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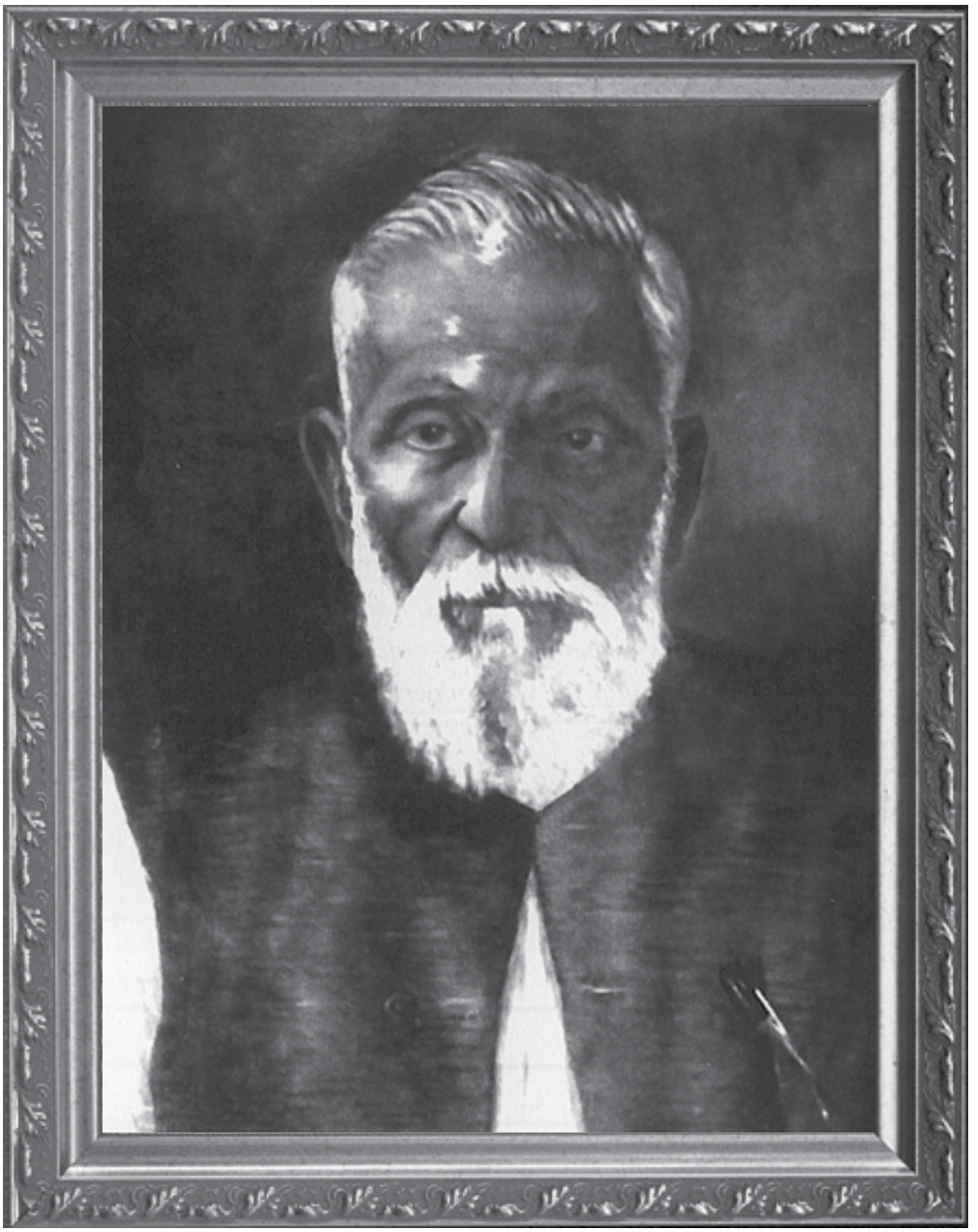

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Preventing Human Trafficking By Addressing Vulnerability: India's Legal Obligation And Failure?

Dr. Sarfaraz Ahmed Khan*

Abstract : *Millions of women are trafficked for prostitution in India and practice of inter-generation prostitutions is also not uncommon in certain communities despite India's commitments to combat trafficking under various international human rights treaties. Any attempt to combat trafficking shall be an unaccomplished goal unless serious efforts are taken to prevent trafficking. As vulnerability plays as a key factor in trafficking processes, the utmost need of the hour is to address vulnerability. While, India has failed in its legal obligation to prevent trafficking in different fronts, the recent legislative amendment to IPC to define the term 'human trafficking' also shows a lack of seriousness on the part of Government to combat trafficking. This article explores through case studies; the impact of the gruesome crime, which also called as modern-day slavery, on victims' life and vulnerability factors involved in trafficking. This article argues that India has failed in protecting human rights of the victims and that future anti-human trafficking initiatives should consider addressing vulnerability factors to prevent trafficking.*

Keywords : Protection Comunities, Trafficking, Slavery, Vulnerability.

1. Introduction:

Thousands of young adults and minor's female are trafficked for commercial sexual exploitation (CSE) in India in the guise of jobs, marriage, and friendship among others.1 There are plenty of victims who are forced into prostitution by their own near and dear ones, as transpire within communities like Nutt and Bairya – inter-generation prostitution is common among them.2 Trafficking in human beings is one of the most heinous crimes resulted in violation of the series of human rights. It has devastating effects upon the welfare of individuals, families and communities. While every effort for combating is important,

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1 * Assistant Professor – Law, West Bengal National University of Juridical Sciences. This article is revised version of the paper presented during 4th International Conference on Human Rights Education 'Global Convergence and Local Practices, held at Taiwan during 21st – 26th November, 2013.
Sen, S., & Nair, P.M. 2004.*Trafficking in Women and Children in India*, New Delhi, Orient Longman. Hereinafter referred as NHRC Report. http://nhrc.nic.in/Documents/ReportonTrafficking.pdf

2 See for detail on intergeneration prostitution Bairya's, Agrawal, Anuja. 2008. *Chaste Wives and Prostitute Sister: Patriarchy and Prostitution among the Bedias of India,* New Delhi: Routledge.

the imperative should be for preventing such crime which should invariably be involved addressing vulnerability factors.[3]

India is a party to several international human rights instruments which impose the legal obligation on the government to take positive steps to prevent trafficking of women and girls for CSE. ILC Draft article on state responsibility imposes obligation on the state to take measures to prevent any particular act from occurrence.[4] The Trafficking Protocol[5] calls upon state to have a comprehensive policy for prevention of trafficking[6] which includes addressing vulnerability.[7] Developing mechanism for prevention of trafficking was one of the strongest advice of the Human Right Council for States.[8] In fact, measures to 'reduce vulnerability, including through the provision of genuine livelihood options to traditionally disadvantaged groups' were also strongly recommended by U. N. Trafficking Principles and Guidelines.[9]

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3 See, Sarfaraz Ahmed Khan, 'Combating Sex-Trafficking between India and Bangladesh: An Integrated Reparation Model' (2017, PhD Thesis), CityU, Hong Kong, Chapter V.

4 Article 14 (3), International Law Commission (ILC), 2001. *Draft Article on Responsibility of States for Internationally Wrongful Acts,* in http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf. Latest update 12 March 2014.

5 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, GA Res. 55/25, Annex II, UN GAOR, 55th Sess., Supp. No. 49, at 53, UN Doc. A/45/49 (Vol. I) (2001), done Nov. 15, 2000, entered into force Dec. 25, 2003 (Trafficking Protocol) in http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf. latest update 1 May 2013.

6 Article 9(1) of the Trafficking Protocol.

7 Article 9 (4) of the Trafficking Protocol. It provides that, 'States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity

8 UN Human Rights Council. 2009. *"Trafficking in Persons, Especially Women and Children*". UN Doc. A/HRC/RES/11/3, June 17, 2009, In http://www.un.org/womenwatch/daw/vaw/humanrights/A_HRC_RES_11_3.pdf. Latest update 10 January 2014.

9 Gallagher, Anne T. 2011. *The International Law of Human Trafficking*. New York: Cambridge University Press. p. 418.

India's Integrated Plan of Action to Prevent and Combat Human Trafficking with Special Focus on Children and Women elaborately drafted action plan for preventing trafficking.10 However, despite being having legal obligation and express guidelines prepared by the government, India has failed to fulfil its legal obligation to prevent human trafficking by taking positive initiatives. Even the recently amended the Criminal Law (Amendment) Act, 2013 while inserted the definition of trafficking in Section 370 of the Indian Penal Code (IPC, 1860), it omitted, "… [a]buse of a position of vulnerability (APOV)," from the ambit of the definition which shows the lack of seriousness on the part of the government to deal with prevention of human trafficking seriously.11 Any prevention mechanism will be unsuccessful unless it attempts to efficiently address the vulnerability of the victims of trafficking.

The issue of vulnerability is too broad to encompass all aspects. The focus of this paper is to establish the fact that in most cases of human trafficking vulnerability plays significant role and state has a positive obligation to address vulnerability in order to prevent trafficking. In this paper first, I have analyze the seriousness of the issue of trafficking globally as well as in India. In Second Part, I have discussed vulnerability factors and their role in victimization processes. In the third part, I have discussed state legal obligation to prevent trafficking as well as addressing vulnerability. In the fourth part, I have discussed the legal framework in India for addressing human trafficking including its prevention. At last conclusion has been made highlighting failure of the Government to fulfil its positive obligation. Some suggestion has also been made to address some of the challenges.

2. The Gravity And Quantum Of The Offence Of Human Trafficking:

Human Trafficking is worst kind of organized crime wide spread throughout the globe. The gravity and quantum of the human of trafficking can be assess from the fact that the 2018 report of the Global Slavery Index estimated that 40.3 million people are enslaved throughout the world, among them around 71% are female.[12] The 2012 ILO study estimated more than 20.9 million people are its victims globally and the majority of them are girls

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10 Integrated Plan of Action to Prevent and Combat Human Trafficking with Special Focus on Children and Women, Avaiable at www.wcd.nic.in

11 The definition of trafficking is almost adopted Palermo Protocol definition but unreasonably it omitted the term APOV. See for detail discussion on the issue, Sarfaraz Ahmed Khan, *Human Trafficking, Justice Verma Committee Report and Legal Reform: An Unaccomplished Agenda,* (2014) JILI, Vol. 56, No. 4.

12 Global Slavery Index is an annual report published by International NGO, Walk Free Foundation. The report can be accessed at https://www.globalslaveryindex.org/, last visited 20th July, 2018.

and women.[13] ILO report further estimated that around 4.5 million persons are trafficked for forced prostitution.[14] The report also affirms that Asia and Pacific region, being source, transit and destination of trafficking, remain largest in terms of the number of victim, accounts for around 11.7 million or 56% of the global trafficking.[15] While it is difficult to precisely quantify whole ambit of trafficking, there is no iota of doubt that millions of girls and women are trafficked for sexual exploitation.[16] The gravity of the offence is such that it is argued that, in certain specified circumstances, the offence of human trafficking can also be considered as a crime against humanity.[17]

India is source, transit and destination for human trafficking victims. The GSI 2018 estimated around 7,989,000 people enslaved in India.18 The GSI 2016 had ranked India 4th in countries ranking having highest number of trafficking victims.19 There are various reasons for which Human Trafficking is being committed which include Commercial Sexual Exploitation, Bonded Labour and Organ Transplantation. Due to clandestine nature of organized crime of trafficking in general and sex-trafficking in particular, it is difficult to have exact estimation of number of sex-trafficking and wide variation found in many

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13 ILO Study estimates that out of 20.9 million trafficked victims around 55% of them, around 11.4 millions, are women and girls. International Labor Organisation (ILO), 2012. "*Global Estimate of Forced Labour"* in http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf. Latest update 10 May 2013.

14 Trafficking in Person Report, 2012 which had adopted *ILO 2012* (n 13) suggests that around 4.5 million person are trafficked for forced prostitution among them around 98% are women and girls. See, U.S. Department of States. 2012. *Trafficking in Person Report*, (TIP 2012), In http://www.state.gov/j/tip/rls/tiprpt/2012/. Latest update 26 May, 2013, 45.

15 The second highest number is found in Africa at 3.7 million (18%), followed by Latin America and the Caribbean with 1.8 million victims (9%). The Developed Economies and European Union account for 1.5 million (7%) forced labourers, whilst countries of Central, Southeast and Eastern Europe (non-EU) and the Commonwealth of Independent States have 1.6 million (7%). There are an estimated 600,000 (3%) victims in the Middle East. See *ILO 2012* (n 13) 16.

16 See for detail discussion; Sarfaraz Ahmed Khan (n 3, Para. 2.2.).

17 Gallagher (n 9) p. 216.

18 GSI 2018 (n 12).

19 The GSI 2016 report estimate that India is host of around 13,300,000 – 14,700,000 slaves. The defination of slavery under Global Slavery Index is too broad which include forced marriage and other categories which may not fall within human trafficking. GSI 2016 report avaiable at https://www.globalslaveryindex.org/, last visited 20th July, 2018. p. 43.

studies.[20] Despite such variations in the statistics of trafficking which is mainly because of the hidden nature of organized crime less frequently got reported, every study uniformly referred to increase occurrences of trafficking. Referring to these trends, in 1996, the UN Special Rapporteur on Sale of Children, Child Prostitution and Child Pornography stated, 'all reports indicate a dramatic escalation of the number of sexually exploited children all over the world.'21 Demand of young girls fuelled further trafficking of teens along with others victims.22 The relation between such huge number of trafficking and vulnerability is undisputable. The diverse vulnerability factors associated with human trafficking for commercial sexual exploitation shall be looking into the next part.

3. Critical Evaluation Of Vulnerability Factors In Sex-Trafficking Cases:

Diverse vulnerability factors are the major reasons for the constant increase in the number of trafficking throughout the country. Such vulnerabilities are ranges from child marriage to poverty, bigamy, sex-discrimination and illiteracy among others, and persists due to failure of the government to address them. The GSI 2018 maps 23 risk variables across five major dimensions, namely: (a) Governance Issues; (b) Lack of Basic Needs; (c) Inequality; (d) Disenfranchised Group; and (e) Effect of Conflict as major vulnerability factors.[23] In one of the study which analysis fifty cases of sex-trafficking in two states of West Bengal and Bihar reflect clear pictures of diverse vulnerability factors for trafficking.[24] Study found a large of sex-trafficking because of the practice of inter-generation prostitutions in the communities like Nutt.[25] But there were cases such as victim Bihar "N", a 14 years old

20 See for discussion on number of Sex-Trafficking in India and lack of authentic data thereof, Sarfaraz Ahmed Khan (n 3, para 2.2.1).

21 *NHRC Report* (n 1) 16.

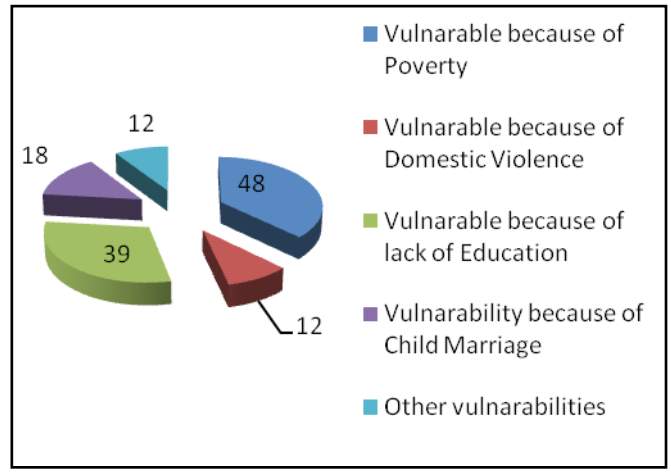
22 *NHRC Report* (n 1) 16.

23 GSI 2018 (n 12).

24 The case studies from West Bengal and Bihar reflected diverse factors associated with traficking as well as distinct manner in which trafficking taking place ranging from kidnapping to child marriage and allurement for job. In case of Bihar as majority of cases belong to members of Nutt community, it reflect factors associated with inter-generation prostitution. Indeed, in all cases their are vulnarability factors associated with even though process may differ from place to place. See, Sarfaraz Ahmed Khan, *Sex-Trafficking & Law* (2018) Satyam Law International.

25 The practiced of inter-generation prostitution is common among Nutt Community members and is well known fact through which girls are enslaved. There are many red-light areas such as Mojaffarpur, Saharsa, Forbesganj, Khabaspur, Purnia among others where some members of Nutt community are involved in intergenration prostitution. See for details, Sarfaraz Ahmed Khan (n 24) Chapter 6.

girl, was abducted when she went for 'Ganga Asnan' and victim Bihar "O" was abducted in conspiracy with her pseudo boyfriend and both of them were forced into prostitution.[26] Even among Nutt community members there are numerous example of forced prostitution such as victim Bihar M1 and her daughter M2 by the organized criminal gang members.[27] In these cases their Caste being Nutt and sex being female itself is a vulnerability factors. There are multiple vulnerability factors found in cases from West Bengal.



The case analysis of fifty sex-trafficking cases in West Bengal and Bihar found five major vulnerability factors, namely: (a) vulnerability because of poverty; (b) vulnerability because of domestic violence; (c) vulnerability because of lack of education; (d) vulnerability because of child marriage; and (e) other vulnerabilities.[28] In other vulnerabilities, study found two major phenomena such as vulnerability because of caste namely Nutt where inter-generation prostitution is in practice and the culture of dowry. Study found that most of the victims had multiple vulnerability factors, such as, Victim 'M2' was vulnerable because of poverty as well as lack of education and being a member of the Nutt community. The study found forty-eight victims were vulnerable because of poverty, while twelve for domestic violence while eighteen were

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26 See for detail, Sarfaraz Ahmed Khan (n 24) Chapter 6. Both cases clearly shows how criminal groups functions in remote areas and target vulnarable groups. Fortunately in this as because of active police officer both girls were rescued, and a case was registered being Saharsa P. S. Case No. 32/2008, U/S 366/373 IPC, 3,4,5,6 ITPA. However, facts remain that large number of similar incident never being reported.

27 Victim M1 was kidnapped when she was 12 years and sold in a brothel at Katihar. She was tortured and forced into prostitution to serve 10-20 customers very day. After two deacdes when her daughter, M2 grown up to the age of, she was forced into prostitution by same sets of traffickers. Interviews on 9th March, 2009. Researcher had several opportunities to met Victim M1 at Araria as presently she is working as community workers at one NGO working to end sex trafficking.

28 See for details, Sarfaraz Ahmed Khan (n 24, Para 6.4).

subjected to child marriage and thirty-nine due to lack of education or illiteracy.[29] It also found twelve victims vulnerable because of caste of Nutt community and practiced of inter-generation prostitution and by and large their family members forced them in prostitution.[30]

Another study of eighty sex-trafficking victims found that thirty-five victims were vulnerable because of child marriage, in thirty cases practiced of bigamy were responsible for increasing vulnerability, in seventy-five cases victims were vulnerable because of poverty and in sixty-five cases victims were vulnerable due to lack of education.[31] These data also establish the fact that decreasing vulnerability by reducing one of the components is not sufficient. As, for example, economic empowerment will reduce the vulnerability of a majority of them but they may remain vulnerable on account of their caste, cultural practices, domestic violence or lack of education. The comprehensive efforts as well as holistic approach needed to address vulnerabilities of women at risk.

4. Vulnerability Factors: Cause Of Trafficking Or Cause Of Prostitution?

The factors like poverty, lack of education, child marriage and the culture of bigamy definitely increase the vulnerability of females. But that does not imply that simply because someone is living below the poverty line, she willingly chooses prostitution as a profession. It is important to appreciate the different causes for being trafficked and ultimately being forced into prostitution. Why is it important to make a distinction between the cause of trafficking and cause for entering into prostitution? There are numerous occasions when studies of scholars on prostitution have created the impression that these vulnerability factors act as causal factors for prostitution.[32]

One study found that out of eighty cases studied, seventy-five victims were vulnerable because of poverty.[33] This vulnerability was misused by traffickers who lured them with the promise of lucrative jobs and subsequently sold them for prostitution. Thus poverty, which is a push factor, becomes instrumental in making them vulnerable, which in turn leads to trafficking and ultimately the victim is forced into prostitution. If it is said that the reason behind the seventy-five girls entering into prostitution was poverty, then technically

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29 See for details, Sarfaraz Ahmed Khan (n 24, Para 6.4).

30 See for details, Sarfaraz Ahmed Khan (n 24, Para 6.4).

31 See, Sarfaraz Ahmed Khan (n 3, Para 5.2).

32 See, K. K. Mukherjee and Deepa Das, *Prostitution in Metropolitan Cities of India* (New Delhi: Central Social Welfare Board1996) 100. Hereinafter referred to as CSWB Report.

33 See, Sarfaraz Ahmed Khan (n 3, para 5.3).

speaking, it may not be wrong, but it gives the impression that they entered into prostitution because of poverty. But the fact is completely different as none of them entered into prostitution because of poverty. They had never imagined such an exploitative life at the time when they had consented to the proposal of the traffickers.

