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EDITORIAL

The Urban landscape, in the contemporary world is full of voices: The academia, the skilled worker, the unskilled worker, the student body, the subalterns of the society, each vying for a fair share of space to talk into and to be talked about. This is even more important in the present day democratic setup where each voice matters and when it comes from intelligentsia it can be an instrument of change and free the society from dogmatic and dominant orthodox ideology. We, who are providing platform for such voices, are the part of that broad and significant spectrum that provides the space to initiate, evolve and develop newer ideas, unmask thoughts, raise questions, provide answers, frame problems and much more.

RGNUL Law Review, started its journey in 2011, with the objective of providing sound and steady stage for contemporary research and development; to underline the dynamics of law; to comment and participate in the newer debates. Its role and quality of research was much appreciated from different quarters: the Judiciary, the Bar the Academicians, the Research scholars. This encouraged and further convinced the RLR team to continue its work with more zeal and sincerity. The role played by the advisory panel, the referees and the contributors is held in high esteem and is deeply admired. In a very short span of time RLR has now covered a significant milestone by entering into a new liaison with an established and renowned publishing house LexisNexis India. The entire team of RLR is confident that this association will widen the frontiers of knowledge and research for all concerned. Looking forward to a vigorous future.

Tanya Mander

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MARKET DEMOCRACY IN INDIA: THE DILEMMAS FOR LAW AND DEVELOPMENT

Pawan Kumar*

1.1 Introduction

The concept of market democracy may be used in two senses. *Firstly*, it means a democracy which has become most desired market for the transnational corporations and investors who wish to maximize their profit. *Secondly*, it means a democracy which not only adopts market friendly behaviour rather promotes market even at the cost of the people whom it is representing. Market and democratization has been the site of massive Western legal invention in the developing countries.[1] Therefore, India being no exception adopted Parliamentary democracy for its people through the Constitution of India and the same has been evolving for over sixty five years in terms of quality and quantity of the democratic processes and institutions. India *decided*[2] to have a President, indirectly elected for a term of five years, who would be a constitutional head of the state...*and to have* a council of ministers, headed by the Prime Minister and collectively responsible to the Parliament, to aid and advice the head of State.[3] Article 74 (1) states, "There shall be a council of Ministers with the Prime Minister at the head to aid and advice the President who shall, in the exercise of his functions, act in accordance with such advice: Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration." Article 75 (3) states, "The Council of Ministers shall be collectively responsible to the House of the People. After the liberalization of its economy in 1991, it has emerged as one of the biggest democratic market for the investors. In spite the liberalization of its economy, India is *even today* regarded as a good example of mixed economy.[4] The country has witnessed unprecedented Foreign Direct Investment which has posed various challenges and opportunities for the government and the people as well although in modern terms the country has become globalised. India has been ranked at the second place in global foreign direct investments in 2010 and will continue to remain among the top five attractive destinations for international investors during 2010-12 period, according to United Nations Conference on Trade and Development (UNCTAD) in a report on world investment prospects titled, 'World Investment Prospects Survey 2009-2012'.[5] Foreign investment involves the transfer of tangible or intangible assets from one country to another for the purpose of their use in

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1 Amy L. Chua, "Markets, Democracy, and Ethnicity: Towards a New Paradigm for Law and Development" 108 *The Yale Law Journal*, (October 1998) at p. 4.

2 The words in Italics have been supplied by the author.

3 Austin Granville, The Indian Constitution: Cornerstone of a Nation, Oxford University Press, 1st Indian Edn. (1972) at pp. 116-17

4 Dutt Ruddar and Sundharam K.P.M., Indian Economy, S. Chand and Company Ltd., 57th Edition (2008) at p. 162.

5 *www.fdiindia.in* last visited on April 08, 2013.

that country to generate wealth under the total or partial control of the owner of the assets.[6]

Of late there is growing perception among common men in India that the democratic institutions in India namely governments, legislatures and the courts have become market friendly even at the cost of peoples whom it is representing. There is growing signs of wealth accumulation in few hands due to governments' market friendly behaviour. From few statements of the present Prime Minister couple of months ago especially on showing concern for Jet airways financial crisis, contemplation to enhance of price of Reliance K-G basin gas unilaterally in spite of the company's promise to supply the gas at a stipulate price till 2014 under a contract and the recent decision of the government to allow FDI in retail sector ignoring the concern of small traders in the name of development and the parliament nod for FDI in retail wherein the government of India allowed FDI in single brand retail trade up to 51% and up to 100% subject to condition inter alia that in respect of proposals involving FDI beyond 51%, mandatory sourcing of atleast 30% of the value of products sold would have to be done from Indian 'small industries/village and cottage industries, artisans and craftsman'[7] and passing of Special Economic Zones Act, 2005 (hereinafter referred as SEZ Act) without amending/replacing outdated Land Acquisition Act, 1897 till August 2013 and the supreme court ruling in Vodafone case giving tax exemptions have substantiated the belief of the people that the democratic institutions are siding with market and eventually turned India into a market democracy in its second sense. *With effect* from 10th February, 2006, the SEZ Act and Special Economic Zones Rules, 2006 have put in place a dynamic piece of legislation with multifold objectives of- (a) generation of additional economic activity; (b) promotion of exports of goods and services; (c) promotion of investment from domestic and foreign sources; (d) creation of employment opportunities; and (e) development of infrastructure facilities.[8] It is beyond doubt that the market has been since antiquity albeit its form and contents has been constantly changing but the recent love of government for markets in the name of development even at the cost of people has raised serious concerns for law and reminds me of Joseph Stiglitz who wrote that 'Globalization seems to have unified so much of the world against it, perhaps because there appear to be so many losers and so few winners...Well-managed globalization can make everyone, or at least most, better off. This has not happened.'[9] Development can be seen, it is argued here, as a process of expanding the real freedoms that people enjoy.[10] The paper intends to highlight an overview of issues and challenges of market, globalization and democracy in general and implications of market democracy in India along with the dilemmas for law and development.

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6 Sornarajah M., *The International Law on Foreign Investment*, Cambridge University Press, 3rd Edn. (2010) at p. 8.

7 *http://dipp.nic.in/English/acts_rules/Press_Notes/pn1_2012.pdf* last visited on 06, 2013 at 1100 hours.

8 Mehta Hitender, *Law and Practice to Special Economic Zones*, Taxman, 1st Edn. (2007) at pp. 1-53.

9 J. Stiglitz, "We have become rich countries of poor people" Financial Times (07 September, 2006).

10 Sen Amartya, *Development as Freedom*, Oxford University Press, 15th Impression 2008), p. 3.

1.2 Market, Globalization and Democracy: Issues and Challenges

With the end of the cold war and the collapse of the Soviet empire, the market and democracy appears to have triumphed.[11] Universally praised these two central values of Western society have become prerequisite for any nation seeking acceptance by the international community or assistance from international financial institutions.[12] It is tempting to believe that democracy has won its eminence for either or both of two reasons.[13] Some prefer to attribute its victory to its evident political justice, its being plainly the best, and perhaps the sole clearly justifiable basis on which human beings can accept the apparent indignity of being ruled at all.[14] Others find it easier to believe that it owes this eminence to the fact that it and it alone can ensure the well-protected and fluent operation of a modern capitalist economy.[15] Democracy ...promises (or threatens) the democratization of everything (work, sex, the family, dress, food, demeanour, choice by everyone over anything which affects any number of others).[16] What it entails is the elimination of every vestige of privilege from the ordering of human life.[17] It is a vision of how humans could live with one another, if they did so in a context from which injustice had been eradicated.[18] There are a wide range of democratic theories, each characterizing the process in different ways.[19] These theories can be lebelled: elite competitive, aggregate and deliberative democracy.[20] The elite competitive theory characterizes democracy as a competition between rival groups of political leaders that are chosen through an election.[21] The opportunities to participate therefore have to be distributed sufficiently widely to ensure that no single elite is very secure in government.[22] A second approach sees the democratic process as a way of adding up or collecting the existing preferences of citizens.[23] The most obvious method of aggregating preferences is through voting, although the extent to which the election outcome really does reflect preferences has been subject to extensive criticism.[24] The central idea underlying the deliberative democracy model is that 'central to democracy should be a particular kind of communication, involving the giving of good reasons and reflection upon points advanced by others.[25] Consequently, a deliberative process requires 'conditions of free public reasoning among equals' in which citizens' offer 'justification for the exercise of collective power framed in terms of considerations that

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11 Jacques Attali, "The Crash of Western Civilization: The Limits of the Market and Democracy" 107 *Foreign Policy* (Summer 1997) at p. 55.

12 *Ibid.*

13 Dunn John, *Democracy: A History*, Atlantic Monthly Press, New York, 1st American Edn., (2005) at p. 149.

14 *Ibid.*

15 *Ibid.*

16 *Id.*, at p. 168.

17 *Ibid.*

18 *Id.*, at p. 169.

19 Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics*, (Cambridge University Press, 1st Edn., (2010), p. 13.

20 *Ibid.*

21 *Ibid.*

22 *Id.*, at p. 14.

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*, Also see, Weale A., "Democracy", Basingstoke, Palgrave, 2nd Edn. (2007).

can, roughly speaking, be acknowledged by all as reasons.[26] Democracy means that people can choose where to live, what to buy and sell, and how to work, save and accumulate wealth, none of which is compatible with the collective ownership of industry.[27] In its most standard usage, democracy requires, inter alia, the free and voluntary participation of individuals and groups in the selection of political leadership.[28] However china has emerged a partial exception as it has no democracy although market has pervasive role in its affairs.

History would seem to suggest that the market economy and democracy together form the equivalent of a virtuous circle.[29] Although I have serious doubt over the last statement particularly the way two concepts have been grossly misused in the sense that even a dictator like Parvez Mushraf who coup Pakistan claimed to be democratic leader by oppressed means. An economic system consists of various agents like households, producers, government and consumers.[30] These agents undertake various economic activities like production, exchange *for consideration* and consumption for the purpose of sustaining themselves resulting into mobilization, allocation, utilization and generations of funds.[31] The places where these economic activities are undertaken are known as market. In assessing the market mechanism, it is important to take note of the forms of the markets: whether they are competitive or monopolistic (or otherwise uncompetitive), whether some markets may be missing (in ways that are not easily remediable) and so on.[32] The market economy needs private property, entrepreneurship, and innovation, which could not flourish without freedom of thought, speech, and movement.[33] In sum, the market economy and democracy appear to be deeply intertwined, with both tied to the fundamental concept of private property.[34] A market economy and democracy can endure only in nations that maintain certain indispensable features: the rule of law, a legal system, a free media, and a social consensus on efficient tax collection.[35] Although I would add few prefixes before some concepts in the preceding statement namely an efficient and transparent legal system, a responsible media and transparent tax collection regime. Despite the prevalent belief that the market economy and democracy combine to form a perpetual-motion machine that propels human progress, these two values on their own are in fact incapable of sustaining any civilization.[36] Both are riddled with weaknesses and are increasingly likely to break down.[37] The marriage of

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26 Elaster J. (ed.), *Deliberative Democracy*, Cambridge University Press, 1st Edn., (1998) at p. 186.

27 *Supra* note 11 at p. 56.

28 Marcus J. Kurtz, "The Dilemmas of Democracy in the Open Economy: Lessons from Latin America" 56 World Politics (January 2004) at p. 266.

29 *Supra* note 27.

30 Kothari Rajesh, *Financial Services in India: Concepts and Application*, (SAGE Publications India Pvt. Ltd., 1st Edn., (2010) at p. 1.

31 *Ibid.*

32 *Supra* note 10 at p. 116.

33 *Supra* note 11 at p. 56.

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

37 *Ibid.*

democracy and the market economy suffers from three fundamental shortcomings: First, *inapplicability*[38] of guiding principles of the market and democracy[39]; second, these two sets of principles often contradict one another and more likely to go head-to-head than hand in hand[40]; and third, they carry within themselves the seeds of their own destruction.[41]

The frantic search for money to fund elections, the spread of corruption, and the scale of criminal economy are all signs of the ascendancy of the market economy over democratic ethics.[42] Transparency International defines corruption as "the misuse of entrusted power for private gain." The magnitude of corruption can be gauged by following figures: *(1)* Estimates show that the cost of corruption equals more than 5% of global Gross Domestic Product, with over United States $ 1 trillion paid in bribes each year; *(2)* Corruption adds up to 10% to the total cost of doing business globally, and up to 25% to the cost of procurement contracts in developing countries.[43] Powerful minorities seeking to take full advantage of the market economy will want total control of their resources and will come to view the collective democratic decisions of poor majorities as intolerable burdens.[44] As legislatures and courts lose their power to central banks and corporations, market elites will become stronger than democratic elites, further shrinking the reach and appeal of the public sphere.[45] The media will fall into the hands of huge conglomerates that can sway the behaviour of citizens' worldwide, deepening skepticism about political matters and democratic values.[46] Eventually, democracy will fade away, having been replaced by market mechanisms and corruption.[47] We

38 The word in italics has been supplied by the author.

39 It is said that applying the principles of market economy both within and among nations is problematic and undesirable...and among nations, a free market for nuclear weapons, illegal narcotics, high technology, potable water, and pollution would promote the rapid growth of supranational political bodies and powerful nonstate entities capable of challenging national governments.

40 In a democratic society, the promotion of the individual is the ultimate goal, while in a market economy the individual is treated as a commodity- one that can be excluded or cast aside for want of the right education, skills, physical characteristics, or upbringing; The market economy accepts and fosters strong inequalities between economic agents, whereas democracy is based on the equal rights of all citizens; The market economy resists the localization of power, discourages selfishness, while democracy depends upon a clear identification of political responsibility, the coalition of citizens in political parties, and a general appreciation of our common fate; The market economy assumes that the aggregation of selfish behaviour by all economic agents is best for the group, whereas democracy makes the assumption that the best outcome for any given group will result from the acceptance by a minority of the decision of a majority.

41 *Supra* note 1.

42 *Ibid.*

43 Dahiya S.B., Chakravarty Kavita, et. al., *Governance Issues and Corruption*, Intellectual Foundation India (2010) at p. 68.

44 *Supra* note 1.

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

will have a kind of market dictatorship, a "lumpen market", without strong democratic institutions to serve as countervailing powers.[48]

In different ways, statist and free-market economic forms can imperil the autonomous political activity (whether mobalized or electoral) that is essential for pluralist democracy.[49] Pluralist democracy ensures a State wherein people with a specific interest having multireligious beliefs, multilinliguistic, multicultural etc. identities reside without any discrimination by the State or its instrumentalities. Joshua Cohen claims that in a well-ordered democracy, political debate is organised around alternative conceptions of the public good.[50] So an ideal pluralist scheme, in which democratic politics consists of fair bargaining among groups each of which pursues its particular or sectional interest, is unsuited to a just society...[51] In free-market contexts the problem hinges on the declining ability of citizens to organize or engage in collective action, which can become so substantial as to prevent meaningful political activity together.[52] Lindblom argues that the holders of capital in market societies have a distinct advantage insofar as their views must be considered regardless of whether they are organised collectively or coordinated with each other.[53] Statist development, that is, tends to reduce the group autonomy that is essential to pluralist democratic competition.[54] It is the virtue of free-market policies that they necessarily undermine ...state tutelage over groups by privatizing or deregulating the economic decisions that had provided the leverage for elites to impose outcomes.[55] Changes to labor markets during the course of economic liberalization can have dramatic implications.[56] Not only the balance of formal sector to informal-sector employment typically shifted toward the latter, but the rules that structure formal-sector labor relations are generally loosened.[57] The modernization of agricultural land markets can have similar critical effects on the (always problematic) political role of the peasantry.[58] Here the liberalization of land tenure alongside exposure to international competition has a tendency not only to spark a process of social division and differentiation among peasants but also to destroy the historical institutions of rural social life.[59] When adopted aggressively and broadly, free-market reforms may well undermine the motivation for participation in associational life and the potential returns from it.[60]

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48 *Ibid.*

49 *Supra* note 28 at p. 267.

50 Posner Richard, *Law: Pragmatism and Democracy*, Universal Law Publishing Co. Pvt. Ltd., 1st Indian Reprint (2005) at p. 132.

51 *Ibid.*

52 *Supra* note p. 49.

53 Charles Lindblom, "The Market as Prison" *Journal of Politics* (May 1982), p. 44.

54 *Supra* note 28 at p. 270.

55 *Ibid.*

56 *Id.*, at p. 272.

57 *Ibid.*

58 *Id.*, at p. 273.

59 *Ibid.*

60 *Id.*, at p. 274.

The neoliberal economies[61] have accelerated globalization as capital elites, capitalist processes, multinational corporations and banks grew phenomenally after 1990's. Spector states that globalization refers to increasing worldwide integration of the economy, culture, technology, communication and information-sharing, and the movement of people.[62] Globalization is promoted as the expansion of 'freedom' by this is meant the freedom to invest and trade through the free flow of capital, goods, and sometime labor without national boundaries or protectionist policies interfering with the 'free market'.[63] More recently, the term 'globalization' has been used to characterize the rapidly developing interconnectedness and interdependence of national economies within the world economy, with respect to production, trade, finance, and labour markets, as well as the related universalization of technologies not only of production but also of communication.[64] Supposedly, it is a 'win-win' situation for the advanced and less developed capitalist countries alike as they freely bargain in the marketplace.[65] However, the real world is quite different from perfectly balanced equations on an economist's chart.[66] In reality, unregulated economies do not maximize competition in the sense that everyone competes equally.[67] Rather, the unbridled 'competition' allows the strongest to set the terms and results in unequal relationships that then build on the advantages/disadvantages to further intensify the unequal relationships.[68] Another aspect of this 'economic reform' requires that these governments (governments of less developed countries) cut spending as a way to ensure economic stability.[69] Public sector jobs are cut, wages are driven down, and social services are reduced, all of which further lower the standard of living of working people.[70] This increased impoverishment of the working class has also led to another of globalization's consequences: the mass migration of tens of millions of workers from countryside to the cities and from poor countries to wealthy ones.[71] The grassroots people, the working class and others who are experiencing the worst effects of a global capitalist economy implementing neoliberal policies wherever it can, are the wild card in this current situation.[72] Neoliberal globalization manifests an intense, accelerated dynamic of exploitation

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61 Infra note 62 at p. 12 Spector states that neoliberal globalization is an extension of the capitalist-era globalization that predominated from the mid nineteenth century until the late twentieth century. While the word 'liberal' has come to mean a combination of state-intervention Keynesian economics and 'favouring social welfare programs for the poor' in the United States, its meaning in classical economics has been 'liberalizing-opening up-the economy for the capitalist class' and minimizing the regulation by the state.

62 Alan J. Spector, "Globalization or Imperialism? Neoliberal Globalization in the Age of Capitalist Imperialism" 33 *International Review of Modern Sociology* (Special Issue 2007) at p. 7.

63 *Id.*, at p. 15.

64 Gould Carol, *Globalizing Democracy and Human Rights*, Cambridge University Press, 1st Edn., (2004), p. 160.

65 *Supra* note 62 at p. 15.

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

69 *Id.*, at p. 16.

70 *Ibid.*

71 *Id.*, at p. 17.

72 *Id.*, at p. 24.

and oppression.[73] The public sector accounts for about 35% of industrial value added in India, but although privatization has been a prominent component of economic reforms in many countries, India has been ambivalent on the subject until very recently.[74] However off late, India has accelerated the economic reforms by allowing privatizing many public sector undertakings.

Sceptics of the globalization refer to the socioeconomic costs of globalization: increasing income gaps and inequality around the world, uneven and unfair geographical and social distribution of gains (more than a billion people live on less than a dollar a day, many of them have never made a phone cell), uprooting of local brands, social tensions, environmental degradation and growing intolerance towards political diversity (many want to defend their right to be wrong).[75] They argue that potential gains of the current phase of globalization are largely overblown.[76] It is now widely accepted in official circles that to succeed in the global market a country must have competitive advantage that they should utilize to the fullest.[77] But who does not know that competition in the globalized world itself is unequal?[78] While poorer countries find themselves pitted against global corporations having necessary technological advantages of negotiating distance and locating economic activities anywhere, the former only have a huge reserve of workers, at various educational levels, whose wage rate is extremely low compared to the prevailing rate in the west.[79] This may lead to high return on capital but not with an associated increase in real wage and personal income, as stated by several critics [Bhaduri 2007; Mitra 2006].[80]

1.3 Market Democracy and India: Impactions

There has been contentious studies on the impact of market and globalization on India. More of the world's income-poor live in India than any other country.[81] Experience prior to the 1990s suggests that economic growth in India has typically reduced poverty.[82] Using data from 1958 to 1991, Ravallion and Datt (1996) find that the elasticity of the incidence of poverty with respect to net domestic product per capita was -0.75 and that with respect to private consumption per capita it was-0.9.[83] Nor is there any convincing evidence that economic growth in India prior to the 1990s has tended to be associated with rising overall inequality (Bruno, Ravillion and

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73 *Id.*, at p. 25.

74 Mukherji Rahul (ed.), *India's Economic Transition: The Politics of Reforms*, Oxford University Press, 1st Edn. (2007) at pp. 105-06.

75 Miroslave N. Jovanovic, "Is Globalization Taking us for a Ride?" 25 *Journal of Economic Integration*, (September 2010) at p. 521.

76 *Ibid.*

77 Infra note 97 at p. 55.

78 *Ibid.*

79 *Ibid.*

80 *Ibid.*

81 Gaurav Datt and Martin Ravallion, "Is India's Economic Growth Leaviing the Poor Behind?" 16 *Journal of Economic Perspective* (Summer 2002) at p. 89.

82 *Ibid.*

83 *Ibid.*

Squire, 1998).[84] These observations clearly refute claims that pre-1990s growth in India tended to leave the poor behind.[85] Prior to the release in 2001 of the results from the 1999-2000 survey round, a number of observers had looked at the numbers...and concluded that India's economic reforms were leaving the poor behind-in short, that poverty reduction has stalled (Datt, 1999; Jha, 2000a).[86] From 1960 to 1990, for example, the ratio of the rural poverty rate to the urban poverty rate in India hovered in the range of 1.1-1.2.[87] However, over the 1990s, the ratio of rural-to-urban poverty rates has leaped up to 1.4.[88] Ravillion and Datt investigation failed to provide any evidence of acceleration of poverty reduction in 1990s.[89]

According to 55th round National Sample Survey 1999-2000, the official rural poverty line of Rs. 328 for 1999-2000 yields the poverty percentage of 27.4...We find that only 1890 calories could be obtained at this expenditure, over 500 calories per day less than the norm.[90] The true expenditure at which 2400 calories could be assessed is Rs. 565, and as high as 75.5 percent of person spent less than this amount-the correct estimate of poverty for 1999-2000.[91] Similarly, we see that Rs. 454, the official urban poverty line allowed only 1875 calories to be assessed.[92] In order to access 2100 calories, the urban consumer needed to spend Rs. 625, and 45 percent of persons were below this level.[93] According to 61st Round, National Sample Survey, the official poverty line is Rs. 356 and the poverty ratio is 28.3.[94] The direct estimate of the poverty line required to access 2400 calories in 2004-05 is Rs. 795 and an all-time high, 87 percent of the rural population is below this level.[95] Patnaik proposes (initial findings from the 61st Round, National Sample Survery, 2004-05) that (a) there has been a substantial worsening of income distribution, and (b) that the worsening has been of a particular type, namely, absolute real decline in rural incomes, is consistent with the 61st expenditure data.[96]

In several states in India, specific areas-large and small, rural and urban, are being identified as special economic zones (SEZs) to carry out modern hi-tech corporatized activities with promised returns at a high rate.[97] They are mostly located in functionally active spaces, barring a few that have less habitat or

84 *Id.*, at p. 90.
85 *Ibid.*
86 *Id.*, at p. 91.
87 *Id.*, at p. 98.
88 *Ibid.*
89 *Id.*, at p. 106.
90 Usha Patnaik, "Neoliberalism and Rural Poverty in India" 42 *EPW* 3137 (28 July -3 August 2007).
91 *Ibid.*
92 *Ibid.*
93 *Ibid.*
94 *Id.*, at p. 3141.
95 *Ibid.*
96 *Ibid.*
97 Swapna Banerjee-Guha, "Space Relations of Capital and Significance of New Economic Enclaves: SEZs in India" 43 *EPW* 51 (22-28 November, 2008).

occupations.[1] In the process of converting old/active economic spaces into newer ones, a large number of farmers, agricultural labourers, fisherfolk and allied workers are getting displaced from land and livelihoods that is leading to fierce resistance movements in different parts of the country and resultant state atrocities and violence.[2] The above process of opening up of new territories-within old ones by replacing the existing land uses-to not just capitalistic development but to capitalistic forms of market behavior-needs to be viewed as a part of a larger process of progression of global capital and its strategy to industrialize the south.[3] Most of the SEZs are gigantic, requiring huge land areas (minimum 1,000 hectares for multi-product zones and 100 for the service sector ones). One must note the congruence of SEZ functional policy of keeping only 25% land reserved for multi-product SEZs and 50% for sector specific productive purposes while the rest for development of real estate, potentially creating speculative real estate bubbles in an effort towards absorbing surplus value, with the help of "neoliberal" urbanism[Smith 2002].[4] The speed with which they are being approved is alarming: 462 formally approved till May, 2008 since the enactment of SEZ Act in 2005.[5]

There have been far-reaching shifts in Indian policy in the last few decades facilitating large-scale entry of global corporate capital in almost all economic sectors, downsizing of labour, outsourcing of industrial and other economic activities and promotion of an aggressive urbanization by modernizing cities of different size, through direct polity intervention.[6] Such policies are systematically keeping out a large section of the population from the growth process, creating a distinct space of marginalized that has been steadily on the rise.[7] Ruthless exploitation of the labour has thus become the source of increased corporate profit as well as international price competitiveness in a globalised world [Bhaduri 2008].[8] A culmination of all the above processes, as argued by many, is the recent decision of establishing SEZs-the largest in number among all countries-that will help the corporate sector directly appropriate land and resources and open up the possibility of having a huge army of cheap labour, a large section of them comprising the dispossessed.[9] Surveys have found that workers in SEZs work 5.3 percent more hours than non-SEZs and at hourly wages that are 34% lower [Sen and Dasgupta 2008], obviously to offer labour power at "competitive price" in the global production system.[10] To facilitate this, SEZs are declared as "public utility services" with several exemptions from the labour laws, including the Minimum Wages Act and the Contract Labour (Regulation and Abolition) Act, and where strikes are also illegal.[11]

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1 *Ibid.*
2 *Ibid.*
3 *Id.*, at p. 52.
4 *Id.*, at p. 54.
5 *Ibid.*
6 *Id.*, at p. 56.
7 *Ibid.*
8 *Ibid.*
9 *Ibid.*
10 *Ibid.*
11 *Ibid.*

Recently a cabinet minister in India allocated new licenses in 2G mobile services on 'first come first basis' by changing rules and proponed the auction under the influence of transnational corporations intimating the same to the Prime Minster Office in favour of these corporations.[12] The Court has observed that the officials in Prime Minister Office failed to give true factual and legal advice to him.[13] In India too after globalization, the gap between the rich and the poor has widened and those without requisite skills have been the losers.[14]

1.4 Conclusion

The study has clearly shown that the players of Constitutional law without changing its text dealing with democracy, have changed the form of Indian democracy namely form namely truly representative deliberative democracy to market democracy eclipsing mandate contained in fundamental rights and directive principles of state policy especially Article 39 which inter alia states that the ownership and control of material resources of the community are so distributed as best to subserve the common good and that the operation of the economic system does not result in concentration of wealth of production to the common detriment whereas in reality after the liberalization of its economy thereby adopting market democracy has resulted in the disparity between rich and poor which has grown drastically and has undermined what has been solemnly resolved by WE, the People of India, inter alia to constitute India into a Sovereign, Socialist...Democratic Republic and to secure to all its citizens: Justice: Social, economic and political. Moreover Article 13 (2) states that the State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void and Article 13 (3) (a) states that in this article, unless the context otherwise requires, law includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. The Preamble, the Fundamental Rights and Directive Principles can be characterized as the trinity of the constitution.[15] The Supreme Court in Ogla Tellis case[16] concluded that since the Directive Principles are fundamental in the governance of the country they must, therefore, be regarded as equally fundamental to the understanding and interpretation of the meaning and content of the Fundamental Rights.

The study also shows that after market democracy in India and its pace is likely to accelerate rather than slowing down giving rise to the rule of few market friendly elites through unscrupulous means of distributing cash among voters at the time of election and misguiding people through paid news through congregate media. The democratic institutions will heavily favour elites as they only will have huge chunk

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12 *Subramanian Swamy v. Manmohan Singh*, AIR 2012 SC 1185.

13 *Id.*, at p. 2011-12.

14 J.S. Sodhi, "An Analysis of India's Development: Before and after Globalisation" 43 *Indian Journal of Industrial Relations*, p. 327.

15 M.P. Jain, *Indian Constitutional Law*, Vol. 2, 1957 LexisNexis Butterworths Wadhwa, 6th Edn. (2010).

16 *Ogla Tellis v. Union of India* AIR 1986 SC at p. 194.

of money to contest elections and such politicians will be changing rules in favour of transnational corporations as has happened in 2G allocation scam recently and Enron Power Plants case earlier. The way SEZ Act has been passed by the parliament without amending/replacing the outdated Land Acquisition Act till August 2013 which could have embodied rehabilitation policy for displaced and market rate for disposed for dispossessing them of their perennial source of livelihood namely land and turning them into labourers who will be exposed to transnational corporations friendly labour laws in market free economy. The criminalization of Indian politics have lurking danger as these criminal legislators may in connivance with unscrupulous transnational corporations may ruin the life of people by taking away their right to live with dignity, depriving them an opportunity of participating in democratic process. The election commission of India has also from time to time expressed concerns on the role of money and muscle power in elections in India. The corruption has also alarmingly increased in market democracy and as per many reports, the corrupt money may have siphoned off in India through Foreign Direct Investment, so there is an imminent need to see that only good money is allowed to be invested in India which require mandatory disclosure source of FDI otherwise it would have catastrophic impact on the Indian democracy which may turn India from market economy to black money market democracy. The fading impact of Anna Hazare movement against corruption after its initial success in the beginning particularly the apathy of the parliament strengthens the view that statist development/market democracy tends to reduce the group autonomy and undermine the motivation for participation in associational life that is essential to pluralist democracy. The implication of FDI in retail would have disastrous implication for the small trades and farmers as the transnational corporations like Wal-Mart etc. may tend to dump the outsourced agricultural/marketing products from abroad particularly in case these commodities are surplus abroad which may result in lower prices for the farmers and traders in India as under the present FDI policy a corporation is bound to only sourcing 30% of the value of products from Indian small industries/village and cottage industries, artisans and craftsman. Therefore, there is an urgent need to reform corporate governance in India making it mandatory for transnational corporations to declare their contributions to political parties and political persons. Luckily! Recently the Chief Information Commission has recently in its ruling declared that the political parties are public authorizes under Right to Information Act, 2005 but all the present government in consensus with all the political parties baring one political outfit has initiated first Amendment in the Right to Information Act which is bound to undermine democratic institutions. In Professor Hans Kelson terms, the Constitution being supreme norm which sanctions other norms namely acts and policies, stand subverted in the name of development. Hence, the study has clearly reflected upon various dilemmas for the law and development.

FAIR COMPETITION : THE ENGINE OF ECONOMIC DEVELOPMENT

Mohammad Atif Khan *

In a market free from monopolies and self-serving public policies, competition among the self-interests of isolated consumers and producers produces a stable and expanding economy."[1]*----**Adam Smith (1723-1790)***

1.1 Introduction

Fair competition is essential for the operation of markets, bring up innovation, production and growth all of which responsible for society's wealth and economic development of any country. Many developing countries like India are emphasizing on fair competition because it is a driver for productivity and an opportunity of equality. As a general objective Competition Law (Antitrust Law in US) contains rules that are intended to protect the process of 'Fair Competition' in order to maximize consumer welfare and economic efficiency.[2] The ultimate objective of the competition law throughout the world is to maintain fair competition to harmonize the market which is very important for the economic development of any country.

Fair competition means a just, open, and equitable competition between business competitors. Many countries enforce fair competition laws.[3] A Fair competition can improve a country's economic performance, open business opportunities to its citizens and reduce the cost of goods and services throughout the economy which would result into overall economic development of the country. "The term 'economic development' constituted a persuasive definition: an increase in real income per head as a desirable objective. During the 1950s and early 1960s, development polices emphasized the maximum growth of GNP[4] through capital accumulation and industrialization."[5] There are now more than 100 systems of competition law in the world in all types of economies- large, small, continental, island, advanced, developing, industrial, trading, agricultural, liberal and post- communist including India and China.[6] Sometimes different business entities having market power are able to harm consumer welfare by reducing output, raising prices, degrading the quality of product and depriving the consumers of choice which are considered as a whole unfair trade practices. Therefore to achieve the economic development it is necessary to remove this unfair trade practice which is only possible by the fair competition for which competition law is adopted in more than 100 systems of competition law.[7]

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* Mohammad Atif Khan, Lecture at Amity Law School Lucknow.

1 *http://www.economyprofessor.com/theorists/adamsmith.php*, last visited on 24 April 2011.

2 *See* P. Areeda and Turner, *Antitrust Law: Analysis of Antitrust Principles and their Application*, p. 149, note 2 (1980).

3 http://definitions.uslegal.com/f/fair-competition, last visited on 01 October 2012.

4 Gross National Product

5 Gerald M. Meir and James E. Rawch, *Leading Issues in Economic Development*, Oxford University Press, 7th Edition (2000), p. 69.

6 Richard Whish, *Competition Law*, Oxford University Press, 6th Edition (2008) at p. 1.

7 *Supra* note 7 at p. 1.

1.2 Practices Controlled By Competition Law to Achieve Fair Competition

Competition law of entire world i.e. Sherman Act 1890 (US), Clayton Act 1914 (US), Treaty of Rome 1957 and Indian Competition Act 2002 is concerned with those practices which are harmful for competitive process, economic development and for consumer welfare. Because without removing those practices it is not possible to maintain fair competition which is core of economic development. To achieve fair competition some practices are under scrutiny of competition law as mentioned below:

1.2.1 Anti-competitive Agreements

The agreement is anti-competitive[8] if it creates a dominant enterprise by the combination[9] of two or more industries particularly, agreements between competitors for price fixation or to share market share etc. Those are often referred as horizontal agreements which are severely punished.

The Competition Act essentially states two kinds of anti-competitive agreements as horizontal agreements and vertical agreements. In this context it is important to mention section 6(1) of Competition Act, 2002 which states:-

> No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

Anti-competitive agreement between enterprises that restricts competition generally falls into two categories as: Horizontal agreements e.g.

1.2.2 Abuse of Dominant Position

For fair competition it is necessary to avoid a dominant position[10] by a monopolist or a dominant firm having substantial market power. Because sometimes dominant firm reduces its price than cost to drive out the competitor and subsequently charge higher price which is known as 'predatory pricing'. In such situation fair competition cannot be maintained.

1.2.3 Public Restriction

Sometimes government makes legislative measures, regulations, licensing which results into distortion of competition. Therefore competition law provides a role to competent authority to scrutinize public restrictions and to play a role of competition advocacy.

These are some practices which must be controlled and avoided to achieve the position of fair competition without that economic development cannot be possible.

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8 Section 3 the *Competition Act* 2002.
9 *Id.*, S. 5.
10 *Id.*, S. 4.

1.3 Theory of Fair Competition and Economic Development

In business world competition means determined for more market share. The UK Competition Commission has described competition as 'a process of rivalry between firms...seeking to win customers' business over time'[11]. Therefore competition has always an effect on economic performance of every country. The important factor is to recognize the effect of competition on economic development which is not possible without the study of economic theory. After that one can consider what would happen in the condition of fair competition and can compare with the outcome under monopoly.

Before going further it is expedient to understand that what is meant by economic development. Economic development obviously includes economic growth measured by increase in GDP/GNP per capita but for the economic development it is necessary that benefits of the growth must be shared across the population of the country.[12] *Economic development is a sustainable process of structural change in which real per capita output increases and in which there is a wider participation in the production and consumption of output, such that an increasing proportion of the population experiences an improvement in its level of economic welfare.*[13]

1.3.1 Benefits of Fair Competition from Economics Perspective

The benefits of fair competition are lower price, better products, wider choice and greater efficiency which cannot be obtained in monopoly.[14] According to neo-classical economic theory, social welfare is maximized in conditions of fair competition. Social welfare is not a very general concept but in this allocative and productive efficiency would be achieved which resulted in society's wealth overall is maximized. Because of fair competition competitors are innovated to produce new and better product which resulted into a developed economy and also known as dynamic efficiency.[15]

Fair competition is the basis of allocative efficiency because economic resources are such allocated that it is not possible for anyone to make anyone better off without making someone else worse off. Goods and different services are allocated between consumers according to the price which never rises above the marginal cost. The achievement of allocative efficiency can be shown analytically on the economist's model.[16] Allocative efficiency can be achieved under fair competition only because in such situation if producers want to earn more so they have to produce one more unit. Producer will cease to expand the production only when cost of the further unit

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11 *Supra* note 3 at p. 3.

12 Development and Globalization Facts and Figures available at *http://unctad.org/en/docs* /gdscsir20071

13 Available at *www.londoninternational.ac.uk/...pdf/.../44_economics_of_dev_chap2.pdf.*, last visited on 20-04-2011.

14 Dando B. Cellini, "Economic Growth and Consumer Welfare - The Role of Competition Law", *Competition Law Today,* edited by Vinod Dhall, Oxford University Press, New Delhi, (2007) at p. 430.

15 Uchida and Cook, in Cook et al. (2007) at p. 311.

16 *Supra* note 3 at p. 5.

(marginal cost) exceeds the price he would obtain for it (marginal revenue). So in allocative efficiency consumers can obtain goods and services at the price they are prepared to pay.

Apart from the allocative efficiency many economist consider that under fair competition goods and services are produced at the lowest cost possible. Therefore very little of society's wealth is used in the production process. In monopoly produces are free from competition, hence may be high cost producers in monopoly. Thus fair competition is said to be helpful to productive efficiency. Productive efficiency is achieved because a produce is unable to sell above cost and if he did his customers immediately desert him.[17] If a producer charges high then other competitors would move into the market in the hope of profit.

1.3.2 Harmful Effect of Monopoly

In the theoretical model of economics it is suggested that when fair competition is there in market producers can sell their products only at the price which the market is prepared to bear. Consumers are free to buy at the price fixed by market and producers cannot affect the price by any change in their own output. The law of supply and demand determines the price as aggregate output of the market would remain unaffected. But under the monopoly condition is totally different. Monopolist is in the condition to affect the whole market as well as the price itself. Monopolist is the sole responsible for the aggregate output therefore he can either increase or decrease price through the principle of supply and demand.[18] In the economic point of view monopolist tries to refrain from expanding the output to earn largest profit which is not possible in fair competition.[19] In this monopolistic situation there is allocative inefficiency and resources are not distributed in most efficient possible manner.

Productive efficiency is also lower in monopoly than in fair competition. Because monopolist is not bound by the competitive forces to curtail the price to the lowest possible level.[20] In such condition resources are used to make right product but less efficiently. Furthermore monopolist does not feel the need of innovation in the absence of constant pressure for getting more advanced. Finally monopolist charges higher price than in fair competition so he is a kind of price maker. This may be particularly true where he is able to discriminate between customers, charging some more than others: however it is important to recognize that price discrimination in some circumstances may be welfare enhancing, or at least neutral in terms of social welfare.[21]

However it is not the matter of competition authority to determine the distribution of society's wealth but it is a matter of concerning Government to take interest in

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17 *Ibid.*

18 E. Mansfield, *Microeconomics: Theory and Applications* 4th ed. (1982) at p. 277-92.

19 Herbert Hovenkamp, *Federal Antitrust Policy - The Law of Competition and Its Policy*, Hornbook Series, West Group, Second Edition (1999) at p. 21.

20 *Ibid.*

21 *Id.*, at p. 7.

economic equality, because without ensuring fair competition in the market economic development is not possible in real world.

1.4 Consumer Welfare and Fair Competition as a soul of Economic Development

We can understand with above discussion in the light of economics that expected benefits of fair competition which are necessary for consumer welfare may be as follows:

1. Fair competition encourages allocative and productive efficiency
2. Fair competition leads to lowest price for consumers for what they are ready to pay
3. Consumers have a choice to buy in fair competition and their choice is being respected by producers
4. Fair competition ensures innovation which resulted in better products and ultimately advanced technology and exact economic growth.

In recent years many competition authorities have stressed on the importance of consumer welfare as well as economic development when applying competition policies in their respective country. Historically there had not been one single policy which bound the economic development of EC and UK. Different systems of competition law reflects different concerns, an important point when comparing the laws of the US, EC and UK.[22]

As already mentioned in this paper competition law with its one of fundamental objective to establish fair competition has been adopted in more than 100 countries, whose economies and economic development is very different from one to another. But it is well settled now in every country that if any country wants to be real economic developed, they have to ensure fair competition as I mentioned above value fair competition in the light of economics. As each country does not has the identical concern which was demonstrated at the time of negotiation of the Lisbon Treaty of 2007[23] where some member states were less enthusiastic about the process of competition.

Consumer welfare, fair competition and economic development are the terms which are really interconnected with each other because without consumer welfare it is not possible for any country to achieve economic development in real sense which can be only ensured by fair competition.[24] By a fair competition a country protects its consumers which are essential for consumer welfare. For the economic growth of any

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22 Jebsen and Stevens, "Assumptions, Goals and Dominant Undertakings; the Regulation of Competition under Article 82 of the European Union", (1996) 64 *Antitrust Law Journal* 443.

23 Lisbon Treaty of 2007 is an international agreement that amends the two treaties which form the constitutional basis of the European Union. It was signed by the EU member states on 13 December 2007, and came into force on 1 December 2009. It amends the Maastricht Treaty (also known as the Treaty on European Union) and the Treaty establishing the European Community (TEC; also known as the Treaty of Rome).

24 Vinod Dhall, "Overview: Key Concepts in Competition Law" Dhall, Vinod (ed.) *Competition Law Today: Concepts, Issues and the Law in Practice*, Oxford University Press, New Delhi, (2007) at p. 24.

country interest of consumers should be protected. For example if in any economy any firm having a dominant position and abusing its position so it is the obligation on the concern Government to protect the interest of consumers and ensure fair competition.

The objective of fair competition may be the dispersion of economic power and the redistribution of society's wealth which is the promotion of economic equity than economic efficiency. Aggregation of resources in the hands of monopolist or in hand of few producers is against the fair competition and as well as consumer welfare and could be considered as a threat to the notion of democracy and economic opportunity. President Roosevelt warned Congress in 1938 that:

> The liberty of a democracy is not safe if the people tolerate the growth of a private power to a point where it becomes stronger than the democratic state itself...Among us today a connection of private power without equal in history is growing.[25]

It is necessary here to discuss about small firms, because to establish fair competition these firms should be protected against more powerful rival firm. Dominant firms always try to drive out the small firms to control over the entire market which is the end point of fair competition.[26] This practice is also a hindrance to the economic development. Therefore small firms are very much important for economic growth of a country. These small firms avoid the monopoly in the market by which they protect the interest of consumers and try to maintain consumer welfare. But in the present time it can be questioned that is the approach of economic equity appropriate? In the present era economic efficiency is much more important than economic equity which is meant to be achieved by fair competition.[27]

1.5 How does Fair Competition Promotes Economic Development?

Fair Competition is central to the operation of markets, and fosters innovation, productivity and growth, all of which create wealth and economic development of a country.[28] The competitive process and the development process are so intertwined as to be indistinguishable.[29]

First, fair competition results in goods and services being provided to consumers at a lower price and so more is consumed and produced.[30] Some of the producers are also consumers therefore in the situation of fair competition they have to pay reasonable price which is not possible in the monopoly or in anti-competitive market. So they

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25 83 Cong Rec 5992 (1938).

26 Available at *www.oft.gov.uk/shared_oft/business_leaflets/.../OFT1113.pdf*

27 Available at *www.usbig.net/papers/029-CharleyClark.doc - United States*

28 Nick Godfrey, "Why is Competition Important for Growth and Poverty Reduction?," Department for International Development, London OECD Global Forum on Investment, (March 2008).

29 Metcalfe and Ramlogan, in Cook et al. (2007), p. 26

30 UNCTAD (1998) Survey of the literature providing quantitative evidence of the benefits of competition policy. In a cartel involving real estate in Washington DC, prosecution led to a 32% decline in prices received by real estate sellers.

buy more and more to enhance their production which results into economic development.

Improvements and innovations are important for economic development which can be happened only in fair competition.[31] In fair competition firms compete only on the basis of efficiency so they have to improve their product and technology.[32] Competition gives firms continuing incentives propelling dynamic efficiency in the market to make their production and distribution more efficient, to adopt better technology, and to innovate. Fair competition leads to new technology and advancement of product which is directly promotes the economic development. Just because of fair competition now industries are trying to reduce their waste, improve their technologies and invest in new technologies which all resulted in economic development.[33]

As fair competition is established in the market so it protects the right of small firm to compete.[34] And when it is established that the competition would be on merit and not on the market power of dominant firm, confidence will be increased and firms are more engaged in competitive conduct. Ultimately it affects the production of country positively and economic growth would be accelerated.[35] Property rights of investors are also protected in fair competition strategy and it enhances the investment climate for foreign direct investment because it creates a level playing field where remedies are available in the case of anti-competitive practices.[36]

Fair competition also encourages entrepreneurship, another contribution to economic development. In fair competition it is easy for a new firm to get into the market than in monopoly. Because in monopoly new firms are the threat to the dominant industry so they try to make hurdle for new firm or existing small firm. But in fair competition nobody can control the entire market so it is a kind of encouragement for entrepreneurship and new firms easily can step in into the market. It also creates an efficient market in which consumers have a variety of choices for purchasing at a genuine price for which they are ready to pay, which ultimately increase the investment and resulted in economic development.[37]

1.6 Conclusion

By above discussion it is clear that fair competition has a very crucial role to play in the economic development because fair competition is the basis for competitive markets and efficient allocation of economic resources and product which definitely encourages the economic growth. Fair competition also improves the efficient investment and technology which resulted into better production with more efficient

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31 Dutz Mark, "Competition Policy Issues in Developing and Transition Markets," *OECD Discussion Paper* CCNM/GF/COMP/WD (2002) 35.

32 Nickell, Stephen J. (1996), "Competition and Corporate Performance," *Journal of Political Economy (104)* 4, 724-746.

33 *Ibid.*

34 Broadman (2007) at p. 191.

35 Lewis (2004) at p. 288.

36 *Supra* note 29 at p. p. 5.

37 A. Smith, *An Inquiry Into The Nature and Causes of the Wealth of Nations* 61 (Modern Library Ed. (1978) (1st Ed. 1776).

product which is necessary for the economic development. Fair competition is not an automatic process and countries have to implement competition law according to their need and circumstances as Competition Act, 2002 is applied in India to ensure fair competition. Economic development includes sustainable economic growth which cannot be possible without monopoly free market that can be achieved only by fair competition. Therefore Author wants to conclude this paper with its title itself that fair competition is definitely the engine of economic development.

INTERNATIONAL CRIMINAL COURT AND GLOBAL CRIMINAL JUSTICE SYSTEM: ISSUES AND CHALLENGES

Dr. Sukhwinder Kaur Virk*

1.1 Introduction

The primary objective of International Criminal Law is the preservation and maintenance of public order for peace, security and development. Its functions also include the protection of the structure and fabric of community and its members from the forces of evil and destruction. Where the civil law fails to achieve the desired result or the specific social purpose, the Law of Crimes comes to the help of aggrieved persons. The performance or implementation of rules and regulations framed for States under the heading of International Law is also dependent mostly upon the co-operation of States. Therefore, the co-operation of the States had been an important factor for the establishment of an international criminal body to prosecute and punish the offenders of serious International Crimes.

1.2. Need of Permanent Criminal Court

The protection of individuals from violations of human rights and to promote law and justice requires appropriate mechanism to enforce the law. For decades international law lacked sufficient mechanism to hold individuals accountable for the most serious International Crimes. The problem was that, when the most serious crimes were committed the national courts were least willing or able to act. The reason was involvement of agents of the concerned State in the commission of crimes. If we look at serious crimes committed in –Nazi Germany, Rwanda, the former Yugoslavia, Cambodia – the Governments themselves or their agents were involved in the commission of those crimes. Although prosecution was carried out by ad-hoc Tribunals in some cases, such Tribunals had serious deficiencies, weaknesses and limitations. They were not only concerned with specific conflict but were also created only by few parties. Moreover some times, the tribunals had to become partial because they were created by the victorious parties of the conflict and covered crimes committed by the defeated parties only.

For solving the above problems and for the purpose of providing just and fair criminal justice to the aggrieved party many sincere efforts were made to make the existence of International Criminal Court a reality. The International Criminal Court has now been established as a permanent institution having jurisdiction over persons for prosecution of most serious crimes of International concern.

1.3. The Establishment of International Criminal Court and Its Jurisdiction

The Rome Conference adopted the Rome Statute of International Criminal Court[1] on 17 July 1998 was attended by one hundred and sixty countries. After five weeks of

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1 *The Rome Statute of the International Criminal Court*, see UNDOC. CONF.183/9, 17 July 1988.

negotiations, one hundred and twenty countries voted to adopt the treaty. Seven countries (the US, China, Libya, Israel, Iraq, Qatar and Yemen) voted against it and twenty one abstained. Abstainers were several Arab and Islamic States, as well as a number of delegations from the Commonwealth Caribbean. The Bush administration firmly opposed it and has formally renounced the US obligations under the treaty.[2]The Rome Statute for ICC came into force in 1 July 2002 with 66 ratifications. The ICC is the first permanent international court in the history of mankind to provide international criminal justice. In the fifteen years since the adoption of the Rome Statute of the International Criminal Court one hundred and twenty two States has ratified the Rome Statute. The Rome Statute contains a comprehensive codification of genocide, war crimes, crime against humanity. The Court has jurisdiction over the most serious crimes of international concern; genocide, crimes against humanity, war crimes and aggression.[3] The Court cannot exercise jurisdiction over the crime of aggression until the Statute has been amended by the addition of a definition of that and inclusion of preconditions for the ICC to take jurisdiction.[4]The ICC takes an important step towards global accountability for all, irrespective of official capacity of political and military leaders. The Court has only jurisdiction with respect to crimes after the entry in to force of the Statute. In other words the court does not have retrospective operation.

The Court has granted four mechanisms to its jurisdiction; if the accused is a national of a State party to the Rome Statute; if the alleged crimes took place in the territory of a State Party;[5] if a situation is referred to the Court by the UN Security Council and if a State not party to the Statute Accepts the Jurisdiction of the Court.[6] The Court can exercise its jurisdiction through three ways i.e. the Security Council may refer the case to the Court acting under Chapter VII of the UNs Charter;[7] State Party may refer the case to the Court[8] and the Prosecutor himself initiates the investigations in respect of such crime. Although the ICC has jurisdiction over the suspected persons based on the concept of universal jurisdiction for the covered crimes[9], the ICC may not establish jurisdiction over accused persons until certain pre-conditions[10] are met. It should be keep in mind that Court's jurisdiction is complimentary to that of national courts. The ICC will try cases only when the States with custody of the accused is unable or unwilling genuinely to prosecute.[11] The prosecution by the Court can only be suspended or deferred for a period of 12 months, when the Council

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2 Jonathon Wright, "U.S. Renounces Obligations to International Court", *Reuters*, 6 May 2002. Available at *www.state.gov/r.pa/prs/ps/2002.9968.htm.* visited on 23 April 2013.

3 *The Rome Statute*, Article 5(1).

4 *Id.*, Article 5(2)

5 *Id.*, Article 12(2) (a and b).

6 *Id.*, Article 12(3).

7 *The Rome Statute*, Article 13 reads as the UN Security Council may recommend investigation of alleged crimes using its authority under Chapter VII of the UN Charter.

8 *The Rome Statute*, Article 12(1).

9 Rome Statute's Preamble Para 6, recalling that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

10 *The Rome Statute*, Article 17.

11 *Ibid,*

by a Resolution passed under Chapter VII of the UNs Charter requests the Court to this effect.[12] It is for the first time in the history of International Criminal Justice that victims have the right under the Statute to present their views and observations before the Court. A victim is entitled to participate in the proceeding can receive material assistance and reparations. The ICC provides various privileges before victims which lead to proper reparation against crime. The victim based provisions within the Rome Statute[13] provide victims with opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. This type of victim oriented approach of ICC is a significant step and positive shape to international criminal proceedings.

