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EDITORIAL

Rajiv Gandhi National University of Law, Punjab has been accredited with 'A' Grade scoring CGPA of 3.32 out of 4 points. Among 18 National Law Universities across the country, the RGNUL is the first and only National Law University of Law, that has been accredited by NAAC so far. National Assessment and Accreditation Council, Bangalore (NAAC) is the statutory body discharging this responsibility. The mandate of NAAC is to make quality the defining element of higher education in India on various parameters which inter alia include Curricular Design; Teaching Learning Evaluation; Research and Consultancy; Student Support and Progression; Leadership and Governance; Innovative Practices and Infrastructure. Assessment and evaluation is a combination of self and external quality evaluation, promotion and sustenance initiatives. The NAAC Peer Team comprising, Prof. Mehrajud-Din, Vice-Chancellor, Central University of Kashmir Transit Campus, Sonwar, Sirinagar (J&K); Prof. (Dr.) M.S. Soundara Pandian, Director, School of Excellence in Law, The Tamil Nadu Dr. Ambedkar Law University, Poompozhil, Chennai; Dr. Ashok R. Patil, Chair Professor, Chair of Consumer Law and Practice (Ministry of Consumer Affairs, Government of India), Nagarbhavi, Bangalore, Karnataka; Professor Sanjukta Bhattacharya, Professor, Department of International Relations, Jadavpur University, Kolkata and Professor P.G. Marvania, Professor, Department of Economics, Saurashtra University, Rajkot, Gujarat, visited the RGNUL Campus. The focus of assessment was with reference to three aspects Quality initiative, Quality sustenance and Quality enhancement. The RGNUL established Internal Quality Assurance Cell (IQAC) under the guidelines issued by the UGC. IQAC coordinated the entire assessment and accreditation exercise. It is indeed a great moment of pride and satisfaction for the RGNUL.

Tanya Mander

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ASSISTED REPRODUCTIVE TECHNOLOGIES (REGULATION) BILL 2010: AN ANALYSIS OF THE SURROGACY PROVISIONS

Jasdeep Kaur*

Assisted reproductive technologies (ARTs) are a group of technologies, which assist in conception and pregnancy.[1] Surrogacy, which is not a technique, but an arrangement, is also included under the term of ARTs.[2] It is an arrangement where by a woman agrees to deliver the child for the intended parents. She also agrees that she will relinquish the custody as well as all the rights in relation to the child after delivery. Presently there is no law governing surrogacy in India.[3] However in the year 2002 the commercial surrogacy arrangements were declared as valid, enforceable and legal.[4] Thus the situation of India in case of surrogacy is in sharp contrast to other countries where either the surrogacy provisions are outlawed or strictly regulated.[5] In case of countries like Germany and Canada, surrogacy arrangements are banned. In United Kingdom, it is highly regulated and expensive. In some of the states in Australia entering in to surrogacy arrangement has been declared as a criminal offence.

1.1 Present Status of Surrogacy Arrangements

India is now integrating with global reproduction tourism industry which is estimated to be three million crore in US alone.[6] In response to the rising demand, many of the clinics have started offering surrogacy even in the absence of the expert doctors.[7] Numbers of the advertisements are put up by the clinics regarding the different success stories of their clinics.[8] Surrogacy has become a contentious issue due to use

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1 "Assisted reproduction" refers to and encompasses any procedure by which an intended parent attempts to conceive a child by means (usually, but not necessarily, a medical procedure) other than sexual intercourse. "Third-party reproduction," also referred to as "collaborative reproduction," refers to such procedures in which the egg, sperm, or uterus of a third party is used to achieve a pregnancy.

2 Sama Team, *Welcome Kit for Parliamentarians: ARTs Centre for Legislative Research and Advocacy (CLRA),* in Shailey Hingorani & Rishabh Gulati (ed.), 1-4 at 1 (2009).

3 Lily Srivastava, *Law and Medicine,* at 86 (2010).

4 It was in the year 2002 that Draft guidelines were issued by Indian Council of Medical Research, New Delhi. Through these guidelines the ART Clinics were permitted to undertake surrogacy arrangements.

5 Devadatt Kamat and Lavanya Regunath, "Time to Regulate Surrogacy in India", *Weekend Leader*, Vol. 5, Issue 5, Jan 31- Feb 6 (2014) Available at *http://www.theweekendleader.com/culture/1389/wombs-on-rent.html.*

6 Mohan Rao, "Why All Non- Altruistic Surrogacy should be Banned", *Economic and Political Weekly*, Vol. XLVII, No. 21, May 26, 2012, 15-17 at 17.

7 Rohini Mohan, "The Lives of Others", Available at *http://archive.tehelka.com/storymail filename=hub111008thelives.asp.*

8 "Surrogacy Brings Joy to Childless NRI Couple after 21 years of Childless Marriage", Available at *http://www.punjabnewsexpress.com/news/26265.*

of this arrangement by number of persons like divorced, single, married, gay, disabled persons etc.[9] A number of surrogacy rackets have also been disclosed by the police authorities in different cases. After analyzing all these rackets, one can come to a definite conclusion that all these are result of absence of law and regulation of surrogacy in India. One such example is that of an Israeli Paedophile, who was in jail for one year for the offence of sexually abusing child and managed to adopt the girl child through a surrogate in India. The Indian government has no information about how the girl was adopted and how that man has succeeded to take away that girl from India. Moreover, the fate was that as the girl has already become Israeli citizen, so it becomes difficult for Indian government to intervene. Further, the Israeli government fails to take the custody of the girl from that person as the law in that country does not authorize so.[10] Another case involves Sonawane, an employee of Shanti Bhavan orphanage for disabled children in Ulhasnagar, Mumbai. She was part of the racket in which needy and underprivileged women from Mumbai and Pune were asked to give birth to children who genetically belongs to them. After birth the children were sold to the childless couples.[11] Another immediate instance of baby trading was unearthed in a much disputed case known as Mona Thakur case. This case basically starts with investigations in to rape complaint filed by Mona Thakur against her boy friend Raj kumar.[12] She has disclosed that she was a divorcee and since 2007 she was living alone. However she again moved with her ex husband and maintained physical relationship. She also maintained intimacy with her boyfriend. Meanwhile she got pregnant in 2010. However the paternity of the child was not clear. She wanted to abort the child and went to Atit Bharat Clinic in Ahmedabad.[13] There she met a nurse named Niru Rathi. The nurse convinced Mona that there is no need to abort the child. She told her that the child can be given to the childless couple who will be arranged by the doctor. She also informed her that she will receive payment for giving the child to the intended parents.[14] Mona agreed without entering in to the contract. The baby boy was born in 2011 and was handed over to the couple informing that he genetically belongs to them. It was also admitted by her before the police that sex determination was also conducted and she was paid two lakh for the child.

The unregulated fertility clinics also indulge in medical malpractices. In many of the clinics, surrogacy is depicted as the guaranteed option for the couples seeking IVF

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9 Kumudhi Challa, "Contentious Issues in Surrogacy: Legal and Ethical Perspectives in India", *Christ University Law Journal,* 1 (2012), 117-126 at 121.

10 Manan Kumar and Ritika Chopra, "India's Shame Story: Israeli Paedophile Adopts Girl Through Surrogate Mother", Available at *http:// www.dnaindia.com/india/report-india-s-shame-story-israeli-paedophile-adopts-girl-through-surrogate-mother-1845195.*

11 Kiran Sonawane, "Adoption Racket: Illegal Surrogacy Angel Probed", *The Hindustan Times*, 25th February 2012, Available at *http://www.hindustantimes.com/india-news/mumbai/adoption -racket-illegal-surrogacy-angle-probed/article1-816736.*

12 Ujjwala Nayudu, "Surrogacy as Cover for Trading in Babies", *The Indian Express,* at 9, 8th January 2013.

13 "Surrogacy: Gujarat Doc Booked for Selling Baby", *The Indian Express*, 3rd January 2013, Available at *http://www.indianexpress.com/news/surrogacy-gujarat-doc-booked-forselling baby/16536151.*

14 "Fake Surrogacy: Cops for DNA Test on 7", *The Indian Express,* Available at *http:// www.indianexpress.com/news/-fake-surrogacy-cops-for-dna-test-on-7/1071337/.*

treatment. Some clinics also offer money back policies.[15] The rights of minor girl and women are violated in the garb of surrogacy arrangements. A 17 years old girl, Sushma Pandey died due to the procedures conducted on her by a fertility clinic in Mumbai in relation to egg harvesting.[16] Another woman Premila Vaghela, died due to complications of giving birth to premature child for the American couple.[17] The preference for male children and demand for the same caste surrogates are also rampant in India.[18] There is an instance of a couple from Tamil Nadu who has been waiting for three years so that surrogate from the same caste can deliver the child on their behalf.[19] Even one can find the couples who ask for the photographs of the surrogate before finalizing contract through the ART clinics in order to ensure colour, appearance etc. of surrogate.[20] Not only the big cities but the small villages are also becoming potential markets for surrogacy arrangements.[21]

Keeping in mind all these situations the Ministry of Home Affairs has intervened and issued regulations in regard to surrogacy. However there are contradictions in different decisions taken by the government. Further the requirements issued by the Indian government are different in approach than the Assisted Reproductive Technology (Regulation) Bill.[22] The government has issued two notifications in regard to undertaking surrogacy arrangements by the foreigners. These regulations circulated by the Ministry of home affairs makes the surrogacy by gay, single men and women, non married couples from other country as illegal.[23] It provides that the foreigners visiting India for the purpose of surrogacy are required to apply for the medical visa and not the tourist visa.[24] It is further required that the man and woman must be duly married and must have previous two year subsisting marriage.[25]

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15 Aditi Raja and Lakshmi Raj, "Just Another Normal Delivery", *The Indian Express,* 14th July 2013, Available at *http://www.Indianexpress.com/news/surrogacy-just-another-normal-delivery /1140657/3.*

16 Brinda Karat, "Everyone Forgets the Surrogate", *The Indian Express,* 17th July 2012, Available at *http:// www.indianexpress.com/news/everyone-forgets-the-surrogate/975372.*

17 "His Surrogate Mother Dead, Baby Boy Alright", *The Indian Express,* 18th May 2012, Available at *http:// www.indianexpress.com/news/his-surrogate-mother-dead-baby-boy--all-right-/950923.*

18 "A Raw Deal for Surrogates in Quest for Quality Offspring", *The Hindu,* at 1, 25th October 2012.

19 Arti Dhar, "Growing Demand for Male Children, Same Caste Surrogates", *The Hindu, 16th* July 2012, Available at *http://www.hindu.com.*

20 Shimona Kanwar, "Couple Seek Educated, Same Community Surrogate", *Times of Chandigarh,* at 2, 13th December 2010.

21 Shimona Kanwar, "City Sees Rent a Womb Surge", *Times of Chandigarh,* at 1, 13th December 2011.

22 Yasmine Ergas, "Babies without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy", *Emory International Law Review,* Vol. 27, 117-188 at 135 (2013).

23 Nilanjana Bhowmick, "Why People are Angry about Indian's New Surrogacy Rules", Available at *http:// worldtime.com/2013/02/15/why-people-are-angry-about-indias-new-surrogacy laws/ #ixzz2sWVWCKPm.*

24 "Only Medical Visas for Foreigners Hunting for Surrogate Mothers", *The Indian Express,* 24th April 2013, Available at *http:// www.indianexpress.com/news/only-medical-visa-for-foreigners-hunting-for-surrogate–mothers/1106896/.*

25 "No More Tourist Visa for Commissioning Surrogacy in India", *The Indian Express,* Available at http:// *www.indianexpress.com/news/no-more-tourist-visa-for-commissioning-surrogacy-in-india/ 1189084/.*

Moreover, they require a letter from the embassy with the visa application which must declare that their country recognize surrogacy and the child born out of surrogacy arrangement will be treated as the biological child of the couple.[26] They are also required to file undertaking that they will take care of the child.[27] It is further provided that the treatment can only be undertaken in a registered ART clinic and the list in this regard must be prepared by the Ministry of Home Affairs.[28] After the birth of the child, it is required on the part on the intended parents to get exit permit from Indian Foreigners Regional Registration Office. It will include DNA test in order to confirm that the child belongs to the intended couple and all the required documents will also be verified by the authorities.[29] However in spite of the fact that these notifications have been issued for securing the interest of the child as well as surrogate, it has raised the concern about the babies who are still in the womb and has also given a major blow to the multi million industry.[30] The ban has resulted in such a situation that such children when born will not be entitled to get either the Indian citizenship or the citizenship of the country where the commissioning parents live as the parents have not fulfilled the requirements as laid down by the notification.[31] After issuing the abovementioned notifications the government has now taken another recent decision of importing the human embryos for artificial reproduction including surrogacy. It will allow the foreign couples to send frozen embryos and rent a womb in India for the baby.[32] In yet another decision, the government has allowed the overseas citizens of India and person of Indian origin to undertake surrogacy without the medical visas.[33] Thus on the one hand the government is restricting the entering of surrogacy contract by foreigners but on the other making further regulations for giving relaxation in these restrictions.

1.2 Assisted Reproductive Technology (Regulation) Bill and Surrogacy

The present Bill has been drafted to check harassment of the surrogate as well as commissioning parents.[34] It envisages a national framework for the regulation and

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26 Arti Dhar, "Ministers Consulted on Assisted Reproduction Technology Bill", *The Hindu*, Available at *http://www.hindu.com/todays-paper/tp-national/ministers-consulted-on-assisted-reproduction-technology-bill/articles5381809.ece.*

27 Anil Malhotra, "New Medical Visa Laws to Regulate Surrogacy", *The Tribune,* at 9, 5th February 2013.

28 "Same Sex Couples can not Hire Surrogates", *The Tribune,* at 22, 19th January 2013.

29 Rahul Tripathi, "Government Set to Allow Visas to Singles Too for Surrogacy", *The Indian Express,* 28th May 2013 (Tuesday), Available at *http:// www.indianexpress.com/news/govt-settoallow-visas-tosingletoo-for-surrogacy/11/21434/.*

30 "Australians Fear Over India's Amended Surrogacy Rules", *The Indian Express,* 5th March 2013, Available at *http:// www.indianexpress.com/news/australians-fear-over-indias-amended-surrogacy-rules/1083335/.*

31 "New Indian Surrogacy Laws Risks Making Children Stateless", Available at *http://thefamilylawfirm.blogspot.in/2013/03/new-indian-surrogacy-law-risks-making.html.*

32 Surabhi and Ababtika Ghosh, "In Boost to Infertility Treatment, Government Allows Import of Frozen Embryos", *The Indian Express*, at 1, 16th January 2014.

33 "No Visa Needed for PIOs Coming for Surrogacy: Just Permission from Foreign Registration Office will Do", *The Hindu,* at 10, 7th March, 2014.

34 Nagender Sharma, "Surrogate Parenthood Law on Anvil", *The Hindustan Times,* at 1, 16th February 2010.

supervision of the ART and surrogacy arrangements.[35] The draft of the Bill was framed firstly in 2008 and it was reframed again in 2010. The Bill defines the term "surrogacy arrangements" as arrangements in which a woman agrees to a pregnancy achieved by assisted reproductive technology whereby neither of the gametes belong to her or her husband. The arrangement is carried out with the intention to deliver and hand over the child to the persons for whom she is acting as a surrogate.[36] According to the Bill, a "surrogate" means a woman who agrees to have an embryo implanted in her which is generated from the sperm of a man who is not her husband and oocyte from a woman. She carries the embryo till delivery for the couple or the individual.[37] It also provides that she must be citizen and resident in India. The Bill also provides for the definition of "surrogacy agreement." According to the provisions of the Bill surrogacy agreement means a contract between the persons who is availing assisted reproduction technology on the one hand and surrogate mother and on the other hand.[38] The Bill also stipulates the creation of a national registry which will be centrally maintained and accredited by the licensing authority. It will contain all the records of treatment cycles and outcome.[39]

1.2.1 Duties of ART Clinics

The Bill imposes a number of duties on the ART clinics.[40] It is the duty of the ART clinic to ensure that surrogate mother is eligible for undertaking the procedure. It must also be ensured that she is medically examined so that there remains no danger either to surrogate or child.[41] The ART clinic must also ensure that information regarding the surrogate is kept confidential.[42] The Bill makes it mandatory for the ART clinic to recommend surrogacy only to those couples in whose case it is impossible to conceive and deliver a child or otherwise it is unsafe and involves medical complications.[43] Under the Bill, ART clinic can not obtain or use the sperm or oocyte which is either donated by the relative or known person or friend of the parties seeking ART treatment.[44] Further, ART clinics are prohibited from giving advertisement for finding a surrogate for the intended parents.[45] It has also been made mandatory for the ART clinic to keep record of all the individuals, couples and surrogates involved in surrogacy contract.[46] The Bill provides that if ART clinic will disclose any information about the surrogate to any person, then it will be considered as an offence.[47]

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35 Anil Malhotra, "Legalising Surrogacy: Boon or Bane?" *The Tribune,* at 9, 14th July 2010.
36 Assisted Reproductive Technology (Regulation) Bill, 2010, S. 2 (aa).
37 *Id.*, S. 2 (bb).
38 *Id.*, S. 2 (cc).
39 "Regulating Assisted Births", *The Indian Express,* at 9, 1st July 2010.
40 *Supra* note 36 S. 20.
41 *Id.*, S. 20 (1).
42 *Id.*, S. 20 (9).
43 *Id.*, S. 20 (10).
44 *Id.*, S. 20 (12).
45 *Id.*, S. 20 (16).
46 *Id.*, S. 22 (1).
47 *Id.*, Ss. 34 (13) and (14).

1.2.2 Duties of ART Banks

The Bill imposes a number of the duties on the ART banks in relation to surrogacy arrangements. The Bill provides that the screening of the surrogate is to be made by the ART bank. The semen and oocyte storage for surrogacy has also been made duty of the ART bank.[48] The Bill provides that the surrogate mother can be financially compensated by the ART bank.[49] The Bill provides that the ART bank will obtain all the information regarding name, identity and address of the surrogate mother and such information must be kept confidential by the ART bank.[50] It is further provided that the individuals or couple seeking surrogacy can avail the services of the ART bank for giving advertisement for the surrogate. However the advertisement must not mention any requirement as to caste, ethnic identity, and descent of surrogate.[51]

1.2.3 Rights and Duties in Relation to Surrogacy

A number of rights and duties have been provided through the provisions of the Bill in relation to the parties to the surrogacy arrangements.[52] The Bill provides that the contract entered in to between the parties to surrogacy will be legally enforceable.[53]

1.2.3.1 Rights and Duties of the Intended Parents

The Bill makes it obligatory for the intended parents to bear all the expenses including insurance during the pregnancy and after delivery as per the medical advice.[54] The intending parents must also ensure that surrogate and the child are appropriately insured till the time the child is handed over or till the surrogate is free of all the health problems.[55] The Bill provides that the name of intended parents will be entered in the birth certificate of the child born through surrogacy.[56] The Bill makes it a legal obligation for the intended parents to accept the child irrespective of any deformity in the child.[57] In case of non acceptance, parents will be liable for an offence. The intended parents are further required to provide a certificate to the surrogate which must clearly mention that she had acted as a surrogate for them.[58] According to the provisions of the Bill, a couple or the individual can not have service of one surrogate at a time.[59] It means that at one point of time, the couple can arrange the services of on surrogacy only for carrying child on their behalf. The Bill prohibits the simultaneous transfer of embryos in the woman and the surrogate.[60]

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48 *Id.*, S. 26 (1).
49 *Id.*, S. 26 (6).
50 *Id.*, S. 26 (12).
51 *Id.*, S. 34 (7).
52 *Id.*, S. 34.
53 *Id.*, S. 34 (1).
54 *Id.*, S. 34 (2).
55 *Id.*, S. 34 (24).
56 *Id.*, S. 34 (10).
57 *Id.*, S. 34 (11).
58 *Id.*, S. 34 (17).
59 *Id.*, S. 34 (20).
60 *Id.*, S. 34 (21).

1.2.3.2 Rights and Duties of Surrogate

It is provided through the provisions of the Bill that only a woman who is citizen of India can act as surrogate. The ART clinic is under obligation not to send any such woman to a foreign country for the purpose of surrogacy.[61] The Bill provides that any woman who is between the age of 21- 35 years can act as a surrogate.[62] However she will not be eligible to act as a surrogate for more than five successive live births including her own children.[63] In case the surrogate is married then the consent of her husband is also made mandatory through the provisions of the Bill.[64] The Bill also provides that the surrogate mother will not act as oocyte donor for the couple or the individual for whom she is undertaking surrogacy.[65] The Bill provides that a relative, known person or friend can act as surrogate for the intended parents.[66] However in such a case the relative should belong to the same generation as the woman desiring the child. She must be medically examined for any disease as it can pose a danger to the child. It is obligatory on the part of surrogate to declare in writing that she has not received blood transfusion for the last 6 months.[67] The surrogate has to register as a patient in her own name and medical facility provided to her should clearly declare that she is serving as a surrogate mother. Further the names, addresses of the parents or couple for whom she is serving as surrogate must also be declared.[68] The Bill provides that in case of failure of first embryo transfer, the surrogate can again go for another embryo transfer on the basis of financial terms mutually decided between the parties. Thus according to the provisions of the Bill, no surrogate shall undergo embryo transfer more than three times for the same couple. [69] A surrogate is bound not to engage in any act which could harm the fetus during the pregnancy or till the child is handed over to the intended parents.[70] The Bill makes it mandatory for the surrogate mother to relinquish all the rights in relation to the child after delivery.[71]

1.2.4 Requirements in Case of Foreign Parents Seeking Surrogacy

The Bill specifically provides for the requirements in case the surrogacy arrangements are undertaken by the foreigners.[72] The Bill provides that a foreigner or NRI seeking surrogacy has to appoint local guardian to take care of surrogate during and after the pregnancy, till the custody of the child is taken over by the foreigner or NRI. It is further required that the foreign couple or individual must produce a letter before the registered ART clinic either from the embassy or from the foreign ministry of the country that surrogacy is permitted there and the child born through the

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61 *Id.*, S. 34 (22).
62 Aditi Tandon, "Draft Law to Regulate Surrogacy Finalized", *The Tribune*, at 24, 14th July 2012.
63 *Supra* note 36 S. 34 (5).
64 *Id.*, S. 34 (16).
65 *Id.*, S. 34 (13).
66 *Id.*, S. 34 (18).
67 *Id.*, S. 34 (6).
68 *Id.*, S. 34 (8).
69 *Id.*, S. 34 (9).
70 *Id.*, S. 34 (23).
71 *Id.*, S. 34 (4).
72 *Id.*, S. 34 (19).

surrogacy arrangement in India will be given entry as a biological child of the intended foreign parent. It also provides that in case the foreign parent fails to take up the custody of the child, the local guardian will be responsible for the care of the child till he is given in adoption according to the legal process.

1.2.5 Status of Child Born through Surrogacy

The Bill declares that the child will be the legitimate child. In case the child is born to the married couple, it will be deemed as born with in the wedlock.[73] In case the child is born to unmarried, single or divorced woman, then also he will be presumed as a legitimate child for all the purposes.[74] The birth certificate of the child must also show intended parents as his parents.[75] However if the child is born to the foreign intended parents, then he will not be treated as Indian citizen.[76] The Bill provides that the child has the right to ask for any information regarding his birth on attaining the age of eighteen years. However it will not include personal identification of the surrogate except in case of life threatening disease. The information can only be obtained after the consent of the surrogate mother.[77]

1.3 Anomalies in the Bill

Even though a number of arrangements have been made in the Bill regarding the interest of the parties involved, yet there are enough gaps in the present Bill that need to be addressed before it takes the shape of a law.

- The Bill mentions the minimum and maximum age of the surrogate and also mentions minimum age for a woman undertaking ART treatment. However it does not specify the maximum age for undertaking ART by a woman.[78]
- The Bill does not mention a situation where the surrogate after pregnancy refuses to carry the child without any reason. In this case the question arises whether the compensation must be paid to her or not. If it is to be paid then what will be the extent of compensation. Whether in this situation the contract can be specifically enforced. All these questions are left unaddressed in the provisions of the Bill.
- The present Bill defines the term "couple," "married couple" and "unmarried couple" in such a way that those persons whose relationship is valid in their country of origin are authorized to carry surrogacy arrangements. It means the countries where gay or lesbian relationship is valid, the persons belonging to those countries can avail the services of a surrogate in India.[79] However couples in India can not opt for surrogacy as these relationships are

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73 *Id.*, S. 35 (1).
74 *Id.*, S. 35 (2), (3) and (4).
75 *Id.*, S. 35 (7).
76 *Id.*, S. 35 (8).
77 *Id.*, S. 36 (1) and (3).
78 B. S. Chauhan, "Law, Morality and Surrogacy with Reference to Assisted Reproductive Technology", *Nyayadeep*, Vol. XIII, Issue 4, October (2012), 1-17 at 10.
79 *Supra* note 36 S. 2 (e).

illegal in the country.[80] It is an undue discrimination between Indians and foreigners.

- The Bill declares that the payment can be exchanged between the surrogates on the one hand and the intended parents on the other. However the Bill does not specify the minimum and maximum limit that must be provided as compensation to the surrogate.
- The Bill presumes the informed consent on the part of the parties involved. However the informed consent can not be presumed from the side of either of the parties i.e. parents or the surrogate. Firstly, there is enough medical terminology that parties might not be able to understand until and unless it is explained by the doctors or experts. Although the Bill stresses upon the giving of all the information to the parties, yet how far it will be followed by the doctors or experts is really an unanswered question in the provisions of the Bill. Secondly, the provisions of the Bill provide that any woman whether married or unmarried can act as a surrogate. In both cases informed consent can not be presumed on the part of the surrogate. In case she is unmarried, she is not aware of any complication that may arise during pregnancy. On the other side if she is married and have her own children, then also the informed consent can not be presumed as each pregnancy is different from the other. One can not presume the same kind of pregnancy every time i.e. if first pregnancy was without any complications, it can not be presumed that other will also be without any complication.
- The Bill focuses on rights of the commissioning couples and promotes ART without taking in to account the welfare of the surrogate. The Bill safeguards surrogate's right to the extent of protecting her from taking custody in case the intended parents refuse to take the child on basis of his disability.[81] It does not however cover all the rights and protection that must be available to the surrogate. Like the Bill subjects surrogate to the invasive procedures such as foetal reduction, it does not explain the risk involved in it. Moreover as per the provisions of the Bill, the foetal reduction is dependent on the desire of commissioning couple and the surrogate has no right to decide whether it should or should not be carried on her.[82]
- The provisions of the Bill state that the contract of surrogacy is to be entered in to between the intended parents and the surrogate. It is provided that parties to that contract have to mutually decide all the terms and conditions. However as number of studies reveal that Indian surrogates are generally illiterate or semi literate, how it can be expected on their part that they may be able to decide terms and conditions. Thus it can lead to exploitation of

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80 S. 377, *Indian Penal Code*, 1860, deals with Unnatural Offences. It declares these relationships as an offence.

81 Maya Unnithan, "Thinking through Surrogacy Legislation in India: Reflection on Rational Consent and the Rights of Infertile Women", *Journal of Legal Anthropology*, (2013) Vol. 1, No. 3, 287-313 at 292.

82 *Id.*, at 294.

surrogate as the terms and conditions of the contract can be decided by the intended parents in their own favour.[83] Moreover the Bill is not providing about any authority to monitor the terms and conditions of the contract in order to ensure that the contract has voluntarily been entered in to by the surrogate.[84]

- The provisions of the Bill provide that the surrogate will not carry more than three successful embryo transfers for the same couple.[85] However the Bill does not mention the number of couples for whom she can carry embryo transfer. Moreover it is not mentioned specifically through the provisions of the Bill that how many numbers of IVF cycles can be conducted on her as all the embryo transfer will not result in success due to low success rate of IVF procedure or any ART procedure.[86]
- The draft Bill provides some contradictory provisions in relation to protecting the anonymity of the surrogate. On the one hand it provides that all the information regarding the surrogate must be kept confidential by ART clinic as well as ART bank and should not be disclosed to any person. However on the other hand, the Bill states that she has to register herself as a patient in her own name and must specifically mention that she is serving as a surrogate. Other provisions of the Bill provide that the intended parents have to certify that the surrogate mother has provided service to them.[87] The provisions in relation to appointment of local guardian in case of foreigners undertaking surrogacy arrangements are also in contradiction to provisions of maintaining confidentiality in relation to surrogate.
- The Bill provides about the establishment of ART banks. However it is not mentioned through the provisions of the Bill that what kind of equipments and personnel are required for the ART bank. Further the Bill does not lay down any provision about the authority which can open and run the ART bank. The Bill lacks provisions in regard to inspection and monitoring of ART bank.[88]
- The Bill lays more emphasis on rights of the commissioning parents as compared to rights of the surrogate or the child. The Bill provides that surrogate has to relinquish the custody of child to commissioning parents after the birth. The Bill further requires the surrogate mother not to get too involved with the baby in her body.[89] In doing so the Bill ignores the right of

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83 *Supra* note 35.

84 *Supra* note 80 at 294.

85 *Infra* note 22 at 122.

86 Ayushi M. Sutaria, "Commercial Surrogacy in India: Proposed Framework for Legislation and Safeguarding the Surrogate Mother's Interest", *CNLU LJ* (3) 2013, 29-39 at 37.

87 Kamaljit Kaur and Jishnu M. Nair, "Women's Right to Reproductive Health: Socio- Legal Critique on Surrogacy with Reference to Union Territory Chandigarh", 2012 *RLR* (1) 12, 109-124 at 121.

88 Sama Team, "Assisted Reproductive Technologies: For Whose Benefit?" *Economic and Political Weekly*, Vol. XLIV, No. 18, May 2, 2009, 25-31 at 26.

89 Jyoti Bharkare, "Surrogacy: A Reality Eclipse by Ethical, Social, Legal Issues: An Indian Perspective", *Indian Journal of Law and Justice,* Vol. 2, No. 1, March 2011, 79-86 at 83.

physical and psychological attachment of the surrogate with the child. Moreover the Bill also ignores the child's right to breast feeding and bonding with the surrogate mother even though she is not genetically related to the child.[90] Breast Milk is considered as an ideal food for infants as it provides numerous benefits such as nutrition as well as immunity against different diseases.[91]

- The draft Bill on the one hand mentions that ART's carry risk both to mother and offspring.[92] However it does not mention the risk to the child although some risks to women have been mentioned.[93] The Bill also provides about giving information to patients or individuals. However the information which is provided to the couples consists largely about procedures, success rates and costs as per the provisions of the Bill. Information about possible side effects is not provided although common and rather mild complications are mentioned in the Bill.[94]
- The Bill provides about the appointment of the local guardian in case of foreign parent seeking surrogacy. However the Bill lacks clarity who the local guardian will be, what will be the duties and responsibilities of that local guardian and what will the extent to which he can monitor the surrogate.[95]
- The Bill does not ensure that the surrogate mother is provided with the legal counsel although it provides for professional counseling in relation to risk involved in carrying pregnancy. Further it is also not clear that if these facilities are provided then whether the surrogate is to pay the amount or it is the intended parents who have to pay the amount.[96]
- The Bill has neither designated nor authorized or proposes to create any Court or judicial forum to resolve the issue that may require adjudication in the problems arising out of surrogacy. The Bill provides for the establishment of national and state advisory board for the purpose of putting regulation on the ART clinics. However these authorities are not competent to determine the issues of nationality, citizenship, grant of passport or visa and the problem of disputed parentage or custody of the child.[97]

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90 Imrana Qadeer, "Benefits and Threats of International Trade in Health: A Case of Surrogacy in India", *Global Social Policy,* 10 (3) 302-05 at 304 (2010).

91 Ishita Chatterjee, "An Insight of the Conflicting Interests of Surrogacy Arrangements in India", (2012) 7 *MLJ,* 72-80 at 77.

92 Rule 6.13 Assisted Reproductive Technologies (Regulation) Rules, 2010.

93 *Supra* note 3 at 2.

94 *Ibid.*

95 Aastha Sharma, "Surrogacy: Law's Labour Lost?" *The Hindu,* 25th July 2010, Available at *http://www.hindu.com.*

96 "Prevent Exploitation of Surrogate Mother, Says Health Ministry", *The Hindu,* 24th October 2013, Available at *http://www.hindu.com.*

97 "Proposed Bill Needs to Address Gaps", *The Tribune*, at 13, 25th February 2012 (Saturday).

- The provisions of the Bill provide that in case of multiple pregnancies, the ART clinic will inform the patient about the medical implications and may carry foetal reduction after appropriate counseling.[1] However on the other hand it provides that the surrogate has to agree for foetal reduction if it is asked by the party seeking surrogacy. [2] Thus the Bill provides a right to the commissioning couple to demand reduction in case of multiple pregnancies ignoring right of the surrogate.
- The Bill provides that ART clinic or bank is not responsible for any risk to the surrogate under any circumstances.[3] Thus even in case of death or any other serious complication the clinic or Art bank can not be made liable. This undermines the health of the surrogate.
- The Bill lacks clarity at many places and uses ambiguous language which makes the effective implementation of the Bill changeling. Just for an example section 26(6) of the Bill which states "A semen bank may advertise for gamete donors and surrogates who may be compensated financially by the Bank." But according to section 34(2) of the Bill "the surrogate mother may also receive monetary compensation from couple and individual as the case may be for agreeing to act as such surrogate." Further the form of contract between semen bank and surrogate mentions that "the consideration for surrogacy is to be paid by the parents and the bank will not be responsible for any demand by surrogate in form of compensation. The bank shall not be responsible for any payment to surrogate for any other expenses incurred by the surrogate."[4] Thus on one hand it is provided that financial compensation to the surrogate will be provided by the bank, but on the other hand, the provisions have been made that bank can not be held liable for any demand of surrogate in relation to compensation.

1.4 Suggestions for Improvements in the Bill

- The Bill must specify all the terms and conditions of the contract that is to be entered in to between the parties. It must be done so as to avoid future litigation.
- The Bill does not mention the minimum and maximum amount of compensation that should be provided to the surrogate. The Bill should fix the minimum and maximum limit of compensation to be given to the surrogate.
- A woman should be allowed to act as surrogate only once in her lifetime.
- The Bill must also mention the maximum age of woman undertaking ART as it is mentioned in the case of a woman serving as a surrogate.

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1 *Supra* note 36 S. 23 (5).
2 *Supra* note 92 form J.
3 *Id.*, form R2 (6).
4 *Id.*, rule 2 (4).

- The Bill presumes the informed consent on the part of the surrogate. However the provisions must be made in the Bill to ensure that the surrogate is giving her consent voluntarily. In case the surrogate is a relative, it must be ascertained through the provisions of the Bill that she is giving her consent without any pressure from the family members.
- The Bill is providing about maintaining confidentiality in relation to surrogate and the contract entered in to by different parties with the surrogate. However there is a need of transparency in the surrogacy contract in order to make this arrangement morally acceptable. Thus it should not be unduly kept confidential as to how the contract has been entered in to and performed between the parties. Thus instead of maintaining confidentiality, the Bill must provide for transparency.
- The Bill provides that the clinics are free to charge any cost for the treatment undertaken by infertile individual or the couple in their clinic. However it is generally seen that clinics have fixed different charges for the same treatment on the false pretext of more success rates in their clinic. It leads to undue exploitation of the infertile couple who has to bear the burden of paying more in order to get more success rate for the birth of a child with the help of clinic. So the Bill must provide for fixation of maximum limit of the amount for the purpose of specific treatment given to individual or couple for each clinic undertaking ART services.
- The Bill provides that the state board can monitor the working of registering authority. However the Bill does not provide for any authority to monitor the working of the ART clinic. Role of the clinics must also be scrutinized by a competent authority established through the provisions of the Bill.
- The Bill mentions several rights and responsibilities of ART bank. However minimum requirements of staff and physical infrastructure have not been mentioned. These requirements for ART banks must be clearly mentioned in the provisions of the Bill.
- The Bill must contain the provisions for knowing the background and economic status of the intended parents in order to ascertain the welfare of the child.
- The Bill must be specifically clear about the issue of disputed parentage, citizenship, custody and rights of succession, maintenance, prohibited degree relationship etc. in relation to the child.
- The Bill should specify the enforceability of the contract in different situations like denial by the surrogate in handing over the child, refusal by parents for taking custody of the child, dispute in relation to financial transactions.
- The Bill must designate judicial authority for resolving the dispute between the parties to the surrogacy arrangements. There must also be arrangements for speedy disposal of surrogacy cases.

- The surrogate must be given medical and legal aid in case of necessity and that must be mentioned in the Bill.
- The Bill provides for right of the child in relation to asking information regarding the surrogate on attaining the age of eighteen years excluding personal identification of the surrogate. However the Bill must recognize right to identity of the child and he must be given the information regarding his birth on attaining the age of discretion. The Bill must specifically provide that whether the provision of Right to Information Act will be applicable in relation of giving information to the child or not. Moreover the Bill must make the provisions that the intended parents must disclose it to child about his birth through surrogacy.
- The Bill must recognize the child's right to breast feed and nutrition and must make necessary provisions so that his right is not violated.
- The Bill must clearly prohibit any basis of choosing surrogate like race, caste, religion, complexion etc by the intended parents.
- The Bill at certain places undermines the autonomy of the surrogate. Like in one of the provisions, the Bill makes it obligatory for the surrogate to undertake fetal reduction on desire of the intended parents in case of multiple pregnancies. These kinds of provisions must not be made part of the Bill as the surrogate also has autonomy to decide.
- The Bill must provide for the overall monitoring authority for all the procedures carried on between the intended parents and the surrogate starting from the signing of the contract to the giving of the treatment till the child is delivered to the intended parents. For this purpose the officials of state can be designated through the provisions of the Bill.
- Taking in to account the low success rate of ART, unlimited numbers of cycles are undertaken by the Art clinics in order to ensure success which poses health risk to the surrogate. The Bill must clearly stipulate the number of cycles a woman can undergo as a surrogate as number of live birth is not equivalent to number of ART cycles.
- The ambiguous language used in the different provisions of Bill must be made clear either by deleting the contradictory provisions or explaining them in an accurate manner.
- The Bill must clearly mention about the rights and duties of the local guardian who is appointed in case a foreigner is undertaking surrogacy.
- The Bill mentions on the one hand that intended parents from India are bound to take up the custody of the child but on the other hand make provisions that in case the child is not taken in to custody by the foreign parents, the child can be handed over by the local guardian to adoption agencies. The Bill must provide for the strict compliance with the provisions and in such cases there must not be any relaxation to the foreign intended parents to come in India for surrogacy and then avoid custody of the child.

- The Bill must mention all the possible risks to child as well as to the surrogate mother specifically in order to ascertain true informed consent.
- The Bill must fix the responsibility of ART clinic or bank as the case may be if there is any serious complication like death to surrogate due to their negligence.
- The Bill must ensure that the gay or lesbian couples from other countries are not made eligible for undertaking surrogacy arrangements as these relationships are illegal in India.

Thus there is immediate need to convert the present Bill in the form of law. However the suggestions underlined must be considered before making it as law. The law should take in to account all the rights and obligations of the parties involved. Every effort must be made through the provisions of law that no party feel exploited. Moreover the role of the ART clinics must be strictly scrutinized so that unlawful practices are not adopted by these clinics in the garb of giving treatment. There is more need of transparency rather than confidentiality in the surrogacy contracts.

UNWILLINGNESS OF WOMEN VICTIMS TO SEEK LEGAL REMEDY UNDER THE CRIMINAL JUSTICE SYSTEM OF BANGLADESH: AN ANALYSIS FROM VICTIM'S PERCEPTIONS

Dr. M Abdur Rahim Mia*

1. Introduction

Women victims face many obstacles when they seek relief from the criminal proceedings. In most cases, women become stigmatized and don't dare to file complaints fearing negligence and hassles in police station, courts and the society.[1] Women do not have enough resources to fight the long, unending and extremely expensive legal battles. Lengthy process and undue delay of criminal proceedings discourage women to go to the justice system. Gradually they are compelled to become immune to the brutality of the court atmosphere. The whole system is male dominated. That message tells women who come to court not to speak openly about the violence they have faced.[2] Women rights are being violated due to gender insensitivity of police, lawyers, doctors and Judges. Police misbehaviors and harassment with women, bribery, negligence in duty and unhealthy and unclean environment of the *thana* (police station) custody area are the key causes for violation of women rights in police stations.[3] Many women victims are reluctant to pursue their case as they are intimidated and threatened by their opponents. Often corruptions, loopholes of existing laws, negative outlook of patriarchal society, environment of the court, economic dependence etc. limit women to seek remedy under criminal justice system. Basically it appears that the criminal justice system of Bangladesh is not women-friendly. The court does not provide women victims with an environment in which they feel secure enough to speak. They are fearful of the legal process and feel that they have no access to the legal system. They also face various difficulties to come out from their home and to make a complaint against male family members or others due to lack of knowledge and confidence, financial dependence on others, communication and transport problems, discouraging social norms etc. For these reasons, most of the women victims are interested in mediation and come to approach a legal aid organization. The purpose of this study is to disclose the actual causes of reluctance of women victims to take legal action under the criminal proceedings of Bangladesh. This article has been mostly developed from an interview in June 2010 to September 2010 at Rajshahi Court.[4] 25 women victims as litigants were interviewed on their perceptions and experiences of going to police

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1 BNWLA, *Violence Against Women in Bangladesh*, BNWLA, Dhaka, 2002, at p. 5.

