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EDITORIAL TEAM

EDITORIAL

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IS AADHAAR A BREACH OF PRIVACY?

By- AYUSHI SRIVASTAVA

INTRODUCTION

- **Aadhaar** is very important for every Indian citizen as it is one of the most important identity card issued by the Government.
- **Aadhaar** is the most trusted and widely held unique identification system available in India today.
- **Aadhaar** empowers 119 crore Indians with a credible identity and inspires more trust and confidence between person to person and person to a system than any other identity document in the country.
- **Aadhaar** project is said to be one of the significant project in India to bring the Universal trend of digital innovation.
- **Aadhaar** project was introduced under scheme "**UIDAI**" (Unique Identification Authority of India) by UPA (United Progressive Alliance) government in year 2009.
- **UIDAI** – notified by the Planning Commission on 28 Jan, 2009. **UIDAI** –
- Regulatory authority
- Issue **Aadhaar** number
- Update resident information
- Ensure proper law
- Nandan Nilekani , co-founder of Infosys was appointed as Chairman of **Aadhaar** project.
- Launched on 28 Jan 2009. Control under the Ministry of Electronics & Technology.
- Features-
    - Demographic feature- Name of the citizen, Father's & Mother's name, Date of Birth, Sex, Address of citizen.
    - Biometric feature- Photographs, Fingerprints, Iris(eye).
- **Aadhaar** number- 12 digit random numbers issued by **UIDAI** to the citizens of India after proper verification perform by the authorities.
    - Eg- 2657 8664 4553 called UID (Unique Identification).
- **Aadhaar** allow individual to enrol for only once & only one **Aadhaar** shall be generated to achieve uniqueness.
- **Aadhaar** no. verification done online & cost effective way.

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- Individual resident of India can enrol for **Aadhaar** .
- In foreign also with UID, citizens can be easily identify by their Indian Identity.
- **Aadhaar** based on 3 principles-
- Minimal information
- Optimal ignorance
- Federated database
- Benefits -
    - As an identifier
    - Prevention against fake identities
    - Prevention of Black money
    - Beneficiary Identification
    - High visibility of information

➢ OTHER IMPORTANT BENEFITS OF AADHAAR IN RECENT TIME-

- Enabled record savings for the government. This money is being used for providing better **Aadhaar** based subsidy transfers have ensured that people are getting their entire entitled govt. Benefits.
- No fake identities possible with **Aadhaar** based verification of databases.
- More benefits to the entitled saving of public money.
- **Aadhaar** helping identify duplicates in the system.
- Countries around the world are interested in implementing an **Aadhaar** like initiative to help their people to access schemes easily. Sri Lanka is keen to introduce an **Aadhaar** like initiative.
- **Aadhaar** based authentication will ensure the identity of both buyers and sellers and helps to keep check on benami properties. **Aadhaar** to be big weapon against benami properties: PM Narendra Modi.
- **Aadhaar** has reunited lost children with their loved ones, bringing joy to their families. About 500 missing children traced through **Aadhaar** : **UIDAI**
- **Aadhaar** based subsidy transfers have services to the people.
- LPG subsidy distribution became more efficient with **Aadhaar**, Direct accounts credits led to savings for both the government and the prople as well as elimination of black marketers
- **Aadhaar** verification of each bank account will ensure that no one is able to use fake account for money laundering or illegal activities. **Aadhaar** to help catch money launderers, fake account holders: Ravi Shankar Prasad

- **Aadhaar** – PAN linking enabled identification of the fale/duplicate PANs which were being used to evade taxes.

➢ ISSUES WITH AADHAAR -

- Violation of rights- It was argued that the **UIDAI** might share the biometric information of the people with the other government agencies and thus would violate people's right to privacy.

- Issues with sharing information collected under **Aadhaar** - According to the provisions in the **Aadhaar** Act, 2016 with regard to the protection of identity information and authentication records may be affected by recent verdict by Supreme Court that Right to privacy is a Fundamental right.

- Question of Legal Backing- Current legal backing of **Aadhaar** is via a money bill. The **Aadhaar** Act of 2016 came into force in 2016 but this is now challenged in Supreme Court.

- Discretionary powers of **UIDAI**- The Act empowers the UID authority to specify demographic information that may be collected. The only restriction imposed on the authority
    - Is that it shall not record information pertaining to the race, religion, caste, language, records of entitlements income or health of the individual.

- Time period for maintaining records- The bill does not specify the maximum duration for which authentication records may be stored.

- Potential to profile individual- The act does not specifically prohibit law enforcement and intelligence agencies from using the **Aadhaar** number as a link across various datasets in order to recognise patterns of behaviour.

➢ GOVERNMENT INITIATIVES OF CONNECTING AADHAAR -

- Government has made **Aadhaar** mandatory for the purpose of opening bank accounts as well as for carrying out any financial transactions.
- Government had asked to link **Aadhaar** numbers to their bank accounts by DEC 31, 2017.
- Government made **Aadhaar** compulsory for filing of income tax returns as well as for applications for PAN from JULY 1, 2017.
- **Aadhaar** to be linked with caste, domicile certificate to curb harassment faced by citizens to obtain these certificates.
- Helps in the timely grant of scholarship to students belonging to Scheduled Castes (SCs) and Scheduled Tribes (STs) without any delay.

- The Unique Identification Authority of India (**UIDAI**) has launched 'm-**Aadhaar**', a new mobile application for syncing **Aadhaar** data on mobile phone. The application allows users to have their **Aadhaar** profile on their mobile as a quick and convenient identification proof.
- BHIM-**Aadhaar** or BHIM app has been launched for making digital payments using the **Aadhaar** platform. It enables the citizens to make digital transaction in a much easier way.

RIGHT TO PRIVACY-

- **Origin**- The origin of the right to privacy can be traced back in 19th century.
- In 1890, Samuel D. Warren and Louis D. Brande published an article on "The Right to Privacy" which postulated a general common law right of privacy.
- After this publication, in U.S. Court hundreds of cases were presented in the range of privacy issue.
- **Art.21 of the constitution Part-III**-

  "No person shall be deprived of his life or personal liberty except according to procedure established by law"

- It is a concept in which one's personal information is protected from public scrutiny.
- Art.21 is very essential for individual to ensure a dignified & meaningful life.
- A fundamental right which protects the inner sphere of the individual from State.
- SC has focused in Art.21 towards the improvement of quality of life & to denote people about their bundle of rights available to them.

- Art.21- It was concluded that 'life' do not merely means 'animal existence' but to live with 'human dignity.'

- **BLACKSTONE**- "The power of locomotion, or moving of one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law."

- **Ram Jethmalani and others V. Union of India-** "Right to privacy is an integral part of right to life, a cherished constitutional value and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner."
- "Privacy" has to open the door when "Public interest" knocks the door.

➢ RIGHT TO PRIVACY- INTERNATIONAL CONVENTIONS

- Internationally the right to privacy has been protected in a number of conventions.
- Right to privacy is integral part of the Universal Declaration of Human Rights & International Covenant on Civil & Political Rights, 1966.
- "The natural dignity of Man"- UN Charter 1945, Universal Declaration of Human Rights 1948 & International Covenant on Civil & Political Rights 1966.
- **Universal Declaration of Human Rights, 1948 under Art. 12** provide that:
  - "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."
- UDHR protects any arbitrary interference from the State to a person's right to privacy.
- International Covenant on Civil and Political Rights, 1976 Art.17 imposes the State to ensure that individuals are protected by law against any unlawful or arbitrary interference.
- Art.16 of the Convention on the Rights of the Child (CRC) provides protection to a minor from any unlawful interference to his/her right to privacy. But there are exceptions also when the law on privacy does not apply even in case of a minor.
- Art.8 of European Convention on Human Rights-

  "Right to respect for private & family life."

EVOLUTION OF RIGHT TO PRIVACY IN INDIA THROUGH JUDICIAL JUDGEMENTS-

- **M.P. SHARMA V. SATISH CHANDRA 1954**- 8 Judges Bench of Honourable SC held that,
  - Right to Privacy is not a fundamental right.

- **KHARAK SINGH'S CASE 1964**- 6 Judges Bench were the petitioner challenged U.P. Police on ground of constantly supervising him which restricted & violated his privacy under Art.19 & 21.Judges of SC held that Right to Privacy cannot be guaranteed under constitution.

1. M.P. SHARMA V. SATISH CHANDRA, 1954 AIR 300, 1954 SCR 1077.
2. KHARAK SINGH'S CASE 1964, AIR 1295, 1964 SCR (1) 332

- **GOVIND V. STATE OF M.P**. - In this case the apex court finally recognised Right to Privacy under Art. 19 & 21 of the constitution but later a note was added that it is not absolute right & reasonable restrictions can be imposed.

- **R. RAJGOPAL V. STATE OF TAMIL NADU 1994**- In this case, accused had written his autobiography in which he has revealed his relation with some of the officials of public. SC held that to publish any information without the consent of the person on whom it is mentioned is violation of Art.21.