The ICC is successfully handling the cases of situations in Northern Uganda, Democratic Republic of Congo, Central African Republic, Darfur (Sudan), Cote d'Ivoire, Kenya, Libya and Mali. The Security Council has referred the situation in Darfur, Sudan and the situation in Libya to the ICC for further investigations in 2005 and 2011 respectively[14]. It is noted here that both States are not parties to the Statute. In addition to these eight situations where the Prosecutor has opened formally investigations, several other situations are under 'preliminary examinations' they are; Afghanistan, Colombia, Georgia, Korea and Nigeria. The ICC has a budget upwards of $ 160 million a year, and only five people are currently under custody at the Hague. Human Rights Watch estimates that 200,000 to 300,000 children are currently serving as soldiers in armed conflicts, the charge for which Lubanga was found guilty.[15]

1.4. Challenges before International Criminal Court

In addition to all positive features of the ICC, there are still many hurdles for the smooth working of the Court. Number of problems and challenges are before the ICC to provide fair justice to international community.

i. The Court works on the lines of complementarity regime which states that the Court can only act as a last resort in cases in which national criminal law systems are unwilling or genuinely unable to carry out the investigation and prosecution. In other words the Court's jurisdiction is limited to those cases where national jurisdictions are unable to try the perpetrators of crimes or when States are unwilling to do so. This is to the tune of Article 17 of the Statute which provides that the State having jurisdiction to investigate and prosecute the ICC crimes shall have the priority to do such and the ICC shall not entertain it for investigation or prosecution without determining that the

12 *Id.*, Article 16.

13 *Id.*, Article 75.

14 The UN Security Council Resolutions 1593 of 31 March 2005 and 1970 of 26 February 2011.

15 Thomas Lubanga was found guilty of abducting boys and girls under the age of 15 and forcing them to fight in a war in the east of Democratic Republic of Congo in 2002 and 2003. On 14 March 2012, the Court, by unanimous verdict of the Trial Chamber, found Lubanga guilty as a co-perpetrator in the use of child soldiers. On 10 July 2012 Lubanga was sentenced for 14 years by the Court. Available at *www.reuters.com/article/2012/07/10/oukwd-uk-warcrimes-Lubanga-id AFBRE 8690c120120710.* visited on 8 July 2013.

concerned state is either unwilling or unable to investigate or prosecute such crimes. The serious delays occur due to complementary jurisdiction of International Criminal Court to national criminal jurisdiction. In this situation the ICC has no option but to wait and watch the action of the concerned State.

ii. The Court has no executive powers, no police, no military and even no territory of its own and thus totally relies upon State Parties to fulfill its objectives. It has to depend upon States to serve the summons, arrest the accused and surrender them before Court, to collect evidence and serve documents in their respective territories. It is a big issue that the Court has very less support from member states' police and peace keeping forces for execution of decisions against any of their individual culprits. After pronouncement of decisions, the Court needs to enforce judgement which requires cooperation from States. The problem which lies here is privilege to States to refuse this support on the excuse of national security. Therefore, the States could become the cause of delay and obstruction for the enforcement of decisions of the Court.

iii. Some major crimes of modern world as the crime of Hijacking, crime of Terrorism and crime of International Trafficking of Illegal Drugs are not included in the list of crimes over which ICC has jurisdiction. The Draft Statute though embodied proposals to include them in the list of crimes falling within the jurisdiction of International Criminal Court, but no consensus on this could be reached till this date. Till today, the Court's jurisdiction is confined only to four types of crimes; Genocide; War Crimes; Crimes against Humanity; and Crime of Aggression as per Article 5 of the Rome Statute.

iv. The Court has no jurisdiction for crimes committed before the entry into force of the Statute. This becomes evident from Article 11(2) of the Rome Statute according to which if a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12 Paragraph 3. Due to this, many crimes committed before entry into force by States have gone unpunished.

v. Complementary Clause also limits the jurisdiction of International Criminal Court. The principle of Complementarity signifies that the jurisdiction of the Court is complementary to national judicial system, that is, the Court will exercise its jurisdiction only in cases where States do not exercise their national jurisdiction because they are unable or unwilling to do so. The complementary provisions though were supported by the majority of countries but limiting the International Criminal Court's reach is also not a good step. The statement made by Head of the delegation of India on this provision signifies what exactly the principle of complementary implies. The Head stated that the principle of complementary would limit the jurisdiction

of the Court to cases of collapse of the state machinery or non-availability or inadequacy of national criminal justice system.

vi. Role of the Security Council in referring a situation to the International Criminal Court is also a matter of controversy. It is amounting to granting a special power to the five permanent members of the Security Council. In this regard it is worth to quote the Indian Delegate Mr. S.R. Rao who opposed this Clause:

"Any role given to the Security Council in the jurisdiction of the Court would amount to granting special power to the five permanent members of the Security Council exercising veto power to decide upon a particular situation on purely political condition, while they themselves would not accept the inherent jurisdiction of the Court."[16] Under the Rome Statute, the Security Council has the power to trigger action by the court and to obstruct prosecutions. The United States has several times pushed the Security Council to adopt resolutions exempting UN peacekeepers and US militaries from the jurisdiction of the court. The Prosecution by the Court can only be suspended or deferred for a period of 12 months and that too when the Council by a Resolution passed under Chapter VII of the UNs Charter requests the Court to this effect. The decision of the Court itself can be blocked at any time by one of the five permanent members. Moreover, this also becomes apparent from the attitude of opposing countries. In this direction it is to be noted that along with India, other states like China, Jordan, Israel, Pakistan and Ukraine were opposed to the power of the Security Council referring the case to the ICC. Security Council's Veto power against prosecution also goes against the proper working of the Court on account of "deferral" provision in the Rome Statute. According to Article 16 of the Statute the Court may be prevented from exercising its jurisdiction when so directed by the Security Council. This is called "deferral". It means that the decision of the Court itself can be blocked at any time by one of the five permanent members – the US, the United Kingdom, China, France and the Russian Federation – exercising its Veto. This type of Security Council's dominance over the ICC threatens the Court's legitimacy as an independent institution. India rightly criticized the provision of Article 16, arguing that the Statute violates the fundamental principle of international law by conferring on the Council a power which it does not have under the Charter and which it cannot and should not be given by any other instrument.[17]

vii. The role of the Security Council in determination of the crime of Aggression itself before referring the complaint to the Court is a matter of controversy. In this context, it may be recalled that the International Law Commission Draft Statute provided that no complaint of an act of Aggression could be brought before the Court unless the Security Council first determined under

[16] Summary Records of the Meeting of the Committee of the Whole, 6th Meeting, 18 June 1998, UN Doc. A/CONF.183/C.1/L.1, p.177.

[17] Rome Conference's Press Release 1/ROM/22, 17 July 1998.

Article 39 of the UN Charter that a State had committed an act of Aggression. However, during debates, in the Rome Conference, various States like India, Pakistan, Syria, Iran opposing a pre-determination act of Aggression by the Council before the Court had argued that the Security Council, a political body, only rarely would make a determination that a State had committed an act of Aggression. It was also argued that the requirement of pre-determination of an act of Aggression would in effect prevent any role of the Court in respect of the crime of Aggression.

viii. Although crime of Aggression has been covered in the Rome Statute but it has not been defined in the Statute. Even though such definition has been specifies through an amendment of the Rome Statute by the Review Conference in Kampala, Uganda in June 2010, but a doubt has been raised in this direction by saying that such an amendment might never happen. In Review Conference it has been decided that the Court will only have jurisdiction over the crime of aggression after two conditions are met; the first is, the amendment has entered into force for thirty states parties and second is, on a date after 1 January 2017 the Assembly of State Parties has voted in favour of allowing the Court to have jurisdiction.[18] According to Article 121(1) of the Rome Statute, no amendments will be considered until seven years after the treaty's entry into force. Moreover, as stipulated in Paragraph 3 and 4 of Article 121 of the Rome Statute that the amendments must be approved by a two third vote of the Assembly of States Parties. Therefore, keeping in view, such a difficult amendment process, the differences among States over the definition of the crime of Aggression and over the role of the Security Council in determining whether Aggression has occurred, the ICC would not be able to exercise jurisdiction over this crime for a long time to come.

ix. Triggering power to the prosecutor has also become a matter of discussion at international fora. Where States have proved unwillingness to refer the violations of international law to the appropriate judicial bodies the Security Council should not remain silent and there should be no restriction on its triggering power. On the other hand if Security Council remains passive in the face of heinous crimes committed in States or in conflicts between States the triggering power should have been provided to the aggrieved States Parties also.

x. Exercise of jurisdiction by the Court when States are unwilling to prosecute the accused is also not free from criticism. The Court will exercise jurisdiction only in that situation when States are unwilling to exercise their national jurisdiction or are unable to carry out the investigation or prosecution or their decision not to prosecute the person concerned is the result of their inability to prosecute. Thus it is quite clear that any interested States including non-parties states can prevent the exercise of the jurisdiction

[18] Adopted at the 13th Plenary Meeting on 11 June 2010 by consensus, RC/Res.6 of the Review Conference of the Rome Statute.

by the Court by merely informing the Court that they are investigating the situation and that they intend to prosecute and try the accused.

xi. International Terrorism is a major problem for the international community but it still has no definition under the Statute of the ICC. Many efforts have been made for evolving a consensus between the States on the definition of 'International Terrorism'. But no agreeable solution yet has come out as a result of such efforts. Due to this situation the ICC has become teeth-less against the individuals and the States who propagate, use and finance terrorism and recruit terrorists for their ill designs.

1.5. Conclusion

The International Criminal Court is a completely integrated international judicial organisation. In this way, the Court will be an important component of an international order based on the Rule of Law which strengthens individual criminal responsibility, particularly of individuals in positions of state leadership. The International Criminal Court is a subject of International Law. The status of the ICC as a subject of International Law is spelled out in Article 4 Para 1 of the Rome Statute. Article 4 of the Rome Statute provides a legal status and powers of the Court. Article 4(1) states that 'the Court shall have international legal personality. It has such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes'. The Court has all three core capabilities i.e. treaty making power, the right to entertain diplomatic relations and active and passive international responsibility.

We hope that at the time of Review Conference in 2017 on the Rome Statute, shortcomings would be checked and removed in the Rome Statute. A more viable, forceful and authentic code would emerge for the safety, security and peace of the world.

INDIA'S CHANGING NUCLEAR DOCTRINE: POST INDO-US NUCLEAR DEAL

Gurmanpreet Kaur *

1.1 Introduction

The nuclear epoch began with the Manhattan Project, the clandestine American effort during World War II to construct an atomic bomb. On 6th July 1945 the world's first atomic explosion was detonated during a test in the New Mexico desert. On 6th and 9th August 1945, the Japanese cities of Hiroshima and Nagasaki were devastated by atomic bombings and on 10th August 1945 Japan offered to surrender. The waves of celebration followed in the United States signalling the end of the war trigging an immediate sense of shock at the terrifying power of this new class of weapons.

After World War II, the proliferation of nuclear weapons became an increasing cause of concern throughout the world. At the dawn of 21st century majority of such weapons were held by the United States and former USSR; lesser numbers were held by Great Britain, France, China, India and Pakistan. Israel is also known to possess nuclear weapons but it has not been confirmed publicly; North Korea also conducted nuclear tests recently but does not have readily deliverable nuclear weapons; South Africa is also believed to possess small armoury. Over a dozen other countries are in race of possessing or developing nuclear weapons. In 1970s the scientists began investigating the impending impact of use of nuclear weapons on the environment besides working out the dangers of the radioactive fallout.

In May 1974, India's first nuclear explosion was conducted which was remarked by India's Prime Minister Indira Gandhi as a "peaceful nuclear explosive". But the ambivalence of this peaceful nomenclature meant trouble for the strategic weaponeers. Indira Gandhi and successive prime ministers resisted the scientists' and engineers' desires to conduct additional tests and develop an overt nuclear weapon program. India's nuclear policy was also influenced by India's international security condition as well as by domestic variables such as the vagaries of political change and the influence of bureaucratic elites. Indeed, India's decision to build a nuclear force was taken only in the late 1980s, much after it had become clear that Pakistan with Chinese technological assistance had made rapid advances in the nuclear weapons programme.[1] As for bureaucratic influence, some defence scientists played a key role in keeping the weapons programme alive even when there was no political support or indeed, active opposition, while other bureaucrats were responsible for creating political awareness of India's declining nuclear options.[2] Nevertheless, these

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1 Tellis, Ashley, *India's Emerging Nuclear Posture: Between Recessed Deterrent and Ready Arsena*, Oxford University Press, New Delhi (2001).

2 K. Sundarji (Lt. Gen.), "Introduction," in *Effects of Nuclear Asymmetry on Conventional Balance*, Combat Papers no. 1 (Mhow: College of Combat, May 1981); K. Subrahmanyam, "Nuclear Force Design and Minimum Deterrence Strategy for India," in Bharat Karnad, ed., *Future Imperilled: India's Security in the 1990s and Beyond,* New Delhi: Viking (1994), pp. 176-95.

variables suggest a moderate Indian approach to nuclear weapons and thus reinforce the dominant tendency towards a political rather a military approach to look at nuclear weapons. From the days of independence Indian leaders took a very vocal stand against the development of nuclear weapons. But Jawahar Lal Nehru was a modernist; he was convinced that nuclear technology had a role to play in national development. [3]

1.2 India and Nuclear Weapons

Indian leaders have generally considered nuclear weapons at best a necessary evil. Prime Ministers Lal Bahadur Shastri and Rajiv Gandhi sought international solutions to avoid committing to nuclear weapons. Even Prime Minister Atal Vajpayee, who ordered the nuclear tests in 1998, was more ambivalent two decades earlier, siding with Desai in voting against restarting the nuclear weapons program in 1979. As a number of analysts have concluded, growing nuclear threats and a progressively unaccommodating global nuclear order forced New Delhi to move towards a declared nuclear arsenal in the 1990s. This discomfort with nuclear weapons has defined the manner in which India has viewed nuclear weapons.

Since 1998, both India and Pakistan started to integrate nuclear weapons into security strategy and planning. With the ominous logic of nuclear deterrence, each side desired to make its nuclear forces more credible and make those nuclear forces more usable. Ballistic missiles offer both sides advantages over using aircraft as delivery vehicles, but the short ranges create a hair-trigger situation. From launch to impact, missile flight times may be as short as 5 minutes. In the past, both sides appeared to use the separation of warhead components as a form of command and control (in the sense of lowering the risk of unauthorized or accidental use). Some observers have noted that this approach becomes risky when the other side can launch short-range ballistic missiles against which there is no defense. These observers have called for improving command and control of nuclear forces, while noting, ironically, that reduced ambiguity could conversely increase the likelihood of war.

Indian views about missile defenses are a further indication of the contradiction in Indian views about nuclear weapons. If nuclear weapons are essentially political weapons, not usable in fighting wars, the logic of missile defenses seems difficult to understand: clearly missile defenses are needed only if one assumes that nuclear weapons are going to be used. Nevertheless, New Delhi has pursued a ballistic missile defence (BMD) system since at least the mid-1990s.[4] India's search for an appropriate ballistic missile defence system appears linked to the growth of Pakistan's missile delivery capability, including the transfer of Chinese missiles such as the M-11. As with nuclear weapons, the search for a ballistic missile defence system has continued despite changes of political leadership and ideology in New

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3 Abraham, Itty, *The Making of the Indian Atomic Bomb*, Zed Books, New York (1998).

4 Rajagopalan, Rajesh, *India: Largest Democracy and Smallest Debate?, Contemporary Security Policy,* Vol. 26, No. 3, December 2005, pp. 605-20

Delhi. At various times, India has sought the Russian-built S-300, the Israeli-American Arrow, and the US-built Patriot ballistic missile defence systems.

India is also thought to have a domestic ballistic missile defence system in development, built around the still under-development Akash Surface-to-Air Missile (SAM). New Delhi's decade-long search has been unsuccessful possibly because Indian decision-makers have not given sufficient thought to what kind of system India needs. Indeed, it is not clear how missile defenses will fit into the existing Indian nuclear doctrine. India's official nuclear doctrine has made no mention of a missile defence system, and it is unlikely that the war-fighting orientation of missile defenses will sit well with the political/deterrence driven sentiment that dominates the nuclear doctrine.[5] None of the Indian governments that have been in power since 1995 have given any reason why they want missile defences, though the issue had created dissension among some of allies of the United Progressive Alliance (UPA) Government when it included communist parties because New Delhi has been seeking to buy a US-built system based on the Patriot PAC-3. Thus India's view of nuclear weapons suggests an element of inconsistency: nuclear weapons are essentially political weapons and unusable militarily by India, but other states might not be as restrained. As a consequence, India both opposes the spread of nuclear weapons and pursues ballistic missile defence.[6]

India's no first use nuclear (NFU) posture, however, only heightens its need to develop and deploy second-strike capabilities. With a no first use no-first use nuclear posture, a nation necessarily has to have the ability to survive a first strike and retaliate. Unless a nation wishes to practice deterrence solely through a first-strike posture, as Pakistan is doing, it has to invest in second strike assets. India's decision to add a sea-based component to its nuclear deterrent is to be understood in this context, since the least vulnerable nuclear weapons are those on board submarines.[7] This is why a first-use nuclear doctrine is the simplest, most cost-effective posture, especially for a state not at the top end of the technology ladder. While no first use nuclear has historically been employed by China and the Soviet Union to cover windows of nuclear vulnerability, its credibility is tied to expensive second-strike assets. Unlike India, Israel has not declared no-first use nuclear despite its nuclear monopoly in the Middle East. With China qualifying its no-first use nuclear as it advances in nuclear-deterrent capabilities, India is the only nuclear state with a totally unconditional no-first use nuclear applicable in all circumstances.

1.3 India's Changing Nuclear Doctrine

In 1998 India openly tested nuclear weapons and declared that it had achieved a nuclear capability. It had been widely suspected that India had an undisclosed nuclear capability since the early 1970s. The decision to openly declare nuclear capability has been attributed to a combination of reasons including domestic popularity, an

5 Noorani, A.C., "*India's Quest for a Nuclear Guarantee*," Asian Survey, Vol. 7, No. 7, July 1967.

6 Pant, Harsh, *India Debates Missile Defense*, Macmillan, New Delhi, 2005

7 Ladwig III, Walter C., "A Cold Start for Hot Wars? The Indian Army's New Limited War Doctrine," *International Security*, Vol. 32, No. 3 (Winter 2007/2008) at pp. 158-90.

attempt to gain greater international consideration and frustration at the lack of progress towards nuclear disarmament by the nuclear weapon states.[8] The government followed its tests with policy announcements including the report on "Indian Nuclear Doctrine" released by India's National Security Advisory Board in August 1999. These hold that:

- India would not be the first to use nuclear weapons and would be willing to enter into negotiations on a treaty on non use of nuclear weapons;
- India supports negotiations on a nuclear weapons abolition convention; India supports the inclusion of the threat or use of nuclear weapons as a crime in the Statute of the International Criminal Court.
- India had initially proposed negotiations for a Comprehensive Test Ban
- India had initially proposed negotiations for a Comprehensive Test Ban Treaty, but in 1996 opposed its conclusion on the grounds that it allowed sub-critical explosions and other high-tech nuclear weapons experiments and was no longer a step towards nuclear disarmament.

The various changes in Indian policy, including the promulgation of the Indira Doctrine, may have contributed to the deterioration of relations with Pakistan in the early 1980s. Confrontation rose in new areas, such as the Siachen Glacier, and in a series of provocative military exercises. But there was also a growing concern with Pakistan's expanding nuclear weapons capability. This led to a rethinking of the traditional option policy. Before the 1974 Indian atomic test, India's nuclear option was directed at the perceived nuclear threat from China. By the early to the mid 1980s, Indian analysts were convinced that Pakistan had put together an effective nuclear weapon. Thereafter, India had to consider the possibility of a nuclear threat from two fronts. This perception of a dual nuclear threat is evident in India's military missile program, launched sometime in 1983. Instead of concentrating merely on Pakistan and building a single missile capable of a range from 250 to about 1,000 kilometers, India opted for two separate nuclear-capable missiles, the short-range Prithvi and the longer range (1,500 to 2,000 kilometers) Agni, capable of striking targets as far as Beijing in the east and Tehran in the west.[9]

It is in the context of this emerging deterrence relationship that most of the overt military operations, an era of violent peace can be best explained. India and Pakistan have not been involved in a conflict since the 1971 war, the longest period of peace in the 45-year troubled history of the two nations. Yet while there have been no wars, declared or undeclared, limited military confrontations have regularly erupted. These have taken the following forms: supporting indigenous militant movements in Punjab, Kashmir and Sindh; low-intensity conflicts and skirmishes along the disputed

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8 Sidhu, Waheguru Pal, *The Evolution of India's Nuclear Doctrine,* Centre for Policy Research Occasional Paper No. 9, New Delhi (2004).

9 Retrieved from "Agni-3 clears Test; All set to be inducted into forces," *Indian Express*, February 8, 2010, <*http://www.indianexpress.com/news/Agni-3-clears-test--all-set-to-be-inducted-into-forces/576976*>. last visited on 26th July 2013 at 15.00 IST

border; and a full-blown war in Siachen, confined to a very specific and limited area and conducted only with limited weapons.

The most important of nuclear doctrine is the character and capability of the force structure that a nuclear regime creates. Force structure planning flows from nuclear strategy objectives, prevailing environmental factors, the vulnerability of the force structure, the desired military-technological capability and so on. Having derived possible policy objectives, it now remains to evolve a credible employment policy to achieve the strategic aims. The substratum of the nuclear weapons employment policy is Targeting Philosophy which would aim at meting out the desired levels of assured punitive response to a nuclear initiative by the adversary, thereby contributing to the attainment of policy objective – deterrence. This in turn dictates the weapons capability, i.e. the minimum inescapable quality and quantity of weapon systems that would guarantee strikes on selected targets in the existing technological and security environment, and the deployment policy.

1.4 Implications of Indo-US Nuclear Deal

The Indo-U.S. civilian nuclear agreement is the name commonly attributed to a bilateral agreement on nuclear cooperation between the United States of America and the Republic of India. The framework for this agreement was a Joint Statement by Indian Prime Minister Manmohan Singh and U.S. President George W. Bush, under which India agreed to separate its civil and military nuclear facilities and place civil facilities under International Atomic Energy Agency (IAEA) safeguards and, in exchange, the United States agreed to work toward full civil nuclear cooperation with India.[10]

On August 1, 2008, the IAEA approved the safeguards agreement with India, after which the United States approached the Nuclear Suppliers Group (NSG) to grant a waiver to India to commence civilian nuclear trade.[11] The 45-nation NSG granted the waiver to India on September 6, 2008 allowing it to access civilian nuclear technology and fuel from other countries. However, India can commence nuclear trade with the United States only after the deal is passed by the U.S. Congress. The deal is a major focus of the Congress's last session which began on September 8, 2008.[12]

The *Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006*, also known as the *Hyde Act*, is the U.S. domestic law that modifies the requirements of Section 123 of the U.S. Atomic Energy Act to permit nuclear cooperation with India[13] and in particular to negotiate a 123 agreement to operationalize the 2005 Joint Statement. As a domestic U.S. law, the Hyde Act is

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10 Joint Statement Between President George W. Bush and Prime Minister Manmohan Singh

11 Retrieved from <*http://www.marketwatch.com/news/story/nuclear-suppliers-group-grants-india/story.aspx?guid*> last visited on 25th July 2013 at 14.20 IST

12 Retrieved from <*http://www.outlookindia.com/pti_news?id=32189*> last visited on 21st July 2013 at 9.00 IST

13 The Indo US Nuclear Debate from retrieved from <*http://www.bbc.com/news/*> last visited 21st July 2013 at 20.00 IST

binding on the United States. The Hyde Act cannot be binding on India's sovereign decisions although it can be construed as prescriptive for future U.S. reactions. As per the Vienna convention, an international treaty such as the 123 agreement cannot be superseded by an internal law such as the Hyde Act.

After the terms of the 123 agreement were concluded on July 27, 2007, it ran into trouble because of stiff opposition in India from the communist allies of the ruling United Progressive Alliance. The government survived a confidence vote in the parliament on July 22, 2008 by 275–256 votes in the backdrop of defections from both camps to the opposite camps.[14] The deal also had faced opposition from non-proliferation activists, anti-nuclear organisations, and some states within the Nuclear Suppliers Group. A deal which is inconsistent with the Hyde Act and does not place restrictions on India has also faced opposition in the U.S. House[15] and may not receive a vote until 2009.

Parties to the Non Proliferation Treaty (NPT) have a recognized right of access to peaceful uses of nuclear energy and an obligation to cooperate on civilian nuclear technology. Separately, the Nuclear Suppliers Group has agreed on guidelines for nuclear exports, including reactors and fuel. Those guidelines condition such exports on comprehensive safeguards by the International Atomic Energy Agency, which are designed to verify that nuclear energy is not diverted from peaceful use to weapons programs. Though neither India, Israel, nor Pakistan have signed the NPT, India argues that instead of addressing the central objective of universal and comprehensive non-proliferation, the treaty creates a club of "nuclear haves" and a larger group of "nuclear have-nots" by restricting the legal possession of nuclear weapons to those states that tested them before 1967, who alone are free to possess and multiply their nuclear stockpiles.[16] India insists on a comprehensive action plan for a nuclear-free world within a specific time-frame and has also adopted a voluntary "no first use policy."

The US-India nuclear deal was essential to India because India's traditional approach towards nuclear cooperation had reached a dead-end. Traditionally, India sought international nuclear cooperation, even while maintaining a nuclear weapons program, by agreeing to partial safeguards on nuclear imports. This strategy allowed India to supplement its domestic nuclear power capability with international cooperation, as long as there were willing international partners. However, when the rules of international nuclear commerce changed from partial safeguards (safeguards only on the specific imported item) to full-scope safeguards (safeguards on the entire nuclear program as a condition for any nuclear commerce), India was faced with the choice of either giving up its nuclear weapons program, or giving up on international nuclear commerce. Not surprisingly, India chose the latter. What the US-India

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14 *Economic Times of India "Hyde Act"* will haunt nuclear deal at NSG too. Dated 15th February 2008

15 Retrieved from <*http://www.iht.com/articles/ap/2008/08/01/europe/EU-Nuclear-India.php*> last visited on 28th July 2013 at 12.35 IST

16 Chari, P.R., *Indo-US Nuclear Deal: Seeking synergy in Bilateralism,* Institute of Peace and Conflict Studies, New Delhi (2009).

nuclear deal does is give India the option yet again to both keep its nuclear weapons program while also preserving its access to international nuclear commerce.

The issue had become even more vital for India because India's explosive economic growth has put much greater strains on its electricity generation capacity, leading to peak power shortages of as such as 11 percent. Now that the nuclear deal is complete, and India has the necessary waiver from the NSG that permits other nuclear powers such as France and Russia to supply India with civilian nuclear technology, India is expected to significantly enhance its civilian nuclear power sector with international cooperation. Indeed, several agreements have already been signed to bring to fruition additional nuclear power generating capacity and more nuclear power agreements are expected to be signed over the next two years.[17]

The nuclear deal is unlikely to have major impact on India's nuclear weapons program. In the last two decades, ever since India went nuclear in the late 1980s, India has only built a few dozen nuclear warheads. Most estimates suggest that India has enough fissile material for about 65 –110 warheads, with some estimates suggesting I ndia's Nuclear Policy 111 even lower numbers. If we assume a median of 85 warheads, it would suggest that India has only built, on average, about four warheads a year. This suggests that India feels no great pressure to rapidly increase its arsenal.[18] The suggestion, by some arms control experts, that access to foreign nuclear fuel will free India's domestic fuel resources for weapons does not hold much water because India has much larger stockpiles of fuel (about one ton) that it could have converted for weapons if it had wanted to do so. In other words, the small size of the Indian nuclear force is the consequence of deliberate choice rather than because of any fissile material shortage.

Ultimately the India-US Nuclear deal has translated into economics, commerce, trade, development and FDI benefits for both the nations.

1.5 Conclusion

India's nuclear policy has evolved gradually rather than dramatically. This is unlikely to change. Indian leaders and the political and administrative system are cautious and risk-averse. And India faces no existential insecurities and is indeed a fairly confident and secure state that dominates its region. Thus, there is little domestic political or international reasons to expect rapid changes in India's nuclear policy. But just as it is cautious in advancing its nuclear weapons arsenal, it will also be cautious in advancing on the nuclear arms control and disarmament agenda. India is unlikely to sign either the Comprehensive Test Ban Treaty or the Fissile Material Cut-off Treaty in the next couple of years. On the other hand, India is also unlikely to stage more nuclear tests or hugely increase its nuclear arsenal. Over the next decade,

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17 Karat, Prakash, *The Nuclear Deal and India-US Strategic Relations,* Left World Books, New Delhi (2007).

18 Retrieved from <*http.www.cfr.org/india/us-india-nuclear-deal/p9663*> last visted on 20th June 2013 at 10.45 IST

India should be expected to gradually increase the size of its arsenal and make it more robust and reliable, with some 6000 kilometer plus range ballistic missiles and possibly one or two submarines capable of firing long-range ballistic missiles. India has sought Ballistic Missile Defence for over a decade. Though it is possible that India might buy a Ballistic Missile Defence system or develop one indigenously, it is unlikely that such systems will be deployed in the next few years. India can also be expected to campaign vigorously for nuclear disarmament. New Delhi can also be expected to continue to worry about the negation of its conventional military deterrent, but it is unlikely that it will find a solution to this puzzle either in the immediate future.

India has been slowly but surely developing its nuclear posture, capabilities, and command-and-control structure. Given the time-consuming intra-governmental processes in India, the progress on those fronts has been inevitably unhurried, if not dawdling. In the coming years, India will increasingly focus on developing and strengthening its intermediate-range nuclear capability as part of its proposed tried of air-land-and sea-based assets. As a latecomer in the nuclear world, India has no choice but to concentrate on modest nuclear modernization to meet its perceived defense needs.

USE OF FORCE IN THE OUTER SPACE: ANALYSING THE SPIRIT OF THE LAW

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Aakash Saxena**

1.1 Outer Space Regime and Use of Force

The United Nations Charter in Article 2(4), one of its cornerstones, lays down the most important principle in contemporary international law to govern inter-State conduct,[1] prohibiting the threat or use of force, and prescribing the States to refrain from violating the same.

The U.N. Charter, an international agreement under the international law[2] also constitutes expressive and peremptory rules of general international law[3] from which no deviation is permitted[4] and is therefore binding on all signatories. This rule reflects the *jus cogens* principle from which no derogation is permissible.[5] Thus, the evident wide-sweeping[6] prohibition on the threat or use of force provided in Article 2(4) of the U.N. Charter also binds its signatories to the same.

Moreover, Article 9 of the *Draft Declaration on Rights and Duties of States, 1949*,[7] stipulates that, every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order.

It was iterated in General Assembly Resolution, 1962 that the prohibition on the use of force contained in Article 2(4) of the U.N. Charter is equally applicable to the use of outer space[8] thus, qualifies to govern the deployment of any kind of dangerous weapons of mass destruction in the lower Earth orbit. The deployment of anti-satellite (Hereinafter, called as ASAT) weapon system also amounts to use of force

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1 *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States Of America) (Merits)* [2003] ICJ Rep 161, 291.

2 Captain Sean M. Condron, "Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox" (1999) 161 *Military Law Review* 115 at p. 125.

3 F.B. Schick, "Space Law and Communication Satellites" (1963) 16 (1) *Western Political Quarterly* 14 at p. 29.

4 Edward Kwakwa, "Belligerents Reprisals in the Law of Armed Conflict" (1990) 27 *Stanford Journal of International Law* 49 at p. 56.

5 Sean P. Kanuck, "Information Warfare: New challenges for Public International Law" (1996) 37 *Harvard International Law Journal* 272 at p. 276.

6 Alan D. Surchin, "Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad" (1995) 5 *Duke Journal of Comparative and International Law* 457 at p. 479.

7 *Draft Declaration on Rights and Duties of the States*, GA Res 375, UN GAOR, 4th sess, 270th Plenmtg, UN Doc A/Res/375 (1949).

8 Peter Jankowitsch, "Legal Aspects of Military Space Activities", in Nandasiri Jasentuliyana (ed), *Space Law, Development and Scope* (1992) 143, at p. 145; Maogoto and Freeland, see infra note 112 at pp. 180-181.

or threat of use of force due to the quantum of destruction attributable to their use from outer space. These ASAT systems hold the capability to destroy the target with a combination of laser and projectile weapon system. Projectile weapons include the missiles or the rockets of any nature that are projected forcibly to the set target.

Furthermore, Laser ASATs, both ground-based and space-based have the advantage that they deliver their lethal punch at the speed of light to the set target.[9] Thus, it is evident that, being comprised of the capability to attack a set target with laser and projectile weapons, both ground and space based ASAT system are capable of causing an apprehension of use of force. In the *Case concerning Military and Paramilitary activities in Nicaragua,*[10] it was observed by International Court of Justice (Hereinafter, I.C.J.) that States have a duty to refrain from acts involving the use of force. This view was further recalled by I.C.J. in case concerning *Legality of the Threat or Use of Nuclear Weapons*[11] and in the *Oil Platforms Case (Merits).*[12]

1.1.1 Justifiability of the Use of force in Outer Space in the disguise of Self-Defence

The international community recognized the theory of self-defence long before the adopting of the United Nations Charter. Article 51 of the Charter merely codified the theory and transformed it into an international agreement to which all signatory states must adhere.[13] Thus, having prescribed forcible self-help, the U.N. Charter nevertheless permits those state actions that are reasonably necessary in its self-defence when faced with an 'armed attack'.[14] Article 51 of the Charter prescribes that all states, if attacked, retain the inherent right of self-defence.[15] The deployment of ASAT systems as an anticipatory act of self-defence by certain nation can only be permissible when certain conditions precedent are fulfilled, namely, 'necessity', 'proportionality' and 'imminence'.[16] The field of anticipatory self-defence is riddled with the relative concepts where proportion and the questions of fact may, in certain cases, legitimize forceful action intended to pre-empt a concrete and overhanging

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9 Michael M. May, "Safeguarding our Military Space Systems" (1986) 232 *Science, New Series* 336 at p. 338.

10 *Military and Paramilitary Activities in Nicaragua (Nicaraguav United States of America)* [1986] ICJ Rep 14.

11 *Case Concerning Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] I.C.J. Rep 226

12 See *Supra* note 1.

13 Condron, see *Supra* note 2, at pp. 129-130.

14 Major Philip A. Seymour USMC, "The Legitimacy of Peaceful Reprisal as a Tool against State Sponsored Terrorism" (1990) 39 *Naval Law Review* 221, at p. 228.

15 Michael J. Kelly, "Time Warp to 1945 - Resurrection of the Reprisal and Anticipatory Self-Defence Doctrines in International Law" (2003) 13 *Journal of Transnational Law and Policy* 1, at p. 38.

16 Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenhiem's International Law* 9th ed. (1996) p. 422; Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* 1st ed. (2005), p. 125; A.C. Kiss et.al, *Hague Yearbook of International Law: Annuaire de la Haye de Droit International* Martinus Nijhoff (1988) 53; Captain Sean M. Condron, "Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox' (1999) 161 *Military Law Review* 115, at p. 129.

threat of aggression.[17] Both in the *Case concerning Military and Paramilitary activities in Nicaragua*[18] and in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,[19]I.C.J. has reaffirmed that necessity and proportionality are limits on all self-defence, whether individual or collective. These pre-conditions of anticipatory self-defence are based on the *Caroline* incident.[20] Article 25(1) (a) of the *Draft Declaration on the Responsibility of states for Internationally Wrongful Acts*also supports the elements of imminent danger and necessity. If the ground of necessity cannot be invoked by a nation it is not allowed to use the Outer Space for the purpose of self-defence, as Article 25(2) (b) of the *Draft Declaration on the Responsibility of states for Internationally Wrongful Acts*, contemplates that the States seeking to justify their act under necessity should not have contributed to the act of necessity. This ground was supported by I.C.J. in the *Gabčikovo-Nagymaros Project*[21] case where it was considered that as Hungary had, by act or omission brought about the situation of alleged necessity, it could not then rely on that situation as a circumstance precluding wrongfulness. Thus, the customary principles of the International Law will be applicable in when the condition or the situation for self-defence has been established by the State itself.

Since, the elements of necessity and proportionality, which are the requirements to use of self-defence,[22] apply more rigorously to claim of anticipatory self-defence than to claim of defence against an actual armed attack,[23] thus a State's act of deployment of any ASAT system or any other military application is not justified as its act could not fulfill the test of necessity and proportionality, thus, cannot be regarded as an act undertaken in self-defence.

1.1.2 Operation of Use of Force and the Role of the Security Council

Article 41 of the U.N. Charter stipulates that Security Council may call upon the Members of United Nations to apply measures of complete or partial interruption of economic and diplomatic relations. According to Article 31(1) of the Vienna Convention on the Law of Treaties,[24] which expresses a rule of customary international law,[25] a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Thus, it can be inferred that the Security Council has the power to put an embargo, as it is the most legitimize use which can be followed

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17 Ingrid Detter Delupis, *The Law of War*, 2nd ed., (2000), p. 86.

18 See *Supra* note 11.

19 See *Supra* note 12.

20 *Caroline incident* 29 BFSP 1137, C.F. Malcolm N. Shaw, *International Law*, 5th ed. (2007) p. 1024.

21 *Gabčikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7.

22 Kelly, *Supra* note 15, at p. 38.

23 Lieutenant Commander Michael Franklin Lohr, 'Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism' (1985) 34 *Naval Law Review* 1, at p. 17.

24 *Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

25 *Terretorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, 21; *Kasikili/Sedudu Island (Bots. v Namib.)* [1999] ICJ Rep 1045, 1059.

to avoid the repercussions of war or any other non-peaceful settlement of disputes in the international arena.

1.1.3 Deployment of Military Satellites in Form of ASATs : Violation of Corpus Juris Spatialis

The deployment of weaponry in outer space like ASAT systems does not comport with international law,[26] while there is no specific treaty that explicitly prohibits ASAT and similar military applications' development or deployment, but the treaties concerning the use of outer space, which constitute the formal documents reflecting the *corpus juris spatialis*, recognize the need to confine the use of outer space for peaceful purposes. Similar provisions are contemplated in several U.N. Resolutions, although, not binding as treaties, but do reflect the international concern in maintaining the use of outer space for peaceful purposes.[27]

1.1.4 Customary Norms of International Law Reflected by Various General Assembly Resolutions:

One of the most remarkable features in the evolution of space law during the past decade has been the emergence of the General Assembly as the principal world community organ for setting standard of conduct in the new environment.[28] Various United Nations Resolutions, which are one of the gauges of international legal principles, refer to the promotion of space for peaceful purposes.[29] The Resolution of Nov. 14, 1957 was the first landmark in the line of the resolutions of the General Assembly, as the outcome of grave concern of United Nations on international peace and security and ensured that the achievements in outer space should be devoted to peaceful and scientific purposes.[30]

Furthermore, in 1958, U.N. General Assembly passed a Resolution recognizing that the common aim of humankind is that the outer space is to be used for peaceful purposes only.[31]This view was further reiterated in the subsequent General Assembly Resolutions,[32] These resolutions are accompanied with the various reports by the

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26 Kimberly M. Schile, "Developing and Deploying Laser Weaponry in Space: Is it Legal?" (2000) 4 *DePaul International Law Journal* 17, 20.

27 *Id.*, at p. 20.

28 Ivan A. Vlasic, "The Space Treaty: A Preliminary Evaluation" (1967) 55 (2) *California Law Review* 507, at p. 518.

29 *Supra* note 26.

30 *Resolution on Regulation, limitation and balanced reduction of all armed forces and all armaments; conclusion of an international convention (treaty) on the reduction of armaments and the prohibition of atomic hydrogen and other weapons of mass destruction,* GA Res 1148, UN GAOR,12thsess, 716thplenmtg, UN Doc A/Res/1148 (1957)

31 Richard A. Morgan, "Military use of Commercial Communication Satellites: A New Look at the Outer Space Treaty and Peaceful Purposes" (1994) 60 *Journal of Air Law and Commerce* 237, at p. 306.

32 *Resolution on International Cooperation in the peaceful uses of outer space,* GA Res 1472, UN GAOR, 14th sess, 856th Plenmtg, UN Doc A/Res/1472 (1959); GA Res 1721, (1961); GA Res 2453, (1968); GA Res 32/196, (1977); GA Res 43/56,(1988); GA Res63/90,(2008).

Committee on the Peaceful uses of Outer Space[33](COPUOS), which further substantiates the need for use of outer space for peaceful purposes.

Since, a General Assembly Resolution may also be given weight as a declaration of general principles and would then bind all states[34] hence, any act of deployment of military satellite systems or the advanced ASAT systems can be said to contrary to various General Assembly Resolutions which reflect various principles regarding the use of outer space and preserve space as a peaceful arena.[35]

1.1.5 Article IV Outer Space Treaty, 1967: Restriction on the Use of Force

The Outer Space Treaty, which besides being an ideological charter for the space age,[36] is the fundamental treaty establishing national-security law in outer space,[37] it hasevolved from a series of General Assembly Resolutions and Declarations on Outer Space[38] and incorporates a number of principles, rules and procedures, which are applicable to activities throughout the environment of outer space.[39]

The Outer Space Treaty establishes within its preamble a global homogeneous ethos for outer spacestressing that the exploration and use of outer space shall be for 'peaceful purposes'.[40] Furthermore, Article IV of the Outer Space Treatywhich contains the first principles of international law explicitly relating to military activities in space[41] is the basic charter or constitution governing space activities.[42]

The concept of 'peaceful purposes' as found in the preamble to the Outer Space Treaty has been interpreted by some States and commentators to mean 'non-aggressive purposes'.[43] It is the wider interpretation of the Article which restricts implicitly the deployment of the military satellite systems,[44] and if a nation does so then it can be contended that it has acted in violation of Article IV of Outer Space

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33 It was established by the Resolution 1348(XIII), of the U.N. General Assembly with the tasks of examining the nature of legal problems posed by uses of outer space. It has the large strength of 69 members and has produced many Reports discussing the matter of peaceful uses of outer space. Last report produced was in year 2008 available at *<http://www.unoosa.org/oosa/en/COPUOS/copous.html>*

34 Stacey L. Lowder, "A State International Legal Role: From Earth to Moon", (1999) 7 *Tulsa Journal of Comparative and International Law* 253, at p. 256.

35 *Supra* note 26.

36 Major Robert A. Ramey, "Armed Conflict on the Final Frontier: The Law of War in Space", (2000) 48 *Air Force Law Journal* 1, at p. 74.

37 Michel Bourbonniere, "National-Security Law in Outer Space: The Interface of Exploration and Security" (2005) 70 *Journal of Air Law and Commerce* 873, at p. 5.

38 Colleen Driscoll Sullivan, 'The Prevention of an Arms Race in Outer Space: An Emerging Principle of International Law' (1990) 4 *Temple International and Comparative Law Journal* 211, at p. 226.

39 Vlasic at 512.

40 Bourbonniere, *Supra* note 43, at p. 7.

41 Christopher M. Petras, "Space Force Alpha" Military use of the International Space Station and the concept of "peaceful purposes" (2002) 53 *Air Force Law Review* 135, at p. 157.

42 Jonathan N. Halpern, "Antisatellite Weaponry: The High Road to Destruction" (1985) 3 *Boston University International Law Journal* 167, at p. 177.

43 Michel Bourbonniere, "National-Security law in Outer Space: The Interface of Exploration and Security" (2005) 70 *Journal of Air Law and Commerce* 873, at p. 877.

44 Compromis, para 17.

Treaty which establishes the general framework for activities in outer space,[45] as it contemplates that the outer space shall be used for peaceful purposes or non-aggressive purposes.[46] Thus, deployment of ASATs and the major military satellites which are used for dual use is a clear evidence of aggression in the light of Article 3(b) of General Assembly Resolution on definition of Aggression[47] and hence for securing international peace should be restricted and prohibited completely.

1.2 Damage through Space Objects: Issues Pertaining to Liability

1.2.1 Liability for the Damage to Space Objects

Article VII[48] of the Outer Space Treaty, which set forth several principles of liability,[49] makes an attempt to assure responsible use of outer space by providing liability for misuse,[50] it provides that each party to the Treaty that launches or procures the launching of an object into outer space, is internationally liable for damage to another State Party to the treaty or its natural or juridical persons by such object or its components parts on the Earth, in air space or in outer space.

Article VII of the Outer Space Treaty can be interpreted as one of the basic principles which clearly delineates that in the sovereign-less regions of outer space, each state party to the treaty will be liable on the international plane to another foreign state or persons of the foreign state for the damages resulting from its outer space activities.[51]

Article VII of the Outer Space Treaty recognizes the principle of international liability[52] for damage caused by space objects[53] or personnel while in space.[54]Article VII of the Outer Space Treaty provides a strict liability standard under which a

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45 Abram Chayes (et.al), "Space Weapons: The Legal Context" (1985) 114(3) *Daedalus* 193, at p. 195.

46 Allan Rosas, "The Militarization of Space and International Law" (1983) 20(4) *Journal of Peace Research* 357, 359.

47 *Resolution on the Definition of Aggression*, GA Res 3314, UN GAOR, 34thsess, 2319thplenmtg, UN Doc A/Res/3314 (1974).

48 ARTICLE VII OF TREATY ON PRINCIPLES GOVERNING THE ACTIVITIES OF STATES IN THE EXPLORATION AND USE OF OUTER SPACE, INCLUDING THE MOON AND OTHER CELESTIAL BODIES: *Each party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the treaty or its natural or juridical persons by such object or its components parts on the Earth, in air space or in outer space, including the moon and other celestial bodies.*

49 Marc S. Firestone, "Problems in the Resolution of Disputes Concerning Damage caused in Outer Space" (1985)59 *Tulane Law Review* 747, at p. 752.

50 Carl Q. Christol, "International Liability for Damage Caused by Space Objects" (1980) 74 (2) *American Journal of International Law* 346, at p. 351.

51 James A. Beckman, "Citizens without a Forum: The lack of an Appropriate and Consistent Remedy for United States Citizens Injured or Killed as the Result of Activity Above the Territorial Air Space" (1999) 22 *Boston College International and Comparative Law Review* 249 at p. 271.

52 "Outer Space", (1972) 21 *The International and Comparative Law Quarterly* 576,576.

53 Christol, *Supra* note 50 at p. 355.

54 Julie C. Easter, 'Spring Break 2023—Sea of Tranquity: The effect of Space Tourism on Outer Space law and World Policy in the New Millennium' (2003)26 *Suffolk Transnational Law Review* 349 at p. 361.

member state is liable for any damage caused by an object that is launched into space and subsequently causes damage in the course of space activity.[55]

1.2.1 Convention on International Liability for Damage caused by Space Objects: Another Document to save Space Objects from Damage

The Liability Convention, 1972, which contains a set of rules that supplements the provisions of the Outer Space Treaty,[56] is applicable to disputes concerning damages caused by a space object on the earth, in the atmosphere, or anywhere in outer space; however the substantive basis of liability varies according to where the damage is sustained,[57] as the Liability Convention which provides rules for determining liability and exculpation from liability,[58] provides two kinds of Liability: absolute liability and fault based liability. Under Article II of the Liability Convention, a launching state is absolutely liable 'for damage caused by its space object on the surface of the earth or to its aircraft in flight'. When, however the damage is caused elsewhere than on the earth's surface, a launching state 'shall be liable only if the damage is due to its fault'.

Since, for damage inflicted by the launching state's object upon another state's space object, the Liability Convention imposes a different standard of fault-based liability,[59] thereby the if the satellites of a nation are destructed in the outer space hence, fault based liability or Article III of the Liability Convention would be applicable.

Article III of the Liability Convention requires that a state shows fault[60] before it can recover, when another state damages its space object.[61] Hence, Article III of the Liability Convention which articulates liability terms for launching objects into outer space,[62] provides that a launching State will be liable for the damage caused by its space object, to the space object of another launching State.

1.2.2 Violation of International Responsibility: Commission of an Internationally Wrongful act

Article VI of the Outer Space Treaty indicates that the parties to the treaty shall bear international responsibility for their nation's activities, both private and public, in outer space.[63] Additionally, Article VII of the Outer Space Treaty advances a first principle of liability that states must bear responsibility for the harm their space

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55 Michael J. Listner, 'The Ownership and Exploitation of Outer Space: A Look at Foundational Law and future legal Challenges to Current Claims' (2003) 1 *Regent Journal of International Law* 75, 80.

56 Christol, *Supra* note 50 at 355.

57 Firestone at p. 758.

58 Edward F. Hennessey, "Liability for Damage Caused by the Accidental Operation of a Strategic Defence Initiative System" (1988) 21 *Cornell International Law Journal* 317 at p. 321.

59 *Id.,* at p. 321.

60 Listner, *Supra* note 55 at p. 83.

61 Hennessey, *Supra* note 58 at p. 328.

62 Easter, *Supra* note 54 at p.362.

63 Webb, above n 64, 299.

activities cause to other states.[64] Furthermore, Article 1 of the *Draft Articles on theInternational Responsibility of States for Internationally Wrongful Acts* provides that when a state commits an internationally wrongful act against another State international responsibility is established immediately as between the two states,[65] it lays down that,[*e*]veryinternationally wrongful act of a state entails the international responsibility of that State.

Since, Article VI of the Outer Space treaty imposes general international responsibility for space activities while Article VII says the launching state should be internationally liable for damages;[66] thereby the Outer Space Treaty, the Liability Convention and other legal instruments bind the launching state to respect the principle of international responsibility for harm caused by its space objects. Additionally, the I.C.J. in its Advisory Opinion on *Reparation for Injuries*[67]and *Interpretation of Peace Treaties (Second Phase)*[68], stated that, 'refusal to fulfill a treaty obligation involves international responsibility'. I.C.J. has further recalled this principle in the *Corfu Channel Case*[69], in the *Military and Paramilitary Activities in and against Nicaragua*[70]and in the *Gabčikovo-Nagaymaros Project Case*[71].

Furthermore, Article 2 of the *Draft Articles on theInternational Responsibility of States for Internationally Wrongful Acts* provides that, [*t*]here is an internationally wrongful act of a state when conduct consisting of an action or omission:

(a) Is attributable to the state under the International law; and

(b) Constitutes a breach of an international obligation of the state.

The terminology of breach of an international obligation of the state is long established and is used to cover both treaty and non-treaty obligations.[72] In the *Rainbow Warrior* case,[73] the Administrative Tribunal stressed that, 'any violation by a state of any obligation, of whatever origin, gives rise to state responsibility'. This principle has been recalled by Administrative Tribunals in various cases like in *Claims of Italian Nationals Resident in Peru* Cases[74];*Dickson Car Wheel Company* Case,[75] in the *International Fisheries Company* Case,[76] in the *British Claims in the Spanish Zone of Morocco Case*[77]

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64 Hennessey, *Supra* note 55 at p. 332.

65 *Phosphates in Morocco* [1938] PCIJ (ser A/B) No 74, 10.

66 Webb, above n 68, 306.

67 *Reparation for injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.

68 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania Case, (Second Phase) (Advisory Opinion)* [1950] ICJ Rep 221.

69 *Corfu Channel Case*[1949] ICJ Rep 4, 23.

70 See *Supra* note 10.

71 See *Supra* note 121.

72 Draft Articles on the International Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, (A/56/10); Ian Brownlie, *System of Law of Nations:State Responsibility, Part I* (1983) at p. 15.

73 *Rainbow Warrior Arbitration (New Zealand v France)*(1990) 20 RIAA 217.

74 *Claims of Italian Nationals Resident in Peru* Cases (1901) 15 RIAA 399, 401, 404, 407, 408, 409 at p. 411.

75 *Dickson Car Wheel Company* Case *(U.S.A. v United Mexican States)* (1931) 4RIAA 669, 678

76 *International Fisheries Company (U.S.A. v United Mexican States)* (1931) 4 RIAA 691, 701.

77 *British Claims in the Spanish Zone of Morocco Case* (1925) 2 RIAA 615.

and in the *Armstrong Cork Company* Case.[78]Liability for the damage caused to space objects of another state by its space object.[79] Hence, an internationally wrongful act is evident by the breach of international responsibility and international obligation, of not to harm interest of other states by its own space activities.

1.2.3 Reparation in case of Internationally Wrongful Act for Damage done by Space Objects in the light of Customary International Law

Article 31(1) of the *Draft Articles on theInternational Responsibility of States for Internationally Wrongful Acts,* whichis a general principle of consequences of the commission of an internationally wrongful act,[80]provides that, [*t*]heresponsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

Additionally, this principle was further stated by Permanent Court of International Justice in the *Factory at Chorzów, Jurisdiction* Case[81].

