HUMAN RIGHTS AND THE RULE OF LAW IN ECONOMIC AND SOCIAL PERSPECTIVE : THE INDIAN EXPERIENCE

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1. INTRODUCTION

The guarantees of human rights and the rule of law seek to tackle the perennial problem of harmonising the individual and social interests in the society. The international and national documents establish an inextricable link between human rights and the rule of law[1] in laying emphasis for the protection of human rights through the application of the rule of law[2]. Since the international documents make the observance of these rights a duty of the states, the contents of human rights and the rule of law forming part of the constitutions and the laws of various countries are required to be patterned in accordance with the international norms. This assumes that the enjoyment of human rights by the people depends on the application of the rule of law by the individual states. However, the inequitable economic and social stratification with miserable living and working conditions of the vast population resulting in oppression, inequality, insecurity, bondage and infringement of basic rights in less-developed countries governed by the rule of law require concrete analysis of the relation between the human rights and the rule of law at the national level in economic and social perspective.

II. THE HISTORICAL LINK

The constitutional norms of the rule of law and basic rights in India owe their origin to their development in western countries. The documented development of the human rights and the rule of law in western countries[3]

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1 Initially concerned with law and order or government, the rule of law has now come to cover economic and social goals. See A.V. Dicey, *AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 187-205 (London : The Macmillan Press Ltd., 1968); Sir Ivor Jennings, *THE LAW AND THE CONSTITUTION* 55-60 (London: Hodder and Stoughton Ltd., 1971); and E.C.S. Wade and E.W. Bradley, *THE CONSTITUTIONAL AND ADMINISTRATIVE LAW* 103-9 (New York : Longman Publishing, 1993)

2 The concern for protecting the human rights by the rule of law shown in the Universal Declaration of Human Rights, 1948 is reflected in the International Covenant on Civil and Political Rights, adopted in 1966 and the Declaration on the Right to Development adopted in 1986.

3 For instance, The English Bill of Rights, 1689, The French Declaration of the Rights of Man and of Citizen, 1789, The American Declaration of Independence,

evolving through the historical process, has been linked with the development of nationalism, capitalism and liberalism. While liberalism extending from monarchic state to the democratic one[4] gradually legitimised the system of representative governance through the rule of law and the broader protection of human rights, the human rights guarantees and the rule of law themselves got firmer ground under such a system. For instance, in England, the conflict between the king - the representative of the feudal system - and the representative government came to be gradually resolved through law such as the Petition of Right, 1628, the Agreement of the People, 1649 and the Bill of Rights, 1689 tightening the parliamentary control over the crown. The Habeas Corpus Acts of 1679 and 1816 supplemented them. Later, the Parliamentary Reform Acts beginning with the Reform Act of 1832 together with the laws extending individual freedom[5] and social security[6] broadened the ambit of rule of law and the human rights.

The Indian legal system though patterned on the English legal system due to historical reasons, came to have different character and the course of development. In British India, the colonial interests required subjugation of the people and maintaining of existing property relations. Subsequently, inspite of the hectic legislative activity[7] through the law commissions beginning in 1835 under the influence of Benthamite utilitarianism, it remained limited to codification, maintaining the societal status quo. The character of the governments formed during the British rule remained very much limited due to its propertied and communal basis despite the initiation of the process of increased representation of Indians and non-official members in the government by The Indian Councils Act, 1892 and gradual expansion of legislature through The Indian Councils Act, 1909, The Government of India Act, 1919 and The Government of India Act, 1935.

1776 and The American Constitution, 1787 (adopted in 1788) as also the American Bill of Rights of 1791 and the subsequent civil war amendments (1865-1870) for giving basic rights to negro slaves.

4 Mainly see J. Locke, *TWO TREATISES OF GOVERNMENT* (London: Cambridge University Press, 1960) and J.J. Rousseau, *THE SOCIAL CONTRACT*(Middlesex: Penguin Books Ltd., 1968) (translated by Maurice Cranston).

5 Such as The Marriage Act, 1835; The Divorce Act, 1857 and The Married Women's Property Acts, 1870-1893.

6 For instance, See The Old Age Pensions Act, 1908; The National Insurance Act, 1911; The Trade Disputes Act, 1906; The Trade Union Act, 1913; and The Education (Provision of Meals) Act, 1906.

