as a remedy:

> (3) The quantum of damages ordered against each respondent who intentionally commits direct or indirect discrimination, harassment and or victimization under this section shall not ordinarily be less than twice the monthly salary of a Member of Parliament at the time of making the order or rupees one lakh, whichever is higher, to each aggrieved person.
>
> (4) The quantum of exemplary damages ordered against each respondent who commits aggravated discrimination under this section shall not ordinarily be less than the annual salary of the President of India at the time the order is made or rupees fifteen lakhs, whichever is higher.

Tarunabh Khaitan describes the Bill as systematically as well as comprehensively dealing with the various kinds of discrimination and the Bill prohibited direct discrimination and also prohibit discrimination both public and private actors. Khaitan stated about the Bill as:

> As it seeks to realise B.R. Ambedkar's vision of an India free from discrimination, the ADE Bill also honours a less-celebrated (and increasingly rare) dimension of his democratic politics: A principled pragmatism that preferred an imperfect solution accepted (albeit grudgingly) by many, to a perfect one championed by the few (Khaitan 2017).

Saurav Datta states that if this Bill does not convert into an Act, it would be the collective loss for the Indian society (Datta: 2017). The Hindustan states about the Bill "A bill that prevents discrimination may not be the panacea for all our ills on this front, but it certainly would be a very good beginning" (Hindustan Times: 2017).

These laws show the significance of Horizontal Rights in the contemporary Constitutional jurisprudence in India. The need of such kind of legislation is due to the fact that the State is not the only one which always discriminates to individuals, but society or any individual person can also discriminate. Indian society is realising the social-economic goal which the Constitution promises in 1950 and the society still learning democracy towards become an egalitarian society.

How relevant are the views of Dr. Ambedkar today as he presented his draft of fundamental rights which include the provision of social boycott at the framing of the Indian Constitution. It is failure of the democratic values of the Indian society that after the sixty-eight years of the working of the Constitution, now the country needs social boycott act. It is a significant move by the society to abolish a historically socially exclusionary practice from in India to realise the object of HRs.

New Development in the field of Horizontal Rights

A public interest litigation seeking the court's intervention for the fundamental right to worship and to access religious places was admitted in the Gujarat High Court. It was filed by a Parsi woman, Goolrokh Adi Contractor, now Goolrokh Mahipal Gupta, a resident of Bulsar in south Gujarat. She pointed out that she had married a non-Parsi, Mahipal Gupta, in 1991 and hence was being denied entry to the Parsi Agiyari (religious temple) and stopped from participating in other Parsi rituals (Dasgupta: 2010).

In March 2016 Punjab government passed the Indian Penal Code (Punjab Amendment) Act, which inserts a new Section 295AA into the Indian Penal Code (IPC), according to reports, prohibits "sacrilege" to the Guru Granth Sahib, and imposes life imprisonment as a punishment (Bhatiya: 2016b).

The Nine-Judge Bench of the Supreme Court on Aadhar dispute regarding to right to privacy, is considering the horizontal aspect of right to privacy. During the hearing, Justice DY Chandrachud observed as follows (Krishnan: 2017):

> If there is a Right to Privacy which is horizontal and is actionable against the world at large and not just the State, then the immediate consequence would be an obligation on the State to enact a law to regulate private players to ensure that rights are protected.

Future of Horizontal Rights in India

The primary object of the HRs is to convert political democracy into social democracy which prohibits discrimination among the citizens. Andre Beteille stated that "A constitution may indicate the direction in which we are to move, but the

social structure will decide how far we are able to move and at what pace" (Austin 2016: 665). The Report of the National Commission to Review the Working of the Constitution (2002) headed by Justice Shri M. N. Venkatachaliah stated:

> The working of the Constitution over a period of about fifty years, on a balance of the good and bad, achievements and failures, promises and performances, is one of lost opportunities. The increasing impurity of the political climate and its deadening effect on the creativity of the people present a depressing picture. There are, it is true, some impressive achievements. Much has been done and achieved; but in the area of social justice performance falls greatly short of the potentials and of expectations (Kasyhyap 2004: 282-83).

Dr. B.R. Ambedkar in Annihilation of Caste stated on the significant of a healthy society that: "Men constitute a society because they have things which they possess in common. To have similar thing is totality different from possessing things in common. And the only way by which men can come to possess things in common with another is by being in communication with one another" (Ambedkar 2014a: 51).

On the working of the Constitution and the Indian Society Granville Austin stated that:

> Looking backward, the value of written constitution for a society establishing fresh norms for itself has been proven. Positive and negative rights have been there for all citizens to claim as their own and to use as benchmark for measuring their own and government's performance. In a society where traditional form of hierarchy and privilege have licenced exploitation, the Fundamental Rights and Directive Principles and the special provisions for the 'weaker sections' of the society and for the minorities have been especially important (Austin 2016: 634).

Rajiv Bhargava stated that "The Constitution is a socially constructed object, and therefore it does not possess the hard objectivity of natural objects. This element of the constitution is the ground for contesting interpretations. It is high time we identified these interpretations and debated their moral adequacy" (Bhargavav 2008: 9).

Bhikhu Parekh in *The Constitution as a Statement of Indian Identity* stated on the relation between individual and the society, "What happens to individuals also happens to societies. They generally rely on their traditions, customs, and

historically inherited self-understanding to structure their lives and define their goals" (Parekh 2008: 42). Henry Shue stated about the importance of the social institutions in which the rights can be enjoy peacefully: "A person is actually enjoying a right only if the person is living among social institutions that are well designed to prevent violations of the right and, where prevention fails, to restore the enjoyment of the right insofar as possible" (Shue 1996: 75).

Durkheim stated on the relationship between individual and society that:

> Men cannot live together without acknowledging, and, consequently, making mutual sacrifices, without tying themselves to one another with strong, durable bonds. Every society is a moral society. In certain respects, this character is even more pronounced in organized societies. Because the individual is not sufficient unto himself, it is from society that he receives everything necessary to him, as it is for society that he works. Thus is formed a very strong sentiment of the state of dependence in which he finds himself (Durkheim 1933: 228).

Gupal Guru (Guru 2008: 237) on the obligation of upper caste to the Constitution, argued that:

> The legal system may succeed in extracting confirmation of the constitutional rights of Dalits from the upper castes. However, constitutional provisions tend to achieve only a limited success in extracting upper castes compliances with the cultural justice. This is because the upper castes have failed to take the moral lead in offering unconditional recognition to those social groups deprived of this recognition. On the contrary, these upper castes seem to be deploying discursive methods to escape this constitutional obligation.

Gopal Guru (Guru 2008:242) further stated that the upper caste's denied the constitutional obligations to share the resources to the marginalized sections, the author said:

> The upper castes control the distribution of moral/cultural resources that tend to condition the use of the public sphere. Constitutional provisions are found deficient in compelling the upper castes to share these resources with those who require it. The Indian Constitution, even with its punitive provisions, therefore offers a limited promise. It has not succeeded in penetrating the upper caste self which has become morally so hardened.

