CHAPTER - II

Human Dignity of Marginalised Section of the Society: A Conceptual analysis

In the recent years, the jurisprudence of human dignity has emerged around the world in a number of constitutional texts and in a range of cases in which courts enforce or refer to the right to dignity.\(^1\) It raises a question (i) what is the relevance of dignity; (ii) why does it seem useful to legislators and judges alike; (iii) and what role is it playing in all these diverse factual situations even though another right might be more particular and equally, if not more, effective. This calls upon to consider the importance of human dignity.

Right to human dignity is intertwined with right to exist as human being, not as an animal but as a social animal within the contours of civility. Right to exist does not mean mere survival or animal existence; it would include the right to live with human dignity; a right to minimum subsistence and would include all those aspects of life which makes a life meaningful, complete and worth living\(^2\). The right to live with human dignity is affected if there appears to be some direct, overt and tangible act threatening the fullness of the life of the person\(^3\).

As explained earlier, greater emphasis has been laid down to the concept of human dignity which can be well proved and explained through the international documents:

The Preamble of UN Charter affirms faith in the fundamental human rights, in the dignity and worth of the human person.

The Preamble of Universal Declaration of Human Rights declares in the similar vein the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family. It further declares that all Human beings are born free and equal in dignity and rights. International Covenant on Civil and Political Rights, Optional Protocols to the International Covenant on Civil and Political Rights, International

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2. See, Maneka v.Union of India, AIR 1978 SC 597; See also, Board of Trustees v. Nandkarni, AIR 1983 SC 109.
Covenant on Economic, Social and Cultural Rights, International Convention on Elimination of All Forms of the Racial Discrimination, Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on Elimination of all Forms of Discrimination Against Women, Convention on the Rights of Child also emphasise on recognition of the inherent dignity and of the equal and inalienable rights of all the members of the human family as it lays the foundation of freedom, justice and peace in the world.

Vienna Declaration and Programme of Action, 1993, United Nation Millennium Declaration, 2000 *a multo fortiorari* also emphasise on the collective responsibility to uphold the principles of human dignity, equality and equity as the global end.

Even the Courts around the world while developing a jurisprudence of human dignity have ruled on the right to dignity, including Germany, India, Canada, South Africa, Hungary, and Israel have been more deliberate in the development of the jurisprudence of dignity than others⁴. However, there, is no clear connection between the status of the dignity as textually protected right and its prominence in the country’s jurisprudence: Canada’s Charter does not mention dignity at all⁵ Indian Constitution mentions it several times but primarily in the Preambles and in the Articles on unenforceable directive principles⁶; Hungary’s Constitution mentions it an one of the many rights⁷; Israel’s evolving Basic Law emphasizes it⁸, so does South Africa’s post apartheid Constitution which calls it as a founding principle⁹; in Germany it is fundamental and non-derogable¹⁰. Many countries whose Constitutions protect dignity have failed to develop jurisprudence about it¹¹. Some patterns of the jurisprudence of human dignity from around the world fall into the three broad categories¹².

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⁴ Ibid
⁶ See, Arts. 14, 15,16,21,29, 30, 38, 39 & 46 of the Constitution of India.
⁸ See, Article 4 of the Constitution of Israel; See also Human *Dignity and Liberty*, 1992.
¹¹ See, The Constitutions of Pakistan and Bangladesh.
¹² Supra note 1.
1) One category treats dignity as a mechanism “for protecting individuality”. This individuation principle starts from the premise that each individual human being is unique and in that uniqueness lies dignity. The “Individuation Principle” has varied applications. In some cases, it emphasises that the State’s objectification on individuals violates their dignity. In other instances, it is used to protect the individual decisions a person makes, such as the choice of intimate partner and lifestyle, selection of names, religion choices, occupational opportunities, and decisions relating to reproduction. Dignity has been used to support both the fetal right to life and the woman’s right to choose. Courts have also recognised that the right to protect one’s reputation rests on the right to dignity, as does the right to travel.

