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SIDHUWAL BHADSON ROAD, PATIALA - 147 006
TEL.: 0175 – 2391600, 2391601, 2391602, 2391603,
TELEFAX: 0175 – 2391690, 2391692
E-MAIL: info@rgnul.ac.in WEBSITE: www.rgnul.ac.in

EDITORIAL

How far and how deep can 'law', as a tool of transformation and also as a glue to keep fundamentally dysfunctional society together; help in assessing the sources of conflict and exploring the dimensions of peace in Jammu and Kashmir. In this drama unfolding, history and politics play a significant role and comparisons can be easily made with the chequered past of some other nations as well, such as Northern Ireland; Basque country, Spain and Quebec, Canada, the lessons that can be easily discerned and learned are one, to confront the problems and not circumvent them and dialogue without significant policy change is waste of time. The increasing discord is painfully entrenched in the cultural, political and social ethos of the area, where all actors, liberals and extremists view each other with suspicion and skepticism. The template of Northern Ireland, Spain and Canada frames the idea that there is a way out of this maze. India is a vibrant and a true democracy and therefore we must confront our problems and not brush them under the carpet. This culture of resistance that has evolved over the years will take focused and targeted, approach by 'crating a culture of accommodation'. 'Law' will have to serve the purpose of a bandage as it cleans and covers the wounds allowing them to eventually heal.

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ATTEMPT TO COMMIT CRIME UNDER IPC: AN APPRAISAL

*Professor (Dr.) Gurpal Singh
**Professor (Dr.) G.I.S. Sandhu

1. Introduction

The law relating to stages of crime in India is marked by controversies. Different and divergent opinions expressed in various decisions and commentaries of legal luminaries on the subject, have confounded the legal position. The necessary changes made in English law, on which Indian Law is based, to present the clear legal position, are not correctly and clearly outlined. Keeping in view the importance of stages of crime in the field of criminal law, especially, in the contemporary context, an effort is made in this paper to present the law in the proper perspective.

The offences are committed either after premeditation (planning) or at the spur of the moment. It is in relation to the former that it is necessary to consider different stages of the commission of the offence. A culprit first intends to commit an offence, then makes preparation for committing it and thereafter attempts to commit it. If the attempt succeeds, he has committed the offence, if it fails due to circumstances beyond his control, he is said to have attempted to commit the offence.[1]

The Indian Penal Code, 1860 (hereinafter referred as IPC) like other penal laws, recognizes that a pre-planned act passes through four successive stages which are:

(i) Intention to commit offence;

(ii) Preparation to commit offence;

(iii) Attempt to commit offence; and

(iv) Commission of the offence.

2. Intention

The first stage which is intention to commit offence is not punishable. It is impossible to prove the mental state of a man and the court cannot convict a person for that which it cannot know. Chief Justice Brain in this respect opined that the thought of a man is not triable, for the devil himself knows not the thought of a man. It means that law does take note of intention which is not followed by some act of expression.[2] Lord Mansfield observed that bare intention is not punishable because it

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* Former Dean and Head, Department of Law, Punjabi University, Patiala.
** Registrar-cum-Professor of Law, Rajiv Gandhi National University of Law, Punjab.

1 *Abhyanand Mishra* v. *State of Bihar*, AIR 1961 SC 1698; *Koppula Venkat Rao* v. *State of AP*, AIR 2004 SC 1874.

2 Y.B. (1477), p. 17; Nigam, General Principles of Criminal Law, 111.

is impossible to prove the mental state of man.[3] Indian Law does not make intention punishable. However, Calcutta High Court in Ramesh Banerjee's Case[4] held that dacoity probably is the only offence in IPC, which is made punishable at all the four stages of a crime i.e. assembly for dacoity under Section 402; preparation to commit dacoity under Section 399; attempt to commit dacoity under Section 393. And docoity itself under Section 395 of IPC. The offence of criminal conspiracy i.e. agreement to commit crime under Section 120-A IPC is another example where intention is punishable.

3. Preparation

After forming intention to commit crime, a person will think of the means how to commit crime. In other words, he makes preparation to commit the crime. This is the stage of preparation which consists of devising or arranging means or measures for the commission of crime. Generally, preparations to commit crime are not punishable. If mere acts of preparations were made punishable, it would be impossible in ninety-nine out of hundred cases to prove that the object for which preparation were made, was to commit an offence.[5] On the other hand it would merely harass the suspected persons. Preparation to commit crime as a general rule is not punishable as law allows locus ponitentiea – opportunity to retreat up to the second stage. However, there are exceptions to this rule, when mere preparations to commit the offence are punished, they preclude the possibility of innocent intention. Such preparations are, generally, made for heinous offences of grave nature. In such cases when persons undertake great risk and make preparation, the possibility of retreat is remote. The State deem it necessary to nip them in the bud in view of serious repercussions of such grave offences. Under the IPC, following are the instances of preparations which are punishable according to their gravity or otherswise:

(1) Preparation to wage war against the Government of India (Section 122 of IPC).

(2) Preparation to commit depredations on the territories of a friendly country (Section 126 of IPC). In both these cases preparations are punished as these activities affect the security of the state or security of friendly nation and need to be dealt with a heavy hand;

(3) Preparation to commit dacoity (Section 399 of IPC). Assembling for the purpose of dacoity is punishable under (Section 402 of IPC). This section applies to mere assembling for the purpose of committing dacoity without proof of other preparations. Dacoity is a very serious offence and therefore, we find that it is punished in all its stages. (A person may not be guilty of dacoity, yet be guilty of preparation, and not guilty of preparation, yet be guilty of assembling.[6]

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[3] In re Scifield (1784) Cald 402; Nigam, General Principles of Criminal Law, 111.
[4] (1913) Cal 350.
[5] Nigam, General Principles of Criminal Law, 112.
[6] Re-Ramesh Chandra Banerjee (1913) 41 Cal. 350.

(4) Similarly, possession of counterfeit coins, false weights and forged documents (Sections 242, 243, 259 and 266 of IPC), and Possession of forged or counterfeit currency notes or bank notes; making or possession of instruments or material for forging or counterfeiting currency notes or bank notes (Sections 489-C and 489-D of IPC).

Preparation to commit crime has also been made punishable under some special Acts. The underlying reason being the gravity of the offence and no chance to retreat once preparation is made. For example Section 30 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and Section 135-A of the Customs Act, 1962.

3.1 Reasons for not Making Preparation Punishable

Generally, the following reasons are given for not making stage of preparation punishable under the law:

(1) Preparation apart from its motive is generally an harmless act.

(2) It would be impossible in most cases to show that preparation was directed to a wrongful end or was done with an evil motive or intent. Therefore, if preparations were punishable it would cause unnecessary harassment to innocent persons as there is a locus ponitentiae and doer may have changed his mind.

(3) Then again, it is not the policy of law to create and multiply offences. If preparations were to be punished, innumerable offences will have to be created.

(4) Mere preparation does not and cannot ordinarily affect the sense of security of the individual to be wronged nor would the society be disturbed or alarmed so as to rouse its sense of vengeance.

4. Attempt

The third stage in commission of crime, namely, that of an attempt, marks a distinct advance on the development of criminality, so that it is punishable everywhere. Ordinarily, law allows *locus ponitentiae* (opportunity to repent) only upto the second stage, after which it regards the stage of criminality as too far advanced to go unpunished. Indian Penal Code does not define attempt. The Supreme Court in *Arun Kumar* v. *State of Haryana*[7] explained the necessity to punish the offence of attempt. It observed:

> An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is same as if he had succeed. Moral act must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.

[7] (2004) SCC 379.

The Apex Court further observed:

> The word 'attempt' is no where defined, and must therefore, be taken in its ordinary meaning. This is what the provisions of Section 511 of IPC require.[8] Attempt defies a precise and exact definition. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The third stage is reached when the accused takes deliberate overt or covert act or step towards the commission of the offence. Such step or act in order to be 'criminal' need not be penultimate act towards the commission of the offence. It is sufficient if such acts are reflection of the intention to commit offence aimed being reasonably proximate to the consummation of the offence.[9]

In order to constitute an 'attempt' first, there must be an intention to commit a particular offence, second, some act must have been done towards the commission of the offence and third, such act must be proximate to the intended result. The measure of proximity is not in relation to time and place but in relation to intention.[10]

Attempt is direct movement towards the commission of the offence, the act fails to achieve intended result due to circumstances beyond the control of the offender. A careful analysis of various observations of the Apex Court on attempt, with special reference to Section 511, shows that there are three essentials of attempt in order to make it an offence. These are:

(1) The person must have an intention or *mens rea* to commit the contemplated or intended offence;

(2) he has done some act or taken a step towards the commission of the contemplated offence; and

(3) he, for reasons beyond his control, failed to commit the intended offence.[11]

An attempt to commit an offence can be said to begin when after having made preparation, the doer does some act towards commission of the offence though not a penultimate act, but fails to achieve intended result due to the circumstances beyond his control. An attempt to commit an offence thus begins when state of preparation ends.[12]

4.1 'Attempt' under the Indian Penal Code

The approach of the makers of *the Indian Penal Code*, 1860 towards attempt is reflected in three ways i.e. attempt has been dealt with in three ways in the Code. In the first category commission of the offence as well as the attempt to commit it are dealt with in the same section and the extent of punishment prescribed for the both is the same. There are 27 such sections in the IPC, namely, sections 121, 124, 124-A, 125, 130, 131, 152, 153-A, 161, 162, 163, 165 (sections 161, 165-A omitted from

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[8] *Id.*, at p. 387 para 8.

[9] Per Justice Sarkaria in *State* v. *Mohd. Yakub* (1980) 3 SCC 57.

[10] Per Justice Chinappa Reddy in *State of Maharashtra* v. *Mohd. Yakub* (1980) 3 SCC 57.

[11] *Abhyanand Mishra* v. *State of Bihar,* AIR 1961 SC 1698; *Kailash Chandra Pareek* v. *State of Assam* (2003) Cri. L.J. 3514 (Gau); *Kappula Venkat Rao* v. *State of A.P.,* AIR 2004 SC 1874.

[12] *Abhyanand Mishra* v. *State of Bihar,* AIR 1961 SC 1698.

IPC and included in Prevention of Corruption Act, 1988) 196, 198, 200, 213, 239, 240, 241, 251, 385, 386, 389, 391, 397, 398 and 460. In the second category, some attempts are treated as separate offences and punished accordingly. There are five such offences:

(1) attempt to commit murder (S. 307)

(2) attempt to commit culpable homicide (S. 308)

(3) attempt to commit suicide (S. 309) and

(4) attempt to commit robbery (S. 393)

(5) Attempt to throw acid with the intention to cause grievous hurt (S. 326-B).[13]

In all the above sections of the IPC, attempts for committing specific offences are dealt with side by side with the offences themselves but separately, and separate punishments are provided for the attempts from those of the offences attempted. Of course, Section 309 stands as a class by itself as the completed offence here is not punished as it cannot be punished in view of the death of the accused.

Third category relates to offences which are not covered by the above two categories. Such attempts are governed by the general provisions contained in Section 511 which has been illogically placed at the end of the IPC. This section lays general principles relating to attempts in India.[14]

Section 511 reads:

> Whenever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does an act towards the commission of the offence, shall where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half if imprisonment provided for that offence.

Illustration:

> (b) A makes attempt to pick pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z having nothing in his pocket. A is guilty under this section (i.e. attempt to commit theft).

The words, 'and in such attempt does any act towards commission of offence' used in the section have been analysed by different eminent authors and judges in different ways. Shamsul Huda considers these words unnecessary as all attempts require something done towards commission of the offence.[15] According to H.S. Gour[16] these words are equivalent to the English phrase does an overt act. They exclude a mere intention not followed by an overt act, they also exclude acts not proximate and necessarily connected with the commission of an offence. These words, therefore, have been introduced in this section with a view perhaps to mark

[13] Added by Criminal Law (Amendment) Act, 2013 (Act 13 of 2013).

[14] *Koppula Venkat Rao* v. *State of A.P.*, AIR 2004 SC 1874.

[15] Shamsul Huda, *The Principles of Law of Crimes in British India*, (1902), p. 50.

[16] H.S. Gour, *Penal Law of India*, 4th Edition P. 2804.

out the difference between a preparation and an attempt, which has been explained by Lord Blackburn as:

There is no doubt a difference between a preparation antecedent to an attempt and the actual attempt, but if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime.[17]

4.2 Definition of Attempt under Halisbury's Laws of England

Any overt act immediately connected with the commission of the offence and forming part of a series of acts which if not interrupted or frustrated, would end in the commission of the actual offence, is if done with guilty intent, an attempt to commit the offence.[18] In view of vagueness in the concept of attempt and absence of clear definition, the Common Law concept of attempt has been substituted by the Criminal Attempts Act, 1981 of U.K.

Section 1 of this Act which codifies attempt including impossible attempt reads:

(1) If with intent to commit an offence, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempt.

(2) A person may be guilty of attempting to commit an offence, even though the facts are such that the commission of the offence is impossible.

(3) In any case where (a) apart from this sub-section, a person's intention would not be regarded as having amounted to an intent to commit the offence, but (b) if the facts of the case has been as he believed them to be, his intention would be regarded as having had an intent to commit the offence.

The concept of impossible attempt is fully covered under the UK Act of 1981. For example in *R.V. Shivpuri*[19] the accused was arrested by custom officials while in possession of a suitcase which he believed to contain prohibited drugs. After his arrest, he told, the officers that he was dealing in prohibited drugs. However, on analysis the substance in the suitcase was found not to be drugs, but snuff or similarly harmless vegetable matter. Nevertheless, he was charged under Section 1 of *the Criminal Attempts Act*, 1981 and Section 170 (b) of *the Custom and Excise Management Act*, 1979. He was convicted for attempting to commit an offence of being knowingly concerned in dealing with and harbouring prohibited drugs contrary to Section 170 (b) of *the Custom and Excise Management Act*, 1979. The point of law involved there in was, does a person commit an offence under Section 1 of the Criminal Attempts Act, 1981, where if the facts were as that person believed them to be, the full offence would have been committed by him, but where on true facts the offence which that person set out to commit was in law impossible, e.g. substance imported and believed to be heroine was not heroine but harmless substance.

The point for determination is the knowledge of the person about quality of thing recovered irrespective of its actual recovery from the accused. The principle laid down is that the accused is punished for his guilty mind, although the act actually

[17] *R.* v. *Cheesman* (1862) 1 (SC) 140.
[18] Vol. X (3rd Edition) 1955, p. 307.
[19] (1986) 2 All ER 334 (HC).

committed is innocent. An act otherwise innocent turns to be a crime, if the intention of the accused was to commit an offence through the said act or activities[20] (Shivpuri applied in Jones (Jon Anthony (2007) 4 All Er 112 (A).

4.3 Preparation and Attempt: Demarcation

The difficulty in certain cases arises in determining culpability of a person whose act is a borderline case between preparation and attempt. If such case is treated as preparation to commit crime, he is not liable. But if it is considered as an attempt, he would be liable. It means an attempt to commit offence begins when the state of preparation ends.[21] Courts in India, in many cases have stressed that there is a thin line between the preparation for and attempt to commit an offence.[22] No universal test/rule can be laid down to determine whether a particular act amounts to preparation or whether it actually amounts to an attempt to commit an offence. Courts have held repeatedly whether the act is at the stage of preparation or it has reached the stage of attempt depends on the facts and circumstances of each case. However, some tests/principles can be deducted from judicial decisions to determine whether a particular act or series of acts has crossed the stage of preparation to enter into the area of attempt to commit an offence. Various prominent tests which have been developed and applied by the Courts in India for distinguishing between attempt and preparation are given hereunder.

4.4 The Proximity Rule to Determine Attempt

According to this test/rule an act or series of acts constitute an attempt if the offender has completed all or at any rate all the more important steps necessary to constitute the offence, but the consequence which is the essential ingredient of the offence has not taken place. In order to designate an act or series of acts as attempt to commit an offence, the act or series of acts must be sufficiently proximate to the accomplishment of the intended substantive offence. In other words, an act or series of acts must be sufficiently proximate and not remotedly connected, to the crime intended. An act of the accused is considered proximate, even though it is not the last that he intended to do, is the last act that was legally necessary for him to do, if the contemplated result is afterwards brought about without further conduct on his part.[23]

For instance A shoots at B intending to kill him but misses the mark for want of skill or any other defect in the gun and the like, he would be liable for attempt to kill. The proximate test was the basis of the Supreme Court decision in *Abhyanand Mishra;*[24] *Mohd. Yakub;*[25] *Sudhir Kumar Mukerjee.*[26] In *Abhyanand* case the accused prepared

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[20] Principle laid down in *Shivpuri* applied in *Jones* (Jon Anthony 2007) 4 All ER 112 (A).

[21] *State of Maharashtra* v. *Mohd. Yakub* (1980) 3 SCC 57.

[22] e.g. *Abhyanand Mishra* v. *State of Bihar,* AIR 1961 SC 1698; *Sudhir Kumar Mukerjee* v. *State of W.B.,* AIR 1973 SC 2655; *Aman Kumar* v. *State of Haryana,* AIR 2004 SC 1498.

[23] *State of Maharashtra* v. *Mohd. Yakub,* (1980) 3 SCC 57; *Sachin Jana* v. *State of W.B.* (2008) 3 SCC 390; *Sagayam* v. *State of Karnataka,* AIR 2000 SC 2161.

[24] AIR 1961 SC 1698.

[25] (1980) 3 SCC 57.

[26] AIR 1973 SC 2655.

false experience certificate for appearing in M.A. examination of Patna University Roll Number was issued to him. On complaint against him and consequent holding of inquiry, his candidature was cancelled and criminal case of attempt to cheat was registered against. He pleaded that his theft act was only preparation but the Apex Court held that act to be an attempt. In order to cheat the university he did everything whatever he could do, but he could not cheat the university due to circumstances beyond his control.

In *Mohd. Yakub*[27] case, the accused were arrested by officials of Central Excise for attempting to smuggle silver out of India. Custom officials arrested them when they had brought silver ingots in a truck. The accused were found to have kept some small and heavy parcels on the ground. At the same time, the sound of a mechanized sea/craft was also heard. The trial court convicted the accused of attempting to smuggle silver out of India. Under *the Foreign Exchange Regulation Act* and *the Customs Act* the court of Additional Sessions Judge, acquitted them as their act did not go beyond preparation. The High Court dismissed State appeal against acquittal.

The Supreme Court on appeal by the State, however, set aside the acquittal by holding that the accused had committed the offence of attempting to export silver out of India by sea in contravention of Law. Two different but concurrent judgments were given by Justice Sarkaria and Justice Chinappa Reddy. The main contention of Justice Chinappa Reddy's regarding proximity rule is in relation to intention but not in relation to time and action,[28] whereas Justice Sarkaria considered proximity in terms of the actual physical proximity rather than the intention oriented proximity, the objective of the intended crime. He observed:

> Broadly speaking ... Overt act or step in order to be 'criminal' need not be the penultimate act towards the commission of the offence. It is sufficient if such an act or acts manifest ... manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence.[29]

Therefore, the determination of proximity rule, as per Justice Chinappa Reddy, relates with the proximity of 'State of mind' or intention of the doer with the intended crime. Justice Sarkaria considers its determination in terms of 'physical proximity' of the doer with the commission of the intended crime. The line of reasoning, in the backdrop of the requisite of committing an act 'towards the commission of the offence' advanced by Justice Sarkaria appears to be more logical than that of Justice Reddy's as proximity generally, refers to the sequence of acts leading to and closely connected with the commission of the contemplated offence.

R.C. Nigam, after elaborate discussion of the proximity rule concluded by quoting various English and Indian cases as under:

> It is submitted that the view that an attempted crime should be punished as there is *mens rea* in the attempt, is gaining ground in modern times, both in England as well as in our

[27] *State of Maharashtra* v. *Mohd. Yaqub* (1980) 3 SCC 57.
[28] *Id.*, para 31.
[29] *Id.*, para 13.

> own country. In the case of *R.* v. *Spicer*[30] where the charge was not one of attempt but of using means, namely, manual manipulation with intent to cause miscarriage contrary to the law of England[31] expert evidence was given to the effect that the acts of prisoner had not and could not cause the miscarriage. Judge directed the jury, "Whether this act does or does not produce miscarriage does not matter. Whether it was a method which could or could not procure a miscarriage does not matter. The question is what did he intend to do when he did the acts which were admitted by him in the witness box." The jury held him guilty for attempt to cause miscarriage.[32]

4.5 Doctrine of Locus Poenitentiae

The doctrine of *locus poenitentiae* denotes the possibility of person who, having made preparations to commit an offence actually backs out of committing it, due to change of heart or out of any other type of compulsion or fear. Therefore, an act will amount to a mere preparation and not an attempt, if the person of his own accord, drops the idea of committing a crime before the doing of a criminal act. In other words, as long as the steps taken by the person leave opportunity for a reasonable expectation that he might, either of his own because of fear of consequences that he might face or for whatever reason, desist from going further for the contemplated act, then in law, he will be treated at the stage of preparation and criminal liability will not be fastened on him.[33] However, if he stops from moving further due to his being detected or because the police officer was at his elbow, then he ceases to be a beneficiary of the doctrine of locus poenitentiae, because thereafter he has no time for repentance.

The Supreme Court applying this doctrine, in *Malkit Singh* v. *State of Punjab*[34] ordered acquittal of truck driver and helper of a truck convicted by a lower court of attempting to smuggle paddy out of Punjab. In this case the accused, driver and cleaner were intercepted at Smalkha, barrier post in Punjab, which was 14 miles from the Punjab-Delhi border, driving a truck containing 75 bags of paddy. A letter written by the consigner in Punjab to the consignee in Delhi was also recovered from the possession of the driver. They were charged with the offence of attempting to (smuggle) export paddy in violation of the Punjab Paddy (Export Control) Order 1959. The Apex Court quashed the conviction of the accused by holding that their acts were still at the stage of preparation. It observed:

> The test for determination whether the act of the appellants constituted an attempt or preparation, is whether the overt acts already done are such that if the offender changes his mind, and does not proceed further in its progress, the act already done would be completely harmless.[35]

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[30] *R.* v. *Spicer* (1955) 39 Cr. App. R. 189.
[31] Offences Against Person Act, 1861, S. 58.
[32] R.C. Nigam, *General Principles of Criminal Law,* (1965) ed., p. 124.
[33] *Empress* v. *Baku* (1900) Bob LR 287; re-*Narayanswamy Pillai,* AIR 1932 Mad 507; in Re-*Bavaji,* AIR 1950 Mad 44.
[34] AIR 1970 SC 713.
[35] *Id.,* para 4.

However, due to subsequent changes in substantive law relating especially to socio-economic offences, a different view than that of *Malkit Singh's* case was followed thereafter. Section 7 of *the Essential Commodities Act*, 1955, was amended in 1967 by the Parliament. After amendment, if any person contravenes, whether knowingly or intentionally or otherwise, any order made under Section 3 (Prohibiting Export of Fertilizer), then he would be liable for punishment. The changed law came to be considered by the Supreme Court in the case of *State of M.P.* v. *Narayan Singh.*[36] The issue in this case was whether the lorry and cleaner of two lorries carrying fertilizer without license, and intercepted on the highway between Maharashtra and Madhya Pradesh would be liable for contravention of the Fertilizer (Movement Control) Order 1973 read with Section 3 and 7 of *the Essential Commodities Act*, 1955, for attempting to smuggle fertilizers. The trial court acquitted the accused in both cases, on the ground that the prosecution had failed to prove that the accused were attempting to smuggle fertilizers. Since, the High Court refused to intervene, the State went in appeal to Supreme Court. The Apex Court held that it was not a case of mere preparation, viz., the respondents trying to procure fertilizer bags from someone or trying to engage a lorry for taking these bags to Maharashtra. It is difficult to say that the respondents were taking the lorries with fertilizer bags in them for innocuous purposes or for the mere thrill or amusement and they would have stopped well ahead of the border and taken back the lorries and fertilizer bags to the original place of dispatch or to some other place in M.P. State itself. Therefore, these were clear cases of attempted unlawful export of the fertilizer bags and not case of mere preparation alone.

In a situation where facts and circumstances prove that an attempt has been made to smuggle out the goods/currency, the contention of distance and possibility of his returning back or change of mind cannot be taken into account.[37]

Where the accused truck carrying smuggled bajra was intercepted fifty yards away from Punjab border, it was held that the giving of necessary thought to change of mind cannot be lost sight of but in the instance case, it could hardly be conceived that the accused could have changed his mind in a span of two to four seconds or within a distance of 50 yards changed his mind not to take truck cross the border. It was said that if the theory of change of mind is pressed to illogical ends there would hardly be left any field for the penal clause of attempt to cover the distance between preparation and actual commission.[38]

The doctrine of locus poenitentiea as propounded in *Malkit Singh* cannot be accepted as a general rule and it is to be confined to the particular facts of the case.[39] While explaining the logic of the observation regarding the rule in *Malkit Singh's* case, the Apex Court opined:

> We think ... that the test propounded ... should be understood with reference to the facts of the case... (T) the test is propounded with reference to the particular facts of the case and not as a general rule. Otherwise, in every case where an accused is interrupted

[36] AIR 1989 SC 1789.
[37] (1973) 3 SCC 401.
[38] *Hazara Singh* v. *UOI and Ors. Darbara Singh* v. *State of Haryana*, 1980 Cri.L.J. 1157.
[39] *State of Maharashtra* v. *Mohd. Yakub*, (1980) 3 SCC 57.

at the last minute from completing the offence, he may always say that when he was interrupted he was about to change his mind.[40] However, the logic about change of mind in Malkit Singh case and holding the act at the stage of preparation seems to be against probabilities. When truck was loaded and was to be taken to a particular distance, the truck driver or cleaner, who were just carrying the goods, could not be expected to change their mind. In such a situation, they have done act towards commission of the offence but fail due to the circumstances beyond their control. Such act is not preparation but attempt.

4.6 Unequivocality Test (Unambiguous/Leaving no Doubt)

The equivocality test, a continuation of the proximate rule and the doctrine of locus poenitentiae, suggests, that an act done towards the commission of the offence would amount to an attempt to commit an offence, if and only if, it indicates beyond reasonable doubt what is the end towards which it is directed[41] i.e. if it unequivocally indicates the intention of the doer to accomplish the criminal object. The *actus reus* of an attempt to commit a specific crime is constituted when the accused does an act which is a step towards the commission of that specific offence and the doing of such act cannot reasonably be regarded as having any other purpose than the commission of the specific crime.[42] In other words, the act must be unequivocally referable to the commission of crimes and must speak for themselves.[43] This theory has found its application in courts in New Zealand.[44] For instance, in case of attempt to commit murder by fire arms, the act amounting to commit an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires, he does not do any act towards the commission of the offence and once he fires, and something happens to prevent the shot taking effect, the offence of attempt to commit murder is made out.[45] When a person intends to commit a particular offence, and then he conducts himself in such a manner which clearly indicates his desire to translate the intention into action, and in pursuance of such an intention if he does something which may help him to accomplish that desire, then it can safely be held that he committed an offence of attempt to commit a particular offence.[46]

An evaluation of the above tests and cases decided by courts applying these tests indicates or leads to the conclusion that the court have decided cases with strict reference to one rule or the other. The above tests have been extracted from the decided cases in Common Law System. The Criminal Attempts Act, 1981 in England has clearly defined the attempt to commit an offence which now includes an impossible attempt. The same approach need to be followed in India.

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[40] *Id.*, para 30.
[41] *Russel on Crimes,* 11th ed., p. 483.
[42] Turner, *Modern Approach to Criminal Law*, p. 279.
[43] *Id.*, p. 280.
[44] *Id.*, pp. 280-81.
[45] *Om Parkash* v. *State of Punjab,* AIR 1961 SC 1872.
[46] *State* v. *Parasmal & Ors.*, AIR 1969 Raj 65.

4.7 The Position of Attempt under Section 307 vis-à-vis Section 511 of the IPC

There is difference of opinion among the Indian Courts regarding the scope of Section 307 *vis-à-vis* Section 511 of IPC. Bombay High Court in *R.C. Cassidy*[47] held that if case of attempt to murder is not covered by Section 307 it can be dealt with under Section 511 which is a general provision. However, Allahabad High Court in *R.* v. *Nidha*[48] held tht under no circumstance could an attempt to commit murder can come under Section 511. Straight J. of Allahabad High Court observed:

> I am of opinion that Section 307 of the Penal Code is exhaustive and within the four corners of that section is to be found the whole provision of law relating to attempt to murder.

His Lordship gave following reasons for non application of Section 511 for covering cases of attempt to murder:

> Firstly, because Section 511 applies only to offences punishable with "transportation (for life, now imprisonment for life) or imprisonment whereas Section 302 is punishable with death (i.e. maximum punishment provided); Secondly, Section 511 applies only where no express provision is made for punishment of such an offence but this Section (307) is an express provision, specially and deliberately providing for the offence of attempt to murder, and this section must be held to be exhaustive; Thirdly, the maxim' expression unius est exclusion alterius (the specific mention of one is the exclusion of another): Where there is conflict between generic and specific, the specific excludes generic as per rule of interpretation, should be applied in construing a penal statute of this kind; Fourthly, any other view would create an uncertainty and conflict of opinion as to what constitutes an attempt to commit murder.

The Court further observed:

> No court has any right to resort to Section 511 for the purpose of convicting a person of the offence of attempted murder which according to the view of the Court does not come within the provision of Section 307 of the IPC.

Various authorities like Mayne,[49] H.S. Gour,[50] Rattan Lal[51] and other, have expressed their views on the decision of the *Nidha* and *Cassidy* cases. However, no concrete conclusion could be drawn from the observations of the learned authors. R.C. Nigam after examining the opinion of the said authorities and discussion of other related authorities and cases, concluded:

> (T)hat the view taken by Straight J. in Nidha's case seems to be the better one as it is consistent with common sense as also the general scheme of the sections in the Penal Code. Section 307 specifically punishes attempts for murder, then why one should take away a *prima facie* attempt to murder out of Section 307 and include in Section 511.[52]

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47 (1867) BHC (Cri.) 17.
48 (1892) 14 All. P. 38.
49 Criminal Law 4th ed., p. 532.
50 Penal Law of India (4th ed.), p. 1646-7.
51 Culpable Homicide p. 11.
52 *Ibid.*

Therefore, Section 511 cannot apply to a case of attempt to murder which is not covered by Section 307 of the Penal Code as it is clear from the language of Section 511 which does not apply to attempt specifically dealt under the code like Section 307. [53]

4.8 Impossible Attempts

Another aspect of law relating to criminal attempts is that of impossible attempts. It is true that the criminality of an attempt lies in intention i.e. *mens rea*, but this *mens rea* must be evidenced by what the accused has actually done towards the attainment of his ultimate objective.[54] In this respect an interesting question arises for consideration, namely, does a step forward in the direction of committing an impossible act amount to an offence to commit offence i.e. can there be an attempt to commit an act which is impossible?

Under the English Law, the earlier law that a person could not be convicted for an attempt to do the impossible[55] was finally overruled in *R.* v. *Ring*[56] where it was held that impossibility of performance does not per se render the attempt guiltless. Under Section 511 of the Indian Penal Code also, an attempt is possible ... even when the offence attempted cannot be committed ... It is possible to attempt to commit impossible theft and offend against the Code.[57] Though the legal frame work relating to law of attempt in the Penal Code does not specifically deal with impossible attempts yet a careful reading of illustrations (a) and (b) appended to Section 511 shows that a person can be held guilty of attempting to steal some jewels from empty jewel box or something from empty pocket. The crucial aspect is the belief of the person and the intention preceding his action to do a particular act. It does not matter that it is after breaking open a box with the intention of stealing jewels which he believes to be inside it, or the person who picks an other's pocket with the intention of picketing (or lifting) whatever valuable he finds inside both persons find their intentions incapable of fulfillment.

These two illustrations, by necessary implication, lay down a rule that a person becomes liable for attempting to commit an impossible act (stealing jewels from empty jewel box or something from empty pocket), if he with intent to commit the intended offence, has done everything within his reach to commit the intended offence but his criminal objective could not be achieved due to circumstances unknown to him or beyond his control.[58] An attempt to commit offence is possible even when the intended offence is impossible to be committed.[59] The essential test for determination as to whether the person has crossed the stage of preparation is the over act that manifests his intention to commit the intended offence.

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[53] General Principles of Criminal Law (1965) p. 139.
[54] Kenny, Outlines of Criminal Law (17th ed.) by Turner p. 92.
[55] Collins 1864 ER 1477, Attempt to steal from empty pocket was not held to be attempt.
[56] (1892) 17, 491.
[57] *Queen Empress* v. *Mungesh Jivaji,* (1887) 11 Bomb. 76.
[58] Re-T. Munisathnam Reddy, AIR 1955 AP 118; *Abhyanand Mishra* v. *State of Bihar,* AIR 1961 SC 1698.
[59] *Queen Empress* v. *Mangesh Jivaji* (1887) 1 LR 11 Bom 376.

However, there is no single reported case in India that deeply examines or analyses or deliberates on the law relating to impossible attempts reflected to in the two illustrations of Section 511 of IPC. The Federation of Malaya Court of Appeal in the case of *Meenah Binti Ali* v. *Public Prosecutor*[60] delved into Section 511 (and its illustrations) of the IPC and provides some insight into these illustrations.[61]

The Court of Appeal Judged the propriety of the decision of the lower court convicting a woman under Section 312 read with Section 511 of the FMS Penal Code, for attempting to abort another woman who was not actually pregnant. The accused became aware of actual position of woman being not pregnant after she attempted to cause miscarriage. The Court of appeal while upholding the conviction for attempting to cause miscarriage under Section 312 read with Section 511 outlined the logic for punishing impossible attempt. The relevant part of the judgement with necessary changes is reproduced as: The evidence clearly showed that the intention of the appellant was to bring about the miscarriage and she could not have made the attempts unless she believed that the woman was pregnant. If the woman was not pregnant, then the failure of the attempt was due to the circumstances independent of the appellant (i.e. beyond her control). Her attempt failed due to absence of circumstances which she believed to exist. She is exactly in the same position as the would be pick-pocket who, believing that there is, or may be something capable of being stolen in the pocket which he decides to pick, attempts to steal it and finds his attempt failed by circumstances independent of himself, namely, non-existence of anything capable of being stolen. The circumstances of the case seem to be exactly covered by illustration to Section 511 of the IPC, even though these illustrations speak of attempts to commit a different type of offences.[62]

The position of impossible attempt in England has totally changed after the enactment of *the Criminal Attempts Act*, 1981. The impossible attempts are specifically covered under Section 1 (2) of the said act which states that a person may be guilty of attempting to commit an offence, even though, the facts are such that the commission of the offence in impossible.

The foregoing brief discussion of impossible attempt now leads to the logical conclusion that impossibility to commit the offence cannot be a defence in India and England, and a person's subjective belief to commit a particular offence is sufficient to make him liable for such attempt to commit the offence and punish him accordingly. However, the law in India is not precise and requires to be read in the illustrations rather than in substantive provision. In order to make the law crystal clear for guidance of lower courts, an explanation can be added to Section 511 regarding impossible attempt.

One of the important aspects of impossible attempt is whether the accused was actually 'on the job' i.e. whether he has gone beyond the stage of preparation and was in the next stage of trying to actively implement the planned or desired action by

[60] (1958) Malayan Law Journal 159.
[61] FMS Penal Code of Malaya is verbatim the the IPC.
[62] *Id.*, at p. 166.

way of trying to act on the intent, or trying to achieve his attention. If a person in order to commit theft from a locked box tries to break open the box but uses inadequate instruments, then he is on the job inspite of the fact that means used by him are not sufficient to achieve the intended result i.e. to commit theft. Here, he has the intention to commit offence and with the said intention he has done the act towards the commission of the offence though he failed to do the act due to reasons beyond his control. However, if the person is not on the job, then he cannot be held liable as he has no intention to commit the offence.

The ambit of application of the impossibility can be explained by the following examples:

(a) A shoots at B, whose back is towards A. The attempt fails because B is beyond the range of A's weapon. A is guilty of attempt to murder.

(b) A does not intend to kill B, knows the limited range of his weapon and is merely practicing actually. Here there is no *mens rea,* hence no attempt.

Thus, it is clear whether there is attempt or not depends solely on *mens rea.* If there is *mens rea,* it is capable of establishing *actus reus,* an act that would otherwise be not only legally but morally and socially incorrect.

In case of sexual offences especially of rape, the person who with the intention to commit rape, disrobes the woman, lie her flat and then tries to have sex with her but before he could penetrate, he ejaculates, he would be liable for attempt to commit rape and not under Section 354 IPC.[63]

This distinction between attempt to commit rape and commit indecent assault is fine. However, distinguishing point between an offence of attempt to commit rape and to commit indecent assault seems to some action on the part of the accused, that shows that the accused was just going to have sexual connection with a woman.[64]

4.9 Endeavors for Reforming Law of Attempt in India

The question of operation of law of attempt in general and Section 511 in particular was examined by the Fifth Law Commission of India. The commission was not satisfied with application of law attempt in India. In order to make the law of attempt more precise, the commission proposed some significant substantive and structural changes. It proposed shifting of Section 511 from the last chapter along with other provisions to Chapter V-B to be added in the IPC. It proposed Sections 120-C and D to be included in the chapter. Section 120-C defining the offence and S. 120-D providing punishment for attempt. The proposed Section 120-C reads:

> A person attempts to commit an offence punishable by this Code when (a) he with the intention or knowledge requisite for committing it, does any act towards its commission (b) the act so done is closely connected with, and proximate to the commission of the offence, and (c) the act fails because of the facts not known to him or because of

[63] *Madan Lal* v. *State of Jammu & Kashmir,* AIR 1998 SC 386.
[64] *Sman Kumar* v. *State of Haryana,* AIR 2004 SC 1498.

circumstances beyond his control.[65] The proposals of Law Commission with minor changes were included in the Indian Penal Code (Amendment) Bill 1978 which lapsed due to dissolution of Lok Sabha in 1979. No effort was made thereafter.

However, the Fourteenth Law Commission of India[66] refused to accept the proposals of the Fifth Commission by observing that there is no need to delete Section 511 and insert it in chapter V-B.

The reason given for rejection was dual: (i) it is difficult to formulate satisfactory and exhaustive definition that lays down a criterion for deciding as to where preparation to commit offence ends and where attempt to commit that offence begins (ii) mere proximity in time or place does not draw a definite line between preparation and attempt.[67]

5. Conclusion

Consequently the law of attempt in India remains untouched by Legislature unlike the English Law. Section 511 of IPC is based on the principles of law laid down in English cases especially *R.* v. *Ring.* It may be appropriate to follow the English Law embodied in Criminal Attempts Act, 1981. Adoption of such law would resolve many controversial questions raised in various decisions of High Courts and the Supreme Court. It is because of these controversies that many attempts go unpunished as prosecution fail to prove its case beyond reasonable doubt and impossibility of attempt weighs in favour of accused. The emerging areas of crime in modern society of scientific temper especially relating to information technology, need to be dealt with comprehensively and effectively by plugging various loop holes in the existing law of attempt. In order to balance the scales of justice in the proper perspective, the recasted English Law of attempt should be adopted in India. Till comprehensive legislation on attempt is passed in India, an explanation to Section 511 of the IPC should be added on the pattern of Section 1 (2) of Criminal Attempts Act, 1981 of UK.

[65] Law Commission of India 43rd Report (1971).
[66] Law Commission of India 156th Report (1997).
[67] Law Commission of India, 156th Report (1977) Paras 6-16.

SEXUAL HARASSMENT OF WOMEN AT WORKPLACE

Bikram Singh Goraya*

Why degrade and condemn those who
give birth to kings.

Sri Guru Nanak Dev

1. Introduction

Where the women are held in reverence, there do the Gods reside. This is an old Sanskrit adage. In the ancient times, women were considered an epitome of humility and purity. But with the passage of time, the status of women has changed radically. Nowadays, crimes against women are on the rise in almost all countries of the world. Most of these crimes are sexual in nature like rape, sexual assault, molestation, eve teasing, sexual harassment, etc. It is due to the patriarchal setup that women are considered as weaker sex which in turn makes women more prone to crimes. Amongst the above mentioned categories of crimes, sexual harassment is the easiest to commit. One of the difficulties in understanding sexual harassment is that it involves a range of behaviours. In most cases it is difficult for the victim to describe what they experienced. This could be related to stress and humiliation experienced by the recipient.

2. History and Coining of the Term

Sexual harassment is bullying or coercion of a sexual nature, or the unwelcome or inappropriate promise of rewards in exchange of sexual favours. The term 'sexual harassment' was used in 1973 in "Saturn's Rings", a report authored by Mary Rowe to the then President and Chancellor of Massachusetts Institute of Technology (MIT) about various forms of gender issues.[1] Rowe has stated that she believes she was not the first to use the term, since sexual harassment was being discussed in women's groups in Massachusetts in the early 1970's, but the MIT may have been the first or one of the first large organizations to discuss the topic and to develop relevant policies and procedure.[2]

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* Research Scholar, Panjab University, Chandigarh.

1 Rowe Mary, "Saturn's Rings", a study of the minister of sexism which maintain discrimination and inhibit affirmative action results in corporation and non-profit institutions; published in *Graduate and Professional Education of Women,* American Association of University Women, 1974, pp. 1-9.

2 Available at, *http://en.wikipedia.org/wiki/sexual_harassment#ate_note_5*, (last accessed 17 January, 2014).

3. Sexual Harassment

Sexual harassment may also be defined as "unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct a sexual nature that lends to create a hostile or offensive work environment.[3]

In U.S., the Court and employers generally use the definition of sexual harassment contained in the guidelines of U.S. Equal Employment Opportunity Commission (EEOC). The guidelines states, unwelcome sexual advances, request for sexual favours and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(i) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual employment.

(ii) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals, or

(iii) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile or offensive environment.

Under the Indian Legal system, much needed changes have been made is the Indian Penal Code (IPC) in order to make laws stringent as far as the matter of security of women is considered under Indian Penal Code. "A man committing any of the following acts:

(i) Physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) A demand or request for sexual favours; or

(iii) Showing pornography against the will of a woman; or

(iv) Making sexual coloured remarks;

shall be guilty of the offence of sexual harassment."[4]

4. International Legal Framework

Sexual harassment is a violation of women's human right and a prohibited form of violence against women in many countries. Sexually harassing conduct causes devastating physical and psychological injuries to a large percentage of women in the workplace around the world.[5] Various international conventions and covenants that directly address or are relevant to sexual harassment at workplace.

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[3] Available at, *http://thefreedictionary.com/sexual+harassment*, (last accessed 19 January, 2014).

[4] The *Indian Penal Code*, 1860, s. 354A.

[5] available at, *http://www.stopraw.org/sexual_harassment*, (last accessed 27 January, 2014).

4.1 United Nations Conventions

Sexual harassment is a violation of fundamental principles of International Human rights. Although the international Bill of Human rights, which consists of Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948, and its implementing covenants, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (both entered into force in 1976), does not explicitly mentions sexual harassment, but it does contain provision that apply to sexually harassing conduct. Sexual harassment is a form of invidious discrimination that violates the equal protection or anti-discriminatory provision in these agreements. The International Bill of Human Rights protects rights "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[6] Sexual harassment also violates the right to just and favourable conditions of work.

1. Article 2 of Universal Declaration of Human Rights states that everyone is entitled to all the rights and freedom set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, origin, property birth or other status. Furthermore, no distinction shall be made on the bases of the political, jurisdictional or international status of the country or territory to which a person belongs, whether to be independent, trust, non self-governing or under any other limitation of sovereignty.
2. Article 23(1) of Universal Declaration of Human Rights states that everyone has the right to work, to free choice of employment, to just and favourable condition of work and to protection against unemployment.

4.1.1 Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979

The Convention on Elimination of All Forms of Discrimination against women (CEDAW), adopted in 1979 by the United Nations General Assembly, is often described as an international bill of rights for women. It came into force on 3rd September, 1981 and consist of a preamble and 30 articles. This convention initially does not include language on violence against women or sexual harassment. However, it does prohibit discrimination in employment and also guarantees the right to protection of health and safety in working conditions.

General Recommendation No. 19 adopted by CEDAW at the 11th Session, 1992 explicitly interpreted the women's convention to prohibit violence against women as a form of discrimination against women. The recommendation noted that "gender based violence is a form of discrimination that seriously inhibits

[6] available at, *www.undocuments.net/a3r217.htm*, (last accessed 24 January, 2014).

women's ability to enjoy rights and freedom on a basis of equality with men, and that equality in employment can be seriously impaired when women are subjected to gender specific violence. Such as sexual harassment in the workplace". The United Nations General Recommendations to the CEDAW define sexual harassment of women to include:

> such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or action. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion; or when it creates a hostile working environment.[7]

4.1.2. Declaration on Elimination of Violence Against Women, 1993

This declaration was adopted by the General Assembly in the year 1994.[8] The nations of the world have become so disturbed at the prevalence of violence against women that a number of important steps have been taken to combat it. The Committee of Conventions of the Elimination of All Forms of Discrimination against Women places emphasis when examining the reports of states parties, both on ascertaining the level of violence against women, whether it is condoned or perpetrated by the State and on what measures are in place to combat it. The United Nations has appointed a Special Rapporteur on violence against women and itself has developed a Declaration on the Elimination of Violence Against women. In that declaration the General Assembly adopted the affirmation in the preamble that: "Violence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms, and is concerned about the long standing failure to protect and promote those rights and freedoms in relation to violence against women". Violence against women is defined in the declaration as:

> Any act of gender based violence that results in, or is likely to result in, physical sexual or psychological harm to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whethero occurring in public or private life.

Under Article 2, violence against women shall be understood to encompass but not be limited to, the following: (i) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (ii) physical, sexual and psychological violence

[7] Paragraph 18 of the Committee on Elimination of Discrimination Against Women in its General Recommendation No. 19.

[8] General Assembly Resolution No. 48/104, 1994.

occurring within the general community including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; (iii) physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

4.2 United Nations Conference Document

4.2.1 The Beijing Declaration and Platform for action adopted in 1995 at 4th World Conference on Women

The following declaration has been adopted in the conference:[9]

I. Take all necessary measures to eliminate all forms of discrimination against women and the girl child and remove all obstacles to gender equality and the advancement and empowerment of women;

II. Encourage men to participate fully in all actions towards equality;

III. Promote women's economic independence, including employment and eradicate the persistent and increasing burden of poverty on women;

IV. Promote people centred sustainable development, including sustained economic growth, through the provision of basic education, life-long education, literacy and training, and primary health care for girls and women;

V. Prevent and eliminate all forms of violence against women and girls;

VI. Ensure equal access to and equal treatment of women and men in education and health care and enhance women's sexual and reproductive health as well as education;

VII. Promote and protect all human rights of women and girls;

VIII. Ensure respect for international law, including humanitarian law, in order to protect women and girls in particular;

IX. Ensure women's equal access to economic resources, including land, credit, science and technology, vocational training, information, communication and markets, as a means to further the advancement and empowerment of women and girls to enjoy the benefits of these resources;

X. Ensure the success of the Platform for Action, which will require a strong commitment on the part of Governments, international organizations and institutions at all levels.

[9] The Fourth World Conference on Women, Beijing (China), 4-5 September, 1995.

5. Indian Legal Framework

5.1 The Guidelines and Norms of Supreme Court Relating to Vishaka's Case[10]

The main objective imposed by the CEDAW, 1979 on the State party is to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation and to ensure, through law and other appropriate means the practical realization of the principle. The Government of India ratified the Convention on the 25th June, 1993. Being a member State to the convention, Indian Government failed to incorporate a proper legislation to protect against sexual harassment and the right to work with dignity immediately. It was only when a writ petition was filed before the Supreme Court for enforcement of Fundamental rights guaranteed under Article 14,[11] Article 15(1),[12] Article 19(1)(g)[13] and Article 21[14] of the Indian Constitution by certain social activists and NGOs. In Vishaka's Case the basic cause for the filing of petition was due to an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. The Court issued notices to the Government of Rajasthan and Centre Government to appear before it to render needful legal assistance to deal with the matter. The whole issue which drew the attention of the Court is whether the existing legal provisions in India are sufficient to deal with all facts of gender justice including prevention of sexual harassment or abuse. To answer this question the Court examined various constitutional and penal provision existing in India. The Court relied at this stage upon some of the provision in the Conventions of the Elimination of All Forms of Discrimination against Women to ensure appropriate measures to eliminate discrimination against woman in the place of employment. Since our penal laws were insufficient to curb this social evil the Apex Court speaking through Justice J.S. Verma, C.J.I., rightly pointed out that, "in the absence of enacted law to provide for the effective enforcement of basic human rights of gender equality and guarantee against sexual harassment and abuse more particularly against sexual harassment at workplace, we lay down the guidelines and norms specified hereinafter for due observance at all work places and other institution until a legislation is enacted for the purpose". This is done in exercise of the power

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[10] *Vishaka and Others* v. *State of Rajasthan and Others*, AIR 1997 SC 3011, date of judgement 13 August, 1997.

[11] The *Constitution of India* Article, 14 provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

[12] *Id.*, Article 15(1) provides that "State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them".

[13] *Id.*, Article 19(1)(g) provides "All citizens shall have the right to practise any profession or to carry on any occupation, trade or business".

