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PRIVATIZATION OF HIGHER EDUCATION IN INDIA: CONSTITUTIONAL VISION, EMERGING ISSUES AND TRENDS

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1. Introduction

The importance of higher education was formally recognized, perhaps for the first time in the Universal Declaration of Human Rights. It ordained that education should promote understanding, tolerance, and friendship amongst all nations. The Declaration provided a philosophical platform for the development of higher education:

> Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.

The philosophical aspects of higher education are also highlighted in UNESCOs Report of the International Commission on Education for the 21st Century, which asserted that:

> In confronting the many challenges that the future holds in store, humankind sees in education an indispensable asset in its attempt to attain the ideals of peace, freedom and social justice. The Commission does not see education as a miracle cure or a magic formula opening the door to a world in which all ideals will be attained, but as one of the principal means available to foster a deeper and more harmonious form of human development and thereby to reduce poverty, exclusion, ignorance, oppression and war.

The report, proposed that education is built on four pillars which it identifies as learning to be, learning to know, learning to do and learning to live together. The World Bank in its document titled "Higher Education: The Lessons of Experience" states:

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> Institutions of higher education have the primary responsibility for equipping individuals with advanced knowledge and skills required for positions of responsibility in government, business, and other professions. Estimated social rate of return of 10 percent or more in many developing countries also indicate the investments in higher education contribute to increase in labour productivity and to long – term economic growth, which are essential in poverty alleviation.

The spectacular expansion of higher education that took place in the second half of the 20th Century saw a marked increase in the gaps between developed the developing and the least developed countries as regards access to higher education and research facilities. The situation was exacerbated by the fact that under mistaken advice from the World Bank, based on the contention that higher education provides meager returns in comparison to secondary and primary education, governments of many developing countries assigned a relatively low priority to higher education. Those who did assign some priority to higher education developed a strange fetish for technical education to the exclusion of arts & social sciences. The result was denial of access to higher education to the weaker sections of society which was necessary to maintain existing social hierarchies. Neo-liberal thrust to privatization of education is the latest strategy to manufacture silence against an inequitable social, economic & political order.

2 Private Higher Education

At the time of UNESCO's last global overview of tertiary education, private higher education had already surged globally. This expansion has continued, intensifying and spreading to additional regions and countries. Privatization means many things in higher education. While a public university is generally considered to be an institution funded by and responsive to a local, provincial or national government, private institutions do not reflect a consistent model. Private institutions may operate entirely with private assets or partially with public funds; they may be for-profit or nonprofit; they may be accountable to the host government or operate completely outside of local regulation; they may have owners or investors or operate as foundations. The trend toward privatization also has meaning in the public sector where institutions are being encouraged (if not required) to decrease their dependence on public funds, to be more "entrepreneurial" and competitive, and to demonstrate efficient professional management. Some of these ideas would have seemed ludicrous a few decades ago but are now fundamental to strategic plans and new policy almost everywhere. Significantly, the role of higher education has been recognized at the global level, and has been defined in the context of the requirements of the 21st Century Neo-liberal world.

By 2015-2016; the higher education system in India consists of 799 Universities out of this 277 Universities are privately managed. There are 39071 colleges out of this 78% Colleges are privately managed with 64% Private-unaided and only 14% Private-aided which caters to 67% of the total enrollment. There are 11923 Stand Alone Institution which are mainly run by Private sector (76%); Private unaided – 66% and Private aided – 10%. Only 24% Stand Alone Institutions are in Government sector. According to one estimate by 2019, we will have more private universities than public universities. Even amongst the public universities, close to 79% would be private colleges affiliated to a public university. It would mean that about 85% to 90% students would be studying in a private college or a private university.[1]

In this context, the marked shift towards private higher education can be analyzed using different perspectives. There is certainly scope for an entire debate on the desirability and merits of privatization and capitalism over socialism and State-sponsored higher education. Such a debate would probably derive most of its theoretical perspective from the discipline of economics. It is also possible to look at privatization of higher education in India from a sociological and cultural perspective, focusing on the bias inherent in private education and how this bias works against certain underprivileged sections of the society. Accepting that all of these are equally important vantage points from which the whole issue of privatization of higher education can be examined, this paper focuses on using the Indian Constitution as a prism through which the contentious issue of privatization in higher education may be examined.

3. Constitutional Vision *vis-à-vis* Privatization of Higher Education

The Indian Constitution, like any other guiding document, certainly envisages the attainment of certain goals, these being collectively referred to in this paper as the constitutional vision. At the same time, it is less certain whether the Constitution prescribes any doctrinaire means for the fulfillment of this vision. Ultimately, whether it is higher education or land reforms, the economic and social ideologies perpetrated and implemented by the power-holders in each epoch of India's national evolution have probably kept changing according to political necessities. The constitutional vision, however, has always been the attainment of the noble goals enshrined in the Preamble, the Fundamental Rights & the Directive Principles

[1] Maheshwar Peri, *Role of Private Players in Higher Education,* 17 August, 2016, Available at *https://www.saddahaq.com/role-of-private-players-in-higher-education*

of State Policy, and several other constitutional provisions. A cursory glance at these foundational provisions of the Constitution would make it evident that the ideals of social and economic justice, and equality of opportunity, form an integral part of the constitutional vision. This is further confirmed by the guarantee of equality as a fundamental right under Article 14 of the Constitution, and the desirable guidelines for policy-making as expressed through the Directive Principles of State Policy.[2] Most importantly, the Preamble was amended by the 42nd Constitutional Amendment to specifically proclaim adherence to the socialist principle. The idea of socialism is therefore an integral part of the constitutional vision.

The Preamble to the Indian Constitution constitutes its spirit and backbone,[3] and therefore no better way to begin than from the very beginning. The Preamble promises a commitment by the people of India to secure to all Indian citizens the laudable objectives of liberty, justice, equality and fraternity. Though on a primary reading, this may look like an exercise in rhetoric, on deeper examination, a sense of purpose and direction is evident from the Preamble and its wording. Social, economic and political justice are arranged in that very order with a clear purpose: Economic justice is a hollow promise without the attainment of social justice, and only the joint assurance to an individual, of both these kinds of justice, can result in guaranteeing political justice. Similarly, the unity and integrity of the nation can be secured only through the guarantee of individual dignity. Without equality of status, equality of opportunity is an unattainable goal.[4] This insightful vision enshrined in the Preamble must have influenced Chandrachud, C.J., in *Minerva Mills* v. *Union of India*,[5] to express the view that "the edifice of our Constitution has been built upon the concepts crystallized in the Preamble."

Having submitted that social, economic & political justice constitutes an integral part of the Indian constitutional vision, I now seek to examine whether the very idea of privatization of higher education is inconsistent with this vision. Here, one has to give due regard to the express commitment to socialism as enshrined in the

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2 Article 38(1) states that the State shall strive to promote public welfare by securing a social order in which social, economic, and political justice informs all institutions of national life. Article 38(2) spells out minimization of inequality in status, facilities, and opportunities, as a goal to be attained through State action. Similarly, Article 39 desires the operation of the economic system without concentration of wealth and means of production. It also envisages the distribution of ownership and control of the material resources in a manner best serving the common good.

3 Justice R.C. Lahoti, *Preamble: The Spirit and Backbone of the Constitution of India* 2 (Lucknow: Eastern Book Co., 2004).

4 *Ibid*, at p.10-11.

5 (1980) 2 SCC 591.

Preamble, and the nationalization model of economic development that was long considered as a manifestation of this socialist vision. As rightly observed by Gajendragadkar C.J., in *Akadasi Padhan* v. *State of Orissa*,[6] while the rationalist would take a pragmatic approach and implement the nationalization model only when it was certain to assure higher economic efficiency and returns, the socialist would adopt a doctrinaire approach and justify nationalization or State ownership as a matter of principle and root its justification in the general notion of social welfare. Socialism certainly places importance on State-engineered measures for securing social and economic justice. The judiciary in India has also endorsed the doctrinaire approach as is evident from various decisions that resort to the principle of socialism while upholding nationalization schemes. At the same time, it is submitted that socialism can only be a justificatory principle in the Indian context. Ultimately, the Indian Constitution is an organic document, flexible enough to be interpreted according to the changing times,[7] and the necessary corollary to this is that socialism as enshrined in the Preamble cannot be used to impugn other models of development, especially more economically efficient ones.

Thus, when we look at privatization of higher education from the perspective of this constitutional vision, it is clear that there are two materially different issues to be addressed. The first issue is that of permissibility. Is privatization of higher education constitutionally permissible in the first place? If the answer to this is in the affirmative, the next aspect of permissibility pertains to the extent of privatization as well as the restrictions on privatization. This issue of constitutional permissibility in the arena of privatization of higher education has been dealt with extensively by the Hon'ble Supreme Court of India as well. Therefore, a discussion of this issue also involves an analytical examination of the important judicial pronouncements that deal with private educational institutions.

The expression 'socialist' has not been defined in the Indian Constitution and therefore, can derive its content only from specific constitutional provisions and related judicial philosophy. As far as the constitutional provisions go, none of them stipulate any ideologically colored means for attainment of the constitutional goals. Concepts such as social justice are not fixed but ever-changing in nature, depending on the time, place, and needs of society.[8] Even at the time of drafting of the Constitution, the idea was only to create a democratic constitution with a

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6 AIR 1963 SC 1047.

7 *Synthetics & Chemicals Ltd.* v. *State of U.P.*, (1990) 1 SCC 109.

8 *Supra* note 2, at p.77.

socialist bias so as to facilitate India in becoming as socialist as desired by its citizens or as dictated by its needs.[9] Judicial philosophy in the post-liberalization era has also affirmed this constitutional reality. In *Delhi Science Forum* v. *Union of India*,[10] it was contended that the telecommunications industry being integral to the security and welfare of India should have been monopolized by the State, and not privatized at all. The Supreme Court rejected this contention while explicitly recognizing that the Indian Parliament had adopted a national policy of liberalization and privatization. The Court opined that it was not its function to pronounce on the desirability of any national policy at a given juncture or under a particular situation prevailing in the country. Similarly, in *Zippers Karamchari Union* v. *Union of India*,[11] the de-reservation of an integrated zip-fastener manufacturing plant after having followed protectionist policies for the past 25 years was challenged using the socialist ideal of protectionism of small scale industries. The Supreme Court rejected this doctrinaire approach and found the policy of de-reservation to be capable of producing quality zip fasteners worthy of competing in the world market and also of generating more employment in the field of readymade garments and leather industry. Based on this, it was held that there was nothing unconstitutional about the policy.

As rightly observed by Sinha, J., in *State of Punjab* v. *Devans Modern Breweries*,[12] though the expression "socialist" is found in the Preamble, constitutional interpretation has to reflect societal changes without doing damage to the core constitutional intent of the makers, especially in the age of globalization when vast changes are taking place both at the social and political levels. Therefore, from a constitutional perspective, there is no blanket prohibition against privatization of higher education in India, as there is no chosen path prescribed by the Constitution for the attainment of the constitutional vision.

4. Attainment of Constitutional Vision through Privatization of Higher Education

Once it is admitted that there is no constitutional prohibition in utilizing private higher education as a means to achieve the constitutional vision of social, economic & political justice the next question is whether privatization of higher education would help us attain this vision. If yes, then what are the challenges &

9 Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 43 (New Delhi: Oxford University Press, 1974).
10 (1996) 2 SCC 405.
11 (2000) 10 SCC 619.
12 (2004) 11 SCC 26.

limitations of privatized higher education? Whether some reasonable restrictions are necessary to enable private higher education to achieve its avowed objectives? In doing so, what should be the guiding principle to balance the claims of private players vis-a-vi those reasonable restrictions? How should the State adjust to the reality of privatization of higher education without compromising its fundamental obligations towards weaker sections of society? In order to explore an answer to these questions one needs to understand why & to what extent public higher education failed to achieve the constitutional vision which made it inevitable to barter it with private higher education.

An ontological study of public higher education in India would reveal that from the very beginning it was designed to reproduce preexisting social hierarchies which could be done in two ways. Firstly, by strategic exclusion of the subaltern mediated by caste, gender and linguistic identities from the realm of higher education.[13] Secondly, by controlling pedagogical content with an elaborate State apparatus ostensibly meant for regulation of higher education. The first result was achieved by the denial of universal & common schooling, preference of English over vernacular and careful inaction to support the subaltern so that they never get to acquire the so called "merit" which was sine qua non-for entry & satisfactory performance on the anvil of higher education. In order to conceal the Neo-Brahmanical design of exclusion through denial of meaningful education it was sanctified by glamorous declaration of Article 15 that public educational institutions have been thrown open to all citizens irrespective of religion, race, caste, sex, or place of birth. In practice, the subaltern was systematically condemned to a life without education & dignity which has been the bane of Bahujan[14] for centuries under the regimented social order of Brahmanism. Denial of education to Bahujan is a tried & tested formula of Manuvadi classes in order to maintain atrocious social order built on caste and gender injustice.[15]

On the other hand, construction of pedagogical content under the watchful gaze of "Brahmanic Socialist State"[16] ensured that critical pedagogy finds no place in public institutions of higher education. In turn, public education was utilized to manufacture certain hegemonic consensus in order to support nascent Brahmanic

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13 Debaditya Bhattacharya, of Feudal Intellectual Capital: The History of the New Provincial Universities *in "The Idea of the University"* (Issue 29) of Café Dissensus on September 15, 2016 Available at *https://cafedissensus.com/*

14 A term used in this paper to cumulatively refer to SC/ST/OBCs & Women

15 Dr. B. R. Ambedkar, *Annihilation of Caste,* P-26 (Gautam Book Centre, Delhi, 3rd edn., 1945).

16 Gail Omvedt, *Understanding Caste: From Buddha to Ambedkar and Beyond,* 66 Orient Blackswan, Delhi, 2011

Socialist State disguised as imperatives of nation building. The net effect of this development was that hitherto what has been sanctioned only by religious education came to be propagated in the form of nationalist education something flatteringly referred to as 'Nehruvian Consensus.'[17]

5. Twin Issues of Higher Education

From the above analysis, it is clear that from its inception public education involved two substantive issues which prevented constitutional vision from being realized in a progressive manner. First issue is the question of representation of the Bahujan[18] in spaces of higher education. Second issue is the question of space for critical pedagogy. On both counts public higher education failed miserably[19] until the neo-liberal intervention in the form of private higher education came to substitute it. Therefore, the ontology of private higher education can be developed with the help of these two issues identified as central concerns of the debate regarding reasonableness of constitutional restrictions on private players of education. This paper would argue that if the two issues identified here are not effectively addressed by privatization of higher education then its ontology is not likely to be very different from public higher education. Firstly, it would attempt to theorize judicial behavior in the field of higher education with the object of visualizing its realistic trajectory vis-a-vis the issue of representation. In this process, the problems of meritocratic judiciary which has failed to address the issue of representation within the annals of higher judiciary would also be considered. An attempt would be made to understand how judicial behavior in the field of higher education is shaped by its non-representative character. In the end, this paper would briefly allude to one consistent trend since independence, that is how every institution whether public or private when qualified by the expression "higher" (education, judiciary, bureaucracy, business, media or academia) came to acquire non-representative character & how this trend held up the progressive realization of noble constitutional vision.

On the second issue, it would be demonstrated how the space for critical pedagogy in private higher education is sought to be conscripted by converting "Brahmanic Socialist State" into a "Brahmanic Capitalist State." Here commoditization of

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17 Perry Anderson, *The Indian Ideology,* P-103-114 (Three Essays Collective, New Delhi, 1st edn., 2012)

18 *Id.*

19 Debaditya, Guest-Editorial: *What 'Use' is the Liberal Ruse? Debating the 'Idea' of the University, in "The Idea of the University"* (Issue 29) of Café Dissensus on September 15, 2016 Available at *https://cafedissensus.com/*

higher education through its vocationalization is the strategy borrowed from neo-liberal common sense.[20] It is not surprising that this second issue is yet to reach the corridors of higher judiciary as development of critical pedagogy is not identified as an issue at all! Concerns against "Saffronization" of education ensure that the question of "Brahmanization"[21] of education through conformist pedagogy is not raised at any stage of the debate. This question would be raised here in order to compare pedagogical values of public and private higher education.

6. Issue of Representation & Public Higher Education

A careful study of the All India Survey on Higher Education (AISHE) 2015-16, published by the Ministry of Human Resource and Development opens up the issue of representation of Bahujan students in public higher education in a chilling fashion. According to this survey, despite relatively undisputed reservation policy for SCs & STs in admission provided by Article 15(4) of the Constitution the Dalit representation in higher education is 2.89% and the corresponding figure for ST students is only about 2.01%.[22] The fate of OBC representation in public higher education is worse as it fell victim to what may be termed as "judicial policy of postponement of social justice" on every question of representation of the Bahujan to the core of Indian State.

The first attempt to provide representation to OBCs after the Constitution of India came into existence was made by the Madras Government. It was shot down by the Supreme Court on the ground that it was opposed to the Constitution and was in violation of Article 29 (2)[23]! As a result, the first constitutional amendment was made by which Article 15(4) was added to the Constitution in 1951. This enabling amendment provided that:

> Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

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20 Ania Loomba, Of Utopias and Universities, in "The Idea of the University" (Issue 29) of Café Dissensus on September 15, 2016 Available at *https://cafedissensus.com/*

21 This term is used here in the sense of support for hierarchical social order created by birth in a particular caste which negates equality, liberty, democracy & hence is the biggest enemy of fraternal relations in society.

22 This data has been obtained by taking into account census figures of 2011. For detailed methodology please see Debaditya, Guest-Editorial: What 'Use' is the Liberal Ruse? Debating the 'Idea' of the University, in "The Idea of the University" (Issue 29) of Café Dissensus on September 15, 2016 Available at *https://cafedissensus.com/*

23 *State of Madras* v. *Smt. Champakam Dorairajan,* AIR 1951 SC 226

The second attempt to provide representation to OBCs utilizing Article 15(4) was made in 1958 by the Government of Mysore which was immediately struck down by the Mysore High Court on technical grounds. Thereafter, the Mysore High Court kept on quashing order after order which sought to provide reservation to socially and educationally Backward Classes. Finally, the Supreme Court in 1963 struck down all the attempts by the Government of Mysore to provide reservation to OBCs in public higher education.[24] In addition, the SC refused to recognize the phenomenon of caste among Christians, Jains and Muslims which substantially reduced the chances of educational progress of OBCs belonging to these religious groups. Moreover, an arbitrary ceiling of 50% reservation was introduced by the Supreme Court[25] which keeps haunting the Bahujan cause of representation in public higher education till date.

By the time Supreme Court could reconcile with the idea of representation of OBCs institutions of higher education in States it was already 1968.[26] From here on characteristically, only those States could make some progress on the question of representation of OBCs in public higher education where the Legislature & Executive had already become reflective of political representation of OBCs. Certainly, Parliament of India could not acquire such character as late as 2007[27] when Central Educational Institutions for the first time made provision for the representation of OBCs in central institutions of higher education. By this time, the issue of representation of OBCs in public higher education was seriously burdened by an arbitrary criterion of 'creamy layer' and unscientific ceiling of '50%'.[28]

Thus, the issue of representation of Bahujan students in public higher education substantially remained unresolved as it fell victim to what can be termed as the judicial policy of postponement of social justice. The issue of representation of Bahujan staff (both academic & administrative) in public higher education suffered the same fate with disastrous consequences for the evolution of critical pedagogy which we consider to be second substantive issue of higher education. Let us now examine where private higher education stands on the issue of representation of Bahujan in order to appreciate its transformative potential, if any.

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24 *Balaji* v. *The State of Mysore,* AIR1963 SC 649

25 *Ibid.*

26 *P. Rajendran* v. *State of Madras,* AIR 1968 SC 1012

27 Act 5 of 2007 was enacted to implement the recommendations of Mandal-II

28 *See A. K. Thakur* v. *Union of India,* (2008) 6 SCC 1. *See* also *Indira Sawhney* v. *Union of India,* AIR 1993 SC 477

7. Issue of Representation & Private Higher Education

In *P.A. Inamdar* v. *State of Maharashtra*,[29] the Supreme Court declared that the State could not impose its policy of reservations on the private managements, nor could they prescribe differential fee structure based on government and management quota. In short the whole idea of a compulsory Government quota, the product of the Supreme Court decision in *Unnikrishnan J.P.* v. *State of A.P.*[30] was conclusively declared impermissible.[31] To overcome this much-lamented verdict, Article 15(5) has been introduced in the Indian Constitution.[32]

While the constitutional validity of Article 15(5) was upheld by the Supreme Court[33], the judicial policy of postponement of social justice was at full play in private higher education as well. Firstly, Supreme Court through its judgment in *Inamdar* case ensured that the Bahujan do not get representation in private higher education at their formative stages. Evolution of private higher education with shared living experience of people representing all shades of social reality would have infused a certain element of radical potential in spaces of private higher education, something which public higher education always lacked. With the emergence of private as the preeminent domain of higher education, public higher education is not likely to acquire any such capacity in near future. Supreme Court through *Inamdar* judgment denied this role to private space of higher education as well. In this sense Inamdar judgment is to private higher education what Champakam[34] judgment was to public higher education.

Secondly, Article 15(5) is only an enabling provision which means that the issue of representation of Bahujan as students & staff (both academic & administrative) in private higher education is now dependent upon the sweet will of Legislature &

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29 AIR 2005 SC 3226. Hereinafter referred to as *Inamdar*

30 (1993) 1 SCC 645. Hereinafter referred to as *Unnikrishnan*

31 This is considered a conclusive declaration as *TMA Pai* was a confusing decision in many respects. Though the *Unnikrishnan scheme* was overruled in *TMA Pai*, certain portions of this judgment was used to justify the permissibility of a Government quota in *Islamic Academy*. The Supreme Court gave its final verdict against Government quota in *Inamdar*, overruling *Islamic Academy* in this process.

32 The text of Article 15(5) is as follows: "Nothing in this Article or in sub-clause (g) of clause (1) of Article 19 shall prevent the state from making *any special provision*, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions, *including private educational institutions*, whether aided or unaided by the state, other than the minority educational institutions referred to in Clause (1) of Article 30."

33 *A. K. Thakur* v. *Union of India*, (2008) 6 SCC 1

34 *Supra* note 18.

the Executive of each State. The net effect of *Inamdar* judgment is that it postponed the question of representation of Bahujan in private higher education by a decade or two by making it contingent on the political conditions of different States. Even where the political will could be mustered to implement the mandate of Article 15(5) the judicial hurdles continue to surmount. For example the State Legislature of Uttar Pradesh passed the Admission o Educational Institutions (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 2006 in order to override the decision in *Inamdar* by making provision of reservation of seats for Scheduled Castes, Scheduled Tribes and other socially and economically backward classes, in admission to educational institutions, including private educational institutions.[35] But the Allahabad High Court prevented the enforcement of this Act on one pretext of the other and finally gave a fatal blow to it by declaring the key provisions of the Act unconstitutional in 2011[36]. Hence, the judicial policy of postponement of social justice continues deep into private higher education.

Thirdly, the exemption by Article 15 (5) to minority educational institutions referred to in Clause (1) of Article 30 has suppressed the question of representation of SC/ST/OBC belonging to minority communities[37] popularly known as "Pasmanda"[38] in private higher education. On this question public & private higher education look like a mirror image of each other. This is one of those classical examples where both the Parliament & the judiciary come together to pursue a policy of denial of representation to Bahujan at all spaces which can be termed as higher.

Thus, on the issue of representation of Bahujan, privatized higher education faces similar challenges if not the same as those suffered by public education. If are to take any lesson from the history of public higher education on this issue, it would be to prevent its repetition in private higher education by time bound implementation of Article 15 (5) across the country.

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35 (*U.P. Act No.* 23 of 2006). This Act is available at *http://www.bareactslive.com/ALL/UP161.HTM* last visited on 13 May, 2017.

36 Sudha Tiwari v. Union of India and others, Allahabad High Court judgment delivered on 11.2.2011 available at *http://elegalix.allahabadhighcourt.in/elegalix/WebShowJudgment.do*

37 Khalid Anis Ansari, *Ghettoes of the Mind,* 24 March, 2011 Available at *http://www.counter currents.org/ansari240311.htm*

38 In particular, the SC/ST/OBC belonging to Muslim community identified as Pasmanda have suffered worst fate as their representation is suppressed by internal caste hegemony camouflaged as cultural right of the minorities & denied recognition by external institutions which includes all the three wings of the State.

8. Issue of Critical Pedagogy & Public Higher Education

According to Henry Giroux the crisis of higher education is about much more than a crisis of funding, as assault on dissent, and a remaking of higher education as another institution designed to serve the increasing financialization of neoliberal driven societies; it is also about a crisis of memory, agency, and the political.[39] If the issue of critical pedagogy in public higher education of India is tested on the touchstone of memory, agency, and the political it would be a far bigger crisis. Public higher education of India had been conceived as a strategy to suppress the memory, agency and the political of the Bahujan initially as a colonial project & eventually as a post-colonial stratagem.[40] Again pedagogical ground for such continuum were laid early on, right from primary education stretching deep into secondary education & finally fructifying in higher from primary education. It is no coincident that the specter of Brahmanism continues to giggle across the corridors of power even after more than seventy years of independence. Such a mammoth exercise cutting across time & space was facilitated by the Brahmin-Baniya[41] alliance stitched at the turn of 20th century.[42] Public higher education was the natural playground for this game of high stakes. The tone for conformist pedagogy was set up by stand-alone institutions of engineering, medical & management studies. These institutions were crucial in building the conventional wisdom against humanities & legal studies as similar institutions for study were conspicuous by their absence. As a result public higher education completely skipped the question posed by JM Coetzee i.e. "Is a university without a proper faculty of humanities (or faculty of humanities and social sciences) still a university?" In a country where society is the root cause of most economic and political challenges, such abject neglect of law & social sciences prevented the development of critical pedagogy and undermining the Rule of Law.

Even where social sciences managed to get some space, they were decorated by Brahmanical values in the name of developing nationalist outlook. For example, the foremost text of Indian social order theorizing 'graded inequality' by Dr.

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39 Henry A. Giroux, Neoliberal Savagery and the Assault on Higher Education as a Democratic Public Sphere in "The Idea of the University" (Issue 29) of Café Dissensus on September 15, 2016. Available at *https://cafedissensus.com/2016/09/15/neoliberal-savagery-and-the-assault-on-higher-education-as-a-democratic-public-sphere/*

40 *Supra* note 13

41 Aakar Patel, "When Will the Brahmin-Bania Hegemony End? Live Mint, August 28 2009. Available at *http://www.livemint.com/Leisure/3u2QUPuXBEFPaBQXU2R8mJ/When-will-the-BrahminBania-hegemony-end.html*

42 G. Sampath, "*Caste and the Battle for Secularism*," The Hindu, September 9, 2015.

Ambedkar, Annihilation of Caste failed to secure space even in the footnotes of most centres of law & social science. Here, the ideologues of left, right & the centre to came together in order to invizibalize the critical texts of subaltern pedagogy. On this count also, public higher education failed to open doors & windows for Bahujan autonomy which blurred the constitutional vision of social justice.

9. Issue of Critical Pedagogy & Private Higher Education

Hyper-capitalism or market fundamentalism has put higher education in its cross hairs and the result has been the ongoing transformation of higher education into an adjunct of the very rich and powerful corporate interests.[43] In the Indian context, the expression rich & powerful corporate interests naturally converge with the Brahmin-Baniya hegemony. As the institutions of private higher education are taking roots under this unholy overreaching alliance, the fate of social sciences & critical pedagogy could not be any different. Barring a few well known exceptions, private higher education predominantly focuses on engineering, medical & management courses leaving little space for law & social sciences. Given the penchant of private players for efficiency & precisions even those exceptional spaces find it difficult to engage in critical activities. The crackdown on students & staff for signing a petition addressed to the J&K government and the Centre, condemning the violence after militant Burhan Wani's death and calling de-militarization of the state and the conduct of a plebiscite is a case in point.[44]

The Situation will exacerbate if the issue of representation in private higher education is settled sooner rather than later. Such representation will open up many contentious questions in institutions of private higher education which have remained suppressed due to lack of representation of Bahujan in such spaces. How far the Brahmin-Baniya management would accommodate the Bahujan demand of substitution of Gandhi by Ambedkar is any body's guess. To the Brahmanical Pedagogy, Ambedkar is still an iconoclast who may be strategically co-opted but never preferred over Gandhi the messiah of Neo-Brahmanism.

Thus, the present state of affairs in private higher education – rather than striking in us fears of the unprecedented – actually confirms a policy-trend in public education

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43 *Supra note 36.*

44 Ritika Chopra, "Indian Express," October 13, 2016, 'Liberal' Ashoka University crackdown: 2 staffers quit after signing student petition on J&K. Available at *http://indianexpress.com/article/india/india-news-india/ashoka-university-crackdown-student-petition-jammu-kashmir-3079850/*

that dates back to the early nineteenth-century.[45]

10. Non-Issue of Cost and Private Higher Education

After identifying the substantive issues of private higher education, it is important to address the non-issue of higher education in the context of neo-liberal ethos & how it is utilized to cover the substantive issues most prominently by the left ideologues. Once the utility of private higher education is accepted on the touch stone of expansion and excellence, the problem of high cost of private higher education is relatively easier to resolve.

The United States has a long history of private higher education dating back to the establishment of famous Harvard University in 1636. Yale, Princeton, Stanford, Massachusetts Institute of Technology (MIT) are known prestigious institutions. There are 2823 private institutions (more than 40 % share) enrolling 5.6 million students (28% share) in 2009 in USA. The role of the private sector has been spurred by the emergence of for-profit institutions whose share in enrollment increased from 3% in 2000 to 8% in 2008. The US Higher Education system allows the set up for-profit institutions which has enabled such institutions to raise equity capital through PE funds and public markets. In 1972, reauthorization of the Higher Education Act increased the student aid available to for-profit institutions. Equity: e.g. 59% students enrolled in public institutions are white vs. 40% in for-profit private institutions.

Similar trend is visible in Japan also whereas of 2009, private institutions accounted for 73% of the 2.8 million enrollments in Japan's universities. The private sector also accounted for 77% of the 773 universities in the same year. The Standards for Establishment of Universities was deregulated in 1991 and process of setting up of private universities was eased up. The Government subsidized operating cost of selecting private universities. Government also introduced a certified periodic evaluation system in 2002, ensuring standardization of quality.

In India, the private sector has till now been instrumental in increasing penetration and enrollment, especially in professional disciplines. Not only does India have the largest target market in the world, but also the fastest growing market, resulting in a demographic dividend for higher education players. India's youth population aged 18-24 years is expected to increase by 13% over 2005-2020 vs. the world average of 4%. The number of students enrolled in Classes 9-12, which is an

[45] *Supra* note 13.

indicator of potential demand for higher education, has increased at a CAGR of 5.7% over 1996-2008, in line with the growth in higher education enrollment.[46] Moreover, with the implementation of the RTE Act, there is expected to be a significant increase in the primary and middle school levels which will result in an increase in eligible population for higher education over the long term. [47]If India is to meet its 30% GER target by 2020, about 40 million students would be enrolled in the higher education system in 2020. Currently, 14.6 million students are enrolled in the higher education sector. Therefore, an additional capacity of about 25 million seats would be required over the next decade to cater to the increased demand. However, the present expenditure on higher education by the government is highly inadequate[48] and the consequent widening of the demand supply gap will result in an infrastructure and investment deficit hampering entry and growth opportunities for private sector players.

The Indian higher education system is inundated by three fundamental challenges: Access, Equity, and Quality. With a GER of 13.8% and enrollment of 14.6 million, access to higher education in India is currently restricted to a limited population. There is wide disparity in Higher Education GERs across states, urban and rural areas, gender, and communities. Examples:[49]

i. Inter-state disparity: 31.9% in Delhi vs. 8.3% in Assam

ii. Urban-rural divide: 23.8% in urban areas vs. 7.5% in rural areas

iii. Differences across communities: 2.5% for SCs, 0.9% for STs, 8.7% for OBCs

iv. Gender disparity: 10.6% for female vs.14.4% for male

v. Faculty shortage: 45% of the positions for professors, 51% positions for

46 US Census Bureau: International Programs; OECD 2008 Higher Education to 2030, Volume 1: Demography; Population Projections for India and States 2001-2026, Report of the Technical Group on population projections constituted by the National Commission on population May 2006; Selected Education Statistics, 2005-06, MHRD; Selected Education Statistics, 2007-08, MHRD.

47 US Census Bureau: International Programs; OECD 2008 Higher Education to 2030, Volume 1: Demography; Population Projections for India and States 2001-2026, Report of the Technical Group on population projections constituted by the National Commission on population May 2006; Selected Education Statistics, 2005-06, MHRD; Selected Education Statistics, 2007-08, MHRD.

48 44% of Central Government spend on higher education (INR16,690 crore in the year 2010-11) is allocated to the UGC, which, in turn, assists colleges mainly in the form of grants for their maintenance and development. Centres of excellence including IITs, NITs, and IIMs accounted for nearly 20% of the budgeted expenditure, most of which is directed towards the maintenance of existing institutions. Other major expenditure heads include National Mission in Education through ICT and the Development of Languages.

49 UGC: Higher Education India 2008; 11 the Five Year Plan Volume II 2004-05; National Assessment and Accreditation Council Annual Report; NAAC Website.

readers, and 53% positions for lecturers were vacant in Indian universities in 2007-08.[50]

vi. Deficient physical infrastructure: 48% of universities and 69% of colleges have infrastructural deficiencies.[51]

vii. Poor academic standards: The system is plagued with outdated curricula and ill-equipped libraries (average 9 books per student vs. 53 in IIT Bombay).[52]

viii. Unaccredited institutions: As of March 2011, only 161 universities and 4,371 colleges had been accredited by NAAC.[53]

In the light of these facts, doctrinaire opposition to privatization of higher education would be fortuitous. Instead, the problem of increasing cost[54] of private higher education can be tackled what we term as a "Common Scholarship Scheme." Under this scheme all students falling below a certain income criteria would get government scholarship irrespective of their religion, caste, race, sex or place of birth. This scheme would weed out undesirable subsidy to students coming from affluent backgrounds while fulfilling the aspirations of meritorious students from financially weak background.

11. Legitimate State Interest in Private Higher Educational Institutions

The noble constitutional goals of social justice and equality are part of the larger constitutional vision, and would most certainly qualify as legitimate competing interests. Accordingly, there are certain compelling interests that the State can legitimately protect in the realm of private higher education. The Universal Declaration of Human Rights (UDHR), to which India is a signatory, provides that higher education shall be made equally accessible to all on the basis of merit.[55] Since resources are limited in nature, compulsory higher education for everyone is not feasible. At the same time, meritorious individuals should have access to higher education. This is the guiding principle behind this provision. The right to development is also gradually attaining the status of a human right. The content of this right can be derived from the UN Declaration on the Right to Development,

50 *Ibid.*
51 *Ibid.*
52 *Ibid.*
53 *Ibid.*
54 The government approved tuition fee for MBBS course in the session 2016-17 is Rs. 1130000 per annum in addition to hostel & other fees.
55 Article 26 of the UDHR.

1986, which describes development as a comprehensive economic, social, cultural and political process that aims at constant improvement of well-being of people and of individuals on the basis of their active, free and meaningful participation in the process.[56] As well established by now, constitutional and other legal provisions should, as far as possible, be interpreted in a manner that best facilitates the attainment of international obligations and goals.[57] When Articles 19(1)(g) and 19(6) are interpreted in the light of India's constitutional vision as well as international obligations such as UDHR, it becomes clear that the State has a compelling interest in ensuring that meritorious students belonging to socially & educationally backward class are not denied admission to higher educational institutions due to other considerations.

As a necessary corollary to this, it is legitimate State interest that private educational institutions follow the principle of representation while admitting students. It is also legitimate State interest that poverty born out of social disabilities does not stand in the way of meritorious students who are desirous of pursuing higher education. Since the quality of higher education is important in shaping the future of the nation, the State also has a legitimate interest in ensuring excellence in higher educational institutions, whether they are of a private or public character.

12. Harmonizing Interests

The legitimate interests of State in private higher education should be balanced with the rights of the individual as per the 'balancing criterion' in the proportionality doctrine.[58] Moreover, this doctrine requires that the least restrictive and most suitable means be employed to achieve these legitimate interests, as the fundamental rights of private educational institutions hang at the other end of the balance. In determining the reasonableness of any restriction using proportionality, the legislative objective should be sufficiently important to justify such a restriction, the measures designed to meet the legislative objective should be rationally connected to it, and the means used to impair the right or freedom should

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56 *Islamic Academy of Education* v. *State of Karnataka*, (2003) 6 SCC 697, *Per* Sinha, J. (Hereinafter referred to as *Islamic Academy*).

57 *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241.

58 *Teri Oat Estates Pvt. Ltd.* v. *Union Territory, Chandigarh*, (2004) 2 SCC 130 The doctrine of proportionality essentially involves a balancing of competing interests to ensure a proportionality of ends, as well as securing the proportionality of means by permitting only the least restrictive choice of measures by the legislature or the administrator for achieving the object of the legislation or the purpose of the administrative order.

be no more than is necessary to accomplish the objective.[59]

It would violate Article 19(1) (g) if private managements are compelled to admit students at a subsidized fee and bear the cost for the same. Therefore, the best strategy to harmonize the competing interests of private management & State is to devise an integrated scheme of reservation & scholarship. State while making the provision of reservation for the Bahujan in private institutions of higher education must provide scholarship to all students who fall below a certain level of income irrespective of their religion, caste, race, sex or place of birth. This will provide special incentives to private managements to follow the reservation policy & effectively enjoy the right under Article 19(1)(g). In this way, the State's interest of social justice does not impose unnecessary financial burden of private management.

13. Conclusion

The geneses of private higher education were many fold: the dissatisfaction with the public education system in terms of access, equity and quality, the need felt by religious sects and minority groups to ensure for their children education that is consistent with their religious and socio-cultural requirements. The economic and social transformation of India in the 21st century will depend in large part on knowledge. Only knowledge can provide the foundations of an inclusive society. It is with this broad task in mind that the National Knowledge Commission (NKC) was established on 13th June 2005 and given a timeframe of three years from 2nd October 2005 to 2nd October 2008 to achieve its objectives. The overall task before the National Knowledge Commission was to take steps that will give India the 'knowledge edge' in the coming decades, i.e. to ensure that our country becomes a leader in the creation, application and dissemination of knowledge. The NKC report focused on the need for excellence in the system, expansion of the higher education sector in the country, and providing access to higher education for larger numbers of students. Curiously, the NKC does not identify representation and critical pedagogy as issues of higher education.[60] Still, given the well-established

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59 *R. (on the Application of Daly)* v. *Secretary of State for the Home Department*, [2001] 2 W.L.R. 1622 (HL); *de Freitas* v. *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, [1999] 1 A.C. 69 (PC).

60 Some of the issues that have been highlighted by the National Knowledge Commission in its report to the Prime Minister are: Systemic issues like quantity and quality of higher education; Regulatory framework; Access to higher education; Financing of higher education; Institutional architecture of universities; Governance and administration Content in terms of curriculum and examinations and Faculty and Research.

constraints on public funding of education, it has it this juncture become essential to encourage private and also open gates for foreign educators willing to invest in India to expand capacities at an accelerated pace. However, legislative, executive and judicial intervention on these issues must be illuminated by the constitutional vision and its realization by the means available at hand. The means available at hand to address the two issues of higher education must be integrated with the ongoing process of privatization of education.

At the end, a University is nothing if it is not a public trust and social good; that it; a critical institution infused with the promise of cultivating intellectual insight, the civic imagination, inquisitiveness, risk-taking, social responsibility, and the struggle for justice.[61]

[61] J M Coetzee, "*Universities Head of Extinction*" Mail and Guardian, November 1, 2013. Available at *http://mg.co.za/article/2013-11-01-universities-head-for-extinction.*

HUMAN TRAFFICKING AND INTERNATIONAL INTERVENTIONS: A LESSON FOR INDIA

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1. Introduction

The exploitation of one human being by another is the basest crime.[1] Millions of men, women and children around the world are currently victims of human trafficking - bought and sold as commodities into prostitution and forced labour.[2] Human trafficking is a booming international trade, making billions of dollars at the expense of millions of victims.[3] Even today it is very difficult to assess the scale of the problem because of its clandestine nature. Human trafficking has become a fast-growing global criminal activity, and it affects just about every country in the world.[4] Recently, Spanish Police on January 26, 2016 have made a major breakthrough in their investigation of one of the biggest human trafficking rings in Europe.[5] Sharing some of their findings with the BBC, they reveal that Britain's airports are increasingly being used by major trafficking gangs as a gateway to the European Union. This is not only the condition of the European countries but for the entire world and India is not an exception. This ill practice can also be seen in Indian society. On Dec 30, 2015, one news in Hindustan Times titled "*Bihar: KBC contestant gets death threat for fighting human trafficking*" attracted the millions of Indian minds, mentioning that an unidentified man has threatened to kill Fatima Khatoon, a star of 'Kaun Banega Crorepati' contest in 2014, fighting against prostitution and human trafficking in Bihar's Araria district. Therefore, we can understand deep roots and the severity of this clandestine crime. As per National Bureau of Crime Records (NCRB) crime related to human trafficking in India has

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1 Yury Fedotov, Preface, *in* UNODC, Global Report on Trafficking in Persons 1 (2014).

2 BBC News, *Human trafficking: The Lives Bought and Sold* (July 28, 2015), available at *http://www.bbc.com/news/world-33592634* (Last visited on June. 12, 2016).

3 *See* UNODC, The Global Initiative To Fight Human Trafficking, A Crime That Shames Us All, 2 (May, 2007).

4 Amy O'Neill Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime* 1 (April 2000) (Intelligence Monograph on file with Center for the Study of Intelligence).

5 BBC News, *Cracking Europe's Human Trafficking Rings*, (January 26, 2016), available at *http://www.bbc.com/news/world-europe-35413672* (Last visited on June. 12, 2016).

gone up by 59.7 percent between 2010 and 2014. Recently, on the directive of the Supreme Court, while hearing public interest litigation in December 2015, the Ministry of Woman and Child Development has decided to move a comprehensive legislation that will look beyond trafficking of women and children for the purpose of sexual exploitation.[6] Officials said the new law will also have a component for rehabilitation of the victims.[7]

In this paper, the author seeks to highlight the severity of Human Trafficking and also wants to analyze the effective mechanism to eradicate the problem at national and international levels. The author has basically relied on the data published by National Bureau of Crime Records (NCRB) and also collected relevant evidences from the official website of United Nations, United States Agency for Int'l Development, U.S. Department of State, United Nations Office on Drugs and Crime, United Nations Office of the High Commissioner for Human Rights etc. The author also highlighted the Indian response to the problem of human trafficking followed by the conclusion.

2. Human Trafficking: A Harsh Reality of Today's World

Human Trafficking is an ongoing worldwide crisis, with an estimated Twenty-seven million people enslaved through a $32 billion industry.[8] The trafficking of human beings is not a new evil but has existed for centuries. And it is also very true that we have been tolerating this issue for centuries as well. Almost every country in the world is affected by the human trafficking either as a country of origin, transit, or destination.[9] This ruthless crime was highly debated in 13th United Nations Crime Congress, Doha on April 12-19, 2015 where UN Secretary-General Ban Ki-moon stated that:

> Human trafficking is one of the world's most shameful ills - a heartless violation of human rights in which lives are traded, sold, exploited, abused and ruined. No country is immune, and millions of lives are at stake. We must take a united stand, shine a spotlight on the issue, put traffickers behind bars and give protection and support to victims and vulnerable people.[10]

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6 Shalini Nair, *Tougher Law on Anvil to Tackle Human Trafficking*, The Indian Express, New Delhi, January 21, 2016.

7 *Id.*

8 *See* United States Agency For Int'l Development, Counter-Trafficking in Persons Policy 4 (2012), available at *http://pdf.usaid.gov/pdf docs/PDACTI l.pdf* (Last visited on September 15, 2016).

9 *See* 13th United Nations Congress on Crime Prevention and Criminal Justice, Doha (April 12-19, 2015), available at *http://www.unis.unvienna.org/unis/en/events/2015/crime_congress* (Last visited on August 27, 2016).

10 *Id.*

2.1 *Definition of Human Trafficking*

"Trafficking in persons," "human trafficking," and "modern slavery" have been used as umbrella terms for the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion.[11] Trafficking victims often believe they are accepting jobs in the labor, domestic service, restaurant, and factory sectors,[12] and are taken across borders - sometimes through coercive methods - where they often end up in exploitative situations.[13] International laws are in place to fight this crime. Governments have agreed to a UN Protocol against trafficking in persons which provides a working definition of human trafficking and a common basis for criminalizing the trafficking of persons, especially women and children.[14] The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (UNTOC) (otherwise known as the Palermo Protocol), defines Human Trafficking as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[15]

Therefore, as per the definition of Protocol, exploitation is a key element of trafficking. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[16]

2.2 *Different Elements of Human Trafficking*

According to the abovementioned definition provided under Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, we can identify the

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11 *See* U.S. Department of State Report on Trafficking in Persons 7 (July, 2015), available on *http://www.state.gov/j/tip/rls/tiprpt/countries/2015/243559.htm* (Last visited on September 27, 2015).

12 Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts, 11 HAR* v. *HUM. RTs. J.* 65, 69 (1998).

13 Becki Young, *Trafficking of Humans across United States Borders: How United States Laws can be used to Punish Traffickers and Protect Victims,* 13 GEo. IMMIGR. L.J. 73 (1998).

14 *See* UNODC, The Global Initiative To Fight Human Trafficking, *A Global Commitment*, 3 (May, 2007).

15 Article 3, paragraph (a), available at *https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html* (Last visited on November 12, 2016).

16 *Id.*

constituent elements of human trafficking. There are three constituent elements of human trafficking as:

a. ***The act*** by which trafficking is being done *i.e.* recruitment, transportation, transfer, harbouring or receipt of persons;
b. ***The means*** applied during the act *i.e.* threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits; and
c. ***The purpose*** for which a person is being trafficked *i.e.* for the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs etc.

Therefore, it is very much evident that if we want to ascertain whether any act amounts to human trafficking or not, we have a guideline in the form of a definition and constituent elements of human trafficking. Although human trafficking is often confused with human smuggling and migration, given that these practices also involve the movement of persons, there are important differences between them.[17] Sometimes human trafficking is confused with migrant smuggling which is a wrong understanding as Trafficking and migration are not the same, and the distinction must be clear.

While there is a link between trafficking and migration, there are some distinctions, as highlighted by the United Nations' definition of trafficking.[18] The biggest distinction is that in migration the initial decision is taken by the migrant himself or herself to seek employment or for any other objective and this is not necessarily done via coercion or deception. It is only when a person migrates, and upon reaching their destination is then subjected to coercion, violence or threat of violence under exploitative circumstances, that the distinction from migration to trafficking becomes clearly evident.[19]

2.3 Reasons Responsible for Human Trafficking

In the countries or regions of origin, trafficking is most commonly caused by abject

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17 Rhacel Salazar Parreñas, Maria Cecilia Hwang & Heather Ruth Lee, *What is Human Trafficking? A Review Essay*, Signs, Vol. 37, No. 4, *Sex: A Thematic Issue*, University of Chicago Press 1015 (Summer 2012).

18 Shelley Case Inglis, *Expanding International and National Protections against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 69 (2001).

19 *Id* at 69, 82.

poverty, especially among women, a lack of political, economic or social stability, a shortage of reasonable, legal job prospects, situations of armed conflict or oppression, domestic violence or disintegration of the family structure, gender discrimination, and a lack of access to education.[20] On the other end, in destination countries, causes of trafficking include the expense of charges that employers need to pay legally hired workers, an increased demand for cheap laborers in the construction, agricultural, and industrial sectors, and a rise in the demand for sex workers in a highly lucrative and globalized sex industry.[21]

Few other reasons are also responsible to both situations include increased restriction on legal migration and sophisticated network of traffickers, which makes the human trafficking a clandestine crime. Lack of awareness is also very important factor as victims and general public are not aware that how to tackle this issue. Lack of effective enforcement, global economic policies that foster exclusion of marginalized people, disintegration of social protection networks, and widespread corruption are also responsible for human trafficking.

2.4 Recent Evidences of Human Trafficking

Trafficking can occur nationally or regionally, or from continent to continent.[22] Trafficking happens everywhere, but as per 2014 UNODC, Global Report on Trafficking in Persons, most victims are trafficked close to home, within the region or even in their country of origin, and their exploiters are often fellow citizens.[23] The crime of trafficking in persons more or less affects virtually every country in every region of the world. Between 2010 and 2012, victims with 152 different citizenships were identified in 124 countries across the globe.[24] Here it is important to note that official data provided by different governmental authorities to UNODC represent only the detected case which is definitely much lower than the case actually occurred.

No country is left untouched by human trafficking.[25] Europe is a destination for victims from the widest range of destinations; many people from Asia are trafficked to the widest range of destinations, and the Americas are prominent, both as the origin and destination of victims of human trafficking.[26] In United Kingdom, the

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20 Sara Birkentha, *Human Trafficking*, 6 Interdisc. J. Hum. Rts. L. 29 (2011-2012).
21 *Id.*
22 *Supra* note 9.
23 *Supra* note 1.
24 See, UNODC, Global Report on Trafficking in Persons 7 (2014).
25 *Supra* note 9.
26 *Id.*

National Crime Agency's report 2014 says a total of 3,309 people, including 732 children, were identified as potential victims of human trafficking in the UK - a 21 percent increase on the previous year.[27]

The United States is also a source, transit, and destination country for men, women, transgender individuals, and children - both U.S. citizens and foreign nationals - subjected to sex trafficking and forced labor.[28] As per the U.S. Department of State 2015 Trafficking in Persons (TIP) Report, in FY 2014, DHS's U.S. Immigration and Customs Enforcement (ICE) reported opening 987 investigations possibly involving human trafficking, a decrease from 1,025 in FY 2013.[29] The Federal Bureau of Investigation (FBI) formally opened 835 human trafficking investigations, an increase from 734 in FY 2013, and DOJ's ECM taskforces initiated 1,083 investigations.[30] The Department of State (DOS) reported opening 154 human trafficking-related cases worldwide during FY 2014, a decrease from 159 in FY 2013.[31] The Department of Defense (DoD) reported investigating 14 human trafficking-related cases involving military personnel, an increase from nine in FY 2013.[32]

In India, 10493 cases were investigated for different trafficking in person offences during 2010-2012.[33] As per National Bureau of Crime Records (NCRB) data which shows that crime related to human trafficking in India has gone up by 59.7 percent between 2010 and 2014. As per NCRB data, under Section 370 and 370A of IPC, there are 774 and 151 cases registered this year till September 2015. This figure itself is alarming as in 2014, under these heads, 562 and 105 cases were registered.

3. International Legal Framework on Counter-Trafficking

This year marks the 16th anniversary of the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter Trafficking Protocol), supplementing the United Nations Convention

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27 *See,* NCA's UK Human Trafficking Centre (UKHTC) Report 2014, available at *http://www.nationalcrimeagency.gov.uk/news/779-nca-human-trafficking-report-reveals-21-rise-in-potential-victims* (Last visited on Jan. 6, 2016)

28 *See,* U.S. Department of State Report on Trafficking in Persons (July, 2015), available on *http://www.state.gov/j/tip/rls/tiprpt/countries/2015/243559.htm* (Last visited on September 27, 2016).

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 Available at *https://www.unodc.org/documents/data-and-analysis/glotip/GLOTIP14_Country_profiles_South_Asia.pdf* (Last visited on July 18, 2016).

against Transnational Organized Crime (Palermo Protocol). Palermo Protocol comprises three protocols adopted by United Nations as:

1) The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children;
2) The Protocol against the Smuggling of Migrants by Land, Sea and Air; and
3) The Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition.

The Palermo Protocol was adopted by resolution A/RES/55/25 of November 15, 2000 at the fifty-fifth session of the General Assembly of the United Nations and marked a significant milestone in international efforts to stop the trade in people.[34] The Trafficking Protocol came into effect on Dec 25, 2003. The impact of the Trafficking Protocol has been remarkable as on Dec. 24, 2015, 169 countries have become a party to the Protocol.[35] Government of India has also signed the Convention on December 12, 2002. But it was ratified after 8 years on May 5, 2011. These protocols and convention fall within the jurisdiction of the United Nations Office on Drugs and Crime (UNODC).

Article 5 of the Protocol requires States to criminalize trafficking, attempted trafficking, and any other intentional participation or organization in a trafficking scheme.[36] Articles 6-8 of the Trafficking Protocol outline a comprehensive framework for the protection of victims of trafficking, which guides State Parties to provide for victims' physical, psychological, and social recovery with appropriate housing, counseling and information regarding their legal rights, medical and material assistance, employment and educational assistance and training, to ensure for the physical safety as well as privacy and confidentiality of victims, and to facilitate the possibility of obtaining compensation for damage suffered.[37]

As the guardian of the Organized Crime Convention and its Protocols on Trafficking in Persons, UNODC plays a leading role in strengthening and coordinating the criminal justice response to human trafficking.[38] The United Nations Office on Drugs and Crime (UNODC) runs the Global Programme against

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34 Available at *https://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html* (Last visited on July 18, 2016).

35 *Id.*

36 *See* United Nations Office of the High Commissioner for Human Rights, *International Instruments Concerning Trafficking in Persons*, (Aug., 2014).

37 David Nelken, *Human Trafficking and Legal Culture*, 43 Isr. L. Rev. 481 (2010).

38 *See* UNODC, *What is Human Trafficking*? Available at *https://www.unodc.org/unodc/en/human-trafficking/what-is-human-traffick* (Last visited on July 18, 2016).

Trafficking in Persons (GPAT), which supports Member States to prevent and prosecute the crime, to protect the rights of victims, and promotes cooperation among Member States.[39] In the last two years alone UNODC has trained more than 1,300 practitioners such as law enforcement officials, and has reached 76 countries through its technical assistance activities. It also runs mock trials for judges and prosecutors and lawyers to aid successful prosecution of traffickers.[40] In March 2009, UNODC launched the Blue Heart Campaign to fight human trafficking, raise awareness, and inspire action.[41]

The United Nations Office on Drugs and Crime (UNODC), with financial support from the Crown Prince of Abu Dhabi, has therefore set in motion a Global Initiative to Fight Human Trafficking (UN.GIFT).[42] The process formally launched in London on 26 March 2007, with the objective give a pace to the world-wide fight against human trafficking. At the international level, a number of UN agencies and regional programs already deal with many aspects of human trafficking as:

a) UNODC as the guardian of the UN Protocol against trafficking in persons
b) UNICEF, promoting the protection of children from violence, abuse and exploitation
c) ILO, promoting protection against forced labour and preventing child labour
d) The Office of the United Nations High Commissioner for Human Rights (OHCHR) as the custodian of the anti-slavery legal instruments
e) Organization for Security and Cooperation in Europe (OSCE), fighting human trafficking in its region.

At this juncture, author would also like to mention that the Universal Declaration of Human Rights (UDHR), a 1948 United Nations document that has retained its relevance to the international community, states in Article 4 that "No one shall be held in slavery or servitude" and prohibits slavery and the slave trade "in all their forms."[43] Therefore human trafficking is the most obvious violation of UDHR. Under such

39 *Id.*
40 *Id.*
41 *See,* United Nations Office on Drugs and Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000) available at *http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mntdsgno=XVIIIa&chapter=i8&lang=en* (Last visited on November 27, 2016).
42 *Supra* note 14, at 4.
43 *See,* United Nations Office of the High Commissioner for Human Rights, *Universal Declaration of Human Rights* (Dec. 10, 1948).

international agreements as the 1966 International Covenant on Civil and Political Rights (ICCPR) which prohibits a number of practices directly related to trafficking, including slavery, the slave trade, servitude and forced labour and the 1976 International Covenant on Economic, Social, and Cultural Rights, states have an obligation to take action against trafficking committed by non-state actors.[44]

There are other international instruments which emphasizes for eradication of human trafficking as two International Labour Organization (ILO) conventions focus on forced labour or services: The ILO Forced Labour Convention (Convention No. 29 of 1930) and its newly adopted Protocol, which defines forced or compulsory labour, and the ILO Abolition of Forced Labour Convention (Convention No. 105 of 1957).[45] Additionally, the ILO's Worst Forms of Child Labour Convention (Convention No. 182 of 1999) prohibits perpetrators from using children under 18 years of age for all forms of slavery or practices similar to slavery, trafficking, debt bondage, serfdom, forced or compulsory labour, and prostitution.

Religious leaders have long played a vital role in combating human trafficking. On December 2, 2014, leaders representing Anglican, Buddhist, Catholic, Hindu, Jewish, Orthodox, and Islamic faiths met at the Vatican, to sign the historic Declaration of Religious Leaders against Modern Slavery.[46]

No country is left untouched by human trafficking. Most countries have now criminalized trafficking with a specific offence in line with the UN Trafficking in Persons Protocol. But impunity remains a serious problem; only four in 10 countries reported having 10 or more yearly convictions in 2010-2012 and nearly 15 per cent having no convictions at all in the same period.[47] Therefore, we have to think over this as only international legal framework or legislations are not required but the effective implementation is the need of the time when the existence of humanity is at stake.

4. Indian Response to Human Trafficking: A Lesson for Comprehensive Legislation

India is a source, destination, and transit country for men, women, and children subjected to forced labor and sex trafficking.[48] Ninety percent of India's trafficking

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44 *Supra* note 20, at 31.
45 *Supra* note 36.
46 *Supra* note 11, at 10.
47 *Supra* note 9.
48 *See,* U.S. Department of State Report on Trafficking in Persons, *India*, (July, 2015), available on

problem is internal and related to bonded labour, and those from the most disadvantaged social strata, the lowest caste Dalits, members of tribal communities, religious minorities, and women and girls from excluded groups, those are most vulnerable.[49] The crime of human trafficking in India has increased with the growth in industries utilizing forced labor, such as construction, steel, textiles, wire manufacturing for underground cables, biscuit factories, pickling, floriculture, fish farms, and boat cutting.

At present, the laws under which trafficking is punishable in India falls under Indian Penal Code, 1860 Sections 370 (trafficking for purpose of exploitation), 370A (engaging minors for sexual exploitation), 372 (selling of girls for prostitution), 373 (buying of girls for prostitution), 366A (procuring minor girls), 366B (importing girls from foreign countries). Besides, there are special laws such as Immoral Trafficking (Prevention) Act (ITPA), 1956, Prohibition of Child Marriage Act, 1929, Protection of Children Against Sexual Offences Act, Bonded Labour System (Abolition) Act, 1976, Juvenile Justice (Care and Protection) Act, 2000, Child Labour (Prohibition and Regulation) Act, 1986 and Transplantation of Human Organs Act, 1994. But majority of these legislations deal certain types of trafficking or have provisions that are inadequate or contradictory in nature. For instance, ITPA deals merely with trafficking for the purpose of sexual exploitation and yet fails to clearly define sexual exploitation.

In the year 2013, India passed the Criminal Law (Amendment) Ordinance introducing section 370A criminalizing trafficking in Persons according to the UN Trafficking Protocol. Before that, the Immoral Traffic Prevention Act (ITPA) was used to prosecute some forms of trafficking for sexual exploitation. U.S. Department of State 2015 Report on Trafficking in Persons states that the Government of India does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so. Therefore, they have put India in TIER 2 means a country whose governments do not fully comply with the Trafficking Victims Protection Act's (TVPA's) minimum standards, but are making significant efforts to bring themselves into compliance with those standards.[50]

As per National Bureau of Crime Records (NCRB) the crime related to human trafficking in India has gone up by 59.7 percent between 2010 and 2014 which

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http://www.state.gov/j/tip/rls/tiprpt/countries/2015/243559.htm (Last visited on September 27, 2016).

49 *Id.*

50 *Supra* note 48.

reflects that India need a one-stop solution to deal with human trafficking in the form of a comprehensive legislation that will look beyond trafficking of women and children for the purpose of sexual exploitation. While hearing public interest litigation by an NGO *Prajwala* in December 2015, Hon'ble Supreme Court of India has directed the Ministry of Woman and Child Development regarding protection, rescue and rehabilitation of commercially and sexually exploited women and children.

The Central Government in an affidavit filed in the Supreme Court, in response to the abovementioned PIL submitted that the draft legislation to combat human trafficking will be ready in six months.[51] According to the ministry this new law will address human trafficking in all its forms and enforce increased penalties for trafficking of minors and for repeat offenders and also have a component for rehabilitation of the victims.[52]

Apart from the initiative taken for a very new comprehensive legislation to combat human trafficking, Government of India is also trying to act proactively through different cooperative programmes with international organizations and NGOs. The government collaborated with international organizations, NGOs, and state governments in its efforts to train police, judges, and lawyers on the proper handling of trafficking cases.[53] The Ministry of Home Affairs (MHA) continued to offer a human trafficking certificate course through a public university and reported training for prosecutors and judges on trafficking had been conducted in every district.[54]

In May 2014, the MHA held a video conference between the joint secretary and the principal trafficking officers in each state to discuss best practices in operating Anti-Human Trafficking Units (AHTUs).[55] In addition, the MHA is also working on the fine print of OCIA, which will be the first-ever centralized agency to investigate human trafficking cases having inter-state and international ramifications.[56] A victim database will be prepared by the agency that will be involved with surveillance and intelligence gathering to bring down the rising number of trafficking cases.[57]

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51 Abraham Thomas, *New Anti-Human Trafficking Law on Anvil*, The Pioneer, December 10, 2015, available at *http://www.dailypioneer.com/nation/new-anti-human-trafficking-law-on-a...* (Last visited July 18, 2016).

52 Nair, *Supra* note 6.

53 *Supra* note 48.

54 *Id.*

55 *Id.*

56 *Supra* note 51.

57 *Id.*

5. Conclusion

Human trafficking is a transnational crime with transnational implications.[58] To attack the business of trafficking effectively, it is often necessary to temporarily put aside appropriate rage and revulsion, and temporarily use a cold, dispassionate analysis to understand the business model and its potential weaknesses.[59] The entire human trafficking is nothing but demand and supply mechanism. Traffickers need the inputs in the form of men, women and children to fulfill the demand for trafficking products and services. Therefore we have to be punitive to this supply chain and to understand the *modus operandi* of traffickers.