2 *Ibid.*

3 Odhikar, *Human Rights in Police Custody*, Odhikar, Dhaka, 2004, at p.10.

4 Rajshahi Court is a Divisional Sessions Court of Bangladesh. 25 women victims as litigants of Rajshahi Court were interviewed in Court area by the author for the purpose of this research. Experiences gathered from interviews with women victims have been used randomly in this article.

stations, doctors, court, being in court. The women represented a variety of backgrounds, rural, poor, middle class and upper-middle class as well as a cross section of experience with violence i.e rape, domestic violence, dowry etc.

2. Number of Incidence of Violence Remain Unreported

Violence against women remains one of the most under reported crimes in Bangladeshi society[5] and this new trend is especially worrying and it is likely that the actual occurrences of violence against women is far greater than the reported numbers.[6] In this context, it may be mentioned here that though the crime rate is high, the reported case rates do not match and are not at proportion.[7] Violent acts are representative of a social attitude and value system that disrespects women.[8] This social attitude is particularly troublesome considering the efforts of government, lawyers, social workers, and Non Governmental Organizations (NGO) to increase awareness and education about women's rights and human rights.[9] It is hoped that every victim will report and pray for justice to the court and court will try to give her remedy. The lack of proper reporting is not only because of the inadequacy of government officials but also because women themselves are reluctant to report crimes against them for fear of repeated violence, honor or loss of face of their families and for fear that they will be turned out of their matrimonial home.[10] When women are brought into police station or even to file a complaint, they are generally subjected to indecent questions, harassment and abuse, which reflects police attitude.[11] The police are unwilling to file cases of family violence. Women without guardians are not treated respectfully. The attitude of the police towards women is generally rough, insulting and objectionable. They are harassed for no reason in the police station through verbal and sexual abuse.[12] In certain cases, police do not want to file a case if the victim does not satisfy them by giving bribes.[13] Women unwilling to pay become victims and the police have also a negative approach towards

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5 Firoz, Fouzia Karim. *Landmark Judgement on Violence Against Women*, Manusher Jonno Foundation, Dhaka, 2007, at p.1.

6 *Ibid.*; Andress, Katrin. *Women Situation in Bangladesh: An Overview with an Emphasis on Dowry*, UNDP, Dhaka, 2005, at p.12.

7 Farouk, Sharmeen A. '*Violence Against Women: A Statistical Overview, Challenges and Gaps in Data Collection And Methodology and Approaches for Overcoming them*', Paper Prepared for the Expert Group Meeting Organized By: UN Division for the Advancement of Women in Collaboration With Economic Commission for Europe and World Health Organization, 11-14 April, 2005, Geneva, Suitzerland.

8 Munni, Shaheda Ferdous. '*Discrimination of Women Needs Universal Family Code*,' Steps Towards Development, Dhaka, 2006, p.3; BNWLA, *Violence Against Women in Bangladesh*, BNWLA, Dhaka, 2003, p. 5.

9 *Supra* note 5, at p. 2.

10 *Supra* note 6, at p. 12.

11 Hossain, Hameeda. '*Accounting for Justice', Rights and Realities*, O Salish Kendra, 1997, p.127; Rahman, Motiur. 'Human Rights in Bangladesh: Women Perspective', in *'State of Human Rights in Bangladesh: Women's Perspectives'*, Women For Women, Dhaka, 2002, at p.29.

12 *Baseline Report on Violence Against Women in Bangladesh* prepared by Naripokkho and Bangladesh Mahila Parishad and coordinated by IWRAW Asia Pacific, at p.52.

13 *Supra* note 1, at p. 89.

women.[14] The general public is well aware that law enforcement agencies often accept bribes, ignore serious complaints, destroy or lose evidence and free criminals.[15] In addition, the judicial system too has several structural and procedural barriers. Though the victims and witnesses can get opportunity to express themselves freely in camera trial under the *Nari O Shishu Nirjatan Damon Ain (*Prevention of Women and Children Repression Act), 2000 but this is not in practice. Political affiliations and motivations often affect court decisions.[16] The majority of women are still dependent on men financially and socially.[17] As such, women are in a vulnerable position and must tolerate various abuses at home because they lack alternatives.[18] It is also found that the petitioner sometimes become bound to compromise with offenders due to pressure from the elite groups or in fear of further violence.[19] For these reasons, women victims are reluctant to file a case.

Table 1

Statistics of incidents and number of cases of women victims from January 2000 to September 2014[20]

Year	Number of Incidents	Cases filed	Cases not filed
2000	2449	1023	1426
2001	1482	622	860
2002	2414	1125	1289
2003	2478	1122	1356
2004	1939	855	1984
2005	1482	556	926
2006	1634	534	1100
2007	1384	551	833
2008	1483	634	849
2009	2209	921	1288

14 Rahman, Motiur. *Supra* note 11, at p. 28-29.
15 *Supra* note 5, at p. 6.
16 *Ibid.*
17 Jahan, Roushan. *Hidden Danger: Women and Family Violence in Bangladesh*, Women for Women, Dhaka, 1994, at p.140.
18 Halim, M Abdul. '*Women's Crisis Within Family in Bangladesh'*, The Bangladesh Society for the Enforcement of Human Rights, Dhaka, 1995, p. 4; BNWLA, *Violence Against Women in Bangladesh*, BNWLA, Dhaka, 2003, at p.6.
19 Monsoor, Taslima. '*Management of Gender Relations: Violence Against Women and Criminal Justice System of Bangladesh'*, British Council, EWLR, Dhaka, 2008, at p. 51.
20 Documentation Unit, Ain O Salish Kendra, Year 2000-2014.

Year	Number of Incidents	Cases filed	Cases not filed
2010	2510	1328	1182
2011	2328	1051	1277
2012	3220	1326	1894
2013	2628	1120	1560
2014	1164	460	704
Total	30856	13228	17628

According to this table, from January 2000 to September 2014, only 13228 cases were filled out of 30856 reported cases.

3. General Causes of Reluctance to take Legal Action

The main reason of reluctance to take legal action is fear of unsympathetic and biased treatment by the police. In most of the cases, victims are reluctant to incur huge financial costs in order to keep witnesses in their favour, hire lawyers and pay money to public prosecutors. In addition, other causes were identified, such as limited number of Magistrates and investigating officers, lack of sincerity and efficiency of Magistrates, and corrupt practices of police and court officers, including bench clerks. The fear of women losing their *izzat* (honour of a person) is what impedes them from seeking legal aid. Women and their families lodge complaints with the police in less than half the cases, while 51 percent cases are resolved informally through a *salish* (community-based informal justice system) or village arbitration.[21] To expose violence, particularly sexual violence, is to ruin the standing of one's own family. According to the victims' point of view, the main causes of their reluctance to seek legal remedies are-

3.1 Family Support for Legal Proceedings

Family is the first obstacle women face when they opt for court especially women who experience violence within the family. Not surprisingly, 'preservation of the family at all cost' was a significant social norm for most respondents, which they dared to abandon to go to court. Most of the women who choose to go to court do so as a last resort despite strong apprehensions and family opposition.[22] Women victims were asked about the family support for the legal proceedings. Their responses are given below:

21 Siddiqi, D.M. '*One Step Forward, Two Steps Back? Women Rights in 2005*', Ain O Salish Kendra, 2006; Hossain, Hameeda. Ed., *Human Rights in Bangladesh 2005,* Ain O Salish Kendra, Dhaka, 2006, at p. 209.

22 Moslem, Sima. *Dharshan Chitra: Analysis of Rape victims in Bangladesh (2002-2004)*, Bangladesh Mahila Parishad, Dhaka, 2004, at p. 75.

Table 2

Family support received by victims

Amount of Support	Percentage
100% Support	32%
75% Support	08%
Under 50%	40%
No Support	20%

Table 2 shows that only 32% victims got full support from their family and 20% had not got any support from their family.

3.2 Financial Burden

Many victims of violence, discrimination or harassment do not have the financial resources to take the matter to court and therefore remain silent.[23] The expenses involved in seeking legal redress, such as, lawyers' fees, court fees, and other incidental expenses, make it very hard for poor women. The delay of any court proceeding also imposes a huge financial burden, unbearable by the women because of their contemporary position in the society as poorest of the poor. In order to secure their legal -matrimonial rights, a disputant, living in villages has to come to the district level, three administrative units i.e. village, union and *thana* (police station) away from their hamlet for getting access even to the lowest level of formal courts. Since most of the people in Bangladesh live overwhelmingly in rural areas,[24] travel costs pose an additional burden on them, especially for women. Besides the cost of traveling long distances, individual have to forgo daily wages as well as have to pay court and lawyer's fees, and spend money to collect evidences etc. the aggregate amount of which seems to be completely unbearable to most of the poor people, especially poor women of the country. Nevertheless, none of these guarantee how many court appearances will be required for a case to be settled by the courts. Long delays and excessive costs due to exorbitant demand of fees by the lawyers may turn a law ineffective.[25] There are various expenses as regards maintaining a suit or a case. The major items of expenses are as Court fees; fees for advocates; and fees for Public Prosecutors (PP), Assistant Public Prosecutors (APP) to examine state's witnesses, though they are paid by the Government; cost of *wakalatnama* (power given to a lawyer by the client to deal with the case), notices/summons/warrant form, envelop, postage, photocopies etc; travelling cost and cost of food; typing cost, if any; cost which are paid to the *Peshkars* (court officials) known as *Bakshish* (reward;

23 Quast, Shelby. 'Justice Reform and Gender', in *Gender and Security Sector Reform Toolkit.* Eds. Megan Bastick and Kristin Valasek, Geneva: DCAF, OSCE/ODIHR, UN-INSTRAW, 2008.

24 A country populated over 14. 4 million, 80% of whom live in village communities that means 8 out of 10 Bangladeshi live in country side. See more details, 'World Development Report, 2004', at <*http://econ.worldbank.org/files/30042select* pdf> Last visited on 4 May 2005.

25 Kabir, Md. Ahsan. 'Independence of Judiciary and The Rule of Law: An Overview', *Rajshahi University Studies*, Part A, Vol.33, 2005, at p.289.

to give a tip before remarrying ex-spouse), i.e. bribe; cost payable to *Dalal* (middle man), if applicable.

3.3 Fear of Bad Treatment and Harassment by Police

Discriminatory behaviour by the police towards the women is obviously a major cause of the low level of confidence in the police.[26] There is also the reluctance of the victims to report because of the shame of public admonition, insensitive environment in the police station, in the same case there is lack of police response and the slow process of bringing the guilty to book. When a woman goes to police station for filing a case, police do not write her statement properly, even they show unreasonable negligence to arrest the culprits in case of serious crime.[27] In 2010, out of the 116258 members of Bangladesh Police, only 2546 are women.[28] Due to shortage of female police, when a woman victim comes to a police station to file a case, generally the male police officers interrogate her, as a result she feels ashamed.[29] Sometimes the police are reluctant to take up the case seriously when a complainant comes to them.[30] Women victims were asked about the behaviour of police personnel. Their responses are mentioned in the following table:

Table 3
Behaviour of police faced by women victims

Good	Percentage
Good	8%
Bad	36%
Oppressed	28%
Despicable	28%

Table 3 shows that 8% women victims faced good behaviour, 36% bad, 28% oppressed and 28% despicable behaviour from police personnel in the criminal proceedings. Therefore only 8% women victims were happy and rest of the 92% women victims were unhappy with the behaviour of police. During the time of a case into the police stations, 36% victims were offered by police officers for settlement of the disputes and 24% said that police pressured them to settle the matter. It is the duty of the police to take necessary steps for medical check up of the victims, when the injured victims come to police station for filing a case. Researcher asked victims about this step of the police. Only 4% replied positively, 52% replied that police did

26 Islam, Md. Saidul and Haque, Abu Saleh Md. Tofazzal. 'The Role of Police in Strengthening Criminal Justice: Bangladesh Perspective', *Rajshahi University Law Review*, Vol-VII, 2007, Department of Law and Justice, Rajshahi University, Rajshahi, Bangladesh, at p.137.

27 'Weaknesses of Existing Judicial System', *The Daily Prothom Alo*, 27 December 2009, at p. 2.

28 Documentary Unit, Bangladesh Police Headquarters, Dhaka, 2010.

29 Rahman, Motiur. *Supra* note 11, at p. 27.

30 BNWLA, 'Violence against Women in Bangladesh', BNWLA, Dhaka, 1999, p.52; Munir, Shaheen Akhter. *An Annual Research Report on Violence Against Women in Bangladesh 2005,* BNWLA, Dhaka, 2006, at p. 79.

not help about this matter and 44% victims replied that police made them illogically late, therefore necessary evidence (*Alamat*) had been destroyed. Some victims had been taken into safe custody. During this time, they faced bad, disturbing and discourteous behaviour of the police. Only 3% enjoyed good behaviour from the police, 28% victims faced disturbing behaviour and 24% faced uncivil attitudes from the police. Furthermore, the women are often pressured by police to withdraw their complaints. An advocate[31] stated, if a woman goes to the police to complain of domestic violence, the police regard the matter of little importance. When they do file such a case they do so under the *Penal Code* provisions of 'hurt' or 'grievous hurt', and not under provisions of the Prevention of Women and Children Repression Act, 2000. Furthermore, when a complainant seeks to file a FIR at the police station, the police only make a general diary entry and skip important facts. This makes filing and even proving a case in court difficult. Again if a woman, who has been thrown out of her husband's house, goes to the police to seek custody of her children, the police intervene by saying that the children are in their rightful place with their father. A rape victim commented that police behaved rudely with women kept in safe custody.[32] According to her, when a victim of rape goes to the police to complain, the first impression the police have of her is of a woman of ill repute or a prostitute. The women are often treated rudely, with suspicion and as if the rape was due to some fault of theirs. The police often do not offer any help to the victims of political violence as they are controlled and influenced by the ruling party. It is a common claim against police that they take bribes from the parties. Corruption among many police officials makes the process of proper recording of the complaint distressful to the complainants. Sometimes police accept illegal gratification from both the accused and victims of the offence.[33] Victims claim that Investigation Officers (IO) deliberately delay to prepare the charge sheet against the alleged perpetrator despite all necessary evidence because of the temptation of getting money.[34] Sometimes *salish* (community-based informal justice system) is conducted in the presence of the law enforcement agency, and they get also a share in the money collected through the arbitration.[35] Victims were asked about this. Their responses are given below:

Table 4

Bribes taken by police from victims

Category of responses	Yes	No
Percentage	**80%**	**20%**

31 Named Shamim Akhter Maya, Rahshahi Bar, Rajshahi.

32 Case No-250/2004. Prevention of Women and Children Repression Tribunal (*Nari O Shishu Nirjaton Damon Tribunal)*, Rajshahi, Bangladesh.

33 BNWLA (1999), *Supra* note 30, at p.102; Monsur, Taslima. *Management of Gender Relations: Violence Against Women and Criminal Justice System of Bangladesh*, British Council, EWLR, Dhaka, 2008, at p. 51.

34 AHRC, 'Rape victim receives serious threats due to the alleged corruption of the investigating officer of the Paikgachha police in Khulna', ASIAN HUMAN RIGHTS COMMISSION - URGENT APPEALS PROGRAMME, 14 September 2006, available at <*http://www.ahrchk.net/ua/mainfile.php/2006/1967/*> Last visited on 29 December 2010.

35 *Supra* note 22, at p. 25.

Table 4 shows that 80% victims gave bribe to police and only 20% were free from such type of corruption. Police take bribe not only at the time of filing a case but also in case of filing a General Diary (GD).[36] The common incidents of police corruption include (i) taking money for registering or declining to register a First Information Report (FIR); (ii) falsely involving innocent persons in an FIR; (iii) letting the accused free; (iv) conducting baseless investigations; and (v) dealing in contrabands, narcotics, illegal arms, and prostitution.[37] Where the perpetrator of violence is an agent of a law enforcement agency, the police generally do not take necessary care to prepare the charge sheet, tend to treat the agent favorably, or try to appease the complainant by filing a GD instead of an FIR. When a case is reported at a police station, often the police show negligence and make delay in having the victim medically checked up.[38] As a result, the case becomes weak.

3.4 Insensitivity and Harassment by Doctor

Medical examination and the report of doctor are the important evidence in the criminal proceedings.[39] In case of rape, hurt, death and acid throwing, the medical examination should be completed as soon as possible after the occurrence.[40] When the victim appears before the doctor, the doctor should give report and certificate about the occurrence.[41] Doctor as like as the police also considers victims as 'bad'. Most of the doctors think that the majority of persons with rape case are habitual.[42] Police and criminals have a tendency to influence medical reports to fabricate those in their favour to cover up their misdeeds.[43] Among 25 victims, 20 victims took medical treatment from several hospitals. In absence of female doctors, most of the women victims received treatment from male doctors. Most of the victims do not allow male doctors for the test.[44] A research conducted by '*FOWSIA*'[45] shows that among the 86 cases, 70% patients are tested by male doctors and 30% cases by female doctor.[46] Due to shortage of female doctors, some victims of such crimes are bound to test by male doctors for filing the case, but most of the victims avoid them for which they are once again victimized by doctors. In the forensic test the doctors do not agree to touch the patient without the permission of the Magistrate, though her immediate treatment is necessary. In most of the cases, doctors do not want to do forensic work.[47]Absence of female doctors in the forensic department put the woman

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36 *Supra* note 1, at p. 16.

37 *Supra* note 26 at p. 137.

38 Interview with a rape victim.

39 S. 23, *The Prevention of Women and Children Repression Act 2000;* S. 20, *The Acid Crime Prevention Act*, 2002.

40 *The Prevention of Women and Children Repression Act, 2000.* S. 32(i).

41 *The Acid Crime Prevention Act*, 2002. S. 29.

42 Interview with a woman victim.

43 Jahan, Asma Akhter. *Women Violence in Bangladesh and Legal Framework: Role of Law Implementing Institutions*, FOWSIA, Dhaka, 2005, at p. 66.

44 *Supra* note 1, at p. 91.

45 Forum on Women in Security and International Affairs.

46 *Supra* note 43, at p. 66.

47 The reasons behind this: A doctor has to make not only the list of forensic test but also has to perform various duties. A doctor gets only 5 *taka* per day for going to the court as a witness. He has

[Footnote No. 47 Continued]

victim in a vulnerable position. The presence of the male doctor as an examiner is itself a trauma for the victim, especially in a country where social values and religion play an important role in their lives. According to one doctor,[48] female doctors are not interested to come to this department. As a result male doctors have to be there to perform this duty in presence of either a nurse or *aya* (assistant of Nurse). 80% women victims said that they completed their check up by male doctors and only 20% made their check up by female doctors. As male doctors usually carries out medical examinations. Due to this, many victims refuse to be examined or refrained from complaining. This makes the crime hard to prove. Sometimes doctors are rude to their victims. Victims were asked about the behaviours of the doctors. Their responses are given below:

Table 5
Behaviour of doctors faced by women victims

Nature	Percentage
Good	20%
Discourteous	40%
Oppressed	40%

Table 5 shows that 20% women victims faced good behaviour, 40% discourteous, and 40% oppressed or despicable behaviour from doctors. Therefore only 20% women victims were happy and rest of the 80% women victims were unhappy with the behaviour of doctors. Victims were asked about the role of doctors in case of giving medical report. 20 victims answered according to the following table:

Table 6
Role of doctors in case of giving medical report

Role of the doctors	Percentage
Given timely and appropriately	20%
Not given timely and appropriately	20%
Demanded bribes and taken it	45%
Demanded bribes and given biased report for not getting it	15%

According to table 6, 20% victims said that doctor gave medical report timely and appropriately, 20% victims said that doctor did not give medical report timely and appropriately, 45% victims confessed that doctor demanded and took bribe from

[Footnote No. 47 Continued]
to face some unrespectful question of the opposite party in the court. Sometimes he has to stay long day for hearing into the court. There is no waiting room in the court; it is an embarrassing situation for the doctor. There are very few doctors in a hospital who are specialist in the forensic test. Sometimes they feel unsecured for the pressure of powerful persons of the society.

48 Interview with Dr. Rosy Ara Khatun, Medical Officer, Medical Sub-dipo, Divisional Office, Rajshahi.

them, only 12% victims said that doctor demanded bribe from them and gave biased report for not getting it. According to a rape victim,[49] medical report of a doctor in case of criminal case means monetary corruption of a doctor. She also added that her incident was true, but doctor gave certificate that there was no *alamat* (necessary evidence) for rape.

3.5 *Corruption, Negligence and Unwarranted Attitudes of Advocates*

Women victims have various experiences about the behaviour of the advocates faced in different stages of the legal proceedings. Victims shared their experiences with the researcher. 28% women victims were satisfied for the sincerity of advocates and 72% were not happy. Victims were asked about the first experiences of the behaviour of the advocates, their answers were not positive.

Table 7
First experiences about the behaviour of advocates faced by women victims during filing of a case

Nature	Percentage
Good	28%
Bad	40%
Unsatisfactory	24%
As victim is a woman, so, advocate denied the case	8%

During examination and cross-examination, almost all victims face scandalous and attacking questions thrown by lawyers for opposite party.[50] In court, indecent questions are asked and gestures are made in open courtroom that mentally devastates a victim. In most cases, defence counsels intentionally ask obscene questions to get some sort of pleasure.[51] They also try to prove the victims as characterless by diverting the cases. Since the cross-examinations take place in front of many people, victims feel humiliated and get demoralized.[52] In court, efforts are made by the defence lawyer to find the sexual history of the complainant. To win the case, the defence lawyer asks irrelevant questions one after another.[53] The raped woman is asked how many men raped her, if she tried to resist at that time and if she got any pleasure. This is how the woman is re-raped by the criminal justice system. 72% victims said that they faced scandalous languages from the advocates during the hearing, but 28% were satisfied about the job of the advocates in the courtroom. There are many allegations against PP and APP of Bangladesh. The PP and APP are

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49 Interview with a rape victim, named Zaheda Khatun, Case no-486/2003, Prevention of Women and Children Repression Tribunal, Rajshahi, Bangladesh.

50 See <*http://nation.ittefaq.com/issues/2008/04/10/news0045.htm*> Last visited on 20 March 2011.

51 *Ibid.*

52 Haque, M Shamsul. 'Anti-corruption mechanisms in Bangladesh', available at <*http://www.article2.org/mainfile.php/0901/371/*> Last visited on 4 January 2011.

53 *Supra* note 30 at p. 116.

appointed politically; they may follow party interests and are not accountable towards the victims.[54] They may unnecessarily delay proceedings. Sometimes, PP does not produce witnesses before the court, because of taking bribes from the accused and creates an opportunity to grant bail to the accused.[55] Often he demands money from both the parties.[56] There is a strong allegation against PPs and APPs that they take bribe from victims and accused for arranging witness hearing.[57] About the corruption of the PPs and APPs at the legal proceedings, victims were asked about this matter. Their responses are given below:

Table 8
Experiences of women victims about PPs and APPs

Nature	Percentage
Demanded and taken bribes	52%
Demanded bribes but not taken	8%
Not demanded bribe	40%

Table 8 shows, 52% victims confessed that PP and APP demanded and took bribe from them, 08% victims said that PP and APP demanded bribe but victims did not give, and only 40% victims said that PP and APP did not demand bribe. A rape victim said that she had to give 300 taka to PP for everyday hearing and without it no hearing were held.[58]

3.6 Lack of Women-friendly Environment in the Court

Behaviour of court officials and insensitivity of Judges towards women are important factors of reluctance of victims to take legal action. Among the respondents, 76% victims filed their cases into the court and 24% into the police stations. Among 76%, most of them faced unsatisfactory behaviour of the court officials and they have strong claim about the corruption against the court officials.

Table 9
Behaviour of court officials faced by women victims

Nature	Percentages
Good	28%
Bad	12%
Not satisfactory	60%

54 Ud-Din, M Faiz. and Hannan, M Abdul. *Protection of Human Rights in Criminal Justice: Bangladesh Perspective*, Research Project 1998, Rajshahi University, Bangladesh, 2000, at p. 148; Taslima Monsoor, (2008), *Supra* note 19, p. 63.

55 Found from Field Survey.

56 *Supra* note 19, at p. 63.

57 Roy, Palash Kumar. 'Witnesses are not produced into the Court without Bribe', *The Daily Jai Jai Din*, 29 September 2009, at p.12.

58 Case No 117/2010, Prevention of Women and Children Repression Tribunal, Rajshahi, Bangladesh.

Table 9 shows that 28% women victims faced good behaviour, 12% bad and 60% despicable behaviour from court officials. Victims were asked about the bribes taken by the court officials. Their responses are given below:

Table 10
Bribes taken by court officials from victims

Nature	Percentages
Yes	32%
No	52%
Demanded bribes but not taken	16%

Table 10 shows that 32% victims gave bribes to court official, 52% replied that court official did not demand any money, and 16% claimed that court official demanded money but did not take. Mukta Begum (32), a victim of sexual assault said during interview that money was a necessary element to know the next hearing date from court officials.[59] One poor victim, named Jahanara Begum[60] said, '*The court is not for the powerless people like me, police, lawyers, doctors, everyone wants money only, they don't try to understand my sufferings.*' There are several laws[61] still in force to prevent corruption. Not only are these laws in force but also there are some special courts and tribunals to try corruption cases. But corruption is a common phenomenon in Bangladesh. Victims stated at the time of interview that the Judges of the cases were 92% male and 08% female. According to the victims, most of the Judges are not gender sensitive; therefore their rights are being violated.

Table 11
Gender sensitization of Judges

Gender sensitive	Percentages
Yes	28%
No	72%

Table 11 shows, 28% victims said that Judges were gender sensitive, but 72% said that Judges were not gender sensitive. The Prevention of Women and Children Repression Tribunal and the Family Court were observed by researcher. This court watch revealed that intimidation of victims and witnesses by the defence counsels was a regular practice and Judges were mostly silent about this situation. The court environment including attitude of Judges and lawyers, except the female court

59 Case No-56/2010, *Ibid.*

60 *State* v. *Kajimuddin* (2003), Case no 201/2003, GR No- 5/2003, *Ibid.*

61 Such as the *Anti-Corruption Commission Act*, 2004; *Money Laundering Act*, 2002; *Bangladesh Government Servants (Conduct) Rules, 1979*; *Criminal Law Amendment Act, 1958*; *Prevention of Corruption Act, 1947*; some sections of the *Income Tax Ordinance, 1984* and some sections of the *Penal Code.*

officers, are not friendly at all. Often the language used by the Judges and the defence lawyers are not understandable to the litigants. Counsel has to repeat the question to the witnesses in more colloquial language. The courtrooms are congested, noisy, overcrowded and there is no sitting arrangement for litigants. Litigants, particularly women litigants, do not feel free and comfortable in the courtroom. Most of the Judges are still predominantly men and typically conservative.[62] They seldom rise above the men instinct of relishing the quips about women. This is reflected in the judicial decisions.[63] If the Judge does not fix the next date of a case, with the permission of the Judge, *peshkar* (court officials) is allowed to fix the date. In such case, it gives an opportunity to some *peshkar* to take bribe from the party for fixing the date. If complainant does not give him bribe, he may not summon witnesses; on the other hand by taking bribe from accused party, he may abstain from sending summons to witnesses. When analysing the incidents of dowry or physical torture in a pilot study "Gender and Judges," Naripokkho[64] found that the Judges put too much emphasis on proof of grievous injury and /or threat to life.[65] Wife beating was not considered as a legal offence by the Judge. Therefore, it was stated by Naripokkho that the Judge was concerned more with the technical legal points relating to the particular legal provision under which charges were filed and less with the actual fact of physical abuse. They argued that the court should have demanded that the prosecution produce medical certificates instead of making the victim liable. According to them, the Judges appear to have ignored the social fact that husbands consider wife beating as their natural right and failed to be proactive in demanding better investigation and presentation of testimonies in court.[66] From consultation with Judges it has become apparent that only having the option of harsh punishment like the death sentence or life imprisonment makes the Prevention of Women and Children Repression Act, 2000 harder for justice to be served.[67] Much of the time there is a lack of reliable witnesses, lack of eyewitnesses, lack of proper investigation, lack of proper collection of evidence and lack of submission of proper reports by experts. Due to these factors, as well as inefficiency, lack of accountability, intimidation of witness and complaints and so on, Judges often have no option but to acquit the accused, many of whom are actually guilty.[68]

3.7 Uncertainty of Completion of Trial

Among the women victims, 70% were uncertain that the investigation and trial would be completed or that they would secure a just outcome. Delay in disposal of cases is one of the key reasons of suffering of women litigants. In some cases several years

62 Jahan, Roushan and Islam, Mahmuda. 'Violence Against Women in Bangladesh: Analysis and Action', Women For Women and South Asian Association For Women's Fund, Dhaka, 1997, at p. 43.

63 *Ibid.*

64 A Human Right Based NGO of Bangladesh.

65 Naripokkho, *Gender and Judges: A Pilot Study in Bangladesh*, Naripokkho, Dhaka, 1997.

66 *Ibid.*; See also *Supra* note 12, at p.53.

67 Interview with a Judicial Magistrate.

68 *State* v. *Nur Muhammad*, 38 DLR (1986) 349; UNDP, '*Human Security in Bangladesh, In Search of Justice and Dignity*, United Nations Development Program (UNDP), Bangladesh, 2002, Chapter one, at p. 101.

pass from the time of FIR to the final disposal of a case.[69] Women victims cannot continue litigation due to poverty, sometimes witnesses die and evidence is destroyed and as such victims do not get proper relief.[70] Failure of police, in particular the investigation officers, in preparing the FIR, case docket and investigation report properly and in conducting thorough investigation or in producing witness to the court may dilute a case substantially or delay the hearing of a case for an indefinite period.[71] Sometimes the investigating officer deliberately, being influenced by the accused, makes unnecessary delay in starting the investigation and recording statements of the witnesses. The use of bribes and other pressure has a direct effect on police responsiveness, which only sets the stage for such persuasion tactics to continue.[72] Failure of the parties to present witnesses on the dates fixed for trial is one of the main causes for delay of the process.[73] Rotation and transfer of the Judges, often meaning that the Judge who heard testimony may not decide the dispute, taking away thereby much of his incentive to push forward the proceedings to judgments seriously impede the process of continuous trial; the new Judge may have to repeat some of the procedural requirements already fulfilled. Another cause of delay in the justice delivery system is that the higher judiciary in appeal stays decisions of some cases of lower judiciary for a long time.[74] In most of the rape cases, police take unusual long time for investigation, as a result of which ends of justice are not met.[75] The opportunity for women's access to justice through traditional formal court system is very much slender because of the huge backlog of cases in formal courts.[76] The problems of delay in disposal and resultant backlog of cases at all tiers of the judiciary, and the prohibitive costs of litigation for the parties, have been identified as major road-blocks to access to justice.[77] In a survey conducted on the corruption under Transparency International Bangladesh, 78% of the women victims in formal courts reported that they are uncertain about the period when settlement would be reached and about 75% reported that delays in reaching settlement is deliberate and due to lawyer's interest.[78] These unnecessary delay and backlog eroded women's opportunity to get justice through formal courts.[79]

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69 *Supra* note 54, at p. 147.

70 *Ibid.*, p. 148.

71 Nazrul, Asif. 'Malpractices Relating to Bail', The *Daily Star*, 4 March 2006, at p.18.

72 *Human Security Report*, UNDP, September 2002, Dhaka, Bangladesh.

73 Haque, Justice Md. Hamidul. 'Trial of Criminal Cases: Loopholes and Deficiencies in the Existing Laws', *58 DLR 2006,* at Jr. p. 4.

74 Islam, Moksedul. 'Delay in the Lower Judiciary', *The Daily Star*, 30 September 2006, at p. 22.

75 Choudhury, Amirul Kabir. 'Administration of Criminal Justice in Bangladesh', *31 DLR*, Journal, p. 9.

76 Cole, George F. *The American System of Criminal Justic*, Brooks/Cole Publishing Company, Monetery, California, New York, 1935, at p. 408.

77 Alam, M Shah. 'Problems of delay and backlog cases', *The Daily Star (Supplements)*, 19 February 2010.

78 Transparency International Report, 2003; Chowdhury, Jamila Ahmed. '*A.D.R in Accelerating Access to justice in family Disputes: Experiences in Bangladesh and Some Lessons from Japan*; Masters Thesis, Faculty of Law, Niigata University, Niigata, Japan, 2004.

79 Ali, Mohammad Yusuf. 'Easy access to justice: Overcoming the Problems', *The Daily Star*, 4 March 2006, p.18; M. Shah Alam, 'A possible way out of Backlog in our Judiciary', available at *http://ruchichowdhury/ tripod. com/a possible way out of backlog in our judiciary. htm,* last visited on 12 March 2010.

3.8 Lack of Evidence

In case of domestic violence, it is so difficult to produce documents or eye-witness. It is also impossible to witness a rape incident by a person except the abettor of the rapists. One rape victim said to researcher that she had been raped in a dark place and she identified the culprits but without any eye witness the case was dismissed whereas the incident truly happened.[80] Another rape victim said that most of the rape incidents occur out of the view-finder's concern and though her incident is true, she has no capability to produce witnesses into the court, because nobody has seen this incident.[81] Thus in all cases the court is to depend on circumstantial evidence. However, where the witnesses are available, sometimes they cannot narrate ins and outs of the fact accurately during the examination into the court. In reply to the cross-examination, asked by the defence lawyer, the witnesses feel nervous and miserably fail to produce correct answer. The sudden shock of humiliation makes the victim almost numb and inactive and such a reaction followed by fear and shame of social ostracism prevent her from taking any initiative.[82] When the victims are illiterate or unaware, they innocently destroy signs of rape. Another rape victim said that she had been raped one year earlier and after rape this matter was settled with the condition that rapist would marry her, but he did not, next she filed a case, but there was no sufficient evidence then to prove the case, already signs of rape were destroyed. [83] When a woman is raped, she must convince the police, then be subjected to a medical examination and finally undergo an embarrassing and humiliating cross-examination in the court. In many cases, many victims withdraw their cases to avoid this type of unwarranted situation.[84] The archaic, lengthy and expensive criminal justice system often prevents women victims from bringing cases to the court. If somehow they manage to lodge cases, 95 percent of the accused in rape cases are acquitted due to faulty investigations or lack of evidence.[85] Sometimes witnesses are reluctant to depose in a case because the accused or the group to which the accused belongs threatens them. 80% of rapists are set free due to unprofessional investigation and the victim's lack of interest in providing a testimony.[86] Often the witnesses, at the early stage of investigation, are afraid of divulging the truth before the investigating officers.[87] There were other incidents where the perpetrators settled the whole matter in secret by offering money to the family members of the victims.[88] There is practically no effective legal measure through which protection can be given to each

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80 *State* v. *Mahar Ali and Others* (2003), Case no-755/2004, GR No- 486/2003, Prevention of Women and Children Repression Tribunal, Rajshahi, Bangladesh.

81 *State* v. *Moksed* (2006), Case No-73/2006, *Ibid.*

82 *Supra* note 30, at p. 91.

83 Case No- 216 /1999, Prevention of Women and Children Repression Tribunal, Rajshahi, Bangladesh.

84 *Supra* note 50.

85 Begum, Afroza. 'Rape: A Deprivation of Women's Rights in Bangladesh', in *Asia-Pacific Journal on Human Rights and the Law*, 2004 (1/1–48): 2.

86 *Supra* note 22, at p. 13.

87 *Supra* note 26, at p. 136.

88 *Supra* note 22, at p. 71.

and every witness, which is also not practicable. But at least, key witnesses in a case of grave or heinous offence should be given protection.[89]

3.9 *Fear of Patriarchal Domination and Social Ostracism*

The patriarchal traditions in Bangladesh discourage women to seek judicial remedy. Pressures of perpetrators on victims to remain silent or blaming the victim by society are barriers for not reporting cases to the police.[90] The patriarchal system almost always places the burden on the woman to file a case. Moreover, there is a general reluctance to seeking legal redress, owing to prevailing socio-cultural attitudes that discourage exposure of "private" or "domestic" matters and encourage women to suffer in silence. Legal procedures are generally found to be the first cause of citizens' alienation in the criminal justice system. According to section 10 of the Prevention of Women and Children Repression Act, 2000,[91] the opportunities to legal recourse for sexual harassment has been made difficult that taking legal recourse by a woman in a country like Bangladesh is extremely difficult.[92] For fear of more harassment from police, doctors and advocates, most of the victims do not want to file a case. In Bangladesh 50% of all murders are of women by their partners, 68% of beating cases are never told to anyone.[93] Sometimes police takes money from the culprits of women victims and local elites threaten the victim from seeking assistance from the local police.[94] Sometimes, local elites take money from the perpetrators and persuade the victim's husband to declare his wife to be an ill character woman.[95] Often the local elites propose the victim to go for *salish*. If the victim denies, she and her family members are alienated from the society. Local inhabitants take initiatives as mediators to make a settlement between the victim and the delinquent and for a while they arrange a *salish* for resolving the dispute. In most of the cases, this *salish* convicts women. When tension rises between husband and the wife on the hit of the moment seeks help from the lawyer for providing harsh punishment to the husband, the lawyers advise to file a case under the special laws even if the offence is a minor one. As the special laws are non–bailable with provision of minor offences, filing a case by special law is nothing but abuse of law.[96]

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89 Haque, Justice Md. Hamidul. 'Trial of Criminal Cases: Loopholes and Deficiencies in the Existing Laws', *58 DLR 2006,* at Jr. p. 14.

90 ASK, 'State Response to Gender Violence', *Rights and Realities*, Ain O Salish Kendra, Dhaka, 1997, at p.133; UNDP, '*Human Security in Bangladesh, In Search of Justice and Dignity*', United Nations Development Program (UNDP), Bangladesh, September-2002, Chapter one, at p. 101.

91 S. 10, *The Prevention of Women and Children Repression Act*, 2000, amended in 2003, available at the Bangladesh Gazette (Extra), 2003: 'If any person in order to satisfy his sexual urges illegally touches any part of a woman's or child's body with any part of his body or object or outrage the modesty of any woman would be accused of sexual oppression and the act would be punishable with rigorous imprisonment of extending for ten but not less than three years, with additional fine.'

92 Mia, Md. Abdur Rahim. 'Sexual Harassment in Bangladesh: Laws and Realities', *Rajshahi University Law Journal* 2008, Rajshahi University, 2009, at p. 99-118.

93 Monsoor, Taslima. 'Justice delayed is justice denied: Women and violence in Bangladesh', *The Daily Star*, 2 March 2006.

94 *Supra* note 22, at p.70

95 *Ibid.*

96 Munir, Shaheen Akhter. 'An Annual Research Report on Violence Against Women in Bangladesh 2005', BNWLA, Dhaka, 2006, at p.141.

3.10 Unaware of the Law and Procedures

Many women victims are not aware of their rights and the laws that exist to protect them from violence and exploitation.[97] Most of the women have no clear idea about the formalities of criminal proceedings. Some women are even afraid of filing cases, as they believe it as an unholy process. The reason behind such perception is, as they believe, that (a) it is impossible to conduct a case without offering bribe to some vested groups at various stages of proceedings; (c) courts and jails are the places for the brokers, thieves, dacoits etc, if one goes there her status will also be lowered.[98] It is quite difficult to realize the rules and procedure other than by a law knowing person. Legal education as well as human rights education can provide such information and awareness. Women are so conditioned to their existing situation that law cannot benefit them. Moreover, illiteracy, poverty and family pressures also play a vital role, as these women have virtually no access to the courts or knowledge of laws. A major factor of women rights violation in Bangladesh is ignorance about the existing laws and proper implementation of these laws. Victims are asked about the existing laws of Bangladesh relating to the criminal justice. Their responses are given below:

Table 12
Knowledge of victims about the law

Category	Percentages
Conscious about all relating laws	12%
Conscious about some laws, not all	44%
Ignorant about laws	44%

Table 12 shows that 44% victims had no idea about the laws relating to the criminal justice system and women rights. 56% were conscious fully or partly about related laws. Among these conscious women victims, 8% felt that laws were being properly implemented and 56% felt that there was no proper implementation of law, therefore, women rights are being violated here. Victims were asked to criticize the criminal justice system of Bangladesh. Their expressions are given below:

Table 13
Impression of the victims about the criminal proceedings of Bangladesh

Category	Percentages
Hopeful and comfortable	8%
Scared/fearful	28%
Oppressed and discriminatory	56%
No response	8%

97 *Supra* note 22, at p.70.
98 *Supra* note 79, at p.18.

