NOTES AND COMMENTS

THE MARCH OF LAW IN INDIA-THE LONG ROAD FROM OPPRESSION TO JUSTICE

Abstract

Rule of law is generally understood to be a universal good. However, this paper argues that rule of law is an incomplete and at times, undesirable ideal. Rather, the focus of juridical thought should be on rule of justice. To substantiate this claim, the paper traces the evolution of law in India through three paradigms. *Firstly*, rule *by* law wherein, the colonial powers used law as a means to govern the country and exploit its resources. *Secondly*, rule *of* law, exemplified in Dicey's conception of treating persons equally and everyone being subject to the law. *Finally*, rule of *justice* illustrated in the post emergency era by an activist Supreme Court which responded to the call of using law as a tool to achieve justice.

"In the absence of justice, what is sovereignty but organized robbery?"

-St. Augustine

I Introduction

LAW IS a tool of social control.[1] It can be used to achieve inherently contradictory aims. While law can function as an effective tool to render justice, it can also be used as a tool for the justification of imperial rule, or for the massive exploitation of natural resources. It is for this reason that the rule of law is necessary but not sufficient to meet the demands of justice. In this paper, it is argued that the evolution of law in India can be traced through three different paradigms: *firstly*, the rule *by* law wherein the colonial powers used law as a means to govern the country and exploit its resources; *secondly*, the rule *of* law, exemplified in Dicey's conception of treating persons equally and everyone being subject to the law. *Finally*, rule of *justice* illustrated in the post-emergency era by an activist Supreme Court which used law as a tool to achieve justice. The court which was earlier the resort of people with deep purses quibbling over intricate legal issues suddenly became the last resort for the oppressed and bewildered.[2]

II Rule *by* law

Violence was not an exceptional but an ordinary part of the British rule in the subcontinent. Despite the pledge of equality, colonial legislation and practices of white

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1 See Roscoe Pound, *Social Control through Law* (Transaction Publishers, New Jersey, 2002).

2 See Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" 4 *Third World Legal Studies* 107 (1985).

judges placed most Europeans above the law, literally allowing them to get away with murder.[3]

India, like all other colonized societies, had to be controlled and governed for the benefit of the colonial power. How did the colonial power, the English, govern India? It was the realm of 'rule of law' which helped the British to control India. In the guise of 'rule of law' the British practiced 'rule by law' using law as a cloak for arbitrary power.[4] For example, laws under the British rule were enacted to accommodate and further the interests of the colonial rule and rulers. The British sought not only to rule or govern but to extract resources for their industries and to have a market for their finished goods. If they developed roads or railways or ports, it was to facilitate their commerce and to discourage any indigenous growth. Dadabhai Naoroji's classic exposition *Poverty and Un-British Rule in India*[5] and Romesh Chunder Dutt's *Economic History of India*,[6] record this facet of British rule in great detail. The British then were different from all previous settlers who had come to India. The latter had made India their home unlike the British whose primary goal was India's economic exploitation. Laws were developed in a manner which suited this economic enterprise, and access to justice or how justice delivery was done, was determined keeping in mind the interest of the colonial rulers. This paper illustrates this with the help of the five landmark cases discussed below:

Raja Nand Kumar's trial (1775)

The circumstance in which the case was started, tried, and executed has led many historians to call it a judicial murder.[7] The facts leading to the case are most interesting. Raja Nand Kumar, who had held high positions under the *nawab*s and the company, made an allegation against Warren Hastings (in March 1775), the then Governor General, that he had received in 1772 a certain amount of money to award favourable positions in the company (*Diwan*, Guardian of the *nawab*, *etc.*). In fact, the majority of the members of the Governor General's council decided that Hastings had received the money and he should pay it to the company.

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3 See generally, Elizabeth Kolsky, *Colonial Justice in British India* (Cambridge University Press, 2011); James Epstein, *Scandal of Colonial Rule* (Cambridge University Press, 2012); Lauren Benton, *Law and Colonial Cultures* (Cambridge University Press, 2002).

4 Ratna Rueban Balasubramaniam, "Has Rule by law Killed the Rule of law in Malaysia?" 8(2) *Oxford University Commonwealth Law Journal* 225 (2008).