This principle has further been recalled by I.C.J. in the decisions of LaGrand (Germanyv United States of America),[82] Case Concerning Avena and Other Mexican Nationals (Mexico vUnited States of America),[83]in theGabčikovo-NagymarosCase,[84] and by International Tribunal for the Law of sea in M/V Saiga (No. 2).[85]

The remedy in form of compensation must commensurate with the loss occurred.[86]The loss due to the destruction of the space objects is unascertainable attributable to their manifold uses. Thus, it is submitted that in accordance with decision in *The Zafiro Case,*[87]the onus should be placed on the other party regarding the proportion of damages which according to it are not attributable to its conductcarried on by it and its instrumentalities. [88]

1.3 Reprisal against Space Objects: Imposition of Liability for the Destruction of Dual-Use Satellites

The United Nations Charter which is a clear expression of the collective will of nations to find alternatives to the use of force,[89] sets forth a structure for the peaceful

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78 *Armstrong Cork Company* Case (1953) 14 RIAA 159, 163.

79 *Outer Space Treaty* art VII.

80 ILC Articles on the Responsibility of States for Internationally Wrongful Acts, Official record of General Assembly, 56thsess, UN Doc A/56/10, 91.

81 *Factory at Chorzów (Jurisdiction)* [1927] PCIJ (ser A) No 9, 21.

82 *LaGrand Case (GermanyvUnited States of America) (Merits)* [2001] ICJ Rep 466, 495.

83 *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] ICJ Rep 12.

84 See *Supra* note 21.

85 *M/V Saiga (No 2) Case (St Vincent and the Grenadines v Guinea)* (1999) 120 ILR 143.

86 *Lusitania Case* (1923) 7 RIAA 32.

87 *The Zafiro Case* (1925) 6 RIAA 160.

88 Bin Cheng, "International Responsibility and Liability of States for National activities in Outer Space Especially by Non-Governmental Entities" in Tieya Wang, Ronald St. J. Macdonald (eds), *Essays in Honour of Wang Tieya* (1993) 145 at p. 145.

89 Lech M. Campbell, "Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan" (2000) 74 *Tulane Law Review* 1067 at p. 1078.

settlement of international disputes,[1] Article 2(3) of the United Nations Charter lays down that,[*a*]ll the members shall settle their International disputes by peaceful means in such a manner that international peace and security, and justice are not endangered.[2]Additionally, the *Draft Declaration on Rights and Duties of States* also provides that the state is under a duty to settle its disputes with other states peacefully.[3][4]

1.3.1 Use of Force: A Contradiction to the UN Charter

Article 2, Paragraph 4 of the United Nations Charter lays down the most important principle in contemporary international law to govern inter-State conduct,[5] providing a prohibition on the use of force.[6]The provisions of the U.N. Charter regulating the use of force should be interpreted in the light of the goals of the United Nations and one central goal of United Nations is to remove the need for states to use war as an instrument of foreign policy by promoting the peaceful settlement of disputes.[7] The United Nations Charter, which is an international agreement under the international law,[8] also constitutes peremptory rules of international law from which no deviation is permitted[9] and is therefore binding on all signatories which is a member of United Nations as well, but due to wide-sweeping[10] prohibition on the use of force provided in Article 2(4) of the U.N. Charter, any punitive nature of armed retaliation by a State, would comport neither with the Charter's provision for the peaceful settlement of disputes nor with its prohibition on the use of force.

Since, Article 2(4) of the United Charter is equally applicable to the use of outer space,[11] it is evident that retaliation or the aggressive use of force[12] are not permitted under the Charter.

1.3.2 Reprisal leading to the destruction of Satellites:An Unjustified Practice

Although, the words 'reprisals'[13] and 'retaliation' are not to be found in the Charter, this proposition was generally regarded by writers and by the Security Council as the logical and necessary consequence of the prohibition of force in Article 2(4).[14]

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1 *Supra* note 22 at pp. 29-30.
2 *Charter of the United Nations* Article 2 (3).
3 *Draft Declaration on Rights and Duties of States* Article 8.
4 Article 33 (1) of the United Nations Charter enumerates a number of peaceful means for settlement of disputes.
5 See *Supra* note 1.
6 *Charter of the United Nations* Article 2 (4).
7 Surchin, *Supra* note 6 at p. 475.
8 Condron, *Supra* note 2 at p. 125.
9 Kwakwa, *Supra* note 4 at p. 56.
10 Surchin, *Supra* note 6 at p. 479.
11 Jackson Maogoto and Steven Freeland, "The Final Frontier: The Law of Armed Conflict and Space Warfare" (2007)23 *Connecticut Journal of International Law* 165 at pp. 180-181.
12 Surchin, *Supra* note 6 at p. 475.
13 Lohr, *Supra* note 22 at pp. 29-30.
14 D. Bowett, "Reprisals Involving Recourse to Armed Force" (1972) 66 *American Journal of International Law* 1 at p. 1.

Furthermore Security Council has condemned Reprisals as, "*incompatible with the purpose and principles of the United Nations*".[15]

This *de jure* prohibition on Reprisals found its way into documentary form in 1970,[16] in the *Declaration concerning Principles of Friendly Relations and Co-operation among States*,[17] which categorically asserted that, States have a duty to refrain from acts of reprisal involving the use of force.

The Declaration concerning Principles of Friendly Relations and Co-operation among States in accordance with the U.N. Charter seems to suggest that the members of the United Nations have legally renounced the use of Reprisals. The declaration constantly speaks of the duties of states towards one another and one of the duties imposed under this principle or this draft declaration is to refrain from acts of reprisal involving the use of force.[18]

Additionally, Draft Declaration on Rights and Duties of States also provides that,[*e*]very State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threats or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order.[19]Moreover, reprisals even in form of counter-reprisals are not permitted,[20] and are unlawful,[21] since even if justified, a reprisaldoes not create a right of counter-reprisalin the enemy State.[22]

1.3.3 Destruction of Space Objects and Jus in Bello Principles: Widened Ambit of the Law of Armed Conflict

The principles of International Humanitarian Law and *Jus in bello*, have emerged over the time as the international community has gradually agreed that there should be certain legal constraints applicable to the conduct of armed conflict.[23] Moreover, A State using force in self-defence[24] is acting legally under the *jus ad bellum.* But, even whether a State is acting legally or illegally under the *jus ad bellum,* if it is in fact using force it must always do so in the manner prescribed by the *jus in bello.*[25] Thus, even a State may be acting in self-defence under Article 51 of the United Nations Charter, yet it is subjected to *jus in bello* principles as even when the right of

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15 Ian Brownlie, *International Law and the Use of Force by States,* 1st ed. (1963) at p. 281.

16 Kelly, *Supra* note 15 at p. 13.

17 GA Res 2625, UN GAOR, 25th sess, 1883rd Plenmtg, UN Doc A/Res/2625 (1970).

18 Seymour, *Supra* note 14 at p. 231.

19 *Draft Declaration on Rights and Duties of States* Article 9.

20 Kwakwa, *Supra* note 4, 80.

21 Shane Darcy, "The Evolution of the Law of Belligerent Reprisals" (2003) 175 *Military Law Review* 184 at p. 191.

22 Cynthia A. Holt and Paula B. MaCarron, "A Faustain Bargain? Nuclear Weapons, Negative Security Assurances, and Belligerent Reprisal" (2001) 25 *Fletcher Forum of World Affairs* 203, 222.

23 J.N. Maogoto and S. Freeland, "Space Weapon Section and the United Nation Charter' Regime on Force: A Thick Legal Fog or a Receding Mist", *International Lawyers* 41 (4), (2007) at p. 171.

24 *Charter of the United Nations* Article 51.

25 Above n 13 at p. 419.

self defence is lawfully exercised, the state acting in self-defence remains subjected to the *jus in bello* principles.[26]

1.3.4 The Dual-Use Satellites: A Protection under International Humanitarian Law due to Civil Nature?

Article 52(3) of the *Additional Protocol I*[27] lays down that, in case of doubt whether an object which is normally dedicated to civilian purposes, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

This principle presumption of civilian character in case of doubt is also contained in Amended Protocol II to the *Convention on Certain Conventional Weapons*[28]. A Satellite used for dual purposes and mainly military applications and thereby according to the principle presumption of civilian character laid down in Article 52(3) of the *Additional Protocol I* and Article 3(8)(a) of the Amended Protocol II to the *Convention on Certain Conventional Weapons,* will be considered a civilian object possessing a civilian character and not military character.

1.3.5 Article 48 and 52(2) of the Additional Protocol: The Principle of Distinction

The Principle of Distinction, which is one of the cardinal principles[29] of International humanitarian law, is also one of intrangressible principles of International law,[30] a general principle of the law of armed conflict that requires an attacker to distinguish between civilians and civilian objects and military objectives or military objects, on the other.[31] This principle of distinction is laid down in the Article 48 and 52(2) of the Additional Protocol-I[32], which further contemplates that the attack should not be directed against Civilian objects. Article 48 of Additional Protocol I provides the clearest statement of the customary principle and lays down that, [*i*]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Additionally, Article 52(2) of Additional Protocol I lays down that, [a]ttacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial

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26 Maogoto and Freeland, see *Supra* note 112 at p. 180.

27 Protocol Additional to the *Geneva Conventions* of 12 August 1949, and relating to the *Protection of Victims of International Armed Conflicts.*

28 Amended Protocol II to the *Convention on Certain Conventional Weapons,* Article 3 (8) (a).

29 Above n 13, 564.

30 *Ibid.*

31 Maogoto and Freeland, see *Supra* note 112 at p. 177.

32 Protocol Additional to the *Geneva Conventions* of 12 August 1949, and relating to the *Protection of Victims of International Armed Conflicts.*

destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage.

1.4 Conclusion

"The Outer Space is the Common Heritage of Mankind"- were the words of the Judge Manfred Lachs who has contributed much in developing the novel field of Outer Space Law under the umbrella of the Public International Law. The Use of Force has been declared as illegal by the U.N. Charter and this was much later adopted as the crucial provision in the Article III of the Outer Space Treaty, 1967 which is considered as the *magna carta* of the Corpus JurisSpatialis. The Star Wars witnessed in the Persian Gulf War was of the major striking point for the international community as for the first time the Satellites were used to destroy the warheads and to locate the missiles and the rockets heading towards the US army. The Communication satellites here were used for the purpose of military operations. The mode of war was very new and quite impressive as it contained the precision Warfare through space.

This type of activities and later on the launch of the ASAT systems by former USSR and then USA had again stirred the fear among the international community. These were later on destroyed through a treaty known as ABM Treaty. Although the Treaty was revoked by US in 2000 saying that there is a need for such warfare against terrorism and the same were used against Taliban Forces in Afghanistan.

The Space warfare can lead to damage to environment also as the debris that will be created through the destruction of the satellites in the Outer Space will lead to the damage to fragile atmospheric layers of the Earth. Furthermore, documents like the Outer space treaty, Liability Convention, Registration Convention etc also show diplomatic creativity as the definitions and prohibition over such weapons is dubious when clearly analyzed.

Thus, it is concluded that the all countries should support the Draft convention on Prevention of Arms Race in Outer Space (PAROS), mainly because it consists of the provisions which will put an end to the increasing arms race in outer space, and thus help in achieving the main purpose of the United Nations of promoting and maintaining international peace and security.

PLEA BARGAINING IN INDIA: AN APPRAISAL

Jagwinder Singh *

1.1 Introduction

The criminal justice system is the set of agencies and process which is established to prevent and control the crime and to punish those who violate the laws. In the criminal justice system Prosecution, Defense attorneys, Police, correction authorities, courts play a key in providing justice to the individuals. The judiciary in India is well known for its independence, impartiality and justice oriented approach. The Courts are considered to be that place where people go with the hope of getting relief and Justice. But mounting blog of cases in the courts and inevitable delay in dispensing of the justice is adversely effecting that hope and belief of getting immediate relief or justice from the courts. Delay in the justice culminates the sense of injustice among the people. Speedy trial is considered to be the essence of criminal justice system and it is well known fact that delays in justice constitutes the denial of justice. In the case of *Hussainara Khatoon vs. State of Bihar*[1], it was observed by the Apex court that speedy trial is an integral and essential part of the fundamental Right to life and personal liberty under Article 21 of the Constitution of India. In *Kartar Singh vs. State of Punjab,*[2] the court has observed:

> The concept of speedy trial is ready into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our constitution. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continuous at all stages.

In *Abdul Rehman Antulay vs. R.S. Naik,*[3] the Supreme Court has reiterated that:

> there is a right to speedy trial of the case pending against him. But there can be no time limit within which a trial must be completed.

In a country like India where people consider, the judges only second to God, efforts should be made to strengthen that belief of common man. Delay in disposal of the cases facilitates the people to raise eyebrows, sometime genuinely which, if not checked may shake the confidence of the people in the judicial system. So it is the policy and purpose of law, to have speedy justice for which effort are required to be made to come to the expectation of the society of ensuring speedy untainted and unpolluted justice.

1.2 The Concept of Plea Bargaining

"Plead Guilty and bargain Lesser Sentence" is the shortest possible meaning of Plea Bargaining. Plea Bargaining' can be defined as pre-trial negotiations between the accused and the prosecution during which the accused agrees to plead guilty in

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1 AIR 1979 SC 1360.

2 1994 SCC (Cri) 899.

3 AIR 1992 SC 1701.

exchange for certain concessions by the prosecution.[4] Plea bargaining is a process of negotiation in which the prosecutor offers the defendant certain concessions in exchange for a guilty plea. Plea bargaining consists of the exchange of official concessions for defendant's act of self conviction.Those concessions may relate to the sentence imposed by the court or recommended by the prosecutor, the offence charged ,or a variety of other circumstances.[5] The plea bargaining involves an active negotiation between prosecution and accused by confessing his guilt in a court may get the benefit of a lighter punishment than what is provided for the offence in question. The Canadian Law commission has defined plea bargaining as, "any agreement by the accused to plead guilty in return for the promise of some benefits."[6] According to *Black's Law Dictionary*, Plea bargaining means, *"a negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one* of *multiple charge in exchange for some concession by the prosecutor, usually a more lenient sentence or a dismissal* of *the other charges*".[7]

Thus plea bargaining is a kind of deal between the prosecution and the accused by which the accused agrees to plead guilty to less charges without facing the long drawn procedure of a trial.[8]In other words, it is conditional pleading guilty by the accused, whereby he seeks leniency for offences charged. Basic reason for the introducing the concept of 'Plea Bargaining' is that most of the criminal courts are over burdened and hence this situation causes inevitable delay in dispensing of the justice. Criminal trial can take day, weeks, months and sometimes years while guilty pleas can be arranged in minutes. Moreover the conditions of the jails are terrible and the accused are bound to live in inhumane conditions. Even in some cases the time spent in jails by the accused exceeds the maximum punishment which awarded to them if they found guilty of offences charged against them.

1.3 Origin of Plea Bargaining

In seeking the historic origins of plea negotiation, one may be influenced by opinion of the value of this practice. A defender of plea negotiation is likely to be comforted by the thought that this bargaining has "always" been with us-a conclusion that suggests both the inevitability of our non adjudicative methods of processing criminal cases and the unreality of those who would alter these methods dramatically. Similarly, an opponent of "bargain justice" may seek comfort in the concept of a bygone golden age in which plea negotiation was un-known-an age from which we departed inadvertently and largely as a result of laziness, bureaucratization, over

4 Suman Rai, *Law Relating to Plea Bargaining*, Orient Publishing Company, Allahabad (2007) at p. 7.

5 Albert W.Alschuler, "Plea Bargaining and its History", *Law & Society Review*, Vol. 13, No. 2, (1979), pp. 211-245 at 213.

6 Law Reform Commission of Canada, "Criminal Procedure : Control of the Process", Working Paper 15, (1975) at p.45.

7 Black's Law dictionary, 8th Edition (2004) at p. 1190.

8 S.D. Tawshikar, "Implementation of Plea Bargaining in India", *Criminal Law Journal*, Vol. 2, No. 3, (2012) 33 at p. 35.

criminalization, and economic pressure.[9] The history of plea bargaining is a fairly blank chapter in the history of Crime justice. This is hardly surprising since, until recently, the history of criminal justice itself was quite generally neglected. Furthermore, the materials are local and elusive. Of course, there are scattered remarks about how and why the system began, but most are nothing more than guess-work. Plea bargaining is not a new phenomena. It apparently originated in seventeenth century England as a means of mitigating unduly harsh punishment. [10] Milton Heumann has written the only quantitative historical study of plea-bargaining. He feels Plea bargaining is at least as old as the end of the nineteenth century. Although his study is valuable, he has no direct evidence of Plea Bargaining and can only infer it from a high rate of guilty pleas.[11] From the earliest days of the common law, it has been possible for an accused criminal to convict himself by acknowledging his crime. "Confession was in fact a possible means of conviction even prior to the Norman Conquest. Nevertheless, confessions of guilt apparently were extremely uncommon during the medieval period. "In hundreds of reported cases, medieval defendants denied "word for word" the felony, the king's peace, and all of it." but historians have found only a handful of recoded instances of confession.[12]

One of the earliest indications of plea-bargaining was a 1485 English statute, which authorized prosecutions for unlawful hunting before the justice of the peace. The statute provided that if a defendant confessed his crime then he was convicted of a summary offence, but if the defendant denied his guilt, he was prosecuted as a felon. However, many of the courts disapproved of the practice of plea-bargaining because of its infringement on the defendant's rights. Plea bargaining is said to get rise in Massachusetts from 1920's to 1930'.It was thought of highly by those involved but people were not comfortable with giving a plea for the reduction of sentence. Following this period, the issue of plea-bargaining did not re-emerge until the 1960s. In the first United States Supreme Court opinion to uphold a guilty plea conviction in *Hallinger vs. Davis,*[13] the U.S. Supreme Court observed;

> The [trial] court refrained from at once accepting [the defendant's] plea of guilty, assigned him counsel, and twice adjourned, for a period of several days, in order that he might be fully advised of the truth, force and effect of his plea of guilty.[14]

A few compilations of early nineteenth century judicial records confirm the apparent absence of a regular practice of encouraging guilty pleas. The re-emergence of plea-bargaining was due to the 'crime wave' of the 1960s produced by the World War II and the increase in drug usage and other cases of victimless crime. In the first such

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9 *Supra* note 5 at p. 214 .

10 Lawrence M. Friedman, "Plea Bargaining in Historical Perspective", *Law & Society Review*, Vol. 13, No. 2 (1979), 247 at p. 247.

11 Milton Heumann "A Note on Plea Bargaining and case Pressure", *Law & Society Review*, Vol. 9, No. 3, (1975), 515 at p. 515.

12 *Supra* note 5 at p. 214.

13 146 U.S. 314, 324, (1892).

14 *Supra* note 5 at p. 216.

case, *Swang v. State*[15] the defendant pleaded guilty to two counts of gambling. In accordance with an agreement that he had enter with the prosecutor, eight other charges of gambling were dismissed. The defendant was fined twenty-five dollars at one count and 10 dollars in other. The Tennessee Supreme Court said;

> Statement of fact [was] unprecedented in the judicial history of the state... [The defendant was] among others things highly improper, told by the Attorney General that if he did not submit he would have to go to jail and that he could certainly prove his guilt. The plea of guilty was entered...While the prisoner was protecting against his guilt, but as the best under the circumstances, he could do.

The court ordered a new trial on a plea of not guilty and said:

> By the constitution of the state the accused in all cases has a right to speedy public trial... and this right cannot be defeated by any deceit or device whatever.[16]

Plea-bargaining has, over the years, emerged as a prominent feature of the American criminal justice system. In the United States, the criminal trial is an elaborate exercise with extended *voir dire* and peremptory challenges during jury selection, numerous evidentiary objections, complex jury instructions, motions for exclusion, etc. and though it provides the accused with every means to dispute the charges against him, it has become the most expensive and time-consuming in the world. Mechanisms to evade this complex process gained popularity and the most prominent was of course, plea bargaining.[17] Plea bargaining was probably non-existent before 1800, began to appear during the early or mid-nineteenth century, and become institutionalized as a standard feature of American urban criminal courts in the last third of the nineteenth century. During the twentieth century there may have been period of renewed growth of plea-bargaining in the 1920's, especially in the federal courts faced with large numbers of prohibition cases, and in the 1960's perhaps related to the growth of street crime.[18]

During the 1920s, a number of states and cities conducted surveys of criminal justice. These surveys which offered a far more completed picture of the working of American criminal courts than has generally been available in later years, revealed a lopsided dependency on the plea of guilty.

Thus, plea-bargaining gradually became a widespread practice and it was estimated that 90% of all criminal convictions in the United States were through guilty pleas. In 1970, the constitutional validity of plea-bargaining was upheld in *Brady* v. *United States*,[19] where it was stated that it was not unconstitutional to extend a benefit to an accused that in turn extends a benefit to the State. In this case Justice White, who delivered the opinion of the court observed:

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15 42 Tenn. (2 Caldwell) 212, 1865

16 *Supra* note 5 at p. 224.

17 *Ibid*

18 Mark H. Haller, "Plea Bargaining: The Nineteenth Century Context", *Harvard Law Review*, Vol. 13, No. 2, (1979) 273 at 274.

19 397 US 742 (1970)

> The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.[20]

One year later, in *Santobello* v. *New York* [21]the United States Supreme Court formally accepted that plea-bargaining was essential for the administration of justice and when properly managed, was to be encouraged and thus upheld the constitutional validity and the significant role of the concept of plea- bargaining in disposal of criminal cases. In this case ,Chief Justice Burger ,Who Delivered the Opinion of the court ,observed:

> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.[22]

In countries such as England and Wales, Victoria, Australia, 'Plea Bargaining' is allowed only to the extent that the prosecutors and defense can agree that the defendant will plead to some charges and the prosecutor shall drop the remainder. The European countries are also slowly legitimizing the concept of plea bargaining, though the Scandinavian countries largely maintain prohibition against the practice.

1.4 Types of Plea Bargaining

Plea Bargaining can be carried out by three different modes:

Charge bargain: Charge bargain occurs when the prosecution allows a defendant to plead guilty to a lesser charge or to only some of the charges framed against him.

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20 *Supra* note 4 at p. 10.
21 404 US 257 (1971)
22 *Supra* note 4 at p. 11.

Prosecution generally has vast discretion in framing charges and therefore they have the option to charge the defendant with the highest charges that are applicable. 'Charge Bargain' gives the accused an opportunity to negotiate with the prosecution and reduce the number of charges that may have framed against him.

Sentence bargain: It occurs when a defendant is told in advance that what his sentence will be, if he pleads guilty. It involves an agreement to plead guilty in return for certain lighter sentences. It can be granted only after the approval of the trial judge.

Fact bargain: This involves an admission of certain facts in return for an agreement not to introduce certain other facts giving rising to certain offences.

1.5 Plea Bargaining in India

In order to ensure the speedy disposal of cases the concept of 'Plea Bargaining' was introduced in the Criminal Justice administration of India. In India, criminal Procedure code has not defined the term 'Plea Bargaining'.

Initially it was not recognized under Indian Law; therefore, not much importance was given to it as it was not in statutes. Reference may, however, be made to Section 206(1) and 206(3) of the Code of Criminal Procedure and Section 208(1) of the Motor Vehicles Act, 1988. These provisions enable the accused to plead guilty for petty offences or less grave offences and to pay small offences whereupon the case is closed. [23]Later on, on the basis of US, The Law Commission of India recommended the application of plea- bargaining in India. They also justified the reasons for the same. The Law Commission of India advocated the introduction of 'Plea Bargaining' in the 142nd,[24] 154th[25] and 177th reports. In its 154th Report, the Law Commission reiterated the need for remedial legislative measures to reduce the delays in the disposal of criminal trials and appeals and also to alleviate the suffering of under trial prisoners. The 177th Report of the Law Commission, 2001 also sought to incorporate the concept of plea-bargaining.[26]The 154[th] Report of the Law Commission recommended the new XXIA to be incorporated in the Criminal Procedure Code. The said Report indeed referred to the earlier Report of the Law Commission, 142nd Report,[27] which put the rationale behind the said concept, its successful functioning

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23 *Supra* note 4 at p. 179.

24 The Law Commission of India, One Hundred Forty Second Report on "Concessional Treatment for Offenders Who On their Own Initiative Choose to Plead Guilty without any Bargaining" (1991).

25 The Law commission of India, One Hundred and Fifty Fourth Report on *The Code of Criminal Procedure 1973*, (1996).

26 *http://www.legalserviceindia.com/article/l87-Plea-Bargaining.html* (last accessed 14 July 2013).

27 In 142nd report (1991), The Law Commission of India, recommended a scheme for concessional treatment to offenders willing to plead guilty on their own volition, outlined in Chapter IX, be statutorily introduced by adding a Chapter in the Code of Criminal Procedure of 1973. Highlights of the Scheme;
(1) The scheme may be invoked only by the offender himself. (Para 9.6).
(2) There will be no negotiations for plea-bargaining with the prosecuting agency or its advocate none of whom will have any role to play in the matter of moving the Competent Authority for invocation of the scheme. (Para 9.7).

(Footnote No. 27 Contd.)

in the USA and the manner in which it should be given a statutory shape. The Report recommended that the said concept be made applicable as an experimental measure to offences which are punishable with imprisonment of less than seven years and/or fine including the offences covered by section 320 of the Code. The recommendation of the 154th Law Commission Report was supported and reiterated by the Law Commission in its 177th Report. To reduce the delay in disposing criminal cases, the 154th Report[28] first recommended the introduction of 'plea bargaining' as an

(Footnote No. 27 Contd.)

(3) The Competent Authority will be a 'plea-judge' designated by the Chief Justice of the concerned High Court from amongst the sitting judges competent to try cases punishable with imprisonment of upto 7 years and a Bench of two retired High Court Judges nominated in this behalf by the Chief Justice of the State concerned in respect of offences punishable with imprisonment for 7 years or more. (Para 9.3 and 9.5).

(4) The application will be entertained only after the Competent Authority is, upon ascertaining in the manner specified in the scheme, is satisfied that it is made voluntarily and knowingly. (Para 9.15 and 9.16).

(5) The Competent Authority will hear the application in the presence of the aggrieved party and the public prosecutor or an assistant public prosecutor and after affording a short hearing to them. (Para 9.17 & 9.18).

(6) The Competent Authority shall have the power to impose a jail term, and/or fine and/or direct the accused applicant to pay compensation to the aggrieved party for compounding the offence in regard to the offences which are compoundable with or without the leave of the Court. (Para 9.17 (iii) and 9.27).

(7) The Competent Authority shall award a minimum jail term of say six months or one year in respect of specified offences if the scheme is extended in this behalf in the light of the provision in the scheme.

(8) The Competent Authority may award a jail term not exceeding one half of the maximum provided by the relevant provision where the Competent Authority is not called upon to exercise the powers to release on probation under the Probation of Offenders Act or under section 360 of the Code of Criminal Procedure in accordance with the guidelines. (Para 9.24, 9.32, 9.33).

(9) In the first instance, as an experimental measure, the scheme may be made applicable only to offences which are liable for punishment with imprisonment of less than seven years and/or fine if both the Central and the State Government so resolves by notification issued by such Government and published in Government gazette. (Para 8.4 and 9.37).

(10) The scheme may be made applicable to offences liable to be punished with imprisonment for 7 years and more after properly evaluating and assessing the results of the application of the scheme to offences liable to be punished with imprisonment for less than 7 years. (Para. 8.4, 8.6 and 9.37).

(11) The scheme may be made inapplicable to socio-economic offences of a non-technical nature in the first phase provided, however, that it may, later on, be made applicable with a rider than an offender will have to undergo a minimum jail term of not less than six months or 1 year or such other period as may be specified, if considered appropriate in the light of the public debate.

(12) The scheme may be made inapplicable to offences against women and children including offences of rape, bride burning, dowry deaths, demand and acceptance of dowry etc. which are viewed by the community with social worth in the context of the age-long history of injustice and suffering on the part of these sections of the society. [See para 9.35 (d)]

(13) The scheme may be restricted to first offenders only. [Para 9.35(a) and (b)

[28] In 154th report (1996), The Law Commission of India observed;

"We have examined the cases decided in USA as well as by the Supreme Court of India in respect of this concept and the 142nd Report of the Law Commission. We are of the view that plea bargaining can be made an essential component of administration of criminal justice provided it is

(Footnote No. 28 Contd.)

alternative method to deal with huge arrears of criminal cases. This recommendation of the Law Committee finally found a support in Malimath Committee Report submitted in 2003. The Report of the Committee on the reform of criminal justice system under the Chairmanship of Justice (Dr) Malimath stated that the experience of United States was an evidence of plea bargaining being a means for the disposal of accumulated cases and expediting the delivery of criminal justice.[29] In Chapter XIV of the said Report, the Committee considered the question of compounding / settlement without trial. The Committee recommends implementation of 142nd and 154th reports of the Law Commission of India in regard to settlement of cases without trial. [30]

So on the basis of recommendation of Malimath Committee, 142nd and 154th Reports of Law Commission of India, a new chapter XXI- A on Plea Bargaining was introduced in the Criminal Procedure Code through the Criminal Law (Amendment) Act, 2005, notified in the Official Gazette of India as Act 2 of 2006.

(Footnote No. 28 Contd.)

properly administered. For that purpose, certain guidelines and procedure have to be incorporated in the Code of Criminal Procedure. Having given our earnest consideration, we recommend that this concept may be made applicable as an experimental measure, to offences which are liable for punishment with imprisonment of less than seven years and/or fine including the offences covered by section 320 of the Criminal Procedure Code."(para 7)

However, plea bargaining should not be available to habitual offenders those who are accused of socio-economic offences of a grave nature and offences against women and children (para 9)

Once the court is satisfied about the voluntary nature of the application the court shall fix a date for hearing the public prosecutor and the aggrieved party and the accused applicant for final hearing and passing of final order.(para 9.3)

Such an application may be rejected either at the initial stage or after hearing the public prosecutor and the aggrieved party. If the Court finds that, having regard to the gravity of the offence or any of the circumstances which may be brought to its notice by the public prosecutor or the aggrieved party, the case is not a fit one for exercise of its powers on plea-bargaining, the Court may reject the application supported by reasons there for(para 9.4)

If an accused enters a plea of guilty in respect of an offence for which minimum sentence is provided for, the Court may, instead of rejecting the application in limine, after hearing the public prosecutor and the aggrieved party, accept the plea of guilty and pass an order of conviction and sentence to the tune of one-half of the minimum sentence provided. (para 9.8)

The Court shall on such a plea of guilty being taken, explain to the accused that it may record a conviction for such an offence and it may after hearing the accused proceed to hear the Public Prosecutor or the aggrieved person as the case may be: (para 9.9)

(i) impose a suspended sentence and release him on probation.
(ii) order him to pay compensation to the aggrieved party, or
(iii) impose a sentence, which commensurate with the plea bargaining;
(iv) convict him for an offence of lesser gravity than that for which the accused has been charged if permissible in the facts and circumstances of the case.

29 Neeraj Arora, "Plea Bargaining: a new development in the criminal justice system", available at *http://www.neerajaarora.com/plea-bargaining-a-new-development-in-the-criminal-justice-system/.* (last accessed on 16 July 2013).

30 Report of Malimath Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, (2003) at p 289 .

1.6 Salient Features of the Plea Bargaining In India[31]

Section 265-A to Section 265-L of the Criminal Procedure Code, 1973 deals with the practice and procedure of plea bargaining in India.

1. The plea bargaining shall be available to the accused charged of any offence other than offences punishable with death or imprisonment or for life or of an imprisonment for a term exceeding seven years. Thus it is applicable in respect of those offences for which punishment is up to a period of 7 years. [32]
2. Moreover it does not apply to cases where the offence committed is a socio-economic offence or where the offence is committed is committed against a woman or a child below the age of 14 years. [33]
3. Also once the court passes an order in the case of 'Plea Bargaining' no appeal shall lie to any court against that order. [34]
4. Any accused person above the age of 18 years and against whom a trial is pending can file an application for the plea bargaining in the court in which such offence is pending for trial[35]
5. The applicant must not be juvenile.[36]
6. The accused should not have been convicted earlier for the same offence.[37]
7. The applicant must file an application voluntary. If the application is not found voluntary by the accused or it is found that accused has been previously convicted by the court for the same offence in which the application of plea bargaining is made then the court will proceed further in accordance with the provisions of the code from the stage where such application has been filed i.e. back to the trial. [38]
8. Accused shall be examined in camera.[39]
9. Negotiation takes place between the public prosecutor, complainant and the accused to work out a mutually satisfactory disposition of the case. In a case instituted on a police report, the court shall issue notice to the public prosecutor concerned, investigating officer of the case, the victim of the case and the accused to participate in the meeting to work out a satisfactory disposition of the case. In a complaint case, the Court shall issue notice to the accused and the victim of the case.[40]

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31 *Supra* note 29.
32 The *Code of Criminal Procedure 1973*, Section 265-A.
33 *Id.*, Section 265-A (1) (b).
34 *Id.*, Section 265-G.
35 *Id.*, Section 265-B (1).
36 *Id.*, Section 265-L.
37 Section 265-B (2).
38 *Ibid.*
39 *Id.*, Section 265-B (4).
40 *Id.*, Section 265-C (a)

10. It will be the duty of the court to keep watch that the parties voluntary complete the entire process.

11. If a satisfactory disposition of the case has been worked out, the Court shall prepare a report of such disposition which shall be signed by the presiding officer of the Courts and all other persons who participated in the meeting. However, if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the application under sub-section (1) of section 265-B has been filed in such case.[41]

12. After completion of proceedings under S. 265 D, by preparing a report signed by the presiding officer of the Court and parties in the meeting, the Court has to hear the parties on the quantum of the punishment or accused entitlement of release on probation of good conduct or after admonition. Court can either release the accused on probation under the provisions of S. 360 of the Code or under the Probation of Offenders Act, 1958 or under any other legal provisions in force, or punish the accused, passing the sentence. While punishing the accused, the Court, at its discretion, can pass sentence of minimum punishment, if the law provides such minimum punishment for the offences committed by the accused or if such minimum punishment is not provided, can pass a sentence of one fourth of the punishment provided for such offence. Apart from this, in cases of release or punishment, if a report is prepared under S 265 D, report on mutually satisfactory disposition, contains provision of granting the compensation to the victim the Court also has to pass directions to pay such compensation to the victim.[42]

13. Judgment is to be given in open court and hearing must be given to the parties on the quantum of punishment[43]

14. A court for the purposes of discharging its functions under Chapter XXI-A, shall have all the powers vested in respect of bail, trial of offences and other matters relating to the disposal of a case in such Court under the Criminal Procedure Code.[44]

15. Section 428 applicable to the sentence awarded on plea bargaining.[45]

Unless the aforesaid procedure contemplated in Chapter XXI-A is followed the same cannot be a valid disposal on plea bargaining. Even though 'plea bargaining' is available after the introduction of the said amendment is available, in cases of offences which are not punishable either with death or with imprisonment for life or with imprisonment for a term exceeding seven years, the chapter contemplates a mutually satisfactory disposition of the case which may also include giving

41 *Id.*, Section 265-D
42 *Id.*, Section 265-E.
43 *Id.*, Section 265 -F.
44 *Id.*, Section 265-H.
45 *Id.*, Section 265-I.

compensation to victim and other expenses. The same cannot be done without involving the victim in the process of arriving at such settlement.

1.7 Arguments in favour of Plea Bargaining

All scholars, practitioners and much of all of the public at large are of the view that in most criminal cases, plea bargaining is necessary and inevitable at any rate.[46] In *Brady v. United State*,[47] the U.S Supreme Court said, "*of course that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them but we cannot hold that it is unconstitutional for the state to extend a benefit to a defendant who is turn extends a substantial benefit to the state and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time that might otherwise be necessary.*"

In *Hutto v. Ross*,[48] the U.S Supreme Court observed: *"If every criminal charge were subjected to a full scale trial, the states and the government would need to multiply by many times the number of judges and court facilities. Disposition of criminal charges after plea discussions or plea bargaining is not only an essential part of the criminal process but a highly desirable part"*. In 1976, Justice Potter Stewart revealed that the heart and soul of plea bargaining is in the benefit it entails to all concerned in a criminal case.[49]

In India, while commenting on aspect of plea bargaining, the division bench of the Gujarat High Court observed in *State of Gujarat v. Natwar Harchanji Thakor*,[50] that, "*the very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable.*"

In re: Prisoners case,[51] Kerala High Court Said, *"Plea bargaining" has become possible now which can, to a certain extent check the evil of a long period of detention of prisoners during trial. Further, this may help the courts to reach a finality of the proceeding in appropriate cases, without going through the ordinary time – consuming procedure in a trial.*

Plea bargaining is an essential component of the administration of justice. Properly administered, it is to be encouraged. It leads to prompt and largely final disposition of most criminal cases and it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial.[52] The introduction of plea bargaining in Indian criminal justice system is largely a response to the deplorable status quo, reflected in the delay in disposal of criminal

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46 Stephen J. Schulhofer, "Is Plea Bargaining Inevitable?", *Harvard Law Review*, Vol. 83, No. 5, March (1984) 1037 at p. 1037.

47 *Supra* note 19.

48 429 US 742 (1976).

49 *Blacklegde v. Allison* 431 US 63 (1977).

50 (2005) Cri. LJ 2957 (Gujarat)

51 2007 Cri. LJ 324 (Kerala)

52 *Santobello v. New York*, 404 US 260 (1971).

cases and appeals, the huge arrears of cases and the appalling plight of under trial prisoners in jails.[53] The plea bargaining allows both parties to avoid a lengthy criminal trial and may allow defendants to avoid the risk of conviction at trial on a more serious charge. Plea-bargaining is something more stringent than the provision provided in the Criminal Procedure Code for compounding the offence. And it is less stringent than the provisions provided in the Criminal Procedure Code for sentencing and punishing the accused person. There are certain kinds of cases that can be compounded in the court by the accused and complainant as per the provisions laid in the Criminal Procedure Code. [54]There are certain cases in which the permission of the court is required to compound the cases. And once the compounding is allowed between the accused and the complainant, the accused is treated as acquitted. Accused is without any blame and he can go scot-free. By having the provision for plea-bargaining, the cases which are of a little more serious nature, when the case is filed in a court of law, the accused person can go to the court and can admits the guilt. One of the advantages of plea-bargaining is that the victim could be given compensation. So, the accused would give the compensation and the victim would get the compensation.[55]

Plea bargaining helps the prosecutors enabling them to prepare for gravest case by leaving the effortless and petty offences to settle through plea bargaining. It is also a factor in reforming the offender by accepting the responsibility for their actions and by submitting them voluntarily before the law, without having an expensive and time consuming trial. In cases where in the prosecution is weak, if trial is concluded, for want of proper witnesses or evidences and the ultimate result may be an acquittal, the prosecution will have a chance to find the accused as guilty, by cooperating with the accused for a plea bargaining.[56] From the angle of victim also, plea bargaining is a better substitute for his ultimate relief, as he can avoid a lengthy court process to see the accused, be convicted. The system gives a greater relief to a large number of under trials lodged in various jails of the country and helps reduce the long pendency in the courts. [57]

It helps the offender in accepting the responsibility and liability for their actions voluntarily, without having an expensive and time consuming trial. Thus, it will help in emphasizing reformatory system. Similarly, witnesses can do away with the troubles of bearing the brunt of delays, traveling, costs of traveling, etc. Plea bargaining is also supported on grounds of economy and necessity of all the three parties, that is, the accused, victim and the judiciary. Besides being a dispute resolution mechanism offering quick justice at the instance of the accused , since undertaking trial for each and every matter is cost and time consuming, plea

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53 Sonam Kathuria , "The Bargain has been Struck: A case for Plea Bargaining in India", available at *http://www.manupatra.co.in/newsline/articles/Upload/3BEB7B04-1EE3-48EB-8716-279FA2B9AF8A.pdf/.* (last accessed on 18 July 2013)

54 *http://www.indiankanoon.org/docfragment/839309/?formInput=%22plea%20bargaining%22* (last accessed on 27 June 2013)

55 *Ibid.*

56 K.P. Pradeep, "Plea bargaining–New Horizon in Criminal Jurisprudence'', available at *http://kja.gov.in/article/PLEA%20BARGAINING.pdf* (last accessed on 27 June 2013).

57 *Ibid.*

bargaining economical method, whereby the time and cost and human (judges and administrative staff, etc) resources can be better used for more important or graver cases. Offenders who are poor, it helps them overcome the costs of litigation and litigation delays. For victims, plea bargaining is a better substitute as it avoids lengthy court process to see the accused convicted and need not bear the brunt of litigation delays and litigation and travel costs, etc.[58] The division bench of the Gujarat High Court observed in *State of Gujarat v. Natwar Harchanji Thakor* [59] that, the very object of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in disposal in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static. It can thus be said that it is really a measure and redressal and it shall add a new dimension in the realm of judicial reforms.

1.8 Arguments against Plea Bargaining

It is considered that the plea bargaining seriously impairs the public interest in effective punishment to the accused regarding the crime which he has committed. The prosecution has the power to present accused with unconscionable pressures. There are every chances of being practically coerced. The prosecution has the incentive to maximize the benefit of pleading guilty in the weakest cases. The more likely acquittal at trial, the more attractive a guilty plea is to the prosecution. But in a borderline case that does go forward, the prosecution may very well threaten the most serious consequences to those accused that may very well be innocent. The defense lawyers who represent accused do not have the resources to independently investigate every case.[60]

One such disadvantage it that the courts still has to have the final determination regarding the terms of the plea bargain. If for whatever reason the court rejects the plea then the case will proceed to a full trial. A big disadvantage for the defendant is that once they sign a plea agreement and agree to plead guilty they will have no opportunity for an appeal at a later date. [61]

Involving the police in plea bargaining process would invite coercion. By involving the court in plea bargaining process, the court's impartiality can also be impugned. Involving the victim in plea bargaining process can invite corruption. If the plead guilty application of the accused in rejected then the accused would face great hardship to prove himself innocent.[62]

The concept of "plea-bargaining is also violative of Article 20(3) of the Constitution. Article 20(3) protects an accused from self- incrimination and provides that: "No person

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58 *http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=4a5ad044-6b7e-4d1b-93cb-d0f1bf117bcf&txtsearch=Subject:%20Criminal* (last accessed on 8 July 2013).

59 (2005) Cri.LJ 2957.

60 *Ibid.*

61 *http://www.streetdirectory.com/travel_guide/14026/legal_matters/plea_bargaining_pros_and_cons.html* (last accessed on 8 July 2013).

62 *http://www.legalserviceindia.com/articles/plea_bar.htm/.* (last accessed on 7 July 2013).

accused of any offence shall be compelled to be a witness against himself." The compulsion referred to under Article 20(3) means duress and includes not merely physical threats or violence, but also psychic torture, atmospheric pressure, environmental coercion, tiring interrogative proximity, overbearing and intimidating methods and the like. Under the concept of "plea bargaining" though it appears that the accused acts voluntarily while making an application under Section 265-B, but in fact he is "compelled" to make the application and plead guilty and there is no mechanism to ensure voluntariness. Hence the concept of plea-bargaining not only violates Article 20(3) and causes injustice but is also a move towards legalizing extortion. At this juncture it must also be pointed out that the scheme of "Plea bargaining" has been profoundly criticized by the Supreme Court, even before it was introduced to the Criminal Procedure Code.[63]

Under Sec 162 of the Code of Criminal Procedure, the statements made before the police officer are inadmissible as evidence during investigation. Instances of cruel and unusual punishment in the form of torture by police or threat by the prosecutor of much greater punishment to the defendant if plea bargaining is not accepted, may increase in India where large population of the country is illiterate and extremely poor It gives rise to prosecutorial discretion and powers and creates such an imbalance that there will be elimination of criminal trials in variety of cases without even being tried. This method is an improper delegation of judicial power to the executive branch of government.[64]

The Supreme Court of India has time and again criticized the concept of plea bargaining saying that negotiation in criminal cases is not permissible. In the case of *M.R.chandra v.State of Maharashtra,* [65]the court observed that it is very wrong for a court to enter into a bargain of this character. Offence should be tried and punishment be given according to the guilt of the accused. The Hon'ble Supreme Court has criticized the concept of Plea Bargaining in its judgment *Murlidhar Meghraj Loyat v. State of Maharashtra,* [66] in the following words:-

These advance arrangements please everyone except the distant victim, the silent society. The prosecutor is relieved of the long process of proof, legal technicalities and long arguments, punctuated by revisional excursions to higher courts, the court sighs relief that its ordeal, surrounded by a crowd of papers and persons, is avoided by one case less and the accused is happy that even if legalistic battles might have held out some astrological hope of abstract acquittal in the expensive hierarchy of the justice-system he is free early in the day to pursue his old profession. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the United States but in our jurisdiction, especially in the area of dangerous economic crimes and food of fences, this practice intrudes on society's interest by opposing society's decision expressed through predetermined legislative fixation of

63 Krishan Kumar Kajal, "Plea Bargaining; A Critical Analyse", *The Legal Analyst*, Vol. 1, (2011), pp. 27-33, available at *http://www.scribd.com/doc/62739525/PLEA-BARGAINING-%E2%80%93-A-CRITICAL-ANALYSIS-by-Krishan-Kr-Kaja* (last accessed on 11 July 2013).

64 *Supra* note 58.

65 AIR 1968 SC 1267

66 AIR 1976 SC 1929

minimum sentences and by subtly subverting the mandate of the law." : (Emphasis Added)

Further, the Hon'ble Supreme Court in the case of *Kachhia Patel Shantilal Koderlal v. State of Gujarat and Anothers* [67] strongly disapproved the practice of plea bargain. The Apex Court held that practice of plea bargaining is unconstitutional, illegal and would tend to encourage corruption, collusion and pollute the pure fount of justice. Similarly, in *Kasambhai v. State of Gujarat*,[68] the Supreme Court had expressed an apprehension that such a provision is likely to be abused. The Supreme Court squarely observed that, *".....The conviction of the appellant was based solely on the plea of guilty entered by him and his confessing of guilt was the result of plea bargaining between the prosecution, the defence and the learned magistrate. It is obvious that such conviction based on the plea of guilty entered by the appellant as a result of bargaining cannot be sustained. It is to our mind contrary to public policy to allow a conviction to be recorded against an accused by inducing him to confess to a plea of guilty on an allurement being held out to him that if he enters a plea of guilty he will be let off very lightly*[69] "

The court further held that "*practice of plea bargaining is unconstitutional illegal and would tend to encourage corruption collusion and polluted the rule fount of justice. The court considered the practice of plea-bargaining contrary to public policy to allow a conviction to be recorded against an accused by inducing him to confess to a plea of guilty, on an allurement being held out to him that if enters a plea o guilty, he will be let of very lightly..*"

An important question arose before the Supreme Court that if a person has been convicted and sentenced by the lower court and in appeal or revision he admits his conviction by pleading guilty in order to bargaining for sentence. Whether in such circumstances the plea of guilty can be a base in bargaining for sentence In the *State of Uttar Pradesh v. Chandrika* [70]The Apex Court held observed that on the basis of plea bargaining court cannot dispose of the criminal cases. The court has to decide it on merits. If the accused confesses its guilt, appropriate sentence is required to be implemented. In the case of *Thippaswwamy v. state of Karnatka*,[71] the court observed that it would be violative of article 21 of the constitution to induce or lead an accused to plead guilty under a promise or assurance that he will be let free lightly. Plea-bargaining takes away from the accused his right to appeal as guaranteed by the Cr. P.C. Assurance of a fair trial is the first imperative of the dispensation of justice.[72] The decision making process should be fair, transparent and open.[73]

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67 1980 Cri. L.J. 553.
68 AIR 1980 SC 854
69 *Ibid.*
70 2000 Cr.L.J. 384(386)
71 AIR 1983 SC 747.
72 *Police Commr. Delhi* v. *Registrar, Delhi High Court*, 1997 Cri.LJ 90.
73 Dutta Associates Pvt. Ltd v. Indo Mercantiles Pvt. Ltd. (1997) 1 SCC 53.

1.9. Re-fixing the Boundaries of Plea Bargaining.

It is not surprising that the practice of plea bargaining has stimulated one of the stormiest controversies in the area of criminal procedure; placing criminal disputes in the hands of prosecutors and defendants, to be settled by contractual means, can be seen as undermining basic concepts in the moral and political philosophy of criminal law.[74] The fact that plea bargaining has taken root and expanded to its present magnitude indicates an advantages of plea bargains, embodied in the opening of the criminal justice arena to contractual ordering, over its disadvantages.[75] Some jurists are in favour of extending the boundaries of the plea bargaining process and make a case for extending these boundaries to the criminal standard of proof i.e. from criminal standard of proof- beyond reasonable doubt to civil standard of proof - preponderance of the evidence. They are arguing for the possibility of converting the criminal standard of proof into a default rule, subject to negotiation between the parties. Under current plea bargaining practices, the defendant agrees to plead guilty in exchange for concessions on punishment offered by the prosecutor. According to the model proposed by them, the negotiation process would not be limited to the attainment of a full admission of guilt. Rather, the prosecutor would also be able to obtain from the defendant a reduction of the standard of proof required to establish criminal culpability in return for an offer of leniency in sentencing. For instance, the parties could agree that the case will be tried according to the civil standard of proof- the preponderance of the evidence. In exchange for the greater risk of conviction faced by the defendant under a lower standard of proof, the prosecutor would make a partial concession on the sentence in the event of conviction.[76]

The main advantage of this is that court must still establish the factual basis of the case through testimony and cross-examination while simultaneously subrogated to the agreement of the parties. In other words, both the present form of plea bargains and the proposed model result in an agreed-upon reallocation of the risks of error associated with the criminal process, as compared to trials conducted under the "beyond a reasonable doubt" standard.[77] In light of the fact that the standard of proof currently constitutes a non-negotiable, fixed, and indivisible feature of the criminal process, the prosecution and defense have only two polar options to choose from when bargaining to settle the criminal case. The first is to conduct a full trial, placing the entire burden of proof upon the prosecution. The second is to enter a plea bargain, whereby the prosecution gains full exemption from having to prove its incriminating case. In other words, due to the indivisible, non-negotiable nature of the criminal standard of proof, the existing model of plea bargaining is based upon self-incrimination by the defendant.[78] The Malimath Committee has also proposed to do away with one of the fundamental principle of criminal justice by substituting the

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74 Albert W. Alschuler, "Guilty Plea: Plea Bargaining," in Sanford H. Kadish (ed), *Encyclopedia of Crime and Justice*, 1983 at pp. 829, 834.

75 Talia Fisher, "The Boundaries of Plea Bargaining: Negotiating the Standard of Proof", *The Journal of Criminal Law and Criminology*, Vol. 97, No. 4, (2007) at pp. 943-1007.

76 *Id.*, at p. 943.

77 *Id.* at p. 975.

78 *Supra* note 5 at p. 211, 213 .

usual standard of proof 'beyond reasonable doubt' for a lower standard of proof. The committee attacks the proof beyond reasonable doubt standard on three principal grounds. First ,that proof beyond reasonable doubt is too difficult to define. Secondly, that proof beyond reasonable doubt standard has already been significantly derogated, so a shift to a lower standard of proof would not be a radical transition. Thirdly, that the standard poses a grave danger to Indian society.[79]

Recently Bombay High Court has interpreted the provisions of plea bargaining in a very important case, *Guerrero Lugo Elvia Grissel v. The State Of Maharashtra,*[80] the question involved in this case was, whether the language of clause (d) of Section 265-E of the Code of Criminal Procedure, 1973 justifies the stand of the petitioners that the Court has discretion to award sentence to the accused for a period lesser than one-fourth of the punishment provided or extendable, as the case may be, for the offence in question? This matter raised pure question of law as to the interpretation of Section 265-E of the Code of Criminal Procedure, 1973, in particular clause (d) thereof. While interpreting the provision of plea bargaining in the light of the Law Commission 142 report and after going through the objects and reasons behind this concept the high court held that the expression "may" appearing in clause (d) is not indicative of having bestowed discretion in the Court regarding the quantum of sentence, but is to cast obligation on the Court to sentence the accused in the manner provided in the said clause.