We have all the good intention in the world to combat human trafficking but sometimes we do not find the best possible and effective way to act on them. What we really need to know is how we can find the best solutions? In India, we have extensive legislation on human trafficking in different form but the problem is with the machinery of enforcement which is inadequate due to socio economic factor prevailing in India. We can adopt the "Four Ps," formula as is directed at the prevention of trafficking, prosecution of traffickers, protection of victims of trafficking, and the establishment of partnerships with others in counter-trafficking.[60]

As we have seen in the case of the United States, a uniform anti-trafficking law TVPA can give prosecutors and judges stronger ammunition with which to convict traffickers.[61] We would hope similar results for India after a new comprehensive anti-trafficking law which is supposed to be a reality very soon.

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58 Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework,* 16 Berkeley *Women's L. J.* 29, 37 (2001).

59 Norman L. Greene & Eric Beinhart, Combating *Human Trafficking-The U.S. Government's Response: a Panel and a Perspective on Counter-Trafficking in Persons*, 20 *ILSA J. Int'l & Comp.* L. 65 (2013).

60 *Supra* note 8 at 3.

61 *"The TVPA [Victims of Trafficking and Violence Protection Act* of 2000] creates new tools that enhance the Department's ability to prosecute traffickers, and it allows us to assist trafficking victims in ways that simply were not possible before the TVPA was passed in October 2000."

POST DATED CHEQUE AS SECURITY AND ITS DISHONOUR – ANALYSIS OF EXISTING LEGAL FRAMEWORK

Preeti Giri*

1. Introduction

In this age of commercialization, the various modes of payment have been resorted to boost up the business dealings. The cheque is certainly a significant mode of payment all over the world. Advent of cheques has given a new height to the commercial world. In day to day commercial dealings the cheque benefits in various ways, it is convenient to make and receive small or large amount through cheque thereby reducing the risk of loss of money, it does away the need of insisting upon a receipt from the payee etc.[1] Basically, the cheques were given for payment of demand, however, over the years the cheques have been used by financial institutions, corporate houses and moneylenders as a security in form of post dated cheques against the loan forwarded. Now days financial institutions, money lenders, business establishment demand blank post-dated cheques from the borrower as a security for repayment of loan. The question is, whether prosecution can be initiated against the drawers in case of dishonour of cheque given as a security under section 138 of Negotiable Act? Time and again questions have been raised about the legal status of post dated cheque. Is a post dated cheque at all a cheque under the Negotiable Instrument Act? What is the period of validity of a post dated cheque? Is section 138 of the Negotiable Instrument Act applicable to post dated cheques? This paper attempts to analyse all these issues and also the legal implications which arises from the presentment of a post dated cheque as a security and its subsequent dishonour.

2. Understanding the Cheque and Dishonour of Cheque

The Cheque was introduced in India by the Bank of Hindustan, the first joint stock bank established in 1770.[2] In 1881, the Negotiable Instruments Act (NI Act) was enacted in India, formalising the usage and characteristics of instruments like the cheque, the bill of exchange and promissory note. Cheque[3] as a sub species is a bill of exchange belonging to genus of negotiable instruments.[4] It is a bill of exchange drawn

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1 For advantages of cheque currency, see, *ML Tannan, Tannan's Banking Law and Practice in India*, Wadhwa and Company Nagpur, New Delhi, 2003.

2 R.N. Choudhary , *Law Relating to Cheques: New Horizons, Digital Signature, e-cheques*, 3, Deep and Deep Publications Pvt. Ltd., New Delhi, 2009.

3 Cheque is defined under section 6 of *The Negotiable Instruments Act*, 1881.

4 Section 13 of *NI Act* recognizes three forms of negotiable instruments in form of promissory note, bill of exchange and cheque.

on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque[5] and a cheque in the electronic form.[6]

Cheques can be classified into various forms on account of various factors.[7] On account of the mentioning of date, cheque can be classified into ante-dated cheque,[8] post dated cheque[9] or stale cheque.[10] The requirement of the inscription of date on the cheque is basically premised upon the fact that the mandate of the customer to the banker given in the cheque becomes legally effective on the date mentioned therein.[11]

A cheque is said to be dishonoured when it is not paid when presented to the bank due to insufficient balance in the account of payer.[12] Section 92 of the Act defines, a cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same. Earlier before 1988, there was no liability provided in case of dishonour of cheque but after the insertion of section 138 in the Negotiable Instrument Act criminal liability was also imposed. It is done to develop and create the faith of the cheque among the people. There are certain ingredients provided in the Act that must be fulfilled in order to hold drawer liable for the dishonour of cheque. Punishment for the offence under section 138 of Negotiable Instrument Act is up to two years of imprisonment or fine which may extend to twice the cheque amount or both.

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5 As per Explanation I (a) to section 6 of *NI Act*, a cheque in the electronic form means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed in a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system.

6 As per Explanation I (b) to section 6 of *NI Act*, a truncated cheque means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

7 Broadly, cheques can be classified into open cheque, crossed cheque, bearer cheque and order cheque. A cheque can further be categorized into post-dated cheques, certified cheques, double-dated cheques, and post-dated certified cheques See generally, Jonnette Watson Hamilton, "Theories of Categorization: A case study of cheques", *Can. J.L. & Soc.*, Vol. 17, 2002, pp. 115-138.

8 An ante-dated cheque is a cheque in which the drawer mentions the date earlier to the date of presenting for payment. For example, a cheque issued on 20th November 2011 may bear a date 5th November 2011.

9 Cheque on which drawer mentions a date which is subsequent to the date on which it is presented, is called post-dated cheque. For example, if a cheque presented on 8th November 2011 bears a date of 25th November 2011, it is a post-dated cheque. The bank will make payment only on or after 25th November 2011.

10 A cheque which is issued today must be presented before at bank for payment within a stipulated period. After expiry of that period, no payment will be made and it is then called 'stale cheque'.

11 See P.N. Varshney, *Banking Law and Practice,* 3.44, Sultan Chand and Sons, New Delhi, 2005.

12 Abhishek Kumar, "Dishonour of cheques: Does criminal liability has solved the problem?" Available at : *http://www.taxmann.com/taxmannflashes/flashart9-2-10_4.htm* (Visited on November 10, 2016).

3. Nature of a Post-Dated Cheque

The ordinary cheque is well-known to everyone. It can be termed to be a pre-printed form which includes information identifying the drawer and their bank, a cheque number, magnetic ink character recognition coding across the bottom left to allow for automated processing, and a number of lines for insertion of the date, the payee, the amount in both numbers and figures, and the signature of the drawer.[13] However to these ordinary cheques, there exist certain variation forms, one of them being, post dated cheques. In *Thomson's Dictionary of Banking,* "post-dated" has been defined as follows: A cheque which is dated subsequent to the actual date on which it is drawn, and which is issued before the date it bears, is called a post-dated cheque. A post-dated cheque should not be paid before the date inscribed thereon. Post dated cheque literally means a cheque with a future date on it. The post dated cheque is not payable till the date which is shown on the face of the said instrument.[14] Unlike ordinary cheques, they are not given for immediate payment. It is a cheque in which the drawer (or any holder) mentions a date on it which is subsequent to the date on which it is drawn. People issue post-dated cheques in order to postpone the date of payment and to allow them to change their mind about making the payment once the goods or services have been investigated [15] and also to secure the loan taken.

3.1 Are post-dated cheques "cheques"?

Before addressing this question we need to first understand the characteristics of "Cheque". As explained before "Cheque" is "a bill of exchange drawn on a bank, payable on demand".

3.2 "Payable on Demand"

A bill is payable on demand

(a) that is expressed to be payable on demand or on presentation; or
(b) in which no time for payment is expressed.

In order to qualify as a cheque, therefore, an instrument must either state on its face that it is payable on demand or on presentation or it must say nothing about time of payment. A post-dated cheque does neither. The bank on which it is drawn cannot pay before the date on the cheque. It is expressly not payable on demand when issued. Section 6 of the Act, a 'bill of exchange' becomes a 'cheque' only when it is 'payable on demand'. So, in

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13 *Supra* note 8 at 128.
14 Hugh Beale, *Chitty on Contracts*, Sweet & Maxwell Ltd., Vol. 2, U.K., 2008.
15 *Supra* note 8.

case of a post-dated cheque, it becomes 'payable on demand' only from the date mention on it; and before that date it is not a 'cheque' in the sense of the term. In India such cheques are considered as bill of exchange till the future date comes. In *Anil Kumar Sawhney* v. *Gulshan Rai* [16] it has been said that as a bill of exchange post dated cheque remains negotiable but it will not become a "cheque" till the date when it becomes "payable on demand". In *Ashok Yashwant* v. *Surendra Madhav Rao Nighochkar* [17] it has been held by the Supreme Court that a post dated cheque is a bill of exchange and it remains as such till the date which it bears comes and then only it becomes cheque.

The cheque is more than a payment instrument. The post dated cheques have been used as a security by financial institutions, housing companies, money lenders, insurers and investment agencies. Security means things deposited or hypothecated as pledge for fulfillment of undertaking to be forfeited in case of failure. Loan today has been guarded with the acceptability of securities. That way, the chances of getting all their money back is considerably improved.

4. Legal Consequences of Dishonour of Post-Dated Cheques Issued as Security

The method of using Post dated Cheques to secure payments has never offered certainty of protection to the receiver of the cheque. Whenever a cheque is deposited to a bank account or a drawer's bank is asked for encashment of it, the drawer's bank may refuse to pay it, usually because the drawer's account does not have sufficient funds: the "NSF" cheque. The legal implications arise when these post dated cheques submitted as a collateral security bounce. The civil remedies have always been available to the payee, holder or holder in due course and he can file a civil suit to recover the amount of dishonoured cheque. In 1988 NI Act is amended and thereby sections 138 to 142 were added providing penalties for dishonouring of cheques due to insufficiency of funds. Though the Law is very much clear on the aspect that, if anyone draws a cheque on an account maintained by him with a banker to pay someone else money, and the cheque bounces, that person is guilty of having committed an offence under the Negotiable Instrument Act, provided certain conditions as envisaged under the provision of the Act are met. Regarding the applicability of provisions of section 138 of the Negotiable Instrument Act to a case in which a blank or posted cheque is obtained by a bank or money lender before or while sanctioning or disbursing loan amount as security for the loan various judgments of High Courts and the Supreme Court have been reviewed in order to find out the existing status.

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16 1993 (004) SCC.

17 AIR 2000 SC 1315.

4.1 Applicability of section 138 of Negotiable Instruments Act, 1881 on issuing of cheques as a security: Judicial Perspective

Section 138 is a highly litigious provision today. Bouncing of post-dated or blank cheques and question of applicability of section 138 of NI Act on such instruments has created flurry among the legal spheres.

The Supreme Court in the matter of *Anil Kumar Sawhney* v. *Gulshan Rai*[18] held that a post dated cheque remains a bill of exchange till the date mentioned thereon and from that date onwards it becomes a cheque amenable to the provisions of section 138 of the Act. A drawer cannot evade his liability if the cheque is dishonoured by his bankers for want of funds, on the plea that it was a post dated cheque when it was drawn. However, The Madras High Court in *M/s Balaji Seafoods Exports (India) Ltd. And another* v. *Mac Industries Ltd.*[19] held that on the date when a blank cheque has been issued by a drawer there should be a subsisting debt or liability between the parties. Similarly the Gujarat High Court and Kerala High Court are of the view that the provision of section 138 are not applicable on dishonour of 'post dated cheque issued as collateral security for due performance of the contract by which the drawer bound themselves to repay the amount, as the cheques were not issued to discharge any existing debt, as the liability which was to be discharged within the meaning of section 138 of the Negotiable Instrument Act was still to arise.

Conflicting decisions of courts discussed in the foregoing paragraph, shows that the law in this area is far more uncertain. Though the Supreme Court had time and again made an attempt to put this uncertainty to rest, despite that various High Courts continued to pass judgment *per incurium*. In the case of *ICDS Ltd.* v. *Beena Shabeer and Another* [20] the Supreme Court observed that the language of section 138 is very lucid. Section 138 reads, "Where *any cheque* drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability". Emphasis was placed by the Supreme Court on the words "any cheque" and "other liability" to support its view that cheques issued as security were also so covered. The section starts with the words 'where any cheque'. These three words are of extreme significance, in particular, by reason of the user of the word 'any' - the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the liability under this provision

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18 (1994)12 CLA (Mag) (35).
19 1999(1) CT 66.
20 (2002) 111 Comp. Cas. 742 (SC).

cannot be avoided in the event the same stands returned by the banker unpaid. The Legislature has been careful enough to include not 'other liability' as well. It further observed, 'Any cheque' and 'other liability' are the two key expressions which clarifies the legislative intent. Any contra interpretation would defeat the intent of the Legislature". Despite the stated law many High Court again followed literal approach in *Goa Handicrafts, Rural & Small Scale Industries Development Corporation Ltd,* v. *Samudra Ropes Pvt. Ltd. & Anr*[21]. Again the High Courts in *Anand Urban Cooperative Credit Society* v. *Vipin Lalchand Mehta & Anr.*[22] and *Hanumant R. Naik* v. *Ajit Harmalkar* [23] expressed the view that security for loan amounts were not to attract provisions of section 138 of the Negotiable Instruments Act.

Later Apex court itself in *M/s. M.S. Narayana Menon* v. *State of Kerala*[24] held that if the cheque is issued for security or for any other purpose the same would not come within the purview of section 138 of the Act. This further raised the uncertainty on this issue which led to many conflicting decisions of High Courts. In *Ramakrishna Urban Co-operative Credit Society Ltd.* v. *Shri. Rajendra Bhagchand Warma* [25] it was held by Bombay High Court that under section 138, the debt or other liability must be in existence when the cheque, whether blank or post dated was issued. Likewise the Delhi High Court in *Krish International P.Ltd. & Ors.* v. *State & Anr.*,[26] that a cheque issued not for an existing due but issued by way of security would not attract the provisions of Section 138 of the Act.

In *Indus Airways Pvt. Ltd. & Ors.* v. *Magnum Aviation Pvt. Ltd.*,[27], the question that arose for consideration before the Supreme Court was, whether the post dated cheques issued by the appellants (purchasers) as an advance payment in respect of purchase orders could be considered in discharge of a legally enforceable debt or other liability and, if so, whether the dishonour of such cheques amount to an offence under Section 138 of NI Act. The Supreme Court held that to attract an offence under Section 138, there should be a legally enforceable debt or other liability subsisting on the date of drawl of the cheque.

Few provisions of an enactment could be said to have had a stormy, varied and conflicting interpretation in so short a time as section 138 of the NI Act.[28] The Supreme Court has now once again in *Sampelly Satyanarayana Rao* v. *Indian Renewable Energy*

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21 2005 ALL MR (Cri) 2643, 2006 (1) Bom. C.R. (Cri) 157.
22 *2008 (2) Bom. C.R. (Cri.) 65, 2008 ALL M.R. (Cri) 2266.*
23 *2008 (1) Bom. C.R. (Cri) 432, 2008 ALL MR (Cri) 486.*
24 AIR 2006 SC 33660.
25 (2010)0 ALL MR (CRI.)1098.
26 ILR (2013) II DELHI 945 CRL.M.C.
27 2014 (4) SCALE 645.
28 P. Bhujanga Rao, "Section 138 of *Negotiable Instruments Act*: What a great mess!" 3 *Comp LJ* 106, 1994.

Development Agency Limited[29] examined whether dishonour of a post-dated cheque given for repayment of a loan instalment which is also described as "security" in the loan agreement would be covered by Section 138 of the Act. The facts of the case were that the loan agreement recorded (under a clause titled "Security") that post-dated cheques towards payment of loan (principal and interest) were given. The cheques carried dates which were in fact the due dates for the repayment of instalments. The cheques were subsequently dishonoured and complaints under Section 138 of the Act were filed. The Delhi High Court was approached to quash these complaints. As the Delhi High Court found no reason to do so, an appeal was preferred to the Apex Court. In its judgment given on 19th September, 2016, the Supreme Court has held that dishonour of such cheques being for discharge of existing liability would be covered by Section 138 of the Act. In the instant case, the loan was disbursed prior to the date endorsed on the cheque and instalments had fallen due on the date of the cheque. The Supreme Court has held that the cheques undoubtedly represent an existing outstanding liability the moment the instalment falls due and the loan becomes due and repayable. Since, liability or debt exists as on the date of the cheque, the Supreme Court has held that Section 138 is indeed available as a remedy to the lender. This is a departure from the earlier position wherein the liability which required due discharge was examined as on the date of delivery or handover of the cheque as opposed to the date inscribed on the cheque. Thus as long as post-dated cheques bearing due dates of specific instalments are handed over to the lender, the defence available to the borrowers under the earlier judgments of the various high courts would no longer be available henceforth.

5. Conclusion

Post dated cheques are the cheques which are drawn by the payer to the payee but are to be drawn only on a future date. In business world, post dated cheques are commonly and issued as security for several purposes. It is a common practice, now a days that a post dated cheque is collected as a collateral security by the financial institutions and money lenders in order to secure the loan amount. A post dated cheque is enforceable as a negotiable instrument only when it becomes payable on demand. It is covered under Negotiable Instrument Act, 1881. The Supreme Court ruling in 1998 clarified that a post dated cheque will be considered as a bill of exchange and not a cheque before the date mentioned on the said instrument. By bill of exchange, it means that the document will stay negotiable and will turn into cheque only on the date it will be payable on demand. The recourse under section 138, Negotiable Instrument Act is not available in those cases wherein the post dated cheques were deposited prior to accrual of debt or

[29] *Supra* note 1.

liability and are dishonoured. In such cases these of civil law remedy is resorted to recover such debt. Whether the provisions of section 138 of the Negotiable Instrument Act can apply to a case in which a blank or posted cheque is obtained by a bank or money lender before or while sanctioning or disbursing loan amount as security for the loan had always been a matter of debate. The anomalies have got strengthen by the different judgments of the High Courts, disregarding Supreme Court judgment on the given point. The recent judgement of the Supreme Court in *Sampelly Satyanarayana Rao* v. *Indian Renewable Energy Development Agency Limited* case will have far reaching consequences as the distinction between a post-dated cheque given as advance and post-dated cheque issued for satisfaction of subsisting liability has been clearly elucidated this time. However, the latest decision of the Supreme Court needs to be distinguished from its decision in the case of *Indus Airways Private Limited v Magnum Aviation Private Limited*, where it was held that when a contract provides that the purchaser has to pay in advance and the cheque towards advance payment is dishonoured, it will not give rise to criminal liability under section 138, although the purchaser may be liable for breach of contract. As the crucial question to determine applicability of Section 138 of the Act is whether the cheque represents discharge of existing debt or liability or whether it represents mere advance payment without there being any subsisting debt or liability. Undoubtedly, this judgement provides sufficient guidance as to circumstances which shall lead to an offence under the most dreaded provision of law, *i.e.,* Section 138 of the Act, 1881 and therefore by virtue of such clarity the possibility of unjustly coercing the borrowers would significantly be reduced. However, the question which remains to be decided is whether an undated or a blank cheque deposited with the lender with the same purpose (i.e., repayment of the loan which is due and payable) would also be now governed by the ratio laid down by the Supreme Court in *Sampelly Satyanarayana Rao* v. *Indian Renewable Energy Development Agency Limited.*[30] Researcher is of the view that so far as it is concerned with blank undated cheques (i.e. which are merely signed without putting any date or amount on it) correct course is to exonerate the drawer of post dated cheque of criminal liability otherwise it would amount to too wide interpretation of law and arm twisting of law by the creditor in his own favour. Also there should be attempts to harmonize the Indian laws with the global banking laws which seem to provide better efficacy in recovering of the debt or liability.

[30] *Supra* note 1.

AN ANALYSIS OF CONTRACTUAL OBLIGATION AND INSURABLE INTEREST IN INSURANCE LAW

Faisal Ali Khan*

The industrial revolution and financial activities has been emerging in the modern society in order to protect in the interest of the property most vulnerable to different types of risk and uncertainty of life. These uncertainties of death, sickness, injury, accident etc. are constantly staring at the face of a man and his property is also exposed to the risks arising from fire, water, accident, windstorm, sea perils, earthquakes, floods, dishonesty, negligence, etc. resulting from acts of God. The annual losses to individuals from untimely death and to businessman from these risks are too great to be calculated and indicate the importance of meeting them in a well - planned manner. Owing to the industrial revolution, technological changes and growing complexities of the economic system, the risks in business have increased manifold. Hence, insurance occupies an important place in the modern industrial world. It would be impossible to do without insurance. Indeed, insurance has now spread to such an extent that is now possible to insure practically anything against loss by a peril. One can easily have a credit insurance, crop insurance, glass insurance, dog insurance, livestock insurance, petrol pumps insurance, weather insurance, twin insurance, property insurance, riot insurance, life insurance, fire insurance, and marine insurance etc. Since man's life is open to risks of various kinds and degrees which involve exposure to losses, a scheme for dealing with some of these risks has been devised. This is known as insurance. It protects man from uncertainty and risks in his personal and business life. The main function of insurance is to spread these losses over a large number of persons through cooperative efforts. The insurance provides protection against a peril, but does not eliminate the risk.

Insurance, therefore, denotes a contract whereby one party, in consideration of money payment, called premium, undertakes to indemnify another party against any loss or to pay to that party an agreed sum of money on happening of a certain event. It is a scientific method of combining individuals who are exposed to identical hazards[1].

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1 M. Arif Khan; *Theory & Practice of Insurance*; Educational Book House, A.M.U., Aligarh; 2001 pp. 1, 6 & 7

1. Definitions of insurance:

i. Prof. D.S. Hansell: "A social device providing financial compensation for the effects of misfortune, the payments being made from the accumulated contributions of all parties participating in the scheme".

ii. Dr. W.A. Dinsdale: "Insurance is a device for the transfer of risks of individual entities to the insurer, who agrees, for a consideration (called the premium), to assume to a specified extent losses suffered by the insured".

iii. Justice Lawrence: "Insurance is a contract by which the one party in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them".

iv. J.B. Maclean: "Insurance is a method of spreading over large number of persons a possible financial loss too serious to be inconveniently borne by an individual".

v. Dictionary of Business and Finance: "A form of contract or agreement under which one party agrees in return for a consideration to pay an agreement amount of money to another party to make good for a loss, damage, or injury to something of value in which the insured has a pecuniary interest as a result of some uncertain event"[2].

The business of insurance, as we all know, is sufficiently old though a comprehensive definition of a contract of insurance still eludes and based on the decision in the case of *Prudential Insurance Co.* v. *Inland Revenue Commissioners*[3], Prof. Hardy Ivamy, a well-known writer on insurance law, defines a contract of insurance as follows:

> A contract whereby one person, called the 'insurer', undertakes, in return for the agreed consideration, called the 'premium', to pay to another person called the 'assured', a sum of money or its equivalent, on happening of a specified event[4].

The event insured against, observed by Channel, J., in the case just cited, must "involve some amount of uncertainty"[5] – whether the event will ever happen at all; such as a motor accident, or, if the event is one which in the course of nature must

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2 *Id.* at p. 7 & 8

3 (1904) 2 KB 658

4 R.M. Vats; *Law Relating to Insurance with Special Reference to Consumer Protection Act,* Universal Law Publishing Co. Pvt. Ltd. Delhi; 1997(Reprint (1998) pp. 4 & 5, ; ISBN 81-7534-044-4.

5 *Prudential Insurance Co.* v. *Inland Revenue Commissioners* (1904) 2 KB 658

inevitably happen at some time or the other, such as death, there must be an uncertainty as to the time at which the event will happen[6].

The specified event, according to Channel J., must further be of a character more or less adverse to the interest of the person effect the insurance[7]. This observation needs to be qualified to the extent that it may be true of indemnity insurance, like fire insurance, burglary insurance, etc. but it may not be true if the insured under an endowment policy qualifies for payment on attaining a specified age or surviving till stipulated period; this event is not adverse to the interest of the insured. Further, the event on which the liability of the insurer depends must be beyond his control[8].

2. Essential ingredients of a contract of insurance

A contract of insurance necessarily has the following essential elements:

i. There is an agreement in writing between the parties, i.e. the assured and the insurer, known as "Insurance policy" and parties should be competent to the contract as defined under section 10 of the Indian Contract Act, there must be proper offer and acceptance for a valid insurance contract, free consent between the parties i.e. insurer and insured/policy holder and there must be legal object and consideration.

ii. There is a stipulation in the agreement about the amount and duration of insurance;

iii. The agreement provides that the insurer undertakes to indemnify the insured on the happening of a specified event; and

iv. In consideration of the above the insured undertakes to pay to the insurer an agreed amount called the "premium"[9].

The uncertainties of human life, the dangers and pit falls with which it is surrounded and the risks accompanying the dealings of human creatures intense may be said to be cause of the beginning and development of insurance in all its departments. The essence of all insurances is the transfer of such risks and dangers to the shoulders of the persons who are willing to accept the burden for money consideration. Apart from this, the time of death of a person is not certain and in the case of his premature death, a man's dependents may find themselves deprived of all means of existence.

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6 *Supra* note 4 at p. 5
7 *Supra* note 5 at p. 664
8 *Supra* note 4 at p. 5
9 *Supra* note 4 at p. 5

Therefore, the basic purpose of insurance is to minimize the hard effects of such happenings by providing a consolidated amount for the substance of the dependents of the deceased person, in consideration of timely payment by him during his lifetime. Likewise, the property of a person is open to all risks of it being destroyed by fire, flood or by any other unforeseen natural calamities and in this case, insurance steps are to indemnify the owner of the property in cases aforesaid. The consideration in such a case is again the timely payment of instalments by the owner. It is obvious that insurance is necessary based on pecuniary considerations and only that risk which is measurable in terms of money can be the basis of a contract of insurance[10].

Insurance is a method, which provides security and protection against financial losses. It is a tool by which a group of small number of peoples is compensated out of the funds collected in forms of premium from large number of people. Therefore, it is a means of shifting the risks to insurer in consideration of a nominal price called premium[11]. Insurance business is contractual obligation between the insurer and insured/policy holder against the life and property of the insured and the insurance contract will play on motion on the uncertainty of events to be happened and on the maturity of the insurance policy. It has also depends on utmost good faith of the parties in the insurable contract. All parties must disclose all material fact related to the insurance. Insurance contract must be a valid contract as defined under Section 10 of the Indian Contract Act, 1872.

The contract of insurance is co-related with the combined reading under sections 7, 8 and 10 of the Indian contract Act and under sections 39 and 64VB of the Insurance Act which may reflect the intention of the legislature about proposal, acceptance of proposal, premium of insurance and nominee. The contract of insurance is exist upon the acceptance of proposal and first payment of premium via cheque and nominee apply for insured money on the death of insured and no defect found in the proposal form by corporation and no communication was made by corporation prior to nominee's application about the acceptance of proposal or rejection of proposal and issuance of receipt and encashment of cheque by corporation and shown acceptance of proposal. Hence, corporation is liable to pay insured amount to nominee[12]. The rights of nominee under section 39 of the Insurance Act says that insurance amount

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10 Gaurav Varshney; *Insurance Laws*; Lexis Nexis, Gurgoan; 2007 pp. 31-2, ISBN: 978-93-5035-881-8.

11 *Ibid*

12 *Life Insurance Corporation of India, Mumbai and others* v. *Krishna Devi* A.I.R. 2017 Pat. 75

received by nominee/wife and such amounts constitute the entitlement of all legal hears of the deceased[13]

3. Fundamental principles of insurance

3.1 Utmost Good Faith

The true concept of good faith i.e., *uberrimate fidei* is given by Lord Blackburn in the case of *Brownlie* v. *Campbell*[14] are as follows:

> In policies of insurance whether Marine or Life insurance, there is an understanding that a contract is *uberrimate fidei* i.e., if you know any circumstance at all that may influence the underwriters opinion as to the risk that he is incurring, and consequently as to whether he will take it or what premium he will charge if he does take it, you will state what you know. There is an obligation to disclose, what you know and the concealment of a material circumstances known to you whether you thought it material or not, avoids the policy. But in other contracts it is not so.

It is fundamental principles of insurance law that the contracting parties must observe utmost good faith. Good faith forbids either party from concealing of what he privately knows, to draw the other into bargain from his ignorance of fact and his believing the contrary[15]. Therefore both the parties must disclose all material facts in case there may be concealment of the material facts, it will be illegal contract. Besides, the policy holder has duty to state correctly in proposal form for the policy and insurer alleging that fraudulent misrepresentation and suppression of material facts regarding health made the policy holder while filling up proposal forms and burden of proof on the insurer[16]. The contract of the insurance, like other contracts of insurance, differs from any ordinary contract in that it requires, throughout its existence, the utmost good faith to be observed on the part of both the insured and the insurers[17].

In addition to the ordinary obligation which exists in every contract that all representations made by the parties during the negotiations leading up to the contract shall be honestly made, the person seeking a contract of fire insurance must communicate to the insurers all matters within his knowledge which are, in fact,

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13 *Shreya Vidyarthi* v. *Ashok Vidyarthi and others.* AIR 2016 SC 139
14 (1880) 5 A.C. 925
15 *United India Insurance Company Ltd.* v. *MKJ Corporation* (1996) 6 SCC 428
16 *Life Insurance Corporation of India* v. *Smt. G.M. Channabasamma* (1991) 1 SCC 357
17 *Hanil Era Textile Ltd.* v. *Oriental Insurance Co., Ltd.* (2001) 1 SCC 269

material to the question of the insurance, and not merely all those which he believes to be material[18].

A failure to comply with this requirement renders the contract voidable; for the insured, as being the person interested in the subject matter, has some acquaintance with its nature and surroundings, and must, therefore be taken as against the insurers, to know what the matters are which ought to be communicated to them[19].

The life insurance policy has fraudulent suppression of material facts and non-production of personal statement of policy holder regarding his health allegedly suppressing ailment of seizure disorder by insurer and primary opinion of doctor regarding the cause of death recorded as septicaemia and not seizure disorder. Hence, policy holder not suppressing any material facts regarding serious illness and his widow is entitled to policy amount with interest 9% p. a[20].

3.2 Contract of Indemnity

The contract of fire insurance resembles the contract of marine insurance, and differs from that of life insurance in that it is purely a contract of indemnity against losses actually sustained[21]. Even where, by the terms of the contract, as is usually the case, the insurers expressly undertake, in the event of loss or damage by fire to the property insured, to pay or make good the loss or damage up to a specified sum, the contract is nevertheless one of indemnity[22], and of indemnity only[23]. Therefore term of indemnity may be defined as the security against the loss. The object of contract of insurance is to make good the loss suffered by the insured person, i.e., to place the insured persons as nearly as possible in the same position in which he was immediately before the happening of the event against which he accident insurance is a contract of indemnity. This means that it is not a contract to make a gain. It is to leave him neither a loser nor a gainer subject to his insuring the property for its full value[24]. Therefore, indemnity is such a fundamental principle of insurance that the doctrine of subrogation and contribution are corollaries of the principles to further ensure that the insured does not make any profit out of the insurance transaction[25].

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18 E.R. Hardy Ivamy; *Fire and Motor Insurance*; Ed. ; Butterworths Insurance Library, London; ; Ed. 4th (1984); p. 7

19 *Id.* at pp. 7 & 8

20 *Mrs. Mamata Satpathy* v. *Zonal Manager, LIC of India and others* A.I.R. 2017 Ori. 54

21 *Dalby* v. *India and London Life Assurance Co.* (1854) 15 C B 365 & 387

22 *Dane* v. *Mortgage Insurance Corporation* (1894) 1 Q B 54 & 61

23 *Supra* note 18

24 *Supra* note 10 at p. 49

25 *Varia Silk Mills* v. *CIT* A.I.R 1991 SC 2104

The principle of indemnity will be applicable only to the extent of loss suffered by the insured and not more than that[26]. Thus, it needs little emphasis that in construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not open for the Court to add, delete or substitute any words. It is also well settled that since upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed to determine the extent of liability of the insurer. Therefore, the endeavour of the court should always be to interpret the words in which the contract is expressed by the parties[27].

3.3 Contract of indemnity not applicable to the LIC policies

All general insurance contracts are contracts of indemnity in the sense that they compensate the insured person and put him in the same position financially as he was before the event happened due to which he suffered a financial loss[28].

While the above is true in case of general insurance policies, the same does not hold true in case of life insurance and personal accident policies. The principle of indemnity does not apply to life insurance and personal accident policies as it is difficult to quantify the financial loss that a family will suffer in event of death of an individual. It is generally said that a person has an unlimited interest in his own life. Similarly a spouse has unlimited interest in the life of the other spouse. In the case of insurance on the lives of debtors, partners, employees etc. the sum assured may be limited to certain amount which may cover the pecuniary interest and other incidental costs such as premium paid and interest etc. even in the case of own life insurance, it does not mean that insurer will grant any amount of insurance. In such cases earning capacity and premium paying capacity of the life to be assured may serve as a guide to arrive at the amount of insurance[29].

3.4 Insurable interest

Insurable interest is a basic essential of any contract of insurance. At a general level, this means that the party to the insurance contract who is the insured or policy holder must have a particular relationship with the subject matter of the insurance, whether

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26 *Shri Say Siangshvi* v. *New India Assurance Co. Ltd. And others* A.I.R. 2015 Megh 104

27 *M/S. Suraj Mal Ram Niwas Oil Mills* v. *United India Insurance Co. Ltd. & Others* on 8 October, 2010; available at: *https://indiankanoon.org/doc/1844953* (Lastly accessed on 08, September, 2017)

28 V.W. Bapat & R.K. Agrawal; *IC – 24 Legal Aspects of Life Assurance*; Ed: 2012; Insurance Institute of India, Mumbai; 2012; p. 112

29 *Ibid*

that be a life or property or a liability to which he might be exposed. The absence of the required relationship will render the contract illegal, void or unenforceable depending upon the type of insurance[30].

3.4.1 Definitions of insurable interest

Lawrence, J. has given definition of insurable interest in the case of Lucena V. Craufurd, are as follows:

> A man is interested in a thing to whom advantage may arise or Prejudice may happen from the circumstances which may attend it.... And whom it import, that its condition as to safety and other quality should continue. To be interested in the preservation of a thing is to be so circumstanced with respect to have benefit from its existence, prejudice from its destruction.

(a) A person is said to have an 'insurable interest' when he stands to gain or benefit from the continued existence (safety) and well-being of the person or property insured, and would suffer a financial loss if there is damage to the person or property.

(b) Insurable interest is the legal right of the person to insure the subject matter with which they have a legal relationship recognised by law.

(c) Insurable interest in simple terms means 'right to insure' a life or property.

(d) Insurable interest applicable to all the risks under the Life Assurance Act, 1774, are as follows:

> Where the assured is so situated that the happening of the event on which the insurance money is to become payable would, as a proximate cause, involve the assured in the loss or diminution of any right recognised by law or in any legal liability, there is an insurable interest in the happening of that event to the extent of the possible loss or liability[31].

An employer has insurable interest in his employee to his employee to the extent of the value of his services. If a lot of employees fall sick at the same time or become a casualty in a catastrophe; then this will be detrimental to the organisation. An employer can create insurable interest in the lives of his employees by undertaking to provide monetary benefit to the family or estate of the employees in the event of death. Group insurance are effected by companies on the lives of their employees are on the basis of such insurable interest[32].

To constitute an insurable interest, it must be an interest whereby the risk would by

30 *Supra* note 10 at p. 47
31 *Supra* note 24 at p. 101
32 *Supra* note 24 at p. 107

its proximate effect cause damage to the person assured, that is to say, cause him to lose a benefit or incur a liability[33]. The validity of an insurance contract, in India, is dependent on the existence of an insurable interest in the subject matter. The person seeking an insurance policy must establish some kind of interest in the life or property to be insured, in the absence of which, the insurance policy would amount to a wager and consequently void in nature[34].

The test for determining if there is an insurable interest whether the insured will in case of damage to the life or property being insured, suffer pecuniary loss[35]. A person having a limited interest can also insure such interest[36]. It was held that the rule of public policy that forbids the taking out of insurance by one on the life of another in which he has no insurable interest does not apply to the assignment by the insured of a valid policy to one not having an insurable interest. In the impugned Judgment, the High Court noted that the law in the U.S.A. after Grigsby is that though there has to be an insurable interest at the inception when the policy is taken out, subsequent thereto there is no requirement of insurable interest at the time of transfer or assignment[37].

3.5 Subrogation

Subrogation means the substitution of the insurance company in place of the assured in respect of all the rights and remedies, which the assured has against the third party. Therefore, if the insured person recovers the full extent of the loss from the insurance company, then the insurance company gets the rights and remedies of the assured and can proceed against the third party for the recovery of compensation. And if the insured person also receives the compensation from the third party in respect of the same loss, then he must pay over that amount to the insurance company[38].

The doctrine of subrogation confers upon the insurer the right to receive the benefit of such rights and remedies as the assured has against third parties in regard to the loss to the extent that the insurer has indemnified the loss and made it good. The insurer is therefore, entitled to exercise whatever rights the assured possesses to recover to that extent compensation for the loss, but it must do so in the name of the

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33 *Seagrave* v. *Union Insurance Company Ltd.* (1886) LR 1 CP 305

34 *Anclil* v. *Manufacturer's Life Insurance Company* (1899) AC 604 (PC)

35 *New India Insurance Company Ltd.* v. *G.N. Sainani* (1997) 6 SCC 383

36 *Tomilson (Haulters) Ltd.* v. *Hoplurane* 1966 (1) AC 418

37 *LIC of India* v. *Insure Policy Plus Services;* decided on 29th December. 2015; available at: *https://indiankanoon.org/docfragment/141140955/?formInput=insurable%20interest%20%20docty pes%3A%20supremecourt* (Lastly accessed on 8 September, 2017)

38 *Supra* note 10 at p. 51

assured[39].

Subrogation by act of law would not give insurer a right to serve in a Court of law in its own name. Subrogation is concerned solely with the mutual rights and liabilities of the parties to the contract of insurance. It confers no right and imposes no liabilities upon third parties. They are strangers to the contract and the insurer who had paid the loss gets no refund or remedy against anyone. Thus, the assured only can serve such parties in his own name[40].

3.6 Contribution

According to the Federation of insurance Institute, Mumbai, contribution may be defined as the right of an insurer who has paid a loss under a policy to cover a proportionate amount from other insurers who are liable for the loss[41].

When a person gets a subject matter insured with more than one insurer called the "Double Insurance" whereby in the event of damage, he cannot claim anything more than the total loss from all the insurers together. Under the principles of indemnity, the insured cannot be restored to a better position than before the loss. In such cases the total loss suffered by the assured is contributed by different insurers in the ratio of the value of policies issued by them for the same subject matter[42].

3.7 Proximate cause

The *cause proxima non remota spectator* is derive from Latin maxim which means that nearest or immediate cause, proximate and not remote cause, shall be taken as the cause of loss. The insurer thus has to make good the loss of insured that clearly and proximate results, whether directly or indirectly from the event insured against in the policy[43].

Lord Shaw has stated that the proximate cause means the active, efficient cause that sets in a train of events which bring about a result, without the intervention of any force started and working actively from a new and independent source[44].

This maxim of proximate cause is implement in such a manner where the contract of insurance stipulate the terms and conditions of the insurance between the insurer and

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39 *Obarai Forwarding Agency* v. *New India Assurance* A.I.R. 2000 SC 855
40 *Union of India* v. *Sri Sardar Mills Ltd.* A.I.R. 1973 SC 281
41 *Supra* note 10 at 52
42 *Ibid*
43 *Supra* note 10 at p. 54
44 *Ley Land Shipping Company* v. *Western Insurance Company* 1868 LR 371

insured and disclose in what circumstances insurance company will liable to pay and insurer will not liable to pay beyond the terms & conditions written in the insurance policy. What types of risk is cover in the policy in the event of some happening or accident? Policy holder/insured is entitle to get compensation for the risk covered in the policy bond and insured is not entitle to get compensation beyond the risks as disclose in the policy bond.

3.8 Mitigation of loss for the insured/policy holder

It is a principle of minimization of loss of the insured/policy holder because insured is not entitle to get more profit as compare to actual loss suffer in the grab of insurance of his goods & property. Besides, it is the duty of insured to do all necessary care of the insured goods/property as a man of reasonable & prudent in such a manner as he ought to do all necessary steps to be taken in such situation that his goods/property is not insured. If he is find to be negligent or his act deliberately loss of his own goods to fulfil mala fide intention, under these circumstances insured will lose his claim from the insurance company.

4. Development of engineering insurance in U.K., U.S.A., Germany and India

The origin of engineering insurance dated back to the 19th century. Great Britain was in the forefront of industrialisation on large scale made possible by James Watt's invention of the stream engine. As many as 500 steam engines of modest output capacity were already in operation at the beginning of the 19th century[45]. The revolution of industrialization is the requirement to protect the plant & machinery from the damage or injury by way of emergence of engineering contract of insurance. Because of plant & machinery are the costly items there is always needs to send from one place to another for the purposes of commercial activities or sometimes it may be damaged in the course of functioning in the industrial units or it may be destroyed from the shipment. Therefore, it is need of insurance policy against the machine in order to safeguard of the industrial sector.

Nevertheless many teething troubles were experienced with this new energy production machinery. An alarming situation was created due to explosions in stream boilers resulting into heavy losses to property and personal injury[46].

An independent organisation called the "Manchester Stream Users Association

[45] A.S. Chaubal; *IC – 77 Engineering Insurance*; Insurance Institute of India, Mumbai; 2013; p. 2
[46] *Ibid*

(M.S.U.A)" was founded by group of engineers in 1854 for the purpose of inspection and revision of steam engines and boilers[47].

The M.S.U.A. was not an insurance company but it was soon realised that inspection with insurance would provide a comprehensive service to the user of steam. With this idea the first engineering insurance company viz. The Steam Boiler Assurance Company was formed in 1858. This was followed by formation of other similar companies[48].

These companies offered insurance policies to cover:

(a) Material damage
(b) Personal injury and
(c) Third party liability resulting from explosion of boilers and other pressure vessels[49].

The various legislations were passed from time to time of this subject matter in U.K., U.S.A. German and India in order to meet out the requirements of the comprehensive legislation and uniformity at international level with respect to engineering insurance and few of them illustrated are as follows:

(a) The Boiler Explosion Act, 1882
(b) The Factory and Workshop Act, 1901
(c) The Coal Mines Act, 1911
(d) Mines and Quarries Act, 1954
(e) Factories Act, 1961

The developments in Germany regarding inspection were similar to that in the U.K. and U.S.A. Statutory regulations were enforced as early as 1856 for the construction, maintenance and revision of steam boiler and pressure vessels. The first Boiler Inspection Authority (DUA) was founded in 1866 in Mannheim on the same principles as the British organisation[50].

Because of the increase in the vulnerability to accident and damage in the industrial sector, there is a need of comprehensive insurance or third party insurance in order to safeguards to this sector's lives & properties, ultimately insurance companies has designed the various types of policies in the interest of their clients and insurance

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47 *Ibid*
48 *Ibid*
49 *Ibid*
50 *Supra* note 40 at p. 3

business. Hence, it is social welfare legislations.

In our country New India Assurance Co. Ltd. has started the engineering insurance on the modest scale in 1953 with the technical assistance of Munich Reinsurance Co. besides, The Oriental Fire and General Insurance Co. Ltd. had also set up its own engineering insurance department in Bombay under the guidance of one Mr. Michael Taylor[51].

However, there is a need of an hour to pass comprehensive social welfare legislation to protect the interest of the industrial sector for engineering insurance in the pattern of Motor Vehicles Act, 1988 and also constitute the tribunals for the adjudication of cases of the Engineering Insurance claims in such a manner of Motor Accidents Claims Tribunal.

4.1 Statement of Problem

During review of the existing literature, it was found that although some laws are enacted for the contractual obligations and insurable interest in insurance laws but they have not achieved the desirable result, some reports of contract of insurance laws have been taken at the globalization era but result have not been much positive due to inconsistency of the laws at global level, mechanism to deals with the problems and prospects.

4.2 Research Methodology

This work is in the form of doctrinal research in which deductive method has been adopted on the basis of material collected from various sources and non-doctrinal research method has also incorporated to collect the information of the practical difficulties from consumers and insurance agents.

4.3 Objective of study

The object of the present work is to make a keen and deep analysis of the contractual obligation in the insurance laws in India and aboard and to evaluate the provisions of insurance laws and policy behind it.

4.4 Hypothesis of Studies

To discuss and re-evaluate the provisions contract of insurance laws and study in-depth of the various legislations whether it is sufficient to meet the demand of justice

[51] *Supra* note 40 at p. 4

and contract of insurance or there is some loopholes, which may need some amendments. Uniform policy will be mooted at global level.

5. Conclusion

To wind up, the above discussions is being made in so far with respect to the contract of insurance: Problems and Prospects that the industrial revolution, technological changes and growing complexities of the economic system, the risks in business have increased manifold. Hence, insurance occupies an important place in the modern industrial world. It would be impossible to do without insurance. Indeed, insurance has now spread to such an extent that is now possible to insure practically anything against loss by a peril. One can easily have a credit insurance, crop insurance, glass insurance, dog insurance, livestock insurance, petrol pumps insurance, weather insurance, twin insurance, property insurance, riot insurance, life insurance, fire insurance, and marine insurance etc. Since man's life is open to risks of various kinds and degrees which involve exposure to losses, a scheme for dealing with some of these risks has been devised. This is known as insurance. It protects man from uncertainty and risks in his personal and business life. The main function of insurance is to spread these losses over a large number of persons through cooperative efforts. The insurance provides protection against a peril, but does not eliminate the risk. However, there is a need of an hour to pass comprehensive social welfare legislation to protect the interest of the industrial sector for engineering insurance in the pattern of Motor Vehicles Act, 1988 and also constitute the tribunals for the adjudication of cases of the Engineering Insurance claims in such a manner of Motor Accidents Claims Tribunal.

PRIVATE STANDARDS AND COMPETITION LAW

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1. Introduction

Many producers and retailers from developed countries require their suppliers or exporters from developing countries to comply with certain social, environmental, labour, and safety norms. These norms are increasingly referred to as 'Private Standards'. The numbers of Private Standards and their influence on trade have risen steadily since the early 1990s under the influence of combined forces of Globalisation, Liberalisation, and Privatisation (L.P.G effect) and the emergence of the global supply chain.[1]

Private Standards when agreed by two or more business enterprises (retailers) or by a business association, it may be significantly limiting or reduce competition between competitors, thus being inconsistent with competition law, for example, as cartels or joint boycott. Further, In order to reduce the competitive disadvantage of the domestic industry, countries might want to ban imports under safety and welfare of customers. Thereby, potentially circumventing competition in the relevant market. Therefore, balance is required to be maintained between Private Standards and Competition law.

2. Competition Law

Before going into intricacies of Competition law, one needs to first understand the Word 'Competition'. "Competition is the best way of ensuring that the common man has right to use to the broadest choice of goods and services at the most competitive prices. With augmented competition, producers are forced to innovate and specialise. This would affect in reduced costs and wider choice to consumers. A free and fair competition in the market is necessary to achieve this objective."[2]

Although the word Competition is not defined in the Competition Act, 2002, it is desirable to understand the meaning of competition. Competition is generally understood to mean the process of economic rivalry amongst companies to attract more

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1 Pascal Liu, *Private standards in International Trade: Issues and Opportunities,* Economist, Trade and Markets Division, FAO. This paper was presented at the WTO's Workshop on Environment-Related Private Standards, Certification and Labelling Requirements, Geneva, 9 July 2009

2 Official Website of Competition Commission of India, available at: *http://www.cci.gov.in/about-cci*, (last accessed on 02 February 2017).

customers or enhance profit or both[3]. The competition also refers to a situation in a corporate world where companies independently strive for the support and repeat purchases by customers in order to attain profit maximisation. Free and fair competition, amongst business houses, is one of the fundamental pre-requisite of an effective and efficient business environment.

According to *Black's Law Dictionary, Competition* is the struggle for commercial advantage; effort or action of two or more commercial interests to obtain same business from the third parties.[4]

The *World Bank*[5], in 1990 adopted the following definition of Competition in relation to commercial transactions: "Competition is a situation in a market in which firms or sellers independently strive for the buyers' patronage in order to achieve a particular business objective, for example, profits, sales or market share".

'Competition' has been further defined as the process by which economic agents, acting independently in a market, limit each other's ability to control the conditions prevailing in that market. The purpose of competition law is to limit the role of market power that may result from considerable concentration in a particular industry. Since the control exercised by a monopoly over price, there are economic efficiency losses to the public at large; and product quality, choice, and diversity may also be affected. Thus, there is a requirement of protection of competition.

The Supreme Court of India opined that the competition law is concerned with the regulation of competition in a particular market within the territory of a country.[6] Further, the Hon'ble Supreme Court in *TELCO v. Registrar of Restrictive Trade Agreements*[7] observed that the issue of competition cannot be considered in a vacuum but in a commercial sense.

In *Competition Commission of India v. Steel Authority of India Limited*[8], the Hon'ble Supreme Court observed that purpose of competition law is to limit the role of market power that may result from considerable concentration in a particular industry. The

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3 Intellectual Property and Competition Law: The Innovation Nexus, CIRC note, October, 2013, available at: *https://www.circ.in/pdf/Intellectual_Property_and_Competition_Law-The_ Innovation_ Nexus.pdf*, (Last accessed on 15 December 2017).

4 Black's Law Dictionary, pp. 322-323 (8th Edn. 2004).

5 The Foundation of the Competition Policy in India, World Bank, 1999, available at: *https://www.lawteacher.net/free-law-essays/international-law/the-foundation-of-the-competition-policy-in-india-international-law-essay.php*, (last accessed on 15 December 2017).

6 *Haridas Export* v. *All India Float Glass Manufacturers Association*, AIR 2002 SC 2728.

7 (1977) 2 SCC 55

8 (2010) 10 SCC 744

main apprehension with monopoly and similar kinds of concentration is not that being big is necessarily undesirable. Thus, there is a need to preserve and protect competition. The main purpose of competition law is to remedy some of those situations where the behaviour of one firm or two lead to the collapse of the free market system, or, to prevent such a collapse by laying down rules by which rival businesses can compete with each other.[9]

In most simple language, competition in the market means sellers striving independently for buyer's support and patronage to maximize profit or other business. A buyer prefers to buy a product at a price that maximises his benefits whereas the seller prefers to sell the product at a price that maximises his profit. Therefore, the Competition is the cutting edge which determines the target achieving approach of a commercial enterprise and the main target or desire of every commercial enterprise is to minimise the competition to a minimal extent possible.[10] Competition is beneficial in followings ways:

a) Optimisation of allocation of resources.
b) Compulsion for effective pricing.
c) Encouragement for producers to be more efficient.
d) Effective performance by producers.
e) Standardisation of quality of goods and services.
f) Optimal consumer choice and options.
g) Promotion of consumer welfare.

3. Competition Law in India

The Indian competition law regime is a nascent regime.[11] Prior to the operationalisation of the Competition Act, 2002 (Competition Act), the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) was the operational law which regulated certain aspects of Competition. In the recent years, the Indian economy has been one of the best performers and is on a high growth path. Infusion of a greater degree of competition can play a catalytic role in unlocking the fuller growth potential in many critical areas of the economy. In the interest of consumers, and the economy as a whole, it is necessary to promote an environment that facilitates fair competition outcomes in the market, restrain anticompetitive behaviour and discourage market

9 *Ibid*

10 Michael E. Porter, "The Competitive Advantage of Nations," *Harvard Business Review*, March-April Issue, 1990, available at: *https://hbr.org/1990/03/the-competitive-advantage-of-nations*, (last accessed on 12 October 2017)

11 *The Competition Act* enacted in 2002 but become operational in May 2009

players from adopting unfair trade practices. Therefore, Competition has become a driving force in the global economy.[12]

According to the Indian Constitution, freedom to trade or practice any occupation is a fundamental right.[13] As per Constitution, only the Parliament or the State has the power to impose restrictions on this right. Constitution also provides for curbing concentration of economic power, so that the common good is not adversely affected. The Chapter IV of the Constitution lays down the Directive Principles of State policy which is to be regarded by the state as guiding principles in the governance of the country. The genesis of Indian law on competition issues may be traced back to Article 38 and Article 39 of the Indian Constitution which inter alia, states that:

1. that the ownership and control of material resources of the community are so distributed as best to subserve the common good; and
2. that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The aforesaid Articles cast a duty on the State to promote the welfare of the people by securing and protecting a social order in which social, political and economic justice is prevalent and its further duty to distribute the ownership and control of material resources of the community in a way so as to best subserve the common good and ensuring that the economic system does not result in the concentration of wealth. The enactment of MRTP Act, 1969 was based on the socioeconomic philosophy enshrined in the Directive Principles of State Policy contained in the Constitution of India.

4. 1991 Economic Reforms and Need for New Competition Law

In the wake of 1991 balance of payment crisis,[14] an additional round of extensive range of economic reforms was initiated under the leadership and guidance of the then finance minister and former Prime Minister of India Dr. Manmohan Singh. The reforms beginning 1991 were not a one-off event and ever since 1991 many additional rounds of reforms have been rolled out year after year to usher or escort India into a market-based economy. These reforms have to a varying extent influenced every

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12 CS Prashant Kumar, *Competition Law in India: An Overview, available at https://www.linkedin.com/pulse/20140821065102-73187306-competition-law-in-india-an-overview*, (last accessed on 18.09.2017)

13 *Constitution of India*, Article 19 -Freedom of Trade

14 Bernard Weinraub, Economic Crisis Forcing Once Self-Reliant India to Seek Aid, available at *http://www.nytimes.com/1991/06/29/world/economic-crisis-forcing-once-self-reliant-india-to-seek-aid.html,* (last *accessed* on 19 November 2016)

characteristic of economic policy including reforms of economic legislation.[15] In 1991, the MRTP Act, 1969 was amended to cope up with the new and innovative reforms known as L.P.G effect i.e. Liberalisation, Privatisation, and Globalisation. However, the MRTP Act, 1969, despite a number of amendments, was not capable to adequately deal with anti-competitive practices like cartels, boycotts and refusal to deal, predatory pricing, bid rigging, abuse of dominance and combinations.

After India became a party to the WTO[16] agreement, a noticeable change was noticed in India's foreign trade policy which had been earlier highly restrictive. Thus, finally enhancing its push on globalization and opened up its economy removing command and control system and resorting to liberalisation.

The Former Finance Minister of India, Yashwant Sinha, in its budget speech in February 1999 announced that:[17]

"The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions." Finding the scope of MRTP Act not enough for nurturing competition in the market and eliminating anti-competitive practices in the national and international trade, the Government of India decided to appoint a committee to propose a modern competition law.[18]

5. High-Level Committee on Competition Law and Policy

The Government appointed a **High Level Committee on Competition Law and Policy** (Raghavan Committee) under the chairmanship of Shri S.V.S. Raghavan in October 1999 to propose a legislative framework, which may necessitate a new law or suitable amendments to the MRTP Act consonant with international developments and for changing the approach from curbing monopolies to promoting and fostering competition in line with the international atmosphere was constituted, which submitted its report in May 2000.

The Raghavan Committee conducted an extensive and comprehensive study of the Government Policies, their effect on the Industrial formation and structure in India, the

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15 *Ibid*

16 India is a WTO member since 1 January 1995

17 Budget Speech, February 1999, available at *http://finmin.nic.in/topics/unoin- budgets/budget1999-2000/b5/b5.htm*, (last accessed on 19 September 2016)

18 *Supra* note 17

deficiencies of the Indian companies to compete with multinational companies and then submitted its report. The most important suggestions and recommendations prepared by the Raghavan Committee were:

- to repeal the MRTP Act and to pass a new Competition Act for the regulation of Anti-Competitive Agreements and to prevent the abuse of dominance and combinations including mergers;
- to do away with reservation of products in a phased manner for the Small Scale Industries and the Handloom Sector;
- to divest the shares and assets of the Government in State Monopolies and privatise them; and,
- to bring all industries in the private sector as well as public sector undertakings within the proposed legislation.

Thus, the MRTP Act became obsolete in the light of changes in international and national economic development[19]. Under these circumstances, India enacted a new Competition law, the Competition Act, in 2002[20] pursuant to Raghavan Committee's Report[21], to replace the Monopolies and Restrictive Trade Practices (MRTP) Act of 1969 which is influenced by the Competition Law of United Kingdom, provisions of EC Treaty[22] and US Antitrust Laws.

The Preamble of the Competition Act, 2002 provides for the establishment of a Competition Commission to prevent practices having an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India. The Competition Act, 2002 seeks to prohibit anti-competitive agreements[23], abuse of dominance[24], and to regulate combinations[25]. For achieving the purposes of the Competition Act, 2002, it empowers the Central Government to establish a

19 T. Ramappa, *Competition Law in India: Policy, Issues and Developments*, Oxford University Press, New Delhi, 2009, P. 6

20 Act No. 12 of 2003 vide notification on 14th January 2003.

21 High Level Committee on Competition Policy and Law, Government of India, 2000

22 The Treaty of Rome, officially the Treaty establishing the European Economic Community (TEEC), is an international agreement that led to the founding of the European Economic Community (EEC) on 1 January 1958. It was signed on 25 March 1957 by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany. The word Economic was deleted from the treaty's name by the Maastricht Treaty in 1993, and the treaty was repackaged as the Treaty on the functioning of the European Union on the entry into force of the Treaty of Lisbon in 2009.

23 *The Competition Act, 2002*, S. 3

24 *Id.*, S. 4

25 *Id.*, S. 5 & 6

Competition Commission of India (CCI)[26]. CCI is mandated to eliminate practices having adverse effects on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants in the market in India and also to undertake competition advocacy[27] for creating awareness and impart training on competition law.

6. Private Standards

Standard setting is the process of determining a common set of characteristics for a good or service, covering many aspects of output and processes.[28] Private Standards are voluntary technical regulations developed by private entities, such as multi-national companies, trade association and other entities outside of government, mandating various standards to be followed by the exporters or manufacturers of products and services.[29] Private Standards by definition are voluntary; they may in practice become de-facto mandatory where compliance is required for entry into certain markets or multi-national companies.[30]

Private Standards differ depending on what they regulate. **Product standards** contain requirements for the final product characteristics, such as shape, size or nutritional content. **Process standards**, on the other hand, regulate the process through which the final product is produced. The requirements can refer to routines for ensuring food safety and can thus be used as a tool for fulfilling a product standard.[31]

Private Standards may vary in scope and objectives, the scope of objectives may cover environmental conservation, eco-labeling, carbon footprint, ensuring food safety, sustainable management of natural resources, organizational accountability and social accountability, labour conditions and protection of social and human rights, to

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26 *Id.*, S. 7

27 *Id.*, S. 49

28 See, OECD Policy Roundtable on Standard Setting, 2010, Technical regulations and standards set out specific characteristics of product - such as its size, shape, design, functions and performance, or the way it is labelled or packaged before it is put on sale. In certain cases, the way a product is produced can affect these characteristics, and it may then prove more appropriate to draft technical regulations and standards in terms of a product's process and production methods rather than its characteristics per se, available at *http://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm*, (last accessed on 18 September 2017)

29 International Trade Centre, *Technical Paper on the Interplay of Public and Private Standards* (2011), available at *file:///C:/Users/hp-pc/Downloads/The%20Interplay%20of%20Public%20and%20Private%20Standards.pdf*, (last accessed on 25 October 2017)

30 Private standards: relevant definitions and a typology, available at *http://www.fao.org/docrep/013/i1948e/i1948e02.pdf*, (last accessed on 4 January 2017)

31 Cecilia Carlsson, Helena Johansson, *Private standards-Levelling the Playing Field for Global Competition in the Food Supply Chain*, Agri-Food Economics Centre, 2013.

promoting good agricultural and manufacturing practices. Private standards can be numerical standards defining required characteristics of products such as contaminant limits or maximum residue limits, or process standards prescribing the production processes or pertaining to the management system and documentation requirements.[32]

7. Types of Private Standards

The private standard can be classified into Buyer codes of conduct, certificates, and product labels. examples of selected private standards are Social Accountability (SA) 8000, Forest Stewardship Council (FSC), Oeko-Tex, Fairtrade Labelling Organization (FLO), Global Organic Textile Standard (GOTS), Worldwide Responsible Accredited Production (WRAP), Business Social Compliance Initiative (BSCI), Fair Labor Association (FLA), and the codes of conduct of Nike, Adidas, Marks & Spencer, H&M, Deichmann, Pier 1, IKEA, Wal-Mart, and Gap Inc.[33]

8. Reasons for Emergence of Private Standards

Private standards and certification schemes have emerged for a number of reasons:

1. Private Standards fill regulatory gaps posed by Globalisation.
2. The emergence of global supply chains coordinated by large multi-national companies (MNC).
3. Private Standards complement public regulations securing implementation of standards throughout the whole global supply chain.
4. They promote best practices and improved productivity.
5. Growing social concerns addressing the need for more sustainable and better production conditions of products and services.
6. Increased consumer awareness of the impact of food on health.
7. Quality and due diligence requirements assigned to by supply chain participants,
8. Growing demand for more responsibly produced goods and services in the public.

9. Private Standards Vis-A-Vis Competition Law: Competition Concerns

i. **Competition Concerns due to dominating buyer power and supplier have to comply- Profit making and Price distortion**: Private Standards are agreed by two or more business enterprises, it may be significantly limiting or reduce competition between competitors thus being inconsistent with competition

32 *Ibid*
33 UNIDO Guidelines

law, for example, as cartels or joint boycott. Further, because of discriminatory and exclusionary nature of Private Standards, competition is restricted and customers are denied the benefits of competition. However, when a Private Standards are adopted by a single private enterprise merely representing its preference with respect to products or services it procures or sells, it appears not inconsistent with competition law.

ii. **The balance between safety and welfare of customers and anti-competitive practice:** To reduce the competitive disadvantage of the domestic industry, countries with more stringent legislation might want to impose similar requirements on or ban imports produced under safety and welfare of customers. However, this is not allowed under the framework of the World Trade Organisation (WTO) and the SPS Agreement, which permits countries to impose requirements on the safety of the final product, but not on the process and production methods in the exporting country.

Private standards used by private actors are not covered by the WTO rules, and can, therefore, incorporate requirements for process and production methods. Private Standards can thus include aspects that are not traditionally contained in the agreements of the WTO, and can thereby potentially circumvent existing rules and regulations and competition in the relevant market.[34] Therefore, balance is required to be maintained between Private Standards and competition concerns.

iii. **The artificial increase in price resulting in more burdens on customers:** Since compliance of Private Standards require additional investment by the supplier on process and production, certification, cost of auditors etc. This will ultimately increase the price of final output or product. Suppliers who are certified by Private Standards are in a position to artificially differentiate their product from others, thereby, demanding an extra premium on their products. The burden of this increased cost or price will be to the customers.

iv. **Extra-territorial applicability of Private Standards**: Municipal laws are necessarily territorial in scope but Private Standards have an extraterritorial scope. Private Standards set by a private entity in one country is applicable to exporters from other countries. If the exporters refuse to comply with these standards then exports will not be accepted. Further, Private Standards violates and invalidates municipal and local laws. This situation often leads to conflict between Private Standards and municipal laws. This is also a violation of the principle of sovereignty and recogonised principles of International Law.