As Gopal Guru states that the upper caste should fulfil their constitutional obligations towards lower strata, V. Geetha (Geetha 2011: 107) stated what the untouchables have to do:

> Untouchables, individually and collectively, have struggled to sustain their self-respect, dignity, and sense of purpose in the face of a generalized anomie. The modern notion of rights has provided them with a means to challenge and protest issue of humiliations-this is something that we see from the late colonial period onwards.

As the authorities states in the discussion it could be says that the future of HRs in India has a significant values which control the behaviour of the citizens from discriminate and violate the FRs of other citizens. The future of HRs depends on the intention of the upper caste of India. How they look forward towards social democracy is key aspect.

Conclusion

The object of Article 15 (2) and 17 is to make SC/ST or untouchables equal as the other human beings in social milieu. After the Sixty-eight years of the enforcement of the Indian Constitution, it seems that the object of these articles becomes nugatory. The Parliament took 5 years to make law in the light of Article 17 but it failed to cover caste atrocities. The attitude of district and High Courts in the matter relating caste and untouchability is not in accordance with the spirit of the Indian Constitution. Till the date only two cases came to the Apex court of the land to discuss the issue of caste and untouchability which is essential part of the HRs.

It becomes important to notice why the Supreme Court took 42 years to discuss caste and untouchability. The High Courts in majority judgements have acquitted the upper caste people from the charges of atrocities, violence and massacres committed towards the SC/ST without taking serious view of the Constitutional spirit as well as the law. One might well assume on the basis of these facts that there is no practice of caste and untouchability existent in India. However, in 2015, more than 47,000 atrocities were recorded against SC/ST which shows that on an average more than 2 Dalits are murdered and 5 Dalit women are raped every day in India (Teltumbde 2016: 10). Thus, it is important to raise these questions in the present context and ask that who is responsible for these discrepancies, the State or the Society.

Neither the law nor the Constitution can change the attitude of the society to develop fraternity and equality among the citizen unless and until the ideology of popular morality changes the mind-sets of the citizens. The Indians should adopt the social

and moral conscience which should be based on constitutional morality. The object of the HRs has not been achieved as the constitutional framers had dream of it. There is no real law without the real implementation of the laws. The implementation of law is the basic part of it. The Constitution is there, laws are there, the executive and judiciary are there but without implementation of these provisions, they are just futile.

Conclusion

It would be apt to quote from the Report of the National Commission to Review the Working of the Constitution headed by Justice Shri M.N. Venkatachaliah, where it was said:

> "A nation may make a Constitution, but a Constitution cannot make a nation". No Constitution, written or unwritten, is 'worth more than the political temper of the community allows it to be worth'. A Constitution, however lofty its exhortations and sentiments, is not a self-executing document. It requires human agency to implement it. The political tradition of the people and the spirit of constitutionalism are what make a Constitution work. It essence is its practice (Kasyhyap 2004: 282).

It is important to quote further that: "Balance sheet by the Commission on the working of fifty years of the Constitution 'Fraternity', the noble ideal of the brotherhood of man enshrined in the Preamble of the Constitution has remained unrealized. The people of the India are more divided amongst themselves than at the time of the country's independence" (Kasyhyap 2004: 308).

It would also be significant to quote Granville Austin - a noted historian on Indian Constitutional history, who stated that:

> "Citizens of India have taken this Constitution as the text-the scripture, even a new *Dharmasastra*-for public life. For if it seemed to fit their society ill, it suited them well, embodying the ideals for, and the constitutional means to, builds a reformed society in which they would be free from traditional repressions…
>
> The Constitution, above all, has been the source of the country's political stability and its one society. Stability in India should not be defined as decorum in legislatures, or functionless political parties, or as the absence of turmoil in state governments and caste-class violence in rural areas. These exist and predictability will continue to do so, for the latter are democratic, social revolutionary stirring. Stability consists of continuity and a reasonable degree of predictability. It and the status quo cannot be equated, for the status quo is incompatible with reform" (Austin 2016: 635).

It was post Second World War time when the international community was trying to avoid next World War by making effective institution, i.e., United Nations which makes and implements the international laws, conventions and treaties to equalise all humans. During that time period, expansion of the rights jurisprudence at both

national as well as international level took place. At the same time, the countries like India, after getting freedom from colonial rule made their own Constitution to govern themselves. Also, Germany had a bad experience of the genocide committed by the State as well as non-state actors, during post Second World War, it imposed constitutional obligation on the non-State actors. The Indian Constitution has also adopted some provisions to make the application of fundamental rights among individuals.

The findings came up from the discussion clarified that HRs emerged at global level because the existing application of the rights seems insufficient to do justice with the FRs of the citizens. In the shrinking nature of the State, it has become need of the hour to relook definition of the "State". The discussion finds that HRs exist in various international conventions, treaties and in various domestic Constitutions. The concept of HRs has been developed broadly in the UK, South Africa, Canada, Germany and Ireland. On the contrary, USA has limited itself with the State Action doctrine and not allowed the application of FRs among the citizens.

The Indian Constitution has adopted the concept of HRs in Part III of FRs. The idea of HRs is based on the distribution of the duty with the State by the non-State actors. The constitutional framers envisaged Articles 15 (2), 17, 23 and 24 to fulfil the object mention in the Preamble i.e. equality, fraternity and the justice social, economic and political. The discussion finds that these provisions are the self-content code (Cite??) and anyone can approach before the Supreme Court (u/a 32) and the High Courts (u/a 226) for enforcement of these rights.

It is extraordinary provisions in the context of FRs in the IC that Articles 15 (2), 17, 23 and 24 does not need of the State action under article 12 of the Constitution. In other words, HRs in the IC makes the State Action doctrine irrelevant. The judiciary expanded the HRs though Article 12, 14, 21 and 21A. The Concept of HRs became prominent as the judiciary developed it by these articles. However, on the contrary the original articles of HRs failed to achieve its objects. The Indian judiciary needs to relook of its approach towards HRs and entertain cases under Article 15 (2), 17, 23 and 24 directly.

Article 12 states the definition of the State for the purpose of fundamental rights under Part III. Though this definition includes the governmental bodies but the two phrase of the article make is inclusive first, "unless the context otherwise require" and second "other authority". The *Report of the National Commission to Review the Working of the* Constitution headed by Justice M.N. Venkatachaliah (2002) suggested that article 12 should be amended and in the definition of the word "other authority" it should be including the word "any person" who functions like the State. That will help to put constitutional obligation on the non-state actors which enjoy right and liberty without constitutional obligations.