Further the high court has expressed that this interpretation may give rise to the argument that, although the parent provision in the principal substantive law does not provide for minimum punishment, but, by virtue of clause (d) of Section 265-E of the Code, the provision of minimum punishment of one-fourth punishment provided or extendable, as the case may be, for such offence is introduced. That may give rise to an argument of possibility of inflicting discriminatory treatment to such accused because if he does not choose plea bargaining he might be get less punishment than the one fourth provided under these provisions. As a result, the accused persons would be dissuaded from resorting to plea bargaining and instead prefer to fend for themselves to face the long-drawn trial, which may eventually endure to their advantage.[81]

The Bombay high court further has observed the scheme of plea bargaining which was propounded by the law commission Report and presently incorporated in chapter XXIA of the code of criminal procedure, 1973 is basically different from the plea-bargaining schemes prevailing elsewhere in five important areas, namely: - (1) There will be no contact between the public prosecutor and the accused for the purpose of invoking the scheme. The initiative will be solely with the accused that alone can make the applicable. The public prosecutor will have no role to play. (2) The decision to accord concessional treatment will rest solely with a judicial officer functioning as a Plea-Judge in respect of offences punishable with imprisonment for

79 K.I. Vibhute, *Criminal Justice-A Human Rights Perspective of The Criminal Justice Process in India*, Eastern Book Company, Lucknow (2004) at p. 156.

80 *Guerrero Lugo Elvia Grissel v. The State of Maharashtra*, decided on 4 January 2012.

81 *Ibid.*

less than 7 years and will not be the result of an outcome of haggling between public prosecutor on one hand and accused on the other. (3) There will be no bargaining with the judicial officers and an application, once made will not be allowed to be withdrawn and the accused will not know what the judicial officers will do. He will only make a representation and plead for such concessional treatment as, according to him, would be appropriate. (4) The sole arbiter will be the judicial officer and, therefore, there will be no risk of underhand dealings or for coercion or improper, inducement by the prosecution. (5) The aggrieved party and the public prosecutor will have a right to be heard and place their points of view.[82]

But overall it can be viewed that Plea bargaining is a good concept to make improvement in criminal justice system if it is implemented properly. It is true that none would object if justice could be achieved with the expenditure of less money, time, and energy. But if savings in the criminal justice system can only be obtained by sacrificing the value of justice itself, the value that gives the system its very point, then as citizens concerned about the quality of our legal institutions, we must object vociferously.[83] For the successful implementation of plea bargaining and to achieve its objectives, the role of law enforcement agencies is very important especially the judiciary. With the changing world scenario, the administration of justice is evolving continuously according to change in the socio-economic circumstances and where all the countries are shifting to Alternate Dispute Resolution mechanism form the traditional litigation process which is lengthy as well as complex, the plea bargaining may prove one of the best recourse to meet the challenges of disposal of pending cases.

1.10 Conclusion

Some scholars view the process of plea bargaining as advantageous to prosecutors, while others stress its benefits for the defence. A basic insight of economic analysis is that these perspectives are not necessarily inconsistent. We do not live in a zero sum world. Contractual exchange, under appropriate conditions, can leave both parties better off. But the converse is also true. When the conditions necessary for welfare enhancing transactions are not met, contractual exchange can leave both parties worse off.[84]The critics of plea bargaining mainly are focusing on the wrongful conduct of the public official rather than the plea bargaining itself.[85] If all involved in the system perform their work properly than it would be better system. *The plea bargaining in the criminal justice system has the potential to inculcate the faith of the people in the justice delivery system in the society.* The object of the criminal justice system is to protect the rights of individuals as well as to preserve the law and order in the society. The concept of plea bargaining has been introduced in criminal justice system as an alternative remedy to the problem of overcrowded jails, overburdened

82 *Ibid.*

83 *Ibid.*

84 Stephen J. Schulhofer, "Plea Bargaining as Disaster" *The Yale Law Journal*, Vol. 101, No. 8, (1992) 1979 at p. 2009 .

85 Kenneth Kipnis, "Plea Bargaining: A Critic's Rejoinder", *Law & Society Review*, Vol. 13, No. 2, (1979) 555 at p. 560.

courts and undue delays in providing justice. Its major purpose is in the quicker disposal of criminal matters and appeals and also helped to lighten the sufferings of under trial prisoners awaiting the commencement of trials. *The success depends upon the willingness of the offender to confess and the agreement of the victim for a reduction in punishment. So it is a splendid idea which must be protected and preserved in the minds of the people who are responsible for delivering justice to the citizens.*

DEVELOPMENTS IN LAW RELATING TO SEARCH AND SEIZURE

Nancy Sharma *

1.1 Introduction

Man is a social being. The centre of all his activity is the society itself which makes it possible for the man to live an orderly and secured life. For this purpose society as a group of human beings makes rules and regulations to confirm individual behaviour and conduct within the framework of permitted and accepted social code which becomes touchstone for judging human conduct in relation to other individuals. Without such a contrivance there can be neither orderly life nor civilized existence. For this purpose the society in all places and times have evolved methods and means to enforce upon the individual pattern of behaviour which is considered just and necessary in the interest of good government and administration of justice.[1] The administration of criminal justice system is the primary function of the state which is performed by the state's law enforcement agencies or functionaries i.e. courts, police etc. Police as a main functionary of the criminal justice system play an important role in the maintenance of law and order in the society. One of the important functions of police is the detection and investigation of crime and for this purpose wide statutory powers have been conferred to the police to perform this function effectively.

The power relating to search and seizure is not a new weapon in the armoury of those whose duty it is to maintain social security in its broadest sense. The process is widely recognized in all civilized countries. Search and seizure is an important tool of investigation which necessarily involves some encroachment on the privacy of an individual who is subject to such search and seizure.[2]

The right to privacy and the power of the State to search and seizure have been the subject of debate in almost every democratic country where fundamental freedoms are guaranteed.[3]

1.2 Development of Law Relating to Search and Seizure in England

At the beginning of the fourteenth century, some laws in England authorized searches and seizures. First of those was 1335 Act which provided that innkeepers in passage ports were to search guests for imported money. During the next century and a half, similar powers were given to certain organized associations as a means of enforcing

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1 S.N. Dhyani, *Jurisprudence and Indian Legal Theory,* Central Law Agency, Allahabad (2006) at p. 161.

2 P.K. Jain, *Commentaries on the Narcotic Drugs and Psychotropic Substances Act,* Prashant Publications, New Delhi (1985) at p. 275.

3 *District Registrar and Collector v. Canara Bank*, (2005) 1 SCC 511.

their regulations and charters. [4]A concept of unreasonable search and seizure did not emerge until after 1485 because, until then, the practice of search and seizure did not stimulate the concept. Although the searches that pre-Tudor law approved were usually general, it authorized few of them, and even those few did not subject most Englishmen to violent searches of their homes on a regular basis. By multiplying the types of search and seizure, Tudor–Stuart lawmakers multiplied the circumstances in which officials could enter English houses. Because most proprietors of those homes were unaccustomed to their routine entrance by officials, they had cause to perceive this proliferation of searches as excessive and to formulate the concept of unreasonable search and seizure.[5]

One prominent statute passed in 1511 gave the authorities of cities, towns and boroughs full power and authority to search for and in the event of discovery destroy adulterated oils.[6] After the introduction of printing into the England a system of state censorship was introduced making it compulsory for all publications to receive a license and it was for the purpose of enforcing this pervasive Licensing System that broad powers of search and seizure were confirmed on those entrusted with its superintendence and execution.[7]

During this period the main responsibility for enforcement belonged to the stationer's company, a private organization which was given monopoly privileges over printing in exchange for undertaking to detect violations of the licensing laws and apprehend those responsible and in pursuance of this purpose, the members of the company were authorized to make search wherever it shall please them in any place and to seize take hold, burn those books and thing printed contrary to the form of any statute act or proclamation.[8] In the second part of the 16th century, two famous decrees passed for further strengthening the licensing system, first of these expanded the authority of the company by giving its wardens power to inspect all books and papers brought into the country, to search any place where they suspected a violation of the printing laws to have taken or be taking place and to seize any books or papers printed contrary to the licensing regulations. The other decree took note of widespread evasion of the printing laws, made provision for stricter censorship and conferred even more sweeping powers of search and seizure.[9] During the first part of the 17th century general warrants were in much use and widely employed to enforce laws in regulation of religion. Thus, the circulars were issued from the court of High Commission in 1634 which directed all peace officers to search every room of any house where they suspected non-conformist services to be held, to arrest all persons to be found there and to

4 Polyvious, G. Polyvious, *Search And Seizure*, Gerald Duckworth and Co. Ltd, London (1982) at p. 1.

5 William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, Oxford Scholarship online (2009) at p. 2.

6 *Supra* note 4.

7 *Ibid.*

8 *Id.*, at p. 2.

9 *Ibid.*

seize all unlicensed books and to search for documentary evidence that might reveal treason or sedition.[10]

A stricter ordinance was issued by Star Chamber in 1637 which conferred even wider powers of search and seizure including the express provision, this time, that a search could take place at any time of day or night.

In 1640, a resolution was made by House of Commons that the issuing and execution of general warrants against members of parliament in 1629 had been breach of Privileges for which those responsible were to be punished. Another development was the growing legislative awareness of the undesirability of general warrants evidenced among other things by the impeachment of the Earl of Strafford partly on the ground that he had granted to subordinates a general warrant of arrest[11].

In 1662, a number of statutes were passed authorizing resort to power of search and seizure as drastic as any that had previously been employed at the direction of the Star Chamber. The most important was the licensing Act, which aimed at "preventing abuses in printing seditious, treasonable and unlicensed books and pamphlets and at regulating printing and printing presses", prohibiting the printing of many types of books and pamphlets required the licensing of books and gave the Kings.[12] Secretaries of state got almost unlimited power to issue search warrants in connection with any books that had not been licensed.

The licensing act expired in 1679 when Charles-II refused to summon parliament. But Chief Justice Scroggs advised Charles II that despite the failure to re enact the Act, seditious libel was a common law offences, that books and papers containing such libels could therefore still be seized and indeed that to write, print or publish any book or other material without a license from the crown was illegal. This enables the king to issue a proclamation suppressing seditious. Libel and forbidding unlicensed printing and this proclamation was in turn relied upon by Scroggs CJ and other Judges in issuing general warrants of arrest and search. But the legislature adopted the disapproving attitude towards general warrants. After 1688, there were various unmistakable signs that the legislature was becoming aware that general warrants represented on oppressive and undesirable exercise of state power and that they should not as a rule be used.[13] This was shown when there was abolition of tax shortly after revolution, enforcement of which would have necessitated objectionable general searches and which constituted a badge of slavery upon the people.[14] Although English thinkers continued to differ on many aspects of search and seizure, Sir Edward Coke placed the general warrant at the center of the emerging debate on what is now called "unreasonable searches and seizures". By 1700, many Englishmen assumed not only that some kinds of search and seizure were unreasonable but

10 *Supra* note 4.
11 *Id.*, at p. 3.
12 *Ibid.*
13 *Ibid.*
14 *Ibid.*

that general warrants were the foremost kinds that were so. During this period between 1642 and 1700, belief and law on search and seizure clashed because the general warrant continued to flourish even as Coke's *Institutes* and other treatises proclaimed its illegality.[15]

Another example was the withdrawal of a Tax Bill proposed by Walpole in 1733, because of its allegedly extensive search provision even though under its terms only those places registered as storehouses were to be liable to inspection on the authority of general warrants and William Pitt's famous parliamentary denunciation in 1763 of the cidar tax and its provisions on enforcement while included powers of search and seizure. The most forceful expression of the English tradition of protection from unreasonable searches came from William Pitt when, in a 1763 speech to Parliament, he stated: He said: "The poorest man may in his cottage bid defiance to all the force of the crown - It may be frail – its roof may shake – the wind may blow through it, the storm may enter, the rain may enter but the king of England cannot enter, – all his force dare not cross the threshold of the ruined tenement.[16]

During the same period, mainly in the 17th century, when both parliament and the crown were using the general warrants and writs of assistance to sanction serious invasions of personal freedom and security, the common law was at work developing its protection. Particularly important in this development was the influence of Sir Mathew Hale who disagreed with the Coke that under the commons law, no warrant could be issued. Hale expressed that warrants were not be granted unless the complainant had probable cause to suspect the allegedly stolen goods to be in such a house or place and unless he showed the reasons for such suspicion.[17]

The conflict between two different ideologies that is on one side was the ideology of the Crown which was based on the continued permissibility of extensive executive action in the interests of public order and on the another side the ideology of the common law premised on a developing consensus among lawyers that warrants for arrest and search should be controlled by strict procedural safeguards, was resolved in series of great cases during 1760's era.[18]

Basically if look upon the history of common law world, the protection against invasion of a person's home reaches back since many years ago in England. The first record in English common law of search and seizure protection was semayne's case,[19] which proclaimed the maxim, "Every man's house is his castle." The English Court recognized the right of the home owners to defend his house against unlawful entry by the King's agents. At the same time the authority to break and enter into upon proper notice by appropriate officers was

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15 *Supra* note 5.

16 http://web1.nusd.k12.az.us/schools/nhs/gthomson.class/pol699.paper/pol699.hist.overview.html.(last accessed on 30 July 2013)

17 *Supra* note 4.

18 *Ibid.*

19 (1604) 5 Coke Rep. 91,

acknowledged. Writs of assistance by the king's agents were used as a general search warrant allowing entry into any house or other place to search and seize any protected and uncustomed goods. One of the consequences of these arbitrary powers led to the American Revolution with the American colonies declaring themselves independent as the United States of America. [20]

The fundamental principle was established to the effect that state agents have been required to have legal authority for under taking searches and seizures and it is clear that the preference by the courts has been established requiring warrants that must be issued by an independent authority, usually a judicially constituted body such as judge or magistrate and moreover, reasonable grounds on the part of the police for searching and seizure must have been demonstrated. The United States Constitution contains a specific provision in the fourth amendment against unreasonable search and seizure.[21]

The validity of a warrant issued by the Secretary of a State to seize the papers of a person's accused of a seditious libel was dealt with in the case of *Entick* v. *Carrington* in 1765, [22]which later on form the basis of the source of the Anglo – American Law of search and seizure .In the two English cases *Wilkes* v. *Wood* (1763)[23] and *Entinck* v. *Carrington* (1765)[24] agents of the King issued a warrant authorizing the ransacking of the pamphleteer's homes and the seizure of all their books and papers. Wilkes and Entick both in their cases sued for damages, claiming that the warrants were void and the searches pursuant to them were therefore illegal. Both Wilkes and Entick won, with powerful opinions issued by Lord Camden, the Judge in both cases. After these decisions Lord Camden made very powerful influence in the colonies. A number of towns and cities were named after him because of his opinion in Wilkes and Entick. In a case of *Boyd* v. *United States*,[25] the U.S. Supreme Court asserted that the great Entick Judgment was "one of the landmarks of English liberty – one of the permanent monuments of the British Constitution."In the Entick's case, the King's Chief Messenger Nathan Carrington and three other broke into the home of the John Entick with force and arms and seized Entick's private papers. Entick who was an associate of John Wilkes, was arrested. The King's Messenger was acting on the idea of Lord Halifax to make strict and diligent search. Entick sought Judgment against Carrington and his colleagues who argued that they acted upon Halifax warrant. A jury returned a special verdict finding that the

20 Daniel Prefontaine, "Implementing International Standards in Search and Seizure: Striking the Balance between Enforcing the Law and Respecting the Rights of The Individual", available at *http://www.icclr.law.ubc.ca/ Publications/Reports/International_Standards.pdf* (last accessed on 15 June 2013).

21 *Ibid.*

22 (1765) 19 Howell's State Trials 1029.

23 *Wilkes v. Wood, 98 Eng. Rep. 489,* (1763).

24 *Entinck v. Carrington,* EWHC, K.B. J98, 1765.

25 *Boyd v. United State,* 116 US (1886).

defendants had broken into Entick's home with force and arms and searched for and taken away some of his private papers.[26]

The trial of the case took place in Westminster Hall presided over by Lord Camden .Lord Camden ruled that the search and seizure carried out in Entick's home was unlawful as the warrant authorized the seizure of all Entick's papers, not just the criminal ones and the warrant lacked probable cause to even justify the search. The Entick's Judgment became a part of the background to the Fourth Amendment to the U.S. constitution and was described by the Supreme Court of the United States as a great Judgment one of the Landmarks of English Liberty, one of the permanent monuments of the British Constitution and a guide to an understanding of the fourth amendment of the U.S. constitution. Entick's case brought the rights of free press and unreasonable seizure questions together when, in an attempt to silence John Wilkes and his criticism of the King, agents raided various homes of his supporters under a general warrant.

1.3 In America

In America, the history of the law of search and seizure is the history of the fourth Amendment of the federal constitution. The fourth Amendment follows as under:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Like Most of the Bill of rights the fourth Amendment has its origins in 17th and 18th century English common law. Unlike rest of the Bill of rights, the fourth amendment arose out of a strong public reaction to three main cases in 1760's era. Two of them decided in England and one in the colonies.[27]The two English cases were *Wilkes* v. *Wood* (1763)[28] and *Entinck* v. *Carrington* (1765)[29].

The fourth Amendment was written against a background of colonial rage against indiscriminate searching practices of the British officers.[30]In the colonies it was the "Writs of Assistance, a type of general warrant used in enforcement of import/export laws, that gave the colonists their most bitter experiences with unreasonable searches and seizures. The writs once issued remained in force throughout the lifetime of the sovereign and six months thereafter. When, upon the death of George II in 1760, the authorities were

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26 *http://en.www.wikipedia.org* (last accessed 24 July 2013).

27 *http://law.frank.org.pg2014/search.seizerc-fouthAmendmant-origin-text-history.html* (last accessed on 27 June 2013).

28 *Supra* note 23.

29 *Supra* note 24.

30 Lawrence. C. Waddington, *Arrest Search and Seizure,* Collier Macmillan Publishers, London (1974) at p. 1.

required to obtain the issuance of new writs, opposition was led by James Otis, who attacked such writs on libertarian grounds and who asserted the invalidity of the authorizing statutes because they conflicted with English constitutionalism.[31]Basically prior to the achieving independence from Great Britain, the colonists frequently experienced arbitrary searches and seizures under the writs of assistance. The writs of assistance were general search warrants which were used by the custom officers to search for and seize goods imported in volition of the British tax laws. [32]Writs of assistance were first authorized by an act of English Parliament in 1660 and were used by the Court of Exchequer to help custom officials to search for smuggled goods. These writs became controversial when they were issued by courts in British America in the 1760's especially in the province of Massachusetts Bay. Controversy over these general writs of assistance inspired the fourth amendment to the U.S. Constitution which forbids general search warrants in the U.S. [33]

In Massachusetts as elsewhere, customs officials could enter and search buildings simply on the authority of their royal appointments. In 1791 the Bosten merchants obtained the services of James Otis who argued on the behalf of the Bosten Merchants against the issuance of writs. Also known as the *Writs of Assistance* case, involved a legal dispute during 1761 in which 63 Boston merchants petitioned the Massachusetts Superior Court to challenge the legality of a particular type of Search Warrant called a writ of assistance. Also known as *Paxton's Case*,[34].He challenged the legality of these writs. His presentation in a court electrified the colonists because he asserted the supremacy of fundamental law. A man's home and property, he argued, were sacred; his privacy could not be invaded on the whim of government officials. Here Otis anticipated Sir William Pitt, a prominent Member of Parliament who gave eloquent speech to this right two years later, "The poorest man may in his cottage bid defiance to all the force of crown....." Otis lost his case, but not his cause. Historians generally agree that the fourth Amendment was designed to affirm the results in Wilkes and Entick's case and to overturn the result in the writs of assistance case, which is also known as the *Paxton's case.*

Widespread use of blank-warrants with unlimited discretion, substantially contributed to American Revolutionary war. For a people warrant less arrests and forcible intrusions into homes were intolerable. To prevent this discretion, US government from continuing previous British practices, authors of the Bill of Rights sought to draft language that would forever prevent indiscriminate arrest and search power. That decision is reflected in the language of the fourth Amendment. Hence the fourth amendment in the US Constitution was drafted after a long debate on the English experience and secured a freedom from unreasonable searches and seizures.

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31 *Supra* note 16.

32 *Stanford v. Texas*, 379 US 476, 481.

33 *Supra* note 30.

34 *http://legal-dictionary.thefreedictionary.com/Writs+of+Assistance+Case* (last accessed on 6 July 2013).

The bill of rights as originally enacted in 1789, applied only to the federal government and its agents acting on its behalf. But the fourth amendment would be inadmissible in a federal trial. In 1914, the Supreme Court had adopted an exclusionary rule in *Weeks* v. *United States*,[35] which held that illegally seized evidence ordinarily could not be used in criminal trials. The Exclusionary rule was a judicially created rule of evidence barring Judges and Juries from considering any evidence seized in violation of the fourth Amendment, no matter, how relevant and material to the issue on trial in determining guilt or innocence. Although the Exclusionary rule has been criticized as not constitutionally required, it remains today as a judicial technique for excluding evidence seized in violation of the fourth Amendment.[36]

In 1949, Supreme Court of United States in a case of *Wolf* v. *Colorado*,[37] held that fourth amendment was a part of liberty protected by the fourteenth amendment due process clause against infringement by state and local officials. Twelve years later, in *Mapp* v. *Ohio*,[38] the Supreme Court imposed exclusionary rules to the states and local police who are the primary enforcers of American Criminal Law would be subjected to same search and seizure rules as FBI agents had and to the same penalty for violating those rules.

Though the US Constitution contains a specific provision in the Fourth Amendment against unreasonable search and seizure, it does not contain any express provision protecting 'the right to Privacy'. The first clause of the Fourth Amendment ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizure") may be considered as unreasonable search and seizure clause. This means that unreasonable searches and seizures are forbidden. But it left the term "unreasonable" undefined.

The Second clause usually called "warrant clause" places a set of limits on the issuance of search and arrest warrant. Three limits include; the warrants must be supported by the probable cause, they must define where the search is to take place, and they must define what the object of the search is i.e. who or what is to be seized. [39]

However, the US Supreme Court has culled out the right to privacy from the other rights guaranteed in the US Constitution. The word Privacy does not appear in the Fourth Amendment or for that matter of fact anywhere in the constitution, the Supreme Court has interpreted the amendment as protecting individual's reasonable expectation of privacy. However under the constitution all searches must be reasonable whether conducted with or without the warrant. The Court has held that reasonableness would be determined by balancing the

35 232 US 314 (1914).
36 *Supra* note 30 at p. 3.
37 338 US 25 (1949).
38 367 US 643 (1961).
39 *Supra* note 30 at p. 7.

The code adequately gives wide powers of search and seizure to the law enforcement agencies to make investigative and adjudicatory processes strong, effective and efficient and it also takes precautions against errors of judgment and provides by the police or judicial officers.

The power of search and seizure is a necessary in the interests of this society at large and without which the process of law enforcement might suffer to the detriment of public interest. It is but natural, that search and seizure is a serious invasion on the rights of the subjects especially right to privacy of the individual is seriously infringed while exercising the power. In India right to privacy is not expressed fundamental right but through the various decisions of Courts it has got this recognition as important part of Article 21 of the Constitution.

The earliest case in India to deal with the privacy and "search and seizure" was *M.P. Sharma* v. *Satish Chandra*,[50] where the Court refused to give recognition to the right to privacy and held that a mere search by itself did not affect any right to property and though seizure affected it, such affect was only temporary and was a reasonable restriction on the right. The question whether search warrants for the seizure of documents from the accused were unconstitutional was not gone into the Court after referring to the American authorities, observed that it the US, because of the language in the Fourth Amendment, there was a distinction between legal and illegal searches and seizures and that such a distinction need not to be imported into our Constitution. The Court opined that a search warrant was addressed to an officer and not to the accused and did not violate Article 20(3).

Also in the case of *Kharak Singh* v. *State of U.P.*,[51] the majority while dealing with the constitutional validity of Uttar Pradesh Police Regulation for domiciliary visits, surveillance refused to recognize the right to privacy but minority judgment took very innovative approach and held that there is right to privacy as well as right to privacy of freedom of movement which can be read into right to personal liberty enshrined in Article 21. It was the case of *Govind* v. *State of M.P.*,[52] where right to privacy actually got space in the Constitution through innovative judicial interpretation. The Supreme Court in this case accepted that right to privacy actually deals with the person not the places. And in later decisions also this view was reiterated.

In *R. Rajagopal* v. *State of Tamil Nadu*,[53] *T. Sareetha* v. *T. Venkata Subaiah*,[54] *Mr. 'X'* v. *Hospital 'Z'*,[55] *People's Union of Civil Liberties* v. *Union of India*,[56]

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50 1954 SCR 1077.
51 AIR 1963 SC 1295.
52 AIR 1975 SC 1378.
53 AIR 1995 SC 264.
54 AIR 1983 AP 356.
55 AIR 1999 SC 495.
56 AIR 1997 SC 568.

Maneka Gandhi v. *Union of India*, [57] the Apex Court through the pronouncements in these cases again recognized the right to privacy as implicit in the right to life and personal liberty guaranteed to the citizens under Article 21 of the constitution. But as well also held that this right is not absolute and state can put reasonable restrictions in the larger public interest. In 2005, the concept of privacy and law relating to search and seizure was discussed in detail by the Supreme Court in the case of *District Registrar and Collector* v. *Canara Bank and Others*,[58] Court again observed the fact that right to privacy deals with the person and not places and gave importance to the right or privacy both of house and person.

1.5 Conclusion

The law relating to search and seizure is needed to compel the production of things for the purposes of any investigation, inquiry or trial. Documents and other material objects relevant for any investigation, inquiry or trial should be available to the law enforcement agencies conducting such proceedings. The Code therefore provides initially for a summons to produce any documents or things, but if this method fails or is apprehended to fail, the court can issue orders to the police for the search and seizure of such documents or things.[59]If come across upon the international standards and constitutional policy, the power relating to search and seizure has always been looked upon with suspicion by law. In order to protect the individuals from unreasonable search and seizure, this power has been subjected to number of safeguards which have been given further a wider meaning through the judicial interpretations. The judiciary in India from time to time has given due importance to the right to privacy while deciding any matter relating to the search and seizure. But it has also subjected it to the reasonable restriction on the basis of compelling public interest.

Thus law relating to search and seizure being a coercive method and involving invasion of the sanctity and privacy of a citizen's home, but such encroachment upon the rights of the citizens has to be tolerated in the larger interests of the society. It is also essential as well that power of search and seizure should be exercised with all care and circumspection and it should be resorted as a preventive or precautionary measure or when the larger Interests of society is involved to maintain peace and order.

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57 AIR 1978 SC 597.

58 (2005) 1 SCC 496.

59 R.V. Kelkar's, *Criminal Procedure*, Eastern Book Company, Nagpur (1998) at p. 65.

THE PROBLEM OF CUSTODIAL VIOLENCE IN INDIA: A CRITICAL STUDY

Ruchi Sapahia *

Liberty is the most cherished possession of man[1]

A human being is the real wealth of any nation and for his development there is always a need to create an enabling environment for enhancing his achievements, capabilities, freedoms and rights. In this context the issue of governance has moved at the forefront of the agenda for sustained human development in recent past years. Good governance helps in securing human well being and sustained development but poor and bad governance is capable of eroding the individual capabilities as well as institutional and societies' capacities to meet even the basic needs of sustenance for large segments of the population.[2]

It is fully realized and understood now that poverty is the result of poor economy as well as poor governance. Being voiceless and powerless makes it very difficult and incapacitates the poor and disadvantaged people to seek and access justice and hence make themselves an easy prey for the state and its agencies to deny them justice, rights and other benefits.[3]

Human rights cut across political, social, ideological and cultural domains and are of universal importance as they are available to the entire humanity irrespective of race, religion, color, sex or domicile. Custodial violence such as lock-up deaths, unlawful detentions, custodial rapes, physical violence and deaths are not tolerated by any faith or culture, which respects humanity. But one of the major problems India is facing today is violation of human rights by individuals and institutions established to uphold these very principles. There is a need to build an in-built mechanism in the administrative and supervisory structure to ensure constant watch at the vulnerable task of human society.

Originally, the word 'police' was derived from the Greek word 'politeia' or its equivalent Latin term 'politia' which stands for the 'state' or 'administration'.[4] In Encyclopedia Britannica, the term police are used to denote 'a body of people organized to maintain civil order and to investigate breaches of law'.[5] In the present context the term 'police' connote a body of civil servants whose primary duties are preservation of order, prevention and detection of crime and enforcement of law. Police as a functionary of criminal justice system, plays a crucial role in maintenance of peace and enforcement of law and order within its territorial jurisdiction. Its

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1 R.S. Verma, *Law Relating to Custodial Death and Human Rights*, Verma Publication (2001) at p. 1.

2 *National Human Development Report* 2001.

3 Kamlesh Kumar, *Custodial Crimes in Police Custody: Causes, Consequences and Preventive Measures,* an unpublished thesis submitted to Tata Institute of Social Sciences, 15 September 2011.

4 N.V. Paranjape, *Criminology and Penology*, Central Law Publisher (2001) at p. 216.

5 Encyclopedia Britanica, Vol. 14 at p. 662.

primary duty is to safeguard the lives and property of the people and protect them against violence, intimidation, oppression and disorder.[6]

The political leadership and police administration has permitted the age old police to continue even today in democratic India. There has been no organized effort to change the police culture. Even today we follow the same rules and regulations without any significant change in the old laws which were practiced during British regime who built their own judiciary, police, jails and laws for their own benefit and convenience so that they could rule over India. The jump from the colonial rules to a democratic rule was a frog jump. But the Indians could not fully realize the indications of such frog jump. It is a fact that the foreign rulers have disappeared from our country and the administration in India is now run by a duly elected democratic government. The agents of the British Raj have gone but they have left the legacy behind. The existing police system is also the legacy of the British. Probably this psyche still remains with the police as well as with the Indian masses.

According to Article 21[7] of the Indian Constitution, the right to life includes the right to live with human dignity and all that goes with it. It also includes protection against inhuman torture and any act which damages or injures or interferes with the use of any limb, faculty of a person, either permanently or temporarily.[8]Everyone has the right to live with human dignity and no state or government has the right to take any action which will deprive a person of the enjoyment of these basic essentials.[9]

The responsibility of protection of the right to life lies in the government of the nation and its various organs. In a democracy policeman is custodian of law. Apart from the police, there are several other government authorities like Directorate of Revenue Intelligence Bureau, Research Analysis Wing, Central Bureau of Investigation, Criminal Investigation Department, Traffic Police, Mounted Police and Indo Tibetan Border Police which have the power of detaining any person and to interrogate him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Custom Act, Foreign Exchange Regulation Act etc.[10]

But the irony is that the protectors of these constitutional and statutory rights have become the major violators. They commit custodial violence- physical and mental, rape and deaths of the persons under their custody.[11]There seems to be a lack of awareness or non interest of its existence by all sections of the society. The public sometimes has the knowledge of its violation through the court and the press.[12]

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6 S.K. Ghosh, *Torture and Rape in Police Custody: An Analysis*, (1993) at p.15.

7 *Article 21* of the Indian Constitution, "No person shall be deprived of his life or personal liberty except according to the procedure established by law".

8 *Francis Coralie v. Union Territory of India* (1981) 1 SCC 608

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

10 S.K. Awasthi, R.P. Kataria, *Law Relating to Protection of Human Rights*, Orient Publication (2000) at p. 908.

11 Shailender Mishra, *Police Brutality: An Analysis of Police Behaviour* (1986 at p. 2.

12 Joginder Patjoshi, *Custodial Death- Violation of Human Right*, SCJ (1997) at p. 65.

In the eyes of law prisoners are also human beings and not animals and therefore if any guardian of law goes berserk and defies the dignity of its people have to be punished. For, when a person is traumatized, the Constitution suffers a setback and a shock. The foundation of peace, freedom and justice is the recognition of the inherent dignity and of the equal and inalienable rights of all the members of the society.

Fundamental freedoms are essential for the peaceful development of the individuals and the nation. No state can develop itself by suppressing the natural rights of its citizens. No correctional institution can survive in democratic politics in the absence of the basic freedoms of its inmates.

It is the duty of the State to regulate brutal activities on the basis of legal principles. There are number of safeguards available to the detainees in the Indian legal systems which are provided under the Constitution of India, Indian Penal Code, Criminal Procedure Code, Indian Evidence Act and such other legislations. This mandate of law is required to be followed by the agencies to protect the interest of the arrested person so that justice may be secured without adhering to any form of custodial violence.

1.1 Custodial Violence

> The functioning of police and other governmental agencies has a direct bearing on human rights.
>
> ....Sir James Fitzjames Stephen[13]
> (Legal member of the Viceroy's Counsel from 1869 to 1872)

Custodial violence is not defined anywhere either in the constitution or in any statutory laws. But it is understood as a mechanism used to assert ones will over another in order to prove or feel a sense of power or superiority. It is generally perpetuated by those in power against the powerless. Violence therefore operates as a means to reinforce subordination.

Torture or violence in simple words or in a layman's language means cruelty, atrocity, and hurt deliberately causing great pain- physical and mental in order to punish or to get information or to forcibly make one to confess to something. When the violence or the torture goes beyond the tolerable limits of the victim, it leads to death.[14]

A Police Act Drafting Committee was formed to re-examine police laws in India and in 2006 it submitted a new draft law. Though the Parliament is yet to approve the draft, in 2006, the Supreme Court of India issued a directive with some basic principles of policing to State governments. The Court asked State governments to follow these principles in the interim until a new legislation is adopted. Following this, many State governments began to revise their police laws. Meanwhile, the Police Act of 1861 still exists in the statutory books, and it remains questionable if the recent reforms would amount to a fundamental departure in the contours of

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13 Stephen, *History of Criminal Law* at p. 442.

14 *Collins Cobuild English Language Dictionary* (1992) at p. 1546.

relations of power between the superintendence, the inspectorate and the constabulary, the hierarchy which formed the bedrock of the colonial police.

According to **Custodial Crimes (Prevention, Protection and Compensation) Bill 2006**, 'custodial crime' means " an offence caused against any arrested person or a person in custody when that person was in the custody of a police officer or a public servant who has power under any law to arrest and detain a person in custody during that period."

The Supreme Court of India in its landmark judgment[15]interpreted 'custodial crimes' as a crime occurring during the period when some limitation is placed upon the liberty of the person either directly or indirectly, by the police. It precisely extends the meaning of custodial commission of crimes that it is immaterial whether or not the injury, torture or assault occurs within premises of police station or police post. What really matters is the control of police over the victims.

According to **United Nations Special Rapporteur on Torture (2008),** "custodial violence against women very often includes rape and other forms of sexual violence such as threats of rape, touching private parts of a woman, being stripped naked, invasive body searches, insults and humiliations of a sexual nature etc.

"Torture" is a wound in the soul so painful that sometimes you can almost touch it, but, it is also so intangible that there is no way to heal it. Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including you.[16]

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has defined 'torture' as "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[17]. It does not include pain or suffering arising only from actions inherent in or incidental to lawful sanctions."[18]

In most parts of democratic world, multiple mechanisms have been set up to ensure the existence of an effective system of police accountability. Civic oversight of policing is increasingly being accepted as the most essential requirement of democratic policing.

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15 SAHELI - *A Women Resource Centre v. Police Commissioner of Delhi* AIR 1990 SC 513.

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

17 *Rudal Shah v. State of Bihar* AIR 1983 SC 1086; Abdul Gafar v. Vasant Raghunath, AIR 2003 SC 4567; *Nilabati Behera v. State of Orissa* AIR 1993 SC 1960.

18 Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Alec Mellor, in his landmark book on the history of torture, *La Torture*, first published in 1949 in the aftermath of the Second World War, tries to explain the reasons for the supposed *reappearance* of torture in the twentieth century. He suggested three fundamental causes for this resurgence: the rise of the totalitarian state culminating in the USSR; the importance of "intelligence" gathering and "special methods of interrogation" as a result of modern warfare; and finally, the influence of "Asianism"[19]. Montesquieu, in his "Persian Letters," for example, used the idea of the "tyranny of the Turk" as a foil for that of Louis XIV.[20] Such an analysis is representative of a long and chequered history, of a discourse in which such a projection of "despotism" as uniquely "oriental" "helped Europeans define themselves in European terms by making clear what they were not, or rather were not *meant* to be" [21]

Upendra Baxi argued that torture is, in fact, institutionalized in India. As he puts it, "custodial violence or torture is an integral part of police operations in India".[22] He notes, however, the difficulty in assessing the magnitude of this phenomenon, because of the lack of any authoritative government-backed study of the practice. Ironically, he says, "When one looks back a little, one finds that the British governing elite was more explicitly concerned with use of torture by the native police, than the governing elite of independent India"[23]. Upendra Baxi's statement probably derives from the fact that the only comprehensive study of this kind in the history of modern India is the Torture Commission Report of 1855. The Commission was set up by the then Madras Government, under orders from the Court of Directors of the East India Company. He notes that the Commission's conclusions regarding the plight of the victims are still valid today. Police torture is as much a reality now as it was then.[24]

1.2 The Torture Commission Report, 1855

In 1854, the House of Commons was rocked by allegations of torture against the East India Company. During a debate, based on information from the Madras Presidency, it was said that torture was frequently employed by native officers to compel the ryots to pay the demands of Government[25]. Mr. Danby Seymore, MP, accused the Company of using torture and coercion to get ten shillings from a man when he only had eight[26]. Soon the British press took over. *The Times* wrote of the "Indian Inquisition" and *Punch* carried a satirical piece on the issue[27]. The Court of Directors immediately directed the Madras Government to set up a 'most searching

19 Peters, Edward. *Torture*. Oxford: Basil Blackwell (1985).

20 *"Very wicked children": "Indian Torture" and the Madras Torture Commission Report of 1855* Retrieved from *http://www.surjournal.org/eng/conteudos/getArtigo10.php?artigo=10,artigo_bhuwania.htm*, at 11.00 am, 7 October 2013.

21 Metcalf, Thomas. *Ideologies of the Raj*. Cambridge: Cambridge University Press (1994).

22 Baxi, Upendra. *The Crisis of the Indian Legal System*. Delhi: Vikas Publishing House (1982).

23 *Id.*, at p. 129.

24 *Id.*, at p. 130.

25 Gupta, Anandswarup. *Crime and police in India* (up to 1861). Agra: Sahitya Bhawan, 1974.

26 Ruthven, Malise. *Torture: The Grand Conspiracy*. London: Weidenfeld & Nicholson, 1978.

27 *Supra* note 16.

inquiry' and to furnish them a full report on the subject. On 9th September 1954, a three-member Commission was appointed to enquire into the "use of torture by the native servants of the state, for the purpose of realizing the Government revenue"[28]. However, the scope of the enquiry was soon enlarged to include "the alleged use of torture in extracting confessions in police cases"[29]About 519 complainants appeared before the Commission, some from distances exceeding 300 miles. Also, 1,440 complaints were received by way of letters. After having been in existence for about 7 months, the Commission submitted its Report on the 16th of April 1855.[30]

On the basis of the evidence, the Commission concluded that personal violence practised by the native revenue and police officials generally prevails throughout the presidency, both in the collection of revenue and in police cases but this practice has of late years been steadily decreasing both in severity and extent[31].The Report found the term "torture" as defined by Dr Johnson - "pain by which guilt is punished or confession extorted" [32] to be applicable to the practices prevalent in the Presidency.

The Report further elaborated on its views regarding the respective characters of the natives and the Europeans.it said that, "the whole police is underpaid, notoriously corrupt, and without any of the moral restraint and self-respect which education ordinarily engenders and that the character of the native when in power displays itself in the form of rapacity, cruelty, and tyranny, at least as much as its main features are subservience, timidity, and trickery, when the Hindoo is a mere private individual".

1.3 Padmanabhaiah Committee on Police reforms.

The problems of police in this country have been examined extensively by various commissions and committees appointed since Independence. The appointment of the Kerala Police Reorganisation Committee in 1949 was followed by a succession of Police Commissions appointed by different State Governments, mainly during sixties and seventies. The Government of India also showed its interest in police reforms by setting up commissions and committees. The appointment of the Working Group on Police by the Administrative Reforms Commission in 1966 was the first sign of central government's interest in the subject. This was followed by the setting up of the Gore Committee on Police Training in 1971. Then came into existence the appointment of the first National Police Commission (NPC) after Independence. Recently, the central government again became active. It first set up the Ribeiro Committee on Police Reforms in 1998 on the directions of the Supreme Court and another committee- the Padmanabhaiah Committee on Police

28 Report of the Commissioners for the Investigation of Alleged Cases of Torture in the Madras Presidency. Madras: Fort St George Gazette Press, 1855.

29 *Id.*, at p. 3.

30 *Supra* note 17.

31 *Supra* note 25.

32 *Ibid.*

Reforms. The Padmanabhaiah Committee on Police Reforms was set up by the Ministry of Home Affairs, Government of India in January 2000. In addition to the Chairman, a former Union Home Secretary, the Committee consisted of four members, who were all policemen- two retired and two serving. The Committee did not have any representation from other sections of society or public. The report was submitted by the Committee to the central government in October 2000.

The Committee was given too wide a task to be completed in too short a period. It had twelve broad terms of reference, one of which alone consisted of eleven specific items. They covered almost all important problems faced as well as caused by the police. The Committee recognises that politicisation and criminalization of the police force has been growing. According to the Committee, corruption is the root cause of both politicisation and criminalisation of the police.[33]The recommendations made by the Committee to curb the growing trend of criminalisation include (i) raising the status of the constabulary and improving their service and living conditions; (ii) preparing a new Departmental Inquiry Manual and a new Code of Conduct for the police; (iii) filing of property returns both by gazetted as well as non gazetted police officers; (iv) improving the in-house vigilance within the police department; (v) improving the accessibility of police officers to the public; and (vi) reviewing the record of arrests made by the police station staff[34]

It is the criminalisation of politics, which has produced and promoted a culture of impunity that allows the wrong type of policeman to get away with his sins of commission and omission. The Committee's report does not suggest effective mechanisms to deal with these basic issues. The Committee ascribes the growing political interference in the police administration and its work to recruitment and transfer policies/procedures, failure of political leadership and the failure of police leadership. The Committee is of the view that most problems of police are due to arbitrary and frequent transfers of police personnel of different ranks and once the powers in this regard are given to the departmental hierarchy, political interference in policing will be reduced. For this purpose, the Committee has recommended that a Police Establishment Board, consisting of the Director General of Police as its chairman and four other members of the police department, should be constituted to decide the transfers of all officers of the ranks of Deputy Superintendent of Police and above.[35]This idea has been borrowed from the Ribiero Committee on Police Reforms, but modified by this Committee. While the Ribiero Committee had suggested the creation of the Board to decide transfers, promotions, rewards, punishments, including suspensions and all service related matters of officers of and below the rank of Deputy Superintendent of Police, the Committee wants the Board to deal with only transfers and that too only of officers of and above the rank of Deputy Superintendent of Police.

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33 Report of Committee on Police Reforms, August 2000, p. 109, para 9.4.

34 *Id.*, at p. 111.

35 *Id.*, at p. 122.

The image of the police in this country has always been bad. With the passage of time, it has only become worse. Citizens are highly dissatisfied with the quality of policing. There are many reasons for the poor quality of policing, but a major reason identified is the type of control that has been exercised over the police. Control over the police is exercised by the state government. Unfortunately, the manner in which the control is exercised has led to gross abuses. Almost all the State Police Commissions, the National Police commission and other expert bodies, which have examined police problems, have found overwhelming evidence of misuse and abuse of police system by politicians and bureaucrats for narrow selfish ends.

The fact that the rule of law is gradually being replaced by the rule of politics is a cause of concern to all who are interested in establishing good governance in the country. The Committee studied different models of control over police and narrowed its inquiry to three - State Security Commission recommended by the National Police Commission (NPC), the UK and the Japanese models. The treatment of the NPC's recommendations is rather cursory and the Committee gives no reason for rejecting them. It merely refers to its discussions with the Chief Ministers of some States, who opposed the recommendations of the National Police Commission.

The Padmanabhaiah Committee suggests for adopting the Japanese pattern with suitable modifications to suit Indian conditions.[36]The National Police Commission's recommendations about insulating the police against illegitimate political control and interference were shaped by the conditions prevailing in the late seventies. Politics has been increasingly criminalised during the last two decades and the problem of wrong and abusive political control over the police has become worse since then. What is therefore necessary is to devise measures and institutional arrangements, which are stronger and more effective than what was recommended by the NPC. Instead of that, whatever recommendations were made by the NPC are being abraded or sidetracked and much weaker arrangements are being recommended in their place. The Ribeiro Committee had recommended the adoption of such arrangements on practical considerations. The Padmanabhaiah Committee has not even done that. Ribeiro Committee suggested that the Authority should be headed by the District Sessions Judge, while Padmanabhaiah Committee recommends the DM to head the institution.

1.4 Shah Commission

The Indian Emergency from 26 June 1975 to 21 March 1977 by President Fakhruddin Ali Ahmed, upon advice by Prime Minister Indira Gandhi, was declared under Article 352 of the Constitution of India, effectively bestowing on her the power to rule by decree, suspending elections and civil liberties.

The government appointed the commission on 28 May 1977 under Section 3 of the Commissions of Inquiry Act, 1952.[37]The commission was to report by 31 December 1977, but was later given an extension to 30 June 1978.[38]

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[36] Report of the Committee on Police Reforms, August 2000, p. 119, para 10.9

[37] Kritz, Neil J.; Mandela, Nelson, *India: Shah Commission of Inquiry, Interim Report* I, 2005

[38] *Ibid.*

The final report was issued on 6 August 1978 and covered prison conditions, torture and family planning atrocities.[39]The commission published its report on the illegal events during the emergency and the persons responsible in three volumes totaling 525 pages.

1.5 Malimath Committee

Malimath Committee recommended many reforms in the Indian criminal justice system. It advocated that instead of following adversarial system completely, some of the good features of inquisitorial system should be adopted to make the criminal justice system more effective. A preamble to the criminal procedure code should be added on the following lines-

> Whereas, it is expedient to constitute a criminal justice system for punishing the guilty and protecting the innocent.
>
> Whereas it is expedient to prescribe the procedure to be followed by it,
>
> Whereas quest for truth shall be the foundation of the criminal justice system,
>
> Whereas it shall be the duty of every functionary of the criminal justice system and everyone associated with it in the administration of justice, to actively pursue the quest for truth, it is enacted as follows

There is no provision in the Indian Evidence Act prescribing a particular or a different standard of proof for criminal cases. Another standard of proof should be recognized by law which is higher than 'proof on preponderance of probabilities' and lower than 'proof beyond reasonable doubt'. The Committee after careful assessment of the standards of proof came to the conclusion that the standard of proof beyond reasonable doubt presently followed in criminal cases should be done away with and recommended in its place a standard of proof lower than 'proof beyond reasonable doubt' and higher than the standard of 'proof on preponderance of probabilities.'

The Committee has made several recommendations which include the right of the victim to participate in cases involving serious crimes and to get adequate compensation. A prompt and quality investigation is therefore the foundation of the effective Criminal Justice System.

A separate wing of investigation with clear mandate that it is accountable only to Rule of Law is the need of the day as suggested by the committee.

Most of the Laws, both substantive as well as procedural were enacted more than 100 years back. Criminality has undergone a tremendous change qualitatively as well as quantitatively. Therefore the apparatus designed for investigation has to be equipped with laws and procedures to make it functional in the present context. If the existing challenges of crime are to be met effectively they have to be trained in advanced technology, knowledge of changing economy, new dynamics of social engineering, efficacy and use of modern forensics etc. Investigation Agency is understaffed, ill

[39] An_ant, Vi Kiru??ā, "India Since Independence: Making Sense of Indian Politics", Pearson Education India (2010), p. 205.

equipped and therefore the gross inadequacies in basic facilities and infrastructure also need attention on priority basis.

There is need for the Law and the society to trust the police and the police leadership to ensure improvement in their credibility.

As the Indian Police Act, 1861, has become outdated, a new Police Act must be enacted on the pattern of the draft prepared by the National Police Commission.

The Committee recommended for the review and reenactment of the IPC, CrPC and Evidence Act and to take a holistic view in respect to punishment, arrestability and bailability.

Since the IPC was enacted in the year 1860, many developments have taken place, new forms of crimes have come into existence, punishment for some crimes are proving grossly inadequate and the need for imposing only fine as a sentence for smaller offences is felt. Variety of the punishments prescribed is limited. There is thus a need to have new forms of punishments such as community service, disqualification from holding public offices, confiscation orders, imprisonment for life without commutation or remission etc.

The IPC prescribes only the maximum punishments for the offences and in some cases minimum punishment is also prescribed. The judge exercises wide discretion within the statutory limits. There are no statutory guidelines to regulate his discretion. Therefore in practice there is much variance in the matter of sentencing. There is no clear indication as to what are all the factors that should be taken into account in the matter of assessing the sentences to be imposed. In many countries there are laws prescribing sentencing guidelines. The Committee therefore recommended for a permanent Statutory Committee being constituted for the purpose of prescribing sentencing guidelines.

As the fines were prescribed more than a century ago and the value of the rupee has since gone down considerably, the Committee feels that it should be suitably enhanced.

The Committee recommended implementation of 142nd and 154th reports of the Law Commission of India in regard to settlement of cases without trial. Malimath committee suggests also for the reclassification of offences.

1.6 Types of Custodial Violence

There are different methods to bring custodial violence.

1.6.1 Psychological

(a) By Communication techniques-the victim is given wrong information and tortured mentally.

(b) By compulsion or coercion-the victim is compelled or coerced to perform activities or to witness actions that torture him mentally. The victim is

compelled to choose between two alternatives that are equally bad and cause mental torture. Forcing the victim to violate social taboos or forcing to witness torture of other victims etc.

(c) By deprivation-depriving the victim the basic needs like water, food, sleep and toilet facilities which results into disorientation and confusion. The sensory deprivation of light and sound, social deprivation by not allowing the visitors to meet, depriving the following of religious rituals and confining to solitary confinement etc disorients a victim with reference to time and place.

(d) Pharmacological techniques-use of various drugs to torture the victim to facilitate torture, to mask the effect of torture and also as a means of torture.

(e) Threats and humiliations-threats and humiliations directed towards them or their family members or friends.

1.6.2 Physical

The methods of physical torture are those which inflict pain, discomfort and dysfunction in different parts of the body. Killing the victim is not the aim of torture.

(a) Severe beatings with sharp objects or forcing the victim to walk barefoot over thorny surface or over glass covered floor.

(b) Scratches and cuts are made on different parts of the body with sharp objects.

(c) The victim is suspended by his legs or arms or by his or her hair. It is usually combined with other forms like falanga, electric shock, heat, cold etc.

(d) Use of irritants like chili powder, table salts etc. on delicate parts or wounds.

(e) Twisting and pricking with pins fingers, ears and hair, pulling out the nails, hitting ears with both hands simultaneously to impair their hearing.

(f) Forcing the victim to sleep on damp floor.

(g) Making the children stay naked in extreme cold weather or under the sun in temperature of more than 30 degrees.

(h) The ligaments in the joints are torn off causing severe pain by twisting and beatings.

(i) Causing disfiguration and exhaustion.

(j) Causing torture to such an extent that the victim feels fear of immediate death.

1.6.3 Sexual

Sexual violence has great social and psychological impact in the minds of its victims. It may start with verbal sexual abuse and humiliation targeting her dignity. It results

into rape or sodomy. The violators or the perpetrators of this crime keep devising new means and methods according to their own mental aptitude and imagination to break the resistance of the subject quickly as well as to satiate his own urges.

1.7 Reasons Leading to Violence in Custody

The law is a command of the sovereign having the sanction of punishment. When the punishment is in terms of incarceration, "the prisons" are there "to serve the society".[40] Custodial crime in police custody is a symptom and not the disease. The disease lies elsewhere. It is merely a reflection of the social milieu in which our governmental agencies work. Its causes are multifaceted. National as well as international agencies have indicted our system for the violation of human rights in the wake of reports of custodial violence and deaths.[41]There has been a long failure of the administration and the government of India to address the issue of custodial violence and custodial deaths and other human rights violations by the law enforcing agencies.

Various governmental agencies have an inordinate amount of power and discretion given to them under various laws and policies, political climate and society in general. The internal award system which provides monetary incentives or promotions for carrying out extrajudicial executions also acts as a catalyst. Also, the victims of this crime hail primarily from the disenfranchised, poverty-stricken, lower caste and illiterate sections of the society which generally lack access to the few legal remedies that actually exist. A lack of cohesion between local organizations has rendered the existing support system incapable of combating the problem. Systematic and endemic corruptions in the police and within the politician and judicial agencies exacerbates the problem and ensures that such crime go unpunished. The agencies themselves behave like bandits, thieves rapists etc. Such governmental agencies are supposed to protect the people and not to rape, blackmail, humiliate or cause death of people.