The individual principle also has application in equality and affirmative action cases. The Canadian Supreme Court, for instance, has found that the purpose of constitutionally guaranteeing equality is “to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as member of Canadian society, equally capable and equally deserving of concern, respect and consideration.” Through equality jurisprudence, courts have recognized the “inherent” dignity of women, people with disabilities and others who were previously not held to enjoy the same respect in law as privileged groups.

All these cases suggest that the constitutional right to dignity requires the government to respect the individuality and individual choices of citizens as against majoritarian control.

2) A second category protects “socio-economic interests” viz., “distributive justice” or “access to justice”. In these cases courts consider that whether the State violates the right to dignity when it fails to provide an appropriate level of medical care, shelter,
education, or other basic needs to its citizens and residents. These cases tend to posit that the right to dignity demands that the individual must have the means by which to live with dignity, making the right to dignity meaningful even in the face of significant fiscal constraints.

The Indian Supreme Court has repeatedly insisted that the right to life includes the right to live with human dignity and “All that goes along with it, namely the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”

The courts have also linked the right to life to the right to live with dignity, meaning “free from exploitation” or not dependant on others.

3) The third category concerns the “right of those who are legally dependent on the State” viz., “inherent dignity of every person”. Where the individuals are dependent for their care on the State, their dignity is to that extent compromised. But the courts have held that the rights to human dignity nonetheless imposes some limits on what States can do to individuals within their control in terms of care, treatment, and punishment. In these cases, the State is obligated to recognize the “inherent dignity of every person “for instance, prisoners, victims of crime, juveniles, girl child workers, contractual workers and others whom society traditionally treated as without dignity. It discerns that there has been a dramatic constitutional shift in the last few decades with the judicial recognition of the inherent, and equal, humanity of each individual. Courts in these cases

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20 Ibid.

21 See, Francis Coralie v. Union of India, AIR 1981 SC 746

22 Ibid.


have tried to invest the concept of dignity with real content and to ensure that the values encapsulated in that right are judicially enforceable\(^{25}\).

Dignity jurisprudence across the globe encapsulates that the destiny of the man and woman must be shaped to a large extent on his and her own conception of his and her physical, mental and spiritual imperatives and his and her place in the society\(^{26}\). Thus the State cannot enforce individuals to adopt a particular religion, or to work in a particular industry; it cannot demean prisoners to the point where they have literally nothing left, but must allow them to hope, and to live\(^{27}\). It must ensure that individuals have the means by which to live with some degree of independence, autonomy and dignity so that they are not absolutely controlled by the need to satisfy basic needs.

When courts enforce the right to dignity, they are saying something important not only about what dignity means; they are also saying something important about what it means to be an individual in the particular contemporary society in which courts sit. A case about the medical care, for instance, becomes not only about what health care rights are available under the Constitution at issue, but in the hands of judges concerned about dignity – becomes a case about what care an individual- who, by definition in imbued with inherent dignity - is entitled to.

Individual dignity requires the provision of emergency treatment, and if, the country cannot afford to provide treatment for chronic illness to all who need it, the government is at least required to take action to enhance the availability of health care for all\(^ {28}\). Such cases are not just about a particular right, but also about the respect that is due to individuals per se\(^ {29}\). Although dignity is inherent and often “inviolable”, it can never be absolute\(^ {30}\). Even in countries where dignity is constitutionally protected, the inviolable dignity of million of people is severely comprised by inadequate health care, food,


\(^{26}\) See, Planned Parenthood v. Casey, 505 U.S. 833.

\(^{27}\) See, The Right to dignity has been used in South Africa and Hungary to abolish death penalty.


\(^{29}\) Supra note 1.

\(^{30}\) Ibid
shelter, education and so on. Dignity does not mean to provide individual with the means to live with dignity of kings rather, the constitutional obligations is to progressively realize the right to health care or housing, to avoid disproportionate or unnecessary incursions into an individual’s dignity, meaning that the government should not excessively limit the scope of authority that one has over oneself. Thus, even though individual dignity is recognised, the scope of state authority still has silence.