[14] *Id.*, Article 21 provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law".

conferred under Article 32[15] of the Constitution for the enforcement of fundamental rights and it is further emphasized that this would be the law declared by the Court under Article 141[16] of the Constitution. The guidelines and norms of Supreme Court relating to Vishaka's Case to ensure the prevention of sexual harassment in the case is summarized as follows:

5.1.1. Duty of the Employer or other responsible persons in workplaces and other institutions:

It shall be the duty of the employer or other responsible persons in workplaces and other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (Whether directly or by implication) as:

(a) Physical contact and advances;
(b) a demand or request for sexual favours;
(c) sexually coloured remarks;
(d) showing pornography;
(e) any other unwelcome physical, verbal or non - verbal conduct of sexual nature.

5.1.2 Preventive Steps

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

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[15] *Id.*, Article 32 provides that:
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the fundamental rights.
(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

[16] *Id.*, Article 141 provides "the Law declared by Supreme Court shall be binding on all courts within the territory of India".

(b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

5.1.3 Criminal Proceedings

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

5.1.4 Complaint Mechanism and Complaints Committee

An appropriate complaint mechanism should be created in the employers organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints and the complaint mechanism should be adequate to provide, where necessary, Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality. The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

5.1.5 Workers Initiative

Employees should be allowed to raise issues sexual harassment at workers meeting and in other appropriate forum and it should be affirmatively discussed in Employer - Employee Meetings.

Accordingly, it was directed that the above guidelines and norms should be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field.

In *Apparel Export Promotion Council* v. *A.K. Chopra*, the Supreme Court applied the guidelines laid down in *Vishaka* v. *State of Rajasthan*.[17] In this case the Court upheld the dismissal of respondent from the service, who was found guilty of sexual harassment of a subordinate female employee at the work place as it violated her fundament right under Article 21 of the Constitution. The respondent was working as a private secretary to the chairman of the appellant private company. He hired to molest a woman employer of the company. The respondent compelled her to reach Taj Place for taking dictation from the chairman and asked her to do typing work. When she was waiting in the room the respondent tried to sit too close to her and despite her objection did not give up his objectionable behaviour, when she was doing typing work in the business centre of the same hotel the respondent taking advantage of the isolated place again tried to sit close to her and touch her despite her objections. The respondent tried to molest her in the lift of the same hotel, but she saved herself by pressing the emergency button. She orally narrated the whole story to her boss and gave a written complaint also. The respondent denied the allegations and said that it was motivated and imaginary. He admitted that he merely attempted to molest her but had not actually molested her. The inquiry officer found the charges leveled against him to be proved. The disciplinary authority by believing the report removed him from the service. The Supreme Court held that the act of the respondent, was wholly against moral sanctions, decency and undoubtedly amounted to sexual harassment and hence the punishment of dismissal from service imposed on him was commensurate with the gravity of his objectionable behaviour and valid. In such cases the Courts are required to examine broader probabilities of the case and not be swayed by insignificant discrepancies or narrow technicalities.

5.2 Other legislations to prevent crimes against women in India

5.2.1 The Dowry Prohibition Act, 1961

The concept of dowry is wider than the concept of Stridhan. While dowry signifies presents given in ceremonies during marriage to the bridal couple as well as others. Stridhan is a part of dowry. It does not include the present given to the husband or his parents or for the common use of all the in the matrimonial homes including her. The legislature has tried to maintain a balance between the age old tradition of giving customary gifts and the daughter as the auspicious occasions and if such gifts are made with certain compulsion then the law makes it a penal offence.

[17] AIR 1997 SC 3011.

5.2.2 The Protection of Women from Domestic Violence Act, 2005

The above mentioned legislation aimed at provide for more effective protection of the right of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matter connected therein or incidental thereto.

5.2.3 Indian Penal Code

Under the Indian Penal Code System, landmark changes were made in the penal laws after the report of the committee on amendment to criminal law for protection of women. The provisions like Section 354A[18] and Section 498A[19] of the Indian Penal Code aims at curbing the crime committed against women.

6. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

The condition of women has undergone radical changes from ancient times till date. Women are not given the respect that they deserve. The patriarchal setup has aggravated the problem furthermore. There is a huge increase in number of crimes against women and sexual harassment at workplace is one of the categories of such crimes. Though the Government of India ratified the CEDAW on 25th June, 1993 but it failed to enact a comprehensive legislation to check sexual harassment at workplace. From 1997 till date of passing of the

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[18] The *Indian Penal Code* 1860, Section 354-A provides that:

1. A man committing any of the following acts –
   (i) physical contact and advances involving unwelcome and explicit sexual overtures; or
   (ii) a demand or request for sexual favours; or
   (iii) showing pornograpghy against the will of a woman; or
   (iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.
2. Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both
3. Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

[19] *Id.*, S. 498A provides that whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation: For the purpose of this section, "cruelty" means-

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Act of 2013, the guidelines laid down by Supreme Court operated as law and it was emphasized to be law declared by the Supreme Court under Article 141 of the Constitution. The Sexual Harassment of Women at workplace (Prevention, Prohibition and Redressal) Act, 2013 is a legislative Act in India that seeks to protect women from sexual harassment at workplace. The bill received the assent of the President on 23rd April, 2013. The Act came into force on 9th December, 2013.[20]

The aim of the act is to provide protection against sexual harassment of women at workplace and for the prevention and Redressal of complaint of sexual harassment and for matters connected therewith or incidental thereto.[21]

The salient features of Sexual Harassment of Women at Workplace Prevention, Prohibition and Redressal) Act, 2013 are discussed hereunder:

I. Section 3[22] of the Act further elaborates the ambit of sexual harassment.

II. Section 4(1),[23] and Section 6[24] takes about Constitution of internal complaint committee and Constitution of local complaint committee respectively.

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[20] Available at, http://en.wikipedia.org/wiki/the_sexual_harassment_of_women_at_ workplace_ (Prevention,_Prohibition,_and_Redressal)_Act, 2013, (last accessed 25th January, 2014).

[21] Long title of the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, 2013.

[22] S. 3 provides for prevention of sexual harassment:
(1) No woman shall be subjected to sexual harassment at any workplace.
(2) The following circumstances, among other circumstances, if it occurs or is present in relation to or connected with any act or behaviour of sexual harassment may amount to sexual harassment:
(i) implied or explicit promise of preferential treatment in her employment; or
(ii) implied or explicit threat of detrimental treatment in her employment: or
(iii) implied or explicit threat about her present or future employment status; or
(iv) interference with her work or creating an intimidating or offensive or hostile work environment for her; or
(v) humiliating treatment likely to affect her health or safety.

[23] S. 4(1) provides that every employer of a workplace shall, by an order in writing, constitute a Committee to be known as the "Internal Complaints Committee":
Provided that where the offices or administrative units of the workplace are located at different places or divisional or sub-divisional level, the Internal Committee shall be constituted at all administrative units or offices.

[24] S. 6 provides for the constitution and jurisdiction of Local Complaints Committee:
(1) Every District Officer shall constitute in the district concerned, a committee to be known as the "Local Complaints Committee" to receive complaints of sexual harassment from establishments where the Internal Complaints Committee has not been constituted due to having less than ten workers or if the complaint is against the employer himself.
(2) The District Officer shall designate one nodal officer in every block, taluka and tehsil in rural or tribal area and ward or municipality in the urban area, to receive complaints and forward the same to the concerned Local Complaints Committee within a period of seven days.
(3) The jurisdiction of the Local Complaints Committee shall extend to the areas of the district where it is constituted.

The internal complaint committee shall consist of the following members to be nominated by the employer, namely:

(a) A presiding officer who shall be a woman employed at a senior level at workplace from amongst the employees.

Provided that in case a senior level woman employee is not available, the presiding officer shall be nominated from other offices or administration unit of the workplace referred to a sub-Section 1;

Provided further that in case the other officer or administrative units of the workplace do not have a senior level woman employee, the presiding officer shall be nominated from any other workplace of some employer or other department or organization;

(b) not less than two members from amongst employer preferably committed to the cause of woman or who have no experience in social work or have legal knowledge;

(c) One member from amongst non-governmental organization or association committed to the cause of women or a person familiar which the issues relating to sexual harassment;

Provided that at least one half of the total members so nominated shall be women.[25]

Every member of the committee including presiding officer shall hold office for a period not exceeding three years, from the date of their nomination as may be specified by the employer.[26]

III. This Act also provides for complaint mechanism in case a woman is sexually harassed:

(i) Any aggrieved woman may make, in writing, a complaint of sexual harassment at workplace to the internal committee if so constituted, or the local committee, in case it is not so constituted, within a period of three months from the date of incident and in case of a series of incidents, within a period of three months from the date of last incident;

[25] S. 4(2) of the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, 2013.

[26] *Id.*, S. 4(3).

Provided that where such complaint cannot be made in writing, the presiding officer or any member of the Internal committee or the chairperson or any member of the local committee, as the case may be, shall render all reasonable assistance to the woman for making the complaint in writing:

Provided further that the internal committee or, as the case may be, the local committee may, for the reasons to be recorded in writing, extend the limit not exceeding three month, if it is satisfied that the circumstances were such which prevented the woman from filing a complaint within the said period.

(ii) Where the aggrieved woman is unable to make a complaint on account of her physical or mental incapacity or death or otherwise, her legal heir or such other person as may be prescribed may make a complaint under this Section.[27]

IV. In order to amicably solve the matter the Act provides for conciliation and it quotes:

(i) The internal committee or, as the case may be, the local committee may before initiating an enquiry under Section 11 and at the request of the aggrieved woman take steps to settle the matter between her and the respondent through conciliation;

Provided that no monetary settlement shall be made as a basis of conciliation.

(ii) Where a settlement has been arrived at under sub-Section (1), the internal committee or the local committee, as the case may be, shall record the settlement so arrived and forward the same to the employer or the district officer to take action as specified in the recommendation.

(iii) The internal committee or the local committee, as the case may be, shall provide the copies of the settlement as recorded under sub-Section (2) to the aggrieved woman and the respondent.

(iv) Where a settlement is arrived sub-Section (1), no further enquiry shall be conducted by the internal committee or the local committee, as the case may be.[28]

[27] *Id.*, S. 9.
[28] *Id.*, S. 10.

The present Act also provides for the full fledged procedure for inquiry[29] into the complaint and it also provides for punishment for false or malicious complaint and false evidence.[30]

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[29] S. 11 provides that:

(1) Subject to the provisions of section 10, the Internal Committee or the Local Committee, as the case may be, shall, where the respondent is an employee, proceed to make inquiry into the complaint in accordance with the provisions of the service rules applicable to the respondent and where no such rules exist, in such manner as may be prescribed or in case of a domestic worker, the Local Committee shall, if prima facie case exist, forward the complaint to the police, within a period of seven days for registering the case under section 509 of the Indian Penal Code(45 of 1860), and any other relevant provisions of the said Code where applicable:

Provided that where the aggrieved woman informs the Internal Committee or the Local Committee, as the case may be, that any term or condition of the settlement arrived at under sub-section (2) of section 10 has not been complied with by the respondent, the Internal Committee or the Local Committee shall proceed to make an inquiry into the complaint or, as the case may be, forward the complaint to the police:

Provided further that where both the parties are employees, the parties shall, during the course of inquiry, be given an opportunity of being heard and a copy of the findings shall be made available to both the parties enabling them to make representation against the findings before the Committee.

(2) Notwithstanding anything contained in section 509 of *the Indian Penal Code* (45 of 1860), the court may, when the respondent is convicted of the offence, order payment of such sums as it may consider appropriate, to the aggrieved woman by the respondent having regard to the provisions of section 15.

(3) For the purpose of making an inquiry under sub-section (1), the Internal Committee or the Local Committee, as the case may be, shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908(5 of 1908) when trying a suit in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of documents; and
(c) any other matter which may be prescribed.

(4) The inquiry under sub-section (1) shall be completed within a period of ninety days.

[30] S. 14 provides that:

(1) During the pendency of an inquiry, on a written request made by the aggrieved woman, the Internal Committee or the Local Committee, as the case may be, may recommend to the employer to-

(a) transfer the aggrieved woman or the respondent to any other workplace; or
(b) grant leave to the aggrieved woman up to a period of three months: or
(c) grant such other relief to the aggrieved woman as may be prescribed.

(2) The leave granted to the aggrieved woman under this section shall be in addition to the leave she would be otherwise entitled.

(3) On the recommendation of the internal Committee or the Local Committee, as the case may be, under sub-section (1), the employer shall implement the recommendations made under sub-section (1) and send the report of such implementation to the Internal Committee or the Local Committee, as the case may be.

V. The Act also embodies duties of the employer[31] and provides that every employer shall:

(a) provide a safe working environment at the workplace which shall include safety from the persons coming into contact at the workplace.

(b) display at any conspicuous place in the workplace, the penal consequences of sexual harassment; and the order constituting, the internal Committee under sub-Section (1) of Section 4;

(c) organize worships and awareness programmes at regular interval for sensitizing the employees with the provision of the Act and oriental programmes for the members of the internal Committee in the manner as may be prescribed;

(d) provide necessary facilities to the internal Committee or the local Committee as the case may be, for dealing with the complaint and conducting an inquiry;

(e) assist in securing the attendance of respondent and witnesses before the internal Committee or the local Committee, as the case may be;

(f) make available such information to the internal Committee or the local Committee as the case may be, as it may require having regard to the complaint made under sub-Section (1) of Section 9.

(g) provide assistance to the woman if she so chooses to file a complaint in relation to the offence under the Indian Penal Code or any other law for the time being in force;

(h) came to initiate action, under the Indian Penal Code or any other law for the time being in force, against the perpetrator, or if the aggrieved woman so desires, where the perpetrator is not an employees, in the workplace at which the incidence of sexual harassment took place.

(i) treat sexual harassment as a misconduct under the service rules and initiate action for such misconduct;

(j) Monitor timely submission of reports by the internal Committee.

7. Loopholes in the Present Act

The Indian legislation regarding Sexual Harassment of Women at workplace (Prevention, Prohibition and Redressal) Act, 2013 had been widely criticized for the following drawbacks:

[31] S. 19 of the *Sexual Harassment of Women at Workplace (Protection, Arbitration and Redressal) Act*, 2013.

I. By virtue of Section 4[32] of the Act, all companies and employers who have more than 10 employees are required to constitute an internal committee to which an aggrieved woman can make her complaint. This committee which must be headed by a senior female employee, is supposed to be initially to get a settlement i.e. conciliation under Section 10[33] and only to launch an investigation in case of mediation facts. According to many scholars and law thinker, this is yet another way in which the dignity of women is undermined.

   i. Even according to the report of the committee on amendments to criminal law headed under the Chairmanship of Late Justice J.S. Verma (Retd.) pointed that "in matters of harassment and humiliation of women, an attempt to compromise the same is yet another way in which the dignity of women is undermined.[34]

II. The complaints forwarded to internal complaint committee or Local Committees should be examined by outside tribunal instead of these committees who are themselves the employees might get pressurized by employer to oppose the complaint.

III. Section 14 prescribes punishment for false or malicious complaint and false evidence.[35] But a woman with legitimate grievance may keep quiet, fearing that they will not be able to prove their allegation as the process of filling complaint is too bureaucrats and may instead be hounded for making false crime.

IV. While the new law states by advocating prevention of sexual harassment, it dilutes the responsibility of the employer in preventing it. Since the few for an offence has to be paid by the respondent/employee generally, it does not give companies much incentive to take active steps to create a harassment for environment.[36]

8. Conclusion and Suggestions

Despite the enactment of a comprehensive legislation for the protection of women from sexual harassment, crimes against women are still on the rise.Even the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, 2013, with so many loopholes may not be sufficient to provide ample protection to women from sexual harassment. The allegations of sexual harassment have been leveled against many high dignitaries including Judges of

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[32] *Supra* note 23.
[33] *Supra* note 28.
[34] Report of the Committee on Amendment to Criminal Law, submitted on 23 January, 2013.
[35] *Supra* note 30.
[36] S. 26 of the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redresal) Act*, 2013.

the Supreme Court of India,[37] high profile Journalists[38] and even Godmen.[39] The abovementioned instances shows that women are not safe and secure even in the highest judicial office of the county and even in the ashrams of Godmen, what to talk about those who worked in all sorts of hostile work environment. Before committing an act of sexual harassment in any form, one should always keep in mind that his own mother, wife, sister or daughter can fall victim to the same circumstances in her life. In order to improve the plight of women, some suggestions from my side are given hereunder:

I. For reforms one would definitely jump on the bandwagon of police sensitization and accountability, judicial expediency, fast track Courts and justice civil defence mechanisms so on and so forth. But in the glittering space of institution bashing, one would not undermine the role of one of the most important social institution, namely family. It is the moral duty of parents to inculcate basic values in their children.

II. The construction of male superiority is so deeply embedded in the male psyche in society that its uprooting would need a prolonged ideological struggle. This mindset is behind foeticide, infanticide, domestic violence, dowry death, harassment at workplaces and other forms of female persecution. You can't put policeman in every house for the safety of girl. Most of such cases go unreported and are rushed up in the name of family honour. The ideal society would be the one in which even without the fear of an administrative watchdog, men wholeheartedly want women to live and move around well as much freedom and liberty without unsolicited invasion on their integrity as they themselves do.

III. The Act of 2013 provides for the establishment of internal complaint Committee to monitor the complaints of sexual harassment. However, this is far from reality as very few offices and departments (Government and private) have actually constituted these committees. It is therefore suggested that should be set up as early as possible to enforce the provision of the act of 2013 in letter and spirit.

IV. The offence of sexual harassment under the Act of 2013 is gender specific as it provides that only a female can be harassed by a male. In my opinion the offence of sexual harassment should be made gender neutral so as to

[37] The Female students undergoing internship under Justice A.K. Ganguly and Justice Swatanter Kumar have levelled allegations of sexual harassment on them. They have alleged that the judges harassed them in hotel rooms and were seeking sexual favours from them. Even the report submitted by Supreme Court panel that was probing the alleged matter found Justice A.K. Ganguly guilty.

[38] A female journalist has leveled allegations of sexual harassment against her superior, Tarun Tejpal, a renowned journalist and editor-in-chief of Tehelka.

[39] Self styled Godmen Asaram and his son Narain Sai have been accused of rape, molestation and sexual harassment by several female followers.

protect the rights of males as well as transgenders. To support my opinion, it would like to mention the findings of a survey which was a survey of employees by a law firm and quoted in the guardian revealed that one in eight women left their jobs because workplace harassment made them uncomfortable. The same report also said that 40 percent of men also reported similar experience of harassment and that 60 percent of women kept it to themselves.

V. Even under the *Criminal Law Amendment Act*, 2013 Section 354A has been inserted in Indian Penal Code which makes sexual harassment a criminal offence. However, even under the said Section, only a male can be held guilty of harassing a female. In my opinion, this Section should be appropriately amended so as to make sexual harassment a gender neutral offence. It would not be wrong to say that young men are sexually harassed by unsatisfied women in dominating positions.

"Not all men are beasts, and not all women are saints".

AN OVERVIEW OF RIGHT TO SERVICE LEGISLATION IN INDIA AND ITS EFFICACY AGAINST CORRUPTION WITH SPECIFIC FOCUS ON MADHYA PRADESH, PUNJAB AND KARNATAKA

Usha Prakash*

1. Introduction

Administration is one of the important wings of the government. The success of democratic government lies on the efficiency of this wing. The general public loses its faith and confidence if this wing suffers from mal-administration and corruption. India is not the only country where we find Corruption in administration. In fact, it is one of the common feature we find in all the developed and in developing countries of the world.[1] The concept of corruption in administration is not new in India. We find this concept from the time immemorial. In fact this concept has been discussed by Kautilya in 'Arthashastra'. Thus, corruption can be defined as deviant behavior which encourages to make a private gain at the cost of the public interest. Thus it results in inefficiency and inconsistency in administration.[2] In addition to the economic development of the country also hampers. Corruption and economic growth are antithesis to each other. Some of the causes that have been identified for corruption in India are: administrative delays, complicated and cumbersome administrative procedure, colonial model of bureaucracy, low salaries of public servants and administrative culture, inadequate and ineffective law to deal with corruption cases, excessive regulations in administration, inefficient legal and institutional framework mechanism against corruption, lack of political commitment against corruption and absence of strong public opinion and civil society against corruption.[3]

1.1 Object of passing the Right to Service Legislations in India

The charters which are similar to the Right to Public Service Acts were enacted in the form of Citizen's charter by the central as well as by the state governments as early as in the year 2000. However, these charters were not effective in

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* Assistant Professor, Department of Law, Bangalore Institute of Legal Studies, Bangalore.

1 Cheol Liu and John Mikesell, 'The Impact of Public Officials Corruption and the Size and Allocation of U.S. State Spending, 2014', *www.onlinelibrary.wiley.com* at *http://onlinelibrary.wiley.com/doi/10.1111/puar.12212/full* (accessed on 25-3-2015).

2 Tarun Kumar, 'Evaluating the Kautilyan Antecedents, 2012' *www.idsa.in* at *http://idsa.in/issuebrief/CorruptioninAdministrationEvaluatingtheKautilyanAntecedents_TarunKumar_121012* (accessed on 25-3-2015).

3 S. Prabhu, 'Corruption in India, Causes and Remedies', 2013, *www.theglobaljournals.com*, 'available at' *http://theglobaljournals.com/ijsr/file.php?val=November_2013_1383312669_3f4c2_160.pdf* (accessed on 25-3-2015).

implementation.[4] In 2008 the Administrative Reforms Commission sponsored survey of these charters found, that "41% of the charters did not provide any time limit for redressal of public grievances. 61% of these charters did not fixed the time limit for acknowledging the receipt of public grievances and nearly 43% of the charters did not have the time limit for responding to the complainants. Most importantly these charters did not impose any duty to give reasons for rejection of applications filed by the applicants". The Second Administrative Reforms Commission made the recommendation in its 12th Report, to the Government of India to introduce hassle-free delivery of public services. The Department Related Parliamentary Standing Committee also made similar recommendation. Accordingly, the Department of Administrative Reforms & Public Grievances reviewed and revised[5] the existing Citizen's charters and to overcome the existing loopholes, the Right to Public Service Acts were passed[6] in different States.[7] The Right to Service Act reflects the intention of the particular State to give service to the general public within certain time with minimum inconvenience, to bring about transparency in administration and to reduce corruption in administration. The Act also imposes duties on the administrative officers to provide quick and efficient service to the public.

The main object of Right to Public Service legislations is to guarantee time bound delivery of services to the public. The Act also provides mechanism to punish the officials for dereliction of their duty. If they fail to provide service within the stipulated time, the erring official has to pay fine. Thus the main intention of the legislature is to increase transparency and accountability in administration and reduce corruption.[8]

Corruption in India is one common phenomenon that one has to face in every walk of life. In fact corruption has become a part of administration. Today it has become common for the public, that either they have to pay bribe or get the influence of VIP's to get the service from the government office which, in fact, they are bound to get freely. For example to get ration cards, all types of certificates, driving license, building permits etc., bribing the officials has become the common feature. Thus, to bring about changes in the existing

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[4] S. K. Agarwal, 'Right to Service, a Guide', 2014, Transparency International India, the coalition against corruption, *https://www.transparency.org/* available at *http://www.transparencyindia.org/resource/books/rts.pdf* (accessed on 25-3-2015).

[5] Nick Robinson, 'Right to Public Service Acts in India: the experience from Bihar and Madya Pradesh' 2012, Accountability Initiative, research and innovation for governance accountability, Accountable Government: Policy Research Series, *http://www.accountability india.in/about-us* available at *http://www.accountabilityindia.in/ sites/default/files/ policy-brief/right_to_public_services_act_nick_robinson.pdf* (accessed on 25-3-2015).

[6] *Id.,* at Note 4.

[7] The states in which the *Right to Services Act* are in force are Madhya Pradesh, Bihar, Delhi, Punjab, Rajasthan, Himachal Pradesh, Haryana, Uttar Pradesh, Karnataka and Jharkandh.

[8] *Id.,* at Note 3 p. 2.

administrative system, the Right to Services Act has been passed in different States. The first state to introduce this enactment was Madhya Pradesh.

2. Overview of Madhya Pradesh Lok Sewaon ke Pradon Ki Guarantee Adhiniyam 2010

2.1 Object

The preamble of the Act clearly contemplate that in order to deliver the services to the people of the State within the stipulated time limit, the Act has been passed, and the Act came into force on 17th August, 2010.

2.2 Key Provisions of the Act are:

I Right to service within a specified time limit;

II Two-level appeals mechanism to seek relief for denial of or failure to provide service;

III Fining of government officers responsible for causing delay in delivery of service without sufficient and reasonable cause; and

IV Compensation that may be paid to the applicant, will be deducted from the salary of the erring official.[9]

2.3 Madhya Pradesh was the first state to implement a Right to Public Service Act by passing Madhya Pradesh Lok Sewaon ke Pradon Ki Guarantee Adhiniyam 2010.

The Act covers 52 services[10] in 16 departments. The services range from applications for ration cards to income certificates. To be more specific the services includes electricity connections in the power department, maternity and marriage aid in the Labour department, receiving copies of Khatha in Revenue Department, Income and Domicile certificates in General Administration Department to Social Security Pension, Old Age Pension, Benefit of National Family Welfare in the Social Welfare Department.

There are three stages to comply to receive the service in time from the concerned department. The first stage is submitting the application to the designated officer. The second stage is first appeal if the service is not provided within the stipulated time or the application is rejected without any reasons. The third stage is second appeal to the Second Appellate Authority.[11]

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[9] Swagata Raha, 'State Legislation on Right to Time Bound Delivery of Service: An overview' 2012, *www.accountabilityindia.in* at *http://www.accountabilityindia.in/sites/default/files/policy* (accessed on 25-3-2015).

[10] *Ibid.*

[11] *Id.*, Note 4 at p. Preface.

The State Government notifies the designated officer. On receiving the application, he is required to either provide the service within the stipulated time or he can reject to entertain the application. In case of rejection he has to record the reasons in writing and also intimate the same to the applicant. If the officer rejects the application without giving any reason, the applicant can file an appeal before the appellate authority within 30 days from the date of rejection. (usually a sub-divisional officer, and sometimes the district collector) the first appellate authority may direct the designated officer to provide the service within the stipulated time or may reject the application. The aggrieved party may go for the second appeal. If the second appellate authority finds that the designated officer has failed to provide service without any reasonable cause, may impose penalty which will not be less than 500 rupees and not more than 5000 rupees. The nodal department is Department of Public service Management.

A research study[12] reports that the Madhya Pradesh has made an attempt to simplify application procedures. For example, they have created centers in district collector's offices where one can apply for a whole set of services in one location. The research report also records that under the Public Service Management Department, the government has appointed in each district a district manager and an assistant. They are hired on contract, are generally either young Management graduates or IT graduates, or retired state civil servants.

The research report also observed that even though the government has recommended the use of computer data base programme to track the application and also to give the computer generated receipts, but in some places the applications were recorded manually or the district manager or the subordinate officials must collect from other corners to enter in the centralized data base.

The District Manager and their assistant check the service given by the officials and see whether the official have done the service within the stipulated time.

The report made by Madhya Pradesh administration, states that 3.6 million complaints have been disposed off in less than a year under the Public Service Guarantee Act.[13] The Madhya Pradesh made an honest attempt to help people to get the service in time. In this direction the Jhansi district administration of Uttar Pradesh has developed the Jnansi Jan Suvidah Kendra (JJSK), where people within the district can call free of cost to the toll free number of this centre for redressal of their grievances in the government department. The ICT tool of the telephone is used to connect to the concerned official and directly seek the redressal through this centre. Another important feature is that the case will not be closed without giving an opportunity of being heard from the complainant side.

[12] *Id.*, Note 5 at p. 2.
[13] *Id.*, Note 9 at p 4.

Another interesting development from Uttar Pradesh government is that, as per its report in June 2014, the government has decided to accept self attested certificate instead of affidavits while taking the benefits of government schemes and also while taking admission to the academic institutions. The decision would definitely results in giving hassle free service to the people in taking the benefits under the government scheme. It is also interesting to note that the government of Uttar Pradesh has ordered to replicate this model in all the districts for improving delivery of public services in drinking water, electricity, hygiene, sanitation, food and civil supplies and all other social sector schemes.[14]

3. Overview of Right to Service Act 2011, Punjab

3.1 Introduction

The main object of the Punjab Government was to provide delivery of services to the people of the state within time limits, the Punjab Right to Service Ordinance was notified on 14/7/2011. The Ordinance came into force on 28th July, 2011. The Punjab Government Notified 67 services under the provisions of this ordinance. Soon after, Punjab Right to Service Act-2011 (PRTS Act-2011) was passed by the State Assembly and the Act came into effect on 20th October, 2011.[15]

Some of the important services that are included under the time bound services are, certified copies of all documents, at Village-level-record of land rights (Jamabandi), girdawri, mutation, demarcation of land, sanction of water supply/sewerage connection, certified copies of Birth/Death Certificates, registration certificate of vehicles, fitness certificate for commercial vehicle, issue of driving license and renewal of arms license, all kinds of police verifications including passport verification, issue of various certificates such as caste, OBC, income, residence, registration of all kinds of documents, sanction of all social security benefits for old age/ handicapped/ widow, among others, would also come under its purview.[16]

Section 12 of the Punjab Right to Service Act (PRTS) Act-2011, is one of the most interesting and important provision which insist the constitution of a commission viz.,Punjab Right to Service Commission (PRTSC) which includes 1 Chief Commissioner and 4 Commissioners who would look after the task of effective implementation of the Act. It is most important to note that there is a statutory body to monitor the implementation of the provision of the Act.[17]

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[14] *Ibid.*

[15] *www.rtspunjab.gov.in* at *http://rtspunjab.gov.in/AAboutus.A* (accessed on 25-3-2015).

[16] *Id.*, Note 9 at p. 4.

[17] *www.rtspunjab.gov.in* at *www.rtspunjab.gov.in/Aboutus.aspx* (accessed on 25-3-2015).

Punjab Right to Service Commission has been entrusted with the task of making suggestions to the state government for ensuring better delivery of services.[18] Another important feature of this Act is that, it provide for the appointment of Commission. The Commission is empowered to hear revision applications against the orders of 2nd Appellate Authority. The Commission has been constituted since 23 Nov, 2011.[19]

The main purpose of the Act is to provide time bound delivery of services by the government departments which in turn promote transparency and accountability. The intention of the legislature is to give hassle free, corruption free, transparent and time-bound service. The Punjab Government strongly believes that corruption free and time bound service will increase the credibility of the government functioning.[20]

An attempt has been made in Punjab to give training to the officials at district level and the decision has been taken to make inspections at all the district offices to check the performance of the various administrative departments in reference to the service provided by them and also to identify the erring officials. The Punjab government has taken e-governance mechanism for the purpose of effective implementation of the Act.

The statistical information shows that up to February, 2013 (services including Civil+ Police) 81, 24, 209 persons have availed services in various districts under the Act. 57 *suo moto* action cases have been initiated, 104 complaints not covered under the Punjab Right to Service Act, 2011 has also been disposed off. The First Appellate Authority had received 590 applications out of which 547 application have been disposed off. In 8 cases second appeal was preferred out of which 7 have been disposed off. 8 Revision petitions have been preferred before the Commission and all have been disposed off. In appropriate cases where default of the officials have been proved fine has also been imposed from 500/- rupees to 4000/- rupees.[21]

The Punjab Government has taken another important initiative in the area of procedural matter, which earlier, often resulted in delay. The government has introduced the system of self attestation, in place of affidavits while submitting the documents in the public dealings, except few documents which requires affidavit. At the same time it has also been made as an offence to make a false self attestation and he / she will be prosecuted under the provisions of the penal code for doing so.

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[18] *Ibid.*

[19] The *Punjab Right to Service Act,* 2011, S. 12.

[20] *Id.,* Note 16, p. 6.

[21] *www.rtspunjab.gov.in* at *http://rtspunjab.gov.in/Images/News_Training%20Programme.pdf* (accessed on 25-3-2015).

4. Karnataka Guarantee of Services to Citizens Act 2011; popularly known as Sakala:

4.1 Object

The object of the Act is to provide guarantee of services to citizens in the State of Karnataka. It incorporates totally 265 government departments for providing time bound service. This is the legislation which guarantees timely delivery of government services to the general public by the government departments. The Act clarifies that, time bound service means '*all the services that are covered under Sakala be got without paying a single rupee as bribe and in time.*'[22] It guarantees the citizen's service within the time specified under the Act. The Act also prescribes penalty for dereliction of duty by the official. For each day's default 20 rupees fine will be imposed which may extend up to 500 rupees.[23]

4.2 Information Technology is being used to implement the Act.

The technology is used to provide an on-line transparent monitoring mechanism. The applicant can track the status of his application on the Sakala web site (*www.sakala.kar.nic.in*) as well as on their mobile phone.[24]

If the application is rejected without any valid reasons or if the service is not given within the stipulated time, the citizens can call to the call Centre and lodge a complaint. On receiving the complaint, the competent officer, redresses the grievance within the specified time. The compensation payable for the complainant will be deducted from the salary of the officer who is responsible for the delay or default.[25]

4.2.1 As per the statistics report submitted in the month of August 2014, out of 5,041 complaints received for Sakala 4,270 have been resolved and 269 complaints have been rejected. The remaining applications are pending for disposal. In 961 cases, first appeal have been preferred, out of which 806 were disposed of, 155 cases were rejected at the threshold as not maintainable. Second appeal have been preferred in 87 cases out of which 32 cases were approved and 19 cases were rejected. 36 cases are pending for final disposal. Out of all the complaints filed and appeals preferred, compensation have been awarded in 521 cases.[26]

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[22] Dr. Shalini Rajneesh, 'Sakala', *www.ctax.kar.nic.in* available at *https://ctax.kar.nic/latestupdates/howdoes sakala0001.pdf*

[23] *Ibid.*

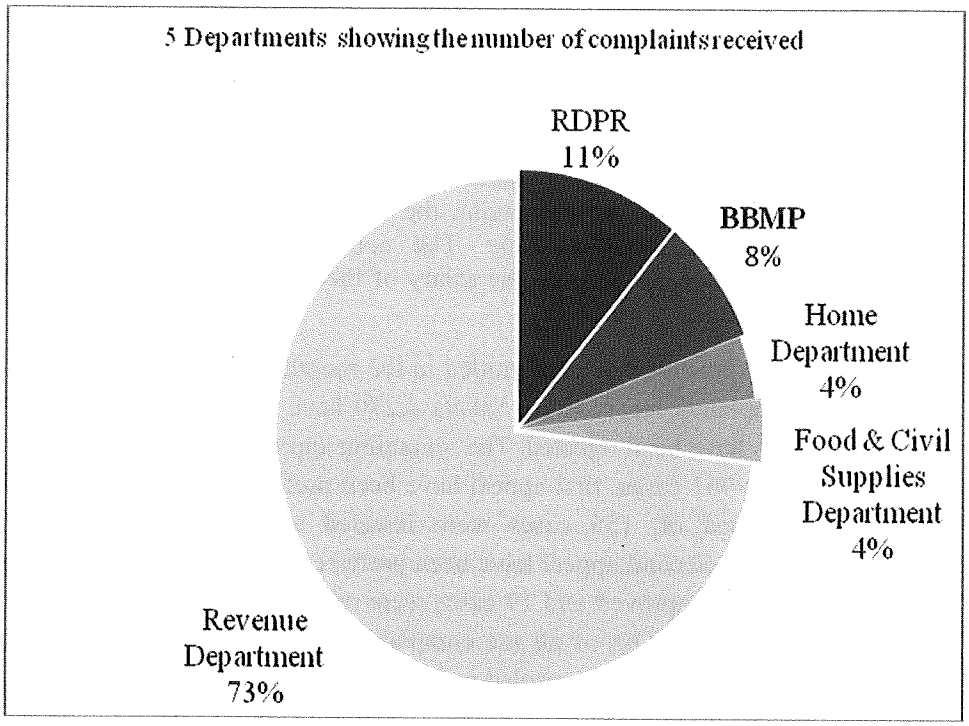
[24] *Ibid.*

[25] *Ibid.*

[26] *www.kgsc.kar.nic.in* at *www.kgsc.kar.nic.in/download/Sakala%20ENG-%PRINTED.pdf*

4.2.2 If we analyze the statistics on the basis of the report submitted, in five departments i.e., Rural Development and Panchayat Raj Department (RDPR), Bruhat Bangalore Mahanagara Palike (BBMP) Food and Civil Supplies Department, Home Department and Revenue Department have constituted to 86%. Of the total complaints received, Revenue Department alone constituted 73%.

Sl.No	Name of the Department	% of complaints received
1	RDPR	11%
2	BBMP	8%
3	Home Department	4%
4	Food & Civil Supplies Department	4%
5	Revenue Department	73%



It is important to note that out of 5,041 complaints received for Sakala, 4,270 cases have been resolved, 269 cases have been rejected, 266 complaints are in progress and 236 complaints are overdue.[27]

[27] *Ibid.*

4.2.3 The Services those come under Revenue Department

Agricultural Labor Certificate, Insurance of Arms License, Landless Certificate, Solvency Certificate, Sandhya Suraksha, Indira Gandhi Old Age Pension, Agricultural Family Member Certificate, Conversion of agricultural land for non agriculture purpose, small and marginal farmer Certificate, No Government Job Certificate for Compassionate Appointments, Living Certificate, Agriculturist Certificate, Surviving Family member Certificate, Unemployment Certificate, pension for disabled persons, No objections Certificate under LRF Grant, Destitute Widow pension, Not re-married certificate, No tenancy certificate, No Objection Certificate under PTCL Act, All types of Caste Certificate, Domicile Certificate, Residence Certificate.[28]

4.2.4 The services that comes under Home Department

The Arms License Issue and Renewal Verification, Police Verification Certificate for Institutions/ Companies, Noc for Passport Verification.[29]

Thus most of the departments comes under Sakala are under Revenue Department. It is one department, from both urban and rural area. The common man uses the service of the department for one or the other reason.

Indian Institute of Management Bangalore's Centre for Public Policy has submitted four independent evaluation reports. In a recent report submitted by them, they focused on delayed disposals under Sakala. As per the report the delayed disposal figures are highest in the delivery of the Caste, Income and Residence certificates in the Revenue Department. Besides, it also made a review of rejections.[30]

5. Critical Analysis of the Reports Submitted

- All the three states viz., Madhya Pradesh, Punjab and Karnataka have made tremendous efforts to provide time bound services to the people. The Right to Service legislation has definitely brought about change in the working pattern amongst the government servants. To some extent the lethargic attitude has been diluted due to active implementation of this Act.

  It is also noticeable that in all the three states efforts are being made to check the progress of receiving and disposal of applications that has been made in the concerned department which comes under the provisions of time bound services.[31]

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[28] *Ibid.*

[29] *www.kgsc.kar.nic.in* at *http://www.kgsc.kar.nic.in/download/Sakala_August_2014_Eng.pdf* (accessed on 25-3-2015).

[30] at *http://www.espandana.in/* (accessed on 25-3-2015).

[31] at *Sakala_November_2013_Eng.pdf-Reader.*

- It is important to note that Madhya Pradesh Government has appointed the District Manager to monitor the departments that comes under time bound services. The general public can make a direct telephone contact to get their grievances redressed. These are some of the important steps taken by the Madhya Pradesh government for effective implementation of the Act.[32]

  The ground reality in Madhya Pradesh which has been reported in the survey states, firstly, that majority of the people are unaware about the Right to Services Act. Most of the people who have taken the service in different departments have not received the receipt for their application. Only 10% of the people reported to have received the services in time. People are unaware as to the place where they can get the application. Majority of the people receives the form from the respective offices or from the market. About 27% of the people reported that they have to visit the office several times to get the services after filing the application.[33]

- For the purpose of effective implementation of the Act the Punjab Government is providing regular training to the officials and regular inspection is also made to monitor the functioning of the departments that comes under time bound delivery of services. It is also note worthy that in place of affidavits, self attested documents are accepted to make the process easier for the public.

  The important feature of the Right to Services Act is that it provides for the appointment of Commission. The Commission is empowered to hear revision applications against the orders of 2nd Appellate Authority.[34]

  In spite of attempt being made in Punjab to provide time bound services to the public the problem continues to persist. Low awareness of the existence of Right to Service legislation is one of the problem for effective implementation of the Act. People are not aware of the Act. Most of them in rural areas are even less interested in this scheme. As the public are used to get their job done easily by paying money to middle man. One of the farmer even said that he waited for the whole day to get his property registered as the officials had been to attend a marriage. However, he got his property registered in the evening by paying a bribe of Rs 7,000/- though in the usual course a bribe of Rs 10,000/- as bribe is required to be payable to get their property registered. When an attempt was made to explain the existence of the Act, he smiled and said that the law will come into picture only after the acceptance of the application, and the

[32] *Id.*, Note 9, p. 4.
[33] *www.skoch.org 'at' http://skoch.org/15/DrNiranjanSahoop.pdf* (accessed on 25-3-2015).
[34] *Id.*, Note 17, p. 7.

application will not be accepted at all till the bribe is given. All these instances shows the existence of corruption in administration.[35]

- The Karnataka Government is also making all the sincere efforts to give effective implementation of the Act. In order to achieve this end regular meeting once in a month is held. Reports are collected from each department. Assessment of all the applications filed and the number of applications rejected will be discussed. Special training classes are organized to train the officials. To motivate the departments, rank is awarded district wise on the basis of their performance.[36]

  The actual procedure for getting the service under Sakala is that, firstly, the applicant files the application to the concerned official in the department, which will be recorded electronically and the applicant gets the message of acceptance of his application and he also gets the message when his application is disposed of. The question is whether the purpose of his application is served or not. The time bound service counts from the time of application filed and the date of disposal. All the reports shows the application received by the concerned departments and the date of disposal. If the applications are rejected without acceptance, it will not come on record. Only those applications which are rejected after its receipt are recorded.

- In spite of all the attempts made, the crucial question is whether the time bound service to the public has reduced the corruption level in administration? The actual problem lies in the procedure that is adopted for acceptance of applications and rejection of applications received rendering service. The Act is clear, as to on receiving the application the complainant will get his complaint number to his mobile and the expiry date; the complainant shall also get the text message of the closure of his application. But the actual mischief is done in these circumstances. The officials use these circumstances for making monitory benefits in-spite of the enforcement of the Act very vigorously. The report published proves that in reality the time bound services have little impact in curbing corruption. It has also been reported that the applicant who is a university teacher made an application to BBMP under SAKALA Scheme, for the issue of his son's corrected birth certificate which he needed urgently to apply for passport. Subsequently, he went to the office repeatedly, requested to correct the spelling in his son's name and surname but even after fifteen days he could not succeed in getting the name corrected. As per SAKALA rules the application for the said certificate must be

[35] Manu Moudgil, 'Service to People: Punjab yet to get it Right' 2012, *www.goimonitor.com* at *http://www.goimonitor.com/story/service-people-punjab-yet-get-it-right* (accessed on 25-3-2015).

[36] *Ibid.*, Note 22, p. 8.

disposed of within 15 days. Finally he took the help of a middleman and got the certificate in two days.[37] Like this there are several instances which goes unreported.

The Karnataka Evaluation Authority, commissioned IMRD to evaluate the time bound services. And its report is most shocking, which revealed that half of the applications are rejected without giving proper explanation. However, the common endorsement for rejection of application is "document not provided" without specifying the reasons. The IMRB survey also found that 30% of people in Karnataka are still unaware of Sakala. The survey covered six districts including Bangalore, particularly assessing the awareness of women with respect the Sakala Service.[38]

It has been rightly observed by Sri B.M.Shivakumar, an RTI activist, who regularly uses Sakala, that more than 90% of the grievances lodged under Sakala have not yet been resolved due to the reasons, either public fails to report it or take the help of the middleman to get their work done.[39]

The officers are lethargic mainly due to the fact that the penalty imposed under the Act, on erring official, is very meager amount.

Another example which shows how, in spite of stringent efforts are being made to give training to the officials to give the service in time and enlightening about the Sakala Act, the officials use their own means to escape from the clutches of law. It this case the Project Director of District Urban Development Centre, Mangalore, directed the Deputy Commissioner of Mangalore to investigate the Mangalore City Corporation's claims, in which it was revealed that in five services of the Corporation, the officials took the applications directly without registering under Sakala. They took their own time to process and then register the same under Sakala, and then gave the receipts and claim to have processed it in time. In fact Mangalore City Corporation remained on the top ranking for its performance in Sakala.[40]

6. Conclusion

It is evident from the above study, that there is a hard reality that one has to accept that there still persists red-tapism and corruption in the area of citizen

[37] *www.timesofindia.indiatimes.com/topic/Sakala* at *http://timesofindia.indiatimes.com/city/bengaluru/Not-in-time-not-without-grease/articleshow/40816215.cms* (accessed on 25-3-2015).

[38] *Ibid.*

[39] *Ibid.*

[40] Mohit M. Rao, 'Mangalore Corporation Officials Misusing Sakala Scheme', finds probe' 2014 *www.thehindu.com* at *http://www.thehindu.com/news/cities/Mangalore/mangalore-corporation-officials-misusing-sakala-scheme-finds-probe/article6525976.ece* (accessed on 25-3-2015).

service mechanism. On one hand the departments submit the reports showing the details of receiving the application and the disposals made in time. It also records the various programmes under taken to enlighten about the time bound service, not only the public but also the officials. It is appreciated that the state Governments have recognized the difficulty of citizen's in getting the services, and has made all the possible efforts to reduce the same by introducing one more citizen's charter viz 'Right to service legislation'.

However, it is important to note that the departments to which 'time bound legislation' or 'right to service legislation' covers are mainly the government departments which were already providing service to the public. Even before the Act came into force, notice was displayed in some conspicuous place in the government departments, which gave the details of; in what form the application is to be filled, the fee payable for each application, the number of days required for fulfilling the service, and the list of documents which are necessary to be affixed along with the application etc., Now the big difference is, the Act has made it compulsory to give the service to the public within a stipulated time and in case of dereliction of duty or negligence; penalty is also fixed under the Act by the erring official.

For the purpose of more effective implementation of the Act there is an urgent need to reconsider the documents required by the certain departments to be affixed along with the application. For eg., for the purpose of khata transfer in Karnataka the list of document required to be submitted along with the application are: Certified copies of registered title deed, Certified possession certificate, Flow chart, Improvement charges paid, Sketch showing location and measurement of property, Affidavit of succession/inheritance/gift/court decree, Original death certificate, Affidavit regarding blood relationship. Now the required documents appears to be essential documents but if the original sale deed is very old document but there is a partition deed / family settlement deed which is 40 or 50 years old, then it becomes highly impossible to get the original deed. Surprisingly, the katha will be transferred without the original old mother deed/document, if the applicant bribes the official.

These are the areas which give an opportunity for officials to demand bribe, if the bribe is not paid, the applicant can never get the service done. Without paying the bribe, if any complaint is made for not providing the service, they easily escape by defending that the required documents are not produced by the applicant. Thus the mode of production of documents requires to be simplified that is to say the age old mother documents and those types of the documents which practically difficult to secure by the ordinary people are to be done away seeking production.

7. Suggestions

I. The first suggestion is to enlighten the citizens with regards to the time bound legislation and the manner in which it works;

II. The process of receiving and filing the applications must be made transparent and has to be recorded on CC cameras. The people who enter the public office must be compulsorily record the reason for coming to the office;

III. The number of documents required for taking the service must be reduced;

IV. Giving the endorsement for 'rejection' of an application must be made more specific;

V. All the application filed and rejected must be scanned and must be kept as record;

VI. There must be number of computer counters to help the public in getting the form and also to help them fill on line particularly in rural areas. i.e., Help-lines;

VII. Spreading the awareness of the Act and enlightening the public must be made more vigorously;

VIII. The penal provision under the Act must be made more stringent, it is not sufficient to impose meager amount as penalty, the tainted officials must be kept under suspension, and it must be made public; and

The officers, who negligently or carelessly grant, permit or register a document without scrutinizing whether it is a government or private property, should not be allowed to escape on the ground that an affidavit or self attestation has been made by the applicant. An amendment to the existing public service legislations which are in force is very essential to include this provision with severe punishment.

INTERNATIONAL INSTRUMENTS ON CUSTODIAL TORTURE

Dr. Seema Rani Garg*

1. Introduction

Torture is an international phenomenon and has been the concern of the international community, because the problem is universal and the challenge is almost global. Human rights treaties are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states. The prohibition of torture is considered to carry as special status in international law that of *jus cogens*, which is peremptory norm of International Law – endowed with special legal force, which is valid for all without exception and from which no opting out or derogation is possible.

The prohibition of torture is found in all major international and regional human rights treaties. There is an international consensus that the abuse like custodial torture violates the inherent dignity of the human being and is not justified under any circumstances. At the international level a number of significant efforts have been made which can act as important tool to fight against custodial torture.[1]

2. The Universal Declaration of Human Rights, 1948

On 10 December 1948, the United Nations General Assembly proclaimed the Universal Declaration of Human Rights (UDHR). It was adopted without a dissenting vote. The UDHR was 'a Common Understanding' of those rights which the member states had pledged to respect and observe, i.e. the first comprehensive statement of human rights of Universal applicability. Its preamble states that it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.[2]

Article 3 of the Declaration provides that 'Everyone has the right to life, liberty and security of person'.