The National Police Commission in its third report observed that the power of arrest is one of the chief sources of corruption in the police. The report suggested that by and large, nearly 60% of the arrests were either unnecessary or unjustified and accounted for 43.2% of the expenditure of the jails. The police has to produce the arrested person before the magistrate within twenty four hours and as the police find these hours very less, so it resort to not entering the name and the arrest in the station house diary, which is mandatory according to the guidelines issued by the Supreme Court of India. And since the 'due process of law' is a time consuming process, the police has devised the method of "summary punishment" which takes the form of torture in police custody often resulting in custodial deaths. This is one of the reasons why police remand is discouraged in practice. If we have an effective "arrest review system", like in England, where arrest is reviewed periodically to ensure that the accused has not been maltreated in police custody

[40] Ketan Mukhija, Sweta Pandey, "*Police Power and the Criminal Justice System*, Lawz Magazine (2012) at p. 36.

[41] Law Commission of India, *152nd Report on Custodial Crimes* at p. 1.

we can also provide for a method which provides definite safeguards against custodial violence.[42]

The custodial crime is preceded by arrest or detention. In general "custody" commences on a person being arrested, the arrest may be legal or illegal: it may be formal or informal; it may be by word or action[43]. Whatever be the origin or category of the act of arrest, it has one very important consequence; it deprives the person arrested of his personal liberty. His movements, his freedom, his actions, even his thinking, come under the exclusive control and mastery of another person. His personality becomes subordinate to that of the person in whose custody he is placed. Every arrest amounts to custody. Arrest and custody are not synonymous terms. Custody may amount to arrest in certain circumstances but not in all circumstances[44]. The situation of mastery, domination and total control is generative of a possibility of abuse. If "power tends to corrupt" in the political area, it is equally true to say that a situation of authority tends to abuse authority. Such abuse may take a variety of forms. It may lead to physical torture, mental cruelty, silent psychic domination or any other form of abuse. The varieties of custodial torture and crime can be as infinite as are the varieties of human perversity.

Role of Law is very important to have supervision and overview by it. It is one of the essential functions of the law to create and maintain an apparatus that will function as the restraining element against oppression, malpractice, abuse and corruption, particularly in situations of sensitivity. Where the situation is one of temptation, the law will act as a brake on the vice of greed. Where the situation is one of passion, the law, by its sanctions, tries to control the surge of passion. Where the situation is one of exploitation or oppression, the law must try to construct a barrier to stop the onslaught of the evil mind. It is in this respect that the invisible, but omnipresent influence of the law has a role to play. And it is for this reason that the law should try to supply the deficiency that the peculiarity of the situation may give rise to.

If unfortunately, an incident of violence or torture or other crime in custody occurs, it obviously becomes necessary to invoke the criminal process. Ordinarily, the initiation of the criminal process in India takes the shape of lodging information with the police or of making a complaint to the competent Magistrate. Lodging information with the police is the more frequently adopted course. However, where the person alleged to have committed an offence is himself an officer concerned with the enforcement of the law, this may not always prove to be very effective. It is this element of the situation which, in a negative way, counts as a factor that facilitates malpractices.

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42 *Supra* note 40.

43 Law commission of India, *113th Report on Injuries in Police Custody.*
See Uttam Chand v. Mahmud Jewa AIR 1936 Nag 200; *Chottey La v. State of U.P.* AIR 1954 All. 687; *Muthiah Chettiar v. Ganesan* AIR 1960 Mad 91; *Paramhausa Jadab v. State of Orissa* AIR 1964 Ori 144l; *Jodha Khoda Rabari v. State of Gujarat* 1992 Cri.LJ 3298.

44 *Directorate of Enforcement v. Deepak Mahajan* JT 1994 (1) SC 299 (306).

Allegations about the perpetration of violence by an officer having custody have to be proved by concrete evidence. Eye witness testimony in such cases would very rarely be available. But, in general, medical evidence would furnish a very satisfactory material in this regard, provided it is available. To ensure that such evidence is available, medical examination of the alleged victim of custodial violence could be the best device. Such examination should be exclusively and adequately provided in the law. Where custodial violence results in death of the victim, obviously the substantive law has failed. But procedural law must 'take over' in order that the factum of death, the cause of death, the mode of death and other relevant facts are ascertained. As far as possible, the ascertainment of such facts must be quick in its timing, adequate in its coverage, thorough in its methodology, and impartial in its approach.

The statutory law, particularly, the Code of Criminal Procedure, does contain a few provisions on the subject, but experience seems to indicate that there are three major defects in this regard. In the first place, though inquest by the Executive Magistrate is, at present, mandatory, cases are known where police officers are associated with the inquiry, thus defeating the very object of the provision for magisterial inquiry. These inquests have not always inspired public confidence. This is evident from the persistent demands for the appointment of Commissions, of Inquiry that are made whenever there is custodial torture or violence or rape or death. Even, assuming that inquest by an Executive Magistrate is, from the practical point of view, the best that can be thought of; the difficulty is that such inquests do not always result in the initiation of appropriate criminal proceedings against those who may be guilty[45].

There are certain practical problems also arising in the sphere of evidence. By its very nature, a crime that takes place while the victim is in custody is extremely difficult to prove. In the first place the situation is such that the victim is totally subservient to the alleged perpetrator of the crime. Hence the victim would always be afraid to speak out. Secondly, the situation is such that no third person may ordinarily be present who can give oral testimony. Even where there is probability that custodial violence had been committed, it is difficult to link up the episode with the custodian and to establish to the satisfaction of the court that: (i) the offence in question had been committed, and (ii) the offence was committed by the custodian.

The root of this problem lies in a highly anomalous provision contained in the Evidence Act, namely, section 27.[46] A confession made by a person in police custody is not admissible. By way of a proviso, section 27 lays down that if a person in the custody of a police officer makes a statement leading to the discovery of a fact, the same is admissible, whether or not it amounts to a confession.

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45 *Ibid.*

46 Section 27 *Indian Evidence Act*, 1872, "provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered, may be proved."

Different grammatical problems and linguistic vagueness have been generated by the placing and inapt language of the section. The fact that a statement can be rendered admissible, if it is represented to the trial court as a "discovery statement" and presented at the trial in the form of a confession marked as a discovery statement, a fact well known to every police officer, acts as a lever to the police officer to use unfair means to procure such a statement. The police know that this is an easy method of circumventing the prohibitions based on practical wisdom, experience, of generation, and deep thinking. Section 27 of the Evidence Act, 1872 has been productive of great mischief, in the sense that it generates an itch for extorting a confession which, in its turn, leads to resort to subtle, disguised action in regard to the section. The section needs a drastic surgery, if the cause of honest law enforcement is to be promoted.

There is a need to mention here of an important aspect relating to the organization of the police. By and large, the police in India is so organized that no strict dividing line is drawn between the function of investigation and the function of maintenance of law and order. The former requires patience, skill, long-range effort and expertise of a high order. The latter envisages very quick action on the spot, faculty of immediate response, firmness of the mind and a decisive approach. The officer engaged in investigation has to collect facts, explore the reality, reconstruct the past and analyze the entire gamut of materials. The officer charged with duties connected with law and order, security and the like must, on the other hand, capture reality in a fleeting moment and exhibit an immediate and effective response. If a police officer is shunted off from time to time to emergency duties, he cannot be expected to adapt to the text book line of investigation and he may be tempted to switch over to less desirable methods. This is very likely to result in an urge to resort to coercion.

The criminal justice system includes besides police, the prosecution, the courts and the correctional service. At any given point of time, one particular wing may look important but failure of one will definitely affect the working of the other partners of the judicial system. Police is the state agency which is responsible for maintaining the law and order in the society. But the stark irony lies in the fact that illegal acts and omissions have become part of police's daily routine throughout India. The reports of National Human Rights Commission and Amnesty International also suggest the same thing. Sometimes the 'overzealousness' to secure justice and conviction of the accused by the police officer or the investigating officer gives rise to temptation of custodial violence.[47]

There is tremendous pressure on the police to detect the crime and the guilty. If there is any lapse, only the police are singled out for blame. Hence many police officers opt for rough and ready method for quick results. Subordinate officers who are entrusted with the job of applying the third degree methods, over do it. Most often, the death occurs not because there was any intention to kill but as a result of excessive violence or when quite unknowingly, the officer injures some weak

[47] *Supra* note 40.

organ of the victim. The custodian employs practically all methods and techniques to make the suspect plead guilty or to do things as demanded[48].

The police routinely cite 'suicide' as a cause of death in custody. The explanations of the police are also often inadequate. The police have even claimed that people have committed suicide by using handkerchiefs or by consuming poison while in police custody.[49]

The police in India are taken as an authoritarian agent of state rather than an agent of law. The honest officers who discern their duty as serving without bias, fear or favour find themselves labeled as uncooperative, difficult and non-helpful and are sidelined into non-operational roles. Allegiance to power centers outside of the police means that the chain of command is weakened, line of control get blurred within the force and the ability of superior officers to marshal their forces or make them accountable for wrong-doing is severely compromised. Political interference has a chain reaction and gets institutional in a negative sense resulting in the subversion of existing structures of supervision and control within the establishment. The power of transfer and ability to dam or further the career paths of individual officers make the police unable to resist outside influence, whether this comes from powerful societal or political elements or political superiors. All these make the possibility of professional policing a distant dream.[50]

Investigating officers sometimes lack proper orientation in scientific methods and they resort to short- cut methods of third degree and the like for eliciting confessions irrespective of its truthfulness so that the crime solving rate may go higher.[51]

Asian Centre for Human Rights' suggested that the victims suffer high risks of torture in first twenty four hours following detention. The lack of any effective system of independent monitoring of all places of detention facilitates custodial violence. [52]

There is also a palpable dichotomy in public expectation from the police. This contributes to the continued prevalence of the third degree as well as custodial crime.[53]

Administrative reasons like absence of proper supervision on the functioning of the officers at the police station level which makes them feel that their activities are not being monitored by their supervisors. They take the liberty of working recklessly indulging in perpetration of custodial crimes. To keep them under proper restraint is

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48 B. Chatterjee, "A Centaury of Social Reforms for Prisoner's Status", *Indian Journal of Social Work*, Vol. XLI, No. 3 (October 1980) at p. 241.

49 Torture in India 2010, Asian Centre for Human Rights, p.16

50 Kamlesh Kumar, *Custodial Crimes in Police Custody: Causes, Consequences and Preventive Measures,* an unpublished thesis,Tata Institute of Social Sciences (15 September 2011) at p 21.

51 Stephan Timmerman, *Science Politics and Forensics*, "Contexts: Understanding People in Their Social Worlds", Vol. 6, No.1 at pp. 25-30.

52 *Torture in India 2010*, Asian Centre for Human Rights, p. 5.

53 Vasudha Daramwar, "Human Rights and the Prisoners", *The Prisoner and the Law*, UNICEF, (1997) at p. 27.

one of the duties of the supervisory officers which can be ensured only by effective supervision. Imposition of proper punishment on erring officers by the departmental superior can go a long way in enforcing norms of discipline among subordinate rank.[54]

Law enforcement personnel continue to enjoy virtual impunity from prosecution for human rights violations including custodial violence or torture and extrajudicial killings. Prosecution requires prior permission from the government under section 197 of Criminal Procedure Code, 1973 and various special laws including the Armed Forces Special Powers Act, 1958[55] which provides impunity to the public servants against prosecution without the prior sanction from the central government or the concerned state government.

1.8 Suggestions

The government must re-educate the police out of their sadistic arts and inculcate a respect for the human being, a process which must begin more by example than by exhortations. If any policeman is found to have misconduct himself, the authorities should not hide the crime under the pretext of police solidarity or brotherhood.

Essence of custodial management comes down to three key objectives:

- protecting the safety of the inmates, jail personnel and the visitors.
- preventing the property damage and its loss.
- Preserving inmate rights.

Training and recruitment are the other important areas that need to be addressed promptly to bring about a change in attitude and mindset of the police with regard to investigations. Unless stern measures are taken to check the malady of the very fence eating the crops, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The Indian courts therefore need to deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of judiciary itself, which if happens will be a sad day, for anyone to reckon with.[56]

A number of judgments have been delivered by the honorable Supreme Court of India whereby important guidelines have been issued and also it has provided for the payment of compensation to the persons affected by custodial crimes.

The criminal justice system should be in conformity with the international human rights obligations of India. The reform should take into account and seek to eradicate

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54 Stephan Timmerman, "Contexts: Understanding People in Their Social Worlds", *Science Politics, and Forensics*, Vol. 6, No. 1 at pp. 25-30.

55 *Torture in India*, Asian Centre for Human Rights (2010) p. 33.

56 *Munshi Singh Gautam v. State of M.P.* AIR 2005 SC 402.

the root causes of its malfunctioning. The authority conducting the investigation should be separate and independent from the detention authority. The length of the police custody should not be extended.

The working conditions of the policemen especially the lower ranks are quite pathetic. They are not given good pay. They do not have any fixed hours of work nor is family accommodation available to all of them. Their promotion prospects are not bright due to which they adopt the short cut methods. It becomes difficult for them to be sensitive towards human rights under these conditions. There is a total lack of control and accountability which is evident from the data available that how they use third degree methods and do informal and unlawful detentions.[57]These problems need to be sorted out.

Award of compensation in a proceeding under Articles 32 or 226 of the Constitution of India for custodial crimes is a remedy available in 'public law' based on strict liability for contravention of fundamental rights to which the principle of 'sovereign immunity' does not apply. There is a positive trend of the judicial policy for compensating victims of custodial violence or the families of victims of custodial deaths. But this compensation is awarded without any basis or principles for quantifying the amount. The courts and the judges go by their intuition rather than any rational basis or law. Increasing use of compensation remedy may also give an impression that the state is ready to compensate if it can purchase the right to continue to inflict constitutional deprivations on its citizens. Whether a death is deliberate, accidental, suicide or due to neglect or however it is caused, the net result is a custodial death. Then the question is how to compensate for the life that has been lost, of the fact that state agencies have committed a crime and therefore, the state must pay compensation. The question remains about the prosecution of those officials who have committed this heinous crime.

There is a need to devise a scheme wherein steps to police the police are taken, *where wits and not fists* are the part of police kit, where third degree methods are completely plucked out and the fresh shoots of humanist respect are put in.

The functioning of lower level police officers should be continuously monitored and supervised. While arresting and detaining any person all the requirements enumerated in D.K. Basu's case should be strictly followed. Simple and foolproof procedures should be introduced for prompt registration of first information reports relating to all crimes.

Computerization, video- recording, and modern methods of record maintenance should be introduced to avoid manipulations, insertions, substitutions and ante-dating with regard to FIRs, mahazars, inquest proceedings, post-mortem reports and statements of witnesses etc. and to bring in transparency in action.

Large notice board in the police stations and in the jails should be put up so that even if somebody is not aware of his or her rights, he or she should come to know of them then.

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[57] Ekta Prakash, Custodial Violence... the *Worst Crime in a Civilized Society*, *http://ibnlive.com/cfs/blog/53758/1541* on 12/20/2009.

The Prison Act should be reformed and there should be complete overhaul of the Prison Manuals with humanitarian touch and the copies of the same ought to be made available to the prisoners and liberal visits by family members and friends must be encouraged.

There must be timely and regular examination of the registers and records of the people kept in prisons. And if any inmate gives any relevant information, it should be forwarded to the government without any delay. The magistrates also should meet the prisoners to listen to their grievances. They should be permitted to set up a wall paper to ventilate grievances.

Prisoner's handbook should be published in Hindi and circulated. Jail bulletins regarding rehabilitative and improvement programme should likewise be printed and circulated.

The State must keep to norms and standards consistent with the Standard Minimum Rules for treatment of prisoners.

The Indian law should specifically define the term 'custodial violence' in its laws-substantive as well as procedural. This definition should also include all those persons who are arrested formally and also those who are under inquiry or interrogation and without any formal arrest are subjected to custody.

The law relating to burden of proof should be reexamined to prove custodial violence.

The recruitment policy of the government should be based according to the latest scientific developments in the concerned field which should be fair but strict to assess the suitability of the candidate for the post.

There should be focus on training which is modern and humane in nature to be given not only at the time of recruitment but also throughout the service at regular intervals to update the knowledge and skills, to develop a helping attitude towards the general public.

Every investigating agency should be provided with the latest techniques and modern equipments to gather relevant evidence to prove the guilt of the accused without violation of any human rights, like equipments to lift fingerprints from the scene of crime, recording of evidence by both audio-visual computers, trained technicians, footprint and finger print experts, photographers, sophisticated forensic laboratories etc.

Media should be encouraged to bring to light the incidents and cases of custodial violence to limelight so that the guilty are punished and the victims of the crime get justice.

The judiciary can play a positive role to curb this menace by judicial activism in the form of institution of public interest litigations which have contributed greatly towards restraining the reckless members of the various forces.

The policy of or the attitude of achieving the ends by any means needs to be changed. Surprise checks and inspections of the police stations, police lock ups, jails, care

taking institutions or homes should be done on a regular basis so that the human rights violations if any can be found out and appropriate action be taken.

Organizations built under the law, like police are peoples institutions built on community edifice but their structure and workings tend to get so isolated from the public that a hiatus subsists and creates a barrier causing immense friction and misunderstanding between the two. Common sense would tell us that public participation does not mean that any and sundry can interfere in the day to day working of public institutions. On the contrary, there is need to evolve a character and ethos to the crucial activities of police by which the public can stand assured that measures planned and pursued by the police are in the best interests of the community and further an enlightened body which is independent of the executive in performing a watch dog role on their behalf.

Any progress in society can be done only when the government and the people are conscious of the need to ensure respect of human rights of each and every person. This can be achieved by putting these important principles as part of the syllabus at schools, colleges, universities and in the training programmes of members of the parliament and state legislatures.

There must be more transparency and accountability in the functioning of all the government departments. Officers in charge of the work should be prepared to show and prove to the people that they are doing only lawful things whenever claiming to administer or helping in the administration of justice. There is no need to be unduly secretive in police or other work which may cause more suspicion in their sense of doing justice. There can be no justification for lawlessness in police functioning. Unjustified violence and all sorts of human rights violations have a tendency to administer miscarriage of justice, obscure the real issues and effect adversely the police relations or the relations of other agencies with the public.

There is a need to make a conscious effort by all the internal and external bodies towards bringing much needed attitudinal changes in the police and other governmental agencies. The need to create an environment where they can perform their duties with a sense of pride and fulfillment without feeling hamstrung either on account of legal hurdles or due to administrative and financial problems can hardly be over emphasized. It is only when policing and police are elevated to a pedestal of a well deserved priority in the government scheme of things and the necessary training and orientation is imported to the rank and file of police forces that observations in police behavior can be progressively learned and the image of the police in public perception will change sooner or later for the better.

1.9 Conclusion

> No one can truly know a nation until one has been inside the jail. A nation should not be judged by how it treats its highest citizen but its lowest ones".

In any democratic society, work in a prison is public service. Prisons are places like schools and hospitals which should be run by civil power with object of contributing to the public good. Jails are the critical part of any justice system Violence of any

kind at the hands of police is counterproductive. Custodial management is very important to overall jail management program so that the authorities are able to accomplish the mission despite various challenges.[58]

But this can be achieved only when each of us come together and participate in building a strong character of the nation. And since the force cannot function in isolation, therefore all others which make criminal justice system i.e. prosecution, advocates, judges and functionaries in correctional services has to come forward and take initiative to eradicate torture, violence, rape and death in the custody.

Be just to the criminal,

Be just to the victim,

Be just to the society,

Be just to the criminal justice system.

This is the need of the hour. This is what people want today. This is what is known as equal justice system for the third millennium.

58 *Ibid.*

SAFEGUARDING THE POLAR MARINE ENVIRONMENT: AN OVERVIEW OF THE LEGAL FRAMEWORK

Ivneet Kaur Walia *

1.1 The Arctic and Antarctic Regions: Similarities and Contrasts

Do the polar conditions of both the Arctic and Antarctic make these two regions not only special but also similar cases, in terms of the international regulation needed for their environmental protection – from which some appropriate 'polar approaches' should be required? Or do their many different socio-economic and political features make the two regions as diametrically opposed as they are in terms of their geographical location and the resulting semantics behind their names: Arctic and Anti-Arctic?

1.1.1 Contrasting Features

Chiefly as a consequence of major difference in the social, strategic and economic conditions of the two Polar Regions, they do differ considerably in legal and political terms. When the 1996 Antarctic Treaty Consultative Meeting reviewed the possible mutual relevance of developments in the Arctic and the Antarctic, the emphasis was on:

The need to bear in minds that, as far as co-ordination was concerned, the political and legal context governing activities in the Arctic and the Antarctic differ considerably.[1]

Indeed, the Arctic still lacks any counterpart to the Antarctic Treaty System, governing the whole spectrum of human activities in the Antarctic with an increasing reliance on 'hard' law.[2]

Cooperation among the Arctic Eight has emerged only since the late 1980s, and formally since 1991 within the framework of the Arctic Environmental Protection Strategy.[3] This has been a process based on declarations, i.e. on 'soft' law. Even the Arctic Council has been established, not by an international treaty, but by a declaration[4]. Clearly, these cooperative for a are placed in contrasting social, strategic and economic settings, and here several important difference between the two polar regions emerge. First, there are indigenous peoples inhabiting the Arctic coasts,

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1 *The Final Report of the Twentieth Antarctic Treaty Consultative Meeting*, Utrecht, the Netherlands, 29 April–10 May 1996, Paras. 33–7.

2 O. S. Stokke and D. Vidas, *Governing the Antarctic: The E?ectiveness and Legitimacy of the Antarctic Treaty System*, Cambridge University Press, Cambridge (1996) at p. 56.

3 Arctic Environmental Protection Strategy with the Action Plan, was adopted at the First Ministerial Conference on the Protection of the Arctic Environment, at Rovaniemi, Finland, on 14 June 1991. Text reprinted in ILM, Vol. 30, (1991) at pp. 1624 ?.

4 The Arctic Council was established as a 'high level forum' by the Declaration on the Establishment of the Arctic Council, signed by the Arctic Eight in Ottawa, Canada, on 19 September 1996; text reprinted in ILM, Vol. 35, (1996) at pp. 1387 ?.

whereas Antarctica has no native human inhabitants.[5] This very absence of a native population in the Antarctic was, at the time when the Antarctic Treaty was being negotiated, seen as a major factor favoring the founding of what later became the Antarctic Treaty System[6].

In the Arctic context, on the contrary, the presence and demands of the indigenous population may be seen as a factor which prompted the establishment of the Arctic Council, not least linked with domestic policy concerns, especially in Canada and Denmark/Greenland. Nevertheless, while the Antarctic Treaty System is a true form of international administration, the Arctic Council is still largely confined to international consultation. Secondly, the strategic importance of the Arctic, although in military terms significantly diminished in the post-Cold War period, is still far greater than that of the Antarctic. True, this aspect now represents a considerably less striking difference between the two Polar Regions than only a decade or so earlier. For instance, in 1994 the US administration made an inter-agency review of its Arctic policy, listing environmental protection at the top and thus (at least nominally) 'downgrading' national security and defence considerations. On the other hand, freedom of navigation has traditionally been the strategic military interest of the US Navy, globally as well as Arctic-regionally; and in the latter context particularly when it comes to submarine operations. These concerns are largely distinct from environmental considerations.[7] This difference is clearly reflected in the constitutive documents of the two regional cooperative processes. While demilitarization of the Antarctic figures among the basic principles of the Antarctic Treaty, which prohibits any measure of a military nature in the Antarctic the Arctic Council Declaration expressly states that the Council is not to deal with matters related to military security. Instead, environmental protection related to military activity in the Arctic is, on the inter-national level, relegated to separate arrangements among individual states, such as the trilateral Declaration on Arctic Military Environmental Cooperation signed between Russia, the United States and Norway in September 1996.[8]

Thirdly, various economic uses,some of them quite extensive, are present in the Arctic, including the Arctic Ocean. A direct consequence of the differing nature and scope of economic uses of the two polar regions and their oceans – a difference highly relevant to the themes of this book – concerns the type and scale of sources of marine pollution situated within the polar regions. Of prime importance in this respect, the presence and intensity of land-based sources (by far the largest single source of marine pollution in global terms) in the two polar regions are quite different. Large urban settlements, ports and harbours and other coastal developments, and not least centres of heavy industry – all present in parts of the

5 Compare 'Peoples of the North', in *A State of the Arctic Environment Report*, pp. 51–69, with J. C. M. eltramino, The Structure and Dynamics of Antarctic Population, Vantage Press, New York (1993) at p. 67.

6 The Antarctic Treaty was signed in Washington, DC, on 1 December 1959, and entered into force on 23 June 1961; published in UNTS, Vol. 402 at pp. 71 ?.

7 'United States Announces New Policy for the Arctic Region', Press Release of the US Department of State, 29 September 1994.

8 The Antarctic Treaty, Preamble to and Article I (1).

Arctic, the Russian Arctic in particular – are either absent or negligible in the Antarctic.[9]

It should be borne in mind that the sources of pollution affecting the polar oceans do not originate solely within the respective Polar Regions. Extraregional sources of pollution, often remote from the polar areas themselves, may exert a significant impact on the polar marine environment. Indeed, sources situated at one pole may affect the environment of the other pole. Camplin and Hill have described a typical journey for a nuclide dumped in the cold Arctic water, travelling through the Atlantic, finally reaching the bottom waters of the Southern Ocean, and surfacing in Antarctica, in waters mixed vertically by surface cooling. Recent reports indicate the presence of persistent organic pollutants of extraregional origin in both polar regions,[10] although it is in the Arctic that this type of environmental contamination may exert significant effects on the indigenous population, for whom local foods remain important dietary and cultural resources.[11]

1.2 Globalism and Regionalism in the Protection of Marine Environment

No study of the international law relating to protection of the marine environment can fail to note the interplay of global, regional, sub-regional and national rules and institutions, or the variety of interrelated and sometimes overlapping treaties which deal with the marine environment at these various levels. This phenomenon has been likened to a 'Russian doll effect': as one layer of international regulation is peeled away, other layers appear beneath, until eventually the purely national layer is reached.[12]

1.2.1 Restrictive Model of Regionalism

This model is exemplified by the provisions of the Law Of Sea Convention on dumping at sea and pollution from ships. Here the function of regional rules or treaties is relatively limited: it is to reinforce enforcement and application of the global rules found in the LOS Convention itself and in the 1972 London Convention and MARPOL 73/78. These latter conventions are also global in scope; neither permits regional derogation or the separate adoption of lower regional standards. Their purpose is to provide international minimum standards, especially for flag states, and the Law Of Sea Convention articles largely serve to reinforce this objective. At the same time, some elements of regionalism are permissible even here. Although dumping at sea is now globally almost entirely prohibited, regional treaties had for some time been more stringent than was required by the 1972 London Convention in its original form. Neither the LOS Convention nor the London Convention in any way limits the freedom exercised by states to impose additional controls on dumping in response to the

9 *AMAP Assessment Report*, p. 142.

10 'Peoples of the Arctic: Characteristics of Human Populations Relevant to Pollution Issues', in *AMAP Assessment Report*, pp. 141–82.

11 Global Environment Outlook 2000: UNEP's Millennium Report on the Environment Earthscan Publications, London (1999 at pp. 177–96.

12 H. Ringbom, *Competing Norms in the Law of Marine Environmental Protection – Focus on Ship Safety and Pollution Prevention*, Kluwer Law International, London (1997) AT. p. 65.

environmental circumstances of certain regional seas, including those, such as the Baltic, that are shallow and semi-enclosed.[13]

The scope for regionalism with regard to pollution from ships is necessarily more limited. In the interests of freedom of navigation, MARPOL 73/78 is not merely a minimum standard for flag states, it is also a maximum standard for exclusive economic zone regulation by coastal states[14]. There is some room for additional regional action, however. MARPOL 73/78 itself provides for stricter discharge rules in designated special areas while the LOS Convention does not prevent coastal states from exercising some control over navigation in environmentally sensitive areas, or the exercise of port state control over compliance with international rules and standards.

In practice, international action to tackle these sources of pollution remains almost entirely regional. Prior to the 1992 Rio Conference, no agreement could be reached on a stronger global approach to land-based marine pollution. Since Rio, there has been the adoption in 1995 of the non-binding Washington Declaration and the Global Plan of Action for the Protection of the Marine Environment from Land-Based Activities, but this neither sets global standards of pollution control nor does it limit or preclude regional action. Precisely because it does so little, it does not alter the liberal attitude of the LOS Convention towards regionalism in the control of these sources of pollution.[15]

There are certain points to be focused on:

First, there is no inherent reason why interested states should not or cannot cooperate to produce regional regimes for protection of the marine environment in either the Arctic or the Antarctic.

Secondly, there is nothing in the 1982 LOS Convention or in general international law to inhibit the making of such regional arrangements, provided they do not contravene the objectives of the LOS Convention or the rights of third states.

Thirdly, it is self-evidently essential to define the area of application of any new legal regime, but there can be different definitions for different purposes within the same basic region. Neither 'the Arctic' nor 'the Antarctic' needs to be given a single all-purpose definition – nor have states done so.

And, finally, the real test of regional arrangements is the existence of institutions with the political will and scientific input to make them work effectively. Rules alone cannot solve any of the problems.

1.3 United Nations Convention on the Law of the Sea and Polar Marine Environment

According to Part II of the Law Of Sea Convention, passage of a foreign ship through the territorial sea 'shall be considered to be prejudicial to the peace, good order or security of the coastal State' if it engages in 'any act of wilful and serious pollution contrary to this

[13] The *Law of Sea Convention*, Articles 210 and 211.
[14] *Id.*, Article 211 (5).
[15] UNEP (OCA)/LBA/IG.2/L.4.

Convention' (Article 19(2)(h)). The coastal state may adopt laws and regulations in conformity with the Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of 'the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof' (Article 21(1)(f)). When the coastal state designates or prescribes sea lanes and traffic separation schemes in its territorial sea, it may particularly require tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials to confine their passage to such sea lanes (Article 22). Such ships, when exercising their right to innocent passage, are to 'carry documents and observe special precautionary measures established for such ships by international agreements' (Article 23).All these rules on the protection of the marine environment in respect of ships enjoying the right of innocent passage are applicable also to straits used for international navigation (Article 45) and to archipelagic waters (Article 52) when the regime of innocent passage is applied in these areas. Special rules on the marine environment are contained also in the new regime agreed upon at UNCLOS III for straits used for international navigation the transit passage regime. Ships in transit passage are required to 'comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships' (Article 39(2)(b)). States bordering straits may adopt laws and regulations relating to transit passage through straits in respect of 'the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait' (Article 42(1)(b)).

In Part XI of the Convention (entitled 'The Area') special consideration is given to the protection of the marine environment in the international seabed area. The duty to take necessary measures to ensure effective protection of the marine environment from harmful effects which may arise from the activities of exploration and exploration of the Area is proclaimed in Article 145 of the Convention. However, specific duties are given to the organs of the International Seabed Authority, in particular the Council (Article 162(2)(x)) and the Legal and Technical Commission (Article 165(2)).[16]

Part XII of the LOS Convention deals with the protection and preservation of the marine environment. It applies to the entire marine environment, the polar oceans included. Among these rules of general application are provisions of particular relevance for the polar oceans. For example, Article 194(5) deals with vulnerable seas:

The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

Another provision very important for polar oceans is Article 197 ('Cooperation on a global or regional basis'):

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with

[16] D. Vidas and W. Ostreng (eds.), *Order for the Oceans at the Turn of the Century*, Kluwer Law International, Hague (1999) at pp. 291-314.

this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

The basic principle of Part XII of the LOS Convention, as well as customary law in the field (Principle 7 adopted at the 1972 Stockholm UN Conference on the Human Environment), is expressed in Article 192:

States have the obligation to protect and preserve the marine environment. The Convention also affirms a state's sovereign right to exploit its natural resources. This is a right to be exercised in accordance with the state's environmental policies and its duty to protect and preserve the marine environment (Article 193; Stockholm Principle 21). This is reconfirmed in Principle 2 of the 1992 Rio Declaration on Environment and Development: States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[17]

States are to take all necessary measures to carry out their basic duty to protect and preserve the marine environment; to this end they shall use 'the best practicable means at their disposal', taking measures 'in accordance with their capabilities'(Article 194(1)). Here we should note how the drafters of the LOS Convention have taken into account the differences that exist between states. The main consequence to be derived from this provision is the possibility of differentiating between developed and developing states in relation to the interpretation and application of some provisions of the Convention, as well as in regard to future national and international actions. Moreover, some of the environmental provisions in the Convention have already been stipulated, with due regard for the special needs of developing states. For example, scientific and technical assistance is to be provided for such countries; furthermore, states parties to the Convention are to promote programmes of scientific, educational, technical and other assistance to developing states for the protection of the marine environment (Article 202(a)). The duties to provide appropriate assistance for both the minimisation of the effects of major incidents and concerning the preparation of environmental assessments are obligatory upon all states parties, especially in relation to developing states (Article 202(b) and (c)). Furthermore, for the purpose of abating pollution, developing states are to be granted preference in the allocation of appropriate funds and technical assistance by international organisations and in the utilization of their specialised services (Article 203).

All such provisions that take into account the specific situation of developing states represent the implementation of Stockholm Principles 11 and 23. These state that 'the environmental policies of all states should enhance and not adversely affect the present or future development potential of developing countries', that it is necessary to meet 'the possible national and international economic consequences resulting from the application of environmental measures' and that it will be essential to consider 'the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries'.

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17 *Rio Declaration on Environment and Development*, UN doc. A/CONF.151/5/Rev.1.

The provisions of the LOS Convention on the protection and preservation of the marine environment, as well as all other rules it contains, will represent a useful contribution to contemporary international law only in so far as they can coexist with other general and regional norms in this field. One very sensitive issue involves their relation to the already-developed treaty system for the Antarctic, and the initial cooperation of the Arctic countries. However, the high level of participation of the Antarctic Treaty Consultative Parties and the Arctic countries in the LOS Convention proves that the attitude of UNCLOS III was not wrong. The participation of these countries is a proof of their will to contribute to the co-existence of the Treaty system for the Antarctic and the regime for the seas and oceans established at UNCLOS III.

1.4 Marine Protection Instruments

The marine environment is subject to many legal regimes, some applying only within defined regions. In the cases of the Arctic and the Antarctic, significant regional initiatives include the regimes created by the 1959 Antarctic Treaty and its 1991 Environmental Protocol, as well as those adopted under the 1991 Arctic Environmental Protection Strategy and the 1996 Arctic Council. Beyond such regional regimes, there exists a sizeable body of international law which applies globally: legal regimes which set out to impose obligations upon all states, in principle covering all parts of the earth. Developments in international environmental law during the past three decades have seen the emergence of several core principles which provide a framework of customary environmental law. These principles include: the obligation of all states to conserve the environment and its natural resources; the obligation upon states to assess potential, and monitor actual environmental impact; the obligation upon states to conserve the environment both within and beyond areas of national jurisdiction; and sustainable development.[18]

Like other oceans of the world, the Arctic and Southern Oceans are subject to the existing international legal regime dealing with marine pollution. The legal regime which has come into being has primarily done so without the benefit of the provisions of the LOS Convention being in place, as most of the relevant conventions were negotiated during the late 1960s and the 1970s in response to growing international concerns over marine environmental pollution, especially following several major maritime incidents. These conventions have primarily dealt with discrete types of pollutants or polluting activities, which has meant a focus on ship-sourced marine pollution, primarily from oil and other related substances. MARPOL 73/78 is the principal global convention dealing with these matters. In relation to the dumping of substances at sea, the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) is the principal global convention.[19]

Even though it is considered to constitute approximately 70 per cent of marine pollution[20], land-based pollution has been the least regulated form of marine pollution at

[18] A. Kiss and D. Shelton, *International Environmental Law*, Transnational Publishers and Graham & Trotman, London (1991) at pp. 145–54.
[19] ILM, Vol. 12, (1973) at pp. 1, 319 ? (Convention); and ILM, Vol. 17, (1978) at pp. 546 ? (Protocol).
[20] Agenda 21, Chapter 17, para 18.

the global level. There is no specific convention dealing with this problem, though the international community has begun to pay greater attention to this problem following the 1995 Washington Declaration and the Global Programme of Action for the Protection of the Marine Environment from Land Based Activities. Global-level international regimes have also been developed to deal with maritime emergencies that can have polluting consequences, as well as liability resulting from marine pollution and other maritime incidents resulting in impact upon the marine environment[21]. The result is a global body of law dealing with marine pollution and protection of the marine environment which is relatively sophisticated and certainly more advanced than any other area of international environmental law. These developments will now be reviewed from a sectoral perspective.

International regulation of ship-sourced marine pollution has been the subject of global attention since the 1950s following the adoption of the 1954 International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL). However, the Convention suffered from difficulties in implementation and enforcement and eventually became outdated following the development of the so-called 'supertankers' and the consequent challenges these vessels posed for international regulators seeking to limit pollution by ships at sea. MARPOL 73/78 was eventually adopted as a replacement for OILPOL, but did not enter into force until 1983 following the adoption of an amending Protocol in 1978.[22]

MARPOL 73/78 is a framework convention containing specific provisions that regulate certain types of pollution in attached annexes. The main body of the Convention deals with extent of application (Article 3), violation and enforcement (Articles 4–6) and other procedural issues. The six annexes that are attached to the Convention concern:

1. the prevention of pollution by oil (Annex I);
2. the control of pollution by noxious liquid substances in bulk (Annex II);
3. the prevention of pollution by harmful substances in packaged forms (Annex III);
4. the prevention of pollution by sewagefrom ships (Annex IV);
5. the prevention of pollution by garbage from ships (Annex V); and
6. the prevention of air pollution from ships (Annex VI).

In addition to the international environmental instruments discussed above, there remain a great many more with the potential to protect the polar marine environment indirectly. Instruments dealing with nuclear weapons testing and nuclear materials are clearly of significance. The concern expressed over the depletion of the ozone layer, particularly over the polar regions, also makes the principal legal instrument dealing with this problem significant. All polar states have given strong support to the 1985 Vienna Convention for the Protection of the Ozone Layer, and its subsequent Protocol. Of special importance to the polar states is the issue of climate

21 *International Convention on Civil Liability for Oil Pollution Damage* (1969).
22 UNTS, Vol. 327, pp. 3 ?.

change; nuclear emergency assistance and notification has also been a matter of concern.

1.5 Conclusion

There exist many international law sources that provide a legal basis for protection of the polar marine environment. They are 'additional sources' in the sense that they operate in addition to the framework provisions of the LOS Convention, and the more specific regional instruments that have been adopted for the polar oceans. The conventions reviewed here are, however, conventions with global application, designed to apply to all of the world's oceans and seas. It is therefore not surprising that in only a few instances are specific provisions found dealing with the particular marine environmental conditions that exist in the polar regions. With the LOS Convention providing a framework within which marine environmental law operates at the global level, a complex web of international instruments is created for both environmental law and maritime law in the Arctic and Antarctic. However, notwithstanding the global application of these marine environmental instruments – thus including application to the polar regions as well – there are practical differences, for a variety of reasons. The most significant difference is that the lack of general recognition of Antarctic 'coastal states', in conjunction with the limitations on the assertion of sovereignty and jurisdiction imposed by the Antarctic Treaty, constrains the application of many of the global instruments in Antarctica. In contradistinction, the Arctic is characterised by settled coastal state sovereignty, which means that Arctic states are on a sounder legal foundation when they seek to enforce the international legal regime in their polar waters. Arctic states have also had longer exposure to the threats posed to their marine environments by commercial shipping, and this is reflected by the more stringent domestic legal regimes adopted in the past to regulate pollution. In addressing marine pollution issues, Arctic states have had to take into consideration the significant human settlements in the Arctic, including indigeous peoples, and the industrial activities which attract commercial attention.

This is to be contrasted with Antarctica, where it was only in the late 1990s that some states began to patrol their polar waters on a regular basis, and even then only in sub-Antarctic waters where sovereignty is uncontested. Clearly, the legal regimes reviewed above in many respects fail to address adequately the particular challenges posed by protection of the polar marine environment. To that end, the proposed Polar Code should be significant, especially as it is being developed by a global body within the IMO.

PRECAUTIONARY PRINCIPLE: A DEFINED CONCEPT IN INTERNATIONAL LAW

Dr. Rajinder Kaur*
Mr. Jagteshwar Singh Sohi**

1.1 Introduction

In its early stages, environmental protection - at the national and international level – could be characterized by a 'curative model' towards the natural environment. With the passage of time, the environmental impacts increased due to growing populations and industrialization. As a result, the environment was no longer able to cure itself and intervention was required to repair the damage inflicted by human activities. This heralded in the era of the 'Polluter Pays' - the one who caused the damage must pay for it. Though the concept was both equitable and feasible, it soon became apparent that it was practicable only when accompanied by a preventive policy intended to limit further damage to an environment. This 'prevention is better than cure' stage was characterized by the idea that science can reliably assess and quantify risks, and the Prevention Principle could be used to eliminate or diminish further damage. But with the emergence of increasingly unpredictable, uncertain, and unquantifiable but possibly catastrophic risks such as those associated with Genetically Modified Organisms, Climate Change etc., there arose the need to develop an 'anticipatory model' to protect humans and the environment against uncertain risks - the Precautionary Principle (PP).[1]

The precautionary principle has been included in a long list of international agreements,[2] making it one of the more popular legal concepts in international environmental law today.[3] Whereas traditional regulatory practices are reactive, precautionary measures are preventive and pre-emptive. This marks a shift from

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1 COMEST Report, "The Precautionary Principle" (March, 2005) p. 6, available at *<http://unesdoc.unesco.org/images/0013/001395/139578e.pdf>* (last accessed on May 15, 2013).

2 Annex ¶ 22, at 19, U.N. Doc. A/CONF.199.20, U.N. Sales No E.03.II.A.1 (2002), available at *<http://www.johannesburg.org/html/documents/sunmuit_docs/l31302_wssd_report_reissued.pdf>*; (last accessed on June 5, 2013) Stockholm Convention on Persistent Organic Pollutants, U.N. Env't Prog., Article 1, U.N. Doc. UNEP/POPS/CONF/2 (2001), 40 I.L.M. 532; Cartagena Protocol on Bio-safety to the Convention on Biological Diversity, (Jan 29, 2000) Article 1, 39 I.L.M. 1027; Protocol to the 1979 Convention on Long-Range Trans-boundary Air Pollution on Persistent Organic Pollutants, opened for signature 24 June 1998, pmbl., available at *<http://www.unece. org/env/lrtap/pops hl.htm>*; also see other conventions listed in Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* 320-27 (2002).

3 To the extent that few commentators, who have studied the question exhaustively, regarded the precautionary principle as a customary rule of international law. See Harald Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law* (1994) at 335-45; Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (2002) at 244-45, 285; James Cameron & Juli Abouchar, The Status of the Precautionary Principle in International Law, in *The Precautionary Principle and International Law: The Challenge of Implementation* 36-50 (David Freestone & Ellen Hey, eds., 1996).

post-damage control (civil liability as a curative tool) to pre-damage control (anticipatory measures) of risks.[4] In its simplest form, the precautionary principle provides that if there is risk of severe damage to humans and/or the environment, absence of conclusive or definite scientific proof cannot be-used as a reason for not taking action

1.2 Origin and Development of the Precautionary Principle

1.2.1 Early Origins

The concept of precaution seems to have roots in the past of mankind; it dates back to the early history. This is particularly true in light of the words of Vice-President Weeramantry in the Gabcikovo-Nagymaros Project case. He notes that *"the concept of reconciling the needs of development with the protection of the environment is not new. Millennia ago these concerns were noted and their twin demands reconciled in a manner so meaningful as to carry a message to our age."* [5] He illustrates this through an in-depth analysis of the irrigation system of the ancient civilizations in Sri Lanka[6] and Sub-Saharan Africa.[7] He provides further examples from Euphrates valley, China and India. His Excellency notes that *"in relation to concern for the environment generally, examples may be cited from nearly every traditional system, ranging from Australasia and the Pacific Islands, through Amerindian and African cultures to those of ancient Europe."*[8]

Similarly in his address to the Parliamentary Earth Summit of the UN Conference on Environment and Development, the Dalai Lama of Tibet noted that *"in the seventeenth century, [Tibetan leadership] began enacting decrees to protect the environment..."*[9] The Theravada scriptures of Buddhism provide the earliest written sources supporting the concept of precaution.[10]

Another simple illustration of precaution comes from the report – 'The Late Lessons from Early Warnings'. It mentions the example of Dr. John Snow who in 1854 recommended removing the handle of a London water pump in order to stop a cholera epidemic. The evidence for the causal link between the spread of cholera and contact with the water pump was weak and not a 'proof beyond reasonable doubt'. Yet, the simple and inexpensive measure was very effective in halting the spread. It further mentions a series of other instances, such as

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4 See *Supra* note 2. Also see Anne Ingeborg Myhr and Terje Traavik (2001), "The Precautionary Principle: Scientific Uncertainty and Omitted Research in the Context of GMO Use and Research," *Journal of Agriculture and Environmental Ethics,* No. 15, at p. 76 (The Hague: Kluwer Academic Publishers).

5 1997 ICJ 3 Para 140.

6 *Id;* at pp. 94-101 (providing explicit illustrations from the 3rd century B.C to the 11th century A.D).

7 *Id; at* pp. 101-102 (taking a look at two civilizations from Tanzania).

8 *Id;* at p. 104.

9 Address of His Holiness the XIV Dalai Lama on 7 June 1992 to the Parliamentary Earth Summit (Global Forum) of the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil (Environment and Development Desk, 2004: 26).

10 Martin, Philippe H. (1997), "If You Don't Know How to Fix It, Please Stop Breaking It." *Foundations of Science,* at 276.

asbestos, where precaution could have saved many lives if early warnings of potential – at the time unproven but still reducible – harm had been taken more seriously.[11]

Undeniably, the origin of the concept of precaution may well be found in the history of civilization. In the early stage of civilization, nature was deemed to be sacred, it was revered as the provider of life and therefore exploitation of its generosity was considered unethical. Subsequently, nature's mystery was unravelled through developments in science and this elevated the status of humans above the environment. In due course, man had exceeded the levels where the environment could regenerate itself, thus causing a struggle for survival and protection of human health. This led to the early use of the concept of precaution.

1.2.2 Modern History

According to some, the earliest instance of precaution in contemporary public policy is to be found in the early 1950s under the guise of what was then called "safe minimum standard of conservation."[12] Over the next decade environmentalists and policy makers, influenced by major environmental issues (like the case of DDT) began to rethink their approach to specifically address uncertainties.[13] This paved the way in the 1970s for the establishment of the precautionary principle as a reaction to *"the limitations of public policies based on a notion of 'assimilative capacity,' i.e. that humans and the environment can tolerate a certain amount of contamination or disturbance, and that this amount can be calculated and controlled".*[14]

The modern origin of Precautionary principle was sometimes in the mid-1970s, though opinions are divided as to the first usage of the term. Some scholars mention a Swedish and others a German origin of the concept.[15] In the mid-1970s, West Germany's legislature enacted a national environmental policy which provided for precautionary approach to environmental protection.[16] The German concept of "Vorsorgeprinzip" (translated as principle of foresight) prescribes society to engage in careful study and planning to avoid environmental and health damage from potentially harmful activities. The most unambiguous

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11 Harremoës, P., Gee, D., MacGarvin, M., Stirling, A., Keys, J., Wynne, B., And Guedes Vaz, S. (eds.) (2001), Late lessons from early warnings: the precautionary principle 1896–2000, *Environmental issue report no. 22.* Copenhagen: European Environment Agency.

12 *Supra* note 10 at 264.

13 Rabbi Elamparo Deloso, The Precautionary Principle: Relevance in International Law and Climate Change, available at *<http://www.lumes.lu.se/database/alumni/04.05/theses/rabbi_deloso.pdf>* (last accessed on 20 June 2013).

14 Barrett, Katherine, and Joel Tickner (2001), "Trans-Atlantic Consumer Dialogue (TACD) Briefing Paper on the Precautionary Principle" available at *<www.sustainableproduction.org /downloads/TACD%20Briefing.pdf>* (last accessed on 20 June 2013).

15 See *Supra* note 1.

16 Morris, Julian, *Rethinking Risk and the Precautionary Principle*, 1 (Oxford: Butterworth-Heinemann, 2000).

elaboration of the principle in German environmental policy is from a later date and reads:

> Responsibility towards future generation's commands that the natural foundations of life are preserved and that irreversible types of damage, such as the decline of forests, must be avoided.' Thus: 'The principle of precaution commands that the damages done to the natural world (which surrounds us all) should be avoided in advance and in accordance with opportunity and possibility. Vorsorge further means the early detection of dangers to health and environment by comprehensive, synchronized (harmonized) research; in particular about cause and effect relationships..., it also means acting when conclusively ascertained understanding by science is not yet available. Precaution means to develop, in all sectors of the economy, technological processes that significantly reduce environmental burdens, especially those brought about by the introduction of harmful substances.[17]

It was in 1970s that the concept came up in American legislation as well.[18] The essence of the precautionary principle can be seen in the U.S. Federal Food, Drug and Cosmetic Act of 1958 (Section 409), which outlawed any food additive that was found to induce cancer regardless of the magnitude of the dose, and the 1970 Clean Air Act which established the National Ambient Air Quality Standards.[19]

1.2.3 Into the International Forums[20]

The concept was first used at the international level as a result of proposals from environmentalists and European governments. The 1982 United Nations World Charter for Nature[21], though never used the term expressly, provided that when *"potential adverse effects [of an activity] are not fully understood, [it] should not proceed"*.[22]

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17 BUNDESMINISTERIUM DES INNERN, Dritter Immissionsschutzbericht, (1984), Drucksache Bonn 10/1345.

18 See generally, Robert V. Percival, "Who's afraid of the Precautionary Principle", *23 Pace Envtl. L. Rev. 21* (2005-06).

19 Goklany, Indur, "The Precautionary Principle: A Critical Appraisal of Environmental Risk Assessment", Washington DC: Cato Institute (2001) at p. 4.

20 See generally David Freestone & Ellen Hey, *Origins and Development of the Precautionary Principle*, in The Challenge of Implementation, David Freestone & Ellen Hey, eds., (1996) at pp. 3-15; James E. Hickey, Jr. & Vern R. Walker, "Refining the Precautionary Principle in International Environmental Law", *14 Va. Envtl L.J.* (1995) 423 at pp. 432-38; Harald Hohmann, "Precautionary Legal Duties and Principles of Modern International Environmental Law (1994)"; Peter H. Sand, The Precautionary Principle: A European Perspective, *6 Hum. & Ecol. Risk Assessment* (2000) 445 at pp. 445-46; Arie Trouwborst, Evolution and Status of the Precautionary Principle in International Law (2002 Annexes A, B; David Vanderzwaag (1999), "The Precautionary Principle in Environmental Law and Policy: Elusive Rhetoric and First Embraces", *Journal of Environmental Law & Practice* at pp. 363-72.

21 G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982); 22 ILM (1983) at p. 455.

22 *Id.,* (under Part II. Functions – 11(b)) available at *<http://www.un.org/documents/ga/res/37/a37r007.htm>* (last accessed on 15 June 2013).

Both the term and concept of precautionary principle were part of successive North Sea Treaties[23] (Bremen 1984[24], London 1987[25], The Hague 1990[26], Esbjerg 1995[27] and Bergen 2002[28]). These also show an interesting evolution of the concept at the international level, especially among its strongest supporters – the European countries. This evolution has been admirably brought out by the COMEST report[29], which provides the shift in reference to it from – *'... timely preventive measures ...'* given *'insufficient state of knowledge'*[30] (1984) to: *'... a precautionary approach is necessary which may require action ... even before a causal link has been established by absolutely clear scientific evidence...'*[31] (1987) and: *'...apply the precautionary principle ... even when there is no scientific evidence to prove a causal link...'*[32] (1990) to: *'...the guiding principle ...is the precautionary principle ... - ...the goal of reducing discharges and emissions ... with the aim of their elimination'* (1995). Notably, it was during these declarations that the precautionary principle became part of an international agreement for the first time.[33] Since then, the precautionary principle has been integrated into subsequent international agreements, becoming a recognized principle of international environmental law.

From the North-Sea ministerial conferences, the concept of precaution made its way into the North-East Atlantic during the negotiations for the Oslo and Paris (OSPAR) Commissions.[34] It provided that:

> the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of the causal relationship between inputs and the effects[35]

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23 Freestone, David, and Ellen Hey, eds. (1996), *The Precautionary Principle and International Law: The Challenge of Implementation* at 49 (The Hague: Kluwer Law International).

24 Available at *<http://www.seas-at-risk.org/1mages/1984%20Bremen%20Declaration.pdf>* (last accessed on 15 May 2013).

25 Available at < http://www.seas-at-risk.org/1mages/1987%20London%20Declaration.pdf > (last accessed on 15 May 2013).

26 Available at <http://www.seas-at-risk.org/1mages/1990%20Hague%20Declaration.pdf> (last accessed on 15 May 2013).

27 Available at <http://www.seas-at-risk.org/1mages/1990%20Hague%20Declaration.pdf> (last accessed on 15 May 2013).

28 Available at <http://www.seas-at-risk.org/1mages/2002%20Bergen%20Declaration.pdf> (last accessed on 15 June 2013).

29 *Supra* note. 1.