7 For example, The Code of Civil Procedure, 1859; The Indian Penal Code, 1860; The Code of Criminal Procedure, 1861; The Police Act, 1861; The Evidence Act, 1872; The Contract Act, 1872; The Negotiable Instruments Act, 1881; The Transfer of Property Act, 1882 and The Official Secrets Act, 1923.

It would be worthwhile to mention that the permanent settlement of land revenue in 1793 in Bengal, Bihar and Orissa[8], had already placed the intermediaries collecting revenue at the centre of land relations, thus relegating the rest of the rural community comprising tenants and labourers to the periphery.

With the intermediary system being prevalent in all the three systems of land tenure – *zamindari,*[9] *ryotwari*[10] *and mahalwari*[11] – the tenancy laws mainly regulating the tenure and rent had to be in consonance with such a system, thus not affecting the basic relationship between land and the people. This had the effect of continuing the exploitation of the rural people by the intermediaries.

The rule of law in British period was, indeed, limited by feudal and colonial norms and the guarantees of basic human rights remained conspicuously absent till the adoption of the Constitution in 1950 after the end of the British rule. Thus, in contrast to gradual materialistic and philosophical development of the human rights and the rule of law in England, they came to be declared through the constitutional document in India. Quite obviously, the rule of law in India departs from the English one in that it comes to be basically contained in and limited by the Constitution.

III. THE WELFARE PERSPECTIVE

The welfare state having the basis of the rule of law for state action for meeting the societal requirements came in India with the adoption of the Constitution in the post-colonial period, unlike its gradual development in England and other western countries. Quite obviously, with large feudal rural base having uneven land-people relationship, vertical caste segregation, poverty and illiteracy, the interaction between the welfare measures and the operational base could not be smooth. Both the contents of the laws and their implementation came to be geared to suit the propertied interests.

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8 See Bengal Regulation I of 1793, settling the land with the intermediaries permanently and making them its proprietors.

9 This system conferring proprietary rights on the land revenue collecting agents was prevalent in Assam (Goalpara and Cachar), Bengal, Bihar, Orissa (1/2), Bhopal, Madhya Bharat (1/2 Gwalior), Rajasthan, Saurashtra, U.P. and Madras (northern 1/3rd). See G.D. Patel, *THE INDIAN LAND PROBLEM AND LEGISLATION* 403 (Bombay: N.M. Tripathi Ltd., 1954).

10 This system prevalent in Assam (a portion), Bihar, Bombay, Jammu & Kashmir, Hyderabad, Mysore, Coorg, Madhya Bharat (half) and Madras (Southern 2/3rd) sought to deal directly with the individual plots and their holders. See Patel, *ibid.*

11 Under this system, prevalent in Agra, parts of Oudh and Punjab, the village as a whole was recognised as a unit for purposes of revenue liability. See Patel, *ibid.*

A. The Basic Norms

The basic norms of the rule of law and human rights are embodied in the Indian Constitution and all the laws and executive orders have to conform to such norms. The Constitution resolving to secure to the citizens justice, liberty, equality and fraternity in the preamble, unfolds them in Parts III and IV in the form of 'fundamental rights' and the 'directive principles of state policy.' The fundamental rights contain guarantees of equality (Articles 14 to 18)[12] and liberty (Articles 19 to 22)[13] and protect freedom of religion (Articles 25 to 28) and cultural and educational rights of minorities (Articles 29 and 30). Besides, Article 23 prohibits traffic in human beings and forced labour and Article 24 prohibits child labour. Article 32 is remedial providing for the enforcement of fundamental rights through the writs. Article 13 protects the fundamental rights against the state law taking away or abridging them by declaring such a law void. However, during the emergency, Article 359 gives draconian power to the state to make any law or to take any executive action overriding the freedoms guaranteed under Article 19. Article 359 even authorises the President to suspend the enforcement of all the fundamental rights (except Articles 20 and 21) during the emergency. The emergency provisions, no doubt, stand in contradiction to the rule of law and become the breeding ground of human rights violations. The events subsequent to the proclamation of emergency on 26 June, 1975 (such as suppression of individual freedom and arbitrary arrests) testify it. The fact that the exception to suspend Articles 20 and 21 by presidential order came to be inserted in Article 359 by the Constitution (Forty-fourth Amendment) Act, 1978 after the revocation of emergency, bears further testimony to this.