Some of the social science literatures, while analysing the 'causes of prostitution' invariably ignore to make these distinctions.[34] The CSWB Report, which is frequently referred to for singling out the causes of prostitution, identified sixteen causes for entering into prostitution such as ill-treatment by the parent, economic distress, social custom, desertion by the spouse, dejection in love and delay in rendering justice.[35] It reflects the percentage of women who entered into prostitution because of these different factors. A plain reading of the Report may give the impression that those women become 'prostituted women' because of such reasons. But in reality, most of them were become vulnerable because of the factors which lead to their trafficking and subsequent thereto they are forced into prostitution.[36]

Accordingly, the casual factors (push factors) such as poverty are factors to make someone vulnerable while they ultimately embrace prostitution because of trafficking. In such situation, any statement that simply indicates poverty as a push factor for prostitution would not be correct in my opinion as such a correlation misses one important step, the step of trafficking through which traffickers force women and children into prostitution in most circumstances.

5. State Obligation For Prevention Of Human Trafficking:

The ILC Draft article on state responsibility imposes an obligation on the state to take "all reasonable and necessary measures to prevent a given event from occurring."[37] The

34 CSWB Report (n 32).

35 CSWB Report (n 32) 42.

36 See for detail examination of different case studies on the issue, Sarfaraz Ahmed Khan (n Phd, Para 5.3). It referred to the case of victim Ban 4 where the family members of the victim agreed to send the victim to work as a domestic help at the age of 10 because of extreme poverty. But at the time of sending the girl for work, they had never imagined that within three years she will be sold for prostitution by known people who trafficked her in the name of work. In this case poverty increased her vulnerability and because of such vulnerability she was trafficked. She was forced into prostitution through trafficking and not because of poverty. Poverty simply played one of the contributory factors for increasing their vulnerability.

37 ILC (n 4) Article 14 (3) ILC Draft Article provides that, 'the breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire

explanatory note clarifies, 'obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur'.[38] Similarly, the Trafficking Protocol[39] requires State Parties to establish comprehensive policies, programs, and measures to prevent and combat trafficking and to protect victims from revictimization.[40] It also calls upon member states to alleviate the factors that make the person vulnerable.[41] The Human Rights Council also advises all States to develop mechanisms for prevention of trafficking among others.[42] The General assembly urges governments to:

'Provide or strengthen training for law enforcement, judicial, immigration and other relevant officials in the prevention and combating of trafficking in persons, including the sexual exploitation of women and girls, and in this regard calls upon Governments to ensure that the treatment of victims of trafficking, especially by law enforcers, immigration officers, consular officials……, is conducted with full respect for the human rights.'[43]

U.N. Trafficking Principles and Guidelines also strongly recommend prevention, highlighting the need for States to take specific measures to 'reduce vulnerability, including

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period during which the event continues and remains not in conformity with that obligation.'

38 ILC (n 4)p. 62, para. 14.

39 Trafficking Protocol (n4).

40 Article 9(1) of the Trafficking Protocol (n 5).

41 Article 9 (4) of the Trafficking Protocol (n 5). It provides that, 'States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

42 Clause (n) of resolution Resolution 11/3 of HRC on trafficking in persons, especially women and children provides, 'to enhance cooperation with each other and with relevant intergovernmental and non-governmental organizations to ensure effective prevention and countering of trafficking in people, and to consider strengthening existing regional cooperation and mechanisms aimed at combating trafficking in persons or to establish such mechanisms where they do not exist;. UN Human Rights Council. 2009. *"Trafficking in Persons, Especially Women and Children"* UN Doc. A/HRC/RES/11/3, June 17, 2009 In http://www.un.org/womenwatch/daw/vaw/humanrights/A_HRC_RES_11_3.pdf. Latest update 10 January, 2014.

43 General Assembly Resolution 63/156 on Trafficking in women and girls, dated 30 January 2009, Para 18, In http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/63/156&Lang=E. Latest update 10 January 2014.

through the provision of genuine livelihood options to traditionally disadvantaged groups.[44] As trafficking affects several jurisdictions, it is important to improve the condition of vulnerable groups at source countries suggested by the explanatory note of the European Trafficking Convention in the following words:

'It is widely recognized that improvement of economic and social conditions in countries of origin and measures to deal with extreme poverty would be the most effective way of preventing trafficking. Among social and economic initiatives, improved training and more employment opportunities for people liable to be traffickers' prime targets would undoubtedly help to prevent trafficking in human beings.[45]

The Beijing Platform for Action notes that "[i]n addition to economic factors, the rigidity of socially ascribed gender roles and women's limited access to power, education, training and productive resources" contribute to the disproportionate number of women living in poverty'.[46] The CEDAW Committee emphasizes that poverty and unemployment increase opportunities for trafficking in women and force many women, including young girls, into prostitution.[47] The Special Rapporteur observed on the inherent cause of vulnerability of women as, '[t]he failure of existing economic, political and social structures to provide equal and just opportunities for women to work has contributed to the feminisation of poverty, which in turn has led to the feminisation of migration as women leave homes in search of viable options'.[48] These kinds of situations may lead to further exploitation of victims.

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44 Galladghar, (n 9) p. 418.

45 Council of Europe. 2009, *Council of Europe Convention on Action against Trafficking in Human Beings.* In http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm. Latest update 13 March, 2014. para. 104.

46 United Nations. 1995. *"Beijing Declaration and Platform for Action"* Fourth World Conference on Women, UN Doc. A/CONF.177/20 and UN Doc. A/CONF.177/20/Add.1, Sept. 15, 1995 (Beijing Declaration and Platform for Action), at para. 47. In http://www.un.org/documents/ga/conf177/aconf177-20add1en.htm. Latest update 13 March 2014.

47 UN Committee on the Elimination of Discrimination against Women, *"General Recommendation No. 19: Violence against Women".* UN Doc. A/47/38, Jan. 29, 1992 (CEDAW General Recommendation No. 19), at paras. 14–15. In http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19. Latest update 13 March 2014.

48 UN Commission on Human Rights, "Report of the Special Rapporteur, Ms. Radhika Coomaraswamy, on Violence against Women, Its Causes and Consequences, on Trafficking in Women, Women's Migration and Violence against Women," UN Doc. E/CN.4/2000/68, In http://www.unhchr.ch/Huridocda/

The UN Committee on the Rights of the Child (UNCRC) given opinion that, 'unaccompanied or separated children in a country outside their country of origin are particularly vulnerable to exploitation and abuse. Girls are at particular risk of being trafficked including for purposes of sexual exploitation.'[49] At regional level, the preamble of the SAARC convention recognises 'establishing effective regional cooperation for preventing trafficking for prostitution and investigation, detection, interdiction, prosecution and punishment of those responsible for such trafficking' as one of the objectives of the instrument.[50] It mandates the state parties to endeavour to focus preventive and development efforts on areas which are known to be source areas for trafficking.[51] It also suggests the state parties to consider taking necessary measures for the supervision of employment agencies in order to prevent trafficking in women and children under the guise of recruitment.[52]

The study of fifty cases of West Bengal and Bihar has established the fact that vulnerabilities are the main reasons for trafficking. Some of the vulnerability factors were poverty, domestic violence, lack of education, child marriages and other similar vulnerabilities could be found in dowry culture which forced parents on occasions to take the risk of marrying their wards to unknown persons. Any Policies and activities for preventing trafficking should lead to decrease in these vulnerabilities. While there may be varying arguments to determine the kinds of vulnerability and their role in fuelling trafficking; some basic issues need to be addressed such as violence against women; educational empowerment with additional focus on more vulnerable groups such as Nutt community; economic empowerment targeting vulnerable groups and their families etc.

6. Domestic Legal Framework To Address Trafficking For Sexual Exploitation: -

There are quite a few legislations, directly or indirectly, addressing the issues of human trafficking for commercial sexual exploitation. The Constitution of India expressly

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Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb?Opendocument. Latest update 10 March 2014, at para. 4.

49 UN Committee on the Rights of the Child (UNCRC), "General Comment No. 6: Treatment of Unaccompanied or Separated Children outside Their Country of Origin," UN Doc. CRC/GC/2005/6, Sept. 1, 2005 (CRC General Comment No. 6), at para. 50. In http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf. Latest update 10 March 2014.

50 SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002. In http://www.saarc-sec.org/userfiles/conv-traffiking.pdf. Latest update 10 March 2014.

51 Article 8(7) of the SAARC Convention (n 50).

52 Article 8 (6) of the SAARC Convention (n 50).

prohibits trafficking in human beings.[53] Article 14 provides for equality in general[54] while Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth.[55] Article 21A guaranteed fundamental rights of all children between the age of 6-14 to have free and compulsory education. There are other constitutional provisions that impose positive obligations on the state to take specific actions, which may be helpful in addressing the issues relating to human trafficking.[56]

The first exclusive legislation to combat human trafficking for commercial sexual exploitation was enacted in 1956 namely the Suppression of Immoral Traffic in Women and Girls Act[57] now renamed as the Immoral Traffic (Prevention) Act 1956.[58] This legislation attempted to consolidate many provincial legislation.[59] The reason for the enactment of this

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53 Article 23 of the Constitution of India prohibits traffic in human beings and forced labor while Article 24 of it prohibits employment of children in any hazardous employment or in any factory or mine unsuited to their age. The reading of Article 23 and Article 24 made a clear mandate on the government to take positive steps for elimination of trafficking of human being.

54 Article 14 of Constitution of India provides for 'Equality before law' in following words, 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'.

55 Article 15 (3) of the Constitution of India provides for special protection in favour of women and children. It states that 'Nothing in this article shall prevent the State from making any special provision for women and children'.

56 As example Article 16 of the Constitution of India mandate for equality in opportunity for employment, Article 39 and 39 suggested to achieve social, economic and political justice for all and Article 46 obliges state to promote educational and economic interest of women and weaker section of society as well as to protect them from social injustice and all forms of exploitation.

57 Suppression of Immoral Traffic in Women and Girls Act Act 104 of 1956, hereinafter named as SITA.

58 The Immoral Trafficking (Prevention) Act, 1956, (ITPA) came into force on 1st May, 1958, <http://wcd.nic.in/act/itpa1956.htm> accessed 26th May 2013.

59 As example Bengal Suppression of Immoral Traffic Act, 1930; the Bombay Prevention of Prostitute Act, 1923. Similarly province of Uttar Pradesh, Punjab and Mysore enacted legislations relating to supression of immoral trafficking in the year 1923, 1935 and 1936 respectively. Even there were several regulations prior to these enactment such as in 1668, the East India Company authorities issued regulations against prostitution known as company commandments. During the regime of Governor Anguri orders were issued to close down brothel and soldiers were prevented from accessing prostituted women. This was the first time brothels came under legal review and prior to 1860 few such regulations were enforced. See for further information, Law Commission of India, *Suppression of Immoral Traffic*

legislation was the legal obligation to bring domestic law in conformity with international treaty, which India had signed and ratified namely Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.[60] While the focus of earlier legislation was to suppress the vices of trafficking for prostitution later more focus on prevention. The most notable difference in the later enactment was the substitution for "women or girls" by "persons," making the new law more gender-neutral than SITA. Neither of the legislation suggests complete prohibition of prostitution rather prescribed punishment for surrounding circumstances leads to trafficking or associated with prostitution.

The main purpose of ITPA is to abolish the commercialized vice of trafficking in women and girls for prostitution. Accordingly a series of offences associated with trafficking for commercial sexual exploitation was made punishable such as: keeping a brothel or allowing premises to be used as a brothel;[61] living on the earnings of prostitution;[62] procuring, inducing or taking persons for the sake of prostitution;[63] detaining a person in premises where prostitution is carried on;[64] prostitution in and around the vicinity of public place;[65] seducing or soliciting for the purpose of prostitution;[66] and seduction of a person in custody.[67] Apart from aforesaid penal provisions, a large number sections incorporated procedural elements such as section 10A incorporated provision for detention in correctional institutions post conviction of the female U/S 7 or 8 ITPA.[68] Section 8 of the Act, which prescribed

Act, (64th Report) 2. In http://lawcommissionofindia.nic.in/51-100/Report64.pdf. Latest update 10 March 2014.

60 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 4, Dec. 2, 1949, G.A. Res. 317(IV), *entered into force* July *25,* 1951.

61 Section 3 of ITPA (n 58).

62 Section 4 of ITPA (n 58).

63 Section 5 of ITPA (n 58).

64 Section 6 ITPA (n 58).

65 Section 7 ITPA (n 58).

66 Section 8 ITPA (n 58).

67 Section 9 ITPA (n 58).

68 Section 10-A ITPA (n 54) Detention in a corrective institutional — Clause (1) provides that where; (a) A female offender is found guilty of an offence under Section 7 or Section 8, and (b) The character, state of health and mental condition of the offender and the other circumstances of the case are such that it is expedient that she should be subject to detention for such term and such instruction and discipline as are conducive to her correction, It shall be lawful for the court to pass, in lieu of a sentence of imprisonment,

punishment for solicitation for prostitution frequently used against the trafficking victims which amounted to double victimization, as those victims are victimized by traffickers and then subsequently they victimized by law enforcement agencies who invariably prosecute them for solicitation.[69] There are several provisions like 11 which have the potentiality of violating the rights of the victims.[70] Section 13 of the Act incorporated the provision for special police officer to be notified for the purpose of this legislation.[71] This provision again

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an order for detention in a corrective institution for such term, not being less than two years and not being more than five years, as the court thinks fit.

69 *NHRC Report* (n 1).

70 Section 11 of ITPA imposed duty on the court to order the habitual offender in certain circumstances to notify the address to the appropriate authority. This provision may be used against the victims of trafficking as we have seen earlier that in large number of cases victims are prosecuted under several provisions. Section 7, 8 and Section 20 are also frequently used against the victims violating their rights. See *NHRC Study* (n 1).

71 Section 13 ITPA (n 58). Special police officer and advisory body —

(1) There shall be for each area to be specified by the State Government in this behalf a special police officer appointed by or on behalf of that government for dealing with offences under this Act in that area.

(2) The special police officer shall not he below the rank of an inspector of Police.

(2-A) The District Magistrate may, if he considers it necessary or expedient so to do, confer upon any retired police or military officer all or any of the powers conferred by or under this Act on a special police officer, with respect to particular cases or classes of cases or to cases generally:
Provided that no such power shall be conferred on —

(a) A retired police officer unless such officer, at the time of his, retirement, was holding a post not below the rank of an inspector;

(b) A retired military officer unless such officer, at the time of his retirement, was holding a post not below the rank of a commissioned officer.

(3) For the efficient discharge of his functions in relation to offences under this Act,

(a) The special police officer of an area shall be assisted by such number of subordinate police officers (including women police officers wherever practicable) as the State Government may think fit; and

(b) The State Government may associate with the special police officer a nonofficial advisory body consisting of not more than five leading social welfare workers of that area (including women social welfare workers wherever practicable) to advise him on questions of general importance regarding the working of this Act.

(4) The Central Government may, for the purpose of investigating any offence under this Act or under any other law for the time being in force dealing with sexual exploitation of persons and committed in

created a considerable challenge for law enforcement agencies mainly because of lack of availability of senior police officers.[72]

Despite having such lengthy provisions, the act has failed in addressing the menace of human trafficking. It was realized that the Act did not achieve its purpose and failed to prevent trafficking for commercial sexual exploitation throughout the country. The legislation despite being making references of prevention within its name failed to incorporate any provisions obligating states to take particular kinds of initiatives to prevent trafficking or address vulnerability.

7. Legal Framework To Addressing Vulnerability:

ITPA despite being the key legislation for combating human trafficking for commercial sexual exploitation did not define the term human trafficking which left it with major lacuna in the statute and vacuum was not filled till 2013 amendment of Indian Penal Code (IPC).[73] The Criminal Law (Amendment) Act, 2013[74] has made several changes in penal provision, including defining the term human trafficking in Section 370 of the IPC. The definition followed, more or less, the same wording as given in the Palermo Protocol[75], but it omitted, "… [a]buse of a position of vulnerability (APOV)," from the ambit of the definition which implies that if any victims of trafficking allured by the trafficker and, at the same time, obtained the consent of the victim, even if it was exploitation of the vulnerability of victims, it does not fall within the definition of trafficking. This is a significant drawback of the definition, particularly when we see from the perspective of vulnerability because there are numerous occasions in which traffickers abuse the vulnerability of victims.[76]

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more than one State appoint such number of police officers as trafficking police officers and they shall exercise all the powers and discharge all the functions as are exercisable by special police officers under this Act with the modification that they shall exercise such powers and discharge such functions in relation to the whole of India.

72 In reality most of the remote areas police stations are headed by Sub-Inspector and as they don't have power to investigate they avoid this legislation and register the case under IPC as a matter of general practice.

73 The Indian Penal Code, 1860 (IPC), Act No. 45 of 1860 dated 6th October, 1860, In http://indiacode.nic.in/. Latest update 26 May 2103.

74 The Criminal Law (Amendment) Act, 2013, Act. No 13 of 2013 dated 2nd April, 2012, In http://egazette.nic.in/WriteReadData/2013/E_17_2013_212.pdf. Latest update 26 May 2013.

75 Trafficking Protocol (n 5). Article 3 defined the term human trafficking.

76 See for detail analysis of the issue, Sarfaraz Ahmed Khan (n 11).

There are several other legislations which can be used for redressing the vulnerability and menace of human trafficking in India such as Juvenile Justice (Care and Protection of Children) Act, 2015[77] can be used in respect of any children who are vulnerable.[78] In order to combat child marriage, Prohibition of Child Marriage Act, 2006[79] was enacted which incorporate several punitive provisions as well as preventive provisions. Despite having legislation, we found a large number cases among case study; the child marriage was instrumental in victimization processes as its increase's vulnerability. Similarly, for addressing menace of dowry, The Dowry Prohibition Act, 1961[80] was enacted but rare implementation of the legislation is mainly responsible for its failure to address the menace of dowry, hence decreasing vulnerability. The Protection of Women from Domestic Violence Act, 2005[81] is another example of legislation which attempt to address the issue of domestic violence. There is a constitutional mandate for the government to address other vulnerabilities such as education, bringing equality and addressing caste discrimination. It will not be wrong to say that elaborately constitution protections along with penal provisions are in existence in India for addressing human trafficking, though there is always reasonable scope of further improvement – despite that India has failed to combat trafficking of women and children and placed in list 2 of TIP consistently in last few years.[82]

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77 As most of the trafficking victims are minor, they are entitled to the protection provided by J. J. Act which classified Children into Juvenile in Conflict with Law (JCL) and Child in Need of care and Protection (CNCP). All trafficking victims are CNCP within the ambit of law. See, The Juvenile Justice (Care and Protection of Children) Act, 2015. Hereinafter JJ Act.

78 Section 2(12) of JJ Act defined the term 'child-in-Need of Care and Protection' so broadly to include vulnarable children.

79 Prohibition of Child Marriage Act, 2006, Act 6 of 2007, notified on 10th January, 2007. In http://wcd.nic.in/cma2006.pdf. Latest update 5 November 2013.

80 The Dowry Prohibition Act, 1961, Act No. 28 of 1961, In http://wcd.nic.in/dowryprohibitionact.htm. Latest update 4 November 2013.

81 The Protection of Women from Domestic Violence Act, 2005, Act 43 of 2005, In http://wcd.nic.in/wdvact.pdf. Latest update 5 November 2013.

82 Since 2006 to 2010, India was placed in Tier 2 Watch List of TIP yearly report but from 2011 onwards consecutively report rank India into Tier 2 countries which imply India is not doing sufficient for combating human trafficking at domestic level. TIP 2018 report can be access at https://www.state.gov/j/tip/rls/tiprpt/2018/, Last visited on 20th July, 2018.

The Integrated Plan of Action to Prevent and Combat Human Trafficking with Special Focus on Children and Women has elaborately drafted an action plan for preventing trafficking.[83] It provides that 'preventing trafficking should take into account both demand and supply as a root cause. Central Government/State Governments/Union Territories should also take into account the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination and prejudice. Effective prevention strategies should be based on existing experience and accurate information'.[84] It suggests strong legislative action to address factors generating demand and supply[85] and empowering vulnerable groups through developmental schemes.[86] It also recommends improving access to education, particularly to vulnerable sections.[87] A series of other mechanisms have also been suggested by the National Plan of Action, namely increasing literacy and spreading legal awareness with special emphasis on adolescent girls,[88] developing information campaign,[89] increasing

83 Integrated Plan of Action to Prevent and Combat Human Trafficking with Special Focus on Children and Women, Avaiable at www.wcd.nic.in.

84 Integrated Plan of Action (n 83).

85 It suggested for, 'analysing the factors that generate demand and supply for exploitative commercial sexual services and exploitative labour and taking strong legislative, policy and other measures to address these issues'. Integrated Plan of Action (n 83).