Table 13 shows that 84% victims felt that the criminal justice system of Bangladesh is not women friendly but fearful, oppressed and discriminatory. These respondents felt that their gender disadvantaged them in many ways in getting access to justice in criminal proceedings in Bangladesh, but only 8% do not think so

3.11 Family Honour

Most of the guardians of the victims hide the incidents or do not want to file the case for fear of culprit's pressure or for honour of the family in the patriarchal society, or, to ensure a good marriage of victims. The lack of proper reporting is not only because of the inadequacy of government officials but also because women themselves are reluctant to report crimes against them for fear of repeated violence, honour or loss of face of their families and for fear that they will be turned out of their matrimonial home.[1] However, when a wife decides to seek a divorce, she often reports such violence. Families of victims are hesitant to enter into legal discourse. Law allows women to divorce their husband, but women themselves tend not to use their right to divorce. They prefer to stay at their husband's house or with their husband's family, even if they are tortured brutally, rather than living an unsecured economic and social life with their children. Exceptionally, special laws are sometimes misused in some cases of family matters.[2] In most of the cases, reluctance of victim's family members to run the case, different forms of social pressure and lengthy, complex judicial procedure deter the victims from getting justice.[3] Sexual harassment, rape, acid burning, trafficking, divorce etc. defame and destroy family honour in the society. As a result such an incident is kept hidden by the parent and family members. Furthermore, women are not allowed to go out from the home premises in order to keep traditional *purda* (seclusion)[4] unbroken. Parents or other relatives of such women consider legal proceedings as an extra burden. Many women have small children to care for. It can be difficult for them to arrange childcare during the court case period.[5] Because of the dismal conditions in which they live, they cannot afford to fight for their rights in a hostile social and economic environment.

3.12 Misled by Touts

There are a lot of rules and formalities in legal protection and it is difficult to follow all such directives by women. The harassment and complexities involved in court procedures make parties to accept out of court settlements. Besides, there are so many touts in the courtyards, who cheat litigant people for collecting money through illegal means. Political or any other form of backing from influential people obviously makes the process much more difficult to seek justice against the guilty

1 Hossain, Hameeda. 'Looking for Justice', available at *<http://www.thedailystar.net/suppliments/anni2004/justice_02.html>* Last visited on 25 August 2010.

2 Munir, Shaheen Akhter (2006). *Supra* note 30, at p.141.

3 *Supra* note 22, at p. 25.

4 Muslim women are prohibited to go outside the home to secure their chastity and if permitted, they are supposed to wear a special dress or gown called '*Burkah*'.

5 *Supra* note 23.

parties.[6] If they themselves are not directly responsible, their support helps the culprits at every stage, from preventing the police from accepting cases, to influencing the victims to withdraw them.[7]

4. Conclusion and Suggestions

From the above discussion, it is clear that criminal justice system of Bangladesh is not friendly in its treatment towards women. Victims always hesitate whether to report or not to report to police station, because criminal justice system is unresponsive and due to discriminatory attitude, women themselves become faulty. The complicated court procedure, delay in disposal of cases, regular paying fees to the lawyers, insincerity of the Judges, threatening by the offenders, lack of family support, corruption of doctors, exploitation by *dalals* or touts etc. create a negative attitude in the mind of the aggrieved women and as a result they decline to seek remedy. There is no alternative of defeating corruption. The criminal justice system fails to address the problems of women's access to criminal justice system, legal aid, corruption, discrimination, police, prosecution etc.[8] Disposal of cases is extremely slow; it appears that the state, who is the prosecutor in these cases, does not pursue the cases diligently. The investigation is poor. Equipment and technical expertise for scientific investigation is extremely limited. Unnecessary delay in obtaining reports deters the trial. As police officers are involved in different types of responsibilities, they cannot perform the investigation properly, so an independent and unbiased investigation cell in every police station is needed to make proper investigation. So far as the constituents of criminal justice system are concerned, role of police in this connection stands supreme. The culture of police impunity[9] endorses the existing trend and protects the culprit from being prosecuted. It encourages others to follow the suit, as the criminal justice system is open to manipulation by the law enforcing agencies. The law enforcing agencies must be free from all sorts of subjective political interference. Gender sensitization of Judges, judicial officers and lawyers is important so that they treat women with dignity and honour and inculcate confidence in them by the sober conduct, behavior and ideology of the judicial concern whenever the victim approach to them and seek justice. Judges have to keep in mind that women are weaker section of the society. At the courtrooms women should be treated with courtesy and dignity while appearing there. Any comment, gesture or other action on the part of any one in or around the courtroom which would be detrimental to the confidence of women is to be curbed with heavy hand. Court proceedings involving women must begin on time and repeated appearance of women in the court and harassment should be carefully avoided. In order to improve

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6 *Supra* note 54, at p. 147.

7 Islam, Kajalie Shehreen. 'How Rapists Go Free', *The Daily Star* (Magazine), 2 October 2010.

8 *Supra* note 79, at p. 18.

9 'Impunity' means, in legal sense, the impossibility or failure, *de jure* or *de facto*, in bringing the perpetrators of human rights violations to justice-whether in criminal, civil, administrative or disciplinary proceedings-since they can not be subjected to any enquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties and to making reparations for their victims.

women's faith to the criminal justice system, the following steps should be taken immediately:

The procedural laws should make it obligatory for the police to take cognizance of complaints lodged by women. Refusal to register the FIR or making changes while noting it down should be taken very seriously and the persons responsible for this lapse must be punished. A women cell should be made in every police station to deal with crime against women. Gender sensitization training should be made compulsory for all judicial officers as part of their job. This may ensure women's access to justice to some extent. An amendment with regard to monitoring of adjournment must be brought in the Code of Criminal Procedure (Cr.PC). Time frame for concluding a case should be included here. Summary trial should be held to punish the witness who knowingly gives false evidence or tries to mislead the court.

A separate and well-equipped investigation department needs to be set up. A greater number of women police investigating officers, specialized in area of investigating crimes against women should be appointed. They will definitely restore the lost confidence of the women, by solving their cases. Each and every police station must have a woman police officer to attend the female victims of sexual offences. Women police should be present to record complaints made by women. Every police station should have separate investigation cell in order to investigate cases of violence against women and children. Judges, law enforcing agencies and all service providers should be made aware about laws relating to women and their implementations. If necessary, regular training might be provided. The qualities of investigation officer must be improved by proper recruitment and training. Quick medical examination should be done along with *alamat* of the case. Observation of police stations by women's groups, human rights groups and NGOs has proved effective in bringing about some changes in attitudes and behaviours. So, this observation should be increased.

A Criminal Justice Commission may be established at national levels to be headed by retired personnel of any organs of the government. The functions of the Criminal Justice Commission will be to oversee investigations and trials of police, trial in lower judiciary and treatment in prison. A post of administrator should be created in court and he will be under the Ministry of Law and Justice. He will supervise over bench assistant's work, take necessary action against the corruption of *sherestader* or *peshkar*. He will also supervise whether summon has been properly issued or not. The provision of camera trial must be implemented in case of sexual harassment and rape. The court should exercise its discretion to prohibit annoyed, scandalous and attacking questions. The number of female Judges, Magistrates, and advocates should be increased. Separate Public Prosecutor service should be set up under the Director of Public Prosecution and the PP should be appointed only on the basis of merit. To suppress corruption the *Durniti Domon Commission* (Anti Corruption Commission)[10] should be strengthened and made independent of the government. The shadow whip of the opposition should be made chairman of the Commission and other members

[10] Anti Corruption Commission was created in 2004 to prevent and check the corruption from the administration and the society.

should also be from the opposition party. This will help balance the political bias of both ruling and opposition party thus gradually rooting out corruption from the society. Government should appoint at least one female doctor to look after women repression cases in every governmental hospital. Also, adequate equipments and forensic facility must exist in all district hospitals of the country so that proper information about the physical condition of violated women can be expeditiously and effectively collected by the on-duty female doctors of the medical hospitals. Law should be enacted by making provisions to take disciplinary and punitive action against the doctors who are liable for delay in filing forensic report and also for filing false forensic report or medical report. Ignorance or unawareness about one's right is a hindrance to the smooth enjoyment of such rights.[11] Legal awareness building can be an effective tool for unshackling the country from legal illiteracy.[12]Women's organizations can play a crucial role to create legal awareness amongst the masses. They should interact with local people in spreading awareness about their legal rights and obligations. Mass media should be utilized to act as an analyst in building links between Government departments, planning agencies professional bodies and educational institutions. It should play the role of opinion builders and become a source of pressure on the Government for implementing progressive legislation. Audio-visual resources like TV, cinema, radio and cultural forums should be exploited to spread the message of legal literacy through imaginative, interesting programmes.

11 Abu Noman, ABM and Richardson, Christine. *Women and The Law of Citizenship in Bangladesh: A Study of the Rights from the Gender Perspective*, Forum of Women in Security and International Affairs and Bangladesh Freedom Foundation, Dhaka, 2005, at p.58.

12 Al Asad, Md. Islam, Mahmud and Faroze, Tasnim. *'A Lawyer's role in enhancing access to justice', The Daily Star, 4 May 2007, at p.19.*

JUDICIAL TREND TOWARDS DELAY IN DISPOSAL OF MERCY PETITIONS IN INDIA

Dr. Amita Verma*

Yugdeep Kaur**

1.1 Introduction

> . . . For, whoever imposes severe punishment becomes repulsive to the people; while he who awards mild punishment becomes contemptible. But whoever imposes punishment as deserved becomes respectable. For, punishment (danda), when awarded with due consideration, makes the people devoted to righteousness and to works productive of wealth and enjoyment; while punishment, when ill-awarded under the influence of greed and anger, or owing to ignorance, excites fury even among hermits and ascetics dwelling in forests not to speak of house-holders.[1]

As Crime is inevitable in any human society since some violation or the other of any code of conduct prescribed for the members of a society is bound to occur. Not only is crime inevitable but, some sociologists have gone to the extent of saying that crime, to some extent, helps in promoting social solidarity among people constituting the society.[2] Historically, the concept of crime seems to have always been changing with the variations in social conditions during the evolutionary stages of human society. This can be illustrated from the fact that the early English society during 12th and 13th centuries included only those acts as crime which is committed against the State or the religion. Thus to rape and blasphemy were treated as crime whereas 'murder' was not a crime.[3]All societies and social groups develop ways to control behavior that violates norms.[4] Punishment involves pain or suffering produced by design and justified by some value that the sufferer is assumed to have violated. Accidental pain or suffering is not punishment.[5] The essential object of criminal law is to protect society against criminals and law-breakers. For this purpose the law threatens with the punishments to prospective law breakers and as well attempts to make the actual offenders suffer the prescribed punishments for their crimes.[6] Penologists all over the world have all expressed a doubt about the efficacy of fixed sentence for offenders. They have persistently argued that greater discretion in

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1 Kaut, 8, M. Rama Jois, *Legal and Constitutional History of India*, pp.612-613, Universal Law Publishing Co., New Delhi, 1990.

2 Prof. (Dr.) Syed Mohammad Afzal Qadri, *Ahmad Siddique's Criminology & Penology*, p. 1, Eatern Book Company, Lucknow, 2011.

3 Oppenhimer on "Rationale of Punishment", Dr. N.V. Paranjape, *Criminology and Penology*, p.1,Central Law Publications, Allahabad, 1991.

4 Terance D. Miethe, Hong Lu *Punishment: A Comparative Historical Perspective*, p.2, Cambridge University Press, Cambridge, 2005.

5 Ram Ahuja, *Criminology*, pp. 266-267, Rawat Publications, Jaipur, 2000.

6 R. V. Kelkar, *Criminal Procedure*, p. 1, Eastern Book Company, Lucknow, 2004.

judicial sentencing is absolutely necessary for treatment of offenders through modern rehabilitative methods. Some discretion in mitigating the rigors of punishment should be necessarily vested in the head of the executive in the form of granting pardon, amnesty, reprieve or respite and commutation of sentence of the offender.[7]

1.2 Concept of Pardon

A pardon is the broadest of the clemency mechanisms and is an official nullification of punishment or other legal consequences of a crime. The term pardon is first found in early French Law and derives from the Late Latin perdonare ('to grant freely'), suggesting a gift bestowed by the sovereign.[8] To pardon means to forgive a person of his offence. It is an act of grace and cannot be demanded as a matter of right. It is a purely executive act. Even principles of natural justice need not be followed.[9]Pardon is an act of grace which absolves a person from punishment. It places the offender in the same position as if he had never committed the offence.[10]

The executive has power to pardon an offender. Such power exists in other Constitutions. In India under Articles 72 and 161 of the Constitution the power has been conferred on the President and the Governors of the State.[11] As to why such power is given to the executive, Taft, C.J. in *Ex parte* Grossman[12] observed as follows:

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the Courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in proper governments, as well as in monarchies, to vest in some authority other than the Courts power to ameliorate or avoid particular criminal judgment. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."[13]

1.3 Important Cases on Delay in Disposal of Mercy Petitions

Prolonged delay in execution of death sentence is unquestionably an important consideration for determining whether the death sentence should be allowed to be executed. The Supreme Court noted with concern the delay in disposal of the petition

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7 Paranjape, *N. V. Prof., Criminology & Penology*, p. 316, Central Law Publications, Allahabad, 2007.

8 Ridolfi, Kathleen M. and Gordon, Seth, 'Gubernatorial Clemency Powers: Justice or Mercy?' (2009) available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_Section_newsletter/crimjust_cjmag_24_3_ridolfi.authcheckdam.pdf (last accessed 21 June 2013).

9 Prof. G.S. Pande, *Constitutional Law of India*, p. 318, University Book House (p) Ltd., Jaipur, 2007.

10 K.C. Joshi, (Dr.), *The Constitutional Law of India*, p. 358, Central Law Publications, Allahabad, 2011.

11 267 US 87: 69 L.Ed. 527, Dr. S. S. Srivastava, *Criminology, Penology & Victimology*, p. 267, Central Law Publications, Allahabad, 2012.

12 *Id.*, p. 267.

13 *Ibid.*

under Articles 72 and 161 of the Constitution of India, 1950of the time which the Government takes to dispose of the application under Section 432 and Section 433 of Criminal Procedure Code, 1973. The Supreme Court held that a self imposed rule should be followed by the executive authorities rigorously and every such petition shall be disposed of within three months from the date of receipts for long and interminable delay in the disposal of the petitions are a serious hurdle in the dispensation of justice.[14] A mercy petition filed by the convict remains solely in the Governor's domain and the Court cannot direct the Governor to decide it within a time-bound period.[15] It can affirmatively be said that the delay in deciding the mercy petition is unconstitutional and illegal and is a clear violation of Article 21 of our constitution (Protection of Life and Personal Liberty). It's thus imperative that the government should avoid undue delays in deciding the mercy petition to avoid the adverse implication for the victims, the convict and the society at large.[16]The Supreme Court has played an important role in this regard as is clear from the following landmark cases:

1.3.1 Piare Dusadh v. Emperor[17]

The Federal Court of India altered the death sentence into one of transportation for life on the ground that the appellant had been awaiting the execution of death sentence for over one year.[18]

1.3.2 Vivian Rodrick v. The State of West Bengal[19]

The Chief Justice S. M. Sikri of the Supreme Court held in this case that the extremely excessive delay in the disposal of the case of the appellant would by itself be sufficient for imposing a lesser sentence of imprisonment for life under Section 302. The appellant was committed to trial by the Presidency Magistrate as early as July 31, 1963 and he was convicted by the Trial Judge on September 4, 1964. It is now January, 1971, and the appellant has been for more than six years under the fear of sentence of death and it is a fit case for awarding the sentence of imprisonment for life.[20]

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14 *Sher Singh* v. *State of Punjab*, 1983 (2) SCC 344: AIR 1983 SC 465, D. J. De, *The Constitution of India,* Vol. 1, pp.1305-1306, Asia Law House, Hyderabad, 2001.

15 *Jagraj* v. *State*, 1989 Cri LJ 1863 (P & H), Acharya Dr. Durga Das Basu, S.R. Roy & S.P. Sen Gupta, *Indian Constitutional Law*, p. 739, Lexis Nexis Butterworths Wadhwa, Nagpur, 2011.

16 'Capital Punishment: Delay has made it a nebulous category' Civil Services Times Magazine, available at *http://www.civilservicestimes.com/national-/national-politics/529-capital-punishment-delay-has-made-it-a-nebulous-category.html* (last accessed 24 June 2013).

17 AIR 1944 FC 1.

18 Writ Petition (Criminal) D.No.16039 of 2011, *Devender Pal Singh Bhullar* v. *State of N.C.T. of Delhi*, available at *http://judis.nic.in/supremecourt/imgs1.aspx?filename=40266* (last accessed 10 July 2013).

19 1971 (1) SCC 468.

20 *Id.*, para 6.

1.3.3 Ediga Anamma v. State of Andhra Pradesh[21]

In the present case, the appellant, a rustic young woman, flogged out of her husband's house by her father-in-law, was living with her parents with her only child. She committed a premeditated, cleverly planned murder of another young woman and her child because of rivalry between the appellant and the murdered woman for the affections of an illicit lover. The Sessions Court awarded the death sentence and the High Court confirmed. Justice V. R. Krishnaiyer of the Supreme Court held in this case that the death sentence must be dissolved and life sentence substituted. The Court held in this case as "What may perhaps be an extrinsic factor but recognized by the Court as of human significance in the sentencing context is the brooding horror of 'hanging' which has been haunting the prisoner in her condemned cell for over two years." The death sentence in this case was substituted by life sentence on the basis of two years delay in the execution of death sentence as the Sessions Judge in this case pronounced the death penalty on December 31, 1971.

1.3.4 Sadhu Singh v. State of U.P.[22]

The appellant Sadhu Singh was convicted of the murders and sentenced to death by the Sessions Court which was confirmed by the High Court and the appellant came up in appeal by special leave. The bench of Justice S Bahadur, and G. Singh J. of the Court held:

> In regard to sentence the appellant has been under spectre of the sentence of death for over 3 years and seven months. The evidence also gives an indication that he was probably instigated directly or indirectly by his father. In the circumstances we think that the sentence of imprisonment for life may be substituted in place of the sentence of death.[23]

1.3.5 T.V. Vatheeswaran v. State of Tamil Nadu[24]

In this case there was a delay of about 10 years in executing the sentence of death. Justice O. Chinnappa Reddy observed:

> [W]hat may be considered prolonged delay so as to attract the constitutional protection of Article 21 against the execution of a sentence of death is a ticklish question. In *Ediga Anamma* v. *State of Andhra Pradesh case*,[25] delay of two years was considered sufficient to justify interference with the sentence of death. In *Bhagwan Bux Singh and Anr.* v. *The State of Uttar Pradesh*,[26] two and a half years

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21 AIR 1974 SC 799: 1974 SCR (3) 329.

22 (1978) 4 SCC 428.

23 *Id.*, para 9.

24 (1983) 2 SCC 68, 1983 SCR (2) 348, the accused in this case was sentenced to death for committing dastardly murders in a planned way. He was first a 'prisoner under remand' for two years and thereafter he was kept in solitary confinement for eight years. In the SLP and writ petition, the accused has claimed that the prolonged delay of about 10 years in executing the sentence of death has violated his right under Article 21. Special leave petition and writ petition was allowed in this case.

25 *Supra* 21.

26 AIR 1978 SC 34: (1978) 1 SCC 214: 1978 SCC (Cri) 104: 1978 Cri LJ 153.

and in *Sadhu Singh* v. *State of U.P.*,[27] three and a half years were taken as sufficient to justify altering the sentence of death into one imprisonment for life. Section 366 of the Code of Criminal Procedure, 1973 provides that a sentence of death imposed by a Court of Session must be confirmed by the High Court. The practice, to our knowledge, has always been to give top priority to the hearing of such cases by the High Courts. So also in this Court there are provisions in the Constitution of India, 1950 (Articles 72 and 161) which invest the President and the Governor with power to suspend, remit or commute a sentence of death. Making all reasonable allowance for the time necessary for appeal and consideration of reprieve, we think that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 Constitution of India, 1950 and demand the quashing of the sentence of death."[28]

The Apex Court taking into consideration the dehumanizing factor of prolonged delay fixed a time period of two years to be sufficient for commuting the death sentence.[29]

1.3.6 K. P. Mohammed v. State of Kerala[30]

A Bench headed by the then Chief Justice Y.V. Chandrachud noted that the petitioner who was sentenced to death had filed a petition under Article 72 of the Constitution of India, 1950in 1978 but the same was not decided for the next four and half years. After waiting for a sufficiently long period, the Court commuted the death sentence into life imprisonment by recording the following observations:[31]

> It is perhaps time for accepting a self-imposed rule of discipline that mercy petitions shall be disposed of within, say, three months. These delays are gradually creating serious social problems by driving the courts to reduce death sentences even in those rarest of rare cases in which, on the most careful, dispassionate and humane considerations death sentence was found to be the only sentence called for. The expectation of persons condemned to death that they still have a chance to live is surely not of lesser, social significance than the expectation of contestants to an election petition that they will one day vote on the passing of a bill.[32]

However, the Court also emphasized and said that we are not of the opinion that a sentence of death becomes inexecutable after the lapse of any particular number of years. We are not commuting the death sentence only on the ground that a certain

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27 *Supra* 22.

28 (1983) 2 SCC 79, para 21.

29 *Supra* 24.

30 1984 (Supp) SCC 684, the petitioner was convicted under S. 302, *Indian Penal Code*, 1860 by the learned District & Sessions Judge, Manjeri, and was sentenced to death in 1977. The High Court having confirmed the order of conviction and sentence, the petitioner filed a SLP which was dismissed on August 16, 1978. The petitioner then filed a mercy petition to the President of India on October 8, 1978 which has been pending for the last four and a half years. The writ petition was adjourned from time to time in the hope that, the Government of India will expedite its processes and dispose of the mercy petition early.

31 *Ibid.*

32 *Ibid.*

number of years have passed after the imposition of death sentence.[33] Though the death sentence was commuted but they deviated from the principle of fixing time period as laid down in *T.V. Vatheeswaran* v. *State of Tamil Nadu*.[34]

1.3.7 Sher Singh v. State of Punjab[35]

In this case the petitioners contended that since more than two years have passed since the petitioners were sentenced to death by the Trial Court, so they are entitled to demand that the said sentence should be quashed and substituted by the sentence of life imprisonment. It was held by Chief Justice Y. V. Chandrachud that there is no specific period of delay that will entitle a convict to have his death sentence commuted to life. However, inordinate delay, on the facts of each case, would justify commutation of death sentence to life imprisonment.[36] In this case the three-Judge Bench broadly agreed with the ratio of the judgment in *T.V. Vatheeswaran* v. *State of Tamil Nadu*,[37] but refused to lay down any hard and fast rule regarding the time period for the commutation of death sentence into life imprisonment on the ground of delay in the Court processes.[38] The Court observed:[39]

> It has been sad experience of this Court that no priority whatsoever be given by the Government of India to the disposal of petitions filed to the President under Article 72 of the Constitution of India, 1950. Frequent reminders are issued by this Court for an expeditious disposal of such petitions but even then the petitions remain undisposed of for a long time. Seeing that the petition for reprieve or commutation is not being attended to and no reason is forthcoming as to why the delay is caused, this Court is driven to commute the death sentence into life imprisonment out of sheer sense of helplessness and frustration. Therefore, with respect, the fixation of the time limit of two years does not seem to us to accord with the common experience of the time normally consumed by the litigative process and the proceedings before the executive.[40]

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33 *Ibid.*

34 *Supra* 24.

35 (1983) 2 SCC 344, in this case the petitioners, Sher Singh and Surjit Singh, and one Kuldeep Singh were convicted under S. 302 read with S. 34 of the Penal Code and were sentenced to death by the by the learned Sessions Judge, Sangrur on November 26, 1977. By a judgment dated July 18, 1978 the High Court of Punjab and Haryana reduced the sentence imposed upon Kuldip Singh to life imprisonment but upheld the sentence of death imposed upon the petitioners. SLP against the judgment of the High Court was dismissed on March 5, 1979. The petitioner then filed a writ petition in this Court challenging the validity of S. 302 of the Penal Code. That petition was dismissed on January 20, 1981. Review petition was also dismissed, then again a wirt petition was filed under Article 32 challenging the validity of S. 34 of the Penal Code which was again dismissed. At last petitioner again filed two writ petitions on March 2, 1983, basing themselves on the decision rendered by Justice Chinnappa Reddy and Justice R. B. Misra on February 16, 1983, in Vatheeswaran.

36 *Sher Singh* v. *State of Punjab*, AIR 1983 SC 465- overruling *Vatheeswaran* v *State of Tamil Nadu*, AIR 1983 SC 361, It is submitted that Vatheeswaran's case did not merit commutation at all, Arvind P. Datar, *Datar on Constitution of India,* p. 390, Lexis Nexis Wadhwa, Nagpur, 2001.

37 *Supra* 24.

38 Writ Petition (Criminal) D.No.16039 of 2011, available at *http://judis.nic.in/supremecourt/imgs1.aspx?filename=40266* (last accessed 10 July 2013).

39 *Supra* 24, para 18.

40 *Ibid.*

In *Sher Singh* v. *State of Punjab*,[41] while disposing of a writ-petition for the commutation of death sentence into life imprisonment on the ground of inordinate delay the Court took an opportunity to impress upon the Central and State Governments that the mercy petitions filed under Articles 72 and 161 of the Constitution of India, 1950or under Sections 432 and 433 of the Criminal Procedure Code, 1973, must be disposed of expeditiously. Chandrachud, C.J., said:

> A self-imposed rule should be followed by the executive authorities vigorously, that every such petition shall be disposed of within a period of three months from the date when it is received. Long delays in the disposal of these petitions are a serious hurdle in the disposition of justice and indeed, such delay tends to shake the confidence of the people in very system of justice.[42]

The Court cited several instances and one such case was a mercy petition under Article 161 Constitution of India, 1950 pending before the Governor of Jammu and Kashmir for the last eight years.[43]

1.3.8 Javed Ahmad v. State of Maharashtra[44]

The petitioner was found guilty of cruel and multiple murder. He was convicted and sentenced to death by the Sessions Judge on 6-2-1982. The High Court confirmed the death sentence on 29/30-4-1982. The appeal under Article 136 of the Supreme Court was dismissed on 20-4-1983.[45] The President of India also rejected a petition for clemency. Then the petitioner filed a writ petition in the Supreme Court under Article 132. The Supreme Court quashed the death sentence and substituted it with the life-imprisonment.[46] The Bench consisting of Justice O. Chinnappa Reddy said that the cause of delay was immaterial in case of death sentence. "Be the cause for the delay, the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanizing character of the delay."[47]

1.3.9 Triveniben v. State of Gujarat[48]

There was a conflicting decision of this Court in *T.V. Vatheeswaran* v. *State of Tamil Nadu*,[49] *Sher Singh* v. *State of Punjab*[50] and *Javed Ahmad* v. *State of Maharashtra*,[51] on the grounds of inordinate delay in disposing mercy petitions. In this pertinent case the matter was referred to the Supreme Court's five-judge

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41 *Supra* note 35.
42 *Ibid.*
43 P.K. Majumdar & R.P. Kataria, *Commentary on The Constitution of India*, p. 1545, Orient Publishing Co., New Delhi, 2009.
44 AIR 1985 SC 231: 1984 Cr L J 1909 (SC).
45 S.S. Srivastava, (Dr.), *Criminology, Penology & Victimology*, pp. 251-252, Central Law Agency, Allahabad, 2012.
46 *Ibid.*
47 *Ibid.*
48 (1989) 1 SCC 678.
49 *Supra* note 24.
50 *Supra* note 35.
51 *Supra* note 44.

Constitutional Bench in 1989. The accused persons in this case were convicted under Section 302 Indian Penal Code, 1860 and sentenced to death by the Trial Court. The High Court confirmed their conviction and sentence. Supreme Court dismissed their special leave petitions or appeals and subsequent review petitions. Their mercy petitions to the President and /or the Governor were also rejected. They thereupon moved writ petitions under Article 32 Constitution of India, 1950 for setting aside the death sentence and substitution of sentence of life imprisonment on ground of prolonged delay in execution of death sentence. The ground of delay in execution was based on the inhuman suffering which a condemned prisoner suffers waiting to be executed and the mental torture it amounts to. The Bench consisting of Justice G.L. Oza, Justice M.M. Dutt, Justice K.N. Singh, Justice K.J. Shetty and Justice L.M. Sharma in this case distinguished between the delay caused in the judicial proceedings and that by the executive in the exercise of its prerogative clemency and held that the only delay which would be material for consideration will be the delay in disposal of the mercy petitions or delays occurring at the instance of the executive.[52] It must be observed that when such petitions under Article 72 or 161 Constitution of India, 1950 are received by the authorities concerned it is expected that these petitions shall be disposed of expeditiously.[53] In this case on one hand Court denied to prescribe a time limit for disposal of even for mercy petitions.[54] On the other hand the Court held that right to speedy trial in criminal cases though not a specific fundamental right is implicit in the broad sweep and content of Article 21 Constitution of India, 1950.[55]

1.3.10 Jagdish v. State of M.P.[56]

The condemned prisoner and his suffering relatives have a very pertinent right in insisting that a decision in the matter be taken within a reasonable time, failing which the power should be exercised in favour of the prisoner. It is to be noted that human beings are not chattels and should not be used as powers in furthering some largest political or governmental policy. Plight of agony of death row in pending mercy petition for delay in disposal is highlighted in *Jagdish* v. *State of M.P.*[57] It is suggested in that case in the light of the Eighth amendment of the U.S.A. Constitution and Article 21 of the Indian Constitution of India, 1950that in such cases the death sentence should be commuted to one of life.[58]

In this case, the Bench consisting of Harjit Singh Bedi and J.M. Panchal of the Supreme Court held that we must take this opportunity to impress upon the Government of India and the State Governments that petitions filed under Article 72 and 161 of the Constitution of India, 1950or under Sections 432 and 433 of the Criminal Procedure Code, 1973 must be disposed of expeditiously. A self-imposed

52 *Supra* note 48, para 17.
53 *Id.*, para 18.
54 *Id.*, para 73.
55 *Ibid.*
56 JT 2009 (12) SC 300.
57 (2009) 9 SCC 495, paras 39-41, 47.
58 H.K. Saharay, *The Constitution of India,* pp. 499-500, Eastern Law House, Kolkata, 2012.

rule should be followed by the executive authorities rigorously, that every such petition shall be disposed of within a period of three months from the date on which it is received.[59]

1.3.11 Daya Singh v. Union of India[60]

In this case Justice L.M. Sharma of the Supreme Court stated that delay in execution of death sentence should be sufficient to entitle the person under sentence of death to invoke Article 21 Constitution of India, 1950 and demand quashing of death sentence.[61]

1.3.12 Jumman Khan v. State of U.P.[62]

In this case the petitioner was convicted of committing rape on a 6 years old girl and strangulating her to death awarded sentence of death by the Sessions Judge Agra which was confirmed by the High Court. His special leave petition to the Supreme Court was also rejected. His petition for pardon was rejected by the Governor on Feb, 1988. The mercy-petition addressed to the President was received by the Ministry of Home Affairs and the same was rejected on October 1988. It was argued that the mercy petition rejected by the President require reconsideration. It was held by Justice S. R. Pandian that after examining the same carefully the Court found no ground for interference.[63]

1.3.13 Madhu Mehta v. Union of India[64]

In this case commuting the death sentence to life imprisonment due to long delay the Bench consisting of Justice Sayasachi Mukherji of theSupreme Court made the following observations that it is well settled now that undue long delay in execution of the sentence of death would entitle the condemned person to approach this Court or to be approached under Article 32 of the Constitution of India, 1950, but this Court would only examine the nature of delay caused and circumstances that ensured after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the Courts while finally maintaining the sentence of death. But the Court is entitled and indeed obliged to consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life.[65] . . . The convict has suffered mental agony of living under the shadow of death for far too long. He should not suffer that agony any longer. In the facts and circumstances of the case, therefore, we direct the death

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59 Criminal Appeal No. 338 of 2007, *Jagdish* v. *State of M.P.* para 27 available at *http://indiankanoon.org/doc/63817/* (last accessed 07 June 2014).

60 1991 (3) SCC 61.

61 *Ibid.*

62 AIR 1991 SC 345: (1991) 1 SCC 752: 1990 (2) Scale 1167: 1991 (1) JT 31: 1991 Cr. LJ 439: 1991 (1) Crimes 151: 1991 CAR 64: 1991 (1) UJ 328: 1981 Cr LR (SC) 98.

63 *Supra* 43, at p. 1546.

64 AIR 1989 SC 2239.

65 *Madhu Mehta* v. *Union of India*, 1989 AIR 2299, 1989 SCR (3) 774, available at *http://indiankanoon.org/doc/1666141/* (last accessed 07 June 2014).

sentence should not be carried out and the sentence imposed upon him be altered to imprisonment for life.[66]

1.3.14 Devender Pal Singh Bhullar v. State of N.C.T. of Delhi[67]

Recently, the Bench consisting of Justice G. S. Singhvi and Justice Sudhansu Jyotimukhopadhaya of the Supreme Court of India dismissed death-row convict Devender Pal Singh Bhullar's writ petition seeking commutation of his sentence on the grounds of inordinate delay in rejecting his mercy petition by the President.[68] The petitioner in this case was charged with offences under Sections 419, 420, 468 and 471 Indian Penal Code, 1860, Section 12 of the Passports Act, 1967 and Sections 2, 3 and 4 Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA). The designated Court, Delhi found him guilty and sentenced him to death. The appeal filed by him was dismissed by the Supreme Court and the review petition was also dismissed. Soon after dismissal of the review petition, the petitioner submitted petition dated 14.01.2003 to the President under Article 72 of the Constitution of India, 1950and prayed for commutation of his sentence vide a letter dated 30.05.2011; the President's decision came as:

> The President of India has, in exercise of the powers under Article 72 of the Constitution of India, 1950 of India, been pleased to reject the mercy petition submitted by the condemned prisoner Devender Pal Singh and petitions on his behalf from others. The prisoner may be informed of the orders of the President's act accordingly.[69]

After rejection of his petition by the President, the petitioner sought leave of the Court and was allowed to amend the writ petition. In this case the denying commutation of death sentence in terrorism related cases the Court observed:

> The rule enunciated in Sher Singh's case, Triveniben's case and some other judgments that long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes. Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes.[70]

However, the Court also held:

> On its part, the Ministry of Home Affairs also failed to take appropriate steps for reminding the President's Secretariat about the dire necessity of the disposal of the pending petitions. What was done in April and May, 2011 could have been done in 2005 itself and that would have avoided unnecessary controversy.[71]

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66 *Ibid.*

67 Writ Petition (Criminal) D. No. 16039 of 2011, available at *http://www.sci.nic.in/outtoday/40266.pdf* (last accessed 24 December 2013).

68 *Ibid.*

69 *Id.*, para 9, sub-para 9.8.

70 *Id.*, para 40.

71 *Id.*, para 45.

1.3.15 Mahendra Nath Das v. Union of India & Ors.[72]

In 2013, the Apex Court again dealt with the point of delay which came before the same Court of two judges bench which decided the *Devender Pal Singh Bhullar* v. *State of N.C.T. of Delhi*,[73] The question which arises for consideration in this appeal is whether 12 years delay in the disposal of the petition filed by the appellant under Article 72 of the Constitution of India, 1950 was sufficient for commutation of the sentence of death into life imprisonment and the Division Bench of the Gauhati High Court committed an error by dismissing the writ petition filed by him. The Bench consisting of Justice G. S. Singhvi and Justice Sudhansu Jyoti Mukhopadhaya while referring to the judgment of *Daya Singh* v. *Union of India,*[74] has held that a careful reading of that judgment shows that this Court had commuted the sentence of death of Daya Singh into life imprisonment by taking into consideration long time gap of 12 years in the execution of death sentence and the judgment of the Constitution of India, 1950Bench in *Triveniben* v. *State of Gujarat.*[75] In present case, the Court relying upon the principles enunciated in Triveniben's case commuted the death sentence to life imprisonment.

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72 Criminal Appeal No. 677 OF 2013 (Arising out of SLP (Crl.) No. 1105 of 2012), available at *http://judis.nic.in/supremecourt/imgs1.aspx?filename=40353* (last accessed 13 July 2013). Facts in this case were as; the appellant was prosecuted for an offence under S. 302 of the *Indian Penal Code, 1860* on the allegation that he had killed Rajen Das, Secretary of Assam Motor Workers Union on 24.12.1990. He was convicted by Sessions Judge, and vide judgment dated 11.11.1997 he was sentenced to life imprisonment. While he was on bail he killed Hare Kanta Das (a truck owner). He was tried in Sessions Case No. 114(K) of 1996 and was convicted by the trial Court and was sentenced to death on the premise that the murder was most foul and gruesome. The appellant challenged the judgments of the trial Court in Appeal Nos. 254(J) of 1997 and 2(J) of 1998. Both the appeals were dismissed by the High Court vide judgments dated 3.2.1998 and 12.12.1998 and the sentence of death awarded in Sessions Case No. 114(K) of 1996 was confirmed. The appeal filed by the appellant against the confirmation of the sentence of death by the High Court was dismissed by this Court vide judgment – *Mahendra Nath Das* v. *State of Assam,* (1999) 5 SCC 102. While dealing with the appellant's contention that the extreme penalty of death should not have been imposed by the trial Court and confirmed by the High Court, the Supreme Court held that declining to confirm the death sentence will, in our view, stultify the course of law and justice. Soon after the judgment of this Court, the appellant submitted a petition to the President under Article 72 of the *Constitution of India, 1950* and prayed for commutation of the sentence of death into life imprisonment. A similar petition was filed by him under Article 161 of the *Constitution of India, 1950.* The Governor of Assam rejected his petition vide order dated 7.4.2000. The mercy petition addressed to the President was forwarded by the Government of Assam to the Ministry of Home Affairs sometime in June, 2000. After a lot of correspondence with the State Government, the Ministry of Home Affairs prepared a note suggesting that the petition filed by the appellant may be rejected. On 20.6.2001, the then Home Minister recommended to the President that the mercy petition of the appellant should be rejected.

73 Writ Petition (Criminal) D. No. 16039 of 2011, available at *http://www.sci.nic.in/outtoday/40266.pdf* (last accessed 24 December 2013).

74 (1991) 3 SCC 6.

75 *Mahendra Nath Das* v. *Union of India & Ors.*, Criminal appeal no. 677 of 2013 available at *http://judis.nic.in/supremecourt/imgs1.aspx?filename=40353* (last accessed 13 July 2013).

1.3.16 Shatrughan Chauhan & Anr. v. Union of India & Ors.[76]

Recently in the case of *Shatrughan* the Bench consisting of Justice P. Sathasivam, Justice Ranjan Gogoi and Justice Kirti Singh of the Supreme Court of Indian has said that on a number of occasions this Court has declined to frame any guidelines for exercise of pardoning powers because (i) Firstly, it is a settled proposition that there is always a presumption that the constitutional authority acts with application of mind as has been reiterated in *Bikas Chatterjee* v. *Union of India.*[77] Secondly, this Court, over the span of years, unanimously took the view that considering the nature of power enshrined in Articles 72/161, it is unnecessary to spell out specific guidelines. The Apex Court went further and quoted the passage from *Epuru Sudhakar*[78] as:

So far as desirability to indicate guidelines is concerned in *Ashok Kumar alias Golu* v. *Union of India and Ors.*,[79] it was held as follows:

> In Kehar Singh case on the question of laying down guidelines for the exercise of power under Article 72 of the Constitution of India, 1950 this Court observed as under:
>
> It seems to us that there is sufficient indication in the terms of Article 72 Constitution of India, 1950 and in the history of the power enshrined in that provision as well as existing case-law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 Constitution of India, 1950 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme.[80]

Further in the case of *Shatrughan Chauhan & Anr.* v. *Union of India & Ors.*,[81] the Supreme Court of India has held that the nature of delay i.e. whether it is undue or unreasonable must be appreciated based on the facts of individual cases and no exhaustive guidelines can be framed in this regard.[82] The Court in this case held that there is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence.

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76 Writ Petition (Criminal) No. 55 of 2013,*Shatrughan Chauhan & Anr.* v. *Union of India & Ors.*, available at *http://judis.nic.in/supremecourt/imgs1.aspx?Filename=41163* (last accessed 25 January 2014).

77 (2004) 7 SCC 634.

78 *Epuru Sudhakar & Anr.*v. *Govt. of A.P. & Ors.*, AIR 2006 SC 3396 para 36.

79 1991 SCR (2) 858, 1991 SCC (3) 498.

80 *Supra* note 76, para 18.

81 *Ibid.*

82 *Id.*, para 54.

In *Navneet Kaur* v. *State of NCT of Delhi & Anr.*,[1] the Supreme Court of India after taking into consideration the judgment of *Shatrughan Chauhan & Anr.* v. *Union of India & Ors.*, [2]commuted the death sentence of Devinder Pal Singh Bhullar into life imprisonment on the ground of inordinate delay and insanity.

In *V. Sriharan @ Murugan* v. *Union of India & Ors.*,[3] the bench comprising of Justices P. Sathasivam, Ranjan Gogoi and Shiva Kirti Singh the Supreme Court of India after keeping under consideration the case of *Shatrughan Chauhan & Anr.* v. *Union of India & Ors.*,[4]commuted the death sentence of the accused into one life imprisonment on the ground of inordinate delay.