In contrast to individual character of most of the fundamental rights, directive principles intend to provide the basis for furthering collective economic and social interests of individuals through law. Though directing the state to secure a social and economic order for common welfare of the people (Article 38), *inter alia,* by distributing ownership and control of the material

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12 Article 14 guarantees to every person equality before law and the equal protection of the laws in general terms while Articles 15 and 16 are specific in prohibiting discrimination on grounds of religion, race, caste, sex or place of birth and in guaranteeing equality of opportunity in matters of public employment. Article 17 abolishes the inhuman practice of untouchability and Article 18 abolishes titles.

13 Article 19 guarantees to the citizens specific freedoms of speech and expression, assembly, forming of association, movement, residence and settlement and profession, occupation, trade or business subject to reasonable restrictions. Article 20 safeguards to the persons in criminal matters in respect of ex-post facto laws, double jeopardy and self-incrimination. Article 21 protects life and personal liberty of a person broadly and Article 22 provides safeguards against arbitrary arrest and detention but the general safeguards contained in clauses (1) and (2) of the Article do not apply to an enemy alien and in preventive detention cases.

resources of the community for common good and preventing concentration of wealth and means of production to the common detriment [clauses (b) and (c) of Article 39], yet because of being worded vaguely and being practically limited by the economic capacity of the state as also due to their non-enforceability by any court[14] (Article 37), these principles have proved to be a base for political manoeuvring. The constitutional and legal norms providing for suitable conditions for the availability of human rights face the built-in hurdles emanating from the character of the rural set-up such as resource-people relationship, feudal hold, caste hierarchy, poverty and illiteracy etc. Consequently, the laws enacted in pursuance of these provisions remained rooted in *status quoism* and, thus, came to have the inherent limitations of the economic and social set-up both in their content and implementation.

B. Ordering the Agrarian Structure

In a country with large rural base and concentration of landholdings in the hands of few people, legal ordering of agrarian structure was supposed to further economic and social justice and to provide a base for dignified living to the vast populace. However, the implementation of the ceiling laws, enacted in two phases in sixties and seventies in respect of the agricultural land by different states providing for distribution of surplus land in excess of ceiling area among the poorer sections, bears witness to the fact that this remained a far- fetched dream. Marred by high ceiling limits, landholders' choice and a large number of exemptions[15], these laws could not stand upto their avowed aim.

The meager quantity of poor quality of land produced by the implementation of these laws[16] , allotted individually for a purchase price[17] proved insufficient for improving the living conditions of the rural poor. The fact that the zamindari abolition laws enacted by the states after 1947 had

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[14] Some of the directive principles have been treated as fundamental rights by the Supreme Court such as legal aid speedy trial (*H.M. Hoskot* v. *State of Maharashtra,* AIR 1978 SC 1548 and *Hussainara Khatoon* v. *Home Secretary, State of Bihar*, AIR 1979 SC 1369) and education (*Unnikrishnan* v. *State of A.P.*, AIR 1993 SC 2178).

[15] For instance, see the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961; Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960; Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 and Punjab Land Reforms Act, 1972.

[16] Out of 72.2 lakh acres land declared surplus, only 46.5 lakh acres of land could be distributed by the end of the Seventh Plan. See Government of India, Planning Commission, vol. II, Eighth Five Year Plan, 1992-97 (Delhi : The Controller of Publications, 1992) at 34.

[17] For instance, see the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition Surplus Land) Act, 1961 and the M.P. Ceiling on Agricultural Holdings Act, 1960.