86 Paragraph 2 provides: 'Empowering the vulnerable sections living in remote corners of country by extending to them various welfare, development and anti-poverty schemes of the Government of India, such as, Swadhar, Swayamsidha, Swa-Shakti, Swawlamban, Balika Samridhi Yojana, Support to Training and Employment Programme for Women (STEP), Kishori Shakti Yojana, etc. This would provide scope for ample economic opportunities for the women and other traditionally disadvantaged groups in their native place itself so as to reduce their vulnerability to trafficking.', Integrated Plan of Action (n 83).

87 Clause 3 provides, 'improving children's access to schools and increasing the level of school attendance, especially of those affected or dependants, including the girl children, especially in remote and backward parts of the country. Efforts should also be made to incorporate sex-education and gender sensitive concerns in the school curriculum, both at the primary and secondary levels'. Integrated Plan of Action (n 83).

88 Clause 4 of Part II National Plan of Action. Integrated Plan of Action (n 83).

89 'Developing information campaigns for the general public aimed at promoting awareness about the dangers associated with trafficking. Such campaigns should be informed by an understanding of the complexities surrounding trafficking and of the reasons as to why individuals may make potentially dangerous migration decisions'. Clause 5 of Part II National Plan of Action. Integrated Plan of Action (n 83).

focus on adolescent and potential victims,[90] strengthening the capacity of law enforcement agencies,[91] and coordination among different agencies as well as NGOs. It also suggests proper documentation of birth, marriage etc. as well as a database including information about missing persons, creation of helpline for women and children throughout the country and addressing culturally sanctioned practices like devadasis, jogins etc.[92]

Despite having legislative obligations, the national plan of actions and several other projects, India has failed to address the vulnerability factors.

8. Conclusion:

Human trafficking is a human rights issue as victims of trafficking is subjected of the series of human rights violation during such trafficking processes. It is frequently referred to as modern day slavery. The menace of inter-generation prostitution among the Nutt community still exists in the state of Bihar as we found that out of fifty around twelve girls were forced into prostitution because of the practice of inter-generation prostitution among Nutt communities. The case study found that forty eight out of fifty trafficked victims were vulnerable because of poverty. It implied that any poverty alleviation program should target such vulnerable group from where the instances of trafficking occur. Some of the groups are visible like members of the community belong to Nutt. Similarly, such programs should also target other marginalised group who are more vulnerable.

Study also found that twelve victims were vulnerable because of domestic violence. In those circumstances, there is a need for effective implementation of domestic violence legislation and protective mechanisms enshrined under those legislation. Eighteen victims were subjected to child marriage which increases their vulnerability. It establishes the fact that that government has, on the one hand, failed to eliminate the culture of child marriage, on the other hand, failed to implement legislation against child marriage. Majority of the victims were found illiterate and out of fifty, the lack of education increases vulnerability

90 Clause 8 of Part II National Plan of Action, (n 83), 'Giving focused attention to the adolescents, who are both potential victims and clients. It would be useful if appropriate information and value clarification is given to them on issues related to 'sexuality' and 'reproductive health'. This exercise would be beneficial in view of the growing evidence of increased pre-marital sexual activity among adolescents and the looming threat of HIV/AIDS within this group'.

91 Clause 8 of Part II National Plan of Action, (n 83), 'Strengthening the capacity of law enforcement agencies to arrest and prosecute those involved in trafficking. This would include ensuring that law enforcement agencies comply with their legal obligations'.

92 Clause 12-14 of Part II National Plan of Action (n 83).

of thirty-nine victims. Right to education is a fundamental right in India but despite being such noble mandatory provisions in the constitutions, the reality shows how such rights are violated and utter failure of the Government.

More than six decades of independence and explicit obligations under the constitutions made no difference for the government to bring change among the members of Nutt community where systematic human rights are violated, and their children are enslaved as a matter of practice. While various initiatives can help in preventing trafficking among Nutt community and reducing their vulnerability, the Apne Aap Model of Kasturba Gandhi Balika Vidyalaya[93] has been found to be very effective model for preventing trafficking among vulnerable groups, like girl children belonging to the Nutt community.

It is also apparent from multi-vulnerability status of victims that any singular initiative to reduce vulnerability will not work. The average age of the victims found in this study is around 15.3 years. A decade old study of NHRC also corroborates the same which found that around 20.7% victims were minors in brothels. The NHRC study conducted at that point of time had also found that around 62% of their responded, prostituted women, were forced into prostitution when they were minors.[94] This implies that when girls are trafficked, they are of such tender age that it makes them incapable of giving legal consent. This finding also refutes the arguments of those who suggest that those victims entered into these exploitative situations voluntarily.

As State has a positive obligation under the law to reduce vulnerability and prevent trafficking, any violation of such human right entail states *ipso facto* responsible as violative of state responsibility. One of the most significant State obligations is to prevent human trafficking which derives its source from diverse international and regional instruments. The obligation for prevention of demand has also derived its source from different international instruments including CEDAW, which calls upon the State to address the culture of exploitation and to minimise such culture. Accordingly, to prevent the culture

93 Kasturva Gandhi Balika Vidyalaya (KGBV) is a Governmnet of India scheme in which hostel is provided for the girls for study and accomodation which invariably attached with some schools. This can be an eefcetive ways to empower vulnarable group like Nutt. Apne Aap Women Worldwide, which is an International NGO fighting to end sex trafficking, run KGBV and accomodate 50% of the students from Nutt community to prevent next generation prostitution. Once they wil study and empowered, they cannot be forced into prostitution by their parents. AAWW has to face several challenges in successfully running this initiatives. Detail of this intiatives can be found in the website of AAWW, www.apneaap.org.

94 NHRC Study, (n 1), Page 81, 92.

of exploitation such as inter-generation prostitution is a state responsibility and government are liable for any such failure of human rights. The non-serious efforts to bring domestic law inconformity with the international obligation is also apparent from omission of incorporation APOV within the definition of human trafficking which is a serious lacuna under existing law.

The existence of red-light areas in West Bengal and Bihar provides traffickers a market to sale human being and facilitate the entire racket of trafficking that what we found from cases referred to. This implies that even if we remove all vulnerability factors, there are criminals who will kidnap the young girls and will sell them in open markets which are available throughout the country. Any future discourse to address human trafficking shall be incomplete without dealing with the vulnerability on the one hand and need to closure of the market for trafficking victims on the other. Nevertheless, any initiative to close down brothel and dismantle red light areas should be taken with utmost care and planning so that women who are in prostitution are given alternative means of livelihood and rehabilitation. Indeed, at the same time criminal justice system need to be capable of providing justice by punishing criminal and providing reparation to victims.

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CRIMINAL JUSTICE AND THE RULE OF FAIR TRIAL: A CRITICAL ANALYSIS

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Abstract: *The core of criminal law is to punish the offenders, and by doing so, society can be protected so that peace and order should be maintained , but natural justice principlei.e. Audi alterum partem should be followed which means no one should be punished without being heard and both are of equal importance for the sake of justice. Therefore, we can say that justice and fair play is required because in the administration of justice, it is important that justice should not only be done but must also appear to have been done . It is a pivotal principle of criminal law that every accused or offender should be presumed to be innocent unless his guilt is proved beyond a reasonable doubt in a trial before an impartial and competent court.*

Therefore, it becomes absolutely necessary that every person accused of a crime is brought before the court for trial and that all the evidences appearing against him is made available to the court for deciding as to his guilt or innocence.

Fair trial: Offender should be punished if the offence is proved; a fair opportunity for defense on his behalf of allegations; by impartial judges in the course; should follow natural justice and should be as per rule of law.

Key Words: Fair Trial, impartial Justice, Open Trial, Expeditious Trial, Treatment.

1. Introduction:

The right to a fair trial is a norm of international human rights law and also adopted by many countries in their procedural law. Countries like U.S.A., Canada, U.K., and India have adopted this norm and it is enshrined in their Constitution. The right to a fair trial has been defined in numerous international instruments. The major features of fair criminal trial are preserved in Universal Declaration of Human Rights, 1948.

Article 10[2]- Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

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2 UDHR 1948

Article 11[3]- (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to the law in a public trial at which he has had all the guarantees necessary for his defense. (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 14 of the International Covenant on Civil and Political Rights[4] reaffirmed the objects of UDHR and provided that "Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 14(2) provides for the presumption of innocence, and article 14(3) sets out a list of minimum fair trial rights in criminal proceedings. Article 14(5) establishes the rights of a convicted person to have a higher court review the conviction or sentence, and article 14(7) prohibits double jeopardy[5]

Section 11 of the Canadian Charter of Rights and Freedoms protects a person's basic legal rights in criminal prosecution.

Article 6 of the European Convention on Human Rights[6] provides the minimum rights, adequate time and facilities to prepare their defense, access to legal representation, right to examine witnesses against them or have them examined, right to the free assistance of an interpreter to everyone charged with a criminal offence.

The Sixth Amendment to the United States Constitution provides in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

As far as Indian legal system is concerned, the international promise of fair trial is very much reflected in its constitutional scheme as well as its procedural law. Indian judiciary has also highlighted the pivotal role of fair trial in a number of cases. It is designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of their basic

3 UDHR 1948

4 ICCPR 1966

5 Ibid

6 ECHR 1950

rights and freedoms, the most prominent of which is the right to life and liberty of the person. The concept of fair trial is based on the basic principles of natural justice.

2. Fair Trial:

The concept of a fair trial is based on the basic ideology that State and its agencies have the duty to bring the offenders before the law. In their battle against crime and delinquency, State and its officers cannot on any account forsake the decency of State behavior and have recourse to extra-legal methods for the sake of detection of crime and even criminals. For how can they insist on good behavior from others when their own behavior is blameworthy, unjust and illegal? Therefore, the procedure adopted by the State must be just, fair and reasonable. The Indian courts have recognized that the primary object of criminal procedure is to ensure a fair trial of accused persons. Human life should be valued and a person accused of any offence should not be punished unless he has been given a fair trial and his guilt has been proved in such trial.

In *Zahira Habibullah Sheikh and ors v. State of Gujarat and ors.*[7]The Supreme Court of India observed "each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as it is to the victim and to society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witness or the cause which is being tried, is eliminated."

The right to a fair trial is a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms, most importantly of the right to liberty and security of a person.

3. Principles of Fair Trial:

3.1. Adversary Trial System:

The system adopted by the Criminal Procedures[8] is the adversary system based on the accusatorial method. In adversarial system, responsibility for the production of evidence is placed on the prosecution with the judge acting as a neutral referee. This system of criminal trial assumes that the state, on one hand, by using its investigative agencies and government counsels will prosecute the wrongdoer who, on the other hand, will also take recourse of best counsels to challenge and counter the evidences of the prosecution.

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7 1999 Cr.L.J. 4083

8 Code of Criminal Procedures,1973

Supreme Court has observed *"*if a Criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent, active interest."

In *Himanshu Singh Sabharwal v. State of M.P. and Ors.*[9], the Apex Court observed that if fair trial envisaged under the Code is not imparted to the parties and court has reasons to believe that prosecuting agency or prosecutor is not acting in the requisite manner the court can exercise its power under section 311 of the Code or under section 165 of the Indian Evidence Act, 1872 to call in for the material witness and procure the relevant documents so as to subserve the cause of justice.

3.2. Presumption of Innocence:

Every criminal trial begins with the presumption of innocence in favor of the accused. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. This presumption is seen to flow from the Latin legal principle *eiincumbit probatio qui dicit, non qui negat,* that is, the burden of proof rests on who asserts, not on who denies.

The Supreme Court in *State of U.P. v. Naresh and Ors*[10].observed "every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right subject to statutory exceptions. The said principle forms the basis of criminal jurisprudence in India."

Similarly, in *Kali Ram v. State of H.P*[11],The Supreme Court observed "it is no doubt that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse; however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot be felt in a civilized society."

It is the duty of the prosecutor and defense counsel, as well as all public authorities involved in a case to maintain the presumption of innocence by refraining from pre-judging the outcome of the trial.

3.3. Independent, Impartial and Competent Judges:

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9 1981 Cri.L.J. 470.

10 AIR 1978 SC 3243

11 1986, Cri.L.J. 1084

The basic principle of the right to a fair trial is that proceedings in any criminal case are to be conducted by a competent, independent and impartial court. In a criminal trial, as the state is the prosecuting party and the police are also an agency of the state, it is important that the judiciary is unchained of all suspicion of executive influence and control, direct or indirect. The whole burden of the fair and impartial trial thus rests on the shoulders of the judiciary in India.

The primary principle is that no man shall be a judge for his own cause. Section 479 of the Code,[12] prohibits trial of a case by a judge or magistrate in which he is a party or otherwise personally interested. This disqualification can be removed by obtaining the permission of the appellate court.

In *Shyam Singh v. State of Rajasthan*[13], the court observed that the question is not whether a bias has actually affected the judgment. The real test is whether there exists a circumstance according to which a litigant could reasonably apprehend that a bias attributable to a judicial officer must have operated against him in the final decision of the case.

In this regard Section 6 of the Code is relevant which separates courts of Executive Magistrates from the courts of Judicial Magistrates. Article 50 of the Indian Constitution also imposes a similar duty on the state to take steps to separate the judiciary from the executive.

3.4. Autrefois Acquit and Autrefois Convict:

According to this doctrine, if a person is tried and acquitted or convicted of an offence, he cannot be tried again for the same offence or on the same facts for any other offence. This doctrine has been substantially incorporated in the article 20(2) of the Constitution and is also embodied in section 300 of the Cr. P.C.

Similarly, in *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao*[14]the Supreme Court observed that Section 300(1) of Cr.P.C. is wider than Article 20(2) of the Constitution. While Article 20(2) of the Constitution only states that 'no one can be prosecuted and punished for the same offence more than once', Section 300(1) of Cr.P.C. states that no one can be tried and convicted for the same offence or even for a different offence but on the same facts. In the present case, although the offences are different but the facts are the same. Hence, Section 300(1) of Cr.P.C. applies. Consequently, the prosecution under

12 Code of Criminal Procedures, 1973

13 1986, Cri.L.J. 1084

14 1976, Cri.L.J. 968

Section 420, IPC was barred by Section 300(1) of Cr.P.C. The impugned judgment of the High Court was set aside.

4. Pre-Trial Rights:

The Code of Criminal Procedures entitles an accused of certain rights during the course of any investigation, enquiry or trial of an offence with which he is charged and that can be reflected as.

4.1. Knowledge of the Accusation:

A Fair trial requires that the accused person is given an adequate opportunity to defend himself. But this opportunity will have no meaning if the accused person is not informed of the accusation against him. The Code, therefore, provides in Sections 228, 240, 246, 251 in plain words that when an accused person is brought before the court for trial, the particulars of the offence of which he is accused shall be stated to him.

In case of serious offences, the court is required to frame in writing a formal charge and then read and explain the charge to the accused person. A charge is not an accusation in abstract but a concrete accusation of an offence alleged to have been committed by a person. The right to have precise and specific accusations is contained under Section 211, Cr. P.C.

4.2. Right to Open Trial:

A Fair trial also requires a public hearing in an open court. The right to a public hearing means that the hearing should as a rule is conducted orally and publicly, without a specific request by the parties to that effect. A judgment is considered to have been made public either when it was orally pronounced in court or when it was published or when it was made public by a combination of those methods.

Section 327 of the Code laid the provision for open courts for a public hearing but it also gives discretion to the presiding judge or magistrate that if he thinks fit, he can deny the access of the public generally or any particular person to the court during disclosure of indecent matter or when there is a likelihood of a disturbance or for any other reasonable cause.

In the case of *Naresh Sridhar Mirajkar v. State of Maharashtra,*[15] the apex court held that the right to open trial must not be denied except in exceptional circumstances. The High court

15 AIR 1967 SC 1

has inherent jurisdiction to hold trials or part of a trial in camera or to prohibit publication of a part of its proceedings.

In *State of Punjab v. Gurmit Singh*[16]the court held that the undue publicity is evidently harmful to the unfortunate women victims of rape and such other sexual offences. Such publicity would mar their future in many ways and may make their life miserable in society. Section 327(2) provide that the inquiry into and trial of rape or an offence under Sections 376, 376-A, 376-B, 376-C or 376-D of the Indian Penal Code shall be conducted in camera.

4.3. Aid of Counsel:

The requirement of a fair trial involves two things :(a) an opportunity for the accused to secure a counsel of his own choice and (b) the duty of the state to provide a counsel to the accused in certain cases. The Law Commission of India in its 14th Report has mentioned that free legal aid to persons of limited means is a service that a Welfare State owes to it citizens.

In India, the right to counsel is recognized as a fundamental right of an arrested person under Article 22(1) which provides, *inter alia,* no person shall be denied the right to consult, and to be defended by, a legal practitioner of his choice. Sections 303 and 304 of the Code are the manifestation of this Constitutional mandate.

In *Khatri v. State of Bihar,*[17]the court held that the accused is entitled to free legal services not only at the stage of trial but also when first produced before the Magistrate and also when remanded.

Further, Article 39-A was also inserted in the Constitution[18]which requires that the state should pass suitable legislation for promoting and providing free legal aid. To fulfill this, Parliament enacted Legal Services Authorities Act, 1987. Section 12 of the Act provides legal services to the persons specified in it.

In *Suk Das and Ors.v. Union Territory of Arunachal Pradesh*[19], the court strengthen the need for legal aid and held that "free legal assistance, at state cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty. The exercise of this fundamental right is not conditional upon the accused applying for free

16 (1996)2 SCC 384

17 (1981)1 SCC 627

18 Constitution 42nd Amendment Act 1976

19 (1986) 25 SCC 401

legal assistance so that if he does not make an application for free legal assistance the trial may lawfully proceed without adequate legal representation being afforded to him. On the other hand, the Magistrate or the Sessions Judge before whom the accused appears is under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty is entitled to obtain free legal services at the cost of the State.

In *Mohd.Hussain Julfikar Ali v. The State (Govt. of NCT) Delhi*,[20] the appellant, an illiterate foreign national, was tried, convicted and sentenced to death by the trial court without assignment of counsel for his defense. Such a result is confirmed by the High Court. The convict is charged, convicted and sentenced under Sections 302/307 of the Indian Penal Code and also under Section 3 of The Explosive Substances Act, 1908. Fifty-six witnesses and investigating officers were examined without the appellant having a counsel and none were cross-examined by appellant. Only one witness cross-examined to complete the formality.

Therefore, it was held that every person has a right to have a fair trial. A person accused of serious charges must not be denied this valuable right. Appellant was provided with legal aid/counsel at the last stage which amounted to a denial of effective and substantial aid. Hence appellant's conviction and sentence were set aside. Section 304 does not confer any right upon the accused to have a pleader of his own choice for his defense at State expenses. If, however. He objects to the lawyer assigned to him; he must be left to defend himself at his own expense.

4.4. Expeditious Trial:

A Speedy trial is necessary to gain the confidence of the public in the judiciary. Delayed justice leads to unnecessary harassment. The concept of speedy trial is an integral part of article 21 of the Constitution. The right to speedy trial begins with actual restraint imposed by arrest and consequent incarceration and continues at all stages namely, the stage of investigation, inquiry, trial, appeal and revision.

Section 309(1) provides "in every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded."

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20 (1994)6 SCC 442

In *Hussainara Khatoon (iv) v. State of Bihar*[21], the Supreme Court declared that speedy trial is an essential ingredient of 'reasonable just and fair' procedure guaranteed by Article 21 and it is the constitutional obligation of the state to set up such a procedure as would ensure speedy trial to the accused. The state cannot avoid its Constitutional obligation by pleading financial or administrative inadequacy.

The Supreme Court in *A.R. Antulay v. R.S. Nayak,*[22]issued guidelines for the time period during which different classes of cases are to be concluded. It was held "it is neither advisable nor feasible to draw or prescribe an outer time limit for conclusion of all criminal proceedings. While determining the alleged delay, the court has to decide each case on its facts having regard to all attending circumstances including nature of the offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions etc.- what is called systematic delay." The aforesaid decision came up for consideration in the case of P. Ramachandra Rao and was upheld and reaffirmed.

In *Ranjan Dwivedivs C.B.I Tr. Director General,*[23] the accused was tried for the assassination of Shri. L.N. Mishra, the then Union Railway Minister. The trial has been pending for the past 37 years. In view of delay in completion of trial for more than 37 years from date of the trial the Petitioners presented Writ Petitions praying for quashing of the charges and trial. But it was held that the trial cannot be terminated merely on the ground of delay without considering the reasons thereof. Hence the petition was dismissed.

4.5. Protection against Illegal Arrest:

Section 50 provides that any person arrested without a warrant shall immediately be informed of the grounds of his arrest. The duty of the police when they arrest without warrant is to be quick to see the possibility of crime, but they ought to be anxious to avoid mistaking the innocent for the guilty. The burden is on the police officer to satisfy the court before which the arrest is challenged that he had reasonable grounds of suspicion.