> 'Right to Privacy is an integral part of the fundamental right to life enshrined under Art.21 of the Constitution.'

EXTENSION OF ARTICLE 21 FOR PRISONERS-

- Protection to the under trail prisoners.
- If no trail launched for person for years. (Case- Pahadia V. State of Bihar)
- Prisoners subjected to ill-treatment.
- Free legal aid to poor accused. (Case- Khatoon V. State of Bihar)
- Prisoners' right to publish books. (Case- State of Maharastra V. Panduranga)

HISTORICAL CASES RELATED TO RIGHT TO PRIVACY-

SMT. MANEKA GANDHI V. UOI 1978-

- SC Bench of 7 Judges held- 'Personal Liberty' under Art.21 covers variety of rights & status of Fundamental Rights.
- In this case, confinement of the passport was questioned. Later, it was held that the denial of passport may affect the right to profession abroad etc. Hence, Passport was issued to the petitioner.
- As per Art.21 this restricted petitioners' "Right of Movement".
- The law & procedure authorising when the interfering with personal liberty & right of privacy must be- right, just & fair and not arbitrary, fanciful & harsh.

3. GOVIND V. STATE OF M.P, 1975 AIR 1378, 1975 SCR (3) 946
4. R. RAJGOPAL V. STATE OF TAMIL NADU 1994, 1995 AIR 264, 1994 SCC (6) 632
5. Pahadia V. State of Bihar, Writ Petition (crl.) 5943 of 1980
6. Khatoon V. State of Bihar, 1979 AIR 1369, 1979 SCR (3) 532
7. State of Maharastra V. Panduranga,1966 AIR 424, 1966 SCR (1) 702
8. Maneka Gandhi v. Union of India AIR 1978 SC 594

NAZ FOUNDATION CASE 2009- Delhi HC

- It came out to be landmark decision on consensual homosexuality.
- Examination of Sec. 377 of IPC & Art. 14, 19&21 of constitution took place.
- Right to Privacy-
- "Private space must be provided to man in whom he may become free to be himself"

PEOPLE's UNION FOR CIVIL LIBERTIES (PUCL) V. UNION OF INDIA 1996-

- Public Interest Litigation filed protesting against the phone tapping system of politicians by CBI.
- In this case, it was held that Right to Privacy is inherited under Art. 21.

SUPTD, CENTRAL JAIL V. CHARULATA JOSHI 1999

- Issue was regarding the interviewing Murder Under trial prisoner.
- It was held that right of freedom of press was subject to the personal right of the prisoner in regard to volunteer information and contending to its publication.
- In this case, other rights related to the jail authorities also recognised.

NEERA MATHUR V. LIC 1991

- In this case, the petitioner contested of a wrongful termination of her after she returned from maternity leave.
- Respondent gave the reason of it that she had withheld information about her pregnancy in questionnaire which she has filled at the time of her appointment.
- SC founded that process requires females to provide information about the date of their menstrual cycle and past pregnancies.
- Court declared that, the question to be invasion of privacy and court directed the LIC to delete such columns from its future questionnaires.

9 NAZ FOUNDATION CASE 2009, WP(C) No.7455/2001
10 PUCL V. UNION OF INDIA 1996, AIR 1997 SC 568
11 SUPTD, CENTRAL JAIL V. CHARULATA JOSHI 1999, 63 (1996) DLT 90
12 NEERA MATHUR V. LIC , 1992 AIR 392

PRIVACY BILL, 2011-

- Bill was drafted on 19th April, 2011 which aims to create a statutory right to privacy in India.
- The Government of India decided to bring out a legislation that will provide protection to individuals in case their privacy is breached through unlawful means.
- Aim- Right to privacy to citizens of India.
- Regulate & maintain use of personal information.
- Punishment to be given for violation of such rights.

Exceptions to the Right to Privacy in bill of 2011-

- Sovereignty, integrity and security of India, strategic, scientific or economic interest of the State.
- Preventing incitement to the commission of any offence.
- If preventing done in order of public disorder or detention of any crime.
- Protection of rights and freedom of others.
- In the interest of friendly relations with foreign State.
- Any other purpose specifically mentioned in the Act.

RIGHT TO PRIVACY AS FUNDAMENTAL RIGHT-

- A 9-judge bench of the Supreme Court on 24 August 2017 made a landmark judgement that Indian citizens have "Privacy as their Fundamental right" protected under Art.21 of the Indian Constitution.
- Judgment was given in the case – Justice K.S. Puttaswamy V. Union of India.
- Supreme Court bench headed by Cheif Justice- J.S. Khehar.
- It overruled the previous judgement in the case of M.P.Sharma &others V. Satish Chandra 1954 and Kharak Singh V. The State of UP & others 1962.
- **Bench of 9 Judges –**

Justice Khehar, Justice Jasti Chelameshwar, Justice S.A. Bobde, Justice R.K. Agarwal, Justice Rohinton Nariman, Justice A.M. Sapre, Justice D.Y. Chandrachud, Justice S.K. Kaul & Justice Abdul Nazeer.

13. Justice K.S. Puttaswamy V. Union of Indi, WRIT PETITION (CIVIL) NO 494 OF 2012

POSITIVE & NEGATIVE EFFECT OF THE JUDGEMENT-

Positive effect-

- Will maintain dignity of the individual as per the Preamble of our Constitution.
- Provide security against the Government when their policy tries to encroach citizen's privacy.
- Provide encouragement to Right to personal liberty under Art.21 of the Constitution.

Negative effect-

- It may hamper the performance of very important welfare schemes of India like **Aadhaar** & Direct Benefits Transfer.
- It may create hindrance in development programs.
- It may bound the officials and other police authorities who are involved in the investigation process & their work is to collect personal information about particular person.

RECOLLECTING HISTORY-

- 2012- Former H.C. Judge Justice K.S. Puttaswamy was first to file petition challenging **Aadhaar** .
- He was of the view that **Aadhaar** violates "Right to Privacy" & was having no legislative backing.
- Government was of the view that in Constitution there is no absolute fundamental right to privacy.
- 2015- 3 judge bench hearing matter ordered that the apex court should decide this question.
- Oct,2015 – SC Constitutional bench led by H.L. Dattu – "**Aadhaar** card purely voluntary & could not be made mandatory"
- On 24 Aug,2017- Unanimously landmark judgement was made.

SOME VIEWS OF FAMOUS PEOPLE REGARDING THIS ISSUE-

- Kapil Sibal- "Privacy is a Constitutional right but not an absolute one"
- Justice J.S. Khehar- "If what you have been asked to disclose bothers you, then it infringes your right to privacy"
- Justice S.A. Bobde-"If man has to die with dignity, he has to have some privacy"

AADHAAR CARD ACT OF 2016-

- Passed by the Lok Sabha in form of a voice note.
- It was introduced as Money Bill.
- Passed on- 11 March 2016
- Aim- Giving statutory backing for transfer of subsidies & providing benefits to targeted people by assigning them **Aadhaar** number (UIN).
- **Aadhaar** is legally backed by the **Aadhaar** Act, 2016, Covers-
    - Privacy protection
    - Collection of limitation
    - Sharing restrictions
- Section 3.1 of the **Aadhaar** Act 2016 – "Only a resident shall be entitled to obtain an **Aadhaar** number". Non-Resident Indians (NRIs) are not eligible to get **Aadhaar** .

NRIs / OCIs are advised not to give false declaration for **Aadhaar** Enrolment

ISSUE RELATING TO AADHAAR & ITS PRIVACY-

- **Aadhaar** requires full information of personal data of a person this has created some controversy because-
    - Inevitable danger of data theft or privacy hack.
    - Biometric details could be misused.
    - Cyber security is not very strong in India.
    - Lacking of statutory back up (before **Aadhaar** Card Act of 2016).

GOVERNMENT STEPS TOWARDS THIS ISSUE-

- Strict law against any misadventure done to sensitive data.
- Independent data protection authority must be constituted.
- Steps should be taken to strengthen Cyber Security System.
- Proper line should be demarcated between a person's public & private life.

CASES RELATED TO AADHAAR -

- Jharkhand leaks- During the month of April in 2017, many of the **Aadhaar** card numbers were leaked by Jharkhand government sites. Officials were unaware of the fact that how the data were leaked. Later, **UIDAI** – shut down the website.
- M.S.Dhoni's details of **Aadhaar** got published- Incident took place in month of March of 2017. Details got leaked in the agency's twitter post.

- Software developer illegal access to **Aadhaar** database- Abhinav Shrivastav of Bangalore developed a mobile application & was accessing the **Aadhaar** database. He was arrested in August, 2017.

- Government website displaying **Aadhaar** -Incident took place in month of July were about 210 websites of Central & State government department found displaying personal details of **Aadhaar** card.

- Fraud cases related to **Aadhaar** - Andhra Bank witnessed 4 such cases where money was withdrawn from customers' accounts using their **Aadhaar** details without their knowledge.

Aadhaar details just for Rs 500- There was a media report which claimed that anonymous people were selling details of a billion **Aadhaar** card account holders over whatsapp group just for Rs 500.