**Human Dignity the fundamental concept of Human Rights**

In the background of the above, the analogy appears to be that the human dignity is the foundational concept of the global human rights regime, “the ultimate value” that gives coherence to human rights. The International Human Rights Covenants proclaim “these rights derive force from the inherent dignity of the human person.” The Vienna Declaration of 1993 World Human Right Conference likewise affirms “All human rights derive from the dignity and worth inherent in the human person.” And all of this can be traced back to the aim of the United Nations, as stated in the second paragraph of the Preamble of the Charter, “to reaffirm faith in the fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of the nation large and small.”

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31 *Ibid*
32 *Ibid*
33 See, International Covenant on Economic, Social and Cultural Rights (ICESCR) second perambulatory paragraph; and International Covenant on Civil and Political Rights (ICCPR) second perambulatory paragraph. See also, ICESCR and ICCPR, first perambulatory paragraphs.
34 See, Vienna Declaration of 1993 World Human Right Conference Second perambulatory paragraph. See also para 1.11.3 (The World Conference on Human Rights notes that certain advances, notably in the biomedical and life sciences as well as information technology, may have potentially adverse consequences for the integrity, dignity and human rights of the individuals, and calls for international cooperation to ensure that human rights and dignity are fully respected in this area of universal concern); para 1.18.2 (Gender based violence and all forms of sexual harassment and exploitation, including those resulting from the cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated.); para 1.20 (“The World Conference on Human Rights recognizes the inherent dignity and contribution of indigenous people”); para 1.25 (“Extreme poverty and social exclusion constitute a violation of human dignity”). In addition para B of the Vienna Programme of Action is titled “Equality, Dignity, and Tolerance” and para. 55 “emphasizes that one of the most atrocious violations against human dignity is the act of torture, the result of which destroy the dignity and impairs the capability of victims to continue their lives and their activities.”
Yehoshua Arieli argues that Universal Declaration and the concept of dignity of man were “the cornerstone and the foundations on which the United Nations sought to reconstruct the future international order of mankind and of public life in general. Be that as it may, the International Document, are however, unclear as to the exact meaning of human dignity and how the dignity gives rise to Human Rights. Schachter says that “We do not find an explicit definition of the expression “dignity of the human person” in international instrument or in national law. Its intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors. When it has been invoked in concrete situation, it has been generally assumed that a violation of human dignity can be recognized even if the abstract term cannot be defined”. Henkin also a-

36 See International Convention on the Elimination of All Forms of Racial Discrimination first perambulatory paragraph (“the charter of the United Nations is based on the principles of the dignity and equality which is inherent in all human beings”), second perambulatory paragraph (“the Universal Declaration of Human Rights proclaims that all Human Beings are born free and equal in dignity and rights”), and fifth perambulatory paragraph (stating the aim of securing understanding of respect for the dignity of human person “); Conventions on the Elimination of All Forms of Discrimination against Women, first perambulatory paragraph (“the Charter of United Nations reaffirm faith in fundamental human rights, in the dignity and worth of human person”), and seventh perambulatory paragraph (“discrimination against women violates the principles of equality of rights and respect for human dignity”); Conventions against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Second perambulatory paragraph (“those rights derive from the inherent dignity of the human person”); Convention on the Rights of Child, first perambulatory paragraph (“dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”); second perambulatory paragraph (“…… faith in fundamental human rights and in the dignity and worth of the human person”), eighth perambulatory paragraph (“the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity”), Article 23(1) (“a mentally and physically disabled child should enjoy a full and descent life, in conditions which ensures dignity”), Article 28(2) (“State parties shall take appropriate measure to ensure that school discipline is administered in a manner consistent with the child’s human dignity”), Art 27 (c) (“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person”), Article 29 (“…… an environment shall fosters the health, self respect and dignity of the child”), and Art 40(1) (“promotion of the child’s sense of dignity and worth”). At the regional level, the American Declaration of Rights and Duties of Man, in its first perambulatory paragraph, declares that “The American people have acknowledged the dignity of the individual” and in the next paragraph goes on to the claim that “the essential rights of man are not derived from the fact that he is a national of certain state, but are based upon attributes of his human personality.” And Chapter VII of the Helsinki Final Act commits the parties to “promote and encourage the effective exercise of civil, political, economical, social, cultural and other rights and freedoms all of which derive from the inherent dignity of human person”.