In *Pranab Chatterjee v. State of Bihar*[24] the court held that Section 50 is mandatory. If particulars of offence are not communicated to an arrested person, his arrest and detention are illegal. The grounds can be communicated orally or even impliedly by conduct.

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21 AIR 1979 SC 1369

22 AIR 1988 SC 1531

23 AIR 1983 SC 624

24 AIR 1959 SC 144

Section 57 of Cr.P.C. and Article 22(2) of the Constitution provides that a person arrested must be produced before a Judicial Magistrate within 24 hours of arrest. In *State of Punjab v. Ajaib Singh* the court held that arrest without warrant call for greater protection and production within 24 hours ensures the immediate application of judicial mind to the legality of the arrest.

The decisions of the Supreme Court in *Joginder Kumar v. State of Uttar Pradesh*[25] *and D.K. Basu v. State of West Bengal*[26], were enacted in Section 50-A making it obligatory on the part of the police officer to inform the friend or relative of the arrested person about his arrest and also to make an entry in the register maintained by the police. This was done to ensure transparency and accountability in arrests. Sec.160 of Cr. P.C provides that investigation by any police officer of any male below 15 years or any woman can be made only at the place of their residence. Section 46(4) provides that no woman shall be arrested after sunset and before sunrise, save in exceptional circumstances and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.

4.6. Proceedings in the Presence of the Accused:

For the conduct of a fair trial, it is necessary that all proceedings related to the case should take place in the presence of the accused or his counsel. The underlying principle behind this is that in a criminal trial the court should not proceed *ex parte* against the accused person. It is also necessary for the reason that it facilitates the accused to understand properly the prosecution case and to know the witnesses against him so that he can prepare his defense.

The Code does not explicitly provide for the mandatory presence of the accused in the trial as section 317 provides that a magistrate may dispense with the attendance and proceed with the trial if the personal presence of the accused is not necessary in the interests of justice or that the accused persistently disturbs the proceedings in court. The courts should insist upon the appearance of the accused only when it is in his interest to appear or when the court feels that his presence is necessary for the effective disposal of the case. Court should see that undue harassment is not caused to the accused appearing before them. Section 273 of the Code provides that all evidence taken in the course of the trial shall be taken in the presence of the accused or if the personal attendance of the accused is dispensed with then the evidence shall be taken in the presence of his pleader.

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25 AIR 1994 SC1349

26 AIR 1997 SC 610

For a fair trial, the accused person has to be given full opportunity to defend himself. This is possible only when he should be supplied with copies of the charge sheet, all necessary documents pertaining to the investigation and the statements of the witnesses called by the police during an investigation. Section 238 makes it obligatory for the Magistrate to supply copies of these documents to the accused free of cost.

Article 14 of the Constitution ensures that the parties be equally treated with respect to the introduction of evidence by means of interrogation of witnesses. The prosecution must inform the defense of the witnesses it intends to call at trial within a reasonable time prior to the trial so that the defendant may have sufficient time to prepare his/her defense. In fairness to the accused, he or his counsel must be given full opportunity to cross-examine the prosecution witness.

In *Mohd. Hussain Julfikar Ali v. The State (Govt. of NCT) Delhi*[27], it was held that every person has a right to have a fair trial. A person accused of serious charges must not be denied of this valuable right. Appellant was not provided with an opportunity to cross-examine the fifty-six witnesses. Only one witness was cross-examined to complete the formality. Hence appellant's conviction and sentence were set aside.

In *Badri v. State of Rajasthan*[28], the court held that where a prosecution witness was not allowed to be cross examined by the defense on a material point with reference to his earlier statement made before the police, his evidence stands untested by cross-examination and cannot be accepted as corroborating his previous statement.

4.7. Right to Bail:

By virtue of Section 436 the accused can claim bail as a matter of right in cases which have been shown as bailable offences in the First schedule to the Code. Bail is basically released from restraint, more particularly, release from custody of the police. An order of bail gives back to the accused freedom of his movement on condition that he will appear to take his trial. If the offence is bailable, bail will be granted without more ado. But bail under Section 389(1) after conviction is not a matter of right whether the offence is bailable or non-bailable. If no charge -sheet is filed before the expiry of 60/90 days as the case may be; the accused in custody has a right to be released on bail. In non-bailable offences, the Magistrate has the power to release on bail without notice to the other side if the charge sheet is not filed within a period of sixty days. The provision of bail to women, sick and old age persons is given priority subject to the nature of the offence.

27 1989 CrLJ.1888

28 1995 SCC (Cri)990

4.8. Prohibition on Double Jeopardy:

The concept of double jeopardy is based on the doctrine of 'autrefois acquit' and 'autrefois convict' which mean that if a person is tried and acquitted or convicted of an offence, he cannot be tried again for the same offence or on the same facts for any other offence. This clause embodies the common law rule of *nemo debet vis vexari* which means that no man should be put twice in peril for the same offence.

Section 300 of the Code provides that persons once convicted or acquitted not to be tried for the same offence or on the same facts for any other offence. Plea of double jeopardy is not applicable in case the proceedings for which the accused is being tried are distinct and separate from the offence for which the accused has already been tried and convicted.

In *Kolla Veera Raghav Rao vs Gorantla Venkateswara Rao*[29] the Supreme Court differentiated between Section 300(1) of Cr. P.C. and article 20(2) of the Constitution. While Article 20(2) of the Constitution only states that 'no one can be prosecuted and punished for the same offence more than once', Section 300(1) of Cr.P.C. states that no one can be tried and convicted for the same offence or even for a different offence but on the same facts. Therefore, the second prosecution would be barred by Section 300(1) of Cr.P.C.

In *S.A. Venkataraman v. Union of India*[30] the appellant was dismissed from service as a result of an inquiry under the Public Servants (Inquiries) Act, 1960, after the proceedings were before the Enquiry Commissioner. Thereafter, he was prosecuted before the Court for having committed offences under the Indian Penal Code, and the Prevention of Corruption Act. The Supreme Court held that the proceeding taken before the Enquiry Commissioner did not amount to a prosecution for an offence. It was in the nature of a fact-finding to advise the Government for disciplinary action against the appellant. It cannot be said that the person has been prosecuted.

In *Leo Roy Frey v. Superintendent, District Jail*[31], the accused was prosecuted and punished under the Sea Customs Act, 1878. Later on, he was prosecuted under Section 120 of the Indian Penal Code, 1860 for conspiracy to commit the act for which he was already convicted under the Sea Customs Act, 1878. It was held that the second prosecution was not barred by Article 20(2), since it was not for the same offence. Committing an offence and conspiracy to commit that offence has been held to be two distinct offences.

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29 1979 SCR (2) 202

30 AIR 1986 SC 289

31 ((2004) 4 SCC 158)

4.9. Right against Self-Incrimination:

Clause (3) of Article 20 provides: "No person accused of any offence shall be compelled to be a witness against himself." This Clause is based on the maxim *nemo tenet urprodere accussareseipsum,* which means that "no man is bound to accuse himself.

In *State of Bombay vs. KathiKalu*[32], the Supreme Court held that "to be a witness" is not equivalent to "furnishing evidence". Self-incrimination must mean conveying information based upon the 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. Compulsion means duress which includes threatening, beating or imprisoning the wife, parent or child of a person. Thus, where the accused makes a confession without any inducement, threat or promise article 20(3) does not apply.

The Apex Court in *Selvi v. State of Karnataka*[33], drew the following conclusions:

- The taking and retention of DNA samples which are in the nature of physical evidence, does not face constitutional hurdles in the Indian context.
- Subjecting a person to narco-analysis, Polygraphy and Brain fingerprinting tests involuntarily, amounts to forcible interference with person's mental processes and hence violates the right of privacy as well as Article 20(3).
- A person administered the narco-analysis technique is encouraged to speak in a drug-induced State and there is no reason why such an act should be treated any differently from verbal answers during an ordinary interrogation.

In *Dinesh Dalmia v. State of Madras*[34], the court held that the scientific tests resorted to by the investigating does not amount to testimonial compulsion. Hence, the petition was dismissed.

5. Post-Trial Rights

5.1. Lawful Punishment:

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32 AIR 1961 SC 1808

33 1992 Cr.L.J 1070

34 2003 Cr.L.J 980

Article 20(1) explains that a person can be convicted of an offence only if that act is made punishable by a law in force. It gives constitutional recognition to the rule that no one can be convicted except for the violation of a law in force. In Om Prakash v. State of Uttar Pradesh, offering bribes was not an offence in 1948. Section 3 of the Criminal Law (Amendment) Act, 1952 inserted Section 165A in the Indian Penal Code, 1860, declaring offering bribes as punishable. It was held that the accused could not be punished under Section 165A for offering bribes in 1948. Article 20(1) provides that no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. It prohibits the enhancement of punishment for an offence retrospectively. But article 20(1) has no application to cases of preventive detention.

5.2. Right to Human Treatment:

A prisoner does not become a non-person. Prison deprives liberty. Even while doing this, the prison system must aim at reformation. In prison, treatment must be geared to psychic healing, release of stress, restoration of self-respect apart from training to adapt oneself to the life outside. Every prisoner has the right to a clean and sanitized environment in the jail, the right to be medically examined by the medical officer, the right to visit and access by family members, etc. Recognizing the right to medical facilities, the National Human Rights Commission recommended the award Rs. 1 Lakh to be paid as compensation by the Govt. of Maharashtra to the dependents of an under-trial prisoner who died in the Nasik Road Prison due to lack of medical treatment.

5.3. Right to file Appeal:

Section 389(1) empowers the appellate court to suspend execution of sentence, or when the convicted person I in confinement, to grant bail pending any appeal to it. Court need not give notice to the public prosecutor before suspending sentence or releasing on bail. The Existence of an appeal is a condition precedent for granting bail. Bail to a convicted person is not a matter of right irrespective of whether the offence is bailable or non-bailable and should be allowed only when after reading the judgment and hearing the accused it is considered justified.

5.4. Proper Execution of Sentence:

The hanging of *Afzal Guru* was criticized by human rights activists, legal experts all over the country. In carrying out *Afzal Guru's* death sentence, the government deliberately ignored the view of the Supreme Court and courts across the world that hanging a person after holding him in custody for years is inhuman. *Mohammad Afzal Guru* was convicted by Indian court for the December 2001 attack on the Indian Parliament, and sentenced

to death in 2003 and his appeal was rejected by the Supreme Court of India in 2005. The sentence was scheduled to be carried out on 20 October 2006, but Guru was given a stay of execution after protests in Jammu and Kashmir and remained on death row. On 3 February 2013, his mercy petition was rejected by the President of India, Pranab Mukherjee. He was secretly hanged at Delhi's Tihar Jail around on 9 February 2013.

6. Conclusion:

"Equality, Justice and Liberty" is the trinity of fair trial recognized in the administration of justice of India where the affluent and the "lowly and lost" have the equality of access to justice in the administration of justice in general and the criminal justice system in particular. This fundamental principle of fair trial is the backdrop of the International Covenants, and enjoined in the Constitution of India as well as the criminal laws devising the criminal justice system of India. The beauty of the principles enshrined lies in the fact that much matter is decocted into small words. The thrust is imperative to means (criminal procedures) which must be trustworthy in order to have just ends.

The Constitution of India lays down a social policy concerning equal justice and free legal aid "by suitable legislation or schemes or in any other way, to ensure that opportunities securing justice are not denied to any citizen by reason of economic or other disabilities." This social policy aims at: "Indigence should never be a ground for denying fair trial or equal justice particular attention should be paid to appoint competent advocates, equal to handling complex cases, not patronizing gestures to raw entrants at the Bar.

Section 304 of the Cr.P.C, 1973 enables the Session Courts to assign the pleader for the defense of the accused at the expense of the state provided he is unrepresented and the court is satisfied that he has no sufficient means to engage a pleader. The selection of such pleader, the facilities to be given to him by the court and his remuneration is to be governed by the rules that may be framed by the High Court in this regard with the previous approval of the State Government. This facility also extends to any class of criminal trials before other courts as indicated earlier to try criminal cases in the State as it applies in relation to trials before Courts of Sessions.

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Constitutionalism and Judicial Process – An Analysis

Dr. Ranjan Kumar[1]*

Abstract : *The concept of constitutionalism connotes the concept of divided power. C.J. Friedrich, thus writes "Division of Power is the basis of civilized Government. It is what is meant by constitutionalism"[2] Constitutionalism involves the supremacy of constitution and makes the Government of the day a limited government. "The very fact" wrote Professor K.C. Wheare[3] "That there is a written constitution defining the powers of the different organs of the Government means that the powers of each of them are limited by the terms of the constitution and none can exercise any arbitrary power beyond what is granted by that instrument".*

1. Introduction :

The article presents critical analysis of constitutionalism and judicial powers. In UNESCO Dictionary of the social sciences.[4] The constitution has been defined as "a set of devices to subject the freedom of the holders of the political powers to limitations and restraints." Constitution, therefore, is the higher or fundamental law, and it limits the authority of the each organ of the state.

Keywords : Constitution, Constitutionalism, Judicial Process

Dr. S.N. Singh is of the view that constitutionalism denotes limitation on the power of the authorities and institutions created under the constitution. Thus, all public powers including constitutional powers should be exercised in tune with constitutional ethos.[5] Constitutionalism is adherence to the constitutional values. Our Summit Court has observed in Nandini Sundar v. State of Chhatisgarh.[6] That as constitutional adjudicator it has always to be mindful of preserving the sanctity of the constitutional values. The primordial value is that it is the responsibility of the every organ of the state to function within the four corners

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1 *Professor & Head, Department of Law, MGKVP, Varanasi

2. Constitutional Government and Democracy Oxford Publishing Company, Calcutta, 1966, p. 5.

3. Modern Constitutions, 196, p. 137.

4. 1965, p. 131.

5. Annual Survey of Indian Law, Vol. XLVI, p. 202.

6. (2011) 7 SCC 547.

of the constitutional provisions. It has also observed in GVK Industries v. ITO.[7] That powers and claim of supremacy must be exercised within the four corners of constitutional permissibility and scheme. One of the devices of limiting the government is doctrine of separation of power. In Indira Nehru Gandhi v. Raj Narayan[8] Mr. Justice Chandrachud, thus observed that- the political usefulness of the doctrine of separation of powers is now widely recognized. No Constitution can survive without a conscious adherence to its fine checks and balances. Just as courts ought not to enter into problems entwined in the 'political thicket', Parliament must also respect the preserve of the courts. The principle of separation of powers is a principle of restraint which has in it the precept, innate in the prudence of self-preservation, that discretion is the better part of the valour.

The doctrine of separation of powers envisages that legislative power shall vest in legislature, executive power shall ness with executive and judicial power shall rest in the judicial organ of the Government. Writing in 1748, Montesquieu said that- "When the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should exact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty if the judicial power be not separated from the legislative and the executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then a legislator. Where it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of exacting laws, that of executing the public resolutions and of trying the causes of individuals."

Montesquieu described his doctrine of separation of power as a complete separation of wall between the three organs of the Government. However, his words remained in the books and in practice there has never been the separation of power in the strict sense of the term. It is a structural concept not the functional one. "It can be very well said that our constitution does not contemplate assumption by one organ or part of the state of functions that essentially belong to another.[9] In *Indira Nehru Gandhi v. Raj Narayan*[10] it has been held that in the Indian Constitution there is separation of powers in a brand sense only. However, in *Kesava*

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7. (2011) 4 SCC 36.

8. 1975 Supp. SCC 1, 260, para 688.

9. Ram Jawaya v. State of Punjab, AIR 1955 SC 549.

10. AIR 1975 SC 2299.

Nand Bharati v. State of Kerla[11] Mr. Justice Beg opined that- separation of powers is a part of the basic structure of the Constitution. None of the three separate organs of the Republic can take over the functions assigned to the other. This scheme of the Constitution cannot be changed even by resorting to Article 368 of the Constitution.

Professor I.P. Messey, thus writes[12]- In India, not only is there a functional overlapping but there is personnel overlapping also. The Supreme Court has the power to declare void the laws passed by the legislature and the actions taken by the executive if they violate any provision of the Constitution or the law passed by the legislature in case of executive actions. Even the power to amend the Constitution by Parliament is subject to the scrutiny of the Court. The Court can declare any amendment void if it changes the basic structure of the Constitution.[13] The President of India in whom the executive authority of India is vested exercises law-making power in the shape of ordinance-making power and also the judicial powers under in the shape of ordinance-making power and also the judicial powers under Article 103(1) and Article 217(3), to mention only a few. The Council of Ministers is selected from the legislature and is responsible to the legislature. The legislature besides exercising law-making powers exercises judicial powers in cases of breach of its privilege, impeachment of the President and the removal of the judges. The executive may further affect the functioning of the judiciary by making appointment to the office of Chief Justice and other judges. One can go on listing such examples yet the list would not be exhaustive.

Apart from the difficulties inherent in the enforcement of any strict doctrine of separation of powers in the functioning of a modern government, there is also the inherent difficulty in defining in workable terms the division of powers into legislative, executive and judicial.

The learned author further write- If the doctrine of separation of powers in its classical sense, which is now considered as a high school textbook interpretation of this doctrine, cannot be applied to any modern government, this does not mean that the doctrine has no relevance in the world of today. The logic behind this doctrine is still valid. The logic behind this doctrine is of polarity rather than strict classification, meaning thereby that the centre of authority must be dispersed to avoid absolutism.

In this contest the view of Professor K.C. Davis are very illuminating. The learned Professor writes- The idea that the three kinds of power should not at any level be blended in any one set of hands becomes so impracticable that our legislative bodies, with later judicial approval,

11. AIR 1973 SC 1461.

12. Administrative Law, Fifth edition, EBC Lucknow, 2003, pp. 36-38.

13. Supra Note 10.

have generally had no hesitation in rejecting it. After all, the philosophers who developed the theory of separation of powers were not thinking in terms of the practical problems of fitting administrative powers into the existing structure of national and state governments; they had no conception of such modern problems as what kind of governmental machinery is desirable, within our overall framework of government, for the regulation of airlines or of television. What we have discovered in facing such problems and we have by now had a good deal of experience- is that the true principle that should guide the allocation of power within the general framework is not the principle of separation of the three kinds of power, but is the principle of check.

The danger is not blended power. The danger is unchecked power. The principle whose soundness had been confirmed by both early and recent experience is the principle of check. We have done far beyond Montesquieu. We have learned that danger of tyranny or injustice lurks in unchecked power, not in blended power.[14]

Constitutionalism, thus denotes that each organ of the Government must not travel beyond the path, shown to them by the fundamental law of the land. It is also to be remembered that each of the three functions of the Government containes element of other two. Thus blending is there, constitutionalism demands that the blending must not go unchecked and the government as a whole remains limited by the constitution.

2. The Concept of Judicial Process.

Judicial process, now a days, is not confined to black stonian doctrine of declaratory functions of the court.

Long Ago Blackstone the learned commentator of the law of England, wrote that, the "duty of the court is not to pronounce a new law but to maintain and expound the old one."[15] However, this doctrine has been discarded and law making role of the judiciary has been underlined again and again judges have given new dimensions to law of contracts, torts, and family relations. It was only after the judgment of House of lords in *Danghu v. Stevension*.[16] The tort of negligence not touched by legislature came into existence in England. It has been held in Cooper v. Wandsworth Board of Works by Byles J. That if the legislature has omitted to legislate on a particular subject, the "common law will supply the omission of the legislature". According to Berger and luck manns "The Role represent

14. Administrative Law Treatise, 1958, pp. 64-74.

15. Commentaries 15th edition 1808, p. 69.

16. (1932) AC 562.

an entire institutional nexus of conduct. The role of judge stands in relationship to other roles, the totality of which comprises the institution of law".[17] Thus, Charles Evans Hughes declared that, "The constitution is what the courts say it is".[18] The judicial law making is held to be usurpation of legislative functions, on the other hand, it is justified on the ground that, "Judicial functions would, by its' more creative, liberal and rational exercise, avoid the danger of loss of popular understanding and support for the law".[19]

Professor Hurst Terms the process of judicial law making as an instrument to depreciation of legislation.[20] Justice Markandey Katju, a retired judge of the Supreme Court has written that in many recent judgments, the Supreme Court has become hyper-activist in making laws. He has cited Arun Gopal v. Union of India (2017), M.C. Mehta v. Union of India (2018), Rajesh Sharma v. State of Uttar Pradesh (2017), in all there cases, judiciary, instead of adjudication has legislated. He, thus, concludes "If judges are free to make laws of their choices, not only would that go against the principle of separation of powers, it could also lead to uncertainty in the law and chaos as every judge will start drafting his own laws according to his whims and fancies.[21]

3. The Movement from Adjudication and Legislation to Execution.

Though, separation of power restricts each organ of the Government, our judiciary is moving fast in the direction of negativating the rule, both in letter, and spirit. It has attempted to rewrite a faith in Sabarimala case and has not accepted the community belief and its established practice as essential. It has as out then Chief Justice has observed, balanced the Right to Practice religion with fundamental rights. The judges in this case have imposed their personal views in respect of the form of worship of a deity. Thus, this judgment is, in the words of dissenting judge, Justice Indu Malhotra, is an attempt to impose constitutional morality and rationality with respect to form of worship.[22] "It is for the Supreme Court to tell people what their bonafide faith is … the Supreme Court's majority decision in the Sabarimala case has rewritten the constitutional dispensation on Freedom of Religion,

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17. The social construction of reality, (1960) p. 92.
18. Addresses of Charles Evans Hughes, 1906-1916, p. 185.
19. Lord Evershed, "Judicial Process" in twentieth century England' 1961, pp. 61; Columbia Law Review, 761-791.
20. The Growth of American Law (1950) p. 186.
21. When Judges Legislate, The Hindu Nov. 16, 2018, p. 9.
22. The Hindu, September 29, 2018, p. 1.

equality and untouchability, in contrast to justice Indu Malhotra's no less admirable dissenting judgement.[23]

Taking Administrative functions in their hands, the judges have become more executive minded than the executive. It is against the legal culture which denies the judges the role of executive. As Lord Woolf has pointed out the there organs of the state are like three chains that hold the structure of the state together. If one chain slackens, then another needs to take the strain. However, so long as there is no danger of the chain breaking, the fact that this happens, is not the manifestation of weakness but strength".[24] N.I. Rajah has rightly written that- In a bygone era, authority was accepted on principles set by a culture of reverence. Today none of the three organs of the state is inclined to extend this privilege to the other. Therefore, every constitutional authority can seek to validate its action only on the touchstone of reason and conformity to the constitutional ethos. Concerns about the independence of the judiciary being in peril have set alarm bells ringing. However, these are neither meant to escalate tensions nor to confound the common man but are to be treated as a wake-up call to the constitutional authorities concerned to get their act together and resolve issues amicably within the larger constitutional framework.