- Illegal storing of **Aadhaar** data- In Feb,2017 **UIDAI** lodged criminal complaints against Axis Bank, Suvidha Infoserve and eMudhra for illegally storing and using **Aadhaar** data to impersonate people and carry out the transactions. They conducted multiple transactions using the same fingerprint, which implied that organisations are illegally storing biometric data on their servers.

STEPS TAKEN BY UIDAI AFTER AADHAAR PRIVACY ISSUE-

Aadhaar users to be verified using face authentication-

- The Unique Identification Authority of India (**UIDAI**) announced that there have been introduction of "Face authentication" feature for **Aadhaar** users by 1 July, 2018.
- It can be helpful for elder people or others who are facing issues with fingerprint authentication

.

Aadhaar to introduce "Virtual ID"-

- **UIDAI** shall implement the VID service by 1st March, 2018.
- To improve privacy (**UIDAI**) has announced a "Virtual ID"& restricted the "Know Your Customer" (KYC) service for data safety.
- For temporary purpose 16- digit Virtual ID, which will be randomly generated & can be used instead of actual **Aadhaar** number authentication

- Use of VID would be optional. The **Aadhaar** holder can choose to use **Aadhaar** number instead.
- VID will be a temporary number that shall be automatically revoked once the **Aadhaar** holder generates a new VID or after the validity of the current VID lapses (specified by **UIDAI** policy).
- Only **Aadhaar** holder would be able to generate the VID. No one else including the authentication agency can generate this VID on behalf of the **Aadhaar** holder.

DATA PROTECTION BILL-

- After a landmark judgement by the SC on Right to Privacy, Ravi Shankar Prasad, Minister of Electronics and Information Technology, has indicated that the Data Protection Law would be placed by the December.
- The Union Minister said that the new bill would be drafted keeping the recent right to privacy judgement in mind.
- The bill will be drafted taking key inputs from the former Supreme Court Judge, B.N. Srikrishna.

SUPREME COURT ON AADHAAR -

NEED TO MAINTAIN BALANCE BETWEEN CITIZENS' RIGHT TO PRIVACY AND NATIONAL INTEREST-

- Justice Chandrachud- "In the time of problems faced by the country due to terrorism and money laundering, and when the government is spending thousands of crores for the social welfare, a balance between state interest and citizens' privacy has to be maintained."
- Bench also remarked that the government authorities, private companies, could not use **Aadhaar** data to keep surveillance and track movements of citizens as the Centre was bound by the Constitution.
- Justice Chandrachud- "Everything that falls under liberty needs not necessarily fall under privacy. Privacy is a very small part of liberty".
- "Right to privacy as a amorphous right which is not absolute".
- Justice Chandrachud- "My right to cohabit with my wife or sexual orientation is a right to privacy, but your right to decide to which school your child will go is a matter of choice."

CONCLUSION-

The **Aadhaar** scheme has lived up to its objectives. Apart from the purpose of verification **Aadhaar** also helps individual to open new bank account, rail or bus ticket to be booked online, getting new mobile connections etc. But as per the recent news the threat towards the privacy of the **Aadhaar** needs to be sorted out. Global trends are important but the happening of the unsocial elements which can manipulate with someone's personal data is to disgrace the spirit of democracy in India. The issue should be dealt in the right perspective.

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Extradition

By – Himanshu Mishra

Introduction:-

The inability of a state to exercise its jurisdiction within in the territory of another State would seriously undermine the maintenance of law and order if there were no cooperation in the administration of justice. The awareness among national decision-makers of the social necessity of jurisdictional co-operation is illustrated by the widespread practice of returning a person who is accused or who has been convicted of a crime to the state in which the crime was committed. [1]

Meaning:-

Extradition is the delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed or to have been convicted of a crime by the State on whose territory the alleged criminal happens to be for the time being.[2]

Definition:-

According to Starke, "The term 'extradition' denotes the process where by under treaty or upon a basis of reciprocity one state surrenders to another State at its request a person accused or convicted of a criminal offence committed against the laws of the requesting State, such requesting State being competent ti try the alleged offender.

Under the International law, extradition is mostly a matter of bilateral treaty. In principle, each State considers it a right to give asylum to a foreign national.

States have always upheld their right to grant asylum to foreign individuals as an inference from their territorial supremacy, those cases where a treaty imposes an obligation to extradite them.[3]

Thus there is no universal rule of customary international law in existence imposing the duty of extradition.

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[1] Edward Collins International Law in a Changing World (1969), p. 216.

[2] L. Oppenheim, International Law, Vol. I, Eighth Edition, p. 696; See also Oppenheim's International Law, Ninth Edition, Vol. I, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group U.K. Ltd and Mrs. Tomoko Hudson, 1992, pp. 948-949.

[3] Oppenheim's International Law, note 2, p. 950.

Purpose:-

The purpose of extradition is to prevent criminals who flee from a jurisdiction to escape from punishment for a criminal offence they have been accused or convicted of.

The objective of extradition is to prevent crimes and punish the persons accused or convicted of crimes. If a person commits some crime in a country and to escape punishment flees from that country to another country, then through the process of extradition, such a person is brought to the jurisdiction of that country where he had committed the crime and is tried and punished for the crime. If on account of some technicalities of law or lack of jurisdiction, the criminal cannot be punished, then through the process of extradition he can be punished by being brought to the country where the committed the crime.

In the country where he committed the crime, it would be convenient to adduce the evidence against the accused.

Thus, the object of the process of extradition is to prevent and reduce the crimes in the international field. Thus the role of extradition is to prevent crimes and punish criminals. It is the interest of all countries to prevent crimes because, the country in which a person of criminal character resides, it is in the interest of such a country to ensure extradition of such a person.

Generally, extradition depends on bilateral treaty and the principle of reciprocity. But in the absence of a bilateral interest if a country request another country where the accused or fugitive resides for the time being, to extradite the fugitive, it is in the interest of security and law and order of such country to extradite the accused. Such a step not only enhances international cooperation but is also in accordance with the purposes of the United Nations.

In view of the increasing crimes the international field in recent years, the importance and prevalence of the extradition has increased.

In recent years, the provisions relating to extradition find mention in international treaties. The universal recognition of human rights has enhanced the prevalence and importance of extradition.

International cooperation is most essential is cases of extradition because there is hardly a country which has extradition treaty with all the other countries of the world.

European Convention on Extradition (1957)

European Convention on Extradition was adopted at Paris on 13th December, 1957.

Under Article 1 of the convention, the contracting parties have undertaken to surrender to each other, subject to the provisions laid down in the convention, all persons against whom the competent authorities of the requesting party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

The convention also lays down extraditable offences (Article 2), the principle of non-extradition for political offences (Article 3); Principle of non-extradition for military offences (Article 4).

Contracting parties, right to refuse extradition of its own nationals etc.

The European Convention on Extradition (1957) entered into force on 18th April, 1964.

It may be noted that the European Convention on Extradition was amended by Additional Protocol to the European Convention. The Additional Protocol was concluded on 15th October 1975. It came into force on 20th August 1979.

The European Convention on Extradition was further amended by Second Additional Protocol to the European Convention which was concluded on 17th March, 1978 and entered into force on 5th June, 1983.

It is suggested that since for the last two to three decades, number of international crimes especially acts of terrorism have witnessed a phenomenal increase, an Universal Convention on the lines of above mentioned European Convention is needed to curb the menace of terrorism.

Essential conditions of granting extradition or restrictions on surrender:-

Under international law extradition mostly depends on treaties among the States. However, the courts have also established certain principles and rules in regard to law of extradition.

In other words, we may say that following are some restrictions on surrender of fugitive criminals or essentials conditions for extradition :

1) Non-extradition of Political Criminal:-

It is a very important principle of International Law that extradition for political crimes is not allowed. "Most States refuse to commit themselves to extradite….any person charged with 'political crimes' that is to say crime committed for political purposes or crimes that are politically motivated. The difficulty of applying political exception is obviously a problem that regularly plagues the courts"[4]

[4]Collins International Law in a Changing World (1969), p. 216. See also Sections 29 and 31 (a) of the Extradition Act, 1962 referred earlier.

The practice of non-extradition for political crimes began with the French Revolution of 1789.

Later on other States also subscribe to this view although many difficulties arise in the enforcement of this principle. The most difficult problem is of the definition of the term 'political crimes'.[5]

Although the principle is now widely accepted that political criminals should not be extradited, there is probably no rule of customary internationals law which prevents their extradition. However, serious difficulties exist concerning the concept of 'political crimes'." [6]

Many attempts have been made to define the term 'political crime', but success has so far eluded.