Article 5 of the Declaration provides that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

Article 7 of the Declaration states that, 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled

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* Assistant Professor, Maharishi Markandeshwar University, Mullana (Ambala). Author is indebted to Dr. S.S. Khehra, Professor, Punjabi University, Patiala for his constant support, guidance and motivation.

1 Duner Bertil, *An End to Torture – Strategies for its Eradication, Zed Books, London,* 1998, p. 4.

2 UN General Assembly Resolutions No. 217 A (111) of 10 December 1948.

to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.

Article 8 of Declaration provides that, 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law'.

Article 9 of the Declaration states that, 'No one shall be subjected to arbitrary arrest, detention or exile'.

Article 10 of Declaration provides that, 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

Article 11 (1) provides that, 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence'.

Article 11(2) declares that, 'No one shall be held guilty of any penal offence on account of any act or omission, which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was, applicable at the time the penal offence was committed'.

Sir Humphrey, Waldock expressed his opinion that the constant and widespread recognition of UDHR clothes in it the character of the customary law.[3] International Court of Justice in the *Tehran Hostage Case*[4] states that, 'wrongfully to deprive human being of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles enunciated in the UDHR. Nowhere in the Charter, wrongful deprivation of liberty or the imposition of hardship on persons subjected to physical constraint expressly prohibited. That prohibition is contained in the right to liberty and security of person and in the right to freedom from torture, which are articulated in the UDHR.

United States federal Court of Appeals in the case of *Filartiya v Pena-Irala* held, in 1980, that 'official torture is now prohibited by the laws of nations'. The Court noted that the Charter of the United Nations obliges all member states to take action to promote 'respect for the observance of human rights and fundamental freedoms for all'.[5]

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[3] John P. Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Judicial Character," B.G. Ramacharan (ed.), *Human Rights: Thirty Years After the Universal Declaration,* The Hague, Nijhoff, 1979, pp. 21-37.

[4] Diplomatic and Consular Staff in Tehran Case, 1980 *ICJ Reports* 42.

[5] 630 F. 2D 876 (2D Cir. 1980).

2.1 Geneva Conventions

The Geneva Convention of 1949 on the Protection of War Victims, and the Additional Protocols of 1977, consider 'torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health' to be grave breaches. The states are under an obligation to search for the perpetrators of such crimes regardless of their nationality and to bring them before their Courts or hand over to another high contracting party for trial.[6]

In 1991 an optional 'International fact-finding Commission' was established under Article 90 of the first Additional Protocol, and granted the competence to enquire into alleged grave breaches or other serious violations of the Conventions and Protocols.

Inspection of places of detention where persons affected by the events of war are being held can be carried out *inter alia* by the International Committee of Red Cross in accordance with the 1949 Geneva Convention and the Additional Protocol of 1977.[7]

Article 3 of Geneva Conventions, 1949 provides that[8] persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth or any other similar criteria.

2.2 The International Covenant on Civil and Political Rights, 1966

The General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) on 16 December 1966.

Article 7 provides that, 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected to medical or scientific experimentation without his free consent'.

Article 10(1) lays down that, 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.

The two Articles have notable differences – first, whereas Article 7 is of general application, Article 10 targets only persons in detention. Second, Article 7 is non-derogable, that is, states must comply with it even in times of public emergency. Article 10 is not protection from infringement in times of crises. UN

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[6] *Supra* note 1, at p. 39.

[7] *Ibid.*

[8] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949, Article 3.

Convention against Torture of 1984 is one of notable exception, which permits the infliction of pain and suffering as part of the imposition of lawful sanctions.[9]

In *Linton v Jamaica*, the Committee considered that, 'the physical abuse inflicted on the author, the mock execution set up by prison wardens and the denial of adequate medical care after the injuries sustained in the aborted escape attempt, constitutes cruel and inhuman treatment within the meaning of Article 7 and therefore, also entail a violation of Article 10 of the Covenant'.[10]

It is submitted that ICCPR is the only international instrument drafted within the UN that contains a specific reference to 'medical and scientific experiments' as being prohibited if performed without a person's free consent.

2.3 The First Optional Protocol to the International Covenant on Civil and Political Rights, 1966

The First Optional Protocol to the the International Covenant on Civil and Political Rights,1966 was adopted by the UN General Assembly on 16 December 1966 and entered into force on 23 March 1976. When people or groups of people have exhausted local remedies, the Protocol allows them to petition the Committee directly about their Government's alleged violations of the Covenant.

It is submitted that as India has signed and ratified the Universal Declaration of Human Rights (1948) and International Covenant on Civil and Political Rights (1966); it is the duty of state to provide special safeguards against violations. India should also ratify the Optional Protocol to provide a mechanism for the enforcement of rights.

2.4 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975

The United Nations developed guidelines to ensure that torture and degrading treatments to human beings are eradicated from the world. On the recommendations of the fifth Congress on the Prevention of Crime and the Treatment of Offenders, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly.[11]

Article 7 of the Declaration to protect persons provides that each state will ensure that torture or other similar treatment or punishments are offences under its Criminal Law. The rights to complain and to have their cases impartially examined by the competent authorities are concerns of the state (Article 10).

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[9] Human Rights Committee, "General Comments", General Comment No. 07.
[10] HRC Communication No. 255/1987, 22 October 1992.
[11] UN General Assembly Resolution No. 3452 (xxx) of 9 December 1975.

Article 11 provides that the state shall ensure that victim shall be afforded redress and compensation in accordance with law. Article11 prohibits the state from using as evidence any statement made as a result of torture or of other cruel, inhuman or degrading treatment or punishment.

It is submitted that although this Declaration lacks legally binding force, but it has moral and political impact in the formulation of three United Nations instruments, first, the Principles of Medical Ethics relevant to the Role of Health Personnel, second, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the Assembly and third, the Body of Principles for the Protection of All Persons Under Any form of Detention or Imprisonment, adopted by the General Assembly.

2.5 Standard Minimum Rules for the Treatment of Prisoners, 1977

The first United Nations Congress on the Prevention of Crime and the Treatment of offenders adopted the United Nations Standard Minimum Rules for the Treatment of Prisoners in 1955.[12]

Rule 31 of the United Nations Standard Minimum Rules for the Treatment of Prisoners prohibits corporal punishment. According to Rule 33 except for the necessary limitation, instrument of restraint, such as handcuffs, chains, irons and strait – jackets shall never be applied as a punishment. It further provides that chains or irons shall not be used as restraints. Standard Minimum Rules provides that all prisoners have certain fundamental rights and they should be treated with due respect to their inherent dignity and value as human beings without discrimination of any kind.

2.6 Code of Conduct for Law Enforcement Officials, 1979

The General Assembly considering the importance of the task that the law enforcement officials are performing and being aware of the potential abuse of power by the officials while discharging their duties adopted Code of Conduct on 17 December 1979. The Code prohibits torture by providing that law enforcement officials shall respect and protect human dignity and shall maintain and uphold human rights of all persons.[13]

Article 5 prohibits the use of 'torture or other cruel, inhuman or degrading treatment or punishment', which is derived from the Declaration against Torture in 1975. Article 5 also prohibits the use, in defence, of the 'superior order' plea, which is missing in the 1975 Declaration but was included in the Convention against Torture in 1984. Article 8 lays down the duty for law-enforcement officials not only to prevent but also rigorously to oppose any violations of the

[12] Economic and Social Council Resolution No. 663 CI (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[13] General Assembly Resolution No. 34/169 of 17 December 1979.

Code as well as to report these, if they believe have occurred or are about to occur, both to their superior and to other higher authorities, external to police force, invested with the power to review grievances and complaints.[14]

It is submitted that it was the first step at the international level to ensure equal standards of justice to all, both nationally and internationally. It has also become the guiding maxim for the European Committee on Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

2.7 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

The United Nations Convention against Torture was adopted by the United Nations General Assembly in 1984. It sets out internationally accepted definitions of torture and ill-treatment, establishes the responsibility of states for preventing these abuses and provides for the creation of the Committee against Torture (CAT). Convention against Torture both criminalizes torture (in Article 1) and cruel, inhuman or degrading treatment or punishment (CIDTP) (in Article 16) and seeks to prevent them.[15] Article 1 defines that torture means,

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Under Article 16 state parties are required to prevent 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 when such acts are committed by or at the instigation of or with the consent or acquiescence a public official or other person acting in an official capacity'.

The Committee against Torture has itself recognized that definitional difference between torture and CIDPT is often not clear.[16] But according to UN Special Reapporteur on Torture decisive criteria for distinguishing between two is the purpose of the conduct and the powerlessness of the victim.[17]

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[14] UN General Assembly, Code of Conduct for Law Enforcement Officials, available at *http://www. refword.orgdocid /48abd572ehtml* (last accessed on 21 July 2012).

[15] Manfred Nowak and Elizabeth McArthur, *United Nations Convention against Torture: A Commentary*, Oxford University Press, New York, 2008, pp. 10-15.

[16] CAT, General Comment No. 2 "Implementation of Article 2 by State Parties", UN Doc. CAT/C/GC/2/CRP1/Rev.4 (23 November 2007).

[17] Report of the Special Repporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN4/2003/6 (23 December 2005).

2.7.1 Duty to Protect from Ill-treatment by Private Actors

The UNCAT specifies that, to qualify as torture or other cruel, inhuman or degrading treatment, the pain or suffering must be inflicted at the instigation or with the consent or acquiescence, of a public official or other person acting in an official capacity. It means that states are not generally responsible for acts beyond their control. However, they can be held responsible for acts of torture by private individuals if they fail to take general and specific measures to prevent them.

In the case of *Dzemojl and Others v Yugoslavia,*[18] the Committee considered that lack of action constituted acquiescence in the sense of Article 16 of the Convention.

2.7.2 Duty to Investigate

Article 12 of the UNCAT provides, 'Each party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction'.

This obligation to investigate is complemented by Article 13, which provides that individual shall have the right to complain to the competent authorities and the state shall take steps to protect the complainant and witnesses against reprisal.

The state obligation to ensure a prompt and impartial investigation does not depend on the submission of formal complaint. Furthermore, the investigation must be effective, carried out by appropriately qualified individuals.[19]

2.7.3 Duty to Enact and Enforce Legislation Criminalizing Torture

The CAT asks state parties about domestic Criminal Law and has repeatedly emphasized that Article 4 requires states to 'incorporate into domestic law the crime of torture and adopt a definition of torture that covers all the elements contained in Article 1 of the convention'.[20] Where such a law has been adopted, the Committee will consider both its compatibility with the definition in Article 1 of the UNCAT and its enforcement in practice.

The CAT has not specified a minimum penalty that would appropriately reflect the gravity of the crime of torture. In *Urra Guridi v Spain,*[21] the Committee found that the imposition of light penalties on three Civil Guards who had been

[18] CAT Communication No. 161/2000, 21 November 2002.
[19] *Ristic v Yugoslavia*, CAT communication No. 113/1998, 11 May 2001.
[20] CAT, "Concluding Observations on Italy", UN Doc. CAT/C/ITA/Col, 8 May 2007.
[21] CAT Communication No. 212/2002, 17 May 2005.

found guilty of torture were incompatible with the duty to impose appropriate punishment and therefore constituted a violation of Article 4(2).

In *Roitman Rosenmann v Spain,*[22] the Committee observed that, 'the Convention imposes an obligation on a state party to bring to trial a person, alleged to have committed torture, who is found in its territory, when the State refuses to extradite the person'.

2.7.4 Duty to Exclude Statements Obtained by Torture or Other Ill-Treatment

Article 15 of the UNCAT provides: 'Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made'.

The effective prevention of torture and ill-treatment requires that any incentive to use such abuse to assist investigations need to be eliminated. The prohibition is absolute, as the statements made under such treatment, which are in any case inherently unreliable, must therefore be prohibited by law.

2.7.5 Duty to Train Personnel and Provide Procedural Safeguards

The CAT considers that Article 11 requires compliances with international standards including the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under any form of Detention or imprisonment.[23] In *Barakat v Tunisia,*[24] the CAT considered that, in a case of torture in custody leading to death, Tunisia has failed to meet its obligation under Article 11 of Convention against Torture. The CAT recommended to the states to, 'establish a systematic and independent system to monitor the treatment in practice of persons arrested, detained or imprisoned'.[25]

2.7.6 Duty to Grant Redress and Compensate Victims

UNCAT imposes an obligation on State parties to grant redress and provide adequate compensation to victims of torture or ill-treatment.

The CAT considers that, 'the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory'.[26] In *Urra Guridi v Spain,*[27] the Committee found that state, "should cover all the damages suffered

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[22] CAT Communication No. 176/2000, 30 April 2002.
[23] CAT, "Concluding Observations on Kyrgyzstan", UN Doc. A/55/44, 1999.
[24] CAT Communication No. 60/1996, 10 November 1999.
[25] CAT, "Concluding Observations on Brazil", UN Doc. A/56/44, 2001.
[26] *Agiza* v. *Sweden*, CAT Communication No. 233/2003, 20 May 2005.
[27] *Supra* note 21.

by victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case".

2.7.7 Scope of UNCAT

No derogation is possible to any of the provisions of the UNCAT. The prohibition is therefore absolute, efforts by some states to justify torture and ill treatment as a means to protect public safety or avert emergencies. CAT stressed that the provisions of UNCAT apply whether a State party exercises *de jure* or *de facto* control.[28] Extradition or expulsion of an individual who risks being subjected to torture if returned to another state is explicitly prohibited under the UNCAT.

2.8. The Optional Protocol to the Convention against Torture, 2002

The Optional Protocol was adopted in the General Assembly on 18 December 2002. The Optional Protocol to the Convention against Torture is the first instrument in international human rights, with universal application, that has preventive mechanisms built into it. The international element to this structure is the international Sub-Committee for the Prevention of Torture and the National Preventive Mechanisms give the Optional Protocol to the Convention against Torture its 'local' dimension. These two systems are complementary and proactive in nature. This is a system which is entirely focused on prevention. There is no element of 'naming and shaming' and as such it should not be considered in any way threatening by states considering signing.[29]

The Optional Protocol to the Convention against Torture offers a constantly working national system of monitoring called National Preventive Mechanism (NPM) in addition to an efficient International Sub-Committee. No particular form of NPM is prescribed in the Optional Protocol to the Convention against Torture itself. However, some parameters are firmly stated. The first is that an NPM must be independent.[30] This applies both to the institutions and their personnel. The possibility of designating National Human Rights institutions such as Ombudsmen bodies is acknowledged[31] and states should give consideration to the Paris Principles.[32] The NPM must examine places of

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[28] *Supra* note 26.

[29] Frank Ledwidge, "The Optional Protocol to the Convention Against Torture (OPCAT): A Major Step Forward in the Global Prevention of Torture", available at *http://Vnhcr.ch / htm/menu 3/b/h-cat39.htm.* (last accessed on 22 July 2012).

[30] The Optional Protocol to the Convention against Torture, 2002, Articles 17 and 18 (1).

[31] *Ibid.*, Article 18(4).

[32] Principles relating to the states and functioning of national institutions for protection of human rights (1991), available at *http://www.humanrights.Dk/frontpage/parisprinciples* (last accessed on 22 July 2012).

detention regularly[33] and make recommendations[34] including proposals concerning draft or existing legislation. NPM have the same powers as the Sub-Committee concerning freedom of access both to detainees and place of detention. Anyone should be able to communicate with the NPM without prejudice in any way.[35] Indeed states are bound by the Optional Protocol to the Convention against Torture to publish the annual reports of the NPMs.[36]

It is submitted that although its effectiveness clearly depends on the will of its constituent states, yet Optional Protocol to the Convention against Torture is a real step forward in the global prevention of the crime of torture.

2.9 United Nations Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1985

A Special Rapporteur on Torture was appointed by the Commission on Human Rights in 1985 to examine questions relevant to torture. He was empowered to seek and receive credible and reliable information on such questions and to respond to such information without delay. The Special Rapporteur corresponds with Governments on measures they have taken or plan to take to prevent or combat torture. Requests for urgent action received by him are brought to the attention of the Government concerned to ensure protection of the individual's right to physical and mental integrity. The Special Rapporteur visits countries where torture occurs or is alleged to occur, and submits its annual report to the Commission of Human Rights. Special Rapporteur on Torture has repeatedly stressed that procedural safeguards include the prohibition of incommunicado detention. It has shown that the risk of torture significantly increase if the apprehended person is isolated from the outside world. Measures against incommunicado detention should therefore be enforced, since these are designed to make the treatment of all detainees as transparent as possible.[37]

2.10 The Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, 1988

On 18 December 1988, the General Assembly adopted the Body of Principles which may be considered as the beginning of a founding charter on prisoners' rights.[38]

Torture and cruel, inhuman or degrading treatment on punishment is prohibited under Principle 6, which is as follows:

> I All persons under any form of detention or imprisonment be treated in a humane manner and with respect for the inherent dignity of the human person.

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[33] *Supra note 30*, Article 19.
[34] *Ibid.*, Article 19(b) (C).
[35] *Ibid.*, Article 21.
[36] *Ibid.*, Article 23.
[37] Johan D. Van Der Vyuer, "Torture as a Crime Under International Law", *Albany Law Review*, Vol. 67, 2003, pp. 427-463.
[38] UN General Assembly Resolution No. 43/173 of December 1988.

II Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

III Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

IV No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstances whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

V The authorities who arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subjected to recourse to a judicial or other authority.

VI Anyone who is arrested shall be informed at the time of his arrest of the reasons for his arrest and shall be promptly informed of any charges against him.

VII Any person shall, at the moment of arrest and of the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on an explanation of his rights and how to avail himself of such rights.

VIII Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice about his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

If a detained or imprisoned person is a juvenile or is incapable of understanding the entitlement; the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

IX A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

X It shall be prohibited to take undue advantage of the status of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

XI The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogation and other persons present shall be recorded and certified in such form as may be prescribed by law.

XII Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case.

XIII A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest.

It is submitted that Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment has no binding effect; it is a document annexed to General Assembly Resolution and is not a treaty. But it can serve as guidelines for the shaping of national legislation and domestic practice. It can also serve as statement of basic international legal and human concepts up to which everyone can refer.

2.11 World Conference on Human Rights Vienna Declaration, 1993

The World Conference on Human Rights welcome the ratification by many member States of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and encouraged its speedy ratification by all other member states.

The World Conference on Human Rights emphasized that one of the most atrocious violations against human dignity is the act of torture, the result of which destroys the dignity and impairs the capability of victims to continue their lives and their activities. The World Conference on Human Rights reaffirmed that under human rights law and international humanitarian law, freedom from torture is a right which must be protected under all circumstances, including in times of internal or international disturbance or armed conflicts.[39]

The World Conference on Human Rights stressed the importance of further concrete action within the framework of the United Nations with the view to providing assistance to victims of torture and ensuring more effective remedies for their physical, psychological and social rehabilitation.[40]

[39] Available at *www.orcha.org/EN/ABOUTS/Pages/ViennaWC.aspx9* (last accessed on 23 July 2012).

[40] *Ibid.*

2.12 The Istanbul Protocol in the UN System, 1999

The Istanbul Protocol was submitted to the UN High Commission for Human Rights on 9 August 1999. It is the first set of international guidelines for the effective psychological, physical or legal investigation and documentation of allegations of torture and ill-treatment based upon the needs of daily life. The protocol provides comprehensive and practical guidelines that describe in detail the steps to be taken by states, investigators, legal and medical experts to ensure the prompt and impartial investigation and documentation of complaints and reports of torture.[41]

The Istanbul Protocol is not a binding document and does not include any sanctions. However, the Istanbul Protocol has started to be taken into consideration by regional courts and commissions.

2.13 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005

The General Assembly of the United Nations has laid down the Principles and Guidelines for Remedies and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violation of International Humanitarian Law To that end, states should:

I Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;

II Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;

III Provide proper assistance to victims seeking access to justice;

IV Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.[42]

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[41] Hulya Ucpinar and Turkean Baybal, "An Important Step for Prevention of Torture: The Istanbul Protocol and Challenges," *Torture*, Vol.16, 2006, pp. 252-267.

[42] UN General Assembly Resolution No. 60/147 of 16 December 2005.

2.14 *International Tribunals Containing Provisions Relating Torture*

2.14.1 *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia (ICTY) (1993), Tribunal on Rwanda, 1994 (ICTR)*

Under the statutes of the ICTY and ICTR, torture is considered as a war crime and as a crime against humanity. Trial Chamber I of the ICTR adopted the UNCAT definition of torture and held that, to qualify as torture, the infliction of pain or suffering must be for one of the following purposes

I to obtain information or a confession from the victim or a third person,

II to punish the victim or a third person for an act committed or suspected of having been committed by either of them,

III for the purpose of intimidating or coercing the victim or the third person,

IV for any reason based on discrimination of any kind.[43]

However the ICTR does not consider this list to be exhaustive. Degrading, humiliation and control or destruction of a person also came within the prohibited purposes for the offence of torture under the jurisdiction of the ICTR.[44]

The Trial Chamber of ICTR expressed that the essential element of torture is that the perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.[45] But the Trial Chamber of ICTY is of the view that the presence of a state official or if any other authority wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law. Thus, for the ICTY at least, there is no 'official capacity' requirement for the crime of torture.[46]

2.14.2 *Rome Statute of International Criminal Court, 1998*

In 1998, the United Nations Diplomatic conference of Plenipotentiaries was held in Rome, Italy, to adopt a Convention on the establishment of an International Criminal Court. The Rome conference culminated in the approval, by majority vote, on the text of the Statute of the International Criminal Court (ICC). The statute became effective on 1 July 2002.[47]

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[43] *Prosecution v Akayesu*, Case No. ICTR-96-4, Trial Chamber I, judgment of 2 September 1998.

[44] *Ibid.*

[45] *Ibid.*

[46] *Prosecutor v Kunaroc, Kovac and Vukovic*, Case Nos. IT-96-23 and IT-96-23/1, Trial Chamber II, judgment of 22 February 2001.

[47] *Rome Statute of International Criminal Court*, 1998.

Jurisdiction of the ICC has been confined to the crime of genocide, crimes against humanity, war crimes and crimes of aggression. Torture has been listed in the ICC Statute as both a crime against humanity and a war crime.[48]

The main difference between 'torture' as defined in the Torture Convention and 'torture' as defined for purposes of ICC jurisdiction over crimes against humanity is that the culprit in the latter is not confined to persons acting as, or with the consent or acquiescence of a public official or in official capacity. Torture as a crime against humanity includes any infliction of severe pain or suffering pursuant to a Government or organizational policy. Members of Liberation movement, who inflict pain or suffering in order to provoke confessions from, or to punish, suspected Government spies who may have infiltrated the movement will not be liable under the Torture Convention. However, they could potentially come within the jurisdiction of ICC if the application of torture was widespread or systematic in furtherance of the policies of the movement and if the person or persons tortured were civilians.[49]

The distinction between torture and inhuman treatment is based on the severity of the suffering inflicted as well as the purpose for which it is inflicted. The inhuman treatment also extends to 'acts which violate the basic principles of humane treatment, particularly the respect for human dignity'.[50]

The conclusion seems inevitable that torture as a crime under customary international law is wider in scope than torture as defined in the Torture Convention. The other side is that the Torture Convention applies to all instances of torture that fall within the definition including isolated cases while the ICC jurisdiction is confined to instances of torture which are widespread or have been systematically applied as part of the policy of a Government or of an organization.[51]

It is submitted that torture is listed as one of the crimes in the Statutes of International Criminal Tribunals. It 'has evolved into a peremptory norm or *jus cognes*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ordinary customary rules'.

Torture and CIDTP are banned as a matter of customary international law and this prohibition is enshrined in a number of international legal instruments and by a variety of international and regional Courts and institutions. However, enforcement mechanisms at the international and regional level remain relatively weak or altogether lacking, so non-legal measures are required to backup and

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[48] *Ibid.*, Article 12.

[49] Christophor K. Hall, "Article 7- Crime against Humanity", Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court,* Munich: C.H. Beck, Hart Nomos, 2008, p. 159.

[50] *Ibid.*

[51] *Supra* note 47, Articles 7(1) and 7(2) (a).

consolidate progress. State obligations to investigate, to exclude evidence obtained by torture or ill-treatment, and to grant compensation to victims apply at this stage. The judges and prosecutors have a responsibility to ensure that the standards to protect people against torture are adhered to, within the framework of their own legal systems. Even if a country has not ratified a particular treaty prohibiting torture, because the prohibition of torture is so fundamental, the country is in any event bound on the basis of general International Law.

CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW

Dr. Dinesh Kumar*

1. Introduction

The traditional notion of nation-state has played an important role in keeping the international legal system viable. From its inception, international law focused upon the sovereign territorial entity, giving natural persons and other entities a peripheral role. The birth of modern international law at the signing of the Treaty of Westphalia was the product of a power struggle pitting the nascent state system against the Church and the Holy Roman Emperor. Public international law was developed in order to legitimate and support the new system. Since that time, national governments have held most of the political, economic, and military power, thereby making them the natural *foci* of international law.[1]

Under international law the primary subjects are States. States have full and original international personality, meaning that personality does not need to be conferred on these entities. It is interesting to observe that before the rise of the positivistic doctrine in the 19th century, there was no insistence that States were the only subjects of international law. For example, the large corporations of the 17th century such as the English East India Company (EIC) and the Dutch United East India Company (VOC) clearly operated at the international level occupied land, wage wars and conclude treaties.[2]

However, in the 19th century legal scholars from the positivistic school defended the assumption that only sovereign States could be considered as subjects of international law as they were authorized to conclude treaties, wage war, acquire territory, delimitation of the jurisdiction of States, the immunities of States and their diplomatic representatives. All other entities were labelled objects of international law meaning that they had no direct rights and duties and, logically, no means of invoking any rights.[3]

The ambivalence of international law towards corporations persists. In 1964, Wolfgang Friedmann suggested that private corporations are participants in the evolution of modern international law.[4] Henkin warns '[m]ultinational enterprises create ... huge complications for traditional international legal

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* Assistant Professor, Department of Laws, Panjab University, Chandigarh.

1 Jonathan I. Charney, "Transnational Corporations and Developing International Law", *Duke Law Journal*, Vol. 1983, No. 4, 748-788, at 758-59 (September, 1983).

2 Koen de Feyter, *World Development Law: Sharing Responsibility for Development*, para 243-46 (2001).

3 H. Lauterpacht, *The International Protection of Human Rights*, 8 (1947).

4 Wolfgang Friedmann, *The Changing Structure of International Law* 230 (1964).

concepts'.[5] Joseph find the direct regulation of corporations under international law advantageous.[6] Authors like Antonio Cassese, on the other hand, have argued that multinational corporations possess no international rights and duties because states - whatever their ideological outlook - are reluctant to grant them international standing.[7] The first task when addressing corporate obligations under international law is to assess whether international law in principle applies to the conduct of corporations. The present research paper deliberate upon the question whether corporations have an obligation under international law.

2. Nationality of Corporations

The term 'nationality' or nation is derived from the Latin word 'Natus' which means born. Nationality or nation, therefore, in its derivative sense means a group of people belonging to the same racial stock. The term was used in this sense by the German philosophers. In the words of Gilchrist, "a nationality may be defined as a spiritual sentiment or principle arising among a number of people usually of the same race, residents on the same territory, sharing a common language, the same religion, similar history or traditions, common interests with common political associations and common ideals of political unity".[8]

The way corporations are defined, one way to look at their nationality is that the position is same or rather more typical because of many practicalities in their formation and activities, like the headquarters may be in one state, and the legal incorporation in another state, the shareholders mostly from a third state, and the operations in a fourth state and the workers are from a fifth state and those affected by the operations from yet another set of states.[9]

In the context of determining an individual's nationality for the purposes of a claim of state responsibility on behalf of that individual the International Court of Justice held in *Nottebohm* that:[10]

> Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.

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[5] L Henkin, "International Law: Politics, Values and Functions" (1989) 216 *RdC* 199.

[6] S Joseph, "Taming the Leviathans" (1999) 46 *NILR* 185.

[7] Antonio Cassese, *International Law in a Divided World* 103 (1986).

[8] *http://www.preservearticles.com/201106238475/what-is-the-meaning-of-nationality.html* Accessed on February 23, 2015.

[9] Richard Meeran, "The Unveiling of Transnational Corporations", Michael K. Addo (ed.) *Human Rights Standards and the Responsibility of Transnational Corporations*, 161-170 (1999).

[10] ICJ Rep. (1955) 23. Also see: Andrew Clapham, *Human Rights Obligations of Non-State Actors*, 181 (2006).

According to Brownie "'legal experience suggests that a doctrine of real or genuine link has been adopted, and as a matter of principle, the consideration advanced in the *Nottebohm* case apply to corporations'. Further 'It would seem that the process whereby an individual embarks on a voluntary naturalization and the incorporation of a company in the country of choice are significantly similar.' He suggests that 'where these processes are designed to avoid corporate responsibilities imposed under international criminal law it would seem that the international law should use its 'reserve power'." [11]

3. Personality of Corporations under International Law

According to Natural Entity theory, the corporation is neither a legal fiction created by the state, nor a contract between individuals, but a natural person with a pre-legal existence. This theory played an important conceptual role in the 'personification' of corporations - arguably also the 'personification of capital': Neocleous has argued that between 1844 and 1914 the corporate form was established as 'the legal subjectivity of capital' and that this legal subject 'took to the stage as a fully-fledged persona as capitalist states were at pains to clarify in the late nineteenth century.'[12] Even O'Connell, in 1971, clearly outlined the deficiencies of the traditional approach with respect to legal capacity and legal personality as:[13]

> Capacity implies personality, but always it is capacity to do those particular acts. Therefore, 'personality' as a term is only shorthand for the proposition that an entity is endowed by international law with legal capacity. But entity A may have the capacity to perform acts X and Y, but not act Z, entity B to perform acts Y and Z, but not act X, and entity C to perform all three.

However, in 1949, the International Court of Justice (hereinafter ICJ) expressed that legal personality is a legal fiction, a legal tool that serves practical purposes. In *Reparations for Injuries Suffered in the Service of the United Nations*[14] (*Reparations* Case) the ICJ confirmed that states could confer international legal personality on international organizations such as the UN. However, there is evidence that TNC have had also a international legal personality and have participated in the international legal system for some time. Examples of such

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[11] Ian Brownlie, *Principles of Public International Law*, 488, 490-491 (5th ed., 1998).

[12] Otto Von Gierke is the best known advocate who rejected the Fiction Theory and focused on the Natural Entity Theory. Significantly, Gierke's theory was decisive in the development of state-independent corporate personality in America in the nineteenth century when the legal basis for corporations changed. Indeed, it was in the United States in the nineteenth century that corporations were conceptualised in the way we understand them today. For details see: F. Hallis, *Corporate Personality*, 138 (1930).

[13] D.P. O'Connell, *International Law for Students*, 26 (1971).

[14] Reparations for Injuries Suffered in the Service of the United Nations, ICJ, Rep. 1949, Available at *http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=41&case=4&code=isun&p3=4* Accessed on 23 February 2012.

participation include application of public international law to contracts with state entities and participation in dispute settlement forums established either by treaty or intergovernmental organizations.[15] International legal personality entails two things: being capable of possessing international rights and duties and the capacity to maintain these rights by bringing international claims.[16]

International legal personality can be obtained in several different ways. For, example, legal personality can be the result of a combination of treaty provisions and recognition by other international persons. It is important to keep in mind that having legal personality does not mean the same thing in all cases. The rights and duties can differ depending on the subject. As was pointed out by the I.C.J. in the *Reparations for Injuries* case:[17]

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and the nature depends on the needs of the community. Throughout history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international place by certain entities which are not States.

Where entities have not been granted legal personality by treaty provisions or by explicit recognition by other parties, the best way to ascertain whether an entity does or does not have legal personality is to find out if it in fact possesses any rights or duties under international law. This last mentioned method of acquiring legal personality opens possibilities regarding the Corporations. The extent to which corporations already possess an international legal status may be ascertained by enquiring whether corporations have any existing rights or duties under international law.[18]

There is, in fact, ample evidence that corporations do possess international rights and duties, and, with respect to their rights, the capacity to enforce them. The corporations have traditionally been given rights under foreign investment law, particularly in relation to expropriation, compensation, and non-discriminatory national treatment relative to domestic firms.[19] After World War II, decisions of

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[15] Jonathan I. Charney, "Transnational Corporations and Developing International Law", *Duke Law Journal*, Vol. 1983, No. 4, 748-788, at 763 (September, 1983).

[16] Reparations for Injuries Suffered in the Service of the United Nations, ICJ, Rep. 1949, at 174 Available at *http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=41&case=4&code=isun &p3=4* Accessed on 23 February 2015.

[17] *Id.*, at 178.

[18] Nicola Jagers, "The Legal Status of the Multinational Corporations Under International Law", Michael K. Addo (ed.) *Human Rights Standards and the Responsibility of Transnational Corporations*, 259-270 at 264 (1999).

[19] U.N. Conference on Trade and Development, The Social Responsibility of Transnational Corporations, U.N. Doc. UNCTAD/ITE/IIT/Misc. 21 (1999). *http://www.unctad.org/ en/docs/poiteiitm21_en.pdf* Accessed on February 23, 2015.

the International Court of Justice as well as the international criminal tribunals in many cases raised many hue and cry among the scholars as well as the supporters of the corporations. The supporter pleaded that states are the only subjects of international law by ignoring the developments over the last 70 years or so that have seen non-state parties grow in their roles and responsibilities on the global stage, albeit usually mediated through the direct international responsibilities of states' parties. As Nicola Jägers reminds us, 'legal personality is not a static concept: it is flexible and can be conferred and then later withdrawn.'[20] The complexity lies in that there is no central body that determines whether an entity has international legal personality. It is only through the behaviour of the principal actors, states, that we can establish which entities have legal personality.[21]

A very innovative point which clarifies the issue of the legal status of corporations has been put forward by Wolfgang Friedmann, as far back as 1964 and again repeated by Rosalyn Higgins. She states that the concept of legal personality is an intellectual prison and "the whole notion of subjects and objects has no credible reality and [...] no functional purpose."[22] International law is formed by the needs of the international community. In her opinion it would therefore be better to speak of participants instead of subjects.[23]

4. Corporate Obligations under International Law

In the 20th century this strict subject-object dichotomy came under pressure. The types of entities with legal personality have diversified. Several practical developments demonstrated and the need to enlarge the number of subjects of international law and prompted States to endow other entities with legal personality. In international law, there is no general rule that companies are responsible for their internationally wrongful acts. However, the first example of such kind was the creation of *The Free City of Danzig*. This protectorate[24] was created to solve conflicting interests between Poland and Germany. The Permanent Court of International Justice (PCIJ) recognised that *The Free City of Danzig* has international personality, except in so far as treaty obligations created special relations in regard to the League and to Poland.[25] In the case concerning the *Jurisdiction of the Courts of Danzig*, the PCIJ affirmed that practical needs

[20] *Supra* note 18, at 262.

[21] *Ibid.*

[22] Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, 49-50 (1994).

[23] *Supra* note 18, at 267.

[24] The Free City of Danzig was created in Articles 100-108 of the Treaty of Versailles. Besides protectorates, under certain circumstances 'State-like' entities such as condominiums and internationalized territories are also considered to be legal subjects. This territory was placed under the protection of the League of Nations.

[25] Ian Brownlie, *Principles of Public International Law*, 60-61 (5th ed., 1998).

can override theoretical considerations in regard to international legal personality. States can grant certain rights and duties to non-state entities making them subjects of international law, if they feel the practical need to do so. The Permanent Court held[26] that

> it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definitive rules creating individuals rights and obligations enforceable by the national courts.

The debates on the application of international law to non-State persons have traditionally centred on the individuals, rather than the corporations, as the debate on the position of the individual in international law had been far more prominent in international legal theory. Nonetheless, no distinction has been drawn in theory between the corporation and individual in the context of rights and obligations derived from international law. it could be argued that the individual-based analysis should a fortiori apply to the corporation. The reason is that the corporation, as a legal fiction and juristic person, is structurally more akin to the recognized subjects of international law, namely the State and the international organization. In this vein, to establish an international law obligation binding on the corporation should in principle present less of a conceptual challenge than one binding on the individual.[27]

During the 1970s the emphasis shifted, due to pressure from the recently decolonialised States and several sensational cases of abuse of corporate power,[28] towards the duties of the corporations, which resulted in various international Codes of Conduct for corporations. Examples are the *OCED – Declaration on International Investments and Multinational Enterprises*,[29] 1976 and the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* of 1977[30]. Corporations also have direct duties under some multilateral conventions. For example, both the *International*

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[26] The case concerned the question whether an agreement between Poland and Danzig, regulating the conditions of employment of Danzig railway officials who had passed into the service of the Polish Administration, created rights and obligations for individuals or merely for States. For details see: Jurisdiction of the Court of Danzig, *Advisory Opinion, P.C.I.J.*, Series B, No. 15, 295 (1928).

[27] Markos Karavias, *Corporate Obligations under International Law*, 7 (2013).

[28] A well known case is the involvement of the American TNC 'International Telephone and Telegraph Corporation' (ITT) in the coup against president Salvador Allende in Chile in 1973. Together with the CIA this company played a part in overthrowing the democratically elected government and helping Pinochet to power.

[29] *http://www.oecd.org/document/24/0,3746,en_2649_34887_1875736_1_1_1_1,00.html* Accessed on February 23, 2015.

[30] *http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_101234 .pdf* Accessed on February 23, 2015.

Convention on Civil Liability for Oil Pollution Damage[31] and the *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*[32] directly impose liability on legal persons including corporations. However, during the 1990s, a return to the emphasis on the rights of TNCs can be detected as parts of the efforts to promote free trade by means of globalization, liberalization, privatization and the more recently in country like India a more liberal policy for foreign direct investment.[33]

In a study prepared for the UN General Assembly on the 'Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order', Georges Abi-Saab suggested that international law had to develop to create a duty on states to cooperate to control corporations in this context:[34]

> The Charter of Economic Rights and Duties, coming twelve years after resolution 1803, adds another provision (Article 2, paragraph 2 (b)) in this respect dealing with a particular form of private foreign investment which drew much attention in the meantime, namely that of the transnational corporation. This provision, apart from affirming the legal power of the State to control and regulate activities of these entities with a view to ensuring their compliance with its laws and economic objective and their non-intervention in its internal affairs (which is nothing but the reiteration of the power described above), prescribes a duty on all States to co-operate in rendering this control effective. Indeed as the activities of transnational corporations straddle several States, their effective control necessitates the co-operations of those States. But this is a different (positive) type of obligation than the ones usually attached to sovereign equality, and which are usually obligations of abstention or non-intervention with the exercise of the rights or powers of others.

Although inter-state efforts to adopt a UN Code of Conduct for corporations later ground to a halt, the point remains that states will inevitably have to engage in cooperation to resolve issues relating to transnational corporations. The revised OECD Guidelines, discussed above, represent an important example of such cooperation.

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[31] International Convention on Civil Liability for Oil Pollution Damage, Adopted on 29 November 1969; Entry into force on 19 June 1975; Being replaced by 1992 Protocol: Adoption: 27 November 1992; Entry into force: 30 May 1996 and again amended in 2000 and entry into force on 1 November 2003. *http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx* Accessed on February 23, 2015.

[32] The treaty was opened for signature on 21 June 1993 and till date only 9 state parties signed it. No State has ratified it yet and hence it has not come into force. *http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=150&CM=&DF=&CL=EN G* Accessed on February 23, 2015.

[33] *Supra* note 18, at 264.

[34] G. Abi-Saab, "Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order", *Report of the United Nations Institute for Training and Research*, UN Doc. A/39/504/Add.1., 50 (October 23, 1984).

Furthermore, the UN's *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (hereinafter the 'Norms') purport not only to bind states, but also to place obligations on transnational corporations and other business enterprises [w]ithin their respective spheres of activity and influence, ... to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law. The Norms are, however, unclear as to how corporations could be held directly liable under international law for any breaches of these obligations, beyond implying that such a possibility exists. In this regard, the likelihood is that the liability of corporations will come indirectly through the direct liability that the Norms clearly intend to place on states.[35]

The Corporations are also empowered to enforce their rights.[36] Various international instruments can be found where corporations are accorded with some form of international personality. In 1981 the Iran-United States Claims Tribunal was created as part of the settlement of the Tehran hostage crisis. Before this tribunal companies have legal standing under certain conditions. And under North American Free Trade Agreement (NAFTA), corporations are able to seek recompense, spectacularly, from foreign governments for breach of their right to unhindered, cross-border trade through the Agreement's private dispute-settlement mechanism.[37] Another example is the United Nations Compensation Commission[38] and the Seabed Dispute Chamber.[39] Evidently, therefore, as even this brief note makes clear, it is possible to invest in corporations sufficient international legal personality to bear obligations, as much as to exercise their rights.[40]

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[35] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). *http://www1.umn.edu/humanrts/links /nor ms-Aug2003.html* Accessed on February 23, 2015.

[36] *Supra* note 18, at 265.

[37] Implementation of the NAFTA began on January 1, 1994. This agreement removed most barriers to trade and investment among the United States, Canada, and Mexico. Under the NAFTA, all non-tariff barriers to agricultural trade between the United States and Mexico were eliminated. In addition, many tariffs were eliminated immediately, with others being phased out over periods of 5 to 15 years. This allowed for an orderly adjustment to free trade with Mexico, with full implementation beginning January 1, 2008. *http://www.fas.usda.gov/itp/policy/nafta/nafta.asp* Accessed on February 24, 2012.

[38] The United Nations Compensation Commission (UNCC) was created in 1991 as a subsidiary organ of UN Security Council. Its mandate is to process claims and pay compensation for losses and damages suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait. The United Nations Compensation Commission concluded the claims-processing exercise in 2005, and payments to individuals concluded in 2007. <*http://www.uncc.ch/*> Accessed on February 23, 2015.

[39] Set up under Annex VI of the UN Convention on the Law of the Sea, 10 December 1982, 21 ILM, 1261 (1982). *http://www.un.org/depts/los/convention_agreements/texts/unclos/part11-5.htm* Accessed on February 23, 2015.

[40] Nicola M.C.P. Jagers, *Corporate Human Rights Obligations: In Search of Accountability*, 34-35 (2002).

The applicability of international law to corporations has been most importantly reaffirmed in the framework of the European Convention on Human Rights, which expressly provides for the protection of the right to private property of 'legal persons', a term logically encompassing corporations. More fundamentally, the European Court of Human Rights has held that as 'non-governmental organizations ... claiming to be the victim of a violation by one of the ... Parties' of the rights guaranteed by the Convention lodge individual applications with the Court. In this manner, the Court has accorded them protection that extends beyond the right of the private property.

In 1998 the Rome Conference that adopted the Statute of the International Criminal Court came close to providing the Court with jurisdiction to try not only natural persons but also legal persons for the offences listed in the Statute. In the end, however, the proposal failed to gather sufficient support.[41] Nevertheless, some long-standing multilateral treaties do directly impose obligations on companies. The 1969 Convention on Civil Liability for Oil Pollution Damage provides that the owner of a ship (which may be a company) shall be liable for any pollution damage caused by it.[42] The 1982 UN Convention on the Law of the Sea prohibits not only states but also natural and juridical persons from appropriating parts of the seabed or its minerals.[43]

Admittedly, certain authors have set a rather low threshold when affirming the existence of treaty-based corporate obligations, exclusively relying on the wording of the instrument. Yet, such strictly literal interpretation, without due consideration for the context of the instrument may lead to paradoxical results. Ratner has argued that 'both the purpose of [international labour conventions] and their wording make clear that they do recognize duties on enterprises regarding their employees'. He goes on to add that international labour conventions 'show that states have accepted the need to regulate corporate conduct through international law', thus affirming that the duties he envisages derive from international law.[44]

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[41] Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (2000) 139-195.

[42] Art. III, International Convention on Civil Liability for Oil Pollution Damage (1969): '... the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident'.

[43] Art. 137(1), UN Convention on the Law of the Sea (1982): 'No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized'.

[44] Markos Karavias (2013), 13.

5. Conclusion

It seems that concurrence of international obligations of states and of non-state actors is an inevitable result of the globalization process. International law does not prevent States from creating obligations directly binding on corporations under international law for e.g. UN Norms, 2003. In order for a corporate obligation under international law to be affirmed, three condition have to be met: (a) international law had to develop to create a duty on states to regulate the conduct of corporations without prior recourse to national law; (b) any violation of the corporate obligation should engage the responsibility of the corporation under international law; (c) and the responsibility of the corporation should be enforced via the application of international law.

INITIATION OF CRIMINAL JUSTICE PROCESS: A CRITIQUE ON FIRST INFORMATION REPORT

Dr. Shipra Gupta*

1. Introduction

Rule of law requires administration of justice according to law. Criminal justice system of a society has an onerous responsibility for the maintenance of law and order by preventing and controlling crime in the society. The three separate but interdependent parts of criminal justice system in all democracies - police, courts and jails, though perform distinct functions but cannot remain unaffected by each other's way of working. The manner in which each one functions, is materially decisive of the quality of output of other agencies of the criminal justice system. The quality and efficiency of criminal justice much depends on the quality of initial work done by the police.

In a democratic society, the role of police is to protect freedoms of the citizens so as to provide a safe, orderly environment in which these freedoms can be exercised. The police force of a democracy is concerned strictly with the preservation of safe communities and the application of criminal law equally to all people, without fear or favour. Good policing involves respecting human rights and upholding the rule of law. This has been strongly emphasised by the Supreme Court and the National Human Rights Commission. As protectors of people's rights, police officers are expected to display integrity, transparency, accountability and most of all respect for human dignity. Rule of law requires the police to be an integral part of the criminal justice system who must respect and uphold the rights and liberty of individuals.[1]

In order to set the wheels of justice in motion, prompt and honest registration of the First Information Report carries great significance as it is the first step towards taking any sort of action against the accused, as per law. FIR is a very important document in the criminal justice process and its main object from the point of view of the informant is to set the criminal law in motion; and from the point of view of the investigating authorities, to obtain information about the alleged criminal activity so as to be able to take suitable steps to trace and to bring to book the guilty.[2] It has been a matter of grave concern historically that a number of cases have been thrown up from both the sides where the grievance of the victim/informant of non-registration of valid FIRs as well as that of the accused of being unnecessarily harassed and investigated upon false charges

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* Assistant Professor, Department of Laws, Panjab University, Chandigarh.

1 Mandeep Tiwana, *Human Rights and Policing: Landmark Supreme Court Directives & National Human Rights Commission Guidelines,* (Ed by Maja Daruwala), 2005 at 46.

2 *Hasib* v. *State of Bihar*, (1972) 4 SCC 773.

have been found to be correct. Police information sent by hospitals in medico-legal cases are also not given due importance.[3]

2. First Information Report-Salient Features

The words 'First Information Report' has a legal import. It may be possible to have more than one report about the one and the same incident. In such cases the first report would be the report under section 154 of the Code of Criminal Procedure, 1973 (hereinafter referred as Code). The First Information Report is the earliest report made to the police officer with a view to his taking action in the matter.[4] First Information Report marks the commencement of the investigation which ends up with the information of opinion under section 169 or 170 of the Code, as the case may be, and forwarding of a police report under section 173 of the Code. The FIR is not intended to be a catalogue of events, it is required to contain basic features of the prosecution case, since it sets law into motion. There cannot be two FIRs against the same accused in respect of the same case; but if there is a rival version in respect of the same episode they would normally take the shape of two different FIRs and the investigation can be carried on under both of them by the same investigating agency. The report submitted to the court by way of subsequent FIR need be considered as information submitted to the court regarding new discovery made by police during investigation that persons not named in the first FIR were the real culprits.[5] The police can further investigate the case after submitting the report. There can be no second FIR on fresh investigation or on receipt of subsequent information in respect of the same offence.

The Criminal Procedure Code 1973 does not lay down any condition regarding the *locus-standi* of any person to lodge an FIR. Any person having knowledge about the commission of the cognizable offence can lodge an FIR. Even the police officer who comes to know about the commission of such offence can himself lodge an FIR. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or the assailant. A first informant need not necessarily be an eye witness so as to be able to disclose in great details all aspects of the offence committed.

At this stage it would be sufficient if the police officer on the basis of the information given to him suspects the commission of a cognizable offence, and not that he must be convinced that a cognizable offence has been committed.[6] "Reasonableness" or "credibility" of such information is not a condition precedent for registration of a case as is evident from the non-qualification of the

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[3] It has been noted with concern by the Supreme Court in *Lalita* v. *Government of U.P.*, 2013 (4) RCR (Cr) 979.

[4] *Soma Bhai* v. *State of Gujarat*, AIR 1975 SC 1453.

[5] The *Code of Criminal Procedure* 1973, S. 173 (8).