already left large quantity of land with the intermediaries (the revenue collecting and non-cultivating proprietors of land) in the name of self-cultivation[18] denotes that the big farms were owned by absentee landlords. This gave rise to hidden tenancies in the states where the letting of land came to be generally prohibited[19]. The rural poor mainly consisting of agricultural labourers, share-croppers and the small and marginal farmers have, therefore, to remain at the mercy of these big farmers. As the small and marginal farmers and the share-croppers also work as agricultural labourers in the absence of enough resource base, the agricultural labourers form a sizeable group. Since these labourers have legally distant relation with the land on which they work, it is the spheres of wages, working conditions and social security which are amenable for legal regulation in respect of them. But they have minimal protection in these matters compared to their counterparts in industries. A central Act of the pre-constitutional period - The Minimum Wages Act, 1948 empowering the appropriate government to fix or revise the minimum wages in agriculture initially provides an interval of five years for such a purpose but in the event of inability to do so, it empowers the governments to revise the wages even after five years thus giving a broader discretion. Consequently, the wages remain unrevised for many years. As to working conditions and social security, the agricultural labourers remain an unprotected lot. Though the central government, being empowered under the Minimum Wages Act, 1948 has fixed the number of hours constituting a normal working day, (being 9 in case of an adult and 4-1/2 in case of a child) under the Minimum Wages (Central) Rules, 1950, Rule 24(2) dilutes its effectiveness in permitting the arrangement of working day of an adult worker in such a way as not to exceed 12 hours on any day including the intervals of rest. The social security laws protecting the industrial workers have a limited applicability in agriculture[20]. The fact that the Contract Labour (Regulation and Abolition) Act, 1970 legalises the exploitative intermediary system of contract labour by making provision for licensing of contractors (section 12 is indicative of the systemic limitations of such laws. The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 accentuates this in covering

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[18] For instance, see The Bihar Land Reforms Act, 1950; The Rajasthan Land Reforms and Resumption of Jagirs Act, 1952; The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950; The Orissa Estates Abolition Act, 1951 and The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950.

[19] For instance, under the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, operational in the State of Uttar Pradesh, the letting of land is allowed only by a limited category of persons-the disabled in various respects. See sections 156 and 157.

[20] For instance, the Workman's Compensation Act, 1923 is applicable only to persons employed in farming by tractors or other contrivances driven by steam or other mechanical power or by electricity. Also see the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and the Maternity Benefit Act, 1961.

only the inter-state migrant workmen recruited through contractor or middleman and not those employed directly by the employer. The lack of proper implementational framework, besides the built-in hurdles of the rural set-up, does not even allow the limited benefits guaranteed by these laws to be conferred on the labourers. That the welfare laws face the implementational hurdles of systemic character becomes amply clear in view of the fact that the real efforts for releasing and rehabilitating the bonded labourers could be initiated only with the involvement of the social workers and the Supreme Court.[21] The Child Labour (Prohibition and Regulation) Act, 1986 while prohibiting the employment of children (below 14 years) in certain occupations or in workshops wherein certain processes are carried on, permits child labour in others in regulating the conditions of work of children obviously in accordance with social realities.

The debt-relief laws enacted for giving debt-relief to the poor rural debtors generally against the non-institutional creditors are basically pro-creditor in approach in that the debt was to be discharged only if the debtor had paid a sum exceeding or equivalent to one and a half time the amount of debt in certain case[22] and an amount equal to or exceeding twice the amount of the principal in others.[23] Even the debtor was disentitled for refund of any payment made in excess of the amount of principal and interest.[24] The failure of the institutional credit agencies like the cooperatives and banks in the rural society particularly among the non-cultivating poorer section mainly due to security-based legal norms[25] made the non-institutional exploitative credit agencies, like the professional money-lenders, traders and the landlords survive. Thus, the rural society continues to have exploitative base affecting the human rights of the vast populace adversely.

C. Remedying the Inhuman Social Practices

The unequal norms of the vertical caste segregation operational in Indian society since hoary past make its character quite complex. Even the built-in mechanism of human rights and the rule of law becomes imbued with such norms. This has the obvious effect of negating the human rights of the people

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21 See *infra* note 47 and 48.

22 For instance, see the Punjab Agricultural Indebtedness (Relief) Act, 1975.

23 See the Gujarat Rural Debtors Relief Act, 1972.

24 For instance, see the Andhra Pradesh Agricultural Indebtedness (Relief) Act, 1977 and The Madhya Pradesh *Gramin Rin Vimukti Adhiniyam,* 1982 (the Madhya Pradesh Rural Debt Discharge Act, 1982).

25 For instance, see the Uttar Pradesh Agricultural Credit Act, 1973; the Haryana Agricultural Credit Operations and Miscellaneous Provisions (Banks) Act, 1973; the West Bengal Agricultural Credit Operations Act, 1973; the Punjab Agricultural Credit Operations and Miscellaneous Provisions (Banks) Act, 1978 and The Gujarat Agricultural Credit (Provision of Facilities) Act, 1979.

lower in the caste-hierarchy particularly the scheduled tribes and the scheduled castes having the stigma of untouchability. Though untouchability was constitutionally abolished and was made punishable by the Protection of Civil Rights Act, 1955 [replacing the Untouchability (Offences) Act, 1955] in respect of various acts on the ground of untouchability like enforcing of religious and social disabilities, it still continues to plague the Indian society. The positive societal effect in respect of untouchability - to a small degree indeed- has primarily been the result of extra-legal factors like urbanisation and education.