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[34] *Supra* note 31

v. **Discriminatory against Developing and Under-Developed Countries**: The emergence and proliferation of Private Standards and their mandatory nature in compliance have become an increasing concern for exporters, particularly in developing and under developing countries by imposing a cost on them by imposing additional requirements with the result of raising technical barriers to market access. Further, it has increased the financial burden on poor farmers from developing and underdeveloped countries because for exports they are required to follow Private Standards set by importers and retailers of developed countries and compliance with these Private Standards requires more investments, certification, and cost of audits.

vi. **The multiplicity of Private Standards and lack of uniformity between different Private Standards**: That several different Private Standards exist in parallel can be beneficial for producers since they can choose to implement the standard that best suits their individual production conditions. However, the multiplicity of standards can also be a problem, because different retailers and food processing companies prefer different Private Standards. In such case, a supplier may have to be certified by several Private Standards and the requirements of different Private Standards are no different. Producers and manufacturers have to adapt production so that it satisfies the requirements of each Private Standard, which results in efficiency losses in production and additional costs for multiple audits.[35] Further, there are no globally acceptable standards which result in difficulties in implementation of standards.

10. Conclusion

In present times, Private Standards co-exist with Public Standards and the influence of Private Standards on trade have risen steadily since the early 1990s under the influence combined forces of Globalisation, Liberalisation, and Privatisation (L.P.G effect) and the emergence of the global supply chain. It is very difficult to assess the market penetration and effects of Private Standards due to lack of monitoring mechanism. As discussed in this paper, Private Standards may have benefits but at the same time, there are some valid Competition law concerns also. Further, for proper monitoring and regulations, there is a need to bring Private Standards under the mechanism of the World Trade Organisation.

[35] *Supra* note 28

LIABILITY FOR FOOD ADULTERATION IN INDIA- A REVIEW OF THE EXISTING LAWS

Dr. Shruti Goyal*

1. Introduction

The food from its inception till the stage of reaching the consumer's plate undergoes many processes and treatments. These processes and treatment modify the food product and enhance its characteristics. Many multinational, national as well as small, cottage and local manufacturers have entered the arena of food industry owing to its growing volume and dimensions. The growth of food industry has also brought along with it the menace of food adulteration. Consumption of adulterated food leads to health problems, increase in diseases and at times even premature death. The problem of food adulteration is not a contemporary problem and deliberate adulteration of food products is probably as old as the food processing and production systems themselves. In today's world ensuring the availability of wholesome food has become a challenge in itself. In India, the legislature has enacted various statues in order to deal with the problem. The Law Commission of India in its report submitted in January 2017 has suggested that a uniform scheme of punishment should be created to address the food adulteration offences. The author in this article analyses the existing provisions dealing with food adulteration, the inter-relation between these provisions, the backdrop in which the matter was referred to the Law Commission and the amendments proposed by the Commission for amendments in food adulteration laws.

2. Present Framework to Deal With Food Adulteration Offences

The present laws dealing with food adulteration is the *Food Safety and Standards Act*, 2006 and the provisions envisaged under the *Indian Penal Code*, 1860.

2.1 Provisions of Food Safety and Standards Act, 2006

The *Food Safety and Standards Act* (Food Act) was passed by the Parliament in 2006 and came into effect in 2011. The two main aims of the Act are: firstly, to consolidate the laws relating to food and secondly, to provide for the establishment of Food Safety and Standards Authority of India (FSSAI).[1] The Food Act subsumes in itself various central Acts like the Prevention of Food Adulteration Act, 1954; the Fruit Products Order, 1955; the Meat Food Products Order, 1973; the Vegetable Oil Products (Control) Order, 1947; the Edible Oils Packaging (Regulation) Order, 1998; the

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1 The *Food Safety and Standards Act*, 2006, Preamble.

2.1.2 *Offences and Penalties*

Chapter IX (sections 48-67) of the Food Act deals with offences and penalties. Section 48 enlists the general provisions relating to offences and describes how a food may be rendered as injurious to health.[22] Section 49 lays down factors which shall be taken into account while calculating the quantum of penalty. Sections 50-67 of the Act (except section 65)[23] prescribe for offences and penalties. It is pertinent to note that the Food Act does not use or define the term 'adulteration'. In place, the terms defined under the Food Act are 'adulterant' and 'unsafe food'. 'Adulterant' means any material which is or could be employed for making the food unsafe or sub-standard or mis-branded or containing extraneous matter.[24] 'Unsafe food' means an article of food whose nature, substance or quality is so affected as to render it injurious to health.

A food can be rendered injurious to health-

- by the article itself or its package thereof which is composed whether wholly or in part of poisonous or deleterious substances; or
- by the article consisting wholly or in part of any filthy, putrid, rotten, decomposed or diseased animal substance or vegetable substance; or
- by virtue of its unhygienic processing or the presence in that article of any harmful substance; or
- by the substitution of any inferior or cheaper substance whether wholly or in part; or
- by addition of a substance directly or as an ingredient which is not permitted; or
- by the abstraction, wholly or in part, of any of its constituents; or
- by the article being so colored, flavored or coated, powdered or polished, as to damage or conceal the article or to make it appear better or of greater value than it really is; or
- by the presence of any colouring matter or preservatives other than that specified in respect thereof; or
- by the article having been infected or infested with worms, weevils or insects; or

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22 A food may be rendered injurious to health by means of one more of the following operations, namely, (i) adding any article or substance to the food; or (ii) using any article or substance as an ingredient in the preparation of the food; or (iii) abstracting any constituents from the food; or (iv) subjecting the food to any other process or treatment.

23 The *Food Safety and Standards Act*, 2006, S. 65 talks about the power to order compensation to consumer in case of injury or death.

24 The *Food Safety and Standards Act*, 2006, S. 3(1)(a).

- by virtue of its being prepared, packed or kept under unsanitary conditions; or
- by virtue of its being mis-branded or sub-standard or food containing extraneous matter; or
- by virtue of containing pesticides and other contaminants in excess of quantities specified by regulations.[25]

Some of the contraventions under the Act are punishable with fine only[26] whereas some of the contraventions are punishable with imprisonment and fine.[27]

2.1.3 *Offences Punishable with Fine only*

The Act lays down penalty for selling sub-standard food,[28] misbranded food,[29] food containing extraneous matter[30] or food not in compliance with the provisions of the Act

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25 The *Food Safety and Standards Act*, 2006, S. 3(1)(zz).

26 The *Food Safety and Standards Act*, 2006, Ss. 50-58 are punishable with fine only.

27 The *Food Safety and Standards Act*, 2006, Ss. 59-63 are punishable with imprisonment and fine.

28 Under the *Food Safety and Standards Act*, 2006, S. 51 the penalty for sub-standard food may extend to five lakh rupees. According to section 3(zx) of the Act, an article of food shall be deemed to be sub-standard if it does not meet the specified standards but not so as to render the article of food unsafe.

29 Under the *Food Safety and Standards Act*, 2006, S. 52 the penalty for mis-branded food may extend to three lakh rupees. According to section 3(zf) of the Act, "misbranded food" means an article of food--
(A) if it is purported, or is represented to be, or is being--(i) offered or promoted for sale with false, misleading or deceptive claims either; (a) upon the label of the package, or (b) through advertisement, or (ii) sold by a name which belongs to another article of food; or (iii) offered or promoted for sale under the name of a fictitious individual or company as the manufacturer or producer of the article as borne on the package or containing the article or the label on such package; or
(B) if the article is sold in packages which have been sealed or prepared by or at the instance of the manufacturer or producer bearing his name and address but-- (i) the article is an imitation of, or is a substitute for, or resembles in a manner likely to deceive, another article of food under the name of which it is sold, and is not plainly and conspicuously labelled so as to indicate its true character; or (ii) the package containing the article or the label on the package bears any statement, design or device regarding the ingredients or the substances contained therein, which is false or misleading in any material particular, or if the package is otherwise deceptive with respect to its contents; or (iii) the article is offered for sale as the product of any place or country which is false; or
(C) if the article contained in the package-- (i) contains any artificial flavoring, coloring or chemical preservative and the package is without a declaratory label stating that fact or is not labeled in accordance with the requirements of this Act or regulations made there under or is in contravention thereof; or (ii) is offered for sale for special dietary uses, unless its label bears such information as may be specified by regulation, concerning its vitamins, minerals or other dietary properties in order sufficiently to inform its purchaser as to its value for such use; or (iii) is not conspicuously or correctly stated on the outside thereof within the limits of variability laid down under this Act.

30 Under the *Food Safety and Standards Act*, 2006, S. 54 the penalty for food containing extraneous matter may extend to one lakh rupees. According to section 3 (i) "extraneous matter" means any matter contained in an article of food which may be carried from the raw materials, packaging

or regulations or not of the nature or substance or quality demanded by the purchaser.[31] Penalty can also be levied for processing adulterant[32] or for processing or manufacturing food under unhygienic or unsanitary conditions[33] or for importing food in contravention of the provisions of the Act or rules or regulations[34] or for publishing misleading advertisement.[35] If a food business operator or importer without reasonable ground fails to comply with the requirements of the Act or the rules or regulations or orders issued under it or fails to comply with the directions issued by the Food Safety Officer then he shall be liable to a penalty which may extend to two lakh rupees.[36] In cases, where no penalty has been separately provided for contravening the provisions of the Act or rules or regulations then the person shall be liable to a penalty which may extend to two lakh rupees.[37]

2.1.4 Offences Punishable with Imprisonment and Fine

Section 59 of the Act in particular prescribes punishment for 'unsafe food'. Under this section any person who whether by himself or by any other person on his behalf manufactures for sale or stores or sells or distributes or imports any article of food for human consumption which is unsafe, shall be punishable—

(i) where such failure or contravention does not result in injury, with imprisonment for a term which may extend to six months and also with fine which may extend to one lakh rupees;

(ii) where such failure or contravention results in a non-grievous injury, with imprisonment for a term which may extend to one year and also with fine which may extend to three lakh rupees;

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materials or process systems used for its manufacture or which is added to it, but such matter does not render such article of food unsafe.

31 Under the *Food Safety and Standards Act*, 2006, S. 50 the person shall be liable to pay a penalty which may extend to five lakh rupees. However, petty manufacturers, petty retailers, hawkers, stall holders or any tiny business operator who does not need licence and requires only registration shall be liable to a penalty which may extend to twenty five thousand rupees.

32 Under the *Food Safety and Standards Act*, 2006, S. 57 the person shall be liable to a penalty which may extend to two lakh rupees if such adulterant is not injurious to health. If the adulterant is injurious to heath then the penalty shall extend to ten lakh rupees.

33 Under the *Food Safety and Standards Act*, 2006, S. 56 the person shall be liable to a penalty which may extend to one lakh rupees.

34 Under the *Food Safety and Standards Act*, 2006, S. 67 if any person imports any food in contravention of the provisions of the Act or Rules or Regulations, then he shall be liable under the provisions of this Act in addition to any penalty to which he may be liable under the *Foreign Trade (Development and Regulation) Act*, 1992 and the *Customs Act*, 1962.

35 Under the *Food Safety and Standards Act*, 2006, S. 53 the person shall be liable to a penalty which may extend to ten lakh rupees.

36 The *Food Safety and Standards Act*, 2006, S. 55.

37 The *Food Safety and Standards Act*, 2006, S. 58.

(iii) where such failure or contravention results in a grievous injury, with imprisonment for a term which may extend to six years and also with fine which may extend to five lakh rupees;

(iv) where such failure or contravention results in death, with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and also with fine which shall not be less than ten lakh rupees.

The Act lays down punishment for providing false information or producing false document,[38] and carrying out a business without license.[39] If a person without reasonable cause resists, obstructs, intimidates, assaults or impersonates a Food Safety Officer in exercising his functions;[40] or without the permission of the Food Safety Officer interferers with the seized items[41] then he shall become criminally liable under the Act.

In cases where the offence is committed by a company, every person who was in charge of and was responsible for the affairs of the company as well as the company shall be deemed to be guilty of the offence and shall be proceeded against and punished accordingly.[42]

The Act provides for enhanced punishment in case of subsequent offences. In case of subsequent conviction the person shall be liable to (i) twice the punishment which might have been imposed on a first conviction, subject to the punishment being maximum provided for the same offence; (ii) where the offence is a continuing one, a further fine on daily basis which may extend up to one lakh rupees; and (iii) his licence shall be cancelled.[43]

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38 Under the *Food Safety and Standards Act*, 2006, S. 61 the person shall be punishable with imprisonment for a term which may extend to three months and also with fine which may extend to two lakh rupees.

39 Under the *Food Safety and Standards Act*, 2006, S. 63 the person shall be punishable with imprisonment for a term which may extend to six months and also with fine which may extend to five lakh rupees.

40 Under the *Food Safety and Standards Act*, 2006, S. 62 the person shall be punishable with imprisonment for a term which may extend to three months and also with fine which may extend to one lakh rupees.

41 Under the *Food Safety and Standards Act*, 2006, S. 60 the person shall be punishable with imprisonment for a term which may extend to six months and also with fine which may extend to two lakh rupees.

42 The *Food Safety and Standards Act*, 2006, S. 67.

43 The *Food Safety and Standards Act*, 2006, S. 64(1).

The Act also provides for compensation in cases where article of food has caused injury to the consumer or his death. The compensation shall not exceed three lakh rupees in case of grievous injury and shall not exceed one lakh rupees in all other cases of injury. In case of death the compensation shall not be less than five lakh rupees.[44]

2.1.5 Procedure for Dealing with Offences and Penalties

The Act provides for two kinds of mechanisms for dealing with offences. One is the criminal prosecution of the offender by the criminal courts[45] and the second alternative forum is imposition of penalty by the Adjudicating Officer. The Act also provides for the establishment of the Food Safety Appellate Tribunal to hear appeals from the decisions of the Adjudicating Officers.[46] Civil court shall have no jurisdiction to entertain any suit or proceeding in respect of any matter under this Act in which the Adjudicating Officer or the Tribunal is empowered to determine. No injunction shall be granted by any court or other authority in respect of any action taken under the Act.[47]

Adjudication- The Food Act authorizes the Adjudicating Officer to adjudicate in cases where (i) the contravention is punishable with fine only; or (ii) where the offence is committed by a Company.[48] In such cases, the Designated Officer shall authorize the Food Safety Officer to file application with the Adjudicating Officer. The Adjudicating Officer shall have the power to hold inquiry and impose such penalty as he thinks fit.[49] Appeals from such orders shall lie before the Food Safety Appellate Tribunal.[50] While adjudicating the quantum of penalty, the adjudicating officer or the Appellate Tribunal shall have regard to the following (i) the amount of gain or unfair advantage, wherever quantifiable, made as a result of the contravention, (ii) the amount of loss caused or likely to cause to any person as a result of the contravention, (iii) the repetitive nature of the contravention, (iv) whether the contravention is without his knowledge, and (v) any other relevant factor.[51]

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44 The *Food Safety and Standards Act*, 2006, S. 65.

45 The *Food Safety and Standards Act*, 2006, Ss. 73, 74 and 75.

46 The *Food Safety and Standards Act*, 2006, Chapter X.

47 The *Food Safety and Standards Act*, 2006, S. 72.

48 Under Rule 3.1 of the *Food Safety and Standards Rules*, 2011 the adjudicating officer has the power to hold an inquiry for the purpose of adjudicating offences punishable under sections 50,51,52,53,54,55,56,57,58, 64,65,66 and 67 of the *Food Safety and Standards Act*, 2006

49 The *Food Safety and Standards Act*, 2006, S. 68.

50 The *Food Safety and Standards Act*, 2006, S. 70.

51 The *Food Safety and Standards Act*, 2006, S. 49.

The Commissioner of Food Safety may empower the Designated Officer to compound offences committed by petty manufacturers who himself manufacture and sell any article of food, retailers, hawkers, itinerant vendors or temporary stall holders.[52] However, no offence for which punishment of imprisonment has been prescribed shall be compounded.[53]

Criminal Trial- The Judicial Magistrate First Class (JMIC) or Metropolitan Magistrate shall have jurisdiction to try offences (except offences relating to grievous injury or death of the consumer for which punishment of imprisonment for more than three years has been prescribed) under the Act. The offences shall be tried in a summary way.[54]

The Central Government or the State Government have been empowered if considered expedient in public interest to establish Special Courts for the trial of offences relating to grievous injury or death of the consumer for which punishment of imprisonment for more than three years has been prescribed.[55] Appeal from the orders of this court shall lie to High Court which shall be heard by a bench of not less than two judges.[56]

In cases where the article of the food has caused injury or death of the consumer the Adjudicating Officer or the Tribunal or the Court can order payment of compensation to the victim or his legal representative.[57] In such cases, the Adjudicating Officer or the Court may also cause the name, place of residence of the person held guilty, the offence and the penalty imposed to be published in the newspapers at the offender's expense.[58]

2.2 Offences under the Indian Penal Code

Chapter XIV of the Indian Penal Code, 1860 deals with offences affecting the public health, and safety, convenience, decency and morals. Sections 272 and 273 of this chapter prescribe punishment for offences relating to adulteration of food.

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52 The *Food Safety and Standards Act*, 2006, S. 69 (1).
53 The *Food Safety and Standards Act*, 2006, proviso to S. 69(3).
54 The *Food Safety and Standards Act*, 2006, S. 73.
55 The *Food Safety and Standards Act*, 2006, S. 74(1).
56 The *Food Safety and Standards Act*, 2006, S. 76.
57 The *Food Safety and Standards Act*, 2006, S. 65(1) says the quantum of compensation is (i) not less than five lakh rupees in case of death; (ii) not exceeding three lakh rupees in case of grievous injury; and (iii) not exceeding one lakh rupees, in all other cases of injury.
58 The *Food Safety and Standards Act*, 2006, S. 65(2).

Section 272 prescribes punishment for adulteration of food or drink intended for sale. It states that "Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both." The ingredients of the section are: (i) adulterating any article of food or drink; (ii) the adulteration has made the food or drink noxious; and (iii) the food or drink was intended for sale or there was knowledge that they are likely to be sold. Thus, mixing of noxious ingredients in food or drink or otherwise rendering it unwholesome by adulteration is punishable under this section.[59]

Section 273 prescribes punishment for sale of noxious food or drink. It states that "Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both." Thus, in order to make a person liable under the section, the ingredients are: (i) selling or offering for sale as food or drink some article; (ii) such article must have become noxious or must in a state unfit as food or drink; and (iii) the sale or exposure must have been made with a knowledge or reasonable belief that the article is noxious as food or drink.

Thus, section 272 punishes adulteration of food or drink whereas section 273 punishes sale of adulterated food or drinks. The punishment prescribed for both is imprisonment for a term which may extend to six months or fine which may extend to one thousand rupees. Both offences are cognizable, non-bailable and triable by the Court of Sessions.[60]

2.2.1 State Amendments

The states of West Bengal,[61] Uttar Pradesh[62] and Odisha[63] have amended the punishment prescribed under section 272 and 273. In the states of Uttar Pradesh and Odisha the words "punishment of either description for a term which may extend to

59 Ratanlal and Dhirajlal, *The Indian Penal Code,* Lexis Nexis, Gurgaon, 2014, 4th Ed, p. 444.
60 The *Code of Criminal Procedure*, 1973, Schedule I.
61 The *West Bengal Act* No. 42 of 1973.
62 The *Uttar Pradesh Act* No. 47 of 1975
63 The *Orissa Act* No. 3 of 1992

six months or with fine which may extend to one thousand rupees or with both" has been substituted by the words "shall be punished with imprisonment for life and shall also be liable to fine". In the state of West Bengal the words are "punishment is for life with or without fine".

3. Provisions of IPC Vis-À-Vis the Food Safety and Standards Act

The Food Safety and Standards Act as well as IPC both cover the area for dealing with the menace of food adulteration. The comparison of the two is:

	IPC	**Food Safety and Standards Act**
Section	272& 273	59
Offence	272- Punishment for adulteration of food or drink intended for sale 273- Punishment for sale of noxious food or drink.	Punishment for unsafe food
Punishment	Imprisonment for a term which may extend to six months or fine which may extend to one thousand rupees. In the state of Uttar Pradesh and Odisha-Imprisonment for life and shall also be liable to fine. In the state of West Bengal-Imprisonment is for life with or without fine.	Where such failure or contravention does not result in injury, imprisonment for a term which may extend to six months and also with fine which may extend to one lakh rupees. Where such failure or contravention results in a non-grievous injury, imprisonment for a term which may extend to one year and also with fine which may extend to three lakh rupees. Where such failure or contravention results in a grievous injury, with imprisonment for a term which may extend to six years and also with fine which may extend to five lakh rupees. Where such failure or contravention results in death, imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and also with fine which shall not be less than ten lakh rupees.

Cognizable or non-cognizable	Cognizable	Act is silent. By virtue of Schedule I of Cr. PC- Where contravention or failure has not resulted in any injury or non-grievous injury, the offence is non – cognizable. Where contravention or failure has resulted in grievous injury or death, the offence is cognizable
Bailable or non-bailable	Non- bailable	Act is silent. By virtue of Schedule I of Cr. PC- Where contravention or failure has not resulted in any injury or non-grievous injury, the offence is bailable. Where contravention or failure has resulted in grievous injury or death, the offence is non-bailable.

- The object of the Food Act is to regulate the food industry as reflected by the preamble, section 2[64] and the provisions of the Act whereas the provisions of IPC have been enacted for protecting public health and safety.
- The nature of the provisions contained in Food Act is regulatory so as to streamline the food industry and improve quality of food articles. Although the contraventions have been made offences but the scheme of the Act reflects that the offences are incidental to achieve the objective of the Act whereas the provisions of IPC are preventive and deterrent.
- In Food Act, the target is any person carrying on any activity related to any stage of manufacturing, processing, packaging, storage, transportation, distribution, import of food, that is the food business operator[65] whereas under IPC talks about 'any person'.
- The offences mentioned under the Food Act which are punishable with fine only are compoundable[66] whereas the offences under IPC are non-compoundable.[67]

64 The *Food Safety and Standards Act*, 2006, S. 2 says that it is hereby declared that it is expedient in the public interest that the Union should take under its control the food industry.

65 The *Food Safety and Standards Act*, 2006, S.3 (1) (n) and (o).

66 The *Food Safety and Standards Act*, 2006, S. 69.

- The Food Act is silent as to the powers relating to arrest/detention, bail of the accused where as offences committed under section 272, 273 are non-bailable.
- Under the Food Act, two mechanisms are provided to deal with offences and penalties and in cases punishable with fine only, it is more likely that the adjudication proceedings shall be initiated where as the offences under IPC are cognizable. That means, the police can take prompt action and initiate investigation without the orders of the Magistrate.
- The offences under the Food Act are to be tried summarily (if the offence is punishable with less than three years punishment) whereas offences under IPC are to be tried by a Court of Sessions (even though the punishment prescribed is six months) Trial by Court of Session showcases that these offences are considered as grave and serious offences.

The above mentioned analysis shows that the fields of both laws are overlapping but the procedure to deal with it is varying. This raises an important proposition that in case of food adulteration, whether action shall be initiated under the Food Act or under the provisions of IPC?

Section 89 of the Food Act says that the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or an any instrument having effect by virtue of any law other than this Act. Further, section 97 of the Act seeks to repeal the enactment and orders specified in the Second Schedule immediately with effect from the date on which the Act is enacted and comes into force.[68] Schedule 2 specifically repeals the Prevention of Food Adulteration Act, 1954 but is silent on the provisions of IPC.

The answer to the question whether in an incident of food adulteration, action shall be initialed under IPC or Food Act, revolves around two legal doctrines, that is, presumption against implied repeal[69] and *generalia specialibus non derogant.*[70]

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67 The *Code of Criminal Procedure*, 1973, S. 320 enlists the offences which are compoundable. Sub section (9) of the section says that no offence shall be compounded except those specified in the section. It is important to note that sections 272 and 273 are not mentioned.

68 The Act was brought into force vide notification dated 29th July, 2010.

69 The principle of implied repeal has been elaborately discussed by the Supreme Court in *Municipal Council, Palai* v. *T.J. Joseph*, AIR 1963 SC 1561. Also see, *Om Prakash Shukla* v. *Akhilesh Kumar Shukla and Ors.*, AIR 1986 SC 1043; *Harshad S. Mehta* v. *State of Maharashtra*, (2001) 8 SCC 257 and *Lal Shah Baba Dargah Trust* v. *Magnum Developers & Others*, AIR 2016 SC 381.

70 *Jeewan Kumar Raut & Another* v. *Central Bureau of Investigation*, (2009) 7 SCC 526 and *Jamruddin Ansari* v. *Central Bureau of Investigation and Others*, (2009) 6 SCC 316.

According to legal presumption against implied repeal, whenever the legislature enacts a statue it has complete knowledge of all the existing laws on the subject matter and the failure to add any particular law in a repealing statue indicate that the intention was not to repeal a statue. That means, the provisions under IPC and Food Act must co-exist. On the other hand, according to the doctrine of *generalia specialibus non derogant*, the provisions of a general statue must yield to those of specific one. Where the special subsequent legislation is a complete Code, then it will exclude the provision of a general law. That means, action can be initiated only under the Food Act. However, the position is not clear so far.

In the case of *M/s Pepsico India Holdings (Pvt) Ltd. and Another v. State of U.P. and Others,*[71] similar matter was brought before the High Court of Allahabad. The state government in this case had directed the police to register cases and initiate action under section 272/273 of IPC against the company. The company is engaged in the business of manufacturing soft drinks inter alia under the brand name of PEPSI, Lehar, 7UP, Slice and Miranda etc. The petitioners questioned the validity of the orders passed by the state government on the grounds that (i) section 272/273 were invoked without even waiting for the report of public analyst; (ii) the said sections can be attracted only if it is shown that the adulteration was deliberate, intentional or with knowledge; (iii) a special law prevails over general law and therefore the provisions of Food Safety and Standards Act would prevail. (It is important to note that Prevention of Food Adulteration Act (PFA), 1954 had eclipsed the provisions of section 272 and 273 of IPC and after coming into force of Food Act, it has repealed the PFA and has occupied the entire field); [72] and lastly the food material seized was not meant for sale. The High Court held that after coming into force of Food Act, the authorities can take action only under the Food Act as it postulates an over- riding effects over all other food related law. However, the state of U.P. has filed an appeal before the Supreme Court and the matter is still under consideration before the Supreme Court of India.

The Law Commission of India in its 264th report did not comment on this issue as the matter is under consideration before the Supreme Court of India.

4. Report of Law Commission of India

In India, the menace of growing sale of adulterated and synthetic milk is on rise. A writ petition was filed before the Supreme Court highlighting this aspect and the

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71 2011 (2) Crimes 250

72 See the provisions of The *Food Safety and Standards Act*, 2006 as discussed in earlier part of the article.

inability of the union as well as the state governments to take effective measures for combating it. The Supreme Court in the case of *Swami Achyutanand Tirth vs. Union of India*,[73] directed that the Union of India as well as the state government to effectively implement the provisions of Food Act. The Supreme Court reiterating its earlier stance[74] observed that the Union of India should consider making suitable amendments in penal provisions so that they are at par with the state amendments. It also observed that the punishment for food adulteration should be made deterrent. It was in the light of these observations that the Commission was asked by the Ministry of Home Affairs to examine the amendments required in IPC in sections 272 and 273.

4.1 Recommendations by the Commission

The Commission undertook review of the existing provisions under IPC and the Food Act and also the observations made by the Supreme Court in case of *Swami Achyutanand Tirth* and observed that (i) the punishment provided is too inadequate in the current scenario; (ii) there must be more stringent punishments in offences relating to food adulteration; (iii) the punishment must be seen in the light of the harm caused to the consumer by consuming adulterated food and drinks; and (iv) the Food Act may not be occupying the entire field of food adulteration and thus would not render the provisions of IPC redundant. The Commission drafted a bill titled as "The Criminal Law (Amendment) Bill, 2017" so as to amend the provisions of IPC and CrPC. The recommendations are:

4.1.1 Graded Punishment

The punishment should be proportional to the harm caused by the offence. The Commission recommended that sections 272 and 273 should be amended on the lines of Food Act. That is, if any person adulterates any article of food or drink intended for sale[75] or sells noxious[76] food and drink and such adulteration does not result in injury then imprisonment for a term which may extend to six months and also with fine which may extend to one lakh rupees. In case adulteration results in a non-grievous injury, imprisonment for a term which may extend to one year and also with fine which may extend to three lakh rupees. In case adulteration results in a grievous injury, with imprisonment for a term which may extend to six years and also with

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73 (2016) 9 SCC 699.

74 It had passed similar orders earlier dated 5.12.2013 and 10.12.2014 reported as Swami *Achyutanand Tirth* v. *Union of India,* (2014) 13 SCC 314.

75 The *Indian Penal Code*, 1860, S. 272.

76 The *Indian Penal Code*, 1860, S. 273.

fine which may extend to five lakh rupees. In case adulteration results in death, imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and also with fine which shall not be less than ten lakh rupees. However, the court may for adequate reason to be mentioned in the judgment impose a sentence of imprisonment which is less than imprisonment for life.

4.1.2 Bailable or Non Bailable

The Commission recommended that Schedule I of CrPC should be amended. In cases where the adulteration does not result in any injury or where there is no grievous injury or in cases of sale of noxious food where the injury is grievous the offence should be bailable. In all other cases the offence shall be non-bailable.

4.1.3 Compensation

The Commission recommended that the fine imposed under the section shall be just and reasonable to meet the medical expenses and rehabilitation to the victim. The fine imposed shall be payable to the victim. In order to carry out this it recommended that section 357B of CrPc should be substituted.[77]

5. Conclusion and Suggestions

In a highly commercialized world availability of hygienic and nutritious food is a challenge. The criminal justice system must be well equipped with penal provisions so that the individuals causing adulteration are dealt with stern hands. Sections 272 and 273 of IPC and the Food Act must co-exist so as to ensure that the police powers are invoked by initiating action under IPC in emergent situations. The law should provide for deterrent punishment in cases where food articles cause injury or grievous hurt or death. The punishment should be proportional to the gravity of the offence. The Courts should order payment of compensation in cases of injury. There should be provisions for interim compensation in cases where the victim has suffered medical injury. The food legislation should be strictly enforced so that the acceptable minimum level of food safety is ensured and the citizens of the country lead a healthy life.

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[77] The *Code of Criminal Procedure,* 1973, S. 357 B - The compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A or section 376D of the Indian Penal Code. It covers cases of compensation in case of acid attacks and gang rape. In such crimes the medical expenses are very high and therefore section 357 B provides that the compensation must be reasonable to meet the medical expenses of the victim and shall be paid to the victim.

INFORMATION AND INVESTIGATION OF CRIMES

Dr. Gurneet Singh*

1. Introduction

In India a victim of crime or his heirs after suffering at the hands of the offender, have the choice either to move a court of law or to go to police station to lodge an FIR. At times victim is hesitant to go to the police because of the indifferent behaviour of the police officers firstly in recording the FIR and then during investigation to call the victim time and again. Firstly FIR is not recorded, if it is recorded then no investigation is made and if the investigation is made it is biased. Various High Courts and the Supreme Court of India has been time and again pressing for the need to record FIR immediately on receipt of an information regarding commission of a cognizable offence. However, police avoids recording FIR on one pretext or the other. The practice to verify the information before recording FIR is against the statutory provisions of law. Under Section 154 it has been made mandatory that when information discloses commission of a cognisable offence FIR must be recorded verbatim in the very language of the informant, as far as possible, to be read over and explained to him/her, and to be signed by the informant. The idea behind reading over the information reduced into writing and obtaining signatures on the first information are intended to ensure that what has been reduced into writing is a faithful and true version of the information given to the officer in charge of the police station; same was held in *Tehal Singh* v. *State of Rajasthan.*[1] An FIR can be lodged by any person whether he is an eye witness or not. The same was held in M. *Sarvana* v. *State of Kerala*[2]

In *Niranjan Singh* v. *State of U.P*[3], the Apex Court has held that investigation is not an inquiry or trial before the Court and that is why the Legislature did not contemplate any irregularity in investigation as of sufficient importance to vitiate or otherwise form any infirmity in the inquiry or trial. In *S.N. Sharma* v. *Bipen Kumar*

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1 1989 Cri LJ 1350 (Raj.).

2 2012 Cri LJ 3877 (SC).

3 AIR 1979 SC 1547.

Tiwari[4], it has been observed by the Apex court that the power of police to investigate is independent of any control by the Magistrate.

2. Objectives of Investigation

The principle object of the FIR is to set the criminal law into motion and marks the commencement of the investigation of the case (immediate steps on the part of investigation authorities to trace accused in order to prevent him from tampering with evidence and bring him to book)[5]. FIR is not an encyclopaedia of events it neither requires the list of all present witnesses at the crime scene[6] nor it requires that the names of all accused persons[7] all it requires is the commission of a cognisable offence[8]. The police is duty bound to hold the investigation of a cognizable offence without obtaining any order of the court. The police officer investigating the offence is also under obligation under Section 173 of the *Code of Criminal Procedure*, 1973 to investigate all other related offences committed in the course of same transaction[9] but in regard to same occurrence of offence between same parties and with the similarity of scope of investigation, second FIR cannot be registered[10]. However if there is rival versions of the same event that took different shapes then it is permissible to lodge two FIRs that can be investigated by the same investigating agency[11]. Further it is required under criminal law that it is only after the recording of FIR that investigation can be initiated by police. However after completion of the investigation the officer in charge of the police station is empowered to submit police report to the Magistrate in the shape of charge sheet, failure report or cancellation

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4 1970 (1) SCC 653.

5 See *T.T. Antony* v. *State of Kerala*, (2001) 6 SCC 181, *Amit Bhai A. Chandra* v. *C.B.I*, AIR 2013 SC 3794, *Umesh Singh* v. *State of Bihar*, (2013) 4 SCC 360, *Jatendra Kumar* v. *State of Haryana*, (2012) 6 SCC 204.

6 *Moti Lal* v. *State*, 2010 Cri LJ 1937 (SC), *State of M.P.* v. *Dharkola, 2005 Cri LJ 108 (SC), Pawan* v. *State of Uttrakhand, 2009 Cri LJ 2257.*

7 *Gangabhavani* v. *Rayapati Venkat Reddy, AIR 2013 SC 3681, Tara Singh* v. *The State*, 2014 Cri LJ 2154 (SC), *Dalip Premnarayan* v. *State of Maharashtra*, 2010 Cri LJ 905 (SC).

8 See *Pandu Chandrakant Mhetre* v. *State of Maharashtra*, (2009) 10 SCC 773, *State of U.P.* v. *Munesh*, AIR 2013 SC 147.

9 See *Amit A. Shah* v. *State of Gujrat*, AIR 2013 SC 3794, *P.C. Mhetre* v. *State of Maharashtra, (2009) 10 SCC 773, K. Chaudhary* v. *Sita Devi*, AIR 2002 SC 441.

10 See *Y. Sheikh* v. *State of U.P., (2013) 6 SCC 428, Anju Chawdhry* v. *State of U.P.* (2013) 6 SCC 384, *Reeta Negi* v. *State of West Bengal*, (2009) 9 SCC 129, *K. Chaudhary* v. *Sita Devi*, AIR 2002 SC 441, *Babu Bhai* v. *State of Gujarat*, 2010 (4) RCR (Criminal) 311 (SC), *Nirmal Singh Kahlon* v. *State of Punjab*, AIR 2009 SC 984.

11 See *S. Kaushik* v. *State of U.P.*, (2013) 5 SCC 148, *Shiv Shanker Singh* v. *State of Bihar*, (2012) 1 SCC 130.

report, if the allegations are found to be baseless and false[12]. In *Sukhwinder Kaur* v. *The State*[13], the Supreme Court observed that the investigation is the concern of investigation officers. As provided under Section 154 (2) of the *Code of Criminal Procedure*, 1973 no proceedings of police officer shall be challenged on the ground that he has no territorial power to investigate. The courts cannot interfere with investigation. Even the High Courts cannot quash FIR by invoking Section 482 of the *Code of Criminal Procedure*, 1973 as the same was held in this case.

In *Samaj Parvartan Samudaya* v. *State of Karnataka*[14], the Supreme Court has held that the object of recording of FIR has advantages which are next mentioned: (a) it is the first step to access to justice for the victims, (b) it upholds the rule of law in as much as ordinary person brings forth the commission of a cognisable offence in the knowledge of the State, (c) it facilitates swift investigation and sometimes even prevention of the crime, (d) it leads to less manipulations in criminal cases and lessen incidents of antedates FIR or intentionally delayed FIR, (e) making registration of information relating to commission of a cognisable offence mandatory would also help the society especially the poor in rural and remote areas of the country.

The Supreme Court held that it is high time to give directions to the Governments of all States and Union Territories besides their Director Generals of Police/Commissioner of Police as the case may to the effect that if steps are not taken for registration of FIR immediately and copies thereof are not made over to the complainants, they may move the concerned Magistrate by filing complaint petitions to give directions to the Police to register case immediately upon receipt/production of copy of the orders and make and make over copy of FIR to the complainant within twenty four hours of receipt/production of copy of such orders. It may further give direction to take immediate steps for apprehending the accused persons and recovery of kidnapped/abducted persons and properties which were subject matter of theft or dacoity. In case FIRs are not registered within the aforementioned time and aforementioned steps are not taken by the police, the concerned Magistrate would be justified in initiating contempt proceedings against such delinquent officers and punish them for violation of its orders if no sufficient cause is shown and awarding stringent punishment like sentence of imprisonment against them in as much as the

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12 In the case of cancellation report the informant has to face action under Section 182 of the *Indian Penal Code*, 1860 for giving false information with intent to cause public servant to use his lawful power to the injury of another person.

13 AIR 1991 SC 3596.

14 AIR 2012 SC 2320.

disciplinary authority would be quiet justified in initiating departmental proceedings and suspending them in contemplation of the same.[15]

Further the *Criminal Law (Amendment) Act*, 2013 has made amendment to the *Indian Penal Code*, 1860 under Chapter II. Section 166 A (c) newly added the provision that if the public servant fails to record any information given to him under Sub-Section (1) of Section 154 of the *Code of Criminal Procedure*, 1973, in relation to cognizable offence under Section 326A, 326B, 354, 354B, 370, 370A, 376, 376A, 376B, 376C, 376D, 376E or 509 shall be punished with rigorous imprisonment for a term which shall not be less than six months which may extend to two years, and shall also be liable to pay fine.

According to Section 2(h) of the *Code of Criminal Procedure*, 1973, investigation includes all the proceedings under the Code for the collection of evidence conducted by police officer or by any person (other than a magistrate) who is authorised by a Magistrate.[16] The Supreme Court has viewed the investigation of an offence as generally consisting of-

1) Proceeding to the spot;
2) Ascertaining of the facts and circumstances of the case;
3) Discovery and arrest of the suspected offender;
4) Collection of evidence relating to the commission of the offence which may consist of-
   (a) The examination of various persons (including the accused) and the reduction of their statements into writing, if the officers thinks fit,
   (b) The search of places or seizure of the property considered necessary for the investigation or to be produced at the trial; and
   (c) Formation of opinion as to whether on the materials collected there is a case to place the accused before the Magistrate for trial, and if so, taking the necessary steps for the same by the filing of charge-sheet under Section 173.[17]

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15 *Lalita Kumari* v. *Government of U.P.* in writ petition (Criminal) No. 68 of 2008, (2008) 7 SCC 164, (Decision by D.B.), matter mandatory requirement for recording FIR was referred to three Judge Bench of this Court in *Lalita Kumari* v. *Government of U.P., (2012) 4 SCC 1,* further request was made to the Hon'ble Chief Justice of India to refer the matter to the Constitutional Bench of at least five judges of the Supreme Court in *Lalita Kumari* v. *State of U.P., AIR 2014 SC 187.*

16 R.V. Kelkar, Criminal Procedure, Eastern Book Company, Lucknow, 2011, p. 120.

17 *H.N. Rishbud* v. *State of Delhi,* AIR 1955 SC 196.

The combinative effect of the Section 2 (h) and Section 157 of the Code is that when information of a cognisable offence is advanced to police officer that information will be regarded as FIR and all enquiries held subsequent to the information would be treated as investigation, even thought the formal registration of FIR takes place later. The same was held other cases.[18]

The principle agency for carrying out the investigations of offences is the police; and to make this agency an effective and efficient instrument for criminal investigations, wide powers have been given to the police officers. Apart from the duty of public to give information to the police in respect of certain serious offences, an investigating police officer can require the attendance of persons acquainted with the facts and circumstances of the case under investigation. It is important to note that the power to investigate is not conferred on every police officer. Only an officer in charge of a police station (or any other officer of a higher rank) has been empowered by the Court to investigate.[19]

Sections 154 to 176 contained in Chapter XII of the Code deals with information to the police and their powers to investigate. These Sections have made provisions for securing that an investigation takes place into a reported offence and the investigation is carried out within the limits of the law without causing any harassment to the accused and is also completed without unnecessary or undue delay, same was held in *Abhinandan Jha* v. *Dinesh Mishra*.[20] Regarding the avoidance of delay, Section 173(1) expressly provides that every investigation under this chapter of the Code shall be completed without unnecessary delay.[21]

After completion of the investigation the officer incharge of the police station is empowered to submit police report to the Magistrate in the shape of (1) charge sheet, if there is sufficient evidence in support of allegations levelled in the FIR, (2) failure report, if enough evidence cannot be collected to prove the allegation, and (3) cancellation report, if the allegations are found to be baseless and false. In the case of cancellation report the informant has to face action under Section 182 of the *Indian Penal Code*, 1860 for giving false information with intent to cause public servant to use his lawful power to the injury of another person. The Magistrate may or may not accept the failure or cancellation reports. However, the informant must be given an

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18 See *Maha Singh* v. *Delhi Administration, (1976) 1 SCC 644, Shambhu Das* v. *State of Assam,* (2010) 10 SCC 374.

19 *Supra note 16*

20 AIR 1968 SC 117.

21 *Supra* note 16 at p. 123.

opportunity of being heard so that he may make his submissions to persuade the Magistrate to take cognizance of the offence and issue process.

In the present criminal justice system, offences registered by the police are treated as offences against the State, which after investigation by the police come to the court through prosecution agency for the prosecution of the offender. The victim of crime has no say during the investigation except examining him as a prosecution witness under Section 161 of the *Code of Criminal procedure*, 1973. Similarly, during the trial of the case also, the victim is examined as a prosecution witness before the court. He has no jurisdiction to oppose the bail application of the accused before the court. Similarly, at the stage of the framing of the charge or passing an order of discharge, the views of the victim are not gathered. He is not consulted or his views are not considered by the trial court at any stage of the case. An accused has a statutory right to be heard under Section 235(2) and 248(2) of the *Code of Criminal procedure*, 1973 before passing order of sentence. But the victim, on the other hand has no such right[22].

It is strange that a victim of crime who has suffered loss or injury at the hands of the accused and moves to the court through the police to seek justice, gives the impression that after lodging of the FIR and giving evidence he is the concern of no one. Even where he engages a counsel during the trial of the case instituted on police challan or at the hearing of the appeal, his counsel is considered only as assistant to the public prosecutor. The victim of crime is thus a mute witness to the whole proceedings[23].

3. Role of Victims in Crime Investigation

The *Code of Criminal Procedure*, 1973 assigns a limited role to a victim of crime to participate in the criminal law system. By virtue of the provisions of Section 154 a police officer is required to reduce in writing the information given to him by a victim of a cognizable offence. He is further required to read it over to the informant and to enter its substance in the proper register maintained for this purpose. The police officer is also mandated to give, free of cost, a copy of such a report. And if the police officer refuses to record the information then the informant is allowed to send the information in writing and by post to the Superintendent of police. A crime victim, by virtue of Section 190 of Code, may directly approach the Magistrate

22 Retrieved from: *http://www.ijlp.in/ijlp/imageS/Volume-1,%20Issue-2,%20June-14.pdf.*
23 *Ibid.*

concerned with his complaint without going to the Police for redress. The investigation of the crime alleged by the crime victim or otherwise is carried out, subject to the relevant provisions of the *Code of Criminal Procedure*, 1973, by the investigating officer. The investigation process is the exclusive domain of the police. The crime victim, unless the investigating officer considers it necessary, has no significant role to play in it. Similarly, a complainant/informant does not have any say if the Magistrate, in receipt of a final investigation report from investigating officer recommending dropping of the case/is inclined not to initiate action against the suspect/accused. The *Code of Criminal Procedure*, 1973, in no way, requires the Magistrate to 'hear' the victim/complainant/informant. However, Supreme Court, plausibly realizing the statutory lapse, in 1984 mandated that a Magistrate should not drop proceedings without giving notice to the parties adversely affected. It is just and necessary that, the Apex court asserts, these parties should be heard before making an order of dismissal of the complaint. The Court held that *the right of the complainant to be heard before the acceptance of a cancellation report submitted by the police after investigation of the FIR, was accepted laying down that the informant must be given an opportunity of hearing so that he could make his submissions to persuade the Magistrate to take cognizance of the offence and issue due process*[24]. In another case the apex court has reiterated that such an opportunity of being heard is must[25]. Even during prosecution, a crime victim does not have much say in the proceedings. The existing law presupposes that the Prosecutor appointed by the State is proper authority to plead on his behalf, and to protect interests, of victims of crime.

The *Code of Criminal Procedure*, 1973 assigns to crime victims a very minimal role in criminal proceedings. It does not prohibit a victim from engaging his counsel but such a counsel, with the permission of the court, has to act under the directions of the Public Prosecutor. And a crime victim may be permitted to submit, with the permission of the court, written arguments after the closure of evidence in the trial[26]. Similarly, the views of a complainant/victim are hardly heard while releasing an accused on bail, even though the grant of bail will be materially prejudicial to his interests, claims and security. The Code allows the Public Prosecutor, with the consent of the court, to withdraw a case from prosecution 'at any time before the

24 *Bhagwant Singh* v. *Commissioner of Police,* (1985) SCC 537.
25 *Public Service Commission* v. *S. Papaiah,* (1997) 7 SCC 614.
26 The *Code of Criminal Procedure*, 1973, S. 301

judgment is pronounced[27]. A victim again does not have any role to play though the withdrawal of the case totally frustrates his initial complaint.

In *State of Bihar* v. *J.A.C. Saldhana*[28], the apex court observed that the purpose of the investigation is to collect evidence and apprehend the culprit. It is the duty of everyone concerned to assist the police in their work. The police can question any person supposed to be acquainted with the facts and the circumstances of the case and any such person shall be bound to answer truly to all these questions. Police interference at the stage of investigation has become a routine affair. The National Police commission has expressed concern about the political parties irrespective of their views, using their power and authority regarding the promotions and transfers to compel the force to serve their interest. The liaison between police and politicians is vitiating the impartiality and objectivity of the police investigation. This invariably happens at the stage of submission of charge sheet under Section 173 of the *Code of Criminal Procedure*, 1973. Though it is the sole discretion of the investigating officer to submit or not to submit the charge-sheet and even the Magistrate cannot order him to do so contrary to the former's own honest assessment of evidence.

In order to eradicate this evil, the law commission in its 14th report has suggested that investigating staff should be separated from the law and order staff to enable the investigating officer to devote undivided attention to the investigation. This separation of "investigating police" from "law and order police" will also result in speedier investigation and overall quick disposal of investigation cases.[29]

F.I.R should be registered by the complainant within reasonable time without undue delay because it is considered that human memory is short and it operates for a short period. Delaying of F.I.R affects the merit of the case. The object sought to be achieved by registering the earliest information as FIR is twofold: firstly, that the criminal process is set into motion; and secondly, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment etc. later[30].

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27 *Id.*, S. 321.

28 (1980) 1 SCC 554.

29 R. Deb : Police Investigation: *A Review, JILI*, (1997), p. 266.

30 Retrived from *http://www.savefamily.in/88-sc-constitution-bench-judgment-guidelines-for-fir-registration-preliminary-inquiry.html.*

In *Thulia Kali* v. *State of Tamil Nadu*[31] it has been held by the Apex Court that the First information report is extremely vital and valuable piece of evidence for the purpose of corroboration. The importance of the report can hardly be overestimated....The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eyewitnesses present at the scene of occurrence...On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay should be satisfactorily explained.

In *Ramesh Kumari* v. *State (NCT of Delhi) and Others*[32] the Apex Court observed that Genuineness or otherwise of the information can only be considered after registration of the case. Genuineness or credibility of the information is not a condition precedent for registration of a case. Despite the fact that charge sheet has been submitted and accepted against the accused in a matter, the inaction on the part of the complainants in registering an FIR poses a big question. Law does not intend to make the FIR an engine of blackmailing, oppression and exploitation; its motive is to bring the criminal to book rather than to settle personal scores with someone you do not like or someone who was till yesterday your well wisher and has now parted ways. Some of such delayed FIRs may actually serve the cause of justice by bringing the culprit to book that had been so far able to hide his crime; but same may also be the result of an afterthought.

It does not mean that accused go scot free but delaying in FIR also raise a finger against the complainant as it is well accepted that silence amounts to consent in any matter and if such silence continues beyond the memory of complainant it would be unfair play with the spirit of criminal jurisprudence. Undue delay in registering FIR should be entertained by the police after preliminary enquiry if it discloses the commission of cognizable offence. Sometimes police and complainant both did delay in registering FIR. In both conditions criminal justice gets affected.

The scope of the preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any

[31] (1972) 3 SCC 393.
[32] (1979) 2 SCC 322.

cognizable offence. In a case the court said while limiting the preliminary inquiry process to a select few categories of cases. In *Ram Lal Narang* v. *State (Delhi Administration)*[33] the Apex court observed:

> The police thus had the statutory right and duty to "register" every information relating to the commission of a cognizable offence. The police also had the statutory right and duty to investigate the facts and circumstances of the case where the commission of a cognizable offence was suspected and to submit the report of such investigation to the Magistrate having jurisdiction to take cognizance of the offence upon a police report. These statutory rights and duties of the police were not circumscribed by any power of superintendence or interference in the Magistrate; nor was any sanction required from a Magistrate to empower the Police to investigate into a cognizable offence. This position in law was well-established.

In *Lalita Kumari* v. *Government of U.P.*[34] the Supreme Court has held that:

> (R)egistration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.
>
> If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.
>
> As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under: (a) Matrimonial disputes/ family disputes (b) Commercial offences (c) Medical negligence cases (d) Corruption cases (e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons

[33] (1979) 2 SCC 322.

[34] *Lalita Kumari* v. *Government of U.P. and Ors.*, AIR 2014 SC 187.

> for delay. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry. Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

Herein it is pertinent to note that the original period of 7 days of preliminary inquiry in above mentioned cases was allowed by the Constitutional Bench but after hearing the Additional Solicitor General, Sidharth Luthra, the period of 7 days was enhanced to 15 days. Further in exceptional cases the period allowed for preliminary inquiry can be 6 weeks as provided in clause (vii) of the judgment.

The Constitutional Bench in regard to preliminary inquiry as given in the C.B.I. Manual has observed that the Manual is not statute and it is not made by the legislature. It is a document of set of administrative orders issued for internal guidance of the officers of the department. Thus it cannot supersede the *Code of Criminal Procedure*, 1973.

4. Delay in Investigation

In *Indira Jay Singh* v. *Union of India*[35] the Supreme Court has held that although the court has repeatedly pronounced that mere delay cannot be a ground to discard the prosecution story, however where extraordinary delay in lodging FIR is not satisfactorily explained, the FIR is always viewed by the court with suspicion.

In *Tapan Kumar* v. *Collector of Tax India*[36] the apex court has held that it is evident that the manner in which police investigations are conducted is of critical importance to the functioning of the Criminal Justice System. Not only serious miscarriage of justice results if the collection of evidence is not properly or if there is any error or malpractice, but successful prosecution of the guilty depends on a thorough and

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35 AIR 2008 SC 345. Also see *Vajrehn* V. *Anvekar* v. *State of Karnataka,* (2013) 3 SCC 462, *Ravinder Kumar* v. *State of Punjab,* 2001 Cri LJ 4242 (SC), *Edmund S. Lyngdoh* v. *State of Meghalaya,* 2014 (4) RCR (Criminal 239 (SC), *Om Prakash* v. *State of Haryana,* (2014) 5 SCC 753, *Manoj Kumar* v. *State of Haryana,* 2014 (2) RCR (Criminal) 816 (Pb. & H.).

36 AIR 1992 SC 34.

careful search for truth and collection of evidence which is both admissible and probative.

It is imperative on the officer of a police station receiving information disclosing a cognisable offence to register a case under Section 154 of the *Code of Criminal Procedure*, 1973[37]. There is even in appropriate cases discretion of such officer in appropriate cases to hold preliminary inquiry in relation to the veracity of the accusations made,[38] but under Section 154 (1) of the *Code of Criminal Procedure*, 1973 the legislative intent is clear when the word 'shall' has been used under the said provision[39]. Under Section 154 the word information has been used without prefixing the words or qualified words such as reasonable, credible etc.[40]

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37 See *State of Haryana* v. *Bhajan Lal*, 1992 Supp. (1) SCC 335, *Ramesh Kumari* v. *State (NCT of Delhi)*, (2006) 2 SCC 677, *Parkash Singh Badal* v. *State of Punjab*, (2007) 1 SCC 1, *Mohindro* v. *State of Punjab*, (2001) 9 SCC 581, *Munna Lal* v. *State of Himachal Pradesh*, 1992 Cri LJ 1558, *Giridhari Lal Kanak* v. *State and others*, 2002 Cri LJ 2113, *Katteri Moideen Kutty Haji* v. *State of Kerala*, 2002 (2) Crimes 143.

38 See *P. Sirajuddin* v. *State of Madras*, (1970) 1 SCC 595, *Sevi* v. *State of Tamil Nadu*, 1981 Supp SCC 43, *Shashikant* v. *Central Bureau of Investigation*, (2007) 1 SCC 630, *and Rajinder Singh Katoch* v. *Chandigarh Admn.* (2007) 10 SCC 69, *H.N. Rishbud and Inder Singh* v. *State of Delhi* AIR 1955 SC 196, *S.N. Sharma* v. *Bipen Kumar Tiwari* (1970) 1 SCC 653, *Union of India* v. *Prakash P. Hinduja* (2003) 6 SCC 195, *Sheikh Hasib alias Tabarak* v. *State of Bihar* (1972) 4 SCC 773, *Ashok Kumar Todi* v. *Kishwar Jahan and Others*, (2011) 3 SCC 758, *Padma Sundara Rao (Dead) and Others* v. *State of T.N. and Others*, (2002) 3 SCC 533, *Mannalal Khatic* v. *The State*, AIR 1967 Cal 478, *State of U.P.* v. *Bhagwant Joshi*, AIR 1964 SC 221, *Sevi* v. *State of T.N.* 1981 Supp SCC 43, *Rajinder Singh Katoch* v. *Chandigarh Administration*, (2007) 10 SCC 630, *E.P. Royappa* v. *State of Tamil Nadu*, (1974) 4 SCC 3, *S.M.D. Kiran Pasha* v. *Government of Andhra Pradesh*, (1990) 1 SCC 328, *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416, *Uma Shankar Sitani* v. *Commissioner of Police, Delhi & Ors.*, (1996) 11 SCC 714, *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi*, (1981) 1 SCC 608, *Common Cause, A Registered Society* v. *Union of India*, (1999) 6 SCC 667, *District Registrar and Collector, Hyderabad* v. *Canara Bank*, (2005) 1 SCC 496 *and Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra*, (2005) 5 SCC 294, *Vineet Narain* v., *Union of India*, (1998) 1 SCC 226, *Elumalai* v. *State of Tamil Nadu*, 1983 LW (CRL) 121, *A. Lakshmanarao* v. *Judicial Magistrate, Parvatipuram*, AIR 1971 SC 186, *State of Uttar Pradesh* v. *Ram Sagar Yadav & Ors.*, (1985) 1 SCC 552, *Mona Panwar* v. *High Court of Judicature of Allahabad*, (2011) 3 SCC 496, *Apren Joseph* v. *State of Kerala*, (1973) 3 SCC 114, *King Emperor* v. *Khwaja Nazir Ahmad*, AIR 1945 PC 18.

39 See *B. Premanand and Ors.* v. *Mohan Koikal and Others*, (2011) 4 SCC 266, *M/s Hiralal Rattanlal Etc. Etc.* v. *State of U.P. and Anr.*, (1973) 1 SCC 216 *and Govindlal Chhaganlal Patel* v. *Agricultural Produce Market Committee, Godhra and Ors.*, (1975) 2 SCC 482. *The Court has preferred the rule of purposive interpretation to the rule of literal interpretation (see) Chairman Board of Mining Examination and Chief Inspector of Mines and Another* v. *Ramjee*, (1977) 2 SCC 256, *Lalit Mohan Pandey* v. *Pooran Singh*, (2004) 6 SCC 626, *Prativa Bose* v. *Kumar Rupendra Deb Raikat*, (1964) 4 SCR 69.

40 See *Ganesh Bhavan Patel and Another* v. *State of Maharashtra*, (1978) 4 SCC 371, *Aleque Padamsee and Others* v. *Union of India and Others*, (2007) 6 SCC 171, *Ram Lal Narang* v. *State (Delhi Administration)*, (1979) 2 SCC 322 *and Lallan Chaudhary and Others* v. *State of Bihar and Another*, (2006) 12 SCC 229, *Lallan Chaudhary (Supra), Superintendent of Police, CBI* v. *Tapan*

In *State of Haryana* v. *Bhajan Lal*[41] the legislative intent has been made clear that is as follows:

> (T)he legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" (as defined Under Section 2(c) of the Code) if given orally (in which case it is to be reduced into writing) or in writing to "an officer incharge of a police station" (within the meaning of Section 2(o) of the Code) and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "First Information Report" and which act of entering the information in the said form is known as registration of a crime or a case. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the concerned police officer cannot embark upon an inquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section

5. Completion of Investigation and Procedure thereon

After completion of the investigation, it is for the investigating officer to form an opinion about the case as to whether the accused be placed before the Magistrate for inquiry or trial. The options available to the said officer can be exercised either in regard to Section 169 or Section 170 and further to submit the report under Section 173 of the *Code of Criminal Procedure*, 1973. Section 169 of the Code provides the procedures for the release of accused when evidence deficient. So when there is no evidence available against the accused then the Section provides for the release of the accused on executing a bond to appear before a Magistrate when required. Thus when no evidence is available against the accused, the officer has simply to release him. What is required under the Section is that investigating officer is to obtain a bond with or without surety at the time of the release of the accused[42]. So the police officer is to form an opinion about the sufficiency of the evidence against the accused and at this point intervention by court is not envisaged by legislature. Under Section 169 of the Code, the High Court cannot direct the investigating officer to take

Kumar Singh, (2003) 6 SCC 175, *Khub Chand* v. *State of Rajasthan*, AIR 1967 SC 1074, *State of West Bengal* v. *Committee for Protection of Democratic Rights, West Bengal*, (2010) 3 SCC 571.

41 1992 Supp. (1) SCC 335.

42 *Abdul Razak Abdul Gani Deenge* v. *State of Maharashtra*, 2008 Cri LJ 133 (Bom.).

opinion of the public prosecutor. It is not the scheme of the Code for supporting or sponsoring any combined operation between the investigating officer and the Public Prosecutor for filing report in court[43]. Such a report by the police officer cannot be taken as interference with the administration of justice in regard to decision of the court on bail application. Where the officer recommends the discharge of all the three accused whose bail applications were rejected on two occasions on the account of serious crimes committed by them, the apex court held that the high court erred in its decision in regard to recommendation to the Government to take necessary action against the officer in charge who according to high court acted against the administration of justice[44].

Section 170 of the Code provides for the procedure when there is sufficient evidence or reasonable ground of suspicion regarding the involvement of the accused, the charge sheet against the accused is to be submitted under Section 173 of the Code. If the accused is in the custody, the investigating officer shall forward him to the Magistrate empowered to take cognizance of the offence.

An admission of guilt or confession during investigation does not necessarily amount to sufficient evidence[45]. The evidence collected during the course of investigation must be such that must correspond to the fact that the accused was actually involved in the commission of the offence. A reasonable conclusion indicating the guilt of the accused is to be taken as sufficient evidence.

For the purpose of conducting fair and impartial investigation, Section 171 of the Code provides that no complainant or witness on his way to any court shall be required to accompany a police officer, or shall be subjected to unnecessary restraint or inconvenience or required to give any security for his appearance other than his own bond. It is also provided in the proviso that if any complainant/witness refuses to attend or to execute as directed in Section 170, the officer may forward him in custody to the Magistrate, who may detain him in custody until he executes such bond or until the hearing of the case is completed.

Section 172 of the Code mandates that the police officer investigating a crime is required to maintain the record of proceedings from the beginning to its completion. Now under Section 172 (1A) even the statement of the witnesses under Section 161

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43 *R. Sarala* v. *T.S. Velu,* (2000) 4 SCC 459.
44 *Satish Sharma* v. *State of Gujrat,* AIR 2003 SC 648.
45 *C. Lakshmipat* v. *The State,* (1964) 67 Bom.L.R. 618.

of the Code are required to be recorded in the diary as per the *Criminal Law (Amendment) Act*, 2008. Case diary is a check on police officials who investigate criminal cases. The entries are required to be made with clarity. Sufficient details like significant facts are required to be entered with promptness. Proper and careful chronological order regarding the entries is required to be followed. This means that if the entries are not properly made it defeats the very objective of the provision in regard to the maintaining of case diary. The case diary is only a record of day to day investigation of the investigation officer to ascertain the statement and circumstances of the case ascertained through investigation[46]. The entries in the diary cannot be used as evidence against the accused. They cannot, therefore be used to explain any contradiction in the evidence of the prosecution witness[47].

A perusal of the bare provision of Section 173 of the Code provides that after the completion of the investigation, the police officer who investigated the case is required to submit to the concerned Magistrate having jurisdiction, a report which is also known as challan or charge-sheet. Under the Section it has been provided that every investigation under the chapter shall be completed without unnecessary delay. Investigation being the function of police, Magistrate has no power under the scheme of the Code to direct the police to submit challan.