[6] *Superintendent of Police, CBI* v. *Tapan Kumar Singh*, AIR 2003 SC 4140.

word "information" in section 154(1).[7] at the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of section 154 (1) of the code, the concerned police officer cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable. The police in-charge is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered to inspect as per the code. In case the officer-in-charge refuses to exercise the jurisdiction vested in him and to register a case on the requisite information, violates the statutory duty cast upon him. The person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied with the information forwarded to him discloses cognizable offence, should either investigate himself or direct an investigation to be made by any police officer subordinate to him as per sub-section (3) of section 154 of the code.[8]

2.1 Statutory Provisions

Section 154 of the Criminal Procedure Code provides the procedure to lodge FIR at the police station in case of the commission of cognizable offence. Salient features of Section 154 are as follows:

1. Even if the first informant does not appear with a written report but makes an oral statement, the officer-in-charge must reduce his oral statement to writing and it should be signed by the informant. The substance of the information should be entered by the police officer in a book as prescribed.
2. A copy of the recorded information is to be given to the informant free of cost.
3. In case of refusal to register the FIR the aggrieved person may send the substance of such information in writing and by post to the Superintendent of Police, who upon satisfaction shall investigate/direct investigation as per the provisions of the code.
4. If the informant is a woman against whom offence of rape, sexual assault, acid attack *etc* is alleged to have been committed or attempted, then such information shall be recorded by a woman police officer or any woman officer.[9]
5. If victim of aforesaid offence is temporarily/permanently mentally/physically disabled, such information shall be recorded by the

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[7] *State of Haryana* v. *Bhajan Lal*, 1991 (1) R.C.R. (Cri) 383 at 390-91.
[8] *Id.* at 390.
[9] Proviso, S. 154 Cr.P.C., *Inserted by the Criminal Law (Amendment) Act,* 2013.

police officer at the residence of the person's choice, in the presence of interpreter or special educator.[10]

6. The recording of such information shall be video graphed.[11]
7. The police officer shall get the statement of the person recorded by a judicial magistrate u/cl (a) of sub-section (5a) of sec 164 as soon as possible.[12]

In the light of the recent unfortunate occurrence of offences against women, Section 166 A has been inserted in the Indian Penal Code *vide* Criminal Law (Amendment) Act, 2013 so as to tighten the already existing provisions to provide enhanced safeguards to women. Thus the legislative intent is to punish the police officers for their failure to register FIRs in cases where the information is in relation to cognizable offences punishable under section 326A, 326B, 354, 354B, 370, 370A, 376, 376 A-E or 509 of *the Indian Penal Code*, 1860 (hereinafter referred as IPC) with rigorous imprisonment for a term which shall not be less than six months but may extend to two years and shall also be liable to fine.

2.2 Who can Lodge FIR

- Any person aware of offence
- The person in possession of hearsay information may be treated as First Informant provided the person giving hearsay account is required to subscribe his signature to it and mention the source of his information so that it does not amount to irresponsible rumour.
- Accused himself.
- Information given by medical certificate or doctor's *ruqqa* about arrival of the injured, then the SHO should enter it in daily diary and go to the hospital for recording detailed statement of injured. If the information given by the doctor contains requisites of a cognizable offence, it can be treated as an FIR. If such details are missing, PO will go to the hospital to record necessary information at the instance of the injured, which sha treated as FIR.
- Any judicial magistrate before taking cognizance upon a complaint can order the in charge of the police station for investigation, may direct to register FIR or even may send complaint without any direction. Police is duty bound to register the case and investigate.[13]

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[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Mohd. Yusuf* v. *Alag Jahan*, AIR 2008 SC 705.

2.3 Telephonic Message & Telegraphic Message

Police is not required to record FIR on the basis of telephonic information by a person who does not disclose his identity or is in a vague and cryptic manner. Message transmitted between police officers *inter se*, narrating the circumstances of the crime, with a view that the receiving PO might proceed to investigate thereon, such message would be treated as FIR.[14] But if the purpose is to seek instruction from higher officer, or send direction for police force to reach the place of occurrence or to give information to superior officer, message would not be FIR.

2.3.1 E-mail

As per guidelines issued by the Delhi police, a woman has the privilege of lodging a complaint *via* e-mail or registered post addressed to senior police officer of the rank of CP/DCP. The officer would then direct the SHO of the police station, of the area where incident occurred, to conduct proper verification of the complainant and lodge an FIR. The police can then come to take her statement at the residence of the victim.[15] On January 18, 2013, Delhi police chief announced that Zero First Information Reports to be registered on the basis of a woman's statement at any police station irrespective of jurisdiction. This means women can file an FIR at any police station and the complaint is required to be registered on the basis of the woman's complaint verbatim.[16]

The Indian Penal Code makes it penal to give false information to the public servant as true, having knowledge of its falsity[17] or to furnish false information with an intent to cause public servant to use his lawful power to the injury of another person[18] with six months imprisonment or fine up to Rs 1,000/- or both. Where a police officer suppresses the report of a cognizable offence as a non-cognizable offence, to save himself from the trouble of investigation, or a serious riot is recorded as a petty assault; such an officer would be liable for an offence under sec 177/182 IPC. Section 218 IPC punishes a public servant for wilful falsification of public records, with intention of injuring any person, or saving any person from legal punishment *etc.*[19] In case the contents are recorded

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[14] *Jagdish Singh* v. *State of A.P.*, 1992 Cr. LJ 981 (MP).

[15] HT correspondent, 10 legal rights every woman must know, Hindustan Times, available at *http://www.hindustantimes.com/chandigarh/10-legal-rights-every-woman-must-know/article1-981794.aspx* accessed on 15.8.15.

[16] Aparna Viswanathan, Going from Zero FIRs to e-FIRs, The Hindu, 22.1.2013available at *http://www.thehindu.com/opinion/lead/going-from-zero-firs-to-efirs/article4329575.ece* accessed on 15.8.15.

[17] *The Indian Penal Code, 1860,* S. 177.

[18] *Id.,* S. 182.

[19] *T.T. Anthony* v. *State of Kerala*, AIR 2001 SC 2637, wherein it has been noted by the Court that the Police officers often find themselves under pressure to register cases on flimsy grounds. The Supreme Court has laid down that a just balance has to be struck between fundamental rights of citizens and the expansive power of the police to investigate an offence.

wrongly and not in the manner stated by the complainant such an officer shall be liable for punishment u/s 167 IPC. The gist of the offence consists of an intention to cause injury to any person by perversion of his duty by a public servant. Any information about the identity of the rape victim as recorded in the FIR is not to be disclosed to the public or the media and is punishable with imprisonment for up to two years and fine.[20]

If any information is received after lodging the FIR that becomes part of investigation and does not form part of FIR. When FIR is registered, it is the duty of the officer-in-charge of the police station to send one copy to the concerned magistrate.[21] Police Officer is duty bound to immediately record all information and consequently register complaints with regard to commission of cognizable or non-cognizable offences.[22]

3. Judicial Attitude and the Registration of First Information Report

Non-registration of First Information Reports is one of the most serious, frequent and common grievances against the police whilst the police officers must register an FIR immediately on receiving information about a cognizable offence. Thus there remains a huge gap between what ought to be done and what is actually done. The Supreme Court has over the years, explained, elaborated and interpreted various laws to prevent the agents of the state from intruding upon the individual rights. The Court has from time to time laid down certain directives for law enforcement. The courts have repeatedly reiterated that registration of FIR is compulsory in a case of cognizable offence without conducting preliminary inquiry. An officer who wilfully or inadvertently ignores Supreme Court directives can be tried in court under relevant provisions of the Indian Penal Code and under the Contempt of Courts Act, 1971.[23]

The legal mandate enshrined in section 154 (1) is that every information relating to the commission of a "cognizable offence" if given orally or in writing to "an officer in-charge of a police station" and signed by the informant should be entered in a book to be kept by such officer in such form as the state government may prescribe which form is commonly called as "First Information Report" and which act of entering the information in the said form is known as registration of a crime or a case.[24] Investigation of offences and prosecution of offenders are the duties of the state. The police is duty bound to register the FIR in case of cognizable offences and to conduct investigation as per the provisions of the

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[20] *Indian Penal Code, 1860,* Section 228 A. Inserted by Criminal Law (Amendment) Act, 1983, S. 2 (Act 43 of 1983).

[21] *The Code of Criminal Procedure* 1973, S. 155.

[22] *Id.,* S. 154 & 155.

[23] Constitution of India, Article 141 states that the law declared by the Supreme Court is binding on all courts in India.

[24] *State of Haryana* v. *Bhajan Lal*, 1991 (1) R.C.R. (Cri) 383.

code. Allowing any kind of latitude, discretion or option to the police in the matter of registration of FIRs, can have serious ramifications on the public order situation, adversely affecting the rights of the victims including their fundamental right to equality.[25]

The Committee on Reforms of Criminal Justice System headed by Dr. Justice V.S. Malimath also noticed the plight faced by several people due to non-registration of FIRs and recommended that action should be taken against police officers who refuse to register such information. The Committee observed that according to the section 154 of the Code of Criminal Procedure, the office in-charge of a police station is mandated to register every information oral or written relating to the commission of a cognizable offence. Non-registration of cases is a serious complaint against the police. The Committee noted that the National Police Commission in its 4th Report lamented that the police "evade registering cases for taking up investigation where specific complaints are lodged at the police stations".[26] The Committee also disapproved of the tendency of police officers to minimize the offences by not invoking appropriate sections of law.

Police activities are generally subject to judicial scrutiny. One of the important factors which may weigh with the court is as to whether there was a possibility of false implication of the person, only with a view to test the veracity of the correctness of the contents of the report; the court applies certain well known principles of caution.[27] However, the functions of the judiciary and the police are complimentary and not overlapping.[28] On a number of occasions the Supreme Court has disparaged the functioning of the police and has dealt with strict hand the dereliction on the part of the police officers in avoiding to register the First Information Report. In a recent judgement *Lalita Kumari* v. *State of U.P.,*[29] the Supreme Court has elaborated on this statutory duty of the police to register the FIR so as to set the criminal law in motion. According to the Hon'ble Court the First Information Report serves twofold object - to ensure transparency in the criminal justice delivery system and also to ensure 'judicial oversight'. Thus the commission of cognizable offence is not only brought to the knowledge of the investigating agency but also to the subordinate judiciary.

The Hon'ble Court in *Lalita's* case has issued the following directions so as to ensure strict compliance with the mandatory statutory provisions:

- Registration of FIR is mandatory u/s 154 CrPC immediately after a cognizable offence is reported to them.

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[25] *Lalita* v. *Government of U.P.*, 2013 (4) RCR (Cr)979 at 996.
[26] Editorial, *J Indian Acad Forensic Med.* April-June 2014, Vol. 36, No. 2 at 116.
[27] *Animereddy Venkata Ramana* v. *Public Prosecutor, H.C.of A.P.*, AIR 2008 SC 1603.
[28] *King Emperor* v. *Khwaja Nazir Ahmad.*
[29] 2013 (4) RCR (Cr) 980.

- If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.
- If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In case where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. The reasons of closure of complaint must be disclosed briefly.
- The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.
- The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.
- The category of cases in which in which preliminary inquiry is to be conducted, depending upon the facts and circumstances of the case are:
  (i) Matrimonial disputes/family disputes
  (ii) Commercial offences
  (iii) Corruption cases
  (iv) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over three months delay in reporting the matter without satisfactorily explaining the reasons for delay.

  The Court clarified that these cases are only illustrative and not exhaustive of all conditions warranting preliminary inquiry.
- While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed seven days. The fact of such delay and reasons thereof must be reflected in the general diary entry.
- The court further directed that all the information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected therein.
- In cognizable offences the police can *suo motu* register an FIR and do not require a complaint to initiate action.
- The court took serious note of the fact and said that action must be taken against those officers who do not register FIRs even when the information

received by them reveals a cognizable offence. The relationship between police and judiciary is complimentary and supplementary to each other, thus both should act with coordination.

- Sec 154 CrPC gives a statutory right to file complaint against the accused provided the information is related to the commission of cognizable case and the police officer-in-charge is duty bound to register the FIR. In case he refuses to register, he becomes liable under IPC.
- The code contemplates two kinds of FIRs-1. Duly signed FIR u/s 154(1) by the informant to the concerned officer at the pol. Station and 2. Which is registered by the police itself on any information received or other than by way of an informant-has to be duly recorded and a copy be sent to the magistrate forthwith.

4. Effect of delay in lodging FIR

The importance of FIR from the standpoint of accused cannot be lightly ignored. The very object of insisting on first information regarding the commission of offence is to obtain early information regarding the alleged criminal liability and to record the circumstances before there is time for the parties concerned to exaggerate or develop the case as circumstances present themselves to them. Immediate registration of FIR leads to less manipulation in criminal cases and lessens incidents of *'ante dates'* FIR or deliberately delayed FIRs. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime is committed and other relevant facts. Delay in lodging the FIR quite often results in embellishment which is a creature of afterthought. On account of delay, the report gets bereft of spontaneity, there is likelihood of coloured version creeping in, exaggerated account or concocted version as a result of deliberation and consultation.[30]

In *Shanmugam* v. *State*[31] the Supreme Court noted that delay in lodging FIR is not by itself fatal to the case of prosecution nor can delay itself create suspicion about the truthfulness of the version given by the informant just as a prompt lodging of the FIR may be no guarantee about its being wholly truthful. So long as there is cogent and acceptable explanation offered for the delay it loses its significance. However, in *Bhajan Singh* v. *State of Haryana,*[32] the Court opined that unexplained inordinate delay in sending the copy of FIR to the magistrate may affect the prosecution case adversely. An adverse inference may be drawn against the prosecution when there are circumstances from which an inference can be drawn that there were chances of manipulation in the FIR by falsely

[30] *Thulia Kali* v. *State of Tamil Nadu*, (1972) 3 SCC 393.
[31] (2013) 12 SCC 765.
[32] (2011) 7 SCC 421.

roping in the accused persons after due deliberations. Delay provides legitimate basis for suspicion of the FIR, as it affords sufficient time for the prosecution to introduce improvements. It is only after a complete investigation that police may be able to report on the truthfulness or otherwise of the information that does not furnish all the details, and must find out those details in the course of investigation and collect all necessary evidence.[33]

5. Conclusion

A fair, true and honest FIR is demanded in criminal prosecutions to avoid the proceedings reaching the dismal end resulting in demoralising the victim on account of the injustice inflicted on him/her. An FIR is the very bed-rock upon which a criminal prosecution rests and upon which a fair and just verdict could be given. It is the record of the acts of the public officers prepared in discharge of an official duty. It is a public document as defined in sec 74 of the Indian Evidence Act. It is a document to which sec 162 of the Cr.P.C does not apply because it is not the information recorded during the investigation and is of considerable value as on that basis investigation is commenced and that is the first version of the prosecution.

The underpinnings of compulsory registration of FIR are not only to ensure transparency in the criminal justice delivery system but also to ensure 'judicial oversight'. In order to ensure transparency and authenticity of the FIR certain concrete measures need to be taken. While registering FIR there should be videography of the person recording the information so that the information may be utilised at the time of the trial. This will also ensure transparency. Measures should be taken for online registration of FIRs. This will help to save the victims of sexual offences from facing embarrassment because of social stigma and lack of support from the family. Some safeguards should be introduced in the form of authenticated digital signature and photograph in order to avoid fake reporting. This e-FIR is also likely to reduce corruption and harassment in the registration of FIR. After the registration of the FIR, its status should be updated online. The most important thing in this regard is the need to sensitize and create awareness among general public about the statutory right to get the FIR registered, the relevant laws and the recent directions of the Hon'ble Supreme Court. It appears equally important to take strict action against the erring officers who fail to comply with their statutory duty. The police officers should also be made aware of the recent directives of the Hon'ble Supreme Court so as to ensure strict compliance of the mandatory obligations. Transparency, honesty and authenticity in the registration of FIR will go a long way in achieving justice.

[33] *Hemant Dhasmana* v. *CBI*, 2001 SCC (Cri) 1280.

CHILD LABOUR: INTERNATIONAL PERSPECTIVE

Sonu Sharma*

> The hallmark of culture and advance of civilization consists in the fulfillment of our obligation to the young generation by opening up all opportunities for every child to unfold its personality and rise to-personality and rise to its full stature, physical, mental, moral and spiritual. It is the birth right of every child that cries for justice from the world as a whole.
>
> Justice V.R. Krishna Iyer[1]

1. Introduction

Child labour is an issue, involving widespread international concern. It brings the entire humankind face to face with the consequences of a world in which the disparity between the rich and the poor is ever-widening and economic liberalization is taking its toll on basic human values. The International Law on the rights of the child has developed since the beginning of the twentieth century. The first step in this direction was the recognition that all individuals including children are subject to International Human Rights Law.[2] In a civilized society, the importance of child welfare cannot be underestimated because the welfare of the entire community, its growth and development, depends on the health and well-being of its children. Children are a "supremely important national asset" and the future well-being of the nation depends on how its children grow and develop. However, these wishful and optimistic sayings look shallow and no more than a rigmarole when one encounters the reality of child labour and exploitation in the unorganized and organized sectors of the economy. In several cases, the sectors of work, in which street children are engaged, do not ensure any protection at work with regard to the physical capacity of the child, regularity of income or any long-term benefits.[3]

Child Labour, actually viewed more as a social problem of a greater magnitude than other related problems connected with the development of human beings, is abnormally high in under-developed and developing countries of the world.[4] The problem of Child labourers over the years has assumed international dimension.

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* Assistant Professor of Law, Maharishi Markandeshwar University, Mullana (Ambala) Haryana.

1 "Jurisprudence of Juvenile Justice: A Preambular Perspective".

2 Nuzhat Parveen Khan, *Child Rights and the Law*, (2013), at 347.

3 Mamta Rao, *Law Relating to Women and Children,* (2008), at 413.

4 O.P. Maurya, "Child Labour in India", Indian Journal of Industrial Relations, Vol. 36 No. 4, at 492 (Apr, 2001). available at *http://www.jstor.org/stable/27767746* (accessed on November 11, 2013).

This phenomenon is prevalent throughout India cutting across different sectors of the economy.[5] Child labour is a social evil. Globalization has brought with it an apathetic free-market economic system which is systematically but steadily ruining the support systems and security nets, encouraging migration, eroding away at social values, destabilizing families and contributing to the already wide gap between the rich and poor.[6]

Increasing globalization and the dependency of many developing countries on access to industrialized markets may link the vulnerability of an economy to child labour. On one hand, increasing globalization makes national factors more vulnerable to external pressure from international movements. On the other hand, the increasing necessity to complete on the global market may compel industries to employ more children in an effort to reduce labour costs and gain a competitive edge.[7] This is one of the arguments put forth other than the main argument of 'the vicious cycle of poverty', commonly projected. Efforts are being made consistently at the global level as well as at national level by various International organizations as well as their members in their respective countries to curb the tendencies prevailing among the employers for employing child labour in order to earn maximum profit but unfortunately results obtained so far have proved to be far away from being satisfactory.[8]

Nearly a century and half ago, Europe and America awoke to the grim and disturbing conditions that children worked in; at factories, plants, docks and several other hazardous and precarious milieus and locales. With the setting up of the International Labour Organization in 1919, a year after the end of the first deadly war that had engulfed Europe, the fight against child labour intensified and most importantly attained a concrete direction.[9]

The beginning of the movement for the rights of the child can be traced back to the mid-nineteenth century with the publication of an article in June 1852 by Slagvolk, titled "The Rights of the Children", followed by Kate Kliggins, "Children's Rights" in 1892. With the attention gradually shifting to the working conditions of children, the legal position of children in England began to change with the introduction of factory laws which concentrated on the amelioration of the working conditions of employees especially children.[10]

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5 Basant Kumar Bahera, "Child Labour: An Indian Perspective", quoted in Dr. R.N. Misra (ed.), *Problems of Child Labour in India*, (2004), at 102.

6 *Id. at* 216.

7 Madiha Murshed, "Unraveling Child Labor and Labor Legislation", *Journal of International Affairs*, Vol. 55 at 1(Fall 2001).

8 S.N. jain, Child labour, *J.I.L.I.* 1981, p. 336.

9 Ivan & Prashant Pranjal, "Child Labour In India : A need to be in sync with the World", *Labour and Industrial cases Journal*, Vol. 7 IX, (2013), at 97.

10 Shriniwas Gupta: "Human Rights of the Child", (1994) 7 *CILQ.*

The international organizations like ILO, UNO and UNICEF have been undertaking a commendable social responsibility to eliminate child labour all over the world through their programmatic schemes of formulating different policies, pressing the concerned governments for social legislations and funding particularly the poor third world countries for the purpose.[11] The first impression of international concern over the "situation of children", came in 1923 when the council of the newly–established non-governmental organization "Save the Children International Union" adopted a five –point declaration on the rights of the child. This Geneva Declaration was endorsed the following year, 1924, by the fifth Assembly of the League of Nations. In 1948, the General Assembly of the United Nations approved an expanded version of that text and, in 1959 went to adopt a new declaration for child welfare and protection.[12] At the international level, the issue of child labour having been acknowledged widely, concern regarding the issue is manifested in the adoption of various treaties and conventions relevant to child labour and the protection of children and their rights, and in the creation of the International Programme on the Elimination of Child Labour or IPEC of the ILO in 1992.[13] The evolving concept of child rights at the international level which culminated in the adoption of the UN Convention on the Rights of the Child (1989), enables international law and national legal systems to be used creatively so as to give additional support to these concerns and efforts. The creation of these responsibilities suggests that law and legal systems will be used so as to impact on social practice and strengthen the ongoing efforts on behalf of children.[14]

Many international bodies and conventions have raised concerns regarding child labour. These are discussed as follows:

2. Role of League of Nations

The League of Nations was established on January 10, 1920. The Geneva Declaration on the rights of the child, 1924, which was adopted by the League of Nations, was the first convention in which the rights of the child were considered.[15]

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[11] B.K. Swain, *Child Labour in India,* (2005), at 56.

[12] Justice Gulab Gupta : *Human Rights and Fundamental Freedoms in India*, M.P. Human Rights Commission, Bhopal (2002), at 195.

[13] Pragnya Bhattamishra,"International Conventions on Child Labour-A Critical Analysis", Indian Bar Review, Vol. 29, (2002), at 216.

[14] Devinder Singh, *Child Labour & Right to Education*, (2013), at 28.

[15] P. K. Padhi, "Child Labour: Yesterday, today and tomorrow", *Labour and Industrial cases Journal*, Vol. 37, (2004), at 179.

2.1 Declaration of the Rights of Child, 1924 (Human Rights Instrument Specific to the Rights of the Child)

Human Rights Declaration 1924 is the first International Instrument dealing with Children's Rights. It declares that "the mankind owes to the child the best it has to give". Following are some principles of this declaration:

1. The child must be given the mean requisite for its normal development, both materially and spiritually.
2. The child who is hungry must be fed, the sick must be nursed, the backward must be helped, the delinquent must be reclaimed, and the orphan and the waif must be sheltered and scoured.
3. The child must be the first to receive relief in times of distress.
4. The child must be put in a position to earn livelihood and must be protected against every form of exploitation.
5. The child must be brought up in the consciousness that its talent must be developed to the service of its fellow men.

This Declaration is important as it highlights the social and economic entitlement of children and establishes internationally the concept of the rights of child, thereby laying the foundation for setting future international standards in the field of Children's Rights.[16]

3. Role of United Nations Organization

United Nations is an International Organization established to maintain peace and security in the world. After the First World War the League of Nations was established but it failed to prevent the Second World War. The Second World War once again compelled the nations of the world to endeavor to establish an international organization which could prevent future war and maintain peace and security in the world. During the Second World War itself the great powers had started making efforts in this direction. Their efforts led to the holding of the San Francisco Conference in which the United Nations Charter was adopted and signed by 51 nations of the world. After the Charter was ratified by the prescribed number of states, it came into force on October 24, 1945. Thus the United Nations was finally established.[17] United Nations had taken several steps for Eradication of Child Labour. In his concern for welfare of child as observed Kofi A. Annan, former Secretary-General of the United Nations has observed that "there is no trust more sacred than the one the world holds with children. There is no duty more important than enduring that their rights are respected,

[16] Nuzhat Parveen Khan, *Child Rights and the Law*, (2013), at 349.
[17] S.K. Kapoor, *International Law and Human Rights (Nutshell)*, at 237 (2008).

that their welfare is protected that their lives are free from fear and want and that they grow up in peace".[18]

3.1 United Nations Charter, 1945:

The members of the United Nations affirmed their faith in fundamental human rights and the dignity worth of the human being in various provisions of the Charter. It is to be noted that the dignity and worth of the human being stated there also includes children.[19]

3.2 United Nations Charter and Universal Declaration of Human Rights, 1948

The Universal Declaration of Human Rights, 1948, embodies some more measures to protect the children. Through it, a "common standard" of achievement for all people and all nations was adopted. It provides that everyone is entitled to all the rights and freedoms set forth in this Declaration without any distinction of any kind. Naturally, the standard set forth includes children also.[20]

Through various provisions in the UN Charter, the members of the United Nations reaffirmed their faith in fundamental rights and in the dignity and the worth of human person.[21] It is to be noted that the dignity and worth of human person stated here also includes children. Further the UN Charter contains provisions for international cooperation in solving international problem including promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[22] Here too, the children are not left out. The guarantee envisaged includes children within its ambit.[23]

The United Nations General Assembly adopted the Universal Declaration of Human Rights on December 10, 1948, which embodies some more measures to protect the child. Through it a "common standard' of achievement for all people and all nations was adopted. "All human being are born free and equal in dignity and rights', it says.[24] Then it provides that "everyone is entitled to all the rights and freedoms set forth in this declaration without any distinction of any kind.[25] It is notable that the word 'all' used in Article 1 and the word ''everyone' used in

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[18] Kofi A Annan, "Forward" to The State of the World's Children (2000). Available at: *http://www.unicef.org/sowc/archive/ENGLISH/The%20State%20of%20the%20World%27s%20Children%202000.pdf* (Accessed on 31 may 2015).

[19] P.K. Padhi, *Labour and Industrial Laws,* at 319 (2012).

[20] *Ibid.*

[21] See Preamble to UN Charter.

[22] Article 1(3) of UN Charter.

[23] Shriniwas Gupta, "Unconstitutional Practice of Child Labour Retrospect and prospect", *Central India Law Quarterly*, Vol. 8, at 305 (1995).

[24] The Universal Declaration of Human Rights, 1948, Article 1.

[25] *Id.*, Article 2.

Article 2 obviously and necessarily includes the child also. Besides, this Declaration while dealing with the protection of family says that the family is the natural and fundamental group unit of society and is entitled to protection by the society and the state.[26] No definition of 'family' has been given in the Declaration but by no interpretation the child may be subjected to the exclusion from its ambit. Thus the only conclusion is that the Declaration recognized several rights of the child including right to life and liberty,[27] prohibition of slavery and slavery trade,[28] prohibition of torture and in –human treatment[29] right to equality before law and legal remedies,[30] right to freedom of movement to leave any country and to return to his country,[31] right to seek asylum,[32] right to nationality,[33] right to own property,[34] right to freedom of thought, conscience and religion,[35] right to freedom of freedom of opinion and expression[36] and right to freedom of peaceful assembly, and association,[37] right to social security[38] right to work, free choice of employment et cetera,[39] right to education,[40] right to enjoy arts and to share in scientific advertisements.[41] The Declaration, while dealing with the question of social security, said that 'the motherhood and the childhood are entitled to special care and assistance, all children, whether born in or out of wedlock shall enjoy the same special protection.[42] This Declaration though could not assume any legal sanction behind it yet it has acquired the force of customary international law.[43]

The Universal Declaration of Human Rights, 1948 is a document containing general Human Rights including that of children. This is not a binding resolution for India but has helped in laying down certain common standards for children worldwide. Certain Articles of UDHR specially and expressly deal with Child Rights, such as Article 25 of the Declaration emphasize upon the rights of children to special care and assistance through direct child rights protection and

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[26] *Id.*, Article 1 (3).
[27] *Id.*, Article 1.
[28] *Id.*, Article 4.
[29] *Id.*, Article 5.
[30] *Id.*, Articles 6, 7, 9, 10 &11.
[31] *Id.*, Article 13.
[32] *Id.*, Article 14.
[33] *Id.*, Article 15.
[34] *Id.*, Article 17.
[35] *Id.*, Article 16.
[36] *Id.*, Article 19.
[37] *Id.*, Articles 20 & 21.
[38] *Id.*, Article 22.
[39] *Id.*, Article 23.
[40] *Id.*, Article 26.
[41] *Id.*, Article 27.
[42] *Id.*, Article 25(2).
[43] Shriniwas Gupta, "Unconstitutional Practice of Child Labour Retrospect and prospect", *Central India Law Quarterly*, Vol. 8, (1995), at 306.

through motherhood protection. Article 26 of the Declaration emphasizes on access and aims to education.[44]

3.3 Declaration on the Right of Child, 1959

The adoption of a Declaration of Rights of the Child by the General Assembly of the United Nations on November 20, 1959, was indeed a very important event as regards the international recognition of the right of the child. The General Assembly affirmed that the child has the right to enjoy special protection and to be given opportunities and facilities to be able to develop in healthy and normal manner.[45] The Declaration of the Rights of the Child, 1959 makes reference in its preamble of both United Nations Charter and the Universal declaration of the Human Rights. The preamble also refers to the special safeguards and care including appropriate legal protection needed by children. The Declaration of 1959 reiterates the pledge of Declaration of The Rights of Child 1924, "that the mankind owes to the child the best it has to give". It also places a specific duty upon voluntary organizations and local authorities to strive for the observance for these rights. It emphasizes that a child is entitled to a name and a nationality, adequate nutrition, housing, recreation and medical services. The Declaration of Rights of the Child also deals with special need of physically, mentally and socially handicapped children and children who are without the family.[46]

The resolution evolved ten principles for the parents, voluntary organizations, local authorities and governments to recognize the rights of child and strive for their observance by legislative and other measures progressively.

3.4 International Covenant on Civil and Political Rights (ICCPR), 1966

This Covenant was adopted by U.N. General Assembly in 1966 and entered into force in 1976. It reaffirms the principles of the Universal Declaration of Human Rights (1948) with regard to civil and political rights and commits States parties to take action to realize there rights. Article 8 of the Covenant states that no one should be kept in slavery or servitude or be required to perform forced or compulsory labour.[47]

This Covenant stresses that children deserve special measures of protection and assistance. Article 10 and 12 of the Covenant specifically refer to the children. Article 10 recognizes the family as the natural and fundamental group of the society and therefore accords the widest possible protection and assistance to the family. The Covenant thus emphasizes on the special measures to be taken on

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[44] Nuzhat Parveen Khan, *Child Rights and the Law*, (2013), at 350.

[45] P. K. Padhi, "Child Labour : Yesterday, today and tomorrow", *Labour and Industrial cases Journal*, Vol. 37, (2004), at 180.

[46] *Supra* note 44.

[47] B. D. Rawat, "Human Rights and Child Labour: An Appraisal of Legislative trends and Judicial Response in India", *Journal of Legal Studies*, Vol. 29, (1998), at 49.

behalf on all the children and young persons without any discrimination for reasons of parentage and other conditions and children should be protected from economic and social exploitation. This Covenant on Civil and Political Rights, 1966 complements the Economic, Social and Cultural Covenant. This Covenant is to provide various rights for the children such as Article 14(1) provides, when it is in the interest of the juveniles or where it concerns the guardianships of children there shall be no public hearing of child related cases.[48]

Article 14(3) states that in criminal proceedings the age of the child and the desirability of promoting their rehabilitation must be considered. According to ICCPR the death penalty will be prohibited to the delinquent juveniles.[49] This step has been taken at the initiative of Japan.

Article 10(3) of ICCPR states that juvenile delinquents shall be kept separately from the adult accused and their adjudication procedure shall also be quick and speedy.

Under Articles 18(4) and 24(4) States are obliged to respect the liberty of parents to ensure the religious and moral education of the children in accordance with their beliefs and in the event of dissolution of marriage the provisions for the protection of children.[50]

3.5 International Covenant on Economic, Social and Cultural Rights, 1966

It applies to all 'men and women' and therefore by implication to children.[51] The preamble recognizes that all human rights are interlinked and of equal importance. The Covenant stresses that children 'deserve special measures of protection and assistance'.[52]

The covenant specifically refers to children in Articles 10 and 12. Article 10 of the Covenant enjoins state parties to protect children from economic exploitation and from employment in work harmful to their morals, health, lives or likely to hamper their normal development. It also commits to set age limits below which the paid employment of child labour should be prohibited and made punishable by law.[53]

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48 Nuzhat Parveen Khan, *Child Rights and the Law*, (2013), at 352.

49 UN Doc A/C 3/L 650.

50 *Supra* note 60.

51 In all matters relating to the placement of child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration.

52 Devinder Singh, *Child Labour& Right to Education*, (2013), at 36.

53 B. D. Rawat, "Human Rights and Child Labour: An Appraisal of Legislative trends and Judicial Response in India", *Journal of Legal Studies*, Vol. 29, (1998), at 49.

3.6 The Child Rights Convention, 1989-A New Dimension to Child Labour

The convention on the Rights of the Child reflects a new vision of the child. Children are neither the property of their parents nor are they helpless objects of charity. They are human beings and are the subject of their own rights. The Convention offers a vision of the child as an individual and as a member of a family and community, with rights and responsibilities appropriate to his or her age and stage of development. By recognizing children's rights in this way, the Convention firmly sets the focus on all the children.[54]

The United Nations Convention of the Rights of the Child is a great leap forward in the advancement of the global movement for the protection of children on this planet. The tangible positive outcome of the adoption of CRC is the recognition of childhood as a vulnerable phase in the lives of mankind. This phase of life is to be protected from all odds that damage this childhood. All children of this world are entitled to a decent childhood.[55]

A great headway had been made in the year 1989, which marked the 30th Anniversary of the 1959 Declaration of the Rights of the Child and the 10th Anniversary of the international year of the child, when on 20th November the General Assembly adopted an international convention on the rights of child, which was termed by the General Assembly President Joseph N. Garba as a binding piece of international legislation. The convention needs to be ratified by 20 countries before it comes into force. Prior to being placed before the assembly the draft of the Convention was approved by the Economic and Social Council and the commission on Human Rights during their sessions in 1989. The Preamble to the convention states that a child "needs special safeguards and care including appropriate legal protection before as well as after birth".[56]

3.7 UNICEF on Child Labour

The United Nations International Children's Emergency Fund, created by the General Assembly in 1946, now with a changed name of United Nations Childrens Fund, retaining the well known acronym UNICEF is mandated to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential. UNICEF is guided by the UN Convention on the Rights of the Child and strives to establish

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[54] P. K. Padhi, *Labour and Industrial Laws,* (2012), at 320.

[55] Sudip Chakraborty, *Food Security and Child Labour: The Case of a Hazardous Occupation,* (2011), at 25.

[56] T. Padma & K.P.C. Rao, *The Principles of Labour Law-II,* (2010), at 196.

childrens rights as enduring ethical principles and international standards of behavior towards children.[57]

UNICEF cooperates with over 137 developing countries in several ways. India, with a child population of over 300 million, is the largest country programme of UNICEF, averaging an annual expenditure of over 2.50 billion rupees. This fund supports programmes in mother and child health, water and sanitation, nutrition, universalization of primary education and the elimination of child labour. The UNICEF supports programmes aimed at bonded and hazardous child labour and the severe discrimination faced by the girl child. UNICEF's policy on child labour is founded in the belief that every child labour has a right to joyful childhood and to education, and the child labour can be eliminated with the universalisation of primary education. It placed great emphasis on advocacy in persuading a wide range of potential partners and allies that it is possible to eliminate child labour. Girl child and invisible labour of the children are its priorities.[58]

3.8 The World Summit for Children, 1990

The World Summit for Children was a follow –up action to the Convention. It was held at the UN Headquarters and was the first-ever World Summit which enabled national leaders to focus exclusively on issues affecting the future of children. Among the goals adopted at this Summit were:

(i) Reduction in child deaths and child malnutrition;

(ii) Increasing immunization level;

(iii) Halving maternal mortality; and

(iv) The universal ratification of the Convention on the Rights of the Child.

A plan of action for implementing the World Declaration on the Survival, Protection and Development of Children in 1990 was drawn having three parts, namely:

(i) Introduction

(ii) Specific actions for child survival, protection and development; and

(iii) Follow –up actions and monitoring.

Thus as the needs and problems of children vary from place to place, community to community, 'The Plan of Action' dealt with the "common aspirations".

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[57] B. Srinivasa Reddy & K. Ramesh, *Girl Child Labour: A World of Endless Exploitation,* (2002), at 52.

[58] *Ibid.*

While addressing the World Summit in 1990, J. Perez de Cuellar, the former Secretary-General of the United Nations said:

> As we look at the world's social and economic landscape, we marvel at the extraordinary advances that have been made in civilization as a whole yet with all this we also see that children continue to be the most vulnerable segment of society. Two set of anxieties cry to be addressed. One arises from the global social crisis which robs children of emotional shelter and the moral sustenance that they need. The other cause of distress is the poverty that stalks the larger part of the world and that denies children enjoyment of their rights. To this are added effects of conflicts internal and external. One in two among the eight million refugees in the world is a child.[59]

3.9 UN-Conference on Environment and Development, 1992

The United Nations Conference on Environment and Development was held at Rio de Janeiro, Brazil, in June, 1992. Its real achievement was Agenda 21, which reinforces the commitments made at the World Summit for Children with the words, Specific goals for child survival; development and protection were agreed upon at the world Summit for children and remain valid also for Agenda 21. Chapter 25 of this Agenda 21 is devoted to Children and youth including working children. Then the World Conference on Human Rights 1993-95 considerably urged for the protection and implementation of rights of the child.[60] Chapter 25 of this Agenda 21 is devoted to children and youth and specifically urges the government to:[61]

(a) Implement programmes to reach the goals set by the World Summit for Children;

(b) Ratify and implement the Convention on the Rights of the Child;

(c) Promote primary environmental care activities to improve the environment by meeting basic needs and empowering local communities;

(d) Expand children's education especially for the girl child;

(e) Incorporate children's concerns into all relevant policies and strategies for environment and development.

3.10 World Conference on Human Rights, 1993

In the World Conference on Human Rights considerable urgency was expressed for the protection and implementation of the rights of the child. The World Conference reiterate the principle of "first call for children". In this respect it underlined the importance of the role of the UNICEF in the protection and promotion of the rights of the child. "Human Rights begin with Children's

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[59] Mamta Rao, *Law Relating to Women and Children,* (2008), at 432.
[60] *Supra* Note 69, at 311.
[61] Mamta Rao, *Law Relating to Women and Children,* (2008), at 433.

Rights" is the new perception given by the UNICEF for the promotion of rights of the child. An opinion was also expressed that measures should be taken to achieve universal ratification of the Convention as well as its effective implementation.[62]

3.11 Convention on Involvement of Children in Armed Conflict, 2000

The optional protocol to the convention on the rights on the involvement of children in armed conflict, 2000 reaffirms that rights of children require special protection. The harmful and widespread impact of armed conflict and direct attacks on children and long term consequences it has for durable peace, security and development. The protocol condemns the targeting of children in situation of armed conflict and direct attacks on and objects protected under International law, including places that generally have a significant presence of children such as schools and hospitals. The protocol recommends that state parties, which permit voluntary recruitment into their national armed forces under the age of eighteen years, shall maintain safeguards to ensure that reliable proof of the age, recruitment is genuinely voluntary, with consent of lawful guardians and he should be informed about the nature of duties.[63]

3.12 UN Resolution Adopted by the General Assembly - A World Fit for Children, 2002[64]

This resolution passed by the highest international body having the following objectives: We hereby call upon all members of society to join us in a global movement that will help to build a world fit for children by upholding our commitment to the following principles and objectives:

Put children first - In all actions related to children, the best interests of the child shall be a primary consideration.

Eradicate poverty invest in children - We reaffirm our vow to break the cycle of poverty within a single generation, united in the conviction that investments in children and the realization of their rights are among the most effective ways to eradicate poverty. Immediate action must be taken to eliminate the worst forms of child labour.

Leave no child behind. Each girl and boy is born free and equal in dignity and rights; therefore, all forms of discrimination affecting children must end.

Care for every child - Children must get the best possible start in life. Their survival, protection, growth and development in good health and with proper nutrition are the essential foundation of human development. We will make

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62 *Ibid.*
63 *Supra* Note 67, at 43.
64 *Ibid.*

concerted efforts to fight infectious diseases, tackle major causes of malnutrition and nuture children in a safe environment that enables them to be physically healthy, mentally alert, emotionally secure, socially competent and able to learn.

Educate every child - All girls and boys must have access to and complete primary education that is free, compulsory and of good quality as a cornerstone of an inclusive basic education. Gender disparities in primary and secondary education must be eliminated.

Protect children from harm and exploitation - Children must be protected against any acts of violence, abuse, exploitation and discrimination, as well as all forms of terrorism and hostage-taking.

Protect children from war - Children must be protected from the horrors of armed conflict. Children under foreign occupation must also be protected, in accordance with the provisions of international humanitarian law.

Combat HIV/AIDS-Children and their families must be protected from the devastating impact of the human immunodeficiency virus/acquired immunodeficiency syndrome (HIV/AIDS).

Listen to Children and ensure their participation - Children and adolescents are resourceful citizens capable of helping to build a better future for all. We must respect their right to express themselves and to participate in all matters affecting them, in accordance with their age and maturity.

Protect the Earth for children - We must safeguard our natural environment, with its diversity of life, its beauty and its resources, all of which enhance the quality of life, for present and future generations. We will give every assistance to protect children and minimize the impact of natural disasters and environmental degradation on them.

3.13 Optional Protocol to the Convention on the Rights of the Child on A Communication Procedure (OPIC), 2012[65]

Prior to the appearance of the OPIC in 2012, it was the case that the Convention on the Right of the Child was the only international human rights treaty that did not have a communication / complaints procedure attached to it. Part of the explanation for the absence of a complaints procedure in the Convention 'has been attributed to the NGO Ad Hoc Group's insistence during the CRC negotiations on a positive atmosphere for implementation'. NGOs started to campaign vigorously in 2007 for a communication procedure, a process helped considerably by the adoption of communication procedures by other treaty bodies. The text was adopted by the General Assembly on 19 December 2011

[65] Trevor Buck, *International Child Law*, at 112 & 113 (2014) available at: *https://books.google.co.in/books?id=UrPcAwAAQBAJ&printsec=frontcover#v=onepage&q&f=false* (Accessed on 6 June 2014).

and opened for signature on 28 February 2012. The Rules of Procedure appeared in April 2013.

The OPIC establishes three complaints procedures:

- Individual communication
- Inquiry procedure and
- Inter-state communications.

The OPIC and the OPIC Rules of Procedure set out some general principles and methods of work that apply to all three procedures. The committee in fulfilling its functions under the OPIC, shall be guided by the 'best interests' principle and also have regard to the rights and views of the child. It must also take appropriate measures to ensure that children are 'not subject to improper pressure or inducement 'by those acting on their behalf. In order to reduce the risk that complaints may suffer repercussions from their initiation of a communications, their identity shall not be revealed publically without their express consent. The protection measures establish in the OPIC that oblige states parties to take appropriate steps to ensure that individuals are not subject to such negative repercussions are further supported in the OPIC Rules of Procedure, which specify that in the event of the state parties to take appropriate measures 'urgently to stop the breach reported' and submit written response to the committee. As regards methods of work, the Secretary-General is obliged to maintain permanent records of violations under all three procedures, and this information must be made available to any member of the committee. The committee may also consult with independent experts, at its own initiative, or at the request of the any of the parties.

3.14 Regional Instruments Speaking for Rights of Children:

The American Declaration on the Rights and Duties of Man, 1948 the European Social Charter, 1961, the American Convention on Human Rights, 1969 and the African Charter on Human and People Rights 1981 are some regional human rights instruments which also provides for the protection of the rights of the child but in a limited perspective. We find several provisions providing for the special care and protection of the child in the European Social Charter (ESC) 1961. Then the American Convention on Human Rights, 1969 specially provides that the law shall recognize equal right for children born out of wedlock and those born in wedlock.[66]

[66] Shriniwas Gupta, "Unconstitutional Practice of Child Labour Retrospect and prospect", Central India Law Quarterly, Vol. 8, (1995), at 310 & 311.

3.15 European Convention on Human Rights, 1950

The European Convention has been used as a valuable instrument for protecting child rights. The Charter of this Convention contains a number of specific references to children such as Part 1 of the Convention enshrines the principle that "Children and Young Person have the right to special protection against the physical and moral hazard to which they are exposed."[67]

4. International Labour Organizations

4.1 Role of ILO

International Labour Organization, Known to the world by her abbreviated name, i.e. ILO needs to be mentioned and her role must be perused in the discourse on child labour world wide.[68] The ILO has played an important role in the gradual elimination of child labour, since its inception in 1919.[69] The International Labour Organisation (ILO) set up by the League of Nations, felt a need for some international guidelines by which employment of children could be regulated in industries.[70] Besides the United Nations, ILO has also been rendering yeoman service at the global level to protect child labour. According to the constitution of ILO, "Labour is not a commodity" and thus it stressed that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well being and spiritual development in condition of freedom and dignity or economic security and equal opportunity. The ILO has adopted 18 Conventions and 16 Recommendations so far in respect of children and young persons concerning their minimum age for admission to employment, medical examination, night work, etc.[71] Improvement of labour standard around the world is the basic aim of the ILO and has given a lot of emphasize to protect the working children in the form of conventions and recommendations. From its inception, it has made child labour one of its central concern. ILO works on the child labour and related issues over the decades has mainly taken its cue from the phrase "protection of children" in its preamble of its constitution. The ILO's prime tool in pursuing the abolition of child labour has always been and has remained to this day, the labour standards that embody the concept of a minimum age to enter into employment. Further the main function of the ILO is to work with various Governments by providing technical and financial assistance for the effective implementations of the anti child labour programmes

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67 Nuzhat Parveen Khan, *Child Rights and the Law*, (2013) at 350.

68 Sudip Chakraborty, *Food Security and Child Labour: The Case of a Hazardous Occupation*, (2011), at 27.

69 Elias Mendelievich (ed.), *Children at work*, ILO, Geneva, (1979), at 13.

70 Ashraf U. Kazi & Farisa Tasneem, "Existence of Child Labour in the twenty first century and human rights: International Perspective and Legal implications", *Bangalore Law Journal*, Vol. 2, (2007), at 16.

71 P.K. Padhi, *Labour and Industrial Laws*, (2012), at 320.

in the respective countries.[72] The programmes of ILO focus their attention on the five main issues: prohibiting child labour; protecting children at work; attacking the basic causes of child labour; helping children to adopt to future work life; and protecting children of working mothers.[73] Highest priority was given to the abolition of child labour in the activities of ILO. Besides United Nations, ILO has also been rendering yeoman services at the global level to protect child labour. According to the Constitution of ILO "Labour is not a commodity" and thus it stressed that all human being irrespective of race, creed or sex have the right to pursue both their material well-being and spiritual development in condition of freedom and dignity or economic security and equal opportunity.[74]

The International Labour Organisation (ILO) has paid special attention with respect to the matter of employment of children due to their weak position. The ILO has so far adopted eighteen conventions and nine recommendations about the employment of children and young persons. The main focus of the ILO has been prohibition of child labour and attacking its root cause.[75]

4.2 Conventions Adopted by ILO

Conventions adopted by International Labour Organisation is a legal instrument regulating some aspect of labour administration, social welfare and human rights. It creates obligation of a binding nature on the countries who have ratified it. After ratification of the convention it requires complete compliance with all its provisions. Apart from conventions, a recommendations contains provisions which are generally in the nature of guiding principles for action and it may be implemented progressively and in parts. On the issue of child labour, the role of International Labour Organisation may be visualized, that in the very first session a convention was adopted fixing minimum age for the admission of children to industrial employment at fourteen years. Since its inception various conventions and recommendations mainly in respect of children and adolescents indicate the approach of International Labour Organisation towards the elimination of child labour system.[76] Till now 18 conventions and 16 recommendations have been adopted by the ILO in the interest of working children all over the world the conventions are as follows:

1. Minimum age (Industry) Convention (No. 5), 1919.
2. Night Work of Young Persons (Industry), Convention (No.6), 1919.
3. Minimum Age (Sea) Convention (No. 7), 1920.

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[72] Mamta Rao, *Law Relating to Women and Children,* (2008), at 207.
[73] Tapan Kumar Shandilya & Nayan Kumar, *Child Labour Eradication,* (2006), *at* 156.
[74] P.K. Padhi, "Child Labour : Yesterday, today and tomorrow", Labour and Industrial cases Journal, Vol. 37, (2004), at 180.
[75] Devinder Singh, *Child Labour & Right to Education*, (2013), at 33.
[76] M.P. Shrivastav, Child labour laws in India, (2006), at 13.

4. Minimum Age (Agriculture) Convention (No.10), 1921.
5. Minimum Age (Trimmers and Stockers) Convention (No.15), 1921.
6. Medical Examination of Young Persons (Sea) Convention (No.16), 1921.
7. Minimum Age (Non-Industrial Employment) Convention (No. 33), 1932.
8. Minimum Age (Sea) Convention (Revised) (No. 58), 1936.
9. Minimum Age (Industry) Convention (revised)
10. Minimum Age (Non-Industrial Employment) Convention (revised) (No. 60), 1937.
11. Medical Examination (Sea-farer) Convention (No. 73), 1946.
12. Medical Examination of Young Persons (Industry) (No. 77),1946.
13. Medical Examination of Young Persons (Non-Industrial Occupations) Convention (No. 78), 1946.
14. Night Work of Young Persons (Non-Industrial Occupation) Convention (No. 79), 1946.
15. Night Work of Young Persons (Industry) Convention (revised) (No. 90), 1948.
16. Medical Examination of Young Persons (Underground Work) Convention (No. 124), 1965.
17. Minimum Age (Underground Work) Convention (No. 123), 1973 or 1965.
18. Minimum Age Convention (No.138), 1973.