No doubt, several constitutional prescriptions[26] for protecting the interests of scheduled castes and scheduled tribes and other weaker sections have led to various measures including reservation in education, employment and legislatures, the absence of proper educational facilities has worked as a diluting factor. The societal interaction with legal measures like the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 punishing various acts of the non-scheduled caste or non-scheduled tribe persons for committing atrocities on scheduled caste and scheduled tribe persons, has not been smooth in view of the basic constraints of the economic and social set-up such as poverty and illiteracy etc. The empowerment at the village level too could not prove to be effective tool for advancement of the economic interests of the scheduled castes and the scheduled tribes in view of the exploitation of the village resources by the village headmen to their personal benefit and following of the feudal way of life by them.

D. Curtailing the Human Rights

While the ameliorative constitutional provisions and the welfare laws have the professed goals of creating suitable conditions for a proper living of the people with all their freedoms and rights, the criminal laws with broader arresting powers of police have the effect of curtailing the human rights. The major criminal laws viz the Indian Penal Code, 1860; the Criminal Procedure Code, 1973[27] and the Police Act, 1861 having the colonial roots obviously contain the colonial perceptions and norms of offences particularly pertaining to investigation, prevention, arrest and trial of offences, bails and bonds,

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[26] See the Constitution of India, 1950, Articles 15(4), 16(4), 46, 330 and 332.

[27] The Code revising the Criminal Procedure Code, 1898 retains the vast arresting and detaining powers of the police. It empowers the police officers to arrest a person even without a warrant and order from magistrate *inter alia* for being concerned in a cognizable offence or against whom a reasonable complaint has been made or credible information has been received or there is reasonable suspicion of his having been so concerned (section 41). See also sections 109, 110 and 151 pertaining to arrest without a warrant or an order from magistrate in cases of breach of peace for taking security of good behaviour from suspected persons and habitual offenders and for preventing the cognizable offences.

hierarchy of courts and appellate procedure etc. The unnecessary power of arrest without a warrant of a police officer under section 34 of the Police Act, 1861 on trivial grounds, such as for throwing dirt etc. on the street, obstructing passengers and indecent exposure of person or nuisance by easing himself or by bathing or washing in any tank or reservoir not meant for the purpose, do not accord with the norms of the welfare state. Moreover, the vast arresting powers of a police officer without a warrant in a cognizable offence and in breach of peace matters for taking security for good behaviour from suspected persons and habitual offenders under the Criminal Procedure Code, 1973 become the breeding ground of human rights violations due to unjustified arrests and detention[28] resulting in custodial violence including deaths and rapes and beating and unjustified handcuffing even in breach of peace matters. No doubt, the National Human Rights Commission formed under the provisions of the Protection of Human Rights Act, 1993 has been taking cognizance of human rights violations in various fields, but because of its obvious limitations as a single body for the whole country and the recommendatory nature of its directions as also due to the broader systemic hurdles, it has not been able to cope with the increasing human rights violations. The directory provision of the Human Rights Act, 1993 for the establishment of Human Rights Commissions at the state level (section 21), unlike the mandatory one at the central level (section 3) leaves the establishment of such bodies at the discretion of the states who, obviously, have systemic bias against the formation of such bodies.

IV. JUDICIAL LIBERALISM

The liberal outlook of the Indian Supreme Court over the years has widened the contours of the rule of law and the human rights embodied in the Constitution. Initially, in *A.K. Gopalan* case,[29] the Supreme Court interpreted the right to life or personal liberty guaranteed under Article 21 of the Constitution narrowly which accorded with the prevailing societal values based on feudal notions. In that case, the Court restricted the meaning of personal liberty to the Diceyan concept of bodily liberty connoting freedom from legally unjustified physical restraint.[30] The Court distinguished liberty under the fifth and fourteenth amendments to the U.S. Constitution *inter alia* on the ground that liberty under the Indian Constitution was restricted to personal liberty. Needless to say, liberty of a person is always personal to him vis-a-vis others.