The investigation of the offence cannot be considered to be incomplete or inconclusive merely that the police officer inadvertently failed to append the expert reports or documents or statements under Section 161 of the Code, although these were available with him when he submitted police report to the Magistrate[48]. It is not the obligation of the prosecution to file all documents in their possession, though they are bound to file documents on which they propose to rely. It is a mere irregularity that is curable under Section 465 of the Code[49].

The provisions of Chapter XII of the Code apply to investigation by State agency or through C.B.I. unless the same is specifically excluded by the legislature. The word Police referred to in Chapter XII for the purpose of investigation also apply to an officer of Delhi Special Police Establishment Act, 1946. Thus on the completion of investigation even the C.B.I. needs to submit the report regarding the completion of

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46 *Malkiat Singh* v. *State of Punjab*, (1991) 4 SCC 341.

47 See *Mahbir Singh* v. *State of Haryana*, AIR 2001 SC 2503, *Bhai Lal* v. *State of U.P.*, (1988) 9 SCC 66, *State of Bihar* v. *P.P. Sharma*, AIR 1991 SC 1260, Mohd. *Aknoos* v. *Public Prosecutor, High Court of A.P.*, AIR 2010 SC 566.

48 *State of Haryana* v. *Mehal Singh*, 1978 Cri LJ 1810 (Pb. & H.).

49 *Virendra Kumar* v. *State of M.P.*, 1987 (2) Crimes 494 (M.P.).

investigation as provided under Section 173 of the *Code of Criminal Procedure*, 1973[50]. Further it is settled law that the police report under Section 173 (2) of the Code can be filed by superior police officer like D.S.P. or Inspector and not only by the police officer incharge of the police station[51].

When a police report is submitted to the Magistrate, he has the power to accept the report, take cognisance of the offence and issue process or the Magistrate can disagree with the report and drop proceedings by giving notice to the informant and after providing him an opportunity of being heard or order reinvestigation under Section 156 (3) of the Code and require the police to submit further report[52]. The emerging role of victim in criminal justice is now being acknowledged. Even principle of natural justice supports it. The court before taking decision on the (closer) report, must give notice to complainant and furnish copies of statement of witnesses, other related documents and investigation report[53].

The Magistrate is not bound to accept the closure report of the investigating officer. In case the Magistrate feels that the evidence and the material collected during investigation justifies prosecution of the accused, he may not accept the final report and take cognisance of the offence and summons the accused[54].

The position is now quite clear that upon receipt of a police report under Section 173 (2), a Magistrate is entitled to take cognizance of offence under Section 190 (1) (b) (upon police report) of the Code even if the police report to the effect that no case is made out against the accused or against some of the accused named in FIR. Magistrate can take into account statements of the witnesses examined by the police during investigation or facts pointed by the informant in the police investigation, and take cognizance of the offence complained of and issue order of process to the accused. Section 190 (1) (b) of the Code does not provide that Magistrate can take cognizance of an offence only if the investigation officer gives the opinion that the investigation has made out a case against the accused. The Magistrate can ignore conclusions arrived at by the investigating officer and independently apply his mind to the facts emerging from investigation and take cognizance of the offence, if he

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50 *Ashok Kumar Todi* v. *Kishwar Jahan*, AIR 2011 SC 75.

51 *State of Bihar* v. *Lalu Singh*, (2014) 1 SCC 663.

52 See *Sanjay Singh Ramarao Chavan* v. *D. Gulabrao Phalke*, (2015) 3 SCC 1231, *National Human Rights Commission* v. *State of Gujarat*, (2009) 6 SCC 767, *M. Gangdhar Janardhan* v. *The State*, 2004 Cri LJ 4623 (SC), *Kishan Lal* v. *Dharmindra*, (2009) 7 SCC 685, *J.K. International* v. *State*, (2001) 3 SCC 462.

53 *Jakia Nasim Alesan* v. *State of Gujrat*, AIR 2012 SC 243.

54 *Union of India* v. *Parkash P. Hinduja*, AIR 2003 SC 2612.

thinks fit, exercise his power under Section 190 (1) (b) of the Code[55]. Further the Magistrate may direct reinvestigation under Section 156 (3) of the Code. However, the Magistrate cannot order reinvestigation for the third time under Section 156 (3) of the Code, while disagreeing with the police report[56]. Magistrate cannot order reinvestigation before the submission of the challan. But once the Magistrate takes cognizance of offence on police report, he has no power to order reinvestigation. If there is protest petition, in such a situation, he cannot order reinvestigation. In that case the course open to the Magistrate is to take recourse to the provisions of Section 319 of the Code at the stage of trial[57]. Further it is settled law that during reinvestigation the court cannot direct the police to submit challan against particular person or drop proceeding against some accused[58]. Reinvestigation implies de novo investigation i.e. the previous investigation have no effect. Where the investigation is not fair, tainted, malafide and smacks of foul play, the court would set aside such an investigation and direct fresh investigation, and if necessary even by another independent agency. The power to order reinvestigation should be exercised sparingly. Generally, court should be reluctant to quash investigation and order the fresh one except in rarest of rare cases i.e. where investigation prima facie is indicative of bias mind and foul play[59].

Then there is a concept of further investigation as envisaged by the Section 173 (8) of the *Code of Criminal Procedure*, 1973. This means a continuation in previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and the chain of events relating to the same occurrence incidental thereto. In other words it has to be understood in complete contradiction to a reinvestigation, fresh or de novo investigation[60]. When the charge sheet is submitted in the court thereafter, the police can only conduct further investigation and not reinvestigation[61]. The prime consideration for further investigation is to arrive at the truth and do real, substantive and effective justice[62]. Further investigation can be done by the police officers as is required in the said case. It is only the reinvestigation

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55 See Sanjay Singh Ramarao Chavan v. D. Gulabrao Phalke (2015) 3 SCC 1231, National Human Rights Commission v. State of Gujarat (2009) 6 SCC 767, M. Gagdhar Janardan v. The State 2004 CrLJ 4623 (SC), Kishan Lal v. Dharmindra (2009) 7 SCC 685, J.K. International v. The State (2001) 3 SCC 462.

56 *Harinderpal Singh* v. *State of Punjab,* 2004 Cri LJ 2648 (Pb. & H.).

57 *Reeta Nag* v. *State,* 2010 Cri LJ 2245 (SC).

58 *V. Dubey* v. *State of M.P.,* 2012 (1) RCR 588 (SC).

59 *V. Tyagi* v. *Irshad Ali,* 2013 (2) RCR 197 (SC).

60 *Ibid.*

61 *Arun Kumar* v. *State of M.P.,* 1999 Cri LJ 717 (SC).

62 See *Hasan Valibi Qureshi* v. *State of Gujrat,* (2004) 5 SCC 347, *Kishan Lal* v. *Dharmendra,* (2009) 7 SCC 685, *State of Punjab* v. *C.B.I.,* AIR 2011 SC 2962.

which cannot be conducted without the permission of the Magistrate[63]. The object of keeping the court informed or for seeking formal permission to make further investigation is that the court should know about it and should not proceed to hear the case[64]. Where the police decide to make the further investigation, the police could express their regard and respect for the court by seeking its formal permission to make further investigation[65]. The police officer is empowered to make further investigation as provided under Section 173 (8) of the Code, normally with the permission of the court[66]. When proceedings are pending before the court and new facts come to the knowledge of the police, the formal permission to make further investigation should be sought from the court[67]. The power of court to direct the police to conduct further investigation cannot have any inhibition.

6. Conclusion

The victim of crime is an informant to lodge FIR. A victim of crime after the commission of an offence has the choice either to lodge First Information Report with the police regarding the cognizable offence or approach the court through a complaint. Sometime victim is hesitant to go to the police because of the indifferent behaviour of the police officers firstly in recording the FIR and then during investigation. It is only after an FIR is lodged that investigation in the case can be initiated. The practice to verify any information before recording FIR is against the statutory provisions of law. The principle concern of lodging an FIR is to set the criminal law into motion and to take suitable steps by the police for the investigation of the case and to bring the offender to book. The police is duty bound to hold the investigation of a cognizable offence without obtaining an order from the court.

63 *Hasan Valibi Qureshi* v. *State of Gujrat,* (2004) 5 SCC 347.
64 *Sunil Tandon* v. *State of Maharashtra,* 2010 Cri LJ 4263 (Bom.).
65 *Ram Lal Narang* v. *State,* AIR 1979 SC 1791.
66 *Amit A. Shah* v. *C.B.I.,* AIR 2013 SC 3794.
67 *Mahima* v. *State of Orissa,* 2002 (1) Crimes 137 (Ori.).

BALANCING SECURITY AND LIBERTY IN THE AGE OF TERRORISM: A LEGAL PERSPECTIVE

Dr. Shruti Bedi*
Akhil Kamra**

> I do not believe there can be a trade-off between the effective fight against terrorism and protection of civil liberties. If, we are asked to give up our freedom, liberties and human rights, for protection against terrorism, do we in the end have protection? I think we need to be careful not to undermine human rights and civil liberties in this fight against terrorism because if we do, we are handing the terrorists a victory they cannot win on their own[1].
>
> -Kofi Annan, UN Secretary General (1996-2006)

1. Terrorism: A Threat to Human Security

Terrorism is not a new phenomenon, rather a much debated one whose presence can be felt all across the globe. Its existence can be traced back to the ancient society of the first century. But over the years 'terrorism' has undergone tremendous changes. Now, it has become more lethal, more widespread and more difficult to control. Today, it stands as a serious challenge before the society.

India is facing a period of heightened terrorist threat due to internal, regional and global factors. In this age of conflicting development, terrorism has emerged as the main tool of disruptive power in the hands of zealots, fanatics and also the people who have been trampled upon for what the governments of different states and in turn the society deem to be "The greater good".

In light of the global increase in the number and lethality of terrorist attacks, it has become imperative that nations, states, and private citizens become more involved in a strategic vision to recognize, prepare for, and if possible prevent such events.

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1 United Nations (2006) Madrid, Spain, 7 September 2006 - Secretary-General's press conference with Spanish Prime Minister Jose Luis Rodriguez Zapatero (unofficial transcript) accessible at: *<http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/chogm_report_2007.pdf>* accessed on 1 September, 2017.

In India, anti-terrorism laws have played a vital role to tackle the grave problem of terrorism and keep a check upon such activities which threatens the security of the society. However, it is pertinent to note that these laws empower the State which has been provided with unfettered power which they tend to abuse. This often leads to the violation of human rights of the accused.

Recently, the Malegaon Blast accused Lt. Col. Shrikant Prasad Purohit was granted bail where the court even failed to frame charges[2]. The bail was granted after 9 years when after a special MCOCA court ruled that the Anti-Terrorist Squad had wrongly applied this law against Purohit and ten others.[3]

Innocent or guilty, Purohit's dysfunctional trial is the norm in Indian terrorism cases; alleged jihadists, North-east insurgents and Maoists all routinely spend years in jail. Botched investigations, malicious prosecutions, dilatory proceedings, cumbersome procedures, poorly-framed laws - the list of problems is well known, and calls for reform have existed for years. The Purohit case demonstrates just how toxic their consequences can be.[4] One of the leading National Daily[5] wrote: "Since 2001, he has got numerous recommendations for infiltration. From an unsung hero, he has been now called an incarcerated hero."

The key challenge for democracies when fighting terrorism is to find the right balance between security and liberty. The relationship between the two in the context of countering terrorism becomes tricky due to the complex nature of terrorism. India has had to deal with the pressure of the public which has demanded an effective counter terrorism law to counter the threat of terrorism. On the other hand, the same public is clamouring for answers on the misuse of the liberal powers bestowed upon the authorities. The authors through this article attempt to illustrate this Catch 22 situation by highlighting the absence of just provisions in the existing counter-terrorism regime in India and the consequent violation of human rights.

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2 Malegaon blast case: Supreme Court grants bail to Lt Colonel Purohit, *Times of India* (21 August, 2017), accessible at *<http://timesofindia.indiatimes.com/india/malegaon-blasts-case-supreme-court-grants-bail-to-lt-colonel-purohit/articleshow/60153275.cms>* accessed on 28 August, 2017.

3 SC Grants Bail to Shrikant Prasad Purohit in 2008 Malegaon Blast Case, *The Wire* (21 August, 2017), accessible at *<https://thewire.in/169477/supreme-court-malegaon-blast-purohit/>* accessed on 28 August, 2017.

4 Injustice process', *The Indian Express* (24 August, 2017), accessible at *<http://indianexpress.com/article/opinion/editorials/injustice-process-lt-col-purohit-4810570/>* accessed on 27 August, 2017.

5 2008 Malegaon blast accused Lt. Colonel Shrikant Prasad Purohit granted conditional bail by SC, *Indian Express* (21 August, 2017), accessible at *<http://indianexpress.com/article/india/2008-malegaon-blast-accused-colonel-shrikant-prasad-purohit-granted-conditional-bail-by-supreme-court-4806327/>* accessed on 28 August, 2017.

2 Indian Counter Terrorism Regime

Before the special laws on terrorism came into the picture, several provisions of IPC and CrPC guided the prosecutions of those committing such heinous acts that terrorised the whole society. Terrorism cases, such as the Parliament attack case[6], Kasab's trial[7], and the Malegaon blasts case[8], have all involved charges under the IPC. However, considering the nature and gravity of terrorism, the Centre and States have enacted other specific legislations to deal with terrorism and related activities.

2.1 Terrorist and Disruptive Activities (Prevention) Act

Terrorist and Disruptive Activities (Prevention) Act commonly known as TADA, was enacted in 1985. It was formulated in the back drop of the growing terrorist violence in Punjab which had a violent impact in other parts of the country too, including the capital New Delhi. However, the enactment remained in force till 1995, after which it lapsed, following widespread allegations of misuse. The number of people arrested under the act had exceeded 76,000, by 30 June 1994. 25 percent of these cases were dropped by the police without any charges being framed. Only 35 percent of the cases were brought to trial, of which 95 percent resulted in acquittals. Less than 2 percent of those arrested were convicted.[9]

Among the more controversial provisions of the Act was that the Act provided that a person can be detained up to 1 year without formal charges or trial against him. Following are certain grounds on the basis of which the law was repealed:

- Section 20 of the Act provides that detainee can be in police custody up to 60 days which increases risk of torture.
- The detainee need not be produced before a judicial magistrate, but instead may be produced before an executive magistrate who is an official of police and administrative service and is not answerable to high court.
- The trial can be held secretly at any place and also keeps the identity of the witnesses secret violating international standards of fair trial.

6 *State* v. *Mohd Afzal*, 107 (2003) D.L.T. 385.
7 *State of Maharashtra* v. *Mohammed Ajmal Mohammad Amir Kasab*, 2011 SCC OnLine Bom. 229.
8 *Pragyasingh Chandrapalsingh Thakur* v. *State of Maharashtra*, 2014 (1) Bom. C.R. (Cri.) 135.
9 S. Hussain Zaidi, *Black Friday: The True Story of the Bombay Bomb Blasts*, (Penguin Books, Mumbai, India) at 288.

- The Act, under section 21, reverses the presumption of innocence of the accused under the Act. The accused shall be presumed to be guilty unless contrary is proved.
- A person making confessions to a police officer not below the rank of superintendent of the police can be used as evidence against him.

2.2 *The Prevention of Terrorism Act (POTA), 2002*

The Prevention of Terrorism Act (POTA), 2002 was enacted in the aftermath of the 2001 Parliament attacks. The central government claimed its action was a response to "an upsurge of terrorist activities, intensification of cross border terrorism, and insurgent groups in different parts of the country."[10]

After the legislature passed POTA in March of 2002, the Indian media and human rights groups observed and criticized frequent abuses of the law, including hundreds of questionable and prolonged detentions with no formal charges filed.[11] The most visible of these involved political figures arrested by rivals in control of state law enforcement machinery.[12] Most abuses arising in the form of prolonged detention without charges, however, went unreported, as the targets were often members of disempowered minorities lacking a forum in which to voice the mistreatment. Detainees languished in jail for weeks or months while the wheels of India's overburdened criminal justice system creaked slowly along. Despite the existence of special courts to expedite the process, at least in theory, they did little to counter POTA's permissive stance on such lengthy incarcerations. Provisions for oversight were similarly impotent. Some of these problems stemmed from the law's broad text, while others were rooted in its enforcement.

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10 Chris Gagn, "Pota: Lessons Learned from India's Anti-Terror Ac"t, *Boston College Third World Law Journal* (2004–2005), accessible at: <*https://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bctwj/25_1/09_FTN.htm#F**> accessed on 1 September, 2017.

11 Rupam Jain Nair, "After Gujarat riots, Muslim men stuck in legal limbo", *Reuters.com (India)* (5 February, 2008) accessible at <*http://in.reuters.com/article/idINIndia-31782920080205*> accessed on 27 August, 2017; Human Rights Watch, "In the Name of Counter-Terrorism: Human Rights Abuses Worldwide", Briefing Paper for the 59th Session of the United Nations Commission on Human Rights 15 (25 March, 2003), accessible at <*http://www.hrw.org/un/chr59/counter-terrorism-bck.pdf*> accessed on 27 August, 2017; George Iype, "Terrorising the Politicians", Rediff.com (India), (14 August, 2002), accessible at <*http://www.rediff.com/news/2002/aug/14spec.htm*> accessed on 27 August, 2017.

12 Human Rights Watch, "India: POTA Repeal a Step Forward for Human Rights", (22 September, 2008) accessible at <*https://www.hrw.org/news/2004/09/22/india-pota-repeal-step-forward-human-rights*> accessed on 27 August, 2017.

Since, POTA faced severe criticism for allowing widespread human rights abuses in the country; it was thus repealed in 2004[13] due to the following reasons:

- Provisions for extended periods of detention pending investigation, first introduced in TADA are continuing in the same form in POTA.[14]
- Section 49, a continuation of an identical TADA provision[15], excluded the possibility of applying for anticipatory bail under section 438 of the CrPC.
- Section 32 of POTA allows confessions made to police officers shall be admissible in trial.
- The Act, under section 22, provides that the accused shall be presumed to be guilty unless contrary is proved.

POTA is, however, relevant even today since the Act's repeal did not affect pending investigations and legal proceedings instituted under the Act.[16]

2.3 Unlawful Activities (Prevention) Act, 1967

In the immediate wake of the Indian army's defeat in the Sino-Indian War, as well as the threat posed by the DMK contesting elections in Tamil Nadu with secession from India being part of their manifesto, reasonable restrictions in 'the interest of the sovereignty and integrity of India' were amended to Article 19 (2). It was in this background that the UAPA was enacted on December 30, 1967 – to satisfy the need of the Indian state to declare associations that sought secession from India as 'unlawful'.

The original Act was targeted at unlawful activities of a general nature, and stringent provisions on terrorism were added only later through various amendments, following POTA's repeal. The amended UAPA made substantial changes to the definition of 'unlawful activity', included the definition of 'terrorist act' and 'terrorist organisation' from the repealed POTA, and also introduced the concept of a 'terrorist gang'.

The enactment lacked the presence of a sunset clause like its predecessors. However, even where a restriction to fundamental rights is reasonable given the extraordinary

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13 Editorial, 'Rethink the new UAPA' *The Hindu* (20 December 2012) accessible at *<http://www.thehindu.com/opinion/editorial/rethink-the-new-uapa/article4218425.ece>* accessed on 28 August, 2017.

14 The *Prevention of Terrorism Act, 2002 (POTA)*, S. 49(2).

15 The *Terrorist and Disruptive Activities (Prevention) Act*, 1987 (TADA), S. 20(7).

16 The *Prevention of Terrorism (Repeal) Act*, 2004, S. 2(2).

situation of a threat of terrorism, the absence of a *sunset clause* in UAPA could not be justified.[17]

In 2008, another amendment of the UAPA was moved and adopted following the attacks of November 26, 2008. More provisions similar to POTA and TADA that increased the period of detention without bail[18] were incorporated into the UAPA. The 2012 amendments to the UAPA further expanded the already vague definition of "terrorist act"[19] to include offences that threaten the country's economic security. Thus, UAPA brought in the stringent provisions for which TADA and POTA were earlier criticised.[20]

3. Departure of the Current Counter-Terrorism Law from the Established Principles of Criminal Jurisprudence

In a criminal trial, it is not at all obligatory on the accused to produce evidence in support of his defence and for the purpose of proving his version he can rely on the admissions made by prosecution witnesses or on the documents filed by the prosecution.[21]

Basically, there are three cardinal principles of criminal jurisprudence. Those are:

1. Prosecution to prove its case beyond reasonable doubt;
2. The accused must be presumed to be innocent, till proved guilty; and
3. The burden of proof lies on the prosecution to prove the guilt beyond reasonable doubt.

All the above special laws of India are characterised by: Emphasis on protection of state rather than people; over-reaction to the threat posed and far more drastic measures than necessary; not much room for judicial scrutiny or public debate; ambiguous definitions of terrorism that fail to satisfy the principle of legality; pre-trial investigation and detention procedures which infringe upon due process,

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17 Arun Ferreira and Vernon Gonsalves, "Fifty Years of Unreasonable Restrictions under the Unlawful Activities Act, *The Wire*" (9 March, 2017) accessible at *<https://thewire.in/115353/uapa-anti-terrorism-laws/>* accessed on 28 August, 2017.

18 *Unlawful Activities Prevention Act, 1967 (UAPA)*, S. 43 D (2).

19 UAPA, S. 15.

20 Mark H Gitenstein, 'Nine Democracies and the Problem of Detention, Surveillance, and Interrogation', in Benjamin Wittes, ed., *Legislating the War on Terror: An Agenda for Reform* (Brookings Institution 2009) at11-12.

21 *Dahyabhai Chhaganbhai Thakker* v. *State of Gujarat*, A.I.R. 1964 S.C. 1563, 1964 S.C.R. (7) 361; *Rabindra Kumar Dey* v. *State of Orissa*, A.I.R. 1977 S.C. 170, 1977 S.C.R. (1) 439; *Jaikrishnadas Manohardas Desai and Anr.* v. *State of Bombay*, [1960] 3 S.C.R. 319.

personal liberty, and limits on the length of pre-trial detention; special courts and procedural rules that infringe upon judicial independence and the right to a fair trial; provisions that require courts to draw adverse inferences against the accused in a manner that infringes upon the presumption of innocence; lack of sufficient oversight of police and prosecutorial decision making to prevent arbitrary.[22] The current counter-terrorism law is on the similar line like that of its predecessors in terms of defeating the basic principles of the Criminal Jurisprudence.

3.1 Presumption of Innocence etc.

The Act creates a rebuttable presumption of guilt on the basis of certain evidence. Thus, the onus of proof is on the accused to prove his innocence. India follows an adversarial justice system, one of the basic tenets of which is a presumption of innocence of the accused. Thus, the notion that the prosecutor must prove the case beyond reasonable doubt in criminal matter is fundamental to the notion of an adversarial justice system.

The amended UAPA requires a court during trial to presume the guilt of an accused person for engaging in terrorism where certain inculpatory evidence is proved but without a showing of criminal intent.[23]

If a court determines that either of these two forms of evidence against the accused is proved beyond a reasonable doubt, "the Court shall presume, unless contrary is shown, that the accused has committed the offence." This provision is highly problematic because it permits an individual to be convicted of acts of terrorism solely on the basis of material evidence, without any showing of intent to commit a crime. It shifts the burden of proof onto the defendant to prove there was no such intent, even though there is a great risk that police could plant such evidence to ensure detention.

Further, Indian courts have always strongly endorsed the human rights notion of a presumption of innocence, with the Supreme Court noting that proof cannot ever be displaced by suspicion, not the matter how strong. All of these provisions cumulatively create an atmosphere where it is virtually impossible for an accused to defend or safeguard his rights. In a 2011 judgment[24] of the apex court noted that the provisions of the UAPA must be read in consonance with fundamental rights and not in isolation,

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22 N. Manoharan, "Counter-Terror Laws and Security in India", *Economic and Political Weekly*, Vol. 44, No. 46 (Nov. 14-20, 2009) at 22.

23 UAPA, S. 43E.

24 *Sri Indra Das* v. *State of Assam*, (2011) 3 SCC 380.

noting that "If there is a statute which appears to violate it (the constitution) we can either declare it unconstitutional or we can read it down to make it constitutional." The recent invocations of the UAPA show that this is not being done.

This provision makes an accused prove his own innocence- thus shifting the burden of proof away from the State and onto the shoulders of each individual accused. This cannot in any way be said to safeguard his rights- rather, it places a heavy burden on the accused.

The Supreme Court has included a presumption of innocence in its holdings concerning the constitutional right to a fair trial.[25] This provision of the UAPA encourages abusive prosecution, undermines the basic right to a fair trial right and creates enormous risks of wrongful conviction.

The UAPA has proven to be a deeply regressive legislation that has, and will continue to be used to promulgate police abuse of civil rights of Indian citizens. There is an immediate need for some sort of checks and balances system that will safeguard the interest of any innocent accused while still enforcing the objectives and rationale behind the formation of such and act.

3.2 Unreasonable Detention

The UAPA gives Indian authorities heightened powers to detain persons without charge, which places them at greater risk of mistreatment and violates basic due process rights.

Under the amended UAPA, the period that an individual can be held in police custody was increased from 15 days to 30 days. Detainees face the greatest risk of torture and other ill-treatment while in the custody of the police, who may seek to extract confessions and evidence of wrongdoing.[26]

The enactment also permits a detainee to be held in judicial custody without charge for up to 180 days (including the 30 days in police custody). A court can authorize an initial period of 90 days pre-charge detention without special grounds of any kind. A

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25 *Indian Supreme Court, State of Punjab* v. *Baldev Singh*, A.I.R. 1999 S.C. 2378.

26 Human Rights Watch, "Broken System: Dysfunction, Abuse, and Impunity in the Indian Police", HRW (4 August, 2009) accessible at <*http://www.hrw.org/en/reports/2009/08/04/broken-system-0*> accessed on 28 August, 2017. The Law Commission of India, in its 1994 report on custodial crimes: "Members of the weaker or poorer sections of society, are arrested informally and kept in police custody for days together without any entry of such arrests in the police records. During the informal detention they are subjected to torture, which at times results in death." Law Commission of India, "152nd Report on Custodial Crimes," 1994, para. 1.5.

court can extend detention for up to 90 more days if the public prosecutor files a report with the court "indicating the progress of the investigation" and the specific reasons for the continued detention of the suspect—a very low threshold to enable an additional three months of pre-charge detention.

Pre-charge detention, whether of 90 or 180 days, with little or no burden on the investigating authorities to demonstrate its necessity, violates India's obligations to ensure that all arrested persons are "promptly" informed of the charges against them.[27] In the absence of any requirement for the reviewing judge to assess whether there are reasonable grounds to believe that the detained person has committed a terrorism offense, individuals do not have an effective right to challenge the lawfulness of their detention.

India has historically used long-term detention without charge as a means of "backdoor" preventive detention of persons deemed to be associated with militant organizations. Under TADA provisions similar to those in the UAPA, the government from 1985 to 1994 arrested 76,000 terrorism suspects and other persons who allegedly presented a national security threat. The government's use of sweeping detention powers has also become a means to intimidate members of religious minorities and other vulnerable groups to provide information to investigations, since prolonged detention—even in the absence of a conviction—can have dire economic and emotional consequences for families living hand-to-mouth.

Further, the easy denial of bail under the UAPA facilitates police and prosecutorial abuse of the law to allow prolonged pre-trial detention contrary to general Indian criminal law and international human rights law. India's criminal procedure law maintains the court's discretion to order bail even where there is a presumption against bail.

3.3 Accountability and Police power

The UAPA permit the security forces to conduct searches and arrests that otherwise would be unlawful under Indian law. They authorize "any officer of a Designated Authority" to search any person or property, and seize any property or arrest any person, where they have "reason to believe from personal knowledge or information given by any person and taken in writing ... or from any document" or thing that an offense has been committed under the UAPA.[28]

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27 International Covenant on Civil and Political Rights, 1966(ICCPR), *Art.* 9.
28 *Unlawful Activities (Prevention) Act*, 1967, S. 43A.

Authorities acting under the UAPA can also compel information from third parties without a court order or judicial warrant.[29] Thus, a superintendent of police could authorize an officer to compel any government agency, corporation, or "any other institution, establishment, organization or any individual" to furnish information "where the investigating officer has reason to believe that such information will be useful for, or relevant to" the investigation. Failure to comply with the demand is punishable by up to three years in prison.[30]

These provisions confer discretion for search, seizure and arrest that is much broader than under the Indian criminal procedure code. As a general rule, the Code of Criminal Procedure requires a threshold of "reasonable suspicion" for arrest and "reasonable grounds" for searches by a police officer.[31] By contrast, the UAPA allows such actions based on an extremely low standard of certainty ("reason to believe,") and only on the "personal knowledge" of the relevant officer, without requiring this knowledge to be specified in writing and provided to superior officers or a magistrate within a limited period, such as 24 hours. They greatly increase the risk that individuals will have their privacy violated or be deprived of their liberty, on vague and unspecified grounds.

Under the Indian criminal procedure code, police must inform a person "forthwith" of the "full particulars of the offence for which [he or she] is arrested" arrest.[32] The UAPA only requires that police inform an individual of the grounds of arrest "as soon as may be." This vague formulation could result in individuals remaining unaware of the reasons for their arrest, and undermine their ability to take appropriate action.

3.4 Torture

The current counter-terrorism enactment provides a wide room for the abuse of power by the enforcement agencies. The approach taken by the investigation agencies to resort to Torture in order to extract vital information from the person in custody is that the 'ends justify the means', a calculus in which individual interests are sacrificed for community gains. Such preventive measures are justified in terms either of self-defence or of necessity. However, the defensive action is performed by law enforcement officials or defence personnel and not by the citizens. The defence of necessity, which admits that there will be circumstances where a person may

29 *Unlawful Activities (Prevention) Act*, 1967, S. 43F.
30 *Unlawful Activities (Prevention) Act*, 1967, S. 43F.
31 *Code of Criminal Procedure* 1973 (CrPC), S. 41 & 165.
32 *Code of Criminal Procedure* 1973 (CrPC), S. 50(1).

legitimately break the law, involves the weighing of lesser evils. Even if the torture is 'regulated' so as to avoid the risk of death, the victim of torture is not only subjected to serious pain but also experiences a form of moral death.[33]

3.5 Witness protection

Section 44 of the UAPA provides the Court with discretion to take measures of protection of witness once it is satisfied that a witness's life was in danger and only after recording reasons therefore in writing. The section is assailed on the ground that the accused was denied a right to know the identities of witnesses before trial, the right to cross-examine, and was thus denied the right to fair trial.

3.6 Due process: Abuse of Power

Vague definitions, accompanied by harsh penalties and wide ancillary powers of detention and investigation, can be misused to persecute political opponents or authorize repressive measures against unpopular or marginal religious and ethnic populations.

If a law is arbitrary or irrational it would fall foul of Article 14.The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and is regarded as a pervading theme of the Constitution since the decision in *Maneka Gandhi* v. *Union of India.*[34]The underlying principle is that, "every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity". If the standard laid down by law is unreasonable or arbitrary, then law may be struck down as discriminatory. [35]

However, the UAPA provides the definition of 'unlawful activity' and includes vague definitions of 'terrorist act' and 'terrorist organisation'. The 2012 amendments to the UAPA further expanded the already vague definition of "terrorist act" to include offences that threaten the country's economic security. The recent history of counterterrorism laws in India underscores the real risk of misuse of such definitions and the sweeping powers associated with them.

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33 Simon Bronitt, "Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform" in Miriam Gani, Penelope Mathew, eds., *Fresh Perspectives on the 'War on Terror'*, (ANU Press, 2008) at 67.

34 (1978) 2 S.C.J.

35 *State of Uttar Pradesh* v. *Kartar Singh*, A.I.R. 1964 S.C. 1135; *A.P. Grains & Seeds Merchants Association* v. *Union of India*; A.I.R. 1971 S.C. 1986.

While the UAPA as the country's counter terrorism has been on the books more than any other counter terror law till date. However, if the anomalies discussed previously are dealt with, it might turn out to be one of the most successful one. Provisions pertaining to periodic review and a sunset clause, if incorporated would go a long way in making UAPA a more acceptable counter terror law.

4. Lessons to be learnt from Laws of other countries and International Laws

The current legislation on Anti-terrorism makes a departure from the Criminal law standards set internationally and it is warranted by time that the Indian legislators correct the erred position of law prevailing in the country:

4.1 Presumption of Innocence

The ICCPR[36]and the Human Rights Committee[37] has stated that the presumption of innocence is "fundamental to the protection of human rights" and "imposes on the prosecution the burden of proving the charge" beyond reasonable doubt.

4.2 Arbitrary Detention

Article 9 of the ICCPR upholds the right to liberty and prohibits arbitrary arrest or detention. Those detained on a criminal charge shall be promptly informed of any charges against them.[38] It is well established in international human rights law that any interference with the fundamental right to liberty must be shown to be strictly necessary and proportionate.

4.3 Bail

The ICCPR provides that "it shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial."[39]

4.4 Search and Seizure

International law protects against arbitrary or unlawful interference with a person's privacy and home.[40] The Human Rights Committee, the international expert body

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36 ICCPR, *Art.* 14(2).

37 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), S. IV.

38 ICCPR, *Art.* 9.

39 ICCPR, *Art.* 9(3).

that monitors compliance with the ICCPR, has ruled that the prohibition against arbitrary searches under article 17 "is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."[41]

4.5 Informed Arrest

ICCPR requires that anyone arrested "shall be informed, at the time of arrest, of the reasons" for their arrest.[42] According to the Human Rights Committee, merely referencing the legal basis for arrest without any indication of the substance of the complaint is insufficient. An individual needs to be sufficiently informed of the reasons for arrest to be able to take immediate steps to secure their release in the event the reasons given are invalid or unfounded.[43]

4.6 Torture

It is prohibited by customary international law, the Geneva Conventions, which govern the treatment of those seized in the course of armed conflict andArticle 7 of the ICCPR absolutely forbids "torture or cruel inhuman or degrading treatment or punishment." The "Torture Convention" also prohibits "torture," which is defined to involve thelaw, liberty, and the pursuit of terrorism intentional infliction of severe injury by public officials. Its prohibition on torture is subject to no exceptions.

5. Conclusion

It seems ludicrous that in a civilised democratic society like India, a citizen may be practically abducted by police, charged with perfunctory offences and incarcerated without bail on mere suspicion for an indefinite period of time. But this is indeed the situation in present-day India, with duly passed legislation sanctioning the inhumane state of affairs.

A common claim is that human rights observance is too costly in cases involving terrorism. But a wider sweep of the history of criminal justice supports the above

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40 International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, Entered into force March 23, 1976, ratified by India on April 10, 1979; ICCPR, Article 17(1).

41 Human Rights Committee, *Rafael Armando Rojas García* v. *Colombia*, Communication No. 687/1996, U.N. Doc. CCPR/C/71/D/687/1996 (2001), para. 10.3.

42 ICCPR, *Art.* 9(2).

43 Human Rights Committee, *Adolfo Drescher Caldas* v. *Uruguay*, Communication No. 43/1979, U.N. Doc. CCPR/C/OP/2 at 80 (1990), para 13.2.

hypothesis about the importance of procedural justice to compliance. It is important to recall that 'due process' rights were not forged in the lower courts in relation to minor misdemeanours, but rather were first articulated in relation to serious security offences.

When the House of Lords found that legislation permitting the administrative detention of foreign terrorist suspects violated human rights, observed[44]:

Terrorist crime, serious as it is, does not threaten our institutions of government or our existence as a civil community. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.

The anti-terrorism legislation could not prevent harassment of the innocent civilians. This increased the public discontent and in effect strengthened the belief in repressive nature of the regimes. Consequently, those innocents who got affected due to harassment of security laws played into the hands of the militants to resist "repressive regimes". As the Supreme Court of India rightly recognised, "terrorism often thrives where human rights are violated", and "the lack of hope for justice provides breeding grounds for terrorism".[45]

It is warranted by time to strike a balance between the power given to the State to ensure the security of the society and the liberty given to the citizens in order to protect the Human Rights of the suspected individuals involved with terrorism.

> They [who] ... can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.
>
> Benjamin Franklin

44 *Supra* note 22 at 23.

45 *People's Union for Civil Liberties* v. *Union of India*, A.I.R. 2004 S.C. 456,465.

HUMAN RIGHTS OBLIGATIONS OF TRANSNATIONAL CORPORATIONS WITH SPECIAL REFERENCE TO PLACHIMADA CASE

Dr. Dinesh Kumar*

1. Introduction

In the Trail Smelter case, *United States* v. *Canada*, the Court held that:[1]

> Under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and injury is established by clear and convincing evidence.

This case was heard close to a century ago, yet little has developed in terms of state's obligations or responsibility for transnational effects of their actions. This is true for international law in general and for international human rights law in specific. The role of State in protecting and promoting human rights of individuals inside the territorial boundary is specifically governed by the domestic laws. But at the same time, the States have obligations relating to the human rights effects of their external activities, such as trade, development cooperation, participation in international organizations and security activities.[2]

In the 21st century, the Transnational Corporations (TNCs) has become more relevant even for a common man as they are active in most of the dynamic sectors of national economies. They have brought new jobs, technology and capital, and are also capable of exerting a positive influence in fostering development, by improving living conditions. Their impact is visible in all spheres of life i.e. social, cultural, economic, political and legal in all the States across the world.

After 1955, the TNCs not only grew in size and power but also in number. They widened their scope and activities too. This sudden growth of the TNCs and their role at international as well as national level raised many critical concerns including foreign direct investment (FDI), legal rights and responsibilities on the part of TNCs, for the economist, the political scientists and the jurists. As a result, all of them started looking the TNCs from various angles and there emerged a striking difference when they are viewed by economist and the jurist.

The growing size and influence of these large companies became a matter of concern, especially for newly independent developing nations. They perceived TNCs as perpetuating colonial ties in economic terms and threatening political independence

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1 *United States* v. *Canada* 3 R.I.A.A. 1905 (1941).

2 Sigrun I. Skogly and Mark Gibney, "Transnational Human Rights Obligations", *Human Rights Quarterly*, Vol. 24, No. 3, 781-798, at 781 (August 2002).

and development prospects.[3] As human rights abuses have persisted worldwide and especially in developing and least developed states, so too have various attempts to establish international standards for corporate actions. Those efforts have been less than productive, because of two reasons: firstly, most of the development of international law through treaties has focused on State actors; and secondly, they have largely been without strong implementation methods or support from the United Nations (UN).[4]

In the present research paper, the researcher has tried to address only the latest guidelines knows as UN Framework for Business and Human Rights. However, a reference is given to all other instruments of human rights dealing with the subject. In the end, a special reference of Plachimada case, which is pending in the Apex Court, is given to highlight how all the principles of human rights and the human rights obligation of TNCs has been sidelined in the high court decision.

2 Human Rights Obligation of Transnational Corporations

In the 1960s and 1970s, the activities of TNCs provoked intense discussions among the economists, academician, social workers, labour organisations, NGOs, political authority and even among states, related to labour and social issues, environment issues, corporate conduct and ethics, human rights, taxation, competition related aspects, that resulted in efforts to draw up international instruments for regulating their conduct and defining the terms of their relations with host countries, mostly in the developing world. These efforts were made at various level i.e., international level, regional level and at the States level.[5]

To address effectively the activities of TNCs infringing on human rights, the need for creating a specific institutional and normative framework to complement the current general framework was advanced by number of States jointly. In 1974, the UN's Economic and Social Council (ECOSOC) created the 'Transnational Corporations Commission', with 48 member States, which endeavoured itself with two priority tasks: to investigate the activities of transnational corporations and to prepare a Code of Conduct for them. The UN Commission on Transnational Corporations prepared the draft United Code of Conduct for TNCs which was to be a statement from the international community regarding the international legal obligations of businesses. This code was discussed for thirteen years but it never saw the light of day due to the opposition of the world's powers including transnational economic power and even

3 Scott Jerbi, "Business and Human Rights at the UN: What Might Happen Next?", *Human Rights Quarterly*, Vol. 31, No. 2, 299-320 at 301 (May, 2009).

4 David Weissbrodt, "Business and Human Rights", *University of Cincinnati Law Review*, Vol. 74, 55-74 at 55 (2005).

5 Various writings of Raymond Vernon, Eugene V. Rostow and George W. Ball, Detlev F. Vagts, Hays D. Richard, Roscoe Pound and V Gauri Shankar are available to support these arguments. However, there are many more economist, political and legal thinkers which are not covered under the same.

the UN body never full adopted it. In the same year, ECOSOC also created, within the UN's Office of the Secretary General, the Centre for Transnational Corporations an autonomous organism operating as the Secretariat of the Commission on Transnational Corporations.[6]

The Organization for Economic Co-operation and Development (OECD) undertook a similar effort in 1976 when it established its first guidelines for Multinational Enterprises to promote responsible business conduct consistent with applicable laws.[7] In 1977 the International Labour Organization (ILO) adopted its Tripartite Declaration of Principles concerning Multinational Enterprises which incorporated relevant ILO Conventions and recommendations.[8] In addition, the ILO assists private voluntary initiatives to establish and implement their own codes of conduct.[9]

During the period when the UN, OECD, and ILO were preparing codes of conduct for business, other groups were also considering the obligations of businesses with regard to human rights conduct.[10] Throughout the 1980s and 1990s efforts grew as an increasing number of consumers, investors, local communities, NGOs, and other started to take note of and call for action regarding human rights violations by businesses. Finally, the UN adopted two instruments: the *Global Compact*, 1999 and the U.N. *Norms on the Responsibility for Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 2003 to address the issue.[11] At its 2005 session the Commission adopted a resolution that welcomed the High

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6 In 1993-1994 both organisms were practically dismantled and their objectives changed. The UN's Secretary General decided to transform the Centre for Transnational Corporations into a Division for Transnational Corporations and International Investment at the seat of the United Nations Conference on Trade and Development (UNCTAD). As for ECOSOC, it decided to transform the Transnational Corporations Commission into a Commission of UNCTAD's Council on Trade and Development, taking into account the 'change in orientation' of the Commission (consisting of abandoning the attempts to establish societal control over transnational corporations and endeavour it in lieu to the 'contribution of transnationals to growth and development'). *<http://www.jussemper.org/Resources/Corporate%20Activity/Resources/Observations_to%20Ruggies_final-2011.pdf>* Accessed on May 23, 2017.

7 *<http://www.oecd.org/daf/inv/mne/48004323.pdf>* Accessed on May 23, 2017.

8 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2006). *<http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication / wcm s_094386.pdf >* Accessed on May 23, 2017.

9 *<http://www.ilo.org/public/english/standards/relm/ilc/ilc89/rep-i-a.htm#Voluntaryprivateinitiatives>* Accessed on May 23, 2017.

10 Various European State Governments have also begun to address issues with regard to the human rights conduct of businesses. In 1998 the European Parliament passed a resolution calling upon the European Union (EU) to draft a binding Code of Conduct for European Multinationals and to establish a monitoring mechanism, leading to the 'Green Paper on promoting a European Framework for corporate social responsibility.' In December 2000 the United Kingdom and United States governments, along with many of the leading extractive and energy companies, released the 'Voluntary Principles on Security and Human Rights in the Extractive Sector'.

11 David Weissbrodt and Muria Kruger, "Human Rights Responsibilities of Businesses as Non-State Actors, Philip Alston (ed.) *Non-State Actors and Human Rights*, 315-350 at 320-21 (2005).

Commissioner's report and identified in an extraordinarily balanced fashion precisely the same number of criticisms of the Norms as it found positive attributes.[12]

3. UN Protect, Respect and Remedy: A Framework for Business and Human Rights

The Secretary-General appointed[13] Harvard Professor John G. Ruggie on 27 July 2005 to be his Special Representative (SRSG) on business and human rights with the mandate, which includes elaborating on "the role of States in effectively regulating and adjudicating the role of transnational corporations" with regard to human rights and identifying "standards of corporate responsibility and accountability for transnational corporations" with respect to human rights matters.[14] He presented a report called UN *Protect, Respect and Remedy: A Framework for Business and Human Rights* (the UN Framework) to the Human Rights Council in June 2008. The Human Right Council unanimously welcomed it and referred it as the UN Framework, marking the first time that a UN intergovernmental body had taken a substantive policy position on this issue.[15] The UN Framework posits three 'core principles': (1) the State Duty to protect human rights; (2) the corporate social responsibility to respect human rights; and (3) the need for access to appropriate remedies for human rights abuses.

3.1 The State Duty to Protect

The first pillar of the UN Framework is the state duty to protect against human right abuses committed by third parties, including business, through appropriate policies, regulation and adjudication. It highlights that states have the primary role in preventing and addressing corporate related human rights abuses. In his reports to the council, John Ruggie has proposed five priority areas through which states can work to promote corporate respect for human rights and prevent corporate-related abuse. They include: (a) striving to achieve greater policy coherence and effectiveness across departments working with business, including safeguarding the state's own

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12 C.H.R. res. 2005/69, U.N. Doc. E/CN.4/2005/L.11/Add.7 at 68 (2005), was adopted April 20, 2005, by a vote of 49 in favour, 3 against (Australia, South Africa and the United States), and 1 abstaining (Burkina Faso). The United States called for a vote and explained its vote against the resolution. <*http://www.humanright-usa.net/2005/0420Item17TNC.htm*> Accessed on April 24, 2017.

13 <*http://www.un.org/News/Press/docs/2005/sga934.doc.htm*> Accessed on April 24, 2017.

14 UNCHR December 2004/116, Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, 20 April 2004, E-CN_4-Res-2005-69. <*http://ap.ohchr.org/ documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc*> Accessed on April 03, 2017.

15 <*http://198.170.85.29/Ruggie-protect-respect-remedy-framework.pdf*> Beyond the Human Rights Council, the Framework has been endorsed or employed by individual Governments, business enterprises and associations, civil society and workers' organizations, national human rights institutions, and investors. It has been drawn upon by such multilateral institutions as the International Organization for Standardization and the Organization for Economic Cooperation and Development in developing their own initiatives in the business and human rights domain. Other United Nations special procedures have invoked it extensively. Also see: *Infra* note 161.

ability to protect rights when entering into economic agreements; (b) promoting respect for human rights when states do business with business, whether as owners, investors, insurers, procurers or simply promoters; (c) fostering corporate cultures respectful of human rights at home and abroad; (d) devising innovative policies to guide companies operating in conflict-affected areas; and (e) examining the cross-cutting issue of extra-territoriality.[16]

3.2 The Corporate Responsibility to Respect

The corporate responsibility to respect human rights means acting with due diligence to avoid infringing on the rights of others, and addressing harms that do occur. The term "responsibility" rather than "duty" is meant to indicate that respecting rights is not currently an obligation that international human rights law generally imposes directly on companies, although elements of it may be reflected in domestic laws. It is a global standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Human Rights Council itself.[17]

A company's responsibility to respect applies across its business activities and through its relationships with third parties connected with those activities - such as business partners, entities in its value chain, and other non-State actors and State agents. In addition, companies need to consider the country and local contexts for any particular challenges they may pose and how those might shape the human rights impacts of company activities and relationships.[18]

3.3 Access to Effective Remedy

Even where institutions operate optimally, adverse human rights impacts may still result from a company's activities and victims must be able to seek redress. Effective grievance mechanisms play an important role in both the state duty to protect and the corporate responsibility to respect. As part of their duty to protect against business-related human rights abuse, states must take appropriate steps within their territory

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16 The Special Representative documented the duty's legal foundations, policy rationales and scope in his 2008 and 2009 reports to the Council. *<http://www2.ohchr.org/english/issues/trans_corporations/docs/A-HRC-14-27.pdf>* Accessed on April 13, 2017.

17 *<http://198.170.85.29/Ruggie-protect-respect-remedy-framework.pdf>* Beyond the Human Rights Council, the Framework has been endorsed or employed by individual Governments, business enterprises and associations, civil society and workers' organizations, national human rights institutions, and investors. It has been drawn upon by such multilateral institutions as the International Organization for Standardization and the Organization for Economic Cooperation and Development in developing their own initiatives in the business and human rights domain. Other United Nations special procedures have invoked it extensively.

18 Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, UN Doc. A/HRC/8/5 (April 07, 2008). *<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>* Accessed on April 13, 2017.

and/or jurisdiction to ensure that when such abuses occur, those affected have access to effective remedy through judicial, administrative, legislative or other appropriate means. Currently, access to judicial mechanisms for business-related human rights claims is often most difficult where the need is greatest as a result of both legal and practical obstacles. And there is currently an uneven patchwork of non-judicial mechanisms, including mechanisms at the company level, national level (such as national human rights institutions, or National Contact Points in states that have signed the OECD Guidelines on Multinational Enterprises) and at the international level (such as the Compliance Advisor Ombudsman for the International Finance Corporation).[19]

4. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework

In its resolution[20] 8/7, welcoming the "Protect, Respect and Remedy" Framework, the Council also extended the SRSG's mandate until June 2011, asking him to "operationalize" the Framework - at is, to provide concrete guidance to States and businesses for its implementation. The Council asked the Special Representative, in developing the Guiding Principles, to proceed in the same research-based and consultative manner that had characterized his mandate all along. Thus, the Guiding Principles are informed by extensive discussions with all stakeholder groups, including Governments, business enterprises and associations, individuals and communities directly affected by the activities of enterprises in various parts of the world, civil society, and experts in the many areas of law and policy that the Guiding Principles touch upon.[21]

However, it is recognized that while the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 UN Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium sized enterprises. When it comes to means for implementation, therefore, one size does not fit all. So, these Guiding Principles are grounded in recognition of:[22]

(a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

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19 Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, UN Doc. A/HRC/8/5 (April 07, 2008). *<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>* Accessed on April 13, 2017.

20 *<http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf>* Accessed on April 13, 2017.

21 *Ibid.*

22 *Ibid.*

(b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and

(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

Since, the mandate of SRSG was to provide 'operationalize' framework of the earlier report, the SRSG categorized the present Guiding Principles into "foundational" principles and "Operational" principles under the same heading which he used for the UN Framework in 2008.

4.1 The State Duty to Protect Human Rights

The guiding principles while explaining the 'foundational' principles states that the State while protecting the human rights abuse by the third parties including business enterprises within their jurisdiction must take appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication. In paragraphs 2, for the first time, the states are awarded with an extraterritorial jurisdiction to regulate the activities of the TNCs, domiciled in their territory with having operations outside territory also.[23]

To operationalize the above mentioned 'foundational' principles, a four steps strategy has been derived in the guiding principle. Firstly, it recognizes the 'general state regulatory and policy functions,' which impose a duty on the State not only to enforce the laws that require the business to respect human rights but also make a periodical assessment regarding the adequacy of the laws and address the gaps. The state should also ensure that laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate and securities laws, directly shape business behaviour. Yet their implications for human rights remain poorly understood. For example, there is a lack of clarity in corporate and securities law regarding what companies and their officers are permitted, let alone required, to do regarding human rights.[24]

Secondly, the States is duty bound to take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, because they have the greatest means within their power to ensure the relevant policies, legislation and regulations regarding respect for human rights are implemented. The next provision further adds that as a necessary step, the relevant

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[23] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 3-4 (2011). *<http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>* Accessed on April 13, 2017.

[24] *Id.*, at Guiding Principle 1-2.

service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights.[25]

Thirdly, it imposes a duty on the states to ensure that business enterprises operating in conflict-affected areas must not involve themselves in human rights abuses. Further, the States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas. They should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business.[26]

Fourthly, the guiding principles impose a duty on the states to ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of the human rights obligations and they should consider them seriously while fulfilling their mandate. It also recognised that greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business-related issues, such as international trade and financial institutions.[27]

4.2 The Corporate Responsibility to Respect Human Rights

The guidelines laid down five 'foundational' principles to address the corporate responsibility to respect human rights. The principles states that business enterprises should not only respect human rights but they should also avoid infringement of the rights of other irrespective of the "abilities and/or willingness" of the states wherever they operate.[28] Further, the businesses should also address the adverse human rights impacts by taking "adequate measures for their prevention, mitigation and where appropriate, remediation." The business should consider all the human rights as mentioned in the international bill of human rights and ILO' Declaration on Fundamental Principles and Rights at Work.[29]

Guiding principle 13 elaborate that the business enterprises should avoid causing or contributing to adverse human rights impacts through their own activities and also to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations.[30] Lastly, it is mandatory for the enterprises to have "policies and processes appropriate to their size and circumstances" which includes a "human rights due diligence process" to identify, prevent, mitigate and account for how the enterprises address their impact on human rights.[31]

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25 *Id.*, at Guiding Principle 5-6.
26 *Id.*, at Guiding Principle 7-8.
27 *Id.*, at Guiding Principle 10.
28 *Id.*, at Guiding Principle 11.
29 *Id.*, at Guiding Principle 12.
30 *Id.*, at Guiding Principle 14.
31 *Id.*, at Guiding Principle 15.

To operationalize the foundational principles regarding the corporate responsibility to respect human rights, the guiding principles suggest the following steps. First of all, the business should strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationship.[32]

To make the implementation more effective, the principles has recommended "human rights due diligence" process to identify, prevent, mitigate and account of human right impact of the enterprise activities.[33] The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed with the help of internal and/or independent external human rights expertise.[34]

This is required to ensure that the potential impacts should be prevented or mitigated through the horizontal integration of findings across the business enterprise, while actual impacts - those that have already occurred - should be a subject for remediation.[35] Finally, the principles laid down an obligation on the business enterprises that they should comply with all applicable laws and in case of conflicting requirements, they should seek ways to honour the principles of internationally recognised human rights.[36]

4.3 Access to Remedy

In this part, the SRSG adopted the same 'foundational principle' which it adopted in the Framework, i.e., States must take appropriate steps to ensure an access to effective remedy in case of human rights abuses through judicial, administrative, legislative or other appropriate means.[37] To operationalize the same, the first step recommended by the guidelines is to ensure the 'effectiveness of domestic judicial mechanism' by reducing legal, practical and procedural barriers by reducing the cost of litigation, adopting a speedy trial mechanism that could lead to a denial of access to remedy.[38]

Besides this the State should provide effective and appropriate non-judicial grievance mechanisms to fill the gaps which may arise due to filling of large number of litigations before the traditional courts. These may be mediation - based, adjudicative or follow other culturally - appropriate and rights - compatible processes - or involve some combination of these - depending on the issues concerned, any public interest

32 *Id.*, at Guiding Principle 16.
33 *Id.*, at Guiding Principle 17.
34 *Id.*, at Guiding Principle 18.
35 *Id.*, at Guiding Principle 22.
36 *Id.*, at Guiding Principle 23.
37 *Id.*, at Guiding Principle 25.
38 *Id.*, at Guiding Principle 26.

involved, and the potential needs of the parties. And even national human rights institutions have a particularly important role to play in this regard.[39]

Lastly, in order to ensure the effectiveness of the non-judicial mechanism, both State-based and non-state-based, should be legitimate, accessible, predictable, equitable, transparent, right-compatible and a source of continuous learning. Operational-level mechanisms should also be based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.[40]

5. Human Rights Violations by Transnational Corporations: Plachimada Case

Plachimada is often cited as a prime example of corporate aggression over natural resources and the consequent denial of the rights of the people. It has also been portrayed as the fight against a transnational corporation by a small section of the local population in order to protect basic human rights, such as the right to drinking water and the right to livelihood. Plachimada, a small village in Kerala, became the centre of controversy after The Coca Cola Company set up a bottling plant there. The village became more famous (or infamous) after incidents of pollution and over extraction of groundwater by the Company, were reported by various organisations and the popular media.

5.1 Facts of the Case

Plachimada village of Perumatty panchayat in Chittoor taluk is a small hamlet in Palakkad district. On October 8th, 1999 Hindustan Coca-Cola Beverages Pvt. Ltd. applied to Perumatty *panchayat* for permission to set up a bottling plant in Plachimada. On January 27th, 2000 the *panchayat* granted a license to Coca-Cola for setting up and running the factory. The Coca-Cola plant was built on a 15-hectare plot of what used to be multi cropped paddy land. The main raw material used in the manufacture of beverages is water. Substantial portion of the need for water is met by exploiting ground water through bore-wells. The people in the locality raised objection against the exploitation of ground water by the Company which resulted into acute drinking water scarcity and other several environmental problems in Perumatty Grama Panchayat and nearby places. Therefore, the Panchayat passed resolution on 07.04.2003, deciding not to renew the licence of the factory.

To the above resolution, the company replied, that the factory is running with all necessary statutory clearances. The Panchayat can cancel its licence, if only any violation of the conditions of licence is found. The allegations of depletion of ground water and causing of environmental problems by the functioning of the unit were denied by the Company. Thereafter, after hearing the company, the Panchayat

[39] *Id.*, at Commentary of Guiding Principle 27.
[40] *Id.*, at Guiding Principle 31.

decided to cancel the licence of the Company and directed the Company to stop production with effect from 17.05.2003.

As a result, in the civil writ petition[41], the point that arises for consideration in the High Court of Kerala is whether a Grama Panchayat can cancel the licence of a factory manufacturing non-alcoholic beverages on the ground of excessive exploitation of ground water? As a matter of theoretical support, the Court discussed two principles, public trust doctrine and the common law rule of absolute proprietorship.

5.2 Public Trust Doctrine

The basis of the doctrine emanates from the property relationship. By considering natural resources as a property, the doctrine describes the right of the State and the individuals over it. The preliminary object of the doctrine was to impose a restriction upon the power of the government to transfer certain common properties to private hands.[42] The public trust doctrine denotes the state's relationship with certain 'common property' and its citizens. The doctrine, as it stands now, relates to the nature of title, protection and use of the essential natural and cultural resources. The doctrine put a control over the government's power to transfer the natural resources to private hands. This theory is based on the notion of trusteeship. In this doctrine the state's title has not been interpreted as one of ownership but as a trustee. This means the state is duty bound to protect and use the natural resources by respecting the natural right of the individuals. Thus the principle can be defined as follows: 'the state which holds the natural waters as a trustee, is duty bound to distribute or utilise the waters in such a way does not violate the natural right to water of any individual or group and safe guards the interest of public and of ecology'.[43]

The public trust doctrine can be a basis of the power of the state to control the use of groundwater by the private individuals. It can also be a basis of the duty of the state to take measures for the protection and preservation of the natural resources for the present and future generations. The legal regulation of the use of the natural resources is necessary in the present context of environment that is deteriorating in quality and quantity.

5.3 Common Law Jurisprudence on Ground Water

One of the peculiar facts in the history of water law is the separate development of the doctrines governing the surface water sources-such as lakes and rivers - and that governing the groundwater. While land ownership is critical to both surface water

41 *Perumatty Grama Panchayat* v. *State of Kerala*, High Court of Kerala, Civil Writ Petition (C) No. 34292 of 2003, Judgement dated December 16, 2003.

42 *Illinois Central Railroad Company* v. *Illinois*, 146 U.S. 387, 452 (1892).

43 Chhatrapati Singh, *Water Rights and Principles of Water Resource Management* 76 (Bombay: N.M.Tripathi Pvt. Ltd., 1991).

and groundwater, the riparian rights in the case of surface water are usually subject to the doctrine of reasonable use whereas groundwater has always been governed by the freewheeling rule of capture. Common law considers groundwater as part of the soil in which it exists. It is founded on the idea that a landowner should have dominion over the percolating groundwater that underlies his/her land in the same way that s/he has dominion over the other elements in his/her subsoil. Therefore, the common law rule permitted the landowner to extract any extent of groundwater, even though it is dangerous to his/her neighbours. The common law dismisses the problems caused by one person's extraction of the groundwater with the court observation that such a result is '*damnum absque injuria*'.[44]

The historical reason for such an evolution of the rule is the lack of knowledge about groundwater hydrology.[45] When the mechanisms for tapping groundwater were not advanced, the chance of extraction of too much groundwater did not exist and as such was unlikely to cause any serious social problems which required mediation through the law. These reasons have now become obsolete. The science of hydrology is well-developed and now the processes involved in the recharge and discharge of groundwater and the quantity of water available in a region are matters within the realm of human knowledge. The existence and characteristics of groundwater is no longer a mystery. The availability of the powerful mechanical devices for drawing groundwater has also resulted in tilting the balance. The quality and quantity of groundwater have deteriorated due to the indiscriminate exploitation. This situation supports the need for mediation through law to regulate the use of groundwater.

5.4 Single Bench Decision

The question considered by the single bench of the Kerala High Court was whether the decision of the Panchayat to cancel the license of the industrial unit and order its closure on the ground of excessive extraction of groundwater was legal and whether the intervention of the government in its appellate jurisdiction is sustainable.[46] The single bench mentioned the arguments raised by the Panchayat before the government, regarding the allegation of pollution caused by the industrial wastes

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44 The meaning of the maxim '*damnum absque injuria*' is damage without injury. The implication of the maxim is that the damage without any legal injury is not actionable. In the context of groundwater, even though the over extraction by one person cause damage to others, it does not amount to a legal injury and therefore it is not actionable.

45 *Roath v Driscoll,* 20 Conn. 533, 540 (1850) that, 'Each owner has an equal and complete right to the use of his land, and to the water, which is in it. Water combined with the earth, or passing through it, by percolation or by infiltration, or chemical attraction, has no distinctive character of ownership from the earth itself; not more than the metallic oxides of which the earth is composed. Water, whether moving or motionless in the earth, is not, in the eye of law, distinct from the earth. The laws of its existence and progress, while there, are not uniform, and cannot be known or regulated. It rises to great heights, and moves collaterally, by influences beyond our apprehension. These influences are secret, changeable and uncontrollable, we cannot subject them to the regulations of law, or build upon them a system of rules, as has been done with streams upon the surface.'

46 *Supra* note 41, Paragraph 10.

generated by the company and the impurity of the products of the company. But the Court, while framing issues, had rejected these allegations. The Court reasoned its approach on the ground that: 'the panchayat is not competent to go into the quality of the beverages produced. It is for other appropriate authorities to look into such allegations. Regarding the pollution caused by industrial effluents, the panchayat can look into and take appropriate action in consultation with expert bodies under section 233 A of the Act (Kerala Panchayat Raj Act)'.[47]

In this context, the Panchayat and the Company had presented their parts in the Court. It has been argued on behalf of the Panchayat that the Panchayat is authorised to preserve water resources in its jurisdiction as per the Kerala Panchayat Raj Act. Therefore the closure order issued by the Panchayat was legitimately in the interest of the general public. Further, it was argued that the government could not dictate to a licensing authority as how it should work. On the whole, the Panchayat argued mainly on the basis of the discretionary and exclusive power of the Panchayat under the Constitution of India and the Kerala Panchayat Raj Act.