Recently, Supreme Court of India stayed the execution of the death sentence of Yakub Abdul Razak Memon.[5]

Table showing delay as a ground for commutation of death sentence

Sr. No.	Case Law	Delay whether counted as a ground or not
1.	*Piare Dusadh* v. *Emperor*,[6]	Delay of one year counted as a ground for altering death sentence into one of transportation for life.
2.	*Vivian Rodrick* v. *The State of West Bengal*,[7]	Supreme Court held in this case that excessive delay in the disposal of the case i.e., for six years, so the case is a fit case for awarding the sentence of imprisonment for life.
3.	*Edigma Anamma* v. *State of A.P.*,[8]	Death sentence substituted to life sentence on the basis of 2 years delay in the execution of death sentence.
4.	*Sadhu Singh* v. *State of U.P.*,[9]	Sentence of imprisonment for life substituted in place of the sentence of death on delay for over 3 years and 7 months.

1 Curative Petition (Criminal) No. 88 of 2013 in Review Petition (Criminal) No. 435 of 2013 in Writ Petition (Criminal) No. 146 of 2011, *Navneet Kaur* v. *State of NCT of Delhi & Anr.*, available at *http://judis.nic.in/supremecourt/Chrseq.aspx* (last accessed 31 May 2014).

2 *'Supra'* 76.

3 V. *Sriharan @ Murugan* v. *Union of India & Ors.*, Transferred Case (Criminal) No. 1 of 2012, available at *http://judis.nic.in/supremecourt/imgs1.aspx?filename=41228* (last accessed 01 June 2014).

4 *Supra* note 76.

5 Krishnadas Rajagopal, 'SC reprieve for Yakub Memon' The Hindu, News National, June 2, 2014 available at *http://www.thehindu.com/news/national/sc-reprieve-for-yakub-memon/article6075757.ece* (last accessed 05 June 2014).

6 AIR 1944 FC 1.

7 1971 (1) SCC 468.

8 AIR 1974 SC 799.

9 (1978) 4 SCC 428.

Sr. No.	Case Law	Delay whether counted as a ground or not
5.	*T. V. Vatheeswaran* v. *State of Tamil Nadu,*[10]	In this case there was a delay of about 10 years in executing the sentence of death. The Apex Court taking into consideration the dehumanizing factor of prolonged delay fixed a time period of 2 years to be sufficient for commuting the death sentence.
6.	*K. P. Mohammed* v. *State of Kerala*[11]	Court commuted the death sentence into life imprisonment on delay of four and haly years. Court also emphasized that we are not of the opinion that a sentence of death becomes inexecutable after the lapse of any particular number of years.
7.	*Sher Singh* v. *State of Punjab,*[12]	It was held that there is no specific period of delay that will entitle a convict to have his death sentence commuted to life.
8.	*Javed Ahmad* v. *State of Maharashtra,*[13]	Death sentence quashed and substituted for life imprisonment. The Court said that the cause of delay was immaterial in case of death sentence.
9.	*Triveniben* v. *State of Gujarat,*[14]	It was held in this case that the only delay which would be material for consideration will be the delay in disposal of the mercy petitions. Court on one hand denied prescribing a time limit for disposal of mercy petitions. On the other hand held right to speedy trial in criminal cases is implicit in Article 21.
10.	*Daya Singh* v. *Union of India,*[15]	Supreme Court stated that delay in execution of death sentence should be a sufficient ground to entitle the person under sentence of death to invoke Article 21
11.	*Madhu Mehta* v. *Union of India,*[16]	Death sentence commuted to life imprisonment due to long delay
12.	*Devender Pal Singh Bhullar* v. *State of N.C.T. of Delhi*[17]	Supreme Court of India dismissed petition of death row convict on grounds of inordinate delay

10 (1983) 2 SCC 68.
11 1984 (Supp) SCC 684.
12 (1983) 2 SCC 344.
13 AIR 1985 SC 231.
14 (1989) 1 SCC 678.
15 1991 (3) SCC 61.
16 AIR 1989 SC 2239.
17 Writ Petition (Criminal) D. No. 16039 of 2011, available at *http://indiankanoon.org/doc/108787168/* (last accessed 16 May 2014.

Sr. No.	Case Law	Delay whether counted as a ground or not
13.	*Mahendra Nath Das* v. *Union of India & Ors.*[18]	Twelve year delay counted as a sufficient ground for commutation of death sentence into life imprisonment
14.	*Shatrughan Chauhan & Anr.*v. *Union of India & Ors.*[19]	Delay ranging between eleven to thirteen years counted as inordinate delay sufficient for commutation of death sentence into life imprisonment
15.	*Navneet Kaur* v. *State of NCT of Delhi & Anr.*,[20]	Delay of eight years counted as inordinate delay sufficient for commutation of death sentence into life imprisonment
16.	*V. Sriharan @ Murugan* v. *Union of India & Ors.*,[21]	Delay of more than eleven years counted as sufficient in commutation of death sentence into life imprisonment.

1.4 Conclusion

While exercising this power the delay has become one of the important factors in the disposal of mercy petitions of those on death row. It is always decided from case to case that in which case pardon is to be given and in which case not. There are lacunae in the present legal system which needs to be fulfilled. The present procedure of disposal of mercy petitions is very long and exhaustive. The judiciary has played an important role in dealing with the point of delay. *Piare Dusadh* v. *Emperor*,[22] *Vivian Rodrick* v. *The State of West Bengal*,[23] *Edigma Anamma* v. *State of A.P.*,[24] *Sadhu Singh* v. *State of U.P.*,[25] *T. V. Vatheeswaran* v. *State of Tamil Nadu*,[26] *K. P. Mohammed* v. *State of Kerala*,[27] *Sher Singh* v. *State of Punjab*,[28] *Javed Ahmad* v. *State of Maharashtra*,[29] *Triveniben* v. *State of Gujarat*,[30] *Daya Singh* v. *Union of India*,[31] *Madhu Mehta* v. *Union of India*,[32] in all of these cases the death sentence was commuted into life imprisonment on the basis of the delay involved in disposal

18 *Supra* note 75.
19 *Supra* note 76.
20 *Supra* note 83.
21 *Supra* note 85.
22 AIR 1944 FC 1.
23 1971 (1) SCC 468.
24 AIR 1974 SC 799.
25 (1978) 4 SCC 428.
26 (1983) 2 SCC 68.
27 1984 (Supp) SCC 684.
28 (1983) 2 SCC 344.
29 AIR 1985 SC 231.
30 (1989) 1 SCC 678.
31 1991 (3) SCC 61.
32 AIR 1989 SC 2239.

of mercy petitions. In *T. V. Vatheeswaran* v. *State of Tamil Nadu,*[33] the Supreme Court fixed a time period sufficient for commuting the death sentence. But afterwards the Supreme Court in *Triveniben's* case did not fix any particular time limit in disposal of mercy petitions to be sufficient for commuting the death sentence.

In the recent scenario, in the *Devender Pal Singh Bhullar's* judgment the Supreme Court of India has held that the Government and the President's Secretariat have not dealt with these petitions with requisite seriousness. We hope and trust that in future such petitions will be disposed of without unreasonable delay.[34] In the case of *Devender Pal Singh Bhullar* the Supreme Court of India has expressed that there will be no pardon for terrorists in India, while laying down the present judgment the Supreme Court has changed its age old pardon jurisprudence. In the judgment of *Devendar Pal Singh Bhullar* v. *State of N.C.T. of Delhi,*[35] the Hon'ble Supreme Court of India held that long delay by the President or the Governor in disposing of mercy petitions of persons convicted under anti-terror laws or similar statutes cannot be a ground for commutation of the death sentence.[36]

By denying relief to the death-row convict Devender Pal Singh Bhullar on the grounds of inordinate delay in disposing of his mercy petition, the Supreme Court has reversed the two-decade-old jurisprudence in favour of the human rights of prisoners.[37] But after this judgment in the landmark case of *Shatrughan Chauhan & Anr.* v. *Union of India & Ors.,*[38] even though the Court did not set a time frame for disposal of the mercy petitions, the Supreme Court has laid down certain guidelines for safeguarding the interest of death row convicts. In regard to procedure in placing the mercy petition before the President, the Court said that there should be fixed time limit within which the authorities should forward the necessary documents to the Home Ministry. Further the Home Ministry should send the recommendations/views to the President within a reasonable time and it is also the duty of the Home Ministry for sending reminders to the President's office for early disposal of the petition.[39]

In this judgment the Court laid down that the death sentence should be commuted into life imprisonment even in terrorism cases. Soon after this judgment the Supreme Court commuted the death penalty of terror convict Devinder Pal Singh Bhullar to life term over mental illness and an inordinate delay by the government in deciding his mercy plea. In the *Navneet Kaur* v. *State of NCT of Delhi & Anr.,*[40] a bench led

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33 (1983) 2 SCC 68, 1983 SCR (2) 348.

34 Writ Petition (Criminal) D.No. 16039 OF 2011, *Devender Pal Singh Bhullar* v. *State of N.C.T. of Delhi*, para 7 available at *http://indiankanoon.org/doc/108787168/* (last accessed 17 June 2013).

35 *Ibid.*

36 'Delay no ground for mercy in terror cases', The Hindu, 12 April 2013, available at *http://www.thehindu.com/news/national/delay-no-ground-for-mercy-in-terror-cases/article460 9566.ece* (last accessed 17 June 2013).

37 V. Venkatesan, 'Mercy denied', available at http://www.frontline.in/social-issues /general-issues/mercy-denied/article4653362.ece (last accessed 17 June 2013).

38 *Supra* note 76, para 264.

39 *Ibid.*

40 Curative Petition (Criminal) No. 88 of 2013 in Review Petition (Criminal) No. 435 of 2013 in Writ Petition (Criminal) No. 146 of 2011, *Navneet Kaur* v. *State of NCT of Delhi & Anr.*

by Chief Justice P Sathasivam allowed the curative petition filed by Bhullar' s wife Navneet Kaur while also taking on record the government's submission that Bhullar's was a case that had to be allowed.[41]

In *V. Sriharan @ Murugan* v. *Union of India & Ors.*,[42] the bench comprising of Justices P. Sathasivam, Ranjan Gogoi and Shiva Kirti Singh the Supreme Court of India commuted the death sentence on the ground of inordinate delay.

The Supreme Court stayed the execution of the death sentence of Yakub Abdul Razak Memon, "mastermind" of the 1993 Mumbai serial blasts. A Bench comprising Justices J.S. Khehar and C. Nagappan on Monday issued notice to the Maharashtra government and the Union of India on Memon's writ petition. Staying the execution proceedings, the Bench further referred the petition to a Constitution Bench.[43] The present disposal of the mercy petitions show that, no uniformity has been while dealing with these petitions and they are more influenced by the personal opinion. Asian Centre for Human Rights (ACHR) in its press release states that President Pranab Mukherjee has reduced the President's Office to a rubber stamp of the Ministry of Home Affairs (MHA) while rejecting mercy pleas of the death-row convicts as per the advice of the MHA.[44]The power of pardon as used by the Presidents presents a mixed picture which is influenced by their personal opinion. Some of them used Article 72 perfunctorily, even reluctantly, yet some others did so with differential effect, not just for the man under the shadow of the noose but for the future of capital crime and capital punishment.[45] Providing mercy to a criminal is a very big task and the onerous responsibility is on the shoulders of the President. Before President Pranab Mukherjee's taking the charge there was a huge backlog of mercy petitions, but after his taking the charge, there has been a hurry if disposal of the mercy petitions. Since the independence the Presidents of India have different approaches towards mercy petitions. Some have played a very active role in disposing of these petitions. The disposal of mercy petitions is an act of the Council of Ministers rather than presidential. The need of an hour is to dispose off these mercy petitions quickly and seriously without any kind of political influence. Setting up of pardon boards could be a positive step in decreasing the delay in disposal of mercy petitions in India.

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41 Utkarsh Anand, 'Supreme Court commutes death penalty of Devinderpal Singh Bhullar to life imprisonment', available at *http://indianexpress.com/article/india/%20india-others/supreme-court-commutes-death-penalty-of-devinderpal-singh-bhullar-to-life-term/* (last accessed 29 May 2014).

42 V. *Sriharan @ Murugan* v. *Union of India & Ors.*, Transferred Case (Criminal) No. 1 of 2012, available at *http://judis.nic.in/supremecourt/imgs1.aspx?filename=41228* (last accessed 01 June 2014).

43 Krishnadas Rajagopal, 'SC reprieve for Yakub Memon' The Hindu, 2 June 2014 available at *http://www.thehindu.com/news/national/sc-reprieve-for-yakub-memon/article6075757.ece* (last accessed 05 June 2014).

44 '74% of the mercy petitions were rejected by Presidents of India since 1981: ACHR condemns arbitrary rejection of mercy pleas of 9 death-row convicts', available at *http://www.achrweb.org/press/2013/IND10-2013.html* (last accessed 28 June 2013).

45 Gopalkrishna Gandhi, 'The Power to Pardon' available at *http://www.thehindu.com/opinion/lead/the-power-to-pardon/article4627717.ece* (last accessed 18 June 2013).

PROTECTION OF PARENTS AND SENIOR CITIZENS: A SOCIO–LEGAL STUDY

Neelam Batra*

1.1 Introduction

At the dawn of the twenty-first century the world is faced with the phenomenon of ageing population. We are, in this respect, in the midst of a process that is still unfolding, one whose implications are only starting to affect society. Ageing population is forecast to accelerate until 2050. So far, the most conspicuous outcome of this process is that the increase in life expectancy that took place during the second half of the twentieth century has resulted in an additional generation of humanity referred to as "third age."[1]

India maintains a population structure that is far more 'pyramid-shaped' than those of developed countries. However, ageing has also been steadily taking place in India. The effects of ageing, as well as the welfare policy for senior citizens, are important issues not only in developed countries where ageing has taken place rapidly, but also in developing countries.[2]

The UN defines a country as 'Ageing" or "Greying Nation" where the proportion of people over 60 reaches 7% to total population. By 2001 India has exceeded that proportion (7.47%) and is expected to reach 12.6% in 2025.[3]Ageing can be defined as the process of progressive change in the biological, psychological and social structure of individuals. For statistical purposes, the aged, are commonly placed into specific age groups, for example those aged 60 years and above, depending on cultural and personal perceptions. However, ageing is a life-long process, which begins before we are born and continues throughout life.[4]

Indian culture, like many other Asian countries, emphasized filial piety. In a family the structural positions are occupied by persons whose rights and obligations are prescribed. Parents care their children from infancy to later stages of their life and children taking care of them in old age can be explained in terms of 'debt of gratitude' and as obligation to provide care, security, love and affection. In India

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1 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* visited on October 14, 2013.

2 Hitosha Ota, "India's Senior Citizens' Policy and Examination of the Life of Senior Citizens in North Delhi." IDE Discussion Paper No. 402, (2013), available at *http://www.ide.go.jp/English/Publish/Download/Dp/pdf/402.pdf.* visited on September 4, 2013.

3 Suvalaxmi Chakrabarti, Ashis Sarkar "Pattern and Trend of Population Ageing in India" II(2) Indian J. Spatial Space 3(2011), available at: *http://indiansss.org/pdf/Vol_ 2_No_2/Art_012.pdf* visited on September 24, 2013.

4 Claudia Stein and Inka Morit, "A Life Course Perspective Of Maintaining Independence In Older Age," available at *http://www.who.int/ageing/publications/life_course/en/index.html* visited on October 1, 2013.

caring of aged is rooted in religious and moral values and is governed by community norms. It is being made legal by enacted law.[5]

This spirit has been reflected even in the case of *Mahendra kumar s/o Ramrao Gaikwad* v. *Gulabbai and Ors*[6] wherein it was held by the Bombay High Court that it is not out of place to remember the mandate of Manu in the matter of maintenance of parents, wife and child. Manu said that the aged parents, a virtuous wife and an infant child must be maintained even by committing a hundred misdeeds. Manu does not speak of solitary duty; it is moral duty of a person to maintain aged parents, virtuous wife and infant child. In discharge of this pious duty, Manu went to such an extent that he made hundred misdeeds pardonable. During course of time, this moral duty assumed a legal character. The need was felt to introduce an enactment in this behalf. The Legislature, therefore, enacted Section 125 of Cr.P.C. to enforce social and moral obligations.

A close examination of the social and ethical reality of India divulges the fact that the elderly person is always revered and respected for the virtue which is deeply rooted into the social and ethical realities of social domains. The elderly have always enjoyed the decision making power in the context of Indian society. They have provided the entire fabric of the social reality with proper care and concern which have played a nurturing role in society. The colossal events of industrialization, urbanization and globalization have troubled the fabrics of social realities and hence they have not only affected the decision making power of elders but have also helped in bringing a number of problems before them. Today, they are facing the number of problems such as crime, abuse, maltreatment, mental and physical torture, fear of crime and heedless ignominy from the family and the society.[7]

Social Scientists report that that there is a general lowering of social status of elderly people in India. Increasingly, older people may be perceived as burdens due to their disability and dependence. Rapid changes in the family system, even in rural areas, are reducing the availability of kin support. With modernization of the country, older values are being replaced by "individualism'. The family capacity to provide quality care to older people is decreasing. The Government had been complacent that the joint family system and traditional values would provide social security in old age. This view is being drastically revised. In non-agrarian societies older persons who are economically unproductive do not have the same authority and prestige that they used to enjoy in extended families where they had greater control over family resources.[8]

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5 R. Maruthakutti, "Filial Responsibility and Problems of the Caregivers in the Family Setting" 25(2) Indian J. Gerontology 178(2011), available at *http://www.gerontologyindia.com/pdf/ vol25-2.pdf* visited on September 16, 2013.

6 2001 CriLJ 2111 (Bom).

7 Avanish Bhai Patel, "Effect of Crime on the Wellbeing of the Elderly: A Content Analysis Study of Indian Elderly" 6(2) *Int'l J. Criminology & Soc Theory*, 1138-1149 (2013), available at *http://pi.library.yorku.ca/ojs/index.php/ijcst/article/viewFile/36406/33123* visited on October 4, 2013.

8 Indira Jai Prakash, "Ageing in India", available at *http://www.who.int/iris/handle/10665/6596* visited on September 24, 2013.

There are many legal systems which contain a rule whereby adult children have an obligation to provide maintenance to their parents. This provision was necessary at the time when the joint family system was disintegrating and the nuclear families were emerging. Such maintenance provision does not appear to be contradictory with existing social circumstances. But those for whom it is invoked are highly vulnerable people excluded from the social security system. Although the amount of maintenance ordered under this rule is small, such orders create problems for the aged and their children as their emotional ties weaken. Furthermore, the children who are liable to fulfill the obligation may themselves be needy. The result is a social paradox: the rule purports to encourage families to care for their elderly parents, but the families upon whom the obligation is imposed actually suffer from such imposition.

The maintenance obligation not only regulates certain aspects of family relations but also affects the social allocation of resources. Parents with insufficient income must turn to their children for assistance; they are given a legal right, and their children placed under a legal duty. Children owe a lot to their parents for bringing them up and making them capable of doing something. It is their responsibility that they should take care of their parents and should not leave them.

The government has taken initiatives to deal with factors such as pensions, health care, insurance, care services, old age homes, etc. However, their coverage is greatly limited in that, with the exception of health care, less than 10 to 20 per cent of the population can access these services. Quasi- government initiatives also exist, as well as activities and initiatives by voluntary, non –governmental and/or non-profit organizations that are complementary to or substitute the government initiatives. These initiatives and activities are not confined to serve only destitute people; there are also some specially aimed at affluent people. However, this coverage is limited, and far from covering the whole senior citizen population. Senior citizens who remain outside the scope have to depend on their family or community, and if they cannot do so, are on their own.[9]

1.2 International Perspective

At the international juncture, significant efforts have been taken to address the issues relating to the socio-cultural, economic and political rights of elders. International Conventions and United Nation's principles on older person assure the rights of independence, self fulfillment, participation, care and dignity of senior citizens. Questions related to ageing were first introduced to the United Nations agenda in 1948, when Argentina submitted a draft declaration on old age rights to the General Assembly. Although the Argentine draft was not adopted, the matter was delegated to the Economic and Social Council. Two years later, the Secretary-General's office submitted a report to the Council entitled "Welfare of the Aged: Old Age Rights." No major follow-up action was taken by the United Nations, although the welfare approach as emphasized in the title of the report became the guiding policy approach to ageing at the international level over the following decades. In 1969, at the initiative of the Government of Malta, the topic of ageing was reinstated onto the

9 *Supra* note 1.

agenda of the United Nations and has remained to this day. Further initiatives during the 1970s led to the convening in 1982 of the first-ever World Assembly on Ageing in Vienna, Austria.[10]

The major outcome of the World Assembly on Ageing was the adoption of the International Plan of Action on Ageing–the first international instrument to deal specifically with the issue of ageing. It contains recommendations to national Governments in seven areas, including health, housing, the family, social welfare, income security and employment, education, research and training. At the international level, the plan identifies three major areas of cooperation in promoting policies and programmes on ageing data collection and analysis, training and education, and research.[11]

The United Nations Principles for Older Persons – adopted by the General Assembly in 1991 – is undeniably the second most significant milestone in international policy action on ageing. Under its banner "to add life to the years that have been added to life," the principles provide guidance in the areas of independence, participation, care, self-fulfillment and dignity of older citizens. The principles have proved to be a helpful tool as they provide a general framework for national legislation related to ageing and older persons. Governments, whenever possible, have been encouraged to incorporate them into national programmes. The Vienna Plan and subsequent international policy documents on ageing have provided a broad framework for action on ageing, and have called attention to specific groups of older persons often excluded from mainstream socio-economic development, such as older women, migrants, refugees, indigenous elders and the oldest old."[12]

The decision to observe 1999 as the International Year of Older Persons and to promote as its theme, "A society for all ages" was made in 1992 by the General Assembly with the adoption of the Proclamation on Ageing. The International Year of Older Persons advanced policy debate and promoted awareness of innovative solutions to meet the new and continuing challenges of ageing. At its 54th session, the General Assembly requested that the revised plan of action on ageing be considered within the context of, "a society for all ages." At the same session, the General Assembly decided to convene a Second World Assembly on Ageing in 2002, the twentieth anniversary of the Vienna World Assembly on Ageing.[13]

The Second World Assembly on Ageing was convened in Madrid in April 2002.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

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10 Alexandre Sidorenko, "A Society for All Ages: UN Policy action on Ageing", available at *www.icsw.org/publications/sdr/2001-dec-2002-march/society-all.ages.htm* visited on October 1, 2013.

11 *Ibid.*

12 *Ibid.*

13 *Ibid.*

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.[14]

The Second World Assembly on Ageing was a remarkable episode. The United Nations Principles for Older Persons adopted by the United Nations General Assembly in 1991, the Proclamation of Ageing and the Global Targets on Ageing for the year 2001 adopted by the General Assembly in 1992, and various other resolutions adopted from time to time are intended to encourage governments to design their own policies and programmes in this regard.

1.3 Constitutional and Legislative Measures

So far as India is concerned, there are various provisions in the Constitution which apply equally to elderly people. Elderly people should not be thought of as worthless to society only because some of them may need more care than the average person. These stereotypes of the elderly can lead to undignified treatment, discrimination and neglect. Right to equality under Article 14[15] has been guaranteed by the Constitution as a Fundamental Right. Article 21 talks about protection of life and personal liberty.[16]

There are other provisions, too, which direct the State to improve the quality of life of its citizens. Article 38,[17] 41,[18] 46,[19] and 47[20] are the Directive Principles of State Policy, which shall not be enforced but are considered fundamental to the governance of the country.[21] Social security has been made the concurrent responsibility of the

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14 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* visited on October 21, 2013.

15 Article 14 Constitution of India, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

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

17 *Id.*, Article 38 (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

18 *Id.*, Article 41 "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want."

19 *Id.*, Article 46 "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

20 *Id.*, Article 47 "The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

21 *Id.*, Article 37 provides "The provisions contained in this Part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

Central and State Governments. Entry No. 9[22] of the State List and Entry No's 20,[23] 23,[24] and 24[25] of the Concurrent List of Schedule VII of the Constitution deals with old age pensions, social security and social insurance, and economic and social planning.

Among Hindus, the obligation of sons to maintain their aged parents, who are unable to maintain themselves out of their own earning and property was recognized in the early texts. The statutory provision for maintenance of parents is contained in Section 20[26] of the Hindu Adoption and Maintenance Act, 1956. Under Muslim Law, children have a duty to maintain their aged parents. According to Mulla:[27]

(a) Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.

(b) A son though in strained circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm.

(c) A son, who though poor, if earning something, is bound to support his father who earns nothing.

Apart from other laws, the provision relating to maintenance of parents has also been provided in Code of Criminal Procedure 1973(hereinafter referred in Code). The Code is a secular law and governs persons belonging to all religions and communities. Chapter IX of the Code contains Section 125[28] which deals with

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22 *Id.*, Entry 9 provides: 'Relief of the disabled and unemployable'.

23 *Id.*, Entry 20 provides: 'Economic and social planning'.

24 *Id.*, Entry 23 provides: 'Social security and social insurance; employment and unemployment'.

25 *Id.*, Entry 24 provides: 'Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions' and maternity benefits.

26 *The Hindu Adoption and Maintenance Act*, 1956, S. 20.
Maintenance of children and aged parents—(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.
(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.
(3) The obligation of a person to maintain his or her aged or infirm parent or daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property'
Explanation- In this section "parent" includes a childless stepmother.

27 Mulla, *Principles of Mohammedan Law*, 348 (1972).

28 The *Code of Criminal Procedure*, 1973, S.125.
Order for maintenance of wives, children and parents -- (1) If any person, having sufficient means neglects or refuses to maintain –
(a) his wife, unable to maintain herself or
(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself or
(d) his father or mother, unable to maintain himself or herself. a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct.

maintenance of the wife, children and parents. This provision is intended to fulfill a social purpose and provide a preventive remedy by way of payment of maintenance to the neglected wife, children and parents. The object is to compel a man to perform his moral obligations which he owes to the society in respect of his neglected wife, children and parents against starvation.

In *Mahendrakumar S/O Ramrao Gaikwad* v. *Gulabbai And Ors*[29] it was noticed that in old Code of 1898, parents did not find place in Section 488. On witnessing plight of old parents, need to take revolutionary decision was felt. Thus, parents are brought under protective umbrella of maintenance by enacting Section 125(l)(d) of the Code. By virtue of the special provision contained in Section 125(l)(d) of the Code, the Magistrate is now competent to pass an order against a son for payment of monthly allowance for maintenance of the father or mother, who is unable to maintain himself.

The joint Committee of Parliament, while pleading the case of parents for maintenance, observed:

> The Committee considers that the right of the parents not possessed of sufficient means to be maintained by their son should be recognised by making a provision that where the father or the mother is unable to maintain himself or herself an order for payment of maintenance may be directed to a son who is possessed of sufficient means. If there are two or more children, the parents may seek the remedy against anyone or more of them. Thus, parents are brought under protective umbrella of maintenance by enacting Section 125(l)(d) of Cr.P.C.,1973. By virtue of the special provision contained in Section 125(l)(d), Cr.P.C., 1973, the Magistrate is now competent to pass an order against a son for payment of monthly allowance for maintenance of the father or mother, who is unable to maintain himself or herself.[30]

It has been observed by the Hon'ble Supreme Court in *Bhagwan Dutt* v. *Kamla Devi*[31] that the object of section 125 of the Code is to provide a summary remedy to save dependants from destitution and vagrancy and thus to serve a social purpose. There can be no doubt that it is the moral obligation of a son or a daughter to maintain his or her parents. It is not desirable that even though a son or a daughter has sufficient means, his or her parents would starve. Apart from any law, the Indian society casts a duty on the children of a person to maintain their parents if they are not in a position to maintain themselves. It is also their duty to look after their parents when they become old and infirm. The father is entitled to claim maintain from his sons and the fact that he was not dutiful father and had immoral behavior is no defence. This point was settled by the judgment given in the case of *Selven Singh and anr* v. *Vedamanikkom Nagamani*.[32]

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29 *Supra* note 6.
30 *Id.*, at P. 2116.
31 (1975) 2 SCC 386.
32 2007 (1) R.C.R. (Criminal) 128.

In *Raj Kumari* v. *Yasoda Devi and another,*[33] it was held that daughter cannot be made liable to maintain her parents'. But in *M. Areefa Beevi* v. *Dr. K.M. Sahib,*[34] another Single Bench of the Kerala High Court has taken the view that the parents who are unable to maintain themselves can claim maintenance also from their daughters under section 125(1)(d) of the Code.

It has been held by Hon'ble Supreme Court in *Dr. Vijaya Manohar Arbat* v. *Kashirao Rajaram Sawal*[35] that father or mother unable to maintain himself or herself can claim maintenance from their married daughter.

Government policies and The Maintenance and Welfare of Parents and Senior Citizens Act, 2007

Besides these legal provisions, there are various policies and programmes which represent a significant step towards the fulfillment of the Directive Principles of State Policy enshrined in Article 41[36] and 42[37] of the Constitution of India, recognizing concurrent responsibility of the Central and State Governments in the matter.

Social security benefits are used as a main policy instrument to eradicate poverty, reduce income inequalities and enhance human capital and productivity. These measures are important mechanisms for financing the elderly in many western countries. In India, there are no universal social security measures for the elderly, but there are schemes addressing the people below poverty line, which is in line with Article 246,[38] Item 24[39] of the Concurrent List of the Indian Constitution.

The National Social Assistance Programme (NSAP)[40] was launched in 1995 with the objective of supporting minimum needs of poor below Poverty Line households. Currently, the scheme comprises of:-

I. Indira Gandhi National Old Age Pension Scheme (IGNOAPS);

II. Indira Gandhi National Widow Pension Scheme (IGNWPS);

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33 1978 Cri. LJ 600.

34 (1983) Cr .L.J. 412 (Ker).

35 1978 (1) R.C.R.(Criminal) 354.

36 *Supra* note 20.

37 Constitution of India Article 42 "The State shall make provision for securing just and humane conditions of work and for maternity relief."

38 *Id.*, Article 246 "Subject matter of laws made by Parliament and by the Legislatures of States.
(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the Union List).
(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the Concurrent List).
(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List."

39 *Supra* note 27.

40 *http://www.accountabilityindia.in/sites/default/files/nsap_203-14.pdf* visited on September 25, 2013.

III. Indira Gandhi National Disability Pension Scheme (IGNDPS);

V. National Family Benefit Scheme (NFBS); and

VI. *Annapurna.*

Authored by the United Nations Population Fund,[41] the just released Status of Elderly in Select States of India, 2011, is a data-packed report that points to multiple development challenges stemming from the changes in the age and sex structure of India's population. A primary survey was carried out in seven states – Himachal Pradesh, Kerala, Maharashtra, Odisha, Punjab, Tamil Nadu and West Bengal – having a higher percentage of population in the age group 60 years and above compared to the national average. The utilisation of all three schemes is abysmally low among the target group of those belonging to BPL households. Only around 18 per cent of elderly belonging to BPL households are beneficiaries of IGNOAPS, while only 3.5 per cent utilise the *Annapurna* scheme and a quarter of elderly widowed women utilise the IGNWPS. It should be noted that substantial wrong targeting of the scheme is apparent with up to 9 per cent of non BPL cardholders benefiting from the IGNOAPS and 15 per cent from the IGNWPS.

The National policy on Older Persons[42] was announced by the Government of India in the year 1999. The Government of India, being a signatory to MIPAA, deserves recognition for its foresight in drafting a National Policy on Older Persons (NPOP) in 1999 (to commemorate the International Year for Older Persons) way ahead of MIPAA. The policy vision statement is well articulated and action strategies cover important aspects of financial security, health, shelter, education, welfare, and protection of life and property. It broadly complies with MIPAA. The NPOP is coordinated by the Ministry of Social Justice and Empowerment (MOSJE) and implemented through the respective mandates of several ministries. The National Policy seeks to assure older persons that their concerns are national concerns and they will not live unprotected, ignored or marginalized. The goal of the National Policy is the well-being of older persons. It aims to strengthen their legitimate place in society and help older persons to live the last phase of their life with purpose, dignity and peace. The Policy visualizes that the State will extend support for financial security, health care, shelter, welfare and other needs of older persons, provide protection against abuse and exploitation, make available opportunities for development of the potential of older persons, seek their participation, and provide services so that they can improve the quality of their lives.

The National Programme for Health Care for the Elderly (NPHCE) launched by the Ministry of Health and Family Welfare (MOHFW) is an example of how ageing is incorporated in sectoral programmes. After over a decade of implementation, the NPOP was reviewed recently. The revised National Policy for Senior Citizens (NPSC) recommends eight areas of intervention, namely income security in old age,

41 Report on Status of Elderly in Select States of India, 2011 (United Nations Population Fund, 2011), available at *http://india.unfpa.org/?publications=5828* visited on October 3, 2013.

42 National Policy for Older Persons 1999; Ministry of Social Justice And Empowerment, Government of India, available at *http://socialjustice.nic.in/npsc.php* visited on September 16, 2013.

health care, safety and security, housing, productive ageing, welfare, multigenerational bonding, and enhancing involvement and participation of media on ageing issues.

The Government constituted a National Council for Older Persons (NCOP) under the Chairmanship of Minister for Social Justice and Empowerment to advise and aid the Government on policies and programmes for older persons and also to provide feedback to the Government on the implementation of the National Policy on Older Persons as well as on specific programme initiatives for older persons. The NCOP is the highest body to advice and coordinate with the Government in the formulation and implementation of policy and programmes for the welfare of the aged.

The Integrated Programme for Older Persons (IPOP)[43] has been in effect since 1992. The Programme aims at improving the quality of life of senior citizens by providing basic amenities like shelter, food, medical care and recreational opportunities. The revised Scheme was effective from 01.04.2008. The Programmes which are admissible for assistance under the scheme are: Maintenance of Old Age Homes, Maintenance of Respite Care Homes and Continuous Care Homes, Running of Multi Service Centres for Older Persons, Maintenance of Mobile Medicare Units, Running of Day Care Centres for Alzheimer's Disease / Dementia Patients, Physiotherapy clinics for older persons, Disability and hearing aids for older persons, Mental health care and Specialized care for the Older Persons, Help-lines and Counselling Centres for older persons, Sensitising programmes for children particularly in Schools and Colleges, Regional Resource and Training Centres Training of Caregivers to the older persons, Awareness Generation Programmes for Older Persons and Care Givers, Multi facility care centres for destitute older widow women, Volunteers Bureaus for older persons, Formation of Vridha Sanghas/Senior Citizen Associations, Any other activity, which is considered suitable to meet the objective of the scheme. Up to 90% of the cost of the project indicated in the scheme will be provided by the Government of India and the remaining shall be borne by the organization/ institution concerned.

There are various facilities provided to the senior citizens under various schemes.[44] The Ministry of Health and Family Welfare provides different facilities for senior citizens: e.g. Separate queues for older persons in government hospitals; Two National Institutes on Ageing at Delhi and Chennai have been set up; Geriatric Departments in 25 medical colleges have been set up. The Ministry of Rural Development has implemented the National Old-age Pension Scheme (NOAPS) – for persons above 65 years belonging to a household below poverty line, Central assistance is given towards pension @ Rs. 200/- per month, which is meant to be supplemented by at least an equal contribution by the States so that each beneficiary

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43 Integrated programme for older persons; Ministry of Social Justice And Empowerment, Government of India, available at *http://socialjustice.nic.in/schemespro2.php* visited on September 16, 2013.

44 Government of India, Report: Situation Analysis of The Elderly in India (Ministry of Statistics & Programme Implementation, 2011), available at: *mospi.nic.in/mospi_new /upload/elderly_ in_india.pdf* visited on November 15, 2013.

gets at least Rs.400/- per month as pension. The Ministry of Railways provides various facilities to senior citizens like Separate ticket counters for senior citizens of age 60 years and above at various (Passenger Reservation System) PRS centres if the average demand per shift is more than 120 tickets; 30% and 50% concession in rail fare for male and female senior citizens respectively of 60 years and above respectively. Some of the facilities for senior citizens provided by the Ministry of Finance are: Income tax exemption for senior citizen of 65 years and above up to Rs. 2.40 lakh per annum; Deduction of Rs 20,000 under Section 80D is allowed to an individual who pays medical insurance premium for his/ her parent or parents, who is a senior citizens of 65 years and above. An individual is eligible for a deduction of the amount spent or Rs 60,000, whichever is less for medical treatment (specified diseases in Rule 11DD of the Income Tax Rules) of a dependent senior citizen of 65 years and above. A Pension Portal has been set up to enable senior citizens to get information regarding the status of their application, the amount of pension, documents required, if any, etc. The Portal also provides for lodging of grievances. The National Carrier, Air India, provides concession up to 50% for male senior citizens of 65 years and above, and female senior citizens of 63 years and above in air fares.

Inspite of several programs enunciated by government for older persons, it was felt that legislation imposing legal obligations to take care of older persons was inevitable and hence central government enacted the Maintenance and Welfare of Parents and Senior Citizens Act, 2007.The object of the legislation is to provide for the maintenance and welfare of parents and senior citizens.

Himachal Pradesh was probably the first state to legislate on this issue in 1996 and the bill received presidential assent and became functional from 2001. The applications received were a mere 89 in the whole state, although over the last three years there has been an increase. There were 27 applications received in 2004-05, 21 in 2005-06 and 37 in 2006-07. Between 2001 and 2004 the numbers were as few as three to seven cases in the whole state. Of the 75 cases in which decisions were taken a few were dismissed in default and the parents, after lodging the initial complaint, did not turn up to fight further. It highlights the fact that legislation alone cannot possibly be seen as the panacea for this malaise that is setting in.[45]

The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 defines a senior citizen as a person who has attained the age of 60 years or above.[46] The Act places an obligation on children and relatives to maintain a senior citizen or a parent to an extent so that they can lead a "normal life."[47] This obligation applies to all Indian citizens, including those residing abroad. A senior citizen who is unable to maintain himself based on his own earnings or property shall have the right to apply to a maintenance tribunal for a monthly allowance from their child or relative.[48] If he

45 Anuradha Thakur, "Care of Senior Citizens and the Role of the State" 43(17) *Econ. & Pol. Wkly,* (2008) available at: *http://www.jstor.org/stable/40277382* visited on October 11, 2013.

46 The *Maintenance and Welfare of Parents and Senior Citizens Act,* 2007, s 2(h).

47 *Id.,* S. 4(2).

48 *Id.,* S. 4(1).

is incapable of filing the application on his own, he may authorise any other person or registered voluntary association to apply on his behalf. The maintenance tribunal may also, on its own initiate the process for maintenance.[49]

The Act defines "children"[50] as sons, daughters, grandsons and granddaughters and "relative"[51] as any legal heir of a childless senior citizen who is in possession of or would inherit his property upon death. Minors are excluded from both definitions. "Parents" include biological, adoptive or step parents.[52] In cases in which more than one relative will inherit the property of a senior citizen, each relative will be responsible to pay the maintenance fee in proportion to the property they will inherit.

The State Government may establish one or more maintenance tribunals per sub-division to decide upon the order for maintenance. If the tribunal is satisfied that the senior citizen is unable to take care of himself and that there is neglect or refusal of maintenance on the part of the children or relative, it may order children or relatives to give a monthly maintenance allowance to the senior citizen.[53] The maximum maintenance allowance shall be prescribed by the state government, and shall not exceed Rs 10,000 per month.[54] On failure to comply with the maintenance fee, the tribunal may issue a warrant for collection within three months of the due date. Punishment for abandoning a senior citizen shall include an imprisonment of up to three months or fine of up to Rs 5,000, or both.[55] The tribunal can declare a transfer of property (as gift or otherwise) from a senior citizen to a transferee as void if the transfer was made under the condition of maintenance, and the transferee neglects the agreement.[56]

In *Justice Shanti Sarup Dewan, Chief Justice (Retired) and another* v. *Union Territory, Chandigarh and others*,[57] it was directed by Hon'ble Punjab and Haryana High Court that the adminstration of Union Territory, Chandigarh should forthwith take steps to bring into force proper rules under Section 32(1) so as to protect the life and property of senior citizens as envisaged under section 22 of the said Act. In this case son of the retired Chief Justice was also directed to vacate the property and the keys be handed over to his father.

It emerges from the statement of objects and reasons[58] that the Legislature has, by enacting the Act, addressed the need arising from the unfortunate plight which many

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49 *Id.*, S. 5.

50 *Id.*, S. 2(a).

51 *Id.*, S. 2(g).

52 *Id.*, S. 2(d).

53 *Id.*, S. 9(2).

54 *Id.*, S. 9(1).

55 *Id.*, S. 24.

56 *Id.*, S. 23.

57 2013 Indlaw PNH 2604, available at: *http://www.westlawindia.com/cases/index.htm* visited on October 13, 2013.

58 The *Maintenance and Welfare of Parents and Senior Citizens Act*, 2007.
Objects and Reasons of the Act states:
Traditional norms and values of the Indian society laid stress on providing care for the elderly. However, due to withering of the joint family system, a large number of elderly are not being

[Footnote No. 58 Continued]

elderly persons and senior citizens have to suffer on account of declining joint family system and rise of micro families as well as on account of economic compulsion of the family where man and wife have to work full time.

In *Jayantram Vallabhdas Meswania* v. *Vallabhdas Govindram Meswania*,[59] the son was directed under the provisions of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 to handover the possession of the part of the property which was in his possession to the father as the son was not taking proper care.