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[28] The Third Report of the National Police Commission has brought to light the astonishing fact that nearly 60% arrests either unnecessary or unjustified accounting for 43.2% of the expenditure of the jails and that such a power of arrest was one of the chief sources of corruption in the police. Quoted in *Joginder Kumar* v. *State of U.P.*, AIR 1994 SC 1349, 1352.

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

[30] See A.V. Dicey, *supra* note 1 at 207-8.

It was, however, in the next decade that this distinction was given up in *Kharak Singh* case[31] and liberty under the Indian Constitution was equated with liberty under fifth and fourteenth amendments to the American Constitution. In that case, the Court struck down Regulation 236(b) of U.P. Police Regulations authorising domiciliary visits by the police as being unconstitutional. It was, however, in the post-emergency period that the right to life under Article 21 was emphasized to mean a dignified living. In *Maneka Gandhi* case[32], the Supreme Court, interpreted the words personal liberty widely and held that both the law and the procedure under Article 21 must be fair and reasonable. In that case, the petitioner's passport was impounded by the Central Government under the Passport Act, 1967. In *Francis Coralie*[33] involving detenue's right to have interview with his lawyer and family members, the Supreme Court emphasised that the right to life means to live with human dignity and all that goes along with it.

The contents of Article 21 were gradually broadened by the Supreme Court with the inclusion of specific rights, such as free legal aid,[34] speedy trial,[35] livelihood,[36] shelter,[37] education,[38] pollution free water and air[39] and health and medical care of workers.[40] The judicial liberalism has come to ramify in various dimensions and it is not feasible either to refer to all the decisions or to categorise them. However, broadly they pertain to criminal justice and the ameliorative socio-economic justice. Evidently, these two categories are not isolated as the social justice is a broader term even covering the criminal justice. The judicial concern for criminal justice has come to be reflected generally in cases pertaining to the abuse of police power of arrest and detention and the police torture,[41] speedy trial[42] and prison justice.[43] A police

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31 *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295.

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

33 *Francis Coralie* v. *Union Territory of Delhi*, AIR 1981 SC 746.

34 *H.M. Hoskot* v. *State of Maharashtra*, AIR 1978 SC 1548.

35 *Hussainara Khatoon* v. *Home Secretary, Bihar*, AIR, 1979 SC 1360; *Kadra Paharia* v. *State of Bihar*, AIR, 1982 SC 1167; *and Abdul Rahmari Antuley* v. *R.S. Nayak*, AIR 1992 SC 1630.

36 *Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180.

37 *Prabhakar Nair* v. *State of Tamilnadu*, AIR 1987 SC 2117 and *Chameli Singh* v. *State of U.P.*, AIR 1996 SC 1051.

38 *Mohini Jain* v. *State of Karnataka*, AIR 1992 SC 1858.

39 *Subhash Kumar* v. *State of Bihar*, AIR 1991 SC 420.

40 *Consumer Education and Research Centre* v. *Union of India*, AIR 1995 SC 922.

41 For instance, see *Joginder Kumar* v. *State of U.P., supra* note 28; *Khedat Mazdoor Chetna Sangath* v. *State of M.P.*, AIR 1995 SC 31; *Kishore Singh* v. *State of Rajasthan*, AIR 1981 SC 625.

42 See *supra* note 35.

43 *Sunil Batra (No. 1)* v. *Delhi Administration*, AIR 1978 SC 575; *Sunil Batra (No. 2)* v. *Delhi Administration*, AIR 1980 SC 1579; *Prem Shankar v. Delhi*

officer enjoys vast discretion pertaining to power of arrest under the Code of Criminal Procedure, 1973 and the Police Act, 1861 as discussed earlier. This gives rise to large scale abuses resulting in curtailment of liberty of the people. The motivation for such a deprivational attitude is derived from narrow view of the police largely governed by colonial and feudal mind-set. Accustomed to protecting the establishment, the police officers lack broader view of liberty and force the people to refrain from asserting their rights and thus maintain the status quo.[44] The fact that such a trend continues inspite of the judicial condemnation and directions, denotes their systemic roots. In *Joginder Kumar's* case,[45] the Supreme Court, having gone into the American and English position and the report of the National Police Commission, has tried to strike a balance between individual liberty and the police power of arrest. The Court found the arresting power unduly tilted towards the police in derogation of individual liberty. Reading the right of the arrested person to have someone informed into Articles 21 and 22(l) of the Constitution, the Court put the burden of proof of justifying the arrest on the police officer. Moreover, disapproving the arrest made in a routine way, it emphasised the objective and reasonable satisfaction of the police officer for making the arrest. It may be mentioned that the mandate of the Supreme Court in that case should not be read in isolation. Since the discretion of a police officer is affected by systemic factors, such as, colonial norms, feudal hold, casteism, poverty and illiteracy, the judicial mandate faces the implementational hurdles.