Since its inception, ILO has adopted numerous conventions on child labour. The very first child labour convention adopted in 1919 prohibited the work of children under the age of 14 in Industrial establishments. The most comprehensive ILO convention on the subject is the Minimum Age Convention, 1973 (No. 138). It obliges the ratifying states to fix a minimum age for admission to employment or work and to pursue a national policy designed to ensure the effective abolition of child labour. The accompanying recommendation (No. 146) sets out the broad policy framework and essential policy measures for the prevention of child labour and its elimination[77].

The Convention No. 138 replaced all the previous relevant conventions. Its purpose was to establish minimum standards valid for all sectors of economic activity, with a view to achieve total abolition of child labour. The primary striking aspect of Convention No. 138 is the fact that unlike its predecessors, it does not remain specific to a certain industry or a certain sphere of

[77] B. Srinivasa Reddy & K. Ramesh, *Girl Child Labour: A World of Endless Exploitation,* (2002), at 39.

employment.[78] The most comprehensive ILO instrument on child labour is the Minimum Age Convention No. 138 (1973) and Recommendation No.146. convention No. 138 is a consolidation of the principles that have gradually been established through various earlier instruments and applies to all sectors of economic activity (factories, mines, plantations, the sea, etc.) regardless of whether the children are employed for wages or not.[79] To make this convention apply its principles easily, Recommendation No. 146 was adopted, which advocates, inter alia, a firm national commitment to full employment; the progressive extension of socio-economic measures to alleviate poverty and ensure high living standards to keep children away from economic activity.[80]

Laying down its primary objective, the aforementioned convention requires the abolition of child labour; the focus being on gradual ascend for the minimum age of entry in to employment, all the while keeping in perspective the ultimate objective; through mental and physical development of the youth.[81] The Convention states that the ratifying country should fix a minimum age of admission to employment and undertake to pursue a national policy designed to ensure the effective abolition of child labour and progressively raise the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons. Recommendation No. 146, that supplements convention No. 138, provides a broad framework and essential policy measures both for prevention of child labour and its elimination.

The principal drawback of Convention No. 138 is that instead of speaking of a single minimum age it speaks of various minimum ages depending on the type of employment and work. Convention No. 138 rests on a number of principles. The first is that the minimum age should not be less than the age of completion of compulsory schooling and in no event less than 15 years. The second principle is that the minimum age should be progressively raised to a level consistent with the fullest physical and mental development of young persons. For those countries whose economies and educational facilities are insufficiently developed the age can be set initially at fourteen. The third principle is that the convention fixes a higher minimum age of eighteen for hazardous work that by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety, or morale of young persons. Accordingly to the forth principle, the Convention envisages that the type of employment or work involved shall be

[78] Convention 138 specifically mentions: 'the time has come to establish a general instrument on the subject, which would gradually replace the existing ones applicable to limited economic sectors, with a view to achieving the total abolition of child labour'.

[79] Lakshmidhar Mishra, *Child Labour in India*, (2000), at 188.

[80] Tapan Kumar Shandilya & Nayan Kumar, *Child Labour Eradication,* (2006), at 158.

[81] Ivan & Prashant Pranjal, "Child Labour In India : A need to be in sync with the World", *Labour and Industrial cases Journal*, Vol. 7 IX, (2013), at 98.

determined by national laws or regulations or by the competent authority, leaving it to individual countries to determine the content of these activities.[82]

The primary object behind such subjective implementation of the aforementioned convention, as also put forth by Lakshmidhar Mishra in his book on child labour,[83] was to facilitate developing and less developed nations to exclude from within the convention's ambit certain specific sectors of the economy.[84] However, the convention does, vide Article 5, ask of its ratifying members to compulsorily cover seven sectors; mining and quarrying, manufacturing, construction, electricity, gas and water, sanitary services, transport, storage and communication, plantation and other agricultural undertakings.[85] Another striking feature that this convention embodies its reliance upon national legislations and national regulatory bodies to carry out the principles articulated with in the text of the convention. This has been a set back towards the convention's efficacy; not having a uniform minimum age has prevented states from ratifying the convention for incompatibility with the domestic legal system. For instance, the domestic laws may administer different treatment to the various economic sectors in comparison with the convention. This makes it highly difficult to harmonize the domestic provisions with those in the conventions, leading to non-ratification.[86]

India has not been able to ratify the Convention so far, the principal obstacle being the absence of an omnibus provision fixing a minimum age of entry to employment. This is because labour figures in the concurrent list of distribution of powers in the constitution, empowering both the central and state governments to enact laws relating to it, which has been responsible for a plethora of laws relating to a host of subjects including child labour and the age of entry to employment.[87] Consequently, the Indian standards are not, though they ought to be, at par with the international ones.

The World Day against Child Labour is an International Labour Organization (ILO) sanctioned holiday first launched in 2002 aiming to raise awareness and activism to prevent child labour. It was spurred by ratifications of ILO Convention No. 138 on the minimum age for employment and ILO Convention

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[82] *Supra* Note 189, 84 at.

[83] *Supra* note 20.

[84] This was also seen as a measure to maximize the membership of the convention; by allowing for reservations, the convention ensured that maximum countries could be a signatory to the convention without drastically altering its economic and demographic structure.

[85] Article 5 of International Labour Organization, Minimum Age Convention, C 138, 26 June, 1973 (it needs to be specified that family and small-scale holdings producing for local consumption and not regularly employing hired workers are excluded from this provision).

[86] Ivan & Prashant Pranjal, "Child Labour In India : A need to be in sync with the World", *Labour and Industrial cases Journal*, Vol. 7 IX, (2013), at 213.

[87] Lakshmidhar Mishra, *Child Labour in India*, (2000), at 190.

No. 182 on the worst forms of child labour. The World Day Against Child Labour, which is held every year on June 12, is intended to foster the worldwide movement against child labour in any of its forms.[88]

Due to poverty and unorganized nature of the Indian economy, the child labour laws have not been able to reach the standards set forth by the International Labour Organization. This is the reason why India has been able to ratify and implement only 4 conventions out of 18 adopted by ILO.[89] These are:

I Minimum Age (Industry) Convention, 1919.

II Minimum Age (Trimmers and Stockers) Convention, 1921.

III Medical Examination of Young Persons (Sea) Convention, 1921.

IV Night Work of Young Persons (Industry) Convention (revised), 1948.

1. **Minimum Age (Industry) Convention, 1919:** This Convention is ratified by India on 09 September 1955.[90] This convention is applicable to industrial undertakings with wide coverage. It prohibits the employment of children below fourteen[91] years in any public or private industrial undertakings other than an undertaking in which other members of the same family are employed. Similarly, it further prohibits the employment of children less than 12 years in factories with power and employing more than ten persons, in mines and quarries, and in transport by rail and handling of goods at dock and wharfs but excluding transport by land.[92]

   This convention was revised in 1937 by the Minimum Age (Industry) Convention (Revised), 1937. The revised convention has fixed the age of 15 years under which the children shall not be allowed to work in any industrial undertaking. It has also provided that medical certificate shall be necessary in the case of persons between the ages of 12 and 17 years employed in factories working with power and employing more than 10 persons, and persons between 15 to 17 years employed in mines.[93]

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88 Available at: *http://en.wikipedia.org/wiki/World_Day_Against_Child_Labour* (Accessed on 6 June 2015).

89 Tapan Kumar Shandilya &Nayan Kumar, *Child Labour Eradication,* (2006), at 158.

90 Available at : *http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102691* (Accessed on 30 may 2015).

91 The convention was revised in the year 1937 and fixed the age at fifteen year.

92 Devinder Singh, *Child Labour & Right to Education,* (2013), at 34.

93 A.S. Verma, "Child Labour and the Law in India: A Critical Analysis" Kanpur Law Journal, Vol. 9 &10, (1996), at 32.

2. **Minimum Age (Trimmers and Stockers) Convention, 1921:** This Convention is ratified by India on 20 November 1922.[1] This convention prohibits the employment of young persons under the age of eighteen years as trimmers or stockers on ships and boats engaged in maritime navigation. This prohibition does not apply to employment on school ships or training ships and on vessels propelled by other means than steam. In India a young child above sixteen years if found physically fit after medical examination may be employed as trimmers of vessels exclusively engaged in the coastal trade in India.[2]

3. **Medical Examination of Young Persons (Sea) Convention, 1921:** This convention is ratified by India on 20 November 1922.[3] This convention is being enforced through the provisions contained in Merchant Shipping Act, 1958. The employment of child or any person less than eighteen years of age on sea going vessel is permitted under this convention subject to the conditions of obtaining a medical certificate from certifying surgeon.[4]

4. **Night Work of Young Persons (Industry) Convention (revised), 1948:** This convention is ratified by India on 27 February 1950.[5] This convention makes some stringent provisions regarding employment of young persons at nights in industrial undertakings. The period of night in case of young persons less than sixteen years of age includes interval falling between 6 to 18 years of age. This period includes the interval of seven consecutive hours falling between 10 p.m. and 7 a.m. This convention has some special provision in case of India. Firstly, it applies to Factories Act, 1948, to mines as defined in Mines Act, 1952 and railways and also to posts departments. Secondly, the prohibition on employment at night as imposed applies to young persons who are under the age of seventeen years. Thirdly, for purpose of night intervals the age prescribed are thirteen to fifteen and fifteen to seventeen years as the case may be. Fourthly, a slightly lower age for apprenticeship and vocational training has been prescribed.

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1 Available at : *http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102691* (Accessed on 30 may 2015).

2 India has ratified this convention and its requirements have been fully implemented through its provisions contained in the Merchant Shipping Act, 1958.

3 Lakshmidhar Mishra, *Child Labour in India*, (2000), at 188.

4 *Supra* note 97.

5 Available at : *http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102691* (Accessed on 30 may 2015).

This convention has some special provisions in the case of India. Firstly, it applies only to factories as defined in section 2 (m) of the Factories Act, 1948, to mines as defined in the Mines Act, 1952, and railways and ports. Secondly, the prohibition on employment at night imposed applies to young persons who are under the age of 17 years. Thirdly, for the purpose of night interval the ages prescribed are 13 to 15 and 15 to 17 years as the case may be. Fourthly, a slight lower age for apprenticeship and vocational training has been prescribed.[6]

These four ratified conventions aim at protecting the young persons and children employed in industries in respect of hours of work and from hazardous occupations not suited to their age and health.[7]

4.3 Worst Forms of Child Labour Convention 1999

The latest and most recent convention on Child Labour is the "Worst Forms of Child Convention, 1999", followed by "Worst Forms of Child Labour Recommendation, 1999". The 87th Annual International Labour Conference (1999) unanimously adopted the Worst Forms od Child Labour Convention, which applies to all persons under the age of 18 and calls for immediate and effective measures to secure the prohibition and elimination of the Worst forms of Child Labour as a matter of urgency.[8]

The convention[9] adopts new instruments for the prohibition and elimination of the 'worst form of child labour'.[10] The convention was adopted to supplement the Worst Forms of Child Labour Convention No. 182.[11] Convention 182 includes forms of child labour, which are predefined worst forms of child labour. They are also sometimes referred to as *automatic* worst forms of child labour.

The convention defines the worst forms of child labour as: "all forms of slavery or practices similar to slavery such as the sale and trafficking of children, debt bondage, serfdom and forced or compulsory labour; forced or compulsory recruitment of children for use in armed conflict; use of child for prostitution, production of pornography or pornographic performances; use, procuring or offering of a child for illicit activities, in particular for the production and

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[6] A.S. Verma, "Child Labour and the Law in India: A Critical Analysis" *Kanpur Law Journal*, Vol. 9 &10, (1996), at 33.

[7] *Ibid.*

[8] B. Srinivasa Reddy & K. Ramesh, *Girl Child Labour: A World of Endless Exploitation*, (2002), at 41.

[9] The UN Convention on the Rights of Child, 1989, Article 27.

[10] The convention concerning the Prohibition and Immediate Action for this convention was adopted on 17th June 1999 and came into force on 19th November 2000.

[11] Worst Forms of Child Labour Recommendations No. 190.

trafficking of drugs and work which is likely to harm the health, safety or morals of children".[12]

The convention requires ratifying states to design and implement programmes and action to eliminate the worst forms of child labour as a priority. It also calls for ensuring access to free basic education or vocational training for all children removed from the worst forms of child labour, identify children at special risk and take into account the special situation of 'girls'.[13]

The Convention is basically divided into 3 parts:-

Part I deals with Programme of Action referred to under Article 6 of Convention 182, which the recommendation proposes "should be designed and implemented as a matter of urgency" and includes identifying and denouncing the worst forms of child labour; giving special attention to young children and the girl child and informing, sensitizing and mobilization public opinion and concerned groups, including children and their families.[14] Part II of the Recommendation which deals with hazardous work states that in determining the types of work referred to under Article 3 (d) of the Convention No. 182, and in identifying where they exist, consideration should be given inter alia to work which exposes children to physical psychological or sexual abuse; work in an unhealthy environment which may e.g., expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health and work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer. Part III of the Recommendations deals with implementation of convention No. 182. Apart from proposing compilation of data regarding setting up of data bases and requiring members to establish appropriate national mechanisms for the effective implementation and to co-operate with international efforts aimed at the prohibition and elimination of the worst forms of child labour as a matter of urgency, it also recommends enhanced international co-operation and or assistance among members which should include, mobilizing resources for various programmes and mutual technical and legal assistances.[15]

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[12] B. Srinivasa Reddy & K. Ramesh, *Girl Child Labour: A World of Endless Exploitation,* (2002), at 41.

[13] *Ibid.*

[14] Pragnya Bhattamishra, "International Conventions on Child Labour-A Critical Analysis", *Indian Bar Review,* Vol. 29, (2002), at 222.

[15] *Id.* at 223.

4.4 International Programme on Elimination of Child Labour and Global Action Plan, 2006

The International Programme on the Elimination of Child Labour (hereinafter IPEC), an outcome of German initiative,[16] was set up in the 1990s as an augmenting programme, to the efforts already undertaken by the ILO, towards the effective abolition of child labour. As figures stand today, the IPEC works with over 99 Governments and other partners in various States towards the initiation of policies, effective management of implementational hurdles and setting ubiquitous standards in recognizing the problem.[17] India was the first country to join it in 1992 and it signed a MOU with ILO. The long term objective of the International Programme for the elimination of Child Labour is for the effective abolition of child labour.

International Law give guidance to member nations regarding the elimination of child Labour through its Conventions and Declarations but the weakest point of International Law is lack of enforcement. It was found that international Law has limitations because of the attitude of the State parties which work under financial crisis. The result of the same is that the child labour continues as such in spite of various effective programmes of ILO and other international agencies.

[16] See International Labour Office (Geneva), Accelerating Action Against Child Labour: Global Report under the follow-up to the ILO Declation on fundamental Principles and Rights at Work, International Labour Conference (99th Session), Report I (B) 19 (2010) (The German Government in September, 1990 announced a special annual contribution over a period of 5 years towards the fight against child labour).

[17] Ivan & Prashant Pranjal, "Child Labour In India : A need to be in sync with the World", *Labour and Industrial cases Journal*, Vol. 7 IX, (2013), at 100.

EXPANDING FRONTIERS OF ENVIRONMENTAL LAW IN INDIA: LEGAL AND JUDICIAL PERSPECTIVE

Neelam Batra*

1. Introduction

Environment is immune to political boundaries. This is because of the inherent global nature of environment itself. Our planet is one. Our globe is one. All nations are just components of it. Often environment problems, with essentially local impact, have global implications as to qualify for international concerns. Thus, although social and economic development is essentially a national issue, its advancement can be a global concern. Further, environmental disasters are not local in their consequences. The sulphur emissions from the American steel mills come down in the form of acid rains destroying the Canadian forests. The toxic industrial effluents discharged into the Rhine by the chemical units in Switzerland poison the drinking water in Holland. The radioactive waste in the Ukraine contaminates the vegetables in Sweden. Power stations in England and Germany pollute the Norwegian lakes and trees. Tree felling in Nepal leads to flooding in Bangladesh. The Chernobyl blast made undrinkable the milk of the cows in Scotland. And the CFC emissions in the north cause skin cancer in the southern hemisphere. International concern for environment dates back to the 19th century. In the 20th century, after the Second World War, environmental concerns appeared on the agenda of a wide variety of international organizations. There were landmark international efforts to protect birds, fish, wildlife and wetlands; to prevent pollution of sea by oil; to ban testing of all kinds of weaponry; dumping of nuclear waste in Antarctic etc. These categories reflect a broadening of the environmental agenda from purely national issues, where single State jurisdiction was apparent, to concerns for the wilderness and wildlife, high seas and nuclear pollution, which are outside the ambit of national jurisdiction and which affect the mother earth as a whole. The future of the earth depends on adopting the model of sustainable development and this was enunciated in Agenda 21 of the Earth Summit in 1992. Protection of ecology, on which depends the survival of mankind, is therefore a common task.[1]

In the present paper, an attempt has been made to briefly outline the Indian laws which are primarily and more relevant to protect and improve the environment. The enforcement of these laws has also been examined and evaluated. The researcher presents a qualitative analysis of these judgments. The objective of the paper is to evaluate the extent to which environment has been protected under the Acts with a specific focus on the role of the judiciary. The Judgments

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* Assistant Professor, Panjab University Regional Centre, Ludhiana.

[1] Institutional Framework for Environmental Management in India. Available at *www.ecology.edu.htm.*

of Supreme Court and National Green Tribunal specifically have been gathered and analyzed.

2. Constitutional and Legislative Measures

At the international level, *Stockholm Declaration* of 1972 was perhaps the first major attempt to conserve and protect the human environment. As a consequence of this Declaration, the States were required to adopt legislative measures to protect and improve the environment. Various other major attempts at the international level are 1982 Stockholm+10: Montevideo Declaration; 1992 UN Conference on Trade and Development: Agenda 21, Rio Declaration; 1997 Rio + 5: Programme for the Further Implementation of Agenda 21; 2002 World Summit on Sustainable Development: Johannesburg Plan of Implementation, Johannesburg Declaration.

It is only during the 70s that environmentalism emerged as an organized movement in India. And the credit for this goes to the Stockholm Conference of 1972. Indian Parliament inserted two Articles 48A and 51A in the Constitution of India in 1976.[2] Article 48A of the Constitution rightly directs that the State shall endeavour to protect and improve the environment and safeguard forests and wildlife of the country. Similarly, Article 51A (g) imposes a duty on every citizen of India to protect and improve the natural environment including forests, lakes, river, and wildlife and to have compassion for living creatures. The cumulative effect of Articles 48A and 51A (g) seems to be that the 'State' as well as the 'citizens' both are now under constitutional obligation to conserve, protect and improve the environment. Every generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nation in the best possible way.[3]

Apart from the constitutional mandate to protect and improve the environment, there are a plenty of legislations on the subject but more relevant enactments are *the Indian Penal Code*, 1860, *Criminal Procedure Code*, 1973. *Water (Prevention and Control of Pollution) Act*, 1974; *the Water (Prevention and Control of Pollution) Cess Act*, 1977; *the Air (Prevention and Control of Pollution) Act*, 1981; *the Environment (Protection) Act*, 1986; *Public Liability Insurance Act*, 1991; *the National Environment Tribunal Act*, 1995; *the National Environment Appellate Authority Act*, 1997; *the Wildlife (Protection) Act*, 1972; *the Forest (Conservation) Act*, 1980.

In India, specific provisions relating to public nuisance prescribing punishment for fouling water and air are contained in sections 277 and 278 of Indian Penal Code, 1860. However, the Code of Criminal Procedure of 1973 contains in section 133 empowering a magistrate to make orders to abate public nuisance.

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[2] The *Constitution (Forty-second Amendment) Act*, 1976.

[3] *State of Tamil Nadu* v. *Hind Store*, AIR 1981 SC 711.

The Water Act provides for the prevention and control of water pollution and the maintaining or resorting of the wholesomeness of water. The Act prohibits any poisonous, noxious or polluting matter from entering into any stream or well. The Act provides for the formation of Central Pollution Control Board and the State Pollution Control Board. The new industries are required to obtain prior approval of such Boards before discharging any trade effluent, sewages into water bodies.

The Air Act has been designed to prevent, control and abatement of air pollution. The Air Act defines an air pollutant as any 'solid, liquid or gaseous substance including noise present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment.' The Act provides that no person shall without the previous consent of the State Board establish or operate any industrial plant in an air-pollution control area. The Central Pollution Control Board and the State Pollution Control Board constituted under the Water Act shall also perform the power and functions under the Air Act. The main function of the Boards under the Air Act is to improve the quality of air and to prevent, control and abate air pollution in the country. It is expressly provided that persons carrying on industry shall not allow emission of air pollutant in excess of standards laid down by the Board.

In Delhi, the public transport system including buses and taxies are operating on a single fuel CNG mode on the directions given by the Supreme Court.[4] Initially, there was a lot of resistance from bus and taxi operators. But now they themselves realize that the use of CNG is not only environment friendly but also economical.

The Environment (Protection) Act, 1986 was enacted to provide for the protection and improvement of the quality of environment and preventing, controlling and abating environmental pollution. The Act came into existence as a direct consequence of the *Bhopal Gas Tragedy.* The term 'environment' has been defined to include water, air and land, and the inter-relationship which exists among and between water, air and land and human beings, other living creatures, plants, micro-organism and property. The Act has given vast powers to the Central Government to take measures with respect of planning and execution of a nation-wide programme for prevention, control and abatement of environmental pollution. It empowers the Government to lay down standards for the quality of environment, emission or discharge of environmental pollutants; to regulate industrial locations; to prescribe procedure for managing hazardous substances, to establish safeguards for preventing accidents; and to collect and disseminate information regarding environmental pollution. The Act is an 'umbrella' legislation designed to provide a frame work for Central Government

[4] *M.C. Mehta* v. *Union of India,* AIR 1998 SC 2963.

coordination of the activities of various Central and State authorities established under previous laws, such as the Water Act and the Air Act.[5]

The Parliament passed the *Public Liability Insurance Act*, 1991 to provide for public liability insurance for the purpose of providing immediate relief to the persons affected by accident occurring while handling any hazardous substance and for matters connected therewith. Such insurance will be based on the principle of 'no fault' liability as it is limited to only relief on a limited scale.

The National Environment Tribunal Act, 1995 was enacted to provide for strict liability for damages arising out of any accident occurring while handling any hazardous substance. The Act provides for establishment of a National Environment Tribunal for effective and expeditious disposal of cases arising from such accident. It imposes liability on the owner of an enterprise to pay compensation in case of death or injury to any person; or damage to any property or environment resulted from an accident.

The National Environment Appellate Authority Act, 1997 has been enacted to provide for the establishment of a National Environment Appellate Authority to hear appeals with respect to restriction of areas in which any industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguard under the Environment (Protection) Act, 1986.

The Wild Life (Protection) Act, 1972 was enacted with a view to provide for the protection of wild animals, birds and plants. The Act prohibits hunting of animals and birds as specified in the schedules. The Act also prohibits picking, uprooting, damaging, destroying etc. any specified plant from any forest. The Act provides for State Wildlife Advisory Board to advise the State Government in formulation of the policy for protection and conservation of the wildlife and specified plants; and in selection of areas to be declared as Sanctuaries, National parks, etc.

The Forest (Conservation) Act, 1986 was passed with a view to check deforestation of forests. The Act provides that no destruction of forests or use of forestland for non-forest purposes can be permitted without the previous approval of the Central Government. The conservation of forests includes not only preservation and protection of existing forests but also re-afforestation. Reafforestation should go on to replace the vanishing forests. It is a continuous and integrated process.[6]

The National Green Tribunal was established on 18.10.2010 under the *National Green Tribunal Act*, 2010 for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural

[5] *Supra* note 2, at p. 68.

[6] *Anupama Minerals* v. *Union of India & Others,* AIR 1986 A.P. 225.

resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto. It is a specialized body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues. The Tribunal is not bound by the procedure laid down under *Code of Civil Procedure*, 1908, but shall be guided by principles of natural justice. According to Section 38 of *National Green Tribunal Act*, 2010, *The National Environment Tribunal Act*, 1995 and *The National Environment Appellate Authority Act*, 1997 have been repealed after coming into force of 2010 Act.

Another important legislative measure taken is the newly enacted *Companies Act*, 2013. Under the Act, Companies will have to necessarily spend two per cent of their average net profits in previous three preceding financial years towards corporate social responsibility (CSR) activities. One of these CSR activities is to include "ensuring environmental sustainability" also. But the newly formed Lok Sabha on 17th December, 2014 approved the Companies Act (Amendment) Bill 2014 which seeks to remove "oppressive provisions" in Companies law and to align it with international practices, with the government saying it will improve ease of doing business and attract investments. It has also done away with the section that made mandatory spending and reporting on corporate social responsibility initiatives. As per the 2013 law, companies had to spend 2 percent of their profit in the last three years on CSR.[7]

It is evidently clear that there is no dearth of legislations on environment protection in India. What is needed is the effective and efficient enforcement of the constitutional mandate and the other environmental legislations.

3. Judicial Contribution

Unlike natural calamities that are beyond human control, avoidable disasters resulting from human error/negligence prove more tragic and completely imbalance the inter-generational equity and cause irretrievable damage to the health and environment for generations to come. Such tragedy may occur from pure negligence, contributory negligence or even failure to take necessary precautions in carrying on certain industrial activities. More often than not, the affected parties have to face avoidable damage and adversity that results from such disasters. The magnitude and extent of adverse impact on the financial soundness, social health and upbringing of younger generation, including progenies, may have been beyond human expectations. In such situations and where the laws are silent or are inadequate, the courts have unexceptionally stepped in to bridge the gaps, to provide for appropriate directions and guidelines

[7] Companies Bill amended: No more 'POTA-type' provisions like mandatory CSR spend, Available at *www.indiacsr.in*.

to ensure that fundamentals of Article 21 of the Constitution of India are not violated.[8]

The right of a person to pollution free environment is a part of basic jurisprudence of the land. Article 21 of the Constitution of India guarantees a fundamental right to life and personal liberty. The Supreme Court has interpreted the right to life and personal liberty to include the right to wholesome environment.[9] The Court through its various judgments[10] has held that the mandate of right to life includes right to clean environment, drinking-water and pollution-free atmosphere.

There is of course a need for a comprehensive analysis of how law operates as an instrument of environmental protection. In recent years, there has been a sustained focus on the role played by the higher judiciary in devising and monitoring the implementation of measures for pollution control, conservation of forests and wildlife protection. Many of these judicial interventions have been triggered by the persistent incoherence in policy-making as well as the lack of capacity-building amongst the executive agencies. Devices such as Public Interest Litigation (PIL) have been prominently relied upon to tackle environmental problems. The general approach of the higher judiciary in environmental litigation can be described as 'activist' in nature. Few prominent examples of judicial activism have been discussed below.

3.1 Ganga Water Pollution case

In this case[11] owners of some tanneries near Kanpur were discharging their effluents from their factories in Ganga without setting up primary treatment plants. The Supreme Court held that the financial capacity of the tanneries should be considered as irrelevant while requiring them to establish primary treatment plants. The Court directed to stop the running of these tanneries and also not to let out trade effluents from the tanneries either directly or indirectly into the river *Ganga* without subjecting the trade effluents to a permanent process by setting up primary treatment plants as approved by the State Pollution Control Board.

3.2 Dehradun Valley Case

In that case,[12] carrying haphazard and dangerous limestone quarrying in the Mussorie Hill range of the Himalaya, mines blasting out the hills with dynamite,

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[8] *Bhopal Gas Peedith Mahila Udyog Sangathan and Ors* v. *Union of India (UOI) and Ors.* : AIR 2012 SC 3081 *www.manupatra.co*

[9] *Rural Litigation and Entitlement Kendra, Dehradun* v. *State of U.P.*, AIR 1988 SC1037.

[10] See *Subhash Kumar* v. *State of Bihar,* AIR 1991 SC 420; *M.C. Mehta* v. *Union of India.* AIR 2000 SC 1997.

[11] *M.C. Mehta* v. *Union of India,* AIR 1988 SC 1037.

[12] *Rural Litigation & Entitlement Kendra* v. *Slate of U.P.*, AIR 1985 SC 652; see also AIR 1988 SC 2187.

extracting limestone from thousand of acres had upset the hydrological system of the valley. The Supreme Court ordered the closing of limestone quarrying in the hills and observed:[13] This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance.

3.3 Taj Mahal Case

In *this* case,[14] the Supreme Court issued directions that coal and coke based industries in Taj Trapezium (TTZ) which were damaging Taj should either change over to natural gas or to be relocated outside TTZ. Again the Supreme Court directed to protect the plants planted around Taj by the Forest Department.

3.4 Smoking in Public Places

In 2001, the Supreme Court of India imposed ban on smoking of tobacco in public places all over the country.[15] Smoking causes harm not only to the smokers but also to non-smokers who are forced to inhale the second hand smoke. More than 3 million people die every year in India as a result of smoking tobacco including bidis and cigarettes.[16] One lakh Indians get lung cancer every year because of smoking. Indeed, lung cancer kills 95% of its victims.[17] That is why the apex Court ruling has immense social value and it is the social awakening which can only help us to prevent smoking.

3.5 Pollution in Delhi

In *Almitra H. Patel* v. *Union of India,*[18] the Supreme Court reiterated the observations made in *Wadehra's* case[19] Historic city of Delhi, the Capital of India, is one of the most polluted cities in the world. The authorities, responsible for pollution control and environment protection have not been able to provide clean and healthy environment to the residents of Delhi. The ambient air is so much polluted that it is difficult to breathe. More and more Delhites are suffering from respiratory diseases and throat infections. River Yamuna-the main source of drinking water supply-is the free dumping place for untreated sewerage and industrial waste. Apart from air and water pollution, the city is virtually an open dustbin. Garbage strewn all over Delhi is a common sight. The Court directed the authorities to take immediate necessary steps to control pollution and protect the environment.

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[13] *Id.*, at p. 654.
[14] *M.C. Mehta* v. *Union of India,* AIR 1997 SC 734; see also *M.C.Mehta* v. *Union of India,* AIR 1999 S.C. 3192.
[15] *Murli S. Deora* v. *Union of India* (2001) 3 SCC 765.
[16] The *Hindustan Times*, New Delhi, dated 5.11.2001, p. 10.
[17] *Ibid.*
[18] AIR 2000 SC 1256.
[19] *Dr. B.L Wadehra* v. *Union of India,* AIR 1996 SC 2969.

3.6 Sri Ram Food and Fertilizer Case

In this case,[20] a major leakage of Oleum Gas affected a large number of persons, both amongst the workmen and public. The Supreme Court held that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to any one on account of an accident in the operation of such hazardous and inherently dangerous activity resulting in the escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such a liability is not subject to any exception.

3.7 Public Health

The Supreme Court has emphasised the importance of preservation of public health. In *Subba Rao* v. *State of Himachal Pradesh,*[21] the Supreme Court ordered the closure of a bone factory which was polluting the environment by its pungent smell and making the life of the people miserable. No one can do business at the cost of public health. With a view to preserve the environment and control pollution within the vicinity of tourist resorts of Badkhal and Suraj Kund, the Supreme Count directed the stoppage of mining activity within two Kilometers radius of these two tourist resorts.[22] In *Municipal Council, Ratlam* v. *Vardhichand & Others,*[23] the Supreme Court held that a responsible Municipal Council constituted for the purpose of preserving public health cannot run away from its duty by pleading financial inability.

3.8 Public Park

A place which is reserved for Public Park cannot be converted for use into a private nursing-home. In *Banglore Medical Trust* v. *B.S. Muddappa,*[24] the Supreme Court set aside the decision of the Banglore Development Authority granting permission for converting the place reserved for public-park for the establishment of a nursing home and observed thus:

3.9 Sustainable Development

The modern concept of sustainable development was most clearly articulated in 1987 through the publication of a United Nations report entitled *Our Common Future*, also known as the Brundtland Report. It provides the most widely cited definition of sustainable development that is "development which meets the needs of the present without compromising the ability of future generations to meet their own needs". Although the Brundlandt Report has identified critical objectives for the environment and development, the concept of sustainable

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[20] *M.C. Mehta* v. *Union of India,* AIR 1987 SC 1086.
[21] AIR 1989 SC 171.
[22] *M.C. Mehta* v. *Union of India* 1996 (4) SCC 351.
[23] AIR 1980 SC 1622.
[24] AIR 1991 SC 1902.

development needed strengthening by an international legal framework. This was accomplished in June 1992 in Rio de Janeiro, Brazil under the aegis of the United Nations Conference on Environment and Development also known as the Earth Summit. At this Summit it was agreed and accepted that development, as striven for until then, as the unrestricted increase in material wealth, has placed mankind's survival at risk because it exceeded the earth's capacity as an ecosystem.[25]

The Supreme Court of India in *Vellore Citizens Welfare Forum* v. *Union of India,*[26] elaborately discussed the concept of 'sustainable development' which has been accepted as part of the law of the land. The 'precautionary principle' and the 'polluter pays principle1 are essential features of 'sustainable development'. The 'precautionary principle' makes it mandatory for the State Government to anticipate, prevent and attack the causes of environment degradation.[27] The Supreme Court in *M.C. Mehta* v. *Union of India*[28] observed thus: We have no hesitation holding that in order to protect the two lakes (Badhkal and Suraj Kund) from environmental degradation, it is necessary to limit the construction activity in the close vicinity of the lakes.

The 'polluter pays principle' demands that the financial costs of preventing or remedying damage caused by pollution should lie with the undertakings which cause pollution. The 'polluter pays principle' has been held to be a sound principle and as interpreted by the Supreme Court of India,[29] it means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environment degradation.

In *Lafarge Umiam Mining (P) Ltd.* v. *Union of India,*[30] the Supreme Court on an interpretation of section 3(3) of the Environment Protection Act, 1986 has taken a view that it confers a power coupled with duty to appoint an appropriate authority in the form of a Regulator at the Central level and at the State level for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters and has, accordingly, directed the Central Government to appoint a National Regulator. It is also clear from the same judgment that the Supreme Court has not found the mechanism of making the EIA appraisals of the projects by the MoEF to be satisfactory.

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[25] Paul, S. (2004). "The Role of Environmental Law within the Framework of Sustainable Development.. Available at *www.ttenvironmentalcommission.org/speechadd/Presententation%20in... · PDF file.*

[26] AIR 1996 SC 2715.

[27] *M.C. Mehta* v. *Union of India,* (1997) 1 Camp L.J. 199 (SC).

[28] *Id.,* at 203.

[29] *Indian Council for Enviro-Legal* Action v. *Union of India,* AIR 1996 SC 1446.

[30] (2011) 7 SCC 338.

3.10 India National Green Tribunal's Landmark Judgment on Access to Information

Save Mon Region Federation and Ors v. Union of India and Ors[31] The National Green Tribunal directed that the copy of the entire Environmental clearance for all projects which are granted environmental clearance in accordance under the EIA Notification, 2006 be made available to the public through websites, public notice board, publication in local newspaper as well as providing copies to local bodies including panchayats and municipal bodies. Due to lack of knowledge about the grant of environmental clearance, concerned citizens and groups are unable to file an appeal before the NGT on time.

The Judgment is a step towards ensuring greater access to environmental information and at the same time ensures that that the remedy of appeal as provided in the NGT Act is made effective and doors of the Tribunal are not shut on grounds of narrow interpretation of locus standi and limitation.

3.11 Illegal sand mining: National Green Tribunal Bans Sand Mining Across the Country[32]

The Tribunal ordered a stay on all sand mining activity in the river beds, which do not have requisite environmental clearance. The environmental court's interim order was given on a petition filed by the National Green Tribunal Bar Association in response to the suspension of IAS officer Durga Shakti Nagpal, who initiated a drive against illegal sand minning Gautum Budh Nagar district of Uttar Pradesh

3.12 Green Tribunal Cancels Environmental Clearance of Aranmula Airport[33]

The southern Bench of the National Green Tribunal (NGT), on Wednesday, cancelled the environmental clearance given to the controversial international airport project in Kerala. The project is under construction at Aranmula in Pathanamthitta district. The tribunal, at Chennai, ordered KGS Group, the promoters of the project, to stop all the construction and related activities at the project site. The project was given clearance by the Union Ministry of Environment and Forests in November last year. Verdict was seen as a major victory for local residents and activists who strongly oppose the proposed airport as it involves large-scale illegal conversion of paddy fields and alleged ecological impact.

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[31] M.A 104 of 2012. Judgment dated 14-3-2013. *http://ercindia.org/index.php/latest-updates/latest/658-direction1403.*

[32] *http://articles.economictimes.indiatimes.com/2013-08-05.*

[33] *Aranmula Heritage Village Action Council* v. *State of Kerala and others http://timesofindia.indiatimes.com/2014-06-06.*

4. Conclusion and Suggestions

The aforesaid study of cases clearly reveals that judiciary has played a vital role for protection and improvement of environment which leads to the following conclusion and suggestions:

(i) There is a need to have a comprehensive and an integrated law on environmental protection for meaningful enforcement. It is not sufficient to enact the legislations. A positive mind-set on the part of everyone in society is vital for successful enforcement of these legislations.

(ii) There is a multiplicity of environment pollution control standards for the same type of industries. However, under the Environment (Protection) Act, 1986 the power has been conferred upon the Central Government for laying down the standards for the quality of air, water and soil. It is hoped that this will ensure uniformity of standards throughout the country.

(iii) The tapping of natural resources must be done with requisite attention and care so that ecology and environment may not be affected in any serious way. A long-term planning must be undertaken by the Central Government in consultation with the State Governments to protect and improve the environment and to keep up the national wealth.

(iv) A Corporate Social responsibility (CSR) activity which has largely been a voluntary contribution by corporate has now been included in Companies Act, 2013. There is a debate as to whether any penal consequences will emanate on failure to spend, or an explanation in the directors' report on the reasons therefore are only warranted. There may be reluctance in compliance, especially in case of companies which are not profitable, but fall under the designated category due to triggering net worth or turnover criteria. It is not clear what all constitutes CSR activities as the list specified under Schedule VII of the Act seems like an inclusive list and not exhaustive.

(v) The need is to ensure continuous monitoring of CSR activities as well as their continuance. With the requirement of CSR having been introduced in the Companies Act 2013 itself, the companies must come forward with the task of carrying out the CSR activities. For the aforesaid, a plan should be drawn up and submitted before the CECB and also for identifying issues of CSR, the requirement and needs of the people of the area and the project affected persons should be taken into account by calling a meeting of the local panchayats or the village samitis which have been created in the area or presenting proposals during the meetings of the Gram Sabhas.

(vi) People must understand that it is not for the government alone that "public property" be looked after and nurtured. No doubt that resources like rivers, seashores, forests and the air are held by the government in trusteeship for the free and unrestricted use of the common public[34] but the general public owes towards the discharge of its duties to the environment that it inhabits; both morally and legally.

(vii) There is a need to initiate policies on restructuring of existing Pollution Control Boards (PCB), empower PCBs to impose a fine against rogue industries, create an incentive mechanism for the personnel, reduce the revenue generation responsibility and provide financial assistance directly for the ministry of finance. The requirement is to improve the functioning of the regulatory system by making necessary changes not only in substance of the law, but also in the working conditions of the PCBs so as to improve the environmental quality in the country.

(viii) It has been observed in various cases[35] that the Municipalities, which are more financially sound and that are more autonomous in functioning, are also in non-compliance zone. In those cases too, the compliance levels are absolutely below the mark.

The creative role of judiciary has been significant and commendable. The Supreme Court of India has played a fundamental role in giving directions from time to time to the administrative authorities to take necessary steps for improving the environment. Undoubtedly, people are optimistic in the present situation, with the approach and efforts shown by the legislature and judiciary. But mere optimism will not work to tackle the problem of environmental degradation. Unless a time bound program is outlined, backed up with judicial order, the compliance of various laws, rules, policies relating to environmental protection will not be achieved in a realistic manner, by overcoming various procedural and operational hindrances. Above all, what is most importantly required is social awareness and need to educate people about the environmental issues.

[34] *M.C. Mehta* v. *Kamal Nath* (1997) 1 SCC 288.

[35] *Dr. Uday Kumar Vasantrao Jagtap* v. *Saswad Municipal Council and Others* Application No. 46 of 2013.

INTERNATIONAL ANTI-CORRUPTION INSTRUMENTS

Archana Priyadarshini*

1. International Dimensions of Corruption

UN Secretary-General Ban Ki-moon's message for International Anti-Corruption Day, as observed on 9 December, is very inspiring for developing a perspective on corruption.[1] Corruption suppresses economic growth by driving up costs, and undermines the sustainable management of the environment and natural resources. It breaches fundamental human rights, exacerbates poverty and increases inequality by diverting funds from health care, education and other essential services. The malignant effects of corruption are felt by billions of people everywhere. It is driven by and results in criminal activity, malfunctioning State institutions and weak governance.

Good governance is critical for sustainable development, and vital in combating organized crime. Every link in the trafficking chain is vulnerable to corruption, from the bribes paid to corrupt officials by dealers in arms and drugs to the fraudulent permits and licenses used to facilitate the illicit trade in natural resources. Corruption is also rife in the world of sport and business, and in public procurement processes. In the last decade, the private sector has increasingly recognized its role in fighting corruption. A call to action launched by the United Nations Global Compact and partners is mobilizing businesses and Governments to engage in transparent procurement. Guidelines are also being developed to help business fight corruption in sport sponsorship and hospitality.

The United Nations is strongly committed to fulfilling its own obligations. Operating in some of the world's most unstable environments, the United Nations faces multifaceted corruption risks that can undermine our efforts to advance development, peace and human rights. We have developed a robust system of internal controls and continue to remain vigilant and work hard to set an example of integrity.

Corruption is a barrier to achieving the Millennium Development Goals and needs to be taken into account in defining and implementing a robust post-2015 development agenda. The United Nations Convention against Corruption, adopted 10 years ago, is the paramount global framework for preventing and combating corruption. Full implementation depends crucially on effective prevention, law enforcement, international cooperation and asset recovery.

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* Research Scholar, University of Delhi, New Delhi.

[1] *http:/www.un.org/News/Press/docs/2013/sgsm15523.doc.htm* (visited on 19-07-2015).

On this International Anti-Corruption Day, I urge Governments, the private sector and civil society to take a collective stand against this complex social, political and economic disease that affects all countries. To achieve an equitable, inclusive and more prosperous future for all, we must foster a culture of integrity, transparency, accountability and good governance.'

The United Nations Conference on Anti-Corruption, Good Governance and Human rights convened in Warsaw, also stressed on three themes:

(i) Impact of corruption on human rights;

(ii) How human rights principles and approaches can help in fighting corruption;

(iii) Fighting corruption while safeguarding human rights.[2]

In recent years, a number of international documents signed under the auspices of both the United Nations and regional organizations have acknowledged the negative effects of corruption on the protection of human rights and on development as under:

(i) Corruption is an enormous obstacle to the realization of all human rights i.e. civil, political, economic, social and cultural, as well as the right to development.

(ii) The core human rights principles of transparency, accountability, non-discrimination and meaningful participation, when upheld and implemented, are the most effective means to fight corruption.

(iii) There is an urgent need to increase synergy between inter-governmental efforts to implement the United Nations Convention against Corruption and international human rights conventions. This requires strengthened policy coherence and collaboration between the intergovernmental processes in Vienna, Geneva and New York, UNODC, UNDP, OHCHR and civil society.[3]

Though a large number of international governmental as well as non-governmental organizations are working in the field of tackling the menace of corruption internationally as well as nationally, yet all useful and relevant principles followed by such organizations have been distilled, compiled and embodied in the United Nations Convention Against Corruption (UNCAC). Such principles have been adopted by UN general assembly after prolonged deliberations. Therefore, our purpose of treatment of the topic would be best served if we confine ourselves and focus on the concepts of UNCAC.

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[2] *http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/Warsaw Conference.aspx* (visited on 19-07-2015).

[3] *http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/AntiCorruption.aspx* (visited on 19-07-2015).

2. United Nations Convention Against Corruption

The UNCAC[4] is a landmark, international anti-corruption treaty adopted by the UN General Assembly in October 2003. It represents a remarkable achievement in the sense of a global response to a global problem. With 145 countries bound by UNCAC so far, it is unique not only in its worldwide coverage but also in the extent of its provisions, recognizing the importance of both preventive and punitive measures. It also addresses the cross-border nature of corruption with provisions on international cooperation and on the return of the proceeds of corruption. States Parties (countries that have ratified the Convention) are also obliged to help each other to prevent and combat corruption through technical assistance (defined broadly to include financial and human resources, training, and research). The Convention further calls for the participation of citizens and civil society organizations in accountability processes and underlines the importance of citizens' access to information. The UNODC in Vienna serves as secretariat for the UNCAC.

Checklist of Key Actions Required of States Parties to UNCAC: M=Mandatory; SE = Shall Endeavour. (Provisions that States "shall consider" are optional and not included in this summary)

2.1 Preventive Measures

Ensure the existence of a body or bodies to prevent corruption (through knowledge dissemination, and overseeing/coordinating preventative policies) (Article 6, M). Each State Party shall grant the body or bodies the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

Establish a merit system for its civil service (Article 7, SE) by adopting principles of efficiency, transparency and objective criteria such as merit, equity and aptitude; with adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions; providing adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party; and by promoting education and training programmes to enable public servants to meet the requirements for the correct, honorable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions.

[4] *https://www.unodc.org/unodc/en/treaties/CAC/.*

Promulgate a code of conduct for all public officials and endeavour to require officials to disclose outside activities, employment, investments, assets, gifts that may reflect a conflict of interest, etc. (Article 8, SE). Require public officials to make assets declarations (Article 8, SE)

Create a public procurement system based on transparency, competition, and objective selection criteria with legal recourse for violations (Article 9, M)

Enhance transparency in public administration by such measures as publishing information and simplifying procedures for attaining access to such information (Article 10, M)

Prevent corruption among members of the judiciary through measures such as rules of conduct (Article 11, M)by taking measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

Take measures to enhance accounting and auditing standards in the private sector (Article 12, M) where appropriate, by providing effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

Promote participation of civil society in fight against corruption through, for example, by ensuring effective access to information (Article 13, M) and by enhancing the transparency of and promoting the contribution of the public to decision-making processes.

Institute a comprehensive regulatory scheme to prevent money laundering and consider creating financial intelligence unit to receive, analyze, and disseminate reports of suspicious transactions (Article 14, M) by emphasizing requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions.

2.2 Punitive Measures

Outlaw the offering or soliciting of a bribe by a national public official (Article 15, M): The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

The solicitation or acceptance by a public official, directly or indirectly, of any undue advantage, for himself or herself or another person or entity, in order that the official acts or refrains from acting in the exercise of his or her official duties.

Outlaw the promise, offering or giving of a bribe to a foreign public official (Article 16, M)

Outlaw embezzlement (Article 17, M): when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

Outlaw money laundering (when proceeds of a crime are transferred intentionally for the purpose of concealing or disguising their illicit origin) (Article 23, M)

Ensure that the obstruction of corruption investigations and attempts to commit corrupt acts are criminal (Articles 25 and 27, M)

Provide a long statute of limitations for bribery and other corrupt acts and provide for its suspension when an offender has evaded prosecution (Article 29, M)

Make sure the penalties for corrupt acts reflect the gravity of the offense, immunities for public officials are not over-broad, and that if there is discretion to prosecute it is exercised with due regard for the need to deter corruption (Article 30, M) Make sure the penalties for corrupt acts reflect the gravity of the offense, immunities for public officials are not over-broad, and if there is discretion to prosecute it is exercised with due regard for the need to deter corruption: (Article 30, M)

Take measures to ensure protection for whistle-blowers (Article 32, M) by providing effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

Establish procedures to freeze, seize, and confiscate the proceeds of corrupt acts and permit those injured by corrupt acts to initiate an action for damages (Articles 31 and 35, M)

Remove any obstacles posed by bank secrecy laws to investigating corruption (Article 40, M)

2.3 International Co-operation

Cooperate with other governments on anti-corruption offenses investigations, prosecutions and judicial proceedings in relation to Convention offenses (Article 46, M)

Enhance the effectiveness of communication between law enforcement bodies to facilitate secure and rapid exchange of information. (Article 48, M)

2.4 Asset Recovery

Require financial institutions to conduct enhanced scrutiny of accounts maintained by or on behalf of prominent public officials (Article 52, M)

Ensure that the proceeds of corrupt acts committed in other states can be confiscated and returned (Articles 55 and 57, M)

2.5 Technical Assistance

Implement training programmes for personnel responsible for preventing and combating corruption (Article 60, S)

Make concrete efforts to enhance financial, material and technical assistance to support developing countries'efforts to implement the Convention. (Article 62, M)

Acknowledged, efforts of UNO to evolve international and national rule of law institutions so that corruption may be eschewed as best as it can be are praiseworthy, India, too, has ratified UNCAC in May, 2011.