In a writ petition, *Priti Dhoundial and Others* v. *Tribunal (Under Maintenance and Welfare of the Parents and Senior Citizens Act, 2007) and another*,[60] Government was advised that before constituting the Tribunal, the Government must ensure the competence of the members and should ensure the members not only have basic knowledge of law but should also have basic knowledge of a fair trial and they should have respect for legislative enactments and for common man.

Conclusion

It is not a simple task to extend and execute effective strategies that promote graceful ageing. Awareness of law relating to elder people is rising amongst the people but they are still unsure about effective functioning of judicial system. At present, the legal system does not provide full and satisfactory solutions to the new needs, problems and interests raised by the increase of the elderly population. The solutions provided are limited and the mission has yet to be accomplished. Most of the elderly people are still in very hard situations. Indeed, their daily necessities are not fulfilled with the obligation of the children to contribute only a small portion toward maintenance. The amount of maintenance may be inadequate to guarantee subsistence to elderly persons in need. Furthermore, the children who are liable to fulfill the obligation may themselves be needy. Various government policies and schemes are not at par so far as social security in old age is concerned. In India situation of social security schemes is very disappointing. Government should focus on social security schemes keeping in view the rising population of older persons. At the same time, those steps should be taken so that older persons can lead a peaceful life in old age.

[Footnote No. 58 Continued]

looked after by their family. Consequently, many older persons, particularly widowed women are now forced to spend their twilight years all alone and are exposed to emotional neglect and to lack of physical and financial support. This clearly reveals that ageing has become a major social challenge and there is a need to give more attention to the care and protection for the older persons. Though the parents can claim maintenance under the Code of Criminal Procedure, 1973, the procedure is both time consuming as well as expensive. Hence, there is a need to have simple, inexpensive and speedy provisions to claim maintenance for parents.

59 AIR 2013 (3) Guj. 160.

60 2009 Indlaw DEL 3469, available at *http://www.westlawindia.com/cases/index.shtm* visited on September 27, 2013.

DISPARAGEMENT *VIS-À-VIS* PUFFERY: JUDICIAL APPROACH

Dr. Rajinder Kaur*

Dr Rashmi Aggarwal**

1.1 Introduction

"Consumerism" is the buzz word in the corporate world today and to survive or retain or create a mark in the market the companies are creating new strategies to make their product notable. Advertisement has become a lifeline of every industry and with the increasing competition in the market this medium is also exploring new angles. Comparative advertisement is that which compares two or more specifically brands of the same generic product or service class. EU directive defines Comparative advertisement is any advertisement which explicitly or by implication identifies a competitor or goods or services offered by a competitor.[1]

In the words of Lord Diplock,[2] a producer of consumer goods is 'unlikely to find a path beaten to his door' in the absence of an expensive advertising campaign. However, in today's competitive environment, every representation of a product or service is about what 'others are not'. The comparison is made with a view to increase the sales of the advertiser by suggesting that the advertiser's product is of better quality than that of rivalry product. This raises concerns over dividing a line between advertisements that are actionable and those which are not. Comparative advertising enable advertisers to demonstrate the merits of their products and helps to improve the quality of information available to consumers providing the choice between competing products/services. Comparative advertising helps in consumer awareness, promotes the accountability of the suppliers of goods and services in the market and stimulates the competition to the consumer's advantage. The concept of "*Consumer sovereignty*" requires three conditions to be fulfilled - "*Perfect competition,*" "*Perfect information*" and "*free choice*" - and comparative advertising creates these conditions.[3] An EU directive also acknowledges the concept of comparative advertisement. Article 3(a) of Directive 84/450 provides as follows:

1. Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:
   (a) it is not misleading according to Articles 2 (2), 3 and 7(1);
   (b) it compares goods or services meeting the same needs or intended for the same purpose;

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1 EU Directive 97/55/EC, OJ L290 23/10/1997 at 8.

2 *Reckitt & Colman of India Ltd* v. *Kiwi T.T.K. Ltd* 63(1996) DLT 29.

3 Guruprasad Pasupulety, 'Comparative Advertising', available at <*http://www.coolavenues.com/know/mktg/guruprasad-comparative-adv-2.php*> (last accessed on May 10, 2014).

(c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

(d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;

(e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

(f) for products with designation of origin, it relates in each case to products with the same designation;

(g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;

2.1 Comparative Advertisement and Disparagement

Comparative claims may not explicitly name a competitor; they may implicitly refer to the competitor. Even though the brand name or logo of a competitor may not be shown or blocked, an advertisement can still be actionable if they clearly indicate towards the competitor's product by showing its colour, contours, the overall shape, packaging etc.[4] This is because when an advertisement seeks to attract consumers to its product and away from other competing products, it is obvious that the advertisement also targets those persons who use the Plaintiff's product. These persons, using the Plaintiff's product, are intimately aware of the product's look and therefore know its colour, shape, size, contour, packaging, bottling etc. Consequently, the comparison must be from the perspective of an average person with imperfect recollection. However, such person must be picked from the category of users of the product allegedly sought to be disparaged or slandered.[5]

The term *disparagement* has not been defined in any statute, but judicial pronouncements have adopted its dictionary meaning of Disparagement and Disparagement of goods which is as follows:[6]

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4 *Reckitt Benckiser (India) Ltd* v. *Hindustan Lever Limited* 2008 (38) PTC 139 (Del.)

5 *Ibid.*

6 *Karamchand Appliances Pvt. Ltd.* v. *Sh. Adhikari Brothers and Ors* 2005 (31) PTC 1 Del. The present case concerned about the advertisement of mosquito repellents i.e. ALL OUT and GOOD NIGHT. The offending advertisement showed a lady removing the ALL OUT plugged and replacing it with GOOD NIGHT with a background voice claiming that the latter's turbo vapour chases the mosquitoes at double the speed. While granting an injunction, the Delhi High Court held in Para "19. Two propositions clearly emerge from the above pronouncements, namely, (1) that a manufacturer or a tradesman is entitled to boast that his goods are the best in the world, even if such a claim is factually incorrect, and (2) that while a claim that the goods of a manufacturer or the tradesman are the best may not provide a cause of action to any other trader or manufacturer of

[Footnote No. 6 Continued]

> The expression *Disparagement* is defined as *Matter which is intended by its publisher to be understood or which is reasonably understood to cast doubt upon the existence or extent of another's property in land, chattels or intangible, things or upon their quality.* Furthermore, Disparagement of Goods is defined as *A falsehood that tends to denigrate the goods or services of another party is actionable in a common law suit for disparagement.* The Hon'ble Delhi High Court[7] defined disparagement to mean "*to speak of slightingly, undervalue, to bring discredit or dishonor upon, the act of deprecating, derogation, a condition of low estimation or valuation, a reproach, disgrace, an unjust classing or comparison with that which is of less worth, and degradation.*"

Generic disparagement of a rival product without specifically identifying or pin pointing the rival product is equally objectionable. No one can disparage a class or genre of a product within which a complaining plaintiff falls and raise a defense that the plaintiff has not been specifically identified.[8] Clever advertising can indeed hit a rival product without specifically referring to it.[9] The principle which is enunciated in catena of judgment is that to determine the question of disparagement, the intent, manner, storyline and message to be conveyed are important factors. If the manner is ridiculing or condemning the product of the competitor, then it amounts to disparaging but if the manner is only to show one's product better or best without derogating other's product then that is not actionable.[10] Mere puffing of goods is not actionable. Tradesman can say his goods are best or better. But by comparison the tradesman cannot defame the goods of the competitor nor can call it bad or inferior.[11] This principle has also been laid down under on the basis of internationally decided courts decision in *White* v. *Mellin*[12] and *De Beers Abrasive* v. *International General Electric Co.*[13]

The Hon'ble Calcutta High Court has summarized the law on this subject (*in the matter of Reckitt & Colman* v. *M.S.Ramachandran and Another*[14] have laid down a mile stone in the direction which has been followed over the last decade.

[Footnote No. 6 Continued]

similar goods, the moment the rival manufacturer or trader disparages or defames the goods of another manufacturer or trader, the aggrieved trader would be entitled to seek relief's including redress by way of a prohibitory injunction.

7 *Pepsi Co. Inc. and Ors.* v. *Hindustan Coca Cola Ltd and Anr.* 2003 (27) PTC 305 (Del.) In this case, an advertisement in which a boy was shown preferring THUMS UP to PEPSI on the ground that the former was a stronger drink while the latter was meant for children, was in issue.

8 *Dabur India Limited* v. *Colgate Palmolive India Ltd* AIR 2005 Delhi 102 In the instant case the advertisement showing the tooth powder manufactured by a competitor to be abrasive was in issue. In this context the plaintiff has rejected the offer of the defendant to drop the container from its advertisement so as to avoid the averred identification of the plaintiff's product.

9 *Ibid.*

10 *Ibid.*

11 *Hindustan Lever* v. *Colgate Palmolive (I) Ltd,* MANU/SC/0899/1998.; *Reckitt & Colman of India Ltd.* v. *M.P. Ramchandran and Anr.* 1999 1 PTC 741; *Reckitt & Colman of India* v. *Kiwi TTK Ltd.* 1996 16 PTC 393; *Pepsi Co. Inc. and Ors.* v. *Hindustan Coca Cola Ltd and Anr.* MANU/DE/0896/2003,

12 1895 AC 154.

13 1975 (2) All ER 599.

14 1999 PTC (19) 741.

1. A tradesman is entitled to declare his goods to be the best in the world, even though the declaration is untrue.
2. He can also say that his goods are better than his competitor's, even though such statement is untrue.
3. For the purpose of saying that his goods are the best in the world or his goods are better than his competitor's he can even compare the advantages of his goods over the goods of others.
4. He, however, cannot while saying his goods are better than his competitors', say that his competitors' goods are bad. If he says so, he really slanders the goods of his competitors. In other words he defames his competitors and their goods, which is not permissible.
5. If there is no defamation to the goods or to the manufacturer of such goods no action lies, but if there is such defamation an action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation.

In a leading case *Horlicks* v. *Complan*[15] on the issue of showing disparaging advertisement through visual media and the print media of two products "Horlicks" and "Complan." Horlicks states that in August 2004 it had instituted a civil suit in Calcutta High Court seeking permanent injunction against Heinz alleging that it had issued a disparaging advertisement in respect of its products "Horlicks," as against Heinz's product Complan. It led to the publication of another advertisement, which in turn resulted in initiation of contempt proceedings. Horlicks apparently filed another suit before the Madras High Court against the product Complan. In response to that Heinz (Complan) instituted a civil suit in Bombay High Court alleging disparagement against Horlicks. It impugned a moving advertisement, which comprised of 30 sec footage with audio and video lines. It was alleged that the impugned moving advertisement made disparaging remarks against Complan in regard to nutrients in health value as compared with Horlicks product. Heinz's attempt to secure ad interim relief was unsuccessful, dissatisfied with the single judge order's Heinz appealed to the division bench. The Calcutta High Court considered the concept of negative advertisement. Summing up the law the court said that: It is now a settled law that mere puffing of goods is not actionable. Tradesman can say his goods are best or better. But by comparison the tradesman cannot slander nor defame the goods of the competitor nor can call it bad or inferior.[16]

The Court (Calcutta and Delhi High Courts) has analyzed the case keeping in mind the different angles like:

1. Whether it is an act of comparative advertisement where disparagement of the brand has happened?

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15 I.A. No. 15233/2008 (O-39, R-1&2 CPC) in CS (OS) 2577/2008 – High Court of Delhi.

16 Rajinder Kaur & Rashmi Aggarwal, 'The Regulatory Environment of Comparative Advertisement in India – An Analysis', *International Journal of Law and Management* Vol. 55 No. 6, 2013 pp. 429-443 at 435-6.

2. Whether it is copyright violation of the tagline?
3. Whether it is copyright violation of cinematographic film?

Here it was concluded that it was the act of deliberate disparagement where Heinz (Complan) was held liable against Horlicks:[17]

The intent of the advertisement: This can be understood from its story line and the message sought to be conveyed.

The overall effect of the advertisement: Does it promote the advertiser's product or does it disparage or denigrate a rival product? In this context it must be kept in mind that while promoting its product, the advertiser may, while comparing it with a rival or a competing product, make an unfavourable comparison but that might not necessarily affect the story line and message of the advertised product or have that as its overall effect.

The manner of advertising: Is the comparison by and large truthful or does it falsely denigrates or disparage a rival product?

While truthful disparagement is permissible, untruthful disparagement is not permissible. In the final judgement by Delhi Court the court held that in view of the above discussion, the temporary injunction application in the first Delhi suit is allowed; Heinz is restrained from publishing or telecasting the two impugned. Advertisements, or any other advertisements containing similar content, which tends to cast a slur on Horlicks, by implying that it is cheap or inferior, or that it compromises on essential qualities. Similarly, the ad-interim injunction application in the second Delhi suit is allowed, partly; Heinz is restrained from publishing any reference to Horlicks being cheap, or inferior, or comprising of inferior ingredients, or compromising on children's growth needs. Heinz's ad-interim temporary injunction application, for the reasons discussed above, is dismissed. In the circumstances, Heinz is directed to bear the costs of the three injunction applications, quantified at Rs 75,000/- each, to be paid to Horlicks within four weeks.[18]

Therefore, a settled law on this subject appears to be that a manufacturer is entitled to make a statement that his goods are the best and also make some statements for puffing of his goods and the same will not give a cause of action to other traders or manufacturers of similar goods to institute proceedings as there is no disparagement or defamation to the goods of the manufacturer so doing. However, a manufacturer is not entitled to say that his competitor's goods are bad so as to puff and promote his goods. If an action lies for defamation an injunction may be granted.[19] However, if

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17 *Ibid.*

18 *Ibid.*

19 *Reckitt & Colman of India Ltd* v. *Kiwi T.T.K. Ltd* 63(1996) DLT29. In Instant case, the Delhi High Court was concerned with an action brought forth by the manufacturers of a liquid shoe polish under the brand name 'Cherry'. The defendant in the action was marketing a shoe polish under the brand name Kiwi. In an advertisement released in the electronic media, a bottle of the defendant's shoe polish with the name KIWI written on white surface was shown against another liquid polish described as 'OTHERS' marketed by Brand X. While the word KIWI written on the defendant's bottle would not drip, the word 'OTHERS' written in the other bottle was shown dripping. The other bottle looked like the one used by the plaintiff for their product since it had a red blob on its surface.

any trader is entitled to puff his own goods, such puff may, as a matter of pure logic, involve the denigration of his rival's goods.[20]

In another case, Unibic India launched their biscuit 'Great Day' with a tag line '*why have a good day when you can have a great day!*' This advertisement directly affected the competitor Britannica's Good Day biscuits, has led to injunction restraining Unibic from placing any further disparage advertisement. Although, the Defendant has every right to market its product by claiming that its product is superior in quality, yet at the same time the freedom of expression,[21] i.e. the right to advertise, does not permit to go to the extent to cause damage or irreparable injury to the product of others. If the words used in the advertisement are intended to cause damage and loss to the product of another, the trader shall be restrained from issuing such advertisements.[22]

Recent judgment of Madras High Court[23] has given a new approach to comparative advertisement keeping in mind the interest of consumers. The judgment highlighted the issue that all the decisions of high court are following English and American decisions which are prior to development of consumer protection Act. In India the advent of the Consumer Protection Act, 1986, signaled the arrival of a new era. The Statement of Objects and Reasons of the Act recognized the right to be informed about the quantity, potency, purity, standard and price of goods to protect consumers against unfair trade practices. These rights would become meaningless, if free commercial speech is clipped.

In *Reckitt Benkiser (India) Ltd.* v. *Hindustan Unilever Ltd,*[24] Hindustan Lever Limited (HUL) aired a television commercial which depicted a child being sick because of the alleged use of Dettol as an antiseptic liquid in bathing water whilst

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20 *De Beers Abrasive Products Ltd and Ors.* v. *International General Electric Co Ltd.* (1975) 1 WLR 972.

21 Article 19 (1)(a) of the Constitution of India provides that All citizens shall have of freedom of speech and expression This freedom is wide enough to cover print and electronic media. The Supreme Court further in *Tata Press Ltd* v. *Mahanagar Telephone Nigam Ltd* {1995 (5) SCC 139} lays down that "publication of advertisements is a free commercial speech" and hence protected under Article 19(1)(a) of the Constitution.

22 *Unibic Biscuits India Pvt. Ltd.* v. *Britannia Industries Limited* MIPR2008(3)347

23 *Colgate Palmolive India Ltd.* v. *Anchor Health and Beauty Care Private Ltd.* O.A Nos 493 and 494 of 2008 in C.S. No. 451 of 2008. The grievance of the plaintiff i.e. Colgate Palmolive in these suits is that the defendant recently came out with a Television Commercial, advertising their tooth paste "Anchor". The TV Commercial was telecast in Tamil as well as in Hindi in various Satellite Channels. In the advertisement, a Hindi Film actress advises her daughter that "Anchor" tooth paste is the only tooth paste containing Triclosan, Calcium and Fluoride and that it is the first tooth paste providing all round protection. Ultimately, the actress questions the viewer as to when the viewer would change over to "Anchor" tooth paste. The first objection of the plaintiffs is were that "Anchor" is the "ONLY" tooth paste containing all the three ingredients viz., Calcium, Fluoride and Triclosan, second objection of the plaintiff is to the statement in the advertisement that "Anchor" is the "FIRST" all round protection tooth paste, third objection of the plaintiff is to the statement that the Fluoride in "Anchor" tooth paste gives 30% more cavity protection and the fourth objection of the plaintiff is to the statement that Triclosan contained in "Anchor" tooth paste is ten times more effective in reducing bacteria. The Madras High Court restrained the respondents from using the word *only* and *First* in the offending advertisement.

24 CS(OS) 1834/2012 & IA No. 11467/2012 (O-39, R-1&2) Judgment delivered on:13.05.2013.

promoting the superiority of Hindustan Lever Limited's Lifebuoy Soap. The plaintiff, Reckitt Benckiser filed a suit for an ad interim injunction against the telecast of the television commercial of defendant Hindustan Lever Limited's Lifebuoy Soap, which was disparaging and denigrating the reputation and goodwill of the plaintiff's product Dettol in the commercial market.[25] The Delhi High Court allowed the defendant to air the advertisement only after making the following changes to it:

(a) Removal of 'toys' in the advertisement.

(b) Removal of the phrase *"two dhakkans"* and the particular portion featuring the lady showing pouring liquid in the bucket by holding the bottle of the antiseptic liquid in her hand.

(c) Removal of the shot showing the cloud formation.

(d) Since green is the colour majorly associated with 'Dettol', therefore to also change the colour scheme showing the comparison between the two products in the television commercial and change the green colour to a different shade.

In another case of *Reckitt Benkiser (India) Ltd.* v. *Hindustan Unilever Ltd.*[26] a unique question of law was examined in the later case in which 4 advertisements, two each of defendants and the Plaintiffs were in question. One of the advertisements in question was an advertisement in print media of *Dettol Healthy Kitchen gel* in which the there was a comparison between two dish wash gels, one being the defendant's Dettol and other a "leading dishwash bar." The advertisement in question showed a white plate which was vertically divided into two halves and on the bottom of each half there are words "leading dishwash" and "Dettol Healthy Kitchen Gel" written. Two bottles one green in color as Dettol Healthy Kitchen Gel and one yellow in color were also shown. A magnifying glass is placed over the plate vertically examining the diameters of the plate in a manner that half of it covers the portion of "Dettol Healthy Kitchen Gel" and the other half covers the portion of "leading dishwash." The portion covering "Dettol Healthy Kitchen Gel" is shown with only one black mark and the portion with words "leading dishwash" written on it showed several such black marks like black insects. These black marks were said to depict germs. The plaintiffs; Hindustan Unilever Limited argued that the reference to "leading dishwash" necessarily pointed out at their product Vim, by way of Innuendo.[27]

Unilever contended that the reference in Advertisement I to 'leading dishwash' was necessarily and innuendo referring to Vim, as they had 2/3rd share of the market by terms of volume sale and turnover, making any reasonable person understand it as a

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25 Anubha Sinha, 'Comparative Advertising: Delhi HC (*Reckitt Benckiser* v. *Hindustan Lever Limited*)' available at *http://spicyip.com/2013/05/comparative-advertising-delhi-hc_27.html http://spicyip.com/2013/05/comparative-advertising-delhi-hc_27.html* (last accessed on May 15, 2014).

26 2014 (57) PTC 78 [CAL].

27 Vaibhavi Pandey, 'Comparative Advertising Through Innuendo: Defaming Without Naming' available at *http://www.mondaq.com/india/x/310716/Trademark/Comparative+Advertising+Through+Innuendo+Defaming+Without+Naming* (last accessed on May 10, 2014).

reference to Vim. In Advertisement II, there is a direct reference to their product Vim. They also questioned the results of scientific tests submitted by Reckitt, contending that the conditions, in which those tests were carried out – a suspension test carried out by a virtually undiluted liquid for a period of 5 minutes, would not hold good as the conditions in which the product would be used in practice does not correspond to those conditions. They filed another test report which claims that in the practical conditions, while the Dettol product achieves 99.99% reduction in germs, Vim achieves 99.95%.[28] The Calcutta High Court reached the following conclusions:

Regarding Advertisement I & II: The court agreed with the claim of Unilever that the reference to 'leading dishwash' would lead any reasonable man to construe it as a reference to Vim. They held that the law relating to innuendo in defamation applies to cases of disparagement of goods as well. Further, they held that the claim of killing '100X more germs' than 'leading dishwash' and Vim (as directly referred to in Advertisement II) was in the nature of a serious comparative advertisement. They held that while proclaiming that Dettol Healthy Kitchen Gel 'kills 100X more germs' is permitted within the rule enunciated by White v. Mellin, at the same time showing the application of Vim whereby no germs are killed or removed, certainly denigrates Vim. The court said that the failure to show the germ removal capacity of Vim, without killing them, as declared by Unilever makes the advertisement one-sided and hence unfair and devoid of honest intention.[29]

Regarding Advertisement III & IV: The court held that the Advertisement III did not show the product of Reckitt in a proper perspective as Dettol antiseptic liquid is predominantly for germ eradication, as compared to Lifebuoy, which is for cleansing. The Dettol product has been marketed by Reckitt as a supplement to a cleaning agent and it is unfair to compare it then with such a cleaning agent. Further, they held that showing Reckitt's product in an inappropriate dilution and context and then declaring that it has no germ protection capacity when compared to Lifebuoy was indeed disparaging Reckitt's product. Regarding Adverstisement IV, the court upheld Reckitt's contention that the antiseptic product being shown in the ad would be, according to a reasonable man, an innuendo to Dettol products. They observed that by saying that Dettol products being an antiseptic is dangerous would be detrimental to the product and hence amounts to disparagement. The court held that all the advertisements were hit by section 30 of the Trade Mark Act, 1999[30] as they were serious comparative advertisements which caused disparagement of the other's products. All the impugned advertisements were injuncted by the court.[31]

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28 Gautam Aredath, "Comparative Advertisement- Is it Disparagement"; available at *http://novojuris.com/2014/06/12/comparative-advertisement-is-it-disparagement/* (last accessed on 10 May, 2014).

29 *Ibid.*

30 The Trade Mark Act, 1999 S. 30(1) – Nothing in S. 29 shall be construed as preventing the use of a registered trade mark by any person for the purposes of identifying goods or services as those of the proprietor provided the use – (a) is in accordance with honest practices in industrial or commercial matters; and (b) is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trade mark.

31 *Supra* note 28.

In *Colgate Palmolive Company* v. *Hindustan Unilever Ltd*[32] Hindustan Unilever Limited launched a print advertisement which appeared on the front page of the *Hindustan Times* claiming: "Pepsodent – now better than Colgate strong teeth Delivers 130% germ attack power." The impugned television advertisement compared the two products visually and ended with a statement that Pepsodent Germi Check killed germs 130% more effectively than Colgate. The division bench concluded as follows:

> With regard to the impugned television commercial, the court held that although it was not disparaging per se, the concluding voiceover which claimed that Pepsodent had 130% more germ killing power in comparison to Colgate was misleading and hence ordered that it be removed. With regard to the text that appeared at the bottom of the screen during certain portions of the ad, the court remitted the matter back to the single judge to ascertain whether the claim made therein was prima facie truthful or misleading. With regard to the impugned print advertisement, the court held that this was indeed disparaging of Colgate's goodwill and its product Colgate ST (Strong Teeth), and issued an injunction against it.[33]

Colgate contended that the correct test to be applied was to determine how the impugned ads would be viewed by average consumers with imperfect recollection. Where such an ad is capable of two meanings – one of which is disparaging and the other of which is not – an injunction restraining such an ad should be granted. This is known as the 'multiple meaning rule' and Colgate argued that it should be used in this case. However, Hindustan Unilever Ltd contended that the multiple meaning rule has no basis in law and has not been accepted in India. It argued vehemently that the impugned ad was permissible and that the claims made therein were substantiated by *in vivo* and *in vitro* tests. The question faced by the court, therefore, was: what test should be used to determine advertisement tarnishes another's trademark. In *Colgate Palmolive* the impugned ads may not have tarnished Colgate's mark. However, one frame in the impugned television ad showed the mother of the child using Colgate appearing upset, in contrast with the Pepsodent child's mother, who was portrayed as happy and confident. This was followed by a frame showing Triclosan soldiers diminishing in Colgate, while increasing in Pepsodent GSP. The court ruled that this sequence had indeed tarnished Colgate's image. By issuing an injunction against the impugned print ad, the court in *Colgate Palmolive* gave the clear message that any explicit statement that an impression that a competitor's goods are substandard or inferior is not permissible. However, by ruling that the impugned television ad was not disparaging and ordering only the removal of the concluding voiceover, it signalled that comparative advertising is permissible, and that even explicitly comparing a competitor's goods and attacking the concerned brand is allowed.[34]

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32 MIPR 2014 (1) 4.

33 Archana Sahadeva and Deepthi Mary Alexander, 'When Comparison Steps over the line', June/July 2014 *World Trademark Review*.

34 *Ibid.*

The law as it developed from the decisions of the Court on the basis of English precedents recognizes the right of producers to puff their own products even with untrue claims, but without denigrating or slandering each other's product. But the recognition of this right of the producers would be to de-recognise the rights of the consumers guaranteed under the Consumer Protection Act, 1986. To permit two rival traders to indulge in puffery, without denigrating each other's product, would benefit both of them, but would leave the consumer helpless. If on the other hand, the falsity of the claim of a trader about the quality and utility value of his product is exposed by his rival, the consumer stands to benefit, by the knowledge derived out of such exposure.[35]

3.1 Conclusion

The Trademarks Act, 1999 and the Monopolies and Restrictive Trade Practices, 1984(herein after referred to as the "MRTP Act") have to be read together to understand the concept of Comparative Advertising. However, in view of the repealing of the MRTP, Act, all cases pertaining to unfair trade practices referred to in clause (x) of sub-section (1) of section 36A of the MRTP Act, and pending before the Monopolies and Restrictive Trade Practices Commission has been transferred to the Competition Commission of India. The above referred legislation fails to define *honest practices*. In the absence of specific guidelines the Judiciary has recognized the comparative advertisement as a healthy mode of competition but at the same time fail to provide uniform and clear guidelines to differentiate between puffery and disparagement leaving the business houses at the mercy of judiciary. The aim of comparative advertisement is not only to promote competition but also to provide correct information to the consumers. Though the Madras High Court (*Colgate Palmolive India Ltd.* v. *Anchor Health and Beauty Care Private Ltd.*) has also discussed this aspect from the consumer's point of view but till this we were oblivious of this issue. In the existing brand conscious economy the disputes relating to disparagement in comparative advertisement is becoming common so there is a need of comprehensive law which lays down the parameters to allow and to restrict the comparative advertisement but it should also be take into consideration the interest of consumer.

[35] *Supra* note 20.

NARCO ANALYSIS: BOON OR BANE

Manjit Singh*

Pushp Lata**

1.1 Introduction

Crimes are omnipresent in any society. As told by Aristotle, "man is the noblest of all animals, but if he is separated from the law, he is the worst."[1] In the society there are two types of person, the noblest and the worst. In the worst kind of person the animal tendency is so high that they become a threat not only to an individual only but to society at large. They do acts against the law because of some enmity, under compelling circumstances or because of their daily needs which can be termed as a cold blood. To tackle with these kinds of criminals almost every society need a legal system to punish such criminals and to provide justice to individuals as well as the society. As our society is marching ahead in a fast pace, the criminals are also not lagging behind, rather the present crime scenario clearly predicts that criminals are a step ahead.

When a criminal commits a crime, investigation plays a crucial role in the administration of criminal justice system. Investigating agencies uses so many methods for extracting information in order to collect evidence. The search for effective aids to interrogation is probably as old as man's need to obtain information from an uncooperative source and as persistent, as his impatience to shortcut any tortuous path. As we are living in an age of science and technology, scientific invention and discoveries are growing at much faster speed. The age old laws of evidence underwent major changes with the advent of information technology. Scientific and technological advancement help in assisting the police as well as investigating agencies in collection of evidence.

The neuro-scientist says that the brain does not commit crime; people commit crimes. While investigating the case some criminals prove to be a hard nut crack. In such cases, to procure evidence, the investigating teams generally end up by adopting unfair and illegal means. Now with the advance scientific discoveries, working with expert, the investigating officer can read the mind of suspect and dig out concealed information and evidence. This concerns brain science which is the need and requirement of present day administration of criminal justice system.[2] With the advancement of science and technology, sophisticated methods of lie detection have been developed which do away with the use of "third degree torture" by the police.

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1 Syed TazkirInam, "Scope of Narco Analysis in Criminal Investigation", available at *http://www.ssrn.com* (last accessed 2 July 2014).

2 Satyender K. Kaul and Mohd. Hasan Zaidi, *"Narco Analysis, Brain Mapping, Hypnosis and Lie Detector Test in Interrogation of Suspect"*, Asia Law Agency, Allahabad, 2008.

In the annals of police investigation, physical coercion has at times been substituted for painstaking and time consuming inquiry in the belief that direct methods produce quick results.[3] The brain mapping, Narco-Analysis, hypnosis and polygraph test emerged as the most powerful branch in helping the law enforcement agencies in administration of criminal justice system.

2.1 Narco-Analysis

The term Narco-Analysis is derived from the Greek word 'narkc' meaning 'anesthesia' or 'torpoh'. Narco-Analysis is a process whereby a subject is put to sleep, or into semi-somnolent state by means of chemical injection and then interrogated while in this dream like state or the process of injecting a "truth-serum" drug into a suspect to induce; consciousness and then interrogating the suspect. In the Narco-Analysis test, the subject's inhibitions are lowered by interfering with his nervous system at the molecular level. In this state; it becomes difficult, though not impossible for him to lie. In such sleep like state, efforts are made to obtain 'probative truth' about the crime. The subject, which is put in state of Hypnotism is not in position to speak up on his own, but can answer specific but simple questions giving some suggestions. The answers are believed to be spontaneous, as a semi-conscious person is unable to manipulate the answer.[4]

The drug used for Narco-Analysis is called Sodium Pentothal. This is a trade name given by a company, Abbot Laboratories, which discovered it in 1935. Its real name is Thiopental Sodium, which is a thiobarbiturate, a part of the barbiturate group of drugs. But before this became the drug of choice, doctors undertaking Narco-Analysis for treating patients had several other drugs like sodium amytal, scopolamine and nitrous oxide. Apart from drugs, hypnosis was also used in psychiatry. All these procedures were designed to help patients suffering from certain mental illnesses.[5] In 1922, Robert House, an obstetrician from Texas, experimented the use of Narco- Analysis in the interrogation of suspected criminals. He arranged to interrogate two prisoners in the Dallas county jail by using scopolamine, whose guilt was almost confirmed. Under the influence of drug, both prisoners denied the crimes for which they had been detained, and upon trial were found not guilty. After the successful experimentation, House concluded that an accused under the influence of drugs cannot lie.[6] In India, Narco-Analysis was first used in 2002 in the Godhra Carnage case. It was also in the news after the famous Arun Bhatt kidnapping case in Gujarat and recently Narco-Analysis test has been used in the investigation of large number of high profile cases, including that of Abdul Karim Telgi, the Nithari killing and the Arushi murder case.

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3 Vimal Joshi, "Narco-Analysis Test vis-a-vis Constitutional and Legal Rights of Accused", *Asian Resonance*, Vol.II, October 2013, pp. 177-180.

4 Subhojyoti Acharya 'Criminal Investigation Techniques' available at *http://www. marinews.com* (last accessed on 4 May 2014).

5 'Narco-Analysis, Torture and Democratic Rights', available at *http://www.esocialsciences.org* (last accessed on 11 May 2014).

6 K.C. Suresh, 'Narco-Analysis- its Violation of Human Rights and Constitutional Rights', available at *http://www.lawyersclubindia.com* (last accessed on 4 April 2014).

2.1.1 Method to conduct Narco-Analysis Test

The Narco-Analysis test is conducted by mixing 3 grams of Sodium Pentothal or Sodium Amytal dissolved in 3000 ml of distilled water and this mixture along with 10% of dextrose is injected intravenously to antecubital vein in the body of the subject over a period of 3 hours with the help of an experienced anesthetist. It is injected in normal conditions 0.5 to 1 ml per minute till the subject becomes sedative. The drug depresses central nervous system and makes the heart beat slower and blood pressure also lower down. When the person's speech becomes slurred and he or she behaves in a co-operative manner and becomes more talkative it may pressure that he or she is under full control of the patient.

Narco-Analysis test is carried out by an expert committee which consists of one anaesthetist, one physician and one clinical/ forensic psychologist. The responsibility of each expert in the team is well defined. The physician certifies the fitness of the person before and after Narco-Analysis, the anaesthetist modulates the depth of anaesthesia required depending upon the quantum of information to be obtained and monitors the various stages of anaesthesia. Only the clinical or forensic psychologist interacts with the individual who is a "trance" and gives reports along with videotapes to the courts on behalf of the team. No medical professional in the team is involved in interrogating the individual. This task is the exclusive domain of the clinical/forensic psychologist. The revelations made during this stage are recorded both in video and audio cassettes. The forensic psychologist will prepare the report about the revelations, which will be accompanied by a compact disc of audio-video recordings. The strength of the revelations, if necessary, is further verified by subjecting the person to polygraph and brain mapping tests. The report prepared by the experts is what is used in the process of collecting evidence. This procedure is conducted in government hospitals after a court order is passed instructing the doctors or hospital authorities to conduct the test. Personal consent of the subject is also required.

2.1.2 Uses of Narco-Analysis Test

Narco-Analysis may be used in following purpose:-

2.1.2.1 For Medical Purpose:

Narco-Analysis is now being used in mental health cases for diagnosing habiliment. In medical field Narco-Analysis is used-

I. for restoring speech to mute persons,
II. in case of amnesia, for reviving memory and
III. for expression of suppressed or repressed thought or conflict.

2.1.2.2 In Criminal Investigation

Narco-Analysis is now being used in forensic field also. According to Dr. S.L. Vaya, Deputy Director of DFS, Gandhi Nagar, Gujarat, India, Narco-Analysis is a useful

and non-invasive asset for investigation and for prevention of crimes and if used in a scientific way can be very useful for interrogation of Suspect. In criminal justice system it is used for investigation purposes. Narco-Analysis test should be used only in selected cases where interest of society at large is involved. In case of terrorist activities, organised crimes, serial killing etc. generally Narco-Analysis is used.[7]

2.1.3 Guidelines for Interrogating Officers when Interrogating the Suspect during Narco-Analysis Test

I. The suspect is not given food 5-6 hours before preceding the test and alcohol containing food and medicine should also be avoided.

II. The suspect must always be attended by the physician/Psychiatrist from the time of injection until the initial narcosis worn off.

III. Careful observations is necessary if properly administered drugs dosages caused no alarming physiological effect on pulse rate as well as respiratory rate.

IV. If the suspect goes to deep sleep then by the use of anti- narcotics stimulants the suspect awakes in a minute but feels drowsy and wants to sleep.

V. The quantity of drug depends upon the suspect's sex, age, health and physical and mental condition and after the procedure ends the suspect should remain on the bed rest for about 5 hours.

VI. The main objects of the investigation under intravenous administration of truth drug are to standardize the method of administration; to study the alterations of blood pressure, pulse respiration etc. before and after the administration; to estimate time required; to reach the various stages of hypno-narcosis; to estimate duration of deep sleep following narcosis; and to investigate drugs which would extend the period for Psychiatric investigation.

VII. Larger dosage are too dangerous it may lead to-

i. Sedative stage;

ii. Unconsciousness with exaggerated reflex (hyperactive stage);

iii. Unconsciousness without reflex even to painful stimuli, and

iv. Even death.

Therefore, Narco-Analysis test should be performed with great care and caution and in the supervision of experts. The maximum dose must not exceed 1 gm. over a long period of time. The normal dose is half of above mentioned quantity.[8]

3.1 Constitutional Validity of Narco-Analysis Test

"Rule of Law" is the guiding principle for running our nation efficiently and wisely. Our special investigating agencies also function according to well defined legal

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7 Ishita Chatterjee, *Techno- Legal Aspects of Scientific Evidence*, Central Law Publication, Allahabad, 2012, pp.46.

8 *Ibid.*

framework. "Constitution Law" which has been termed as the "Mother" of law, is the most efficient guide for the functioning of 'Law Enforcement Machinery'. Various powers, responsibilities duties and mode of function of various Special Investigating Agencies have been laid down in the Indian Constitution. The main provision regarding crime investigation and trial in the India Constitution is Article 20. In any criminal investigation, interrogation of the suspects and the accused plays a vital role in extracting the truth from them. Article 20(3) deals with the privilege against self incrimination. It says "No person accused of any offence shall be compelled to be a witness against himself."[9]

3.1.1 Right against Self-Incrimination and Narco-Analysis Test

Freedom of speech as a fundamental right has an element to remain speechless also. Article 20 (3) guarantees 'Right against Self Incrimination' in general, this doctrine states that "No person, accused of any offence, shall be compelled to be a witness against himself."[10] The 'right against self-incrimination', which is cardinal principle of criminal law jurisprudence is also known as 'right to silence' or 'privilege against testimonial compulsion'. The privilege against self incrimination is based on the principle "*Nemo Tenetur Seipsum Accuare'* i.e. no man is bound to accuse himself. The right to silence is also granted to the accused by the virtue of the pronouncement by the Supreme Court in the case of *Nandini Satapathy* v. *P. L. Dani*,[11] where the apex court held: "no one can forcibly extracts statement from the accused who has the right to keep silence during the course of investigation." On analysis of Article 20 (3) of the Constitution of India, it is found to contain the following components:

3.1.1.1 It is a Right Pertaining to a Person Accused of an Offence

In order to avail the protection available as right to silence, the person claiming the same should be one *"accused of an offence"* at the time when he makes the statement. A person is said to be an accused person against whom a formal accusation relating to commission of an offence has been leveled which in normal course may result in the prosecution and conviction.[12] In *Balkishan A. Devidayal* v. *State of Maharashtra*[13] on the aspect of 'a person accused of an offence' in Article 20(3) it was observed by the Supreme Court speaking through Justice Sarkaria, "that determination of the person made the self incriminatory statement, a formal accusation of the commission of an offence had been made against him.[14] Though it has been held that the lodging of F.I.R. or complaint is not an indispensable condition to accuse a person so as to attract this Article, it will be attracted only if the proceedings start with an accusation and such accusation normally results in prosecution and the person who seeks its protection was already an accused person

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9 Available at *http://www.shodhganga.inflibnet.ac.in/bitstream/10603/9696/10/10 _chapter%204.pdf* (last accessed on 12 June 2014).

10 *The Constitution of India,* Article 20(3).

11 AIR 1977 SC 1025.

12 J. N. Pandey, *Constitutional Law of India*, Central Law Agency, Allahabad, 1987, pp.177.

13 (1980) 4 SCC 600.