"A crime is sometimes considered 'political' if committed from a political motive or if committed both from a political motive and for a political purpose or the term 'political crime' may be confined to certain offences against the state only, such as high treason lees majesty and the like. So far all attempts to formulate a satisfactory and generally agreed definition of the term have failed." [7]

Further, " Since a political offences will usually be at the same time an ordinary crime such as murder, arson, theft and the like, the practical difficulty in any particular case is to determine whether the alleged political element is sufficient to give the ordinary crime a sufficient political colour to ensure to the perpetrator protection from extradition. This balance is, in the first place, to be struck by the State from which extradition is requested, in applying its laws to non-extradition of political offender."[8]

Restrictions on Surrender under Indian Law:-

Section 31 of the Extradition Act, 1962, provides certain restrictions on surrender of fugitive criminals.

These restrictions are as follows:-

- Offences of political character – A fugitive criminal shall not be surrender or returned to a foreign State Commonwealth country if the offence in respect of which his surrender is sought is of a political character or if he proves to the satisfaction of the magistrate or court before whom he may be produced or of the central government that the requisition or warrant for his surrender has, in fact, been made with a viewed to try or punish him for an offence of a political character.[9]
- Prosecution for offence being barred by time – A fugitive criminal shall not be surrendered if prosecution for the offence in respect of which his surrender is sought is according to the law of that State pr country barred by time.[10]
- Extradition treaty or provision be law of foreign State that Fugitive Criminal shall not be tried or detained in that State for any offence committed prior to his surrender or return.

[5] Oppenheim, see supra note 2, at p. 707.
[6] Oppenheim's International Law, note 2, p. 963.
[7] Ibid at p. 964.
[8] Ibid at pp. 964-965.
[9] Section 31 (a) of the Extradition Act, 1962.
10 Section 31 (b).

- If accused of some offence in India other than offence for which extradition is sought – A fugitive criminal shall not be surrendered or returned if he has been accused of some offence in India, not being the offence for which his surrender or return is sought or is undergoing sentence under any conviction in India until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise.
- After expiration of 15 days after being committed to prison- Lastly a fugitive criminal shall not be surrender or returned until after the expiration of fifteen days from the date of the his being committed to prison by the magistrate.

- Where prosecution on trial of person extradited is made for lesser offence under Section 365 I.P.C. although said offence was not mentioned in extradition decree, it was held that if was not illegal as extradition of accused was allowed for higher offence under Section 364-A, I.P.C. This was held by the Supreme court in Suman allas Kamal Jeet Kaur v. State of Rajasthan.[11]

Unfettered power or discretion of Central Government to discharge any fugitive criminal.-

- Despite the provisions of the Extradition Act, 1962, particularly section 3 and section 12 of the act, The Central Government has unfettered powers or discretion to discharge any fugitive criminal. If it appears to the Central Government that by the nature of the trivial nature of the case or by reason of the application for the surrender or return of a fugitive criminal not being made in good faith or in the interest of justice or for political reasons or otherwise it is unjust or inexpedient to surrender or return the fugitive criminal, it may, by order at any time stay any proceedings under this Act and direct any warrant issued or endorsed under this Act to be cancelled and the person for whose arrest the warrant has been issued or endorsed to be discharged,[12]
- It is further provided that notwithstanding anything to the contrary contained in section 3 or section 12 the provisions of section 29 and 30 shall apply without any modification to every foreign State or Commonwealth country.[13]

[11] AIR 2007 SC 2774.
[12] Section 29
[13] Section 32.

Case relating to refusal to grant of extradition of two Burmese students

In November 1990, two Burmese students were persuaded to land at Calcutta airport. They had hijacked Thai International Airbus with 205 Passengers and 16-members to highlight the cause of restoration of democracy in their country. Their six point Charter of demands, written in blood, included restoration of democracy in Burma, ending military rule, release of all political prisoners and a direct dialogue with the Burmese Government.

The Indian Government refused to hand them over to Burmese or Thai authorities.

However, the Indian Government have charged them under Anti-Hijacking Act, 1982 and for criminal conspiracy.

Some Indian Cases on Extradition:-

- **Savarkar's case** :- The facts and decision of the Savarkar's case has been referred earlier while explaining the essential conditions of extradition.
- **Sucha Singh's case**:- Sucha Singh was accused of murdering Pratap Singh Kairon, the former Chief Minister of Punjab and had fled away to Nepal and on the request of the Government of India, the Government of Nepal after starting proceedings against him in accordance with the law of Nepal, extradited him.
- **The Tarasov Extradition case, 1963**[14]:- This case has been discussed earlier in this Chapter.
- **Mobarak Ali Ahmad v. State of Bomabay, 1957**[15]
- **Extradition of Abu Salem** :- Abu Salem was one of the most wanted accused persons in Mumbai Blasts of 1993. He was living in Portugal and the government of India sought his extradition.

[13] A.I.R 1955 S.C. 867.
[14] A.I.R. 1955 S.C. 367.

S.A.A.R.C. Accord on Extradition:-

On 16th June 1987, the Foreign Secretaries of South Asian Regional Countries entered into an agreement on extradition. The draft of the Agreement and recommendations were presented before the Standing Committee of Foreign Affairs Ministers. The agreements provided for the extraditions of persons accused of terrorist acts but not including acts of political nature. Later on three-day summit of SAARC, the conference adopted a convention on Terrorism on 4th November, 1987. The convention was to be ratified within six month. The convention provides for the extradition of person accused of terrorist acts. However, Article 11 of the convention provides, that if the state concerned thinks that it is not proper and expedient to extradit the accused, there shall be no obligation to extradit. Similarly, there shall be no obligation to extradite if the matter is very ordinary and the request for extradition has not been made in good faith and is not in the interest of justice. But under the convention it is the obligation of the member states to ensure the presence of the accused for prosecution under national laws. Under the convention following six crimes shall not be considered as political crimes or crimes inspired by political motives:

- Crimes relating to aircraft hijacking under the Hague Convention of 16 December, 1970 on Hijacking ;
- Crimes relating to aircraft hijacking under the Montreal Convention of 23 September, 1971 on Hijacking ;
- Crimes under the Convention of 14 December, 1973 relating to Prevention and Punishment of crimes against Internationally Protected Persons ;
- Crimes under any Convention of which SAARC States are parties and under which State parties are under obligation to prosecute or extradit the accused ;
- Crimes relating to murder, assault ; making hostage etc ; and
- Attempt to aid and advice the crimes etc.

The convention also provides that the Member States shall not consider political crimes the crimes concerning violence.

Indian- U.K. Pact on Extradition:-

In the first week of January, 1992 during his visit to India. British Home Secretary Kenneth Baker offered to sign an extradition treaty with India regarding extradition and confiscation of funds of terrorists and drug traffickers operating from Britain. This step is being taken to deter drug trafficking and terrorists on Punjab and Kashmir. The treaty is subsequently signed. The treaty was ratified on 15th November, 1993,

Earlier India had entered into in 1986 an extradition treaty with Canada. India is also making endeavors to enter into a similar treaty with United States of America.

Extradition Treaty Between India and Russia:-

India and Russia also signed an extradition treaty. This treaty was approved and ratified by Russia on 15th April, 2000.

Extradition Treaty Between India and United States:-

India and America have been cooperating with each other for a long time for curbing extremism and terrorism. In several cases in past, America has cooperated with India in respect of extradition of criminal who after committing crime had fled away to that country. Recently America extradited Daya Singh Lahoria at the request of the Government of india. A couple of more extraditions are expected soon. On 25th June, 1997 India and America entered into a treaty on extradition. It is a modern treaty containing exhaustive provisions relating to new trends on extradition.

In accordance with Article 23 of the treaty, instruments of ratification were exchanged at New Delhi on 21st July, 1999. Thus the treaty came into force immediately because Article 23 provides that this treaty shall enter into force upon the exchange of the instruments of ratification.

Last but not the least. Article 18 provides for 'Waiver of Extradition'. According to it if the person sought consents to surrender to the Requesting State, the Requested State may, subject to its laws, surrender the person as expeditiously as possible without firthe proceedings.

Extradition Treaty between India and Germany:-

With a view to combat, India and Germany signed an extradition treaty at Berlin on 27th June, 2001. The treaty will enable the two countries to extradite a person wanted in "extraditable offences."

Under the treaty extraditable offences are the offences which are punishable by a term of imprisonment of not less than one year. Extradition shall also be granted in respect of an attempt or conspiracy to commit, or aiding, abetting, inciting or participating as an accomplice in the commission of an extraditable offences.

Extradition Treaty Between India and Spain:-

India and Spain have also signed an extradition treaty. It was signed in June, 2002.

Extradition Treaty Between India and France:-

India and France signed an extradition treaty on 24th January, 2003. Prior to the signing of the treaty France had apprehensions that the terrorists or criminals to be extradited to India might get death penalty. India removed such apprehensions by giving an undertaking that terrorists extradited to India would not be given death penalty.

The treaty was signed by Deputy Prime Minister L.k. Advani on behalf on India and Dominique Perben, Minister for Justice of France, on behalf of France.

Extradition Treaty Between India and Bulgaria:-

India and Bulgaria signed an extradition treaty on 23rd October, 2002. This treaty aims to ensure that terrorists are not able to seek sanctuary abroad.

Thus India has so far signed extradition treaties with 25 countries.