The research analysed the concept of HRs with the judicial interpretation of articles 12, 14, 15 (2), 17, 23 and 24 of the Indian Constitution. The Indian judiciary developed the scope of HRs through various judgments like *Muri S Devda* (2001) and *Naz Foudation* (2009). In direct HRs, there are land marks judgments of the Supreme Court and High Courts of India. Like in *M.C. Mehta v Union of India* (1986), the Supreme Court of India deviated from the State action doctrine and entertained a writ petition under article 32 against a private company. It was the highly radical step taken by Justice P.N. Bhagwati that applied fundamental rights direct horizontally.

In *Vishaka v UOI* 1997, CJI Justice Verma directed the government to implement fundamental rights under Articles 14, 15 and 21 on all public and private work place. In *Common Cause v UOI* 1996 the Supreme Court directed implementation of fundamental rights horizontally in all government and private blood banks. In *Mohini Jain* 1992 case, the Supreme Court entertained a writ petition against a private medical college. Latest judgement on HRs *Society for Un-Aided Private Schools of Rajasthan v UOI* 2012, where the Supreme Court enforced fundamental rights of education against private schools and reserved 25% seats for the economically weaker and socially disadvantages backgrounds children's.

In a recent landmark judgement *State Board of Control for Cricket in India v Cricket Association of Bihar and Others* 2015, the Supreme Court of India adopted a new approach that non-State actors or private organization performing the functions of the State or public function, should be treated as a State function. The court also held that the writ petition can be filed by any individual against in such organisation if

there is find any malpractice in function. These are the examples of direct HRs. For the indirect HRs, large numbers of cases have been cited in the research. It is quite unfortunate that after 42 years of the enforcement of the IC, the first case reached before the Supreme Court to discuss caste and untouchability. That shows how the system is functioning on the caste and untouchability atrocities. The victims of caste atrocity did not get justice neither from the police nor the courts.

The constitutional courts should apply the principle of constitutional morality that makes it the obligation to follow the constitutional values. The judiciary should entertain the petition of infringement of fundamental rights against the citizen as well. The constitution does not allow taking the help or depending on the State definition to entertain petitions regarding the HRs, therefore the judiciary ought to change its approach. The research found that till date neither the Supreme Court nor the High Court directly accepted any writ petition under Article 15 (2), 17, 23 and 24.

The session courts in majority of the cases acquitted the criminals and if some cases which, when accused were convicted, went up to the High Court, the Court in majority case acquitted the criminals. The PoA Act has the lowest conviction rate in India. It only implies that the upper castes are not willing to implement of the law. As Pratiksha Baxi stated that in the Act, status of Dalit women is as an extortionist to take the money from upper caste. The courts do not see the Dalit women as legal subject, but as a non-reliable person.

The discussion suggests that the words ‘custom’ and ‘usage’ should be removed in the definition of ‘law’ under Article 13(2) because these words make caste, religious and society’s rule as law under the constitution of India. The laws of these castes and religious institution have larger impact on the individual’s life; in other words, the non-States actors control the freedom and liberty of citizens more than the State. Sometimes these bodies expel the individual from their society which call ‘social boycott’ for violation the code of so-called bodies. To control these extra-legal force’s laws, it is the need of time to make a law which make these bodies’ law illegal.

Besides, the PoA Act, it is high time to enact an act at national level that deals the issue of social boycott which is very common problems in rural India. Dr. Ambedkar wanted to incorporate this law in the Part III but he compromised on it believing that the Central as well as the State Governments would pass such laws under the preview of articles 15 (2) and 17. After the 68 years of the enforcement of the Constitution, the Maharashtra Assembly (2017) legislated an Act to eradicate this social evil. Now Maharastra State becomes the first State in India that make social boycott a crime. The Parliament failed to make effective laws and effective implementation of existing laws. The new developments in the field of HRs-the Private Members Bill 'Anti-Discrimination and Equality Bill 2017' presented by Dr. Shashi Tharoor and The Social Boycott Act of Maharashtra - are the welcome step.

To makes successful the object of Articles 15 (2) and 17, the parliament made PoA Act 1955. There are special courts to hear the cases registered under the Act. The discussion finds that laws are enough to abolish the caste atrocities and untouchability but there is lack of will to implementation the laws in the society. On the abolition of caste and untouchability practice the Gandhinian (change the heart or moral values) as well as the Ambedkar's (moral values as well as legal) method failed to abolish this social evil. It is not happening because Indian society has exercised popular morality which is essentially based on inequality and discrimination. The research finds that though the caste atrocities should have ended as soon as possible, as envisaged by the constitutional framers, but on the contrary, it rises day by day.

For a healthy democracy, it is necessary that law and its implementation is the last resort for solving a social problem. There can be one or two methods or it might be any other ways to resolve the social issue but it is impossible to deal with the issue without putting it into the domain of law. It is the duty on the State as well as the citizen to develop scientific temperament among the citizens. The research founds that the attitude of the upper casts has not changed towards the SCs and STs.

The provisions of HRs are true representative of the social democracy which is not being truly implemented by the State. The IC makes collective responsibility of both the State as well as the individual to make an egalitarian society where everyone treated equally. The citizens have to develop the idea of fraternity. The idea of

fraternity and equality is against the spirit of current social order that is called popular morality. The constitutional morality has to be achieved by each and every citizen of the India. India is a free nation since1947, which is a long journey in the making of a society egalitarian. It will not be good for the future of Indians if we do not awake immediately and not follow the spirit of equality and fraternity.

The morality is necessary for a society which leads to the egalitarian society but the question is what kinds of morality? In India, the nature of morality exiting in the society is based on inequality, discrimination and hierarchical. The superiority and inferiority of social status is practiced vertically as well as horizontally. In all major Varna's *Brahmins, Kshatriya, Vaisva and Shudra* the practice of caste and untouchability exists. In a group, Indians practise caste and untouchability horizontally, and in other group it changes its forms and exist vertically.

This is the nature of Indian society's morality, i.e., popular morality. On the contrary, Indian Constitution makes everyone equal irrespective of anything and it has its own morality. The object of the concepts of HRs in India is to achieve the spirit of 'constitutional morality' over 'popular morality'. The only solution of the all social and other problems is that the citizens and well as the State should follow the constitutional morality to develop harmony, equality and fraternity in the society. As Dr. B. R. Ambedkar rightly said that we got political democracy on 26 Jan 1950 but social and economic democracy have to be achieved. However, India is still waiting to achieve the social and economic democracy which Dr. Ambedkar had dreamed on 25 November 1949 in the Constituent Assembly:

> 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 is Assembly has to laboriously built up (CAD Vol. XI, 25 Nov, 1949).

BIBLIOGRAPHY

African Carter of Human and Peoples' Rights, (known as Banjul Charter) (1981). (achpr). Retrieved March 17, 2017, from http://www.achpr.org/files/instruments/achpr/banjul_ charter.pdf

Jaggar, Alison M. 1988. *Feminist Politics And Human Nature*. Totowa, NJ: Rowman & Littlefield.