The Company presented its counter arguments on the basis of two points. First, it was argued that the government is the appellate authority under the Kerala Panchayat Raj Act and therefore the government is empowered to cancel the direction of the Panchayat. It is not proper for the Panchayat to challenge it. The company also justified the government's decision by arguing that the order against the company was a non-speaking order. The order was not supported by any authoritative reports or investigations. Secondly, it was argued that there was no statutory prohibition on digging of bore-wells at the time when the Company started production. Therefore, legally, there was no restriction upon the company to extract groundwater from its land.

In the light of the arguments raised by both the parties, the Court had invalidated the closure order issued by the Panchayat. It was held that the Panchayat was not authorised to issue a closure order on the basis of finding excessive extraction of groundwater by the Company. It was further held that, at best, the Panchayat could ask the company to stop the extraction from its jurisdiction and direct the company to find alternative sources.[48] Hence, the Court upheld the interference of the government to the extent in which it has disapproved the closure order issued by the Panchayat.

At the same time the Court answered the second question, that is, whether the Panchayat has the power to restrict or prohibit the extraction of groundwater, affirmatively. The Court has disapproved the argument made by the Company that in the absence of law the Company can extract any quantity of groundwater from its land by saying that these contentions are incompatible with the emerging

47 *Id.*, Paragraph 8.
48 *Id.*, Paragraph 12.

environmental jurisprudence around Article 21 of the Indian Constitution.[49] It was held that:

> Even in the absence of any law governing the groundwater, I am of the view that the Panchayat and the State are bound to protect the groundwater from excessive exploitation. In other words the groundwater under the land of second respondent (the company) does not belong to him. Normally, every landowner can draw a reasonable amount of water, which is necessary for his domestic use and also to meet the agricultural requirements. It is a customary right.[50]

The single bench has strongly relied upon the public trust doctrine as highlighted by the Supreme Court in the *M.C. Mehta* case.[51] It was held that being the trustee of the great wealth of the natural resources, it is the duty of the state to protect the groundwater resources against overexploitation. The inaction of the state in this regard will tantamount to the infringement of the constitutionally guaranteed right to life under Article 21 of the Constitution of India. The Court also found basis in the Kerala Panchayat Raj Act. It was held that 'the duty of the Panchayat can be correlated with its mandatory function No. 3 under the third schedule to Panchayat Raj Act namely, 'maintenance of traditional drinking water resources'.[52]

Based upon the above findings, it was decided that the Company should be restrained from excessive extraction of groundwater from its land. It was further held that the Company, like any other landowner, should be permitted to extract the groundwater, which must be equivalent to the water normally used for irrigating the crops in 34 acres of plot. The Panchayat was given the power to monitor and inspect the groundwater consumption of the Company. The single bench decision also recognises the fundamental right (the right to life and the right to livelihood) of the individuals likely to be infringed by the over extraction of groundwater by a person or a company.

5.5 Division Bench Decision

Being aggrieved by the single bench decision, both the Panchayat and the Company had filed appeals[53]. The division bench disapproved the reasoning of the single bench based on public trust doctrine and said that the abstract principles could not be the basis for the Court to deny basic rights.

The division bench also discredited the powers of the Panchayat under the Kerala Panchayat Raj Act that had been relied upon by the single bench. It was said that:

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49 *Id.*, Paragraph 13.

50 *Id.*, Paragraph 13.

51 *M.C.Mehta v Kamal Nath* (1997) 1 SCC 388.

52 *Supra* note 41, Paragraph 13.

53 Writ Appeal No. 17600 of 2004 (Y) per M.Ramachandran and K.P.Balachandran JJ (hereafter the division bench) decided on April 7, 2005.

'even reference to the mandatory function referred to in the third schedule of the Panchayat Raj Act, namely 'maintenance of traditional drinking water resources' could not have been envisaged as preventing an owner of a well from extracting water there from as he wishes. The division bench recognised groundwater as a 'private water resource' and accepted the proposition of law that the landowner has 'proprietary right' over it. Based upon this premise it was held that 'the Panchayat had no ownership over such private water resources and in effect denying the proprietary rights of the occupier and the proposition of law laid down by the learned judge (single bench) is too wide for unqualified acceptance'.[54]

The division bench recognised groundwater as a 'private water resource' and accepted the proposition of law that the landowner has 'proprietary right' over it. The division bench also considered and rejected the allegation of pollution and the quality problem of the cola. The landowner's right to extract the groundwater from his/her land was held as a basic right. It was held that the abstract principles like public trust doctrine could not be used to curtail the 'basic right' of the individuals and applied the common law jurisprudence on ground water.

6. Conclusion

The complex relationship TNCs entertain *vis-a-vis* human rights in the countries in which they develop their activities is hardly surprising. TNCs are simply agents of economic globalization. They have the potential to be important actors in development, not only in that they may contribute to the expansion of exchanges and therefore to economic growth, but also in that they may help fulfil a form of development oriented towards the expansion of human capabilities, of which human rights are both a main ingredient and a precondition.[55]

It is primary duty of the state to protect the basic/human rights of the individual from all the forces which have the potential to exploit these rights including the State herself.

In the present case, not only the State machinery failed in performing its duties under the international human rights instruments but also the TNC failed in performing its corporate social responsibility as well as right of the people which are highlighted in many instruments adopted by the United Nations including the Global Compact, UN Norms on the Responsibility of the Business and the latest the UN Framework. The present TNC is engaged in many human rights activities in the developed country by at the same time in a developing country like India, an attempt has been made in the court to apply common law rather than Public trust doctrine.

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54 *Id.*, Paragraph 35.

55 Olivier De Schutter, "Transnational Corporations as Instruments of Human Development", Philip Alston and Mary Robinson (eds.) *Human Rights and Development Towards Mutual Reinforcement*, 403-444 at 404 (2005).

Moreover, the division bench of the Kerala High Court has not considered the reasons for the evolution of the proprietorship rule under the common law. The Court had relied upon the age-old and irrelevant principles and put the fundamental right to drinking water and the right to livelihood at peril. The Court has not considered the adverse impacts upon the environment because of its decision.

The Plachimada case is an example of how a case which contain the basic human rights issue can be diverted and badly produced before the High Court to decide the issues relating to interpretation of local or state laws. The power of the Panchayat was the only matter discussed in the High Court. The serious problems of pollution had been completely neglected. The Division Bench of the Kerala High Court had not considered the legal framework of the pollution control laws and the underlying principle of the decentralisation policy. The property right of the Company has been given more importance than the basic human rights of the people of Plachimada and the environmental degradations caused by the Company. The victims of Plachimada have to wait for the Supreme Court decision for legal remedies. And the human rights activists are looking towards Supreme Court for a land mark decision where TNCs can be held responsible for the violation of human rights.

BANNING CORPORAL PUNISHMENTS

*Ms. Shampa I Dev**
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1. Introduction

> *Treat him gently; but do not cuddle him because only the test of fire makes fine steel.*

The United Nations Committee on the Rights of Child, define Corporal Punishment as any punishment in which physical force is used with intention to cause some degree of pain or discomfort, however light. Corporal punishments have been justified on many grounds. There are various perceptions associated with it. These perceptions can be gathered from, 'Spare the rod and spoil the child,' 'He who spare the rod hate his son: but he that love him correct him betimes' (Proverbs 13:24) and 'Withhold not correction from a child: for if thou strike him with the rod, he shall not die. Thou shalt beat him with the rod, and deliver his soul from hell.' (Proverbs 23:13-14).[1] Corporal Punishments have deep psychological impact on the child. According to a study the more often or more harshly a child was hit, the more likely they are to be aggressive or to have mental health problems. Corporal punishment on its own does not teach children right from wrong. Secondly, although it makes children afraid to disobey when parents are present, when parents are not present to administer the punishment those same children will misbehave.[2] Another study reveals that physical punishment is associated with children's psychological maladjustment only if punishment is seen by youths as a form of a caretaker rejection.[3] Analysis of the act shows that the use of corporal punishment is instance of patience giving way to anger. It surfaces when anger overrides control over the state of mind thereby loosing objectivity and reason. It is in such cases that the danger of child abuse arises.

2. Statement of the Problem

Despite studies showing the adverse effects of corporal punishments and the Conventions that India has ratified, India has still not made the desired changes in the law to impose a ban on corporal punishments. Only recently the Free and

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1 *http://www.tldm.org*

2 Psychologist Elizabeth Thompson Gershoff, PhD, of the National Centre for Children in Poverty at Columbia University, looked at both positive and negative behaviours in children that were associated with corporal punishment. Her research and commentaries on her work are published in the July issue of *Psychological Bulletin*, published by the American Psychological Association *http://www.apa.org/*

3 *Children's perceptions of Corporal Punishment, Caretaker Acceptance and Psychological Adjustments,* Ronald P Rohner, Shana L Bourque and Carlos A Elordi, available in *http://www.jstor.org/discover/353974*

Compulsory Education Act was passed that bans corporal punishments at school. But Penal laws still offer defense to the person administering corporal punishment when such is inflicted for the betterment of the child. The defense of parental and quasi-parental authority also protects the giver of corporal punishment. Also nowhere the parents are held responsible if excessive or harsh punishment is imposed. Recently the newspapers have been flooded with very harsh punishments being meted out to children who have practically no say in the matter, being highly vulnerable and dependent on the very elders who administer such harsh treatment.

3. Research Methodology

This paper employs analytical method to analyze the law relating to corporal punishments. The Right to Free and Compulsory Education Act banned corporal punishments at school. The law is silent on corporal punishments being meted out by parents at home. Law of Torts also offers parental and quasi-parental authority as a defence on actions against corporal punishments. The Indian Penal Code further under sections 88 and 89 authorizes acts done for the betterment of the subject.

This paper is a doctrinal research employing primary and secondary sources of data. Primary sources like legislations; the National Policy on Education is studied. Secondary sources include articles in various journals, newspaper reports and books on the subject. Decisions of the Supreme Court and High Court on the subject are analyzed. The nature of the research would be purely library based and not empirical in nature.

4. International Law on Corporal Punishments

4.1 Universal Declaration of Human Rights, 1948

Article 25 states that childhood is entitled to special care and assistance. Article 26 states that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. On perusal of the above it is found that the goals of education are clearly laid down. To have peace and harmony in the society it is important that the children today learn the above values.

4.2 International Covenant on Civil and Political Rights

Article 24 states that every child shall have, without any discrimination, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Responsibility for guaranteeing children the necessary protection lies with the family, society and the State. Where parents are gainfully employed outside the home, States parties should see to it that the society, social institutions and the State together

shoulder the responsibility to assist the family in ensuring the protection of the child. Moreover, in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from his family when circumstances so require.[4]

The above paragraph depicts the importance laid on the safety and the security of the child by the office of the High Commissioner for Human Rights at the United Nations. It requires the State Parties to report to it of the actions taken regarding protection of the child in its social environment, be it the family, social institutions or the State.

4.3 International Covenant on Economic, Social and Cultural Rights

Article 10 emphasizes that children should be protected from social exploitation.

4.4 Convention on the Rights of the Child, 1989

This Convention reiterated strongly the necessity of bringing up the child in the spirit of the ideals proclaimed in the Charter of the United Nations, particularly in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

Article 19[5] states clearly that every State party to the Convention must ensure the safety of the child from all forms of violence at the hands of parents or any person under whose care it is. Every State must have mechanism in place to take care of any instances of such violence. The State has the responsibility to identify, investigate and report such cases even if need be by judicial intervention.

Article 29 enjoins all States parties to ensure that the education of the child shall be directed to the realization of the full potential of the child, and for the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; apart from developing respect for the child's parents, his culture and country of origin as well as for different civilizations and people other than his own and must have the spirit of understanding, peace, tolerance, equality and friendship towards all.

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4 Office of the High Commissioner for Human Rights, General Comment No. 17 – Rights of the Child, Article 24- 04/07/1989

5 "(1) State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. (2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

Article 39 imposes a duty on the States parties to take appropriate measures to promote physical and psychological recovery and social re-integration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment. Such recovery and re-integration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40 further requires that criminal law with regard to the child must be administered in a manner consistent with the promotion of the child's sense of dignity and worth.

Thus, to sum it all, Articles of the Convention focus on the protection of the child from all forms of physical or mental violence, injury, neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment and adoption of means for the welfare of the child in every conceivable way and preservation of the dignity of the child. The Government of India acceded to the Convention on December 11, 1992. The National Policy on Education was modified in 1992 before acceding to it.

5. Municipal Law on Corporal Punishments

5.1 The Constitution of India

Article 14 of the Constitution of India ensures equality for all its citizens. A child and an adult are equally granted right to equality.

Article 21 of the Constitution of India, guarantees the right to life. This has been construed widely by the courts. The Courts have construed 'life' to mean a meaningful and a wholesome life. It is far more than plain survival or animal existence. It is a dignified life that is contemplated. This view finds support from the various decisions[6] of the courts.

All these rights are available to the child and he cannot be deprived of the same just because he is a kid. Being a kid does not make him a less human being than a grown up. Article 21 makes no distinction between a grown up person and a child. Whatever rights are available to the former are also available to the latter.[7]

Article 39 (e) and (f) requires the State to direct its policy towards ensuring that the tender age of child is not abused and securing opportunities and facilities for children

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6 *Refer Munnan* v. *Illinois* 94 US 113; *Smt. Maneka Gandhi* v. *Union of India* [1978] 2 SCR 621, *State of Maharashtra* v. *Chander Bhan* MANU/SC/0396/1983: (1983) IILLJ 256 SC ; *Kharak Singh* v. *State of UP* 1963 CriLJ 329 ; *C. Masilamani Mudaliar and others* v. *Idol of Sri Swaminathaswami Thirukoil and others* MANU/SC/0441/1996 : [1996] 1 SCR 1068 ; and *Gian Kaur* v. *State of Punjab* MANU/SC/0335/1996 : 1996 CriLJ 1660

7 *Parents Forum for Meaningful Education* v. *Union of India* (1970) 2 SCC 417: (1971) 1 SCR 734

to develop in a healthy manner in conditions of freedom and dignity. It must ensure that childhood and youth are protected from exploitation.

Parents Forum for Meaningful Education v. Union of India.[8] This is a Public Interest Litigation challenging the vires of Rule 37[9] of the Delhi School Education Rules, 1973 that provided for disciplinary measures and corporal punishment in cases of indiscipline. The petitioner inter alia sought the banning of corporal punishment to students in schools and contended that it was illegal, arbitrary and violative of Articles 14, 19, 21 and 39 (e) and (f) of the Constitution. The respondents justified Rule 37 on the ground that corporal punishment used in moderation to discipline the child cannot be violative of the Constitution.

The Honourable Court rejected the stand of the respondents while taking into account the Preamble to the Convention on the Rights of the Child and the necessity of bringing up the child in the spirit of the ideals proclaimed in the Charter of the United Nations, particularly in the spirit of peace, dignity, tolerance, freedom, equality and solidarity. The Constitution of India through Articles 14, 21, and 39(f) and (g) contributes to the said values and the National Policy on Education supports it too.

Hence the Court held Rule 37 as ultra vires the Constitution. The court directed the State to ensure that children are not subjected to corporal punishment in schools and they receive education in an environment of freedom and dignity and free from fear.

In *F.C. Mullin* v. *Administrator, Union Territory of Delhi and others,*[10] the Supreme Court held that every limb or faculty through which life is enjoyed is protected by Article 21. Freedom of life and liberty guaranteed by Article 21 is violated when physical punishment scars the body and the mind of the child and robs him of his dignity. Any act of violence, which traumatizes, terrorizes a child, or adversely affects his faculties falls foul of Article 21 of the Constitution.

The Supreme Court in *Bandhua Mukti Morcha* v. *Union of India*[11], relying upon the Convention on the Rights of the Child and the Constitution observed that a child cannot develop to be a responsible and productive member of the society unless an environment is created which is conducive to his social and physical health.

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8 *Ibid.*

9 Rule 37 (4) (a) Corporal punishment may be given by the head of the school in cases of persisting impertinence or rude behavior towards the teachers, physical violence, intemperance and serious form of misbehaviour with other students. (b) Corporal punishment shall not be inflicted on the students who are in ill-health. (c) Where corporal punishment is imposed, it shall not be severe or excessive and shall be so administered as not to cause bodily injury. (d) Where cane is used for inflicting any corporal punishment, such punishment shall take the form of strokes not exceeding ten, on the palm of the hand. (e) Every punishment inflicted on a student shall be recorded in the Conduct Register of such student.

10 MANU/SC/0517/1981 : 1981 CrLJ 306

11 AIR 1984 SC (802)

Applying the ratio laid down in *Maneka Gandhi's* case any disciplinary rules of a school providing for corporal punishment are punitive in nature. Hence a child cannot be put through corporal punishment without granting him an opportunity to be heard. If he is condemned unheard it would be highly unjust, unfair and unreasonable.

The court in *Bhajan Kaur*,[12] observed that fundamental rights of the child will have no meaning if they are not protected by the State. The State cannot be a mute spectator to the violation of the rights guaranteed to a person under Article 21 of the Constitution. The State must intervene to secure the rights to an individual as it is the job of the State to recognize the rights of the child and protect them by making necessary laws and implementing them.

5.2 Indian Penal Code, 1860

Section 88[13] of the Indian Penal Code makes provision for act not intended to cause death, done by consent in good faith for persons benefit, whereas section 89 actually gives a defence to a guardian for inflicting harm if it is done in good faith for the benefit of a person below 12 years of age. The section is worded thus,

> Section 89 -Nothing which is done in good faith for the benefit of a person under 12 years of age, or of unsound mind, or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person provided:
>
> Firstly - That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;
>
> Secondly - That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;
>
> Thirdly - That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;
>
> Fourthly - That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

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12 *Bhajan Kaur* v. *Delhi Administration*, MANU/DE/0543/1996: 1996 III AD (Delhi) 333

13 Nothing which is intended to cause death, is an offence by reason of any harm which it may cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm or to take a risk of that harm.

In *M Natesan* v. *State of Madras*[14] the Court in para 5 of it judgment observed that - "It cannot be denied that having regard to the peculiar position of a school teacher he must in the nature of things have authority to enforce discipline and correct a pupil put in his charge. To deny that authority would amount to a denial of all that is desirable and necessary for the welfare, discipline and education of the pupil concerned. It can therefore be assumed that when a parent entrusts a child to a teacher, he on his behalf impliedly consents for the teacher or exercise over the pupil such authority. Of course, the person of the pupil is certainly protected by the penal provisions of the Indian Penal Code. But the same code has recognized exceptions in the form of sections 88 and 89. Where a teacher exceeds the authority and inflicts such harm to the pupil as may be considered to be unreasonable and immoderate, he would naturally lose the benefit of the exceptions. Whether he is entitled to the benefit of the exceptions or not in a given case will depend upon the particular nature, extent and severity of the punishment inflicted."

In *Ganesh Chandra Saha* v. *Jiw Raj Somani*[15] *the Honourable* Calcutta High Court discussing on this aspect and also accepting the principle of law, recognized in England and Schools therein, observed that – "When a boy is sent by his parent or guardian to a School, the parent or the guardian must be said to have given an implied consent to his being under the discipline and control of the school authorities and to the infliction of such reasonable punishment as may be necessary for the purposes of school discipline or for correcting him. The action of the petitioner in administering corporal punishment to the complainant is, therefore, covered by Section 88 of the Indian Penal Code."

In *K. A. Abdul Yahid* v. *State of Kerala* the Court observed that - "If a teacher out of fury and excitement inflicts injuries which are harmful to the health of a tender aged student, it cannot be accepted as a right conferred on such a teacher to inflict such punishment, because of the express or implied authority granted by the parents of that student. Therefore, there cannot be any generalized pattern of principle in such situations. The acts of a teacher has to be appreciated and assessed depending upon the circumstances that are placed before the Court, in each case. It is the duty of the teachers to have a restrained and controlled imposition of punishments on the pupils under their care and charge. Unwieldy, uncontrolled and emotional attacks or actions on their part cannot be accepted." Yet the Court held that the punishment was reasonably given and hence no offence was made out under the law.

It may be noted here that the section 89 still exists and continues to defend the acts of corporal punishments given by teachers or parents as the law justifies it as being done in the interest of the child. Various bodies working for the protection of child rights demand for amending the Indian Penal Code to ensure that anyone involved in corporal punishment must be severely punished. The National Commission for

[14] AIR 1962 Madras 216
[15] AIR 1965 Calcutta 32: 1965 CrLJ 24

Protection of Child Rights (NCPCR), a body to safeguard the rights of children, is of the view that Section 88 and 89 of the Indian Penal Code that give cover to teachers and elders to resort to corporal punishment against children must be looked into.

5.3 Law of Torts

As per the Children and Young Persons Act of 1933,[16] parents or persons in loco parentis can inflict moderate corporal punishment on children to correct their behaviour. The school master had similar authority. When a parent put the child in the care of the master he delegated to him all his authority, so far as it is necessary for the welfare of the child.[17] The master could therefore inflict moderate corporal punishment on his student. The modern view is that the schoolmaster has his own independent authority to act in the welfare of the child.[18] This authority was not just limited to acts committed in the school, but it reached beyond school premises on the way to and from school. In one instance a school master administered five strokes to a student as he had seen him smoking at a public place the previous evening.[19]

In England, section 548 of the Education Act, 1996 has abolished the authority of a member of staff of a school to give corporal punishment to a child. It is silent on the corporal punishment meted out by parents to their wards. It implies that as long as parental authority goes, it still exists. Hence if the school master is of the opinion that corrective punishment is required, he may recommend the same to the parents. This provision has been held not to affect any right of the teachers and parents under the Human Rights Act 1998.[20]

The above law relating to corporal punishments is now inconsistent with the modern thought that endorses the view that – "Spanking is simply another form of terrorism. It teaches the victims that might is right, and that problems can be solved through the use of violence by the strong against the weak." Spanking is one of the causes of increase in dropouts.[21] Till the time mankind believes that with force compliance in behaviour can be obtained till that time it will be difficult to do away with the same.

5.4 The National Policy on Education

The National Policy on Education as modified by the Government of India in 1992 agrees with the Convention on the Rights of Child. Paragraph 5.6 of the Policy which envisions this approach reads as follows:-

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16 23 &24 Geo. V, Ch. 12 cf. Ratanlal & Dhirajlal, The Law of Torts, 24th Ed. Reprint 2007, Wadhwa and Co. Nagpur.

17 Cockburn C.J. in *Fitzerald* v. *Northcote* (1865) 4 F & F 656-89

18 *Ramsay* v. *Larsen* (1965) ALR 121

19 *Rex* v. *Newport* 1929 2 KB 416

20 *R.* v. *Secretary of State for Education and Employment* (2003) All ER 385

21 UNICEF's report titled "The State of the World's Children 1999" wherein 40 million children hopped out of school before reaching V grade due to substandard learning conditions. *www.unicef.org*

> "Child-Centered Approach
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> 5.6 A warm, welcoming and encouraging approach, in which all concerned share solicitude for the needs of the child, is the best motivation for the child to attend school and learn. A child-centered and activity-based process of learning should be adopted at the primary stage. First generation learners should be allowed to set their own pace and be given supplementary remedial instruction. As the child grows, the component of cognitive learning will be increased and skills organized through practice. The policy of non-detention at the primary stage will be retained, making evaluation as disaggregated as feasible. Corporal punishment will be firmly excluded from the educational system and school timings as well as vacations adjusted to the convenience of children."

The National Curriculum for Elementary and Secondary Education requires respect for the child's individuality and dignity. Every child's needs, interests, aptitude and abilities are different and must be taken care of. He must be familiarized with human values, social justice and non-violence.

6 Conclusion and Suggestions

Spanking has many undesirable effects. Children become withdrawn and exhibit anti-social behaviour. Children receiving corporal punishments at school may become adamant and haughty. They lose respect and develop hatred for their teachers. They lose interest in learning and learning becomes a burden and compulsion. It discourages regular attendance and increases dropouts. They cannot concentrate in their studies. Fear is an impediment in the wholesome development of children. The National Commission for the Protection of Child Rights has already issued guidelines in 2007. But those rules are not enough to check the menace.

Even animals are protected against cruelty. It is punishable under section 11 of the Prevention of Cruelty to Animals Act, 1960. Beating, kicking over-riding, over-driving, overloading, torturing or other-wise treating any animal so as to subject it to unnecessary pain or suffering is a criminal offence. Instances of children being traumatized and beaten in schools and at homes are of common occurrence. Our children surely deserve better treatment.

Inspite of India being a signatory to the International Conventions and even after ratifying India has lagged behind in inducing necessary changes in the municipal laws. Many countries have banned corporal punishments at school as well as at home. Minor steps in the nature of a provision on banning corporal punishments at school have been introduced in the Right to Free and Compulsory Education Act. But parents can still administer corporal punishments and this requires change. The State has issued directions to schools on banning this medieval practice of administering corporal punishments. Yet as long as Indian Penal Code keeps on extending protection to such acts as being in the interest of the child, it continues unabated. Section 89 of Indian Penal Code, clearly goes against the right to life granted to the

child guaranteed under Article 21 of the Constitution. It therefore calls for an amendment. It must be remembered that Article 19 of the Convention on the Rights of Child requires state parties to protect a child from violence at the hand of the parents too.

Rights-based approach can be taken to bring an end to corporal punishments. A child is a person in the eyes of law and is equally entitled to all the rights, which an adult enjoys. Article 14 ensures equality. Article 21 guarantees right to life without making an exception against the child. Corporal punishment is nothing but an assault for whatever reason it might be. It hardly matters that a person in loco parentis or a parent in the interest of the child administers it. The act is the same in both case.

Media can play a very important role by spreading awareness and mould the views of the people against corporal punishments to children. Bringing forward the ill effects of corporal punishments that teaches the child that he can get his way by might and violence can do this. If children are to be taught values of peace, non violence and brotherhood, then certainly subjecting them to corporal punishment is not the way. Law must change to accommodate the interests of the child.

THE FUNDAMENTAL AND HUMAN RIGHT TO RELIGION AND PILGRIMAGE VIZ-A-VIZ RIGHT TO CLEAN ENVIRONMENT: AN INTERNATIONAL AND NATIONAL PERSPECTIVE

*Ashish Virk

1. The Concept of Religion: From Mysterious Origin to Human Right

1.1 The Mysterious Origin

One summer day long age, a man was lying in the grass observing some of the many things which go on there but remain invisible from the lofty regions where men's eyes normally dwell. Near him was a flat stone, perhaps of the size of the hand, on which as he looked a small spider ran, apparently intent of crossing it. The man plucked a blade of grass and, as the spider was about to get off, he gently pushed it back. The spider then busily started in a different direction, which, the blade of grass eventually blocked again. This repeated two or three times. Then, however, the spider's strategy changed radically; it curled itself up in a little motionless ball, virtually saying: "Not my will, but thine, be done!" Thereby, its problem was solved, for a problem is always a conflict between what one desires and what facts at the moment are.

To solve the problem man usually have two options in hand. One, which of self-reliance, consists in exertion by the individual of his powers, thereby so altering the existing objective situation that it eventually becomes what he wished it to be. This is the way advocated by La Fontaine in one of his fables. He there describes a rustic cart is so deeply mired that the horse cannot move it, and who then calls for aid from Hercules. The latter answers: "Dig out that mud...take thy pick and break the rock which is in thy way...fill that rut. Aid thyself and Heaven will aid thee." The other way is to make the adjustment at the subjective instead of at the objective pole of the situation-to resign one's will, or at least alter it to conform to what may be possible: "Require not things to happen as you wish," says Epictetus, "but wish them to happen as they do happen, and you will go on well."[1] The first of these two ways of solving one's problems is suited to moments and situations where one has or can get the power, the knowledge, or the instruments needed to bend circumstances to his will. The other is appropriate to the occasions where, on the

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1 Elizabeth Carter, In the Moral Discourses of Epictetus, J.M. Dent & Sons Ltd., London, 1909.

contrary, one finds himself too weak, ignorant, or ill-equipped to make things conform to his will. This humble way is the religious way; or at least, it is his when the values in jeopardy are values felt as momentous.[2]

This is called personal religiousness; however, religion has social functions to perform as well which is termed as social religiousness. This consist of inclination, inner impulse-to behave towards one's fellow beings justly and altruistically, as contrasted with so behaving, but grudgingly, reluctantly, only as onerous duty imposed by one's religion. The social aspect of religion leads to various other mode which is religious cult. The concepts of God, prayer, pilgrimage are all part of religious cult. The word 'cult' is derived from the Latin word *colere*, which means to cultivate, to act in a manner favorable to the subsistence and growth of something. The cult of a religion, therefore, consists of the rites, ceremonies, and practice conceived by its adherents to foster right relations between themselves and divine. This implies that the cult is conceived to be effective in one or the other or both of two ways: one, by influencing favorably the gods, demons, or other mysterious external forces on which depends the fate of whatever man values; and the other, by stimulating periodically, and thus keeping alive and functional in a man, the beliefs, attitudes, feelings, ideals, and dispositions to virtuous conduct prescribed by his particular religion.

The first of these two kinds of effects is the one directly aimed at in such forms of worship as prayers, sacrifices, songs of praise or gratitude, invocations; the second, in ceremonies symbolically representing in dramatic form some of the basic beliefs of the theology or the mythology of the given religion; also, in sermons, in readings from the sacred books, in recitals of creed, in mediations, ascetic practices, confessions of sins, and so on. The frequency, multiplicity, and regularity of the observances enjoined by a religion are important factors in its psychological hold of its adherents. Montesquieu, in the second chapter of the twenty-fifth book of his famous Esprit des Lois, discusses the variety of factors that tend to attach men to their religions. He believes that s "religion enjoining many observances binds men to it more than a religion that enjoins fewer; one gets much attached to things at which he is continually busy."[3]

Hence, what can be concluded from the philosophical scrutiny of religion is that religion came up to satisfy the psychological needs of the mankind. The origin of

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2 C.J. Ducasse, *A Philosophical Scrutiny of Religion*, The Ronald Press Company, New York, 1953, pp. 251-52.

3 M.D. Conway, *Demonology and Devil Lore*, Henry Holt & Co., Inc, New York, 1879, pp. 411-13.

religion remains hidden from our knowledge. Mankind posses no evidence regarding beginning of the religion. But whereas men live on earth, religion springs into being. The science of religion encounters the fact that nowhere on earth have people been found who do not possess a religion in the sense described above. Ethnologists, anthropologists and pre-historians know no men without religion. But we know nothing of its origin because of various reasons, so by far the greater part of the story of mankind lies entirely in darkness, or at best in a dim twilight which can never be fully illuminated.[4] In its broadest sense, religion can be said that it is a relationship between man and the superhuman power as man believes in him and feels himself to be dependent on him. This relationship may be expressed by feelings such as trust or fear, by ideas such as legends, myths, or dogmas, and by the actions, such as special rites and the carrying out of religious precepts. The another notion that can be concluded is that religion has a long history and there is never any phase of human development when it has vanished away from society; it persisted at all times and will continue to persist till the existence of human race. However, philosophers like Michael Rea believe that over the past sixty year, within the so-called analytic tradition of philosophy, there has been a significant revival of interest in the philosophy of religion.[5] However, with the change in the human civilization there has been a sweeping change in the different notions of religion.

1.2 Human Right to Religion

With the advent of the State, society and its beings were now controlled by this politico-legal institution. This changed the outlook of religion and it got controlled but still remained an inseparable part of human psychology and sociology. The religion continued to play its role for the human beings. With the passage of time religion started playing more of social functions as well. Many philosophers think that the modern concept of human rights and its movement has been an initiation of religion. "Is there a schism between the human rights movement and religious communities?" A question asked by Jean-Paul Marthoz and Joseph Saunders. The answer to the question may vary from person to person but one point this question answers is that there is a definite relationship between human rights and religion. In

4 Hans-Joachim Schoeps, *An Intelligent Person's Guide to the Religions of Mankind*, Victor Gollancz Ltd, London, 1967, p. 7.

5 Michael Rea, *Philosophical Theology: Trinity, Incarnation, Atonement*, Oxford University Press, Oxford, 2009, p.1.

fact it has been proved by the preceding paragraphs of this research work that religion has always been an inseparable part of human race to such an extent that the modern man has struggled to claim it as a matter of right from the State. In many countries religion was the prime mover behind campaigns for human rights. The role of ***U.S. and England's*** Protestant churches in the anti-slavery campaigns, in the Congo reform movement, and in solidarity with Armenian victims in the late days of the Ottoman Empire belong to the best chapters of the history of human rights movement. The social teachings of the Catholic Church in the late 19th century also created a context allowed committed Christians to press actively for social justice and contributed to the development of strong labor unions and mutual help associations that fought for social and economic rights. In ***South Asia***, Hindusim was the inspiration of Gandhis's long march for the liberation of India. Since the occupation of ***Tibet by China*** in 1949-51, a religious figure- Dalai Lama- has been guiding the Tibetian's struggle for freedom, pushing for a democratic, self-governing Tibet in association with China. The civil rights movement in the ***United States*** was powerfully inspired by religious figures, among who Martin Luther King, Jr., stands as an icon, and was in many cases supported by mainstream Christians and Jewish denominations. After 1964 military coup in ***Brazil*** a significant part of the Catholic Church, centered around Bishop Dom Hedler Camara, inspired by the teachings of the Second Vatican Council (1962-65) and of mainstream Protestant denominations, became a vibrant defender of human rights. Political coups in ***Bolivia, Chile, and Uruguay*** in the 1970s and civil wars in Central America in the 1980s often placed the official Church, or at least some of its most powerful voices, on the side of the human rights movement.

When a human being looks at the Universe, his view of the mystery cannot be more than a glimpse, and even this may be delusive. The human observer has to take his bearing from the point in space and the moment in time at which he finds himself, and he is bound to be self-centered, for this view is part of the price of being living creature. So, this view will inevitably be partial and subjective, and if all human beings were exact replicas of one standard pattern, like the standardized parts of some mass-produced machine, mankind's view of reality would be rather narrowly limited. Fortunately, over human plight is not as bad as that, because the uniformity of human nature is relieved by the variety of human personalities. Each personality has something in it that is unique, and each walk of life has its peculiar, experience, outlook, and approach.[6] However, ever since Charles Darwin

[6] Arnold Toynbee, *The Historian's Approach to Religion (Portents of Hope?)*, Oxford University Press, London, 1956, p.1.

introduced the concept of evolution into biology, the science of religion has developed a number of evolutionary theories[7] of its own regarding the origin of religion.[8]

2. Fundamental Rights under Indian Constitution

2.1 Right to Religion: Article 25 of Indian Constitution

Since, the 17th century, if no earlier, human thinking has been veering round to the theory that man has certain essential, basic, natural, and inalienable rights and freedoms and it is the function of the State, in order that human liberty maybe preserved, human personality developed and an effective social and democratic life promoted, to recognize these rights and freedoms and allow them to recognize these rights and freedoms and allow them a free play. The concept of these rights can be traced to the natural law philosophers, such as, Locke and Rousseau. The natural law philosophers philosophized over such inherent human rights and sought to preserve these rights by propounding the theory of 'social compact.'[9] According to Locke, man was born 'with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the Law of Nature' and he was by nature a power to preserve his property- that is, his life, liberty, and estate, against the injuries and attempts of other men.' The Declaration of French Revolution, 1789, which may-be regarded as a concrete political statement on human rights was inspired by Lockeian philosophy.[10] In India in 1928, when a committee headed by Pandit Nehru was appointed by the All Parties Conference to outline the principles for a Constitution of India, it gave its report in favor of Bill of Rights, therefore, on the basis of Nehru's Report and experience of Bill of Rights of USA, the framers of

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7 **The Animistic Theory:** First posed by the English Scholar, Sir Edward B. Tylor in his epoch-making book Primitive Culture (1871), long dominated the science of religion. According to this theory, man in his early stages assumed the presence of a soul in all things and began venerating certain spirits/souls as personified causes. The souls of the dead were especially venerated-in other words ancestor worship was practiced. **The Preanimistic Theory:** It was given by R.R. Marett and Andrew Lang. They were the people who seem devoid of belief in individual spirits. The origin of religion according to Marrett, must be sought in the dynamistic conception of a general impersonal phenomenon and can cause extra-ordinary effects. **The Theory of Original Monotheism:** This theory was developed by Andrew Lang and Wilhelm Schmiat. They demonstrated that the concepts of high Gods in the sky developed by Primitive Australian tribes were original with them.

8 Hans-Joachim Schoeps, An Intellectual Person's Guide to the Religions of Mankind, Victor Gollancz Ltd., London, 1967, pp.7-9.

9 Llyod, *Introduction to Jurisprudence*, Sweet and Maxwell, London, 2008, 117-123.

10 M.P. Jain, *Indian Constitutional Law*, Lexix-Nexis, Nagpur, 2010, p.897.

our Constitution decided to include fundamental rights.[11] While quoting the importance of these fundamental rights Justice Bhagwati said that these rights represent the basic values cherished by the people of this country since the Vedic Times.[12] Central to much legal thinking today are human rights. However, the human rights claimed today go beyond those then argued for, for example, right's to life's necessities and to health care, to practice one's own religion, right to clean environment as a basic ingredient for right to dignified life etc.

We are living in strange times where human right to religion has played both positive and negative roles. They are playing a crucial task in all fields especially in socio-political aspects of society. In Russia, where for decades religion was treated as the 'opium of the people', with the government's approval, the 1000th anniversary of the introduction of Christianity into Russia has been celebrated for a week. And a Coptic Church which had been converted into a museum has been resorted to Church.[13] Hence, the political leadership cannot ignore the religious sentiments of the population not only to protect their leadership but also to preserve peace and security in the society, especially in countries like India which is multi-religious nation.

Religion has both a personal and an institutional side. In practice, the personal right is inseparable from the institutional, and a person would justify complain that he had been denied the freedom of religion if the right to public worship was denied to him. So, right to practice one's religion in the religious institutions and right to move freely for religious purposes run from within right to religion. No doubt the follower of a religion can pray at home and 'hit heaven with his prayers.' But most followers of a religion desire to join in common worship and prayer in churches, temples, mosques and other places of religious worship. For a religious denomination is a cohesive body.[14] With this raison d'être religious tourism has always remained in vogue throughout the world in almost all ages. India is a secular but not an anti-religious State, for Indian Constitution guarantees the freedom of conscience and religion. However, the freedom of religion is subject to limitations.

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11 S.R. Bhansali, *The Constitution of India*, India Publishing House, Jodhpur, 2007, p.85.

12 *Maneka Gandhi* v. *UOI*, AIR 1978 SC 597 (619).

13 H.M. Seervai, *Constitutional Law of India: A Critical Commentary*, Universal Book Traders, Delhi, 2002, p. 1271.

14 *Ibid.*, p. 1277-78.

2.2 *Right to Life: Article 21 of Indian Constitution*

The expansive interpretation of 'life' in Article 21 has led to the statutory development of an environmental jurisprudence in India. Although a number of statutes have been enacted with a view to protect environment against pollution, administrative machinery has been put in the place for the purpose of enforcement of these statutes, the unfortunate fact remains that the administration had done nothing concrete towards reducing environment pollution.[15] In this context the Supreme Court of India has performed a yeoman service by taking cognizance, in the number of cases, of various environmental problems and giving necessary directions to the administration. The Court has thus compelled an inactive and inert administration to make some movements towards reducing environment pollution. In the way, the Court has promoted a broad social interest. For this purpose, the Court has depended upon such Directive Principles of State Policy (DPSP) as those contained in Article 47 and 48-A as well as fundamental duty in Article 51 (g) of the Constitution.[16] The right to healthy is an internationally recognized essential. The Basel Convention effectuates the fundamental rights guaranteed under Article 21, the right to information and community participation for protection of environment and human health.[17]

On the question of relationship between ecology and Article 21, the thinking of the Court is that since the right to life is a fundamental right under Article 21 and since the right to life connotes 'quality of life', a person has a right ti enjoyment of pollution free water and air to enjoy life fully. Any disturbance of the basic environmental elements, namely air, water and soil, which are necessary for 'life' would be hazardous to life within the meaning of Article 21 of the Indian Constitution. The Supreme Court has accepted the doctrine of public trust which rests on the premise that certain natural resources are means for general use and cannot be restricted to private ownership. These resources are gift of nature and the State, as a trustee, thereof, is duty bound to protect them. The State is the trustee, and the general public is the beneficiary, of such natural resources as sea, running waters, air, forest, ecologically fragile land.[18]

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15 M.P. Jain, *India Constitutional Law*, Lexis-Neis, Nagpur, 2010, p.1241.

16 *Goa Foundation (II)* v. *UOI*, (2005) 11 SCC560.

17 *Research Foundation for Science Technology National Resource Policy* v. *UOI*, (2005) 10 SCC 510.

18 *M.C. Mehta* v. *Kamal Nath*, (1997) 1 SCC 388.

Hygienic environment is thus an integral fact of the right to healthy life as it is not possible to live with human dignity without humane and healthy environment. There is, therefore, a constitutional imperative on the government not only to ensure and safeguard proper environment but also take adequate measures to promote, protect and improve both man-made and the natural environment. The Supreme Court has retreat the public trust doctrine in relation to conservation of forests.[19]

2.3 Right to Life vis-a-viz Noise Pollution

The Supreme Court has recognized that noise constitutes a real and present danger to people's health and laid down certain tests for permissible limits. The Court defined noise as unwanted sound. The Court also pointed out that as there is no specific provision in Environmental (Protection) Act, 1986, to deal with noise pollution, the Act confess powers on the Government of India to take measures to deal with various types of pollution including noise pollution, as noise was included in the definition of air pollutants in Sec 2(a) of Air (Prevention and Control of Pollution) Act, 1987, besides other statutory provisions.[20] In Noise Pollution Case,[21] the Supreme Court held that considerations of any kind cannot come in the way of enforcement of Fundamental Rights to live in peace and comfort in an atmosphere free from pollution of any kind, such as that caused by noise pollution. The Supreme Court[22] observed that the noise polluters often take shelter behind Art. 19(1) (a), pleading Freedom of Speech and Right to Expression guaranteed under India Constitution. The Court held that nobody can claim fundamental right to create noise by amplifying the sound of his speech with aid of speaker. By amplifying ones speech with aid of artificial devices, a person cannot expose an unwilling listener to obnoxious levels of noise thereby violating the other person's right to peaceful, pollution free life guaranteed under Article 21of the Indian Constitution.

2.4 Right to Life viz-a-viz Right to Health

The Supreme Court has emphasized that a healthy body is the very foundation of all human activities. Article 47 of Directive Principles of State Policy also lays stress on the improvement of public health. The Court held that the maintenance

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19 *T.N.G. Thirumulpad* v. *UOI*, AIR 2005 SC 4256.

20 Noise Pollution (Regulation and Control) Rules, 2000; Section 268, 290, 291 of IPC; Section 133 Cr.PC, 1973; Section 89, 90, Schedule III the *Factories Act*, 19448; Rules 119-120 Central Motor Vehicles Rules, 1989.

21 *Noise Pollution (V) in Re*, (2005)5 SCC 733, AIR 2005 SC 3136.

22 Forum, *Prevention of Environment and Noise Pollution* v. *UOI*, AIR 2005 SC 3136.

and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Indian Constitution makes envisaged. Attending to public health, in our opinion, therefore, is of high priority-perhaps the one at the top.[23]

3. Religion in Conflict with Other Fundamental & Human Rights: An International and National Socio-Legal Perspectives

The enemies of Jesus asked him: Shall we pay tribute to Caesar? Jesus asked them to produce a penny. When it was produced, it bore the image of Caesar; whereupon Jeasus said, "Render to Caesar the things that are Caesar's and to God the things that are God's. Broadly speaking, our Constitution renders to religion the things that belong to religion and to the State the things that belong to the State. The broad line is not easy to draw, but it to be drawn, without fear or favor, by independent judges.[24] No doubt the follower of a religion can pray at home and 'hit heaven with his prayers,' but most followers of a religion desire to join in common worship and prayer in Churches, Temples, Mosques, and other places of religious worship. For a religious denomination is a cohesive body.[25] However, blatant violation of religious freedom by the arbitrary action of religious heads has to be dealt with firmly by our highest court. No greater service can be done to our country than by discharging that duty as resolutely disregarding popular clamor and disregarding personal predilections. I am not unaware of the present political and judicial climate. But I would like to conclude with the words of a very great man' never despair for when evil reaches a particular point, the anti-dote of that evil is near at hand.'[26]

4. Suggestions

4.1 Right to Dignify and Healthy Life:

1. A competent authority of a level of Chief Medical Officer and Medical Superintendent with a team of specialized doctors should issue a

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23 *Vincent* v. *UOI*, AIR 1987, SC 990.

24 M. Seervai, *Constitutional Law of India: A Critical Commentary*, Universal Book Traders, Delhi, 2002, p. 1272.

25 M. Seervai, *Constitutional Law of India: A Critical Commentary*, Universal Book Traders, Delhi, 2002, p. 1277-78.

26 M. Seervai, *Constitutional Law of India: A Critical Commentary*, Universal Book Traders, Delhi, 2002, p. 1281.

Compulsory Health Fitness Certificate. Without such certificate no one should be allowed to visit holy sites.

2. Deployment of more medical teams, at regular distance on all the passages leading to the main temple.
3. Adequate number of Medical Aid Centers (MACs) at regular intervals/distances shall be developed, by the concerned management or administration. Religious Tourism at high level attitude should have High Attitude Sickness Management to handle emergency situations.
4. Insulated Huts/Prefabricated Huts should be developed for medical facilities. The Hajj Management has taken an initiative in this area by setting up of special tents in the holy sites for initial handling of any cases of exposure by pilgrims to chemical pollution.[27]
5. Ambulances, especially air ambulances that are medically equipped, inbuilt intensive care units, especially for heart-stroke or sunstroke made tourists shall be made available so as to deal with emergency situations.
6. As developed by Hajj Management, other tourist spots where gathering is in great number a control center should be developed with GPS System for better and accurate reach to the patient's location in the very crowded areas carrying patients to appropriate health care facility in minimum time. In the recent Hajj season these centers conducted eight open heart surgeries and 110 catheterization procedures on the pilgrims.[28]
7. The local administration, especially the Health Department should take strict steps to introduce appropriate food menu in the religious tourist spots. All kinds of junk food items should be banned and should not be allowed to be served during the entire religious tour.
8. The local administration should make strict terms and conditions for the persons who are running food business in these tourist places. They should not serve junk food, beverages and moreover, the food items supplied should be hygienic and of the best standards. This will not only help in proper maintenance of health of pilgrims but will also lower the risk of spread of epidemics.
9. The pilgrimages that are at the high altitudes, the governments and the local administration should develop Mountain Rescue Teams (MRTs). The personals of these should be especially trained periodically, and latest rescue

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27 Special tents to combat chemical pollution introduced for Hajj, Monday 14th October, 2013. For more information visit: *<http://english.alarabiya.net/en/special-reports/hajj-2013/2013/10/14/Special-tents-to-combat-chemicalpollution-introduced-for-hajj.html>* (25th November, 2013).

28 *Id.*

equipments should be provided to them. These teams should be deployed at the identified points along the routes, especially at the Amarnath Yatra.[29]

10. The administration should take adequate efforts to maintain the cleanness and hygienic conditions at the concerned area, so as to minimize the risk of spread of epidemics etc.

4.2 Right to Clean Environment:

1. Studies shall be undertaken at regular intervals, on different aspects of pilgrims to examine the impact of the flow of several lakh pilgrims, sanitation and solid waste management, quality and availability of water etc. The Environmental Impact Assessment shall be conducted whenever mandated. [30]
2. To avoid contamination of the waters, as in case of Jordan River, River Pampa near Sabarimala Temple, the concerned authorities should consult experts to identify the most appropriate technological designs and solutions for prevention of water pollution.
3. Human Waste Management and Disposal is one of the major problems faced by the management in all famous religious tourist spots. Optimal number of toilets, bio-digester based toilets, and covered toilets should be provided so as to save environmental pollution from human waste.
4. It has been observed that 'pilgrimages have become corrupted by consumerism, for instance instead of buying millions of plastic bottles, 100 years ago every pilgrim would have travelled with a flask.' Plastic disposables management is another concern of environmentalists as they create pollution. There should be statutory ban on the use of plastic. Moreover, proper arrangement of clean filter drinking water should be made available in all areas where pilgrims are residing, at route of religious spots/ Shrines, camps, food court counters etc. The hotels, restaurants in these areas should not use plastic material while serving food and beverages to the pilgrims.
5. Biological wastes and its disposal is another threat to clean environment. All biological waste should be disposed off in compost pits, which should be built in the food court areas/ Langar areas. No such site should be cleared without the availability of mandatory facilities of waste segregation and

29 *Court on its Own Motion* v. *Union of India & Others*, 13th December 2013.
30 *Id.*

disposal. Municipal Solid Wastes Rules should be made more strict and up to date accordingly.

6. Restricted entry should be made in religious places which are forests or other environmental protected areas like Sabarimala Temple in Bhimashankar Wildlife Sanctuary in Maharashtra, India. The discarded plastic bags, wrappers, shards of glass, detergent from washing laundry, human excreta, traffic bright lights, pollutes not only water in the area but threatening the wildlife and tribal people's existence in the area.[31]
7. Energy saving measures should be introduced like solar-power invertors, geezers etc., to save energy and environment.

4.3 Other Suggestions

1. The administration should decide the entry of pilgrims on yearly basis taking into consideration the ready to use infrastructure, weather conditions, and forecasts, health conditions of the people interested etc., for the better co-ordination of the entire trip.
2. Minimum and maximum age of all pilgrims should be decided and it should be made legally mandatory. No other group person should be legally allowed taking into consideration the age of the person.
3. Pilgrims shall not be corrupted by consumerism. The local administration should not encourage the development of business nearby the religious tourist places. Or otherwise as said by Soubadra Devy, these religious places should be declared and treated as commercial enterprises and should be made to comply with all applicable environmental laws and conditions.
4. Ecological and Social awareness must be developed amongst the tourist. Such awareness can be developed by pictorial signage, announcements in regional languages, giving education before the start of the pilgrimage etc.

In some religious places, which are in the areas under forests, wildlife sanctuaries or eco-sensitive zones maybe involved and clearances under relevant protection and conservation laws may be required.

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[31] Religion v Conservation: When will Pilgrims stop Polluting our forests, March 18, 2012. For more information visit *<http://www.firstpost.com/blogs/religion-vs-conservation-when-will-pilgrims-stop-polluting-our-forests-248313.html?utm_source=ref_article>*, (25th November, 2013).

THE RICHLY-DESERVED POSITION – FROM SCIENTIFIC COLUMBUS TO FATHER OF CRIMINOLOGY: CESARE LOMBROSO'S AUGMENTATION

Dr. Aman A. Cheema*

> *"Anthropologist? Psychologist? Psychiatrist? Criminologist? Hygeniscist? Sociologist? Philosopher? I do not know. The culture of these specialist disciplines all have in them the master, as the earth of Ellade in Homer, as Dante exists in every piece of Italy's Soul.....I feel in Cesare Lombroso – a benefactor of Humanity"*
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> Berenini[1]

'Born Criminal', the terminology given by Cesare Lombroso, probably made his name eulogised or attacked so much as none other in the history of criminology. By the time of his death in 1909 his ideas gained wide attention among critics and friends engaged in the study of criminal behaviour. More has been written by and about Lombroso than any other criminologist, a fact that makes doubly difficult the task of summarising the life, work and influence of one who has been called "the Father of Modern Criminology". His method of research opened new gates for the contemporary criminologists for the study of crime whereas his emphasis on biological traits of criminality has provided sufficient fuel for continuous attacks from many critics who no longer take the time to read his works. Though the European approach towards the biological orientation of the criminal and America's environmental approach represent not only two different perspectives regarding causation of criminal behaviour, but both these approaches reflect historical results of Lombroso's writings. It is important, therefore that a century after his death we pause to re-examine the life and contribution of Cesare Lombroso and his position in contemporary criminology.[2]

1. Intellectual Stage for Lombroso's Inquiries

Although Lombroso should not be denied credit for his originality and insight, there can be little argument that the intellectual stage was already established for his probing inquiries into criminal behaviour. Since the time of the earliest

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1 Berenini as quoted in Paul Knepper and P.J. Ystehede (ed.), *The Cesare Lombroso Handbook* 2(Routledge, New York, 2013).

2 Marvin E. Wolfgang, "Pioneers in Criminology: Cesare Lombroso (1835-1909)", 52 *J. Crim. L. Criminology & Police Sc.* 361(1961).

surviving records, ugliness, disability and deformity have been taken as reflections of evil and criminality. Egyptian Papyri, the Bible and Homer's Iliad all take the link as valid and this belief has survived to the present day. Physiognomy (assessing personality from facial features) traces its roots to ancient Greece where the concept that mind, morality and body were intimately interrelated was widely accepted, even by Aristotle (perhaps the most scientific of the ancient Greeks). Socrates was condemned to death partly on the evidence of a physiognomist that his face showed him to be a cruel drunk.[3] In medieval Europe physical imperfections, such as warts, moles and third nipples, were taken as proof of demonic possession and in ordinary, secular, law if two people were under equal suspicion then the uglier was to be found guilty.[4]

Della Porte (1535-1615) was the first to scientifically study the belief that appearance reflected inner worth. He studied dead bodies and claimed that he had found a connection between facial features such as small ears and large lips with criminal behaviour. Later physiognomists such as Beccaria in his 'On Crimes and Punishments' published in 1764 and Lavater in his 'Physiognomical Fragments' published in 1775 extended Della Porte's theory in late eighteenth century.[5]

Franz Joseph Gall & Johann K. Spurzheim: Later in the eighteenth century, another theory 'Phrenology' adopted and publicized largely through the work of Franz Joseph Gall (1758-1828) extensively studied the Brain. He along with Johann K. Spurzheim (1776-1832) gave empirical support to the linking of 'bumps' found on the head to criminal behaviour. He proposed that the surface of the skull was raised where it lay over parts of the brain that were more active than average. He suggested that the brain was the centre of thought and was divided into separate areas which controlled different activities. The areas of more importance were of greater size. He identified 26 separate functions of the brain. Those of most relevant in explaining crime included acquisitiveness, combativeness, destructiveness and secretiveness. His study reveals that the 'destructiveness centre' behind and above the left ear really is prominent in about 17 percent of criminals and there are others at the back of the skull that seem to reflect abnormalities of two parts of the brain. These parts are thought to be important in violent anti-social or criminal behaviour. He further went on to say that the different parts of brain may be enhanced or inhibit development by social

3 Ian Marsh and Gaynor Melville *et.al.* (ed.), *Theories of Crime* 22 (Routledge, London, 2006).
4 *Ibid.*
5 *Ibid.*

forces.[6]

But these two very earliest versions tend to be regarded as somewhat eccentric. Physiognomy might match with the modern clinches about people's eyes being shifty or two close together, but it was criticised on the point that it is impossible to scientifically test phrenology's conception of the brain's areas and their associated functions. The methods and philosophical understanding, to test Gall's theory did not exist in his lifetime and his attempts to get around these problems ended by invalidating the project.[7]

Although Lombroso's early investigations my have been performed without the benefit of knowledge of all his predecessors, but he could hardly help becoming aware of important works like those of *P. Lucas* (1805-1885)[8], *E. Dally* (1833-1887)[9] and *J. Bruce Thomson* (1810-1873)[10]. Lombroso was primarily influenced by a German materialism that increasingly sought objective fact in opposition to "natural Philosophy". This saw the growth and importance of Darwinian biological evolutional theory that was eloquently extended into social evolution by Herbert Spencer. Within the intellectual climate established by these movements, Lombroso studied, practiced, investigated and taught. From the growing body of medical, clinical, psychiatric literature directly or indirectly related to criminals, Lombroso gained a perspective and theoretical orientation; to this knowledge he added new, exciting and controversial dimensions.

2. Brief Biographical Exchange

On November 6, 1835[11] in Verona, Italy (then under Austrian Rule), the second of the five children born to Aron and Zefira Levi Lombroso, Italian-Jewish parents. While still at school his interest in history was revealed in two serious papers written when he was fifteen years of age. At the age of eighteen he began

6 Ian Marsh and Gaynor Melville *et.al.* (ed.), *Theories of Crime* 22 (Routledge, London, 2006).
7 *Ibid.*
8 P. Lucas in his work in 1847 contended that some kind of criminal tendency is present from the moment of birth and that this tendency is hereditary.
9 E. Dally pointed out that crime and Insanity are two forms of organic and mental decay.
10 J. Bruce Thomson summarised his observations on over 5000 prisoners in "On the Hereditary Nature of Crime" published in the year 1870 in the Journal of Mental Science.
11 There is difference of opinion as to the year of birth of Lombroso. Lombroso's daughter, Gina Lombroso-Ferro along with George B.Vold, Thomas J. Bernard, Jeffrey B. Sipes, Katherine S. Williams, Robert W. Winslow, Frank Schmallenger, Sheldon X. Zhang, Hermann Mannheim Maggi Lee, Paul Iganski, Plummer, Nigel South and Eamonn Cerrabine, state 1835 as the birth year of Lombroso whereas some like Curt R. Bartol and Anne M. Bartol state 1836 as his birth year. The first date is likely to be right.

his study of medicine. He received the degree in Medicine in 1858 from the University of Pavia and in Surgery in 1859 from the University of Genoe.[12] His earliest researches were concerned with cetinism and pellagra, particularly rampant at that time in Italy.[13] Lombroso was an Italian doctor and became a specialist in Psychiatry. He spent his time working as a doctor in the Italian army and with the mentally afflicted in the lunatic asylums and had then become interested in crime and criminals while studying Italian soldiers. After becoming an Army physician, he carried out the anthropometric measurement of 3000 soldiers. This was followed by work in mental hospitals and then in 1874 he became a lecturer in legal medicine and public hygiene at the University of Turin, where he later became a professor of psychiatry and of criminal anthropology.[14]Lombroso's working techniques were different from his predecessors. He claimed to be scientific rather than philosophical or juridical as he was the first at that time who made scientific observations of the 'criminal' and collected and prepared statistical analysis. He moved criminology away from purely religious and philosophical study towards an empirical scientific methodology.

3. The Criminal Man: 'Atavist' Being

It began in Italy in 1871 with a meeting between a criminal and a scientist. The criminal was a man named Giuseppe Villella, a notorious Calabrian thief and arsonist. The scientist was an army doctor called Cesare Lombroso, who at that time of his career was trying to pinpoint the differences between lunatics, criminals and normal individuals by examining inmates in Italian prisons.[15]

Lombroso found Villella interesting, given his extraordinary agility and cynicism as well as his tendency to boast of his escapades and abilities. After Villella's death, Lombroso conducted a post-mortem and discovered that his subject had an indentation at the back of his skull, which resembled that found in apes. Lombroso concluded from this evidence, as well as that from other criminals he had studied, that some were born with a propensity to offend and were also

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12 Robert W. Winslow and Sheldon X. Zhang, *Criminology: A Global Perspective* 86 (Pearson Prentice Hall, New Jersey, 2008).

13 Aman Amrit Cheema, *"Reinventing Lombroso in the Era of Genetic Revolution: Whether Criminal Justice System Actually imparts Justice or is based on 'convenience of Assumption'"*, 4 *AILJ* 98 (2011).

14 Hermann Mannheim, *Comparative Criminology* 214 (Routledge & Kegan Paul, London, 1980).

15 BBC History Magazine, Historyextra, The 'born criminal'? Lombroso and the origins of modern criminology, available at *http://www.historyextra.com/article/feature/born-criminal-lombroso-origins-modern-criminology* visited on (28/07/2016)

savage throwbacks to early man. This discovery was the beginning of Lombroso's work as a criminal anthropologist.[16]

Lombroso wrote:

> *"At the sight of that skull, I seemed to see all of a sudden, lighted up as a vast plain under a flaming sky, the problem of the nature of the criminal – an atavistic being who reproduces in his person the ferocious instincts of primitive humanity and the inferior animals".*[17]

Lombroso used Darwin's theory of evolution to argue that criminals were biological throwbacks (i.e. their looks, morality and behaviour were atavistic – or like their primitive ancestors criminals were physically and morally degenerate). While a doctor in the army, Lombroso noticed wider and more indecent prevalence of tattoos on the bodies of offensive soldiers as compared to the disciplined ones.[18] Lombroso studied 383 criminals looking for a set of signs that he argued showed atavism. According to him, the criminal reflected physical characteristics that resembled those of apes. His theory used physical characteristics as indicators of this degeneracy or inadequacy and therefore as indicators of criminality. *Katherine S. Williams* states certain physical characteristics as measured by Lombroso like Peculiar size or shape of head, Peculiarities of the eyes, Asymmetry of the face, Enlarged jaw and cheekbones, Ears which are too large, too small or too handle-shaped, Nose twisted, upturned or flattened (indicative of thieves) or aquiline or beak like (indicative of murderers), Lips fleshy and protruding, Peculiarities of the palate, Abnormal teeth, Chin too long, too short or too flat, Abundance of wrinkles, Abundance of hair which is often black and frizzled, Sparse beard in men but abundance of facial hair in women, Excessive length of arms, Retreating forehead and Dark skin.

If a person portrayed five or more of these atavisms or anomalies, then by Lombroso's reckoning that individual was a born criminal. In addition to th purely physical characteristics he claimed that the born criminal portrayed cer other factors, such as[19] :

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16 BBC History Magazine, Historyextra, The 'born criminal'? Lombroso and the origir criminology, available at *http://www.historyextra.com/article/feature/born-crim origins-modern-criminology* visited on (28/07/2016)

17 *Ibid.*

18 S.M.A. Qadri (ed.) *Ahmad Siddique's Criminology and Penology* 78(Easter zine, Historyextra, The 'born crimi Lucknow, 2007). ble at *http://www.historyextra* logy visited on (28/07/2016).

19 Katherine S. Williams, *Textbook on Criminology* 143 (Oxford University Pre

- *Sensory Peculiarities*, including greater sensibility to pain and touch, more acute sight, less acute hearing, taste and smell.
- *Functional Peculiarities*, including greater agility, more ambidexterity and greater strength in left limbs.
- *A lack of Moral Sense*, including an absence of repentance and remorse, the presence of vindictiveness, cynicism, treachery, vanity, impulsiveness, cruelty, idleness, participation in and love of orgies, a passion for gambling and an irresistible craving for evil for its own sake.
- Use of a special criminal argot or slang.
- A tendency to express ideas pictorially.
- An excessive use of tattooing.
- Excessive idleness.