5 Dadabhai Naoroji, *Poverty and Un-British Rule in India* (S. Sonnenschein, London, 1901).

6 Romesh Chunder Dutt, *Economic History of India* (K. Paul, Trench, Trubner & Co. Ltd., London, 1916).

7 M.P. Singh, *Outlines of Indian Legal and Constitutional Theory* 42 (Universal Law Publishing, New Delhi, 2006).

Meanwhile, a case of forgery was started against Nand Kumar. The trial started on June 8 and was over within eight days, resulting in punishment of death sentence. He was hanged on August 5, 1775.

During the course of the trial, the defence witnesses were severely cross examined by the judges, which was not the usual practice in common law courts. The witnesses did not in any way contradict their testimony in the cross-examination. However, the court concluded that these witnesses had been thoroughly prepared to state a cooked-up story and did not accept their evidence. It is also pertinent that Warren Hastings and Nand Kumar were enemies while the Chief Justice of the Supreme Court of Judicature at Calcutta, Sir Elijay Impey was a school friend of Hastings. An old adage goes "justice should not only be done, but be seen to be done".[8] Leaving aside the question of whether justice had been actually done or not, the fact that no effort was made by the judges to make it look like justice had been done, displays the arrogance with which the law was used to terrorise people.

The contemporaneous events that led to Nand Kumar's death have led many to conclude that Hastings could be suspected of being behind the prosecution and conviction of Nand Kumar.[9] In fact, Nand Kumar was also the subject of a conspiracy case which was rendered infructuous after his death.

Bahadur Shah Zafar's trial (1857)

During India's first war of independence in 1857, the rebelling *sipahi*s marched to Delhi and installed the last Mughal emperor Bahadur Shah Zafar as the emperor of India with the title '*Shahenshah-i-Hind*'. But this did not last for long and within a matter of four months, the British recaptured Delhi. Thereafter, Bahadur Shah Zafar was put on trial. The charges included offences committed for being an accomplice in the mutiny, an accessory to the murder of women and children at Delhi, and encouraging/ordering others to kill Europeans. The Military Commission concluded that the emperor was guilty of all the charges.[10] However, three issues in this trial need to be noted.

Firstly, Bahadur Shah was a sovereign and not a British subject.[11] Therefore, he was not amenable to the fiat of British court. He was not shorn of the legal title as a sovereign. The prosecutor himself referred to him as 'the titular majesty' of Delhi.

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8 Lord Hewart in *R* v. *Sussex Justices Ex p McCarthy* [1924] 1 KB 256, 259.

9 M.P. Singh, *supra* note 7 at 43.

10 A.G. Noorani, *Indian Political Trials 1775 – 1947* Bahadur Shah Zafar (Oxford University Press, 2007).

11 *Ibid*.

The British recognized the *de jure* status of the emperor when they agreed to pay an annual sum, also known as *peshkash* to him. Additionally, coins were also struck in the name of the emperor till 1835.

It can be argued, relying on Austin's definition of sovereignty, that sovereignty necessarily entails that the sovereign is not in a habit of obedience to a determinate human superior.[12] Therefore, Bahadur Shah Zafar might not qualify as a sovereign. But such an argument is misplaced. In accordance with the international law existing at that point of time, a sovereign even under the protection of the British was afforded the sovereign rights such as sovereign immunity.[13] It has been unequivocally stated by Wills J that, a sovereign while submitting to foreign protection remains an independent sovereign.[14] The sovereign has bound itself not to exercise certain sovereign rights except in a particular way.[15]

Secondly, procedure of fair trial was not followed, as is evident from the prosecutor's statements like, "scope of the investigation is not in any way confined by the observance of technicalities, such as belong to a more formal and to a regular trial"[16]; "a full investigation is the great desideratum, and that such cannot be perfected, if evidence, credible in itself, be rejected merely because some unimportant formula cannot be complied with."[17]

Finally, the Military Commission that carried out the trial of the emperor was in fact not empowered to conduct a criminal trial. The commission was established under Act XIV of 1857 which did not authorize military commissions to conduct an inquiry of such a nature that it did in this case.[18]

This case is a perfect example of rule by law. The legal form was used as an excuse for wielding naked power to further the interests of the empire.

Bal Gangadhar Tilak's trials (1897/1908/1916)

The trials of Bal Gangadhar Tilak[19] are examples where the rule by law was glorified. Tilak was tried not once but thrice for sedition in 1897, 1908 and 1916.

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12 J.G. Murphy and J. L. Coleman, *Philosophy of Law* 23 (Oxford University Press, 1984).