37 See, Universal Declaration on the Human Genome and Human Rights (2005), where “Human Dignity” appears eight times, without an attempt specify its meaning, and usually separate from but in conjunction with “human rights and fundamental freedoms”. This type of situation is more similar in 1997 Council of Europe Convention for the Protection of Human Rights and Dignity of Human Being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine, where “dignity” appears four times in the Preamble and Article 1.

proprio -vigore says “The framers of the international instruments did not define human dignity……… Nor were they precise about the relationship between the human rights and human dignity”\textsuperscript{39}. The nature of Human Dignity has been encapsulated in Article 1 of the Universal Declaration that, “All human beings are born free and equal in dignity and rights” – a premise, and promise, that still frames the leading challenges for State and citizens in contemporary international society\textsuperscript{40}.

Human rights thus have no single philosophical or religious foundations\textsuperscript{41} and have many foundations than could be provided by any particular philosophy or religion, i.e., Hindus, Christians, Muslims, Confucians, and Buddhists; Kantians, Utilitarian’s, Pragmatists, and neo- Astrotelians; liberals, conservatives, traditionalists, and radicals, and many other groups come to human rights from path with their own nuances. However almost all the leading paths to social justice and human rights centrally involve human dignity. The Universal Declaration of Human Rights thus presents a global vision mission that humanity has become the only valid framework of values, norms and principles capable of structuring a meaningful and yet feasible scheme of National and International civilized life\textsuperscript{42}. And this does contain a kernel of truth enjoined in the insights of the drafters of the Universal Declaration of Human Rights into some of the central social and a political problem of modernity has proved immensely fruitful\textsuperscript{43}. While protecting the ability of diverse consciences to disagree radically about the premises and principle of ethical theory, they found a way to emphasize a number of basic findings of practical reasons, to which a sufficient majority of people around the

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\item[40] Supra, note 1
\item[41] Ibid
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world had been driven\textsuperscript{44} and continue to be driven. In this way, Universal Declaration of Human Rights has in fact become a common standard of achievement for all people and all nations. Human rights, Human dignity, and social justice are related but analytically distinct concepts. It may be argued that human rights represent a particular strategy for realizing certain elements of social justice, based on a particular set of conceptions of human dignity\textsuperscript{45}. Human Rights are according to the literal sense of the term, the rights that one has simply because one is human.

\textit{Human Dignity: The Genesis of Sustainability}

The genesis of the human sustainability depends upon two facts, i.e., human rights and human dignity. First, the idea of human rights, viz, equal and inalienable rights held by every human being, can be exercised against the State and society. Second, the idea of dignity as an inherent feature of all men serves as a foundation for moral theory and political practice. Dignity is an attribute of virtue recognised as a universal principle of equality throughout most of the human history.

The rise of the idea of human rights and the inherent dignity of the human person are two interrelated manifestations of a broad transformation of modern societies towards more individual – centred and universalistic system of social, political and ethical life, which has been effectuated in concept of \textit{dignites} in the west and \textit{dharma} in the east.

Human rights thus go beyond the inherent dignity of human person to provide mechanism for realizing a life of dignity. Human rights both specify forms of life that are worthy of being with inherent moral worth and provide legal and political practices to realize a life of dignity that vindicates the inherent worth of human person. In other words human rights insists that the inherent worth of human beings must not left in an abstract philosophical and religious domain but rather must be expressed in everyday life through practices that respect and realize human rights. This is the challenge, these

sections of our society face today: to use human rights to construct the foundations for lives of dignity all across this planet.