In the wise words of constitutional scholar Dennis Pearce, "For the good of our society, it is better for the combatants to realise that they are there to serve the people, not their own ends, and to adapt their conduct accordingly."[25]

The danger of our court turning into an Executive Court will disrupt the constitutional scheme and legal culture. According to Gautam Bhatia-[26]

Accountability only to oneself, however, is a very weak form of constraint. The temptation to overstep is always immense, more so when such immense power has been placed in one's own hands. It is here that legal culture plays a critical role in establishing judicial accountability. By legal culture, I refer to a set of unwritten, but clearly established, norms that determine what is or is not acceptable in the process of adjudication. And a legal culture does not spring up out of a vacuum: it must be created and nurtured by judges, lawyers, legal academics, the press and the citizenry.

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23. Rajeev Dhavan when the judiciary rewrites the faith, The Hindu October 15, 2018, p. 9.

24. Quoted in Hindu May 23, 2018, p. 8.

25. Keeping each other on Edge, The Hindu May 23, 2018, p. 8.

26. The Hindu 14 December 2018, p. 8. The Fear of Executive Court.

By the 1990s and the 2000s, under the misleading label of "judicial activism", the court was beginning to engage in a host of administrative activities, from managing welfare schemes to "beautifying cities" to overseeing anti-corruption initiatives. The constitutional court had become a Supreme 'Administrative' Court. This, too, was justified on the altar of necessity: politicians were corrupt, bureaucrats were inefficient, and things didn't move. *Someone* had to come and clean it all up.

We are not there yet. But we urgently need the return of a thriving legal culture, one that uncompromisingly calls out political posturing of the kind we have seen this week. And this legal culture cannot pick and choose, criticizing regressive orders like Justice Sen's, while exempting judgments that equally cross the line, but nonetheless seem to have achieved a "right outcome". Only a principled consistency in requiring that judges must always give *reasons* for their judgment can halt the transformation of the constitutional court into an executive court.

With respect to the judges of the Apex Court, we request them to remain law applier and interpreter and to act as Guardian of the constitution only then the fear of their being executive court will whiter away.

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JUDICIAL REVIEW OF LEGISLATIONS: A COMPARATIVE STUDY

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Abstract : *Judiciary which is the guardian of the constitution has a very important role to play, a role given to them by the forefathers of the constitution. They undo the harm caused to the constitution by the tyranny of the Legislature and Executives and deliver to its citizens all that which was promised to them long back. There are two concepts by which the courts tackle the tyranny of Legislature and Judiciary on our constitution. First,the concept of "Judicial Activism" which was firstly coined by Arthur Schlesinger in the Fortune Magazine, classifying the sitting Judges of the U.S. Federal Supreme Court as "judicial activists" and "champions of self-restraint". The statement made by Schlesinger in the magazine could be seen in connection to the decision taken in Brown v. Board of Education in which the court reversed its stand as taken in an earlier case, i.e. Dredd Scott v. Sanford, on the subject of slavery. The article presents a comparative study of the legislation of various countries.*

Keywords : Constituion, Comparative Study, Judicial Review, Legislation .

1. Introduction :

In the case of ***Marbury v. Madison***, Chief Justice Marshal hinted that the work of Judiciary is just not to *inter se* solve disputes but also to provide equilibrium to society; which in essence, can be understood in terms of Judicial Activism.[2]

"*There was a time when it was thought almost indecent to suggest that judges make law; they only declare it. Those with a taste for fairy tales seem to think that in some Aladdin's cave there is hidden a common law in its entire splendour and there on a judges appointment there descends on him knowledge of the magic words, 'Open Sesame'. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales anymore."*[3]

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2 Marbury v. Madison, 5 U.S. 137 (1803).

3 SIR LOUIS BLOM, GAVIN DREWRY & BRICE DICKSON, THE JUDICIAL HOUSE OF LORDS 226 (2009).

And *Second,* the concept of *Judicial Review* which was imbibed in our constitution[4]. Renowned Jurist *H. M.Seervai* noted that the principle of *Judicial Review* is a familiar feature of the Constitutions of Canada, Australia and India, though the Doctrine of Separation of Powers has no place in strict sense in Indian Constitution, but the functions of different organs of the Government have been sufficiently differentiated, so that one organ of the Government could not usurp the functions of another[5].

2. Comparison Between The U.K., U.S.A And Indian Concepts

In England, since there is no Written Constitution and Supremacy of the Parliament exists, there is no judicial review of legislation enacted by Parliament. An English court cannot declare an act of Parliament *ultra vires.* This theoretical position remains unchanged even after the enactment of the European Communities Act, 1972, which makes the community law directly enforceable in the United Kingdom, and Human Rights Act, 1998, which requires the England courts to point out that an act of Parliament is not compatible with European Charter on Human Rights. The courts, however, cannot declare an act of Parliament unconstitutional.[6]

The Indian experience of *Judicial Review* needs to be seen in the light that the Indians saw in a bill of rights an assurance to the minorities of their rights, and a safeguard against arbitrary rule. The Constitution of India of 1950 contained a bill of rights in *Part III* under the caption *' Fundamental Rights'* and declared that any law which are in derogation with the fundamental rights shall be void.[7] However, while vesting the power of judicial review in the High Courts and the Supreme Courts, maximum vigilance was taken to prevent the courts in India from being more than auditors of legality.

*While,*the Constitution of United States, gave rights in unqualified terms and left it to the courts to define their limits and legitimize restrictions on them, the Constitution of India enumerated the rights as well as the restrictions. *In England*, the courts have expanded their power through the process of interpretation. They have imposed greater restrictions on the executive by subjecting more and more of its actions to the principles of natural justice[8],

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4 Gurram Ramachandra Rao, "Judicial Review in India" available at http://www.mondaq.com/india/x/20649/Constitutional+Administrative+Law/Judicial+Review+in+India. (last accessed on 20-10-17.)

5 H.M. Seervai, Constitutional Law of India, 3rd ed., Vol. 1, N.M. Tripathi Private Ltd. Bombay, 1983, p. 237.

6 S.P.Sathe, Judicial Activism in India, 1st ed., Oxford University Press, New Delhi,2002,p.1.

7 Article 13(1), 13(2) of Constitution of India,1950.

8 Ridge v. Baldwin (No 1) [1963] APP.L.R. 03/14

critically scrutinizing the exercise of discretionary powers[9], and narrowly construing the ouster clauses that made the decisions of the administrative authorities or tribunals final and conclusive. Although courts in England cannot declare an act of Parliament *ultra vires*, they have subjected the administrative action to searching judicial vigilance. This is also '***judicial activism'***.

A written constitution imposes limits on the powers of the legislatures. If it is a federal constitution, the limits are imposed by the distribution of power between the federal government and the units and if the constitution contains a bill of rights, further limits are imposed on the legislature. Judicial review under a written constitution with a bill of rights cannot remain merely technocratic because the expressions used in the bill of rights, such as 'equality before the law', 'equal protection of law', 'personal liberty', 'the procedure established by law', acquire new meanings as society evolves and social change occurs. A constitutional court therefore cannot remain a mere technocratic court forever. A court interpreting a bill of rights is bound to be an activist in its interpretation and its decisions are bound to have political implications.

3. Meaning And Concept Of Judicial Activism

The concept of judicial activism has its roots in the English concepts of 'equity' and 'natural rights'. Whereas in America the theory of 'judicial activism' can be found in the notion of 'judicial review'. The first landmark judgement related to the concept was the case of *'Marbury v. Madison'*[10] where for the first time the judiciary took an active step above the legislative actions. The American Judiciary with the power of judicial review embarked upon the era of Judicial Activism in 1954 in the landmark case of *Brown v. Board of Education*[11].In the case of *Plessy v. Fergusson*[12] the Supreme Court not only abolished the laws which treated blacks as a separate class but also guaranteed such rights which were clearly provided for in the Constitution.

4. Meaning And Concept Of Judicial Review

Judicial Review, in its most widely accepted meaning is the power of courts to consider the constitutionality of acts of the other organs of the government when the issue of constitutionality is important for the disposition of law suits properly pending before the

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9 Padfield v. Minister Of Agriculture, Fisheries And Food [1968] UKHL 1.

10 Marbury v. Madison 5 U.S (1 Cranch) 137 (1803).

11 Brown v. Board of Education 347 U.S 483 (1954)

12 Plessy v. Ferguson 163 U.S. 537 (1986).

courts. The power to consider constitutionality in appropriate cases includes the courts' authority to refuse to enforce, and in effect invalidate, governmental acts they find to be unconstitutional[13].

The doctrine of judicial review has acquired different nuances during the course of its evolution in the U.S.A, U.K., and India. While the origin of judicial review can be traced to the United Kingdom which has no written constitution, it has become firmly established in the U.S.A with a written constitution establishing a federal polity[14].

4.1. Models of Judicial Review

There are two models of judicial review. One is a *Technocratic Model* in which judges act merely as technocrats and hold a law invalid if it is *ultra vires* the powers of the legislature. In the second model, a court interprets the provisions of a constitution liberally and in the light of the spirit underlying it keeps the constitution abreast of the times through dynamic interpretation. A court giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the horizons of the rights of the individual is said to be an activist court.

4.2. Types of Judicial Activism

Judicial activism can be positive as well as negative. A court engaged in altering the power relations to make them more equitable is said to be positively activist and a court using its ingenuity to maintain the status quo in power relations is said to be negatively activist. The decisions of the US Supreme Court in *Dred Scott*[15]was example of negative judicial activism, whereas the decision of that court in *Brown v. Board of Education*[16] is an example of positive activism.

In *Dred Scott,* The US Supreme Court upheld slavery as being protected by the right to property. Moreover, in *Brown v. Board of Education*[17]*,* the Court held that segregation on the ground of race was unconstitutional and void. Activism is related to change in power relations. A judicial interpretation that furthers the rights of the disadvantaged sections or

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13 Encyclopedia of the American Constitution, Vol 3 (New York, 1986) p.1054.

14 Dr.G.B.Reddy, Judicial Activism in India, Gogia Law Agency, Hyderabad, 2013 ,p.63.

15 Dred Scott,60 U.S. 393 (1856): or Lochner v. New York 198 U.S. 45 (1904).

16 Brown v. Board of Education,347 U.S. 483 (1954): 98 L.Ed. 873.

17 *Ibid.*

imposes curbs on absolute power of the State, or facilitates access to justice is a positive activism. *'Judicial activism is inherent in Judicial Review'*.

Whether it is positive or negative activism depends upon one's own vision of social change. Since, through *Judicial Activism,* the court changes the existing power relations, judicial activism is bound to be political in nature. Through *Judicial Activism*, the constitutional court becomes an important power centre of democracy.

5. History And Development Of Judicial Review

5.1. Development in the U.S.A legal System.

The doctrine of Judicial Review is one of the invaluable contributions of the U.S.A. to the political theory. In 1789 the Congress of the United States passed the Judiciary Act, which gave federal courts the power of judicial review over acts of state government. This power was used for the first time by the U.S. Supreme Court *Hylton v. United States*[18] . The significance of this case had an important impact on both judicial review and on direct tax laws. Not a decade after this decision, this case was used as precedent in *Marbury v. Madison*[19] to justify the court's use of judicial review. Though the format of judicial review has changed over the centuries, the idea that a court can refrain from reviewing a case is directly linked back to *Hylton v. US*[20]. as this was the first case with a question of what a direct tax was, it is considered as a stepping stone for all subsequent cases pertaining to the matter.

While *Marbury* cemented the Court's authority to exercise Judicial Review over federal legislation (though that authority would not again be exercised until *Dred Scott v. Sandford*, it took a few more years for the Court to assert its power over state statutes and courts as well. In *Fletcher v. Peck*[21] , the Court invalidated the Georgia legislature's voiding of certain previously made contracts. The Court held this to be a violation of the Contract Clause in Article I, Section 10.

In *Martin v. Hunter's Lessee* (1816)[22], the Court both invalidated a Virginia law and overruled the Virginia Supreme Court's opinion on the issue. Virginia had passed a law

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18 Hylton v. United States: 3 U.S. 171 (1796)

19 Marbury v. Madison, 1 Cranch 137 (1803).

20 *Supra Note 18.*

21 10 U.S. 87 (1810).

22 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

permitting the confiscation of land belonging to British loyalists (during the Revolutionary War). This law was challenged in an earlier case in the U.S. Supreme Court, and the Court held that the law was unconstitutional. The Virginia Supreme Court, however, charged with implementing that decision, refused to comply, holding the U.S. Supreme Court to have no power over state court actions. The case then returned to the U.S. Supreme Court which insisted on, and fomented, its supremacy over state legislative and judicial action.[23]

5.2. Development of this Jurisprudence in the U.K. legal System.

Professor Dicey's theory of parliamentary sovereignty[24] was an English constitutional incarnation of Austin's theory of sovereignty. The English people felt quite secure with an omnipotent Parliament because they had full faith in the strength of their democracy. Over the years, even in the England, parliamentary sovereignty has been considerably eroded in practice as well as in law. England has joined the European Convention on Human Rights and has accepted the jurisdiction of the European Court on Human rights. Further, the House of Lords in England has held that a European Community law would prevail over an Act of British Parliament.[25] This has been provided by the European Communities Act, 1972 but the above decision of the House of Lords whereby an earlier statute of Parliament was held to prevail over a later statute was clearly a constitutional revolution and meant the virtual demise of the Dicean theory of parliamentary sovereignty.[26] The United Kingdom has after a long hesitation enacted the *Human Rights Act, 1998*, which contains a declaration of rights. These rights act as limitations upon the executive and though theoretically they do not limit the power of the British Parliament, they would indirectly do so because the courts would presume that the act of Parliament could not be contrary to the rights given by that Act. These developments have doubtless changed the nature of the judicial review in the United Kingdom. There are of course limits to judicial creativity in England. In England, Parliament being supreme, the courts cannot declare a law of Parliament void.

An attempt was made by Lord Coke in 1610 in the *Bonham case*.[27] To assert the power to hold an act of Parliament void or it was inconsistent with the common law. Having miserably failed in securing such power of the courts, no judge again made such a claim.

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23 *Ibid.*

24 Dicey, Law of the Constitution (Macmillan, 1952).

25 R. v. Secretary of State of Transport, ex. P. Factortame Ltd. (No.2) [1999] All ER (D) 1173.

26 H. W. R. Wade, 'Sovereignty- Revolution or Evolution', 112 L. Q. R. p. 568

27 Thomas Bonham v College of Physicians, (1610) 77 Eng. Rep. 638

Judicial activism therefore was essentially directed against the executive and very subtly and indirectly against Parliament without challenging its authority to legislate.

In administrative law, more and more actions were required to be taken after hearing the affected party (*Ridge v. Baldwin*[28]), and the exercise of administrative discretion was subjected to strictest scrutiny (*Padfield v.Ministry of Agriculture, Fisheries and Food*[29]). Statutory efforts to oust jurisdiction of the courts were frustrated by converting every error of law into error of jurisdiction (*Anisminic Ltd. v. Foreign Compensation Commission*[30]). These were common law methods of dealing with the ouster clauses. The courts do not hold a legislative act invalid but construe it in such a way as not to give effect to the legislative intension to exclude the jurisdiction of the courts.[31]

5.3. Evolution and comparison with the Indian Legal System: Case by Case Analysis

Judicial review has been the special American contribution to the world. But it has been the bone of contention among the constitutional law experts as it is not clear that whether the judicial review is enshrined in the U.S Constitution[32]. The framers planned to put Judiciary's power of *Judicial Review* beyond any controversy and that is the reason why along with the independence of Courts and the powers of the Supreme Court, Judicial Review was the subject matter that loomed largest in the minds of the framers of the Indian Constitution. Unlike in the United States, Judicial review in India was provided for expressly in the constitution. *Art.13 (1) and (2)* provide for the power of the courts for judicial review. The constitution also divides the legislative power between the centre and the states and forbids either of them to encroach upon the power given to the other. Who is to decide whether a legislature or an executive has acted in excess of its or in contravention of any of the restrictions imposed by the constitution on its power? Obviously, such function was assigned to the courts.[33] It would be prudent to consider the period before independence for tracing the origin of judicial activism. However, there are few instances even prior to that period, where certain judges of the High Court delivered a dissenting judgement.

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28 Ridge v. Baldwin,[1963] APP.L.R. 03/14

29 Padfield v. Ministry of Agriculture, Fisheries and Food,[1968] UKHL 1

30 Anisminic Ltd. v. Foreign Compensation Commission,[1968] APP.L.R. 12/17

31 Rajeev Dhavan, The Supreme Court of India: A Socio-Legal Critique of its Juristic Techniques, pp. 63-7 (Tripathi, 1977).

32 Anirudh Prasad, CandrasenPratap Singh, Judicial Power &Judicial Review, Eastern Book Company, Lucknow, 2012, p.349.

33 CAD, (Official Report reprinted by the Lok Sabha Secretariat), Vol.7, 1968,p.700.

In 1893, *Justice Syed Mehmood* of Allahabad High Court delivered a dissenting opinion which sowed the seed for judicial activism in India. In that case which dealt with an under trial who could not afford to engage a lawyer, Justice Mahmood held that the pre-condition of the case being "heard" would be fulfilled only when somebody "speaks".[34] The Supreme Court of India started off as a technocratic Court in the 1950's but slowly started acquiring more power through constitutional interpretation. In fact the roots of judicial activism are to be seen in the Court's early assertion regarding the nature of judicial review.

In *A.K.Gopalanv.State of Madras*[35], although the Supreme Court conceived its role in a narrow manner, it asserted that its power of judicial review was inherent in the very nature of the written constitution. The Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment to the extent it transgresses the limits, invalid.[36] The posture of the Supreme Court as a technocratic Court was slowly changed to be activist Court.

In *Sakal Newspapers Private Ltd. v. Union of India*[37], it held that a price and page schedule that laid down how much a newspaper could charge for a number of pages was being violative of freedom the press. The Court also conceived a doctrine of giving preferred position to freedom of speech and expression, which includes freedom of the press, over the freedom to do business. The Supreme Court held that at a newspaper was not only a business; it was a vehicle of thought and information and therefore could not be regulated like any other business.

In *Balaji v.State of Mysore*[38], the Supreme Court held that while the backward classes were entitled to protective discrimination, such protective discrimination should not negate the right to equality and equal protection of law. It held that backwardness should not be determined by caste alone but by secular criteria though caste could be one of them, and that the reserved seats in an educational institution should not exceed fifty per cent of the total number of seats.

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34 Balkrishna, 'When seed for Judicial Activism was sowed',The Hindustan Times‖New Delhi, on 01-04-96, p.9.

35 A.K.Gopalanv.State of Madras, A.I.R. 1950 S.C. 27.

36 *Ibid*.

37 Sakal Newspapers Private Ltd. v. Union of India,A.I.R. 1950S.C. 27.

38 Balaji v. State of Mysore, A.I.R. 1964 S.C. 1823.

In *Chitralekha v. State of Mysore*[39], similar restrictions were imposed on the reservation of jobs in civil services. These are examples of judicial activism of the early 1960s.[40] In these early years of the Indian Supreme Court, the inconvenient decisions of the Supreme Court were overcome through the device of constitutional amendments. The first, the fourth and the seventeenth constitutional amendments removed various property legislations from the preview of judicial review.