30 Bremen Declaration 1984, Conclusions A-6 & A-8.

31 *London Declaration 1987*, Paragraph VII.

32 *Hague Declaration 1990*, Preamble.

33 Morris, Julian (2000), "Rethinking Risk and the Precautionary Principle" at 3 (Oxford: Butterworth-Heinemann). (It was first used in the London Declaration of 1987).

34 The OSPAR Convention, available at *<http://www.ospar.org/html_documents/ospar/html/OSPAR_Convention_e_updated_text_2007.pdf#18>* (last accessed on 10 June , 2013)

35 OSPAR Convention, General Obligations A. 2 (2a).

From here the concept spread into the rest of the world of fisheries with its incorporation into the agreement for straddling and highly migratory stocks.[36] The tradition of precaution with respect to fisheries had been in existence ever since the 1982 decision of the International Whaling Commission (IWC) which imposed a *de facto* moratorium on commercial whaling.[37] Precaution has also been endorsed as the base of the policies of several forums concerned with the protection and preservation of the marine environment. Examples include the North-East Atlantic[38], the Baltic Sea[39], the Black Sea[40], and the Wider Caribbean Region[41].

Outside the world of fisheries, the Convention for the Protection of the Ozone Layer[42] (Vienna Convention) was adopted by 20 countries and the European Commission in 1985.[43] Cameron noted that this was the *"first [multilateral] treaty to make explicit reference to precaution".*[44] As there was still no scientific certainty on the causes and impacts of ozone depletion at the time of adoption, the Convention's later success was largely due to its precautionary nature. Precaution was re-iterated as the way to go in relation to the ozone layer in 1987 in the Montreal Protocol to the

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36 Elliot, Lorraine (2004), *The Global Politics of the Environment* (2nd Ed), 45 (New York: Palgrave MacMillan); Article 6 and Annexure 2 of the Draft Agreement on Straddling and Highly Migratory Fish Stocks; the Agreement incorporates both the precautionary principle and the ecosystem approach as basis for conservation and management policies.

37 The Commission amended the Schedule under Article V of the Convention so that *"catch limits for the killing of commercial purposes of whales from all stocks for the 1986 coastal and 1985/6 pelagic seasons and thereafter shall be zero."*

38 Article 2 (2) (a) Paris Convention for the Protection of the Marine Environment of the North-East Atlantic 1992 ("the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of the causal relationship between inputs and the effects")

39 Article 3 (2), Baltic Sea (Helsinki) Convention 1992 *(The Contracting Parties shall apply the precautionary principle, i.e., to take preventive measures when there is reason to assume that substances or energy introduced, directly or indirectly, into the marine environment may create hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects).*

40 First Declaratory Paragraph of the Black Sea (Odessa) Declaration 1993 *(To these ends they confirm their commitment to integrated management and sustainable development of coastal areas and the marine environment under their national jurisdiction and will base their policies on the following: A precautionary approach).*

41 See Relevance and Application of the Principle of the Precautionary Action to the Caribbean Environment Programmed. Secretariat paper approved by the CEP Meeting of Experts and the Third Meeting of the Parties to the Cartagena Convention, November 1992, UN OCA/CAR WG.10/INF.4. (from The Precautionary Principle: Relevance in International Law and Climate Change by Rabbi Elamparo Deloso, available at *http://www.lumes.lu.se/database/alumni/ 04.05/theses/rabbi_deloso.pdf)*

42 Available at <*www.unep.org/Ozone/pdfs/viennaconvention2002.pdf*> (last accessed on May 20, 2013)

43 *Supra* note 36 at p. 74.

44 Cameron, James and Juli Abouchar (1996), "The Status of the Precautionary Principle in International Law", in Freestone, David, and Ellen Hey eds., *The Precautionary Principle and International Law: The Challenge of Implementation*, The Hague: Kluwer Law International at 114.

Vienna Convention[45], which provided in part that *"Parties.....determined to protect the ozone layer by taking precautionary measures to control equitable total global emissions of substances that deplete it..."*[46]

But the defining moment in the history of the precaution[47] came during the Earth Summit at Rio de Janeiro, Brazil in 1992. The concept of the precautionary principle formed an integral component of both the binding conventions signed and also the two non-binding texts.

1. The non-binding Rio Declaration[48] provided that:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[49]

And this definition has since been the most known and accepted version for defining the precautionary principle.

2. Convention on Biological Diversity (CBD)[50] also provided for precautionary measures:

> Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat[51]

Similarly, the Cartagena Protocol to the CBD of 2000 re-iterated the need to follow the precautionary path laid down in the convention.[52]

3. Another binding document that was signed at this summit provided for precautionary measures. This was the United Nations Framework Convention on Climate Change[53]:

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45 Available at <http://www.unep.ch/ozone/Ratification_status/montreal_protocol.shtml> (last accessed on 20 May 2013).

46 Montreal Protocol (1987) Preamble.

47 The precautionary principle gained greater salience in the international environmental lexicon in 1992, but, as a result, statements of the precautionary principle came under increased scrutiny from its critics. Thus, after Rio-which was itself a carefully compromised text-there is a discernible trend toward less strict versions of the precautionary principle. Arie Trouwborst, Evolution and Status of the Precautionary Principle in International Law (2002) at 28 (describing a "breakthrough" of the precautionary principle into international law).

48 UN Doc. A/CONF.151/26 (Vol. I); 31 ILM (1992) at p. 874.

49 U.N. Conference on Environment & Development (3-14 June 1992) Rio Declaration on Environment and Development, Principle 15, U.N. Doc A/CONF.151/26, quoted in Robert V. Percival et al., Environmental Regulation: Law, Science & Policy 1039 (4th ed. 2003); Rio Declaration, Principle 15, available at *<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>* (last accessed on 20 May 2013).

50 1760 UNTS 79; 31 ILM 818.

51 Convention on Biological Diversity (1992) Preamble.

52 *Supra* note. 36 at 42; also check Preamble & Art. 1 of Cartagena Protocol on Bio-Safety (2000). Available at *http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf* (last accessed on 20 May 2013).

53 1771 UNTS 107; S. Treaty Doc No. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992).

> The parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific research should not be used as a reason for postponing such measures, taking into account the policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost[54]

A reference to the afore-quoted article was provided in the Preamble of the 1997 Kyoto Protocol[55] and worded as follows, *"Being guided by Article 3 of the Convention"*. The precautionary principle is thus a norm that parties to the UNFCCC have endorsed.

4. The last was a futuristic non-binding document which set out goals that the community hoped to achieve. Precaution was again included in this, Agenda 21[56] (Chapter 17) provided:

> A precautionary and anticipatory rather than a reactive approach is necessary to prevent the degradation of the marine environment. This requires, inter alia, the adoption of precautionary measures, environmental impact assessments, clean production techniques, recycling, wastes audits and minimization, construction and/or improvement of sewage treatment facilities, quality management criteria for handling of hazardous substances, and a comprehensive approach to damaging impact from air, land and water.

Over the years precautionary principle has moved into various diverse dimensions. It is now a part of the Convention on International Trade in Endangered Species Guidelines[57] adopted in 1994 and the World Trade Organization's (WTO) Agreement on Sanitary and Phyto-Sanitary Measures (SPS Agreement) of 1994. It has also been included in a number of conventions on pollution[58], conservation of living resources[59], health[60] and water resources[61].

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54 UNFCCC, 1992: Article 3 § 3.

55 UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998).

56 U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (1992).

57 Elli *Supra* note 36 at 3. (provided for a precautionary approach in determining whether species are threatened with extinction or are likely to withstand pressures of trade).

58 LRTAP Sulphur Protocol, 1994 (Preamble); Mediterranean Hazardous Waste Protocol, 1996 (Preamble & Article 8.3); Protocol to the London Convention,1996 (Article 3); Protocol to MARPOL 73/78, 1997 (Preamble); LRTAP POPs Protocol, 1998 (Preamble); LRTAP Heavy Metals Protocol, 1998 (Preamble & Annexure VII. 3); LRTAP Acidification Protocol, 1999 (Preamble); International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001 (Preamble); POPs Convention, 2001 (Preamble, Article 1 & Article 8 §9); International Convention for the Control and Management of Ships Ballast Water and Sediments, 2004 (Preamble).

59 Agreement for the Conservation of Africa-Eurasian Migratory Waterbirds (Article 2); ACCOBAMS (Article 2, § 4); Agreement Concerning the Creation of a Marine Mammal Sanctuary in the Mediterranean, 1999 (Final Declaration); Galapagos Agreement, 2000 (Article 5(b)); Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 2000 (Preamble, Article 5(c) & Article 6); Agreement on the Conservation of Albatrosses and Petrels, 2001 (Preamble & Article II § 3).

60 Health Protocol, 1999 (Article 5(a)); Chemicals Convention, 1998 (Article 14, §3(d) & Annex 5, 1(e).

61 SADC Water Protocol, 1995 (Preamble); Convention on the Law of Non-Navigational uses of International Watercourses, 1996 (Preamble); Convention on the Protection of the Rhine, 1999 (Article 4); North-East Pacific Convention, 2002 (Article 5 § 6 (a)).

1.3 Versions of the Precautionary Principle

In the early 1990's, a leading environmental scholar noted[62]: *"In its restless metamorphosis, the environmental movement captures ideas and transforms them into principles, guidelines and points of leverage. Precaution is one such idea; the precautionary principle is neither a well defined principle nor a stable concept..."* He further warned that[63] – *"unless its advocates sharpen up their understanding of the term, the precautionary principle may not establish the influence it deserves."*[64]

Over the years, precautionary principle has evolved in international law in a less than straightforward manner.[65] It has been a victim of negotiations at the international level to appease all possible nations; this has lead to its multiple definitions.[66] According to D.Vanderzwaag, about 14 different definitions of the precautionary principle exist in international law.[67] Such a variety of definitions has even prompted some researchers to assume that the lack of one unanimous definition is one of the properties of the precautionary principle.[68] On the other hand, the variety of formulations is used by critics because it helps uncover problems in the application of the principle.[69]

Martin describes the reasons for this variance in definitions.[70] He states that in the academic area, the various versions reflect the cultural origins and disciplinary backgrounds[71] of the scholars. The French definitions delve on the

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62 "The Precautionary Principle, Science, Politics and Ethics" by Timothy O'Riordan and Andrew Jordan, CSERGE Working Paper PA 95-02, available at *<http://www.uea.ac.uk/env/cserge /pub/wp/ pa/pa_1995_02.pdf>(1995)*; for similar views see Mark Geistfeld, Implementing the Precautionary Principle, 31 Envtl. L. Rep 11,326 (2001).

63 "The Precautionary Principle, Science, Politics and Ethics" by Timothy O'Riordan and Andrew Jordan, CSERGE Working Paper PA 95-02, available at *<http://www.uea.ac.uk/ env/cserge/pub/wp/ pa/pa_1995_02.pdf>*

64 *Id.*

65 Earlier versions of the precautionary principle contain elements that tend to increase its stringency, while later versions tend to be less strict. See Per Sandin, Dimensions of the Precautionary Principle, 5 Hum. & Ecol. Risk Assessment 889 (1999) at pp. 890-898.

66 See Harald Hohmann, Precautionary Legal Duties and Principles of Modern International Environmental Law (1994) at pp. 335-40 (describing "relativity" regarding form of the source of law, time, and region); Arie Trouwborst, Evolution and Status of the Precautionary Principle in International Law (2002) at p. 286.

67 David Vanderzwaag (1999), "The Precautionary Principle in Environmental Law and Policy: Elusive Rhetoric and First Embraces", *Journal of Environmental Law & Practice*, at pp. 355-375 (suggesting a "spectrum of embraces" from passionate to cool); David Vanderzwaag, "The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas, and Rising Normative Tides", 33 *Ocean Dev. & Int'l L.*, 165 (2002) at pp. 166-70.

68 P. Taylor (1998), *An Ecological Approach to International Law* (London: Routledge), p. 25; Martin, Philippe H. (1997), "If You Don't Know How to Fix It, Please Stop Breaking It." Foundations of Science at p. 266.

69 I. Goklany (2001), *The Precautionary Principle: A Critical Appraisal of Environmental Risk Assessment* (Washington DC: Cato Institute).

70 *Supra* note 10 at p. 266.

71 (Stringent approach is found in treaties that reflect regional agreements among relatively homogenous states) Harald Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law* (1994) at pp. 339-40.

constraints of the physical environment; the Anglo-Saxon formulations are concerned with the economic cost of preventative measures; while the Scandinavian literature reveals a deferential relationship with nature.[72] Further he states that definitions also vary according to disciplines[73], as in the context of climate change discussions, most physical scientists are concerned with irreversibility and preservation; economists with costs, risk and optimal formulations, planners with flexibility and protection, and lawyers with damage and indemnification.[74]

The precautionary principle has two versions - the 'strong' precaution and the 'weak' precaution.[75] The former[76] suggests that precaution is mandatory; hence activities should not be allowed if there is no proof that they will do no harm. While the latter is justifiable, i.e. a lack of absolute certainty is not a justification for preventing an action that might be harmful to human health or the environment.[77] In operational terms, a 'strong' precautionary principle places the burden of proof of non-harm to the technology developers, while a 'weak' precautionary principle places the same burden of proof to technology regulators.[78]

The most known definition of the 'strong' version was provided by a group of 35 scientists, advocates, and policy-makers during the Wingspread Conference in January 1998.[79] It states:

> When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically. In this context the proponent of the activity, rather than the public, should bear the burden of proof.
>
> The process of applying the precautionary principle must be open, informed and democratic and must include potentially affected parties. It must also examine the range of alternatives, including no action.

It obliges proponents and governments to study alternatives to potentially harmful existing activities, and to institute an open, informed, and democratic decision-making process. Thus ensuring that precaution is not only a principle to

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72 *Supra* note 70.

73 Deborah Katz, "The Mismatch between the Bio-safety Protocol and the Precautionary Principle", 13 *Geo Int'l Envtl L. Rev.* 949 (2001) at pp. 958-961 (A strong approach is used to address particularly dis-favored activities).

74 *Supra* note 70.

75 *Supra* note. 33.

76 "(The stronger versions are associated with instruments that are merely hortatory) Deborah Katz, The Mismatch between the Bio-safety Protocol and the Precautionary Principle", 13 *Geo Int'l Envtl L. Rev.* 949 (2001) at p. 965; Jonathan B. Wiener, *Precaution in a Multi-Risk World, in Human and Ecological Risk: Theory and Practice 1509*, 1521-24 (Dennis D. Paustenbach ed., 2002); (or those that reflect regional agreements among relatively homogenous states) Harald Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law* (1994) at pp. 339-40.

77 *Supra* note 75.

78 Goklany, Indur (2001), *The Precautionary Principle: A Critical Appraisal of Environmental Risk Assessment*, 3 (Washington DC: Cato Institute).

79 *Supra* note 75.

anticipate and stop potentially harmful activities but is also a principle to stimulate innovation and democratic involvement in seeking the safest alternatives to meet our needs and plan for sustainability.[80] The first sentence has caused opponents of the principle to suggest that this version would open the door for abuse and thus stall development.[81] The 'weak' version of the concept is the one which has been incorporated in most afore-mentioned international treaties and conventions.

1.4 Precautionary Principle - Definition Under International Conventions/ Treaties

It has been repeatedly stressed by the critics of the principle that it does not possess a stable definition. We started looking into all the international conventions, declarations and treaties which define the principle. We came out with a certain question and a hypothesis in our mind. The question was whether it is possible to define the Precautionary Principle in any set format given the multiplicity of definitions associated with it? While the hypothesis[82] was that any given definition of the principle has the following key characteristics: (i) Risk or threat of serious damage [to human health or the environment][83]; (ii) Lack of certainty[84]; and (iii) Reasonable Action[85].

For the purpose of testing this hypothesis, we conducted a survey of international environmental agreements starting with the World Charter of Nature in 1982 till the present day.[86] A total of 38 international documents, both binding and non-binding were found to contain a reference to either `Precautionary Principle` or `Precautionary Approach`. A few others were also included in the scope of the search which though did not explicitly use either term but provided all three of the hypothesized characteristics. Below Table shows the results of the survey:

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80 O'Riordan, Tim, Andrew Jordan and James Cameron, eds. (2001), "Reinterpreting the Precautionary Principle", 192-3 (London: Cameron May Ltd.)

81 Goklany, Indur (2001), *The Precautionary Principle: A Critical Appraisal of Environmental Risk Assessment*, 2 (Washington DC: Cato Institute).

82 Here we had followed the same method as employed by Rabbi Deloso in "The Precautionary Principle: Relevance in International Law and Climate Change", available at *<http://www.lumes.lu.se/database/alumni/04.05/theses/rabbi_deloso.pdf>* (last accessed on 20 May 2013).

83 This includes: *damage; potentially damaging impacts; threats of serious or irreversible damage (effects); may bring hazards, threats of significant reduction, likely to cause harm, reason for postponing cost-effective measures, possibly damaging effects.*

84 This includes: *lack of full scientific certainty; scientific research has not yet strictly proven, even without full scientific certainty, no conclusive evidence of a causal relationship, potential adverse effects are not fully understood, absence of complete scientific certainty.*

85 This includes: *take appropriate measures; action; control; not be used as a reason to postpone measures (actions), measures are to be taken, activities should not proceed.*

86 This is not the exhaustive list of all conventions, treaties or declarations. We tried to cover all the important conventions, treaties or declarations.

Sr. No.	Convention or Declaration or Treaty	Element 1: *Risk or threat of serious damage*	Element 2: *Lack of certainty*	Element 3: *Reasonable Action*
1	UNFCCC, 1992	threats of serious or irreversible damage	lack of full scientific certainty	reason for postponing such measures
2	Transport Protocol	serious or irreversible effects	scientific research has not yet strictly proven	Measures... should not be postponed
3	ASEAN Agreement	threats of serious or irreversible damage	even without full scientific certainty	Take... measures
4	OSPAR Convention	May bring hazards	no conclusive evidence of a causal relationship	Measures are to be taken
5	Waigani Convention	threats of serious or irreversible damage	lack of full scientific certainty	reason for postponing cost-effective measures
6	CBD, 1992	threat of significant reduction	lack of full scientific certainty	should not be used as a reason for postponing measures
7	Albatrosses and Petrels agreement, 2006	threats of serious or irreversible adverse impacts or damage	lack of full scientific certainty	shall not be used as a reason for postponing measures
8	Protocol to Convention on Marine Pollution by Dumping 1996	likely to cause harm	no conclusive evidence to prove a causal relation	appropriate... measures are taken
9	Convention on Protection of Lakes and Watercourses 1992	potential... impact	scientific research has not fully proved a causal link	action

Sr. No.	Convention or Declaration or Treaty	Element 1: *Risk or threat of serious damage*	Element 2: *Lack of certainty*	Element 3: *Reasonable Action*
10	Convention on Protection of Marine Environment of Baltic Sea Area 1992	may create hazards	no conclusive evidence of a causal relationship	take ... measures
11	Sulphur Emissions Protocol 1994	are threats of serious or irreversible damage	lack of full scientific certainty	reason for postponing such measures
12	World Charter of Nature, 1982	likely to cause irreversible damage	potential adverse effects are not fully understood	activities should not proceed
13	North Sea Conference, London Declaration 1987	possibly damaging effects	a causal link has been established by absolutely clear scientific evidence	action to control
14	North Sea Conference, Hague Declaration 1990	potentially damaging impacts	no scientific evidence to prove a causal link	take action to avoid
15	Fish Stocks Agreement, 1994	-	absence of adequate scientific information	reason for postponing or failing to take ... measures
16	Rio Declaration, 1992	threats of serious or irreversible damage	lack of full scientific certainty	not be used as a reason for postponing cost-effective measures
17	North-East Pacific Convention, 2002	serious or irreversible threats	absence of complete scientific certainty	adoption of effective measures
18	1999 Protocol to Convention on Protection of	-	scientific research has not fully	action... shall not be postponed

Sr. No.	Convention or Declaration or Treaty	Element 1: *Risk or threat of serious damage*	Element 2: *Lack of certainty*	Element 3: *Reasonable Action*
	Lakes and Watercourses of 1992		proved a causal link	

1.5 Conclusion

It has been found that both elements 2 and 3 (*Lack of certainty & Reasonable Action*) were found in all 18 documents, while element 1 (*Risk or threat of serious damage*) was found missing in just two. Hence, a broad definition of precaution as developed from the study of various international documents defining it would be - *"if there is risk (or threat) of serious damage to human health or the environment, reasonable (precautionary) action should be taken despite lack of absolute certainty with regard to its causes or impacts"*. A similar formulation is provided by a number of authors giving credence to the findings.[87] In light of this, we would suggest that though the concept has been defined in varying words, the essence of it has remained steady through-out.

[87] Hohmann, Harald (1994), *Precautionary Legal Duties and Principles of Modern International Environmental Law between Exploitation and Protection*, 10 (London: Graham and Trotman); Cameron, James and Juli Abouchar (1996), *The Status of the Precautionary Principle in International Law*, in Freestone, David, and Ellen Hey eds., *The Precautionary Principle and International Law: The Challenge of Implementation*, 30 (The Hague: Kluwer Law International); Christoforou, Theofanis (2002), "The Precautionary Principle in European Community Law and Science," in Joel Tickner (ed.), *Precaution: Environmental Science and Preventive Public Policy*, 241 (Washington DC: Island Press).

THE CONSTITUTIONALITY OF MANDATORY CAPITAL PUNISHMENT UNDER *NDPS* ACT

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The use of narcotic drugs is in existence since times immemorial. Initially it was used for its pain suppression qualities, but gradually it was used as an intoxicant. References are available that in ancient India, after finishing one's midday meal, a person was to chew *tambula or mukhavasa*; and it appears that in ancient times persons smoked also certain preparations made with fragrant herbs and medicaments (and not tobacco which was then unknown). For example, *Bana* describes in the *Kadambari* that king *Sudraka* after his mid-day meal took in the smoke of fragrant drugs and then chewed tambula. In the *Caraka-samhita, sutrasthana*, there is description how a reed was to be smeared with pastes of sandalwood, nutmeg, cardamom and several other drugs and spices, how it was to be eight angulas long and as thick as one's thumb, how it was to be dried and reed removed and then the dried portion was to be smoked[1].

In the contemporary era, it is used for stress-relief, fun sake, stimulation, etc., without even bothering about its addictive capacity which drains a person emotionally, physically, economically, socially and so on. This tendency has found favour with the underworld people who keep on researching for the improvised version of the drugs and new means to spread their tentacles in the society as it is the most lucrative and financial viable enterprise, what if at the cost of the lives of the fellow beings. The illicit trade has shifted from Golden Triangle, i.e., Thailand, Burma and Laos, to Golden Crescent, i.e., Iran, Pakistan and Afganistan. The existence of illicit trade at the borders of India has also affected India. A plethora of legislations were passed from time to time by the Indian States to check and curb the menace within their bounderies, i.e., Opium Acts of 1857 & 1878, the Dangerous Drugs Act, 1930, etc.; and the exercise culminated with the passage of a common central legislation known as the Narcotic Drugs and Psychotropic Substances Act, 1985. This Act was the result of common international consciousness which adopted the convention concerning the narcotic drugs in 1971. The Act was further amended in 2001 to make it in tune with the UN convention on narcotic drugs and psychotropic substances, 1988.

1.1 UN convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

The UN convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was adopted on 19 December, 1988 out of concern from rising trends and magnitude of illicit trade, production, distribution and consumption of narcotic drugs posing a serious threat to the health and welfare of human beings; and which was

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1 Pandurang Vaman Kane, *History of Dharmasastra: Ancient and Mediaeval Religious and Civil Law*, Bhandarkar Oriental Research Institute, Vol 2 (1974) at pp. 799.

adversely affecting the economic, cultural and political foundations of the society entailing a danger of incalculable gravity. This convention shows the urgency of the international comity to address the internationalization of the illicit drug trade which had spilled havoc world over. As per the statistics of UNODC, around 272 million people are drug users in the age group of 15-64. The drug usage has been one of the potential reasons for the transmission of HIV, HCV and HBV infections. Moreover, deaths in the range of 104000 to 263000 globally are attributed to the consumption/overdose of narcotic drugs[2].

The convention stresses on adoption of measures to declare production, distribution, manufacture, import, export, extraction, preparation, sale, transportation, financing, etc., as criminal offences; but all these activities must have been done intentionally[3]. It also stresses on the rehabilitation of the offender in addition to punishment; and in minor cases as an alternative to punishment for the offender[4]. It is also permissible for the member States to adopt stricter measures, if desirable[5].

1.2 The Narcotic Drugs and Psychotropic Substances Act, 1985

The NDPS Act also prohibits the cultivation, production, use, consumption, possession, sale, transportation, import, export, etc., of narcotic drugs and psychotropic substances except for scientific or medical purposes or under due authorization.[6] It permits central and State governments to allow and regulate activities concerning drugs[7]. If any person contravenes the prohibition in relation to poppy[8], opium[9], cannabis[10], manufactured drugs[11] or psychotropic substances,[12] then the person can be punished

I. If the contravention relates to small quantity, then up to 6 months & fine up to Rs. 10,000 or both; or

II. If the contravention relates to greater than small quantity but less than commercial quantity, then up to 10 years & fine up to Rs. 1 lakh; or

III. If the contravention relates to commercial quantity, then up to 20 years & fine up to Rs. 2 lakhs.

The consumption of drugs is punishable with conviction in the range of 6 months to 1 year depending upon the item consumed[13]. Even financing of the drug racket,

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2 *http://www.unodc.org/documents/data-and-analysis/WDR2011/World_Drug_Report_2011_ebook.pdf* (last visited on 31 July 2013).

3 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 3 (1) (a).

4 *Id.*, Article 3 (4).

5 *Id.*, Article 24.

6 *NDPS Act*, 1985, S. 8.

7 *Id.*, Ss. 9 and 10.

8 *Id.*, S. 15.

9 *Id.*, Ss. 17 and 18.

10 *Id.*, S. 20 (b).

11 *Id.*, S. 21.

12 *Id.*, S. 22.

13 *Id.*, S. 27.

directly or indirectly invites conviction from 10 years to 20 years[14]. The Act also prescribes stricter punishment for the second offence[15] and it is here that it provides the mandatory death penalty[16]. Section 31A prescribes mandatory death penalty where the person has been convicted of the first offence for offences relating to embezzlement of opium by the cultivator or its illegal disposition; obtaining or supplying drugs outside India without authorization; financing illegal trafficking in drugs or engages in the cultivation, production, use, consumption, possession, sale, transportation, import, export, etc., of narcotic drugs and psychotropic substances in quantity more than the specified quantity which ranges from 500 grams to 20 kg depending upon the drugs.

1.3 Capital Punishment: An Overview

The capital punishment is often challenged as unconstitutional on account of its effect on the life and liberty of an individual in the modern world, wherein the individual liberty is considered to be of paramount importance, and it seriously threatens the same. But the capital punishment has been prevalent in the society from time immemorial sanctioned by religious and political institutions. It was mandated that death is sure punishment for killing of a human being[17] which cannot be satisfied by any means except death[18]. Infliction of punishment was considered the chief duty of the king and the punishment was expected to deter people from commission of a crime on the belief that crime and punishment are inversely proportional and increase in one leads to decrease in other, whereas it has been observed that there is no determinate relation between crime and punishment as the crime is not controlled by punishment because it is triggered by multifarious factors unmindful of punishment.

1.3.1 The Evolution

In the middle ages indiscriminate use of severe punishment including death penalty was the hour of the day. Capital punishment was not only inflicted for homicide but for minor offences. Even the mode of execution was brutal and inhuman ranging from beheading, boiling in hot oil, pulling to pieces, poisoning, burning, crushing under the feet of an elephant, etc[19]. Unprecedented executions were reported during reign of Henry VIII when 72000 people were hanged to death and a good many were executed[20]. The imposition of death sentence was for crime against person- infanticide, patricide, lynching, rape, kidnapping; crime against property- robbery, speculation, theft; as well as crime against State- treason, spying, rebellion, mutiny,

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14 *Id.*, S. 27A.
15 *Id.*, Ss. 31 and 31A.
16 *Id.*, S. 31A.
17 LEV. 24: 17; see also Brhaspati, xxii, 29.
18 *Num.* 35: 31.
19 Elinor Lander Horwitz, *Capital Punishment,* Philadelphia, Lippincott, 1st ed. (1973) at p. 21; see also R.P. Kangla, *Kautilya Arthsastra* 2d ed. (1972).
20 *Id.*, at p. 24.

etc[21]. Stoning to death was the mosaic punishment for the crimes of blasphemy, adultery, kidnapping, incest, murder, etc[22].

The frequent use of death penalty even for minor offences was on account of its recognition as a proper, effective, reasonable and proportional mode of punishment. The people believed that punishment was a passionate social reaction which was not aimed at avengement but defence. The desire for vengeance was a normal reaction of an individual which satisfied their animal instinct and is a common response to the stimuli in those days. The State undertook the responsibility to execute the vengeance on behalf of individuals in order to stop the individual chain reactions. The believers of positivist theory, deterrence theory, reformatory theory, transcendental theory, expiatory theory, preventive theory recognizes the punishment as a reaction to crime but differ on account of the purpose of punishment. It was believed that punishment including capital punishment as a proper and effective way to deter people as it discourages criminal behavior, controls crime precipitation and satisfy victims[23]on the pretext that it is better to eliminate few than to put to peril the life of many. Moreover execution was considered economically viable as confinement involves expenditure over a period of time as a waste. The money so saved can be utilized for other more constructive works and for the betterment of noble souls. The retention of death penalty can be found in the statute books of the countries which are facing terrorist threats or the drug menace. Even in those countries the judiciary has been vibrant enough to safeguard the individuals against the abuse of the process. In *Jagmohan Singh v. State of U.P.*[24], the court opined that death penalty is not unusual in India as it had been existing since ancient time. Even the procedure for appeal, reprieve, etc., make it a reasonable because the life is deprived as per the procedure established by law. Reliance was placed on the observation of the law commission of India which recommended for the retention of capital punishment[25]. The discretion with the judges was held to be proper and not unfettered as it is exercised after taking the aggravating and mitigating factor.

Recent trends exhibit that the abolitionist approach has emerged victorious over the retentionist approach as the majority countries have either exterminated the capital punishment from their statute books or have reduced it to bare minimum. The humanistic approach stands recognized in the international instruments especially in the form of second optional protocol to the International Covenant on Civil and Political Rights wherein it is affirmed that abolition of death penalty will contribute towards enhancement of human dignity and progressive development of human rights. The reformative approach to crime was initiated in the 18th century principally advocated by *Caser Beccaria* and *Jeremy Bentham.* They were very critical of the

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21 *Id.*, at p. 15; see also Anant Sadashiv Altekar, State And Government In Ancient India, Delhi: Motilal Banarasidas 3rd ed. (1958); Subash C. Gupta, *Capital Punishment In India*, New Delhi : Deep & Deep Publications (1986).

22 *Id.*, at p. 17.

23 Dane Archer, "Homicide and Death Penalty: A Cross-national Test of a Deterrence Hypothesis}, *Journal of Crim. L. & Criminology,* Vol. 74 (1983) at pp. 991.

24 AIR 1973 SC 947.

25 Law Commission of India, 35th Report (1967).

capital punishment and the ways of executing it. It was advocated that incapacitation and deterrence are the ends, and, to the extent possible, mildness should characterize the means of achieving them. Severity is gradations of intensity to deter men from committing crimes, if beyond the extent necessary, it is unjust[26]. Thus penitentiary was put forth as an alternative to capital punishment which was aimed at bringing about a radical transformation or a complete regeneration in the society. In the age of science, the tendency to commit crime is viewed as a diseased or disturbed state of mind which gets fired under stressful socio-economic conditions. Therefore the reformation aims at bringing about peace and solace to the perturbed state of mind, thus turning the beast out of human body. Even the studies are being carried out to ascertain the chromosomal links to criminality which if established will be a pointer to the diseased state of body and mind.

Krishna Iyer., J., pinpointed that every saint has a past and every sinner a future, never write off the man wearing the criminal attire but remove dangerous degeneracy in him, restore his retarded human potential by holistic healing of his fevered, fatigued, or frustrated inside and by repairing the repressive, though hidden, injustice of the social order which is vicariously guilty of the criminal behavior of many innocent convicts. Law must rise with life and jurisprudence responds to humanism[27]. His Lordship is of the view that death penalty is a teasing illusion, a retributive barbarity, violent futility, violation of divinity, revocation of correctional possibilities, myopically unscientific and a farewell to human rights and human dignity[28].

In ancient India, amercement was recognized as an alternative to punishment provided the death was caused under delusion or it happened after a lapse of time.[29] Abolitionists view the capital punishment as a barbaric, inhuman, cruel, irrevocable punishment especially on account of judicial fallibility. They view that life is a fundamental privilege enjoyed by a human being which should be extinguished in a natural way and not unnaturally by a human agency. Recently a resolution was moved in the general assembly of the UN for the abolition of death penalty wherein 107 members voted in favor, 36 members abstained from voting and 38 members voted against it including India, China, America, Iran, and Saudi Arabia[30]. Indeed, the countries with the high crime rate prefer to retain the death penalty but in India the judiciary has very effectively drawn a compromise between the extremes of retentionist and abolitionist views and has evolved the **doctrine of rarest of rare cases** in awarding death sentence. The majority in *Rajendra Prasad v. State of U.P*[31] strived to carve out special reasons for imposing death penalty in order to regulate the judicial discretion. Accordingly the death penalty can be imposed in very limited

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26 Walter Berns, For Capital Punishment, *The New York Review* (1979), p. 28.

27 V.R. Krishna Iyer, *Perspective In Criminology, Law And Social Change*, New Delhi: Allied, (1980) at p. 112; *Mohammad Giasudin v. State of Andhra Pradesh* AIR 1977 SC 1926.

28 V.R. Krishna Iyer, "Death Sentence on Death Sentence", *The Indian Advocate: Journal of The Bar Association of India* Vol. 28 (1978).

29 R.P. Kangla, see *Supra* note 19 at p. 283.

30 *http://www.un.org/News/Press/docs/2012/gashc4058.doc.htm* (last accessed on 29 July 2013).

31 AIR 1979 SC 916.

circumstances to uphold public order and social security which include the personal and social, the motivational and psyche of the criminal; absence of mental imbalance, neurotic upsets and psychic crises; violent dacoity; organized economic offences; planned and intentional killing; professional murders; nefarious activity with a profit motive; killing of defenders of law; intentional killing by a professional or businessmen; hardened criminal who cannot be reformed according to current psychotherapy or curative techniques, etc. *Sen,* J. delivering the minority judgment opined against putting the judicial discretion in a straight jacket formula as each case depends upon its peculiar facts and if they were to be guided by the classification, the imposition of death penalty shall be non-existent[32].

In *Bachan Singh v. State of Punjab*[33], the court deliberated whether section 302 of Indian Penal code is unconstitutional as it provides death penalty as an alternative punishment in cases of murder. The court by a majority opined that death penalty is not unconstitutional as it is or the execution is not unreasonable, cruel or unusual. According to court the signing of ICCPR does not affect the constitutional validity of death sentence as it does not defile the dignity of an individual. The court cautioned that relative weight should be given to aggravating and mitigating factors and it should be imposed in rarest of rare cases. *P.N.Bhagwati*, J.[34], in his minority judgment opined that death penalty has no rational nexus with any legitimate penal goal and it is arbitrary and irrational. Furthermore it confers unguided and standard less discretion to the court.

1.4 Mandatory Capital Punishment

The existence of capital punishment as an alternative mode of punishment is indeed reduced to bare minimum; but still countries have recognized mandatory capital punishment for violation of law especially in relation to heinous crimes including first degree murder, murder by life convict, sedition, terrorism, drug trafficking, etc. If a case is made out against the accused then the judiciary is compelled to impose mandatory death sentence in the absence of judicial discretion. These provisions take out the effective judicial determination of the guilt of the person and the judges are forced to apply the strict standards of guilt determination. They cannot draw a balance between the mitigating and the aggravating circumstances. Moreover the shift in the principle from presumption of innocence to presumption of guilt complicates the procedural propriety making it difficult for the accused to defend him from the rigors of law. Of late, there has been a shift in the judicial stance to apply constitutional standards in determining the validity of such legislations.

1.4.1 Unconstitutionality of Mandatory Capital Punishment

Though the judiciary has reduced the capital punishment by evolving the rarest of rare case doctrine to humanize the sentencing, yet there exists some provisions of the law which prescribe mandatory death sentence calling for a bold judicial stance

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32 *Id.,* 945.

33 AIR 1980 SC 898; See also *Shiv Ram v. State of U.P.* AIR 1998 SC 49.

34 *Bachan Singh v. State of Punjab* AIR 1982 SC 1325.

against the prescriptive traditional role of judiciary as mere interpreter of law. In *Mithu v. State of Punjab*[35], the constitutional validity of section 303 of the Indian Penal code was challenged as it imposes mandatory death sentence on a life convict. The court on the question of finality of legislative decision pointed out that legislative wisdom on justice and fairness is not final and court can always deplore the historical facts as well as fairness of procedure prescribed by law in depriving a man of his life. Courts cannot be imposed with dubious, unconscionable duty of imposing pre-ordained sentence of death by the legislature. On the question of rationality of death sentence approved by the apex court *in Bachan Singh v. State*[36], the court observed that in that case the death penalty was an alternative and not mandatory or the only punishment prescribed. In case of death sentence as an alternative, the judiciary can reason out as to sentence, which is denied in mandatory sentencing. The judges cannot look into the circumstances under which the offence is committed but have to compulsorily impose death sentence if a case is made out which is a denial of judicious determination. The court observed the impugned provision as unconstitutional as it denies the right to be heard as to sentence which is available to other accused persons. It takes away the right of judiciary to look into mitigating factors like systematic harassment, grave provocation, diseased state of mind, etc. Furthermore, it is unjust and unreasonable as it does not logically differentiate between a life convict who had undergone a sentence and commits murder and a life convict who commits murder during captivity[37].

In *George Summer v. Raymond Wallace Shuman*[38], Nevada statute provided for mandatory death sentence to a convict who commits murder while undergoing life imprisonment. The majority opined through *J. Blackburn* that the statute is violative of 8th and 14th amendment, hence unconstitutional. In *Furman v. Georgia*[39] , the U.S Supreme Court observed every death penalty statute as unconstitutional as the death penalty is being imposed indiscriminately; and the legislature and jury never used the power to discern between the choices of life imprisonment and death penalty. Furthermore, the court opined the capital punishment being cruel and unusual is violative of 8th amendment. After this determination, the State of North Carolina made an amendment in the statutes and instead of discretion provided mandatory death sentence for first degree murders. The constitutionality of the statute was challenged in *Woodson v. North Carolina*[40]. The court after looking into the history of death sentencing in America opined that death sentencing is considered to be unduly harsh and unworkably rigid and in majority of the cases, after 8th amendment was adopted, the jurors having given verdict against automatic death sentencing. The court deciphered the contemporary standards of decency rejecting death sentence from the aversion of jurors and

35 AIR 1983 SC 473.
36 *Supra* note 33.
37 *Supra* note 35 at pp. 479-480.
38 483 US 66.
39 408 US 238 (1972).
40 428 US 280 (1976).

legislators. The court observed that North Carolina's mandatory death penalty statute departs markedly from contemporary standards as it failed to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion which talks of standardization of sentencing power and removing total discretion. The judiciary also loses its power to check the arbitrary and capricious exercise of that power through a review of death sentences. The mandatory death sentencing also accords no significance to relevant facets of character and record of individual offender and the diverse frailties of humankind but treats every offender as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

In *Roberts v. Louisiana*[41], the constitutionality of Louisiana mandatory death sentence statute was challenged which was held by the courts as unconstitutional as it does not provide the standard for jury trial and aims at capricious exercise of power by jurors in case they feel death sentence is inappropriate. In *Reyes v. Rex*[42] , the Privy Council held the statute of Belize providing for mandatory death sentence as unconstitutional because it precludes the judicial consideration of the humanity elements. It was stressed that the job of court is to do justice, i.e. ,the determination of sentence which the aggressor deserves and fixing of appropriate sentence for the crime; and job of executive is to provide mercy i.e. the aggressor need not suffer the punishment which he deserves. In *Regina v. Hughes*[43], the Privy Council held the criminal law of Saint Lucia providing for mandatory death sentence as unconstitutional because it is inhuman and degrading and moreover the judicial wing lacks judicial discretion. In *Bowe v. Queen*[44], the pricy council formulated principles to be observed while imposing death sentence;

I. It is fundamental principle of just sentencing that the punishment should be proportionate to crime.

II. Criminal culpability varies from case to case.

III. Every murderer does not deserve to die.

IV. The discretionary judgment on measure of punishment must be made by the judiciary.

In *State of Punjab v Dalbir Singh*[45], the vires of sec. 27(3) of Arms Act, 1959 was challenged before the Supreme Court. In this case, a constable of CRPF fired from an SLR upon the Battallion Havaldar Major and the Deputy Commandant resulting in the death of Battalion Havaldar Major. When the accused was reloading the gun, he was over powered and disarmed. The accused was charged under sections 302 and 307 of IPC read with section 27 of Arms Act. The Trial court sentenced him under the impugned section but the High Court reversed the order of conviction on the basis of irreconcilable inconsistency in the prosecution case. The apex court did

41 428 US 325 (1976).
42 (2002) 2 AC 235.
43 (2002) 2 AC 259; see also *Fox v. Rex* (2002) 2 AC 284.
44 (2006) 1 WLR 1623.
45 Cr. Appeal no. 117 of 2006, decided on 1 February 2012.

not found any perversity in the finding of the High Court, therefore declined to interfere, but since vires of section 27 was questioned, the court examined it. The said section 27 consisted of three sub-sections; first part prohibited the use of arms and ammunition without a license and provided for a punishment with imprisonment of 3-7 years; the second part prohibited the use of prohibited arms and ammunition and provided punishment with imprisonment of 7 years to life imprisonment; and the third part provided that if a person does an act resulting into death of person, the punishment is mandatory death sentence. The apex court opined that first two parts of section 27 were reasonably classified and proportionate but part third was unconstitutional. In the case section 27(3) was not called for because the accused was not using the prohibited arms in contravention to sec. 7 of the Act. The court observed that mere possession can entail death penalty or even accidental firing or unintentional use can invite death penalty. Thus it is unreasonable as it is devoid of any guideline in determining the use and its effect. Moreover the said provision came into operation in post-constitutional era[46] and is clearly violative of Article 13 of the Constitution of India. Therefore, section 27 is against fundamental tenets of Constitution and the judicial determination of death sentence in *Mithu*[47] *and Bachan Singh*[48] which have been recognized worldwide as proper.

1.5 Constitutionality of capital punishment

The constitutional validity of section 29 of Misuse of Drugs Act, 1973 was challenged in *Ong Ah Chuan v. Public Prosecutor*[49] which provided for mandatory death sentence for persons convicted of trafficking in more than 15 grams of heroin. Two persons namely *Ong* and *Koh Chai Cheng* were arrested for carrying heroin in their cars for more than the prescribed quantity. *Ong* pleaded that he was carrying heroin for his personal consumption whereas *Koh* pleaded ignorance about presence of heroin in his car. Both were sentenced to death by the trial court. They appealed to Court of Criminal Appeals of Singapore but the same was dismissed. Thereafter they filed special appeal to Privy Council. The Constitution of the republic of Singapore provided that no person shall be deprived of his life or personal liberty save in accordance with law[50] and all persons are equal before the law and entitled to equal protection of the law[51]. It was argued on behalf of the defendant that replacement of presumption of innocence with the presumption of guilt violates Article 9 as there were no compelling reasons for the same and it operated unfairly. A fair inference is not enough to justify a prima facie breach. The government must show that it is difficult or impossible for the police to prove that possession is for the purpose of trafficking. This shift makes it almost impossible for the accused to rebut the presumption. Furthermore there should be pressing social needs dealt with by the statute and the means provided by the legislature must be proportional to the aims

46 *Amendment Act* 42 of 1988.
47 *Op.cit*
48 *Op.cit*
49 (1981) AC 648.
50 Article 9 (1), Constitution of Singapore.
51 Article 12 (1).

pursued. The classification of persons in possession of a controlled quantity and the variation in punishment is not justified. The standardization of the sentencing process which leaves little or no room for judicial discretion to take into account of the variations in culpability further makes mandatory death sentencing as unreasonable. The court cannot determine the quantity of drug, the state of mind of accused, age of the accused or other compelling reasons in case of mandatory sentencing[52]. *Lord Diplock* stressed that the defendants could not prove why they were in possession of controlled drugs more than the prescribed quantity; henceforth they were not in position to rebut the presumption. Moreover, they have moved the drug in their car. Hence in the absence of proper supportive evidences, it may be presumed that they were in possession for trafficking as action is determined by what the offender actually did. The larger is the quantity the greater is the inference for presumption. His lordship opined that one of the fundamental rules of natural justice in the field of criminal law is that a person should not be punished for an offence unless it has established to the satisfaction of an independent and unbiased tribunal. This involves the tribunal being satisfied that all the physical and mental elements of the offence with which he is charged, conduct and state of mind were present. This cannot be described as presumption of innocence. What fundamental rules of natural justice do require is that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused is charged. Presumption of guilt is a common feature of modern legislation concerning the possession and use of things that present danger to society like additive drugs, explosives, arms and ammunition[53].

It was pointed out that judges in their judicial capacity are in no way concerned with arguments for or against capital punishment or its efficacy, as there are questions to be decided by the legislature. The primary object of imposing a death sentence for offences that society regards with particular abhorrence is that it should act as a deterrent; particularly where the offence is one that is committed for profit by an offender who is prepared to take a calculated risk[54].

The classification does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed[55]. In case of proved possession, there is no violation of Article 9 (1) as well as factors adopted by legislature on constituting a dissimilarity of circumstances were not purely arbitrary but bore a reasonable relation to social object of a law. It is not unreasonable for the legislature in differentiating between two classes of cases, i.e., persons possessing more than 15 grams of heroin and persons possessing less than 15 grams of heroin. Furthermore the prerogative of mercy is available to mitigate the rigors of the law[56].

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52 *Supra* note 49 at pp. 656-657.
53 *Id.*, at p. 672.
54 *Id.*, at p. 673.
55 *Ibid.*
56 *Id.*, at p. 674.

A similar stance was taken by Bombay High court in the case of *Indian Harm Reduction Network v. Union of India*[57] wherein a number of writ petitions were filed challenging the constitutionality of section 31A of NDPS Act of 1985 which provides for the mandatory death sentence. In this case, a person who was earlier convicted under section 29 of the Act was again charged for offences relating to narcotic drugs and was prosecuted under section 31A; and the trial court awarded mandatory death sentence. The high court observed that the case legitimately fits into the legislating scheme of structuring the punishments for the different offences and the legislature is competent to provide for the extreme death penalty; and as such there is nothing against the provisions of the Constitution. Though the court was of the opinion that impugned provision was violative of Article21, yet it directed that the word, "shall" should be read as "may" in order to save the constitutional validity of the relevant provision. Thus the court favored judicial discretion in matters concerning awarding of sentence.

1.6 Concluding Observations

Indeed the punishment serves the purpose of crime control and crime precipitation but despite existence of capital punishment from time immemorial there has been no retrogression of crime rate and even heinous crimes are constantly on the rise[58]. This development invites serious deliberations to search for new alternatives of punishment which can bring about a total transformation in the society concerning the crime and the criminal. The abolitionist view concerning capital punishment which was endorsed by majority has again been seriously questioned in the wake of global terrorism and drug trafficking. These inhuman acts of gross violation of human rights can again bring about a radical change in the thought process and one can again witness a change to retentionist view.

In case of death sentencing, there is a need to provide life a chance as reformation and existence should always be preferred over elimination. Modern men boost of scientific advancement and the scientific development warrants a scientific answer to perception of people towards crime as well as scientific manner of punishment. The human being is considered to be best creation and the same should not be exterminated in a casual, unscientific and brutal manner. The chance of reformation should be given to a criminal and where the criminal does not respond to psychotherapy or is certified to be a man beyond correction, the severity in punishment invariably should be brought into action. There should always be proportionality review in cases of sentencing in order to bring out uniformity in the sentencing process. Even in gravest of crimes, there must be gradation of punishment in accordance with the gravity of commission and execution of crime and capital punishment should always be the last sentence.

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57 *Indian Harm Reduction Network v. Union of India* (criminal writ petition no. 1790 of 2010) For full judgment see: *http://www.lawyerscollective.org/files/IHRN%20judgment.pdf* (last visited on 31 July 2013).

58 *http://ncrb.nic.in/CD-CII2011/Statistics2011.pdf* (last visited on 31 July 2013).

Moreover there cannot be a sudden leap in inflicting capital punishment but there must be gradation in infliction of punishment depending upon the severity of crime. As the crime gradation increases, there should be an increase in the punishment. If proper logical method is not followed, the capital punishment can easily be declared as unconstitutional.

In reference to mandatory capital punishment, the observations of *Mithu's*[59] and *Woodson's*[60] cases are worth consideration. Though the judiciary has by and large controlled capital punishment as an alternative mode of punishment, yet in reference to mandatory capital punishment, there is clear diversification. The stance of British judges can be best understood in reference to their professional training in maintaining the traditional conventions. It is difficult to seek an observation from them for unconstitutionality as they believe that law making is a proper, professionalized and crafty exercise; and the Parliamentary sovereignty and wisdom are significant factors; whereas in other countries the law making is not that professional exercise.

The section 31A of NDPS Act, 1985 makes a giant leap from punishment prescription of 20 years to mandatory death sentence. There are no intermidiatory provisions prescribing intermediary punishments. It imposes compulsory death sentence just for a mere degree of increase in drugs recovered. It seems to be sound common sense to increase the intensity of punishment in reference to the gradation of offence committed. The NDPS Act was amended to bring it in tune with the UN convention, but it failed to incorporate the noticeable features of the convention i.e., rehabilitation, *mens rea*, etc. All these features can infuse human touch in to the most inhuman laws. Lord *Goddard, C.J.* observed that in these days when offences are multiplied by various regulations to an extent which makes it difficult for the most law abiding subjects in some ways or some time to avoid offending against the law, it is more important than ever to adhere to the (Humanizing) principles[61]. Especially in countries like India, one cannot ignore the socio-economic conditions and the level of awareness of the people concerning quality and type of drugs. Even the most aware person will not be in the position to identify a drug except regular users. The intention of the legislature is presumed from the words used in the statute and the use of the word, shall, and makes the provision mandatory. It is a principle of construction that the words used in a statute should be given its natural meaning unless there is an absurdity in the language. If the holding of a provision mandatory, general inconvenience is caused to the innocent people, the same may be considered directory[62]. If the legislation transgresses the limits laid down by the organic law of the Constitution, it requires stricter test of reasonableness.[63]

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59 *Op.cit*
60 *Op.cit*
61 *Harding v. Price*, (1948) 1 KB 695.
62 *Kavaish v. Nanhku*, AIR 2005 SC 2441.
63 *Welfare Association, Maharastra v. Ranjit P. Gohil*, AIR 2003 SC 1266.

VIOLENCE AGAINST WOMEN: SOME RECENT DEVELOPMENTS AND POLICY RESPONSES

Dr. D.R. Swami*

1.1 Introduction

The women population constitute significant human resource of the global economy. In the wake of unemployment, global competition and deregulation more and more women are joining an unforgiving job market.[1] In line with this, various international declarations, conventions and national policies have brought to forefront the role of women in the development process. Furthermore, the fundamental principle of human rights law is that every society, no matter its cultural, economic or social background, should provide equal protection for men and women. Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, and civil or any other field. In the past few decades, there have been potential efforts from civil society activists and the international community to protect these human rights and uphold their rights across the globe in accordance with various international, multilateral and bilateral treaties and forums.

The Universal Declaration on Human Rights stipulates that "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."[2]

In addition, the international community has adopted numerous policy documents, strategies and legislation and established bodies to tackle foregoing issues including poverty, social exclusion, improvement of the position of socially excluded. These create basis for identifying and implementing measures for affirmative action in different fields, including civil registration, personal documents, registration of residence, education, health care, social welfare, employment, gender equality and prohibition of discrimination.

Although efforts have been taken to improve the status of women, there are huge challenges for women engaged in the defence of human rights. Despite considerable progress achieved in recent decades in the process of empowerment of women, their conditions are not up to mark and their participation in the mainstream of the society remains limited. They are facing wide range of biases in society such as unequal

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1 M.L., Narasaiah, *Women and Development,* Discovery Publishing House, New Delhi (2006) at p. 5.