One cannot imagine the Human rights without Human dignity, e.g., the right to life without dignity means the mere right to exist without the meaningful essentials required for life enjoyment. The right to health without dignity means that one can only enjoy it with whatever facilities the state provides and in the way the state provides. The right to work without dignity means the person is bound to work according to the working environment, whether healthy or unhealthy, and nothing beyond that. The right to food in the absence of dignity means that the man is expected to eat whatever is provided; and the right to shelter means every disgraceful and degrading place to live in.

Nevertheless, if one attaches the element of dignity to human rights, it means and includes all the necessities which make the human rights worth realisation. Then the right to life would not mean mere existence but much more than that and includes everything which makes the life worth living as a human being. The right to health would imply affirmative action on the part of the State to provide health-care to everybody in need of it. The right to work would imply healthy working environment. Henceforth it is meaningless to consider human rights without human dignity which adds flavour and fervour to the human rights.

In the background of the above, it seems expedient to explain the genesis of the marginalised section of the society in India from different perspectives such as : Social Marginalisation, Political Marginalisation, Economic Marginalisation, Age based Marginalisation, Gender based Marginalisation and Health based Marginalisation.

**Social Marginalisation:** Marginalisation is a slippery and multi-layered concept. Whole society can be marginalised at the global level, while classes and communities can be marginalised from the dominant social order. Similarly, ethnic groups, families or individuals can be marginalised within localities. To a certain extent, marginalisation is a shifting phenomenon, linked to social status. So, for example, individuals or groups might enjoy high social status at one point in time, but as social change takes place, so
they lose this status and become marginalised. Similarly, as life cycle stages change, so might people's marginalised position.

**Economic Marginalisation**: People who are experiencing marginalisation are likely to have tenuous involvement in the economy. The sources of their income will vary. Some will be waged and some will depend on state benefits, marginal economic activity such as casual work, or charity. It is not unusual for people to combine, or move between, these various ways of getting money in their struggle for survival. Poverty, dependency, and feelings of shame are everyday aspects of economic dislocation and social marginalisation.

**Political Marginalisation**: It is a type of marginalisation where the struggle is for the ballots. And this game does not have any relation with the individual status but it is only for the sake of ballots. In order to reduce this political marginalisation the children who are at the age of 18 yrs are allowed to participate in voting but prior it was 21 yrs, this example clearly shows the impact of political marginalisation in the society and what shape was given to it at present. The best examples are seen in case of Apartheid, Race, Caste and Tribal’s.

**Age based Marginalisation**: Under this type of marginalisation mainly the children and the old-age persons are exploited in the society. They are all exploited due to their dependency on account of their age. Under this type of marginalisation they not only face the above stated exploitation but are also discarded from the society.

**Gender based Marginalisation**: This type of marginalisation shows that how one section of society is treated in different ways and how their exploitation was committed by opting different attitudes towards them. This type of marginalisation basically laid down the stress on the offences which are committed at working places like Sexual harassment and rapes. However these types of examples clearly indicate that inequality exists and gender discrimination is there.

**Health based Marginalisation**: People who have become disabled, and those with a severely disabled child, often report rejection and isolation from their family, friends and
allies. Marginalisation then means reduced opportunity to link with others in common action to solve problems. The result can be described as disempowerment.

All these types of marginalisation make the life of marginalised section of society hapless. To alleviate the marginalisation stigma, the policy makers, law makers and social contentiousness people of country made multifaceted efforts. Thus marginalisation of sections of society means such persons who have been deprived of directly, overtly, covertly by tangible acts which threaten the fullness of the life of such persons or members of community from the main national stream. Such persons are segregated from the upper strata of the society and were deprived the right to education, right to social life, right to economy, right to economic stability and right to participation in the political system of the country. To mitigate the importance of marginalisation in India, the founder of Constitution of India introduced effective provisions in the Constitution which are known as affirmative action.\footnote{See, Articles 14, 15, 16 & 17 of Indian Constitution.}