Ambedkar, B.R. (2014a) *Dr. Babasaheb Ambedkar: Writings and Speeches. Vol. 1*. New Delhi: Dr. Ambedkar Foundation.

Ambedkar, B.R. (2014b) *Dr. Babasaheb Ambedkar: Writings and Speeches. Vol. 1*. New Delhi: Dr. Ambedkar Foundation.

Ambedkar, B.R., and Moon, V. (1994) *Dr. Babasaheb Ambedkar, Writings and Speeches. Vol. 13.* Mumbai: Education Department, Government of Maharashtra.

American Convention on Human Rights, (1969). B*asic Documents-American Convention.* Retrieved March 17, 2017, from http://www.cidh.org/Basicos/English/Basic3.American Convention.htm

Anand, I. (2016). Dalit Emancipation and the Land Question. *Economic and Political Weekly*, *51*(47), 12–14. Retrieved from http://www.epw.in/journal/2016/47/ commentary/dalit-emancipation-and-land-question.html

Arasu, P., & Thangarajah, P. (2012). Queer Women and Habeas Corpus in India: The Love that Blinds the Law1. *Indian Journal of Gender Studies*, *19*(3), 413–435. https://doi.org/10.1177/097152151201900304

Austin, G. (2000). *The Indian Constitution Cornerstone of a Nation*. New Delhi: Oxford University Press.

Balasubramaniam, J. (2015). Tamil Nadu Floods 2015 Caste Discrimination in Relief. *Economic and Political Weekly*, *51*(2). Retrieved from http://www.epw.in/journal /2016/2/reports-states/caste-discrimination-relief.html

Barendt, E. (2007). State Action, Constitutional Rights and Private Actors. In J. Oliver, Dawn and Fedtke (Ed.), *Human Rights and the Private Sphere a Comparative Study* (First, pp. 399–426). New York: Routledge-Canvendish.

Baxi, P. (2014). *Public Secrets of Law Rape Trail in India*, New Delhi: Oxford University Press.

Baxi, U. (1998). The Development of the Right to Development. In J. Symonides (Ed.), *Human Rights: New Dimensions and Challenges* (pp. 99–116). Dartmouth: Ashgate Publishing.

Baxi, U. (1999). The constitutional discourse on secularism. In U. Baxi, Jacob and Singh (Ed.) *Reconstructing the Republic*. New Delhi: Har-Anand Publications.

Baxi, U. (2011). Humiliation and Justice. In G. Guru (Ed.), *Humiliation Claim and Context* (First, pp. 8–78). New Delhi: Oxford University Press.

Baxi, U. (2012). *The Future of Human Rights* (Third). India: Oxford Publication.

Baxi, U. (2015, December 24). Supreme Error. *The Indian Express*. New Delhi. Retrieved from http://indianexpress.com/article/opinion/columns/supreme-error/

Baxi, U. (2011). Dignity In and With Naz. In A. Narain and Gupta (Ed.), *Law Like Love: Queer Prespectives on Law*(pp.237–258). New Delhi: Yoda Press.

Berlin, I. (1969). *Four Essays on Liberty* (First). New York: Oxford University Press.

Beteille, A. (2015). The Peculiar Tendency of Caste. In S. Deshpande (Ed.), *The Problem of Caste* (Reprint, pp. 53–62). New Delhi: Orient Black-Swan Private Limited.

Bhatia, G. (2015). Horizontality under the Indian Constitution: A Schema. Retrieved March 9, 2017, from https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/#comments

Bhatia, G. (2016). Two state laws (and one proposed law) with Constitutional implications. Retrieved May 10, 2016, from http://www.legallyindia.com/blogs/two-state-laws-and-one-proposed-law-with-Constitutional-implications.

Bhatia, G. (2016). Laws that make us human. Retrieved July 1, 2017, from http://www.thehindu.com/opinion/lead/Laws-that-make-us-human/article14255339.ece

Chandhoke, N. (2011). Equality for What? Or the Troublesome Relation between Egalitarian and Respect. In G. Guru (Ed.), *Humiliation Claim and Context* (First, pp. 140–162). New Delhi: Oxford University Press.

Chishti, S. (2017). Unlike earlier, violence (against Dalits) now by community as a whole, says Sukhdeo Thorat. Retrieved June 17, 2017, from http://indianexpress.com/article/india/unlike-earlier-violence-against-dalits-now-by-community-as-a-whole-says-sukhdeo-thorat-4700997/

Chugh, A. (2005). Fundamental Rights—Vertical or Horizontal? Retrieved March 9, 2017, from http://www.ebc-india.com/lawyer/articles/2005_7_9.htm

Clapham, A. (1998). *Human rights in the Private Space* (Reprinted). New York: Oxford University Press.

United Nations. (2017). Convention on the Elimination of All Forms of Discrimination against Women, 1979. Retrieved March 17, 2017, from http://www .un.org/womenwat ch/daw/cedaw/text/ econvention.htm

UN Commission on Human Rights. (1999). *Convention on the Prevention and Punishment of the Crime of Genocide, 1948.* Retrieved March 17, 2017, from http://www.oh chr.org/E N/ProfessionalInterest/Pages/CrimeOfGenocide.aspx

Corbridge, S. (2015). Politics and Culture. In P. B. Jayal, Niraja Gopal and Mehta (Ed.), *The Oxford Companion to Politics in India* (Eighth imp, pp. 254–267). New Delhi: Oxford University Press.

Datta, S. (2017). Anti-Discrimination Bill: India needs comprehensive law to punish prejudice, uplift diversity. Retrieved July 1, 2017, from http://www .firstpost.com/india/anti-discrimination-bill-india-needs-a-comprehensive-law-to-punish-prejudice-encourage-diversity-3340830.html

Deshpande, A. (2016). MLA won't chant "Bharat Mata ki Jai", suspended. Retrieved January 25, 2017, from http://www.thehindu.com/news/national/mim-mla-suspended-from-maharashtra-assembly/article8361194.ece

Deshpande, Ashwini and Newman, K. S. (2015). Where the Path Leads the role of Caste in Post-university Employment Expectations. In S. Deshpande (Ed.), *The Problem of Caste* (Reprint, pp. 152–161). New Delhi: Orient Black-Swan Private Limited, New Delhi.

Dreze, Jean and Sen, A. (2013). *An Uncertain Glory India and Its Contradictions* (First). New Delhi: Penguin Books.

Drolia, R. (2016). End social boycott in Chhattisgarh, bring an Act, demands doctor. Retrieved July 2, 2017, from http://timesofindia.indiatimes.com/city/raipur/End-social-boycott-in-Chhattisgarh-bring-an-Act-demands-doctor/articleshow/53013960.cms

Dworkin, R. (1977). *Taking Rights Seriously*. USA: Harvard University Press.