13 Lucinda Bell, *The 1858 Trial of the Mughal Emperor Bahadur Shah Zafar for Crimes against the State* 196 (2004) (Ph.D. Thesis, Faculty of Law, The University of Melbourne).

14 *Mighee*l v. *Sultan of Jahore* (1894) 1 QB 149.

15 *Ibid.*

16 Victor's Trial, *supra* note 10.

17 *Ibid.*

18 *Ibid*.

19 *Emperor* v. *Bal Gangadhar Tilak*, 1908(10) BLR 848.

Tilak's first trial began in 1897. The government claimed that some of the speeches delivered by him instigated the murder of two British officers. Tilak was convicted of the charge but released in 1898 due to the efforts of famous figures such as Max Weber *etc*.[20] Once the charges were framed against Tilak, the British Government transferred and promoted James Strachey J, who was known for his anti-Indian bias. He was asked to preside over such an important case despite being the youngest member of the bench.[21]

The second trial took place in 1908. He was arrested for the publication of two articles in support of two young men of Bengal who were given death sentence following their act of hurling a bomb which had killed two English women. Tilak was charged and convicted for sedition under section 124A of the Indian Penal Code (IPC) which prohibited one from bringing or attempting to bring into hatred or contempt or exciting or attempting to excite disaffection against the 'government established by law' in British India. Tilak was ultimately sentenced to six years rigorous imprisonment with transportation.[22]

The third trial took place in 1916 on the allegation that he was disseminating seditious information. Mohammad Ali Jinnah led the defence for Tilak. It was skillfully argued that his words had attacked the bureaucracy and not the government. The judge in the case held that his words did not amount to sedition.[23]

Savarkar's trial (1910)

The British frequently used section 124A of the IPC to imprison or deport revolutionaries. The trial of Vinayak Damodar Savarkar provides a good example of this. Briefly, the facts of the case included the police raiding Savarkar's house and finding various incriminating articles, primary among which was a collection of 18 poems in the eighth and ninth booklets of *Laghu Abhinav Bharat Mala*. These booklets were published by Savarkar in Nasik on March 18, 1907.

The chief charge against him was that of sedition under section 124A of the IPC. The government argued that these poems preached treason and exhorted rebellion

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20 A. G. Noorani, *supra* note 10.

21 *Ibid*.

22 *Supra* note 19 at 903.

23 Lawrence Liang, "We are all Seditious Now, but When Did This Start?", *available at:* http://kafila.org/2010/12/06/we-are-all-seditious-now-but-when-did-this-start/ (last visited on Feb. 20, 2017).

against the King.[24] Savarkar took various defences, even claiming that the 'evidence' was planted in his house by the police. Further, he also contended that the poems were meant to be recited on festivities and were true account of historical events. But the judge, oblivious to his claims, sentenced Savarkar to transportation for life.

Mahatma Gandhi's trial (1922)

Mahatma Gandhi was booked under section 124A of IPC for "bringing or attempting to excite disaffection towards His Majesty's Government established by law in British India," and thereby committing offence punishable under it. The charges had been levelled against him on the basis of two articles that were published in his paper, 'Young India' in 1922. The political situation around the time was highly charged. The *Chauri Chaura* incident had happened in which a number of policemen at Agra were burnt alive, due to which the non-cooperation movement was called off.

In the trial, Mahatma Gandhi pleaded guilty to the charges and delivered a historic statement wherein he stated:[25]

> [T]he law itself in this country has been used to serve the foreign exploiter. My unbiased examination of the Punjab Marital Law cases has led me to believe that at least ninety-five per cent of convictions were wholly bad. My experience of political cases in India leads me to the conclusion, in nine out of every ten, the condemned men were totally innocent. Their crime consisted in the love of their country. In ninety nine cases out of hundred, justice has been denied to Indians as against Europeans in the courts of India. This is not an exaggerated picture. It is the experience of almost every Indian who has had anything to do with such cases. In my opinion, the administration of the law is thus prostituted, consciously or unconsciously, for the benefit of the exploiter.

Further, Gandhi stated that section 124A is the prince among the political sections of the IPC designed to suppress the liberty of the citizen. If one were to study the statement of the judge who tried Gandhi, it would be abundantly clear that he felt that he was duty bound by the law to hand down a sentence. In his closing line, the judge famously remarked that nobody would be better pleased than him, if the government

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24 D.N. Gokhale, *Krantiveer Babarao Savarkar* 343 (Shrividya Prakashan, Pune, 1979).