SCOPE OF JUDICIAL POWERS: JUDICIAL ACTIVISM

By- Adarsh Kumar

It is true on some occasions, courts have overstepped their limits. But, by and large, judicial activism has done a great service to society.

To begin with, what does the concept of 'judicial activism' mean? Let me try to put it in proper perspective with introduction.

Introduction

Under the Indian Constitution, the State is under the prime responsibility to ensure justice, liberty, equality and fraternity in the country. State is under the obligation to protect the individuals' fundamental rights and implement the Directive Principles of State Policy. In order to restrain the State from escaping its responsibilities, the Indian Constitution has conferred inherent powers, of reviewing the State's action, on the courts. In this context, the Indian judiciary has been considered as the guardian and protector of the Indian Constitution. Considering its constitutional duty, the Indian judiciary has played an active role, whenever required, in protecting the individuals' fundamental rights against the State's unjust, unreasonable and unfair actions/inactions.

Black's Law Dictionary defines judicial activism as: "a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent".

The judicial activism is use of judicial power to articulate and enforce what is beneficial for the society in general and people at large. Supreme Court despite its constitutional limitation has come up with flying colors as a champion of justice in the true sense of the word. JUSTICE… this seven letter word is one of the most debated ones in the entire English dictionary. With the entire world population being linked to it, there is no doubt about the fact that with changing tongues the definition does change.

The judicial activism has touched almost every aspect of life in India to do positive justice and in the process has gone beyond, what is prescribed by law or written in black and white. Only thing the judiciary must keep in mind is that while going overboard to do justice to common man must not overstep the limitations prescribed by sacrosanct i.e. The Constitution.

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(The Constitution of India, 1950, the Preamble.)

Judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law. The question of judicial activism is closely related to constitutional interpretation, statutory construction, and separation of powers.

History of Judicial Activism

The exact history of judicial activism is unclear, but it is believed that the concept has been around for centuries. However, a man named Arthur Schlesinger, Jr. brought about the term judicial activism in 1947. Schlesinger was a specialist in American History, and was well known for his study of 20th century American Liberalism.

Schlesinger introduced the term in a Fortune Magazine article published that year entitled "The Supreme Court: 1947." In the article, Schlesinger grouped the courts into three categories: (1) judicial activists, (2) champions of self-restraint, and (3) a middle group.

Since the term first hit the political-judicial stage, it has been a point of controversy. This is especially interesting, as Schlesinger never truly defined the term. Since the term's inception, there have been varying opinions on what the term judicial activism truly means.

Law professor and leading constitutional scholar, David A. Strauss, has offered his opinion that judicial activism can take at least three forms. These include:

1. The act of overturning laws as unconstitutional
2. Overruling judicial precedent
3. Ruling contrary to a previously issued constitutional interpretation

A good example of the history of judicial activism is the 1954 case of Brown v. Board of Education. In 1951, a group of parents, on behalf of their children, filed a lawsuit against the Board of Education of the City of Topeka, Kansas. The parents had attempted to enrol their African-American children in the closest neighbourhood school that year, but were refused enrolment. The suit requested that the school district reverse its policy of racial segregation, in which the district operated separate schools for black and white children. The plaintiffs in the case claimed that racial segregation resulted in inferior facilities, accommodations, and treatment of their children.

The District Court ruled in favour of the Board of Education, based on the prior ruling of Plessy v. Ferguson, a case that upheld state laws requiring segregated transportation on trains. When the parents appealed their case to the U.S. Supreme Court, the Court ruled that segregation of whites and blacks in school was indeed unconstitutional, as it was harmful to black students.

This ruling flew in the face of the legal doctrine of stare decisis, which requires judges to uphold prior rulings of higher courts. This is also referred to as "case precedent." In this case, rather than relying on the ruling in Plessy v. Ferguson, which was a similar case, the Supreme Court overruled it.

This ruling on desegregation of public schools came with considerable resistance, as opponents of the ruling believed that the Court had relied on statistics and social theories, rather than on established law. This meant to them that the Supreme Court Justices had acted outside of its powers by creating new law. Supporters of the decision believed, on the other hand, that the court's exercising of judicial activism was appropriate. They argued that the court should use its power to adapt existing laws to address problems in current society.

Toward the end of the 20th century, the U.S. Supreme Court was seen as a powerful judicial body exercising greater activism than ever before. Conservatives criticized many of the justices, claiming they struck down many state and federal laws based on their own liberal political beliefs. The history of judicial activism shows us however, that both liberals and conservatives are known to take part in, and benefitting from the practice, while accusing the other group of doing so.

➢ Constitutional powers of the Supreme Court and High Courts in India

Judicial activism happens when the courts have power to review the State action. Article 13 read with Articles 32 and 226 of the Indian Constitution gives the power of judicial review to the higher judiciary to declare, any legislative, executive or administrative action, void if it is in contravention with the Constitution. The power of judicial review is a basic structure of the Indian Constitution.[2]

Article 32 of the Indian Constitution gives right to every individual to move directly to the Supreme Court of India for the enforcement of his or her fundamental right. Article 32 confers power on the Supreme Court to issue any order or writ for the enforcement of any of the fundamental rights. The Supreme Court in Fertilizer Corporation Kamgar Union v. Union of India[3] held that the power of the Supreme Court under Article 32 is an integral part of the basic structure of the Indian Constitution "because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated." It cannot be suspended even during emergency. An appropriate writ/order under Article 32 for the enforcement of Articles 17, 23 and 24 can be passed against a private individual also.[4]

2.L. Chandra Kumar v. Union of India, (1997) 3 S.C.C. 261.

3 A.I.R. 1981 S.C. 344.

4 People's Union for Democratic Rights v Union of India, (1982) 3

S.C.C. 235.

Increasingly, the Supreme Court has interpreted Article 32 in a very liberal manner in many cases in order to enforce fundamental rights even against the private entities performing public functions.

Article 226 of the Indian Constitution gives power to the High Courts to issue any appropriate order or writ for the enforcement of fundamental right and other legal rights. In this context, the jurisdiction of High Court under Article 226 seems wider than the jurisdiction of Supreme Court under Article 32. Both Articles 32 and 226 are basic structure of the Indian Constitution. Article 227 further gives power of supervisory control to the High Court over the subordinate courts, special courts and tribunals.

Further more, the Supreme Court has power to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed by any court or tribunal under Article 136 of the Indian Constitution confers special power on. The Supreme Court exercises its special power in those cases where gross injustice happens or substantial question of law is involved.

Power under Article 136 is discretionary one and can be exercised to decide the case on justice, equity and good conscience.[5] However it should be used with proper care and caution. In Pritam Singh v. The State,[6] the Supreme Court said that wide discretionary power under Article 136 should be exercised sparingly and in exceptional cases only. In Tirupati Balaji Developers Pvt. Ltd. v. State of Bihar,[7] the Supreme Court said that Article 136 does not confer a right of appeal on a party but vests a vast discretion in the Supreme Court meant to be exercised on the considerations of justice, call of duty and eradicating in justice.

Again, curative petition has been invented by the higher judiciary in order to prevent abuse of processor to cure gross miscarriage of justice. It is also maintainable in case of violation of the principles of natural justice.[8] The apex court in Rupa Hura judgment in 2002 said that the Bench considering curative petitions should have the three top judges of the Supreme Court.

One of the most important constitutional provisions giving extraordinary power to the Supreme Court is Article 142 of the Indian Constitution. This provision empowers the Supreme Court to pass suitable decree or order for doing complete justice in any pending matter before it. Despite the fact that the law-making power in India lies primarily with the Parliament only, the Supreme Court is able to legislate under Article 142 of the Indian Constitution. This provision is responsible for the judicial legislation in India. However, the judicial legislation is being done only when there is vacuum in law on the concerned subject-matter.

5. Union of India v. C Damani and Co., 1980 Supp. S.C.C. 707.
6. A.I.R. 1950 S.C. 169.
7. A.I.R.2004S.C.2351.
8. RupaAshokHurrav. AshokHurra,(2002)4S.C.C.388.

In Vishaka v. State of Rajasthan,[9]
The Supreme Court held that in 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 guide lines and norms specified here in after for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by this Court under Article 141 of the Constitution."

Considering the importance of Article 32 read with Article 142, it becomes necessary for the judiciary that it should perform its constitutional obligation where there is no legislation on the certain field and implement the rule of law.[10] Again, the Supreme Court in Kalyan Chandra Sarkar v. Rajesh Ranjan,[11] acknowledged the importance of Article 142 of the Indian Constitution and said that the court has power under Article 142 to issue directions and guidelines for implementing and protecting the fundamental rights in the absence of any enactment. The court reiterated that any such direction, filling up the vacuum of legislation, is the law of the land. However, the Parliament has power to replace such directions e.g. the Sexual Harassment of Women at Work place (Prevention, Prohibition and Redressal) Act, 2013 replaced the Vishakha Guidelines for prevention of sexual harassment issued by the Hon'ble Supreme Court of India in the year of 1997.