Edmundson, W. A. (2012). *An Inroduction to Rights* (Second). New York: Cambridge University Press.

Press Trust of India (2016). Chhattisgarh: Rationalist outfit wants "social boycott" criminalised. *The Indian Express*. Retrieved from http://indianexpress.com/article/india/india-news-india/chhattisgarh-rationalist-outfit-wants-social-boycott-criminalised-3070178/.

Fedtke, J. (2007). Drittwirkung in Germany. In J. Oliver, Dawn and Fedtke (Ed.), *Human Rights and the Private Sphere a Comparative Study* (First, pp. 125–156). New York: Routledge-Canvendish.

Fedtke, J. (2007). From Indirect to Direct Effect in South Africa: A System in Transition. In J. Oliver, Dawn and Fedtke (Ed.), *Human Rights and the Private Sphere a Comparative Study* (First, pp. 351–377). New York: Routledge-Canvendish.

Flew, A. (1989). *Equality in Liberty and Justice*. New York: Routledge, Chapman & Hall.

Galanter, M. (2015). Untouchability and the Law. In S. Deshpande (Ed.), *The Problem of Caste* (Reprint, pp. 89–97). New Delhi: Orient Black-Swan Private Limited.

Ganesh, M. I. (2014). Love, War and the Vishaka Judgement. Retrieved May 13, 2017, from http://theladiesfinger.com/love-war-and-the-vishaka-judgement/

Gardbaum, S. (2003). The "Horizontal Effect" of Constitutional Rights. *Michigan Law Review*, *102*(3), 387–459. https://doi.org/10.2307/3595366

Gardbaum, S. (2016). Horizontal Effect. In P. B. Choudhry, Sujit, Khosala, Madhav and Mehta (Ed.), *The Oxford Handbook of The Inidan Constitution* (First, pp. 600–613). New Delhi: Oxford University Press.

Geetha, V. (2011). Bereft of Being the Humiliations of Untouchability. In G. Guru (Ed.), *Humiliation Claim and Context* (First, pp. 95–107). New Delhi: Oxford University Press, New Delhi.

Ghosh, A. (2014). Dalit tortured, forced to eat human excreta. Retrieved July 24, 2017, from http://timesofindia.indiatimes.com/city/kanpur/Dalit-tortured-forced-to-eat-human-excreta/articleshow/42926546.cms

Gopalakrishnan, A. (2016). Fanning the fire: Why the Havells anti-reservation ad got everyone winded. Retrieved July 21, 2017, from http://blogs.timesofindia. Indiatimes.com/to-name-and-address/fanning-the-fire-why-the-havells-anti-reservation-ad-got-everyone-winded/

Governemnt of Canada. (2017). *Constitution Act, 1982*. Retrieved May 13, 2017, from http://laws-lois.justice.gc.ca/eng/Const/page-15.html

Governemnt of South Africa. (2017). *Constitution of the Republic of South Africa 1996 - Chapter 2: Bill of Rights*. Retrieved April 24, 2017, from http://www.gov.za/ documents/constitution /chapter-2-bill-rights#8

Govindarajan, V. (2017). More than 25 Dalit activists have been murdered in Tamil Nadu over the past year, says Madurai NGO. Retrieved July 21, 2017, from https://scroll.in/article/844192/more-than-25-dalit-activists-murdered-in-tamil-nadu-over-the-past-year-says-madurai-ngo

Gupta, D. (2015). Continuous Hierarchies and Discrete Castes. In S. Deshpande (Ed.), *The Problem of Caste* (Reprint, pp. 44–52). New Delhi: Orient Black-Swan Private Limited, New Delhi.

Guru, G. (2012). Archaeology of Untouchable. In S. Guru, Gopal and Sarukkai (Ed.), *The Cracked Mirror an Indian Debate on Experience and Theory* (First, pp. 200–222). New Delhi: Oxford University Press, .

Guru, G. (2015). Archaeology of Untouchability. In S. Deshpande (Ed.), *The Problem of Caste* (Repreint, pp. 411–419). New Delhi: Orient Black-Swan Private Limited.

Guru, G. (2015). How Egalitarian are the Social Sciences in India? In S. Deshpande (Ed.), *The Problem of Caste* (Reprint, pp. 107–118). New Delhi: Orient Black-Swan Private Limited.

Guru, G. (2015). Social Justice. In P. B. Jayal, Niraja Gopal and Mehta (Ed.), *The Oxford Companion to Politics in India* (Eighth imp, pp. 361–380). New Delhi: Oxford University Press,

Hart, H. L. A. (2006). Are There Any Natural Rights. In C. L. Ten (Ed.), *Theories of Rights* (pp. 61–77). England: Ashgate Publishing Limited.

Hart, H. L. A. (2006). Between Utility and Rights. In C. L. Ten (Ed.), *Theories of Rights* (pp. 269–287). England: Ashgate Publishing Limited.

Hart, H. L. A. (2006). Natural Rights: Bentham and John Stuart Mill. In C. L. Ten (Ed.), *Theories of Rights* (pp. 163–188). England: Ashgate Publishing Limited.

Press Trust of India (2015). Dalit groom attacked for riding a horse. Retrieved June 12, 2017, from http://www.thehindu.com/news/national/dalit-groom-attacked-for-riding-a-horse-in-madhya-pradesh/article7198539.ece

The Hindu (2016). Maharashtra nod for Bill against social boycott. Retrieved May 10, 2016, from http://www.thehindu.com/news/national/other-states/maharashtra-nod-for-bill-against-social-boycott/article8472909.ece.

The Hindu (2016). SC criticises poor implementation of SC/ST Act. Retrieved July 21, 2017, from http://www.thehindu.com/news/national/SC-criticises-poor-implementation-of-SCST-Act/article16919812.ece

Hohfeld, W. N. (1913). Some Fundamental Legal Conception as Applied in Judicial Reasoning. *The Yale Law Journal*, *23*(1), 19–59. https://doi.org/10.2307/785533

Hohfeld, W. N. (2016). Fundamental Legal Conceptions as Applied in Judicial Reasoning. *Faculty Scholarship Series*, 717. Retrieved from http://pgil.pk/wp-content/uploads/2014/11/Fundamental-Legal-Conceptions-as-Applied-inJudicialReasoning-by-wesely-h ohfeld-Yale.pdf

The United Nations General Assembly. (1966). International Covenant on Civil and Political Rights. Retrieved March 17, 2017, from http://www.ohchr .org/EN/ProfessionalInte rest/Pages/CCPR.aspx

The United Nations General Assembly. (1966). Internayional Covenant on Economic Social and Cultural Rights. Retrieved March 17, 2017, from http://w ww.ohchr.org/EN/Profe ssionalInterest/Pages/CESCR.aspx

Press Trust of India (2013). Indian judiciary one of most powerful in world: CJI. Retrieved June 11, 2017, from http://timesofindia.indiatimes.com/india/Indian-judiciary-one-of-most-powerful-in-world-CJI/articleshow/20633479.cms

Press Trust of India. (2017). Two suspected "cattle thieves" lynched in Assam's Nagaon. Retrieved July 10, 2017, from http://timesofindia.indiatimes.com/city/guwahati/two-suspected-cattle-thieves-lynched-in-assams-nagaon/articleshow/58448181.cms

Indian Penal Code, (1860). India.