25 "Statement in the Great Trial of 1922," *available at*: http://pdcrodas.webs.ull.es/anglo/GandhiStatementInTheGreatTrialOf1922.pdf (last visited on Feb. 19, 2017).

were to reduce the period of incarceration and release Gandhi.[26] The lawyer prosecuting Gandhi had quipped that even he was affected by the atmosphere of the court during the sentence.[27]

As Mahatma Gandhi articulated, British law itself was tilted towards the ruling British Government. Indians were subjected to all kinds of torture in the name of rule by law. There was no freedom of the press or freedom of speech and expression.

With English education in bigger cities, the British nurtured and developed a class of professionals to serve the needs of the Empire. Along with the European education system also came its ideas of political liberty, freedom, individualism and other values of the enlightenment era. In this backdrop, the British were unable to sustain a system which Indians found discriminatory and deeply humiliating. Consequently, a gradual political process evolved with some piecemeal reforms by Morley – Minto in 1909; Montague – Chelmsford in 1919 and then the Government of India Act, 1935.

III Rule *of* law

With the independence of the country on August 15, 1947, colonial rule ended, but imperial rule of the state continued. While the colonial era was based on a system of rule *by* law, the handing of power to the Indians led to a transition to rule *of* law regime. This rule of law was not merely a colonial inheritance. It had two strands in its genesis: one was the colonial strand, and the other was the strand derived from the Indian freedom movement. The latter had continued through all the peasant revolts across the 19th century, through the Indian war of independence in 1857, through constitutional pleadings of the Indian National Congress in its early phase, followed by its emphasis on *poorna swaraj* and other political ideologies starting from Tilak and followed by Mahatma Gandhi. India's struggle for independence became a common rallying point in India's search for its *satya* and *swaraj*, brought about by peaceful non-cooperation. In this, the Indian ethos of *bhakti* and *sufi* as the basis of peace, brotherhood, love and compassion showed the path.

The 'rule of law' regime in India post-independence was in tune with Dicey's conception of the rule of law.[28] The Constitution of India ensured the absolute

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26 Sir Thomas Strangman, "Indian Courts and Characters", *available at:* http://bombayhighcourt.nic.in/libweb/historicalcases/cases/TRIAL_OF__MAHATMA_GANDHI-1922.html(last visited on Feb. 20, 2017).

27 *Ibid*.

28 A.V. Dicey, *Introduction to the study of Law and Constitution* (Macmillian & Co., London, 1885).

predominance of law and equality before the law. However, a concern that repeatedly arose in the early years of the Constitution was whether law needed to be just for it to be termed 'law' under the Constitution. A related question was whether the Constitution was the sole repository of the rule of law, such that the state could take away one's life in the absence of the Constitution of India. As discussed through the examples below, in the initial years, the court answered the first question in the negative and the second in the affirmative. This implied that all that the Constitution guaranteed was rule by law, not a just rule.

A.K. Gopalan v. *State of Madras* (1950)

In *A.K. Gopalan*,[29] the question before the Supreme Court was whether detention can be justified merely on the ground that it has been carried out "according to the procedure established by law," as stipulated in article 21 of the Constitution, or, as the petitioner argued, that procedure be valid only if it complied with principles of natural justice such as giving a hearing to the affected person. Essentially the question was, whether the term 'law' encompasses such fundamental principles?

The court took a narrow view of article 21 and refused to incorporate any such principles[30] within article 21 thereby, restricting it to enacted law.[31] In fact, the court relied on the presence of the term 'established' as against 'due' (due process of law in the American Constitution) to strengthen its conclusion that the aspect of reasonability of law has been kept out of the Indian Constitution.[32]

ADM Jabalpur v. *Shivakant Shukla* (1976)

The question presented to the court was whether high court can entertain a writ of *habeas corpus* filed by a person challenging his detention despite the presidential proclamation of emergency which resulted in suspension of rights of a person to approach the courts in order to effectuate the rights granted in articles 14, 21 and 22 of the Constitution.[33]

The majority held that the doors of the high court were closed as a result of the proclamation. Further, the court stated that the sole repository of the right to life and personal liberty is article 21 and there is no rule of law beyond it.[34] This would mean

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29 *A. K. Gopalan* v. *State of Madras*, AIR 1950 SC 27.

30 *Id.*, paras 18 and 241.