During his study of 383 criminals, he found that one in five had one sign and over two in five had at least five. Essentially, Lombroso believed that criminality was inherited and that criminals could be identified by physical defects that confirmed them as being atavistic or savage. A thief, for example, could be identified by his expressive face, manual dexterity, and small, wandering eyes. ·itual murderers meanwhile had cold, glassy stares, bloodshot eyes and big noses, and rapists had 'jug ears'.[20]

·lysis: Addition of Insane Criminals, Epileptic Criminals ` Criminals

·l for years and years assembling his material, ··rtem examinations or anthropometric ·ndividuals, he came to believe that ·mentally alike in physical ·· had been subjected to · of the anomalies ıtavism. Lombroso ɔblem of criminality up, that of Misdea, a ıt not vicious. Although the army when suddenly,

ombroso and the origins of modern
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for some trivial cause, he attacked and killed eight of his superior officers and comrades. His horrible work accomplished, he feel into a deep slumber, which lasted twelve hours and on awakening appeared to have no recollection of what had happened. Misdea, while representing the most ferocious type of animal, manifested, in addition, all the phenomena of epilepsy, which appeared to be hereditary in all the members of the family. Changes occurred in Lombroso's thinking to modify his original pronouncement of the atavistic criminal type. He came to designate epileptic criminal, the insane criminal and the born criminal as separate types, all stemming from an epileptoid base. That's why he went on to state that although all born criminals were epileptics, not all epileptics are necessarily born criminals.[21]

In addition to his other types of criminals, Lombroso refers in his later editions, to a large section of occasional criminals. Occasional criminals are those criminals who do not seek the occasion for the crime but are almost drawn into it for very insignificant reasons. These occasional criminals are further divided into four types: Pseudo-criminals,[22] Criminaloids,[23] Habitual criminals[24] and epileptoids[25]. Lombroso also mentions another category of criminals, that lies outside the general base of epilepsy. These are criminals committing crimes by passion. These are violent crimes committed often from anger, platonic or filial love, offended honour. Political criminals are included under this category and characteristics such as powerful intellect, exaggerated sensibility, great altruism, patriotic, religious or even scientific ideals are significant features in these criminals.[26]

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21 Marvin E. Wolfgang, "Pioneers in Criminology: Cesare Lombroso (1835-1909)", 52 *J. Crim. L. Criminology & Police Sc.* 361(1961).

22 Pseudo-criminals are those criminals who commit crime involuntarily. Their acts are not perverse or prejudicial to the society but fall within the definition of crime as defined by the law. These crimes could be committed in defence of the person, of honour or of family. These crimes do not cause societal fear and nor do they disturb the moral sense of the community.

23 The largest group of occasional criminals is the criminaloids. They commit crime due to environmental or opportunities to commit the crime. Opportunities offered for fraud, the associate of the prison and other unfavourable exogamous factors lead this group to crime. His organic tendency is less intense than that of the born criminal and he has only a touch of degeneracy.

24 Habitual criminal was born without serious anomalies or tendencies in his constitution that would predispose him to crime. Poor education and training from parents, the school and community at an early age causes these individuals to fall continually lower into the primitive tendency towards evil. Association of criminals such as mafia draw individual into crime by association.

25 Lombroso briefly mentions a class of epileptoids in whom a trace of epilepsy may form the basis for the development of their criminal tendencies

26 Marvin E. Wolfgang, "Pioneers in Criminology: Cesare Lombroso (1835-1909)", 52 *J. Crim. L. Criminology & Police Sc.* 361(1961).

5. The 'Fairer' Criminal: La donna delinquente

In the later stage of his career, Lombroso turned his attention to two cultural targets – woman and the Jew. In 1893, he published (with his son-in-law-Guglielmo Ferrero) *La donna delinquente, la prostitute e la donna normale* (The Criminal Woman, the Prostitute and the Normal Woman), thus turning his attention to the 'fairer' sex. We note a distinct difference between Lombroso's treatment of the male criminal, set forth in his 1879 text *L'uomo delinquente* (Criminal Man) and the female. For Lombroso, the three terms "Woman Criminal", "Prostitute" and "Normal Woman" were inseparable and he theorizes this inseparability over and over. Lombroso repeats many times that "normal" woman is but a criminal but her immoral, criminal tendencies are kept in abeyance by her maternal instincts, her culture and bourgeois society. He states for the 'normal' male there is no connection to atavism but women are 'closer to nature', more atavistic, closer to her ancestor, the female savage. There is the sense here that the male criminal is in fact ultimately not responsible for his condition, because of the compelling force of atavism. Woman on the other hand are all potential criminals and only the soothing forces of culture and their maternal physiology may or may not keep this criminality suppressed. Lombroso asserts that primitive women have always been prostitute and remained this almost until the semicivilised epoch; that explains that the prostitute must have certain masculine, virile physical characteristics than the female criminal. After conducting post mortem on many prostitutes, Lombroso stated that he often found many masculine physical characteristics like masculine larynax, virile distribution of hair, exaggeration of jaw, virile characteristics of face and the cranium in many prostitutes.[27]

Lombroso believed that women had much in common with children. They lie 'naturally', he says, as if lying were part of their natures. While defining habitual nature of women to 'lying', Lombroso quotes a proverb *"Women always say the truth, but never in its entirety."*[28] According to Lombroso, women are morally deficient, vengeful ad jealous. Women criminals, in Lombroso's appraisal, talk too much and write too little. She lacks skills and development in the graphic area of the brain, which would explain their reluctance or inability to write at a very sophisticated level. He also states that women criminals quite literally

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27 Nancy A. Harrowitz, *"Weininger and Lombroso: A Question of Influence"* in Nancy A. Harrowitz and Barbara Hyams (eds.), *Jews and Gender: Responses to Otto Weininger* 74-75 (Temple University Press, Philadelphia, 1995).

28 *Id.*, p. 76.

cannot keep their mouth shut about their crimes, that they are compelled to tell someone about them and to brag about them. At the same time, they will stick to the most audacious lies, even when confronted with absolute proof of their ridiculousness. Lombroso concludes from this that women have a poor sense of reality when it comes to truth, that reality is actually estranged from them in some way.[29]

6. Criminality induced by socio-economic factors

Although the name of Lombroso is associated with terms like 'born criminal', 'atavism' but later, may be induced by his critics and friends as well as by new opportunities to make more expansive inquiries, Lombroso wrote *Le Crime: causes et reme'des* (Crimes: Its Causes and Remedies) in 1899. Throughout his discussions of socio-economic factors, he emphasized on mutual interactive relationship between heredity and environment. Wolfgang goes on to state about Lombrosian work that *"The emphasis is on the biological, it is true, but it would be fallacious to deny recognition of environmental, precipitating factors that lie outside the individual and contribute to the etiology of crime.*[30]

As early as 1875 Lombroso published an article on the causes of crime, in which he stated *"There is no crime which does not have its roots in numerous causes. If these often merge or are interdependent, we should nevertheless.....consider them one by one, as is done with all other human phenomena to which practically never a single cause can be assigned."*[31]

Moreover, in the second edition of *L'uomo delinquent* (1878) and twenty years before *Le Crime: Causes et reme'des,* Lombroso gives attention to several environmental conditions that cause or that have an effect on criminality like poverty, the relationship between prices of wheat, rye, potatoes and other food products and minor violations, influence of alcohol, emigration, evils of criminal gangs, effect of criminal association in prisons and corruption of police. But all these items were deleted in the fourth edition of *L' uomo delinquent* which became the basis of translation of Lombroso's work. Lombroso in his work in *Crimes: Its Causes and Remedies* (1899) begins with the examination of climatic

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29 *Id.*, p. 77.

30 Marvin E. Wolfgang, "Pioneers in Criminology: Cesare Lombroso (1835-1909)", 52 *J. Crim. L. Criminology & Police Sc.* 361(1961).

31 Sellen, A New Phase of Criminal Anthropology in Italy, 125 Annals 235 (May 1926) as quoted in Marvin E. Wolfgang, "Pioneers in Criminology: Cesare Lombroso (1835-1909)", 52 *J. Crim. L. Criminology & Police Sc.* 361(1961).

conditions on the individual and suggests that extremes of temperature, hot or cold, sap the individual's energy and leave little time or enthusiasm for deviations such as crime. While further discussing about the influence of race, he concludes that certain races in every culture are responsible for most criminality. Here again he minimizes the influence of social factors by suggesting that hereditary seems to function in the case of races like Jews, Gypsies and some robber tribes in India and elsewhere. Further Wolfgang, went on to explain Lombroso's other social factors as the perpetrators of crime such as:[32]

- Progress of civilization has in turn lead to accumulation of wealth, encouraging multiple needs and desires. This has further lead to flood of alcoholics and general paralytics into insane asylums and huge crowd of property offenders into the prisons.
- The very congestion of population by itself gives an irresistible impulse towards crime and immorality.
- Immigration from other countries and emigration from the rural to the urban areas had given impetus to crime and vices.
- The food prices too have an impact on the criminality. Lombroso states that the effect of the price of provisions upon murder and assault is uncertain or negligible. The influence upon theft is very great, as is also the inverse effects upon crimes against good morals, which increase with the falling off in the price of food. Famine lessens sexual vigour and abundance excites it; and while the need of food derives man to theft, the abundance of it leads to sexual crimes.

Lombroso never departs from his original concept of 'born criminal' and states that there are two forms of criminality, which consists of "atavistic criminality" and "evolutive criminality". Into the first class of criminals fall only a few individuals fatally predisposed to crime, into the second any one may come who has not a character strong enough to resist the evil influences in his environment.[33]

7. Lombrosian Penological Theory

Lombroso's basic philosophy of punishment was in complete opposition to

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32 Marvin E. Wolfgang, "Pioneers in Criminology: Cesare Lombroso (1835-1909)", 52 *J. Crim. L. Criminology & Police Sc.* 361(1961).

33 Henry P. Horton (Trans.), Lombroso, *Crime: Its Causes and Remedies* 45 (Little Brown and Company, Boston, 1911).

Beccaria's Principle[34] and stated that individual does not commit the crime because of his free will. He stated that criminals acted out of compulsion from either their innate physical and psychological degeneracy or from the social environment. Becarria believed that human behavior is based on Pleasure Pain theory and stated that major control over the person's free will is particularly fear of pain. This fear of pain only in the form of punishment would deter an individual from criminal activities. But Lombroso completely rejected this and stated that though criminals did not freely choose to break the law, society still had the right to punish them in its own defences. According to him the purpose of punishment should not be the infliction of pain on the criminal, but the well being of the society and restitution to the victim. He further asserted that punishment should be tailored to individual criminals rather than to their crimes. The stress of classical school to punish the criminal as per the crime was vehemently refuted by Lombroso. He argued that punishment should be proportionately less to the gravity of the crime than to the dangerousness of the criminal. He exemplified stating that there is a vast difference between the future threat posed by an individual who kills a man for honour, politics or an ideal after leading a completely honest life and one who kills to rape or rob, crowning a life already full of crime. He argued that in the first case, punishment is almost unnecessary because the crime itself tortures the perpetrator, who will never repeat it. In the second case, every delay and mitigation of punishment endangers society.[35]

While the classical school had championed prisons as a humane and efficient alternative to corporeal punishment, Lombroso believed that incarceration corrupts reform able criminals by mixing them with the habitual deviants. And when it is unavoidable, the prisons should be made on cellular system, where inmates lived and worked in separate cells to prevent communication of moral contamination.[36]

Lombroso, highly skeptical of prison, goes on to suggest alternatives to prison as

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[34] Cessare Beccaria was the main exponent of Classical School of criminology. He argued that the individual had 'Free Will' and every individual made rational choices about the way in which they behave. Individual's behavior is based on the rational calculation of the consequences of his act. Free Will enables human beings to purposely and deliberately choose to follow a calculated course of action. If people seek to increase their pleasure illegally, they do so freely and with full knowledge of the wrongness of their acts. For more information, see Anthony Walsh and Craig Hemmens, *Introduction to Criminology: A text/Reader*, 118(Sage Publications, Los Angeles, 2014).

[35] Mary Gibson and Nichole Hahn Rafter (eds. And Trans.), Cesare Lombroso, *Criminal Man* 75 (Duke University Press, Durham, 2006).

[36] *Id.*, p. 70.

a mode of punishment. He stated that fines can be inflicted instead of punishment and if the defendant is poor, then he can be ordered to do community service. For non dangerous criminals, Lombroso adviced judges to recommend house arrest, police surveillance or simply judicial reprimands or forced labour without imprisonment, local exile. Lombroso was also enthusiast about suspended sentences and parole. He also recommended probation system which was considered excellent penalty for minors and occasional criminals. On Lombroso's inspiration only in earlier edition of *Criminal Man*, Brockway introduced *Elmira Reformatory system*[37]. Lombroso further recommended criminal insane asylums too for unhappy beings whose crimes have arisen out of morbid psychological impulses rather than inner perversity. For such type of criminals, prison is an injustice and liberty a peril. Therefore he recommended that for judges, criminal insane asylums provide an answer to the eternal conflict between justice for the insane and defence of the society.[38]

Lombroso emphasizes that punishment should vary according to the age, sex, type of offender. Explaining the punishment to be meted out to the type of criminal, he stated that for:[39]

> *Occasional Criminals*: A prison sentence serves no purpose for occasional criminals who commit minor offences and are not essentially dangerous. When violations by occasional offenders are more civil than penal, they should be punished by fines rather than incarceration.
>
> *Criminaloids:* the appropriate punishment for the first offence of an adult criminaloid who acted alone is a suspended sentence accompanied by bail, a judicial warning and payment of damages or (if the offender has no money) forced labour. Only criminaloids who refuse to work should be sent to prison.
>
> *Habitual Criminals*: Recidivists and criminaloids who become habitual

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37 In Elmira Reformatory System adopted by Brockway in the United States, the reformatory admits only young men between the ages of sixteen and thirty who have committed non-serious crimes. For each prisoner, Brockway studies the psychological condition, the family background and causes of the crime; on the basis of this information, he designed an individualized program of reform that usually includes exercise, showers, massage, gymnastics and a good diet. The aim is to reinvigorate the will, turn the inmate onto his own boss and give him a stake in his own liberation, which he will obtain as soon as he demonstrates that he is able to fend for himself.

38 Mary Gibson and Nichole Hahn Rafter (eds. And Trans.), Cesare Lombroso, *Criminal Man* 75 (Duke University Press, Durham, 2006).

39 *Id.*, 347-348.

offenders should be treated like born criminals, with the following proviso: since their crimes are less serious (theft, forgery, fraud), their punishments should be less severe. While a born criminal's first offence, if it is serious, may justify a life sentence, the habitual criminal would need to recidivate several times before being declared incorrigible.

The ideal form of punishment for urban criminals is industrial work in the new large factories. Rural criminals should work on penal farms with the most dangerous offenders assigned to the least healthy lands. Minors should work in fields that have already been cultivated.

Insane Criminals: Criminal insane asylums are the only solution for insane criminals and for those numerous born criminals in whom epilepsy and moral insanity causes violent fits, permanent internment in asylums will prevent insane criminals from transmitting their disease through hereditary, from associating with ordinary criminals and from forming criminal gangs. In addition, criminal insane asylums would reduce recidivism, the cost of additional trials and the number of imitative crimes. Lombroso went on the recommend special types of criminal insane asylums for alcoholics, epileptics.

Incorrigible Criminals and Born Criminals: Dangerous habitual criminals and born criminals must be interned in special institutions for the incorrigible. Lombroso gave the example of the proposal passed by the House of Lords in United Kingdom in 1864 where second-time recidivists should be condemned to life long penal servitude.

Death Sentence for Incorrigibles: When Criminals repeat bloodthirsty crimes for the third or fourth time inspite of being punished by incarceration, deportation and forced labour, there is no choice but to resort to that extreme form of natural selection, death. He maintained that the death sentence should not be used often. It is sufficient that it should be suspended over the most terrible criminals, those who have attempted to kill innocent people. The death penalty should also be applied to members of organized crime and brigands, who threaten the security and honour of our country. By creating violent, war like conditions, they merit the same severe penalty as that meted out to traitors. Lombroso went on to state that born criminals, programmed to do harm, are atavistic reproductions of not only savage men but also the most

A JOURNEY OF PATENT WARS: POSITION OF DRUG INDUSTRY IN INDIA

Prof. Rajinder Kaur*
Reenu Chauhan**

1. Introduction

> *"The idea of a better ordered world is one in which medical discoveries will be free of patents and there will be no profiteering from life and death."*
>
> Indira Gandhi[1]

In legal sense, Patents provides the Patent owner to prevent others from making, using, or selling the new invention for a limited period of time, subject to a number of exceptions. Patents do not constitute marketing authorizations. The Agreement on Trade Related Aspect of Intellectual Property Rights[2]stipulates that it must be possible for all inventions to be protected by a patent for 20 years, whether for a product[3] or a process[4]. Medicines are expensive when they are protected by patents. The patent holder has a monopoly on the drug for a minimum of 20 years, and uses that period to maximize profit. But as soon as generic competition is possible, prices of medicines plummet: for instance, after the Brazilian government began producing generic AIDS drugs in 2000, prices dropped by 82%. Protection of public health was one of India's major concerns

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1 The national sentiment on this issue is well captured in an often quoted statement made by Indira Gandhi at the World Health Assembly in 1982, available at: *https://www.cgdev.org/doc/expert%20pages/lanjouw/ lanjouw_drugs.pdf* (last visited on December 5, 2016).

2 The Agreement on Trade-Related Aspects of Intellectual Property Rights hereinafter referred as TRIPs is an international agreement administered by the World Trade Organization (WTO) that sets down minimum standards for many forms of intellectual property rights hereinafter referred as IPR regulation as applied to nationals of other WTO Members. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994, available at: *https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm+&cd=3&hl=en&ct=clnk&gl=in* (last visited on December 6, 2016).

3 In the case of Product patent, it is an exclusive right given to the original inventor of a product. This means that no other manufacturer can provide the same product through the same or any other process. TRIPs follow the product patent regime.

4 Process patent regime is that it gives less protection for the inventor. There is high tendency for competitors to reengineer the original invention by discovering a new process with less strain and investment. It reduces the element of monopoly.

when the TRIPS Agreement was being negotiated.[5] The Patents Act, 1970[6] did not provide for product patents for inventions relating to medicines. The duration of protection of process patents for medicines was also limited to a maximum of seven years. This conscious policy choice adopted in India's Patent Act yielded positive results over a period of three decades in building a good industrial infrastructure for manufacturing generic medicines, while also to keeping the price of essential drugs at a relatively low level. During the final stages of negotiations that resulted in the TRIPS Agreement, India attempted to ensure that TRIPS provisions would not substantially affect the public health needs of the large sections of the population that are below the poverty line. Subsequently, India made conscious efforts to incorporate the flexibilities available in TRIPS and the Doha Declaration[7] when India amended the Patents Act in 1999, 2002 and 2005. The Indian Patents (Amendment) Act, 2005 introduced product Patents in India and marked the beginning of a new patent regime aimed at protecting the World Trade Organization[8] on matters relating to TRIPs.[9]

1. Evolution of Indian Pharmaceutical Sector

Indian pharmaceutical industry is third largest in the world and the pharmaceutical market size is expected to grow to US$ 100 billion by 2025. The remarkable growth of this industry is shown in the figure below-

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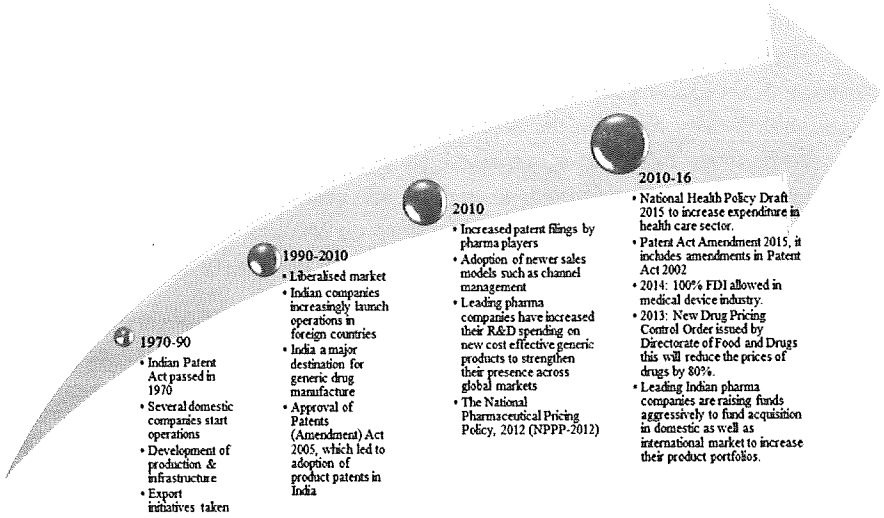
5 Natalia Arzeno, Rebeca Diaz and Sandra Gonzalez, Brazil's Generic Drug Manufacturing Success and the policies that permitted it, available at: *https://ocw.mit.edu/courses/electrical-engineering-and-computer-science/6-901-inventions-and-patents-fall-2005/projects/brazil_gen_drug.pdf* (last visited on January 30, 2017).

6 The *Patents Act*, 1970 is the legislation that till date governs patents in India. It first came into force in 1972. The *Patents Act* has been repeatedly amended: 1999, 2002, 2005, and 2006. These amendments were required to make the *Patents Act* TRIPS-compliant. The major amendment was in 2005, when product patent was extended to all fields of technology like food, drugs, chemicals and microorganisms.

7 The Doha Development Round or Doha Development Agenda (DDA) is the latest trade-negotiation round of the WTO which commenced in November 2001 under then director-general Mike Moore. Their objective was to lower trade barriers around the world and facilitates increased global trade.

8 The World Trade Organization hereinafter WTO deals with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.

9 Pharmaceutical Patent in India: Access to Medicines, available at: *http://www.legalindia.com/pharmaceutical-patent-in-india-access-to-medicines* (last visited on December 7, 2016).



Source: Tech Sci Research
Notes: KAM - Key Account Management, CSO - Contract Sales Organisation[10]

1.1. Indian Government's Pharma Vision 2020

- Health care will shift in focus from treatment to prevention.
- Pharmaceutical companies will provide total health care packages.
- The current linear phase research & development process will give way to in-life testing and live licensing, in collaboration with regulators and health care providers.
- The traditional blockbuster sales model will disappear.
- The supply chain function will become revenue generating as it becomes integral to the health care package and enables access to new channels.
- More sophisticated direct-to-consumer distribution channels will diminish the role of wholesalers.

The Indian pharma industry, which is expected to grow over 15 per cent per annum between 2015 and 2020, will outperform the global pharma industry, which is set to grow at an annual rate of 5 per cent between the same periods. The market is

[10] Evolution of Indian Pharmaceutical Sector, January 2016, available at: *http://www.brandindiapharma.in/uploads/documents/Pharmaceutical-%20January%202016.pdf* (last visited on January 30, 2017)

expected to grow to US$ 55 billion by 2020, thereby emerging as the sixth largest pharmaceutical market globally by absolute size. The implementation of the *Goods and Services Tax (GST)* is expected to be a game-changer for the Indian Pharmaceuticals industry. It will lead to tax-neutral inter-state transactions between two dealers, thereby reducing the dependency on multiple states and increasing the focus on regional hubs. It is expected to result in an efficient supply chain management, which is expected to reduce its cost considerably. The cost of technology and investment is expected to reduce on account of tax credit which can be availed now on the duties levied on import of costly machinery and equipment.[11]

1.2. Our country is having a long journey to fight for affordable drugs –

1970-95	Position of Pharmaceutical Patents in Pre-TRIPS era
1995-2008	**Position of Pharmaceutical Patents in Post-TRIPS era**
March 2012	Breaking of pharmaceutical monopoly by issuing first compulsory licence
April 2013	Indian Supreme Court ruling against Novartis, ending seven year battle
August 2013	Roche decides not to pursue its patent on trastuzumab (Herceptin)
2014	India put on the Office of the US Trade Representative's priority watch list
2015	The 'tatkal' system was introduced under Make in India scheme for the examination of patent applications bring down the time period from the present 5-7 years to 18 months by March 2018.
May 2016	New IPR Policy with the slogan *'Creative India, Innovative India.'*
2017	Under Special 301 Report on IPR. India still remains on the Priority Watch List of USTR for lack of sufficient measurable improvements to its IP framework on longstanding challenges and new issues particularly with respect to patents, copyrights, trade secrets, and enforcement.

[11] Indian pharmaceutical industry, available at: *https://www.ibef.org/industry/pharmaceutical-india.aspx* (last visited on January 31, 2017)

2. Position of Pharmaceutical Patents in Pre-TRIPS era (1970-95)

The focus of the intellectual property regime that India has had to adopt since it took commitments under TRIPS have remained on the ability of the country to provide mechanisms which can ensure that the country is able to provide access to medicines to its citizens at affordable prices. India has had a unique position among the countries in the developing world for it has a strong generic pharmaceutical industry, which has been able to provide medicines at prices that were among the lowest in the world. Much of the credit for this development goes to the Patents Act that India enacted in 1970. Two key provisions facilitated this process. The first was introduction of a process patent regime for chemicals and, the second, shortening of the life of patents granted for pharmaceuticals.[12]

The Patent Act 1970 stated objective was to foster the development of an indigenous Indian pharmaceutical industry and to guarantee that the Indian public had access to low-cost drugs. The Act replaced intellectual property rights laws left over from the British colonial era and ended India's recognition of Western-style "product" patent protection for pharmaceuticals, agricultural products, and atomic energy. Product-specific patents were disregarded in favour of manufacturing "process" patents that allowed Indian companies' to reverse engineer[13] or copy foreign patented drugs without paying a licensing fee. India became a hot spot of reverse engineering in the field of medicines. In India the price of medicines became lowest in the world. Indian Pharmaceutical Company Cipla became the largest AIDS generic drug supplier in the world. Indian Pharmaceutical companies achieved excellence in manufacturing all kinds of generics. This allowed the domestic industry build up considerable competencies and offers a large number of cheaper "copycat" generic versions legally in India at a fraction of the cost of the drug in the West. The Act protected process patents for 7 years instead of the usual 15 years needed to develop and test new drugs.[14]

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12 *Supra* note 8

13 The history of Patent law in India starts from 1911 when the *Indian Patents and Designs Act*, 1911 was enacted. The present Patents Act, 1970 came into force in the year 1972, amending and consolidating the existing law relating to Patents in India. The Patents Act, 1970 was again amended by the Patents (Amendment) Act, 2005, wherein product patent was extended to all fields of technology including food, drugs, chemicals and micro organisms. Under the provisions of section 159 of the Patents Act, 1970 the Central Government is empowered to make rules for implementing the Act and regulating patent administration , available at: http://www.mondaq.com/india/x/125766/Patent/Patents+Law+In+India+Everything+You+Must+Know (last visited on January 31, 2017)

14 Reverse engineering, also called back engineering, is the processes of extracting knowledge or design information from anything man-made and re-producing it or re-producing anything based on the extracted information.

3. Position of Pharmaceutical Patents in Post-TRIPS era (1995-2008) *(Indian Patent (Amendment) Act, 2005 in consensus with TRIPS Agreement)*

On March 23, 2005, the Indian Parliament passed the Patent (Amendment) Bill 2005. It was the third amendment to the Indian Patent Act (1970). The amended Patent Act conforms to requirements set forth by the WTO Agreement on TRIPS. Since the new law came into effect on January 1, 2005, there have been serious concerns regarding the role of the domestic Indian generic industry in the new product patents regime, and the continued availability of essential medicines at affordable prices.[15]To meet its TRIPs obligations, India amended its patent law on March 22, 2005, abolishing its "process" patents law and reintroduced Western style "product" patents for pharmaceuticals, food, and chemicals. This action effectively ended 36 years of protection for Indian pharmaceutical companies and stipulated that Indian companies selling copycat drugs must pay foreign patent holders a "reasonable" royalty for copies sold in the Indian market. The amendment made reverse engineering or copying of patented drugs illegal after January 1, 1995. The Act allowed for only two types of generic drugs in the Indian market for instance - Off-patent generic drugs and, Generic versions of drugs patented before 1995. At present, nearly 97 percent of all drugs manufactured in India are off patent and therefore will not be affected by this Act. It also introduced a provision establishing compulsory licenses[16] for exports to least developed countries with insufficient pharmaceutical manufacturing capacities. The Amendment grants new patent holders a 20-year monopoly starting on the date the patent was filed and, without a compulsory license, no generic copies can be sold during the duration of the patent.[17]

3.1. Introduction of process patent regime (2005)

The introduction of pharmaceutical patents in India has been particularly controversial. Indian producers have long been suppliers of low-cost medicines (including key HIV/AIDS treatments), domestically and also to other low- and middle-income countries. In amending its patent law to meet new international obligations, India, like many developing countries, attempted to take advantage[18] of

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15 *Supra* note 10

16 Compulsory licensing is when a government allows someone else to produce the patented product or process without the consent of the patent owner. It is one of the flexibilities on patent protection included in the WTO's agreement on intellectual property the TRIPS Agreement.

17 *Supra* note 13

18 Challenges to India's Pharmaceutical Patent, available at: *Lawshttp://science.sciencemag.org/content/early/2012/07/03/science.1224892.full* (last visited on February 1, 2017).

flexibilities in TRIPS to cast negative effects on pharmaceutical patents. India used its full transition period, waiting to introduce pharmaceutical product patents until 2005 (pharmaceutical process patents were already available prior to TRIPS).[19] In 2005, when India was compelled to re-introduce the product patent regime, the Indian Parliament, aware of its responsibility not only to Indians but to patients across the world adopted the only pragmatic solution available — to utilize flexibilities available under TRIPS in an attempt to secure the availability, affordability and accessibility of medicines. According to this approach, TRIPS does not set any universal common standard for the substantial aspects of the patent law. The TRIPS implementation strategy was "to find the means within the patent system and outside it, to generate the competitive environment that will help to offset the adverse price effect of patents on developing country consumers.[20] The cautious approach suggests the implementation of TRIPS should be done with minimum damage. The various amendments to India's patents law introduced flexibilities at both the pre- and post-grant stage of a patent application. This shows the potential of three of these key flexibilities in allowing continued generic production of medicines.[21]

4. Breaking of pharmaceutical monopoly by issuing first compulsory licence (12 March 2012)

On March 9, 2012, India's first compulsory license was granted by the Patent office to Nacto Pharma ltd[20] for producing generic version of Bayer corporation's patented medicine Nexavar, used in the treatment of Liver and Kidney cancer. The controller decided against Bayer on all the grounds enlisted in the Patents Act for the grant of compulsory license -

a) Reasonable requirements of the public not being satisfied;
b) Non –availability to the public at a reasonably affordable price,
c) Patented invention not being worked in the territory of India

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19 Applications dating from 1995 onward were received but were not examined on HIV/AIDS (UNAIDS) and civil society groups, defend 3(d) and point to India as a model for developing countries attempting to use TRIPS flexibilities to promote public health.

20 The Doha Declaration on the TRIPS Agreement and Public Health, clearly states every WTO member has the right "to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose".

21 Five Years into the Product Patent Regime: India's Response. UNDP, 2010, available at: *http://apps.who.int/medicinedocs/en/d/Js17761en/* (last visited on February 2, 2017).

Nacto was directed to pay 6 percent of the net sales of the drug as royalty to Bayer. Among other important terms and condition of the non assignable, non exclusive license were directions to Nacto to manufacture the patented drug only at their own manufacturing facility, selling the drug only within the Indian Territory and supplying the patented drug to at least 600 needy and deserving patients per year free of cost. Aggrieved by the Controllers decision, Bayer immediately moved to the Intellectual Property Appellate Board alleging that the grant of Compulsory license was illegal and unsustainable.[22] The Board rejected Bayers appeal holding that if stay was granted, it would definitely jeopardize the interest of the public who need the drug at the later stage of disease. It further held that the rights of access to affordable medicine was as much a matter of right to dignity of the patients and to grant stay at this juncture would affect them.[23]

5. Roche decides not to pursue its Patent on Trastuzumab (Herceptin) (August 2013)

Recent decision of Swiss drug major Roche has decided not to pursue its patent for anti-cancer drug Herceptin[24], the patent which had come up for extension till 2019, paving the way for generic drug makers to manufacture this drug. Trastuzumab, sold under the brand name of Herceptin, is used in breast-cancer treatment and costs close to Rs 1 lakh for a month. "Roche has come to the conclusion not to pursue Indian Patent No. 205534 (the secondary patent for Trastuzumab) and the related divisional applications to drop anti-cancer drug Herceptin patent in India is due to indirect pressure of granting compulsory licensing of Nexavar (sorafenib tosylate) to Natco. This decision creates easy availability of generic version of Nexavar to the millions of patients suffering from kidney and liver cancer. Bayer's product (Nexavar) costs Rs. 2.8 Laks for one month dose, where as Natco provides it at a price of Rs. 8880 for the dosage for a month and Cipla at a price of Rs.5400 for the dosage for a month.

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22 Bayer Corporation v. Natco Pharma Ltd., Order No. 45/2013 (Intellectual Property Appellate Board, Chennai), available at: *http://www.ipab.tn.nic.in/045-2013.htm* (last visited on February 2, 2017).

23 Compulsory licensing of Patents in India, available at: *http://www.ssrana.in/Intellectual %20Property/Patents/Patents-Compulsory-Licensing-in-India.aspx*, also see, The compulsory licence has been granted by India's Controller of Patents (the highest authority of the Indian Patent Office) to the generic company Natco for the eight years sorafenib tosylate will remain patented in India (until 2020), and against the payment of a royalty rate fixed at 6%. The order of the compulsory licence can be found here, available at: *http://www.ipindia.nic.in/ipoNew/compulsory_License_ 12032012.pdf* (last visited on February 4, 2017).

24 Hoffmann-La Roche AG is a Swiss multinational health-care company that operates worldwide under two divisions: Pharmaceuticals and Diagnostics. Roche decided to drop anti-cancer drug in India due to indirect pressure of granting compulsory licensing of Nexavar to Natco in 2013.

[25]This incidence has proved the strength of Indian Patent Act 2005, in which the definition of invention prevents ever greening[26]of patents. It is hoped that judicious use of the provisions of the Indian Patent Act 2005 will help to improve access to essential medicines.

However there is ample scope of getting more advantage in favour of India by framing proper legislation utilizing the existing provisions of the IPR legislation. This decision takes into account the strength of the particular rights and the Intellectual Property environment in India in general," Roche said it will continue to enforce all other patents in India and remains committed to working with the Indian government. Ensuring access to innovative medicines such as Herceptin is a complex issue and that significant progress will only be made through ongoing close collaboration between the government, industry and care providers without compromising intellectual property. Incidentally, Herceptin is the same drug which the health ministry had proposed for a compulsory licence under Section 92 of the Indian Patent Act, which allows government to revoke a patent during emergency situation. But the government had hesitated to revoke the patent because it didn't know if there were other Indian drug makers who were ready with the copy of this drug. Roche's decision of giving up its patent is a smart move, as there is no Indian company manufacturing this drug due to the complex science involved. So, even after giving up the patent, Roche will be the only company that will be manufacturing this drug. [27]

6. India put on the Office of the US Trade Representative's priority watch list of special 301 reports (2014/ 2017)

If a country is put under priority, the US administration focuses all its attention to make that culprit country fix its IPR regime. India is continued to be under pressure for having an "ineffectual" IPR policies and patents regime since Obama administration to even under the Donald Trump administration. Due to US pressure,

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[25] Roche not to pursue patent on breast cancer drug Herceptin, available at: *http://www.thehindubusinessline.com/companies/roche-not-to-pursue-patent-on-breast-cancer-drug-herceptin/article5026258.ece* (last visited on February 5, 2017).

[26] S. 3d of the *Indian Patent Act*, 2005, prevents "Ever greening," is the practice whereby pharmaceutical firms extend the patent life of a drug by obtaining additional 20-year patents for minor reformulations or other iterations of the drug, without necessarily increasing the therapeutic efficacy. However it has become a practice in the pharmaceutical industry where on one hand innumerable patients struggling to afford the high priced patented drugs, while on the other hand innovators struggling to give immortal value to their creation.

[27] Drug Information Bulletin, available at: *http://www.ipapharma.org/news/Drug%20Information%20Centre%20Bulletin%20Volume%207/Drug_Information_Bulletin_19_07.pdf* (last visited on February 6, 2017).

the Prime Minister Modi-led government rolled out a National IPR Policy in May, 2016 in conformity with the WTO and TRIPs as well but India had been consistently ranking poorly even in the IPR index.

Indian Patents Act prohibits "Ever greening" of patents. As a result, Novartis lost patent of anti-cancer drug "Glivec". United States Trade Representative (USTR) interprets that it creates obstacle to IPR of MNCs. India permitted a domestic company NATCO to produce cheaper generic version of Bayer Pharma's patented drug Nexvar. India's Drug Price Control Order 2013, permits that certain Indian manufactured drugs to be sold at higher price.Same relaxation not given to foreign companies. India is the top supplier of counterfeit pharmaceuticals to USA. Patent holder loses billions of dollars each year due to counterfeit / pirated products. Thus, India's IPR regime is not conductive for innovation by foreigners at least in USTR's interpretation, hence put under "Priority watch list" of Special 301 report.[28] Once again in April 2017, the US Trade Representative kept India, China and Russia on its "Priority Watch List" for inadequate improvement in IPR protection.[29]

7. Tatkal system reduce the period from 5-7 years to 18 months by March 2018

The government has amended rules and introduced several measures including a system similar to 'tatkal' to expedite examination of patent applications by start-ups as well as entities choosing India for the first filing of patent. This comes in the backdrop of 2.37 lakh patent applications pending in the country. The government is aiming to bring down the time period for initial examination of patent applications from the present 5-7 years to 18 months by March 2018. It had also announced the National IPR policy to push IPRs as a marketable financial asset and economic tool, promote innovation and entrepreneurships, while protecting public interest. Under this system applicants can opt for the expedited route to choose India as the competent authority to file their applications first in India. This move is to popularise India as a patent filing hub so that more companies file applications in India. Patent application filing at Indian Patent Office has been increasing consistently over the years which demonstrate the confidence of the global industry in the Indian patent ecosystem. Patent filings have increased by 10% in 2015-16 vis-à-vis 2014-15. India

[28] Special 301 Report, Priority List, Implication on India, Nexvar case, Compulsory License, Patent Ever greening, IPR protection, USTR explained , available at: *www.firstpost.com/world/united-states-us-priority-watch-list-ipr-pharma-2756774.html* (last visited on February 7, 2017).

[29] India likely to remain under 'priority watch list' in US IPR report, January 11, 2017, available at: *http://www.thehindubusinessline.com/economy/india-likely-to-remain-under-priority-watch-list-in-us-ipr-report/article9474144.ece* (last visited on February 7, 2017).

has taken strong steps in strengthening the patent system in the country. The Government aims at establishing a patent regime that is conducive to technological advances and is in line with its global commitments.[30]

8. New IPR Policy with the slogan 'Creative India, Innovative India.'

A total of 2.37 lakh patent applications and over 5.44 lakh trademark registrations were deemed as pending, some of these hanging fire for years.[31]The main reason for these pendency figures has been attributed to the shortage of manpower in the country's intellectual property offices. The unclogging of the pendency and quality examination are at the heart of improving the robustness of India's IPR system, something that the government has moved towards by announcing the country's first IPR policy. The new National Intellectual Property Rights policy seeks to put in place a legal framework that will encourage the IPR regime and reduce the time taken by the government to approve a trademark to a month by 2017. Currently, the process takes more than 12 months on an average.[32] The government's move to streamline the IP related laws under a single department is a big positive, considering that this will help in streamlining of the intellectual property framework in the country. As of 2014, India's spend on research and development (0.8 per cent of GDP) significantly lagged global counterparts such as China (1.9 per cent), Korea (3.8 per cent) and the US (2.7 per cent). In 2015, India ranked a dismal 29th out of 30 countries in the International IP Index released by the Global Intellectual Property Center of the US Chamber of Commerce, a ranking that measures the overall IP environment in a country. China was ranked 19th in the same list.[33]

9. Conclusion

TRIPS Agreement attempt the arduous task of balancing private and public rights. On one hand, it protects the interest of the pharmaceutical companies that invest heavily in R&D of Drugs and, on the other; it allows nations that belong to the WTO to promote public health in their respective countries. However, patents on

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[30] 2017 Special 301 Review, a 'tatkal' system to expedite patent examination, available at: *http://www.thehindu.com/business/Industry/now-a-tatkal-system-to-expedite-patent-examination/article8612218.ece* (last visited on February 8, 2017)

[31] India's Trade News and views (15 May to 31 May 2016), available at: *http://wtocentre.iift.ac.in/ebulletin/India%27s%20trdae%20News%20and%20Views-%2015%20May%20to%2031%20May%202016.pdf* (last visited on February 9, 2017)

[32] The policy, approved by the Cabinet last Thursday, nominates the Department of Industrial Policy and Promotion (DIPP) as the nodal agency for regulating intellectual property rights in the country.

[33] Intellectual Property Rights: New policy may power R&D, national growth, available at: *http://indianexpress.com/article/business/business-others/intellectual-property-rights-new-policy-may-power-rd-national-growth-2804419/ece* (last visited on February 10, 2017)

(ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both Covenants were adopted by the General Assembly in 1966, and entered into force in 1976. The two Conventions-the ICESCR and the ICCPR- offer generic protection of cultural, economic, social, civil and political rights. The Optional Protocols supplement both Covenants with additional rights.[3]

Aging was first recognized as a global challenge back in 1968, when the Government of Malta brought the demographic changes to the attention of the United Nations. After a period of research and data analysis, the global community decided to organize the first ever World Assembly on Ageing in 1982 in Vienna, Austria. The most important result of this period is the Vienna International Plan of Action on Ageing, which became the first set of guidelines for different stakeholders to help our society adapt to population aging. While member states began to introduce new goals in the local policies, the UN kept processing the data and developing a more in-depth vision for the needs of older persons and what measures would help meet these needs. It led to the creation of the next strategic document: the UN Principles for Older Persons. The Principles primarily provide a list of goals to promote the well-being of the elderly through social protection measures.[4]

From the 1980s to 2000s our population increased significantly (from 4.4 to 6 billion people), and population aging became a strong trend in many countries (primarily the European countries and Japan). The WHO turned its attention to the health problems of the elderly and issued a number of reports and recommendations to help people all over the world extend their healthy period of life. This is exactly when humanity reached understanding, that while population aging is a challenge with respect to healthcare and the economy, it also is a unique opportunity of growth as a great share of older people are able and willing to support social and economic development – if society is willing to remove some physical and political barriers limiting their activities.[5]

The Second World Assembly on Ageing took place in Madrid, in 2002, with the aim of evaluating the achievements promoted by Vienna Plan and to set new, more relevant goals. As a result, the Madrid Plan of Action on Ageing was developed under the lead of Dr. Alexandre Sidorenko. This plan offers a bold new agenda for handling the issue of aging in the 21st-century. Its focus is on three priorities: older

3 *Supra* note 1.

4 From Vienna to Madrid and Beyond: How the Priorities of the United Nations Related to Aging Changed Over Time available at: *http://www.leafscience.org/united-nations-1/* (last visited on 1 June 2017).

5 *Ibid.*

persons and development; advancing health and well-being into old age; and ensuring enabling and supportive environments. These priorities can be easily merged into one crucial message: inclusion.[6]

While the attention of the Madrid Plan of Action on Ageing is still mostly on social measures to promote well-being of the elderly, it also recognised the importance of more intensive scientific research on age-related diseases and development of new treatments and rehabilitation programs. The Madrid Plan remains the main source for policymakers around the world until now. However, moving forward, the recent World report on ageing and health (2015) by the World Health Organization, as well as the Global strategy and action plan on ageing and health (2016) and the new set of Sustainable Development Goals (notably, Goal 3, related to health improvement) start introducing the need for innovative medicines to counteract age-related diseases in the international agenda on aging.[7]

2. Key International Initiatives on the Status of Senior Citizens

A number of international treaties and instruments exists which refer to ageing or older persons. The terminology used to describe older persons varies considerably, even in international documents. It includes: "older persons", "the aged", "the elderly", "the third age", "the ageing" and, to denote persons more than 80 years of age, "the fourth age".[8] A brief description of these initiatives is given below:

2.1. The International Bill of Rights

As mentioned earlier, human rights are universal. They apply to all human beings everywhere, regardless of their sex, age, religious affiliation, disability, sexual orientation and other distinctions. Thus, the human rights of all people, including older persons are tacitly protected in the Bill of Rights. Though the human rights are spelled out in various international instruments produced under the auspices of the United Nations (UN), the Universal Declaration and Bill of Rights being the most influential and important.[9] Taken together, the UDHR, the ICESCR and the ICCPR with its two additional protocols m ake up what is generally referred to as the 'International Bill of Human Rights'.

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6 *Ibid.*

7 *Ibid.*

8 Committee on Economic, Social and Cultural Rights. General Comment No. 6 (1995) Adopted at the thirteenth session (39th meeting), on 24 November 1995, available at: *http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx* (last visited on 31 May 2017).

9 *Supra* note 1.

2.1.1. *Universal Declaration of Human Rights*

Although the Universal Declaration of Human Rights is technically a declaration, it is generally considered customary law, and thus legally binding. The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948.[10] The Universal Declaration on Human Rights states in Article 1 that 'all human beings are born free and equal in dignity and rights'. This equality does not change with age: older men and women have the same rights as people younger than themselves. Another important Article i.e. Article 22 of the UDHR states:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. [11]

The 1948 Universal Declaration of Human Rights, the founding human rights instrument of contemporary international human rights law, included in its provisions the first reference to elderly people's rights[12]. This reference can be found in Article 25(1), which states that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."[13]

2.1.2. *The International Covenant on Economic, Social, and Cultural Rights*

One of the most relevant international instruments regarding the current international status of elderly rights is the International Covenant on Economic, Social and

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10 The Universal Declaration of Human Rights, available at: *http://www.un.org.ua/en/publications-and-reports/global-un-publications/3721-the-universal-declaration-of-human-rights* (last visited on 29 May 2017).

11 Universal Declaration of Human Rights, available at: *www.un.org/en/universal-declaration-human-rights/index.html* (last visited on 29 May 2017).

12 Rodríguez- Pinzón, Diego and Claudia Martin. "The International Human Rights Status of Elderly Persons." *American University International Law Review* 18, No. 4 (2003): 915-1008, available at: *http://digitalcommons.wcl.american.edu/auilr* (last visited on 27 May 2017).

13 *Supra* note 11.

Cultural Rights ("ICESCR").[14] Important specific rights for older persons in the ICESCR are the work-related rights (Articles 6[15]–7[16]) and the rights to social security (Article 9)[17], to an adequate standard of living (Article 11)[18], to education (Article

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[14] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) of 16 December 1966, available at: *www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf* (last visited on 31 May 2017).

[15] *Id.*, *Art.* 6 reads: 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

[16] *Id.*, *Art.* 7 reads: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays"

[17] *Id.*, *Art.* 9 reads: The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance ion of world food supplies in relation to need.

[18] *Id.*, *Art.* 11 reads: 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

13)[19] and to the highest attainable standard of physical and mental health (Article 12)[20].

The supervisory body of the ICESCR is the Committee on Economic, Social and Cultural Rights. The Committee on Economic, Social and Cultural Rights (CESCR) is the body that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. The Committee was established

[19] *Id.*, *Art.* 13 reads:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
   (a) Primary education shall be compulsory and available free to all;
   (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
   (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
   (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
   (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

[20] *Id.*, *Art.* 12 reads: 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
   (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
   (b) The improvement of all aspects of environmental and industrial hygiene;
   (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
   (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant.[21]

In the Committee's General Comment 6 on the economic, social, and cultural rights of older persons, the Committee developed the most comprehensive legal analysis of the rights of the elderly currently existing at the international level. Adopted in 1995 by the Committee, General Comment 6 interprets the ICESCR in the context of older persons. General Comment 6 expands the scope of the ICESCR and provides insight into different mechanisms needed to protect the rights of elderly people worldwide. It has structural divisions that can serve as a blueprint for further analysis and elaboration of a comprehensive set of rights of the elderly. Additionally, the Committee issued several other General Comments that, altogether, provide an authoritative guide to understanding the scope of the ICESCR's provisions.[22]

In the preamble of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the States Parties to the Covenant recognizes that these rights are derived from the inherent dignity of the human person[23]. The International Covenant on Economic, Social and Cultural Rights does not contain any explicit reference to the rights of older persons, although article 9, dealing with "the right of everyone to social security, including social insurance", implicitly recognizes the right to old-age benefits. Nevertheless, in view of the fact that the Covenant's provisions apply fully to all members of society, it is clear that older persons are entitled to enjoy the full range of rights recognized in the Covenant. This approach is also fully reflected in the International Plan of Action on Ageing. Moreover, in so far as respect for the rights of older persons requires special measures to be taken, States parties are required by the Covenant to do so to the maximum of their available resources.[24] Article 2 of Part II of the Covenant states:

> The States Parties to the present Covenant undertake to guarantee that the rights enumerated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [25]

An important issue dealt by the Committee on Economic, Social, and Cultural Rights

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21 Committee on Economic, Social and Cultural Rights. Available at: *http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx* (last visited on 2 June 2017).

22 *Supra* note 12

23 *Supra* note 14.

24 *Supra* note 8.

25 *Supra* note 14.

was whether discrimination on the basis of age was prohibited by the Covenant. The Committee ("CESCR") stated that neither the Covenant nor the Universal Declaration of Human Rights refers explicitly to age as one of the prohibited grounds. Rather than being seen as an intentional exclusion, this omission is probably best explained by the fact that, when these instruments were adopted, the problem of demographic ageing was not as evident or as pressing as it is now. This is not determinative of the matter, however, since the prohibition of discrimination on the grounds of "other status" could be interpreted as applying to age. The Committee noted that it might not yet be possible to conclude that discrimination on the grounds of age is comprehensively prohibited by the Covenant, the range of matters in relation to which such discrimination can be accepted is very limited. [26] Another important Article i.e. Article 12 given in Part III states:

> the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[27]

The right to health in all its forms and at all levels contains the four interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party. The four elements are availability, accessibility, acceptability and quality. *Availability* refers to the availability of functioning public health and health-care facilities, goods and services, as well as programmes, in sufficient quantity within the State party. *Accessibility* includes non-discrimination, physical, economical and informational accessibility of health facilities, goods and services. Thirdly, the notion of *acceptability* states that all health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned. Finally, *quality* refers to the scientifically and medically appropriate and good quality of health facilities, goods and services.[28]

With regard to the realization of the right to health of older persons, the Committee reaffirms the importance of an integrated approach, combining elements of preventive, curative and rehabilitative health treatment. Such measures should be based on periodical check-ups for both sexes; physical as well as psychological

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26 *Supra* note 8.

27 *Supra* note 14.

28 Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights General Comment No. 14 (2000), available at: *data.unaids.org/.../ecosoc_cescr-gc14_en.pdf* (last visited on June 2, 2017).

rehabilitative measures aimed at maintaining the functionality and autonomy of older persons; and attention and care for chronically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity[29].

The Committee also provides in its General Comment 14 that any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should address violations of the right to health.[30]

General Comment 6 recommended that while interpreting Article 12 of the Covenant, States parties should take account of the content of recommendations 1 to 17 of the Vienna International Plan of Action on Ageing, which focus entirely on providing guidelines on health policy to preserve the health of the elderly and take a comprehensive view, ranging from prevention and rehabilitation to the care of the terminally ill.[31]

2.1.3. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) elaborates on the rights outlined in the Universal Declaration of Human Rights and include some additional rights, such as those of minorities and detainees. It covers a vast array of political and civil rights, including freedom of conscience and religion; the right to a fair trial; freedom from torture; and the right to remedy for violations of rights in the Covenant.[32]

Certain provisions in civil and political human rights instruments confer rights to the elderly exclusively on the basis of their age. Specifically, **Article 6 of the Covenant states that** every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.[33] **Article 7 provides that** no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.[34] In the ICCPR, 'participation rights' of

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29 *Ibid.*
30 *Ibid.*
31 *Supra* note 8.
32 *Supra* note 1.
33 International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI) of 16 December 1966, *Art.* 6, available at: *http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx* (last visited on June 2, 2017).
34 *Id., Art.*7.

special concern for older persons are the commitment of states to ensure freedom of expression, assembly and association.[35] Article 25 recognises the right of all to participate in the affairs of their own country.[36] Article 26 states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. The article includes race, colour, sex, language, religion, origin 'or other status' as prohibited grounds of discrimination.[37] 'Age' is not mentioned explicitly, yet might be said to be included in the 'and other status'. Furthermore, Article 5(1) in both the ICESCR and the ICCPR imposes obligations on individuals and reads as follows:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Thus, the International Bill of Rights instruments— the UDHR, the ICCPR and the ICESCR make only indirect reference to specific groups. Overall, in binding international law, there are instruments that recognise the human rights of all people, including implicit obligations towards older persons, which apply to signatory states and their citizens. However, the rights of older persons are protected very generally in the Bill of Rights and are otherwise scattered across some, but not by any means all, other core international human rights instruments. No treaty offers older persons a tailored, comprehensive and binding protection of their rights[38].

2.2. Treaties

The first United Nations human rights convention to explicitly affirm age as a prohibited basis for discrimination was the Convention on the Elimination of All Forms of Discrimination against Women, proscribing the discrimination against women in relation to their access to old age subsidies.[39] The Committee on the Elimination of Discrimination against Women has devoted particular attention to the situation of older women in relation to violence, education, illiteracy and access to social benefits in its concluding observations on the reports of various States parties. In 2000, as a contribution to the World Assembly on Ageing in Madrid, the

35 *Id., Arts.* 18,19,21
36 *Id., Art.* 25
37 *Id., Art.* 26
38 *Supra* note 1.
39 Convention on the Elimination of All Forms of Discrimination Against Women, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, *Art.* 11(1)(e). available at: *http://www.un-documents.net/cedaw.htm* (last visited on June 2, 2017).

Committee adopted decision 26/III, which is based on a systematization and further development of its jurisprudence regarding older women.[40]

In 2009, the Committee published a concept note on its draft general recommendation on older women and the protection of their human rights (CEDAW, 2009). In that note, the Committee acknowledges that changes in population structures have profound human rights implications and increase the urgency of addressing discrimination experienced by older women through the Convention, given that there is no other legally binding international human rights instrument to specifically address these issues. [41]

On 19 October 2010, the Committee on the Elimination of Discrimination against Women adopted general recommendation No. 27 on older women and the protection of their human rights. Its purpose is to identify the multiple forms of discrimination experienced by older women and to provide guidance concerning States parties' obligations under the Convention with regard to women's rights and the need to ensure that people are able to age with dignity. It also makes policy recommendations concerning the mainstreaming of responses to the concerns of older women into national strategies, development initiatives and positive action so that older women can participate fully without discrimination and on the basis of equality with men. Guidance is also provided to States parties on the coverage of older women's situation in the reporting process on the Convention.[42]

The scope of prohibited discrimination on the basis of age was subsequently widened by the Convention on the Protection of the Rights of Migrant Workers and their Families,[43] and, subsequently, by the Convention on the Rights of Persons with Disabilities, in relation to such issues as the elimination of prejudices, stereotypes, and harmful practices; access to justice, or the protection against exploitation, violence and abuse.[44] Together with these specific references in United Nations

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40 United Nations Report of the Committee on the Elimination of Discrimination against Women on its twenty-sixth session, (General Assembly, 2002), available at: *www.unicef.org/.../Reporting /CEDAW_Barbados_2002.pdf* (last visited on June 2, 2017).

41 Sandra Huenchuan and Luis Rodríguez-Piñero "Ageing and the protection of human rights: current situation and outlook" Economic Commission for Latin America and the Caribbean (ECLAC), available at: *social.un.org/ageing-working-group/documents...* (last visited on November 26, 2017).

42 *Ibid.*

43 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Adopted by General Assembly resolution 45/158 of 18 December 1990, Article 1, available at: *http://www.un-documents.net/a45r158.htm* (last visited on June 2, 2017).

44 Convention on the Rights of Persons with Disabilities, adopted by General Assembly resolution 61/106 of 13 December 2006, *Arts.* 1, 8, 13, 16. Available at: *http://www.un-documents.net/a61r1 06.htm* (last visited on June 2, 2017).

human rights treaties, the rights of older persons have been repeatedly affirmed in numerous resolutions by the General Assembly. These instruments, often group under the label of "soft law," have obviously a legal status that differs from treaties. However, this does not entail that they lack juridical relevance. In as much as they have been adopted by the highest representative body of the United Nations, and with a view to expressing the common concerns, commitments and aspirations of the international community regarding the rights of the older persons, these instruments should be seen as authoritative reflections of an emerging normative consensus regarding the minimum contents of those rights under international law.

2.3. The Vienna International Plan of Action on Ageing

In addition to the International Bill of Rights and the core human rights treaties, there are many other universal instruments relating to rights of older persons. The first initiative to place ageing on the United Nations agenda was a draft declaration on old-age rights that the Government of Argentina submitted to the General Assembly in 1948. The text contained several articles that referred to rights of older persons to assistance, housing, food, clothing, health care, recreation and work as well as "stability" and "respect". Although it was not adopted, the issue itself stayed on the UN agenda and two years later the United Nations Secretariat produced the report "Welfare of the aged: old-age rights".[45]

Attention to the consequences of population ageing was renewed at the UN in 1969 when the Government of Malta submitted the topic to the General Assembly. Debate on the economic and social consequences of ageing ensued in the 1970s. In 1978, the General Assembly decided to convene the first world assembly devoted to the issues of ageing, as a step toward formulating an international action plan on ageing that would address the needs and demands of older persons as well as analyze relationships between population ageing and economic development. Consequently the first World Assembly on Ageing was held in Vienna in 1982 and adopted the Vienna International Plan of Action on Ageing. The recommendations of that Plan, together with legal mandates stemming from such United Nations legislative and consultative bodies as the General Assembly, the Economic and Social Council as well as Commission for Social Development, put the range of issues of older persons firmly on the international agenda.[46]

The Vienna Plan was the first international instrument for action on development

[45] Sergei Zelenev, "The Madrid Plan: A Comprehensive Agenda for an Ageing World", available at: *www.un.org/esa/socdev/ageing/documents/publications/*. (last visited on 21 November 2013).

[46] *Ibid.*

issues of ageing. It identified three priority areas: (a) the sustainability of development in a world where the population is increasing in age; (b) the maintenance of good health and well-being to an advanced age; and (c) the establishment of an appropriate and supportive environment for all age groups. The purpose of the Vienna Plan was to help Governments in formulating their policies on ageing, by guiding national and international efforts and strengthening capacities of Governments and civil society organizations to deal effectively with demographic ageing.[47] In its 62 recommendations for action, the Vienna Plan included many recommendations addressing research, data collection and classification, training for specialists in different fields related to aging and education. The importance of some sectoral areas was also underlined: health and nutrition, protection of elderly consumers, housing and environment, family, social welfare, income security, employment and so on.[48]

The Vienna Plan raised awareness on ageing issues around the world. In its wake several regional plans of action on ageing were adopted, coordinated by the United Nations regional commissions. They boosted efforts to (a) analyze the existing situation in the regions, (b) identify regional priorities for improving the situation of older persons in forthcoming decades and (c) propose measures and initiatives for the consideration of the respective Governments. The regional plans generally recognized that the increase in the proportion of older persons in the population has economic, social and political ramifications that must be addressed, taking into account regional and national circumstances.[49]

2.4. United Nations Principles for Older Persons

In 1991, the United Nations issued its Implementation of the International Plan of Action on Ageing and Related Activities, which contains the United Nations Principles for Older Persons encouraging Governments to incorporate the 18 principles into their national programmes whenever possible. **To add life to the years that have been added to life, the United Nations General Assembly adopted the following Principles for Older Persons on 16th December 1991.**[50] The Principles are divided into five sections which correlate closely to the rights recognized in the Covenants. The five sections are: independence, participation, care,

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47 *Ibid.*

48 *Supra* note 4.

49 *Supra* note 45.

50 G.A. Res. 46/91, U.N. GAOR, 46th Sess., 74th plen. mtg., Annex 1 paras.1-18, U.N. Doc. A/RES/46/91 (1991). Available at: *http://www.un.org/documents/ga/res/46/a46r091.htm* (last visited on 26 May 2017).

self-fulfillment and dignity. "Independence" includes access to the basic provisions of food, water, shelter, clothing, and health care. To these basic rights are included the opportunity to work or access to other income-generating opportunities, to participate in determining when and at what pace withdrawal from the labour force takes place. It also includes access to appropriate educational and training programmes as well as the ability to live in environments that are safe and adaptable to personal preferences and changing capacities. Under "Participation" it is stated that older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations. It also refers to their ability to seek and develop opportunities for service to the community and to serve as volunteers in positions appropriate to their interests and capabilities as well as their ability to form movements or associations of older persons.[51]

"Care" proclaims that older persons should enjoy- human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives. Older persons should benefit from family and community care and protection in accordance with each society's system of cultural values and should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well- being and to prevent or delay the onset of illness. They should have access to social and legal services to enhance their autonomy, protection and care and should be able to utilize appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment. With regard to "Self-fulfillment", the Principles state that older persons should be able to pursue opportunities for the full development of their potential and have access to the educational, cultural, spiritual and recreational resources of society. Lastly, the section entitled "Dignity" states that older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse. Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.[52]

2.5. Proclamation on Ageing

There are two other relevant United Nations documents which address elderly issues:

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51 *Ibid.*
52 *Ibid.*

the 1992 General Assembly Resolution on 2001 global targets on the ageing[53] and the Proclamation on Ageing.[54] The Proclamation urged states to consider appropriate national policies and programmes for the elderly as part of overall development strategies and to view older persons as contributors to their societies and not as a burden. It urged to give support to older women for their "largely unrecognized contributions to society," to encourage older men to develop social, cultural and emotional capabilities which they may have been prevented from developing during breadwinning years, to support families who are providing care to older persons, and to expand international cooperation strategies in order to reach global targets. It also proclaimed 1999 as the International Year of Older Persons "in recognition of humanity's demographic coming of age and the promise it holds for maturing attitudes and capabilities in social, economic, cultural and spiritual undertakings, not least for global peace and development in the next century".[55]

The objective of the Year is to raise awareness of the fast-changing demographic picture of older persons globally, to stimulate debate, promote action strategies, and encourage research and information exchange. The situation of older persons and its impact on a country's resources call for immediate study and solutions.[56] The General Assembly named the theme of the year "towards a society for all ages", echoing the theme of a "society for all" that had been proposed earlier that year at the World Summit for Social Development at Copenhagen. In its resolution on the matter, the General Assembly noted that the concept of a society for all ages has four interlocking dimensions:

- the situation of older persons
- life-long individual development
- multigenerational relationships
- the relationship between the ageing of populations and development[57]

In that perspective, the situation of older persons cannot be considered separately from the scope of long-term opportunities that society allows them. The key is seeing the "life course" in its progressions from childhood through old age, recognizing that

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53 G.A. Res. 47/86, U.N. GAOR, 47th Sess., 89th plen. mtg., U.N. Doc.A/RES/47/86 (1992). Available at: *http://www.un.org/documents/ga/res/47/a47r086.htm* (last visited on May 26, 2017).