14 Narender Kumar, *Constitutional Law of India,* Allahabad Law Agency, Faridabad, 2008, pp. 289.

when he was compelled to make statement. The words accused of an offence indicates an accusation made in a criminal prosecution before the court or judicial tribunal where a person is charged with having committed an act which is punishable under the *Indian Penal Code,* 1860 or any special or local law.[15] It would not, therefore extend, to parties and witnesses in civil proceedings[16] or proceedings other than criminal. In *K. Joseph Augusthi* v. *M. A. Narayan,*[17] a more logical interpretation was given to "person accused of an offence" and it was held that if a person who is not accused of any offence, is compelled to give evidence, and evidence taken from him under compulsion ultimately leads to an accusation against him that would not be a case which would attract provisions of Article 20(3) of the Constitution. In *Laxmipat Chorarsia* v. *State of Maharashtra,*[18] the court categorically laid down that this provision protects a person who is accused of an offence and not those questioned as witnesses.[19]

3.1.1.2 It is a Protection against Compulsion to be a Witness

In order to bring evidence within the inhibition of Article 20(3), it must be shown that not only the person making the statement was an accused at the time of making the statement and that it had a material bearing of the criminality of the maker of the statement, but also that he was compelled to make the statement.[20] Compulsion is duress; compulsion has to be objective act and not the state of mind of person making the statement, except where the mind has been so conditioned by some extraneous processes as to render the making of the statement involuntary and, therefore, extorted. The mere fact of being in police custody at the time of making the statement does not by itself lead to the inference that the accused has been compelled to make the statement.[21] "Duress is where a man is compelled to do an act by an injury, beating or unlawful imprisonment, sometimes called duress in the strict sense, or by the threat of being killed, suffering some grievous bodily harm or being unlawfully imprisoned. Duress also includes threatening, beating or imprisonment of the wife, parent or child of a person." Compulsion has been held to take place where the person making the statement has been starved or beaten,[22] where by deceitful means, he has been induced to believe that his son is being tortured in an adjoining room or when under the provisions of any law a person is, under any legal sanction, bound to give oral or documentary evidence, it is obvious that he is compelled to be witness.[23] On the other hand, there has been no compulsion within the meaning of this clause merely because the person in question was in police custody at the time he made the statement, or because the statement voluntarily made, was in answer to the

15 *Amin* v. *State*, AIR 1958 All 293.
16 *Suryanarayanan* v. *Vijya Commercial Bank*, AIR1958 AP 756 (759).
17 AIR 1964 SC 1552.
18 AIR 1968 SC 940.
19 Avinash Sharma &Prachi Gupta, "Right to Silence: An indispensable Right In Criminal Jurisprudence" *Nyaya Deep*, Vol. IX, Issue 3, July, (2008), pp. 78.
20 M.P. Jain, *Constitutional Law of India,* LexisNexis Butterworths, New Delhi, 2008, pp.1068.
21 *State of Bombay* v. *Kathi Kali Oghad*, AIR 1961 SC 1808.
22 *Yususfali* v. *State of Maharashtra,* AIR 1968 SC 147 (150).
23 *Collector of Customs* v. *Calcutta Motor and Cycle Co.*, AIR 1958 Cal. 682 (687).

question of a police officer, though such statement ultimately turns out to be incriminatory,[24] where the conversation of the person in question, made freely and voluntary, was recorded without his knowledge by a tape-recorder[25] or where he is not bound, under the law, to answer the question or to produce the document asked for.[26]

3.1.1.3 It is a Protection against such Compulsion resulting in his Giving Evidence against himself

In order that a testimony by an accused person may be said to have been self incriminating, the compulsion of which comes within the prohibition of the constitutional provisions, it must be of such a character that by itself should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement, which makes the case against the accused person at least probable, considered by itself.[27]

All the three ingredients must necessarily exist before the protection of Article 20(3) can be claimed. If any of these ingredients is missing, it cannot be invoked. The application of Narco-Analysis test involves the fundamental question pertaining to judicial matters and also to Human Rights. The legal position of applying this technique as an investigative aid raises genuine issues like encroachment of an individual's rights, liberties and freedom. If Narco-Analysis carried out on an accused it fulfills the first requirement of Article 20(3). The second requirement of Article 20(3) would be available only if the person accused on an offence compelled to give evidence against himself and if he consents to undergo the Narco-Analysis test than this protection is not available o him. Compelling the accused to undergo the test, as has been done by the investigative agencies in India, is a blatant violation of fundamental Right against Self-Incrimination. It also goes against the maxim "*nemo tenetur se ipsum accusare*" that if the confession from the accused is derived from any physical or moral compulsion (be it under hypnotic state of mind) it should stand to be rejected by the court. The third requirement of article 20(3) is that there should be compulsion to give evidence against himself. Statements given by the accused will either be inculpatory or exculpatory and it is only inculpatory statement which is hit by Article 20(3). Whether the statements are inculpatory or exculpatory will be known only after the test is conducted and not before that. So it is premature to state that the nature of statement or information, which the accused gives under Narco-Analysis test.

3.1.2 Right to Life and Narco-Analysis

Narco-Analysis seems to be violative of the most precious right of human being, the right to life with human dignity.[28] Human dignity is a clear value of our constitution

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24 *State of Bombay* v. *Kathi Kalu Oghad,* AIR 1961 SC 1808 (1816).
25 *Malkani* v. *State of Maharashtra,* AIR 1973 SC 175 (Para. 30.).
26 *Dastagir* v. *State of Madras,* AIR 1960 SC 756 (761).
27 M. P. Jain, *Constitutional Law of India,* LexisNexis Butterworths, New Delhi, 2008, pp.1069.
28 *The Constitution of India*, Article 21.

and is not to be bartered away for mere apprehension entertained by interrogation officials.[29] Narco-Analysis violates Article 21 not only on the ground of violation of human dignity but also the right to privacy. In the case of *Kharak Singh* v. *State of UP*,[30] Subba Rao J. was of the opinion that privacy was an essential ingredient of personal liberty under Article 21. Further, in the case of *Gobind* v. *State of Madhya Pradesh*,[31] the Supreme Court held the right to privacy to be included in the right to personal liberty guaranteed under Article 21. However, the Court also held that the right to privacy is not an absolute one and that it can be restricted on the basis of a compelling State interest. This is to say that just as the Right under Article 21 is subject to restrictions, so is the Right to Privacy. However, such restriction must be under a procedure established by law. Narco-Analysis constitutes mental torture and thus violates the right to life. Again, law against intrusion in privacy of individual would not allow brain mapping evidence to be given in court. Subjecting persons to injections of mind altering criminals against their will is a violation of their Right to Privacy and also violate Right to Health. In *State of Punjab* v. *Mahinder Singh Chawla*,[32] the Supreme Court held that the right to life includes right to health. Subjecting a person to an unsafe scientific test as part of investigation will amount to denial of right to health. The drugs used in Narco-Analysis are not simple medicines, but powerful drugs. Indeed, one of the most commonly used Truth Serum substance-sodium pentothal is the same substance that in large dosage is used to induce a deep "Coma like Stage" for execution by lethal injections. Health risk of Narco-Analysis cannot be overlooked especially if the drug is not properly administered by the trained intended by the doctor to heal the patient or at least relive him from sufferings. Even if administered correctly Narco-Analysis raises the concern of privacy. The principle of mental sovereignty and cognitive liberty is based on the idea that "one's thoughts are of his own" 'that he control manipulation of an individual's mind, marks invasion of mental privacy and necessarily restricts the freedom of imagination or thoughts under Article 19 by discouraging the production of new ideas through coercive psychological threat which is cruel. Even compelled brain finger-printing intrudes on the individual's right of Mental Privacy; it should not be mandated by courts, governments and investigative agencies. On the other hand compulsory brain mapping threatens liberty and violates the sanctity of the mind. Risk of test is in fact, affects the life and pervades into most of human activities. The test directly intrudes on the mental process of the subject, who lacks control over the questioning. There is a risk that unconscious mind may reveal personal information that is irrelevant to the investigation. It is therefore imperative to establish standards of confidentiality and other safeguards, as privacy can be violated only, by procedure established by law. No such safeguards exist in India and therefore Narco-Analysis particularly if performed without consent amounts to a violation of privacy.

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29 *Kishore Singh* v. *State of Rajasthan*, AIR 1981 SC 625.
30 AIR 1963 SC 1295.
31 AIR 1975 SC 1378.
32 AIR 1997 SC 1225.

4.1 Legal Validity of Narco-Analysis Test

In a criminal investigation crime-scene investigators, gather materials for evidence from the crime scene, victim or suspect. Forensic scientists will examine these materials by various forensic tools to provide scientific evidence to assist in the investigation and court proceedings.

Apart from constitutional protection legal question are raised about validity of Narco-Analysis test with some of them holding in the light of legal principles and technological perspective. Narco-Analysis Tests usually do not have any legal soundness as the confession made by a semi-conscious person is not admissible in court of law. The court may, conversely, grant limited admissibility after taking into consideration the circumstances under which the test was carried out. The Code of Criminal Procedure and Indian Evidence Act provide protection against testimonial compulsion which is as followings:

4.1.1 The Code of Criminal Procedure, 1973

The Code of Criminal Procedure empowers a court or an officer-in-charge of a police station to issue a summons or written order, requiring any 'person' to produce a document or thing in his possession. In the case of *State of Gujarat* v. *Shyamlal*,[33] the court held that it is not, permissible for a police officer to issue an order or the court to issue a summons to an accused person in his custody or present in Court, to attend and produce any document, for, such compulsory process amounts to compulsion within the meaning of Article 20(3). A person is bound to answer the questions the answer to which would have a tendency to expose that person to a criminal charge, penalty or forfeiture.[34] Section 161(2) of the code of Criminal procedure, 1973 grants a right to silence during interrogation by the police. It provides that accused shall be bound to answer truly all the questions relating to such case put to him by such officer, other than questions the answer to which would have tendency to expose him to a criminal charge or to a penalty or forfeiture. The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answer to them.[35] His failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial.[36] In others words, Section 161, 313 and 315 raise a presumption against guilt and in the favour of innocence, grant a right to silence both at the stage of investigation and at the trial and also preclude any party or the court from commenting upon the silence.[37]

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33 AIR 1965 SC 1251.

34 *The Code of Criminal Procedure,* 1973, s. 161(2).

35 *Id.,* S. 313(3).

36 *Id.,* 1973, S. 315 (1).

37 Law Commission of India, One Hundred and Eight Report on 'Article 20(3) of The Constitution of India and The Right to Silence, 2002.'

4.1.2 The Indian Evidence Act, 1872

The Indian Courts have so far refused to admit the Narco-Analysis as evidence, but Narco-Analysis is being carried out by the investigators. The reason is that although confession made to the police or in the presence of police is not admissible in Courts, the information is admissible by which an instrument or object used in commission of crime is discovered. This is clear from the wording of Section 27 of the Indian Evidence Act, 1872. It is founded on the principle that if the confession of the accused is supported by the discovery of a fact, the confession may be presumed to be true, and not to have been extracted.[38] It comes into operation only-

i. if and when certain facts are deposed to as discovered in consequence of information received from an accused person in police custody; and

ii. if the information relates distinctly to the fact discovered. If the self incriminatory information given by an accused person is without any threat that will be admissible in evidence and will not be hit by Article 20 (3).[39]

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of temporal nature in reference to proceeding against him.[40] No confession made to a police officer, shall be proved as against a person accused of any offence.[41] The import of section 25 is very well presumes the confession made to a police officer to be involuntary and such confession shall not be proved against him. No confession made by any person whilst he is in the custody of a police officer unless it is made in the immediate presence of a magistrate shall be proved as against such person.[42] Neither the safeguard of the presence of the magistrate in the case of Section 26 of the Evidence Act, nor the substitute confirmation by facts in the case of Section 27 can take them outside the inhibition against self incrimination contained in Article 20 (3) of the Constitution. At any rate it is clear that so far as section 26 is concerned there is no question of its contravening of Article 20(3). Voluntary statements to be used against an accused as such, is not prohibited in Article 20(3). When any fact is deposed to as discovered in consequence of information received from a person accused of an offence, in the custody of the police officer, so much of such information, whether it amounts to confession or not, as relates distinctly to the fact thereby discovered, may be proved.[43] Section 25-27 is in fact a step towards ensuring the protection under Article 20(3) of the Constitution. Section 27 of the Evidence

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38 *The Indian Evidence Act,* 1872, s. 27.

39 Kalpana V. Jawala,"Constitutional Validity of Narco-Analysis Test under Article 20(3) of the Constitution of India with reference to Judicial Pronouncement", *Online International Interdisciplinary Research,* Vol. IV, March 2014, pp. 416-417.

40 *Id.,* 1872, S. 24.

41 *Id.,* 1872, S. 25.

42 *Id.,* 1872, S. 26.

43 *Id.,* 1872, S. 27.

Act, and Article 20(3) of the Constitution may be reconciled. Information voluntarily received from an accused relating distinctly to the fact thereby discovered is not hit by Article 20(3) of the Constitution and is relevant under Section 27. Article 20(3) applies to discoveries under Section 27, Evidence Act, if these discoveries are the results of compulsion.[44] One of the cardinal requirements of Right to Silence is that the statement of the accused must not be obtained by compelling him to make a self incriminating statement against himself. In police custody there are more chances of use of third degree torture by the police so that the accused must confess his crime. But section 25-27 is in fact provide a protection to an accused person by making statements made to a police officer in police custody inadmissible as evidence. If a person accused of an offence is compelled to undergo the Narco-Analysis test than protection under section 24 would be available to him. But if any fact discovered in consequences of an enquiry under Section 27, then the information may be proved against him. Provision of Sections 24 to 27 of the Indian Evidence Act would bar statement from being admissible in evidence because if there is the slightest doubt about coercion or intimidation or any type of fear that the statement was not free or that immediate before such test the subject was harassed by the Police or was coerced then such statement would be meaningless. The revelation made during the Narco-Analysis test has been found most often to be of very useful in solving many sensational cases. In most of these cases, the statements made have led to the discovery of important information's and consequently various recoveries have been made under section 27 of the Indian Evidence Act, in large number of cases. It is clear that the information referred to in Section 27 is admissible because it is voluntary deposition. But if the information has been obtained by the use of compulsion, Article 20(3) will be violated and the information will be inadmissible.[45] Section 45 of 'The Indian Evidence Act' mentioned about expert opinion. It provides that, "When the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impression, the opinions upon that point or persons especially skilled in such foreign law, or of science, or art, or as to identity of handwriting or finger impressions are relevant." However this section is silent on other aspects of forensic evidence e.g. Narco-Analysis, brain mapping etc. that can be admissible in court in criminal proceedings.

5.1 Role of Judiciary and Narco-Analysis Test

Some of the judicial pronouncements maintained that Narco-Analysis ensures an efficient and effective investigation process. It is said that such measures have been employed because of the pressing importance of extracting information which could help the investigating agencies to prevent criminal activities in the future as well as in circumstances where it is difficult to gather evidence through ordinary means. It is well established that the Right to Silence has been granted to the accused by virtue of

44 Batuk Lal, *The Law of Evidence,* Central Law Agency, Allahabad, 2011, pp.161.

45 'Critical Study on validity of Narco Analysis with reference to Article 20(3) of the Indian Constitution' available at http://www.legaltrigger.com/articles/06.pdf (last accessed on 12 March 2014).

the pronouncement in the case of *Nandini Sathpathy* v. *P. L. Dani*,[46] no one can forcibly extract statements from the accused, who has the right to keep silent during the course of interrogation (investigation). By the administration of these tests, forcible intrusion into one's mind is being restored to, thereby nullifying the validity and legitimacy of the Right to Silence.

In *State of Bombay* v. *Kathi Kalu Oghad*[47] a Bench of the Supreme Court consisting of eleven judges held that: "It is well established that clause (3) of Article 20 is directed against self-incrimination by the accused person. Self-incrimination must mean conveying information based upon personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in the controversy, but which do not contain any statement of the accused based on his personal knowledge."

In the case of *Andhra Pradesh* v. *Inapuri Padma and Ors.*, [48] the court by ordering a few suspects to undergo a Narco-Analysis test held that the question of putting the test of testimonial compulsion in case of suspect does not arise. In *Dinesh Dalmia* v. *State of Maharashtra*,[49] the Madras High Court ruled that Narco-Analysis testimony was not by the accused may be taken to the laboratory for such tests against his will, but the revelation during such tests is quite voluntary. The Indian courts seem to be unforseeingly limited the scope of Article 20(3) on the basis of Minimum Bodily Harm Doctrine." This approach is reflected in the Bombay High Court verdict in *Ramchandra Reddy and Others.* v. *State of Maharashtra*[50] upheld the legality of the use of P300 or Brain finger-printing, lie-detector test and the use of truth serum or Narco-Analysis. The court upheld a special court's order in Pune as mentioned above, allowing the agencies to conduct scientific tests on the accused in the fake stamp paper scam including the main accused, Abdul Karim Telgi. The verdict also said that the evidence procured under the effect of truth serum is also admissible. According to Palshikar J. and Kakade J. these tests only involve "minimal bodily harm." The court also said that evidence procured under the effect of Narco-Analysis test is also admissible. In the case of *Santokben Jadeja* v. *State of Gujarat*[51] it was clearly said that in the criminal jurisprudence accepted in India, a person facing an investigation is constitutionally conferred with the right i.e. right to remain silent, leaving it for the investigating agencies to investigate the factual allegations restoring to only those methods which are specially permitted under various statutory provisions. It was submitted that the accused cannot be compelled to be a witness against himself by conducting such Narco-Analysis test and the same would offend the constitutional protection given under Article 20 (3) of the Constitution.

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46 AIR 1978 1025.
47 AIR 1961 SC 1808 (1816).
48 2008 Cri.LJ 3992.
49 Cri. L.J. (2006) 2401.
50 Cr. L.J. WP(c) No. 1924 of 2003.
51 MANU/GJ/7362/2007.

Another thought provoking decision is rather that of *Rojo Gorge* v. *State of Kerala,*[52] in which the petitioner was willing to undergo both Brain mapping and Polygraph test, and he shall not be subjected to Narco-Analysis, alleging it to be an unscientific test. However, J. Padmanabhan Nair relying on *Kathi Kallu* rationale refused to grant the petition. Bombay high court held in the Abdul Karim Telgi case that "certain physical tests involving minimal bodily harm" like Narco-Analysis and brain mapping did not violate Article 20(3) and did not comprise the constitutional protection against self incrimination. Statements made under Narco-Analysis are not admissible in evidence. However, recoveries resulting from such drugged interviews are admissible as corroborative evidence. This is, arguably, a roundabout way to subverting the right to silence acquiring the information on where to find the weapon from the subject when, in his right senses, he would not turn witness against himself. Arguments have been made that Narco-Analysis constitutes mental torture. It works by inhibiting the nervous system and thus lowering the subject's inhibitions. It is not difficult to interpret this as a physical violation of an individual's mind-space. The State police departments are responsible for generating demand for the process. The decision to conduct Narco-Analysis is usually made by the Superintendent of Police or the Deputy Inspector General handling a case.[53]

In the case of *Selvi and Others* v. *State of Karnataka,*[54] the following issues were raised and answered by the court:

I. Whether the involuntary administration of the impugned techniques violates the 'right against self-incrimination' enumerated in Article 20(3) of the Constitution? In relation to the first issue the considered opinion of the Court was that the compulsory administration of the impugned techniques violates the 'right against self-incrimination'. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntary nature of statements that are admitted as evidence.

II. Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject? The respondents submitted that the compulsory administration of the tests will only be sought to boost investigation efforts and that the test results by themselves will not be admissible as evidence. However they argued that if the test results did in fact enable the investigators to discover independent materials that are relevant to the case, such subsequently discovered materials should be admissible during trial.

III. Whether the results derived from the impugned techniques amount to 'testimonial compulsion' thereby attracting the bar of Article 20(3)? The court concluded that Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible

52 WP (c) No. 1924 of 2003.

53 "Article 20 (3) of Constitution of India and NarcoAnalysis" available at *http://www.legalserviceindia.com* (last accessed on 14 March 2014).

54 AIR 2010 SC 1974.

'conveyance of personal knowledge that is relevant to the facts in issue'. The results obtained from each of the impugned tests bear a 'testimonial' character and they cannot be categorised as material evidence.

IV. Whether the involuntary administration of the impugned techniques is a reasonable restriction on 'personal liberty' as understood in the context of Article 21 of the Constitution? The Court was of the view that forcing an individual to undergo any of the impugned techniques violates the standard of 'substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature.

In light of these conclusions, the Court held that no individual should be forcibly subjected to any of the techniques, whether in the context of investigation in criminal cases or otherwise and doing so would amount to an unwarranted intrusion into personal liberty.[55]

Recently Narco-Analysis test have been used in the investigation of large number of high profile cases, including that of Abdul Karim Telgi, the Nithari killing and the Arushi murder case. Petitions were moved before the Supreme Court between 2005 and 2007 by Santokoben Sharmnbai Jadeja, accused of leading an underworld gang in Gujrat, K. Venktaeswara Rao, a Tamil Film producer, Dalip against these tests. The latter three are all prime accused in the stamp paper scam led by Telgi. A three judge bench headed by Chief Justice K.G. Balakrishnan and Justices R. V. Raveendran and Dalveer Bhandari clarified the legal position on the issue. The bench held, "we are of the considered opinion that no individual can be forced and subjected to such techniques involuntarily and by doing so it amounts to unwarranted intrusion of personal liberty." The court further went on to declare that the investigative techniques were an unconstitutional invasion of privacy enshrined in Article 21.[56]

But it seems in the offing, as in 2006 the Supreme Court of India stayed the order of a metropolitan judge to conduct Narco-Analysis on K. Venkateswara Rao in the Krishi Cooperative Urban Bank case.[57] In this case Supreme Court held that it is interesting to note that the Forensic Science Laboratory in Gandhi Nagar in fact refused to conduct the test on a suspect when he did not give his consent. The Magistrate nevertheless ordered the laboratory to conduct the test. However, the Supreme Court stayed the order of a Metropolitan Judge to conduct Narco-Analysis. Utility in investigative processes the scientific tests may be employed in two ways, that is, they may directly be used as evidence in court in a trial or they may be used merely as clues for investigation. Where the tests involve the making of a statement,

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55 Navaz Kotwal, "A Landmark Judgment on Narcoanalysis" available at *http://www.nipsa.in* (last accessed on June 2010).

56 "Narco Analysis and Brain Mapping Unconstitutional" available at *http://www.barandbench.com/News* (last accessed on 10 March 2014).

57 AIR 1993 Kant 20.

they may be directly adduced in evidence, provided they do not amount to a confession because proof of a confession before a police officer or in the custody of a police officer is prohibited. However, if the statements are merely admissions, they may be adduced in evidence Surender Koli was main accused in the Nithari case, was brought to Forensic Science Laboratory in Gandhinagar in January 2007 for Narco-Analysis. Polygraph test was conducted on Moninder Singh Pandher and his servant SurenderKoli, accused of serial killing of women and children in Nithari, to ascertain the veracity of their statements made during their custodial interrogation. Various confessional statements were made by the accused under the effect of the drug, he could remember the names of the females he had murdered and revealed his urge to rape them after murdering them. Supreme Court upholds death penalty for Nithari's accused.[58] Recently the High Court of Delhi in *Shailendra Sharma* v. *State and another*,[59] held that Narco-Analysis test does not suffer from any constitution infirmity as it is step in aid of investigation and any self incriminatory statement, if made by the accused, cannot be used or relied upon by the prosecution.

6.1 Criticism

Narco-Analysis test has been criticised on the following grounds,

I. Narco-Analysis has been criticized on the ground that it is not 100% accurate. It has been founded that certain subjects made totally false statements. It is often unsuccessful in eliciting truth as such it should not been used to compare the statement already given to the police before use of drug.

II. It is very difficult to suggest a correct dose of drug for a particular person. The dose of drug will differ according to will power, mental attitude and physique of the subject. Successful Narco-Analysis test is not dependant on injection. For its success a competent and skill interviewer is required who is trained in putting recent and successful questions.

III. Generally everybody is afraid of police and their corrupt practices even innocent persons are frightened of fix-ups and third degree torture by the police. This fear shows up in their heightened anxiety level, changes is there blood pressure, respiration, heart-beat etc., there are chances of misinterpreting this as the "fear of a criminal of being caught."

IV. These scientific tools are in the hands of police only. Therefore it is based towards the police or the prosecution in the case, forensic science laboratory where these scientific interrogations are conducted under the control of police department. Fundamental objective of police is to prove their case, the prosecution stand point rather than finding out the truth. Sometimes, that standpoint of prosecution and police are influenced by caste political and monetary consideration. This bias reflects in the preparation of the "Questionnaire by the interrogator." The interrogator if he wants to bring out a negative image of the accused before the court, he prepares the questionnaire

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58 *Supra* note 39.

59 WP (Cri.) 532 of 2008 decision on November, 14th 2008.

such that only negative issues come out as the answers. If the accused has got political patronage and has paid hefty bribe to the police, questionnaire is prepared such as to being out a positive image, to highlight innocent image of the accused. The police are the one who decide the fate, destiny of the accused.

V. Every human being has two personalities with in his sub-conscious mind one personality is evil, selfish and craves for all material pleasures. The other personality is good, humane and sociable one. Whenever an issue comes up before a human being, whenever a human being sees, reads or hear a subject two opinions are formed about it by him. One by his evil selfish ego the other by his good humane self. A perfect human being, a social being is one who controls his mind, contains the evil influence of his selfish self and follows the guidance of his good self. This readily expresses itself through good humane social actions. A criminal is one who does not have control over his mind and acts according to the evil guidance of the selfish self.

VI. There are chances of miss-interpretation during scientific interrogation. If you expose only evil self you will get a negative image or else if you expose only the good self you will get a positive image of the accused. For a balanced view, you have to see the evil-self and good self of the accused together with his past and present actions.

VII. At present only it is the prosecution who can use these scientific interrogation facilities, but not the defence.

VIII. Narco-Analysis test is a restoration of memory which the suspect had forgotten. This test result may be doubtful if the test is used for the purpose of confession of crimes. Suspects of crimes may, under the influence of drugs, deliberately withhold information or may give untrue account of incident persistely. Narco-Analysis is not recommended as an aid to criminal investigation. In medical uses like in treatment of psychiatric disorder the Narco-Analysis may be useful unless the test is conducted with the consent of the suspect it should not be used in criminal investigation.[60]

IX. In the code of criminal procedure injury is defined and the punishment for which may extend to 10 years, imprisonment. Hence, administration of narcotic drug amounts to causing injury. Furthermore, the reliability of scientific test is not free from doubt.

X. Narco-Analysis can evolve as viable effective alternate to barbaric third degree methods. However care must be taken that this procedure is not misused or abused by investigating officers and should be correlated with corroborative.

[60] Bhavish Gupta and Meenu Gupta, "Narcoanalysis Test: Its Constitutional Validity", *Indian Bar Review*, Volume XXXVIII, 2011, pp.61.

6.2 Conclusion

The legal system should imbibe development and advances that take place in science as long as they do not violate fundamental legal principles and are for the good of the society. There have been orders of various high courts upholding the validity of Narco-Analysis. These judgments are in stark contrast with the earlier judgments of the Supreme Court interpreting Article 20(3). The veracity lies in the fact that Narco-Analysis is still a nascent interrogation technique in the Indian criminal justice system without any rules or guidelines. The central government must make a clear policy stand on Narco-Analysis because what is at stake is India's commitment to individual's freedom and clean criminal justice system. The Supreme Court's decision in *Selvi* v. *State of Karnataka* is a welcome development. Serious concern is still remain, however is whether to the spirit of the judgment will be respected by law enforcement authorities. The Supreme Court left open the possibility for abuse of such tests when it proved a narrow exception, namely that information indirectly gained from a 'voluntary administered test' can be admitted as evidence. Since the validity of the test and admissibility of Narco-Analysis is upheld taking into consideration the circumstances under which it was obtained, there is a little possibility of miscarriage of justice when administered as per procedure prescribed and observing the due safety precautions., the apprehension on the part of counsels of accused and critics is unwarranted.

VICTIM'S RIGHTS UNDER CRIMINAL JUSTICE SYSTEM IN INDIA: AN ANALYSIS

Jagwinder Singh*

1.1 Introduction

The crime problem is the overdue debt a society pays for tolerating for years the conditions that breed lawlessness. Law and order is the prime duty of the State. It fosters peace and prosperity. The rule of law is to prevail for a welfare State to prosper. The citizens in a welfare State are expected to have their basic human rights.[1] These rights are often violated. The law and order is breached. A citizen is harmed, injured or even killed as a result of the crime. He or she is a victim of an act termed an 'offence' in the criminal justice system. He or she seeks recourse to law and justice. Justice is given to him or her upon upholding the rule of law. It is denied to him or her upon any breach by the perpetrator of the violation or even by the defender of his rights the State. The machinery of the State is set in motion by the victim, either upon his or her own complaint which is a private complaint, when he, as a complainant, seeks to prosecute the case of harm done to him/her. He or she may require the State to prosecute the case of harm done to him or her by informing the State of the act of offence. He or she would then be only the first informant- the State would prosecute such crime. The mischief that the State sought to remedy was the total neglect of the violation of human rights of victims. The State, in other words, sought to embark upon and to grant to the victims of crime their human rights.[2]

1.2 Position of Victims in India

Few years ago, the criminal justice system used to be depicted as a battle between a suspected criminal on the one hand and the government representing respectable society on the other. It is now accepted that criminal law and criminal procedure could never really lead to *justice* being administered unless and until the system pays respect to the interests of victims of crime. This means that the victim should not just be viewed as an instrument enabling the prosecutor to procure convictions.[3] Rather than dealing with the victim as a tool, which can be used in the process of reporting the crime and later on as a witness, he or she should be considered as the injured party, as a human being with rights of their own that should be structurally taken into account at all stages of the criminal investigation and eventual trial. The general direction of victims' reforms means that the victim has a right to be treated fairly,

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1 *Balasaheb Rangnath Khade* v.*The State of Maharashtra* & Ors on 27 April, 2012, available at *indiankanoon.org*.(last accessed on 16 Jan 2014).

2 *Ibid.*

3 Marc Groenhuijsen, "Rights in the Criminal Justice System: a European Perspective," available at *http://www.aic.gov.au/media_library/publications/proceedings/27/groenhuijsen. pdf.* (last accessed on 16 Jan 2014).

respectfully, and will have to be paid compensation or restitution for the damages incurred by the criminal offence.[4]

We can judge the position of victim of crime in Indian criminal justice in the words of great Indian legal jurist Justice Krishna Ayer that it is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependants of the prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law. This is a deficiency in the system which must be rectified by the Legislature. We can only draw attention in this matter.[5] Far reaching efforts had come to be made in the direction of victimology in the western democracies which India had emulated from the time of drafting the Constitution of India. The state of the victims in the discipline of victimology has gone far ahead in the west. The victims have a right to speak and to be heard at all stages of the criminal prosecution bail, release, evidence, sentence and parole. 'Victims impact statements' are recorded and extensively used by the jury and the judge whilst convicting and sentencing respectively and thereafter 'victims impact assessments' are required to be done as a continuous act.[6]

In the past, criminology was centred primarily on the offender. Victimology is a subfield of criminology that specializes in studying the victims of crime. It is the study of personal and public issues associated with victims of crime. In another words it is the scientific study of victimization including the relationship between victim and offender, the interaction between victims and criminal justice system i.e. the police and courts as well as the connection between victims with the other social groups and institutions e.g. media. Victimology is that discipline which is young in nature and its origin can be traced back to the 1940. It was originated due to the feminist movement, civil right movement and victim rights movement. This discipline focuses on the victims, psychological, physical and emotional harm they suffer, compensation right and patterns of behaviour of victims. The concept of victimization or victimology has always been remained a controversial topic as all criminologist do not accept the concept of victimology.[7] Victimology is defined as the thorough study and analysis of victim characteristics, and may also be called victim profiling. The victim constitutes roughly half of criminal offence, and as such, is as much a part of the crime as the crime scene, weapons, and eyewitnesses.[8]

Within the frame of the social psychological interaction theory, over the past three decades interest has turned to the victim of crime. Victimization can occur at any time or place without warning. Victims deserve our sympathy even if they somehow provoked or facilitated their own victimization. Some crime victims suffer lifelong pain from wounds and some suffer permanent disability, but for the majority of victims, the worst consequences are psychological. We all like to think

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4 *Ibid.*

5 *Rattan Singh* v. *State of Punjab* AIR 1980 SC 84; (1979) 4 *SCC* 719.

6 *Supra* note 1.

7 Anil Trehan, *Penology and Victomology*, Shreeram Law House (2011)at p.224

8 Prakash talwar, *Victimology,* Isha books publication, New Delhi (2006) at p. 1.

that we live in a safe, predictable, and lawful world in which people treat one another decently. With victimization comes a stressful feeling of shock, personal vulnerability, anger and fear of further victimization, and suspicion of others. Victimization also produces feelings of depression, guilt, self-blame, and lowered self-esteemed and self-efficacy. Rape in particular has these consequences for its victims.[9]

A victim of crime is an identifiable person who has been harmed individually or directly by the perpetrator. The concept of victim dates back to ancient cultures and civilizations. Its original meaning was rooted in the exercise of sacrifice- taking of the life of a person or animal to satisfy a deity. Over the centuries, the word victim came to have additional meanings, so as to include any person who experiences injury, loss, or hardship due to any cause.[10] History reveals that victim injuries were originally addressed through payment of restitution by the offender. Presumably, restitution served two purposes; it appeased the victim's need for retribution and deterred the offender from committing further crimes. Its roots are found in ancient times when no central authority existed and tribal organizations and kinship ties were the basis of authority. With the growth of centralized governments and the development of criminal laws, however, the victim's role was diminished. Historically, crime was considered an offense against king or state and the victim of crime was largely ignored by the criminal system. Where government did not assist the victim, protection societies sprang up to mete out the punishments that the community thought fit the crime. Victims also turned to religious or community leaders rather than to government to help them settle problems.[11]

1.3 International Scenario Regarding the Victim's Right

At the international level, interest in victims can be traced back at least to the international congresses held during the late 1800s, where, for example, many called for a general return to reparation in criminal justice, an issue which has been dealt with in more recent years by organizations such as the International Association of Penal Law, the International Society of Social Defence and the International Society of Criminology. The first major international meeting focusing specifically on victims was the first International Symposium on Victimology, held in Israel in 1973, which led to the establishment in 1979 of the World Society of Victimology. A number of other international entities have since dealt with core issues related to victims of crime and abuse of power. At the intergovernmental level, the work of the Council of Europe led to the adoption of the 1983 European Convention on the Compensation of Victims of Violent Crimes which entered into force in 1988, the 1985 recommendation on the position of the victim within the framework of criminal law and procedure, and the 1987 recommendation on assistance to victims and the

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9 Anthony Walsh and Craig Hemmens, *Introduction to Criminology*, Sage Publication, New Delhi (2008) at p. 535.

10 *Supra* note 8 at 19-20.

11 Lucy N. Friedman, "The Crime Victim Movement at Its First Decade," *Public Administration Review*, Vol. 45, Special Issue: Law and Public Affairs, (Nov 1985)at pp.790-791,

prevention of victimization.[12] The adoption by the United Nations General Assembly of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985 is by no means the only example of United Nations activity in this field. The work of the United Nations in preventing abuse of power and violations of human rights is long-standing and includes among its achievements the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women. The United Nations has also developed international guidelines to reduce abuses against the elderly, the disabled and the mentally ill, and has drafted basic principles and guidelines on reparation for victims of gross violations of human rights and humanitarian law.[13]

The victim of a crime plays a very important role in the administration of criminal justice both as a complainant/informant and also as a witness for the prosecution. Victim's role is vital at the stage of investigation of a reported crime and also at the stage of trial of the case arising out of that crime. But these victims are nowadays vulnerable to threats, intimidation, coercion and harassment by the offenders or their associates preventing the victims from testifying before the investigating officer at the stage of investigation or from giving evidence before the courts and tribunals at the trial of the case. The testimony of a victim at the stage of investigation and during trial of the case in court specially when the crime is a crime of violence against women and children, can be said to be the best piece of evidence that can be used against the accused. The victim being an important player in the whole process of criminal justice system, much attention needs be given to the rights, privileges and protection of the victims.[14] So the role of victim in a criminal trial can never be lost sight of. He or she is an inseparable stakeholder in the adjudicating process. United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted by the General Assembly through a resolution 40/34 of 29th November 1985. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines victim, a person who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to

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12 *Handbook on Justice for Victims*, United Nations Office for Drug Control and Crime Prevention, New York (1999) at p. 2. (In May 1996, the United Nations Commission on Crime Prevention and Criminal Justice, at its fifth session, adopted a resolution to develop a manual or manuals on the use and application of the Declaration (Economic and Social Council resolution 1996/14). The *Handbook on Justice for Victims* was developed in response to that resolution).

13 *Ibid.*

14 Bangladesh Law Commission Final Report on a proposed law relating to protection of victims and witnesses of crimes involving grave offences available at *www.lawcommissionbangladesh.org/reports/74.pdf*, (last accessed on 12 Jan 2014).

assist victims in distress or to prevent victimization. This declaration divides rights of victims into four categories which are as following:-

1. Access to justice and fair treatment.[15]
2. Restitution[16]
3. Compensation[17]

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[15] 1. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.
2. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
3. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
   (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
   (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
   (c) Providing proper assistance to victims throughout the legal process;
   (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
   (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.
4. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

[16] 1. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.
2. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.
3. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.
4. Where public officials or other agents acting in an official or quasi official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

[17] 1. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
   (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
   (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.
2. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

4. Assistance[18]

On the 15th of March 2001 the European Union Framework Decision on the standing of victims in criminal proceedings was adopted. On the 15th of March 2001 the European Union Framework Decision on the standing of victims in criminal proceedings was adopted. This event is a milestone in more than one way.[19] It is the first time that there is a so-called "hard-law instrument" concerning victims of crime available at the international level. The Framework Decision codifies rules at the supranational level concerning the legal position of victims that are binding concerning the domestic legal order of the member states. Prior to 2001 only soft-law instruments were on offer, like the resolution of the General Assembly of the United Nations and the Recommendation of the Council of Europe in this field.[20] The main theme of the Framework Decision follows the international consensus also evidently expressed by other legal instruments. At its core it includes the following basic rights for victims of crime:[21]

1. A right to respect and recognition at all stages of the criminal proceedings (article 2);
2. A right to receive information and information about the progress of the case (article 4);
3. A right to provide information to officials responsible for decisions relating to the offender (article 3);
4. A right to have legal advice available, regardless of the victims' means (article 6);
5. A right to protection, for victims' privacy and their physical safety (article 8);
6. A right to compensation, from the offender and the State (article 9);
7. A right to receive victim support (article 13);
8. The duty for governments to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure (article 10);

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18 1. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.
2. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
3. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.
4. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

19 M.S. Groenhuijsen and A. Pemberton, "The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference?" *European Journal of Crime, Criminal Law and Criminal Justice,* (2009) at p. 43.

20 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 of 29 November 1985; Recommendation (1985) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure, 28 June 1985; and of later date than the Framework Decision Recommendation (2006) 8 on Assistance to Crime Victims, 14 June 2006.

21 *Supra* note 19 at p. 45.

9. The duty for the State to foster, develop and improve cooperation with foreign States in cases of cross border victimisation in order to facilitate more effective protection of victims' interests in criminal proceedings (article 12).

Until recently, the victim was the forgotten party in the criminal justice system. But things have changed over the last few years some countries have passed victim specific law. In United States of America by 1990, the federal government and a majority of the states had passed some form of victims' rights legislation.[22] Included under the victims' rights rubric are statutes that amend substantive law in favour of crime victims that authorize victim services such as restitution, counselling and victim participation in various phases of the criminal justice process. One of the most widespread innovations is the victim impact statement, a written statement attached to the presentence report which describes the impact of the crime on the victim or the victim's family, or both. The content of a victim impact statement varies, but most states require information on the seriousness of the victim's physical, emotional, and psychological injuries. In addition, many states allow the report to include such matters as the victim's opinion of the offender, her fear of revictimization, her opinion on the recommended sentence, and even her own sentence recommendation.[23] In the penalty phase of a capital trial, the defendant's guilt is no longer an issue. Instead, typically the jury considers both aggravating and mitigating factors in order to decide whether the defendant should receive the death penalty.[24] But in *Payne v Tennessee*[25] US Supreme Court concluded that evidence about the victim of a murder and the impact of the murder on the victim's family could legitimately be considered relevant to a jury's decision whether the death penalty should be imposed, and need not be treated differently from other relevant evidence.[26] *In Payne*, the Court reviewed the widespread use of harm calculations in substantive criminal law and in sentencing practices and concluded that victim impact evidence is simply another form of bringing relevant information to the sentencer. Therefore, there is no reason to treat such evidence differently than other relevant evidence is treated. Further, the introduction of victim impact evidence serves the purpose of humanizing the victim, just as the defendant is allowed a chance to be seen as a unique individual.[27] More broadly, however, *Payne* promotes what might be called a jurisprudence of victimhood.

In 2004, the united state of America passed a crime victims' bill of rights that has gone some considerable way to recognizing the previously discounted victim. This bill has following features:-[28]

1. The right to be reasonably protected from the accused

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22 The *Victim and Witness Protection Act*,1982 was passed to serve as a model for legislation by state and local governments.

23 Angela P. Harris, "The Jurisprudence of Victimhood," *The Supreme Court Review*, Vol. 1991, 1991, at pp.78-79

24 *Id.*, at 88.

25 111 S Ct 2597 (1991).

26 *Supra* note 23, at p. 77.

27 *Id.*, at p. 88.

28 *Supra* note 9 at p. 536.

2. The right to reasonable, accurate, and timely notice of any public proceeding involving the crime or of any release or escape of the accused.
3. The right not to be excluded from any such public proceeding.
4. The right to be reasonably heard at any public proceeding involving release, plea, or sentencing.
5. The right to confer with the attorney for the government in the case.
6. The right to full and timely restitution as provided in law.
7. The right to proceedings free from unreasonable delay.
8. The right to be treated with fairness and with respect for the victim's dignity and privacy.

There are also various victim-centered programs designed to ease the pains of victimization, such as victim compensation. India also needs such legislation to improve its criminal justice system with a purpose to make it victim friendly.