The United Nations General Assembly. (1965). International Convention on the Elimination of All Forms of Racial Discrimination. Retrieved March 17, 2017, from http://www.ohchr.org/EN/Professional Interest/Pages/ CERD.aspx

The United Nations General Assembly. (1973). International Convention on the Suppression and Punishment of the Crime of Apartheid. Retrieved March 17, 2017, from https://treaties.un.org/doc/publication/unts/volume1015/volume-1015-i-14861-english.pdf

Jadhav, R. (2017). Law to prevent social boycott awaits Prez nod. Retrieved July 1, 2017, from http://timesofindia.indiatimes.com/city/pune/law-to-prevent-social-boycott-awaits-prez-nod/articleshow/58186976.cms

Jain, P. M. P. (2008). *Indian Constitutional Law* (5th ed.). Nagpur: LexisNexis Butterwords.

JayaKumar, D. N. (2006). *Lectures in Jurisprudence* (Second). New Delhi: Lexis Nexis.

Jeelani, G. (2017). Caste violence: In Saharanpur's ghost villages, fear looms large among Dalits. Retrieved June 16, 2017, from http://www.hindustantimes.com/india-news/caste-violence-in-saharanpur-s-ghost-villages-fear-looms-large-among-dalits/story-jbE96b1AdpUgZQThWVrScO.html

Jodhka, S. S. (2015). Caste and Politics. In *The Oxford Companion to Politics in India* (pp. 154–167). New Delhi: Oxford University Press.

Menon, N. (2014). sexuality! caste! contests governmentality: contests over gender in India. *Feminists Review* (91), 94–112.

Kapur, R. (2013). Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India. *Melbourne Journal of International Law*, *14*(April), 317–345.

Kashyap, D. S. C. (2004). *The Framing of India's Constitution A study* (Second). New Delhi: Universal Law Publishing Co. Pvt. Ltd.

Kashyap, D. S. C. (2015). *Our Constitution an Introduction to India's Constitution and Constitutional Law* (Reprint). New Delhi: National Book Trust.

Kasyhyap, D. S. C. (2004). *Constitution Making Since 1950 An Overview* (First). New Delhi: Universal Law Publishing Co. Pvt. Ltd.

Kateshiya, G. B. (2016). Gujarat: 7 of Dalit family beaten up for skinning dead cow. Retrieved July 12, 2017, from http://indianexpress.com/article/india/india-news-india/gujarat-7-of-dalit-family-beaten-up-for-skinning-dead-cow-2910054/ last

Khaitan, T. (2015). *A Theory of Discrimination Law* (1st ed.). New York: Oxford University Press.

Khaitan, T. (2017). Protection whose time has come. *The Indian Express*. New Delhi. Retrieved from http://indianexpress.com/article/opinion/columns/shashi-tharoor-introduces-ade-anti-discrimination-equality-bill-4584252/

Khapre, S. (2017, July 14). Maharashtra social boycott Bill gests Presidential nod. *Indian Express*, p. 7. New Delhi.

Kirpal, B. N. (1997). Supreme Court of India Vishaka & Ors vs State of Rajasthan & Ors on 13 August, 1997 Author: Verma Bench: Cji, Sujata V. Manohar, B. N. Kirpal, 1–10.

Knox, J. H. (2008). Horizontal Human Rights Law. *The American Journal of International Law*, *102*(1), 1–47. Retrieved from http://www.jstor.org/stable/40007767

Kothari, R. (2015). Rise of the Dalits and the Renewed Debate Castes. In S. Deshpande (Ed.), *The Problem of Caste* (Reprint, pp. 63–71). New Delhi: Orient Black-Swan Private Limited.

Krishnan, M. (2017). RightToPrivacy: Datar, Grover, Poovayya, Meenakshi Arora make submissions on Day 2. Retrieved July 22, 2017, from https://barandbench.com/right-privacy-datar-grover-poovayya-argue-day-2/

Krishnan, P. S. (2016). Dalit Suicides: Socio-historical facts and remedial and corrective measures. Retrieved May 23, 2017, from http://indianexpress.com/article/blogs/dalit-suicides-socio-historical-facts-and-remedial-and-corrective-measures/

Krishnan, Sanjana and Jambhulkar, R. (2015). Caste, Religious Institutions and Domination. *Economic and Political Weekly*, *50*(37), 15–18. Retrieved from http://www.ep w.in/journal/2015/37/commentary/caste-religious-institutions-and-domination.html

Krishnasawamy, S. (2011). Horizontal Application of Fundamental Rights and State Action in India. In K. Kumar, C. Raj and Chocjalingam (Ed.), *Human Rights, Justice and Constitutional Empowerment* (Second, pp. 47–73). New Delhi: Oxford University Press,

Kumar, V. (2016). How Egalitarian Is Indian Sociology? *Economic and Political Weekly*, *51*(25), 33–39. Retrieved from http://www.epw.in/journal/2016/25/perspectives/how-egalitarian-indian-sociology.html

Mackinnon, C. (1989). Rape: On Coercion and Consent. *Toward a Feminist Theory of the State*, 171–83. Retrieved from http://www.julietdavis.com/WST383/rape.pdf

Mahapatra, D. (2012, February 25). Right to Sleep is a Fundamental Right. *The Hindu*. New Delhi. Retrieved from http://timesofindia.indiatimes.com/india/Right-to-sleep-a-fundamental-right-says-Supreme-Court/articleshow/12025358.cms

Manas, D. (2016). PIL seek Court intervention for right to worship. Retrieved May 10, 2016, from http://www.thehindu.com/todays-paper/tp-national/article735456.ece.

Masih, N. (2017). Saharanpur caste violence: Eye on local polls, BJP walks the tightrope between Dalits and Thakurs. Retrieved June 16, 2017, from http://www.hindustantimes. com/india-news/saharanpur-caste-violence-eye-on-

local-polls-bjp-walks-the-tightrope-between-dalits-and-thakurs/story-ztDkdgW2neVsLVL1SWOaDJ.html

McKinnon, C. (1989). *Toward a Feminist Theory of the State*. Cambridge, Mass: Harvard Unity Press.

Mill, J. S. (1956). *On Liberty*. (C. V. Shields, Ed.) (First). New York: The Bobbs-Merrill Company, Inc.