9 A.I.R.1997S.C.3011.
10 Vineet Narain v.Union of India, A.I.R.1998 S.C.889.
11 A.I.R.2005S.C.972.

Judicial Activism and shift from Locus Sstandi to Public Interest Litigation

Access to justice is a fundamental aspect of rule of law. If the justice is not accessible to all, establishment of the rule of law is not possible. The individuals fail to reach justice system due to various reasons including lack of basic necessities, illiteracy, poverty, discrimination, privacy, poor infrastructure of the justice system, etc.

The Supreme Court of India has recognized in many landmark judgments that access to justice is a fundamental right.[12] Indian Judiciary has played an active role in ensuring access to justice for the indigent persons, members belonging to socially and educationally backward classes, victims of human trafficking or victims of beggar, transgender, etc. Since Independence, the Court sin India have been adopting innovative ways for redressing the grievances of the disadvantaged persons. In many cases, the Supreme Court exercised its epistolary jurisdiction[13] and took suo motto actions on mere post allotters disclosing the human rights violations in society. Human rights violations, which published in the newspapers, were taken into judicial consideration. The court entertains the petitions which are being filed by the public spirited persons in the public interest. By doing so, the superior courts have liberated themselves from the shackles of the principle of Locus standi and given the birth to the Public interest litigation in India.

The shift from locus standi to public interest litigation made the judicial process "more participatory and democratic."[14] S.P. Sathe says: "The traditional paradigm of judicial process meant for private law adjudication had to be replaced by an ewparadigm that was poly centric and even legislative. While under the traditional paradigm, a judicial decision was binding on the parties (resjudicata) and was binding in personam, the judicial decision under public interest litigation bound not only the parties to the litigation but all those similarly situated."[15]

12 Imtiyaz Ahmad v. State of Uttar Pradesh, A.I.R.S.C.2012642.

13 Sunil Batra v. Delhi Administration,(1978)4S.C.C.494

14 S.P. Sathe, Judicial Activism in India (Sixth Indian Impression, OUP 2010)17

15 Id.at18.

The Supreme Court in People's Union for Democratic Rights v. Union of India[16] held that public interest litigation is different from the traditional adversarial justice system. The court said that public interest litigation is intended to promote public interest. Public interest litigation has been invented to bring justice to poor and socially or economically disadvantaged sections of the society. The violations of constitutional or legal rights of such large number of persons should not go unnoticed.

In **Fertilizer Corporation Kamgar Union v. Union of India**, [17] the court held that public interest litigation is part of the participative justice.

Further more, the Supreme Court in **Bandhua Mukti Morcha v. Union of India[18]** has justified the public interest litigation on the basis of "vast areas in our population of illiteracy and poverty, of social and economic backwardness, and of an insufficient awareness and appreciation of individual and collective rights".

The Supreme Court of India in Sheela Barse v. Union of India[19] said: "The compulsions for the judicial innovation of the technique of a public interest action is the constitutional promise of a social and economic transformation to usher-in an egalitarian social-order and a welfare - State". While passing any order under public interest litigation, the intention of the court is to enforce constitution and rule of law in the society.[20]

One of the land mark cases relating to the public interest litigation was Hussainara Khatoon (I) v. State of Bihar.[21] A series of articles exposing the plight of under trial prisoners in the State of Bihar was published in a prominent newspaper. Many of the under trial prisoners had already served the maximum sentence without even being charged for the offence.

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A writ petition drawing the Court's attention to the issue was filed by an advocate. While accepting it as public interest involved, the Supreme Court held that right to speedy trial is a fundamental right under Article 21 of the Indian Constitution. The court directed the State to provide free legal facilities to the under trials so that they could get bailor final release.

16 (1982) 3S.C.C.235.

17 A.I.R.1981S.C.344.

18 A.I.R.1984S.C.802

19 (1988)4 S.C.C.226.

20. State of Himachal Pradesh v. A Parent of a Student of Medical College, (1985) S.C.C.169.

21. (1980)1S.C.C.81.

In another case of **Sheela Barse v. State of Maharashtra**,[22] a letter alleging custodial violence of women prisoners in jail was addressed to the Supreme Court. The letter was written by a journalist who had interviewed some women prisoners in jail. Treating the letter as a writ petition, the Supreme Court took cognizance and issued directions to the concerned authority.

Similarly, epistolary jurisdiction was exercised by the Supreme Court in Sunil Batra v. Delhi Administration[23] when a prisoner's letter was treated as writ petition. The prisoner alleged in the letter that Head Warder brutally assaulted another prisoner. The Court said that the technicalities can not stop the court from protecting the civil liberties of the individuals.

In Municipal Council, Ratlam v. Vardichand,[24] the Court admitted the writ petition filed by a group of citizens who sought directions against the local Municipal Council for removal of open drains. The Court said that if the "centre of gravity of justice is to shift as indeed the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, the court must consider the issues as there is need to focus on the ordinary men."

Similarly,a petition seeking court's directions for protecting the lives of the people who made use of the water flowing in the river Ganga, was accepted as public interest litigation by the Supreme Court of India in the case of M.C Mehta v. Union of India.[25] In this case, the court directed the local bodies to take effective measures to prevent pollution of the water in the river Ganga.

In Parmanand Katarav. Union of India,[26] a writ petition seeking court's directions, in order to provide immediate medical treatment to the persons injured in road or other accidents with out going through the technicalities of the criminal procedure, was filed by an advocate. The Supreme Court accepted the application of the advocate and directed the medical establishments accordingly.

Another good example of public interest litigation is S.P.Gupta v. Union of India.[27] In this case, the court recognized the locus standi of bar associations to file writs by way of public interest litigation. It was said that questioning the executive's policy of arbitrarily transferring High Court judges is in the public interest. Explaining the significance of public interest litigation, the court observed that: "It must now be regarded as well-settled law where a person who has suffered a legal wrong or a legal injury or whose legal right or legally protected interest is violated, is unable to approach the court on account of some disability or it is not practicable for him to move the court for some other sufficient reasons,

22 A.I.R.1983S.C.378.
23 (1978)4S.C.C.494.
24 (1980)4S.C.C.162.
25 A.I.R.1988S.C.1115.

26 A.I.R.1989S.C.2039.
27 A.I.R.1982S.C.149.

Such as his socially or economically disadvantaged position, some other person can invoke the assistance of the court for the purpose of providing judicial redress to the person wrongdoer injured, so that the legal wrong or injury caused to such person does not goun-redressed and justice is done to him."[28]

However, the public interest litigation should not be abused by anyone.[29] it cannot be allowed to be used for creating nuisance or for obstructing administration of justice.[30]

CONCLUSION

The Judiciary cannot take over the functions of the Executive. The Courts themselves must display prudence and moderation and be conscious of the need for comity of instrumentalities as basic to good governance. Judicial activism has to be welcomed and its implications assimilated in letter and spirit. An activist Court is surely far more effective than a legal positivist conservative Court to protect the society against legislative adventurism and executive tyranny. When our chosen representatives have failed to give us a welfare state, let it spring from the Judiciary.

The power of judicial review is recognized as part of the basic structure of the Indian Constitution. The activist role of the Judiciary is implicit in the said power. Judicial activism is a sine qua non of democracy because without an alert and enlightened judiciary, the democracy will be reduced to an empty shell. Judicial activism in its totality cannot be banned. It is obvious that under a constitution, a fundamental feature of which is the rule of law, there cannot be any restraint upon judicial activism in matters in which the legality of executive orders and administrative actions is questioned. The courts are the only forum for those wronged by administrative excesses and executive arbitrariness.

Judicial activism is not an aberration. It is an essential aspect of the dynamics of a constitutional court.[17] It is a counter-majoritarian check on democracy. Judicial activism, however, does not mean governance by the judiciary. Judicial activism must also function within the limits of the judicial process.

The judiciary is the weakest body of the state. It becomes strong only when people repose faith in it.[18] Such faith constitutes the legitimacy of the Court and of judicial activism. Courts must continuously strive to sustain their legitimacy. Courts do not have to bow to public pressure, but rather they should stand firm against public pressure. What sustains legitimacy of judicial activism is not its submission to populism, but its capacity to withstand such pressure without sacrificing impartiality and objectivity. Courts must not only be fair, they must appear to be fair. Such inarticulate and diffused consensus about the impartiality and integrity of the judiciary is the source of the Court's legitimacy.
Take away judicial activism and tyranny will step in to fill the vacant space.

26 Id. at162.

27 Dattaraj Nathuji Thaware v. State of Maharashtra, A.I.R.2005 S.C.540.

30 Common Cause (A Regd. Society) v. Union Of India and Others.

So to sum up the judicial activism in India, it will be very appropriate to quote the words of Dr. A.S. Ananda, Chief Justice of India who said :

"…. the Supreme Court is the custodian of the Indian Constitution and exercises judicial control over the acts of both the legislature and the executive."