31 *Id.*, para 18.

32 *Id.*, para 19.

33 *ADM Jabalpur* v. *Shivkant Shukla*, AIR 1976 SC 1207.

34 *Id.*, para 58.

that in the absence of article 21, the state is empowered to take the life of a person at will. This statement was also logically deduced by Niren De, the then Attorney General of India, in response to a question posed by Khanna J.[35] Bhagwati J who formed a part of the majority in *ADM Jabalpur*, has recently apologised for his decision and admitted that it was indeed a mistake.[36]

The mistake was corrected shortly afterwards, when the court recognized that the Constitution guarantees not merely rule of law, but the rule of justice. As a result, the court held that a law which is not just, fair, and reasonable, is invalid under the Constitution. Thus, began a new phase in Indian constitutional jurisprudence.

IV Rule of *justice*

The shift from rule of law to rule of justice started with *Maneka Gandhi* v. *Union of India*.[37] In this case, the petitioner's passport was impounded by the government and no reasons were given for such impoundment. Thereupon, the petitioner filed a writ in the Supreme Court challenging the action of the government. The court overruled *A. K. Gopalan* and held that article 21 provides that denial of life or liberty can take place through any procedure established by any law, but such procedure and law should itself be just, fair and reasonable.[38] Thus, the substance of law was as crucial to the law's constitutionality, as the form. Interestingly, three judges of the Supreme Court who were a part of the majority in *ADM Jabalpur* delivered the *Maneka Gandhi* judgment, almost as if to atone for the blunder committed two years ago.

The *Maneka Gandhi* decision exemplifies the beginning of the phase of *rule of justice*. The Supreme Court itself recognized that it had become "an arena of legal quibbling for men with long purses."[39] But post *Maneka,* the court came to be identified as the "last resort for the oppressed and the bewildered."[40]

The shift had actually started in 1973 itself with *Kesavananda Bharathi*,[41] where the court propounded the basic structure doctrine and held that the Constitution is founded

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35 Jos. Peter D 'Souza "When the Supreme Court Struck Down the *Habeas* Corpus" *PUCL Bulletin* (June 2011), *available at*: http://www.pucl.org/reports/National/2001/habeascorpus.htm (last visited on Feb.19, 2017).

36 Shanmugham D. Jayan, "A Chief Justice of India says "I am sorry" but 30 years too late", *available at*:http://www.firstpost.com/politics/a-chief-justice-of-india-says-i-am-sorry-but-thirty-years-too-late-85799.html, (last visited on Feb. 19, 2015).

37 *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.

38 *Ibid*.

39 *Kesavananda Bharthi* v. *State of Kerala* (1973) 4 SCC 225 at 947.

40 *State of Rajasthan* v. *Union of India* (1977) 3 SCC 634 (per Goswami J); *supra* note 2 at 107.

41 *Supra* note 39.

on certain fundamental principles.[42] The court also gave co-equal importance to principles of socio-economic justice, and held that parts III and IV of the Constitution had to be read in harmony. Moving away from a restricted understanding of rights as only imposing negative obligations upon the state, the court recognized that the state is bound (though in a judicially unenforceable manner) to provide socio-economic justice to citizens.[43] This approach further crystallized in *Minerva Mills* v. *Union of India.*[44]

But the watershed moment of the Indian judiciary came in 1978 with the decision in *Maneka Gandhi*. The progress is still on. Subsequent cases like *Bandhua Mukti Morcha,*[45]and *Vishakha* v. *State of Rajasthan*[46](to name a few) have continued the trend. However, as Frost would put it, there are miles to go before we can sleep!

Another development along the same axis was the relaxation of the *locus standi* requirement for the enforcement of fundamental rights. In common law, *locus standi* to approach the court was with the person whose rights had been infringed. This stand was diluted by the apex court to make room for those cases where someone else took it upon themselves to address the wrongs done to others. This was the beginning of the public interest litigation (PIL) movement. PIL means "a legal action initiated in a court of law for the enforcement of public interest or general interest in which public or class or class of community have pecuniary interest or some interest by which their legal right or liabilities are affected."[47]

The apex court in *Fertilizer Corporation Kamgar Union* v. *Union of India,*[48] advocated the liberalization of the rule of *locus standi* in the following words:[49]

> [W]e have no doubt that in a competition between courts and streets as dispenser of justice, the rule of law must win the aggrieved person for the law court and wean him from the lawless street. In simple terms, *locus standi* must be liberalised to meet the challenges of the times. *Ubi jus ibi remedium* must be enlarged to embrace all interests of public-minded citizens or organisations with serious concern for conservation of public

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42 *Ibid.*

43 *Ibid.*

44 *Minerva Mills* v. *Union of India*, AIR 1980 SC 1789.