54 G.A. Res. 47/5, U.N. GAOR, 47th Sess., 42nd plen. mtg., Annex 1, U.N. Doc. A/RES/47/5 (1992), available at: *http://www.un.org/documents/ga/res/47/a47r005.htm* (last visited on May 26, 2017).

55 *Ibid.*

56 UN to observe 1999 as International Year of Older Persons press Release SOC/4473 available at: *http://www.un.org/press/en/1998/19980928.soc4473.html* (last visited on May, 26, 2017).

57 *Supra* note 45.

older people are not simply a homogenous group but individuals whose individual diversity tends to increase with age.[58] Discussion of the notion of an "inclusive society" has placed it among the fundamental goals of "society for all" where "everyone, every individual, each with rights and responsibilities, has an active role to play". By adding the age dimension to the concept, Member States emphasized the comprehensive and interdependent nature of such an approach whereby "the generations invest in one another and share in the fruits of that investment, guided by the twin principles of reciprocity and equity."[59]

Public interest in the International Year of Older Persons and its political message reverberated world-wide, generating responses to issues of ageing long after the event. The theme of a society for all ages inspired preparations for the Second World Assembly on Ageing, held three years later at Madrid. Seemingly the world was beginning to recognize that "the ageing of societies in the twentieth century, unprecedented in the history of humankind, is a major challenge for all societies and requires a fundamental change in the way in which societies organize themselves and view older persons."[60]

2.6. Role of International Labour Organization

The International Labour Organization (ILO) too has addressed the issue of age on several occasions. For example, the Older Workers Recommendation, 1980 (No. 162), regulates the issue of age discrimination. This instrument contains useful definitions, as well as a strong statement about equality of opportunity and treatment for older workers. Moreover, Article 5(2) of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) permits special measures for satisfying the needs of people who are generally recognized as needing special protection or assistance for reasons such as age. In this connection one ought also to mention the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), which requires ratifying States to guarantee equal treatment for all people protected against unemployment, including the elderly. There is also the Human Resources Development Recommendation, 1975 (No. 150), which lists measures for older workers as a way of promoting equality in training and employment. And, finally, the Termination of Employment Recommendation, 1982 (No. 166), which states that age may only constitute a valid motive for termination subject to national law and practice regarding retirement. More recently, there has been (on-going)

58 *Ibid.*
59 *Ibid.*
60 *Ibid.*

debate in the ILO concerning the rights of older workers. The ILO Governing Body has considered the possibility of adding "age" to the prohibited grounds of discrimination in a Protocol to the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (ILO, 2002a, para. 25). One should also mention the ILO's contribution to the Second World Assembly on Ageing (Madrid, April 2002): *An inclusive society for an ageing population: The employment and social protection challenge* (ILO, 2002b).[61]

2.7. The Madrid International Plan of Action on Ageing

In April 2002, the United Nations revisited the rights of the elderly at the Second World Conference on Ageing in Madrid, and reviewed the recommendations adopted in the Vienna Plan. The Conference resulted in the International Plan of Action ("the Madrid Plan"), adopted by 159 countries and calling for the promotion and protection of all human rights and fundamental freedoms, including the right to development, the need to include ageing in global agendas, and the need to combat discrimination based on age.[62] India is a signatory to this Madrid Plan (MIPAA) that sets an agenda for formulating and implementing public policies on ageing and influencing the direction and priorities for scientific gerontology in the coming decades.[63]

The Madrid International Plan of Action on Ageing is the second internationally agreed programme to offer recommendations and guidance to countries seeking to develop and implement policies and programmes on ageing. It reflects the changes that took place over twenty years in the situation of older persons around the world, and represents an evolution in the approach to social policy, to the ageing of societies and to older persons.[64]

2.7.1. Background of Madrid International Pan of Action on Ageing (1982)

The first plan of action on ageing, the Vienna International Plan of Action, was adopted by Member States in 1982 at the first World Assembly on Ageing. At that time, it was already apparent in developed countries that populations were ageing,

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61 Gideon Ben-Israel and Ruth Ben-Israel, "Senior citizens: Social dignity, status and the right to representative freedom of organization" 141 *Int'l Lab. Rev.* 253 (2002), available at: *http://heinonline.org* (last visited on October 14, 2013).

62 *Supra* note 12.

63 S. Siva Raju. "Studies on Ageing in India: A Review". BKPAI Working Paper No. 2, United Nations Population Fund (UNFPA), New Delhi, (2011), available at: *isec.ac.in/BKPAIWorking paper2.pdf* (last visited on July 2, 2015).

64 The Madrid International Plan of Action on Ageing Guiding Framework and Toolkit For Practitioners & Policy Makers, available at: *https://www.un.org/ageing/documents/building_natl_capacity/guiding.pdf* (last visited on October 21, 2013).

while the issue remained on the distant horizon in most developing countries. As a result, the Vienna Plan of Action concentrated on two facets of population ageing – humanitarian (responding to the specific needs of older persons) and macro-economic or demographic (the implications of an ageing population for socio-economic policy) – with the latter focusing on general concepts meant to ensure that older persons did not become a drain on national resources. In addition, given the demographic situation and approach to social policy at the time, the Vienna Plan focused on policies in developed countries that tended toward a welfare orientation. Implementation of the Vienna Plan of Action was uneven – particularly in developing countries with high rates of poverty and limited resources. Surveys and anecdotal evidence revealed that, although many developing countries adopted policies, programmes, principles, and even plans of action for older persons, many of these instruments remained unimplemented because of, among other things:

- lack of capacity at many levels: lack of skills, insufficient financial or human resources, low levels of organizational and institutional capacity;
- low political priority given to ageing issues, which affected the ability to implement policies and programmes that were adopted.

Over the twenty years that elapsed between the adoption of the Vienna Plan in 1982 and the Madrid International Plan of Action on Ageing in 2002, many things changed, including:

- the ageing of populations had become much more apparent in developing countries, and at a speed much greater than that experienced by developed countries;
- new approaches to development policy (for example, participation of stakeholders, self-help, mainstreaming etc.); and,
- a transformed economic and social landscape that has brought about policy changes.

These issues were the main driving force behind the decision by Member States to prepare a new Plan of Action, the Madrid International Plan of Action on Ageing (MIPAA). The Madrid Plan of Action on Ageing provided a fresh perspective on the situation of older persons and presented a new global agenda to address issues of ageing. In acknowledging the demographic revolution taking place in countries all over the world, the Plan of Action called for a new approach to ageing policies and programmes that would promote a society for all ages. The MIPAA differs from the Vienna Plan in that it (a) focuses more on developing countries, particularly due to

the expected increase in the number of people aged 60 years or older in those countries during the first half of this century; and it (b) emphasizes inclusion of older persons in deciding policies rather than having policies designed for them.

The Madrid Plan of Action moved from description to analysis. The goal for ageing policy became to ensure that older persons were "mainstreamed" into overall policy, not treated as a separate group in need of remedial care. Thus, policies should not be simply concerned with the welfare of older persons, or the allocation of resources, but should recognize the important role that older persons continue to play in societies, and that bias against them can affect the outcome of the policies themselves. The participation and empowerment of older persons – recognizing older persons as an untapped resource for society – became the centre of much of the debate in the early to late 1990s and is captured in the Madrid Plan of Action.

However, in developing countries and countries with economies in transition, where policies and programmes that specifically apply to older persons may be limited or, indeed, non-existent, mainstreaming should perhaps occur not at the level of the work programmes of individual ministries, but at the level of overall national development plans and policies to make a start on the inclusion of older persons and ageing at the national policymaking level first.[65]

2.7.2. Brief Summary of Madrid International Plan of Action on Ageing

Madrid international plan of action on ageing is a 16,000- word document calling for changes in attitudes, policies and practices at all levels in all sectors, so that the 'enormous potential' of ageing in the twenty-first century may be fulfilled. The Madrid Plan lists 33 objectives and 117 concrete recommendations, grouped into three priorities:

1. Older persons and development
2. Advancing health and wellbeing into old age
3. Enabling and supportive environments.

Together, the priorities cover 18 areas of concern to older people. The Plan concludes with a section on implementation and follow-up. An accompanying Political Declaration summarises the key issues and commitments by governments, which are detailed in the Plan. The Plan is intended to be used as a practical tool to assist policy makers to focus on the key priorities associated with individual and population ageing. A society for all ages. The Plan sets out a vision and values for a society for all ages. It

[65] *Ibid.*

calls for changes in attitudes, policies and practices, so that the enormous potential of ageing may be fulfilled. It stresses older people's right to development, calls for an end to age discrimination, and emphasises the need to mainstream ageing into global development agendas. [66]

The stated aim of the Plan is to ensure that people everywhere can age with security and dignity, and continue to participate in their societies as citizens with full rights. The Plan calls for governments to place the specific contributions and concerns of older people in the context of the major United Nations conferences and summits, special sessions of the General Assembly and review follow-up processes. Implementing the agreements reached at these events would enable older people to contribute fully and benefit equally from development. The Plan describes as essential the promotion and protection of all human rights and fundamental freedoms, including the right to development; combating discrimination based on age, and promoting the dignity of older people; mainstreaming ageing into global agendas; and recognising the ability of older people to contribute to society. The Plan urges governments to embrace the potential of the ageing population as a basis for future development.[67]

The first priority includes recommendations regarding the development and implementation of policies to ensure economic and social protection for older people, to ensure gender equality in social security systems, and to establish social security systems for older persons who lack other sources of income. The Madrid Plan also highlights the vulnerability of older persons during emergency situations, emphasizing their need to access food, shelter, and medical care, and recommends protecting and assisting older persons through concrete measures taken in situations of armed conflict and foreign occupation. The second priority focuses on health promotion, the need to ensure universal and equal access to health- care services, and the mental health needs of older people. Finally, the third priority includes recommendations with regard to the availability of services, and the affordability, accessibility, and cultural adequacy of the right to housing. The Madrid Plan also calls for the elimination of neglect, abuse, and violence toward older people. [68]

The Madrid Plan includes recommendations aimed at implementation and follow-up. At the national level, the plan places the primary responsibility with national governments. At the international level, the United Nations Department of Economic

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66 MIPAA Folder pdf, available at: *www.helpageindiaprogramme.org/other/Publications/Mippa.* (last visited on September 27, 2013).

67 *Ibid.*

68 *Supra* note 12.

and Social Affairs is responsible for facilitating and promoting the plan, the regional commissions are responsible for translating the plan into regional action plans.'[69]

The Madrid Plan made provision not only for international and national implementation but also for its systematic review. The United Nations Commission for Social Development reviews and appraises the Madrid Plan every five years and encourages Member States and the Regional Commissions to evaluate both ageing-specific policies and ageing mainstreaming efforts.[70]

2.7.3. Follow-up to the Second World Assembly on Ageing

Another important step is the 2011 Report of the Secretary- General to the General Assembly on the follow-up to the Second World Assembly on Ageing, the first report to focus entirely on the human rights situation of older persons. The report highlighted four clearly identifiable human rights challenges for older people across the globe: discrimination; poverty and inadequate living conditions; violence and abuse against older people; and lack of special measures, mechanisms and services for older people. The United Nations Secretary-General's report on the follow-up to the Second World Assembly on Ageing acknowledges the steps taken by some governments in designing or piloting policies in the health, social security or welfare systems. However, the report also notes that the pace of progress is insufficient in light of the urgency of the challenges[71]

2.8. Active Ageing: A Policy Framework

The idea of active ageing emerged as an attempt to bring together strongly compartmentalized policy domains in a coherent way. In 2002, the World Health Organization (WHO) released *Active ageing: a policy framework.* This framework defined active ageing as "the process of optimizing opportunities for health, participation and security to enhance quality of life as people age". It emphasizes the need for action across multiple sectors and has the goal of ensuring that "older persons remain a resource to their families, communities and economies". The WHO policy framework identifies six key determinants of active ageing: economic, behavioural, personal, social, health and social services, and the physical environment. It recommends four components necessary for a health policy response:

a) prevent and reduce the burden of excess disabilities, chronic disease and

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69 *Ibid.*

70 Ageing in the Twenty-First Century: A Celebration and A Challenge UNFPA report 2012 available at: *www.unfpa.org/publications/ageing-twenty-first-century* (last visited on 15 May 2017).

71 *Ibid.*

premature mortality;

b) reduce risk factors associated with major diseases and increase factors that protect health throughout the life course;

c) develop a continuum of affordable, accessible, high-quality and age-friendly health and social services that address the needs and rights of people as they age;

d) provide training and education to caregivers.[72]

2.9. Other Key Initiatives

The United Nations is taking steps to strengthen older people's rights and making a rights-based approach to elder abuse more visible. The United Nations established the Open-ended Working Group on Ageing (OEWG), the first dedicated body created by the international community to address the human rights situation of older men and women and to consider a stronger protection regime.[73] The Open-Ended Working Group on Ageing was established by the General Assembly by resolution 65/182 on 21 December 2010. The working group considers the existing international framework of the human rights of older persons and identify possible gaps and how best to address them, including by considering, as appropriate, the feasibility of further instruments and measures.[74]

Another encouraging step is the approval by the United Nations of World Elder Abuse Awareness Day as an International day on 15 June which was celebrated for the first time in 2012. This represented the culmination of a multi-year campaign initiated by the International Network for the Prevention of Elder Abuse in 2006. It publicized activities around the world to raise awareness and promote public education on elder abuse. Elder abuse is a global social issue which affects the health and human rights of millions of older persons around the world, and an issue which deserves the attention of the international community. The United Nations General Assembly, in its resolution 66/127, designated June 15 as World Elder Abuse Awareness Day. It represents the one day in the year when the whole world voices its opposition to the abuse and suffering inflicted to some of our older generations.[75]

In 1990 also, the General Assembly designated 1 October as the International Day for the Elderly, later renamed the International Day of Older Persons, which was

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72 World-Report-on-Ageing-and-Health 2015, available at: *https://www.scribd.com/document/341765755/World-Report-on-Ageing-and-Health* (last visited on July 1, 2017).

73 *Supra* note 70.

74 The Open-Ended Working Group on Ageing, available at: *https//social.un.org/ageing-working-group/index.shtml* (last visited on May 22, 2017).

75 World Elder Abuse Awareness Day 15 June, available at: *http://www.un.org/en/ events/elderabuse/* (last visited on July 2, 2017).

celebrated for the first time the following year. The Day has become an annual event in most countries, with varied activities organized in conjunction with the official commemoration[76].

3. Current Response to the International legal and policy frameworks

Two international policy instruments have guided action on ageing since 2002: the Political declaration and Madrid International Plan of action on ageing and the World Health Organization's Active ageing: a policy frame-work. These documents sit within the context of an international legal framework a□orded by human rights law. They celebrate rising life expectancy and the potential of older populations to act as powerful resources for future development. They highlight the skills, experience and wisdom of older people, and the contributions they make. They map a broad range of areas where policies can enable these contributions and ensure security in older age. Each document identifies the importance of health in older age, both in its own right and for the instrumental benefits of enabling the participation of older people and the benefits that this, in turn, may have on health. However, little detail is given on the systemic changes necessary to achieve these goals.

A global review of national policies and legislation, data and research and institutional arrangements relating to older persons was carried out by UNFPA and HelpAge International in 2010/11. This review was based on information obtained from 133 countries on age-specific policy changes and detailed case studies of 32 countries focusing on ageing-mainstreaming activities. A review of reports from the United Nations Department of Economic and Social Affairs (UNDESA) was also undertaken. These global reviews show that there has been important progress in various areas. The review also points to significant differences in responses to ageing between developed and developing countries. Developed countries have concerns about rising costs of health care, provision of long-term care.[77]

Since 2002, at least 57 countries have approved and published national policies, plans, programmes or strategies on ageing and/or older people. Ten have pending drafts or proposals for such policies which are awaiting approval. In those countries where no evidence for a policy, plan, programme or strategy was found, evidence for the inclusion of specific articles on older people, old age or ageing within their national constitution was found for 11 countries. At least 17 countries including India have

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76 UN to observe 1999 as International year of older persons Press Release SOC/4473, available at: *http://www.un.org/press/en/1998/19980928.soc4473.html* (last visited on 26th May, 2017).

77 *Supra* note 70.

approved age-specific legislation since 2002. Despite observing progress in policy development, the review points out that there is still scant evidence of resource allocation to support implementation of policies on ageing. A better way of reviewing implementation would be to check directly with the "user", as the bottom-up approach to review and appraisal of the Madrid Plan recommends. One clear recommendation for the future is for reporting on the provisions of the Madrid Plan to be focused more specifically on older people.[78]

In preparation for an analysis of progress in implementing the Madrid Plan in the region, Economic and Social Commission for Asia and the Pacific (ESCAP) conducted a survey of governments in 2011 on the development of policies and programmes concerning older people over the past decade. To date, 21 countries – Australia, Bangladesh, Cambodia, China, Fiji, India, Indonesia, Japan, Lao People's Democratic Republic, Malaysia, Maldives, Mongolia, New Zealand, Nepal, Republic of Korea, the Philippines, Samoa, Sri Lanka, Thailand, Turkey and Viet Nam – have introduced national policies on older persons. Twelve countries – China, Democratic People's Republic of Korea, India, Indonesia, Japan, Mongolia, Nepal, the Philippines, Republic of Korea, Sri Lanka, Thailand and Viet Nam – have passed national laws on older persons. Eight countries – Indonesia, Kiribati, Palau, Papua New Guinea, Singapore, Sri Lanka, Thailand and Viet Nam – have established special bodies on ageing within ministries.

As far as the health policy is concerned, a recent review of the progress made globally since 2002, covering more than 130 countries, noted that "there is low priority within health policy to the challenge of the demographic transition"; "there are low levels of training in geriatrics and gerontology within the health professions, despite increasing numbers of older persons"; and "care and support for caregiver is not a priority focus of government action on ageing". This lack of progress, occurring despite clear opportunities for action, is doubly important because population ageing is inextricably linked with many other global public-health agendas, particularly in relation to universal health coverage, non communicable diseases and disability, as well as the post-2015 development agenda and specifically the Sustainable Development Goals. Without considering the health and well-being of older adults, many of these agendas do not make sense or will simply be unachievable.[79]

One of the key challenges is the fact that elder abuse is an enormously sensitive issue, as it involves people in positions of confidence – family members, officials and the

78 *Ibid.*
79 *Supra* note 72.

wider community. Older people generally do not wish to speak about such experiences as they are seen as a threat to the repute of the family or they are embarrassed at being subjected to cruel conduct and demoralized by their own children or other relatives. Elder abuse is an important public health problem. A 2017 study based on the best available evidence from 52 studies in 28 countries from diverse regions, including 12 low- and middle-income countries, estimated that, over the past year, 15.7% of people aged 60 years and older were subjected to some form of abuse. This is likely to be an underestimation, as only 1 in 24 cases of elder abuse is reported, in part because older people are often afraid to report cases of abuse to family, friends, or to the authorities. Consequently, any prevalence rates are likely to be underestimated. Although rigorous data are limited, the study provides pooled prevalence estimates of number of older people affected by different types of abuse:

- psychological abuse: 11.6%
- financial abuse: 6.8%
- neglect: 4.2%
- physical abuse: 2.6%
- sexual abuse: 0.9%[80]

A survey was carried out in 2014 to identify symptoms of Elder Abuse in 12 cities across India with sample size of 100 elders per city with equal ratio of male & female. Across the cities, 50% of the elders admitted to having personally experienced abuse, though 83% of all elders surveyed, are of the view that it is prevalent in society. About 72% of those who experienced abuse belong to the age group 60-69 years while 25% belong to age group 70-79 years. Facing abuse was reported more by females (53%) than males (48%). Elders across cities were asked about the abusers within their family. The Daughter-in-law (61%) and Son (59%) emerged as the top most perpetrators. This is a trend that is continuing from the previous years. Not surprisingly, 77% of those surveyed, live with their families [81]

Globally, the number of cases of elder abuse is projected to increase as many countries have rapidly ageing populations whose needs may not be fully met due to resource constraints. It is predicted that by the year 2050, the global population of people aged 60 years and older will more than double, from 900 million in

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[80] Elder abuse Fact sheet Updated June 2017, available at: *http://www.who.int/mediacentre/factsheets/fs357/en/* (last visited on July 18, 2017).

[81] The State of Elderly in India Report 2014, Help Age India, available at: *www.helpageindia.org/images/pdf/state-elderly* (last visited on July 1, 2017).

2015 to about 2 billion, with the vast majority of older people living in low- and middle-income countries. If the proportion of elder abuse victims remains constant, the number of victims will increase rapidly due to population ageing, growing to 320 million victims by 2050.[82]

4. Conclusion

Each state also has its own local plan of action. Governments have a tendency to provide more thoughtfulness and resources to those groups that consist of the major segment of the population – predominantly children and young people, who have usually been seen as the solution for flourishing national development and increased production. Elderly persons have time and again, been viewed as yet an additional group asking for new policies and programmes in an environment short on resources. Furthermore, many Governments presuppose that a traditional cultural image of family in which older persons are held in high regard by family members – still exists, and thus, whatsoever social or economic troubles faced by older persons will be taken care of by family members.

During the past two decades, major strides have been made in efforts to advance human rights of older people. Numerous international human rights treaties and instruments refer to ageing or older people, enshrining the freedom from discrimination of older women, older migrants and older persons with disabilities, discussing health, social security and an adequate standard of living; and upholding the right to be free from exploitation, violence and abuse. These international treaties and conventions are extensive. It includes sets of principles, declarations, the MIPAA, and comments on how to construe the ICESCR with regards to older persons. These documents are valuable guides for state action in setting standards and influencing domestic policies and programmes. However, none of the documents contains legally binding obligations due to which implementation cannot be strong, and states, time and again fail to include these international standards into their domestic policies.

[82] *Supra* note 80.

JOURNEY FROM FREEDOM OF INFORMATION TO RIGHT TO INFORMATION: CRITICAL ANALYSIS OF TWELVE YEAR'S DRIVE OF THE RIGHT TO INFORMATION ACT, 2005

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Vaibhav Latiyan**

1. Introduction

> *In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. Their right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.*[1]
>
> - Justice K.K. Mathew

The Right to Information Act, 2005, is an Act for the dispensation of information and to empower the citizens to gain that information in an affordable manner, laterally highlighting the principle of transparency and accountability of the public officials. Free flow of information is essential for the health of a democratic society and this is aptly expressed in the Preamble[2] of the Act:

> *Democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed.*

And now, RTI has emerged as an instrument to achieve it. This right broadly has two facets; first, the public has the right to access the information held by the government and public bodies on request; second, governments have an obligation to actively disseminate information to the public on matters of public interest.

Being a complete code in itself; both substantive and procedural law, it has aided in achieving the ground realities, which the lawmakers once dreamt of, like, it is this Act that has mandated all public offices to maintain all its records duly cataloged and computerized, where possible so as to be accessible within a reasonable time. It has embedded into the popular language so much that at times, *'I will file anRTI if desired is not done'* is enough to set the government machinery in motion.

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1 Justice K.K. Mathew, *State of Uttar Pradesh* v. *Raj Narain*, 1975 (4) SCC 428.

2 The *Right to Information Act*, 2005, (Act No. 22 of 2005).

This Act elaborately lays the procedure for demanding information, the time period and the method in which the information is to be reverted, the fees, the exceptions where information cannot be publicized, along with the authorities and other rules. But before proceeding towards the salient features, there is a need to go through the brief history.

2. Brief History of Emergence of the RTI Act, 2005

The genesis of RTI can be traced back to 1776 when Sweden passed a legislation[3] granting the right to information to all its citizen, abolishing political censorship and giving the public access to government documents. With the passage of time, a need was felt for recognizing the right to information in order to enhance its applicability. On an international level, the right to information is increasingly recognized by several international treaties and organizations. In 1948, the UN general assembly passed a resolution[4] declaring freedom of information as fundamental human right thus recognizing people's right to have access to official information.

Article 19 of the Universal Declaration of Human Rights (UDHR), 1948 provides *that everyone has the right to freedom of opinion and expression and this right includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.* Article 19(1) and 19(2) of the International Convention on Civil and Political Rights (ICCPR) declare that *everyone shall have the right to freedom of expression, and this right shall include freedom to seek, receive and impart information of idea of all kinds regardless of frontier, either, orally, in writing or in print, in form of art or through any other media of his choice.*

The international organizations include the United Nations (UN Special Rapporteur on Freedom of Opinion and Expression 2000[5]), the Council of Europe (Recommendation No. R(81)19 on Access to Information held by Public Authorities[6] and Recommendation Rec(2002)2 on Access to Official Documents[7]), the Organization of American States (Declaration of Principles on Freedom of

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3 The *Access to Public Records Act*, 1766.

4 Resolution 217.

5 Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, Para 14, (January 1998), at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/103/12/PDF/G9810312.pdf?OpenElement* (last accessed 21 September 2017).

6 Recommendation No. R (81) 19 of the Committee of Ministers to member states on access to information held by public authorities, at *https://rm.coe.int/16804f7a6e* (last accessed 15 September 2017).

7 Recommendation Rec (2002)2 of the Committee of Ministers to member states on access to official documents, available at *https://rm.coe.int/16804c6fcc* (last accessed 26 September 2017).

Expression[8] and American Convention on Human Rights[9]), and the African Commission on Human and Peoples' Rights (Declaration of Principles on Freedom of Expression in Africa[10]).

Even the US signed Freedom of Information Act (FOIA) in 1966, which was made more austere in 1976, following the Watergate scandal of 1972. But, since India was too busy being involved in other important matters and stabilizing the newly gained bridle, this right was straightly overlooked for many years. After everything was settled, in the process of making India more socialistic, this concept was given impetus and finally, its journey started.

The evolution of this Act started after witnessing the atrocities committed during Internal Emergency in 1977 when in Lok Sabha elections, Janta Party, headed by Morarji Desai promised an open government, that would not misuse intelligence services. After that, it was included in party's speeches and manifestos. In 1994, Mazdoor Kisan Shakti Sanghatan started a campaign; demanding information regarding development work in rural Rajasthan. In the wake of such demand, workers were provided employment under the NREGS. But the contractors devised a way to exploit the worker's income by manipulating the entries in the muster rolls. So in 1996, some social activists, journalists, lawyers, retired civil servants and scholars, including Nikhil Dey, Aruna Roy, later joined by Arvind Kejriwal founded the National Campaign for People's Right to Information (NCPRI) with an objective to bring in existence a national law for the exercise of the fundamental right to information.

Finally, in 1996 the National Campaign for Peoples' Right to Information (NCPRI) and the Press Council of India framed a draft of a Right to Information (RTI) law and sent it to the Government of India. In 1997, the Parliamentary Standing Committee on Home Affairs in its 38th Report[11] recommended that the government should take measures for the enactment of a right to information legislation, as was recognized unanimously at Chief Ministers Conference on "Effective and Responsive

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8 Principle 4 of *Declaration of Principles on Freedom of Expression*, available at *http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26* (last accessed 24 September 2017).

9 Article 13 of *American Convention on Human Rights- Freedom of Though and Expression, http://www.oas.org/en/iachr/expression/showarticle.asp?artID=25&lID=1* (last accessed 29 September 2017).

10 Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia, IV- Freedom Of Information, at *http://hrlibrary.umn.edu/achpr/expressionfreedomdec.html* (last accessed 21 September 2017).

11 38th Report on *The Demands for Grants (1997-98) of the Ministry of Personnel, Public Grievances and Pensions, 2 May 1997*, Pg. 15, at *http://164.100.47.5/newcommittee/reports/English Committees/Committee%20on%20Home%20Affairs/38Report.PDF* (last accessed 3 October 2017).

Government", New Delhi. Also, in 1997 the Working group appointed by the Union Front Government under the chairmanship of Mr. H.D Shourie drafted a law called the Freedom of Information Bill, 1997, which was introduced in Parliament in the year 2000 and referred to a Select Committee of Parliament.

The Government, after all the considerations on the report of Select Committee in early 2002, passed the Bill and thus Freedom of Information Act, 2002, came into being. The Freedom of Information Act, 2002, proved to be a much-diluted version of what was demanded. After some heated arguments between the Government and social groups, the government accepted their recommendations and also resolved that in order to ensure greater and more effective access to information, the FOI Act must be made more progressive, participatory and effective. And finally, the Right to Information Bill was introduced in the Parliament on 22 December 2004. However, this Bill too had many weaknesses like it applied only to the Union Government; not to the whole country. Finally, after a series of argumentation, discussions by National Advisory Council (NAC) and recommendations, the RTI Act then came into existence on 13 October 2005[12].

3. Overview of the RTI Act

The Right to Information Act or RTI is a central legislation, which enables the citizens to procure information from a public authority. It provides the mechanism for obtaining information. It is a progressive legislation based on citizen's right to know which is a fundamental right enshrined in the Constitution of India. The purpose of the act is to make the executive accountable and ensure transparency in the implementation of schemes and policies. The Act is based on the ground that informed citizens and transparency is a must for democracy. The provisions contained in its six chapters and two schedules extends to the whole of India except Jammu and Kashmir, where The Jammu & Kashmir Right to Information Act, 200913 is applicable.

The Act defines various terms such as information, what is appropriate government, chief information commissioner etc. It has also defined the right to information as not only just to get the information from the authority, but also the inspection of work, documents, taking certified copies of records in the printed form or in electronic form. This Act has replaced the erstwhile Freedom of Information Act, 2002[14].

The Right to Information, recognized under Art 19(1) (a) and Art 21 of the

12 *Supra* note 2.
13 The *Jammu and Kashmir Right to Information Act*, 2009, (Act No. VIII of 2009, 20th March, 2009)
14 The *Freedom of Information Act*, 2002. Act No. 5 of 2003 (6th January, 2003).

Constitution of India, is a prestigious human right as well as a fundamental right. This is backed by several Supreme Court decisions also.

In *Bennett Coleman*[15],the SC ruled that the right to freedom of speech and expression guaranteed by Art. 19(1) (a) included the right to information. In *PUCL, 2004*[16], the right to information was further elevated to the status of a human right. Also, Citizens have a right to know about the activities of the State, the instrumentalities, the departments and the agencies of the State. The privilege of secrecy which existed in the olden times that the State is not bound to disclose the facts to the citizens or the State cannot be compelled by the citizens to disclose the facts does not survive now to a great extent. Freedom of speech is based on the foundation of the freedom of right to know.[17]

3.1 RTI Rules 2017: Not Up To Par

Even a detailed legislative brief cannot cover all the aspects in details and most of the times they are left out. So, in order to make them certain, rules are drafted in furtherance of the main Act. Here, in exercise of the powers conferred by section 27 of the Right to Information Act, 2005 (22 of 2005) and in supersession of the Central Information Commission (Appeal Procedure)Rules 2005 and the Right to Information (Regulation of Fee and Cost) Rules, 2005, the Central Government introduced the Right to Information Rules, 2012.

The Rules basically cover the detailed procedure for fee (application fee, the fee for providing information, exemption, and mode of payment) and the appeals (process, return and procedure). But with changing time, these rules are feared to move towards incompetence; not been able to cater the rising demands. So in 2017, the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel & Training issued a circular stating *a proposal for making Rules under RTI i.e. RTI Rules, 2017 in supersession of RTI Rules, 2012-by the Central Government under section 27 of the RTI Act, 2005, is under consideration* and also invited views/suggestions on the draft RTI Rules, 2017.[18]

Though the new draft Rules proposes to increase the number of rules from 15 to 21, there is apparently no significant impact of most of the rules, except one, the draft

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15 *Bennett Coleman* v. *Union of India*, AIR 1973 SC 60.

16 *People's Union for Civil Liberties* v. *Union of India*, (2004) 2 SCC 476.

17 *L.K. Koolwal* v. *State Of Rajasthan And Ors.*, AIR 1988 Raj 2.

18 No. 1/5/2016-IR Govt. of India Ministry of Personnel, Public Grievances & Pensions Department of Personnel & Training, at *http://document.ccis.nic.in/WriteReadData/CircularPortal/ D2/D02rti/ 1_5_2016-IR-31032017.pdf* (last accessed 15 September 2017).

Rule 12. The draft Rule 12 permits the withdrawal of an appeal, on the request of the appellant. It also allows for the abatement of an appeal/ proceedings pending, on the death of the appellant. Considering the statistics, there have been more than 400 cases of harassment of the RTI activists, pointing towards the deteriorating situation of safety and security of RTI activists and information seekers. And if this draft gets the consent of the President, it is certain that this rule would further expose applicants to greater threats in future. If withdrawal of appeal is made legally permissible, then the anti-social elements would pressurize the activists to withdraw RTI, by threatening them or their family members and if refused, by killing the activist, which would still abate the appeal. It is a win-win situation for the miscreants. So, there is an utter need to change this rule, as to prevent the attackers from harming the activists. This could be achieved by making the disclosure of information suo moto in certain cases, on the pretext of public interest; if the CIC finds it to be a case of suspicious harm/death. This way it would discourage the attackers to even think about abusing the activists.

4. Widening Scope and Development of the Act

In the recent years, the Judiciary has played a vital role in vigorously expanding the scope of the Act. The original Act of 2005, in its provisions, explicitly provided the power, scope and usage of the RTI. But due to the outstanding interpretation being done by the judiciary in various cases, it has evolved exponentially. Emphasizing in the *S.P. Gupta case*[19], the Supreme Court said that open government is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception.

Along with the judiciary, even the RTI activists have played a significant role in making it an instrument available to the public. There are so many cases where these RTI activists took the cause of the public and helped them in getting justice. Some of the cases which have championed the fundamental right to free speech and expression, enshrined in the Constitution and highlighted the dimensions of RTI are listed below.

- *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay Pvt. Ltd. and others*[20]

The case was about the publication of an Article by the Indian Express, commenting on the reliability of the debentures issued by the company. The petitioner company

19 *S.P. Gupta* v. *Union of India*, AIR 1982 SC 149.
20 (1988) 4 SCC 592.

objected to it. So the apex court, while dealing with the issue of freedom of press and administration1 of justice observed:

> We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire in the broader horizon of the right to live in this age in our land under Article 21 of our Constitution. That right has reached new dimensions and urgency. That right puts greater responsibility upon those who take upon themselves the responsibility to inform

- *Ministry of Information and Broadcasting, Govt. of India, and Ors., v. Cricket Association of Bengal and others*[21]

While considering the rights of a person to telecast a sports event on television, the Supreme Court observed:

> The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfillment. The right to communicate, therefore, includes the right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. This fundamental right can be limited only by reasonable restrictions under a law made for the purposes mentioned in Article 19(2) of the Constitution

- *Shri Dinesh Trivedi, M.P. & Ors v. Union Of India & Ors*[22]

The case involved the disclosure of the Vohra Committee Report. The Supreme Court, acknowledging the importance of open Government in a participative democracy, held that the citizens have right to know under Article 21 of the Constitution the affairs of the Government elected by them and that it seeks to formulate policies aimed at their welfare. The citizens have a right to know that the MPs/ MLAs/ Ministers they have elected discharge their duties as per the Constitution and the law and are not amassing wealth/assets for their personal benefit. This is a step towards maintaining transparency and honesty among those that have been elected for the governance, by the people. It went on to observe that Democracy expects openness and openness is a concomitant of a free society

- *Union of India (UOI) v. Association for Democratic Reforms and Anr. WITH People's Union for Civil Liberties (PUCL) and Anr. v. Union of India (UOI) and Anr.*[23]

In this case, the Supreme Court upheld the decision of the High Court and issued an

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21 (1995) SCC (2) 161.
22 (1997) 4 SCC 306.
23 2002 A.I.R. SC 2112; 2002 (3) SCR 294.

order directing the Election Commission to make available the criminal, financial and educational records of candidates for political office. The information regarding any conviction/acquittal/discharge of any criminal offense in the past, the assets (movable, immovable etc.), educational qualification, liability or any over the use of public financial institution has to be made available to the public.

- *KhanapuramGandaiah v. Administrative Officer & Ors* [24]

While protecting the judges from the liability to give reasons for the decisions, the Supreme Court said

> Under the Act, an applicant is entitled to get acopy of the opinions, advice, circulars, orders, etc. but he cannot ask for any information as to why such opinions, advice, circulars, orders etc. have been passed especially in matters pertaining to judicial decisions. A judge speaks through his judgments or orders passed by him. If any party feels aggrieved by the order and or judgment passed by a judge, the remedy available to such a party is either to challenge the same by way of appeal or by revision or any other legally permissible mode.

- *Central Board of Sec. Education & Ors v. Aditya Bandopadhyay & Ors.*[25]

This case provides a relief to the students. In this case, the Supreme Court broadened the scope of RTI by declaring that the examining body is not in a fiduciary relationship with reference to the examinee who participates in the examination and whose answer-books are evaluated by the examining body, and thus directing the examining bodies to permit examinees to have inspection of their answer books. Thus, the students have a right to inspection and re-evaluation of his answer sheet.

Also, in a very recent judgment (2017), the Central Information Commission (CIC) has brought the private ICSE board under the preview of RTI, stating that the students cannot be denied their copyright to answer sheets.[26]

With its molding in a statutory form, the legislators rest free and the duty of the courts to further enhance it commences. But in India, the problems lie with the courts also. There have been many instances where the powers of RTI are being diluted on various grounds. Like in the case of *Indira Jaising v. Registrar General, Supreme Court of India*,[27] infamously known as Mysore sex scandal case, the court denied the disclosure of the inquiry report on the ground that the publicity of such report would

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24 (2010) 2 SCC 1.

25 (2011) 8 SCC 497.

26 Hemali Chhapial, *"ICSE under RTI ambit, will have to allow reval", The Times of India*, 6 February 2017, at *http://timesofindia.indiatimes.com/city/mumbai/icse-under-rti-ambit-will-have-to-allow reval/articleshow/56991847.cms* (last accessed 16 September 2017).

27 (2003) 5 SCC 494.

do more harm than good to the institution as judges would prefer to face inquiry leading to impeachment.

Also, in a recent case, in *Subhash Chandra Aggarwal v. Registrar General, Supreme Court of India*,[28] the Supreme Court held that information about doctor's visit expenses of judges and their families can't be revealed as it does not qualify to come within the ambit of the Right to Information Act. Also, in one of the judgments[29], the Supreme Court described the right of information as a potential *'tool to obstruct national development, integration, peace, tranquility and harmony'*. These occasions deeply show how difficult it is to change the old mindsets and so, it is going to be a slow and reluctant transition from a deeply ingrained psyche of secrecy to openness and the freedom of information.

5. The Nexus of Politics and RTI

> *Secrecy, being an instrument of conspiracy, ought never to be the system of regular government.*
>
> -Jeremy Bentham

While the quest for an information bill was going on, some of the side sectors also came into light while determining the scope. And one such sector was our political system. When the society was becoming more vigilant and information thirsted, the bomb dropped on the electoral candidates first. In *Union of India (UOI) v. Association for Democratic Reforms and Anr. With People's Union for Civil Liberties (PUCL) and Anr. v. Union of India (UOI) and Anr*[30], the Supreme Court while observing voter speaks out or expresses by casting vote, for this purpose, information about the candidate to be selected is a must. Voter's (little man-citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for the survival of democracy. The Apex Court directed the Election Commission to issue necessary orders to make the information of criminal antecedents, assets, liabilities and educational qualifications of the candidates available to the public.

This move was unwelcomed by the political fraternity and in wake of that, the Union Government drafted an Ordinance, *The Representation of the People (Amendment) Ordinance, 2002 (No. 4 of 2002)*, of which Section 33(2) read:

> *Candidate to furnish information only under the Act and the rules. - Notwithstanding*

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28 LPA 34/2015 & C.M.No.1287/2015.

29 *Central Board of Sec. Education & Ors* v. *Aditya Bandopadhyay & Ors.*, (2011) 8 SCC 497.

30 (2002) 5 SCC 294

> *anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder.*

But this effort by the government went in vain as the Supreme Court in the above-mentioned case declared this Amendment to be unconstitutional, being violative of Article 19(1) in 2003.

For many years, political parties have also kept themselves out of the scope of RTI. But in the year 2010, Association for Democratic Reforms (ADR), filed an application under the Right to Information Act (RTI) to all national parties, requesting information about the 10 maximum voluntary contributions' received by them in the past five years, but none of them replied. Following this, Shri Subhash Chandra Aggarwal and Shri Anil Bairwal filed a petition with the Central Information Commission (CIC).

In 2013, a full bench of CIC delivered a judgment declaring Indian National Congress (INC), Bhartiya Janata Party (BJP), Communist Party of India (Marxist) (CPM), Communist Party of India (CPI), Nationalist Congress Party (NCP) and Bahujan Samaj Party (BSP) as Public Authorities within the purview of RTI. The political parties, instead of appealing to the court to challenge this, moved to amend the RTI Act to keep the political parties out of the purview of RTI. But the 2013 bill to amend the RTI Act[31] lapsed after strong opposition.

Though there are two reasons which can validate the inclusion of the political parties under the umbrella of Public Authorities, namely, first, substantial financing by the government which empowers the public to know the utilization of these funds and second, the momentous role being played by these parties in the democratic setup of our country, the applicability of RTI in this field is still disputed. Even though this exclusion is not intended by the makers RTI Act, 2005, as political parties are not kept in the group of exempted organizations, the current scenario is that they do not fall under the purview of RTI instead of the order by CIC. Even the Law Commission of India in its One Hundred Seventieth Report, named *Reform of the Electoral Laws*[32], opined that:

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[31] The *Right to Information (Amendment) Bill*, 2013, Bill No. 112, Acts of Parliament, 2013, at *www.asiraipurcircle.in/RTI_Act_PDF/Right%20to%20Information%20(Amendment)%20Bill,%202013%20(Bill%20No.112%20of%202013).pdf* (last accessed 14 September 2017).

[32] Part III, Chapter I, *Necessity for providing law relating to internal democracy within political parties*, para 3.1.2.1., at *http://www.lawcommissionofindia.nic.in/lc170.htm* (last accessed 27 September 2017).

> *[I]f democracy and accountability constitute the core of our constitutional system, the same concepts must also apply to and bind the political parties. It is, therefore, necessary to introduce internal democracy, financial transparency and accountability in the working of the political parties.*

And of all the ways, the best possible way to achieve this is by classifying political parties as Public Authority.

6. Some Revelations under the RTI Act

Apart from these pronouncements, there have been many instances where RTI has done some ground duty and further helped humankind. Like, the RTI Act has also been used by RTI activists and common people to uncover various scams like the infamous Adarsh Housing society scam, where RTI applications filed by activists Yogacharya Anandji and Simpreet Singh in 2008 led to the resignation of the then Maharashtra chief minister Ashok Chavan[33].It has also uncovered the infamous 2G scam, RTI application filed by activist Subhash Chandra Agrawal, in which the then Telecom Minister A Raja undercharged mobile phone companies for frequency allocation licenses and caused a loss of Rs 1.76 lakh crore to the Indian government. The Commonwealth Games Scam was also exposed by the usage of RTI, in which Suresh Kalmadi was charged for corruption and diversion of funds[34]. There are many cases where such simple plain RTIs unearthed the most horrific scams and helped in exposing the reality. The power conferred by RTI Act in the hands of people is commendable and more commendable is the efforts made by common people to use it efficiently.

Also, some old traditional facts have also been proven to be false with the help of RTIs. Like, contrary to the common perception, hockey is not our national game.[35] Also, the great son of India, Mahatma Gandhi, who is revered as the 'Father of the Nation,' actually does not hold any such title as Article 18 (1) of the Constitution does not permit any titles except in education and military fields. So Father of Nation is not officially conferred to Gandhi.[36] Also, an RTI filed has uncovered that

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33 Vibhuti Agarwal, *"A Look at Some RTI Success Stories"*, *The Wall Street Journal*, 14 October 2011, at *https://blogs.wsj.com/indiarealtime/2011/10/14/a-look-at-some-rti-success-stories/* (last accessed 11 October 2017).

34 Betwa Sharma, *"5 Scams The RTI Act Helped Bust In Its First 10 Years"*, *HuffPost India*, 15 July 2016, at *http://www.huffingtonpost.in/2015/10/12/5-most-critical-scams-exp_n_8263302.html* (last accessed 19 September 2017).

35 *"In RTI reply, Centre says India has no national game"*, *Deccan Herald*, 11 September 2017, at *http://www.deccanherald.com/content/268727/in-rti-reply-centre-says.html(last accessed 30 September 2017).*

36 *"Constitution doesn't permit 'Father of the Nation' title: Government"*, *The Times of India*, 26 October 2012, at *http://timesofindia.indiatimes.com/india/Constitution-doesnt-permit-Father-of-the-Nation-title- Government/articleshow/16961980.cms(last accessed 21 September 2017).*

government of India has not issued any formal orders for observing 26 January, 15 August and 2 October as national holidays.[37] These RTI revelations are just as surprising as that of PILs like the case of Hindi not being our National Language, being declared by Gujrat High Court.[38]

7. India's RTI on Global Footing

Amongst all the legislations passed after the Independence of India, this Act hailed as one of the landmark legislations and is considered as a quality piece of legislation. Though the implementation of this Act faced slashes from both sides, but in a very short time, it has successfully met with the global standards of RTI and the global Right to Information Rating is one such programme which acknowledges it. The RTI Rating, developed by Access Info Europe (AIE)[39] and the Centre for Law and Democracy (CLD)[40], is a methodology which provides a numerical assessment or rating for the overall legal framework for the right to information (RTI) in a country, based on how well that framework gives effect to the right to access information held by public authorities.[41] The central idea behind the RTI Rating is to provide RTI advocates, reformers, legislators and others with a reliable tool for comparatively assessing the overall strength of a legal framework for RTI. The Rating also indicates the strengths and weaknesses of the legal framework and provides a handy means for pinpointing areas in need of improvement.[42]

In the rankings released by this programme, India stood at 4th place out of 111 countries which have a similar law. Though India has slipped from 2nd position to 4th position, but at the international level, to secure 4th position out of 111 is still admirable.

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37 *"No formal order on Oct 2, Jan 26 and Aug 15 being national holidays, reveals RTI", India Today*, 23 May 2012, at *http://indiatoday.intoday.in/story/rti-on-national-holidays-no-formal-order/1/189996.html* (last accessed 9 September 2017).

38 *"Hindi, not a national language: Court", The Hindu*, 25 January 2010, at *http://www.thehindu.com/news/national/Hindi-not-a-national-language-Court/article16839525.ece* (last accessed 18 September 2017).

39 Access Info Europe is a human rights organization dedicated to promoting and protecting the right of access to information in Europe as a tool for defending civil liberties and human rights, for facilitating public participation in decision-making and for holding governments accountable.

40 The Centre for Law and Democracy (CLD) is a non-profit corporation based in Halifax, Nova Scotia, Canada. CLD works to promote, protect and develop those human rights which serve as the foundation for or underpin democracy, including the right to information (RTI), but also the right to freedom of expression and the right to free assembly.

41 *"RTI Rating Data Analysis Series: Overview of Results and Trends"*, 28 September 2013, at *http://www.right2info.org/resources/publications/publications/rti-rating-data-anlysis-series_cld-and-aie_2013* (last accessed 6 September 2017).

42 "The RTI Rating analyses the quality of the world's access to information laws", About- Global Right to Information Rating, at *http://www.rti-rating.org/about/* (last accessed 21 September 2017).

To further understand the ratings, we need to look at the methodology involved; RTI Legislation Rating Methodology[43]. The methodology provides a numerical assessment of a country, on the basis of the performance in the seven different areas, namely- Right of Access, Scope, Requesting Procedures, Exceptions and Refusals, Appeals, Sanctions and Protections, and Promotional Measures. In total, there are 61 indicators which help in giving the total points, for a possible indicator of 150 points. While India scored a total of 128, the best performing sectors were Appeals (29 out of 30 points) and Right to Access. India lost certain points in other fields, like in Scope, as the law exempts certain organizations from its ambit and also does not explicitly include private organizations that perform a public function, the Sanctions category, as there is no strong legal protection for the whistle blowers.

As the rankings have explicitly laid down the fields where the legislation lags, it has become easier to focus on the trailing sectors. There is a lot that can be learned from other nations and the legislators can even devise a way to make implementation of such provisions possible in their countries. Like, in Denmark, the applications are to be responded within 10 days, unlike 30 days in India. This limitation on time helps in making the system more effective. Also, in Serbia, the right to access information applies to the executive, legislative and judicial bodies, State-owned enterprises, as well as other public authorities, and private bodies that perform a public function or that receive significant public funding are also obliged to disclose information of public relevance[44], and the reply period is 15 days. In Slovenia, the scope is the same as that of Serbia (Article 1) but the timeline for response is 20 days[45].

Also, the Corruption Perceptions Index 2016 by Transparency International states that higher-ranked countries (very clean) tend to have higher degrees of freedom of press, access to information about public expenditure, stronger standards of integrity for public officials, and independent judicial systems.[46]As Sweden came up with the first RTI related law, it stands among the top five least corrupt nations in the world. Even this makes it clear that how access to information makes the public bodies accountable, which in turn minimizes the corrupt practices. There is a lot that can be improved if these reports are properly studied and understood.

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43 RTI Legislation Rating Methodology, at *http://www.rti-rating.org/wp-content/uploads/Indicators.pdf* (last accessed 5 September 2017).

44 Article 3 of *Law on Free Access to Information of Public Importance* ("Official Gazette of RS" NO. 120/04, 54/07, 104/09 I 36/10), at *http://www.poverenik.rs/en/pravni-okvir-pi/laws-pi/881-zakon-o-slobodnom-pristupu-informacijama-od-javnog-znacaja-preciscen-tekst-sl-glasnik-rs-12004-5407-10409-i-3610.html* (last accessed 29 September 2017).

45 Article 23 of the *Access to Public Information Act,* 2004.

46 Corruption Perceptions Index 2017, 26 January 2017, available at *https://www.transparency.org/news/feature/corruption_perceptions_index_2016* (last accessed 27 September 2017).

8. Impediments in the Implementation of RTI Act, 2005

Like any other system, RTI is not left unscathed by the different anomalies. And the root cause of them being the inadequate background to implement it. Unlike many other countries (for e.g. the UK) which took several years to operationalise the Act post the enactment by making necessary changes in the system, India's RTI was sudden, lacking the appropriate instrumentalities. The colonial mindset of secrecy was under attack and the new law appealed to change the century-old attitude. But with time, the element of secrecy withered away and got replaced by open government. Though in the 12 years of journey of RTI, a lot has been improved in the field of infrastructure, information delivery system and the new posts, but there still lies few implementation issues which need to be identified and properly addressed. Some of these are-

8.1 Low level of awareness

The plug of awareness is connected with the successful implementation of most of the Acts, and so is the case of RTI. Low level of awareness amongst the different classes of society is a major challenge for making RTI a success. Not only are the poor and illiterate people unaware of this right, but even educated people do not have proper knowledge of this concept. And if they have heard about RTI, then it is only the name and the function; not the proper way to implement it. This lack of awareness can be attributed to the insufficient content used to educate the public, either through mass media or through any other means, by the government.

8.2 Fundamental Problem of Poverty and Illiteracy

Until and unless the human kind is not evacuated from these two problems, they would haunt us in every field. The basic principle of RTI is to make the citizenries aware. But this awareness is a sought after luxury only after one is able to live a decent life. In India, the poor and illiterate class constitutes a major portion of the population and thus, where survival is the most desired element, RTI has a little role to play. The approach of the government to tackle a single problem at once needs to be changed as these problems are inter-related.

8.3 Problems in filing RTI application

Though the Act explicitly lays down the duty of PIOs to provide reasonable assistance to the applicant in drafting and submission of the application, there still arises certain issues which act as setbacks in promoting the use of RTI. Like, the non-availability of the user guide with most of the public authorities hinders the

information seeker to conveniently file an application, which ultimately results in substantial efforts on his part. Also, sometimes, the standard forms of RTI does not allow the user to get some specific information or such information is missed, for which another RTI has to be filed. The inconvenient modes of payment at some places, like postal order payment option is not accepted in Maharashtra, Orissa, and Andra Pradesh adds to the list of difficulties.

8.4 Poor quality of information provided

Though the Act clearly lays down for the dispensation of information, but there are certain problems which are faced during the practical application. And one of them is the poor quality of the information provided. Most of the times, due to some frivolous mistakes in the application, only limited information or no information at all is provided. And many times, it takes around three-four RTIs to get whole of the information. This particular lacuna defeats the very purpose of the Act.

8.5 Lack of commitment and coordination among the officials

Due to the trouble-creating capacity of RTI, which is nowadays known to everyone, the official lacks the commitment to make it more user-friendly. This lack of commitment is also visible through the inefficient record management or the non-cooperation of the departments with the PIOs. All this makes the process of implementation more stressful.

8.6 Limited use of Technology

In this era of the digital age, many processes have been shifted from offline to online. But RTI has been left aside, deprived of the e- system. The limited use of technology, be it in regard to file an RTI, to pay the fee, to check the status or to get the information, has hindered the effective implementation of RTI Act. Though the center, along with many other states have inducted effective IT systems, but there is a lot of scope in what can be achieved.

9. Suggestions

In order to further mainstream RTI, these problems need to be addressed properly. The following suggestions are provided to overcome them.

9.1 Awareness Campaigns

To ensure proper implementation of RTI Act, the government needs to tackle this issue quickly. Mass media can play a very important role in publicizing the RTI. Through advertisements, radio and newspapers, common people can come to know

about RTI. Also, NGO's and civil societies can take initiatives in their areas to raise awareness by conducting rallies and awareness drives, with a special focus on children, women and poor sections of the society. And the government can help in this process by allocating specific funds.

9.2 Inducting RTI in the school's curriculum

The very basic of democracy is information. And making citizens informed at the early stages of life is a good future investment. Children, being the future of the nation, if taught RTI at the schools, then it would be beneficial for the nation and the problem of implementation would lessen with the coming generation. Therefore, the study of RTI should be inducted in the course of study.

9.3 Publishing Success Stories

Publishing the success stories of RTI, annually, compiled in the form of a book or in a newsletter would definitely motivate the people to take up the cause in their society, along with providing a solid solution to the awareness.

9.4 Protection to RTI Activists

The nature of RTI is such that in most of the cases the revelations prove to be troublesome to someone. So nowadays, many RTI activists are working with their life on their hands and till now, 69 have already lost their life[47]. In order to promote RTI, the government should put the activists out of this danger by amending the existing laws to include provisions for protection. A separate body needs to be instituted to look after the crimes related to RTI.

9.5 Stronger Commitment and Coordination

The officials should realize the importance of their posts in making RTI more effective and thus demonstrate remarkable commitment towards their work. This can be achieved by proper training/special camps for all the officials of all the departments of public authorities, making them aware of their duties and obligations. Also, for enabling and effective implementation of RTI Act, proper coordination should be there among the information commissioners and the various departments.

9.6 Reducing backlog of RTIs

Something should be learned from the sorrow state of our Judiciary; the never ending

[47] Christophe Jaffrelot & Basim U Nissa, *"It's lonely on the ground", The Indian Express,* 4 September 2017, at *http://indianexpress.com/article/opinion/columns/its-lonely-on-the-ground-4827124/* (last accessed 6 October 2017).

backlog of cases. And the same should not be allowed to happen with the RTI. Immediate actions need to be taken to reduce the backlog of cases, removing the practical impediments on the way else it would defeat the very purpose of the Act. This could be achieved by ensuring that the official suo-moto publishes the most looked after information so that fresh RTIs are not filed.

9.7 Publicizing the initiatives by the States

The various initiatives taken by different states should be published and awarded accordingly. This would allow the other States to learn and bring the effective changes in their system. Like the project "Jaankari", a Facilitation Center by the Government of Bihar, which even bagged National E-Governance Award in 2010[48] or the IT initiatives like internal tracking of appeals and complaints, status of Appeals through SMS by Andhra Pradesh Information Commission (APIC)[49], the other states can definitely consider them while developing or upgrading their systems. Also, the RTI web portal www.rtionline.gov, which provides the facility to citizens for filing applications and first appeals in Hindi language also, along with the facility of online payment of fees, should be brought in front of the eyes of people, so that at least those who can access the e- system do not have to go through the normal tardy procedure.

9.8 Improve the convenience of filling RTI request

Filing RTI can be made more convenient by either providing a standard RTI application form, with scope wide enough to gain adequate information or increasing the payment options, considering the prevalent ones in the society. Also, the political influence should be minimized as it hinders not only the filing of RTI but also the dispensation of information.

10. Conclusion

Information is Power and in this Age of Information, the society is driven by the principle of vigilantism. A true democracy is operated by vigilant citizens. Information empowers the citizens in all the spheres; political, economic and public administration and so, every citizen must be aware of this basic information about RTI. Even with the limited enforcement of this Act due to the various impediments,

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48 E Governance Report Card, Government of Bihar, available at *http://gad.bih.nic.in/Documents/GAD-BP-E-Governance-Report-Card.pdf* (last accessed 5 October 2017).

49 ToR – 4: To identify the best practices in implementation of RTI Act to promote open Government and to outline an action plan for adoption/adaptation by public authorities, at *http://www.apic.gov.in/UploadedFiles/ToR4.pdf* (last accessed 9 October 2017).

every day 4,800 applications are filed to access information from the government across India. The first decadal study conducted after Right to Information (RTI) Act implemented in October 2005 has revealed that over 1.75 crore applications have been filed with one-fourth being requested to the Centre.[50] And if the majority of the population is made aware of this right, then the power would be directly into the hands of the foundation of democracy- the Citizen. Access to information not only promotes openness, transparency and accountability in administration, but also facilitates active participation of people in the democratic governance process.[51]

Since 2002, 28 September is celebrated as Access to Information Day. But in 2015, the UNESCO General Conference voted to designate Sept. 28 as "International Day for the Universal Access to Information". Even this shows the concern of the international society towards the significance of this right in the globalized world. The civil society has also played a major role in making RTI a success. But the successful implementation of Right to Information Act is directly linked to the level of commitment within the government, especially the commitment level of the political leadership and the bureaucracy. Though the term 'file an RTI' has become so dominant that the earlier immune bureaucrats and politicians also have to bow down in front of RTI, there is a need to take it to another level where the citizens become the vigilance monitors of the public authorities. It is a weapon in the hand of the people to protect themselves and active participation would be one more step towards the establishment of open government!

> *"...the single most cause responsible for corruption in society was the barrier to information. It facilitates clandestine deals, arbitrary decisions, manipulations and embezzlements. Transparency in dealings, with their every detail exposed to the public view, should go a long way in curtailing corruption in public life. Sunlight is the best disinfectant. Access to information will prove both an effective deterrent and potent disinfectant...."*
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> - Mr. Justice P.B. Sawant[52]

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50 National Federation of Information Commission of India (NFICI), Newsletter (Volume XIV), October 2016, at *http://www.nfici.org/pdfs/newsletters/nfici_newsletter_oct_dec_2016.pdf* (last accessed 28 September 2017).

51 *Good Practices relating to RTI Implementation in India*, Prepared for the Regional Workshop: Towards More Open and Transparent Governance in South Asia, April 2010, available at *http://rtiworkshop.pbworks.com/f/2010-04-IN-Good-Practices-Relating-to-RTI-Implementation-in-India-IIPA.pdf* (last accessed 23 September 2017).

52 Mr. Justice P.B. Sawant made this statement with respect to the importance of information, while he was the Chairman of Press Council of India.

ROLE OF SOCIAL MOVEMENTS IN PROMOTING HUMAN RIGHTS CULTURE IN INDIA

Rachna Sharma *

1. Introduction

A social movement can be identified as "any explicit or implicit persuasion by non-institutionalized groups seeking public gain by attempting to change some part of the system."[1] The social movements in India have been a major source for the construction and development of ideas and practices in respect of human rights as they laid the foundation to build modern India along democratic and civil libertarian lines. Social movements are inextricably connected with human rights because it is the former which generate the latter as a part of their struggle. The latter half of the twentieth century saw range of social movements developing and claiming human rights. In present times human rights are often perceived as important tools to fight for human dignity and emancipation, and numerous NGOs and social movements use human rights in their campaigns regarding various social and political struggles.[2] In this paper, the researcher has tried to focus on various social movements in India like the women's movement, the movement for environmental protection and sustainable development, the *dalit* movement and Public Interest Litigation, the role of Judiciary, Media etc., that have contributed to a great extent to the increasing reliance on human rights concepts in India. This paper aims at throwing light on the link between social movements and human rights on one hand and exploring how far these social movements and the idea of human rights have been successful in creating socially just society in India.

The second half of the twentieth century is considered to be a period for the emergence of various social movements - women, *dalit*, minority, and environmental, apart from the naxalite and the nationality struggles, which had great impact on the human rights discourse. The social movements constructs claim for human rights as a part of their challenge to status quo. Notwithstanding this, their role in the historical development of human rights has also been of great significance. They are chiefly

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1 Francois Polet, *Globalizing Resistance: The State of Struggle*, Pluto Press, London, 2004, p. 3

2 For further details, see: Sally Engle Marry, "Global Human Rights and Local Social Movements in a Legally Plural World," *Canadian Journal of Law and Society*, Vol. 12, 1998, pp. 247-271.

concerned with defending or changing at least some aspects of the society and rely on mass mobilization or the threat of it as their main political sanction.[3]

1.1 Women's Movement and Human Rights

The protection and promotion of women's rights has been strongly enforced by the United Nations. In fact, UN Charter was the first instrument, which recognized the equal rights of men and women, and the member states adopting the aims and principles of the UN were supposed to bring an end to any discrimination on the grounds of sex.[4] In the past few decades, the women's movement has been instrumental in effecting a conceptual shift in emphasis concerning the advancement and empowerment of women. Women's Groups also advocated that there are no human rights without women's rights, thus grounding the promotion and protection of rights of women in the universality and individuality of all human rights.[5]

In the early 1980s, women's movement gave a new dimension to the human rights discourse in India. A large number of women's groups, such as the Self-Employed Women's Association (*SEWA*), *Manushi,*[6] Joint Women's Forum and other women's organizations raised new consciousness and public debate on the issue of women's status, domestic violence, dowry, rape, custodial violence, trafficking and the invisible labour of women in the household. Although, initially it began as an urban movement, over a period of time, the women's movement spread across the country and has shaped new campaigns on participation and rights. It was partly because of the pressure of this movement that the 73rd and 74th constitutional amendment introduced local self-government institutions with 33 percent reservation for women in it.[7]

In 1978, there was a major conference of the 'social-feminists' in Bombay, which also focused on the growing violation of women's rights. These feminists, after years of lobbying with the politicians, were able to bring about a change in the law that

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3 Neil Stammers, "Social Movements and the Social Construction of Human Rights", *Human Rights Quarterly*, Vol. 21, No. 4, 1999, pp. 980-1008, p. 984.