Therefore, a debate on *A.K.Gopalan v. State of Madras*[41]**,** Sakal *Newspapers Private Ltd. v. Union of India*[42]**.***Balaji v. State of Mysore*[43]. *Chitralekha v. State of Mysore*[44] and scope of the Parliament's power to amend the Constitution started. A question was raised before the Court in 1951 in *Shankari Prasad v. Union of India*[45], whether Parliament could use its constituent power under Article 368 so as to take away or abridge a fundamental right. The court unanimously held that the constituent power was not subjected to any restriction. That question was again raised in *Sajjan Singh v. State of Rajasthan*[46], and this time two judges responded favourably, though theirs was a minority view.

In 1967, *L.C.Golaknath v. State of Punjab*[47] that minority view became the majority view, by a majority of six against five. It was held that Parliament could not amend the Constitution so as to take away or abridge the fundamental rights. Thus, apart from exercising the power of judicial review in an expansive manner, to assert itself more, in the interest of Constitutionalism, the Indian Supreme Court has exercised even more and wider powers. The court exercises the power to do anything or to give any direction to render complete justice. The court has assumed to itself the power to determine the validity of even a constitutional Amendment effected under Article 368, in the aftermath of *KeshavanandBharti v. State of Kerala*[48]**.** Probably, no court in the world under any form of constitutional government exercises such power. This it can be cited as the best example of judicial activism in India.

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39 Chitralekha v. State of Mysore,A.I.R. 1964 S.C. 1823

40 S.P.SATHE, Judicial Activism in India, 2nd edition,2003, oxford university press, New Delhi,p.7.

41 A.K.Gopalan v. State of Madras ,A.I.R. 1950 S.C. 27.

42 Sakal Newspapers Private Ltd. v. Union of India, A.I.R. 1962 S.C. 305.

43 Balaji v. State of Mysore, A.I.R. 1963 S.C. 649.

44 Chitralekha v. State of Mysore, A.I.R. 1964 S.C. 1823.

45 Shankari Prasad v. Union of India, A.I.R 1951 S.C. 458.

46 Sajjan Singh v. State of Rajasthan, A.I.R. 1965 S.C. 845.

47 L.C.Golaknath v. State of Punjab, A.I.R. 1967 S.C. 1643.

48 KeshavanandBharti v. State of Kerala, A.I.R. 1973 S.C. 1461.

After this era, the supreme courts in India has evolved from a positivist court into an activist court over the last fifty years right from *Sankari Prasad case*[49] to *Judicial review of NJAC*[50], *Triple Talaq*[51], *Interpretation of Right to Privacy*[52], *Guidelines for aadhar*[53] *etc***.** It has not, as is generally believed, become suddenly activist during last two decades, it has taken longer than that for the court to acquire its present position.

6. Judicial Review Of Legislative Acts: Position In U.K.

The Doctrine of Judicial Review was prevalent in England. *Dr. Bonham Case*[54]was decided in 1610 by Lord Coke was the foundation of judicial review in England. But in the case of *City of London v. Wood*[55] Chief Justice Holt remarked that *"An Act of Parliament can do no wrong, though it may do several things that look pretty odd."* This remark establishes the 'Doctrine of Parliamentary Sovereignty' which means that the court has no power to determine the legality of Parliamentary enactments.

In U.K. there is a system which is based on Legislative Supremacy and Parliamentary Sovereignty. Earlier, there was no scope of judicial review in U.K., but after the formation of European Convention of Human Rights, the scope of judicial review became wider. The enactment of Human Rights Act, 1998 also requires domestic Courts to protect the rights of individuals. In U.K., there is no written Constitution and Parliamentary Supremacy is the foundation. Principle of "Parliamentary Sovereignty" dominates the constitutional democracy in U.K.

6.1. Dimensions of Legislation in U.K.

There are two dimensions of Legislation in U.K.[56] which are:-

Primary legislation, which are basically legislations enacted by Parliament. Primary legislation is outside the purview of judicial review except in few cases which encroaches

49 Shankari Prasad v. Union of India, A.I.R. 1951 S.C. 455.

50 Supreme Court v. Union of India, W.P. No. (Civil) 13 of 2015.

51 ShayaraBano v. Union of India, W.P. No. (Civil) 118 of 2016.

52 K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1.

53 *Ibid*.

54 Thomas Bonham v. College of Physicians, 77 Eng. Rep. 646 (C.P. 1610).

55 City of London v. Wood, (1701) 12 Mod. 669,687.

56 Mohit Sharma, "Judicial Review - A Comparative Study", Indian Constitutional Law Review: Edition-I,January 2017, P.44.

the law of European Community law. After the formation of European Union and Human Rights Act 1998, *Primary legislation is subject to judicial review in some cases.*

Secondary legislation, which provides rules, regulation, directives and act of Ministries. Secondary legislation is subject to judicial review. There is no exception to secondary legislation, all the executive and administrative functions, rules, regulations can be reviewed by Courts and any of the actions can be declared as unlawful which is *ultra vires* to the Constitution.

In *Les Verts v. European Parliament*[57], it was held that the "European Union is a community based on the Rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional character.

6.2 Current Position of Judicial Review in U.K

The Courts in U.K. strictly follow the principles of *Judicial Review* with regard secondary legislations only. So far as primary legislations are concerned, they are outside the purview of *Judicial Review* but with some exceptional cases. In, *R. (on the application of Drammeh) v. Secretary of State for the Home Department*[58]**,** an immigration detainee who had failed to take his medication for schizo-affective disorder and had gone on hunger strike, but who did not lack mental capacity, failed to establish that his detention was unlawful by virtue of his pre-existing serious mental illness where the facts indicated that his actions were calculated to avoid deportation.

The claimant applied for judicial review of the lawfulness of his immigration detention. It was held that there was no doubt that the effect of detention on a detainee's mental health was a very relevant factor in evaluating what constituted a "reasonable period" of detention. The secretary of state's policy in *Chapter 55.10 of the Enforcement Instructions and Guidance* in relation to the detention of the mentally ill imposed a duty to inquire into the relevant circumstances of a detainee to assess whether serious mental illness existed and whether it could be satisfactorily managed in detention. Further, it was held that, where a detainee had capacity, his refusal to consent to medical treatment put him outside the scope of the secretary of state's policy statements.[59]

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57 Les Verts v. European Parliament, (1986) E.C.R. 1339.

58 R. (on the application of Drammeh) v. Secretary of State for the Home Department, [2015] EWHC 2754.

59 *Supra note*.42, p.45.

6.3. Scenario after the Human Right Act, 1998

The White Paper of the Act specifically mentions in its Introduction that:

"Although the courts will not, under the proposals in the Bill, be able to set aside Acts of the United Kingdom Parliament, the Bill requires them to interpret legislation as far as possible in accordance with the Convention. If this is not possible, the higher courts will be able to issue a formal declaration to the effect that the legislative provisions in question are incompatible with the Convention rights. It will then be up to the Government and Parliament to put matters right."

Numerous declarations of incompatibility have been made and some have resulted in amendments of the primary legislations but almost an equal number have been overturned by the House of Lords or the Court of Appeals on an appeal by the Home Office. An illustration of the change in the legislation can be seen in *Bellinger v.Belligner*[60] wherein it was declared by the courts that *Section 11(c) Matrimonial Cases Act, 1973* was incompatible with *Section 8 and Section 12* in so far as it makes no provision for recognition of gender assignment. This was remedied by the *Gender Recognition Act, 2004.*

However, the trend is not that it favours declarations of incompatibility with a repeal or enactment by the Parliament but there are numerous cases wherein the formal declaration has had no effect on the Parliament. The impact of Human Rights Act, 1998 is reflected in the words of *Lord Steyn* in the case of *Jackson and others v Attorney General*[61] and are as follows:

"Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order. One must not assimilate the European Convention on Human Right with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom."

Thus, Judicial Review is an accepted norm in respect of legislations in contravention of European Convention on Human Rights and wherein a public official has made an unlawful decision. The question that follows is on what grounds will a decision be subject to judicial

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60 Bellinger v. Belligner**,**[2003] UKHL 21.

61 Jackson and others v Attorney General, [2005] 4 All ER 1253.

review? This has been summarized by Lord Diplock in the case of *Council of Civil Services Union v Minister for the Civil Service*[62] in the following words:

"Judicial Review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the ground on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds."

In a very recent matter of an application by *the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)*[63], Whether Ss.58 and 59 of the *Offences against the Person Act 1861* and *s.25 of the Criminal Justice Act (NI) 1945* are incompatible with arts.3, 8 and 14 ECHR in failing to provide an exception to the prohibition on the termination of pregnancy in Northern Ireland in cases of serious malformation of the unborn child/foetus or pregnancy as a result of rape or incest. On appeal and cross-appeal on all issues to the Court of Appeal the respondents' appeals were allowed and the cross-appeal dismissed. The Court of Appeal also agreed to refer two devolution issues raised by the Attorney General for Northern Ireland on the issue of the standing of the Commission to bring the proceedings. So, this is a new trend that can be seen in England regarding the judicial review of legislative acts in U.K.[64]

7. Judicial Review Of Legislative Acts: Position In U.S.A.

The Judicial Review with its entrenched legacy in England travelled to U.S.A. unlike U.K., where a unitary form of government exists under an unwritten Constitution; the U.S.A adopted a written constitution with a federal polity, thus establishing a constitutionally limited or controlled government. The limited constitution can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution, void[65]. The second basis of judicial review is the enactment of constitution with federal set up as the written constitution itself brings the idea of limited government. All the organs derive their power from the

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62 Council of Civil Services Union v Minister for the Civil Service,[1983] UKHL 6.

63 Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland), UKSC 2017/0131.

64 Available at <https://www.supremecourt.uk/cases/uksc-2017-0131.html> last accessed on 14.11.2017 at 18.00 IST.

65 The Federalist (78), Ed Jacob E.Cooke(Hanover;1961) p.524.

Constitution. The third basis of Judicial is the supremacy clause contending Article 6[66] of the Constitution. Chief Justice Marshall pronounces in *Marbury* **v.** *Madinson*[67]"it is the peculiar duty and province of the judiciary to interpret the Constitution which has to endure for ages". Thus, the power of Judicial review is firmly established in front footing in U.S.A.

These expressions viz., judicial activism and judicial restraint are used from the angle of the personal or professional view of the right role of the Court. Accordingly, the courts may be condemned or commended for straying from or for conforming to that -right role. In U.S.A., in more than two centuries of judicial review, superintended by more than one hundred justices who have served on the Supreme Court and who have interpreted a constitution highly ambiguous, in much of its text, consistency has not been institutional but personal. Individual judges have maintained strongly diverse notions of the proper or right judicial role.[68]In America, there are almost as many conceptions of judicial activism as there are commentators. Some discuss activism almost solely in terms of the court's nullifying Acts of congress. Some see activism largely in the Court's violation of its obligation of comity to the other branches of government or to the States.[69]

In U.S.A it is evident that courts are having power to judicial review of the legislative acts of congress. There are so many instances where the supreme court of U.S.A has declared the law as unconstitutional or constitutional by using the power of judicial review. Some of the important case laws are as follows:

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66 Article VI of U.S. Constitution-

1. All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation.
2. This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.
3. The senators and representatives before-mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

67 Marbury v. Madinson,1 Cranch 137(1803).

68 'Evolution & Growth Of Judicial Activism In India 3.1 Introduction' available at <http://shodhganga.inflibnet.ac.in/bitstream/10603/11379/9/09_chapter%202.pdf> last accessed on 13.11.2017 on 17.00 IST.

69 *Ibid*.

In the landmark case of *Marbury v. Madison*[70] When President John Adams did not win a second term in the 1801 election, he used the final days of his presidency to make a large number of political appointments. When the new president (Thomas Jefferson) took office, he told his Secretary of State (James Madison), not to deliver the official paperwork to the government officials who had been appointed by Adams. Thus, the government officials, including William Marbury, were denied their new jobs. William Marbury petitioned the U.S. Supreme Court for a writ of mandamus, to force Madison to deliver the commission. It was held in this case that "*though the Justices agreed that William Marbury had a right to his job, they also ruled that issuing the writ of mandamus to force that to happen did not fall under their jurisdiction as stated in the Constitution. The Supreme Court opinion explained that it* ***is*** *within their power and authority to review acts of Congress, such as the Judiciary Act of 1789, to determine whether or not the law is unconstitutional. By declaring Section 13 of the Judiciary Act of 1789 unconstitutional, the U.S. Supreme Court established the doctrine of Judicial Review."*

In other famous case of *Ladue v. Gilleo*[71] In 1990, Margaret Gilleo placed a sign in the yard of her home in Ladue, Missouri. The sign said "Say No to War in the Persian Gulf, Call Congress Now." The city of Ladue had a law against yard signs, and told Ms. Gilleo to take her signs down. Ms. Gilleo sued the city of Ladue for violating her *1st Amendment rights*. It was held by the U.S Supreme court that Ladue's law against yard signs violated the 1st Amendment of the U.S. Constitution. The 1stAmendment protects political speech, and banning yard signs takes away the main avenue by which people traditionally express their personal political views. The value of protecting personal political speech is more important than Ladue's desire to keep the city free of clutter.

In another case of *Harper v. Virginia Board of Elections*[72]Annie Harper was not allowed to register to vote in Virginia because she wasn't able to pay the state's poll tax. Virginia law required voters to pay $1.50 tax to register, with the money collected going to public school funding. Ms. Harper sued the Virginia Board of Elections, claiming the poll tax violated her 14th Amendment right to equal protection. Again by exercising judicial review power the Supreme Court declared the *Virginia poll tax law unconstitutional*. By making it more difficult for poor people to vote, the state was violating the *14thAmendment guarantee of equal protection*. Voting is a fundamental right, and should remain accessible to all citizens. The amount of wealth someone has should have no bearing on their ability to vote freely.

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70 Marbury v. Madison, 1 Cranch 137 (1803).

71 Ladue v. Gilleo, 512 U.S. 43 (1994).

72 Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

So this judicial review of legislative acts and the acts of the executive are the trend even in the present time in U.S.A. this is very much evident from the very recent incident in case of *Donald J. Trump, President Of The United States v. International Refugee Assistance Project*[73] This case involved challenges to Executive Order No. 13780, Protecting the Nation From Foreign Terrorist Entry Into the United States. The order alters practices concerning the entry of foreign nationals into the United States by, among other things, suspending entry of nationals from six designated countries for 90 days. Respondents challenged the order in two separate lawsuits. It was held by the court that such acts are not as per the basic tenets of the constitution of the U.S.A and it is against the immigration law, therefore the court has given the immediate stay of such orders and the matter is still in hearing.

8. Judicial Review Of Legislative Acts: Position In India

In the landmark judgement of *State of Madras* **v.** *V.G.Row*[74] PatanjaliShastri, C.J. observed that "our Constitution contains express provisions for judicial review of legislations as to its conformity with the Constitution. This is especially true as regards the fundamental rights as to which the court has been assigned the role of *Sentinel* on *Qui Vive*[75]. In *Kesavananda Bharti* **v.** *State of Kerala*[76]Khanna, J. Observed *"if the provision of the statute is found to be violative of any Article of the constitution which is touchstone of the validity of all laws, Supreme Court and the High Courts are competent to strike down the said provisions."* The judicial review in India finds firm footing.

8.1 Provisions of the Constitution which ensures Judicial Review.

The Constitution of India incorporates a number of provisions which ensure the court's power of judicial review. They are as follows: -

Article 13(1) provides that pre-constitutional laws inconsistent with fundamental rights to be void.

Article 13(2) provides that post-constitutional laws which take away or abridge the fundamental rights shall be void to the extent of its inconsistency.

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73 Donald J. Trump, President Of The United States v. International Refugee Assistance Project, 582 U. S./ (2017), decided on 26th june,2017.

74 State of Madras v. V.G.Row, A.I.R. 1952 S.C. 196.

75 Dr.G.B.Reddy, Judicial Activism in India, Gogia Law Agency, Hyderabad,2013 ,pp.70-71.

76 Kesavananda Bharti v. State of Kerala,A.I.R. 1973 S.C. 1899.

Article 245(1) empowers the Parliament and the state legislatures to make laws subject to the provisions of the Constitution. It empowers the courts to review whether such laws are in accordance with the provisions of the Constitution or not.

If there is inconsistency between laws made by Parliament and the state legislature then this power of the Court evokes. *Article 251* provides that if there is any inconsistency between laws made Parliament under *Articles 249* and *250* and laws made by the legislatures of States then the law made by the Parliament will prevail and the State law will be inoperative to the extent of its repugnancy with the Union law.

Article 254 provides that if there is inconsistency between laws made by Parliament and State Legislature then the law made by the Parliament will prevail and the state law will be void to the extent of its inconsistency.

Article 372(1) provides that there will be continuance in force of existing laws until altered or repealed or amended by a competent legislature or the competent authority.

Under Article 32 the individuals have been provided with the right to move the Supreme Court for the enforcement of rights conferred by Part III and the Supreme Court has power to issue directions or orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari, whichever may be applicable. Similarly, the High Courts also have power to issue writs as provided under *Article 226(1)*.

Article 131 confers upon the Supreme Court original jurisdiction in matters of federal dispute. In case of disputes between the Centre and one or more state or between states the Supreme Court has original and exclusive jurisdiction.

Article 105(1) and 194(1) provide freedom of speech in Parliament or in the Legislature of the State respectively *subject to* the other provisions of the Constitution.

There are certain vague terms used in the provisions of the Constitution like “public interest”, “reasonable restriction” and “personal liberty”. These vague terms allows a wide scope of judicial review to the Courts.

8.2. Cases paving the way for Judicial Review

The Constitution can be amended by Parliament if a bill for such amendment is passed in each of its two houses with the support of two thirds of its members present and voting and absolute majority of the total membership of that house. Provisions of the Constitution that have bearing on its federal structure; however, can be amended only when an amendment bill

being passed by both houses in the above manner is ratified by at least half the legislatures of the states. The makers of Constitution provided for a flexible process of constitutional amendment.

In *Shankari Prasad v. Union of India*[77], it was argued that a constitutional was 'law' for the purpose of *art 13* and therefore it had to be tested on the anvil of the above article. If it violated any of the fundamental rights, it should be void. *Chief Justice Patanjali Shastri*, speaking on behalf of a bench of five judges in a unanimous judgement, rejected that argument outright and held that the word 'law' in that article did not include a constitutional amendment. That challenge was not renewed for more than a decade. During Nehru's time, the Constitution went through seventeen amendments. The Seventeenth Amendment, which brought ryotwari estates within the definition of the word 'estate' in *art 31 (A)*, became controversial for many reasons. It was, however, after Nehru's death that the challenge to the constituent power of Parliament was renewed.

In *Sajjan Singh v. State of Rajasthan*[78] the Court consisting of five judges was divided. While Chief Justice Gajendragadkar held on behalf of the majority of three judges including himself that constitutional amendment was not covered by the prohibition of *art 13(2),* two judges, Justice Mudholkar and Hidayatullah (the latter became the Chief Justice three years later), expressed serious reservations about that interpretation. Justice Hidayatullah observed that if our fundamental rights were to be really fundamental, they should not become '*the plaything of a special majority'*[79]

These two dissents opened the door to future attempts to bring the exercise of the power of constitutional amendment under judicial scrutiny. A thought that persuaded the majority justices to stick to the prevision ruling of the Court was that since the Court had upheld Parliament's power to amend the Constitution without any consideration for the fundamental rights in 1951, and seventeenth amendments had been enacted in pursuance of that decision, any reversal of judicial view in 1965 would not only severely jeopardize India's land reforms and other economic programme but also create problems in reverting to the pre-amendments position in respect of property relations. Professor A. R. Blackshield in his path-breaking article had shown how the Supreme Court, if it wanted to change the legal

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77 Shankari Prasad v. Union of India, A.I.R. 1951 S.C. 458.

78 Sajjan Singh v. State of Rajasthan, A.I.R. 1965 S.C. 845.

79 S.P.Sathe, Judicial Activism in India, 1st ed., Oxford University Press, New Delhi,2002, p.65.

position, could do so without upsetting the previously enacted constitutional amendments by prospectively overruling the previous decision.[80]

In 1967, the Supreme Court held in *Golaknath v. State of Punjab*[81] that an amendment passed in accordance with the procedure laid down by *art 368* was 'law' within the meaning of that word as used in *art 13(2)* of the Constitution. The Court by a majority of six against five judges held that Parliament had no power to pass any amendment that would have the effect of abridging or taking away any of the fundamental rights guaranteed by the Constitution. The petitioner had challenged the validity of the *First(1951), Fourth(1955) and Seventeenth Amendment Acts(1964)*, which had foreclosed judicial review of the laws pertaining to property. Chief Justice K. SubbaRao speaking on behalf of five judges invoked the *doctrine of prospective overruling* to save the existing constitutional amendments *(First, Fourth and Seventeenth)* from infirmity while mandating Parliament not to pass a constitutional amendment that would take away or abridge any of the fundamental rights in future. While doing so, the learned Chief Justice promised that the Court would interpret the provisions of the fundamental rights liberally so as not to jeopardize the implementation of the directive principles of state policy.