The Indian Constitution has incorporated the International commitments and has adapted itself to the demands of Indian society in preserving the human dignity of the national under the Fundamental Right’s Chapter and the Directive Principles of State Policy. It provides justice: social, economical and political; liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all; fraternity assuring the dignity of the individual.\footnote{See, Preamble of the Constitution of India.} It guarantees the equality before law and equal protection of laws.\footnote{See, Article 14 of the Constitution of India.}

But provides special privilege for women, children, Socially and Educationally Backward classes of citizens, Scheduled Castes and Scheduled Tribes;\footnote{See, Article 15 of the Constitution of India.} and adopts a policy of reservation in the matter of public employment in favour of backward classes of citizens, Scheduled Castes and Scheduled Tribes both at intake level and promotional level.\footnote{See, Article 16 of the Constitution of India.} In order to check the social exploitation of the people it ensures that untouchability and any
disability arising out of untouchability is strictly forbidden\textsuperscript{51}. For further consolidation of the dignity of the individual the Constitution provides for various rights including the freedom of speech and expression, the freedom to move freely, to reside and settle in any part of India, to practice any profession or carry on any trade and business\textsuperscript{52} as well as right to life and personal liberty\textsuperscript{53}. It prohibits forced labour and trafficking\textsuperscript{54} in human beings as well as employment of children below the age of 14 years in any factory, mines or hazardous employment\textsuperscript{55}. It protects the religious rights of the people as well as the rights of the minorities so that the people should not be exploited in the name of religion\textsuperscript{56} or being a minority\textsuperscript{57}. It further ensures that the wings of the State will always strive for the realization of the welfare of the people where a justice in all its manifestation is guaranteed and the inequalities are eliminated\textsuperscript{58}.

All these Articles of the Constitution intend to remove social and economic inequality to make equal opportunities available. In reality the right to social and economic justice envisaged in the Preamble and elongated in the fundamental rights and the Directive Principles of the State policy of the Constitution are to make the equality of the life of the poor, disadvantaged, disabled, minorities and undeserved citizens of the society meaningful\textsuperscript{59}. Affirmative action tends to empowerment of those underprivileged or undeserved or weaker sections of the society which have been neglected lot of the society and to bring them at par with those who are effluent and privileged. Reservation in India is considered as a kind of affirmative action or positive discrimination or preferential compensatory justice or protective discrimination designed to improve the well being of undeserved. Affirmative action is not a government largesse or bounty; it is a positive measure taken by the State to improve the competitive ability of the disadvantaged section of the society\textsuperscript{60}. It includes not only the reservation or taking of positive steps for

\textsuperscript{51} See, Article 17 of the Constitution of India.
\textsuperscript{52} See, Article 19 of the Constitution of India.
\textsuperscript{53} See, Article 21 of the Constitution of India.
\textsuperscript{54} See, Article 23 of the Constitution of India.
\textsuperscript{55} See, Article 24 of the Constitution of India.
\textsuperscript{56} See, Articles 25-28 of the Constitution of India.
\textsuperscript{57} See, Articles 29 & 30 of the Constitution of India.
\textsuperscript{58} See, Article 38 of the Constitution of India.
\textsuperscript{59} See, Articles 14, 15,16,21,29, 30, 38, 39 &46 of Indian Constitution
\textsuperscript{60} See, \textit{Indra Sawhney v. Union of India}, AIR 1992 SC 477.

Thus the justification for the affirmative action by its proponents is that it helps to compensate for the past discrimination, persecution or exploitation by the upper strata and address the existing situation of discrimination in such a way that it is not being allowed to perpetuate.

61 AIR 1951 SC 226
62 AIR 1963 SC 649
63 AIR 1964 SC 1012
64 AIR 1972 SC 1375
65 AIR 1967 SC 1283
66 AIR 1976 SC 490.
67 AIR 1985 SC 1495.
68 AIR 1993 SC 447.
69 AIR 2002 SC 355.
71 AIR 2005 SC 3226.
72 AIR 2007 SC 71.
73 AIR 2008 SC 1.