Mody, Z. (2013). *10 Judgments That Changed India* (First). New Delhi: Penguin Books India.

MOENCH, M. (2017). Muslim Protesters Dismiss Modi's Cow Violence Criticism as Hollow. Retrieved July 10, 2017, from https://thewire.in/153661/muslim-protesters-dismiss-modis-cow-violence-criticism/

Moran, L. J. (1996). *The Homosexual (ity) of Law*. London: Routledge.

Mothers, R. (1999). Githa Hariharan & Another vs. Reserve Bank of India & Another.

N.E., S. (1998). Rights at the Cutting Edge. In H. Kramer, Matthew H., Simmonds, N.E. and Steiner (Ed.), *A Debate Over Rights Philosophical Enquiries* (First, pp. 113–232). New York: Clarendon Press. Oxford.

O'Cinneide, C. (2007). Irish Constitutional Law and Direct Horizontal Effect- A Successful Experiments? In J. Oliver, Dawn and Fedtke (Ed.), *Human Rights and the Private Sphere a Comparative Study* (First, pp. 213–251). New York: Routledge-Canvendish.

Oliver, D. (2007). The Human Rights Act and the Private Sphere. In J. Oliver, Dawn and Fedtke (Ed.), *Human Rights and the Private Sphere a Comparative Study* (First, pp. 63–97). New York: Routledge-Canvendish.

Oliver, Dawn and Fedtke, J. (2007). Human Rights and Private Sphere-the Scope of the Project. In J. Oliver, Dawn and Fedtke (Ed.), *Human Rights and the Private Sphere a Comparative Study* (First, pp. 3–24). New York: Routledge-Canvendish.

Padmanabhan, A. (2016). Right: Breadth, Scope, and Applicability. In P. B. Choudhry, Sujit, Khosla, Madhav and Mehta (Ed.), *The Oxford Handbook of The Inidan Constitution* (First, pp. 581–599). New Delhi: Oxford University Press, New Delhi.

Pantham, T. (2011). Against Untouchability the Discourses of Gandhi and Ambedkar. In G. Guru (Ed.), *Humiliation Claim and Context* (First, pp. 179–208). New Delhi: Oxford University Press, .

Parliament of India. (2017). Constituent Assembly Debate Volume XI, 25 November 1949. Retrieved July 23, 2017, from http://parliamentofindia.nic.in/ls/debates/vol11p11.htm

Parliament of India. (2017). Constituent Assembly Debate, 21 November 1949. Retrieved June 25, 2017, from http://parliamentofindia.nic.in/ls/debates/v11p7m.htm.

Parliament of India. (2017). *Constituent Assembly Debates volume III, 1 May 1947*. Retrieved January 12, 2017, from http://164.100.47.132/LssNew/cadebatefiles/C01051947.html

Parliament of India. (2017). *Constituent Assembly Debates volume III 29 April 1947*. Retrieved January 12, 2017, from http://164.100.47.132/LssNew/cade batefiles/C290 41947.ht ml

Parliament of India. (2017). *Constituent Assembly Debates volume VII, 29 November 1948*. Retrieved January 12, 2017, from http://164.100.47.132/LssNew/cadebatefiles/ C29111948.html

Parliament of India. (2017). *Constituent Assembly Debates volume VII, 3 December 1948*. Retrieved January 12, 2017, from http://164.100.47.132/LssNew/ca debatefiles/C0 3121948.html

Parliament of India. (2017). *Constituent Assembly Debates volume VII, 8 November 1948*. Retrieved January 12, 2017, from http://164.100.47.132/LssNew/cadebatefiles/C0 8111948.html

Puri, J. (2004). The Sexual State: Naz (India) PIL Against Section 377. *Voices*, 1–47.

Rajagopal, K. (2016, November 19). Everyone has a fundamental right to run. *The Hindu*. New Delhi. Retrieved from http://www.thehindu.com/todays-paper/tp-national /everyone-has-a-fundamental-right-to-run-supreme-court/article9363045.ece

Ralws, J. (1999). *A theory of justice* (Illustrate). Harvard University Press.

Ranjan, R. (2014). India is at last reclaiming its Hindu soul. *Indiafacts Truth Be Bold*. Retrieved from http://indiafacts.org/india-last-reclaiming-hindu-soul/

Rao, A. (2009). The Caste Question: Dalits and the Politics of Modern India. *Politics*, *41*(2), 336–337.

Raz, J. (1986). *The Morality of Freedom* (First). New York: Oxford University Press.

Raz, J. (2006). On the Nature of Rights. In C. L. Ten (Ed.), *Theories of Rights* (pp. 39–59). England: Ashgate Publishing Limited.

Rodrigues, V. (2011). Untochability, Filth, and the Public Domain. In G. Guru (Ed.), *Humiliation Claim and Context* (First, pp. 108–123). New Delhi: Oxford University Press.

S, R. (2014, November 13). Just 5% of Indian marriages are inter-caste: survey. *The Hindu*. New Delhi. Retrieved from http://www.thehindu.com/data/just-5-per-cent-of-indian-marriages-are-intercaste/article6591502.ece

Saldanha, A. (2017). More than 99% Indians now live in areas under cow protection laws, Gujarat has strictest rules. Retrieved July 10, 2017, from http://www.hindustantimes.com/india-news/more-than-99-indians-now-live-in-areas-under-cow-protection-laws-gujarat-has-strictest-rules/story-Z8v4B9skYXyoW79vZ6KHBI.html

Sarat, A., Kearns, T. R., & Maier, C. (1999). Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction. In A. Sarat and Keans (Ed.) *History, Memory and The Law.* Ann Arbor: University of Michigan Press.

Sarukkai, S. (2012). Phenomenology of Untouchability. In S. Guru, Gopal and r Sarukkai (Ed.), *The Cracked Mirror an Indian Debate on Experience and Theory* (First, pp. 157–199). New Delhi: Oxford University Press.

Seervai, H. M. (2005) *Constitutional law of India. Vol. 1*(Fourth edition). New Delhi: Universal Law Publishing.

Sen, A. (2009). *The Idea of justice* (First). Massachusetts: The Belknap Press of Harvard University Press.

Sen, R. (2017). Sony TV's new show, "Pehredaar Piya Ki", celebrates child marriage. Retrieved July 21, 2017, from http://www.livemint.com/Opinion/r4t5GR 1UkXQ8kmf2 jUQ9wN/Sony-TVs-new-show-Pehredaar-Piya-Ki-celebrates-child-ma.html

Shah, A. M. (2017). The Mirage of a Caste-less Society in India A M Shah. *Economic and Political Weekly*, *52*(9), 61–66.