Justice Hidayatullah, in a separate concurring judgement, reached the same result but by an independent reasoning. Instead of prospective overruling, he conceived the principle of acquiescence to legitimize the *first, fourth and seventeenth amendments*. In his view, since the Court had acquiesced in the validity of those Amendment Acts through its prevision decisions, it was stopped from declaring them invalid. The doctrine of acquiescence was the doctrine of estoppels against the Court itself.

However, in order to reach the policy premise that Parliament's power of constitutional amendment must be checked, the judges had taken recourse to interpretational methods that were traditional and positivist. For example, the interpretation that a constitutional amendment as 'law' for the purpose of *art. 13* or that *art 368* of the Constitution, which provides for amendment of the Constitution, did not contain the power of amendment but merely prescribed the procedure and the power was to be located in the plenary legislative power of Parliament contained in the residuary clause (*art 248* and *entry 97* of *List I* of the *Seventh Schedule*) were exercise in legal positivism. In the context of the Court-Parliament confrontation on right to property, the *Golaknath* decision appeared to be a judicial one-upmanship to claim finality to the court's decisions. It flew in the face of the theory that a

80 A. R. Blackshield, 'Fundamental Rights and the Institutional Viability of the Indian Supreme Court', 8 JILI p. 139(1966).

81 Golaknath v. State of Punjab,A.I.R. 1967 S.C. 1643.

Constitution was a *grundnorm* (highest norm) and did not have to be validated. Its validity was *sui juris*.[82]The distinction between ordinary legislation and constitutional legislation had been the basis of judicial review as originally conceived in *Marbury v.Madison.*[83]

In the general elections held in 1971 of the Lok Sabha, one of the items in the Congress Party's manifesto was that, if elected to office, it would make basic changes in the Constitution. Mrs. Gandhi's Congress won a landslide victory in those elections and her party secured more than two third of the seats in the Lok Sabha. This could clearly be considered a mandate for amending the Constitution. The government therefore introduced the Constitution (*Twenty-Fifth Amendment) Act, (1971)*, the purpose of which was to restore toParliament the unqualified power of constitutional amendment it had possessed until the decision of Court in *Golaknath*.[84]Parliament also passed the *Twenty-Fifth Amendment*, which further restricted the right to property, and the *Twenty-Sixth (1971)*, which abolished the privy purses. These amendments along with the *Twenty-Fourth* were challenged in the Supreme Court. If, according to *Golaknath,* Parliament did not have the power to amend the Constitution so as to take away or abridge the fundamental rights, how could it empower itself to do that through a constitutional amendment?

This came up for hearing before the Supreme Court in *Kesavananda Bharati v. State of Kerala***.**[85] A bench of thirteen judges sat to hear this case, two more than the number of judges who decided *Golaknath*. While arguing their cases on behalf of the State, contended that Parliament's power to amend the Constitution was unlimited. When the judges asked them to elaborate whether it could be used for changing India from democracy to a dictatorship or from a secular state to a theocratic state the answer had to be in the affirmative. Chief Justice Sikri summarized those arguments as follows:

" The respondents the Attorney General and the Advocate Generals who represented the Union of India, on the other hand, claim that Parliament can abrogate fundamental rights such as freedom of speech and expression, freedom to form associations or unions, and freedom of religion. They claim that democracy can even be replaced and one party rule established. Indeed short of total repeal of the Constitution, any form of Government with

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82 P. K. Tripathi, 'Golaknath: A Critique' in Some Insights into Fundamental Rights, p. 1 (Tripathi, 1972).

83 Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803).

84 S. P. Sathe, 'Supreme Court, Parliament and Constitution', Economic and Political Weekly vol. VI, 34 and 35 (21, 28 August 1971): S. P. Aiyar and S.V. Raju (cd.), Fundamental Rights and the Citizen, pp. 126-38 (Academic Books Ltd.,1972).

85 Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461.

no freedom to the citizen can be set up by Parliament by exercising its power under art 368."

That doctrine came to be tested when the Constitution *Thirty-ninth Amendment Act (1975)* was challenged in the Supreme Court on the ground of its alleged violation of the basic structure of the Constitution.After the overall perusal the judicial review of the judicial acts continues till present time as well. The best of this is the *Triple talaq verdict*[86]*, Right to privacy*[87] **etc.**

9. Concluding Observations:

After throwing a glance on the above discussion it can be safely concluded that the main purpose of judicial review is to ensure that the laws enacted by the legislature conform to the rule of law. The form of judicial review varies in different parts of the world based upon its history and legal system.

It is not right to assume that judicial review of a legislature confers the judiciary with an upper hand over the other two organs of the government. Review of fundamental rights has been accepted as a legitimate practice in a democratic country either in the form of a necessary evil or as a just requirement.

Doctrine of Judicial Review is very dynamic concept in a present scenario. In various countries Judiciary is acting as a guardian of the constitution by help of the doctrine of Judicial Review. It enables the Court to maintain harmony in the State. Judicial Review is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part.

To perform this task, Constitutional Courts have been regarded as the most appropriate branch of government, and thus they currently possess legal monopoly to declare what the constitution must be. *So, Judiciary should not be so eager to declare the law created by the legislature as unconstitutional because the law made by the legislature is the will of the people so it should be set aside very cautiously.*

There are following suggestion regarding the judicial review of the legislative acts:-

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86 ShayaraBano v. Union of India and others, Writ petition (Civil) no.118 of 2016, decided on 22 August 2017.

87 Justice K.S. Puttaswamy (Retd.) v. Union of India and Others, Writ petition (Civil) no.494 of 2012, decided on 24th August 2017.

There is always a *strong presumption in favour of the legislative* Act and *Burden lies very heavily on those challenging* to establish beyond doubt that the Act done by legislature as unconstitutional.

A statute cannot be challenged on the grounds of public-policy. The policy behind the statute is not subject to review by the court.

The Act of sovereign legislature are not liable to be annulled by judicial decree given, so long as they do not contravene the guarantees given by the Constitution, if it is intra vires to Constitution it should not be declared void.

If the Act of the legislature results into infringement of fundamental rights, there will be no justification for saying that similar Act was done in the power of parliament and the Act will be declared unconstitutional.

As regard interpretation of a validity of Act or an amending Act, the courts have to follow the principle of construction as applicable to the interpretation of the original Act. Where two *Constructions* are possible, the court has to adopt that construction which holds the validity of Law. If court has to declare the Act unconstitutional, they should try to make the effect least painful.

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Legal Measures & Governmental Initiatives Towards Sustainable Agriculture: Conceptual Aspects & Relevance In Today's Scenario

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Abstract: *All over the world there are three basic needs of human being i.e., bread, cloth and shelter. The main goal of today world over is to meet the food needs of present leaving enough resources for the future generation to meet their own needs. This goal can only be achieved by way of sustainable agriculture developments because this phenomenon combines together a healthy environment, economic profits and equality both social as well as economic. The idea of sustainable agriculture embraces the phenomena of using less pesticides and fertilizers as well as genetic seeds to improve the quality of soil and other natural resources. The paper analyses the concept of sustainable development in the light of agricultural development.*

Keywords: Legal Measures, Government Initiatives, Sustainable Development

1. Introduction:

One of the fundamental concepts in the ancient wisdom is that the universe/external environment is comprised of five basic elements of matter. These basic elements of matter are known as 'khhitti- earth/soil'; 'jal -water'; 'pawak - fire/ heat'; 'gagan- space/sky' and 'samira- air'. Of these, fire/heat, water and air are active forms of matter, while earth/soil and space/sky are passive forms. All these forms of matter require space in order to exist. The earth/soil provides the base or area for the active forms of matter to act and interact, while space provides the arena within which they coexist. Samira/air represents wind and is the connecting link between all five matters.

These natural forces are extremely powerful and can become devastating if they violate certain boundaries. As long as the overall ecological balance is maintained, the natural forces will continue to operate in harmony and will help the world be a safe place for all life. The crossing of natural boundaries results in destruction of the normal cycles of nature. As a result we invite ill health and disturbances or disasters, whether personal, societal or ecological.

All over the world there are three basic needs of human being *i.e.,* bread, cloth and shelter. The main goal of today world over is to meet the food needs of present leaving enough

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resources for the future generation to meet their own needs. This goal can only be achieved by way of sustainable agriculture developments because this phenomenon combines together a healthy environment, economic profits and equality both social as well as economic. The idea of sustainable agriculture embraces the phenomena of using less pesticides and fertilizers as well as genetic seeds to improve the quality of soil and other natural resources.

The main issues gripping mankind all over the globe today are satisfying food needs with regard to improving quality of the environment along with the development of natural resources on which the agricultural economy rests. Besides this, it requires the use the non-renewable resources intelligently and efficiently to improve the quality of agricultural life of farmers as well as society at large including techniques such as crop rotation and increasing of live stocks by more use of pasture rather than grains.[2] Since there is less use of pesticides, the consequent effect on human health is not compromised. This kind of agriculture involves farming techniques which are environmental friendly.[3]

The term 'sustainable agriculture' is not new and for the first time it was used by Jackson in 1980[4]. By late 1980s, the term came to be in use and become popular widely.[5]Broadly, an ecological and environmental friendly approach to agriculture constitutes sustainable agriculture. As well as origin of the term is concerned, it is derived from the *Latin* word 'sustinere'. 'Sus' means from below and 'tenere' means to hold. Hence, the word is meant to keep in existence or maintain or being permanent. When the word sustainable agriculture is used in practice, it means 'farming systems which have the capacity to keep in existence their usefulness to society by way of being supportive to the society as a whole, environment friendly, conserving the natural resources and being economically and commercially viable also.[6]

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2. V. Gold, Mary "What is Sustainable Agriculture" *Alternative Farming Systems Information Centre* (July 2009),United States Department of Agriculture, available at, https://www.nal.usda.gov/.../sustainable-agriculture-inf.

3. See, "Sustainable Agriculture-The Basics"Food Program of Grace Communication Foundation (2017), available at, www.sustainabletable.org/246/sustainable- agriculture-the basics.

4. Jackson, Wes *New Roots for Agriculture* 4 (University of Nebraska Press Pub., 1980).

5. Kirschenmanm, Fredrick "A Brief History of Sustainable Agriculture" Vol.9 No.2*The Networker* 1 (March 2004).

6. Ikerd, John as quoted byDuesterhaus, Richard"Sustainability's Promise"*Journal of Soil and Water Conservation* 4(January-February1990).

The Food, Agriculture, Conservation and Trade Act,1990 also known as Farm Bill, 1990defines'sustainable agriculture' as an integrated system of plant and animal production practices having a site-specific applications that over a long term will. It mandates to -

- satisfy human food and fiber needs;
- enhance environmental quality and the natural resource base upon which the agricultural economy depends;
- make the most efficient use of non-renewable and on- farm resources and integrate natural biological cycles and controls;
- sustain the economic viability of form operations; and
- enhance the quality of life for farmers and society as a whole.[7]

According to Sustainable Agriculture Initiative Platform, 'sustainable agriculture' is the efficient production of safe, high quality agricultural product in a way that protects and improves the natural environment, the social and economic conditions of farmers, their employees and local communities and safeguards the health and welfare of all farmed species."[8]It generally aims to promote the practices of agriculture and farming by systems and methods which are productive, economically sound and environment friendly. It needs to be not only environmentally sound but also should be able to support the farmers as a community and should be viable economically.

2. The Conceptual Aspects:

In agricultural production a very remarkable and tremendous growth has taken place over last few decades due to the increase in global food production. As per Global Production Report, the growth in food production is around 280% in Asia, 140% in Africa and in 200% in Latin American countries. The statistics also reveals a growth of two times in United States of America (hereinafter referred as USA) and of 68% in Western Europe.[9] Moreover with increase in world population, the food consumption is increasing alarmingly every year and the agricultural production has to cope with it. However,it requires new technologies and these technologies have to be such that they have a good impact on the environment must be productive and accessible to farmers. Moreover,the quality of food

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7. Title XVI, subtitle A, section 1603, Public Law 101-624 (Food, Agricultural, Conservation and Trade Act of 1990).
8. See, www.saiplatform.org/ sustainable-agriculture/definition.
9. See, *The Report of the Food & Agricultural Organizations*(2005).

grown for human and other living creatures should be healthy and nutritious. This is the conceptual foundation of sustainable agriculture.[10]

Due to global dietary inclination of the people,there is not only an immediate need for sufficient food but there is need for nutritious food also. Further, the consumption of livestock products, meat, fish *etc.*, has also been increased. The livestock are being farmed with sub-standard pasture and food due to the growth in use of chemicals and fertilizers in agricultural crops.Both facts contribute to ill effects on human health. Such agricultural systems also contribute to environmental harm. Excessuse of pesticides and harmful fertilizers is growing and around 30-80% of nitrogen released from the use of such pesticides escapes and contaminates air and water system which increase the probability of diseases in human beings, livestock and aqua-based sectors such as fisheries.[11]

As a whole,sustainable agriculture aims to make the best use of systems which do not spoil the environment as well as the natural resources. Any agricultural system that brings about productivity for the agriculturists without harming environment comes within the preview of sustainability concept. Some of the basic principles that sustainable agriculture embraces may be -

- integration of the biological and ecological processes like soil regeneration, fixation of nitrogen and parasitism *etc*., in the processes of food productions;
- to use renewable inputs so as not to cause degradation of environment and human health;
- to solve the agricultural and resource problems for water use, forests, watershed and pests*etc*., by use of collective capacities of people;
- use of agricultural systems that are beneficial and bestow goodthings for public like clean water, recharge of groundwater and wildlife *etc.,*and
- making best use of crops and animals as well as their agro- ecological management.[12]

Thus, the concept of sustainable agriculture is a response or a way to make theagriculture system from conventional one to modern by making it not only economically viable but also

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10. Pretty, Jules *Agricultural Sustainability: Concepts, Principles& Evidences* 451 (The Royal Society Publication, 2008).
11. Alan, Townsend R., "Human Health Effects of a Changing Global Nitrogen Cycle" *Front Ecological Environment*240 (2003).
12. *Supra* note 9.

more yielding and environment friendly. It is a system to produce sufficient food without depleting the natural or non-renewable sources.

It is noticeable that Agenda 21, the Rio Declaration on Environment and Development and the Statement of Principles for the Sustainable Management of Forests was adopted by more than 178 nations at the United Nations Conference on Environment and Development (hereinafter referred as UNCED) held in Rio de Jenerio, Brazi1.[13] The full implementation of Agenda 21 was also reaffirmed at the World Summit on Sustainable Development.[14]Chapter 14 of Agenda 21[15] is dedicated to sustainable agriculture and its development worldwide. The Introduction of the chapter 14 of Agenda 21 lays down that by the year 2025, 83% of the expected globalpopulation of 8.5 billion will be living in developing countries yet the capacity of available resources and technologies to satisfy the demands of this growing population for food and other agricultural commodities remain uncertain. Agriculture has to meet this challenge mainly by increasing production on land already in use and by avoiding further encroachment on land that is only marginally suitable for cultivation.[16]

Outlaying the concept of sustainable agriculture the United Nations in Agenda 21 observed that major adjustments are needed in agricultural environmental and macro-economic policyat both national and international levels, in developed as well as developing countries, to create the conditions for Sustainable Agriculture and Rural Development (hereinafter referred as SARD). The major objective of SARD is to increase food production in sustainable way and enhance food security.This will involve education initiatives, utilization of economic incentives and the development of appropriate and new technologies, thus ensuring stable supplies of nutritionally adequate food, access to those supplies by vulnerable groups and production for markets employment and income generation to alleviate poverty and natural resource management and environmental protection.[17]

Sustainable agriculture is one of the paths to achieve enhancement and protection of natural resources, better quality life in clean environment and healthy living being and these objectives cannot be ignored in relation to modern agriculture.

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13. Also known as Earth Summit, 1992 held on 3rd to 14th June 1992.

14. The agenda was reaffirmed on 26th August to 4th September 2002 in Johannesburg, South Africa.

15. Under the title‘Promoting Sustainable Agriculture & Rural Development’.

16. Clause 1(Introduction),Chapter 14,Agenda 21.

17. *Id.*, at clause 2.

3. International Perspective:

With the nations feeling the heat for the increasing food consumption, healthy &nutritious food and growing dependability on livestock as well as the ever degrading environment, the concept of sustainable agriculture has been adopted on globally with every nation doing what they can accordthe resources and facilities available in this field. The pressure is more on the developing nations with limited natural resources but the developed nations are also feeling the pressure due to increased consumption of food products in their country every year with which the agricultural food production has to keep pace.

As well as the legal measures to promote sustainable agriculture in international perspective is concerned, the United States of America under Title 7 of the US Code, 1990 by enacting a statutory law as Food, Agriculture, Conservation and Trade Act, 1990has outlined the role of agriculture. Chapter 64 of this Title is concerned with' Agricultural Research, Extension and Teaching'.[18] Section 3103 of Chapter 64 of Title 7 defines the term sustainable agriculture as an integrated system of plant and animal production practices having a site specific application.[19]

Earlier to this,a Federal Agency[20]of the United States Department of Agriculture (hereinafter referred as USDA) was formed in 1935 to provide training, technical as well as financial assistance for the farmers and others who wanted to conserve the natural resources and pursued a goal of productive agriculture. It has several organs to fight the menace of soil erosion, soil conservation, water and land utilization and a 'Farm Forestry Program'. In 1994, the agency acquired the role of 'Wetland Reserve Program' authorized by the Farm Bill, 1990. The Natural Resources Conservation Services (hereinafter referred as NRCS) has developed good standards in the field of forestry, economics, wildlife biology and agronomy *etc.* They were also entrusted to monitor the natural resource assessment and land use.[21]

The concerns for health and environment as well as other social concerns have given rise to organic farming as to support the sustainable agriculture which is actually growing of food without use of harmful pesticides and fertilizers, genetically modified organisms and use of processes to delay ripening of produce to extend its shelf life. There are also

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18. Sections 3101 – 3371, The Food, Agriculture, Conservation and Trade Act, 1990

19. *Id*., at Section 3103 (19).

20. The Agency was designated as Natural Resources Conservation Service (NRCS).

21. See, www.nrcs.usda.gov.

connected issues in organic farming like water use, bio diversity, soil quality, soil erosion and environment *etc.*

Further, to strengthen sustainable agriculture and to regulate food processing and organic farming the United States passed the Organic Food Production Act, 1990. Vide this Act, the National Organic Program (hereinafter referred as NOP) was initiated as a sub-department of the US Department of Agriculture. NOP visualized formation of National Organic Standards Board (hereinafter referred as NOSB) as a panel for advisory to the Secretary of Agriculture. A draft for new organic standard was presented by NOSB for public comment in 1997 and after thorough debates the final rule was published in 2000 which came into effect from April 2001. The standards included thresholds for prohibition of pesticides, chemicals, genetic modification and irradiation of foods. It also set standards for feed of live stocks.[22]

The US Agricultural policy mainly consist of Farm Bills enacted every five years for various agriculture related system governance. The latest farm Bill named the Agricultural Act of 2014 authorizes policies in various fields related to agriculture like the crop insurance, conservation on lands, nutrition, trade, biodiversity and organic agriculture *etc.*

The judiciary in USA is also trying to keep pace with the movement of sustainable agriculture and organic farming by analyzing and reviewing regulations and laws under the relevant Acts. In *Harvey* v*Veneman,*[23] the US Court of Appeals of the First Circuit reviewed the Organic Food Production Act, 1990[24] and held several regulations under the Act as being invalid and gave limited constructions to other regulations. In response to the judgement the congress amended various provisions of the said Act.[25]

Yet in another case in *Aurora Dairy Corporation Organic Milk Marketing and Sales Practices Litigation*,[26] where several petitioners challenged the labeling law of organic milk and the role of State laws under the Organic Food Protection Act, 1990 before the US Court of Appeals, Eight Circuit.The Court was called upon to adjudicate as to whether and to what

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22. Suutari, Amanda "USA/Canada-The Organic Farming Movement in North America:Moving Towards Sustainable Agriculture" The Eco Tipping Points Project (November 2007), available at, ecotippingpoints.org.

23. 396 F. 3d 28 (1st Circuit,2005).

24. Sections 6501-6523, 7 USC.

25. *Ibid*; see also,*Harvey* v *Johanns*, 494F. 3rd 237 (2007).