Victims of crime had remained deserted or elapsed men from long time all over the world. In our criminal justice system also much emphasis has been given to the rights of accused in contrast to victim. In India criminal procedure code, 1973, is the principal procedural law which deals with criminal trials. This code provides number of protection to the accused at the time of arrest, during investigation as well as during and after the trial like protection against arbitrary arrest,[29] duty of police officer to inform the person grounds of his arrest and of right to bail,[30] safety against unnecessary restraint at the time of arrest,[31] right to consult lawyer of his choice,[32] duty to produced arrested person before magistrate within 24 hours of arrest,[33] right to bail,[34] right against double jeopardy,[35] and other protections during investigation and trial like to be witness against himself, right to representation,[36] right to be heard, right to legal aid[37] etc. there are other provisions in Indian constitution[38] and other substantive law like Indian evidence act 1872,[39] Indian penal code 1862[40] which take care the interest of accused.

29 *The Code of Criminal Procedure*, 1973, Ss. 41-44.
30 *Id.*, S. 50.
31 *Id.*, S. 49.
32 *Id.*, S. 41d.
33 *Id.*, S. 57.
34 *Id.*, Ss. 167 & 436-450.
35 *Id.*, 1973, S. 300.
36 *Id.*, Ss. 313 & 315.
37 *Id.*, S. 304.
38 *The Constitution of India*, Article 14 19, 20, 21, 22.
39 *The Indian Evidence Act*, 1872 Ss. 24-31.
40 *The Indian Penal Code*, 1860 Ss. 330, 331, 339, 340.

1.4 Legislative and Judicial Perspective towards the Right of the Victims in India

In India there are main four laws which govern the Indian criminal justice system. This includes The Constitution of India, The Indian Penal Code, The Code of Criminal Procedure of India and The Indian Evidence Act. There are other special criminal laws which deal with special matters. The penal philosophy in India has accepted the concepts of prevention of crime and treatment and rehabilitation of criminals, which have been reiterated by many judgments of the Supreme Court. In Indian criminal justice the state has the responsibility to prosecute and punish the offenders and victim has a very limited role. Judiciary has acknowledged a place of victim in its different judgments. The Constitution of India is a fundamental law of the land. It is recognized fundamental rights of the people. All other laws made by parliament should be in consonance with the constitution. Article 21 of the Constitution of India deals with the Right to life. It includes all the fundamental principle of good and efficient criminal justice system which includes right of fair trial,[41] right of speedy trial,[42] right of hearing, right to compensation, right to represent in the trial. These all rights recognized in this article by giving broad interpretation by the courts. Whole criminal justice system is revolved round these basic rights. The Supreme Court in *Vishaka* v. *State of Rajasthan*[43] stated that sexual harassment in the workplace is a violation of article 15 and 21 of the constitution. In this case the court gave detailed directions on the subject (sexual harassment), which guidelines are to be strictly observes by all employers, public or private, until suitable legislation is enacted on the subject. Further Article 39A provides that the state shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. So the constitution directs the state to provide legal aid to the parties who are unable to avail this. In *Hussainara* v. *Home Secretary, State of Bihar*,[44] Supreme Court held that legal aid may be treated as a part of right to life created under Article 21.

There are some specific provisions in the Indian penal code which deals with victims of crime. Section 166A recently inserted in the code which states that if any 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 punishable under section 326A, section 326B, section 354, sub-sections (*2*) and (*3*) of section 354A, section 354B, section 354C, sub-section (*2*) of section 354D, section 370, section 370A, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509, shall be punished with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine.[45] Further Section 166B of the code provides

41 *Police Commissioner, Delhi* v. *Registrar, Delhi High Court*, AIR 1997 SC 95.
42 *Common Cause Laws* v. *Union of India,* AIR 1996 SC 1619.
43 AIR 1997 SC 3011.
44 AIR 1979 SC 1369.
45 The Indian Penal Code, 1860, S. 166A.

punishment for non treatment of victim. It states that Whoever, being in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of section 357C of the Code of Criminal Procedure, 1973, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.[46] Section 357C of the Criminal Procedure Code mentions that All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code, and shall immediately inform the police of such incident.[47] Section 228A of Indian penal Code makes disclosure or identity of the victim of certain offences etc. a punishable offence. It states that whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376B, section 376C or section 376D or section 376E is alleged or found to have been committed(hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for term which may extend to two years and shall also be liable to fine.[48]

The Code of Criminal Procedure, 1973, also has some specific provisions which deal with victims' rights. Section 2(wa) of the code defines victim a person who has suffered any loss or injury caused by reason of the act or omission for which the

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46 *Id.*, S. 166B.

47 *Supra* note 29 at S. 357C.

48 *Supra* note 45 at S. 228. 228A. Disclosure or identity of the victim of certain offences etc.—(1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under S. 376, S. 376A, S. 376B, S. 376C or S. 376D or S. 376E is alleged or found to have been committed(hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for term which may extend to two years and shall also be liable to fine.

(2) Nothing ins sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is-

(a) by or under the order in writing of the officer – in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purpose of such investigation;

(b) by, or with the authorisation in writing of , the victim; or

(c) where the victim is dead or minor or of unsound mind by, or with the authorization in writing of , the nest of kin of the victim:

Provided that no such authorization shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called , of any recognized welfare institution or organization.

Explanation.—For the purpose of this sub-section, "recognized welfare institution or organization "means a social welfare institution or organization recognized in this behalf by the Central or State Government.

(3) Whoever prints or publishers any matter in relation to any proceeding before a court with respect to an offence referred to in sub-section (1) without the previous permission of such court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Explanation.—The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this sections.

accused person has been charged and the expression "victim" includes his or her guardian or legal heir. This is a very progressive definition because it takes care of the family or dependent of victims. Section 24 provides that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section. This code also Provided that any offence under section 376 and sections 376A to 376D of the Indian Penal Code shall be tried as far as practicable by a Court presided over by a woman.[49] Section 46 mentions that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest. Section 157 provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality. Section 161 provided that statement made under this sub-section may also be recorded by audio-video electronic means. Section 171(1A) states that the investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police station. A new section 195A added in the code which provide procedure for witnesses in case of threatening, etc. it states that a witness or any other person may file a complaint in relation to an offence under section 195A of the Indian Penal Code. Section 275 provides that evidence of a witness under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of the offence. Section 309 provides that when the inquiry or trial relates to an offence under sections 376 to 376D of the Indian Penal Code, the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses. Section 327 Provides further that in camera trial shall be conducted as far as practicable by a woman Judge or Magistrate in rape cases and also states that the ban on printing or publication of trial proceedings in relation to an offence of rape may be lifted, subject to maintaining confidentiality of name and address of the parties. Victim compensation scheme also has provided in the code.[50]

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49 *The Code of Criminal Procedure*, 1973, S. 26.

50 *Id.*, 357A. Victim Compensation Scheme. — (1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who, require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under S. 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

[Footnote No. 50 Continued]

Section 372 provides a right of appeal to victim in some cases. It provides that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall He to the Court to which an appeal ordinarily lies against the order of conviction of such Court.

In *Balasaheb Rangnath Khade v The State of Maharashtra & Ors* decided on 27 April, 2012, three important issues relating to victims right of appeal under section 372 of Cr.P.C were raised before Bombay High Court. These issues and answers of high court on these issues are as following:—

> **Issues:-** (i). Whether an appeal filed by the victim, invoking his right under proviso to section 372 of Cr.P.C, challenging acquittal, or conviction for a lesser offence, or awarding inadequate compensation, is not maintainable, on the ground that the State has filed an appeal against the same order and for the same purpose ?
>
> (ii). Whether an appeal filed by the State should not be entertained, on the ground that the appeal preferred by the victim invoking his right under proviso to section 372 of Cr.P.C., against the same order, is admitted by the Court ?
>
> (iii). If the victim prefers an appeal before this Court, challenging the acquittal, invoking his right under proviso to section 372 of Cr.P.C., whether that appellant is required to first seek leave of the Court, as is required in case of appeal being preferred by the State ?
>
> Answers : Issue No.1 Appeal by the victim is maintainable.
>
> Issue No.2 Appeal by the State is maintainable.
>
> Issue No.3 If the victim also happens to be the complainant and the appeal is against acquittal, he is required to take leave as provided in Section 378 of the Criminal Procedure Code but if he is not the complainant, he is not required to apply for or obtain any leave. For the appeal against inadequacy of compensation or punishment on a lesser offence, no leave is necessary at the instance of a victim, whether he is the complainant or not.

The Indian Evidence Act, 1872 also takes care of the victims and there are some provisions deals with women victim of crime. For example section 146 of the Act provides that in a prosecution for an offence under of section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is an issue,

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[Footnote No. 50 Continued]

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

it shall not be permissible to adduce evidence or to put questions in the cross - examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent. Further section114A mentions that in a prosecution for rape under clause (*a*), clause (*b*), clause (*c*), clause (*d*), clause (*e*), clause (*f*), clause (*g*), clause (*h*), clause (*i*), clause (*j*), clause (*k*), clause (*l*), clause (*m*) or clause (*n*) of sub-section (*2*) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent. A newly added section 53A provides that in a prosecution for an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

India has a special body for the protection of fundamental rights of our people particular for those victims who suffered from the hand of state agencies. Such body in the form of NHRC has been created under the human right act 1993 to giving justice to those victims whose fundamental rights are violated. The purpose of this body is to make accountable to those who violates the human right of the persons and providing justice to those victims who are unable to get justice due to their poverty, ignorance, or due to their inability to get justice particular when the offender is nothing else but state or its machineries. Though purpose of established such body is very good but time and again question has been raised on the working and efficiency of this institution. Though India has special body to prevent of human rights violation and to get justice for victim of such abuses but in practice the government's deliberate refusal to vest the NHRC with adequate authority and resources has rendered it a toothless and inept institution. It seems that it is designed only to please UN and Western countries (who are supposed to be guardians of human rights) at UN assemblies. In fact, ever since its birth in 1993 the NHRC had remained, mentally and physically, a disabled child its scope of both jurisdiction and intervention being strictly limited by the Indian government. There are inbuilt, well-contrived restrictions that render it infructuous. It is not a totally independent body, its chairman being appointed by a committee headed by the prime minister. It does not have any power to punish the guilty. It is not allowed to investigate allegations of human rights violations by Indian defence forces. Its recommendations are not legally binding on the state governments. These restrictions were incorporated in the NHRC by the Indian government, irrespective of the fact which political party is in power, had always cold-shouldered the issue of human rights.[51] This institution can play a very effective role for the victims if it develops a strong working relationship

[51] Sumanta Banerjee, "Human Rights in India in the Global Context," *Economic and Political Weekly*, Vol. 38, No. 5, Feb. 1-7, 2003 at p. 424 .

with the judiciary and be released from several unnecessary constraints putting on it by the government.

A committee on Reforms of Criminal Justice System constituted by government of India under the chairmanship of Justice V.S. Malimath for assessing the working of criminal justice system in India. This committee submitted his report in March 2003. This report disclosed that the existing law provides that only a prosecutor appointed by the State to be the proper authority to plead on behalf of the victim. However, a counsel engaged by the victim may be given a limited role in the conduct of prosecution. Further victim can submits written arguments after the closure of evidence in the trial after court permission. Victim has no substantial role to play at the time when accused move an application for bail except to make application for cancellation of bail.[52] Similarly prosecution can seeks withdrawal at any time during trial without consulting the victim.[53] There is no specific law which protects from intimidation and harassment by offenders which tend to dissuade them from testifying freely and truthfully. It is the duty of the State to prevent such things. An important object of the Criminal Justice System is to ensure justice to the victims, yet he has not been given any substantial right, not even to participate in the criminal proceedings. Therefore, the Committee feels that the system must focus on justice to victims and has thus, made the recommendations which include the right of the victim to participate in cases involving serious crimes and to adequate compensation.[54]

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[52] *Supra* note 29 at 439(2)
The Code of Criminal Procedure, 1973, S. 439(2).

[53] *Id.*, Section 321.

[54] (i) The victim, and if he is dead, his legal representative shall have the right to be impleaded as a party in every criminal proceeding where the charge is punishable with 7 years imprisonment or more.

(ii) In select cases notified by the appropriate government, with the permission of the court an approved voluntary organization shall also have the right to implead in court proceedings.

(iii) The victim has a right to be represented by an advocate of his choice; provided that an advocate shall be provided at the cost of the State if the victim is not in a position to afford a lawyer.

(iv) The victim's right to participate in criminal trial shall, inter alia, include:
  (a) To produce evidence, oral or documentary, with leave of the Court and/or to seek directions for production of such evidence
  (b) To ask questions to the witnesses or to suggest to the court questions which may be put to witnesses
  (c) To know the status of investigation and to move the court to issue directions for further to the investigation on certain matters or to a supervisory officer to ensure effective and proper investigation to assist in the search for truth.
  (d) To be heard in respect of the grant or cancellation of bail
  (e) To be heard whenever prosecution seeks to withdraw and to offer to continue the prosecution
  (f) To advance arguments after the prosecutor has submitted arguments.
  (g) To participate in negotiations leading to settlement of compoundable offences

(v) The victim shall have a right to prefer an appeal against any adverse order passed by the court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation. Such appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court.

[Footnote No. 54 Continued]

The Supreme Court in *Sakshi* v. *Union of India*[55] accepted video conferencing and written questions in sexual and other trials in the absence of a statute. The Court accepted three of the suggestions made by Sakshi (NGO) before the Law Commission but not accepted by it, namely,

(i) Video-conferencing procedure, and

(ii) Putting written questions to the witnesses.

(iii) Sufficient break to be given while recording evidence

Finally the Supreme Court, in its *Sakshi's Judgment*,[56] extended the procedures involving video conferencing (a video circuit system) and the giving of a list of questions to the victims or witnesses, and stated that these procedures do not violate the principle of the accused's right to an open trial in his immediate presence. The Supreme Court in the same case gave the following among other directions in holding trial of child sex abuse or rape victims:—

(i) A screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused.

(ii) The question put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the presiding officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing.

(iii) The victims of child abuse or rape, while giving testimony in Court, should be allowed sufficient breaks as and when required.

[Footnote No. 54 Continued]

(vi) Legal services to victims in select crimes may be extended to include psychiatric and medical help, interim compensation and protection against secondary victimization.

(vii) Victim compensation is a State obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted. This is to be organised in a separate legislation by Parliament. The draft bill on the subject submitted to Government in 1995 by the Indian Society of Victimology provides a tentative framework for consideration.

(viii) The Victim Compensation law will provide for the creation of a Victim Compensation Fund to be administered possibly by the Legal Services Authority. The law should provide for the scale of compensation in different offences for the guidance of the Court. It may specify offences in which compensation may not be granted and conditions under which it may be awarded or withdrawn. It is the considered view of the Committee that criminal justice administration will assume a new direction towards better and quicker justice once the rights of victims are recognized by law and restitution for loss of life, limb and property are provided for in the system. The cost for providing it is not exorbitant as sometimes made out to be. With increase in quantum of fine recovered, diversion of funds generated by the justice system and soliciting public contribution, the proposed victim compensation fund can be mobilized at least to meet the cost of compensating victims of violent crimes. Even if part of the assets confiscated and forfeited in organised crimes and financial frauds is also made part in the Fund and if it is managed efficiently, there will be no paucity of resources for this well conceived reform. In any case, dispensing justice to victims of crime cannot any longer be ignored on grounds of scarcity of resources.

55 2004(6) SCALE 15.

56 *Sakshi* v. *Union of India*, 2004(6) *SCALE* 15.

Judiciary particular in India and other western countries have a long history to protect the human rights of poor, ignored and who belong to weaker section of the society. In India courts are considered as a temple of justice. It is regarded as a last hope of justice for deprived and common man before they left the things to god to console themselves. Acting as expected from it and to providing justice to victims in cases where state investigation agencies working in the hands of powerful offenders in *Dhanaj Singh* v. *State of Punjab*[57] apex court laid down that In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect. To do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. Similarly in *Paras Yadav* v. *State of Bihar*[58] it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined *de hors* such omissions to find out whether the said evidence is reliable or not, the contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

The apex court, giving due consideration to the fundamental right of victim /complainant to know the status of his case as well as to build his confidence in judiciary a opportunity to defend his case at the stage of filing charge sheet, has been recognized. The Supreme Court held in *U.P.S.C.* v. *S. Papiah*[59] that a closure report by the Prosecution cannot be accepted by the court without hearing the informant. This court further expressed that there can be no doubt that when, on a consideration of the report a made by the officer-in-charge of a police station under Section 2(i) of Section 173 the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the magistrate to take cognizance of the offence and issue process. So in a case where the Magistrate to whom the report is forwarded under sub section (2) (i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of the consideration of this report.

The role of public prosecutors in ensuring a fair trial is of paramount importance. Public prosecutor represents the prosecution side in the court. It is his duty that he brings truth before the court. As an officer of the court he should take proper care to get justice for the victims. But in practice it is usually seen that prosecutors come under pressure particular from political class and derelict from his duty. Few are involved in corrupt practices. These all things should be redressed in the interest of justice. Public prosecutors in India are not train enough to how to handle the victims which minimize their harassment. This is a glaring demerit of our criminal justice

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57 AIR 2008 SC 441.

58 AIR 1999 SC 644, (1999) 2 SCC 126.

59 (1997) 7 *SCC* 614, also see *Abhinandan Jha and Ors.* v. *Dinesh Mishra* AIR 1968 SC 117.

system. It was observed by the Supreme Court that such Assistant Public Prosecutors could not be allowed to continue as personnel of the Police Department and to continue to function under the control of the head of the Police Department. And directions had been given to State Governments to constitute a separate cadre of Assistant Public Prosecutors by creating a separate prosecution Department making its head directly responsible to the State Government. So Apex Court also had stressed on the desirability of separation of prosecution agency from investigation agency.[60]

1.5 Conclusion and Suggestions

Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences. It will not be correct to say that it is only the accused that must be fairly dealt with. That would be turning a Nelson's eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial.[61]

Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Time has become ripe to act on account of numerous experiences faced by the courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle the truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. For ensuring of a sense of confidence in the mind of the victims and their relatives, and to ensure that witnesses depose freely and fearlessly before the court following steps shall be taken:[62]

(a) Ensuring safe passage for the witnesses to and from the court precincts.

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60 *S.B. Shahane and Ors.* v. *State of Maharashtra and Another*, 1995 Supp (3) *SCC* 37.

61 *National Human Rights Commission* v. *State of Gujarat & Ors.* 2009(6) *SCC* 767.

62 *Ibid.*

(b) Providing security to the witnesses in their place of residence wherever considered necessary, and

(c) Relocation of witnesses to another state wherever such a step is necessary.

Inexpensive way to help victims survive the assault on their sense of self is to empower them through participation in the criminal justice system. To the extent that the victim understands the process, knows what to expect at each stage, and most importantly, is consulted about key decisions such as bail set-ting and plea negotiations, the more likely the victim feels in control. The court process can also be therapeutic for the victim because of its public acknowledgment that the victim was not to blame and that the offender committed a wrong.[63] The right of the victim to participate with full prosecutorial rights in the criminal proceedings is recognized by only a few legal systems, and even here, in practice, victims usually leave most prosecutorial duties to the public prosecutor. A number of legal systems recognize the right of the victim to serve in effect as a subsidiary prosecutor, in that also the victim may submit evidence; suggest questions which may be asked of the defendant or of witness, and comment on statements and evidence submitted to the court.[64]Historically, police have not been provided with adequate training regarding the impact of violent crime on crime victims, and how they can ensure that victims are informed of their rights and referred to essential services. As a result, undertrained police have often not been sensitive enough when they come into contact with emotionally distraught victims, which has impaired victim satisfaction and decreased the confidence and willingness of victims to participate in the criminal justice system. In many jurisdictions, progress has recently been made in improving police responses to victims. For example, in a number of countries (e.g. Australia, Canada, France, United Kingdom and the United States), attention has been given to the first point of contact of the criminal justice system with the victim, and to the concept of psychological first aid according to which the victim should be treated as a human being, not merely as a possible source of evidence. Assurance should be given to the victim that what has occurred is condemned by society and that the community sympathizes with the victim.[65]

Victims' rights do not mean rights against the offender. Rather the rights which helps the victim to give equal and fair participation in criminal trial instead of mere spectator. So this movement is for providing justice to all and to spread awareness about victims and position. It is not denied that efforts are continuing at international as well as national level to improve the position of victims in criminal trials with a purpose to enlarge his/her participation in the matters which directly relate to them. Western countries have taken lead in such matters in comparison to India. Recently in India a large number of amendments have been made in our criminal law to improve the position of victims of crime. But most important is how the state implements these changes in practice. Judiciary can play a very important role in such matter and track record of Indian judiciary shows that the future of victim's rights is in safe hands.

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63 *Supra* note 11 at p. 793.

64 *Supra* note 8 at pp. 169-170

65 *Id.*, at pp. 193-194.

LIABILITY OF TRANSNATIONAL CORPORATIONS: JUDICIAL APPROACH

Dr. Dinesh Kumar*

1.1 Introduction

In the 21st century, the 'Transnational Corporations (TNCs)' have become more relevant even for a common man as they are active operators 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. They are a phenomenon of the 19th century. However, the evolution of TNCs can be traced back to ancient civilizations under different names and with varied scope of their activities.

After the World War II, the TNCs not only grew in size and power but also in number. They widened their scope and activities too. On the one hand the exerted positive influence as discussed above, but on the other hand, there are many reported instances of violation of human rights, discrimination, despotism of labor rights, dumping of toxic waste in least developed countries. Their negative role towards under developed countries and developing countries has raised many critical concerns regarding legal personality of TNCs, jurisdiction, legal rights and to what extent TNCs are liable in the host countries.

The present research paper is divided into four parts. First part deals with the definition of TNCs, second part with the legal status of TNCs, and third part with the judicial approach towards the issue relating to liability of TNCs in civil as well as criminal matters. The fourth part concludes the paper with some suggestion and further raising another relevant question keeping in view the role and influence of TNCs in the host State economy and in drafting the State policy that whether the TNCs have sovereign status at par with the States?

1.2 Definition of Transnational Corporations

It is pertinent to mention here that many expressions like Multinational Corporations, Multinational Company, 'Multinational Enterprises (MNEs)', International Firm, Global Firm, Transnational Company have been used in the international texts in various contexts. However, the legal literature is divided between two terms: 'MNEs' and 'TNCs'. The UN Economic and Social Council have embraced the term 'TNCs' whereas the Organisation for Economic Co-operation and Development (OECD) and

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the International Labour Organization (ILO) continue to employ the term 'MNEs'.[1] In comparison with these two terms other terms are of recent origin and are also used with few exception regarding their explanation in domestic law, whereas MNEs and TNCs become a part of the international instruments adopted by various intergovernmental bodies like the UN, EU, ILO, etc. The paper research work uses the term 'TNCs'.

In India, *the Foreign Contribution (Regulation) Act*, 2010 defines the term MNC as:[2]

> A Corporation incorporated in a foreign country or territory shall be deemed to be a multinational corporation of such corporation - (a) has a subsidiary or a branch or a place of business in two or more countries or territories; or (b) carries on business, or otherwise operates, in two or more countries or territories.

The term 'TNCs' emphasizes the fact that there is usually a single legal corporation operating in more than one country, with a headquarters and a legal status incorporated in the national law of the home state. According to Rigaux: "The concept of *transnationality* comes into its own when it is applied to an autonomous corporate system and, in this sense, the transnational corporation is *one* single corporation even if it is composed of corporation with separate identities under the corporation law of the State in which they operate."[3]

The Sub-Commission Resolution on the Promotion on Protection of Human Rights constituted a Working Group to examine the working methods and activities of TNCs in order to ensure the protection of human rights, and considering the scope of the State's obligation to regulate TNCs. As a result, the *Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights* was drafted in 2002 and adopted on 13 August 2003.[4]

The main concern about drafting the Norms and to apply the same only to TNCs was due to an inadequate definition of TNC or MNE would allow businesses to use financial and other devices to conceal their transnational nature, and thus to avoid responsibility under the Norms. The Norms define the term 'TNCs' as: [5]

> (A)n economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in

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1 The legal literature is divided between two terms: Transnational Corporations and Multinational Corporations. Even though both the terms convey same meaning and used interchangeably by common man still various thinkers as well as organisations used these terms in a very restricted meaning. Transnational Corporations means corporations having business operations in countries other than their country of incorporation, either directly or through subsidiaries or affiliates. Whereas a multinational corporation is an enterprise which owns or controls production or service facilities outside the country in which it is based.

2 The *Foreign Contribution (Regulation) Act*, 2010, s. 2 (g)(iv).

3 Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, p. 199.

4 *Norms on the Responsibilities of Transnational Corporations and other Business Enterprise with Regard to Human Rights*, UN. Doc. E/CN4/Sub.2/2003/12/Rev.2, 2003.

5 Definition 20, *Available at*, http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003. 12.Rev. 2.En, (last accessed 21 February 2014).

> their home country or country of activity, and whether taken individually or collectively.

The Norms, however, does not limit their application to TNCs but also include other business enterprises. The working group defines the phrase "other business enterprise" as:[6]

> [A]ny business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity.

3. Legal Personality of Transnational Corporations under Indian Law

The term 'person' or 'personality'[7] has been used in many different senses from times immemorial. In the philosophy and moral sense the term has been used to mean the rational substratum or quality of human being. In anthropological and biological sense the term 'person' has been used to mean as one of the species. In law the word 'person' is given a wide meaning. It means not only human beings but also associations as well. Law personifies some real things and treats it as a legal person. Corporations, companies, trade unions, and friendly societies, institutions like universities, hospitals, objects like an idol, holy book Guru Granth Sahib[8] are some examples of artificial personalities recognised by law in the modern age.[9]

As Roscoe Pounds stated, "In civilized lands even in the modern world it has happened that all human beings were not legal persons. In Roman law down to the constitution of Antoninus Pius the slave was not a person. He enjoyed neither rights of family nor rights of patrimony. He was a thing, and as such, like animals, could be the object of rights of property."[10] He further stated that "In the French colonies, before slavery was there abolished, slaves were put in the class of legal persons by the statute of April 23, 1833 and obtained a somewhat extended juridical capacity by a statute of 1845. In the United States down to the Civil War, the free negroes in many of the states were free human beings with no legal rights."[11]

According to Salmond, "A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination. Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. Those which are

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6 Definition 21, Available at, *http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003*. 12.Rev. 2.En, (last accessed 21 February 2014).

7 The term 'personality' should be distinguished from humanity. Humanity means only human beings but personality includes inanimate object also. Personality is wider than humanity. Sometimes both coincide and sometimes they do not.

8 *Shriomani Gurdwara Prabandhak Committee* v. *Som Nath Dass & Ors.* (2000) 4 SCC 146.

9 Nomita Aggarwal, *Jurisprudence: Legal Theory*, Central Law Publications, Allahabad, 2010, p. 169.

10 Roscoe Pound, *Jurisprudence*, West Publishing Company, St. Paul, Minn, Vol. IV, 1959, pp. 192-93. Also see: *Supra* note 9 at p. 156, Para 12.

11 *Id.*, at p. 193.

actually recognised by our own system, however, are of comparatively few types. Corporations are undoubtedly legal persons, and the better view is that registered trade unions and friendly societies are also legal persons though not verbally regarded as corporations."[12]

Paton assigns rights and duties to legal person while stating that "It has already been asserted that legal personality is an artificial creation of the law. Legal persons are all entities capable of being right-and-duty- bearing units-all entities recognised by the law as capable of being parties to a legal relationship. ... Legal personality then refers to the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities."[13]

In *Corpus Juris Secundum* (CJS) legal personality is defined as "A natural person is a human being; a man, woman, or child, as opposed to a corporation, which has a certain personality impressed on it by law and is called an artificial person. According to the CJS definition it is stated that the word person, in its primary sense, means natural person, but that the generally accepted meaning of the word as used in law includes natural persons and artificial, conventional, or juristic persons."[14] It further define artificial person as "Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic."[15] Another source defined the term 'person' as, "We may, therefore, define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights or duties may be attributed."[16]

In 1819, John Marshall, J., in *Dartmouth College* case held that[17]

> A corporation is an artificial being, intangible and existing only in contemplation of the law. Being, a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important ones being, immortality, and if the

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12 P.J. Fitzgerald (ed.) *Salmond on Jurisprudence*, Sweet & Maxwell, London, 12th ed., 1968, p. 305. He further three special cases of legal personality: The first class of legal persons consists of corporations, as already defined, namely, those which are constituted by the personification of groups or series of individuals. The individuals who thus form the corpus of the legal person are termed its members; the second class is that in which the corpus, or object selected for personification, is not a group or series of persons, but an institution. The law may, if it pleases, regard a church or a hospital, or a university, or a library, as a person. That is to say, it may attribute personality, not to any group of persons connected with the institution, but to the institution itself; and The third kind of legal person is that in which the corpus is some fund or estate devoted to special uses a charitable fund, for example or a trust estate.

13 Paton, *Jurisprudence*, 3rd ed., 1954, pp. 349-50. Also see: *Supra* note 9 at p. 157, para 17.

14 *Corpus Juris Secundum: A Complete Restatement of the Entire American Law*, N.Y., The American Law Book Co., Brooklyn, Vol. LXV, 1950, p. 40.

15 Id., Vol. VI, 1937, p. 778.

16 G.C. Venkata Subbarao, *Analytical and Historical Jurisprudence: Jurisprudence & Ancient Law*, 3rd ed., 1956, p. 357. Also see: *Supra* note 9 at p. 158, para 18.

17 *Dartmouth College* v. *Woodward* 17 US 4 Wheaton 518 (1819). Also see: *Halsbury's Laws of India*, LexisNexis, New Delhi, Vol. 27, 2007, 40.004, p. 18. Also see: *Som Prakash Rekhi* v. *Union of India & Anr.* (1981) 1 SCC 449 at 460, para 22.

> expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered the same, and may act as a single individual.

Thus, it is well settled and confirmed by the authorities on jurisprudence and courts of various countries that for a bigger thrust of socio-political-scientific development evolution of a fictional personality to be a juristic person became inevitable. Therefore, institutions like corporations and companies were created, to help the society in achieving the desired result. The Constitution of State, Municipal Corporation, Company, any entity, living, inanimate, objects etc. are all creations of the law and these Juristic Persons arose out of necessities in the human development. In other words, they were dressed in a cloak to be recognised in law to be a legal unit.[18]

A corporation may be created in one of two ways. It may be either established by statute or incorporated under a domestic law. In India, a corporation/company can be registered under the *Companies Act*, 1956 or the *Societies Registration Act*, 1860. Such a company will be a juristic person for all legal purpose in India. The Apex Court of the country has reiterated the same view regarding this issue from time to time in many cases and a few of the landmarks judgments are discussed as under.

In *Tata Engineering and Locomotive Co. Ltd.* v. *State of Bihar*, the Supreme Court has held that:[19]

> The Corporation in law is equal to a natural person and has a legal entity of its own. The entity of the Corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the Corporation. This position has been well established ever since the decision in the case of *Salomon* v. *Salomon and Co.* was pronounced in 1897; and indeed, it has always been the well-recognised principle of common law. However, in the course of time, the doctrine that the Corporation or a Company has a legal and separate entity of its own has been subjected to certain exceptions by the application of the fiction that the veil of the Corporation can be lifted and its face examined in substance. The doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the Corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognised exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of different economic problems, the theory about the personality of the corporation may be confined more and more.

In another landmark case *Som Prakash Rekhi* v. *Union of India & Anr.*, the Supreme Court held that a legal person is any subject matter other than a human being to which the law attributes personality. It was further observed that:[20]

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18 *Supra* note 9 at p. 157.

19 (1964) 6 SCR 885, para 24.

20 1981(1) SCC 449 at p. 461 para 26.

> Let us be clear that the jurisprudence bearing on corporations is not myth but reality. What we mean is that corporate personality is a reality and not an illusion or fictitious construction of the law. It is a legal person. Indeed, a legal person is any subject-matter other than a human being to which the law attributes personality. "This extension, for good and sufficient reasons, of the conception of personality... is one of the most noteworthy feats of the legal imagination." Corporations are one species of legal persons invented by the law and invested with a variety of attributes so as to achieve certain purposes sanctioned by the law.

The Apex Court in *Samatha* v. *State of A.P.*, further laid down that:[21]

> The word 'Person' in the interplay of juristic thought is either natural or artificial. Natural persons are human being while artificial persons are corporation. Corporations are either corporations aggregate or corporation sole. In English Law by Kenneth Smith and Denis Keenan (7ed.) p. 127, it is stated that "[L]egal personality is not restriction to human beings. In fact various bodies and associations of persons can by forming a corporation to carry out their functions, create an organisation with a range of rights and duties not dissimilar to many of those possessed by human beings. In English law such corporations are formed either by Charter, statute or registration under the Companies Act; there is also the common law concept of the corporation sole."

In *Shriomani Gurdwara Prabandhak Committee* v. *Som Nath Dass & Ors.*, the Supreme Court once again held that Guru Granth Sahib is a juristic person after taking into consideration the concept of legal/juristic person in detail. The court reiterated that:[22]

> The very words "Juristic Person" connote recognition of an entity to be in law a person which otherwise it is not. In other words, it is not an individual natural person but an artificially created person which is to be recognised to be in law as such. When a person is ordinarily understood to be a natural person, it only means a human person. Essentially, every human person is a person. If we trace the history of a Person in the various countries we find surprisingly it has projected differently at different times.

Another important question which came up before the Supreme Court of India besides that corporations are legal person was that whether a company, as a legal person, can enjoy the fundamental rights granted to the citizens of India under Part III of the Indian Constitution or in other words is company a citizen? The Supreme Court in a nine judges bench observed in *State Trading Corporation of India Ltd.* v. *CTO*,[23] that "corporations cannot be regarded as citizen for the purpose of enforcing rights under Article 19 1(f) and (g)," of the Constitution.

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21 (1997) 8 SCC 191 at p. 233 para 52.

22 (2000) 4 SCC 146 at p. 155, para 11. Also see: *Sarangadeva Periya Matam & Anr.* v. *Ramaswami Goundar* (dead) by Legal Representatives, AIR 1966 SC 1603, *Masjid Shahid Ganj & Ors.* v. *Shiromani Gurdwara Parbandhak Committee*, AIR 1938 Lahore 369, *Deoki Nandan* v. *Murlidhar & Ors*, AIR 1957 SC 137, *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra*, ILR 37 Cal 128 (F), *Hindu Relgious Endowments Board* v. *Veeraraghavacharlu*, AIR 1937 Mad 750 (G), *Yogendra Nath Naskar* v. *Commissioner of Income Tax*, Calcutta, 1969 (1) SCC 555, *Pritam Dass Mahant* v. *Shiromani Gurdwara Prabandhak Committee*, 1984 (2) SCC 600.

23 (1964) 4 SCR 99 para 62. However, K.C. Das Gupta, J., had given a dissenting opinion and said that the Company is entitled to the fundamental right under Article 19 (1)(f) and (g) of the Constitution of India as a citizen of India.

In *R.C. Cooper* v. *Union of India*,[24] the Supreme Court further observed that how rights of the citizen differs from the corporations when it comes to filling writ for the protection of the fundamental rights. The court observed the following points that a Company is not a 'citizen' and, therefore, cannot maintain a writ petition for enforcement of fundamental freedoms under Article 19 which are conferred on 'citizens' alone; the rights of a company and the rights of its shareholders are not co-extensive; and generally writ is filed by a company along with a shareholder, who is an Indian citizen, so that the petition is maintainable.

The Apex Court reiterated the same view in *Bennet Coleman & Co.* v. *Union of India*,[25] that it is now clear that the fundamental rights of citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholder's rights are equally and necessarily affected if the rights of the company are affected.

The Indian law through judicial intervention recognize and upheld the concept of legal personality imposed upon on TNC and it further differentiated the fields of applicability when the question of fundamental rights come in.

4. Liabilities of Transnational Corporations under Indian Law

4.1 Civil Liability

In the field of tort the governing principle is that a master will be liable for the torts of his servants if they occur in the course of the servant's employment and in the case of agents, if they are within the scope of the agent's authority. In this respect the courts cannot permit the defence of ultra vires. If that defence were to prevail "no company could ever be sued if the directors of the company after resolution did an act which the company by its memorandum of association had no power to do. That would be absurd."[26]

Another author, Clive M Schmitthoff has also reiterated that "It is believed that in these circumstances the company is liable for the torts of its agents or servants, even though these torts are ultra vires its objects. Obiter dicta in American decisions and eminent writers can be quoted in support of this view. It is thought that this view is in harmony with the scanty modern indications of English judicial opinion on this issue."[27]

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24 AIR 1970 SC 564. Also see: *Tata Engineering & Locomotive Co. Ltd.* v. *State of Bihar*, AIR 1965 SC 40, *Narasaraopeta Electric Corpn. Ltd.* v. *State of Madras*, (1951) 21 Com Cases 297 (Mad).

25 AIR 1973 SC 106. Also see: *Delhi Cloth and General Mills Ltd.* v. *Union of India*, AIR 1983 SC 937.

26 *Campbell* v. *Paddington Corpn.*, (1911) 1 KB 869. For details see: L. Sealy and Sarah Worthington, *Cases and Materials in Company Law*, Oxford University Press, Oxford, 2008, p. 150.

27 Clive M Schmitthoff, *Palmer's Company Law*, Stevens & Sons, London, Vol. 1, 24th ed., 1987, p. 207.

The Supreme Court in *M.C. Mehta* v. *Union of India*,[28] held the following regarding the liability to pay compensation for toruous liability where:[29]

> an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate *vis-à-vis* the tortuous principle of strict liability under the rule in *Rylands* v. *Fletcher*.[30]

It further held that[31]

> (W)e would like to point out that the measures of compensation in the kind of cases referred to in the preceding paragraph must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused by on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

In another landmark case *Charan Lal Sahu* v. *Union of India*,[32] the Supreme Court observed on the issue that what should be the law to deal with transnational corporations to protect the human rights of the people while besides following the principle of absolute liability. The Court emphasised that the Bhopal Gas Leak disaster and its aftermath emphasise the need for laying down certain norms and standards that the government to follow before granting permission or licences for the running of industries dealing with material which are of dangerous potentialities. K.N. Singh, J. while concurring held that the fundamental rights:[33]

> must be integrated and illumined by the evolving international dimensions and standards, having regard to our sovereignty, as highlighted by Cls. 9 and 13 of U.N. Code of Conduct of Transnational Corporations. The evolving standards of international obligations need to be respected, maintain dignity and sovereignty of our people, the State must take effective steps to safeguard the constitutional rights of citizens by enacting laws. The laws so made may provide for conditions for granting licence to Transnational Corporations, prescribing norms and standards for running industries on Indian soil ensuring the constitutional rights of our people relating to life, liberty, as well as safety to environment and ecology to enable the people to lead a healthy and clean life. A Transnational Corporation should be made liable and subservient to laws of our country and the liability should not be restricted to affiliate company only but the parent Corporation should also be made liable for

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28 (1987) 1 SCC 395.

29 *Id.*, para 31 at p. 421.

30 *The Rule of Rylands* v. *Fletcher* (1868) LR 3 HL 330 : 19 LT 220.

31 (1987)1 SCC 395 at p. 421, para 32.

32 AIR 1990 SC 1480. The Union of India under the Bhopal Gas Leak Disaster Act, 1985 took upon itself the right to sue for compensation on behalf of affected parties and filled a suit in the New York District Court for realization of compensation. Judge Keenan by his order dated 12th May 1986, dismissed the petition on the ground of *forum non conveniens*. The main question in the present case before the Court was: Is the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 is constitutionally valid?

33 AIR 1990 SC 1480 at p. 1551, para 137.

> any damage caused to the human beings or ecology. The law must require transnational corporations to agree to pay such damages as may be determined by the statutory agencies and forums constituted under it without exposing the victims to long drawn litigation.

The Court further held that in cases where the assets of subsidiary of transnational corporations are inadequate to satisfy the claims arising out of disaster then it become necessary to evolve,[34]

> (E)ither by international consensus or by unilateral legislation, steps to overcome these handicaps and to ensure (i) that foreign corporations seeking to establish an industry here, agree to submit to the jurisdiction of the Courts in India in respect of actions for tortious acts in this country; (ii) that the liability of such a corporation is not limited to such of its assets (or the assets of its affiliates) as may be found in this country, but that the victims are able to reach out to the assets of such concerns anywhere in the world; (iii) that any decree obtained in Indian Courts in compliance with due process of law is capable of being executed against the foreign corporation, its affiliates and their assets without further procedural hurdles, in those countries.

The Bhopal gas disaster led to many litigations in the Supreme Court under various provisions of law including tortious liability of Union Carbide Corporation of India. In another case of *Union Carbide Corporation* v. *Union of India*,[35] the settlement recorded by the Supreme Court in Bhopal Gas Disaster case was challenged on the grounds that it is void under O. 23, R. 3-B of the Civil Procedure Code, 1908 under which the recording of the settlement must be preceded by notice to the persons interested in the suit, which the Court did not do. The Court dismissed the petition while upholding its five judges bench decision in the case of *Charan Lal Sahu*. The majority view held that:[36]

> While we do not intend to comment on the merits of the claims and of the defences, factual and legal, arising in the suits, it is fair to recognise that the suit involves complex questions as to the basis of UCC's liability and assessment of the quantum of compensation in a mass tort action.