3 Institutions Aiming at Elimination of Corruption

Many institutions of international reach having wide impact in their respective fields of operation have devised means and policies to meet the challenge of corruption. Though all of these organizations may not be directly dealing with India yet the threads of wisdom evolved through their independent strategies and policies can prove to be useful in India too because globalization has started putting premium on international aspects of law. Therefore, just to pay tributes to the efforts of all major anti-corruption organizations contributing to the fight against corruption a list is given below:

3.1 Inter-Governmental Organizations

3.1.1 World Bank

The World Bank's Integrity vice Presidency (INT) investigates allegations of fraud and corruption in Bank Group-financed operations or those involving Bank Group staff.[5] By combining investigation with an enhanced focus on prevention, INT promotes a comprehensive approach to anti-corruption. The Bank's Integrity vice President (INT) has a highly specialized team of investigators and trained forensic accountants who investigate fraud and corruption allegations, prevent recurrence, and support the capacity of national authorities.

[5] *http://www.iaaca.org/AntiCorruptionAuthorities/ByInternationalOrganizations/InterGovernmentalOrganization/*

3.1.2 Economic Forum Partnering Against Corruption Initiative

The World Economic Forum Partnering against Corruption Initiative (PACI)[6] is a global anti-corruption initiative, developed by companies for companies. PACI offers a risk mitigation platform to help companies:

(i) Design and implement effective policies and systems to prevent, detect and address corruption

(ii) Benchmark internal practices against global best practice through peer exchange and learning

(iii) Level the playing field through collective action with other companies, governments and civil society.

3.1.3 United Nations Office on Drugs and Crime

UNODC is the United Nations office responsible for crime prevention, criminal justice and criminal law reform. It works with Member States to strengthen the rule of law, promote stable and viable criminal justice systems and combat the growing threat of transnational organized crime and corruption through its Global Programme against Corruption, the Crime and Justice Information Network, and several other programmes.UNODC aims to provide policy options and considerations for States in their efforts to implement the Convention and to complement the Legislative Guide for the Implementation of the UNCAC (2006).

The UNODC through its Thematic Programme on Action against Corruption and Economic Crime acts a catalyst and a resource to help States effectively implement the provisions of the Convention. It assists States with vulnerable developing or transitional economies by promoting anti-corruption measures in the public and private sector. The primary goal of the anti-corruption work done by UNODC is to provide States with practical assistance and build the technical capacity needed to implement the Convention. Efforts concentrate on supporting Member States in the development of anti-corruption policies and institutions, including preventive anti-corruption frameworks.

3.1.4 United Nations Development Programme

UNDP provides expert advice, training, and grant support to developing countries, with increasing emphasis on assistance to the least developed countries. To accomplish the MDGs and encourage global development, UNDP focuses on poverty reduction, HIV/AIDS, democratic governance, energy and environment, social development, and crisis prevention and recovery. UNDP

[6] *http://www.weforum.org/pdf/paci/principles_short.pdf*

also encourages the protection of human rights and the empowerment of women in all of its programs.

The Office of Audit and Investigation (OAI) provides UNDP with effective independent and objective internal oversight that is designed to improve the effectiveness and efficiency of UNDP's operations in achieving its development goals and objectives through the provision of internal audit and related advisory services, and investigation services. OAI's Investigations Section has the mandate to investigate all reports of alleged wrongdoing involving UNDP staff members and allegations of fraud and corruption against UNDP whether committed by UNDP staff members or other persons, parties or entities where the wrongdoing is to the detriment of UNDP. OAI is the sole office in UNDP mandated to conduct investigations. OAI conducts investigations into allegations of procurement fraud, corruption and bribery, theft and embezzlement, entitlements fraud, and misuse of UNDP resources, etc.

3.1.5 Organization of American States

The Inter-American Convention Against Corruption (IACAC) was adopted by the member countries of the Organization of American States on 29 March 1996 in Caracas, Venezuela; it came into force on 6 March 1997. It is the first legal instrument in this field which recognizes the international reach of corruption and the need to promote and facilitate cooperation between states in order to fight against it.

According to Article II of the Convention's text, it has two goals:

(i) To promote and strengthen the development by each of the States Parties of the mechanisms needed to prevent, detect, punish and eradicate corruption ; and,

(ii) To promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions and acts of corruption specifically related to such performance.

The Convention's oversight mechanisms provide for a comprehensive system of inter-state monitoring and compliance assessments.

3.1.6 Interpol Group of Experts on Corruption

INTERPOL aims to facilitate international police co-operation even where diplomatic relations do not exist between particular countries. Action is taken within the limits of existing laws in different countries and in the spirit of the Universal Declaration of Human Rights. INTERPOL's constitution prohibits 'any intervention or activities of a political, military, religious or racial character.' The INTERPOL Group of Experts on Corruption (IGEC) is

committed to making a concerted effort to change the often negative perception the community has of law enforcement vis-à-vis its role in anti-corruption initiatives.

3.1.7 International Chamber of Commerce

The International Chamber of Commerce is committed to an efficiently functioning global economy characterized by free and fair competition. ICC's main objective is to encourage self-regulation by business in confronting issues of extortion and bribery, and to provide business input into international initiatives to fight corruption.

3.1.8 International Group for Anti-Corruption Coordination

The International Group for Anti-Corruption Coordination is dedicated to strengthening international anti-corruption coordination and collaboration in order to avoid undue duplication and to ensure effective and efficient use of existing resources, using systems already in place at the regional and national level.

It provides a platform for exchange of views, information, experiences and "best practice"; on anti-corruption activities for the purpose of enhancing the impact of these activities, including support for the UN Convention against Corruption.

3.1.9 Group of States against Corruption

GRECO's objective is to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe anti-corruption standards through a dynamic process of mutual evaluation and peer pressure. It helps to identify deficiencies in national anti-corruption policies, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption.

GRECO monitors all its members on an equal basis, through a dynamic process of mutual evaluation and peer pressure. The GRECO mechanism ensures the scrupulous observance of the principle of equality of rights and obligations among its members. All members participate in, and submit themselves without restriction to, the mutual evaluation and compliance procedures.

GRECO monitoring comprises:

a "horizontal" evaluation procedure (all members are evaluated within an Evaluation Round) leading to recommendations aimed at furthering the necessary legislative, institutional and practical reforms ;

a compliance procedure designed to assess the measures taken by its members to implement the recommendations.

3.1.10 Financial Action Task Force on Money Laundering

The priority of the FATF is to ensure global action to combat money laundering and terrorist financing, and concrete implementation of its 40+9 Recommendations throughout the world. Starting with its own members, the FATF monitors countries' progress in implementing AML/CFT measures; reviews money laundering and terrorist financing techniques and counter-measures; and, promotes the adoption and implementation of the 40+9 Recommendations globally.

The main functions the FATF plays are as follows:

(i) Sets international standards to combat money laundering and terrorist financing.

(ii) Assesses and monitors compliance with the FATF standards.

(iii) Conducts typologies studies of money laundering and terrorist financing methods, trends and techniques.

(iv) Responds to new and emerging threats, such as proliferation financing.

3.1.11 European Partners Against Corruption

The functions of EPAC/EACN are as follows:

(i) Establishing, maintaining, and developing contacts between specialized authorities ;

(ii) Promoting independence, impartiality, and legitimacy, as well as accountability, transparency, and accessibility in all systems created and maintained for the independent oversight of policing and the anti-corruption work ;

(iii) Promoting international legal instruments and mechanisms from a professional perspective ;

(iv) Supporting the development and the promotion of common working standards and best practices for Police Oversight Bodies and Anti-Corruption Authorities ;

(v) Providing a platform for the exchange of information and expertise concerning developments in police oversight and anti-corruption matter ;

(vi) Providing support to other countries and organizations that are looking to establish or develop oversight mechanisms and anti-corruption authorities; Co-operating with other organizations, authorities, networks, and stakeholders in compliance with the foregoing objectives.

3.1.12 European Ombudsman

The European Ombudsman seeks fair outcomes to complaints against European Union institutions, encourages transparency and promotes an administrative culture of service. He aims to build trust through dialogue between citizens and the European Union and to foster the highest standards of behaviour in the Union's institutions.

The Ombudsman has power to carry out inquiries into maladministration in the activities of the Union's institutions, bodies, offices and agencies. He is completely independent in the performance of his duties.

Any EU citizen or entity may appeal the ombudsman to investigate an EU institution on the grounds of maladministration: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information or unnecessary delay.

The ombudsman cannot investigate the European Court of Justice in its judicial capacity, its General Court, the Civil Service Tribunal, national/regional administrations, even where EU law is concerned or judiciaries or private individuals or corporations. If a complaint is justified, the Ombudsman seeks a friendly solution whenever possible. The ombudsman also has no binding powers to compel compliance with his rulings, yet the level of compliance is very high. The ombudsman primarily relies on the power of persuasion and publicity.

3.1.13 European Anti-Fraud Office

OLAF is the core component of the fight against fraud. It is part of the European Commission and conducts fraud investigations in all European Union (EU) countries and within the European institutions themselves. It can also conduct investigations in non-EU countries with which it has agreements. The mission of OLAF is to protect the financial interest of the European Union and to combat fraud, corruption and any other illegal activities, including serious misconduct within the European Institutions, which have financial consequences. OLAF is not competent to fight fraud that does not concern the budget of the European Union. In other words, EU money has to be involved.

3.1.14 Economic Co-operation and Development

The mission of the Organisation for Economic Co-operation and Development (OECD) is to promote policies that will improve the economic and social well-being of people around the world. Discussions at OECD committee-level sometimes evolve into negotiations where OECD countries agree on rules of the game for international co-operation. They can culminate in formal agreements by countries, for example on combating bribery.

The OECD fights bribery in international business to strengthen development, reduce poverty and bolster confidence in markets. The keystone to its efforts is the OECD Anti-Bribery Convention and the Convention's 2009 Anti-Bribery Recommendation. The OECD has no authority to implement the convention, but instead monitors implementation by participating countries. Countries are responsible for implementing laws and regulations that conform to the convention and therefore provide for enforcement. The OECD performs its monitoring function in a three-phased rigorous peer-review examination process:

Phase 1 evaluates the adequacy of a country's legislation to implement the Convention

Phase 2 assesses whether a country is applying this legislation effectively

Phase 3 focuses on enforcement of the Convention, the 2009 Anti-Bribery Recommendation, and outstanding recommendations from Phase 2.

3.1.15 Asian Development Bank

The Office of Anti-corruption and Integrity (OAI) is the designated focal point of contact for allegations of fraud or corruption pertaining to ADB-financed activities or staff members. It is responsible for all matters related to allegations of fraud and corruption and for ensuring that those participating in ADB-funded activities meet the highest standards of integrity. It also advances awareness of the anticorruption policy in collaboration with other ADB departments and conducts project procurement-related reviews of ADB-financed activities, to help prevent and detect fraud, corruption or abuse.

3.1.16 Anti-Corruption Network for Transition Economies

ACN general meetings are unique regional events, which bring together senior representatives of national governments, civil society and business groups, as well as international partners. The meetings provide an effective framework for review of progress achieved in the ACN region in fighting corruption, sharing of experience on emerging priorities issues and elaboration of good practices on selected themes to support implementation anti-corruption policies at the national level. General meetings also provide valuable networking opportunities.

3.1.17 African Union

The African Union Convention on Preventing and Combating Corruption and related offences (AU anti-corruption convention provides a comprehensive framework) and is unique among anti-corruption instruments in containing mandatory provision with respect to private-to private corruption and on transparency in political party finding. Other strong points of the AU Convention are mandatory requirements of declaration of assets by designated public

officials and restrictions on immunity for public officials (Art. 7) The AU anti-corruption convention also gives particular attention to the media to have access to information (Art. 12)

3.2. Non-Governmental Organizations of International Level

In addition to the Governmental efforts as outline in the preceding paras, many public spirited non governmental initiatives[7] are also making mark at international level for finding ways to uproot the menace of corruption.

3.2.1 Transparency International

Transparency International is the global civil society organization leading the fight against corruption. It brings people together in a powerful worldwide coalition to end the devastating impact of corruption on men, women and children around the world. TI's mission is to create change towards a world free of corruption.

3.2.2 U4 Anti-Corruption Resource Centre

The U4 Anti-Corruption Resource Centre was (U4) initially established in 2002 as a result of the so-called 'Utstein-partnership'. In 1999, Ministers of international development from 4 countries-the Netherlands, Germany, Norway and the UK-met at Utstein Abbey in Norway and made an Utstein joint statement on anti-corruption to formalise cooperation on a number of issues. The U4 Anti-Corruption Resource Centre is a web-based resource centre established by the Utstein Group to strengthen their partnership for international development. Its purpose is to be an internal tool for co-ordination and learning among the Utstein Group's members and staff of the respective international development agencies, to present the Utstein Group's thinking and activities in the field of anti-corruption and share lessons and experiences with the outside world.

The U4 has the four main objectives:

(i) Strengthen the international anti-corruption framework, principally the OECD Convention combat bribery and the Inter-Governmental Financial Action Task Force (FATF).

(ii) Provide co-ordinated support to developing countries committed to fighting corruption.

(iii) Improve capacity in the development assistance administration of the Utstein partners to assist developing country efforts to combat corruption, and to protect development assistance co-operation from corruption.

[7] *http://www.iaaca.org/AntiCorruptionAuthorities/ByInternationalOrganizations/NonGovernmentalOrganization/*

(iv) Learn from the experience of others and develop resources for anti-corruption activities.

3.2.3 TRACE International

TRACE is an independent, non-partisan international organization that undertakes preliminary vetting of agents, consultants and subcontractors. Prior to membership in TRACE, candidates are subjected to an extensive due diligence review, including a lengthy questionnaire, three business references, a financial reference and a media search. Candidates also are required to have or adopt the Code of Conduct addressing bribes, kick-backs and conflicts of interest and agree to annual ethics training to be provided by TRACE or by approved lawyers in-country. TRACE serves two types of business enterprises: commercial intermediaries and the multinational companies.

3.2.4 Tiri

Tiri is an independent, international non-governmental organization, registered as a charity in the UK. It was founded on the conviction that integrity offers the single largest opportunity for improvements in sustainable and equitable development worldwide. "Tiri"-Making Integrity Work (Tiri-is a Maori word, whose meanings include the protection of society by the removal of taboos and the lifting of prohibitions.

Tiri's mission is to empower citizens to act with and demand integrity, actively taking part in building institutions to promote a state that is open, accountable and responsive to its basic needs and expectations. Tiri serve as a catalyst and incubator for important innovations and networks. Tiri work with governments, business, academia and civil society, sharing high levels of expertise and insight to develop the practical knowledge and skills required to tackle corruption and promote integrity effectively. Tiri has established key programmes of an integrity building agenda, namely:

(i) The individual (the Education programme) ;

(ii) The community (the Post-War Reconstruction and Pro-Poor Integrity programmes) ;

(iii) Public, private and third sector institutions (the Workplace programme) ; and

(iv) Electoral and judicial systems as key aspects of the constitutional framework (the Democratic Governance programme).

3.2.5 Stability Pact Anti-Corruption Initiative

Following a multidisciplinary approach, SPAI provides incentives for policy reform and sets out a number of commitments for policy reforms that SEE countries need to implement in order to eradicate corruption. There are five pillars:Promotion of good governance and reliable public administrations ;

(i) Adhesion to and implementation of universal and other European legal anti-corruption instruments as well as implementation of multilateral/regional agreements ;

(ii) Strengthening of legislation and promotion of the rule of law ;

(iii) Promotion of transparency and integrity in business operations ;

(iv) Promotion of an active civil society and raising public awareness

3.2.6 International Anti-Corruption Conference

The IACC is the world premier forum that brings together civil society, heads of state and the private sector to tackle the increasingly sophisticated challenges posed by corruption. The conference serves as the premier global forum for the networking and cross-fertilization that are indispensable for effective advocacy and action, on a global and national level.

The IACC draws attention to corruption by raising awareness and stimulating debate. It fosters the global exchange of experience and methodologies in controlling corruption. The conferences promote international cooperation among agencies and citizens from all parts of the world. They also help to develop personal relationships by providing the opportunity for face-to-face dialogue and direct liaison between representatives from the agencies and organizations taking part.

3.2.7 International Anti-Corruption Academy

As explicitly defined in the Agreement for the Establishment of IACA as an International Organization, the Academy's goal is to become a center for excellence, training, cooperation and academic research in the area of corruption. The Academy aims to contribute to the implementation of the United Nations Convention against Corruption (UNCAC) and other relevant regional and international legal instruments (OECD Anti-Bribery Convention, African Union Convention on Preventing and Combating Corruption, Inter-American Convention against Corruption, Group of States Against Corruption (GRECO)). Specifically, the main functions of IACA include:

(i) Addresses the issue of corruption holistically, comprehensively and through various disciplines

(ii) Provides a platform for a network of global "anti-corruption busters"

(iii) Enhances a public-private approach involving major players in the fight against corruption

(iv) Sets premium benchmarks and the highest standards in providing effective training for corruption prevention, investigation, prosecution and adjudication

(v) Enjoys credibility with key constituents-an institution for police, judges and prosecutors, regulators, academics and the private sector-with training by peers and professionals

(vi) Leverages a global network of professionals, embracing diverse cultural traditions

(vii) Benefits from state-of-the-art facilities generously provided by Austria and offers training to deal with real-life situations.

3.2.8 International Association of Anti-Corruption Authorities

The Association is an independent, non-political anti-corruption organization. From its establishment, the IAACA has been instrumental in the fight against corruption. Its principal purpose has been to promote and support the implementation of the United Nations Convention against Corruption (UNCAC), fostering constructive collaboration among its members in prevention, asset recovery and international cooperation.

The objectives of the Association are:

(i) To promote the effective implementation of the UN Convention Against Corruption

(ii) To assist anti-corruption authorities internationally in the fight against corruption, and for that purpose:

(iii) To promote international co-operation in gathering and providing evidence in tracking, seizing and forfeiting the proceeds of corrupt activities and in the prosecution of fugitive criminals

(iv) To promote speed and efficiency in such international co-operation

(v) To promote measures for the prevention of corruption in both the public and private sectors

(vi) To promote relationships and coordination between anti-corruption authorities internationally

(vii) To facilitate the exchange and dissemination among them of expertise and experience

(viii) To promote examination of comparative criminal law and procedure and best practices and to assist anti-corruption authorities engaged in reform projects

(ix) To promote examination of comparative preventive measures

(x) To co-operate with international and juridical organizations in furtherance of the foregoing objectives.

3.2.9 Global Organization of Parliamentarians against Corruption

GOPAC is the only parliamentary organization / network with the singular focus on combating corruption. GOPAC serves as a global point of contact, connecting and supporting the work of regional groups of parliamentarians promoting good governance and fighting corruption. The Parliamentary Centre serves as GOPAC's interim secretariat. A number of regional networks have been established to strengthen the commitment and capacity of parliamentarians to fight corruption, such as the African Parliamentarians Network Against Corruption (APNAC), the Latin American Parliamentarians Against Corruption (LAPAC) and others.

3.2.10 Global Integrity

Global Integrity is an innovation lab for the transparency and accountability community by developing tools that address the needs of the public, private, and civil sectors equally.Global Integrity's comparative advantage is in developing, testing, and sharing methodologies and technologies for generating cutting edge information that can inform governance reform efforts across those three sectors. Global Integrity seek to empower local stakeholders-including government, civil society, and the private sector-by providing best-of-breed research and reporting for making more informed decisions about how best to allocation.

3.2.11 Global Forum on Fighting Corruption and Safeguarding Integrity

The Global Forum on Fighting Corruption and Safeguarding Integrity is a multilateral gathering held every two years that brings together government representatives, specialists and academics from various parts of the world to discuss and enhance measures for fighting corruption.

3.2.12 Cambridge International Symposium on Economic Crime/ Center for International Documentation on Organized and Economic Crime

The annual Cambridge Symposium is a truly unique event which over the years has made an unrivalled contribution to understanding the real issues involved in preventing and controlling economically motivated serious crime. As a respected and trusted international forum and network it has also made an impressive and meaningful contribution to fostering international co-operation and promoting mutual understanding and goodwill.

3.2.13 Business Anti-Corruption Portal

The purpose of the Business Anti-Corruption Portal (Portal) is to provide a comprehensive and practical business tool, and to offer targeted support to small and medium sized enterprises (SMEs) in order to help them avoid and fight corruption, thereby creating a better business environment. Working actively against corruption will furthermore enable companies to adhere to the UN Global Compact Principle 10 on corruption.

The Business Anti-Corruption Portal offers the following services for free:

(i) Country Profiles

(ii) Due Diligence tools

(iii) Integrity System tools

(iv) Information about anti-corruption initiatives and networks

3.2.14 Anti-Corruption Research Network

Facilitated by Transparency International, ACRN is an interactive web platform with information on corruption research from a wide range of sources-academia, think-tanks, civil society and inter-governmental organizations.

The online platform of ACRN is designed to ensure a high degree of user input and interaction. Registered users of ACRN can comment on posted items and they are able to create their own user profiles and connect with other corruption experts across the globe. They can subscribe to targeted information streams from the web platform using RSS. The forums can be used by members to seek peer advice, brainstorm new ideas and the Calendar and the Marketplace can be used to share information on upcoming conferences, funding opportunities or jobs.

3.2.15 African Parliamentarians' Network Against Corruption

Main functions of APNAC are listed below:

(i) To build the commitment and capacity of parliaments to exercise accountability, with particular relation to financial matters.

(ii) To undertake projects to control corruption.

(iii) To raise general awareness on the issue of corruption at all levels of society.

(iv) To sensitize, educate and make aware the population on the existence, threat and danger corruption.

(v) To campaign for inclusion of corruption issues in government priority programs.

(vi) To advocate for and encourage the improvement of state capacity to timely address and handle matters related to corruption.

(vii) To liase with national and international organisations and institutions on all matters of corruption.

(viii) To mobilise internal and external resources to promote anti-corruption programs.

4. Conclusions and Suggestions

It is tempting to conclude that a crusade is going on against the Corruption at international level and support from all sides, whether governmental or non-governmental, appears to be rushing in. Yet, the corruption is digging in heels, it's is showing temerity of being indestructible, even though some tremors have certainly been felt by it. However, we need to further tap the resources available at international level to take on the might of this malaise.

But, obviously, the fight against corruption is not an easy one by any account. So, we need to join hands with forces waging war against this enemy, with all resources at our command to achieve better and more effective results. The United Nations Convention against Corruption can be seen as a watershed in the resolve of the international community to fight corruption. The provisions relating to asset recovery in the UNCAC are the most important by any standard. Effective use of these provisions would hopefully go a long way to achieving better results in this regard.

Without transparent efforts and assurances, even foreign relations would become increasingly difficult to be established and maintained. International co-operation to fight corruption as envisaged in the UNCAC is inescapable and a requirement of the hour. Seclusion and ostracisation in the times of globalization cannot be in the interest of health of an aspiring global power.

Accordingly, global currents calling for creation of structures and institutions checkmating corruption are being paid heed to. Fabric of rule of law is being strengthened. All pioneering existing institutions are showing signs of concerns for reorientation of legal instruments to impart best efficacy and efficiency to these.

PROSECUTION OF SEXUAL VIOLENCE DURING ARMED CONFLICTS: ROLE OF INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA

Yumna Asaf*

1. Introduction

Sexual violence has always been an inevitable part of all wars the world has seen till date, despite having no military or moral justification. Sexual violence is always considered a crime in national criminal laws as well as International law. Yet, war time sexual violence has only seldom been prosecuted.

The conflict of former Yugoslavia has taken the use of sexual violence during armed conflicts to astonishingly new levels. The case of Yugoslavia is peculiar, not only in the amount of sexual violence used but also the systematic way in which it was used, motivated to force the civilians out of their homes and ensure that they may never return. This pattern of sexual violence was recognized as 'ethnic cleansing'.

This, however, was not the only unique aspect to this war. This was the first armed conflict in which an International body - the Commission of Experts, created by the United Nations Security Council, intervened to investigate the war crime of sexual violence along with other war crimes. Also, an international court – International Criminal Tribunal for Former Yugoslavia (ICTY) was established by the United Nations to try war criminals on all sides in the ongoing Yugoslavian conflict. Though these efforts had to meet political reluctance, bureaucratic hurdles and insufficient funding, but, it was an uncommon opportunity to document specific war crimes and prosecute those who have committed them; to deter the potential future violators by ending the long run of impunity and also to help in the further development of a body of international criminal law which can put the humanitarian principles, meant for wars, to practice and repress these crimes.

This paper attempts to review the statute of ICTY through a critical gender perspective and also examine the contribution of ICTY in the prosecution of war time sexual violence through the landmark cases of the tribunal.

* Research Scholar, Advanced Centre for Women's Studies, Aligarh Muslim University, 2002 (U.P.).

2. Sexual Violence as a Weapon of War in the Conflict of Former Yugoslavia

The 1990s have witnessed the most serious of conflicts and abuses in Europe after World War II, resulting in the disintegration of Yugoslavia into different territories. The violations of International Humanitarian Law included in particular acts of willful killing, ethnic cleansing, mass killings, torture, pillage and destruction of civilian, cultural and religious property. The U.N. Security Council condemned these violations especially the practice of ethnic cleansing and massive, organized and systematic detention and rape of women.[1] In a period of over nine long years from 1991 to 2000, more than 140,000[2] people were massacred, and almost four million others were forced to leave their homes only to be displaced internally or to be expelled from the country all together.

The conflict in former Yugoslavia covers different time spans and geographical areas. There came alarming cases of the use of sexual violence from the state of Bosnia and Herzegovina between the years 1992-1995. As for any armed conflict, the exact numbers are not available but it is estimated that around 20,000 to 50,000 women were raped during this period.[3] The nature of this violence was genocidal. Majority of women raped were Muslims. It was a part of an ethnic cleansing programme. Women were not only raped but were also murdered later on. 'Rape camps' were deliberately created by Serbian forces and Bosnian women were sexually assaulted in all possible ways.[4]

The perpetrators were Serbian paramilitary, Serbian local Police and also Yugoslav army men. Their participation in these war crimes leaves no room for doubt that their higher authorities were aware of their doings. Based on the investigation carried out by the U.N. Commission of experts,[5] through interviews conducted and complaints received, several patterns of sexual violence were identified:

- Sexual slavery was recognized as the most prominent type of sexual violence used in the conflict
- Sexual violence also accompanied looting and intimidation

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[1] Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR,* Belgium: Intersentia Publishers, 2005.

[2] K. Alexa Koenig, Ryan Lincoln, Lauren Groth,' The Jurisprudence of Sexual Violence: A Working Paper of the Sexual Violence & Accountability Project', Human Rights Center, University of California, Berkeley, 2011, available at: *http://www.law.berkeley.edu/HRCweb/pdfs/SVA_Jurisprudence.pdf,* accessed on 22/11/2014.

[3] Miranda Alison, 'Wartime Sexual Violence: Women's Human Rights and Questions of Masculinity', *Review of International Studies,* Vol. 33, No. 1, 2007.

[4] Amnesty International, 'Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court', *Amnesty International Publications,* 2011.

[5] Elizabeth Jean Wood, 'Variation in Sexual Violence during War', *Politics and Society Journal,* Vol. 34, No. 3, 2006.

- After a village was taken over, public rapes were conducted, especially in front of the male family members
- Women who had taken refuge in collection centres were also not spared i.e. women living in refugee camps were also raped
- Sexual violence was used not only as a tool of torture or humiliation but it was also used to impregnate women and they were deliberately held in detention centres up to a period of time till it became impossible for them to undergo abortion
- Sexual violence against men was also reported but with much less frequency.

Sexual violence proved quite an effective tool in the ethnic cleansing of the Bosnian Muslim Communities. The effects of sexual violence were insidious and far-reaching. Raped women were considered adulterated and tainted. Unmarried women became unmarriageable and married women were out casted by their own families and communities. Women victims, who as in any other society in the world, having the primary responsibility of raising children, looking after the household, bearing the burden of preserving cultural traditions and history, could not function in the war torn society. It was a damage done to the community which was beyond repair.[6]

3. Establishment of the International Criminal Tribunal for Former Yugoslavia

In the early 1990s, the United Nations Security Council, upon the allegations of serious violations of humanitarian law, established a Commission of Experts to investigate into the matter through its resolution 780.[7] It was significant because it was first time that international community had taken up a collective action against the violations of humanitarian principles. However the financial and political realities of United Nations were soon exposed; as a five member team was appointed in the commission but only one person was given funds to work. There were no funds allocated to the commission for its investigations and collection of data. Not only this, there were no facilities for collecting data, no equipment to process the data and also no investigators. Nevertheless, the commission somehow managed to continue its investigation for eighteen long months with the help of NGOs and other independent legal experts who volunteered to help the tribunal in its cause.[8]

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[6] M. Cherif Bassiouni, 'Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia', International Human Rights Law Institute, DePaul University College of Law, 1996.

[7] NATO Doc., UN Security Council 3119th Meeting Resolution S/RES/780 October 6, 1992.

[8] M. Cherif Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions', *Journal of Law and Policy,* Vol. 5, No. 35, 2001.

During field investigations the most extensive database for gathering the evidence and information about violations of international humanitarian law was established, 800 detention centres were identified, it also estimated 50,000 cases of torture and 200,000 deaths along with identifying two million displaced persons as a result of extensive ethnic cleansing which was a documentation of around 2000 towns and villages, and lastly it also conducted the world's first and most extensive investigation of the systematic rapes in Yugoslavia.[9]

Based on the documented reports of the commission and its preliminary findings, including evidence of widespread or systematic rape, the U.N. Security Council acting under Chapter 7 of the U.N. Charter, called for the establishment of an ad hoc international criminal tribunal. In February 1993, the UN Security Council Resolution 808 proposed the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY). In the month of May 1993, the proposal was accepted through Resolution 827 formally creating ICTY, established to prosecute "Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.[10] The tribunal as of now has indicted 161 persons and has finished proceedings against over 100 defendants. Those indicted by the ICTY include high ranking officials of the country; from heads of state, prime ministers and army chiefs to other military and police leaders from various sides to the Yugoslav conflicts.

4. Statute of the ICTY and Sexual Violence

International law instruments provide extremely detailed guidelines on the treatment of protected persons during periods of armed conflict; however, it fails to do the same when it comes to the protection of women and girls, which comes across as minimal and weak. International law has dealt with the protection of combatants and civilians in a minute and exhaustive detail. However the issue of the protection of female combatants and civilians seems very little when compared with other provisions.[11] Nevertheless compared to all the previous International Law instruments concerned with armed conflict be it the Nuremberg or Tokyo Tribunal or the four Geneva Conventions, the statute of ICTY did fare better.

It was the legal office of the United Nations that started the process of developing the statute of ICTY with legal experts and an extensive input from

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[9] Mark Freeman, *Truth Commissions and Procedural Fairness*, (Cambridge: Cambridge University Press, 2006).

[10] Kelly D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', *Berkeley Journal of International Law*, Vol. 21, No. 2, 2003.

[11] Kelly Askin, 'Women's Issues in International Criminal law: Recent Developments and the Potential Contribution of the ICC' in International Crimes, Peace and Human Rights, (NY: Transnational Publishers, 2000).

government officials and individual experts.[12] The Statute of ICTY was formally adopted on 25th May 1993 through Resolution 827of the UN Security Council. The Security Council has the exclusive authority to amend the Statute via resolution. The Security Council can also address individual administrative matters before the Tribunal by adopting a resolution without formally amending the Statute. As of now, the statute of ICTY has been amended almost nine times through different Security Council resolutions.[13]

To begin with, under the statute of ICYT, sexual violence is only explicitly included in article 5. Article 5, under the heading of 'Crimes Against Humanity' reads:

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population....(g) *rape*....[14]

Beyond this explicit reference to rape, the statute also provides that provisions other than article 5 can also become basis of the adjudication of sexual violence. The jurisprudence of ICTY has shown that the legal dimensions of it may include other war crimes also as acts of sexual violence.[15]

For instance:-

- **Genocide** explained under article 4 of the statute include the acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such

  (d) Imposing measures intended to prevent births within the group.....[16]

  This implies that forced sterilization is a form of sexual violence under the statute.

- **Torture or inhumane treatment** included in article 2 and article 5 as both a war crime and crime against humanity may include sexual violence as well.[17]

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[12] M. Cherif Bassiouni, 'Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal', *Fordham International Law Journal*, Vol. 18, No. 4, 1994.

[13] U.N. Doc., Resolution 827, Adopted by the Security Council at its 3217th meeting, 25 May, 1993.

[14] UN ICTY Doc., Updated Statute of International Criminal Tribunal for Former Yugoslavia, ICTY Legal Library, available at: *http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf*, accessed on: 08/07/2015.

[15] Patricia Viseur Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation', OHCHR Doc., available at: *http://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf*, accessed on: 09/0/2015.

[16] UN ICTY Doc., Updated Statute of International Criminal Tribunal for Former Yugoslavia, ICTY Legal Library, p. 7.

[17] *Id.*, pp. 7-8.

- **Persecution** as a crime against humanity in article 5 may include acts of sexual violence since it is used as weapon of war to carry out ethnic cleansing as seen in the case of Yugoslavia.[18]
- **Enslavement** mentioned in article 5 of the statute as a crime against humanity may also include sexual enslavement which is considered to be the most prevalent form of sexual abuse during the Yugoslavian conflict[19].

Another relevant provision of the Statute is Article 7 which proved extremely instrumental in challenging the impunity of high ranking officials committing war crimes without any accountability and also those who committed these crimes as a part of their duty. Article 7 lays down that:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 (which include rape and other provisions). . . shall be individually responsible for the crime.[20]

The official position of any such accused persons, whether they are Head of the State or Government or any other responsible Government official, shall not alleviate this person of his criminal responsibility nor shall it ease the punishment. Also if any of these acts are committed by a subordinate, it shall not relieve him as well of his superior criminal responsibility, especially if the commanding authority knew that the subordinate was about to commit or has committed such acts, and he failed to take necessary measures to prevent it. The fact that an accused subordinate acted in pursuance to an order of a superior shall not relieve him of his individual criminal responsibility, but the tribunal may mitigate the punishment if justice requires so.[21]

5. Procedures followed by ICTY in dealing with the cases of Sexual Violence

Although the Statute of ICTY was adopted by a resolution of the Security Council, the judges of the Tribunal were responsible for drafting the Rules of Procedure and Evidence. Securing the testimony of key victims and witnesses has played a vital role in the Tribunal bringing to justice to the survivors of sexual violence. Survivors and witnesses of crimes were significant for the working of the tribunal. The ICTY had a paramount concern to ensure that these individuals could tell their stories without any intimidation or threats. This was particularly relevant in case of the victims of sexual violence, many of whom risked expulsion from their society by

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[18] *Id.*, p. 8.
[19] *Id.*, p. 8.
[20] *Id.*, p. 8.
[21] *Id.*, p. 8, available at: *http://www.icty.org/sections/LegalLibrary/StatuteoftheTribunal*, accessed on 2/10/2014.

coming to testify about the horrors they had gone through. Not only this, the tribunal had also given due importance to the rights of suspects. A number of innovative procedures were therefore introduced to check on the specific needs of the survivors of sexual violence. These procedures later became an inseparable part of modern international criminal justice.[22]

The Rules of Procedure and Evidence became the strength of ICTY in context of sexual violence.The tribunal went ahead of domestic legal systems to protect victims and witnesses. Some of the most revolutionary procedures include:

- Pseudonyms were used, voices and photo images were electronically disguised
- Transcripts were edited to remove any reference to the victim's identity
- Evidences were given *in camera* or via one-way CCTV
- A Victims and Witnesses Unit is working since 1995
- Identity of the victims and witnesses is kept secret form the accused in some cases even at trial.[23]

There are numerous rules in this set up which talk about providing protection to the Victims and Witnesses. Rule 96, being the most important rule, is concerned with 'Evidence in Case of Sexual Assault'. It says, in cases of sexual assault victim's testimony shall not be validated. It also says that 'consent' shall not be allowed as a defence if the victim was subjected to or threatened with or had reasons to fear violence, duress, detention or psychological oppression, or if the victim had reasons to believe that if they did not submit, another might be so subjected, threatened or put in fear. Also, if the defense of consent is presented, the accused must satisfy the Trial Chamber that the evidence is relevant and credible. It further mentions that the prior sexual conduct of the victim shall not be treated as evidence.[24] The reason to provide this protection to victims with regard to the argument of consent is because consent is irrelevant in times of war when the victim is subjugated and is under attack. But since a false allegation is also possible even in the context of war, this remains a highly debatable issue.[25]

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[22] UN ICTY Doc. 'Hearing, Protecting and Counselling Survivors of Sexual Violence', available at: *http://www.icty.org/sid/10313*, accessed on: 09/07/2015.

[23] Kelly Askin, 'Women's Issues in International Criminal law: Recent Developments and the Potential Contribution of the ICC' in International Crimes, Peace and Human Rights, (NY: Transnational Publishers, 2000).

[24] 1. ICTY Legal Library, Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia', pp. 27-98, available at: *http://www.icty.org/sid/136*, accessed on 2/10/2014.

2. Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR,* (Belgium: Intersentia Publishers, 2005), pp. 259-260.

[25] Kelly Askin, 'Women's Issues in International Criminal law: Recent Developments and the Potential Contribution of the ICC' in *International Crimes, Peace and Human Rights*, NY: Transnational Publishers, 2000.

6. ICTY Jurisprudence on Sexual Violence - Landmark Cases

With new and innovative procedures being implied in the process, ICTY has carried out the prosecution of 78 accused having charges of sexual violence which comprise 48% of the total 161 accused. Out of these, 30 of them were convicted, as of February 2014 for their criminal responsibility in cases of sexual violence as Individual Responsibility (Article 7.1) or Superior Responsibility (Article 7.3). Some of the milestone cases are discussed here.[26]

6.1 Duško Tadić-First-Ever Trial for Sexual Violence against Men

Duško Tadić was the former Bosnian Serb Democratic Party's local board president from Kozarac, northwestern Bosnia and Herzegovina. The Tadic case is historic in more ways than one. Not only because it was the first International war crimes trial since Nuremberg and Tokyo but also because it was the first International war crimes trial involving sexual violence. Regarding the nature of his crime the trial chamber found that after taking over the area of Prijedor, in northwestern of BiH, Serb forces confined thousands of Muslims and Croats in camps. Tadić participated in the collection and forced transfer of civilians to detention camps. The people were sexually violated, tortured and humiliated. Through his presence, Duško Tadić assisted and encouraged the group of men actively carrying out the assault. The cruelty and humiliation inflicted on the victims and other detainees was extremely concerning. He stabbed one of the victims and killed two other Muslim policemen.[27]

The Tadic indictment did include charges of rape. But the feminist concern was not simply the inclusion of rape and sexual violence. The bigger concern however was to conceptualize rape as a form of torture, and not just as a humiliating and degrading treatment. This did not happen right away. The original Tadic indictment focused more on the physical violence endured by male prisoners. This case of violence against men also became the focus of the press, while the rape of women did not carry the same weight. Ultimately the rape charges were dropped because the witness could not testify lacking full protection.[28]

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[26] UN ICTY Documents, Outreach, Crimes of Sexual Violence, Landmark Cases, available at: *http://www.icty.org/sid/10314*, accessed on: 26/11/2014.

[27] 1. United Nations Documents, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, pp. 172-178, available at: *http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj961129e.pdf*, accessed on 26/11/2014.
2. UN ICTY, Landmark Cases, available at *http://www.icty.org/sid/10314*, accessed on: 26/11/2014.

[28] Claire De Than, Edwin Shorts, 'Women Sexual Violence and International Crime: A Unifying Example' in *International Criminal Law and Human Rights,* London; Sweet and Maxwell Publishers, 2003.

However, to count on the positives;

- Tadic was tried for 31 counts of graves breaches, war crimes and crimes against humanity.
- 125 witnesses were heard and he was convicted of 11 counts.
- The Tadic trial chamber heard the first ever testimony of rape as a war crime.
- Although rape charges were withdrawn but the witness testimony regarding rape was included as evidence in other charges he faced
- It was the first time ever in the history that an international tribunal heard a direct evidence of rape.
- The trial chamber discussed in great detail the pain and sufferings of the victims of sexual violence, both men and women, and recognized that these incidences may have devastating effect on the victims
- -Since the witness was too frightened to testify, rape could not be included as a war crime separately but amongst the convictions of inhumane acts, sexual mutilation was included as a crime against humanity and war crime
- Persecution as a crime against humanity included rape and other forms of sexual violence.
- The tribunal gave a landmark statement that the testimony of a victim of sexual assault must have the same reliability as the victims of other war crimes. This was something which was long denied to the victims of sexual violence in common law[29]
- Finally in January 2000 Tadić was sentenced to 20 years of imprisonment.[30]

6.2 *Kunarac et al.: Sexual Enslavement and Rape as Crimes against Humanity*

This was a case of three Bosnian Serb Army men who were believed to have played a significant role in organizing and maintaining the system of notorious rape camps in an eastern Bosnian town. The case made a significant contribution in the development of international law. It expanded the facets of enslavement as crime against humanity in order to include sexual enslavement in it.[31]

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[29] Rhonda Copelon, 'Surfacing Gender: Re-engraving Crimes against Women in Humanitarian Law' in *Women and War in the Twentieth Century: Enlisted with or without Consent*, East Sussex: Psychology Press, 2004.

[30] Christopher Greenwood, 'International Humanitarian Law and the Tadic Case', *European Journal of International Law*, pp 13-17, Vol. 7, 1996. See also: The Hague Justice Portal, Courts and Tribunals, Academic Research, Tadić, Duško, available at: *http://www.haguejusticeportal.net/index.php?id=6077*, accessed on: 26/11/2014.

[31] UN ICTY Doc., Prosecutor v. Dragoljub Kunarac Radomir Kovac and Zoran Vukovic, Judgement, available at: *http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf*, accessed on: 13/07/2015.

Women were called to give their testimonies and judges heard the testimonies of over 20 women regarding sexual violence and other forms of intimidation. These women described the way in which they were compelled to do the household work, were forced to perform every action that was demanded by their captors, there was restriction on their movement and they were bought and sold like commodities; all this implies to the fact they were kept in condition of slavery. Judges also believed that the enslavement was sexual in nature. It was a significant ruling under International law as previously enslavement was always associated with forced labour and servitude.[32]

All three accused were also found guilty of rape and other assaults. Charges include torture and rape as crimes against humanity in article 5(g), as a violation of the laws or customs of war, under Article 3 of the Statute and as outrages upon personal dignity recognized by common Article 3(1) (c) of the 1949 Geneva Conventions. These charges were brought in pursuant to Article 7 as individual criminal responsibility and command responsibility.[33]

This judgement represents several significant achievements of international criminal law:

- This was the first verdict in which a commanding officer and all other defendants were convicted as primary actors of the crime of rape having individual criminal responsibility rather than the simple command responsibility
- It was the first time that a custodial sentence was given for the crime of sexual violence. The three accused were given 15 years, 15 years and 8 years of imprisonment for rape respectively.
- As mentioned above, this was the first time that the crime of sexual enslavement was considered by an international tribunal.
- Following the footsteps of International Criminal Tribunal for Rwanda, sexual objectification of women was also treated as a war crime.
- The tribunal also expanded the definition of rape in all situations in which consent in not freely or voluntarily given

[32] 1. Rosalind Dixon, 'Rape as a Crime in International Law: Where to from Here?', *European Journal of International Law*, Vol. 13, No. 3, 2002.
2. Hague Justice Portal, Press Release, Judgement of Trial Chamber II in the Kunarac, Kovac and Vukovic Case, available at: *http://www.haguejusticeportal.net/ Docs/Court%20 Documents/ICTY/Kunarac-et-al.-Summary-of-Judgement.pdf*, accessed on: 2/12/2014.

[33] UN ICTY Doc., Prosecutor v. Dragoljub Kunarac Radomir Kovac and Zoran Vukovic, Judgement, available at: *http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf*, accessed on: 13/07/2015.

- With this judgement, the tribunal tried closing the pre-existing gaps in international criminal law regarding torture, rape, sexual slavery, war crimes, genocide and crimes against humanity.[34]

7. Conclusion

Until the 1990s sexual violence as a war crime remained largely invisible. It was trivialized, considered a private matter and was justified as an inevitable part of war. More disturbing aspect was that sexual violence was treated as a necessary reward for male combatants during armed conflicts. Even the four Geneva Conventions failed to place rape under the category of grave breaches and only treated it as a crime against a woman's honour and dignity not as violence, only re-enforcing the concepts of shame and stigma.[35]

Then a long overdue revolution in the jurisprudence of sexual violence began with ICTY. The massive scale sexual violence became one of the impetuses for setting up an international criminal tribunal that later went on to prosecute people on the basis of their individual criminal responsibility. For the first time in history, it was acknowledged that rape has taken place in an armed conflict and was given an explicit mention in its statute.[36] Inclusion of Rule 96, to prevent harassment and discrimination against victims and witnesses was one such much needed endeavor to ensure justice to victims of sexual violence.[37] It must be noted that the ICTY Statute, while listing rape as a crime against humanity, did not, however, mention it in article 2, which defines grave breaches of the laws of war. Thus, the statutory omission of rape as a war crime was disappointing at that time, but it somehow made it easier to argue for the mainstreaming of sexual violence, else it would have been excluded altogether.

For the mainstreaming of gender in international jurisprudence, ICTY has taken the first landmark steps. The women's human rights movement channelized to support the appointed of female judges and their presence during trials was one of those long awaited critical steps that brought revolutionary changes. The open process of rule-making, in which NGOs and states were invited to make suggestions, enabled feminist groups to focus attention on different dimensions of this problem.

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[34] 1. Kelly Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', *American Journal of International Law*, Vol. 93, No. 1, 1999.
2. Claire De Than, Edwin Shorts, 'Women Sexual Violence and International Crime: A Unifying Example' in *International Criminal Law and Human Rights,* London; Sweet and Maxwell Publishers, 2003.

[35] Chile Eboe-Osuji Leiden, 'International Law and Sexual Violence in Armed Conflicts', *American Journal of International Law,* Vol. 107, No. 3, 2013.

[36] Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR,* Belgium: Intersentia Publishers, 2005.

[37] Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law', *McGill Law Journal*, Vol. 46, 2000.

Besides these achievements, the tribunal is facing a lot of challenges in its way to provide justice to the victims. The tribunal has faced financial crisis in providing counselling and support to the victims. One of the greatest practical challenges in front of the tribunal is to provide security and medical, psychological and other social services that will make it possible for the survivors to come to the tribunal and testify.[38]

In summary, the jurisprudence of ICTY has enriched and developed international criminal law with respect to gender crimes, recognizing sexual violence as a war crime, as genocidal, as a form of torture, as crime against humanity, as a gender-neutral crime and also as a serious violation of international humanitarian law.[39]

[38] M. Cherif Bassiouni, 'Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia', International Human Rights Law Institute, DePaul University College of Law, 1996.

[39] Kelly Askin, 'Women's Issues in International Criminal law: Recent Developments and the Potential Contribution of the ICC' in *International Crimes, Peace and Human Rights*, NY: Transnational Publishers, 2000.

GREATER FOOL THEORY AND DELHI RAPE CASE: CHALLENGING REPRESENTATIVE DEMOCRACY

Dr Rajinder Kaur*
Dr. Rashmi Kumar**
Mr. Jagteshwar Singh***

1. Introduction

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way[1]

December 16, 2012 – New Delhi

> Brutally gang-raped by four persons in a moving bus in south Delhi on Sunday night, a 23-year-old woman is now battling for life at the Safdarjung Hospital here....[2]

As sad as it is, it was just another sexual crime – rape, in India, doesn't even get reported with a capital 'R' – it is one of the most common crimes against women, one which rarely turns heads.[3] In a nation where social stigma and police attitude is such that a large chunk of the cases involving sexual crime are

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* Professor, University Institute of Legal Studies, Panjab University, Chandigarh.
** Professor of Law, IMT, Ghaziabad
*** Assistant Professor, NALSAR University of Law, Hyderbad.

[1] We choose to begin these famous lines of Charles Dickens masterpiece – 'A Tale of Two Cities' (1859). The same has been taken with the purpose to study on 'Democracy' and the need to deepen it to provide the people with a larger say. The paper is written in the background of an incident that took place in Delhi where a young woman was raped mercilessly by six assaulters. This was followed by the people having to take to the streets to get the apathetic political establishment to wake from its slumber and demand something be done. In terms of having a subject to base the paper upon – "it was the best of times" but in terms of where the Nation stood in those weeks on inaction on part of the State compelling action of its citizens – "it was the worst of times."

[2] Shubhomoy Sikdar, "Gang-raped in moving bus, girl fights for life in Delhi hospital" *The Hindu*, December 17, 2012 available at <*http://www.thehindu.com/news/national/gangraped-in-moving-bus-girl-fights-for-life-in-delhi-hospital/article4208833.ece*> (last accessed on May 30, 2015).

[3] Radha Kumar, "Rape and murder in Delhi – A Horrible Attack could prove a Turning Point for India's Women" *The Economist,* January 5, 2013 available at <*http://www.economist.com/news/leaders/21569031-horrible-attack-could-prove-turning-point-indias-women-rape-and-murder-delhi*> last seen on March 30, 2015) – *"Rapes and the ensuing deaths (often from suicide), are routinely described in India's press — though many more attacks go unreported to the public or police".*

not reported – a new rape case is reported every 20 minutes, with the capital leading the way.[4] In a scenario as bleak as this; one wouldn't expect the Indian populace to notice, but notice they did. The incident started out as a disjointed protest by various non-governmental organisations, students unions and other activist bodies would over the next week become an expression of the Indian people in general.