[17] S.P. Sathe, Judicial Activism: The Indian Experience, 6 Wash. U. J. L. & Pol'y 029 (2001)

[18] http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1443&context=wujlp

GENOCIDE

By – Kuldeep Kaur

INTRODUCTION:-

The Genocide committed during the Second World War shocked the whole mankind so much so that the General Assembly in its first meeting affirmed the principles enunciated in the Nuremberg Judgment. In its resolution 96(1), dated 11 December, 1946 the General Assembly declared that "genocide is a crime under international law, contrary to the spirits and aims of the United Nations and condemned by the civilized world."[19]

The main cause of such keen interest taken by the General Assembly in its first session was the Nazi atrocities committed by the Germans during the Second World War.

The Genocide convention entered into force on 12 January, 1951. This Convention has been ratified by India who signed it on 29 November. 1949 and ratified it on 27 August. 1959.

The convention on the Prevention and Punishment on the crime of Genocide has been ratified by 140 countries by 15 December, 2009. Article II of the Genocide Convention defines 'genocide' in the following words : "In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such :

A. Killing members of the group;
B. Causing serious bodily harm to members of the group;
C. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
D. Imposing measures intended to prevent baths within the group;
E. Forcibly transferring children of the group to another group."

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[1]See also Raphael Lemkin, "Genocide as a crime under International Law", A.J.I.L., Vol. 41 (1947) p. 145 at p. 150.

‘Genocide’ a crime under International law

The term ‘Genocide’ was coined by Lernkin a Private Individual whose efforts played a large part in promoting the United Nations work on genocide. The convention probably reflects customary international law.[20]

In Barcelona traction, Light and Power Co. Case (Belgium v Spain)[21]; speaking about the obligations of a State when it admits into its territory foreign investments of foreign nationals, the Internationals Court of Justice observed.[22]:Such obligations derive, for example, in contemporary international law, from the out-lawing of acts of aggression and of genocide as also from the principles and rules concerning the basic rights of human person, including protections have entered into the body of general International law;[23]others are conferred by International instruments of a universal of quais-universal character.”

Article I of the Genocide Convention, 1948, therefore, provides that the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.

- **Under Article III of the Convention following acts are punishable :**
  A. Genocide;
  B. Conspiracy to commit Genocide;
  C. Direct and public incitement to commit Genocide;
  D. Attempt to commit Genocide;
  E. Complicity in Genocide.

Article IV of convention provides that persons committing genocide or any of the other acts enumerated in Article III shall be punished whether they are constitutionally responsible rulers, public officials or private individuals.

- **Other Main Provisions of the Genocide Convention:**
  A. The contracting parties of the convention have undertaken to enact in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the convention

[2]D.J. Harri’s Cases and Materials on International Law (London, Sweet and Maxwell, 1973), p. 549. [3] I.C.J Reports, 1970, p. 3.
[4] Ibid., para 34.
[5] Reservations to the Convention of the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports, 1951, p. 23.

And, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated on Article III.[24]

B. Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.[25]it is unfortunate that the provision relating to "international penal tribunal" to try persons for genocide, and for that matter any other international crime, has yet not been implemented although 36 years have passed since the adoption of the Genocide Convention.

C. Genocide and other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition.[26]

D. Disputes between the contracting parties relating to the interpretation, application of fulfillment of the present convention, including those relating to the responsibility of a state for Genocide or any other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.[27]

As 1 January, 2014, 146 countries have become parties to the convention on the Prevention and Punishment of the Crime of Genocide, 1948.

The International Court of Justice has recognized the principles underlying the convention are principles which are recognized by civilized nations binding on states even without any conventional obligation.

➢ Example of Genocide in Bangladesh

The military regime of Pakistan under General Tikka khan committed incalculable and unprecedented genocide in Bangladesh. As pointed out by M.K. Nawaz," The Bengali people have a language and culture different from the people of West Pakistan, can accordingly be considered as ethical group within the meaning of Article II of Genocide Convention."[28]

Justice V.R. Krishna Iyer, former Member of the Indian law commission and retired judge of the Supreme court, has also pointed out, "The Bengali population of East Pakistan probably falls under the national and ethical group-not merely territorial or linguistic."[29]

[6]Article V of the Genocide Convention.
[7] Article VI.
[8] Article VII.
[9] Article IX.
[10] M.K. Nawaz, "Bangladesh and International Law", I.J.I.L., Vol. 11 (1971), p. 251 at p. 261.

Thus the genocide committed by Pakistan military personnel in Bangladesh was clearly and without a shade of doubt an international crime. As aptly remarked by justice V.R. Krishna Iyer : " The scenes of blood and bestiality ensuring from the military crack down under general Tikka khan deadly direction was such the like of which no eye had seen and no tongue could adequately tell. Bangladesh is fortunately free today but its 'sweetest songs' of freedom are those that tell of 'saddest thought' of the millions dead.

The appealing human annihilation perpetrated by military personnel of Pakistan in Bangladesh, its dimensions and dastardliness prima facie constitutes an International crime."[30]

- **Provisional Measures by World Court against Federal Republic of Yugoslavia for Prevention of Genocide.-**

On 8th April, 1933, the International Court of Justice issued an order on calling upon the federal republic of Yugoslavia to "immediately take all measures with in its power to prevent commission of the crime of genocide".

This order was made unanimously by the court in case concerning Application of the Convention on Prevention and punishment of crime of Genocide [Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro].[31]

The world court unanimously also directed that the government of federal Republic of Yugoslavia and the government of republic of Bosnia and Herzegovina " should not take action and should ensure that no action is taken which may aggravates or extend the existing dispute over the prevention and punishment of the crime of genocide or render it more difficult of solution".

Moreover, by 13 votes to 1, the court directed that the government of former Yugoslavia should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it , as well as organizations and persons which may be subject to its control, direction, influence, do not commit any acts of genocide, or of complicity in genocide whether directed against.

[1]1 Law's Tryst with the Dead in Bangladesh vis-à-vis punishment of Humanicidists", National Herald, February 4, 1972.
[1]2 V.R. Krishna Iyer,J., note 11.
[1]3I.C.J. Reports, (1993), p. 3.

Muslim population of Bosnia and Herzegovina or against any other national, ethical, racial, or religious group.

On further requests for the indication of provisional measures, the international Court of Justice, on 13th Sept, 1993 reaffirmed the provisional measures indicated on 8th April 1993 and directed that the same be "immediately and effectively implemented."[32]

Conclusion:-

The adoption of the convention on the Prevention and Punishment of the Crime of Genocide, 1948 was a great achievement at the time when the memories of atrocities committed during Second World War still loomed large in the minds of the people.

It is however doubtful whether the convention covers cultural genocide.

Moreover, the concept of 'complicity in genocide' is very vague. Last but not the least, failure of the contracting parties to establish, an international penal tribunal to try persons for genocide remains a formidable obstacle in the proper implementation of the convention. Nevertheless the convention has rendered a signal service by making the crime of genocide punishable in time of peace or in time of war. By September 1983, 93 states have expressed their consent to be bound by the convention.

[1]4Case concerning Application of the Convention on the Prevention and Punishment of the crime of Genocide [Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), (13th Sept, 1993), ICJ Reports (1993) p. 325.

"JUVENILES AND THE CRIMINAL JUSTICE SYSTEM"

SUB THEME: - REHABILITATION OF JUVENILE OFFENDERS

By – Shama Parveen

Introduction :-

The key purpose of Indian legislature to legislate the juvenile justice Act, 2015 was the increased huge number of crimes by juveniles of 16 to 18 age groups. The incident of 'Nirbhaya rape case' raised many debate, which demanded amendment in the existing juvenile justice (care and protection) Act, 2000.

The juvenile justice (care and protection) Act, 2000 completely lacks of clarity regarding role, power, responsibilities, functions and accountability of Child Welfare Committees and Juvenile Justice Boards.

The non-registration of institutions under the Juvenile Justice Act, 2000 and inability of the states to enforce registration due to lack of any penal provisions for non-compliance.

The juvenile justice (care and protection) Act, 2000 extinguishes any ground provisions to counter offences against children such as corporal punishment, sale of children for adoption purposes, ragging etc.

The Act came into force from 15 January 2016 in India. The Juvenile Justice (Care and Protection of Children) Act, 2015 has been passed by Indian parliament. The Juvenile Justice act aims to replace the existing Juvenile Justice (Care and Protection of Children) Act, 2000 and to amend earlier demerits and irregularities, such that juveniles in conflict with Law in the age group of 16–18, involved in Heinous Offences, can be treated as adults.

Juvenile Justice (Care and Protection of Children) Act, 2015 looks at the basic needs of children through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly method and disposal of matters in the best interest of children and for their rehabilitation through process provided and defined under the Juvenile Justice (Care and Protection of Children) Act, 2015.

The key purpose of Indian legislature to legislate the juvenile justice Act, 2015 was the increased huge number of crimes by juveniles of 16 to 18 age groups. The incident of 'Nirbhaya rape case' raised many debate, which demanded amendment in the existing juvenile justice (care and protection) Act, 2000.

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However, this case is not only reason for the Government to introduce the Juvenile Justice (Care and Protection of Children) Bill, 2014. The ministry of women and child development justified the introduction of bill with several other reasons.