45 *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802.

46 *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011.

47 Harish Ramaswamy (ed.), *Karnataka Government and Politics* 101 (Concept Publishing Co., Delhi, 2007)

48 *Fertilizer Corporation Kamgar Union* v. *Union of India*, AIR 1981 SC 344.

49 *Id.*, para 38.

resources and the direction and correction of public power so as to promote justice in its true facets.

Apart from dilution of *locus standi* requirements, the growth of PIL has three important aspects:

a. The procedural requirements of submitting the petition in a particular format and other technical modalities were set aside in favour of rendering substantive justice. For instance, the *Dehradun Valley* litigation[50] which resulted in the closure of limestone quarries affecting the environment was instituted based on a letter received by the court from the Rural Litigation and Entitlement Kendra. Similarly, in *D.K. Basu* v. *State of West Bengal*,[51] the court acted upon a letter petition which drew attention to repeated cases of custodial deaths in West Bengal, and issued extensive guidelines on the conduct of arrests and the rights of arrestees.

b. The relief granted in PIL cases is not limited to the pleadings of the parties. In the *Dehradun Valley* case,[52] the court directed the Union Government to constitute a committee to rehabilitate those who were displaced by the order of the court restricting mining activities in the Mussorrie–Dehradun belt. Such a relief was never sought by any party. The court provided the relief *suomotu*.

c. PIL matters have been coupled with an expansive interpretation of article 21, which has resulted in the incorporation of many directive principles of state policy (DPSP) as fundamental rights under article 21. Examples include the right to free legal aid in *Hussainara Khatoon* v. *State of Bihar*,[53] and the right to education in *Unni Krishnan* v. *State of Andhra Pradesh*.[54] Such understanding has also enabled the court to deal with the dynamic nature of issues that a vibrant society like India faces.

Upendra Baxi classifies such cases as 'social action litigation' (SAL) as opposed to PIL. He argues that the term PIL, borrowed from America, represents a distinctive phase of socio-legal development for which there is no counterpart in India.[55] Examples of SAL include the following:

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50 *Rural Litigation and Entitlement Kendra* v. *State of U.P.*, AIR 1988 SC 2187.

51 *D. K. Basu* v. *State of West Bengal*, AIR 1997 SC 610.

52 *Supra* note 50.

53 *Hussainara Khatoon* v. *Home Secretary, Bihar*, AIR 1979 SC 1377.

54 *Unnikrishnan PJ* v. *State of Andhra Pradhesh* (1993) 4 SCC 111.

55 *Supra* note 2 at 107- 108.

Environmental jurisprudence

In *Dehradun Valley* case[56] the apex court directed to stop mining operations adversely affecting the environment. *M.C. Mehta* v. *Union of India*,[57] held that air pollution violates the fundamental right to life guaranteed under article 21 of the Constitution and directed all commercial vehicles in Delhi to switch to compressed natural gas (CNG). In *Vellore Citizens' Welfare Forum* v. *Union of India*,[58] the Supreme Court directed the tanneries situated around river Palar in Vellore discharging toxic chemicals in the river to close down.

Bonded labour

The issue of bonded labour was addressed in the case of *Bandhua Mukti Morcha*, where the apex court held:[59]

> [T]he right to live with human dignity enshrined in article 21 derives its life breath from the directive principles of state policy and particularly clauses (e) and (f) of article 39 and articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner.

Rights of under-trial prisoners

The court considered the right to a speedy trial as a constitutional right of an under trial guaranteed to him/her by virtue of the reasonable procedure ingrained under article 21.[60] Further, the court opined that the absence of legal services to an accused person would not qualify as just procedure under article 21 and therefore, the provision of free legal services to the needy also formed the constitutional right of an accused.[61]

Gender equality

In the historic judgement of *National Legal Services Authority* v. *Union of India*,[62] the Supreme Court affirmed the constitutional rights and freedoms of transgender persons, including those who identify as third gender and those who identify as gender different from their sex assigned at birth.

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56 *Supra* note 50.

57 *M.C. Mehta* v. *Union of India*, AIR 2001 SC 1948.