The systemic conditions operate as built-in hurdles in respect of implementation of the welfare laws too. It is, in fact, the systemic hurdles which necessitated public interest litigation due to incapacity of the vast population to assert their rights in the system of adversary litigation. Such a move responded positively by the Supreme Court led to ameliorative judicial interpretation. Such a litigation obviously arose because of the non-implementation of the laws and existence of societal maladies due to non-development. This implies that the Court tried to remedy the economic and social problems through its interpretative tool. Thus, in *People's Union for Democratic Rights* v. *Union of India*[46] arising out of the letter addressed by a social organisation, the Supreme Court took note of the denial of minimum wages to workmen engaged in various Asiad projects and non-enforcement of the Minimum Wages Act, 1948; Equal Remuneration Act, 1976, Article 24 of

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Administration, AIR 1980 SC 1535; *Francis Coralie* v. *Union Territory of Delhi,* AIR 1981 SC 746.

44 The facts of *Khedat Mazdoor Chetna Sangath* v. *State of M.P., supra* n. 41, depict police atrocities on the members of a social organisation dedicated to the cause of protecting and preventing exploitation of the tribal people.

45 *Joginder Kumar* v. *State of U.P., supra* note 28. The case involved unlawful detention of a young advocate by the police for a period of 5 days.

46 AIR 1982 SC 1473.

the Constitution prohibiting child labour; Employment of Children Act, 1970 and the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979. Widening the ambit of Article 23 of the Constitution prohibiting forced labour, it interpreted the word "force" to include the force arising from the compulsion of economic circumstances apart from physical or legal force. Moreover, the labour or service provided by a person for remuneration being less than the minimum wage, was held to be forced labour in terms of Article 23. The *Bandhua Mukti Morcha* case[47] brings to light the non-implementation of the law and depicts the broader approach of the Supreme Court for correcting the societal distortions. In that case, the pitiable condition of bonded labourers working in some of the stone quarries in Faridabad district of the State of Haryana was brought to the notice of the Supreme Court by an organisation dedicated to the cause of the bonded labourers. The Advocate-Commissioner appointed by the Court reported the helplessness, poverty and miserable life of these bonded labourers and their exploitation by the quarry-owners. That the implementation of the Act found low priority and it remained virtually dormant for about 8 years, at the state level, is apparent from the fact that the Supreme Court had to direct the State of Haryana in that case for (i) constituting vigilance committees in each sub-division of a district in compliance with the requirements of section 13 of the Bonded Labour System (Abolition) Act, 1976, (ii) instructing the district magistrates to take up the work of identification of bonded labour as one of their top priority tasks and to map out areas of concentration of bonded labour which are mostly to be found in stone quarries and brick-kilns and assign task force for identification and release of bonded labour and periodically hold labour camps in these areas with a view to educating the labourers *inter alia* with the assistance of the National Labour Institute, (iii) taking the assistance of non-political social action groups and voluntary agencies for the purpose of ensuring implementation of the provisions of the Bonded Labour System (Abolition) Act, 1976, (iv) drawing up within a period of three months from the date of judgement a scheme or programme for rehabilitation of the freed bonded labourers in the light of the guidelines set-out by the Secretary to the Government of India, Ministry of Labour and implement such scheme or programme to the extent found necessary.[48]

Even after these elaborate directions of the Court, it was found by a civil rights correspondent of "Statesman" that most of the bonded labourers in some of the villages in Bilaspur district of State of Madhya Pradesh earlier working in the stone quarries in Faridabad had not been rehabilitated even six months after their release and they were living a life of misery and starvation. In that case, arising out of her letter, the Supreme Court directed the state government to provide rehabilitative assistance to these labourers within one month from

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

48 *Neeraj Chowdhary* v. *State of M.P.*, AIR 1984 SC 1099.

the date of judgement. The Court had also to direct the state government to include the representation of social action groups in the vigilance committees in order to identify, release and rehabilitate the bonded labourers.