December 20, 2012 – New Delhi

> In another protest at India Gate, the Jawaharlal Nehru University Students Union expressed it solidarity with the rape victim and demanded speedy justice to her. In the memorandum to the Union Home Minster, the Chief Minister and the Delhi Police Commissioner, they demanded that the rate of registration of the First Information Report in cases of crime against women be drastically improved.[5]

December 22, 2012 – New Delhi

> The seething outrage over the gruesome gang-rape case spilled on to the Raisina Hill and the entire stretch of Rajpath on Saturday as a large number of youth, in different groups, descended there to knock at the doors of the Head of the State at Rashtrapati Bhavan seeking justice for the victim.[6]

These protests showed a common understanding among the people that the creation of a safer environment for women is not only the responsibility of the police or the government, but also a matter for us – *We*, the people, to stand up and be counted.[7] These protests also showed the acceptance of the fact that sexual crimes were now a "national problem"[8] and had to be countered by one and all.

2. Greater Fool Theory vis-à-vis Protest against the Delhi rape Case

The Greater Fool theory is an economic concept – more pertinently a concept related to the financial markets or the housing sector – which involves the making of an investment on the premise that one shall be able to sell it at a profit to a 'greater fool.' The asset is bought at any price, no matter whether such price

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[4] Suchitra Mohanty & Frank Jack Daniel, "Indian Rape Victim's Father says he wants her Named" *Reuters*, January 6, 2013 available at *<http://in.reuters.com/article/2013/01/06/us-india-rape-idUSBRE90500B20130106>* (last accessed on November 30, 2013).

[5] Mohammad Ali, "Angry protests across Delhi over gang-rape" December 20, 2012 available at *<http://www.thehindu.com/news/cities/Delhi/angry-protests-across-delhi-over-gangrape/article4220758.ece>* (last accessed on 30 June, 2015).

[6] Devesh K. Pandey, "Waves of Protest slam Raisina Hill" *The Hindu,* December 22, 2012 available at *<http://www.thehindu.com/news/national/waves-of-protest-slam-raisina-hill/article4228699.ece>* last accessed on 30 June, 2015).

[7] Subhashini Ali, "From Outrage to Empowerment" *The Hindu*, December 23, 2012 available at *<http://www.thehindu.com/news/national/from-outrage-to-empowerment/article4229819.ece>* (last visited December 3, 2013) – *"The Delhi bus rape has galvanised the country on the neglected issue of women's safety...."*

[8] Karen L. Kinnear, 'Women in Developing Countries: A Reference Handbook' (ABC-CLIO, 2011) pp. 26–27.

has a rational relationship to the underlying value, in the hope that the buyer can sell it at an even higher price.[9]

Thus, for a community of investors to succeed they need a greater fool – someone who will buy long and sell short – and most people spend their whole life trying not to be that greater fool. However the protestors in Delhi turned up everyday to the India Gate in those wintry mornings, endured *lathi*-charges and tear-gas firings by a police force that is honestly set-up to rule over the people than be of service to them.[10] They did this out of no personal gain that they could achieve from such actions, but out of the more general concern of the society they live in. The interest of the people protesting out was wider than the personal interest in today's commoditized world.

3. The Authority-Justice Balance

The Indian masses stood up against the inaction of state which was an expression of the requirement of a larger say in the socio-political workings of the nation. This section takes into consideration the inherent balance of any social order – the fact of *Authority* on the one hand and the end of *Justice* expected of it on the other and the competing ideals of *Power* and *Rights*.

3.1 The 'Authority-Justice' Balance of Social Living

The idea of social or political contract is a concept in political philosophy which attempts to answer the questions related to 'origin of society and the legitimacy of the authority of the state over the individual.'[11] Typically these theories cover two kinds of contract – both could be found in the modern seventeenth century philosophy as well as the ancient Greek thought[12] – first is the theory of origin of society and second regarding the contract of government.

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[9] Joseph Sternberg, "China, the World's Greater Fool?", *The Wall Street Journal*, August 15, 2012 available at <*http://online.wsj.com/article/SB10000872396390444508504577591063754857288.html*> (last accessed on 30 May, 2015).

[10] PTI, "Manmohan Makes Fresh Appeal for Peace" *The Hindu*, December 24, 2012 available at <*http://www.thehindu.com/news/national/manmohan-makes-fresh-appeal-for-peace/article4234468.ece*> (last accessed on May 30, 2013) – *"... protests, which turned violent on Sunday, continued for the seventh day today..."*; Devesh K. Pandey, "Waves of protest slam Raisina Hill" The Hindu, December 22, 2012 available at <*http://www.thehindu.com/news/national/waves-of-protest-slam-raisina*-hill/article4228699.ece> (last accessed on May 30, 2015) – *"It was around 8 a.m. that the youth had started converging at India Gate... The day-long action that saw unabated agitation and an aggressive response from the Delhi Police, in which 125 tear-gas shells were lobbed".*

[11] J. W. Gough, '*The Social Contract*' Oxford: Clarendon Press, 1936 at pp. 2–3 – It is important to note that *"there may not be a physical, signed contract, but there is still an implicit contract that we enter into when we willingly participate in society and enjoy its benefits."*

[12] Though the antecedents of social contract theory are found in antiquity, in Greek and Stoic philosophy and Roman and Canon Law, as well as in the Biblical idea of the covenant, the heyday of the social contract was the mid-seventeenth to early nineteenth centuries, when it emerged as the leading doctrine of political legitimacy.

The concept begins with human condition absent any political order – what Thomas Hobbes termed as the 'state of nature'[13] – from here it moves onto the needs of man, as a social being, to crave safety and protection.[14] Thus, individuals enter into an agreement with one another and the ruler; where they promise obedience and he promises protection and good government. As long the ruler keeps his promise, the people keep theirs, however if he misgoverns the contract is broken and allegiance is at an end.[15]

If one, analyses this theory in terms of basic concepts of social existence – *Power*, *Right*, *Rights* and *Authority* – then we arrive at the following understanding [Refer to Figure 1]: Firstly, the '*Power*' to establish '*Authority*' lies in the hand of the people, the masses. Secondly, '*Authority*' is established to off-set the existing power-dynamic (physical strength on case of the 'state of nature') and guarantee '*Rights*' to these masses. Thirdly, the concept behind erecting such a system is to move towards creation of a '*Right*' society – one in which '*Justice*' exists. Finally, if a '*Authority*' so created in unable to provide a movement in the direction of the ends for which it is created it is up to the people who had the '*Power*' in the initial place to replace it with another system aiming at the theoretical ends.[16]

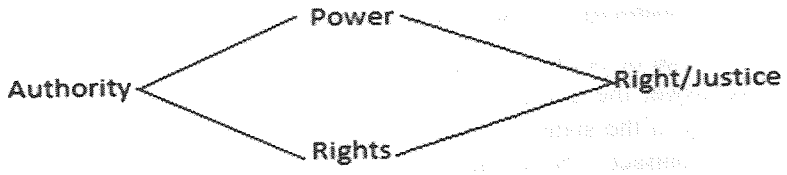

Figure 1: [Theoretical understanding of the basic relations of social existence]

[13] The term, in its present context, was first used by Thomas Hobbes. See Ross Harrison, '*Locke, Hobbs and Confusion's Masterpiece*' Cambridge University Press, 2003 at p. 70 – *"Hobbes seems to have invented this useful term."* The phrase 'state of nature' was also used by Thomas Aquinas does occur, in Thomas Aquinas' 'Quaestiones disputatae de veritate' available at <*http://dhspriory.org/thomas/QDdeVer19.htm*> in Question 19, Article 1, Answer 13 (last accessed on May 30, 2015) – *"The infusion of the gifts of grace does not reach those who are in hell, but these souls are not deprived of the things which belong to the state of nature. "For nothing is completely deprived of a share in the good," as Dionysius says. But the infusion of species mentioned above, which is given when the soul is separated from the body, belongs to the natural state of separated substances. Therefore, the souls of the damned are not deprived of this infusion."* However, as can be clearly the usage of Aquinas is in the context of a discussion of the nature of the soul after death, not in reference to politics.

[14] In the 'state of nature' individuals are bound only by their personal power and conscience.

[15] J. W. Gough, '*The Social Contract*' Oxford: Clarendon Press, 1936 at pp. 2–3.

[16] David Beetham, *The Legitimation of Power* London: MacMillan Educational Press, 1991 at p. 43 – *"Power, in its broadest form is the ability to produce intended effects upon the world and it lies with every individual... [Whereas] political authority is the legitimate right to exercise power over a particular group of people at a particular time... [Acquired through] consent of the powerless without coercion".*

In the end it can be summarize the analysis, one can say that there is an inherent '*Authority-Justice*' balance in each system of social living within which themes of '*Power*' and '*Rights*' play out.[17] One could also reach such a conclusion by staying at an arm's length from the theory of social contract and looking only on the historical structures of human civilization. The illustration of the ancient Greco-Roman system can also be taken from where much of today's western understanding of polity takes root.[18]

For them, Authority or *Auctoritas* as it was known back then was separate from Power or *potestas* – whereas the former was a concept related to the state, the later was a concept used to refer to power held by the people.[19] The ultimate end of the *politika* or politics, i.e. the affairs of the city, was to reach a state of *iustitia* or righteousness and equity; or more basically *iustus* or 'just and right'.[20] [Refer to Figure 2]

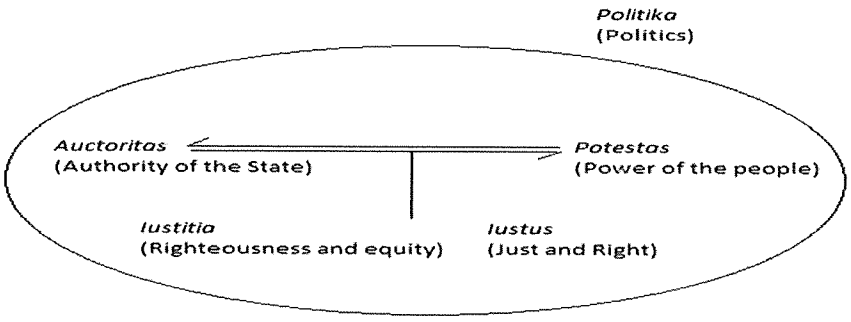

Figure 2: [Greco-Roman understanding of Politics]

3.2 Ongoing Process of Establishing 'Authority-Justice' Balance

Thus, we can analyze the kind of system that is set-up in a civilization is dependent on the understanding of the people as it is in them that lays the ultimate power. Historically, societies have tried various different methods of governance in their attempt to create perfection, where just conditions of life shall be available to all. Aristotle systematically analyzed the different systems of rule that the numerous Greek city-states had and categorized them into three categories based on how many ruled; the many (democracy/polity), the few

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[17] The central assertion of social contract approaches is that law and political order are not natural, but are instead human creations. The social contract and the political order it creates are simply the means towards an end — the benefit of the individuals involved — and legitimate only to the extent that they fulfill their part of the agreement.

[18] Refer to Donald Earl, '*The Moral and Political Traditions of Rome*' Thames & Hudson: Rome, 1967.

[19] Cicero says of power and authority, *"Cum potestas in populo auctoritas in senatu sit"* – "While power resides in the people, authority rests with the Senate".

[20] See generally D. C. Earl, *The Political Thought of Sallust* Hakkert, Amsterdam. 1966; See also J. Rufus Fears, *The Cult of Virtues and Roman Imperial Ideology,* De Gruyter, 1981.

(oligarchy/ aristocracy) and a single person (tyranny or today autocracy /monarchy).[21]

These have been the three systems of governance that have been used, by and large, over the history of human existence. The most popular out of these systems, used widely by different societies, was one of monarchy which takes root from the Greek words monos, meaning 'one or singular' and *árkhō*, meaning 'to rule.'[22] Authority under this system was given to one person; in the earliest of times this was generally based on wisdom or physical strength of the person to guard the group against outsiders. With time however, as the group grew, the system became mechanical – devolution of authority now came to be *via* birth with usually the eldest son of the monarch taking over the reins of the society.[23]

Thus, a system of *Authority* (Monarchy) set-up by the people which was supposed to protect their *Rights* ended up becoming a 'power-over' system whereby it was only the power of those at the top, in the dominant position, that increased.[24] [Refer to Figure 3] History is replete with examples of misuse of authority by various sovereigns but we will not go into details of it here, because the main purposes of the paper here is only to show how establishment of *Authority* to reach the state of *Justice* is an ongoing process.

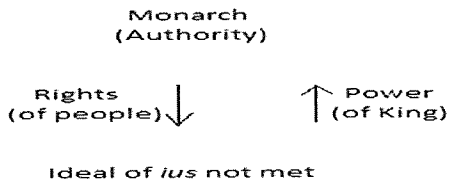

Figure 3: ['Power-over' of monarchy]

As has been mentioned above, ultimate *Power* remains in the hands of the people and not the *Authority* set-up by them. There were revolutions and rebellions,

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[21] Aristotle, *Aristotle in 23 Volumes: Vol. 21*, H. Rackham (Trans) Cambridge, MA, Harvard University Press: 1944.

[22] See Henry George Liddell & Robert Scott, *A Greek-English Lexicon* Oxford: Clarendon Press, 1940.

[23] The system became so entrenched that some even proclaimed that the King was of divine origin. Ideas like this were prevalent all around the world, some examples being – India, England, China, Japan etc. For more on the topic refer to Sir Robert Filmer, 'Patriarcha or the Natural Power of Kings' [1680] available at <*http://www.constitution.org/eng/patriarcha.htm*> (last accessed on 30 May, 2015) – He speaks of monarchy in the following words *"the natural and the divinest form of government; and that the gods themselves did live under a monarchy."*

[24] Here we are not to delving upon the system of oligarchy, as historically it was also corrupted and then changed in a manner similar to one discussed here.

some bloody and others not so much, around the world as people moved to change the system of authority from one man-rule to a more inclusive one.[25]

The change made by these revolutions of the people was to go back to a concept, last used in the ancient era by the Greek city states – the concept of Democracy, from *dēmokratía* "rule of the people."[26] As the polity now to be governed by this new system was a much larger one, instead of a having the direct system of democracy as was practiced in ancient Greece a representative form came to be practiced. Authority, under this system, is put in the hands of a number of elected representatives who are chosen following the principle of universal adult franchise. They, amongst themselves, choose a government which is responsible to them while they themselves are responsible to the masses. The system has, by and large, continued to be a positive one and is still seen as best suited arrangement in the human quest for a just society.[27]

However by the 1980's the theory and the practice of democracy had also lead to disenchantment. A large part of this lies in the political circumstances around that period of time – the eighties are famous for two similar set of economic strategies employed by United States and United Kingdom governments, neither of which were favourable to the either the poor or the middle-classes as they were aimed at spurring on economic growth through the 'trickle down strategy' which is aimed at improving the wealth structures at the top in the hope of benefiting those below.[28] The effects of these situations were felt in the academy

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[25] For a non-exhaustive list refer to – Magna Carta (1215): Monarch was made to give a number of rights to the masses and thus his absolute will was taken away, see Danny Danziger & John Gillingham, '*1215: The Year of Magna Carta'* Touchstone, 2004 at p. 278 – *"the foundation of the freedom of the individual against the arbitrary authority of the despot"*; Glorious Revolution (1688): Monarch's power was greatly restricted in favour of the Parliament, see Victor Windeyer, "Essays" in Victor Windeyer, *'Lectures on Legal History'* Law Book Co. of Australasia, 1938– *"ended moves towards absolute monarchy in the British kingdoms by circumscribing the monarch's powers... he or she could no longer suspend laws, levy taxes, make royal appointments, or maintain a standing army during peacetime without Parliament's permission...."*; The former two lead the way of human history to change the concept of system of *Authority* lying with one person only, other examples are The American War of Independence (1775-83); one could also towards The French Revolution (1789), The Bolshevik Revolution (1917) and even the long drawn out Indian struggle for Independence. All of these changed the polity of their nations from a 'power-over' system to a more equal footing.

[26] Henry George Liddell & Robert Scott, '*A Greek-English Lexicon* Oxford: Clarendon Press, 1940– From *dêmos* 'people' and *kratos* 'power' or 'rule.'

[27] See generally Mark E. Warren, "Deliberative Democracy and Authority," *The American Political Science Review*, Vol. 90, No. 1 (March 1996) at pp. 46-60; Also see, Ronald J. Terchek & Thomas C. Conte, '*Theories of Democracy: A Reader*' Rowman & Littlefield Publishers, Maryland: 2001.

[28] See generally, William A. Niskanen, "*Reaganomics,*" The Concise Encyclopedia of Economics available at <*http://www.econlib.org/library/Enc1/Reaganomics.html*> (last accessed on May 30, 2013) – *"Reagan's 1981 Program for Economic Recovery... major policy objectives: (1) reduce the growth of government spending, (2) reduce the marginal tax*

(Footnote No. 28 Contd.)

as well where, building upon the revival of 'public-spirited' studies of democracy,[29] came scholarly works that can now be termed as a renaissance of the participatory view of democratic polity.[30] This view of radicalizing, or deepening democracy has since come to be known as 'Deliberative Democracy.'[31]

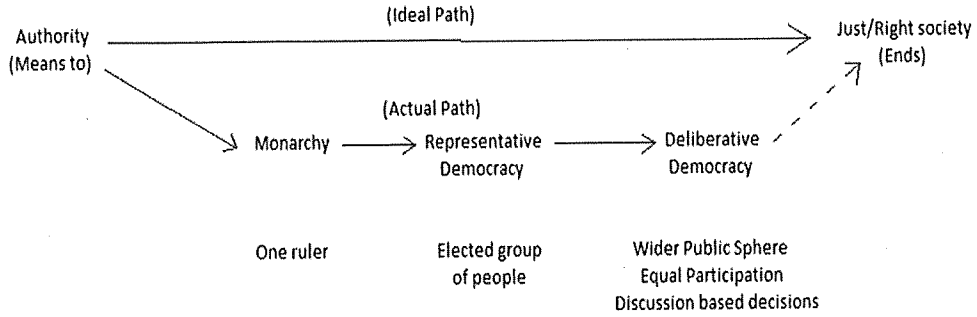

Figure 4: [Towards a Just society]

Thus, with the aspiration of setting up a *just* state of affairs societies have tried various modes of establishing *authority*. We have moved from monarchy to democracy; and now there is shift towards a deepened understanding of democracy – by way of the deliberative theory of democracy [Refer to Figure 4].[32]

(Footnote No. 28 Contd.)

rates on income from both labor and capital, (3) reduce regulation..."; See also Nigel Lawson, "*The View From No. 11: Memoirs of a Tory Radical*" London: Bantam, 1992 at p. 64 – "*Free markets, financial discipline, firm control over public expenditure, tax cuts... privatization and a dash of populism.*" In India one could also make a comparison to the large scale 'opening' of the economy conducted between 1985-1996. These policies were all seen as being more helpful to those already in the position of dominance.

29 See Peter Laslett, '*Philosophy, Politics, and Society*' Blackwell Publishers, 1956; B. Barry, '*Political Argument*' London: Routledge, 1965; Richard E. Flathman, 'The public interest: an essay concerning the normative discourse of politics' (Wiley, 1966); P. Bachrach, "Interest, Participation and Democratic Theory" in J. R Pennock & J. W Chapman (eds.) '*Participation in Politics, Nomos XVI*' New York: Lieber-Atherton, 1973 at pp. 39-55.

30 See P. Bachrach, '*The Theory of Democratic Elitism: A Critique*' Boston: Little, Brown & Co, 1967; Carole Pateman, '*Participation and Democratic Theory*' Cambridge: Cambridge University Press, 1970; Crawford B. Macpherson, '*The Life and Tomes of Liberal Democracy*', Oxford University Press, 1977; James S. Fishkin, '*Tyranny and Legitimacy: A Critique of Political Theories*' Johns Hopkins University, 1979; Jane J. Mansbridge, '*Beyond Adversary Democracy*' University of Chicago Press, 1983; Benjamin R. Barber, '*Strong Democracy: Participatory Democracy for a New Age*' University of California Press, 1984.

31 The phrase was first coined by Joseph Bessette in 1980. See Samantha Besson & Jose Luis Marti, "Introduction" in Samantha Besson & Jose Luis Marti (eds.) '*Deliberative Democracy and its Discontents*' Ashgate, 2006 at p. xiii.

32 The representation shows the 'process' of finding the system of *Authority* that will help man find the *Just* or *Right* social balance. My contention is that Deliberative model is the latest theory in this regard, and the dotted line shows that as of now we do not know if it is the final link in the chain. This paper is dedicated to finding out more about the workings of the theory of deliberative democracy and whether it can be adapted into the Indian socio-political system.

4. Conclusion

One could cynically suggest that a 'greater fool' is a person with the perfect blend of self-delusion and ego to think that he can succeed where others have failed, this certainly wasn't the first time India protested around issues involving women related offences, but a country is made by 'greater fools'. It was this mass action by the people that lead to the formation of the Verma committee and the largely modern methodology of inclusion and involvement it followed.[33] Before moving to the culmination of Verma Committee report a relation of authority and justice is taken into consideration.

Largely due to the enormous public outrage and the pressure it created the government set-up, on 23 December, 2012 a judicial committee headed by Justice J.S. Verma to submit a report on possible amendments that could be brought in the criminal law to deal sternly with cases of sexual assault.[34] How far this amendment serves the real purpose or not is the question to be answered in future. But this amendment which came due to the result of public outrage has added new chapter in the democracy where people elected in the legislature fail to perform their public duties were forced to take the matter with immediate concern. The Jan Lok Pal Bill is another example where the people is not approaching through their elected representatives to legislate but coming out of streets for enactment of legislation for better governance.

The questions which need serious concern are whether democracy is an ideal institution for making the Government? Whether the democracy is in Crisis? Whether representative democracy is only serving a class not the mass i.e. few at the cost of many? Whether we are emerging with the trend that people have to come on roads on show their anger? This is not the question which is raised and deliberated for the first time. The objective of having a democracy is an ideal path towards just society. *We*, as a society, have moved on to a newer system which then has seemed best suited to achieve the utopian dream of a *Just* social position.

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[33] Justice J.S Verma et al, "Report of the Committee on Amendments to Criminal Law" pp. 2-23 available at *<http://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf>* (last accessed 30 May, 2015).

[34] Justice J.S. Verma et al, "Report of the Committee on Amendments to Criminal Law" available at *<http://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf>* (last accessed 30 May, 2015) – The government notification [GOI Notification Number SO (3003) E, dated December 23, 2012] is attached alongwith.

RIGHT TO INFORMATION: A FUNDAMENTAL HUMAN RIGHTS

Mohit Saini*
Nidhi**

1. Introduction

The Indian Parliament had enacted the "Freedom of Information Act, 2002" in order to promote, transparency and accountability in administration. The National Common Minimum Program of the Government envisaged that "Freedom of Information Act" will be made more "progressive, participatory and meaningful", following which, decision was made to repeal the "Freedom of Information Act, 2002" and enact a new legislation in its place. Accordingly, "Right to Information Bill, 2004" (RTI) was passed by both the Houses of Parliament on May, 2005 which received the assent of the President on 15th June, 2005. "The Right to Information Act" was notified in the Gazette of India on 21st June, 2005. The "The Right to Information Act" became fully operational from 12th October, 2005. This new law empowers Indian citizens to seek any accessible information from a Public Authority and makes the Government and its functionaries more accountable and responsible. During the period of the implementation of the RTI Act i.e., October 2005 onwards, it has become evident that there are many anticipated and unanticipated consequences of the Act. These have manifested themselves in various forms, while some of the issues pertain to procedural aspects of the Government; others pertain to capacity building, and so on. The most important aspect to be recognized is that there are issues to be addressed at various ends for effective implementation of the Act.

There have been many discussions and debates about the effectiveness and impact of the Act. The Civil Society Organizations and Government agencies have been engaging themselves in the debate over various aspects of the Act and its effectiveness and interpretations. There is a broad consensus that the implementation of the Act needs to be improved to achieve the objectives. At the same time there is evidence to suggest that the information seekers too have to learn how to use the Act more effectively. While there is significant information – both anecdotal and quantitative – on the level of implementation of the Act, there was limited systematic and comprehensive review available for action by the appropriate Governments. This in turn necessitated a review of all the aspects necessary to analyze the current situation and draw up a plan to bridge the gaps.

* Assistant Professor, Guru Nanak Dev University, Amritsar, Punjab.
** Research Scholar, Panjab University, Chandigarh.

In the above context, Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pension, Government of India, had engaged PricewaterhouseCoopers (PwC) for assessing and evaluating the Act with specific reference to the key issues and constraints faced by the "Information Providers" and "Information Seekers". The scope of study included review of the experiences of the Central and State Governments in implementing the RTI Act, review of the experiences of various categories of information seekers, diagnosis of the situation, suggestion of the nature of interventions to be made and preparation of action plan/recommendations. The assessment of the current situation through various market research tools has resulted in identification of the current problem areas. These problems areas have been analysed/discussed in various workshops/meetings to define time-bound actionable steps to make the Act an effective tool of good governance[1].

2. Ideal Status of Right to Information

The ideal status the right to information deserves is that of a fundamental right under our Constitution. With the Constitutional guarantee to conform to, the Act could have been used as an instrument constituting the requisite authorities, apart from laying down the quintessential exceptions to granting information, such as national security and parliamentary privilege.

2.1 Right to Information Recognized as a Fundamental Right by the Judiciary

At this juncture, it is imperative to note that the Supreme Court, in a case,[2] recognized the 'right to know' as a right inherent in Fundamental Right to freedom of speech and expression guaranteed under article 19(1) (a) of the Constitution. Following this, a plethora of cases the right to information was recognized as a right implicit in the article 19(1) (a) and in article 21.[3]

In *Peoples Union for Civil Liberties* v. *Union of India,*[4] the Supreme Court observed that in Right of information is a facet of the freedom of 'speech and expression' as contained in Article 19(1)(a) of the Constitution of India. Right of information, thus, indisputably is a fundamental right.

However, every time the Constitution is amended, the 'basic structure' test laid down in *Keshavanada Bharti Case*[5] has to be satisfied. The test provides that a constitutional amendment should not be in derogation of the basic features of the

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[1] PricewaterhouseCoopers, Final Understanding the "Key Issues and Constraints" in implementing the RTI Act.

[2] *State of U.P* v. *Raj Narain* AIR 1975 865.

[3] Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

[4] AIR 1982 SC 1473.

[5] (1973) 4 SCC 225.

Constitution like judicial review, democracy or Rule of Law. While including the right to information is as a fundamental right, if at all there is any effect on any of the basic structure it would be in the nature of strengthening the democracy and making it progressive, as envisaged by the makers of our Constitution.

2.1.1 International Commitments

The freedom of information was recognised as a fundamental human right within the United Nations. In 1946, at its first session, the UN General Assembly adopted Resolution 59(1) which states that "Freedom of information is a fundamental human right and...The touchstone of all the freedoms to which the UN is consecrated".

Article 19 of the Universal Declaration of Human Rights, 1948 guaranteed that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

In 1960, the Economic and Social Council of the United Nations adopted a Declaration of Freedom of information.

In 1966, the International Covenant on Civil and Political Rights was adopted by the General Assembly. Article 19 of the Covenant guaranteed that-1. Everyone shall have the right to freedom of opinion: 2. everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any media of his choice; and 3. The exercise of the rights carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) for the protection of national security or of public order, or of public health or morals.

In 1980, the Commonwealth Law Ministers meeting in Barbados stated that "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information". Since then, the Commonwealth has taken a number of significant steps to elaborate on the content of that right.

1992 Rio Declaration on Environment and Development firstly recognised the fact that access to information on the environment, including information held by public authorities, is the key to sustainable development and effective public participation in environmental governance.

In 1993, the UN Commission on Human Rights established the office of the UN Special Reporter on Freedom of Opinion and Expression. Part of the Special Rapporteur's mandate is to clarify the precise content of the right to freedom of

opinion and expression. Part of the Special Reporter's mandate is to clarify the precise content of the right to freedom of opinion and expression.

In March, 1999, the Commonwealth Expert Group Meeting in London adopted a document setting out a number of guidelines on the right to know and freedom of information as a human right. The freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions. These principles and guidelines were endorsed later at the Commonwealth Heads of Government Meeting in November, 1999.[6]

3. The Right to Freedom of Speech and Expression and Right to Information

The right to freedom of expression is guaranteed in very similar terms by Article 19 of the *Universal Declaration on Human Rights* (UDHR),[7] a UN General Assembly resolution, and Article 19(2) of *International Covenant on Civil and Political Rights* (ICCPR),[8] a formally binding legal treaty ratified by 165 States.[9] The latter states: Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

All of the three regional human rights treaties – the *European Convention on Human Rights* (ECHR),[10] the *American Convention on Human Rights* (ACHR)[11] and the *African Charter on Human and Peoples' Rights* (ACHPR)[12] – guarantee the right to freedom of expression, respectively at Article 10, Article 9 and Article 13. These guarantees are largely similar to those found in the ICCPR.

It is not disputed that freedom of expression is a right of the greatest importance. At its very first session in 1946 the United Nations General Assembly declared:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.[13]

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[6] Krishan Pal Malik, *Right to Information*, Allahabad Law Agency, Law Publishers, Faridabad, 2013, p. 2.

[7] United Nations General Assembly Resolution 217 A (III), 10 December 1948.

[8] UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.

[9] As of March 2010.

[10] Adopted 4 November 1950, entered into force 3 September 1953.

[11] Adopted 22 November 1969, entered into force 18 July 1978.

[12] Adopted 26 June 1981, entered into force 21 October 1986.

[13] Resolution 59(1), 14 December 1946. The term freedom of information as used here was meant in its broadest sense as the overall free flow of information and ideas in society, or freedom of expression.

Regional courts and other bodies, as well as national courts around the world, have reaffirmed this. For example, the Inter-American Court of Human Rights has stated:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.[14]

The European Court of Human Rights has noted:

Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.[15]

And the African Commission on Human and Peoples' Rights has indicated, in respect of Article 9 of the African Convention:

> This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country.[16]

At the same time, freedom of expression is not absolute and every system of law provides for some limitations on it. Article 19(3) of the ICCPR provides:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (order public), or of public health or morals.

This has been interpreted as meaning that only restrictions which meet a strict three-part test are considered to be legitimate.[17]

International guarantees of the right to freedom of expression have a number of key features. First, opinions are absolutely protected by Article 19(1) of the ICCPR. Technically, of course, opinions are not expressions. But it is significant that they are afforded absolute protection. This means that it is permissible to think the most evil and depraved thoughts, although giving expression to them may legitimately warrant a sanction.

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[14] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.

[15] *Handyside* v. *United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49.

[16] *Media Rights Agenda and Others* v. *Nigeria*, 31 October 1998, Communication Nos. 105/93, 130/94, 128/94 and 152/96, para. 52.

[17] *Mukong* v. *Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

Second, the right applies to 'everyone'. It must be protected "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[18]

Third, it applies to information and ideas of any kind. As the UN Human Rights Committee, the body of experts tasked with overseeing compliance with the ICCPR, has indicated, this includes any information or ideas which may be communicated:

> Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others....[19]

It also includes factually incorrect statements, opinions which appear to lack any merit, and even offensive statements. As the European Court of Human Rights has noted:

> It matters little that an opinion is a minority one and may appear to be devoid of merit since it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas.[20]

Fourth, protection is also wide in terms of the manner in which a communication is disseminated. This is signalled by the phrase "through any other media of his choice" in Article 19(2) of the ICCPR as well as the term "capable of transmission to others" in the quote from the Human Rights Committee above. The manner of dissemination, as well as the form of the expression, has often been taken into account by international courts when assessing the legitimacy of a restriction. Screaming a statement out to an angry crowd is not the same as incorporating that statement into a poem.[21]

Fifth, the guarantee protects not only the right to impart information and ideas – the right of the speaker; protection is extended to the rights to seek and receive information and ideas – the rights of the listener. As the Inter-American Court of Human Rights put it so compendiously:

> When an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.[22]

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[18] Article 2(1) of the ICCPR.

[19] *Ballantyne and Davidson* v. *Canada,* Communication No. 359/1989 and *McIntyre* v. *Canada,* Communication No. 385/1989, 31 March 1993, para. 11.3.

[20] *Hertel* v. *Switzerland,* 25 August 1998, Application No. 25181/94, para. 50.

[21] See, for example, *Karatas* v. *Turkey,* 8 July 1999, Application No. 23168/94, para. 52 (European Court of Human Rights).

[22] Note 8, para. 30.

4. Right to know under Article 21

Article 21 enshrines right to life and personal liberty. The expressions "right to life and personal liberty" are compendious terms, which include within themselves variety of rights and attributes. Some of them are also found in Article 19 and thus have two sources at the same time.[23] In *R.P.Limited v Indian Express Newspapers*[24] the Supreme Court read into Article 21 the right to know. The Supreme Court held that right to know is a necessary ingredient of participatory democracy. In view of transnational developments when distances are shrinking, international communities are coming together for cooperation in various spheres and they are moving towards global perspective in various fields including Human Rights, the expression "liberty" must receive an expanded meaning. The expression cannot be limited to mere absence of bodily restraint. It is wide enough to expand to full range of rights including right to hold a particular opinion and right to sustain and nurture that opinion. For sustaining and nurturing that opinion it becomes necessary to receive information. Article 21 confers on all persons a right to know which include a right to receive information.

The ambit and scope of Article 21 is much wider as compared to Article 19(1) (a). Thus, the courts are required to expand its scope by way of judicial activism. *In P.U.C.L. v U.O.I.*[25] the Supreme Court observed that Fundamental Rights themselves have no fixed contents; most of them are empty vessels into which each generation must pour its contents in the light of its experience. The attempt of the court should be to expand the reach and ambit of the Fundamental Rights by process of judicial interpretation. There cannot be any distinction between the Fundamental Rights mentioned in Chapter III of the constitution and the declaration of such rights on the basis of the judgments rendered by the Supreme Court.

Further, it is well settled that while interpreting the constitutional provisions dealing with Fundamental Rights the courts must not forget the principles embodied in the international conventions and instruments and as far as possible the courts must give effect to the principles contained in those instruments. The courts are under an obligation to give due regard to the international conventions and norms while construing the domestic laws, more so when there is no inconsistency or conflict between them and the domestic law.

5. Statutory Response

Besides constitutional provisions we have certain statutory provisions also, which confer right to information upon the citizens. The notable one among them is:

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[23] *Kharak Singh* v. *State of U.P.* AIR 1963 SC 1295.
[24] AIR 1989 SC 190.
[25] JT 2003 (2) 528.

5.1 Right to Information in Case of Food and Drugs

Section 23 r/w Rule 32[26] of the Prevention of Food Adulteration Act, 1954 confers on consumers of food products a right to be informed whether or not the article of food is vegetarian or non-vegetarian. As regards drugs and cosmetics, necessary amendments have not been made in the relevant statute. In *Ozir Husain v U.O.I*[27] a division bench of Delhi High court observed that it is the Fundamental Right of the consumers to know whether the food products, cosmetics and drugs are of non-vegetarian or vegetarian origin, as otherwise it will violate their Fundamental Right under Article 19(1) (a), 21 and 25 of the constitution. The packages of non-vegetarian products should bear a symbol giving their non -vegetarian origin; and a package of a vegetarian product should also bear a symbol. To enable a person to practise the beliefs and opinions, which he holds, in a meaningful manner, it is essential for him to receive the relevant information; otherwise he may be prevented from acting in consonance with his beliefs and opinions. In case a vegetarian consumer does not know the ingredients of the drugs or food products which he/she wishes to buy, it will be difficult for him/her to practise vegetarianism. Moreover, reading Article 19(1) (a) along with International Covenant on Civil and Political Rights, it must be recognized that right to freedom of speech and expression includes freedom to seek, receive and information of ideas. Further Article 21 confers on every person right to receive information and also a right to know the ingredients or the constituents of drugs and food products. However, as far as life saving drugs are concerned a limited exception will apply because a patient, who is suffering from serious ailment, which can be fatal if a life saving drug is not administered to him, need not be informed in his own interest as to whether or not the drug contains part of any animal as it is conducive to the preservation of life and, therefore, in tune with Article 21 of the constitution. Thus the High Court issued certain directions about declarations and different coloured symbols to be displayed on packages of drugs and cosmetics regarding their vegetarian or non - vegetarian origin, till amendments are made in the Act.

5.2 Right to Information in Cases of Venereal or Infectious Diseases

The welfare of the society is the primary duty of every civilized State. Sections 269 to 271 of *the Indian Penal Code*, 1860 make an act, which is likely to spread infection, punishable by considering it as an offence. These sections are framed in order to prevent people from doing acts, which are likely to spread infectious diseases. Thus a person suffering from an infectious disease is under an obligation to disclose the same to the other person and if he fails to do so he will be liable to be prosecuted under these sections. As a corollary, the other person

[26] As amended in 2001.
[27] AIR 2003 Delhi 103.

has a right to know about such infectious disease. *In Mr. X v Hospital Z*[28] the Supreme Court held that it was open to the hospital authorities or the doctor concerned to reveal such information to the persons related to the girl whom he intended to marry and she had a right to know about the HIV Positive status of the appellant. A question may, however, be raised that if the person suffering from HIV Positive marries with a willing partner after disclosing the factum of disease to that partner, will he still commit an offence within the meaning of Section 269 and 270 of I.P.C. It is submitted that there should be no bar for such a marriage if the healthy spouse consents to marry despite of being aware of the fact that the other spouse is suffering from the said disease. The courts should not interfere with the choice of two consenting adults who are willing to marry each other with full knowledge about the disease. It must be noted that in *Mr. X v Hospital Z*[29] a three judge bench of the Supreme Court held that once the division bench[30] of the Supreme Court held that the disclosure of HIV Positive status was justified as the girl has a right to know, there was no need for this court to go further and declare in general as to what rights and obligations arise in such context as to right to privacy or whether such persons are entitled to marry or not or in the event such persons marry they would commit an offence under the law or whether such right is suspended during the period of illness. Therefore, all those observations made by the court in the aforesaid matter were unnecessary. Thus, the court held that the observations made by this court, except to the extent of holding that the appellant's right was not affected in any manner by revealing his HIV Positive status to the relatives of his fiancée, are uncalled for. It seems that the court has realized the untenably of the earlier observations and the practical difficulties, which may arise after the disclosure of HIV status.

5.3 Right to Know About the Information under the Control of a Public Authority

In our present democratic framework, free flow of the information for the citizens suffers from several bottlenecks including the existing legal framework, lack of infrastructure at the grass root levels and an attitude and tendency of maintaining secrecy in the day to day governmental functioning. To remove these unreasonable restrictions the Right to Information Act, 2005 (RTIA-05) has been enacted by the Parliament. The Act provides for freedom to every citizen to secure access to information under the control of public authorities consistent with public interest, in order to promote openness, transparency and accountability in administration and in relations to matters connected therewith or incidental thereto. The Act is in accord with both Article 19 of the constitution

[28] (1998) 8 SCC 296.
[29] JT 2002 (10) SC 214.
[30] *Mr. X* v. *Hospital Z* (1998) 8 SCC 296.

as well as Article 19 of the Universal Declaration of Human Rights, 1948.The act will enable the citizens to have an access to information on a statutory basis. With a view to further this objective, Section 3 of the Act specifies that subject to the provisions of this Act, every citizen shall have the right to freedom of information. Obligation is cast upon every public authority u/s 4 to provide information and to maintain all records consistent with its operational requirements duly catalogued, indexed and published.

It must be noted that right to receive information from public authorities, which includes judiciary, is not an absolute right but is subject to statutory and constitutional restrictions. For instance, freedom to speech and expression as provided under Article 19 (1) (a) of the constitution is subject to reasonable restrictions as provided under Article 19(2). Similarly, right to know under Article 21 can be restricted by a procedure established by law which is just, fair and reasonable. On the statutory side, under the Right to Information Act, 2005 (RTIA-05), a citizen is not entitled to an absolute freedom of information. In certain cases information can be withheld from a citizen. Besides the RTIA-05 there may be other statutes also where information may be withheld from a citizen. For instance, the report of an inquiry made against a judge of High Court under the provisions of the Judges Enquiry Act, 1968 may be withheld from the public by the Chief Justice of India (CJI). *In Indira Jaising* v. *Registrar General,* Supreme Court of India[31] an inquiry report was made by the committee to the CJI, in respect of alleged involvement of sitting judges of the High Court of Karnataka in certain incidents. The petitioner seeks the publication of the inquiry report. The Supreme Court held that it is not appropriate for the petitioner to approach this court for relief or direction for release of the report, for what the CJI has done is only to get information from peer judges of those who are accused and the report made to the CJI is wholly confidential. It is purely preliminary in nature, adhoc and not final. The court further held that in a democratic framework free flow of information to the citizens is necessary for proper functioning, particularly in matters, which form part of public record. The right to information is, however, not absolute. There are several areas where such information need not be furnished. The Freedom of Information Act, 2002 (now RTIA-05) does not say in absolute terms that information gathered at any level, in any manner and for any purpose shall be disclosed to the public. The inquiry ordered and the report made to the CJI being confidential and discreet is only for the purpose of his information and not for the purpose of disclosure to any other person. The court thus rejected the contention to release the said report. The court, however, made it clear that if the petitioner can substantiate that any criminal offence has been committed by any of the judges mentioned in the course of the petition, appropriate complaint can be lodged before a competent authority for taking action by complying with requirements of law.

[31] 2003 (4) SCALE 643.

5.4 Right to Information and Electronic Governance

Digital technologies and new communication systems have made dramatic changes in our lives. Business transactions are being made with the help of computers. Information stored in electronic form is cheaper and easier to store. Thus, keeping in view the urgent need to bring suitable amendments in the existing laws to facilitate electronic commerce and electronic governance, the Information Technology Act, 2000 was enacted by the Parliament. The aim of the e-governance is to make the interaction of the citizens with the government offices hassle free and to share information in a free and transparent manner. It further makes the right to information a meaningful reality. In a democracy, people govern themselves and they cannot govern themselves properly unless they are aware of social, political, economic and other issues confronting them. To enable them to make a proper judgment on those issues, they must have the benefit of a range of opinions on those issues. This plurality of opinions, views and ideas is indispensable for enabling them to make an informed judgment on those issues, to know what is their true interest, to make them responsible citizens, to safeguard their rights as also the interests of society and State. All the constitutional courts of leading democracies have recognized and reiterated this aspect. *In U.O.I v Association for Democratic Reforms*[32] the Supreme Court observed that the citizens of India have a right to know every public act, everything that is done in public way by the public functionaries. Public education is essential for functioning of the process of popular government and to assist the discovery of truth and strengthening the capacity of an individual in participating in the decision making process. The right to get information in a democracy is recognized all throughout and it is a natural right flowing from the concept of democracy. Thus e-governance and right to information are interrelated and are two sides of the same coin. With the enactment of the Information Technology Act, 2000 more and more transparency is expected in governmental functioning by keeping people aware of the State's plan, policies, objectives and achievements.

5.5 Right to Know About Antecedents of Election Candidates

In a democratic form of government, voters are of utmost importance. They have right to elect or re-elect on the basis of the antecedents and past performance of the candidate. For maintaining purity of elections and a healthy democracy, voters are required to be educated and well informed about the contesting candidates. Such information would include assets held by the candidate, his qualification including educational qualification and antecedents of his life including whether he was involved in a criminal case and if the case is decided, its result, if pending–whether charge has been framed or cognizance has been taken by the court. There is no necessity of suppressing the relevant facts from

[32] (2002) 5 SCC 294.

the voters. *In U.O.I v Association for Democratic Reform*[33] the Supreme Court recognized this right of the voter. The court held that the decision making process of a voter would include his right to know about the public functionaries who are required to be elected by him. Moreover, Article (19) (1) (a) of the constitution provides for freedom of speech and expression. Voter's speech and expression in case of election would include casting of vote. For this purpose, information about the candidate to be selected is a must. *In P.U.C.L v U.O.I*[34] the Supreme Court held that in an election petition challenging the validity of an election of a particular candidate, the statutory provisions would govern the respective rights of the parties. However, voter's Fundamental Right to know antecedents of a candidate is independent of statutory rights under the election laws. Members of a democratic society should be sufficiently informed so that they may cast their votes intelligently in favour of persons who are to govern them. There can be little doubt that exposure to public gaze and scrutiny is one of the surest means to cleanse our democratic governing system and to have competent legislatures. The court further observed that securing information on the basic details concerning the candidates contesting for elections to the Parliament or State legislatures promotes freedom of expression and therefore the Right to information forms an integral part of Article 19(1) (a). This Right to information is, however, qualitatively different from the right to get information about public affairs or the right to receive information through the press or e-media, though, to a certain extent, there may be overlapping. The right to vote is a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the Fundamental Right enshrined in Article 19(1) (a).

6. Conclusion

Every citizen has a right to impart and receive information as part of his right to information. The State is not only under an obligation to respect this right of the citizen, but equally under an obligation to ensure conditions under which this right can be meaningfully and effectively enjoyed by one and all. Right to information is basic to and indivisible from a democratic polity. This right includes right to acquire information and to disseminate it. Right to information is necessary for self-expression, which is an important means of free conscience and self-fulfilment. It enables people to contribute on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can be circulated. This right can be limited only by reasonable restrictions under a law for the purposes mentioned in Article 19(2) of our constitution. Hence no restriction can be placed on the Right to information on the grounds other than those specified under Article 19(2). The

[33] (2002) 5 SCC 294.
[34] JT 2003 (2) SC 528.

said right cannot be denied by creating a monopoly in favour of the government or any other authority.[35] Human history is witness to the fact that all evolution and all progress are because of power of thought and that every attempt at thought control is doomed to failure. An idea can never be killed. Suppression can never be a successful permanent policy. It will erupt one day. The Constitution of India guarantees freedom of thought and expression and the only limitation being a law in terms of Article 19(2) of the constitution. Thought control is alien to our constitutional scheme. Further, people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which people of a free country aspire in the broaden horizon of the right to life in this age on our land under Article 21 of the Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon the responsibility to inform. Thus it can be concluded that citizens 16 have a right to information and right to know about public affairs and governmental functioning. The legislature, realizing the need and urgency of this requirement, has shown its sensitivity and positive attitude by conferring upon citizens of India various statutory rights, which advance the Right to information and expand its horizons to the deserving limits.

[35] *Tata Press Ltd* v. *M.T.N.L* (1995) 5 SCC 13.

LAW AND SOCIETY: GENDER EQUALITY AND PROTECTION UNDER THE CONSTITUTION

Dr. Anupam Bahri *

1. Introduction

The Indian society like a number of classical societies was patriarchal. The patriarchal values regulating sexuality, reproduction and social production (meaning total conditions of production) prevailed and were expressed through specific cultural metaphors. Overt rules prohibiting women from specific activities and denying certain rights did exist. But more subtle expression of patriarchy was through symbolism giving messages of inferiority of women through legends highlighting the self-sacrificing, self-effecting pure image of women and through the ritual practices which day in and day out emphasized the dominant role of a woman as a faithful wife and devout mother.

For centuries, women have been pushed aside from the race of development in the name of customs, traditions and religion. As a result, they have been denied the opportunities for their social, economic and political development leading to a lower status in the society. The social customs, religiously sanctioned rituals, the authoritarian structure of the family organisation, the accepted mode of socialization of the young girls and the very rigidly defined roles and activities of women have contributed to the social degradation of women in the Indian society.

In the Vedic age the women were highly esteemed and they enjoyed equal socio-cultural status. The early Rig Vedas mentioned of women as equals who participated in all the household activities related both to social and economic spheres. No important function could be performed by man alone. Man was considered incomplete without the women in those days. The women had the rights to read and recite the Vedas and other sacred as well as secular texts. Several of them played very important roles in the formulation of social policies and code of conduct. But in the later Vedic period, the status of women underwent significant changes. Degeneration on society brought about many social evils. Equality of socio-cultural opportunities to express them was also denied. Education of women, which was an accepted norm during the Vedic period, slowly began to be neglected and later on girls were totally denied any access to education. Upanayana or the sacred thread ceremony, which was performed to initiate a person into the Vedic studies, was prohibited in the case of women and Shudras by the Manu codes, thus closing the doors for many formal education to women. By circa 8th century AD the marriageable age for

* Assistant Professor of Sociology, UILS, Panjab University, Chandigarh.

girls was lowered to 9 to 10 years, which gave a final blow to any effort at educating women.

The heterodox religions like Jainism and Buddhism which sprang up challenging the Brahmanical (Vedic orthodox) religion, too were based on the philosophy of avoidance of materialism. Women were regarded as a part of materialism, as both Gautama and Mahavir discarded their wives Yashodhara and Yashoda, respectively, and children in their so called pursuit for 'Truth'. Moreover, nuns in both these religions were second to male monks. They walked behind the monks in processions and were not given any position of authority. Amongst the Jains, even today the nuns outnumber the monks but still women play a second fiddle to the monks. The nuns who join this religion do so not because of any religious conviction and faith but by compulsion. As dowry is very high amongst Jains not many parents can marry off their daughters. Religion comes handy, by accepting them as nuns as it cannot provide a "dignified" life outside its confines.