58 *Vellore Citizens' Welfare Forum* v. *Union of India*, AIR 1996 SC 2715.

59 *Supra* note 45 at para 14.

60 *Supra* note 53 at para 10.

61 *Id.*, para 6.

62 *National Legal Services Authority* v. *Union of India*, AIR 2014 SC 1863.

The court has also addressed issues relating to equality of women. For example, sexual harassment of women at workplace was addressed by the Supreme Court on the basis of a PIL filed by Vishakha and other women's groups.[63] The guidelines formulated by the court on sexual harassment in this case laid the foundation for the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. In this case, the Supreme Court for the first time relied upon the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and held that "any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."[64]

This new era of access to justice has made our high courts and the Supreme Court of India more justice-oriented and people-friendly. With the decline of the reputation and legitimacy of political institutions, the judiciary has filled the vacuum. Judiciary is the backbone of Indian democracy and is a symbol of dignity and excellence. Their contribution in increasing access to justice is singular and a model to be followed by judiciaries elsewhere as well. On some issues they even took up cases *suomoto* and have been a pillar in upholding the constitutional principles enshrined by the founding fathers. In the recent judgment of *Shatrughan Chauhan,*[65] the Supreme Court has again lived up to its moral and judicial conviction by holding that an inordinate delay in the rejection of mercy petitions of death row convicts amounted to torture and that it is a sufficient basis to commute a sentence of death to life imprisonment. These judgments prove how the moment of *rule of justice* has arrived and how we need to approach our institutions with greater confidence and in a positive light.

V Conclusion

Having said this, there is still scope for improvement. Issues of police reforms, more effective implementation of DPSP norms, strengthening of the National Human Rights Commission (NHRC), implementation of its recommendations, and more power to the various national commissions will go a long way in furthering and deepening the *rule of justice* in India. Further, there have been instances where PILs have been misused for personal interests. Recently, the Supreme Court while dismissing a PIL filed against the appointment of former SEBI Chairperson, U.K. Sinha, stated that it was a case of private interest litigation, masquerading as a public interest one.[66] Examples can also be cited of difficult cases where the court has faltered to grapple with vexing issues.

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63 *Supra* note 46.

64 *Id.,* para 7.

65 *Shatrughan Chauhan* v. *Union of India* (2014) 3 SCC 1.

66 *Arun Kumar Agrawal* v. *Union of India*, 2013 (13) SCALE 442.

A stark example is *Suresh Kumar Koushal* v. *Naz Foundation*[67] where the Supreme Court overturned the much applauded judgment of the Delhi High Court in *Naz Foundation* v. *Govt. of NCT Delhi*[68] which had decriminalised consensual sexual acts of adults. The shallowness of the reasoning of the court can be judged from the fact that it cited the limited number of prosecutions under section 377 and the 'miniscule' population of lesbians, gays, bisexuals, transgenders *etc.* as reasons for not declaring the provision unconstitutional.[69]

In another case, the court held the Armed Forces Special Powers Act, 1958, to be constitutional.[70] A reading of the judgment would indicate the extreme deference paid to the laws enacted by state in matters of national security. In this case too, the court failed to uphold the ideals of justice against the interests of the state.

Similarly, in *Narmada Bachao Andolan* v. *Union of India,*[71] the court ordered for relief and rehabilitation of oustees by grant of land while giving a go ahead to the dam. While the court awarded the rehabilitation of the oustees, the unavailability of land for the purposes of rehabilitation[72] ensured the relief was rendered imaginary.

These are but some examples to show that the move from rule of law to rule of justice is uneven and incomplete. While great strides have been made, much remains to be done to achieve the lofty ideals of social transformation enshrined in the Constitution and also to meet the mandate of article 142 of the Constitution of India to do "complete justice".

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67 *Suresh Kumar Kaushal* v. *Naz Foundation*, AIR 2014 SC 563.

68 (2009) 160 DLT 277 (Del).

69 *Id.*, para 43.

70 *Naga People's Movement of Human Rights* v. *Union of India*, AIR 1998 SC 431.

71 *Narmada Bachao Andolan* v. *Union of India*, AIR 2000 SC 3751.

72 "No Land for Oustees: People Protest Against the Unjust Submergence and Displacement", *available at:* http://www.narmada.org/nba-press-releases/november-2000/long.march.starts.html (last visited on Feb. 21, 2017).

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