The Court further held to:[37]

> (E)nsure that in the – perhaps unlike – event of the settlement-fund being found inadequate to meet the compensation determined in respect of all the present claimants, those persons who may have their claims determined after funds is exhausted are not left to fend themselves. ... If should arise, the reasonable way to protect the interests of the victims is to hold that the Union of India, as a welfare State and in the circumstances in which the settlement was made, should not be found wanting in making good the deficiency, if any.

The judgment of the Supreme Court in the case of Union Carbide Corporation was criticized at large even by jurists outside India for settlement at such a fewer amount keeping in view the effect of disaster on the coming generations.

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34 AIR 1990 SC 1480 at p. 1563, para 146.
35 AIR 1992 SC 248.
36 *Id.*, p. 306, para 92.
37 *Id.*, p. 308, para 98.

4.2 Criminal Liability

"The company is intangible; it exists only in contemplation of law; it has no physical body... As Lord Chancellor Selborne once said, 'It is a mere abstraction of law'."[38] Hence, the company can file a criminal complaint but it must be represented by a natural person. A company cannot personally commit any crime. It cannot even authorise any crime because its authority always remains circumscribed by the objects clause of its memorandum and that clause cannot contain anything unlawful. Therefore the question often arises is as to the extent to a corporation can be held liable for any crime committed by those who are working for it.[39]

As Kenny observes: "Moreover a corporation is devoid not only of mind, but also of body; and therefore incapable of the usual criminal punishments. "Can you hang its common seal?" asked an advocate in James KK's days (8St.Tr.1138)." "Thus the fact that a corporation cannot be hanged or imprisoned sets a limit to the range of its criminal liability. A corporation can only be prosecuted, as such, for offences which can be punished by a fine."[40]

In *Halsbury's Laws of England*, the law on the point has been stated as under:[41]

> A corporation may not be found guilty of criminal offences, such as treason or murder, for which death or imprisonment is the only penalty, nor may it be indicated for offences which cannot be vicariously committed, such as perjury or bigamy. Subject to these exceptions, a Corporation may be indicted and convicted for the criminal acts of the directors and managers who represent the directing mind and will of the Corporation and control what it does. The acts and state of mind of such persons are, in law, the acts and state of mind of the Corporation itself. A Corporation may not be convicted for the criminal acts of its inferior employees or agents unless the offence is one for which an employer or principal may be vicariously liable. Whenever a duty is imposed by statute in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence for which a Corporation may be indicted, whether or not the statute refers in terms to Corporations.

Further, it deals with the capacity of a Corporation to commit a crime. It has been stated that in general a Corporation is in the same position in relation to criminal liability as a natural person and may be convicted of common law and statutory offences including those including those require *mens rea*. Criminal liability of a Corporation arises where an offence is committed in the course of the Corporation's business by a person in control of its affairs to such a degree that it may fairly be said to think and act through him so that his actions and intent are the actions and intent of the Corporation. So, the position in England is that Corporation are liable for criminal prosecution even where the offence requires a criminal intent.[42]

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38 A Ramaiya, *Guide to The Companies Act*, 15th Ed., 2001, p. 370.

39 *Ibid.*

40 *Kenny's The Outlines of Criminal Law*, 15th ed., pp. 73-75. Also see: *Standard Chartered Bank* v. *Directorate of Enforcement* AIR 2005 SC 2622 at p. 2630, para 23.

41 *Halsbury's Laws of England*, Vol. 9(2), para 1184. Also see: *Assistant Commissioner, Assessment-II* v. *Velliappa Textiles Ltd.* AIR 2004 SC 86 at p. 104, para 51.

42 *Id.*, Vol. 11(1), para 35.

Again in 19 *Corpus Juris Secundum*, para 1363 it has been observed as under:[43]

> A corporation may be criminally liable for crimes which involve a specific element of intent as well for those which do not, and, although some crimes require such a personal, malicious intent, that a corporation is considered incapable of committing them, nevertheless, under the proper circumstances the criminal intent of its agent may be imputed to it so as to render it liable, the requisites of such imputation being essentially the same as those required to impute malice to corporations in civil actions.

The question of criminal liability of a juristic person has troubled Legislatures and Judges for long. Though, initially, it was supposed that a Corporation could not be held liable criminally for offences where mens rea was requisite, the current judicial thinking appears to be that the *mens rea* of the person in-charge of the affairs of the Corporation, the 'alter ego', is liable to be extrapolated to the Corporation, enabling even an artificial person to be prosecuted for such an offence.[44] The companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are incapable of possessing the necessary *mens rea* for the commission of criminal offences. The legal position in the United States and England, Canada, France and Germany and India has now crystallized to leave no manner of doubt that a corporation would be liable for crimes of intent.

In the year 1909, the United States Supreme Court in *New York Central & Hudson River Railroad Co.* v. *United States* stated the principle thus:[45]

> It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offences, of which rebating under the federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. If it were not so, many offences might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.
>
> We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that inter-State commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a

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43 See *Iridium India Telecom Ltd.* v. *Motorola Inc.* (2011) 1 SCC 74 at p. 94. *Available at*, http://legalperspectives.blogspot.in/2010/11/liability-of-corporations-law-revisited.html. (last accessed 15 November 2013).

44 *Esso* v. *Udharam Bhagwandas Japanwalla*, (1975) 45 Com Cases 16 (Bom - DB).

45 53 L Ed 613 at 622.

> corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.

The aforesaid view is reiterated in the 19 *American Jurisprudence* 2d para 1434 in the following words:[46]

> Lord Holt is reported to have said (Anonymous, 12 Mod 559, 88 Eng Reprint 1164) that 'a corporation is not indictable, but the particular members of it are'. On the strength of this statement it was said by the early writers that a corporation is not indictable at common law, and this view was taken by the courts in some of the earlier cases. The broad general rule is now well established, however, that a corporation may be criminally liable. This rule applies as well to acts of misfeasance as to those of nonfeasance, and it is immaterial that the Act constituting the offence was ultra vires. It has been held that a de facto corporation may be held criminally liable.
>
> As in case of torts the general rule prevails that a corporation may be criminally liable for the acts of an officer or agent, assumed to be done by him when exercising authorized powers, and without proof that his act was expressly authorized or approved by the corporation. A specific prohibition made by the corporation to its agents against violation of the law is no defence. The rule has been laid down, however, that corporations are liable, civilly or criminally, only for the acts of their agents who are authorized to act for them in the particular matter out of which the unlawful conduct with which they are charged grows or in the business to which it relates.

It is also appropriate to make reference to a decision of the United States Supreme Court. The judgment was rendered in *United States* v. *Union Supply Company* by Justice Holmes. There was an indictment of a corporation for willfully violating the sixth section of the Act of Congress of 1902 and any person who willfully violates any of the provisions of this Section shall, for each such offence, be liable to be punished with fine not less than fifty dollars and not exceeding five hundred dollars, and imprisonment for not less than 30 days, nor more than six months. It is interesting to note that for the offence under Section 5, the Court had discretionary power to punish by either fine or imprisonment, whereas under Section 6, both punishments were to be imposed in all cases. The plea of the company was rejected and it was held: [47]

> It seems to us that a reasonable interpretation of the words used does not lead to such a result. If we compare Section 5, the application of one of the penalties rather than of both is made to depend, not on the character of the defendant, but on the discretion of the Judge; yet, there, corporations are mentioned in terms. And if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean, on that account, to let the defendant escape.

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46 *Iridium India Telecom Ltd.* v. *Motorola Inc.* (2011) 1 SCC 74 at p. 97, para 56.

47 54 Law. Ed. 87. Also see: *Standard Chartered Bank* v. *Directorate of Enforcement* AIR 2005 SC 2622 at p. 2636 para 54.

The Courts in England have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the 'alter ego' of the company / body corporate, i.e., the person or group of person that guide the business of the company, would be imputed to the corporation. It may be appropriate at this stage to notice the observations made by the MacNaughten, J. in the case of *Director of Public Prosecutions* v. *Kent and Sussex Contractors Ltd.*:[48]

> A body corporate is a 'person' to whom, amongst the various attributes it may have, there should be imputed the attribute of a mind capable of knowing and forming an intention - indeed it is much too late in the day to suggest the contrary. It can only know or form an intention through its human agents, but circumstances may be such that the knowledge of the agent must be imputed to the body corporate. Counsel for the respondents says that, although a body corporate may be capable of having an intention, it is not capable of having a criminal intention. In this particular case the intention was the intention to deceive. If, as in this case, the responsible agent of a body corporate puts forward a document knowing it to be false and intending that it should deceive, I apprehend, according to the authorities that Viscount Caldecote, L.C.J., has cited, his knowledge and intention must be imputed to the body corporate.

The principle has been reiterated by Lord Denning in the case of *H.L. Bolton (Engg.) Co. Ltd.* v. *T.J. Graham & Sons Ltd.* in the following words:[49]

> A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company. That is made clear in Lord Haldane's speech in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*[50] (AC at pp. 713, 714). So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company themselves guilty.

The aforesaid principle has been firmly established in England since the decision of House of Lords in *Tesco Supermarkets Ltd.* v. *Nattrass*. In stating the principle of

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48 1944 KB 146. (1944) 1 All ER 119 (DC). Also see: *Iridium India Telecom Ltd.* v. *Motorola Inc.* (2011) 1 SCC 74 at p. 98, para 60.

49 (1956) 3 All ER 624 (CA). Also see: *Iridium India Telecom Ltd.* v. *Motorola Inc.* (2011) 1 SCC 74 at p. 99, para 61.

50 (1914-15) All ER Rep 280 (HL). Also see: *Iridium India Telecom Ltd.* v. *Motorola Inc.* (2011) 1 SCC 74 at p. 99, para 61.

corporate liability for criminal offences, Lord Reid made the following statement of law:[51]

> I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.

Hence when the question is of attributing the act or state of mind of an individual to a company, different rules would have to be invoked in different circumstances depending upon a number of factors.[52] It has been opined in *Attorney General's Reference* that on a charge of manslaughter by gross negligence, a non-human defendant, such as a corporation, could not be convicted in the absence of evidence establishing the guilt of an identified human individual for the same crime. As a matter of general observation, the court said:[53]

> Large companies should be as susceptible to prosecution for manslaughter as one-man companies. Where the ingredients of a common law offence were identical to those of a statutory offence, there was no justification for drawing a distinction as to liability between the two and the public interest required the more emphatic denunciation of a company involved in a conviction for manslaughter.

The decision of Canadian Courts regarding the criminal liability of Corporations have developed in a way very analogous to the English case law and indeed in some instances based on it. The Courts have used 'alter ego' doctrine to attribute *mens rea* offences to Corporation and this doctrine was finally established by a decision of the Canadian Supreme Court in *Canadian Dredge and Dock Company* v. *R*[54] that not only the Board of Directors would be seen as the directing mind of a company but also the Managing Director or any other person to whom authority has been delegated by the Board and it suffices that the acts has been committed by a person on behalf of and within the capacity of Corporation.

Under the Regime of the 1992 French Code Penal and General part of the Code lists in detail all the possible sanctions that can be applied to Corporations. Corporations

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51 (1971) 2 All ER 127. Also see: *Iridium India Telecom Ltd.* v. *Motorola Inc.* (2011) 1 SCC 74 at p. 99, para 62.

52 *Meridian Global Funds Management Asia Ltd.* v. *Securities Commission*, (1995) 2 BCLC 116 (PC).

53 (No. 2 of 1999) *Times*, February 29, 2000 (CA). Also see: *Supra* note 165, at pp. 373-74.

54 (1985) 11 RCSC 662. Also see: *Assistant Commissioner, Assessment-II* v. *Velliappa Textiles Ltd.* AIR 2004 SC 86 at p. 102, para 52.

can be fined to five times the maximum for individual offenders. For repeated offence the maximum is 10 times. Besides fines, numerous other types of sanctions are possible: dissolution of the Corporation, disqualification from carrying on specific economic activities, closing down plants that have been used to commit the offence charged, publication of the judgement. Corporations can even be temporarily placed under judicial supervision. It is generally accepted that the amount of the fine should be such as to encompass the proceeds from crime and needs to have a deterrent effect as to hold otherwise would create a de facto incentive for crime. Under the German law heavy fines are provided for corporate crimes and there is a specific provision that the amount of fine should be increased if they are less than the ill-gotten gains.[55]

So far as India is concerned, the legal position has been clearly stated by the Constitution Bench judgment of the Supreme Court in the case of *Standard Chartered Bank Vs. Directorate of Enforcement*[56] in which it overruled its earlier decision in the case of *Assistant Commissioner, Assessment-II* v. *Velliappa Textiles Ltd.*[57] On a detailed consideration of the entire body of case laws in this country as well as other jurisdictions, it has been observed as follows:[58]

> There is no dispute that a company is liable to be prosecuted and punished for criminal offences. Although there are earlier authorities to the effect that corporations cannot commit a crime, the generally accepted modern rule is that except for such crimes as a corporation is held incapable of committing by reason of the fact that they involve personal malicious intent, a corporation may be subject to indictment or other criminal process, although the criminal act is committed through its agents.

This Court also rejected the submission that a company could avoid criminal prosecution in cases where custodial sentence is mandatory. K.G. Balakrishnan, J. (as His Lordship then was), speaking for the majority, summarized the law thus; [59]

> As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such a discretion is to be read into the section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake a series of

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55 Guy Stessens, "Corporate Criminal Liability: A Comparative Perspective", *International and Comparative Law Quarterly*, Vol. 43, 493 (1994).

56 (2005) 4 SCC 530.

57 AIR 2004 SC 86.

58 *Supra* note 56, p. 541, para 6.

59 *Id.*, at p. 549, para 31.

> activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.
>
> We hold that there is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment (sic and fine). We overrule the views expressed by the majority in Velliappa Textiles on this point and answer the reference accordingly. Various other contentions have been urged in all appeals, including this appeal, they be posted for hearing before an appropriate Bench.[60]

The Supreme Court has reiterated the above mentioned decision in the case of *Madhumilan Syntex Ltd.* v. *Union of India* and held that[61]

> It is no doubt true that Company is not a natural person but 'legal' or 'juristic' person. That, however, does not mean that Company is not liable to prosecution under the Act. 'Corporate criminal liability' is not unknown to law. The law is well settled on the point and it is not necessary to discuss it in detail. We may only refer to a recent decision of the Constitution Bench of this Court in Standard Chartered Bank & Ors. v. Directorate of Enforcement & Ors. In Standard Chartered Bank, it was contended on behalf of the Company that when a statute fixes criminal liability on corporate bodies and also provides for imposition of substantive sentence, it could not apply to persons other than natural persons and Companies and Corporations cannot be covered by the Act. The majority, however, repelled the contention holding that juristic person is also subject to criminal liability under the relevant law. Only thing is that in case of substantive sentence, the order is not enforceable and juristic person cannot be ordered to suffer imprisonment. Other consequences, however, would ensue, e.g. payment of fine etc.

In *Iridium India Telecom Ltd.* v. *Motorola Inc.*,[62] the Supreme Court reiterated its earlier decision of Standard Chartered Bank and held that the observations made by the constitutional bench in the latter case "leave no manner of doubt that a company / corporation cannot escape liability for a criminal offence, merely because the punishment prescribed is that of imprisonment and fine."

5. Conclusion

To conclude, as far as criminal liability is concerned, even though the Indian law has followed the same principles as laid down in the English law but still there is much more to do. The Indian judiciary has to apply the direct mind theory to held the corporations liable under the criminal law which in very few selected cases the English and the Dutch court did. Even though the Apex Court has applied the same theory in the case of Sahara India Pariwar Investor fraud case for denying the bail application of its chairman. However, its too early to comment whether the Apex Court will apply the theory in toto or not. As far as civil liability is concerned the

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60 *Id.*, at 550, para 32.

61 *Madhumilan Syntex Ltd.* v. *Union of India* AIR 2007 SC 1481 at p. 1486, para 24.

62 (2011) 1 SCC 74 at p. 101, para 66.

parameters of compensation are far less than determined by English and American Court in their countries which ultimately results into bad name to the Indian legal system, fro example the case of Bhopal Gas disaster case.

The author is of the considered opinion that the Indian judiciary need to change its approach towards the TNCs and it should not treat TNCs at par with any small company or industry while deciding its criminal and civil liability. The lack of stringent approach towards the TNCs amounts to not only increase in their economic power but it also gives them power to dominate employees, customers, stakeholders/shareholders and so on, which further leads to another debate that whether the TNCs are exercising the powers of a sovereign?

CYBER STALKING AND LEGISLATIVE PROVISIONS IN INDIA

Dr. Amita Verma*

1.1 Introduction

Stalking refers to harassing or threatening behaviour that an individual engages in repeatedly towards another person.[1] In quasi-legal terms, stalking can be defined as a 'willful course of conduct' that 'actually causes' the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested and that would cause a 'reasonable person' to feel so.[2] These actions can include (but are not limited to) following, verbal threats, repeated phone calls, hang up calls, spying, harassment, bothering the friends, family, and/or co-workers of the victim, letters and notes, e-mail, hiding outside your house, etc.

Though stalking is not a violent crime, yet it may escalate to serious forms of crime. But again these are separate crimes with separate charges. Stalking does not amount to breaking and entering, battery, assault, pedophilia, child pornography, or any other such like crime. Stalking is a vivid example of how the internet can provide new opportunities for committing crimes and can create completely new forms of crime. Victims can be stalked on the internet through a variety of means. Receiving unsolicited e-mails containing obscene or threatening messages, having invasive, defamatory or even pornographic images posted on the web or distributed widely through e-mails or even taking over a victims' computer are all means used to stalk in cyberspace.

Cyberstalkers target their victims through chat rooms, message boards, discussion forums and e-mail. Cyberstalking takes many forms such as: threatening or obscene e-mail; spamming (in which a stalker sends a victim a multitude of junk e-mail); live chat harassment called flaming; leaving improper messages on message boards or in guest books; sending electronic viruses; sending unsolicited e-mail; and electronic identity theft. Stalking and harassments are problems that many people especially women, are familiar with in real life. There are just as many predators in cyberspace as outside and only their methods that have changed. Some predators might harass you by trailing around after you in live channels pestering you with email messages. In other cases this harassment may become a systematic campaign; where the harasser bombards with threatening messages of hate and obscenities. Although distressful enough, the situation can even escalate to the point where the harasser traces the home address and telephone number; causing to face not just emotional

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1 "*A Citizen's Guide to Stalking*" published by the Michigan Women's Commission at *http://members.aol.com/aardvarc1/ stalking/stalking.htm* Last assessed 17-5-2014.

2 Nandan Kamath, "*Law relating to Computers, internet and E-commerce- A guide to Cyber law*", pp. 318-19 (2000)

distress but also physical danger. It is not surprising that the bad guys are making use of this wonderful technology to harass people and prey on the innocent.

Women form a major part of victims of cyberstalking, who are stalked by men, or children who are stalked by adult predators. The cyberstalking victim is usually inexperienced online. Cyberstalkers lurk in chat rooms just as pedophiles lurk near schoolyards. Cyberstalking, which is simply an extension of the physical form of stalking, is where the electronic mediums such as the internet are used to pursue, harass or contact another in an unsolicited fashion. Most often, given the vast distances that the internet spans, this behaviour will never manifest itself in the physical sense but this does not mean that the pursuit is any less distressing. There are a wide variety of means by which individuals may seek out and harass individuals even though they may not share the same geographic borders, and this may present a range of physical, emotional, and psychological consequences to the victim.[3]

Online stalking can be a terrifying experience for victims, placing them at risk for psychological trauma and possible physical harm. Cyberstalking shares important characteristics with offline stalking. Many stalkers "online or offline" are motivated by a desire to exert control over their victims and engage in similar types of behavior to accomplish this end. In many cyberstalking cases, the cyberstalker and the victim had a prior relationship, and the cyberstalking began when the victim attempted to break off the relationship. The lack of face-to-face interaction with their victims can encourage someone who would not ordinarily behave in such a fashion to act out their fantasies. The only recourse left to the victim is to take the responsibility for being a member of this community, and protect one's self.[4]

1.2 Cyberstalking

Cyber stalking is one of the most talked about net crimes in the modern world. The Oxford dictionary defines stalking as "pursuing stealthily." Cyber stalking involves following a person's movements across the Internet by posting messages (sometimes threatening) on the bulletin boards frequented by the victim, entering the chat-rooms frequented by the victim, constantly bombarding the victim with emails etc. Cyber Stalking usually occurs with women, who are stalked by men, or children who are stalked by adult predators or paedophiles. Typically, the cyber stalker's victim is new on the web, and inexperienced with the rules of netiquette & Internet safety. Their main targets are the mostly females, children, emotionally weak or unstable, etc. It is believed that Over 75% of the victims are female. The motives behind cyber stalking have been divided in to four reasons, namely, for sexual harassment, for obsession for love, for revenge and hate and for ego and power trips. Cyber stalkers target and harass their victims via websites, chat rooms, discussion forums, open publishing

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3 Wayne Petherick, *"Cyber-Stalking: Obsessional Pursuit and the Digital Criminal"* at <*http://www.crimelibrary.com/criminal_mind/psycholohy/cyberstalking/1.html*> Last assessed 10-6-2014.

4 Barbara Jenson , *"Cyberstalking: Crime, Enforcement and Personal Responsibility in the On-line World"* at *http://www.stopnetabusers.org/resources/links.html* Last assessed 10-6-2014.

websites (e.g. blogs and Indy media) and email. The availability of free email and website space, as well as the anonymity provided by these chat rooms and forums, has contributed to the increase of cyber stalking as a form of harassment.

Stalking is a problem that many people especially women, are familiar with in real life. But this problem can occur on the internet as well, which is cyberstalking or online harassment. The fact that cyberstalking does not itself involve physical contact may create the perception that it is not as serious as physical stalking. This is not necessarily true. As the internet becomes an even more integral part of our personal and professional lives, stalkers can take advantage of the ease of communications, the net's intrusive capabilities, as well as increased access to personal information. Whereas a potential stalker may be unwilling or unable to confront a victim in person or on the telephone, he or she may have little hesitation sending harassing or threatening electronic communications to a victim, hiding behind some virtual alias. Finally, as with physical stalking, online harassment and threats may be a prelude to more serious behaviour, including physical violence. It is true that both men and women may be stalked online, but statistics show that the majority of victims are female. Women are the minority of the internet population and as a result, there is generally fierce competition between male users for their attention.[5]

There are a number of definitions offered in the literature and laws, the common elements of the definitions seem to be:

1. repeated and unwanted behaviors whereby one individual attempts to contact another individual, and
2. the behavior causes the victim to feel threatened or harassed.

Most definitions do not require explicit threats of harm or violence. Nor is there any requirement that the stalker intends to cause the victim to feel harassed or threatened. Consistent with this, the term "cyberstalking" refers to situations where someone pursues and repeatedly attempts to contact someone via the internet through various means such as e-mail, chat rooms, instant messaging, bulletin boards, web-based discussion forums, Internet Relay Chat, and/or Usenet groups and the pattern of behavior results in the victim feeling harassed or threatened. Cyberstalking and cyber harassment may also involve signing the individual up for mail lists so that they receive objectionable material or attempting to gain control of the victim's computer or hardware.[6]

Many authors, (Laughren, 2000; Ellison & Akdeniz, 1998; CyberAngels, 1999; Dean, 2000; Ogilvie, 2000) have defined cyberstalking, as the use of electronic communication including, pagers, cell phones, emails and the internet, to bully, threaten, harass, and intimidate a victim.[7]

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5 *Ibid.*

6 "*What is Cyberstalking*" at *http://www.cyber-stalking.net/stalking .html* Last assessed 10-7-2014.

7 Angela Maxwell, "*Cyberstalking*" at *http://www.netsafe.org/resources_stalking.asp* Last assessed 10-7-2014.

Ellison (1999) suggests, cyberstalking can be classified as the type of electronic communication used to stalk the victim and the extent to which the communication is private or public. Cyberstalking can be defined as threatening behavior or unwanted advances directed at another using the internet and other forms of online communications.[8] It's when an online incident spirals so out of control it gets to a point where a victim fears for his or her life.[9] Cyberstalking occurs when electronic mediums such as the internet are used to pursue, harass or contact another in an unsolicited fashion.[10] Many stalkers are motivated by a desire to exert control over their victims.[11] Online harassment can take the form of threatening or obscene email; spamming; chat-room harassment or flaming; improper or threatening messages posted to message boards; and even electronic identity theft.[12]

There is a distinct difference in "Online cyberstalking" and "Offline stalking." With Offline stalking, you will find that most are men and most of their victims are women who have met them before. Online cyberstalking can be carried out in places as close as the same room as the victim, or as far away as another state. Because we seem to have the latest technology available to us at any given time, it makes it easier for stalkers to harass their victims because they do not need to physically confront them.[13]

Similar to stalking offline, online stalking can be a terrifying experience for victims, placing them at risk of psychological trauma, and possible physical harm. Many cyberstalking situations do evolve into offline stalking, and a victim may experience abusive and excessive phone calls, vandalism, threatening or obscene mail, trespassing, and physical assault.

1.2.1 Types of Cyberstalking

There are three primary ways in which Cyberstalking is conducted:

- E-mail stalking: Direct communication through email
- Internet stalking: global communication through the internet
- Computer stalking: unauthorized control of another person's computer.[14]

1.2.1 Cyberstalking-Victims and Stalkers

1.2.1.1 Victims

The victims of cyberstalking are average people who use the internet. Normally these are the people who use discussion groups, chat rooms, and bulletin boards where

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8 *Ibid.*

9 Hitchcock, "*Computer & internet Related Crime Cyberstalking and Harassment*" *http://www.infotoday.com/index.html* visited on 11-6-2014.

10 "*Cyber-Stalking: Obsessional Pursuit and the Digital criminal*," at *http://www.crimelibrary.com/criminology/cyberstalking/1.html* Last assessed 11-6-2014.

11 "*Cyberstalking*", at <*http://cyberguards.com/CyberStalking.html*> Last assessed 11-6-2014.

12 Lisa Szucs, "*Cyberstalking Safety Tips*" at *http://www.techtv.com* Last assessed 11-6-2014.

13 "*Cyberstalking*", *http://www.rich-ent.com/stalking.html* Last assessed 16-6-2014.

14 Emma Ogilvie, "*CyberStalking*", at *http://www.aic.gov.au* Last assessed 16-6-2014.

their personal information is readily available. Victims also include people who know each other physically. Just as in real life, the victims of cyberstalking are generally women stalked by men. Abused women followed into the cyber world by their assailants who can then secretly watch them without their knowledge. This allows the stalker to threaten, impersonate and discredit the victim on the internet. Victims of cyberstalking are just as scared as those being stalked in the real world. In fact, even in the absence of a physical threat, the psychological torment for the victim is enormous. Victims suffer as much, if not more, as those being stalked physically. They often have symptoms that include nightmares, hyper-vigilance, stress, a feeling of being out of control and a loss of personal safety. Cyberstalking ends fairly frequently in physical stalking, which can lead to physical injury or even death. Cyberstalking is potentially just as dangerous to the victim as a live stalker would be at the front door. A study conducted by Weber State University in Utah revealed victims of cyberstalking spend more money on self-protection measures than victims of physical stalking. Self protection measures taken by cyberstalking victims surprisingly included changing jobs, buying guns and taking time off work.[15]

1.2.1.2 Cyberstalkers

The stalker is usually a person with a low self-esteem, paranoia, and a person who likes to dominate. However, the stalker can be a person who was simply made angry on the internet. The most common reason for cyberstalking results from the stalker feeling that the victim has hurt him/her and therefore he/she is out for revenge. Stalkers who have low self-esteem and paranoia are often the ones in this category. They are the ones who believe everyone is after them so they go after everyone with the motive to control and take over those people's lives. In one situation, a man thought two girls on the same university campus were making fun of him when in fact they did not even know him. He found their email addresses on the university website and began sending them threatening messages. Sometimes he sent four or five a day with various messages attached. One message contained the number 187 written hundreds of times on a single page. The number is the section in the California Penal Code for murder.

The other common cyberstalker is the one who has been made angry on the internet. This kind of stalker is one of the most dangerous because he is out to get revenge. This is frequently the stalker who impersonates the victim and posts messages on the internet that degrade and hurt the victim. If this kind of stalker gets the victims phone number and address, he is the one who leaves posts with their phone number and address saying they fantasize of being raped and people can come rape whenever they have the desire. This hurts and scares the victim, precisely the stalkers intention.

A cyberstalker can dupe other internet users into harassing or threatening a victim by utilizing internet bulletin boards or chat rooms. For example, a stalker may post a controversial or enticing message on the board under the name, phone number, or e-mail address of the victim, resulting in subsequent responses being sent to the victim.

[15] http://onlineinvestigations.com.au/cybercrime-study-cyberstalking-victims-spend-more-money-protecting-themselves-than-victims-of-physical-stalking/ Last assessed 11-7-2014.

Each message whether from the actual cyberstalker or others will have the intended effect on the victim, but the cyberstalkers effort is minimal and the lack of direct contact between the cyberstalker and the victim can make it difficult for law enforcement to identify, locate, and arrest the offender.

Unknown to the target, the perpetrator could be in another state, around the corner, or in the next cubicle at work. The perpetrator could be a former friend or lover, a total stranger met in a chat room, or simply a teenager playing a practical joke. The inability to identify the source of the harassment or threats could be particularly ominous to a cyberstalking victim, and the veil of anonymity might encourage the perpetrator to continue these acts. In addition, some perpetrators, armed with the knowledge that their identity is unknown, might be more willing to pursue the victim at work or home, and the internet can provide substantial information to this end. Numerous websites will provide personal information, including unlisted telephone numbers and detailed directions to a home or office. For a fee, other websites promise to provide social security numbers, financial data, and other personal information.

1.3 Places of Cyberstalking

The online user is vulnerable in primarily three areas. The areas include live chat or internet relay chat lines, message boards or newsgroups and the users e-mail box.

Live Chat: Live chat harassment occurs when the victim is sabotaged electronically. An example is flooding the victim's internet chat channel to disrupt their conversation.

Message Boards: A cyberstalker can dupe other users into harassing or threatening a victim by using message boards.[16] For example, a cyberstalker could post a controversial or enticing message on the board under the name, phone number, or e-mail address of the victim, resulting in responses being sent to the victim.

E-Mail: A cyberstalker may send repeated, threatening or harassing messages to the victims e-mail box.

1.4 Classification of Stalkers

Cyber Stalker can be classified into three heads:

1. Common obsessional cyber stalker: The common obsessional stalker refuses to believe that their relationship is over. Do not be misled by believing this stalker is harmlessly in love.
2. Delusional cyber stalker: They may be suffering from some mental illness like schizophrenia etc and have a false belief that keeps them tied to their victims. They assume that the victim loves them even though they have never met. A delusional stalker is usually a loner and most often chooses victims who are married woman, a celebrity or doctors, teachers, etc. Those in the noble &

16 "*Cyberstalking*", at *http://cyberguards.com/CyberStalking.html* Last assessed 17-6-2014.

helping professions like doctors, teachers etc are at often at risk for attracting a delusional stalker. Delusional stalkers are very difficult to shake off.

3. Vengeful cyber stalker: These cyber stalkers are angry with their victim due to some minor reason- either real or imagined. Typical examples are disgruntled employees. These stalkers may be stalking to get even and take revenge and believe that "they" have been victimized. Ex-spouses can turn into this type of stalker.

According to the Los Angeles Police Department's Threat Management Unit, Zona and colleagues (1993; 1998) categorized stalkers in four categories based on different perceptions of stalkers as simple obsessional, erotomanic, love obsessional, false victimisation syndrome.[17]

1.5 Indian Legislative Provisions

India is at the threshold of tremendous growth in the internet industry. As the penetration of internet is growing, new and complex issues concerning cyberlaw are emerging. Cybercrime is one particular area where one is seeing a great deal of activity. Cyberstalking is one of the latest crimes that have emerged in India.

A critical analysis of the elaborate definitions of violence against women under various international instruments clearly indicates that various aspects of the new universal danger of cyber violence against women to which women in any corner of the world are directly and very easily exposed, which is equally, if not more damaging, than the conventional form of violence, has not been taken not of even by the United Nations Beijing +5 Outcome Documents, 2000. Since such a crime against women was already proliferating, the said Documents should have take a specific note of it and devote particular attention to its social and legal aspects in the interest of the vulnerable half of the humanity, i.e., women all over the world. Further, under international law, it is regrettable that there is no international instrument which deals with cyber violence against women as such, nor the phenomenon is defined anywhere. Various countries have different laws relating to stalking and some states of the United States of America have cyberstalking legislations. However, in India there is no specific legislation relating to cyberstalking in Information Technology Act, 2000 but with the Information Technology (amendment) Act, 2008, we have specific provision for such types of crimes under section 66A and Criminal Law Amendment Act, 2013 under section 354D.

Ritu Kohli's case is India's first case of cyber stalking, which was registered by Economic Offences Wing of Delhi Police under Section 509 IPC for outraging the modesty of a woman. As reported, a disgruntled colleague of the husband of Mrs. Ritu Kohli started chatting on the internet through the website www.mirc.com, under the identity of Ritu Kohli, using obscene language. He was distributing Ritu Kohli's residence telephone number to net users and inviting them to chat with her on telephone. The matter came to light when Ritu Kohli started receiving obscene phone

[17] "*What is Cyberstalking*", at *http://onour.com/stalking/definiti.htm* Last assessed 17-6-2014.

calls from different quarters from India and abroad. On inquiry from the callers, it was found that the telephone number was obtained from the net. The matter was then reported to the police. The police asked Ritu Kohli to log on to the website as a male and chat with the person, who called himself Ritu Kohli. The police was therefore able to trace the relevant IP address, the telephone number of the offender and catch him. Delhi Police arrested Manish Kathuria in India's first case of cyberstalking.

The case of Ritu Kohli[18] raises the crucial question as to what exactly is Cyberstalking? Cyberstalking is defined as unwarranted, threatening behavioral patterns or advances directed by one internet user against another user with the purpose of harassing the other user, by using the medium of internet. Cyberstalking is a relatively new phenomenon.

Chapter IX of the IT Act, 2000, contains the definitions of some cybercrimes but Cyberstalking is not covered. In some cases it follows under section 67 of IT Act 2000. But the Information Technology (Amendment) Act, 2008 under Section 66A covers sending of offensive messeages.

Section 66A Punishment for sending offensive messages through communication service, etc[19]

Any person who sends, by means of a computer resource or a communication device,-

a) any information that is grossly offensive or has menacing character; or

b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes by making use of such computer resource or a communication device,

c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages shall be punishable with imprisonment for a term which may extend to two three years and with fine.[20]

Explanation: For the purposes of this section, terms "Electronic mail" and "Electronic Mail Message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.

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18 Cyber law expert Pawan Duggal said victims have been denied justice in the past. In one of the first cases of cyberstalking in the country in 2000, which he worked on, Delhi police booked Manish Kathuria for "intending to insult the modesty of a woman". Kathuria pretended to be Ritu Kohli, the wife of his former colleague, in internet chat rooms, made her phone number public and solicited sex. Though police tracked him down, the lack of specific laws meant he got off lightly.

19 Information Technology Amendment Act, 2008.

20 Section 66A of the IT Act deals with cyberstalking. "A person who repeatedly sends emails can be booked under 66A, but not many know this," said advocate Vakul Sharma. Recently, Chennai police used 66A to book people who stalked singer Chinmayi.

The best way to stop electronic harassment is to make laws prohibiting it. Unfortunately, the IT Act, 2000 contains no provisions addressing this issue. Until the government takes action to protect users, users must take action to protect themselves. For such crimes, it is possible to prevent them by making small efforts like awareness and education to all internet users. In India, people have faced problems of stalking and harassment but no such problem has been publicized. But Now after the Criminal Law Amendment Act 2013, the provision of stalking has been incorporated under Criminal Law.[21]

Stalking section 354D (1) Any man who-

(i) Fellows a woman and contacts or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or

(ii) Monitors the use by a woman of the Internet, email or any other form of electronic communication, commits the offence of stalking

Provided that such conduct shall not amount to stalking if the man who pursued it prove that-

(i) It was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or

(ii) It was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or

(iii) In the particular circumstances such conduct was reasonable and justified.

(2) whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

There is an instance after the enforcement of Criminal Law Amendment Act, 2013. A woman who posted an update on her social networking page saying she was going to the mall, was shocked to see that a person she didn't know replied, calling her a prostitute. The cyberstalker kept posting obscene messages. When she left the site, he followed her to another one.

Such cases aren't rare and India is finally waking up to cyberstalking with the Criminal Law (Amendment) Act, 2013, saying that stalking includes monitoring of a person's use of internet, email and electronic communication.

This is the first time India is tackling cyberstalking directly and attempting to make it a nonbailable offence. Section 354D says that anyone who monitors an individual's electronic communication and causes fear or distress is guilty of stalking, just as they are if they follow or attempt to contact them in the real world. The offender could get

[21] Notified on 2nd April, 2013, Criminal Law Amendment Act, 2013, Under Section 354 D.

a fine and three years in jail. This was drafted following the brutal Delhi gang-rape and the subsequent clamour for a strict law on sexual assault.

The downside is the exceptions under section 354D. "If the offender proves stalking was done to prevent crime, it is not stalking. This could be misused by law enforcers."

Another exception is that it is not stalking if the offender can show it was "reasonable under the circumstances." "Every stalker will say he or she was 'reasonable'."[22]

From the above it is assessed that cybercrime, cyberlaw are still in infancy and the people generally are not much prepared to take the challenges head on. Even the judiciary and advocates are not yet equipped to tackle the burgeoning menace of cybercrime. The software professional though knowledgeable about the intricacies of the cyberspace have little knowledge of the legal provisions on this matter. The need therefore, is to create awareness among all walks of life where cyberspace is used about not only various forms of crime on cyberspace but also the legal remedies and preventive measures. Unless serious steps are taken on the issue, no matter how effective legal measures are taken, the result will not be as good as it can be with wide and effective awareness of all the issues involved in cyberspace and cybercrime.

1.6 Elementary Problem

The elementary problems, which are associated with Cyber-Crimes, are Jurisdiction, Loss of evidence, Lack of cyber army and Cyber savy judges who are the need of the day.

Indian women netizens are still not open to immediately report the cyber abuse or cyber crime. The biggest problem of cyber crime lies in the modus operandi and the motive of the cyber criminal. Cyber space is a transit space for many people, including offenders. While people do not live in cyber space, they come and go like any other place. This nature provides the offenders the chance to escape after the commission of cyber crime. Many websites and blogs provide security tips for the safety of women and children in the net. But still then cybercrime against women are on rise. In reality it is seen many chat friends enjoy teasing their women friends by words such as "sexy," "attractive" which are the virtual beginning of cyber obscenity. They slowly take their female friends into confidence and start discussing about their own problems like a true friend. Hence in many occasions they are successful in turning the net friendship into a strong bond and gradually proceed to send obscene or derogatory remarks. If the recipient shies away, the sender of such messages would become more encouraged to continue. The problem would be solved only when the victimised woman then and there report back or even warn the abuser about taking strong actions.[23]

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22 Times of India dated March 18, 2013, Section Times City, http://epaper.timesofindia.com/Repository/ml.asp?Ref=VE9JQ0gvMjAxMy8wMy8xOCNBcjAwNDAy Last assessed 11.7.2014.

23 http://www.cyberlawtimes.com/articles/103.html Last assessed 11-7- 2014.

Justice Chandrashekhar Dharmadhikari committee has also suggested that there is an urgent need to impose restrictions on objectionable material which is easily available on the Internet as it has the tendency to "corrupt young minds" and there should be immediate restrictions on "networking, Facebook, mobile phone and vulgar and indecent conversations and exchange of pictures."[24]

1.7 Conclusion

This paper highlights that Cybercrime has grown proportionately to the growth of Internet. India has been given the status of sufficiently equipped as compared to the developed nations where the use of IT is much advanced than the developing countries like India. Indian parliament has adopted two-fold strategy to control Cybercrimes. It has amended Indian Penal Code to cover Cybercrimes expressly and has provided provisions in the IT Act, to deal with Cybercrime. But the Act is not comprehensive, as it has very limited objective and has e-commerce in focus.

It is concluded that the need is not only to have appropriate legal provisions for Cybercrime but also creating awareness among general public and the law enforcement agencies. The growth of technology in this field has been stupendous with a faster growth of Cybercrimes. There have been efforts at international and national levels to control and regulate cybercrime but these efforts have not proven to be sufficient so far and the result is that Cybercrime is many steps ahead of any such attempts. So, Cyberstalking involves a variety of different approaches, including personal prevention strategies, legislative interventions and technological solutions to current technological flaws. On the whole, women are more exposed to the new 21st Century "computer age" exploitation, virtual-harassment and cyber-violence such as cyber- stalking, etc., with no safeguards under the international law and even national legislation in India to provide protection against such a "modern" violation of their human rights.

In the end Prevention is better than cure.

[24] http://zeenews.india.com/news/maharashtra/regulate-internet-to-curb-crime-against-women_831188.html Last assessed 23-7-2014.

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(See Rule 8 of the *Registration of News Papers (Central) Rules*, 1956 under the *Press and Registration of Books Act*, 1867)

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