2 See the preamble of Universal Declaration of Human Rights, GA res. 217A (III), UN Doc A/810 (1948) at p. 71.

opportunities in education, employment and assets ownership.[3] According to estimates by the United Nations, up to 200 million women and girls are demographically 'missing'. The number of women forced or sold into prostitution is estimated at anywhere between 700,000 and 4 million per year. Between 120,000 and 500,000 of them are sold to pimps and brothels in Europe alone. Profits from the sex slavery market are estimated at US$7-12 billion per year. Over 60 per cent of HIV positive youth between the ages of 15 and 24 around the world are women.[4]

Among the most extreme issues associated with the women in recent days, violence against women is unspeakable and painful which posed serious threat to the transformation of the society. Gender-based violence is a greatest challenge and block to development worldwide. Violence against women in the form of physical, sexual, psychological and economic within the family, community and the State, is such a serious and key challenge for policy makers, legislators, social activists and human rights activists in recent days. The present profile of women situation created a critical juncture in our collective efforts to address the issue of violence against women, and the need for progress.

It is one of the most pervasive of human rights violations, denying women and girls' equality, security, dignity, self-worth, and their right to enjoy fundamental freedoms.[5] Gender-based violence, can impairs or nullifies the enjoyment by women of human rights and fundamental freedoms such as the right to life; The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; The right to equal protection according to humanitarian norms in time of international or internal armed conflict; The right to liberty and security of person; The right to equal protection under the law; The right to equality in the family; The right to the highest standard attainable of physical and mental health; The right to just and favourable conditions of work.[6]

Besides, the various international documents created and adopted by the international community have generated widespread commitment to address this issue at priority. Violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men; the elimination of violence against women is essential for their individual and social development and their full and equal participation in all walks of life.[7]

1.2 Conceptual Analysis

Violence in its general sense is an act carried out with the intention or perceived intention of physically hurting another person. It is an act involving use of force or

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3 P.J., Chirstabell, *Women Empowermen through Capacity Building,* Concept Publishing Company, New Delhi (2009) at p. 24.

4 Marie Vlachovd and Lea Biason, *Women in an Unsecured World,*. Geneva Centre for the Democratic Control of Armed Forces, Geneva (2005) at pp.1-2.

5 UNICEF, Report on *Domestic Violence-against Women and Girls* (2000), available at *http://unesdoc.unesco.org.images/0009/000966/096629eo.pdf.* (Last accessed 29 February 2012).

6 See UN Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW General Recommendations No. 19, adopted at the Eleventh Session, 1992, A/47/38.

7 See preamble of *UN Declaration on the Elimination of Violence against Women* (DEVAW), GA Res.A/RES/48/104, 20 December 1993.

coercion with intent of perpetuating promoting hierarchical gender relations. It is a multidimensional and multifaceted act of the individual which can take place within different settings such as schools, families, working places, alternative care institutions. It is a heinous act of the individual or group influenced by wide range of factors such as the personal characteristics of the offender and preparatory to their cultural and physical environments.

The United Nations Declaration on the Elimination of Violence against Women (1993) defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[8]

CEDAW General Recommendation 19 on Violence against Women (VAW) views gender-based violence as a form of discrimination that constitutes a serious obstacle in the enjoyment of human rights and fundamental freedoms by women, and addresses intersections of gender-based violence with the different substantive areas covered by the articles of CEDAW.[9] It defines gender-based violence as 'violence directed against a woman because she is a woman or which affects a woman disproportionately. It includes physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.'[10]

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women defined as 'any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.'[11] According to the Convention, violence against women shall be understood to include physical, sexual and psychological violence;

I. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;

II. that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and

III. that is perpetrated or condoned by the state or its agents regardless of where it occurs.

By looking into forgoing provision it can be concluded that violence against women is referred to abuse of the women by a husband, intimate partner (whether

8 *Id.,* Article 1.

9 CEDAW 1992, see *Supra* note 7 at para 1.

10 *Ibid.* at para.6.

11 See *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (IA-VAW), 1994, 33ILM 1534, 6 September 1994; entered into force 3 May 1995, Article. 1.

male or female) ex-husband or ex-partner against a women resulting in a loss of dignity, control and safety as well as feeling powerlessness and entrapment experienced by the women who is direct victim of ongoing or respected physical, economic, sexual, verbal and spiritual abuse. Women abuse also includes persistent threats or forcing women to witness violence against their children or other relatives, friends, pet or cherished possessions by their husband, partners, ex-husband or ex-partners.

1.3 Form of Violence Against Women

Violence in general is a coercive mechanism to assert one's will over another, in order to prove or feel a sense of power. It can be perpetrated by those in power against the powerless, or by the powerless in retaliation which attempts to deny their powerlessness.[12] According United Nations Declaration on the Elimination of Violence against Women Violence against women shall be understood to encompass, but not be limited to, the following:[13]

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 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.

According to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Violence against women shall be understood to include physical, sexual and psychological violence.[14]

I. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;

II. that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and

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12 UNESCO, *Report on Violence against Women Reports from India and the Republic of Korea, Bangkok* (1993), available at *http://unesdoc.unesco.org.images /0009/000966/096629eo.pdf.* (last accessed 29 February 2012).

13 DEVAW 1993, Article 2. See *Supra* note 7.

14 IA-VAW 1994, Article 2. See *Supra* note11.

III. that is perpetrated or condoned by the state or its agents regardless of where it occurs.

Violence against women manifests in multiple behaviours including rape, sexual coercion, incest, honour killings, female genital mutilation, acid burnings, stalking and trafficking. Perpetrators of violence against women can be intimate partners, family members, members of the community or strangers. Across cultures, the most common experience for women is violence by intimate partners.

1.4 Violence Against Women: Evidences

Millions of women and girls around the world are victims or survivors of violence and the number is moving up steadily.The cases of violence against women are invisible in nature and remain hidden for many reasons. Social stigma associated with the reporting of violence is a formidable obstacle to have accurate data on violence against women. However, the various initiative ranging from international institutions to local level research have made us to have an appropriate picture of the magnitude and pervasive nature of the problem.

Women and girls have been unacceptably subjected to violence in such a way that both private and public places are not any safer. Statistics on the frequency and severity of the issues are certainly scanty and artificially hide the scale of the problem.The following statement has been issued by the UN High Commissioner for Human Rights Navi Pillay on the occasion of International Day for the Elimination of Violence Against Women, on 25 November 2010 that 'Although precise statistics are not available, since violence against women – especially domestic violence is a hidden crime, recent figures released by the United Nations suggest that in some countries close to 60 percent of women may be subjected to physical violence at least once in their lifetime. They also make clear that no country, whether rich or poor, dictatorship or democracy, has come close to eliminating violence against women.'[15]

It is further stated that "A life free from violence is an obligation of States and a responsibility of us all. In Africa and elsewhere in the world, eliminating violence against women must be our common effort and can be our common achievement. Violence against women must be recognized as a threat to democracy, peace and security; an obstacle to sustainable development; and an appalling human rights violation."[16] It is further remarked that "Violence against women and girls is an outrage and a gross violation of human rights. It must be stopped through the implementation of existing international treaties, standards and agreements. This requires decisive and courageous leaders to translate these international promises into tangible national

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15 *The above statement has been issued by the UN High Commissioner for Human Rights Navi Pillay on the occasion of International Day for the Elimination of Violence against Women, which is commemorated on 25 November 2010 in UN Headquarters, New York.*

16 Opening remarks of Ms. Lakshmi Puri, UN Assistant Secretary-General and UN Women Deputy Executive Director, on 14 January 2013 in *African Ministerial Preparatory Meeting for the 57th Session of the Commission on the Status of Women (CSW) 'Elimination and Prevention of all forms of Violence against Women and Girls,' to be held* in March 2013 in New York.

actions and to make a true difference in the lives of the women and girls we just heard in the video earlier."[17]

The proportion of ever-partnered women who had ever suffered physical violence by a male intimate partner ranged from 13% in Japan city to 61% in Peru province, with most sites falling between 23% and 49%. The prevalence of severe physical violence (a woman being hit with a fist, kicked, dragged, choked, burnt on purpose, threatened with a weapon, or having a weapon used against her) ranged from 4% in Japan city to 49% in Peru province. The vast majority of women physically abused by partners experienced acts of violence more than once.[18]

The range of lifetime prevalence of sexual violence by an intimate partner was between 6% (Japan city and Serbia and Montenegro city) and 59% (Ethiopia province), with most sites falling between 10% and 50%. While in most settings sexual violence was considerably less frequent than physical violence, sexual violence was more frequent in Bangladesh province, Ethiopia province and Thailand city.[19]

The victims of honour killings are almost always women or adolescent girls, and the perpetrators are normally male family members, including the father or elder brother.[20] According to UNFPA, 5,000 girls and women are killed by family members in the name of honour every year. However, the full extent is unknown.[21]

According to United Nations general secretary Ban Ki-moon 'one out of every three females in the world will be beaten, will be forced into having sex or will be otherwise abused in her life time.' Based on projected data for 2010, secretary general Ban Ki-moon's estimation mean that 52.7 million girls and women in the United States and 1.2 billion worldwide may eventually be victims of violence if something is not done to stop it.[22]

The Female Genital Mutilation/Cutting (FGM/C) is another growing violence against women in recent days. There are an estimated 130 million girls and women alive today whose human rights have been violated by Female Genital

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17 *Remarks by UN Michelle Bachelet, UN Executive Director, on the occasion of the Official Commemoration of the International Day to Eliminate Violence against Women, a Promise is a Promise, held on 28 November 2012 at New York.*

18 WHO, *Multi-country Study on Women's Health and Domestic Violence against Women,* WHO, PATH, , Washigton DC (2005) at p. 6.

19 *Id., at* p. 7.

20 United Nations Children's Fund Innocenti Research Centre, *Law Reform and Implementation of the Convention on the Rights of the Child,* UNICEF IRC, Florence, 2007, at p.70. Quoted in; UNICEF, *A Study on Voilence against Girls,* Report on Interantional Girl Child Conference, held on 9-10 March 2009 at Hague, Natherland. Florence: UNICEF Innocenti Research Centre (June 2009) at p. 20.

21 United Nations Commission on Human Rights, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women, E/CN.4/2002/83, Office of the United Nations High Commissioner for Human Rights, Geneva (31 January 2002) at p. 12. Quoted in; UNICEF (2009), *op.cit.*, at p.20.

22 Bickerstaff, Linda, *Voilence against Women- Public Health and Human Rights,* Rosen Publishing Groups, New York (2010) at p. 8.

Mutilation/Cutting (FGM/C).[23] This harmful practice not only affects girls and women in Africa and the Middle East, where it has been traditionally carried out, but also touches the lives of girls and women living in migrant communities in industrialized countries. Although concerted advocacy work over recent decades has generated widespread commitment to end this practice, success in eliminating FGM/C has been limited – with some significant exceptions.[24]

According to a WHO estimate, between 100 and 140 million women and girls in the world have undergone some form of FGM/C.[25] Although overall figures are difficult to estimate, they do indicate the massive scale of this human rights violation. FGM/C affects far more women than previously thought. Recent analysis reveals that some three million girls and women are cut each year on the African continent (Sub-Saharan Africa, Egypt and Sudan).[26]Of these, nearly half are from two countries; Egypt and Ethiopia. Although this figure is significantly higher than the previous estimate of two million, this new figure does not reflect increased incidence, but is a more accurate estimate drawn from a greater availability of data. Effective efforts to end this practice require a more detailed picture of this situation.[27]

In India, more than a 34 percent of women, between the ages 15-49 have experienced physical violence, and 9 percent have experienced sexual violence. In all, 45 percent of women, between the ages 15-49 in India have experienced physical or sexual violence. By state, women's experience of physical or sexual violence ranges from a low of 6 percent in Himachal Pradesh to 40 percent or more in Rajasthan, Madhya Pradesh, and Tripura, and to a high of 56 percent in Bihar.[28]

Among all ever-married women who reported ever experiencing physical or sexual violence, 36 percent report cuts, bruises, or aches, 9 percent report eye injuries, sprains, dislocations or burns, 7 percent report deep wounds, broken bones, broken teeth, or other serious injury, and 2 percent report severe burns. All of these

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23 Female Genital Mutilation/Cutting (FGM/C) refers to "a range of practices involving the complete or partial removal or alteration of the external genitalia for nonmedical reasons." Shell-Duncan, Bettina and Ylva Hernlund (eds.), *Female Circumcision in Africa: Culture, Controversy and Change,* Lynne Rienner Publisher, London, Quoted in; UNICEF (2009), *Supra* note 22 at p. 1.

24 UNICEF, *Changing A Harmful Social Convention: Female Genital Mutilation/Cutting,* Innocenti Research Centre, Florence Italy (2008) at p. 1.

25 WHO, *Female Genital Mutilation*, Fact sheet no. 241, World Health Organization, Geneva, (2000) at p. 2.

26 It has been calculated that in 2000, approximately, 3,050,000 girls were cut on the African continent. Figure courtesy of Stan Yoder, Measure DHS, ORC Macro. This figure is derived by taking the number of females born in 2000 in these countries, calculating a loss due to infant mortality, and multiplying the resulting figure by the prevalence of FGM/C among the 15-24 year old cohort in each of the countries where FGM/C is performed. The resulting figure is approximate, in part because there are no figures for prevalence among girls of less than 15 years of age, and in part because there is uncertainty over FGM/C prevalence in a number of countries (DRC, The Gambia, Liberia, Senegal, Sierra Leone and southern Sudan). Quoted in; UNICEF (2008), see *Supra* note 25 at p. 9.

27 *Id., at* p. 3.

28 International Institute for Popular Sciences (IIPS) and Macro International, *National Family Health Survey (NFHS-3)-2005-2006: India,* Vol. 1, IIPS, Mumbai (2006) at p. 16.

percentages are higher for women who report violence in the 12 months preceding the survey. Notably, 38 percent of women experiencing physical or sexual violence report having experienced at least one of these groups of injuries.[29]

1.5 Violence Against Women-International Law Approach

The International law, in that too international human rights law plays a massive and decisive role in protection and promotion of the basic rights of the individuals. In order to prevent violations there need to be norms that separate what is permissible from what is forbidden. There are many human rights treaties adopted under the aegis of the United Nations that codify the substance of human right law.[30] International Human Rights law is like domestic law in that it is based on the texts of legal instruments and the decisions of judicial or other authoritative decisions makers.[31]

The World Conference on Human Rights in Vienna (1993) accepted that the rights of women and girls are 'an inalienable, integral and indivisible part of universal human rights.' The 1993 Declaration on the Elimination of Violence against Women, adopted by the General Assembly, is the first international human rights instrument to deal exclusively with violence against women, a ground-breaking document that became the basis for many other parallel processes. The declaration calls upon States to 'consider the possibility of developing national plans of action to promote the protection of women against any form of violence, or to include provisions for that purpose in plans already existing, taking into account, as appropriate, such cooperation as can be provided by non-governmental organizations, particularly those concerned with the issue of violence against women.'[32]

While gender-based violence is not specifically mentioned in the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in 1992 the Committee overseeing CEDAW implementation adopted General Recommendation 19, which states that it is a form of discrimination that inhibits a woman's ability to enjoy rights and freedoms on a basis of equality with men. It asks that governments take this into consideration when reviewing their laws and policies.The Beijing Platform for Action, adopted by the Fourth World Conference on Women in 1995, urges Governments to formulate and implement, at all appropriate levels, plans of action to eliminate violence against women.

In 2002, the United Nations International Research and Training Institute for the Advancement of Women (UN INSTRAW) developed an e-mail based seminar discussion series called "Ending Male Violence -Net" to provide a forum for United

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29 *Ibid.*

30 David Weissbrodt and Connie De La Vega, *International Human Right Law- An Introduction.* University of Pennsylvenia Press, Pennsylvenia (2007) at p. 29.

31 Curtis F.J Doebbler, *Introduction to International Human Right Law,* CD Publications, Washigton DC (2007) at p. 7.

32 CEDAW, Article 4(e), See *United Nations Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), 1979, GA Res.34/180 (adopted on 8 December 1979, entered into force September 1981) 1249 UNTS 13.

Nations bodies, practitioners, NGO representatives, activists and university professionals to discuss men's roles and responsibilities in ending gender-based violence.

Expressing its appreciation for the high number of activities undertaken by the United Nations bodies, entities, funds and programmes and the specialized agencies, including by the Special Rapporteur of the Human Rights Council on violence against women, its causes and consequences, to eliminate all forms of violence against women, and welcoming the recent appointment of the Special Representative of the Secretary-General on violence against children, on 11th February 2010, General Assembly in its resolution 64/137, call upon the international community, including the United Nations system and, as appropriate, regional and sub-regional organizations, to support national efforts to promote the empowerment of women and gender equality in order to enhance national efforts to eliminate violence against women and girls, including, upon request, in the development and implementation of national action plans on the elimination of violence against women and girls, though, inter alia, official development assistance and other appropriate assistance, such as facilitating the sharing of guidelines, methodologies and best practices, and taking into account national priorities.

According to the resolution, as of 27 May 2010, 54 Member States had responded to the Secretary- General's request for information relating to the implementation of General Assembly resolution 63/155. Information was provided on a range of measures taken to address violence against women, including strengthening legal frameworks, adopting dedicated policies, reinforcing prevention action and efforts to prosecute perpetrators and protect and support victims.

On 2 August 2010, in resolution 63/155 on intensification of efforts to eliminate all forms of violence against women, the General Assembly reaffirmed the obligation of all States to promote and protect all human rights and fundamental freedoms, and recognized that violence against women was rooted in unequal power relations between men and women and that all forms of violence against women constituted a major impediment to the ability of women to make use of their capabilities.

1.6 Violence Against Women- Indian Context

Comprehensive legal frameworks provide the foundation for effective action against violence against women at the national level. Progress in strengthening such frameworks and bringing them into line with international and regional standards is therefore essential for combating violence against women. The absence of specific legislation on violence against, or delays in adopting related laws, constitutes an obstacle to an effective response to the problem.

1.7 Constitution of India

Gender equality is the primary and prominent step to address the problem of violence against women and to enhance their position in the power structure of society. The principle of gender equality is enshrined in the Indian Constitution in

its Preamble, Fundamental Rights and Directive Principles of State Policy.[33] Violence against women, either physical, sexual and psychological violence occurring in the family or outside infringes the right to equality and right to life. Gender equality[34] and right to life and live with dignity[35] has cemented under Indian Constitution.

The State is directed by the Constitution 'to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.'[36] An amendment in 1976 states 'The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.'[37]

1.8 The Protection of Women from Domestic Violence Act, 2005[38]

This is the Act to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The Act provides conceptual framework for the terms domestic violence, physical abuse, sexual abuse and verbal and emotional abuse.[39] The Act has provided civil remedies in the nature of protection orders, residence orders, maintenance, compensation and temporary custody orders to women facing domestic violence within the home. The Act Establishes a coordinated implementation mechanism to ensure women have access to and enjoy support services such as shelter, medical relief and legal assistance through Appointment of Protection Officers, who are to act as the link between women and the courts on the

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33 Dasarathi Bhuyan,. "Empowerment of Indian Women- A Challenge for 21st Century". Bhuyan, RC Panigrahy and Dr. Dasarathi (ed.), *Women Empowerment,* Discovery Publishing House, New Delhi (2006), pp.18-23 at p. 18.

34 Constitution of India, Articles 14, 15 and 16.

35 *Id.,* Article 21.

36 *Id.,* Article 38 (1).

37 *Id.,* Article 38 (2).

38 Act No. 43 of 2005.

39 The Protection of Women from Domestic Violence Act, 2005, Section 3 which define domestic violence runs as follows; For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it -

1 harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

2 harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

3 has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

4 Otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

one hand, and women and support services on the other; Registration of Service Providers and notification of medical facilities and shelter homes.[40]

1.9 The Prohibition of Sexual Harassment of Women at Workplace Bill, 2010[41]

The Bill passed in Lok Sabha on 3 September, 2012. It seeks to provide every woman, irrespective of her age or employment status (excluding domestic workers) a safe and secure environment free from sexual harassment by fixing responsibility on the employer and laying down a redressal mechanism. The Bill conferring upon women the right to protection against sexual harassment and towards that end for the prevention and redressal of sexual harassment of women in;[42]

I. any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a cooperative society

II. any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, nongovernmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainmental, industrial or financial activities including production, supply, sale, distribution or service;

III. hospitals or nursing homes;

IV. any place, vehicle either by air, land, rail or sea visited by the employee arising out of, or during and in the course of, employment.

Now, the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, 2013 has been passed as Act 14 of 2013 on 22nd April, 2013.

However, the rules for the implementation of the Act are yet to be notified by the government.

1.10 The National Policy for Empowerment of Women, 2001 (NPEW)[43]

The National Policy for Empowerment of Women, 2001 (NPEW) was formulated as the blueprint for the future, with the express goal of addressing women's felt needs and

40 *Id.*, Ss. 8, 9 and 10.

41 Bill No. 144 of 2012, the preamble of the Bill asserts that 'sexual harassment results in violation of the fundamental rights of a woman to equality under articles 14 and 15 of the Constitution of India and her right to life and to live with dignity under article 21 of the Constitution and right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment'.

42 The Prohibition of Sexual Harassment of Women at Workplace Bill, 2010, s. 2 (n).

43 The goal of this Policy is to bring about the advancement, development and empowerment of women. The Policy will be widely disseminated so as to encourage active participation of all stakeholders for achieving its goals. Particularly principle 1.11 (viii) speaks about Elimination of discrimination and all forms of violence against women and the girl child.

bringing about their advancement, development and empowerment. The NPEW laid down detailed prescriptions to, inter alia, address discrimination against women, strengthen existing institutions which includes the legal system, provide better access to healthcare and other services, equal opportunities for women's participation in decision-making and mainstreaming gender concerns in the development process. The NPEW was envisaged as a comprehensive framework which is progressive and forward looking in nature.

1.11 National Mission for Empowerment of Women

The objective of the Mission is to empower women socially economically and educationally by securing convergence of scheme/programmes of different Ministries / Departments of Government of India as well as State Governments. The National Mission Authority (NMA) is headed by the Hon'ble Prime Minister and has Chief Ministers of two States of Andhra Pradesh & Bihar and five Civil Society Organisations as Members. The NMA is assisted by Central Monitoring Committee headed by Minister of Women and Child Development and Inter-Ministerial Coordination Committee (IMCC) under Cabinet Secretary. To assist NMA and IMCC, there would be Mission Directorate and National Resource Centre for Women (NRCW). Similarly, at the State level, there would be a State Mission Authority (SMA) and State Resource Centre for Women (SRCW).

The Government of India instituted the "Performance Monitoring and Evaluation System (PMES) for Government Departments" under the guidance of the Cabinet Secretariat and with the approval of the Prime Minister. As part of this framework, Ministry of Women and Child Development has developed a Results Framework Document (RFD) for the last quarter of 2009-2010 and for 2010-2011. The Ministry's overarching goal of promoting the survival, protection, development and participation of both women and children is reflected in the priorities delineated in the RFD. The development of the annual RFD constitutes a concrete exercise towards aligning people, systems, programmes and processes towards the fulfilment of the Ministry's vision and mission for women and children.

1.12 The Criminal Law (amendment) Act, 2013[44]

The constitution of Justice Verma Committee is in response to the country-wide peaceful public outcry of civil society, led by the youth, against the failure of governance to provide a safe and dignified environment for the women of India, who are constantly exposed to sexual violence.[45] The immediate cause was the

[44] Act No. 13 of 2013.

[45] The committee was constituted by GOI Notification NO.SO (3003) E, dated 23 December 2012 to find out challenges associated with criminal justice system to tackle sexual assault cases and to suggest possible solutions to the problem of sexual violence against women in India. The Committee consist Hon'ble Justice (Retd.) J.S Verma (Chairman), Hon'ble Justice (Retired) Leila Seth (Member) and Shri Gopal Subramanian, former Solicitor General of India (Member). See Gazette Extraordinary, Part-II, Section (3), Sub-section (ii), 24 December 2012.

brutal gang rape of a young woman in the heart of the nation's capital in a public transport vehicle in the late evening of 16 December 2012. As the both houses of the Parliament were not in session, the President of India had promulgated the ordinance by using its Constitutional power under Article 123 of the Indian Constitution. Subsequently, it came into force as Criminal Law (Amendment) Act, 2013.[46] The major object of this Act is to amend the Indian Penal Code, 1860, Code of Criminal Procedure, 1973 and Indian Evidence Act, 1872.

Through the Act the Government of India has made substantial changes in Substantive as well as procedural criminal law to properly shape the Indian criminal jurisprudence. The Criminal Law (amendment) Act, 2013 intent to bring following changes to the Indian Penal Code, 1860 in order to address the violence against women with committed and consistent way.

1.12.1 Acid attack

The menace of acid attack has strictly been addressed by the legislation by supplementing Section 326A and 326B to Section 326 of the Indian Penal Code, 1860.[47] Though the majority victims of the acid attackers are women, the law has not discriminated statutory protection on gender and both men and women have equal protection against this heinous crime.

Section 326A of the Indian Penal Code demonstrates that whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life and with fine which may extend to ten lakh rupees. Another, glaring feature of this Section is its attempt to compensate victim of the acid attack. The contentious issue of compensation for victims under criminal law has potentially been addressed by the legislative provision under Section 326A of the Indian Penal Code, 1860.[48]

Section 326A of the Indian Penal Code intent to punish the voluntarily causing grievous hurt by use of acid, etc. On the other hand Section 326B of the Indian Penal Code, 1860 has taken care of voluntarily throwing or attempting to throw acid. It says that whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person, shall be

46 Received the assent of the President of India on the 2 April 2013 and came in to force with effect from 3 February 2013. See Gazette of India, Extraordinary part.1, New Delhi Tuesday 2 April 2013.

47 See *Criminal Law (Amendment) Act*, 2013, S. 5.

48 The second part of Section 326A of the Act stipulate that any fine imposed under this section shall be given to the person on whom acid was thrown or to whom acid was administered.

punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.[49]

1.12.2 Sexual Harassment

Through the Criminal Law (amendment) Act, 2013, Section 354A has been added to the Indian Penal Code, 1860 and clarity has been maintained in defining the Sexual harassment. Under Section 354A (1) of the Indian Penal Code, 1860 the following acts constitute sexual harassment;

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 women; or

IV. Making sexually coloured remarks

Any person who commits the offence specified in clause (i) or clause (ii) of sub-section (1) of 354A shall be punished with rigorous imprisonment which may extend to three years, or with fine, or with both. Further, Section 354A (2) mandates that any person who commits the offence specified in clause (iii) or clause (iv) or of sub-section (1) shall be punishable with imprisonment of either description that may extend to one year, or with fine, or with both.

1.12.3 Assault or use of criminal force to woman with intent to disrobe

Assault or use of criminal force to disrobe women is fundamental issue of violence against women in recent days. The Act has intellectual intension to capture this situation by providing conceptual framework and appropriate criminal sanction to these kinds of unnatural activities of the human being. The Act further stipulate that whoever assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked in any public place, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years and with fine.[50]

1.12.4 Voyeurism

Whoever watches, or captures the image of, a woman engaging in a private act in circumstances where she would usually have the expectation of not being

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[49] The explanation added to 326A and 326B of the Indian Penal Code has outlined conceptual analysis of Acid and Permanent or Partial Damage used under Section these Sections. According to Explanation 1 of section 326A "For the purposes of section 326A and this section, 'acid' includes any substance which has acidic or corrosive character or burning nature, that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability." Further, Explanation 2 of the section says that 'Permanent or partial damage' includes deformity, or maiming, or burning, or disfiguring, or disabling any part or parts of the body of a person.

[50] *Indian Penal Code, 1860*, s. 354B of *Criminal Law (Amendment) Act, 2013*, S. 7.

observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminate such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.[51] Where the victim consents to the capture of images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.[52]

1.12.5 Stalking

Following a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly, despite a clear indication of disinterest by such woman, or whoever monitors the use by a woman of the internet, email or any other form of electronic communication constitute stalking under Section 354D of the Indian Penal Code, 1860.[53] Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.'[54]

1.12.6 Trafficking for Exploitation

The exploitation of the human being has strictly been addressed with stringent punishment under the new provision. The exploitation for prostitution or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the forced removal of organs. The amendment provision mandate that whoever recruits, transports, transfers, harbours, or receives a person or persons for the purpose of exploitation by means of using threats or use of force or any other form of coercion, abduction, practising fraud, deception or by abuse of power or by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.[55]

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51 For the purposes of this section, "private act" includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy, and where the victim's genitals, buttocks or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the person is doing a sexual act that is not of a kind ordinarily done in public. See (Explanation 1 of *Indian Penal Code, 1860*, S. 354 C of *Criminal Law (Amendment) Act, 2013*, S. 7.

52 *Supra* note 50, explanation 2, S. 354 C, see the *Criminal Law (Amendment) Act, 2013*, S. 7.

53 However, the following exceptions have been provided to the stalker under Section 354D: Stalking by a person entrusted with the responsibility of prevention and detection of crime by the state; or that it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or that in the particular circumstances the pursuit of the course of conduct was reasonable.

54 *Supra* note 50, S.354 D (2), see the *Criminal Law (Amendment) Act, 2013*, S. 7.

55 *Id.*, S. 370 see the *Criminal Law (Amendment) Act, 2013*, S. 8.

1.12.7 Sexual Assault

The concept of rape in the contemporary world constitute pervasive and persistent element of women lives. This heinous crime has significant impact on charity and quality life of women. The old Indian Penal Code, 1860 concept of rape was intended to replace with 'Sexual Assault' under Criminal Law (amendment) Ordinance, 2013. The Group of Ministers (GoM) was set up by the Prime Minister to resolve difference met on 13 March 2013 and the cabinet on 14 March 2013 agreed to clear the Bill by agreeing to replace the word 'Sexual Assault' with 'rape' and reducing the age of consent from 18 to 16 years. Finally, it was decided to retain the term rape instead of Sexual Assault through the Act. The old Sections 375, 376, 376A, 376B, 376C and 376D of the Penal Code have been replaced with new provisions and the subject matter of the provision also got considerably changed by the amendment as follows;

I. penetrates his penis, to any extent, into the vagina, mouth urethra or anus of woman or makes her to do so with him or any other person; or

II. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

III. manipulates any part of the body of woman so as to cause penetration into the vagina, urethra, anus or any part of body of such person or makes the person to do so with him or any other person; or

IV. applies his mouth to the penis, vagina, anus, urethra of another person or makes such person to do so with him or any other person;

Furthermore, the aforementioned penetration or touching is punishable if it is carried out for proper hygienic or medical purposes under the circumstances falling under any of the following seven descriptions:—

I. Against her will.

II. Without her consent.

III. With her consent when her consent has been obtained by putting her or any person in whom such she is interested, in fear of death or of hurt.

IV. with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

V. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that action to which she gives consent.

VI. With or without her consent, when she is under eighteen years of age.

VII. When she is unable to communicate consent.

1.12.8 Punishment for Rape

The punishment for rape is substantially changed under new Act. Whoever commits rape shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine. The new amendment provisions have maintained the *status quo* in respect to the imposition of the punishment on public servant for their rapist attitude. However, the proportion of the punishment has been revised under the amendment provisions. Section 376 of the newly inserted provision says that whoever;

(a) Being a police officer, commits sexual rape–

  i. within the limits of the police station to which such police officer is appointed; or

  ii. in the premises of any station house; or

  iii. on a women in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government, commits sexual rape; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits sexual assault on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a person when such person is under eighteen years of age; or

(j) commits rape, where the person assaulted is incapable of giving consent; or

(k) being in a position of control of or dominance over a women, commits rape on such women ; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on same woman,

Shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, which shall mean imprisonment for the reminder of that person's natural life, and shall also be liable to fine. The amendment provision further mandates that in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death.[56]

The Act has recognised the Sexual intercourse by husband upon his wife during separation and imposes appropriate punishment for such sexual attack on women. The Act says that whoever has sexual intercourse with his own wife, who is living separately whether under a decree of separation or otherwise without her consent, shall be punished with imprisonment of either description, for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.[57]

The Act is further concentrate on Sexual intercourse by a person in authority by misusing his authority or influencing position. The Act mandates[58] that whoever,—

I. in a position of authority or in a fiduciary relationship; or

II. a public servant; or

III. superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or

IV. on the management of a hospital or being on the staff of a hospital,

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years but which may extend to ten years, and shall also be liable to fine.

The Criminal Law (amendment) Act, 2013 has taken serious course of action gang rapes as they are seriously increasing. The Act mandates that where a women is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the

56 *Id.*, S. 376 A, see the *Criminal Law (Amendment) Act, 2013*, S. 9.
57 *Id.*, S. 376 B, see the *Criminal Law (Amendment) Act, 2013*, S. 9.
58 *Id.*, S. 376 C, see the *Criminal Law (Amendment) Act, 2013*, S. 9.

offence of rape, and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life and fine.[59] The section further says that compensation is to be paid to the victim to reasonably meet the medical expenses and rehabilitation of the victim. If the offences punishable under section 376 or section 376A or section 376C or section 376D are repeatedly committed by a person and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life, which shall mean the remainder of that person's natural life or with death.[60]

The criminal justice system of the nation in recent days is open to severe criticism on a number of counts. There is often a say about the Indian Penal Code, 1860 that it is a colonial law, out dated and a urgent need of fresh look at the provision of the Code. In the light of apparent desire, the Criminal Law (amendment) Act, 2013 is a timely and welcoming step by the Government of India. As Kennedy, J. observed: - "Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule....."[61] On the other hand International Covenant on Civil and Political Rights, 1966 stipulates that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment in particular, no one shall be subjected without his free consent to medical or scientific experimentation."[62] In line with above statement the new Criminal Law (amendment) Act, 2013 has expressed a commendable concern by balancing the punishment of criminals and avoid of inhuman punishment for criminals.

In addition, India is a signatory to the UN Convention against Transnational Organized Crime with its Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children and is in the process of ratifying them. India has ratified: The SAARC Convention on Preventing and Combating Trafficking of Women and Children in Prostitution; Convention on the Elimination of All Forms of Discrimination against Women; and Convention on the Rights of the Child.

1.13 Conclusion, Discussion and Recommendation

Violence is a problem that calls for a multi-sectoral response. Violence against women is being addressed by an increasing range of actors across various sectors of society. The work being done by various International and national institutions, Non-Governmental Organisations, Women Organisations, Community based Organisations to address the gravity of the issue. Even where the struggle has

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59 Explanation to *Indian Penal Code, 1860*, S. 376 D of *Criminal Law (Amendment) Act, 2013*, S. 9, stipulates that 'for the purposes of this section, imprisonment for life shall mean imprisonment for the remainder of that person's natural life'.

60 *Id., 1860*, S. 376 E, see the *Criminal Law (Amendment) Act, 2013*, S. 9.

61 Justice Verma Report at p. 250. J.S. Verma, Leila Seth and Gopal Subramanium, *Report of the Committee on Amendments to Criminal Law*, Ministry of Home affairs (GOI), New Delhi, January 2013 at p. 250.

62 ICCPR, 1966 para. 3 of Article.7, See *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

engaged a wide variety of people, it is not enough. Each and every one of us has it in us to become a human rights defender, acting to prevent or diminish discrimination.

The international legal and policy framework for eliminating discrimination against women is well-developed, but there is a wide gulf between the standards set, and actual practice at the national and local level. States have the primary responsibility to protect their women, and in most cases are clearly not doing enough. Improvement in laws and institutions is necessary for ending violence, but at the same time positive societal change is also needed in the ways that individual's perception, beliefs and behaviour towards women.

Educational curricula and institutions provide an important opportunity and forum within which attitudes that perpetuate violence against women can be addressed and women's rights might be promoted. The media is an important conduit of public opinion and can influence societal attitudes. Training journalists to report on violence against women in a gender sensitive manner can help to dispel myths and create awareness of the issue among the general public.

The Efforts to improve collection of data on violence against women, including a growing number of population-based surveys to assess the prevalence of violence against women and the creation of national databases should be improved. The availability of more and better quality information, including statistical data, is crucial. Such information allows policymakers to undertake effective legislative and policy reforms, ensure adequate provision of targeted and effective services, monitor trends and progress in addressing and eliminating violence against women, and assess the impact of measures taken.

A stronger focus must be placed on prevention, to complement more effectively the improved laws, policies and programmes and their implementation, monitoring and evaluation. These efforts should be rigorously evaluated to gain a better understanding of their impact and effectiveness, including when they form part of a comprehensive approach to addressing violence against women.

VICTIMS OF DOMESTIC VIOLENCE: A CRITICAL APPRAISAL OF EFFICACY OF THE *PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005*[*]

Gurneet Singh[**]

1.1 Introduction

Domestic violence has been widely prevalent since long but has remained largely invisible in the public domain. Provisions of criminal law to save women from cruelty, dowry death and other offences were already there, however there was no comprehensive civil law to save women from domestic violence this enactment is a civil law and its procedure is mixture of civil and criminal law. The aggrieved person is not required to go to the police for registration of the complaint. The Chapter XVI of the *Indian Penal Code*, 1860 relates to offences affecting human body as well as human life. Offences causing miscarriage, injury to unborn children, exposures of infants and concealment of birth etc. have also been included in this Chapter. Section 498A cruelty to married women by husbands or his relatives and Section 304B dowry death caused by husband or his relatives were also added in the year 1983 and 1986 to curb domestic violence of grave nature against women. Similarly there existed local and special laws also to save women from domestic violence. The offences under the *Indian Penal Code*, 1860 i.e. under Section 304B and 498A are of criminal nature and have been added in the code with a view to help the married women. However there is no such provision in the civil law to give protection to the women from domestic violence. Ours is a tradition bound society where women have been socially, economically, physically, psychologically and sexually exploited from time immemorial, sometimes in the name of religion, sometimes by the social sanctions.[1]

In spite of legal safeguards mentioned above, the condition of women has not improved because of indifferent attitude of police and district administration because domestic violence has been considered as family dispute only. As a result of about ten years efforts by women organizations and persistent efforts of other groups, the Protection of Women from Domestic Violence Bill 2005 was passed by both houses of parliament and the President of India accorded assent on 13th September 2005[2]. In India various forms of domestic violence against women (married, unmarried or elderly; female foeticide, infanticide, sexual abuse including incest, bride burning for dowry, harassment and cruelty, marital rape and wife battering) are prevalent since

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[*] The paper was presented at the Annual Seminar of Ph.D. Programme at Rajiv Gandhi National University of Law, Punjab in March 2013.

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[1] Preeti Misra, *Domestic Violence Against Women-Legal Control and Judicial Response,* Deep and Deep Publications, New Delhi (2007) at p. 25.

[2] After which the bill became Act and was brought on the statute book and came into force w.e.f. 26 October 2006.

long for which provisions already existed in the *Indian Penal Code*, 1860 and various other local and special laws. Majority of victims do not come forward to seek legal remedies. The poor response of victims, to avail the protection available, is due to the fact that the Central and the State Governments have not taken proper measures to ensure wide publicity through television, radio and print media at regular intervals. The reason is over dependency of women over men who may be fathers, husbands or sons. In rural areas women are educationally backward and proper help from police, women cell and village respectables and panchayat members is not forthcoming. All of them advise the victim to compromise with her husband and in-laws so that the joint family system is not broken and children be saved from bad effects of wife-husband's dispute. They would be the greatest sufferers if the family dispute lingers on and is not settled amicably. Furthermore, the society is male dominated. The parents celebrate the birth of a male child with great pomp and show. However the birth of female child is considered great burden on the whole family. She is neither given good education nor brought up in a decent way. Her hardship starts from birth and continues till her death. In these social and family conditions an effective legal system is required to safeguard the interest of women.

1.2 Historical Background

In the Vedic period women enjoyed a fair amount of freedom and equality with men in every sphere of life. They (women) studied in Gurukuls and enjoyed equality in learning of Vedas. Purdah was unknown and women had equal rights in the matter of selecting life partners. Polygamy was rare and that too was found only in ruling class. The royal and rich families gave dowry only in the form of movable gifts. There was no gender discrimination on the ground of sex. Man used to regard women as equal partners in managing and running the affairs of grihastha. In the context of domestic violence against women, their position was on equal footing with men during the Vedic period. Boys and girls had equal opportunity in every field. Marriage was considered a sacrament and husband and wife enjoyed equal position. Sati and dowry were unknown.

However in post-Vedic period various restrictions were imposed on the rights of women and afterwards status of women suffered a great set back because their role was restricted within the four walls of their home. Under these circumstances women also started depending on men for their protection. The position of women started to decline. Remarriage of widow was disallowed and child marriage became order of the day. Manu and other Smritikars ruled out the independence of women and stressed that marriage established the supremacy of men over women. It was emphasized that in childhood, the female child is to be kept under strict supervision by her father, after marriage, the husband and thereafter the son has to maintain strict surveillance. Widow re-marriage was prohibited whereas rite of sati started. Society used to hate the woman who did not commit sati i.e. to burn herself in the pyre of her dead husband.

At the dawn of British rule the position of women in the house and society was at the lowest. Reform movements were started under the leadership of Dada Bhai Naroji, Ishwar Chander Vidya Sagar, Aurbindo, and Mahatma Gandhi. Raja Ram Mohan Roy advocated widow remarriage. 19th century brought a new era for women and

crucial role was played by women like Sarojini Naidu, Sucheta Kirplani, Durgabai Deshmukh, Kasturba Gandhi, Vijya Lakshmi Pandit and many others. Schools and colleges for girls were started in Metropolitan cities.

1.3 Laws for the Protection of Women Rights

Laws were enacted to prevent unfortunate atrocities on women i.e. the *Child Marriage Restraint Act*, 1929, the *Hindu Widow Remarriage Act*, 1856, the *Indian Penal Code*, 1860, the *Indian Evidence Act*, 1872, the *Code of Criminal Procedure* now repealed by new act of 1973, the *Indian Divorce Act*, 1869, the *Parse Marriage And Divorce Act*, 1939, the *Dissolution of Muslim Marriage Act*, 1939 etc.

During post-independence period, the Indian Constitution gave equal rights, equal protection and opportunities to all without consideration of sex, religion, language, place of birth, caste and creed. To implement the Constitutional provisions under Fundamental Rights and Directive Principles of State Policy, other enactments i.e. the *Special Marriage Act*, 1954, the *Hindu Marriage Act*, 1955, the *Hindu Succession Act*, 1956, the *Dowry Prohibition Act*, 1961, the *Dowry Prohibition (Amendment) Act*, 1986, the *Medical Termination of Pregnancy Act*, 1971, and the *Preconception and Prenatal Diagnostic Techniques Act*, 1994. During British period the Government did not interfere in religious affairs and therefore these laws were not fully implemented. However relief to some extent was felt by women.

After independence, the marriage laws gave right of divorce to the wife, marriage age was enhanced and cruelty by husband and his relatives became a ground for getting divorce. Similarly the *Hindu Succession Act*, 1956 gave right of inheriting parents property to the daughter but the male dominated society did not allow it to be implemented fully because testamentary succession was left out of the preview of the *Hindu Succession Act*, 1956. Amendment of the provisions of the *Indian Penal Code*, 1860 and the *Indian Evidence Act*, 1972 for preventing dowry deaths, bride burning and cruelty to the wife were made. New Sections i.e. Section 304-B and 498-A of the *Indian Penal Code*, 1860 and Section 113A, 113B of the *Indian Evidence Act*, 1872 have been added but need for comprehensive civil law for protection of women from domestic violence was greatly felt by women organizations, social associations and educated people.

1.4 Meaning of the term Violence

"Violence against women means any act of gender based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life".[3]

Violence means a use of physical force so as to cause an injury, abusive use of force. According to Osborn's Concise Dictionary, "*violence means unlawful exercise of*

[3] *The Declaration on the Elimination of All forms of Violence Against Women* adopted by General Assembly of the United Nations on 20th December, 1993.

physical force, specifically an act calculated to intimidate by causing fear of personal injury. It means this kind of fear or injury for any member of the family".[4]

Domestic violence has been defined vide Section 3 clauses (a) to (d) and further vide explanation 1 clauses (1) to (4) of the *Protection of Women from Domestic Violence Act*, 2005. Terms physical abuse, sexual abuse, verbal and emotional and economic abuse have been explained in detail vide explanation 2, it has been clarified that domestic violence under Section 3 would consist of the overall facts and circumstances of the case which shall be taken into consideration. Sub-Section (2) of Section 32 further lays down that upon the sole testimony of the aggrieved person, the court may conclude that an offence under Sub-Section (1) of Section 31 has been committed by the accused.

1.5 Object, Scope and Purpose of the Act

The Act was designated to serve the purposes for which it was enacted viz. protection of women from domestic violence either explicit or dormant because evil existed in several families especially in rural or sub urban areas. The victims may be wives, sisters, mothers, widows, elderly women or any other female relative living in a shared household in domestic relationship: The respondents are males and may also be female relatives of the respondent when the complaining woman is the wife or a person living in married relationship with the respondent. The aggrieved women only are authorized to submit the complaint however her male child may also carry the complaint if he does so along with her mother. The object of this Act is to provide for summary procedure to protect women victims of domestic violence[5]. Some of the exceptions to the general rule included in the Act are given below:

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4 Preeti Jain, "Domestic Violence Act, 2005: A Shield for Women", *M.D.U. Law Journal*, Vol. 11 (2006) 44 at p. 47.

5 (a) The aggrieved person entitled to file the complaint is women only whether she is married or unmarried.
(b) The respondent against whom complaint is filed can be husband as well as female members of his family.
(c) The summary procedure has been provided under the act for domestic violence case and the court has to decide it within sixty days. Interim orders to give immediate relief can also be passed and implemented pending decision of the case.
(d) The orders passed by the court are to be executed by the trial Magistrate without waiting for execution application from the victim.
(e) The non compliance of the protection or interim order by the respondent is punishable with imprisonment which may extend to one year or with fine which may extend to twenty thousand rupees or with both.
(f) Breach of protection order or interim order by the respondent under Sub-Section (1) of Section 31 shall be an offence under this Act which shall be cognizable and non-bailable.
(g) If the complaint disclosed offence under Section 498-A or other provision of the *Indian Penal Code*, 1860 or under the provisions of the Dowry Prohibition Act, 1961, the Magistrate may frame charge and try the case by adopting regular procedure. In case, the offence is triable by the court of sessions for regular trial, the magistrate may commit it to that court.

(Footnote No. 5 Contd.)

(a) The Magistrate deciding the domestic violence case is given power to execute the orders passed by him without waiting for an application from the aggrieved woman.

(b) The Protection Officer is an officer of the court appointed to assist the court as well as the aggrieved woman. However there exists a harsh provision for his prosecution if he commits any willful breach of duty assigned to him by the Magistrate.

(c) In case if there is no independent and reliable evidence on the file of domestic violence case except that of the aggrieved woman; the Magistrate shall rely her evidence and decide the case on her evidence alone.

(d) The Magistrate trying the case may not rely only on the individual incident of violence reported to him but shall have to consider the overall circumstances of the case i.e. earlier incidents are to be considered while deciding the latest incident.

The Act is a central enactment the implementation of which was entrusted to the States. The preamble to this Act covers the entire subject matter which is based on fundamental rights to life guaranteed to every person under Article 21 of the Constitution of India. The right to decent and dignified life in the family and effective protection of rights of women against domestic violence has been pleaded forcefully. The need to protect the rights of the aggrieved women and to provide immediate relief as well as compensation and rehabilitation has been stressed therein. The preamble further suggests that protection must be adequate and effective for which machinery to attend to the difficulties of the aggrieved women would be required.

This Act is very comprehensive covering all types of domestic violence. The long standing demand of women organizations and other groups for an effective remedy against domestic violence has been fulfilled. The Act covers all types of domestic violence and provides remedy for women enduring domestic violence or facing the possibility of such violence. The Act seeks to cover all those women where both parties have lived together in a shared household and are related by consanguinity, marriage or adoption and relationship with family members living together in a joint family have been included. Even those women who are sisters, mothers, single woman or woman living with the abuser are also entitled to legal protection under the present Act. The definition of domestic violence includes actual abuse or the threat of abuse which may be physical, mental, sexual, verbal or economic. The Act also seeks to protect the rights of women to secure housing. The Act also empowers the Magistrate to pass and execute protection and interim protection orders and

(Footnote No. 5 Contd.)

(h) The appointment of Protection Officer is to assist the victim to draft application regarding domestic violence and to prepare and submit domestic incident report to the court on the basis of complaint or own information and to assist the court. Similarly any social organization or other non-governmental organizations are to be registered as service provider which would assist the victim in medical examination, treatment and arranging residence in a shelter home.

noncompliance of those orders by the respondent have been made cognizable and non-bailable offences. Provisions have also been made for appointment of protection officers and service providers to help the aggrieved woman. The summary procedure as provided under the *Code of Criminal Procedure*, 1973 shall be followed so that decision is made within the stipulated period and relief given to the aggrieved woman without any delay

1.6 Proceedings under the Act

Magistrate means the judicial magistrate of the first class or the metropolitan Magistrate exercising jurisdiction under the *Code of Criminal Procedure*, 1973 in the area where aggrieved person resides temporarily or otherwise or the respondent resides or domestic violence incident has taken place. The aggrieved person in a domestic violence case is always a woman and the respondent who is subjecting her to domestic violence may be a male person or a female related to her husband. The following procedure is usually followed for the reporting of any case related to Domestic Violence:

1.6.1 Protection Officer

An aggrieved person or a protection officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the protection officer or the service provider. The relief sought for under Sub-Section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the *Code Of Civil Procedure*, 1908(5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off. Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto. The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of the receipt of the application by the court. The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of the first hearing. Protection officer is a key person in the working under this Act. It is he to whom the aggrieved woman may approach for assistance. The appointment of this officer is made by the government under Section 8 of the Act by notification published in the gazette of India. The duties of protection officer are enumerated in Section 9 which include assistance to the aggrieved person, submission of domestic incident report and to assist

the court in compliance of orders passed by the court relating to the case under the enquiry.

1.6.2 Service of Notice

A notice of the day of hearing fixed under Section 12 shall be given by the Magistrate to the protection officer, who shall get it served by such means as may be prescribed on the respondent, and on any other person, as directed by the magistrate within a maximum period of two days or such further reasonable time as may be allowed by the Magistrate from the date of its receipt.

A declaration of service of notice made by the protection officer in such form as may be prescribed shall be the proof that such notice was served upon the respondent and on any other person as directed by the Magistrate unless the contrary is proved. Service of notice through police is avoided under this Act and this duty is assigned by the court to the protection officer.

1.6.3 Counseling

The Magistrate may, at any stage of the proceedings under this Act, direct the respondent or the aggrieved person, either singly or jointly, to undergo counseling with any member of a service provider who possess such qualifications and experience in counseling as may be prescribed. Where the Magistrate has issued any direction, he shall fix the next date of hearing of the case within a period not exceeding two months. After the notice is served on the respondent the court shall in appropriate cases arrange for the counseling of the parties. Such counseling may be arranged for the aggrieved woman even before the notice is served on the respondent.

1.6.4 Assistance of Welfare Expert

In any proceeding under this Act, the Magistrate may secure the services of such person, preferably a woman, whether related to the aggrieved person or not, including a person engaged in promoting family welfare as he thinks fit, for the purpose of assisting him in discharging his functions. The purpose of this provision is reconciliation between the parties therefore the court needs assistance of a welfare expert.

1.6.5 Proceedings to be held in camera

If the Magistrate considers that the circumstances of the case so warrant, he may conduct the proceedings under this Act in camera if he so desires. The disputes under this Act relates to intimate family relations, therefore it is better if the proceedings are not conducted in open court.

1.6.6 Jurisdiction

The court of judicial Magistrate of the first class or the metropolitan Magistrate, as the case may be, within the local limits of which: (a) the person aggrieved permanently or

temporarily resides or carries on business or is employed; or (b) the respondent resides or carries on business or is employed; or (c) the cause of action has arisen, shall be the competent court to grant a protection order and other orders under this Act and to try offences under this Act.

Section 27 of the Act speaks regarding jurisdiction of the court to which the case of violence to be filed. It must be the court of Judicial Magistrate. Any person designated as a Magistrate such as Executive Magistrate, collector or Deputy-Collector or any other officers of the Government who are conferred with magisterial powers, is not the competent court to entertain an application under this Act.

1.6.7 Appeal

There shall lie an appeal to the court of Sessions within thirty days from the date on which the order made by the magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later. There is no provision for second appeal. Similarly no revision lies against the order of the Magistrate; however revision can be filed in High Court against the order of the Sessions Judge.