4 Philip Alston, *The EU and Human Rights*, Oxford University Press, Oxford, 1999, p. 221.

5 Sukhpal Kaur, "Women's Rights: A Historical Perspective", *Indian Journal of Political Science*, Vol. 70, No.1, 2009, pp. 121-130, p. 122.

6 In 1979 a small group of women in New Delhi began to publish *Manushi,* a journal about women and society in Hindi and English. This has now become India's premier feminist journal treating specifically women's issues such as sexual harassment; violence against women and in the political and social control; History and literature on about and by women and social/political and economic issues such as communalism and public health policy. See, *www.manushi.in.*

7 Niranjan Sahoo, "Human Rights Movement in India," In Tapan Biswal, *Human Rights Gender and Environment*, New Delhi: Viva Books Pvt. Ltd., 2006, pp. 181-203, p. 190.

would principally benefit their less fortunate, rural based sisters. This was an amendment to the *Hindu Succession Act* of 1956, which, "for the first time brought agricultural land under its purview, allowing women the same inheritance rights as that of men". Another amendment brought "female heirs on par with males with regard to Hindu joint families where sons, previously had claim to a greater share than daughters".[8] The economist Bina Agarwal, whose own work on gender and agriculture had been of a critical influence, expressed about these changes as the ones which have been "a major step in making Hindu women equal in the eyes of the law in every way".[9]

Indian women at the end of the twentieth century had argued that they still had a long way to go to attain gender justice. The issues of the movement and the unsolved problems must not be allowed to negate the victories of the past. It is important to temper the interpretation of the present with the appreciation of the enormous sacrifices Indian women have made to bring about change. Undoubtedly women's education and political action have altered India's political and social landscape. Women have moved from being object of legislation to initiators. So we see that a general beginning has begun and it cannot be permanently suppressed.[10] There is now a complicated mix of women playing public roles- leftist women, moderates, conservatives, right wing women all appropriating the trappings of feminism but without commitment to a vision of gender justice and human rights voiced by the authors of *Toward Equality*[11]. The outcome remains to be seen.[12]

1.2 Environmental Protection and Human Rights

The peoples' movement for environmental protection and various other human rights causes led by the enlightened and dedicated individuals like Medha Patekar, Baba Amte, Sundarlal Bahuguna and B.D. Sharma, have added new dimensions to the human rights movement in India. From the past few decades, the environmental movements in India have emerged from Himalayan regions of Uttar Pradesh to the tropical forests of Kerela and from Gujrat to Tripura in response to projects that threaten to dislocate people and to affect their basic human rights of land, water and

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8 Ramchandra Guha, *India After Gandhi: History of the World's Largest Democracy*, Picador, New Delhi, 2007, p. 629.

9 Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community*, Cambridge University Press, Cambridge, 2013, p. 227.

10 Geraldine Forbes, *Women in Modern India*, Cambridge University Press, Cambridge, 1996, p. 254.

11 For more details see: Phulrenu Guha, *Towards Equality; Report of the Committee on the Status of Women in India,* Government of India, Ministry of Education and Social Welfare, Department of Social Welfare, 1974.

12 *Supra* note 10, p. 252.

ecological stability of life support systems. They share certain features such as democratic values and decentralized decision making, with social movements operating in India.[13] These environmental movements are an expression of socio ecological effects of narrowly conceived development based on short term criteria of exploitation. The movements are revealing how the resource intensive demands of development have built in ecological destruction and economic deprivation. The members have activated micro action plans to safeguard natural processes and to provide the macro concept for ecological development at national and regional levels.[14]

There are instances when environmental movements forced the otherwise indifferent and inactive civil bureaucracy to act for public interest. The *Chipko* movement became an ecological movement in 1977 when environmental action of the *Chipko* was strengthened by public interest captured in the slogan: *"What do the forests bear? Soil, Water and Pure air"*.It was created by the women of Henwal Valley in the Advani forest. They caricatured the partisan forestry science in the slogan, *"What do the forests bear? Resin, Timber and Profits.*[15] The forests in India are a critical resource for the subsistence of the rural people throughout the country. These forests have been increasingly exploited for commerce and industry. Indian villagers have sought to protect their livelihood through the *Gandhian* method of *Satyagraha* or non-violent resistance. The villagers hug the trees, saving them by interposing their bodies between them and the contractor's axe.[16]

Other than the *Chipko* Movement in the Himalayas, *the Narmada Bachao Andolan* (Save Narmada Movement) in the Central India, and the Silent Valley Project in Kerela are the best examples of non violent direct action environmental movements of grass root origin in India.[17]

Narmada River Valley Project is the another popular movement in the environmental history of India. This movement centred on the issue of human rights. As a matter of fact, some of the main leaders of the movement like Medha Patkar were working

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[13] P.P. Karan "Environmental Movements in India", *Geographical Review*, Vol. 84, No. 1, 1994, pp. 32–41, p. 32, Available at *www.jstor.org/stable/215779.*

[14] *Ibid.*, p. 34.

[15] Ghanshyam Shah, *Social Movements in India: A Review of Literature*, Sage Publications, New Delhi, 2004, p. 252.

[16] Sairam Bhatt, *Natural Resources Conservation Law*, Sage Publications, New Delhi, 2010, p. 483. Also see: Madhav Gadgil and Ramchandra Guha, "Ecological Conflicts and the Environmental Movement in India", *Development and Change*, Vol. 25, No. 1, 1994, pp. 101-136, at p. 104. Available at: *http://wgbis.ces.iisc.ernet.in/biodiversity/pubs/mg/pdfs/mg129.pdf.*

[17] *Supra* note 13, p. 34.

towards the rehabilitation programmes for those displaced by the dam. Due to improper implementation of the rehabilitation programme by the state, these human rights activists have become the articulators of the anti-dam protests. Their demands include complete stopping of the dam, resettlement and rehabilitation benefits to the oustees. These demands were supported by the environmentalists who opposed construction of large dams for the ecological reasons. Although Medha Patkar was unsuccessful in stopping the construction of this particular dam, this movement drew wide public attention to the government's disgraceful record in resettling the millions displaced by the development projects. The most important aspect of this movement was the international support received by it. As a matter of fact the main reason behind the World Bank's withdrawal of funding to the project was the international pressure which was something unprecedented in the environmental history of India. Moreover, the success lies in convincing the government to stop the project with the people's support, which is most unlikely in the present socio economic conditions in India.[18] In general, these environmental movements are often grouped under peasant or tribal movements and also under "new social movements"[19]. Some even title them as middle class or elitist movements. The reason being that the ecological aspects are linked with the problems associated with the peasants and tribals whose survival is attached to the natural resources. The problems of tribals as well as the non tribal poor are often articulated by the urban middle class and the elite. Environmental movements in India are, therefore, not necessarily for a 'green' or 'clean' earth or for saving mankind's heritage and endangered species as in the West, but are also for the very survival of the local poor.[20] It is appreciable to note that even with limited resources; these environmental movements have initiated a new political struggle for safeguarding the interest of the poor and the marginalised.[21]

1.3 Dalit Movement and Human Rights

The word *'Dalit'* was coined in the post colonial India by the disciples of B.R. Ambedkar. Since then, the word *dalit* has become the vernacular terminology for the oppressed classes.[22] The *Dalit* movements are predominantly anti-untouchability movements. These movements were generally launched for maintaining or increasing reservations in the political offices, government jobs and welfare programmes.

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18 *Supra* note 16, pp. 486-487.

19 These movements were described as 'new' because they took up issues neglected by the old; class based social movements of peasants and workers. For more details, see: Ramchandra Guha (2007), p. 543.

20 *Supra* note 16, p. 480.

21 *Supra* note 13, p. 32.

22 H.C. Sadangi, *Dalits: The Downtrodden of India*, Isha Books, New Delhi, 2008, p. 195.

Ghanshyam Shah classifies them into: (a) The Reformative Movements; and (b) The Alternative Movements. The former tries to reform the caste system to solve the problem of untouchability and the latter attempts to create an alternative socio cultural structure by conversion to some other religion or by acquiring education, economic status or political power. Both types of movements use political means to attain their objectives.[23]

It is ironical to note that until 1990s, the daily violation, exclusion and humiliation suffered by the millions of people in low caste groups was not treated as human rights issues by the United Nations Organisations or Non Governmental Organisations.[24] In the post colonial period, the *Dalit* movement have kept caste oppression in public view. Moving beyond untouchability which persists in virulent forms, the movement has had to contend with increasing violence against *dalits*, even as *dalits* refuse to suffer in silence, or as they move beyond the roles allotted to them in the traditional caste hierarchy. The scourge of manual scavenging has been brought in to policy and the law campaigns; there have been efforts to break through public obduracy in acknowledging that untouchability exists.[25] The *dalits* of Maharashtra launched the Dalit Panthers Movement in 1970s. The main participants of the contemporary *Dalit* Movement in Gujrat, Karnataka, Maharashtra, Uttar Pradesh, came from the urban educated middle class. The Panthers condemn and discard the dominant culture and attempt to build an alternative socio cultural identity for the oppressed classes. They organized demonstrations against the injustices to the Scheduled Castes. However, most of their activities were limited to propagating their ideas by publishing the original literature such as poems, stories, plays which are used as a means of protest against the *Hindu* intellectual tradition, the *Hindu* religion and the *Hindu* ethics.[26] Moreover these groups have also tried to internationalise this discrimination of caste by influencing the agenda of the World Conference against Racism.

Assertion of *dalit* identity has become a central issue of the *Dalit* Movement. Their struggles have brought *dalits* on the agenda of the mainstream politics. In academic circles, they have forced a section of intellectuals to critically review not only the

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[23] Ghanshyamshah Shah, *Social Movements in India: Review of the Literature*, Sage Publications, New Delhi, 2004, p. 119.

[24] Clifford Bob, "Dalit Rights Are Human Rights: Caste Discrimination, International Activism, and the Construction of a New Human Rights Issue", *Human Rights Quarterly*, Vol. 29, No. 1, 2007, pp. 167–193, p. 168. *Available at* www.jstor.org

[25] Vibuti Patel, "Human Rights Movement in India", *Social Change*, Vol. XXXX, No. 4, 2010, pp. 459-477, p. 467. Also available at: *http://sch.sagepub.Comcontent/40/4/459.*

[26] *Ibid.*, p. 125.

Indian tradition and culture but also the paradigms of modernity and Marxism. In the 1990s, with the increased political participation in the elections and somewhat political success of the *Bahujan Samaj party* in Uttar Pradesh, some scholars consider their mobilization as a 'new political movement' of the *dalits*.[27] Also, there has been a marked shift from the domain of reforms to that of rights. *Dalit* movement within the country seems to have successfully joined the bandwagon of human rights movement. One finds a qualitatively distinct type of militancy and assertiveness characterizing a *dalit* movement.[28]

1.4 Support of Judiciary and the struggle of social movements

Judiciary in every country has an obligation and a constitutional role to protect human rights of the citizens. Under the Constitution of India, this function is assigned to the superior judiciary - High Courts and the Supreme Court. The Supreme Court of India is perhaps one of the most active courts when it comes to the matter of protection of human rights. It has a great reputation of independence and credibility.[29]

The Indian judiciary had earned a dubious distinction for its role in supporting the suspension of right to life during the national emergency and it did not take much time to realize the colossal impact of such a mistake. The judiciary badly wanted to do a rapid image makeover. It was the same period in which the country saw a rapid growth of civil society organizations and the activist individuals fighting for the cause of civil liberties in various spheres, mainly issues relating to emergency. The court saw this as an appropriate moment to change its negative image. The first thing it did was by liberally interpreting the fundamental rights and re-conceptualizing the basic rules of judicial process with a view to make it more accessible and participatory. First, such opportunity came during the Menaka Gandhi's case involving the issue of fundamental rights (right to personal liberty and right to freedom) where her passport was impounded and she challenged the validity on the ground that such an action violated her 'personal liberty'. It also brought in the concept of procedural 'due process' under the words 'procedure as established by law', an import from the American experience. In short, the court

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27 *Supra* note 23, p. 122.

28 Manish Kumar Thakur, "The Dalit Discourse on Human Rights: Durban and Beyond", In S.N. Choudhary (ed.): *Human Rights and Poverty in India: Theoretical Issues and Empirical Evidences*, Concept Publishing Company, New Delhi, 2005, pp. 222-235, at p. 224.

29 A.S. Anand , "Role of National Human Rights Institutions - The Indian Experience", *Journal of the National Human Rights Commission*, Vol. 4, 2005, pp. 57-73, at p. 70.

went beyond the textual construction of the words of the constitution and interpreted them liberally in the context of changing situations.[30]

It is important to note that the Supreme Court of India has dealt with not only the rights guaranteed under the Indian Constitution but specifically also with the rights enshrined under the Declaration of Human Rights. The change of the attitude of the Supreme Court from *A.K. Gopalan*[31] to *Menaka Gandhi*[32] has led to many victories for the common man. *Article 21* is one Article in the Constitution which has been transformed by the Supreme Court. It now encompasses almost all conceivable human rights within its ambit. On a plain reading, it is a directive to the state to refrain from infringing human rights and the right to life or personal liberty of a person. The courts have taken a very liberal view and have transformed the negative injunction to a positive mandate to do all things which will make life worth living. The Supreme Court of India in its various judgments has emphasized the importance of the Universal Declaration of Human Rights.[33]

These decisions are the landmark decisions which show the extreme importance in which Supreme Court of India holds the Universal Declaration of Human Rights. It may be appropriate to point out that the development of human rights has extended into new horizons, for example, the scope of human rights has been extended to the right to environment, right to education, right to pure drinking water, right to good roads, vehicular pollution and female foeticide, to the new socio-economic rights and other rights which are necessary for the enjoyment of human rights.[34]

Thus, we see that our courts have played a positive role in incorporating and enforcing human rights available at international level into the Indian law through judicial construction. The Supreme Court of India in particular through judicial interpretation has widened the horizon of human rights in India. The Courts have acted as guardians and sentinels of democracy, freedom and individual liberty.[35] The

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30 Pandit Kamalakar, *Human Rights and Criminal Justice*, Asia Law House, New Delhi, 2010, p. 27.

31 AIR 1950 SC 27.

32 AIR 1978 SC 597.

33 *Maneka Gandhi* v. *Union of India*, (1978) SCR(2) 621; *Hussainara Khatoon* v. *Home Secretary*, 1979 SCR(3) 169; *Randhir Singh* v. *Union of india*, (1982) 3 SCR 298, *Sunil Batra* v. *Delhi Administration*, AIR 1978 SC 1675; *Olga Tellis* v. *Bombay Municipalities Corporation*, AIR 1986 SC 180; *Vishakha* v. *State of Rajasthan*, AIR 1997 SCC, 3011; *Mohini Jain* v. *State of Karnataka*, (1992) 3 SCC 666; *M.C. Mehta* v. *Union of India*, (1988) SC(1) 471; and *George Verghese* v. *Bank of Cochin*, AIR 1980 SC 470.

34 J.L. Kaul and Manoj K. Sinha (eds.), *Human Rights and Good Governance: National and International Perspectives*, Satyam Law, New Delhi, 2004, pp. 214-15.

35 Nagendra Singh, *Enforcement of Human Rights: In Peace, War and the Future of Humanity*, Eastern Law House, New Delhi, 1986, pp. 84-85.

court's legitimacy will depend to a large extent on its ability to offer support to the social movement struggles which are primarily focused on the realization of economic and social rights at a time of economic liberalization and globalization.[36]

1.4.1 Public Interest Litigation and the Human Rights

At the same time we see that the development of the judicial process of Public Interest Litigation is due to the seeming failure of the other branches to effectively discharge their functions in certain spheres of public concern. Since the issues raised in the PIL pertains to the enforcement of fundamental rights, whenever the issue has a legal component, the Supreme Court has stepped in under *Article 32* to fill in the vacuum.[37] By literally interpreting various problems of the Constitution with an intention to make the court accessible to the common man, the court relaxed the judicial procedures to encourage public participation in the judicial process as a means of control over the other organs of the government. To ensure this, the court created a new system of jurisprudence called Public Interest Litigation (PIL) by relaxing the standing in which it allowed a third party to propagate the cause of others in the court. "PIL has definitely given a boost to the enforcement of human rights in India".

It may be appropriate to mention here that Public interest litigation was nurtured and defined by two eminent jurists - Justice V.R. Krishna Iyer and Justice P.N. Bhagwati. Justice Iyer made a strong basis for liberalizing the nature and scope of judicial system to provide the average citizen access to justice without any hindrance. To achieve this, he advocated for a simple, non-technical inexpensive, flexible and realistic procedure. He stressed on a fundamental judicial reform.

Justice P.N. Bhagwati took the thread from where Justice Krishna Iyer had left and expanded the scope and functions of public interest litigation in several of his judgments. In *S.P. Gupta* v. *Union of India*[38], he made it clear that "*the traditional adversarial system of justice had failed to deliver justice to the helpless as they could not legally represent their cases and produce relevant evidence before the court*". He made it very explicit when he said that "*any member of the public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury could move the court. The court will not insist on*

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[36] C. Raj Kumar and K. Chockalingam, *Human Rights, Justice and Constitutional Empowerment*, Oxford University Press, New Delhi, 2010, p. 236.

[37] J.S. Verma, *The New Universe of Human Rights*, Universal Law Publications, New Delhi, 2004, p. 58. For more details also see: *http://nhrc.nic.in/documents/dm_lecture-ii.pdf*

[38] AIR 1982 SC 149.

strict procedures when such a person moves a petition on behalf of another or a class of persons who have suffered legal wrong and they themselves cannot approach the court by reason of poverty, helplessness or social backwardness."

In other words, the court changed the old concept of *locus standi* by allowing people who had a stake, direct or indirect, in the outcome of a suit, to be represented in the judicial proceedings. In several similar cases, the Supreme Court broadened the *locus standi* and its application as a mass jurisprudence.[39] Apart from liberalizing the *locus standi*, the court went ahead and allowed public participation in the judicial process even as it recognized the group rights to participate in the legal proceedings. In doing this, the court granted workers, residents and general public, the right to appeal the courts against the violation of their collective rights. Further, the court moved beyond the traditional procedures when it treated the letters as writ petitions justifying this on the ground of increasing people's access to judicial process especially for the purpose of providing easy access to justice to the weaker sections of the society. Similarly, the court also took up the issues of non-implementation of its directions by monitoring the implementation of its directions, setting up commissions, expert committees, to gather valid information. It made further innovation in public interest cases by granting interim relief to the victims, specifying the amount of compensation and supervising the process of their implementation. In short, the court broadened the contours of judicial power by enlarging the scope of PIL.[40]

The courts' recognition of rights of third parties by relaxing the *locus standi* encouraged several groups, such as NGOs, public spirited individuals, lawyers and citizen forums to file litigations in the courts for the cause of underprivileged sections and in a way, also expedited and supported the work initiated by social movements. Thousands of litigations were filed on number of issues - human rights violations, women rights, bonded labour, environmental pollution and so on, thereby, strengthening the role of social movements in promoting human rights culture in India. The court in particular broadened the relevance of human rights provisions by liberally interpreting the fundamental rights. The liberal rule of access from which public interest litigation emanated, enabled the court to reach the victims of injustice. The court went into allegations of killings of innocent people or suspected accused through false encounters, death of people in police custody, cases of blinding of prisoners by the police. Through PIL, court's intervention was sought

[39] Niranjan Sahoo, "Human Rights Movement in India," In Tapan Biswal, *Human Rights Gender and Environment*, New Delhi: Viva Books Pvt. Ltd., 2006, pp. 181-203, p. 191.

[40] Sampat Jain, *Public Interest Litigation*, Deep and Deep Publications, New Delhi, 2003, pp. 59-63.

against inhuman working conditions in stone queries, for controlling occupational health hazards and diseases of workmen working in asbestos industry. The Supreme Court entertained petition against the sexual exploitation of the children in flesh trade and asked the Central Bureau of Investigation to inquire into that. Under the traditional paradigm, a court would not have gone into how the inmates were being treated in a mental hospital or it might not have asked the CBI to inquire into the allegation of exploitation of children in flesh trade. There was a subtle shift from neutralist adversarial judicial role to inquisitorial, affirmative judicial role. As a result of this shift, the court now allowed the groups to have the *locus standi* in the judicial proceedings that had no stake in the strict sense. The court recognized the rights of workers and residents to represent the cases in the public interest by abolishing all procedural restrictions.

The PIL lawyers have demonstrated in India and abroad that the common man can raise voice, impress and when need be, even contest against wrongful political and executive actions thereby enabling the inept destitute to take a step towards guaranteeing them that now public agencies will be serving them in the way the law makers intended them to serve.[41]

The concept of PIL, which has been fostered by judicial activism, has become increasingly important in setting up valuable and respectful records, especially in the arena of human rights and legal treatment for the "unrepresented" and the "under- represented". Justice Bhagwati emphasized the importance of public interest litigation in the case of '*Bandhua Mukti Morchha* v. *Union of India*'[42] as following:

"*Public Interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community.*"

In the case of *People's Union for Democratic Rights* v. *Union of India,*[43] it was pointed out by Justice Bhagwati that there was misconception in the mind of some lawyers, journalists and the people in public life that public interest was an unnecessary cluttering up of the files of the court that added to the already staggering arrears of cases pending in the court for years. In the judge's opinion those who were decrying public interest litigation did not realize that "it is only the moneyed who have so far had the golden key to lock the doors of the justice" and

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41 S. Parameshwaran, "Human Rights - Asian Initiative", In *Amity Law Review*, Vol. I and Vol. 2, (2000-2001), pp. 85-94, at p. 86.

42 AIR 1984 SC 802

43 AIR 1982 SC 1473.

that for the first time, the portals of the court were being thrown open to the poor and the downtrodden, the ignorant and the illiterate and their cases were coming before the courts through public interest litigation.[44]

The Supreme Court in the case of *Janata Dal* v. *H.S Chowdhary*[45] summarized the scope of public interest litigation. The horizon of this type of litigation has been widely extended and the public interest litigation constitutes a new chapter in the justice delivery system. Indeed, it has acquired a significant degree of importance in the modern legal jurisprudence which is practiced by the courts in many parts of the world and is based on the principle "liberty and justice for all".[46]

1.5 Media, Social Movements and Human Rights

Now a day's violation of human rights has become a global phenomenon. Every day, media covers and reports violations of human rights with in the country as well as outside the country. It appears that the violations of human rights are becoming part and parcel of our life. Media is known as the watchdog of the society. It has a vital role to play in the protection of human rights and has been playing this role throughout in every corner of the world. It is the responsibility of the media that it should bring the cases of the violation of Human Rights to the notice of the government and also to public at large. However, at the time of doing so, the media must take in to account, that the way it reports the matter must have no adverse affect on the societal harmony and at the same time, the reporting must also be objective. In a country like India, where maintenance of communal harmony is of vital importance, the press must take all possible precautions while reporting any matter, particularly those relating to disputes between different communities, so that it does not lead to any conflict between different communities and one act of violence does not lead to another act of violence. Thus, media acts as an important outlet for social movements, where the quality and nature of media coverage strongly influences how they are perceived in the public eye.

The freedom of press is derived from people's right to know, implied from the freedom of speech and expression *Article 19(1)(a)*. The accountability of public men can be enforced by a vigilant and objective media. The media is, therefore, a powerful tool of good governance.[47] Television News channels which constitute the

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[44] Joan Church (et. al)., *Human Rights from a Comparative and International Law Perspective*, Unisa Press, University of South Africa, 2007, pp. 130-31.

[45] AIR 1993 SC 892

[46] *Supra* note 44, p. 131.

[47] *Supra* note 37.

mainstream media, have played the role of observers, reporters and even analyzers of news. However, the latest role of 'activist' taken by the media has created a new dimension to coverage of social and human rights issues. The media has started taking upon it individual cases and mobilizing mass public campaigns. With such support from the public, the media goes a step ahead to pass pre-judicial verdicts in certain cases. The recent example being that of Jessica Lal, Priyadarshni Matoo rape and murder case, and the Nithish Katara murder issue which was taken up by NDTV, IBN-CNN through SMS and media orchestered candle light campaign.[48] Recently, there is a social movement which focussed upon campaign against corruption led by Anna Hazare and Arvind Kejriwal etc. demanding enactment of long pending Jan Lokpal Bill. This movement got support of general masses and media. This created a buzz where political leaders were denied sharing of dais with the social activists. This movement is a landmark in the constitutional history of independent India and has certainly made corruption a major social issue.

The media while making any report regarding a matter involving Human Rights violation must keep in mind that the subject of their criticism, be the Government or some individual, is presumed to be innocent till it is proved before the court that such a violation has really taken place. The media should not present anyone like a convict unless the accusation made against him is proved. An accused cannot be treated like a convict. *Article 11* of the Declaration of Human Rights also states that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

Media coverage of human rights, if done effectively, would not only help to remove narrow mindedness but also enhance cultural relativity and promote social harmony. For this media has to be a powerful instrument to create awareness and to build pressure for positive action.[49]

1.6 Conclusion

Thus we see that despite their diverse foci, all the social movements discussed above share a common commitment to basic human rights, enhanced citizen political participation, environmental protection, and sustainable development which makes reasonable their greater coordination in the advancement of human rights. Besides we

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[48] V.N. Vishwanathan (ed.), *Human Rights: Twenty First Century Challenges*, Kalpaz Publications, New Delhi, 2008, p. 258.

[49] Satpaul Sahni, "Media and Human Rights," In B.P.S. Sehgal (ed.), *Human Rights in India: Problems and Perspectives,* Deep & Deep Publications, New Delhi, 2004, pp. 204-207, p. 205.

have also seen how judiciary and media have also played a vital role in furthering and supporting the cause of these social movements and promoting human rights culture in India. We must celebrate the power of these social movements and the people affected by different forms of discrimination and oppression, collectively demanding internationally recognized rights due to all human beings.

CORPORATE SOCIAL RESPONSIBILITY IN INDIA

Dr. Sharanjit *

1. Introduction

Corporate social responsibility has assumed tremendous significance in the present world of large-scale industrialization. More and more business organizations are focusing on the ethical, societal, environmental as well as sustainable development concerns. What was thought of as charity or philanthropy in the previous decades have now been projected as the corporate responsibility towards the society for the purpose of serving a larger goal. The business concerns are viewing things in a larger spectrum taking within its ambit profit making, sustainable development and society.

Nowadays, all around the world more and more companies are realizing their duty towards the environment and the society. Corporate houses are spending money on the education, health, environment protection, relief work during calamities and disasters etc. They are also investing money for the welfare and betterment of the workers and their families. Thus CSR is emerging in a big way. The importance of CSR in the Indian context can be further judged from the fact that the recent amendments to the Companies Act in 2013 has lead to the inclusion of CSR for all companies falling within a certain parameter.[1] Thus CSR has formally ushered in the country.

At the dawn of industrial revolution, the prime objective of the business firms was to earn more profit. Fostered by socio-political and technological changes, including the establishment of democracy, various sections of the society started questioning *laissez faire* approaches of business. There has been a growing acceptance of the place that business should be responsible to the society. The business enterprise, which makes use of the resources of the society and depends

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1 Section 135 of the *Companies Act*, 2013 now provides the threshold limit for applicability of the CSR to a company i.e. (a) net worth of the company to be Rs. 500 crore or more ; (b) turnover of the company to be Rs. 1000 crore or more; (c) Net profit of the company to be Rs. 5 crore or more. Significantly, the provisions of CSR are not only applicable to Indian Companies but also applicable to branch and project offices of a foreign company in India.

on it for its functioning, should contribute to enhance the welfare of the society. Business being one of the dominant institution of the present day market-led-economy, wields considerable influence on the resources of the society and plays an important role in the process of socio-economic and cultural modernization. Being organically linked to the wider socio-economic and cultural system, it cannot distance itself from its commitment to the society particularly in a developing country like India.[2]

The concept of social responsibility among businessmen particularly in India, is not new and can be easily seen in the form of magnificent temples, high mosques, large *dharamshalas* and great educational institutions.[3]

2 Relevance of Corporate Social Responsibility

Business enterprise is a social institution created by men. It can't keep itself aloof from this syndrome. In spite of all the codes, laws rules etc. business has been milking the mother earth ruthlessly. Optimum utilization of resource is one of main objectives of any firm. Corporate Governance is commonly perceived as not simply a matter of creating an outer performing organization, which strives towards maximizing customer satisfaction and shareholder value. For this a corporate culture has to be created; the responsibility of creating such culture lies on the Board of Directors who should become effective pilots of management rather then confining themselves to statutory functions alone. The employees must not only speak of empowerment but must also accept the accompanying responsibility. There is nothing radical about the concept of corporate governance it has been developed and practiced by corporation both here at home and abroad for sustained success.[4]

It is true that a firm must make profits in order to survive. It is also true that without profit there is no firm and no corporate social responsibility. But it is not true that CSR is something that comes after profits are made and money deposited with the stockholders. Nor is it true that CSR is only for the big

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2 Renu Jatana & David Growther (Editors) Corporate Social Responsibility: Theory and Practice with case Study, Tejinder Sharma & Mahabir Narwal, *"Societal Perception of Corporate Social Responsibility: An Empirical Study,"* Deep and Deep Publication Pvt. Ltd, New Delhi, 2007, p. 395.

3 Sanjay K. Agarwal, *Corporate Social Responsibility in India,* Sage Publications, New Delhi, 2008, p. 11.

4 P.V Sarma, S. Rajani (Editors), Corporate Governance – Cotemporary Issues and challengers, S. Rajani and Mrs. D. Jyotsna Rani, *"Values and Ethics in Business Basis for Corporate Governance",* Kanishka Publishers, Distributors, New Delhi, 2007, p. 91.

players, and smaller entrepreneurs have to wait till they break into the big league.[5]

Likewise, a firm can also insist that it will not buy parts from a producer that does not meet with the highest standards of compliance regarding working condition, wages and benefits, and pollution standards. Its steadfastness in such matters can also raise the expectations of its consumers who will baulk at the suggestion that some of what they consume has been produced under unacceptable conditions or, an enterprise may decide to purchase from cooperatives set up by marginal communities, or contract with service providers that come from backward sectors of the society. This also adds to the company's profile with its consumers, but again in a manner that affects the working of the organization in any intrinsic fashion.[6]

Till the late twentieth century the mission of business firms was exclusively economic with the business environment being characterized by various developments including the shift of power from capital knowledge, increased levels of literacy and the shrinking of geographical boundaries due to faster means of travel and communication, people are by and large becoming conscious of their rights, which has led to a rise in the expectation of society from business.[7]

CSR has found recognition among enterprises, policy makers and other stake holders, as an important element of new and emerging forms of governance, which can help them to respond to the following fundamental charges:[8]

> -Globalization has created new opportunities for enterprises, but it also has increased their organization complexity and the increasing extension of business activities abroad has led to new responsibilities on a global scale, particularly in developing countries.
>
> -Consideration of image and reputation play an increasingly important role in the business competitive environment, as consumers and NGO's ask for more information about the conditions in which products and services are generated and the sustainability impact thereof, and tend to

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5 C.V Baxi and Ajit Prasad (Editors), Corporate Social Responsibility, Concepts and Issues – The Indian Experiences, Dipankar Gupta *"Corporate Responsibility"* Excel books, New Delhi, 2006, p. 22.

6 *Id.* at 27.

7 *Supra* note 3 at p. 11.

8 V.T Patil, Sarbjit Sharma, *Corporate Social Responsibility and Human Rights*, Author Press, New Delhi, 2009, p. 2.

reward with their behavior, socially and environmentally responsible firms.

-Partly as a consequence of this, financial stakeholders ask for the disclosure of information going beyond traditional financial reporting so as to allow them to better identify the success and risk factors inherent in a company and its responsiveness to public opinion.

-As knowledge and innovation become increasingly important for competitiveness, enterprises have a higher inherent in retaining highly skilled and competent personnel.

Business operations can have repercussion on the human rights situation in their area of activity, and for this reason voices have in recent years become more vigorous in their calls to get business enterprises involved in the respect, promotion and protection of human rights. Among the various instruments that have been developed so far, the overall system of conversion of the International Labour Organisation (ILO), including its Declaration on Fundamental Principles and Rights at work and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, is especially note worthy : Upon ratification, the state party undertake to implement the Convention in their national legislation in a way that guarantees that business operation will be in line with the updated and, in regard to the ever evolving socio –economic context, adopted undertaking of workers human rights. It is important to mention in this context the OECD Guidelines for Multinational Enterprises with its complaint Mechanism of national contact points as well as the UN Global Compact. While the Guidelines are addressed to multinational of the OECD countries (plus observers) only, the latter is universal albeit non binding, instrument that serves as a dialogue platform for businesses to share best practices in order to improve their voluntary codes of Corporate Social Responsibility.[9]

Several large corporate houses pay lip service to CSR wile making the situation work for the communities in which they work. Oil exploration and transmission firms spending millions of dollars on CSR activities, leave oil spills unattended to. Soft drink MNCs deplete village wells. There are too many poor people who depend on forests for their survival. Acres of jungles are cut to accommodate

[9] *Id* at 25.

new industrial activities and migrants work in those industries, but almost nothing is done for those who are deprived of their livelihood.[10]

3. Corporate Social Responsibility and Environment Accounting

The problem of environmental pollution has assumed international dimensions and India is no exception to it[11]. The irony of the situation is that more the economic development in the world, the more is danger to the environment.[12]

The last 50 years have seen a rapid growth in industry, increasing number of transport vehicles and overcrowding in urban areas. Exhaust from chemical factories, thermal power stations, motor vehicles and generator sets in homes and business establishments discharge a large number of pollutants in to the environment which prove harmful to human existence through the polluted foods we eat and the polluted air we breath. Moreover, there is a contact of chemicals with the skin and eyes. The modern living standards, technological advancement, industrialization and urbanization results into constant degradation of the human environment.[13]

Man in order to survive, adopts itself to its environment but he rarely pays due attention for its improvement[14]. According to our scriptures, a *Dharanath Dharma Uayata* – that which sustain all species of life and helps to maintain harmonious relationship among them is *dharma* – and that which disturbs such ecology is *adharma.* But it appears that today, this generation has forgotten the duty towards environment protection. The man is unmindful of the fact that health is wealth and without a pollution free environment, one cannot suppose of good health[15].

CSR also takes within its ambit environmental accounting. Environment concerns are to be reckoned with as today man is ruthlessly playing with the nature. The corporate sector, manufacturing units and industries are depleting the natural resources at a very fast pace and it will take millions of years for the replenishment of these resources and fossil fuels. Further, enormous amounts of air, water, land and marine pollution is generated during the manufacturing process. As the

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10 *Supra* note 3 at p.15.
11 *Ibid.*
12 UNEP, *In Defence of the Earth,* United Nations Environment Programme, Nairobi, 1981, p.3
13 Mool Singh, *Economic Advancement and Environmental Pollution – a Question of Survival of Future Generation,* AIR 1990 J, p. 49
14 Dr. H.N. Tiwari, *Environmental Law,* Allahabad Law Agency, Faridabad, 2002, p.1
15 Dr. Vikas Vashisth, *Laws and Practice of Environmental Laws in India,* Bharat Law House, New Delhi, 2002, p.2

business houses are deriving huge amounts of profits at the expense of the nature they are also ethically bound to restore and preserve the bounty of it. In this way the corporate houses are accountable to the environment.

Industries are seen as a destroyer of environment. Industries bring prosperity but at the same time they impose heavy social costs on the Society. In the present day world, industry and transport are the major polluters and the businesses cannot get away easily shrinking its responsibility. Extensive research by the academic and environmentalists has provided abundant information, which easily fixes responsibility on business for most of the environmental damage. In our country, all the industrial belts particularly the chemical and petro- chemicals are a living ecological disasters. There industries have already polluted rivers. Industries manufacturing drugs, chemicals, textiles, electroplating tanneries and tobacco are contaminating ground water and soil; besides causing air pollution, which hurts environment. Mostly almost all the economic activities require natural resources as environmental inputs charges their quality. As long as human activity is at a level below the regeneration capacity of the natural environment, there is no decline in the quality of their resources. The degradation of natural resources, or loss in the quality of the environment, imposes a burden on present and future generation. It is needed to know how much their resources have been utilized for our living and how much of the burden we leave or we borrow from our future generations. This accounts to go for an environmental accounting.[16]

4. Sustainable Development and Corporate Social Responsibility Concerns

CSR is a concept that organization especially corporations, have an obligation to consider the interests of shareholders, customers, employees, communities, and environment in all aspects of their operation, CSR is closely linked with the principles of sustainable development Enterprises should make decision based not only on financial factors such as profits or dividends, but also on the long term Social and environmental consequences of their activities. CSR has been recognized as an integral part of good corporate governance. The public

[16] Sudhansu Sekhar Mishra and Rajan Kumar Sahoo (Editors) Corporate Social Responsibilities and Industrialization, P.C. Mohanty *"Corporate Social and Environmental Accounting – A Study,"* Dominant Publishers and Distributors, 2009, p. 44

enterprises have the mandate of promoting the interests of Society and the community.[17]

The concept of sustainability or sustainable development is another bracket under which CSR is discussed in business, politics and academia. Originating from forestry and environmental Management, sustainability in a business context aims at mapping out how an organization can successfully survive without compromising the ecological, social and economic survival of its current and future environment. Again, the language and concept of sustainability reflects the influence of different regional contents on the understanding of CSR. In particular, in Europe, Corporations have been forced to think about their impact on and responsibility to wider society in the context of the rise of the green movement during the 1970s and 1980s. Consequently many Corporations became involved in CSR through ecological issues, and still today many companies such as BMW, Danone, Daimler – Chrysler or shall talk about their CSR in terms of sustainability. This concern with sustainability is also reflected on the political level for instance, the Seminal paper on CSR by the EU Commission (2202) equates CSR with sustainable development and n has been influential in shaping the more recent interest in CSR in Europe significantly.[18]

Today, corporate philanthropy has evolved into a new form with the business like description of corporate community involvement "A recent Ford Foundation Report describes corporate investment in community development as a new paradigm likely to "revolt in a healthier economy and positive business outcomes." Structured volunteers programs for corporate employees are a widespread example of this new phenomenon demonstrating the mutually beneficial nature of such programs. While the community benefits from the donation of the employees time and talent, the company benefits from loyal employees and in recruiting and the teaching of team work skills to employees.[19]

The Ethics of Corporate Governance is therefore determination of what is "right, fair, proper and just" in decision and action that affect other people. It focuses on what our relationships are and ought to be – with our employees, customers,

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17 Arun Kumar Rath, *Towards Better Corporate Governance – Independent Directors in the Boardroom,* Excel Books, New Delhi, 2010, p. 165

18 Andrew Crane, Dirk Matter and Laura J. Spencer (Editors), *Corporation Social Responsibility – Readings and Cases in a Global Context,* Routledge, Oxon, 2008, p. 56-57.

19 *Id.* David Hess, Nikolai Rogovsky and Thomas Dunfee, "The Next Wave of Corporate Community involvement : Corporate Social Initiatives, p. 271

stockholders, creditors, suppliers, distributors, neighbors and other member of community/society in which we operate.[20]

Globally, the notion of CSR and sustainability seems to be converging, as is evident from the various definition of CSR put forth by global organization. The genesis of this convergence can be observed from the preamble to the recently released draft rules relating to the CSR clause within the Companies Act, 2013 which talks about stakeholders and integrating it with the social, environmental and economic objectives, all of which constitute the idea of a triple bottom line approach.[21]

Apart from internal drivers such as values and ethos, some of the key stakeholders that influence corporate behavior includes governments (through law and regulation), invertors and customers. In India, a fourth and increasingly important stakeholder is the community, and many companies have started realizing that the license to operate is no longer given by governments alone, but communities that are impacted by a company's business operation. Thus, a robust CSR programme that meets the aspiration of these communities not only provide them with the license to operate, but also to maintain the license, thereby precluding the 'trust deficit' (ibid).

5. Legislative Position of Corporate Social Responsibility in India

The new Companies Act, 2013[22] has introduced the concept of CSR. The Ministry of Corporate Affairs has notified Section 135 and Schedule VII of the Companies Act as well as the provisions of the Companies (Corporate Social Responsibility Policy) Rules, 2014 (CSR Rules) which came into effect from Ist April, 2014.

Section 135. Corporate Social Responsibility.- (1) Every company having a net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

(2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the CSR committee.

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20 *Supra* note 4 at p. 97.

21 *pwc.in/assets/pdfs/publications/2013/handbook – on – corporate – Social – responsibility – in – india pdf* – visited on 19.07.17.

22 Act No. 18 of 2013.

(3) The CSR committee shall –

a) Formulate and recommend to the Board, a Corporate Social Responsibility Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

b) Recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and

c) Monitor the Corporate Social Responsibility of the company from time to time.

(4) The board of every company referred to in sub-section (1) shall-

(a) after taking into account the recommendations made by the CSR committee, approve the CSR policy for the company and disclose contents of such policy in its report and also place it on the company's website, if any in such manner as may be prescribed; and

(b) ensure that the activities are also included in CSR Policy of the company are undertaken by the company.

(a) After taking into account the recommendations made by the Corporate Social Responsibility Committee, approve the Corporate Social Responsibility Policy for the Company and disclose contents of such Policy in its report and also place it on the company's website if any, in such manner as may be prescribed; and

(b) Ensure that the activities as are included in Corporate Social Responsibility Policy of the Company are undertaken by the company.

(5) the Board of every company referred to in sub section (1), shall ensure that the company spends in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding years, in pursuance of its Corporate SR Policy:

Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:

Provided further that if the company fails to spend such amount, the Board shall in its report made under clause (a) of sub section (3) of Section 134, specify the reason for not spending the amount.

According to the Companies Act, 2013 if a company is covered under the ambit of the CSR, it shall be required to comply with the provisions of the CSR which are as follows –

1. As provided under Section 135 (1) itself, the companies shall be required to constitute Corporate Social Responsibility Committee of the Board "hereinafter" CSR Committee". The CSR Committee shall be comprised of 3 or more directors, out of which at least one director shall be an independent director.
2. The Board's report shall disclose the composition of the CSR Committee.
3. All such companies shall spend in every financial year, at least two percent of the average net profits of the company made during the three immediately preceding financial years in pursuance of its Corporate Social Responsibility Policy. It has been clarified that the average net profits shall be calculated in accordance with the provisions of Section 198 of the Companies Act, 2013.

The CSR Activities as envisaged by Section 135 of the Companies Act 2013 and Companies (Corporate Social Responsibility Policy) Rules 2014 are as under (the following list is illustrative but not exhaustive). –

i) Eradicating hunger, poverty and malnutrition promoting preventive health care and sanitation and making available safe drinking water.

ii) Promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly and the differently abled and livelihood enhancement projects;

iii) Promoting gender equality, empowering women setting up homes and hostels for women and orphans setting up old age homes, day care centres and other facilities.

iv) Reducing child mortality and improving material health by providing good hospital facilities and low cost medicines.

v) Providing with hospital and dispensary facilities.

vi) Ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources and maintaining quality of soil, air and water.

vii) Employment enhancing vocational skills.

viii) Protection of National heritage art and culture.

ix) Measures for the benefit of armed forces veterans, war widows and their dependents;

x) Training to promote rural sports, nationally recognized sports and Olympic sports.

xi) Contributions to the Prime Minister's National Relief Fund or any other fund set up by the Central Government for socio economic development and relief and welfare of the Scheduled castes, the Scheduled Tribes, other backward classes, minorities and women;

xii) Contributions and funds provided to technology incubators located within academic institution, which are approved by the Central Government.

xiii) Rural Development Projects etc.

xiv) Slump Area Development.

Section 181- Company to Contribute to *bonafide* and charitable funds etc.- the Board of Directors of a company may contribute to *bonafide* charitable and other funds. Provided that the prior permission of the company in general meeting shall be required for such contributions in case of any amount the aggregate of which, in any financial year, exceed five percent of its average net profits for the three immediately preceding years.

As some observers have pointed out, the practice of CSR in India still remains within the philanthropic space, but has moved from institutional building (educational, research and cultural) to community development through various projects. Also with global influence and with communities becoming more active and demanding, there appears to be a discernable trend that while CSR remains largely restricted to community development, it is getting more strategic in nature (that is getting linked with business) than philanthropic, and a large number of companies are reporting the activities they are undertaking in this space in their official websites, annual reports and even publishing CSR reports.[23]

[23] *https://www.pwc.in/assets/pdfs/publications/2013/handbook-on-corporate-social-responsibility-in-india.pdf*

6. Conclusion

Corporate social responsibility is considered to be a good business practice. It is felt that a company derives huge profits by depending on the nature and the society. It is also felt that the corporate social responsibility create and maintain strong long term relationships with the investors, employees and customers. It reflect the efforts of a company for the environment and social well being. The CSR activities will go a long way in eradication of poverty, in reducing labor problems, it will also foster sustainable development, education and health sector. Earlier the CSR initiatives were voluntary. But with the rapid global expansion of businesses and wide spread industrialization urgent need was felt to address the social and environment concerns by business houses. It is always to be remembered that the economic development should not be at the cost of nature. Indiscriminate use of natural resources needs to be avoided. Our responsibility towards the environment must never be forgotten.

'BAR DANCING' AS AN EMPLOYMENT- LEGAL AND MORAL ISSUES

Dr. Shipra Gupta*

1. Introduction

Morality and law are intertwined concepts and have reciprocal effect on each other. Both the concepts are relative and temporal with variable connotations. Law, in order to be reflection of social morality may have to keep pace with the changing patterns of acceptable standards of morality. Jurisprudential discourse has always been engaged in understanding the relationship of 'law' and 'morality'. Nonetheless, when it comes to focus this relationship with reference to women; morality *viz-a- viz* women has always been viewed predominantly in terms of their sensuality and sexuality, which is projected as a disadvantage indicated to oppress them. This 'stereotypical preconditioning' in the perception of society towards the fixed 'role playing' as care givers or be employed in fixed professions, perceived to be safe for them, has played a major role in shaping the psyche of the people. There is, however, dire need to change the social perspective towards women's rights with a view to assert constitutional mandate of 'equality', right to life and right to employment. The concept of 'equality of men and women' does not go well with those who view women to be vulnerable, susceptible to exploitation, primarily sexual; and hence advocate for keeping the women away from such social milieu that could malign the dignity of women, leading to social and moral depravity thus indirectly maintaining the patriarchal domination. Such a 'perception' throws a challenge for the state, to ensure the dignity of the women so as to quieten such clamour that seeks to deprive them of their constitutional rights; and also, for taking upon itself the responsibility for providing a safe and secure atmosphere for work to earn livelihood for a dignified life.

2. Law and Morality

Law and morality might stand on a different footing although they are inextricably linked, and though a legal decision cannot be based purely on morality.[1] Hence, despite overlapping domain and inextricable relationship between law and morality, both are independent of each other and operate individually.

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1 G.S. Misra, J. (*discenting*) in *Ram Chandra Bhagat* v. *State of Jharkhand,* (2010) 13 SCC 780 at 783.

In the words of Bentham, the elucidation of the relationship between law and morality has been given thus:

> "Morality in general is the art of directing the actions of men in such a way as to produce the greatest possible sum of good. Legislation ought to have precisely the same object. But although these two arts, or rather sciences, have the same end, they differ greatly in extent. All actions, whether public or private, fall under the jurisdiction of morals. It is a guide which leads the individual, as it were, by the hand through all the details of his life, all his relations with his fellows. Legislation cannot do this; and, if it could, it ought not to exercise a continual interference and dictation over the conduct of men. Morality commands each individual to do all that is advantageous to the community, his own personal advantage included. But there are many acts useful to the community which legislation ought not to command. There are also many injurious actions which it ought not to forbid, although morality does so. In a word legislation has the same centre with morals, but it has not the same circumference."[2]

This depicts the distinction between law and morality and the line of demarcation which separates morals from legislation. The essence is that a moral obligation cannot be converted into a legal obligation and the courts are seldom concerned with the morality which is the concern of the law makers.[3] At times the legislative wisdom is coloured by preconditioned notions of morality which in contemporary times no more holds good; judicial interpretation of the letter of law could also be swayed by moral considerations, which could run counter to the constitutional mandate. 'Morality of law' on one hand and the 'legality of morals' on the other, has to be distinguished succinctly. The end purpose of the law should be the ultimate good to the society.

3. Bar Dancing and Right to Employment

Right of employment itself may not be a fundamental right but in terms of both Articles 14 and 16 of the Constitution of India, each person similarly situated has a fundamental right to be considered therefor.[4] Article 21 guarantees the right to life which would include the right to secure a livelihood and to make life meaningful. Article 15(1) of the Constitution of India guarantees the fundamental right that prohibits discrimination against any citizen, inter alia, on the ground only of sex. Similarly Article 15(2) lays down that no citizen shall, on grounds only of, inter alia, sex, be subject to any disability, liability, restriction or condition with regard, *inter alia*, to "access to shops, public restaurants, hotels and places of public entertainment". The provision in Article 15(3) is meant for protective discrimination

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2 Quoting Bentham in his *Theory of Legislation*, Chapter XII at page 60 in *Raghunathrao Ganpatrao* v. *Union of India,* 1994 Supp. (1) SCC 191at 222.

3 *Raghunathrao Ganpatrao* v. *Union of India,* 1994 Supp. (1) SCC 191 at 222.

4 *Anuj Garg* v. *Hotel Assn. of India,* (2008) 3 SCC 1 at 13.

or a benign discrimination or an affirmative action in favour of women and its purpose is not to curtail the fundamental rights of women.[5]

The need for such a provision was felt because of the recognition of the fact of social and economic handicap suffered by women for centuries resulting in inability to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women. An important limb of this concept of gender equality is creating job opportunities for women.[6]

Discrimination based on sex has been rife in our patriarchal society in almost every sphere. Biological distinction between sexes assessed in the backdrop of cultural norms and stereotypes have been referred to as "hard cases". In hard cases, the issue of *biological difference between sexes* gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over.[7]

With the passage of time the women have ventured out in many vocations to be breadwinners for their families, despite adversity and have faced opposition and scathing confrontations from various strata of the society. The pre-determined areas of work and the pre-conditioned notions of employment of women have attracted varied responses dividing the society on account of morality, safety, individuality and self determination with pre-conceived ideas and notions of 'good' and 'bad'. With the changed times there is need to bring about changes in the laws which are not in tandem with the changing times and climes.

It is the State's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. Any other *policy inference* from societal conditions

5 *State of Maharashtra* v. *Indian Hotel & Restaurants Assn.*, (2013) 8 SCC 519 at 566.
6 *State of A.P.* v. *P.B. Vijayakumar*, (1995)4 SCC 520 at 525.
7 See *Anuj Garg* v. *Hotel Assn. of India*, (2008) 3 SCC 1 at 16 quoting Professor Williams in *The Equality Crisis: Some Reflections on Culture, Courts and Feminism* published in 7 WOMEN'S RTS. L. REP., 175 (1982)

would be oppressive on the women and against the *privacy rights*.[8] Various legislations have come to be challenged on the ground of being unconstitutional because of their being lagging behind in respect of the pace of social transformation, still discriminating men and women in employment opportunities and avenues. It is trite that the constitutionality of a provision should be judged keeping in view the interpretative changes of the statute affected by passage of time.[9] Changed social psyche and expectations are important factors to be considered in the upkeep of law. Decision on relevance will be more often a function of time we are operating in. Primacy to such transformation in constitutional rights analysis would rather be desirable.[10] One must be wary of the fact that legislations with pronounced "protective discrimination" aims, potentially serve as double-edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects.[11]

The fundamental issues that emerge out of gender justice discourse primarily being the conflict between autonomy and security. Privacy rights prescribe autonomy to choose profession whereas *security concerns* texture methodology of delivery of this assurance. The measures to safeguard such a guarantee of autonomy should not be so dominant that the essence of the guarantee is lost. State protection must not translate into censorship. Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the State as well as law modelling done in this behalf. Also with the advent of modern State, new models of security must be developed.[12]

No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a *compelling State purpose*. The court's task is to determine whether the measures furthered by the State in the form of legislative mandate, to augment the legitimate aim of protecting the interests of women are proportionate to the other bulk of well-settled gender norms such as autonomy,

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8 *Supra* note 4 at 16-17.

9 *Vallamattom* v. *Union of India,* (2003) 6 SCC 611 at 624.

10 *Supra* note 4 at 9.

11 See *Anuj Garg* v. *Hotel Assn. of India,* (2008) 3 SCC 1 at 18, in which Section 30 of Punjab Excise Act, 1914 prohibiting employment of "any man under the age of 25 years or "any woman" in any part of such premises in which liquor or intoxicating drugs were consumed by the public. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means.

12 *Supra* note 4 at 15.

equality of opportunity, right to privacy etc. Least in this regard is required is a functioning modern democratic society which ensures freedom to pursue varied opportunities and options without discriminating on the basis of sex, race, caste or any other like basis.[13]

4. Bar Dancers' Hung Fate

Dance bars have been a contentious issue in the state of Maharashtra, despite successive governments, cutting across the political divide, branding them as fronts for prostitution.[14] The dance bars opened up a new avenue of employment to women from the marginalized sections for those who have no other skill or qualification. The positive outcome of the entire controversy and the media glare has brought the bar girl out of her closeted existence.[15] This controversy of ban on bar dancing, though not a new one, has once again hogged the limelight with the latest amendment in law absolutely banning bar dancing.

On July 21, 2005, the Bill to ban the dance bars in Maharashtra was passed unanimously. The State introduced the "prohibition of performance of dance in eating house, permit room or beer bar" first in August 2005. Violations meant imprisonment extending to three years and with fine which may extend to rupees two lakhs. Since 2005, majority of the dance bar establishments had literally closed down. This led to the unemployment of over 75,000 women workers.[16] It has been brought on the record that many of them have been compelled to take up prostitution out of necessity for maintenance of their families. In 2013 the Supreme Court in *State of Maharashtra v. Indian Hotel & Restaurants Assn.*[17]declared the impugned legislation to be totally counter-productive, unconstitutional and non-sustainable being violative of Article 19(1)(*g*), Article 15(1), 19(1)(a) and Article 21.[18]

The amended Section 33A in the Maharashtra Police Act, introduced in 2014, has gone a step further and by imposing a total ban on dance bars and dance performances in the state. Earlier, Section 33A allowed dance performances in

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13 *Id.* at 18.

14 A Vaidyanathan, Edited by Anindita Sanyal , "Dance Bars to Reopen in Maharashtra as Supreme Court Puts Ban on Hold" October 15, 2015 available at *http://www.ndtv.com/india-news/dance-bars-to-reopen-in-maharashtra-as-supreme-court-puts-ban-on-hold-1232467* accessed on 27.10.15.

15 Flavia Agnes, "Hypocritical Morality", *available at http://indiatogether.org/manushi/issue 149/bardance.htm* accessed on 26.10.2015

16 In another estimate 1.5 lakh women across the state of Maharashtra lost their jobs post ban on dance bars as reported in Kunal Purohit, A Swirling Debate, *Hindustan Times*, October 25, 2015 at 12.

17 (2013) 8 SCC 519

18 *Supra* note 5 at 590.

"exempted" establishments like three-star and five-star hotels but banned it elsewhere, on the argument that dance bars were obscene and acted as pick-up points for vulnerable girls. In 2013, the Supreme Court held such a classification between three-star and above hotels and other dance bars to be bad in law and slammed the "elitist" attitude of the state government.[19]

Suspending the 2014 amendment with enhanced fine of Rs. 5 lakh, aimed to defeat this Apex Court ruling, the Hon'ble Court noted that the state government had re-enacted legislation similar to 2013 despite it having been struck down. [20] The interim order came on a petition filed by the Indian Hotel and Restaurant Association for judicial declaration of the unconstitutionality of Section 33A inserted by way of an amendment by Maharashtra Police (Second Amendment) Act, 2014. [21] While directing the government to issue licences, the court added a caveat that "no performance of dance shall remotely be expressive of any kind of obscenity in any manner" and that "licensing authority can take steps so that the individual dignity of a woman is not affected and there remains no room for any kind of obscenity". The court, however, added that the dignity of women should be protected and it was the duty of the state police to ensure that it was done.[22]

Earlier in 2013, the Supreme Court took note of the recommendations of the SNDT Report which was not in favour of the closure of dance bars. However, in the report various genuine concerns were raised about the regularisation of working conditions of bar dancers, monitoring and prevention of entry of children into these establishments, protection against forced sexual relations and harassments, security of earning, medical benefits and protection from unfair trade practices. The report further recommended for increase in options rather than reducing the same for women. The report also indicated the apprehension that the ban would lead the women to becoming forced sex workers. Even the second report recommended the ban to be lifted immediately.[23]

Some of the suggestions made for the amendment of the Regulations were as follows:

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19 Utkarsh Anand, "Dance bar stigma, don't fit our culture: Maharashtra govt. in SC", October 19, 2015 available at *affidavit at http://indianexpress.com/article/india/india-news-india/dance-bars-stigma-dont-fit-our-culture-maharashtra/* accessed on 27.10.15.

20 *Ibid.*

21 Krishandas Rajagopal , "SC returns dance to Maximum City, says no room for obscenity" available at *http://www.thehindu.com/news/national/other-states/sc-stays-ban-on-dance-bars-in-maharashtra/article7765441.ece* accessed on 26.10.2015.

22 *Supra* note 11.

23 *Supra* note 5 at 569.

- Bar girls dancing in dance bars should not wear clothes which expose the body and also there should be a restriction on such dancers wearing tight and provocative clothes.

- If the dancers are to be awarded, there should be a ban on going near them or on showering money on them. Instead it should be made binding to collect the said money in the name of the manager of the dancer concerned or to hand over to the manager.

- Apart from the above, a register should be maintained in the dance bar to take entries of names of the girls dancing in the bar everyday. Similarly, holders of the establishment should gather information such as name, address, photograph and citizenship and other necessary information of the dance girls. Holder of the establishment should be made responsible to verify the information furnished by the dance girls. Also, above conditions should be incorporated in the licences being granted.[24]

Concerns over safety of girls working as bar dancers, moral depravity and eroticism of the audience, duty of state to maintain law and order, vulnerability of bar dancers to be trafficked into prostitution *etc.* have been projected as the real apprehension behind such ban.

Hon'ble Supreme Court has maintained its position that instead of putting curbs on women's freedom, empowerment would be more tenable and socially wise approach. This empowerment should reflect in the law-enforcement strategies of the State as well as law modelling done in this behalf. The Court opined that the restrictions in the nature of prohibition cannot be said to be reasonable, inasmuch as there could be several lesser alternatives available which would have been adequate to ensure safety of women than to completely prohibit dance. The Court favoured a large number of imaginative alternative steps instead of completely prohibiting dancing, given *safety of women as the real concern of the State*.[25] "The cure is worse than the disease" with reference to the ban on bar dancing because it has resulted in loss of employment for about seventy-five thousand women employed in the dance bars in various capacities. Many of these unfortunate people were forced into prostitution merely to survive, as they had no other means of survival.[26]

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24 *Id.* at 590-91.

25 *State of Maharashtra* v. *Indian Hotel & Restaurants Assn., (2013) 8 SCC 519*, at page 591.

26 Quoting Altamas Kabir, C.J. in *State of Maharashtra* v. *Indian Hotel & Restaurants Assn.*, (2013) 8 SCC 519 at 591.

Of course, the right to practise a trade or profession and the right to life guaranteed under Article 21 are, by their very nature, intermingled with each other. It would be better to treat the cause than to blame the effect and to completely discontinue the livelihood of a large section of women, eking out an existence by dancing in bars, who will be left to the mercy of other forms of exploitation. But in the long run it is necessary to work towards a change in mindset of people in general not only by way of laws and other forms of regulations, but also by way of providing suitable amenities for those who want to get out of this trap and to either improve their existing conditions or to begin a new life altogether. Whichever way one looks at it, the matter requires the serious attention of the State and its authorities, if the dignity of women, as a whole, and respect for them, is to be restored.[27] Instead of prohibiting women employment in the bars altogether the State should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. [28]

5. Conclusion

The judicial overturning of the ban against bar dancing in 2013 has been celebrated by feminists as a triumph of women's right to livelihood over patriarchal demands of women's sexual morality. The judgment is predicated on a sharp distinction between morally 'good' and 'bad' female labour, namely, bar dancing and sex work. This is ironic given their striking sociological similarities and the stigmatization and levels of state abuse inflicted against both. The bar dancer is being made out to be the cause of all social evils and depravity.

The Supreme Court ruling signalled a fresh beginning balancing the ills associate with bar dancing via regulation, which is the duty of the state to implement. Many concerted voices for 'revival through regulation' have been put forward. It has been suggested to make the profession respectable by de-stigmatising and empowering a group of stakeholders to make decisions about the evolution of the industry. The bar dancers have been seen languishing at the bottom of the decision making pyramid. A way forward is not to judge them on morality and decency parameters but to safeguard their interests against their vulnerabilities taking a pragmatic approach, such as creating a minimum wage, working on the norms for safe working conditions, fixing responsibility of bar owners and the police and above all not treating bar dancing at par with prostitution or the sale of one's body in terms of morality. The context and the perspective cannot be lost sight of. We have to provide more job opportunities with no discrimination to women. It has been alleged that

27 *Supra* note 5 at 592.
28 *Supra* note 4 at 16-17.

dance bars facilitate trafficking, thus if the anti-trafficking laws have not been successful in preventing trafficking, how will ban on bar dancing prevent trafficking? And if certain bars were functioning as brothels, why were the licenses issued to them not revoked? These are some of the pertinent issues concerning bar dancing that need to be resolved by dialogue, regulation and change of mind set. This issue is crucial both from the point of view of the dual standards of morality in the society and also as a set back to the employment opportunities to lakhs of females working as bar dancers, whose lives are at stake.

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