Shah, S. (2003). Sex Work in the Global Economy. *Sage Publications, Inc.*, *12*(1), 74–81. Retrieved from https://www.jstor.org/stable/pdf/40342385.pdf

Sharma, N. K. (2015). Dalit bridegroom rides horse to his wedding, first in village. Retrieved June 12, 2017, from http://timesofindia.indiatimes.com/city/jaipur/Dalit-bridegroom-rides-horse-to-his-wedding-first-in-village/articleshow/47567145.cms

Sharma, V. (2017). South Delhi restaurants will open toilets for public use from April 1. Retrieved July 21, 2017, from http://www.hindustantimes.com/delhi-news/from-april-bathrooms-in-south-delhi-hotels-will-be-open-to-public-at-rs-5/story-TqQ8qQbI41Eb7YrTMHkNnM.html

Sibal, K. (2017). A hollow symbolism. *Indian Express*. New Delhi.

Singh, M. P. (2007). Protection of Human Rights against State and Non-State Action. In J. Oliver, Dawn and Fedtke (Ed.), *Human Rights and the Private Sphere a Comparative Study* (First, pp. 180–212). New York: Routledge-Canvendish.

Singh, M. P. (2017). *V.N. Shukla's Constitution of India* (Thirteenth). Lucknow: Eastern Book Company.

Leauge of Nations. (1926). *Convention to Suppress the Slave Trade and Slavery*. Retrieved March 17, 2017, from http://www.ohchr.org/EN/ProfessionalInterest/Pages/Slavery Convention.aspx

Smart, C. (1992). The Woman of Legal Discourse. *Social & Legal Studies*, *1*(1), 29–44. https://doi.org/10.1177/096466399200100103

Spears, D. (2016). Caste and Life Satisfaction in Rural North India. *Economic and Political Weekly*, *51*(4), 12–14. Retrieved from http://wwwm.epw.in/journ al/2016/4/comm entary/caste-and-life-satisfaction-rural-north-india.html

Srinivas, M. N. (2015). Future of Indian Caste. In S. Deshpande (Ed.), *The Problem of Caste* (Reprint, pp. 34–43). New Delhi: Orient Black-Swan Private Limited.

Steiner, H. (1994). *An Essay on Rights* (First). Blackwell Publisher.

Subramani, A. (2014). Chennai club turns away judge for wearing dhoti. Retrieved June 7, 2017, from http://timesofindia.indiatimes.com/india/Chennai-club-turns-away-judge-for-wearing-dhoti/articleshow/38225698.cms

Teltumbde, A. (2016a). Two Years of an Ambedkar Bhakt and the Plight of Dalits. *Economic and Political Weekly*, *51*(23), 10–11. Retrieved from http://www.epw.in/searc h/site/ Two%2520Years%2520of%2520an%2520Ambedkar%2520Bhakt%2520and%2520 the%2520Plight%2520of%2520Dalits%2520Anand%2520Teltumbde

Teltumbde, A. (2016b). 10 Years of Khairlanji What Do We See? *Economic and Political Weekly*, *51*(36), 10–11. Retrieved from http://www.epw.in/journal/2016/36/margin-speak/10-years-khairlanji.html

Teltumbde, A. (2016c). Fire of Una Ignites Saffron Udupi. *Economic and Political Weekly*, *51*(44–45), 10–11. Retrieved from http://www.epw.in/journal/2016/44-45/margin-speak/fire-una-ignites-saffron-udupi.html

Teltumbde, A. (2017d). Robbing Rohith of His Dalitness. *Economic and Political Weekly*, *52*(9), 10–11. Retrieved from http://www.epw.in/journal/2017/9/margin-speak/robbing-rohith-his-dalitness.html

Teltumbde, A. (2016e). Dichotomisation of Caste and Class. *Economic and Political Weekly*, *51*(47), 34–38. Retrieved from http://www.epw.in/journal/2016/47/caste-and-class/dichotomisation-caste-and-class.html

Tharoor, D. S. (2017). Anti-Discrimination and Equality Bill, 2016. Retrieved April 9, 2017, from https://drive.google.com/file/d/0BzXilfcxe7yuQVdjOFlUNGUydFE/view

The Constitution of India (1950). India.

Governemt of South Africa. (2017). *The Constitution of the Republic of South Africa, 1997*. Retrieved May 13, 2017, from http://www.gov.za/DOCUMENTS/CON STITUTION/constitution-republic-south-africa-1996-1

Council of Europe. (1950). *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Retrieved March 17, 2017, from http://www.echr.coe.int/Doc uments/Convention_ENG.pdf

Thorat, Sukhadeo and Newman, K. S. (2015). Caste and Economic Discrimination. In S. Deshpande (Ed.), *The Problem of Caste* (Reprint, pp. 81–88). New Delhi: Orient Black-Swan Private Limited, New Delhi.

Hindustan Times (2017). An anti-discrimination bill may not be the panacea, but it's a good beginning. Retrieved July 1, 2017, from http://www.hindustantimes.com/editorials/an-anti-discrimination-bill-may-not-be-the-panacea-but-it-s-a-good-beginning/story-5Eu85NUrb3ATTv2S4AR90N.html

Hindustan Times (2017). Haryana: Upper caste men beat up Dalit groom over "ghurchari." Retrieved June 12, 2017, from http://www.hindustantimes.com/india-news/upper-caste-men-beat-up-dalit-groom-over-riding-mare-in-baraat/story-IotmX3xk4WBaUg6YptaIYJ.html

TV, S. (2017). Jaat ki Jugni. Retrieved July 7, 2017, from http://apnetv.tv/Hindi-Serial/Jaat-Ki-Jugni

Universal Declaration of Human Rights (UDHR), 1948. Retrieved March 17, 2017, from http://www.un.org/en/universal-declaration-human-rights/

Vatsa, A. (2016). Body of Dadri lynching accused kept in freezer, under Tricolour. Retrieved July 10, 2017, from http://indianexpress.com/article/india/india-news-india/dadri-lynching-accused-ravin-dead-body-tricolour-mohammad-akhlaq-probe-3069639/

Vazquez, C. M. (2005). Direct vs. Indirect Obligation of Corporation under International Law. *Colum. J. Transnat'l L.*, *43*, 927–959. Retrieved from http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1987&context=facpub

Waldron, J. (2006a). A Right to Do Wrong. In C. L. Ten (Ed.), *Theories of Rights* (pp. 107–125). England: Ashgate Publishing Limited.

Waldron, J. (2006b). Rights in Conflict. In C. L. Ten (Ed.), *Theories of Rights* (pp. 127–143). England: Ashgate Publishing Limited.

West, R. (1988). Jurisprudence and Gender. *The University of Chicago Legal Forum*, *55*(1), 1–72. https://doi.org/10.2307/1599769

Wire, T. (2016). "Purifying" Politics: Jain Monk Addresses Haryana Assembly. Retrieved January 25, 2017, from https://thewire.in/62138/haryana-assembly-monk-tarun-sagar/