1.7 Reliefs Available to Victims under the Act

If any act of domestic violence is committed against the victim by a person with whom the victim is/was residing in the same house, the victim can get all or any of the following orders against respondent:-

1.7.1 Under Protection Order[6]

The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from: (a) committing any act of domestic violence; (b) aiding or abetting in the commission of acts of domestic violence; (c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person; (d) attempting to communicate in any form, whatsoever, with the aggrieved person, including personal, oral or written or electronic or telephonic contact; (e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate; (f) causing violence to the dependants, other relatives of any person who give the aggrieved person assistance from domestic violence; (g) committing any other act as specified in the protection order.

This order covers all aspects of protection including a restraint order against the respondent not to interfere with the rights of the aggrieved woman. It is only after a

6 The *Protection of Women from Domestic Violence Act*, 2005, S. 18.

prima facie case is made out that this order is passed by the court. This order is made after giving aggrieved person or respondent a reasonable opportunity of being heard.

1.7.2 Under Residence Order[7] and under General Order

While disposing of an application under Section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order: (a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household; (b) directing the respondent to remove himself from the shared household; (c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides; (d) restraining the respondent from alienating or disposing of the shared household or encumbering the same; (e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or (f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require: provided that no order under clause (b) shall be passed against any person who is a woman. The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person. The Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence. While passing an order, the court may also pass an order directing the officer in charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order. The Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties. The Magistrate may direct the officer-in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order. The Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled to.

This order is passed for providing immediate shelter to the aggrieved woman. If necessary the shelter may be provided in any shelter home maintained by the Government or any Non Governmental Organisations otherwise she is to live in the matrimonial house where she was living at the time of the incident.

1.7.3 Under Special Order

(1)Remove himself/ stay away from place of residence or Workplace, (2) Stop making any attempt to meet the aggrieved person, (3) Stop calling over phone or making any attempt to communicate with her by letter, e-mail etc., (4) Stop talking

[7] *Id.*, S. 19.

about marriage or forcing to meet a particular person of his/their choice for marriage, (5) Stay away from the school of her child/children or any other place where she visits, (6) Surrender possession of firearms, any other weapon or any other dangerous substance, (7) Not to acquire possession of firearms, any other weapon or any other dangerous substance and not to be in possession of any similar article, (8) Not to consume alcohol or drugs with similar effect which led to domestic violence in past, (9)Any other measure required for ensuring children's safety.

1.7.4 An Order for Interim Monetary Relief[8]

(1) Maintenance for her and her children, (2) Compensation for physical injury including medical expenses, (3) Compensation for mental torture and emotional distress, (4) Compensation for loss of earning, (5) Compensation for loss caused by destruction, damage, removal of any property from her possession or control.

Any of the above relief can be granted on an interim basis, as soon as the aggrieved makes a complaint of domestic violence and present application for any of the relief before the court.

1.7.5 Under Custody Order[9]

Notwithstanding anything contained in any other law for the time being in force, the Magistrate may, at any stage of hearing of the application for protection order or for any other relief under this Act grants temporary custody of any child or children to the aggrieved person or the person making an application on her behalf and specify, if necessary, the arrangements for visit of such child or children by the respondent:

Provided that if Magistrate is of the opinion that any visit of the respondent may be harmful to the interests of the child or children, the Magistrate shall refuse to allow such visit.

1.7.6 Under Compensation Order[10]

In addition to other reliefs as may be granted under this Act, the Magistrate may on the application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by the respondent.

The aggrieved woman may claim any one or more of the reliefs provided under the Act. She may claim compensation for injuries suffered by her. Such injuries may be physical or mental. Compensation may be calculated for all the expenses she suffers as a consequence of her eviction from the shared household or for the pain and suffering to which she was made to suffer. The amount of compensation depends on

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8 *Id.*, S. 20 .
9 *Id.*, S. 21.
10 *Id.*, S. 22.

the quality and status of the woman to which she was accustomed and the competence of the respondent to pay.

1.7.7 Power to Grant Interim and Exparte Order[11]

In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper. If the Magistrate is satisfied that an application prima-facie discloses that the respondent is committing, or has committed an Act of domestic violence or that there is a likelihood that the respondent may commit an Act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under Section 18, Section 19, Section 20, Section 21 or as the case may be, Section 22 against the respondent.

Proceedings under the Act are of very urgent nature. Therefore, it becomes necessary for the court to make interim orders before the appearance of the respondent. Such orders may be issued both ex-parte and even after the respondent appears so as to prevent the continuing hardship of the aggrieved woman.

1.8 Rights of the Aggrieved Persons

A police officer, protection officer, service provider or the Magistrate are duty bound to inform the aggrieved person of her rights given below on receipt of complaint against domestic violence or when present at the place of incident or when the incident of domestic violence is reported to him:

(a) Right to make an application for obtaining relief by way of protection order (Section 18) and an order for monetary relief(Section 20), a custody order (Section 21), residence order (Section 19), a compensation order (Section 22) or more than one such orders.

(b) Right to avail services of service providers. Service providers will assist the aggrieved person in drafting the domestic incident report and to provide them medical facilities, accommodation and other services.

(c) Right to the services of protection officers. He will also assist the Magistrate in pursuing the victim's case to provide the victim, compensation and monetary relief.

(d) Right to free legal services under the *Legal Services Authorities Act*, 1987. Again it is the duty of the protection officer to arrange for free legal aid if the victim needs.

(e) Right to file a complaint under Section 498A of the *Indian Penal Code*, 1860.

(f) Right to safe shelter if thrown out of the matrimonial home with the help of protection officers.

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[11] *Id.*, S. 23.

(g) In charge shelter home shall provide shelter with the help of protection officer to the aggrieved person on the request of the aggrieved person, protection officer or service provider.

(h) Medical facility shall provide medical aid on request of the aggrieved person, protection officer, and service provider. Right to reside in shared household.

1.9 Short Comings in the Act

Although the intention of the legislature is to come up with certain concrete laws for the protection of women there are certain flaws in the existing law relating to Domestic Violence. These defects or grey areas are as under

(a) Rights of residence in matrimonial home or shared household for woman regardless of their right on that property, may result that the woman may not allow man to live in that property on the pretext of apprehension of violence. So even on the pretext of the frivolous complaint being filed, the respondent would not be allowed to dispose off the property.

(b) Under the garb of domestic violence there is every possibility of filing wrong or frivolous complaints. This Act has given legal supremacy to women over men under the garb of welfare of women and children. So the powers, as provided under the Act, may be misused to the disadvantage of men. In many cases under Section 498A of the *Indian Penal Code*, 1860 false allegations of dowry demand and physical harassment have come to notice after investigation against husbands and their family members.

(c) Even verbal abuse or name calling has been brought under the preview of domestic violence. Slight incidents referred to in the Act may prove very detrimental to the joint family system and may lead to divorces, broken homes and ultimately the children would be losers. So a little incident of domestic violence if reported may lead to the breakdown of the marriage, resulting ill-treatment directed towards children, as they are the ultimate sufferers of such violence.

(d) Protection officer has been given unlimited powers which are likely to be misused and may be exploited. So check on those powers has to be over there.

(e) Even single statement of woman can be considered and can be relied upon as said by the Act. Now this can be termed as rigid structure of the legislation although some flexibility is there that the whole incidence relating to domestic violence is to be seen actually in practice before awarding sentence.

(f) Sometimes the husband may not be in a situation to pay the monetary relief in that situation the provisions are futile as to who will pay relief in such a situation.

1.10 Conclusion

It has been found through experience that law by itself is inadequate. It needs two more powerful elements- education and economic empowerment. These are the keys to the emerging women. In India there is discrimination between males and females. The picture is depressing because the birth of a daughter is considered to be a bane and the decreasing ratio of female sex is an example to prove this fact. A girl has to struggle even to live in the womb and struggle for life after her birth. One child norm if practiced honestly is very good for the society to check population explosion. But most of the families want a son and not a daughter. It is the mind set up of the society which is to be changed and not by enacting new legislations. The existing laws should be implemented with dedication and honesty. The suggestions which are required to be implemented are as under:

(1) Setting up of family courts is urgently required in the present day scenario, for providing immediate relief to the aggrieved woman. The traditional courts are already overburdened and therefore the cases pertaining to domestic violence and family laws are over delayed and justice is not delivered.

(2) Amendment in definition of dowry in the *Dowry Prohibition Act*, 1961 is required to cover all aspects of the present day requirements. A clear cut division has to be made that no dowry is to be given or taken. Strict laws are to be made in this respect, so that the greedy persons would be discouraged. Dowry is responsible for great evils in the society, like, female foeticide, infanticide, sex selection, cruelty and dowry deaths.

(3) Property of husband/in-laws in cases of dowry death should be confiscated and delivered to the heirs of the deceased. This step would be beneficial to put an end to this evil practice.

(4) Unmarried women should be brought under section 498A of the *Indian Penal Code*, 1860. Now only married woman are entitled to present a case of cruelty against her husband and his relatives.

(5) Domestic violence cases should be registered by the protection officer in the same manner as the F.I.R. is recorded in the police station. The record pertaining to domestic violence is also required to be maintained in the same way as police record.

In spite of provisions of law mentioned above, domestic violence to women/children has been increasing day by day because domestic violence is considered as family dispute by the law enforcing agencies. The society which is male dominated is also not interested in saving women from this evil. Firstly this problem remains hidden within the four walls of the house and in case some women dare to come out with their complaint the respectables and panchayat members take the side of the abuser and pressurize the victim to compromise because going to the police or any other law enforcing agency is considered against the respect of the village. As mentioned above, the enactment of the law alone does not serve the purpose for which the

provision of law or any enactment has been brought on the statute book unless it is earnestly implemented. Implementation of laws should be taken as a sacred duty by the concerned officials. This is very important in order to give effective relief to the aggrieved person without delay. Study of the newspapers of recent months would show that cases of incest, rape, rape by neighbourers or by persons known to the family, kidnapping, rape and murder, dowry death, cruelty, suicide by burning, drowning or poisoning, marital/custodial rape, suicide due to failure in love or examination and honour killing are daily reported.

WOMEN EMPOWERMENT: AN EXPOSITION OF PANCHAYATI RAJ LAWS AND LAWS ON RESERVATION FOR WOMEN

Dr. (Mrs.) Saroj Bohra *

1.1 Introduction

Rural Local Self government in India is known by the popular name Panchayati Raj. It has been in operation since the early years of independence. Even today, more than 70 percent people of India live in rural areas. Organization of Panchayati Raj in India came as a revolutionary step towards rural development. In October 1957, the Balwant Rai Mehta committee submitted its report. It suggested the organization of Panchayati Raj in rural India. It was to act both as an instrument of rural local self-government as well as an agency for community development. It recommended the creation of the three tier Panchayati Raj- Panchayats at the village level, Panchayat Samities at the block level and Zila Parishads at the district level. The National Development council accepted the recommendations of Balwant Rai Mehta committee in 1958. The Government of India then called upon all the states to implement these recommendations. On 2 October 1959, Rajasthan came to be the first State to establish Panchayati Raj. Thereafter, Andhra Pradesh, Punjab, West Bengal, Gujarat, Madhya Pradesh, Orissa, Bihar, Kerala, J & K, Himachal Pradesh and in fact all states introduced Panchayati Raj in their respective areas by passing necessary laws.

India is predominantly a rural country. Panchayati Raj Institutions are the grass root units of self-government which have been proclaimed as the vehicles of socio-economic transformation in rural India. The effective and meaningful functioning of these bodies would depend on active involvement, contribution and participation of its citizens, both male and female. India is perhaps the first country to recognize this social fact underlined by Lenin on the International Working Women's Day in 1921 and to have taken concrete measures to draw women into leadership positions and thereby into politics by giving them one-third reservation in what may be called as the third tier of governance - the Panchayati Raj.

1.2 Panchayati Raj System for Democracy

The 73rd amendment paved the way for a fundamental change in the way public goods are delivered in rural areas in India. It introduced the three-tier Panchayati Raj System and Municipalities. These new legislations may be helpful in decentralization of power at grass root levels. However, in a country with a heterogeneous population, a danger is that decentralization will make it more difficult to protect the interests of weaker segments of the population, notably women, the Scheduled Castes (SC), and the Scheduled Tribes (ST), and, in particular, to ensure that they get their fair share of public goods. To alleviate this concern, the 73rd amendment required that a

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fraction of seats at all levels be reserved to women, SC's and ST's. The amendment is the first one in India that mandated women's reservation, and this made it a landmark piece of legislation as well as, to some extent, a test case.[1] The amendment provided that one-third of the seats in all Panchayat councils, as well as one third of the Pradhan positions, must be reserved for women.

The Panchayat Raj system is aimed at:

- Establishing the three-tier system of Panchayati Raj in all states with a population of over 20 lakhs.
- Developing a system of decentralization
- Promote people's participation for enhanced socio-economic growth and inexpensive delivery of justice
- Empowering villagers
- Reserving seats for Schedule Castes, Schedule Tribes and Women
- Preserving the natural resources of villages
- Eliminating the social evils of domestic violence, dowry system and alcoholism, with local participation.

1.3 Constitutional Provisions

The Constitution of India has guaranteed social, economic and political rights to the women in order to promote equality of status and opportunity in all spheres. Equality in all spheres is inseparable from active political participation. The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles of State Policy. The Constitution not only guarantees equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women. India has been making a marked shift in its approach to women's issues from welfare to development while keeping the empowerment of women as the central issue in determining their status in the society. The National Commission for Women was set up by an Act of Parliament in 1990 to safeguard the rights and legal entitlements of women. The 73rd and 74th Amendments of the Constitution in 1993 have provided for reservation of seats in the Local Bodies of Panchayats and Municipalities for women, laying a strong foundation for their participation in decision-making at the local levels.

The various provisions in Part III & IV of the Indian Constitution have direct or indirect bearing on social security measures and also on promoting welfare state. The Preamble secures to all it citizens social, economic and political justice; liberty of thought, expression, belief, faith and workshop; equality of status and

[1] There are reservations for women in many other countries, however. Quotas for women in assemblies or on parties' candidate lists are in force in the legislation of over 30 countries (World Bank (2001)), and in the internal rules of at least one party in 12 countries of the European Union (Norris (2001)).

opportunity, and to promote among them fraternity so as to secure the dignity of the individual and the unit and integrity of the Nation. Further also articles 14, 15(3), 16(2), 21, 23, 24, 38, 39, 40, 41, 47, & Concurrent List III in the Seventh Schedule of the Constitution of India. *Organization of Village Panchayats* laid down under article 40 states that the State shall take steps to organized village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self Government.

Part IX of the Constitution deals with 'The Panchayats' from Article 243 to Article 243 O. The various provisions covers :Article 243 A - Gram Sabha, Article 243 B - Constitution of Panchayats, Article 243 C - Composition of Panchayats, Article 243 D - Reservations of seats , Article 243 E - Duration of Pachayats, etc., Article 243 F - Disqualifications for membership, Article 243 G - Power, authority and responsibilities of Panchayats, Article 243 H - Powers to impose taxes by and Funds to the Panchayats, Article 243 I - Constitution of Finance Commission of review financial position, Article 243 J - Audit of accounts of Panchayats, Article 243 K - Elections to the Panchayats, Article 243 L - Application to union territories, Article 243 M - Part not to apply to certain areas, Article 243 N - Continuance of existing laws and Panchayats, Article 243 O - Bar to interference by courts in electoral matters.

1.4 Women's Empowerment and Pancayati Raj

Empowerment is a multidimensional social process that helps people gain control over their own lives. It is a process that fosters power (that is the capacity to implement) in people for use in their own lives, their own communities and in their own society, by acting on issues that they describe as important. Above all, empowerment is a result of participation in decision-making[2].

The status of women in India has been undergoing a sea-change. Supported by Constitutional guarantees to ensure dignity and equal opportunities, their active participation in all walks of life including education, politics, sport etc., has been growing. Taking note of women's role in the nation-building activities, the Government had declared 2001 as the year of *Women's Empowerment* by adopting a National Policy to offer 'Swashakti' to women. Several laws have also been adopted to empower women socially, economically, legally and politically.

Women's empowerment refers to the process by which women acquire due recognition at par with men, to participate in the development process of the society through the political institutions as a partner with human dignity[3]. So, why is empowerment through Panchayati Raj? According to the Document on Women's Development (1985) women's role in the political process has virtually remained unchanged since independence. Broad-based political participation of

2 N.C. Saxena, "What is meant by people's participation", *Journal of Rural Development*. Vol. XLIV (2000) at pp. 48-57.

3 G., Palanthurai, "The Genre of Women leaders in local bodies: Experience from Tamil Nadu, *Indian Journal of Public Administration,* Vol. XLII (2001) at pp. 38-50.

women has been severely limited due to various traditional factors such as caste, religion, feudal attitude and family status.[4] As a result, women have been left on the periphery of political life. Observing this dark picture and considering the role of rural India, the country's backbone, the Government had taken several measures to strengthen Pachayanti Raj system with the active participation of women, 73rd Constitutional amendment Act came to provide them an opportunity to ventilate their grievances and to take active part in decision-making process in the local level. This gave a boost to increase the number of women being elected to the three tier system, an indication to suggest their political empowerment. It has envisioned people's participation in the process of planning, decision-making, implementation and delivery system. The Panchayat Acts of State governments have subsequently been amended to incorporate the stipulations of the central Acts thus the Constitutional mandate has heralded uniform pattern throughout Indian states.

1.5 Reservations and Women's Participation In Decision- Making

The process of decision making is important in political field. This process reflects power. This process is related to leadership. The participation in this process influences politics. Indian society is male-dominated. Generally, male leadership dominates the process of decision making. The women's participation in this decision making process currently is negligible.

The reservations and actual women's participation in decision-making are two different things. Though reservations are provided, women's actual role in active politics and decision making is questionable. 'Decision making for the community and the exercise of political powers is still regarded as an exclusive male preserve, this is clear from the entirely male composition of the traditional panchayats, either of villages or of caste groups'

But the reservation will surely provide the platform for women to decide and generate the policies for welfare. The opportunity to participate and represent is the real gift of this quota system. The reservations are significant in our democracy. When the reservations for women were introduced in 1993, the benefits of reservations are still enjoyed by male candidates as women are used as just rubber-stamps. The women also entered politics as a need of their family. But now the situation is changing. The educated women candidate are using the political opportunity to serve society .They are enjoying the pride to be a representative of people in democratic country. The women candidates are more aware of their role in urban area. But in rural areas, women candidates are still dominated by males.

1.6 Women's Reservation

The Parliament has power to make law for the whole or any part of the territory of India for implementation. The Constitution of India, 1950 makes certain

[4] *Women's Link*, "Women in Local Governance", Vol. 10, No. 3, (July-September 2004) at pp. 22-23.

special provisions for women. Article 14 of the Constitution of India prohibits class legislation but permits reasonable classification. However, the classification must be based on or some "intelligible differentia" and should have a "rational nexus" with the object sought to be achieved by the act or legislation.

In view of classification and object legislation "women" can be treated as a class and special laws can be made in their favour. It is true that various provisions have been declared valid all within the framework of the Constitution of India, where women have been given special treatment. Such provisions of law have been declared by the Courts as "permissive classification" not violating the principle of equality under Article 14 of the Constitution provided the classification is not arbitrary.[5]

The right to equality as enshrined under Articles 14 and 15 of the Constitution of India means the equality of opportunity, equality before law, equal protection of the laws, not discriminating against any person on grounds of sex, religion, caste and place of birth and no discrimination in the matters of public employment on the grounds of sex only as provided under Article 16 of the Constitution. A woman shall not be denied a job merely because she is a woman. In its landmark judgment the Apex Court in ***Air India v. Nergesh Meerza***,[6] has held that a woman shall not be denied employment merely on the ground that she is a woman as it amounts to violation of Article 14 of the Constitution.

The reservation for women in public employment based on reasonable classification is not unconstitutional. However, under Article 15 of the Constitution the State is empowered to make special provisions for women. The concept behind Article 15 of the Constitution is to make protective discrimination.[7] However, there can be no relaxation at the highest level in the medical institution for purpose of admission.

It is submitted that the reservation for women in public employment is a constitutional goal. Women deserve equality in public employment, however, in certain aspects they are to given preferential treatment so that they can come to mainstream along with the men. In ***Savitri v. K.K. Bose***,[8] the Allahabad High Court made it clear that special provision for women as a class can be made, but not to benefit an individual woman. However, exclusive reservation of posts in reservation offices of Railways for women alone is volatile of Articles 14 and 16 of the Constitution of India.[9] Thus, exclusive reservation for women in public employment is not constitutional.

Reservation of seats for women in local bodies and in educational institutions cannot be taken to mean as to discrimination on ground of sex. For example in ***T***

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5 Anjali, Kant, *Law Relating to Women and Children,* Jain book Agency, 3rd ed. (2012).

6 AIR 1981 SC 1829.

7 *Preeti Srivastava v. The State of M.P.,* (1999) 7 SCC 120 .

8 AIR 1972 All. 305.

9 *Ambujan v. Union of India* AIR 1980 Mad. 214.

Sudhakar Reddy v. Government of A.P.,[10] has upheld the Constitutional validity of proviso to Section 316(1)(a) of the Andra Pradesh Cooperative Societies Act, 1964 and of the relevant rules framed there under, the Court relying upon the mandate of Article 15(3) of the Constitution read with the relevant rules providing for nomination of two women members by the Registrar of the managing committee of the cooperative societies with a right to vote and to participate in the committees meeting. The Supreme Court upheld the validity of said Act and Rules framed there under on the ground that Article 15(3) of the Constitution permits the making of special provisions for women.

In 1993 by the 73rd and further constitutional amendments the reservations of seats for women in panchayat and in the municipalities have been incorporated by inserting Articles 243(b), (d) and 243(t). According to the mandate of the Article 243(b) of the Constitution in Panchayat, not less than one-third of the total number of seats is to be filled by direct election in every panchayat by women. These seats may be allotted by rotation to different Constituencies in a Panchayat which shall be not less than one-third of total member of seats. The Chair- person in the Panchayat at each level shall be reserved for women. Article 243(t) of the Constitution makes similar provisions regarding reservation of seats for women in the municipalities. Thus, the Government on the strength of the Constitutional powers made a successful reservation of 33% seats for women in the local bodies which are considered as a pioneer legislative endeavour.

Recently, the Parliament discussed the 81st Constitutional Amendment Bill seeking to reserve one-third of seats in Lok Sabha and State Assemblies for women, though, the Bill has been referred to a joint committee of Parliament and is yet to be passed.

Further the Constitution (One Hundred and Tenth) Amendment Bill 2009 for enhancing reservation for women in panchayats in all tiers from 33 to 50 percent to ensure better demographic representation to the Scheduled Castes and Scheduled Tribes is pending.

In the view of aforesaid Constitutional provisions, it can be said that India has moved a big step forward in empowering the women to participate in the political process at the policy decision making level.

1.7 Positive Effects of Women Reservations

The provision of reservations is the part of efforts to bring the women in active politics. The reservations will provide the opportunity for women candidates to understand and solve the local problems. The local self government has to deal with local problems. These problems are related with day to day life of people. The problems of village are supposed to be solved at village level. Thus local self government is an important part of life of people. The women can understand the problems more sensitively. The problems related to the unemployment, drinking

[10] 1993 Supp. (4) SCC 439.

water, roads, electricity, schools and health can be solved by women with greater priority. The other problems especially related to women like domestic violence, malnutrition, maternal mortality etc., can be tackled by sincerity by women candidates. The women can change the face of Indian democracy. The progress of local units will surely accelerated due to responsible women candidate. The positive effects of reservations will change the dynamics of politics.

1.8 Policy Analysis

The 73rd constitutional Amendment have created space for women in political participation and decision making at the grass root level by providing that 1/3 rd of the seats are reserved in all over the country. The Constitutional Amendment Act, 1992 says-"It provides reservations for women in PRIs set up in two ways; for the office of the members and for that of the chairpersons." As per the clause (2) and (3) of Article 243(d), not less than one third of the seats meant for direct election of members at each tier of the Panchayats are to be reserved for the women.

O.P. Bohra[11] states that, 73rd Amendment Act, mainly aimed at decentralizing the power and also removing the gender imbalances and bias in the institutions of local self government. He justifies the rationale to provide reservations for following reasons, what is the actual intention of our policy makers. Seventy third Constitutional Amendment actually aim for 'Shared perception of justice, deprivation and oppression.' Shared experience of marginalisation vis-a-vis power structure. Collective empowerment through representation and democratic process will give them voice, feelings of solidarity and democratic politics. Affirmative action will build a critical mass of local leadership of such groups which will be active participants in the strategic decision-making.

Devaki Jain[12] in her analysis of the 73rd Constitutional Amendment writes that the main intention of the policy makers behind this reservation is two-fold one is the democratic justice and second is resource utilization (human). She further states that as the half of the population are women, the country's development cannot achieve without the proper participation of woman.

Bidyut Mohanty [13] states that in order to make our democracy legitimate, women will have to make their full contribution in the political stream. The empowerment has been defined here as the change of self-perception through knowledge. She clarifies that by providing reservation, our policy makers intention was not only to improve only the number of elected leaders but also to improve their economic independence, access to resources as well as to education so by examining their socio-economic situation we can derive the conclusion

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11 O.P, Bhora, "Women in Decentralised Democracy", *Journal of Rural Development*, NIRD, Hyderabad, Vol. 16(4), (1997) at pp. 637-683.

12 Devaki, Jain, Women: New vision of leadership: A presentation at Global Forum, Dublin, (9-12 July 1992).

13 Bidyut, Mohanty,*Women and Political Empowerment*, Institute of Social Science, New Delhi (1997) at pp. 53.

whether woman are really 'empowered'. However Dr. Mohanty suggests that the conditional steps for empowerment are clear beginning in this direction. P. Manikymba[14] states that the makers of Panchayati Raj system desired rural woman should not only become a beneficiary of development, but more importantly contributors to it. Analyzing the Balawant Rai Mehta Committee she states that Mehta Committee considered the condition of the rural woman at length and felt that they should be assisted to find ways to increase there incomes and improve the condition of their children. The committee was particular that woman should find representation in the rural political institutions. Then Ashok Mehta Committee according to her laid special emphasis on the need to recognize and strengthen women's constructive decision-makings and managerial rule.

Bhargava and others [15] writes that it was to improve women's representation that the policy of reservation was introduced. According to them, reserving seats for women in the political institutions will provide them an opportunity to raise their grievances and other related social and economic problems in a formal forum, a political process necessary to ensure the improvement for all women in all spheres of life.

Usha & Bharati[16], states that there has been empowerment of women in certain fields. The primary goals for the participation of women in grassroots politics for participatory development will help them to increase their empowerment. policies .The main position of 73rd Constitutional Amendment involves the participation of women as voter, women as members of political parties, women as candidates, women elected members of PRI's taking part in decision making, planning implementation and evaluation. She stressed that reservation provisions are providing a guarantee for their empowerment.

Sudhir Krishna[17] mentioning the aim behind 73rd Constitutional Amendment states that this amendment was made to provide not less than one-third seats including the offices of chairpersons for women in PRI's at all levels and role of women in development programmes.

1.9 Responsible Democracy

The strong democracy needs the base of efficient grassroots- organizations. 'For democracy to be successful at the national level, the grassroots organizations have to be strong. 'The Panchayati raj as postulated by Mahatma Gandhi was given a place in article 40 of the Indian Constitution. This was really an integral part of the concept of 'Pooran Swaraj' His concept of 'Pooran Swaraj' meant

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14 P., Manikymba, *Women in Panchayat Structure*, Gian Publications, New Delhi (1989).

15 B.S., Bhargava & Manu, Bhaskar, *Women in grassroots democracy-A study of Kerala*, University of Kerala/ ICSSR, New Delhi (1992).

16 M.S, Usha & Bharati, Mahapatra-Women's Link, *Women's Empowerment*, Vol. 8, No. 2, (April-June 2002) at p. 44.

17 Sudhir, Krishna, "Women and Panchayati Raj: The Law, Programme and Practices", *Journal of Rural Development*, Vol. 16 (4), *NIRD*, Hyderabad (1997) at pp. 651-662.

several levels of autonomous development of local communities.'[18] Gandhiji's idealism regarding Panchayati Raj is relevant even today. Panchayati Raj can serve as base of people's participation. 'Gram Sabha' is the most important mean for public participation. There is a need of political awareness among the voters. The voters are directly responsible for their representatives. From the grassroots level, people's participation should increase. Then in the real sense reservations for women will serve as important decision. As voters and as a citizen women can contribute a lot. The political awareness among women must be increased. Pandit Nehru said, "India will progress only when the people living in villages become politically conscious. The progress of our country is bound up with the progress in our villages."[19]

The village is basic unit for country's progress. To connect the rural area with technologically literate cities, the candidates must be well educated and capable. The common voters should be aware of challenges in society. The reservation for women is surely a positive step but it is a 'mean' not an 'end'. Through this opportunity women's political awareness should be accelerated. According to Lord Bryce 'the best school of democracy and the best guarantee for its success is the practice of local-self government.'[20] Efficiency of Democracy is related with local self government. The efficient local self government is the step toward Good Governance. The world is becoming smaller today. There is a need of hi-tech and strong women representative even at grassroot level.

1.10 Conclusion

Women's empowerment is not against men, but against the system of patriarchy and all its manifestations. The empowerment spiral transforms every person involved – the individual, the collective and the environment.

The method of measuring and evaluating women's empowerment and progress is by looking at whether women status has improved as a result of being in panchayats? Whether awareness levels of women in panchayats has increased? Whether the ability of effective participation in panchayats has increased? Measure whether the women have been raising problems in panchayat meetings. The issue of women's empowerment, which enables women to assert their political power, has been on the anvil of discussion at many levels in India. The Beijing conference (1995) drew particular attention to the neglect of women in political structures all over the world and the importance of bringing women into political arena.

The 73rd Constitutional Amendment providing for one-third of the seats to women members in Gram Panchayat is considered a land mark attainment towards women empowerment. These provisions are basically to create more

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18 Shakuntla, Sharma, *Grassroot Politics and Panchayat Raj*, Deep & Deep Publication, New Delhi, p. 2.

19 *Id.*, p. 3.

20 Sharad, Ghodke, "Women's Reservations are not Sufficient for Responsible Democracy" *Indian Streams Research Journal,* Vol. I, Issue IV, May 2011: Politics [ISSN 2230-7850] at p. 5.

awareness among women and to strike a greater gender balance in the decision making process. The provision of reservations for women in the panchayats provides tremendous scope and opportunities for women to participate in public life and decision-making process. It is a big step in the process of political empowerment of women. Though initially at least reservation appears to be the only way to bring women into panchayats, there is a need to ensure their effective participation in the functioning and decision making process at the grass-roots level through a process of sustained capacity building.[21]

Women are empowered to play an effective role in panchayats, in terms of being fully aware and able to use their full potential in carrying out their roles and responsibilities, in making decisions etc. The 73rd Constitutional Amendment in which a provision has been made for 33.33 per cent women's reservation is an act of positive discrimination. It has not only unpacked gender relations but also transformed the quality and thrust of local self-government. It provides opportunities for women to assert their rights over resources and have a definite say in the development process. While it enables women to develop a greater understanding of the political structures and systems of governance and how to participate in panchayat.

Undoubtedly the 73rd Amendment to the Constitution has given Indian Women innumerable opportunities to redefine their power with which a large number of women have been brought into the Panchayati Raj institutions. At the same time, it is highly paradoxical, that inspite of their inclusion into the Panchayati Raj Institutions they are not actively participating in the decision making process. Effective participation demands skill, knowledge and attitude which are to a large extent conspicuously absent in women. The need for systematic training and orientation is therefore necessary to empower the women members to exercise their authority and to access the resources available to transform the existing conditions of existence to a better one. It is a need of the hour that the women agencies and movements should frame their own agenda for women's empowerment in all spheres of life and make it a mass - movement. It should challenge political parties and groups to fulfill their commitment regarding gender equality. Thus, it is high time to make women move from 'critical mass' to 'critical action'.

However, providing reservation in public employment is a different matter but giving of reservation in Panchayat, Municipalities, Parliament and State Assemblies on the ground of empowerment of women, without bringing them into educationally, and mentally advanced, such reservation is likely to prove counterproductive. The educational and social institutions are required to take herculean endeavors and it is desirable that Indian women should undergo systematic training before they enter into Parliament and Assemblies under the policy of reservation. In absence of adequate training and temperament women are likely to be exploited or they would become puppets in the hands

[21] C., Hemalatha Prasad, "Empowerment of Women in Panchayati Raj Institutions.", research Report Series – 70, Women in Gram Panchayat, in 10 selected gram panchayats across the Udupi Taluk, National Institute of Rural Development (2005) at p. 78.

unscrupulous men. It is submitted that agitation of reservation in political field needs to be suspended.

The empowerment of women is recognized globally as a key element to achieve progress in all areas. In spite of many conventions and time bound measurable goals world statistics speak of deplorable state of women and they are marginalized from enjoying the fruits and benefits of equality and independence status. Women in both socio-economic and political levels have been inferior to men in the context of Indian Society. The Constitution of India talks about equality of men and women. But family status in Indian context is judged on account of male seniority and not of the female. Women are yet to be accorded equal status by the society through Panchayati Raj. However realizing the needs of women empowerment, since Independence special emphasis was laid on the practical needs of women. Its purpose was to bring women into development as passive beneficiaries of development.

Women reservation has led only to formal and not real empowerment of women in the Panchayats. It is seen that the participation of the women shall have to get co-operation from their family members. Participation of women in preparing budget and plan is also not to the desired extent and it is dissatisfactory. It is only due to less weightage given to the women due to patriarchal and male dominated social system and age old social taboos against women in the rural area.

1.11 Suggestions

Here are some suggestions for the better involvement of women in Panchayati Raj for the betterment as well as the progress of the State.

(a) An important requirement for bringing about empowerment of rural women is to bring about an attitudinal change in both men and women. The feeling that women are meant for household activities and bearing children needs to be replaced by a feeling of equal partnership of women and men. To inculcate this, they should be imparted education for bringing about social and political awareness among both.

(b) Studies on women in politics have emphasized the contact with outside in the political process. There could be two ways of doing it. Firstly, interaction between enlightened rural women and illiterate elected women leaders should be encouraged. Secondly these women could be taken out to the urban areas and their interaction with educated urban elected women representatives be arranged.

(c) There should be increased emphasis on ensuring the participation of women in the meetings of Panchayats at all the levels. This is needed to promote and enhance their leadership qualities and self-confidence. It will help them to perform better in the Panchayats to ensure their participation in the meetings. Attendance of all women must be made compulsory from Gram Panchayat to Zilla Parishad.

(d) The women should also be encouraged to organize themselves. It can be effectively used as an instrument to mobilize women of the village. Some successful women's organizations can also act as catalytic agents for encouraging women's participation in social and political activities. The Government should provide financial support and infrastructure to some of the successful women organizations to take up the responsibility of encouraging the women elected representatives. This task could also be taken up by the leaders of women's movement in the State. They can also provide support to sensitize the rural women.

(e) Incentives play a vital role in ensuring the participation of elected representatives in decision making. It has been noticed that there are very active and enlightened women leaders at all the levels of Panchayat, who have been successfully implementing the developmental scheme and have ensured over all development of their constituencies. Such leaders need to be encouraged by publicizing their leadership qualities and honoring them in public meetings. It will certainly encourage other women representatives and their success stories and good practices will get publicised.

(f) The genuine NGOs are identified for entrusting them the tasks of training, encouraging, organizing, emblazing and guiding the elected women representatives.

(g) National Literacy Mission and other organizations engaged in the Sarva Shiksha Abhiyan should also be assigned the responsibility of educating the rural men and women regarding the significance of Panchayati Raj and empowerment of women.

(h) The media, both print as well as electronic can play vital role in restructuring the rural society. It can act as an agent of political socialization for inculcating the values of gender equality and gender justice.

(i) The curriculum for the students at the primary, secondary and higher secondary levels should be so modified as to promote gender sensitivity among the students. There should be chapters on Panchayati Raj and Women Empowerment in all the classes at the school level and compulsory questions be set on these in the examination.

(j) The unfinished agenda of Women Empowerment is finished by enacting an Amendment for providing reservation for women in the National Parliament and State Legislatures. The reservations at local level are not enough for the Women Empowerment.

Thus women's engagements and participation began virtually from a scratch in Panchayati Raj institutions. The journey of women leadership in local governance is not long. She is still in her learning phase to take up roles that were never of her concern in the past. It is true that only women can effectively voice their pent up feelings, requirement and perspective in development processes. Thus preparation of women is important to voice needs and ideas of this fraction of society in development.

HUMAN RIGHTS AND NATIONAL MOVEMENT

Rachna Sharma*

1.1 Introduction

Human Rights movement represents the historical journey travelled by humankind ever since the beginning of the institutionalized political and social order. There are a few phenomena that have made such a profound impact and a few movements in history that have acquired a universal presence and a powerful potential in the totality of human experience. Human Rights concept finds an expanded expression and constantly covers new areas as human society continues to evolve to a higher level of development.[1] The modern version of human rights jurisprudence took a firm root during the British rule in India. The entire history of the freedom movement in India can broadly be called as the history of human rights struggle.

The Indian National Movement was, as a matter of fact, a grand project to build a modern India along democratic and civil libertarian lines. This larger struggle encompasses in itself the fight against the British imperialism and it was seen as a precondition to the development of India as a country where people would be able to defend their basic human rights.

The main focus of this paper is to portray that human rights enjoyed by the people of India, in however limited a measure, is a legacy of our national movement. At the same time, it also focuses on the different ways in which the national movement practiced and demonstrated its concern for human rights.[2]

If we look at the records and documents of the national movement, speeches and writings of its leaders, one would not find the term 'human rights' anywhere. However, this does not mean that this concern did not exist during the national movement. Although the term 'human rights' is of later origin and came into vogue only at the end of the Second World War in 1948, the common expression used before the Second World War was 'civil liberties'. The concept of civil liberties was about two hundred years old and could be dated back to the French Revolution of 1789. It was this understanding which was inherited by the leaders of the national movement and they made it an integral part of their struggle against the British imperialism.

1.2 The National Movement and Recognition of Rights

The Indian National Movement was, undoubtedly, one of the biggest mass movements the modern society has ever seen. It was a movement which galvanized millions of people of all classes and ideologies into political action and brought to its knees a mighty colonial empire. At the beginning of the nineteenth century, just before the start of the national movement, when these ideas were applied to the

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1 For more details, see: *http / www. rightsedu. net / philoso. htm.* Visited on 28 February 2011.

2 Tapan Beswal, *Human Rights Gender and Environment*, Viva Books, New Delhi (2008) at p. 108.

Indian society, they acquired a uniquely Indian character. During the course of social reforms, various human rights came to be looked at as individual rights, rights of the community and those of the nation. All the three were expressed throughout the nineteenth century. For example, the campaigns for the removal of *sati* and the advocacy of widow remarriage were projected as important individual rights. Leaders like Raja Ram Mohan Roy, Ishwarchandra Vidya Sagar and others championed these issues as a part of an individual's basic rights. Similarly, the low caste leaders like Jyotiba Phule fought for the rights of the community as a whole. And leaders like Bankim Chandra and Vivekanand took the initiative in projecting rights of the nation. All these concerns gave a new direction to the national movement. The renaissance and the enlightenment also enabled the intelligentsia at that time to draw upon the western liberal ideas and to critique the indigenous social, cultural and intellectual practices on the basis of rational and humanistic criteria.

However, the sources which shaped their concerns were not exclusively western. The traditional influences had an equally important presence. Their engagement with tradition was not revivalist, but creative and critical which led to a hybridity of sorts, combining often traditional sanction for argument and legitimacy with notions of social justice and political advantage.[3] In 1867, Vishnubawa Brahmachari wrote a treatise on benevolent government and formulated the outline of an egalitarian social and political order and its practical functioning on the lines of primitive communism, deriving his ideas exclusively from traditional sources. Keshab Chandra Sen who had visited England and had come in contact with the socialist ideas, exhorted the proletariat, in one of his orations, to rise up for their rights.[4] Thus we can say that the national movement derived its inspiration from the classical European doctrine of 'rights' and also its creative application during the social-reform movements in the nineteenth century India.

The leaders of the national movement adopted variety of ways by which the issues of people's human rights were introduced into the Anti-Imperialist struggle.

(i) Giving these issues top priority on its agenda.

(ii) Constantly making demands from the Government especially at the initial stage of the movement.

(iii) Educating the people regarding their rights and conducting struggles around these issues.

(iv) Demonstrating through practice, whenever they could, their utmost concern for civil liberties and human rights.

The Indian National Movement was fully committed to a polity based on representative democracy and the full range of civil liberties for the individual. As a

3 K.N. Pannikar, *Colonialism, Culture and Resistance*, Oxford University Press, New Delhi (2007) at pp. 11-12.

4 *Id.*, at p. 14.

matter of fact, it provided the experience through which these two could become an integral part of the Indian political thinking.[5]

Starting from the turn of the twentieth century, the nationalists demanded the introduction of adult franchise. Indian leaders from nineteenth century onwards constantly criticized the British government for its non-representative character and questioned its credentials for preparing a constitution for India. Motilal Nehru went to the extent of preparing a national constitution in 1928 under the name of Nehru Report. Although it was rejected by the British government, it inspired the Indian people and reaffirmed their capacity for governing themselves.[6] Later on, the constitutional proposal of the Sapru Committee (1945) contained very forceful arguments in support of the incorporation of the fundamental rights in the Indian Constitution.[7]

Much attention was paid to the defense of the freedom of the press and speech against attack by the colonial authorities besides the promotion of other political and economic policies. The Indian National Movement emphasized upon the political rights as a reaction against the exploitative and repressive character of the British rule. At the same time the nationalist ideology also emphasized upon social and economic rights, as evident from their inclusion in the Constitution of India formulated by the leaders of the national movement.[8] Even prior to the framing of the Constitution for India, Mahatma Gandhi had announced before the Second Round Table Conference that the aim was to establish a political society in India in which there would be no distinction between high class and low class people; that women should enjoy the same rights as men; and dignity and justice social, economic and political be ensured to the millions of India.[9]

This was the main objective which inspired Jawahar Lal Nehru in drafting the historic 'Objectives Resolution' in the Constituent Assembly and which was adopted on January 22, 1947. Clause 5 of the Resolution stated that this Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign, Republic and to draw up for her future governance a Constitution.[10]

The Indian Constitution (1949) was drafted even before the Universal Declaration of Human Rights (1950), however, it was adopted at a time when the discussions for the Universal Declaration were in the air. The framers of the Indian

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5 Bipan Chandra, Mridula Mukherjee and Aditya Mukherjee, *India After Independence (1947-2000)*, Penguin Books (2002) at p. 21.

6 Salil Mishra, "Indian National Movement and Human Rights", Syed Mehartaj Begum(ed.), *Human Rights in India: Issues and Perspectives,* A.P.H. Publishing Corporation, New Delhi (2000) 161 at p. 162.

7 O.P. Dhiman, *Understanding Human Rights: An Overview*, Kalpaz Publications, New Delhi (2011) at p. 219.

8 Arun Ray, *National Human Rights Commission of India: Formation, Functioning and Future Prospects*, Atlantic Publishers, New Delhi (1997), p. 63.

9 Satnam Singh Deol, *Human Rights in India: Theory and Practice*, Serials Publication, New Delhi (2011) at p. 105.

10 *Id.*, at p. 106.

Constitution were very much influenced by the concept of human rights, and always guaranteed most of the human rights which later came to be embodied in the International Covenants in 1966.[11]

1.3 Role of the Indian National Congress and Promotion of the Idea of Rights

From its foundation in 1885, the Indian National Congress (INC), the main political organ of the national movement, was organized on democratic lines.[12] The idea of individual rights also came up for the first time when a resolution on civil rights was adopted during the Thirty Fourth Session of the Indian national Congress held at Amritsar in 1919. Later on, in the Thirty Fifth Session held at Nagpur, this approach was reaffirmed and a Draft Constitution incorporating a Declaration of Rights for the dominion of the British India was incorporated. These rights developed the idea of Civil rights further. According to this resolution, the INC was committed to the deed that "no torture or corporal punishment of any kind and no degrading punishment shall be legal."[13] Individuals accused of a criminal offence shall be "(disclosed) the nature of the accusation and all evidence shall be taken before him in an open court subject to cross-examination." In criminal trials, confessions were excluded from evidence "unless made in the course of the trial freely and voluntarily in the immediate presence of the trying judge". Furthermore, the Draft Constitution envisioned the Right to Free Speech and the Right to Assemble. Education was regarded as one of the "most prominent junction of the Government".

Later on in the March 1931, the Karachi Session of the Congress adopted a resolution on "Fundamental Rights and Economic Programme".[14] The INC linked political rights to economic and social rights in this context and the Indian political mind was characterized by those demands such as free association, freedom of conscience, protection of minorities, equality before law irrespective of religion, caste, creed or sex, neutrality in regard to all religions, universal adult franchise, free and compulsory education, abolition of capital punishment and free movement.[15] The Indians saw these demands as positive realisation of "self-rule" or we can say the realization of Fundamental Rights was made dependent upon the success of the movement achieving independence from the British Colonial power.

The major leaders of the movement were committed whole heartedly to the civil liberties. For example, Lok Manya Tilak proclaimed that "liberty of the press and liberty of speech gave birth to a nation and nourish it." Gandhiji wrote in 1922 -

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11 D.D. Basu, *Human Rights in Constitutional Law*, Princeton Publications, New Delhi (1994) at p. 14.

12 *Id.*, at p. 21.

13 Michael Schied "Human Rights and India's Developmental Experience", M.P. Singh (ed.), *Human Rights and Basic Needs*, Universal Publishers, Delhi (2008), 127 at p. 128. Also see: A.M. Zaidi (ed.), *The Encyclopaedia of the Indian National Congress*, Volume VII, 1916-20, S. Chand and Company, New Delhi, pp. 680-83.

14 For more details, See S.K. Ahluwalia, *Socio-Political Trends in Indian Nationalism*, Sarup Publishers, New Delhi, pp. 130-131.

15 Bipan Chandra, *India's Struggle for Independence*, Penguin Book, Delhi, 1988, p. 284.

"We must first make good the rights of free speech and free association . . . We must defend these elementary rights with our lives. Liberty of speech means it is unassailed even when the speech hurts; liberty of press can be said to be truly respected when the press can comment in the severest terms upon and even misrepresent matters. Freedom of association is truly respected when assemblies of people can discuss even revolutionary projects."[16] Similarly, Jawahar Lal Nehru in 1936 wrote, if civil liberties are suppressed, a nation loses all vitality and becomes impotent for anything substantial.[17] Thus we have seen that during their brief spell in power, from 1937-39 the Congress ministries greatly extended the scope of civil liberties.

The defense of civil liberties was also not narrowly conceived in terms of a single group or viewpoint; political trends or groups otherwise critical of each other vigorously defended each other's civil rights. The moderates defended the extremist's right to speak and write what they liked. For example, in 1928, the *Public Safety Bill*[18] and the *Trades Dispute Bill*[19] aimed at suppressing trade unions were opposed unanimously in the Central Legislative Assembly[20] and it was this strong civil libertarian and democratic tradition of the national movement which was reflected in the Constitution of Independent India.

1.4 Promotion of Egalitarianism

An aspect of its commitment to the creation of an egalitarian society, was the national movement's opposition to all forms of inequality, discrimination and oppression based on sex and caste. It allied itself with and often subsumed movements for social liberation of women and the lower castes. It brought millions of women into the political arena. Its reform agenda included the improvement of their social position including the right to work and education and to equal political rights. However, the movement failed to form a strong anti-caste ideology, though Gandhi did advocate the total abolition of the caste system itself in the 1940s. It was because of the atmosphere and sentiments generated by the national movement that no voices of protest were raised in the Constituent Assembly when reservation for the Scheduled Castes and Scheduled Tribes were mooted. Similarly, the

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16 *Supra* note 6 at p. 164.

17 Bipan Chandra, Mridula Mukherjee and Aditya Mukherjee, *India After Independence (1947-2002)*, p. 22.

18 As the communist influence was spreading amongst the workers, the Government introduced a *Public Safety Bill* in September 1928 which provided punishments to those who were maintaining relations with the foreign countries. For more details, see: S.N. Sen (2010) at p. 275.

19 *The Trade Disputes Act* of 1929 prevented lightning strikes by prescribing a month's notice in public utility services. For more details see: Vinay Bahl "Attitude of the Indian National Congress Towards the Working Class Struggle in India (1918-47)", Sekhar Bandyopadhyay (ed.), *Nationalist Movement in India: A Reader,* Oxford University Press, New Delhi, pp. 294-313, p. 296.

20 *Id.*, at p. 23.

passage of the *Hindu Code Bills* in the 1950s was facilitated by the national movement's efforts in favour of the social liberation of women.[21]

In the end we can say that Independent India has, as a whole, remained loyal to the basics of the legacy of the national movement, the large part of which is enshrined in the Constitution of India and incorporated in the programmes and manifestos of most of the political parties. If we talk of legacy, especially of a prolonged movement, it tends to endure for a long time. At the same time we must understand that no legacy, however sound and strong, can last forever. It tends to erode and become irrelevant unless it is constantly reinforced and developed and sometimes transcended in a creative manner to suit the changing circumstances.[22]

1.5 Formation of the Indian Civil Liberties Union

Another major landmark in the growth of civil liberties and human rights was the formation of the Indian Civil Liberties Union in 1936 under the chairmanship of Rabindra Nath Tagore at the initiative of Jawahar Lal Nehru. The Civil Liberties Union was to be formed along non-party lines and could be joined by any Indian opposed to the violation of Indian people's civil liberties by the British Government. The task of the Union was to gather information about the suppression of civil liberties in the provinces, collect facts, publish them, mobilize public opinion, keep in touch with other foreign unions and reach out to the world opinion through them. It was the manifestation of the people's democratic spirits.[23]

The activities of the movement had a considerable impact was proved by the fact that the Congress ministries formed in many provinces after the 1937 elections were directed by the Congress Working Committee to show respect to civil liberties. But one of the inherent weaknesses of the movement on a national scale was that the cases of revolutionary freedom-fighters following the path of armed struggle were not given proper importance. And it should be noted that even today, almost 75 years after the organized beginning of the civil liberties movement in our country, not only the Congress, but rather, all the ruling parties, be they of the "left" or right variety, are virtually denying the civil rights of those political activists, who follow the path of armed struggle to fulfill their dream of leading the Indian people to liberation, "enjoying freedom from want and hunger" as postulated in the UDHR. Still the Indian Civil Liberties Union played a commendable role in developing civil liberties consciousness among a significant section of the people in a colonial set-up.[24]

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21 Bipan Chandra, Mridula Mukherjee and Aditya Mukherjee, *India after Independence (1947-2002)*, p. 26.

22 *Id.*, at p. 30.

23 Man Chand Khandela, *Human Rights and Social Realities*, Pointer Publication, Jaipur (2007) at p. 63.

24 Dipankar Chakrabarty, "The Human Rights Movement in India: In search of a Realistic Approach," *Economic and Political Weekly*, Vol. XLVI, No. 47 (19 November 2011) 33 at p. 34.

The integration of human rights issues into the struggle for independence transformed the national movement from a mere fight against the British Government into a vibrant multi-dimensional phenomenon with respect for democracy, civil-liberties and people's urge for self-determination. As a result, the society after independence was able to sustain democracy against all odds. Over the years this democracy has grown and reached out to marginal groups and sections. This has given them the incentive to conduct their sectional struggles within the democratic framework rather than against it.

1.6 Conclusion

Today, even after so many years of independence, we are still close enough to the freedom struggle to feel its warmth and yet far enough to be able to analyze it coolly. Analyzing it, we must agree that our past, present and future are inextricably linked to it. Men and women in every age and society make their own history, but they do not make it in a historical vacuum, de novo. Their efforts, however innovative, at finding solutions to their problems in the present and charting out their future, are guided and circumscribed, moulded and conditioned, by their respective histories, their inherited economic, political and ideological structures. Thus we can say, the path that India has followed since 1947 has deep roots in the struggle for independence. The political and ideological features, which have had a decisive impact on the post-independence developments, are largely, legacy of the freedom struggle. It is a legacy that belongs to all the Indian people, regardless of which party or group they belong to now, for the party which led its struggle from 1885 -1947 was not then a party but a movement. As a mass movement, it was able to tap the diverse energies, clients and capacities of large varieties of people. It had a place for all - old and young, rich and poor, women and men, the intellectuals and the masses and developed into one of the greatest mass movements in the world history. It was fully committed to a polity based on representative democracy and the full range of civil liberties for the individual. It provided the experience through which it could become an integral part of the Indian political thinking.

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