The most important reasons were delays in various processes under the Act, such as decisions by Child Welfare Committees and Juvenile Justice Boards, leading to high pendency of cases and delay in inquiry of cases leading to children languishing in Homes for years altogether for committing petty offences.

Increase in number the incidents of abuse of children in institutions and Inadequate facilities, quality of care and rehabilitation measures in Homes, especially those that are not registered under the Act, resulting in problems such as children repeating offences, abuse of children and runaway children.

The juvenile justice (care and protection) Act, 2000 completely lacks of clarity regarding role, power, responsibilities, functions and accountability of Child Welfare Committees and Juvenile Justice Boards. The juvenile justice (care and protection) Act, 2000 also limits the participation of the child in the trial process, delays in rehabilitation plan and social investigation report for every child.

The procedures by Juvenile Justice Boards and conduct of Board sittings in Courts in various districts extinguished child-friendly environment.

The juvenile justice (care and protection) Act, 2000 Lacks of any substantive provision regarding orders to be passed by the court, if a child apprehended for allegedly committing an offence was found innocent and no specific provisions for reporting of abandoned or lost children to appropriate authority in order to ensure their adequate care and protection under the Act.

The non-registration of institutions under the Juvenile Justice Act, 2000 and inability of the states to enforce registration due to lack of any penal provisions for non-compliance.

The juvenile justice (care and protection) Act, 2000 extinguishes any ground provisions to counter offences against children such as corporal punishment, sale of children for adoption purposes, ragging etc.

JUVENILE JUSTICE ACT, 2015:-

BRIEF VIEW:-

The Juvenile Justice (Care and Protection of Children) Act, 2015 has been passed by Indian parliament. The Juvenile Justice act aims to replace the existing Juvenile Justice (Care and Protection of Children) Act, 2000 and to amend earlier demerits and irregularities, such that juveniles in conflict with Law in the age group of 16–18, involved in Heinous Offences, can be treated as adults.

The Act came into force from 15 January 2016 in India. But it was also criticized by many protestors as being unconstitutional.

CONCEPT OF REHABILITATION:-

Various Studies indicates that the most efficient and effective way to find constructive solutions to involvement of children in activities that violate a law is to involve children in the process of rehabilitation. The Recognition of juveniles and proper respect for their rights as human being and as a child is a very important, crucial and efficient step in there rehabilitation.

Now we can say that, juvenile justice has made a distance from the criminal justice model of punishment and recognizing the negative effect of association with adult offenders.

Juvenile Justice adopted the model of reformation of children found to have committed an offence through different community based reformative and rehabilitative measures.

Juvenile Justice (Care and Protection of Children) Act, 2015 looks at the basic needs of children through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly method and disposal of matters in the best interest of children and for their rehabilitation through process provided and defined under the Juvenile Justice (Care and Protection of Children) Act, 2015.

REHABILITATION OF JUVENILES OFFENDERS

Process of rehabilitation and social re-integration [Section 39]:-

The process of rehabilitation and social integration of children under the Act is based on the individual care plan of the child, preferably through family based care such by restoration to family or guardian with or without supervision or sponsorship, or adoption or foster care.

For children in conflict with law the process of rehabilitation and social integration shall be undertaken in the observation homes, if the child is not released on bail or in special homes or place of safety or fit facility or with a fit person, if placed there by the order of the board.

The children in need of care and protection who are not placed in families for any reason may be placed in an institution registered for such children under this act or with a fit person or a fir facility, on a temporary or long-term basis, and the process of rehabilitation and social integration shall be undertaken wherever the child is so placed.

The children in need of care and protection who are leaving institutional care or children in conflict with law leaving special homes or place of safety on attaining 18 years of age, may be provided financial support as specified in section 46, to help them to re-integrate into the mainstream of the society.

Restoration of child in need of care and protection [Section 40]:-

The restoration and protection of a child shall be the prime objective of any Children's Home, Specialized Adoption Agency or open shelter.

The Children's Home, Specialized Adoption Agency or an open shelter are need to take such steps as are considered necessary for the restoration and protection of a child deprived of his family environment temporarily or permanently where such child is under their care and protection.

The committee authorized with the powers to restore any child in need of care and protection to his parents, guardian or fit person, as the case may be, after determining the suitability of the parents or guardian or fit person to take care of the child, and give them suitable directions.

"Restoration and protection of a child" means restoration to:-

- Parents;
- Adoptive parents;
- Foster parents;
- Guardian; or
- Fit person.

Registration of child care Institution [Section 41]:-

All Institutions must be registered under the Juvenile Justice Act, 2015 with in a period of six months from the date of commencement of the Juvenile Justice Act, 2015.

It is provided that the institution having valid registration under the Juvenile Justice Act, 2000 as prescribed under Section 56, shall be deemed to have been registered under this act.

At the time of registration,

- The state government shall determine the capacity and purpose of the institution.
- The state government shall register the institution as a Children's Home or Open Shelter or Specialized Adoption Agency or Observation home or Special home or place of Safety, as the case may be.
- The period of registration of an institution shall be five years, and it shall be subject to renewal in every five years.

Penalty for non-registration of child care institution [Section 42]:-

Any person, or persons, in-charge of an institution housing children in need of care and protection and children in conflict with law, who fails to comply with the provisions of sub section (1) of section 41, shall be punished with imprisonment which may extend to one year or a fine of not less than one lakh rupees or both.

Open Shelter [Section 43]:-

"Open shelter" means a facility for children, established and maintained by the State Government, either by itself, or through a voluntary or non-governmental organization.

The open shelters functions as a community based facility for children in need of residential support, on short term basis, with the objective of protecting them from abuse or weaning them, or keeping them, away from a life on the streets.

The open shelters needs to send every month information, in the prescribed manner, regarding children availing the services of the shelter, to the District Child Protection Unit and the Committee.

Foster care [Section 44]:-

- The children in need of care and protection may be placed in foster care.
- The selection of the foster family shall be based on family's ability, intent, capacity and prior experience of taking care of children.
- All efforts shall be made to keep siblings together in foster families, unless it is in their best interest not to be kept together.
- The foster family shall be responsible for providing education, health and nutrition to the child and shall ensure the overall well being of the child in such manner, as may be prescribed.
- No child regarded as adoptable by the Committee shall be given for long-term foster care.

Observation homes [Section 47]:-

"Observation home" means an observation home established and maintained in every district or group of districts by a State Government, either by itself, or through a voluntary or non-governmental organization.

The observation homes shall be registered under section 41 of this Act, for temporary reception, care and rehabilitation of any child alleged to be in conflict with law, during the pendency of any inquiry under this Act.

Special Homes [Section 48]:-

"Special home" means an institution established by a State Government or by a voluntary or non-governmental organization, registered under section 48, for housing and providing rehabilitative services to children in conflict with law, who are found, through inquiry, to have committed an offence and are sent to such institution by an order of the Board

Children's Home [Section 50]:-

"Children's Home" means a Children's Home, established or maintained, in every district or group of districts, by the State Government, either by itself, or through a voluntary or non-governmental organization.

The State Government is authorized to designate any Children's Home as a home fit for children with special needs delivering specialized services, depending on requirement.

Fit Facility [Section 51]:-

"Fit facility" means a facility being run by a governmental organization or a registered voluntary or non-governmental organization, prepared to temporarily own the responsibility of a particular child for a specific purpose, and such facility is recognized as fit for the said purpose, by the Committee, as the case may be, or the Board.

Fit Person [Section 52]:-

"fit person" means any person, prepared to own the responsibility of a child, for a specific purpose, and such person is identified after inquiry made in this behalf and recognized as fit for the said purpose, by the Committee or, as the case may be, the Board, to receive and take care of the child.

Rehabilitation and re-integration services in instructions registered under this Act and management thereof [Section 53].

(1) The services that shall be provided, by the institutions registered under this Act in the process of rehabilitation and re-integration of children, shall be in such manner as may be prescribed, which may include—

- basic requirements such as food, shelter, clothing and medical attention as per the prescribed standards;
- equipment such as wheel-chairs, prosthetic devices, hearing aids, Braille kits, or any other suitable aids and appliances as required, for children with special needs;
- appropriate education, including supplementary education, special education, and appropriate education for children with special needs:
- Provided that for children between the age of six to fourteen years, the provisions of the Right of Children to Free and Compulsory Education Act, 2009 shall apply;
- skill development;
- occupational therapy and life skill education;
- legal aid where required;
- Birth registration etc.

(2) Every institution shall have a Management Committee, to be set up in a manner as may be prescribed, to manage the institution and monitor the progress of every child.

(3) The officer in-charge of every institution, housing children above six years of age, shall facilitate setting up of children's committees for participating in such activities as may be prescribed, for the safety and well-being of children in the institution.

Conclusion:-

So at last this can be concluded that the Indian legislature have taken eminent and effective measures through the Juvenile Justice Act ,2015 by establishing rehabilitation centers for juvenile to rehabilitate and socially re-integrate.