In the Post-Vedic era the sexuality and regulation of women were controlled and judged by her purity. Woman during this vast span of time not only occupied an inferior position but was made to feel that her position was subordinate to men in the society.

The position of women, however, improved during the British period because of two major movements. These were Social Reform Movement of the nineteenth century and the Nationalist Movement of 20th century. Both these movements raised the question of equal status of women. The issues, which attracted were Sati System, the ill-treatment of widows, the ban on widow marriage, polygamy, child marriage, denial of property rights and education to women etc.

The pre-independence period, thus, marked the beginning of awareness of the sufferings of women. During this phase a favourable climate was created to improve the status of women through legal reforms. Many laws were enacted which tried to eradicate certain social evils. To mention a few, the Child Marriage Restraint Act, Sati Abolition Act, Hindu Women's Right to Property Act etc. Besides these social legislation, there were other legal provisions which affected women's work status, such as limiting hours of work in organised industries, prohibiting night work, restricting work in the mines establishment of crèches, etc.

The independent India has seen tremendous functional changes in the status and position of women in Indian society. The Constitution of India has granted franchise to Indian women. This has brought women on an equal footing with men. The adult franchise has much to remove sex discrimination. The Constitution has laid down as a fundamental right the equality of the sexes.

The government also enunciated numerous measures over the years for improving the conditions of women through its various commissions, committees, institutions and policy documents. The various policy measures on the women development are in the form of the following aspects:

1. Constitutional Provisions.
2. Legislative Measures.
3. Appointment of Committees and Commissions.
4. Women Development Plans.
5. Creation of Institutions
6. Support to Voluntary Organisations
7. National Policy for Empowerment of women

2. Constitutional Provisions

The framers of the constitution were conscious of the social maladies, particularly with reference to the Indian women. They realised the unequal status of women and assured that women get equal rights. The fundamental rights enshrined in Articles 14, 15 and 16 guarantees the principle of equality before law, equality of sexes and equal opportunities in all walks of life.

The Directive Principles of State Policy embody the major policy goals of the welfare state. The Directive Principles of State Policy, which have a special bearing on the status of women, are:

Article 39(a) directs the state to frame policy on adequate means of livelihood.

Article 39(d) directs the state to ensure equal pay for equal work for both men and women.

Article 39(e) directs the state to ensure that health and strength and safeguarded for women and children.

Article 42 directs the state to ensure just and humane conditions of work and maternity relief.

Article 44 provides the state shall endeavour to secure for citizens a

Article 51A(c) provides that it shall be the duty to every citizen of India to renounce practices derogatory to the dignity of woman.

3. Legislative Measures

Besides providing a formal structure of equality, the government as it is found in many of third world countries used law as a major instrument to change society. One of the major planks of government activities with regards to women is

legislation. Many legislations have been passed since independence which have been considered quite revolutionary.

A series of labour legislations have contributed to the improvement in the status of women. The Factory Act, Minimum Wages Act, Labour Welfare Regulation Act, Contract Labour Act, Employees State Insurance Act, Plantations Act are some of the legislations who seeks to protect interests of the women and provide for the benefit of the women. The latest addition to this list of legislations are the constitution 73rd and 74th amendment act which seek to provide reservation of at least 33% representation in Panchayati Raj Institution and Urban Local Bodies for Women.

These acts were passed to bring about significant change in the status and the position of women in India. The violation of these acts can be challenged in the court where they exist. However, these acts were not effective in ensuring equality of status and opportunity for women. The experience shows that the legislative actions have not effectively changed Women's situation. When the question arises between conflicting rights of men and women, women rights are mostly seen as secondary. A radical change in the attitude of women induced by and awareness of their rights which are constitutionally guaranteed and legally protected will be the first step in the complex process of transforming the social structure.

4. Appointment of Committees and Commissions

An important landmark in the history of women's welfare and development was the appointment of committees and commissions. A committee on the status of Indian women under the chairmanship of Phulrinu Guha, a social and political worker who later became the then state minister of social welfare, was appointed in 1974. The main task of the committee was to undertake comprehensive examination of all the questions relating to the rights and status of women in the context of changing social and economic condition in the country and the problem relating to the advancement of women. The committee submitted its report entitled "Towards Equality" in 1975. The report of the committee pointed out that the dynamics of social change and development had adversely affected women and they manifested all signs of a backward group, i.e., declining sex ratio, lower life expectancy, higher infant and maternal mortality, declining work participation, increasing illiteracy, rising migration etc. it emphasised the need for a national machinery to coordinate and intensity the efforts and measures needed for women development.

The constitution of national commission for women is another important measure for women welfare and development. Investigation and examination of all matters relating to safeguard provided for women under the constitution and other laws are entrusted to the commission. The commission will examine the

laws to suggest amendments. It will also oversees the implementation of the laws.

The international decade of women 1975 to 1985 had a given a momentum to women development to be adopted in the society and has focused priority attention to women with effective mobilisation of social awareness and public opinion on this front. As a result, we have a blueprint of action.

5. Five-Year Plans

The instrument of planning has been the most positive indicator of policy formulation for women. The five year plans have helped in the process of the development of women. In each plan women development issues especially their economic and health received considerable attention and a number of welfare measures were undertaken to ameliorate their conditions. If we analyse the trends of planning, it would be noticed that the First Five-Year Plan laid down stress on very important parameters of women welfare and development, i.e. education, health, employment, etc., the second, third, fourth and fifth plans carried on the same strategy. It was only in the mid-seventies the setting up of a committee to survey the status of women in 1974, and preparation for celebrating the International Women's Year in 1975 that a heightened consciousness arose in government circles over intensifying the efforts towards the development of women.

6. Establishment of Institutions

Another important landmark in the history of Women Welfare and Development is the creation of Institutions and setting up of Organisations to implement various Women Welfare and Development Programmes. The Central Social Welfare Board (CSWD) was the first organisation set by the Union Government in 1953. The CSWB was given responsibility for promoting and developing welfare services for women and children.

7. Support to Voluntary Organisations

One of the instruments used in the post-independence period to develop programmes and services for women has been the Grants-in-Aid System administered through voluntary agencies. There are some of the Ministries and Departments, which give grants to voluntary organisations: # some other autonomous bodies give technical and financial assistance to voluntary organisation.

8. National Policy for the Empowerment of Women

Empowerment of women became one of the primary objectives of the Ninth Five-Year Plan. The year 2001 was observed as women Empowerment year by UN. The National Policy for the Empowerment of Women was evolved in the

same year. The policy recognizes the causes of gender inequality which are related to social and economic structure. The policy underlines the need for mainstreaming gender perspective in the development process.

9. Women Development Programmes

Government programmes for women's development began as early as 1954. Apart from giving grants to voluntary agencies, the Central Social Welfare Board initiated some new programmes of assistance which were developmental in nature such as the scheme of welfare extension projects, socio-economic programmes of scheme of working women. Thereafter, the Ministry of Social Welfare also sponsored programmes and activities of women's welfare and development, through grants-in-aid. The other ministries such as Agriculture, Health, Rural Development, Labour etc., also contributed for the development of women in addition to the programmes and services of the Department of Women and Child Development, which has the coordinating responsibilities.

Some of the official programmes for the welfare and development of women are:

- Socio-Economic Programme
- Condensed Course of Education and Vocational Training
- Short Stay Homes for Women and Girls
- Hostels for Working Women
- Employment and Income Generation-cum-Production Units
- Creches for Working and Ailing Mothers' Children
- Support to Training and Employment Programme for Women (STEP)
- Mahila Samriddhi Yojana (MSY)
- Indira Mahila Yojana (IMY)
- Special Thrust on Employment and Training for Women
- Development of Women and Children in Rural Areas (DWCRA)

10. Conclusion

Despite laws that provide for some relief to her in many case like marital, domestic, work places and political but in practice she is constantly urged to submit, to adjust, and to have patience. She is denied the right to information and education, with the result that she is alienated from economic and social mainstream.

It appears that the Indian legislature and constitution of India is fully conscious about the need to protect the interest of women and to give them a status equal to their male counterparts in the society. However, the enforcement aspect generally remains neglected and needs improvement

The rights given in theory will not suffice. It requires an effective, strong well organized body to organize and execute the policy of the Government as incorporated in the Constitution. The Will implement should be a part of the new system.

The old concept of the State was that the State is mainly concerned with maintenance of law and order and protection of life and property of its subjects. But we are living in the era of "Welfare State," where a State seeks to promote the socio-economic well-being of the people.

Women's problems are rooted in the image of her as a dependent passing from the custody of her father to that of her husband. As such, her individuality, her rights, her needs, are automatically subject to those of her husband and then to her in-laws, since they are related to her husband.

In the present economic set up, her work in the house, far from being seen as subsidising her husband's and adding value to market goods is denigrated and in fact not visible in economic terms. The system depends on her from producing, socializing, training and nurturing its future and present work force and then makes this major function she performs degrading or at least unimportant.

Even the marketed function she performs are undermined in status and cost due to the circular logic that since she depends most of her time and effort in "unproductive" labour, the "productive" work s of lesser value.

Being thus stripped of all economic power by such a system and being further impoverished by the patriarchal patterns of inheritance, she is at the mercy of her exploiters. The law, designed for and by men does little to remove the disparity that actually exists since it would upset all established economic and social processes.

In Hindu Law she is seen as merging her identity with her husband and the two are considered one entity, represented by the husband. In Muslim law she is equal to half a man for all legal and social purposes. In Christian law she is subject to her husband as the body is to the head.

Now, in respect of property matters, the husband and the life are two different persons. They can own separate property; they can even sue each other to settle property dispute. The share of one spouse on the death of the other is now regulated by law.

In respect of criminal matters, husband and wife cannot be guilty of conspiring together, or of larceny from each other while living together. Certain matrimonial communications are privileged. One spouse is not normally compellable to give evidence against the other, but may give, in general, evidence on behalf of an accused spouse.

Despite Laws that provide for some relief to her in case of violence against her, in spite of the avenues open to her on paper to seek redress of marital grievances in the courts, in practice she is constantly urged to submit, to adjust, to have patience. She is denied access to information and education, with the result that she is alienated from the economic and social mainstream.

MONEY LAUNDERING AND BLACK MONEY: RECENT DEVELOPMENTS IN LAW

Neha Awasthi*

1. Introduction

The generation of black money and money laundering have close nexus. The black money generated through illegal means like, drug trafficking, weapon trading, terrorism, stolen property, bribes etc. is sought to be legitimized through process of money laundering. Black money is also generated through evasion of taxes. In the globalized world there can be illegal investment outside the country. Generation of large scale black money has serious impact on economy like loss of revenue, increasing inflation, unequal distribution of wealth, retarded growth and increase in crime and antisocial activities. Money laundering also poses a serious threat not only to the overall financial system of the countries, but also to their integrity and sovereignty because of its connection with serious crimes.

In India, the Prevention of Money Laundering Act, 2002 was enacted to prevent money laundering and provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto. The Act also addressed international obligations under the Political Declaration and Global Programme of Action adopted by the General Assembly of the United Nations to prevent money laundering.[1] The 2009 Amendments of PMLA further introduced new definitions to clarify and strengthen the provisions related to attachment of property involved in money laundering and its seizure and confiscation. More offences were added in Parts A and B of the Schedule to the Act, including those pertaining to insider trading and market manipulation as well as smuggling of antiques, terrorism funding, human trafficking other than prostitution, and a wider range of environmental crimes. A new category of offences with cross-border implications was introduced as Part C to the Schedule of the Act. In 2010, India became a member of the Financial Action Task Force[2] (FATF) and Asia Pacific Group[3] (APG) on Money

* Ph.D. Research Scholar at Rajiv Gandhi National University of Law, Punjab, Patiala.

1 United Nation Declaration on Transnational Organised Crime, December 2000.

2 India joined as 34th member of Financial Action Task Force (FATF) on 25th June 2010.The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations (40+9) are recognized as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard.

3 Asia Pacific Group (APG) on money laundering was established as an autonomous regional anti-money laundering body in 1997 at the 4th Asia Pacific Money Laundering Symposium in Bangkok (Thailand) to facilitate the adoption, implementation and enforcement of internationally adopted anti-money laundering and anti-terrorist financing standards set out in the FATF recommendation.

Laundering, for effective implementation and enforcement of internationally accepted standards against money laundering and the financing of terrorism.

Further amendments in the Prevention of Money Laundering Act, 2002 by Amendment Act of 2013, to bring this law at par with international standards and it included more reporting entities in addition to Banks, Financial Institutions and Intermediation for verification and maintenance of record of transactions and identity. The Director of FIU-IND is empowered by new Section 12A can make inquiries for non-compliance of reporting entities. The new provision in section 12 (1) also requires to identity 'beneficial owner'[4] and 'attempted transaction'.[5] The Director FIU-IND has been empowered by section 13 (1A) to conduct special audit of reporting entity with regard to their obligation.

Under the amend Section 5 (1) Procedure for attachment of property involved in money laundering does not require that a person has been charged of having committed a scheduled offence. The provision for freezing of property has also been included in section 17 (1A) to enable seizure or attachment or confiscation at the later stage. The confiscation of property has also been made independent of conviction under amended provisions of Section 8 (5) to cover cases where money laundering is committed by a person who has not committed scheduled offence or property is in the hands of a person who has not committed any offence. Section 24 is also amended to provide that there shall be a presumption against the accused that proceeds of crime are tainted and may also be so presumed against any other person.

As a major change, the 2013 amendment Act has omitted Part B of the Scheduled Offences and offences listed therein have been shifted to Part A, with the result that now there is no need of threshold amount of thirty lakh for any offence. Beside there are some procedural changes in the Prevention of Money Laundering Act, 2002 through 2013 Amendments. New Section 58A makes it mandatory on the part of the Special Court to release the property, in case the person is acquitted by the corresponding law of any other country. As such the PMLA has introduced the concept of 'corresponding law' to link the provisions of Indian law with the laws of foreign countries and provide for transfer of the proceeds of the foreign predicate offence in any manner in India.

In a way PMLA deals with the proceeds of serious offences. Its provisions are applicable when these proceeds are illegally conversed into legitimate income or earning. On the other hand black money is generated through evasion of tax which itself is unlawful. Recently there are legislative developments to include evasion of tax as predicate offence under the PMLA. The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 has

[4] The Prevention of Money Laundering Act, 2002, S. 12 (1) d.
[5] *Id.*, S. 12 (1) (c).

amended Part C of the Schedule of PMLA by Section 58 to include offence of willful attempt to evade any tax, penalty or interest as a predicate offence to money laundering.

2. Genesis of Black Money

Black money is a term used in common parlance to refer to money that is not fully legitimate in the hands of the owner. This could be for two possible reasons. *First* money could have been generated through illegitimate activities not permissible under the law, like crime, drug trade, terrorism, and corruption, all of which are punishable under the penal laws, legal framework of the State. The *Second* and perhaps more likely reason is that the wealth may have been generated and accumulated by failing to pay the dues to the public exchequer in one form or other. In such cases earning of a person could be legitimate and otherwise permissible under the law of the land but such person has failed to report the income so generated, comply with the tax requirements, or pay the dues to the public exchequer, leading to the generation of black money. The problem becomes more grave and complex when such black money is stashed in foreign lands to evade liability.[6]

A comparison of the two ways in which black money is generated is fundamental to understanding the problem and devising the appropriate policy with which it can be controlled and prevented by the public authorities. At the very outset, it becomes clear that the first category is one where a strongly intolerant attitude with adequate participation of all State arms can produce results. It is the second category where the issue becomes far more complex and may require modifying, reforming, and redesigning major policies to promote compliance with laws, regulations, and tax laws to deter the active economic agents of society from generating, hoarding, and illicitly transferring abroad such unaccounted wealth.[7]

3. Black Money in India

According to a report released by Global Financial Integrity (GFI) in December 2012, India is among the top 10 developing countries in the world with a black money outflow of $1.6 billion (Rs. 8,720 crore) in 2010. Total outflow of black money from India since independence until 2010 was $232 billion, generally in the form of corruption, bribery and kickbacks. The cumulative value of illicit assets held by Indians during the same period is estimated to be $487 billion. US think-tank Global Financial Integrity had estimated India had lost $123 billion (Rs. 6.76 lakh crore) in "black money" in 2001-10. This is money that is earned and transferred illegally abroad in tax havens, such as the Cayman Islands, typically to avoid taxes. In the post-reform period of 1991-2008, deregulation

[6] Black Money - White Paper, May 2012, Ministry of Finance Department of Revenue Central Board of Direct Taxes, New Delhi, para 1.3.1.

[7] *Id.*, para 1.3.2.

and liberalization accelerated the outflow of illicit money from the Indian economy. About a third of India's black money transactions are believed to be in real estate, followed by manufacturing and shopping for gold and consumer goods. If hidden incomes of Rs. 25 lakh crore were to be disclosed and taxed at 30%, it would generate Rs. 8.5 lakh crore, enough to build a 2,000-bed super-specialty hospital in each of India's 626 districts.[8]

4. Impact of Black Money

It has been pointed out that the flow of black money can seriously affect the entire economic system of India and it can impact the system in following manner:

1. Less Tax for the Government and flow of black money in underground economy.
2. Leads to Mass Poverty with unequal distribution of wealth.
3. Shortage of funds for upgradation of technology.
4. Diversion of black money in concealed investment in Gold etc.
5. Black money promotes corruption.
6. Inflated Rates of Real Estate.
7. Leads to transfer of Indian Funds Abroad to Safe Heavens.
8. Encourages Anti-Social Activity.[9]

5. Measures taken to Tackle Black Money

The countries across the world have started a concerted global effort and as a part of global effort against black money, India has played a proactive role in pointing out deficiencies in the assessment of various countries by the Peer Review Group of the Global Forum. Government is also playing an active role in ensuring that these countries remove the deficiencies to bring more transparency. India has joined the Task Force on Financial Integrity and Economic Development.[10]

There have been endeavor to strengthen the legislative frame work to control generation of black money in the country as well as control the flight of such illicit fund to foreign shores. In pursuance of this India has so far completed negotiations of 22 new Tax Information Exchange Agreements with various tax heavens. India has initiated process of negotiation with 75 countries to broaden the scope of Article concerning Exchange of Information to specifically allow

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[8] Kanta Rani & Sanjiv Kumar, "Black Money in India – A Conceptual Analysis", Paripek – Indian Journal of Research, Volume 3, Issue 1, Jan 2014, p. 14.

[9] *Id.*, at p. 15.

[10] *www.finmin.nic.in>dept_revenue*, Sept. 1, 2011.

for exchange of banking information and information without domestic interest. Protocol amending our tax treaty with Switzerland was signed on 30th August 2010 and was approved by the Swiss Parliament on 17th June 2011.

A Committee was constituted on 27th May, 2011 under the Chairmanship of Central Board of Direct Taxes (CBDT) to examine ways to strengthen laws to curb the generation of black money in the country, its illegal transfer abroad and its recovery.[11]

6. Judicial Intervention

The Supreme Court of India has passed an order dated 04 July 2011 in *Ram Jethmalani & Other* v. *Union of India.*[12] In this case, the Court ordered for creation of a Special Investigation Team (SIT) with the responsibilities and duties of investigation, initiation of proceedings and prosecution, whether in the context of appropriate criminal or civil proceedings, relating to cases involving stashing of unaccounted money in foreign banks by Indians or other entities operating in India.

The court further directed that the High Level Committee constituted by the Union of India be forthwith appointed with immediate effect as Special Investigation Team (SIT) and SIT so constituted shall include Director, Research and Analysis Wing. It has been also directed by Hon'ble Supreme Court that the SIT be headed by and include the two former eminent judges of the Supreme Court namely Mr. Justice B.P. Jeevan Reddy as Chairman and Mr. Justice M.B. Shah as Vice-Chairman.[13]

The Special Investigation Team constituted by the Central Government to implement the decision of the Supreme Court, has also expressed the views that measures may be taken to curb the menace of black money. Internationally, a new regime for automatic exchange of financial information was sought to be established. As such new legislation in the form of the Undisclosed Foreign Income and Assets (Imposition of Tax) Act, 2015 was enacted in 2015.

7. The Undisclosed Foreign Income and Assets (Imposition of Tax) Act, 2015

This Act is also known as *Black Money Act*, 2015, has been passed by Parliament[14] and received the assent of the President on 26th May 2016. The Act provides a window to those stashing black money in foreign banks to come out

[11] Ministry of Finance (CBDT) OM vide F. No. 291/15/2011-IT.

[12] Writ Petition (Civil) No. 176 of 2009.

[13] The Hon'ble Supreme Court, vide paragraph 49 of the order dated 4th July, 2011, in Writ Petition (C) No. 176 of 2009.

[14] The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (Act 22 of 2015) has come into force on 1st July 2015 vide Notification S.O. 1791 (E) Published in Gazette of India Extra Part II, dated 01.07.2015.

clean. The Act is applicable to Ordinarily Resident taxpayers who have undisclosed foreign income/assets. Expatriate employees, including their family members, qualifying as Ordinarily Residents also fall under the Act's ambit. The new Act also proposes amendments to the Prevention of Money Laundering Act, 2002. It makes the offence of concealment of income or evasion of tax in relation to a foreign asset a predicate offence under the PMLA. This provision enables enforcement agencies to attach and confiscate unaccounted assets held abroad and launch prosecution proceedings against persons indulging in laundering of black money.

Recognising the limitations of the existing legislation, the legislation is brought to deal with undisclosed assets and income stashed away abroad. This Act applies to all persons resident in India and holding undisclosed foreign income and assets. A limited window is given to persons who have any undisclosed foreign assets. Such persons may file a declaration before the specified tax authority within a specified period, followed by payment of tax at the rate of 30 per cent and an equal amount by way of penalty. Exemptions, deductions, set off and carried forward losses etc. are not allowed under the new legislation. Upon fulfilling these conditions, a person shall not be prosecuted under the Act and the declaration made by him will not be used as evidence against him under the Wealth-tax Act, the Foreign Exchange Management Act (FEMA), the Companies Act or the Customs Act. Wealth-tax shall not be payable on any asset so disclosed. It is merely an opportunity for persons to become tax compliant before the stringent provisions of the new legislation are to be applied.[15]

Main Feature of the Act are as under:

(i) Concealment of income in relation to a foreign asset will attract penalty equal to three times the amount of tax (i.e., 90 per cent of the undisclosed income or the value of the undisclosed asset). Failure to furnish return of income by person holding foreign asset, failure to disclose the foreign asset in the return or furnishing of inaccurate particulars of such asset shall attract a penalty of Rs.10 lakh.

(ii) The Act provides for criminal liability with enhanced punishment. Willful attempt to evade tax in relation to a foreign income is punishable with rigorous imprisonment from three years to ten years and with fine. Failure to furnish a return of income though holding a foreign asset, failure to disclose the foreign asset or furnishing of inaccurate particulars of the foreign asset is punishable with rigorous imprisonment for a term of six months to seven years. The provisions also apply to banks and financial institutions aiding in concealment of foreign income or assets of resident Indians or falsification of documents.

[15] See Statement of Objects and Reasons of the Bill.

(iii) Second and subsequent offence is punishable with rigorous imprisonment for a term of three years to ten years and with fine of Rs.1 crore to Rs.25 lakh. In prosecution proceedings, the wilful nature of the default is to presumed and it shall be for the accused to prove the absence of the guilty state of mind.

(iv) To facilitate enquiry and investigation, authorities under the Act have been vested with the powers of discovery and inspection, issue of commissions, issue of summonses, enforcement of attendance, production of evidence, impounding of books of account and documents.

(v) The Central Government has been empowered to enter into agreements with other countries, specified territories and associations outside India *inter alia* for exchange of information, recovery of tax and avoidance of double taxation.

(vi) Safeguards to prevent misuse have been embedded in the Act. It is mandatory to issue notices and grant of opportunity of being heard, record reasons for various actions and pass written orders. Appeal to the Income-tax Appellate Tribunal, and to the jurisdictional High Court and the Supreme Court on substantial questions of law have been provided for.

(vii) Persons holding foreign accounts with minor balances which may not have been reported out of oversight or ignorance have been protected from criminal consequences.

(viii) The Act also amends Prevention of Money Laundering Act (PMLA), 2002 to include offence of tax evasion as a scheduled offence under PMLA.

Thus new law has enabled the Central Government to tax undisclosed foreign income and assets acquired from such undisclosed foreign income, and punish the persons indulging in illegitimate means of generating money causing loss to the revenue. It also prevent such illegitimate income and assets kept outside the country from being utilised in ways which are detrimental to India's social, economic and strategic interests and its national security.

This law is applicable to Ordinarily Resident tax payers who have undisclosed foreign income/assets. Expatriate employees, including their family members, qualifying as Ordinarily Residents also fall under the Act. A Resident is a person who is resident in India within the meaning of Section 6 of the Income Tax Act, 1961[16] i.e. who spends more than 182 days in a year in India.

Provisions of the Act apply not only to undisclosed foreign income but also to undisclosed foreign assets (including financial interest in any entity).

[16] The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, S. 2 (10).

Undisclosed foreign income or assets are taxable at the flat rate of 30 percent. No exemption or deduction or set off of any carried forward losses which may be admissible under the existing Income-tax Act, 1961, are allowed.[17]

Penalties:

Violation of the provisions of this Act entails stringent penalties. The penalty for non-disclosure of income or an asset located outside India will be equal to three times the amount of tax payable thereon, i.e., 90 percent of the undisclosed income or the value of the undisclosed asset.[18] This is in addition to tax payable at 30%. Failure to furnish return in respect of foreign income or assets shall attract a penalty of 10 lakh rupees.[19] The same amount of penalty is prescribed for cases where although assesses have filed a return of income, but he has not disclosed the foreign income and asset or has furnished inaccurate.[20] If a person fails to furnish return in relation to foreign income and asset then he shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend upto seven years.[21]

The above provisions also apply to beneficial owners or beneficiaries of such illegal foreign assets Failure to furnish a return in respect of foreign assets and bank accounts or income are punishable with rigorous imprisonment for a term of six months to seven years. The same term of punishment is prescribed for cases where although the assesse has filed a return of income, but has not disclosed the foreign asset or has furnished inaccurate particulars of the same.

The punishment for wilful attempt to evade tax in relation to a foreign income or an asset located outside India is rigorous imprisonment from three years to ten years. In addition, it also entails a fine.[22] Abetment or inducement of another person to make a false return or a false account or statement or declaration under the Act is punishable with rigorous imprisonment from six months to seven years. This provision also applies to banks and financial institutions aiding in concealment of foreign income or assets of resident Indians or falsification of documents.[23]

The principles of natural justice and due process of law have been embedded in the Act by laying down the requirement of mandatory issue of notices to the person against whom proceedings are to be initiated, grant of opportunity of being heard, necessity of taking the evidence produced by him into account,

[17] *Id.*, S. 3.
[18] *Id.*, S. 41.
[19] *Id.*, S. 42 (iii).
[20] *Id.*, S. 43.
[21] *Id.*, S. 49.
[22] *Id.*, S. 51.
[23] *Id.*, S. 53.

recording of reasons, passing of orders in writing, limitation of time for various actions of the tax authority, etc.[24]

Further, the right of appeal has been provided for appeals to the Income-tax Appellate Tribunal[25], and to the jurisdictional High Court[26] and the Supreme Court on substantial questions of law.[27]

The Act also provided a one-time compliance opportunity for a limited period to persons who have any undisclosed foreign assets which had not been disclosed for the purposes of Income-tax. The Central Government announced a compliance window under this Act from 1st July 2015 to 30th September 2015.[28] The requisite tax was to be deposited by 31st December 2015. Such persons were required to file a declaration before the specified tax authority within a specified period, followed by payment of tax at the rate of 30 percent and an equal amount by way of penalty. Such persons will not be prosecuted under the stringent provisions of the new Act.[29] In response to the window the disclosure of assets yielded 2428.4 Crore in tax to the Government. A total 644 declarations were made under the compliance window upto 30th September 2015, involving an amount of Rs. 4164 Crore.[30] The outcome was far less than expected. It is also pointed out that there was a short time frame for disclosure and understanding the nuances of the Black Money Act.[31]

8. Conclusion

There is a close relation between generation of black money and money laundering. In the recent part the India legislature has enacted laws to deal with money laundering. There has been further amendment of the Prevention of Money Laundering Act, 2002 to bring it compatible with international standards to prevent money laundering, Black money specially stashing of money abroad with intent to evade taxes has been a matter of great concern for the Indian Government. The black money is generated as proceeds of crime or by evading taxes. Such evasion of taxes seriously impact the economic growth beside creating other law and order problems, including national security. The Undisclosed Foreign Income and Assets (Imposition of Tax) Act, 2015 contains stringent measures to check the menace of black money. It imposes tax liability and penalty without any immunity. Compliance opportunity has been given and

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[24] *Id.*, S. 46.
[25] *Id.*, S. 18.
[26] *Id.*, S. 19.
[27] *Id.*, S. 21.
[28] The Economic Times, ET Bureau March 01, 2016 http://economictimes.com/news/economy/budget-2016.
[29] *Id.*, See S. 3 and S. 41.
[30] Grant Thorton, Assocham, Black Money Act. Ignorance is not bliss! www.grantthorton.in/globalassets.
[31] *Ibid.*

default could lead to prosecution and punishment. The duration of window provided under the Act from July to September 2015 was very short. One time compliance opportunity has not yielded the desired result. The effectiveness of law would depend upon consistent and firm policy and strict implementation of the Act.

PROTECTION OF TRADEMARKS UNDER INTELLECTUAL PROPERTY RIGHTS

Harpreet Kaur*

1. Introduction

In the modern law of trade marks by Christopher Morcon, Butterworth:

> . . . The concept of distinguishing goods or services of the proprietor from those of others was to be found in the requirements for a mark to be registrable. Essentially, whatever the wording used, a trade mark or a service mark was an indication which enabled the goods or services from a particular sources to be identified and thus distinguished from goods or services from other sources. In adopting a definition of trade mark which simply describes the function in terms of capability of distinguishing the goods or services of one understanding from those of other undertaking the new law is really saying precisely the same thing.[1]

The concept of trade mark dates back to ancient times. Even in the Harppan marks of trade with foreign countries. Such as Mesopotamia and Babylonia were found embossed on article. The law of trademarks was formalized with the process of registration which gave exclusivity to a trader right to deal in goods using a symbol or mark of some sort of distinguish his goods from similar goods sold by other traders. Even today the grant of a trade mark is an indicator of exclusivity in trade under that mark and this right cannot be transferred. Only a limited right of user can be granted via license.[2] A trade mark is a visual symbol in the form of a word, a device or a label applied to articles of commerce with a view to indicate to the purchasing public that they are the goods manufactured or otherwise dealt in by a particular person as distinguished from similar goods manufactured or dealt in by other persons.[3] Trademarks are valuable assets of the traders and business as the identify themselves with the goodwill as reputation of the traders and businessmen. As the consumer become familiar with particular marks trademarks will work as indication of quality. However marks often are categorized according to the type of identification involved in the recent past the field of trademarks has witnessed considerable changes which are worth to be discussed.[4] A trade mark is a means of identification which enables traders to make their goods are services readily distinguishable from similar goods or services supplied by others the sign may consist of one or more pictures

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* Assistant Professor of Law in Khalsa College of Law, Amritsar.

1 Deepak Gogia, *Intellectual Property law*, Ashoka Law House, New Delhi, 2010, p. 327-28.

2 Deepak Gogia, p. 327-28.

3 P. Narayanan, *Intellectual Property Law,* Eastern Law House, New Delhi, 2009, pp. 145-46.

4 Dr. Sreeninasulu N.S.(eds), *Intellectual Property Rights*, Regal Publication, New Delhi, 2007, p.159.

emblems colors or combinations of colors or the form or other special presentation of containers or packages for the product. The sign may consist also of combination of any of the said elements.[5]

There had been considerable changes in the trading and commercial practices due to the globalization of trade and industry. To keep pace with the changing trends of investment flow and technology transfer at international level a comprehensive law was required therefore the trade Marks Act was passed in 1999 which came into force with effect from 15th Sept. 2003. This Act has repealed the trade and merchandise Marks Act 1958.[6] Sec 2(i)(zb) defines "Trade Mark" as a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors.[7] Trade Marks used for the goods or services in the course of business or trade identity themselves with the goodwill or reputation of the traders and businessmen earned by them in respect of the goods or services with which the trade marks is associated. For example, trade mark of a three pointed star in a cude/ring with the trade name "Mercedes Benz" is identifiable with the high priced luxury car with the world wide reputation.[8] Before the statue on the trade mark came into effect only the common law protection was available to a trade mark. If one's trade mark was mispresented by another trade the former could bring an action for decent against the latter at the common law courts later the equity court came into being. It used the action for passing off to protect a trader who had developed a reputation or goodwill through use of a particular sign or symbol.[9]

2. Object of Trademark law

The object of trade mark law is to deal with the precise nature of the rights which a person can acquire in respect of trade marks the mode of acquisition of such rights the method of transfer of those rights to others, the precise nature of infringement of such rights and the remedies available in respect thereof.[10] The law does not permit anyone to carry on his business in such a way as would persuade the customers or clients in believing that the goods or services belonging to someone else are his or are associated therewith. The reasons are two, firstly honesty and fair play are and ought to be, the basic policies in the world of business. Secondly when a person adopts or intends to adopt a name in

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5 Dr. S.R. Myneni, *Law of intellectual Property*, Asia Law Agency, Hyderabad, 2009, p.166.

6 Dr. M.K. Bhandari, *Law Relating to Intellectual Property Rights*, Central Law Publication, Allahabad, 2010, p.146.

7 Dr. B.L.Wadehra, *Law Relating to Intellectual Property*, Universal Law Publishing Co. Ltd, Delhi, 2008.

8 Meenu Paul, *Intellectual Property Law,* Allahabad Law agency, Faridabad, 2004, p.261.

9 J.P. Mishra, *An Introduction to Intellectual Property Rights*, Central Law Agency, Allahabad, 2009, p.204.

10 P. Narayanan, *Intellectual Property Law*, Eastern law House, New Delhi, 2009, p. 148.

connection with his business or services which already belongs to someone else it results in confusion and has probability of diverting the customers and clients of someone else to himself and thereby causing an injury.[11] Object of Trade Mark Law

- The registration.
- Better protection to trade marks for goods or services.
- The prevention of the use of fraudulent marks on goods and services.
- Protection of exclusive right of the proprietor of the trade mark over his trade mark.

Protection of the right of the proprietor of the trade mark to assign his trade mark or any interest in the trade mark to the other person for a consideration protection of the goodwill and reputation of the businessmen and traders.[12]

2.1 A good trade mark should have following ingredients

Trade mark must be a mark which includes a device brand heading label ticket name signature word numeral, shape of goods, packaging or combination of colors or any combination thereof.

I The mark must be capable of being represented graphically.

II It must be capable of distinguishing the goods or services of one person from those of others.

III It must be used or proposed to be used in relation to goods or services.

IV The use must be for the purpose of indicating a connection in the course of trade between the goods or services or some persons having the right either as proprietor or by way of permitted user to use the mark.[13]

When a person get his trade mark registered under law he acquires valuable rights by reason of such registration of his trade mark gives him the exclusive right to the use of the trade mark in connection with the goods in respect of which it is registered and of there is any invasion of this right by any other person using a mark which is same or deceptively similar to his trade mark he can protect his trade mark by an action of infringement in which he can abstain injunction damage or an account of point made by the other person.[14] A unique failure of trade mark is its perpetual life, though initially a trade mark is registered for 10 years but it can be periodically renewed and can be used for indefinite period unless it is removed from register or prohibited by court order.

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[11] *Laxmikant V. Patel* v. *Chetanbhai Shah* AIR 2002 SC 275.

[12] Meenu Paul, *Intellectual Property Law*, Allahabad Law Agency, Faridabad, 2004, p. 264-65.

[13] Dr. B.L. Wadehra, *Law Relating to Intellectual Property*, Universal law publishing Co. Pvt. Ltd., Delhi, 2011, p. 132.

[14] Dr. S.R. Myneni, *Law of Intellectual Property*, Asia Law Agency, Hydrabad, 2009, p. 167.

It is interesting to note that first trade mark registered in U.K. under No. 1 of 1876 consisting of red equilateral triangle in respect of alcoholic beverages is still force.[15] The trade marks Act 1999 which besides providing for registration of trade marks for goods also provides for registration of trade marks for services. It also fulfills India's obligation under TRIP by providing for the protection of well known marks furthermore, the trade marks till 2008 which was passed by the Lok Sabha on February 25, 2009 equips the Indian trade Marks law with the facility of electronic filing as well as the filing of applications for international registration of trade marks.[16]

3. The Function of trademark law

It identifies the product and its origin for example the trade mark 'Brooke bond' identifies tea originating from the company manufacturing tea and marketing it under that mark. It guarantees its quality the quality of tea in the packs marked Brook bond tea would be similar but different from tea labeled with mark Taj Mahal. It advertises the product the trade mark represents the product. The trade mark 'Sony' is associated with electronic items. The trade mark Sony rings bell of particular quality of particular quality of particular class of goods. It thus advertises the product while distinguishing it from products of Sony's competition. It creates an image of the product in the minds of the public particularly of such goods. The mark 'M' which stands for the food items originating from the American fast food chain McDonalds creates an image and reputation for food items offered by it for sale in the market.[17]

The rights in trade mark beyond national boundaries were given by only to well known trade marks in the year 1925 under article 6 of the Paris Convention otherwise trademarks are national in character. Indian trade mark law always national as it was not member of Paris convention. India has now extended the right to well known trade marks prospectively from September 15, 2003 circumscribing their power to check operations of previously registered or used trade marks.[18]

4. Trade mark registry

An office known as trade Marks registry has been established under section 5(i) of the trade Marks Act 1999 to provide for registration and better protection of trade marks for goods and services and for the prevention of the use of

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[15] Dr. M.K. Bhandari, *Law Relating to Intellectual Property Rights,* Central Law Publication, Allahabad, 2010, p. 151-52.

[16] J.P. Mishra, *An Introduction to Intellectual Property Rights,* Central Law Agency, Allahabad, 2009, p. 206.

[17] Dr. B.L. Wadehra, *Law Relating to Intellectual Property,*Universal Law Publishing Co. Pvt. Ltd., Delhi, 2011, p. 132.

[18] Prof. Ashwan Bansal, "Trends in Trade Marks", *Journal Constitutional and Parliamentary Studies, vol. 42,* 2008, p. 112.

fraudulent trade marks, maintenance of the register of trade marks the central Govt may define the territorial limits within which an office of the trade marks registry may exercise its functions the trade mars registry has as seal.[19] Trade mark may be registered or unregistered legal remedies against infringement are provided for both. The registration offers prima facie evidence of ownership of trade mark, whereas in case of non registration the user of trade mark has to establish the prior use and passing of. All trademarks are accepted for registration is entered in to register maintained by registrar. Under the repealed Act of 1958 the register was divided into part A and part B. but the new Act of 1999 has done away with this practice and only a single register is now maintained, it shall be lawful For registrar to keep the record wholly or particularly in computer floppies diskettes or in any other electronic from subject to such safeguards as may be prescribed. Every trade mark is not registerable for obtaining registration a trade mark has to fulfill the conditions lay down under the law.[20]

5. International Perspective on Trademark

5.1 Paris Convention

The Paris convention for the protection of industrial property signed at Paris on March 20, 1883. The convention declared that a trade mark could be registered in a foreign country even if it remained unregistered in its country of origin and each registered trade mark in a member nation shall be independent of marks registered in the other countries of the union.[21] The protection of Industrial property has as its object, patents, utility models, industrial design, trade mark service marks names competition industrial property shall be understood in the broadest sense and shall apply not only to industry and commence proper. But likewise to agricultural and extractive industries and to all manufactured or natural products for example wines, grain, tobacco leaf, fruit, cattle, minerals waters, beer, flower and flour.[22] The convention contains stronger substantive guarantees for trademarks than it does patents. First, the convention facilitates leveraging goodwill from one country through its well known marks provision: under Article 6, members must prohibit the use of, refuse to register, or cancel the registration of any symbol where is liable to create confusion with a mark that is create confusion with a mark that is well known in that country for use on identical or similar goods. Second, the convention facilitates use of the same

[19] S.K. Singh, *Intellectual Property Rights Laws*, Central Law Agency, Allahabad, 2009, p. 228.
[20] Dr. M.K.Bhandari, *Law Relating to Intellectual Property Rights*, Central Law Publication, Allahabad, 2012, p. 175-177.
[21] J.P. Mishra, *An Introduction to Intellectual Property Rights*, Central Law Agency, Allahabad, 2009, p. 204.
[22] Dr. S.R. Myneni, *Law of Intellectual Property*, Asia Law Agency, Hyderabad, 2009, p. 166.

mark in all regions. Article 10 requires members to provide effective protection against unfair competition.[23]

5.2 TRIPS Agreement

Article 15 to 21 of the TRIPS agreement deals with trade mark protection. Any sign or any combination of signs, capable of distinguishing the goods or service of one undertaking from those of other undertakings shall be capable of constituting a trade mark such signs in particular words including personal names, letters, numerals, figurative elements and combination of colors for registration as trade marks.[24] The trade mark law treaty shall apply to marks consisting of visible signs and only in member countries which accept for registration three dimensional marks. But it does not apply to hologram marks and to marks not consisting of visible signs in particular sound marks. India has not signed the trade Mark Law treaty also.[25] The most influential effort on the global scale regarding the protection of intellectual properties is undoubtedly the agreement on trade related aspects of intellectual property rights which were adopted at Morocco on April 15, 1994 came into force on January 1, 1995. TRIPs aim to establish supportive relationship between the world trade organization (WTO) and the world intellectual property organization (WIPO).[26]

5.3 Madrid Agreement concerning the international registration of Marks 1979

The Madrid agreement concerning the international registration of Marks was made on April 14, 1891. The countries to which this agreement applies constitute a special with for the international registration of Marks. National of any of the contracting countries may, in all the other countries party to this agreement secure protection for their marks applicable to goods or services, registered in the country of origin.[27] With respect to the acquisition of rights to trademark, the Paris Convention relies on the same expensive state by state registration system that it uses for patents. The Madrid agreement for international registration of trademarks, which went into effect less than ten years after the conclusion of Paris Convention under the Madrid Agreement. Once protection is secured in a trademark holder's country, it can be extended to other member states by filing an international application with the international bureau at WIPO, specifying where protection is sought. Because the Madrid Agreement bases protection on

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[23] M.K. Bhandari, *Law Relating to Intellectual Property Rights*, Central Law Publication, Allahabad, 2010, p. 162.

[24] Dr. B.L. Wadehra, *Law Relating to Intellectual Property*, Universal Law Publishing Co. Pvt. Ltd., Delhi, 2011, p. 161.

[25] T. Ramappa, *Intellectual Property Rights Law in India*, Asia Law House, Hyderabad, 2010, p. 85.

[26] J.P. Mishra, *An Introduction to Intellectual Property Rights*, Central Law Agency, Allahabad, 2009, p. 210-11.

[27] Dr. S.R. Myneni, *Law of Intellectual Property*, Asia Law Agency, Hyderabad, 2009, p. 179-80.

securing registration in a traders home country. It presents problem for countries that make registration contingent on the use of the trademark in commerce. To enable the United States to join the Madrid Agreement a modified version of the agreement was created in 1989. Under the Madrid Protocol an application is sufficient to enter the system.[28] The WTO`s agreement covers copyright and related rights, trademarks including service Marks; geographical indication including appellations of origin; industrial designs; patents Including the protection of new plant varieties; the layout design of integrated circuits And undisclosed information including trade secrets and test data.[29]

5.4 The Trade Mark Law Treaty (TLT)

The Trademark Law Treaty was adopted on October 27, 1994, at a Diplomatic Conference in Geneva. The purpose of the Trademark Law Treaty is to simplify and harmonize the administrative procedures in respect of national applications and the protection of marks. Individual countries may become party to the Treaty, as well as intergovernmental organizations which maintain an office for the registration of trademarks with effects in the territory of its member States, such as the European Union (EU) and the African Intellectual Property Organization (OAPI). The provisions of the Treaty are supplemented by the Regulations and Model International Forms. The Treaty does not deal with the substantive parts of trademark law covering the registration of marks. The Treaty entered into force on August 1, 1996.[30] This treaty was diplomatic conference in order to smoothen and harmonise the process of national registration of marks. The treaty is open to the individual countries as well as inter governmental organizations.

6. Judicial approach

The absolute and relative ground far refusal of registration have been the subject matter of judicial interpretation for clear and proper understanding of some important factors it is necessary to give some important factors it is necessary to give some illustration which have come out of various courts rulings. Example Already registered Trade Marks. TELCO, BARALGAN, HITACHI, MAF and trade mark to be registered but refused TI-ECO, BARAGAN, HITAISHI, NRF.[31] As mentioned earlier distinctiveness is the primary requirement of trade mark. In the distinctiveness has been understood as some quality in trade mark

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[28] Dr. M.K. Bhandari, *Law Relating to Intellectual Property Rights*, Central Law Publication, Allahabad, 2010, p. 162.

[29] Harman Shergill Suller, *Performance`s Rights in India & United States*, Shree Ram Law House, Chandigarh, 2013, p. 62.

[30] International Treaties and Conventions on Intellectual Property, <*http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf*> Accessed on 1st April, 2016.

[31] Dr. M.K. Bhandari, *Law Relating to Intellectual Property Rights*, Central Law Publications, Allahabad, 2006, p. 138.

which earmarks the goods so marked as distinct from those of after products such goods the burden is on the applicant to prove distinctiveness of the mark as its capability of being distinguished so as to claim monopoly of using the mark.[32]

In case of Infringement of Trademark Subhash Chand Bansal v. *Khadim's and Anr. 2012 ix AD (Delhi) 448.* Court held restrained from selling advertising or storing for sale of any boots, slippers and shoes etc. bearing impugned trademark or any other mark which was identical or deceptive similar to the mark of the plaintiff either on the product or on its packaging.[33]

Nobody can claim trademark with respect to generic word. In cadila health care Ltd. v. *cadila pharmaceuticals Ltd (2001) 2 SCR 743 and SBL Limited* v. *Himalaya Drug Company 1997 PTC (17) 540 (Del).* Court came to the conclusion that 'meropenen' I the molecule which is used for treatment of bacterial infections and the term 'MERO' being on abbreviation of a generic term (Meropenem), was publici Juris. It was held that the plaintiff in that case could not claim exclusive right to the use of 'MERO' as a constituent of any trademark.[34]

Registered trade mark is infringed by a person if he uses such registered trade mark as his trade name. Infosys Technologies Ltd v. *Adinath Infosys Pvt Ltd & ors. AIR 2012 Delhi 46.* Court restrained defendant from using the expression 'INFOSYS' or any other expression which was identical or deceptive similar to the trademark INFOSYS'.As a part of its corporate name or for proving any of the services in which the plaintiff company was engaged.[35]

Clinique Laboratories LLC and Anr. v. *Gufic Limited and Anr. MANU/DE/0797/2009.*

Suit for infringement by a registered trade mark owner against a registered trade mark holder. However, under Section 124(5) of the Act, the court has the power to pass interlocutory order including orders granting interim injunction, keeping of account, appointment of receiver or attachment of any property.In this case, the court held that a suit for infringement of registered trade mark is maintainable against another registered proprietor of identical or similar trade mark.It was further held that in such suit, while staying the suit proceedings pending decision on rectification/cancellation petition, the court can pass interim injunction restraining the use of the registered trade mark by the defendant, subject to the condition that the court is prima facie convinced of invalidity of

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[32] *Imperial Tabacco* v. *Registrar trade mark*, AIR 1977 Cal. 413.

[33] Khush kalra, *Landmark Judgements on Intellectual Property Rights*, Central Law Publication, Allahabad, 2014, pp. 157-60.

[34] Khush Kalra, pp. 166-68.

[35] Khush Kalra, pp. 187-89.

registration of the defendant's trade mark. In this case the court granted an interim injunction in favour of the plaintiff till the disposal of the cancellation petition by the competent authority.[36]

7. Conclusion

Trademarks are considered as a form of intellectual properly. Hence trademarks could be sold purchase, assigned and licensed in the lines of any other property. The very different feature of trademark is that it is a symbol of goodwill. So the transfer of trademarks require much care and caution that of the transfer of other properties it is a very valuable asset in the field of business since it involves goodwill reputation and the market. Here we can appreciate the importance of trademarks by remembering the words "this hard earned right is an important as money in the bank". Hence people are willing to invest large sum of money to acquire assign as license trademarks. The courts and the law in the interest of the business world as well as the consumer have always safeguard protection of trademarks. The reforming of the laws with respect to trademark to meet the challenges of the technological business world is very much required and the same has been guaranteed by the international agreement like the TRIPS agreement.[37]

[36] *<https://indiankanoon.org/docfragment/99626708/?formInput=clinique%20%20sortby%3A%20leastrecent >* Accessed on 1st April, 2016.

[37] Dr. Sreeinvasulu N.S.(eds), *Intellectual Property Rights*, Regal Publication, New Delhi, 2007, pp. 155-56.

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Sidhuwal, Bhadson Road, Patiala - 147 006 (Punjab)
Ph. No.: 0175-2391600, 2391601, 2391602, 2391603, Telefax: 0175-2391690, 0175-2391692
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