These efforts of the Supreme Court in issuing directions for proper implementation of the law became a subject of criticism mainly on the ground that the Court was taking over administrative functions, thus violating the doctrine of separation of powers. Criticism was also made on the grounds that such directions merely reiterate the obligations of the parties under law and that the Court was helpless in enforcing its directions.[49] Moreover, there is the apprehension that all the sufferings and socio-economic deprivations of the people, political mismanagement and corruption and any other conceivable governmental action or inaction can be said to be violative of Article 21.[50] These criticisms based on narrow understanding of the rule of law do not answer the question of the interaction of the judiciary with the ground realities of the economic and social setup and raise the basic issue of the role of judiciary under the framework of the rule of law. Since the reason for such a judicial liberalism lies mainly in state inaction, the judicial inaction in this respect would mean abdication of its constitutional functions and thus, continuous denial of constitutional rights of the people. The application of the principle of separation of powers strictly would thus result in maintaining the status quo. With state welfareism having the base of feudalism and political manoeuvring, the making and implementation of the laws become inbued with built-in hurdles of the economic and social set-up due to the lop-sided resource-people relationship, vertical social stratification, large number of small and marginal farmers, agricultural labourers and the bonded labourers. The only immediate option with the people in such circumstances is to have recourse to judiciary for redressing the societal wrongs. The vigilant judiciary has no option but to issue such type of directions necessitating the functioning of the rule of law. This is what the Apex Court did in *Bandhua Mukti Morcha* and other cases. The state in taking the opposite stand in these cases opposed its own obligations under the law. The criticism on the ground of helplessness of the court for enforcing its directions is devoid of sound basis as it is the duty of the state (executive) to enforce the court's orders. The judicial liberalism has, no doubt, its own limitations as it has its operational base in the lop-sided economic and social system and is grounded in colonial legal system developed in the past. The proper analysis of the matter, thus, requires broadening of the ambit of debate.

In a society marked by economic and social contradictions in income, wealth, employment, education and social status, the rule of law, liberty and equality have different connotations and levels. For instance, the right to travel

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[49] See Agrawala, S.K., *PUBLIC INTEREST LITIGATION IN INDIA - A CRITIQUE* (Bombay: N.M. Tripathi Pvt. Ltd., 1985) at 30-35.

[50] *Id.*, at 37.

abroad and right to be released from bondage are two unequal connotations of liberty for persons at different levels of development, the latter being narrower than the former. The process of availing liberty too differs in such cases. In the former case, availing of liberty by a resourceful person is simply by fulfilling the procedural formalities and if denied by the executive, by taking recourse to judiciary. But in the latter case, there is no liberty even to have recourse to judicial process. That depends upon the mercy of the social reformers and the state machinery. Even after release from bondage, the rest of liberty of livelihood-for employment and education-remain elusive for bonded labourers in the absence of proper rehabilitation. The bonded labourers, therefore, lack liberty in terms of Article 21 of the Constitution even after their judicial release. Supreme Court's emphasis on effective rehabilitation,[51] does not solve the problem due to inadequacy of rehabilitative assistance in the absence of bonded labourers' capacity to have recourse to judicial process. Thus, the judicial liberalism cannot effectively supplement the state-inaction in correcting the societal distortions.

V. CONCLUSION

Human rights and the rule of law in India are inextricably linked with systemic factors like resource-people relationship, poverty, illiteracy, vertical caste system and the feudal rural base generating the built-in hurdles. With the rule of law inheriting the colonial norms and values and the societal norms being dominated by feudal values, the operation of constitutional welfare norms and values faces these systemic hurdles. Consequently, the interplay of legal norms with society particularly its poorer section gives rise to exploitation, arbitrariness and oppression which have the operational effect of violating the human rights. Judicial liberalism extending the contours of the human rights and the rule of law also being circumscribed by the built-in constraints of the economic and social system, could not play a supplementing role in this regard.

[51] See *P. Siwaswamy* v. *State of Andhra Pradesh,* AIR 1988 SC 1863, where the court held a rehabilitative assistance of Rs. 736.00 per family inadequate.