26. 621 F.3d 781 (8th Circuit, 2010).

extentsection 6501 and the subsequent sections of the Organic Food Protection Act setting national standards governing the marketing of certain agricultural product as organically produced productspreempts the State Consumer Protection Law. In this casethe Court observed that the first purpose of the Act is to be establish national standards governing the marketing of certain agricultural products as organically produced productswould be deeply undermined by the inevitable divergence in applicable State laws as numerous court systems adopt possibly conflicting interpretation of same provisions of theOrganic Food Protection Act(hereinafter referred as OFPA)and NOP. While the addition of 'State Enforcement Mechanisms' may assist in assuring consumers that organically produced products meet a consistent standard and any added assurance comes at the cost of diminution of consistent standards, as not only different legal interpretations but also different enforcement strategies and priorities could further fragment the uniform requirements.[27]

The Court Further asserted that the Congress did not intend for requirements such as are given in the Act to preclude a State from prosecuting a certain organic producer. Certification relies upon inspection and observation of only a portion of a producer's operations and thus the evidence which supported certification could, and very likely would be different from the evidence which supports a State cause of action.[28]

In California with the enactment of California Environmental Quality Act, 1973 (hereinafter referred as CEQA) and the Forest Practice Act,1970 there have been several litigations concerning regulation of timber harvesting. In *Bayside Timber Co. Inc.* v *Board of Supervisors of San Mateo Country,*[29] the constitutionality of the Forest Practice Act, 1945 was challenged. Under this Act, there was self-regulatory systems vide which private timber owners had exclusive authority to set rules governing forest practices and there were practically no mechanism to protect environment. The Court held the Act unconstitutional on the ground that vast legislative powers have been given to interested persons. The judgementforced the Congress to enact the Forest Practice Act, 1973 to address concernsaffecting environment.

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27. *Ibid*.

28. *Id*; see also,*Jones* v *Con Agro Foods Inc*., 912 F. Supp. 2d889 (N.D. Cal. 2012); *Quesada* v *Herbs Thyme Forms, Inc*., 166 Cal. Rptr. 3d 346 (Cal. Ct. App. 2013).

29. 20 Cal. App. 3d 1 (1st District, 1971).

Further in *Environmental Protection Information Center*, *Inc.,*v *Johnson,*[30] the Court of Appeal upheld the CEQA guidelines for assessing the environmental effects on new projects. This view was re-affirmed by the Court in*Laupheimer*v *California*.[31]

On the basis of these exemplaryjudgements of US Courts relating to'sustainable agriculture' as well as various 'Acts, Regulations and Policies' formed by the US Government, we can say that they are more serious to sustainable agriculture and are honestlyboosting the policy of sustainable agriculture and organic farming.

The vision for sustainable agriculture in Canada started as early as in 1989 when a review of its Agro-Food Policy was initiated by adiscussion paper 'Growing Together'. This vision initiated a framework to integrate the necessary goals of economic, social and environmental issues. In 1990, the Report of the Federal Agricultural Committee on the theme of 'Environmental Sustainability' presented many recommendations and suggestions for change in agricultural practices as well as a policy for sustainability of the environment along with economic viability in relation to agriculture. The main sectors identified as requiring attention were water management, conservation of natural and soil resources, conservation of genetic resources and pollution *etc.* Certain NGOs and Public Advisory Committees are also cooperating with the Government in various programs relating to sustainable agriculture and education of farmers on environmental issues.[32]

In this context currently 'Growing Forward 2'(hereinafter refereed asGF2) initiative taken by the Canadian Governmentas a five year program from 2013 to 2018 is a serious steptowards policy framework for agricultural and agro-food sector in Canada. It is a 3 billion Dollar investment by the Government for agricultural programs.

Special emphasis and governmental patronage on sustainable agriculture has led to organic farming in Canada and is receiving a lot of recognition as a part of sustainable agriculture. Canadian organic farming has made tremendous progress especially in horticulture and grain production.

For the first time,the organic farming started in Canada in 1950 but was developed mostly during 1970's. To promote such agricultural practices various organisations were formed

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30. 170 Cal.App. 3d 604(1st District, 1985).

31. 200 Cal. App. 3d 440 (6th District, 1988.)

32. Information provided by Government of Canada to the 5th Session of the United Nations Commission on Sustainable Development, 1997, available at, www.un.org/esa/agenda21/natlinfo/counter/canada/natur.htm.

in six provinces of Canada during this period. Apart from this, research and development programs were initiated by Government in this direction and by 2003,it had 3100 organic producers totaling 1.3% of Canadian farmers who are farming around 3,90,000 Hectares of land.[33]

Initially, there was no federal policy in Canada relating to organic farming. However, the Crop Insurance Programmes and Canadian Agricultural Income Stabilization Program were in practice. Though in the year 2000,it was recommended by the Standing Committee of the House of Commons that the Government should develop an Organic Agricultural Policy for the transition from pesticide-dependent farming to organic farming. This policy should include tax incentives, an interim support program during the transition period and technical support for farmers the development of post-secondary organic farming programmes and enhanced funding for research and development in organic agriculture.[34]

This step created a faith for adoption of Canadian Organic Farming Standards constituted by the Federal Government. On 30th June 2009 the Organic Products Regulations(hereinafter referred as OPR) came into effect making the Canadian Organic Standards mandatory.[35]These' Standards' are a detailed set of guidelines and regulations issued by the Canadian Food Inspection Agency to be used in the process of organic certification.[36]

As far as agricultural sector and rights of farmers is concerned,the judiciary has also been very active in Canada. The Supreme Court of Canada in a ruling dated April 29, 2010,[37] has ruled against allowing exclusive representation for farm workers. Eight out of nine judges supported the decision. As per the ruling the farm workers have been given protected rights at the judicial and legislative levels by way of application of the Agricultural Employees Protection Act (hereinafter referred as AEPA). This was to ensure that the farm workers

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33. Forge, Frederic "Organic Farming in Canada: An Overview", available at,www.lop.part.gc.ca/content/lop/research publication, 2004.October.

34. *Pesticides-Making the Right Choice for the Protection of Health and Environment* First Report of the Standing Committee on Environment and Sustainable Development, 2nd Session, 36th ParliamentHouse of Commons (May 2000).

35. The Canadian Organic Standards were again updated on 25th November 2015.

36. See, www. inspection.gc.ca/food/organic-products/standards.

37. Wales, Mark(Vice President of Ontario Federation) "Supreme Court Ruling Good for Farming"*Green House Canada*(6th May 2011), available at, www.greenhousecanada.com/news/may-2806.

have a right to associate and exercise their rights. This decision was effected to secure the sector of sustainable agriculture in Ontario.[38]

The issue of genetically modified seeds which have become very important for their contribution to sustainable agriculture and has the capacity to yield more when used for agriculture, were the subject of decision in another landmark case of *Monsanto CanadaInc.,*v*Schmeiser*.[39] This case was related to the grant of patent rights for biotechnological invention between the agricultural biotechnology company Monsanto and Canadian Canola Farmer Percy Schmeiser. In this case the Supreme Court was called upon to decide whether intentional growing of genetically modified plants by Schmeiser would mean the use of the Monsanto's patented genetically modified plant cells.[40]

The patent right of a gene for canola plant was patented by the Monsanto company and when they came to know that Schmeiser was using it, they approached him to sign a license agreement to their patent and pay a license fee. Scheimiser refused to do so saying that the seeds, he was using were generated by contamination which was accidental and he owned the harvested seeds and could use it to his satisfaction and wish. Monsanto thus filed a case for infringement of patent rights.

The issue was settled in favour of Monsanto by the Federal Court of Canada as well as in appeal before the Federal Court of Appeal. On May 21st, 2004 the Supreme Court also ruled by a majority of 5-4 in favour of Monsanto. However, they granted relief to Schmeiser by holding that he did not have to pay to the company for profits of his crops since the presence of gene in his crop did not give him any advantage and did not accrue any profit to him.[41]

Presently the application of crop-rotation system, organic farming and agro-forestry practices are the main ingredients of sustainable agriculture in Canada and are benefiting the society and agriculturists equally. The ecologically educated local farmers are making use of their knowledge and practicing the same in their farms.[42]

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38. *Ibid*; see also,*Dunmore* v *Ontario (Attorney General),* (2001) 3 SCR 1016: 2001 SCC 94.

39. (2004) 1 SCR 902 : 2004 SCC 34.

40. See, https://en-wikipedia.org/wiki/Monsanto-Canada-Inc-v-Schmeiser.

41. Ibid; see also,www.organicconsumers.org.

42. Thiessen, Joanne &Entz, Martens Martin &Wonneck, Mark"Ecological Farming Systems on the Canadian Prairies: A Path to Profitability, Sustainability and Resilience" *The Report of the Science and Technology Branch of Agriculture and Agri-Food, Canada*46 (December 2013).

5. Indian Perspective:

Agriculture is a multi-faced activity. A large section of Indian population directly or indirectly depends on agriculture.Right from beginning, India has a very long history of agriculture. It was started by cultivation of plants and crops as well as domestication ofanimals as early as 9000 BC. Crops such as wheat, rice and cotton *etc.,* went into the global market from India during the British Period. From 1960safter independence,'Green Revolution in India' started to encourage and strengthen the agriculture sector.[43]

However, while the Indian farmers over centuries devised practices like crop rotation, mixed cropping, use of organic fertilizer for crops and pest management for making the agriculture practices sustainable and environment friendly, the Green Revolution in 1965 brought about the use of chemicals for production of crops which tended to not only degrade the environment but also played with the health of society at large.[44]

At present India is facing a severe crisis of food due to uncontrolled use of chemical fertilizers and pesticides as well as systems like mono-cropping. The solution to this would lie in encouraging concept of sustainable agriculture by way of conservation of water resources, soil and bio diversity *etc*.,and the means to achieve it, is certainly the concept of sustainable ecological farming. To make crops healthy as well as nutritious, organic farming and genetic food crops are the only way. There has to be lesser and lesser use of harmful chemical pesticides and fertilizers and this can be brought about by an extensive agro-policy to make the soil more productive and the crops more nutrition's and healthy.

In spite of remarkable industrial growth and improved attention to services and manufacturing, still a large number of its people engaged and dependent on agriculture. However,due to cutting of large number of trees and conversion of forest lands into agricultural lands, there has been relatively large spurt in imbalance of ecology which has given rise to pollution and degradation of environment. As the agricultural land is limited and there is possibly no vision at present of its expansion, the need to increase the food production in that limited area of crop fields has given rise to use of harmful fertilizers and pesticides to enhance the yields of lands available for agriculture. The overall effect of green revolution is nowhere to be seen and is only limited to some parts of Punjab, Uttar Pradesh, Andhra Pradesh and Maharashtra. The over use of water,low quality pesticides and fertilizers has also effected the water bodies and contaminated them extensively. The largest area of irrigated land

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43. See,https://en.wikipedia.org/wiki/History-of-agriculture-in-the-Indian-Subcontinent.

44. See, "Ensuring our Food Security"*Green Peace India*(March20,2013), available at, www.greenpeace.org/India/en/what-we-do/Sustainable- Agriculture.

around 55 million hectares lies in our country but around one third of it has already been defoliated by being barren due to soil erosion and around 7 million is lying abandoned.[45]

Urgent need and the demand of the present time is to make agriculture sustainable by lesser use of natural resources, increase of water availability, increasing fertility of soil and saving the soil from erosion, lesser use of chemicals and fertilizers which cause soil degradation as well as contamination of water bodies and plantation of trees. In our country where the farmers are committing suicides due to debts and poverty,it is socially necessary that there is an urgent need for beneficial policies to be initiated by the Government and to divert more budget money towards the agricultural sector. Sustainability in agriculture would also require the farmers to be financially capable and they must get proper financial assistance as well as proper money for their crops. Crop-rotation instead of mono cropping is also to be encouraged.

Nowadays, another term which is being frequently used is 'Alternative Agriculture Methods' if adopted on a major scale would also be helpful in promoting sustainable agriculture. Alternative agriculture is a systematic approach to agriculture which improves the profitability and efficiency of land as well as causes remarkable reduction in environmental pollution. This method of agriculture involves natural process for agriculture such as nitrogen fixation, nutrient cycles *etc*., reduction in the use of pesticides and chemical fertilizers, conservation of soil as well as water and no till planting methods. It also involves crop rotation and a more productive use of genetic potential of plants and animals.[46]

The Indian Government is well aware of these facts and is taking necessary steps. However, there is much need for more policies, research and development as well as education of farmers. Knowing the importance of the agricultural sector in respect of the economy, wellbeing and health of the society at large in our country, the Government by way of several policies and guidelines as well as agricultural policies have been constantly working towards the betterment of this sector. Though much more is needed to be done in this field yet the effort being made presently are indeed welcome steps observing that the agricultural sector in respect of technology and research lags behind as compared to other countries.

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45. See, "Promoting Sustainable Agriculture in India" Council for Social Justice and Peace, Goa in category 'Agricultural Sector' and 'Employment and Livelihood'(6th January 2011),available at, www.csjpgoa.org/employment-and-livelihoods/promoting-sustainable agriculture-in-India.

46. *Ibid*; see also, "Alternative Agriculture", available at,www.teachmefinance.com/ Scientific-Term/ Alternative agriculture.html.

6. Sustainable Agriculture: Legal Measures &Governmental Initiatives:

6.1. National Mission for Sustainable Agriculture

The National Mission for Sustainable Agriculture(hereinafter referred as NMSA) promoted by the Department of Agriculture and Cooperation, Ministry of Agriculture and Farmers Welfare, Government of India is a Mission deriving its authority from the 'Sustainable Agriculture Mission' which is one the missions outlined under the 'National Action Plan' on Climate Change (hereinafter referred as NAPCC). The Prime Minister's Council on ClimateChange has approved the objectives, strategies as well as the programmes of NMSA on 23rd September 2010. The programme of NMSA consists of attaining the goal of sustainable agriculture by adopting measures in some of the important areas needing attention like the wateruse efficiency, improved farm practices, pest management, credit support and agricultural insurance *etc*. These programmes have been specially designedto focus on key issues like soil conservation, water conservation, soil health management and rain fed area development.[47] These programmes are being coupled with other missions and schemes of Department of Agriculture and Cooperation during the 12thFive Year Plan.[48]

Some of the major objectives of NMSA include *inter-alia* to-

- make agriculture more productive, sustainable, remunerative and climate resilient by promoting location specific integrated/ composite farming systems;
- conserve natural resources through appropriate soil and moisture conservation measures;
- adopt comprehensive soil health management practices based on soil fertility maps, soil test based application of macro and micro nutrients and judicious use of fertilizers; and
- optimize utilization of water resources through efficient water management to expand coverage for achieving 'more crop per drop'.[49]

To achieve these objectives in the best possible way in the least possible time, the NMSA has formulated many strategies. Some of the strategies of NMSA for achieving its objectives areas are as follows -

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47. See, nmsa.dac.gov.in.
48. The term of Twelfth Five Year Plan commenced *w.e.f.,* 2012-2017.
49. See, The Mission objectives of NMSA, available at, nmsa.dac.gov.in.

- promoting integrated forming system for crops, livestock, fisheries *etc.*, and ensuring food security as well as minimizing risks of crop failure by way of supplementary or residual production systems;

- popularizing resource conservation technologies and introducing practices supporting mitigation efforts in times of extreme climatic events, disasters and floods *etc*.;

- promoting effective management of available water resources;
- encouraging improved agronomic practices for higher farm productivity, improved soil treatment, increased water holding capacity and judicious use of chemicals;
- promoting location and crop specific integrated nutrient management practices to improve soil health, enhancing land productivity and maintaining the quality of land and water resources; and
- involving NGOs for implementation of 'Village Development Plan' in case of limited government infrastructure available in that area.[50]

The State Department of Agriculture has been assigned the duty for implementing NMSA at State levels. State Governments may engage or nominate any other Department or Agency as nodal authority for NMSA at district level. The States also are required to prepare a Mission Implementation Plan (hereinafter referred as MIP) which shall indicate action Plan and strategies for sustainable agriculture for 5-7 years period.

In 2014, NMSA issued guidelines for achievement of its objectives by setting up of National Advisory Committee as well as structure for Stateand District Level, as well as guidelines for implementation of Soil Health Management Component under NMSA.[51]

According to the reports of NMSA for the financial year 2016-2017, the Mission has releasedRs. 1800 Lakh for 'Rain fed Area Development' for the State of Andhra Pradesh out of which Rs. 633 Lakhs has already been utilized. Similarly, for JharkhandRs. 1000 Lakh have been released out of which Rs. 23745 Lakh has been utilized and for Uttar PradeshRs. 1642.50 Lakhs has been released for the same purpose and so on.[52]By these efforts it seems that the NMSA is not lagging behind in terms of issuing strategies, guidelines and funds for steps to be taken to attain the goal and targets for sustainable agriculture. The States are required to respond to the mission in spending these funds allocated to them through various steps and schemes.

50. See, The Strategies of NMSA, available at, nmsa.dac.gov.in.

51. See, NMSA Guidelines, available at, nmsa.dac.gov.in .

52. See, *Progress Reports for the year 2016-17*,*The Reports on MIS,* available at, nmsa.dac.gov.in.

6.2. Agro-forestry

India is the first country of the world, which has enacted agro-forestry policy to face the challenges of global warming on agriculture. It is a combination of traditional and scientific knowledge. Development of the concept of agro-forestry is another positive step which has been taken by the Government towards sustainable agriculture. Agro forestry activity combines the annual agricultural activities like crops and pasture production with the long terms production by trees and timber *etc.* It visualizes the activity of tree planting on agricultural land around or between the crops or pasturel and. This is a way towards the attainment of healthy crops, increased bio-diversity, good environmental conditions, increased fertility of soil, clean water run through the lands and farms and lesser need of chemical fertilizer and pesticides.[53]

The Sub-Mission on Agro-forestry (hereinafter referred as SMAF)launched in 2016 by the Government of India is another 'Mission' under the NMSA, by the Department of Agriculture, Co-operation and Farmers Welfare, Ministry of Agriculture and Farmers Welfare, boost the steps being taken in our country for attaining sustainable agriculture. The concept of agro-forestryis useful also because besides being environment friendly, it is also a valuable source for economic gains as about 65% of the timber requirement of the country is met by trees grown outside of forests.[54]

The objectives of SMAF *inter-alia* are to -

- encourage and expand tree plantation in complimentary and integrated manner with crops and livestock to improve productivity, employment opportunities, income generation and livelihoods of rural households especially the small farmers;
- ensure availability of quality planting material like seeds, seedlings, clone, ecological regions and land use conditions;
- popularize various agroforestry practices/models suitable to different ecological regions and land use conditions;
- create database, information and knowledge support in the area of agroforestry; and

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53. See, https://en.wikipedia.org/wiki/Agroforestry; and see also the site of Association for Temperate Agroforestry, available at, www.aftaweb.org/about/what is agroforesty.html.

54. See, Clause 1.2, Introduction and Operational Guidelines of Sub-Mission on Agroforestry, available at, www.agricoop.nic.in.

- provide extension and capacity building support to the agroforestry sector.[55]

The strategies devised by SMAF to attain the said objectives includes-

- expanding the coverage under tree plantation in arable land suitableto local agro climatic and land use conditions to provide livelihood,environmental and bio-diversity protection by encouraging farmers to grow trees in their farmlands along with crops/ cropping systems and/or livestock as an integral component of farming system;
- promoting establishment of new small nurseries and hi-tech big nurseries for producing quality planting materials like seeds seedlings, clones and improved varieties to meet the requirement of quality planting material/seeds for the farmers;
- promoting various agroforestry practices/models suitable to different agro ecological regions and land use conditions that will support adaptation and mitigation efforts in climate change. Promoting sustainable 'agrisilvicultural' systems, 'silvipastoralsystems, 'agrisilvipastroal' systems and other systems of agroforestry like apiculture with trees and aqua- forestry;
- promoting peripheral and boundary plantation on farms will serve as fencing of farms, demarcation of farms boundary, stabilizing farm bonds, protecting from soil erosion, improving soil moisture, enrichment of soil organic master without affecting coverage under crops; and
- creating database on area under agroforestry, status of soil organic carbon, information and knowledge support *etc.*[56]

The SMAF is also converged with other policies and programmes of the like the National Food Security Mission, Rashtriya Krishi Vikas Yojna, Mahatma Gandhi National Rural Employment Guarantee Act and Pradhan Mantri Krishi Sinchayee Yojna*etc*., to attain the objectives of sustainable agriculture. The States are required to prepare action plans for implementation of objectives of SMAF and there shall be regular monitoring and evaluation of implementation of SMAF by way of quarterly and annual progress reports of different States. It is visualized that proper implementation of SMAF will provide additional income for farmers along with other opportunities. The increase in plantation of trees will result in less carbon emission in the atmosphere and would help in curbing the menace of global warming and climate change as well as would meet the increasing demand of food supply in India by generating more of healthy and nutrient crops.[57]

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55. Clause 2.1 - 2.5, Mission Objectives of SMAF, Sub-Mission on Agroforestry, available at, nmsa.dac.gov.in.
56. See, Mission Strategic of SMAF, available at, nmsa.dac.gov.in.
57. See,Sub-Mission on Agroforestry, available at, nmsa.dac.gov.in.

6.3. National Agricultural Policy

In the era of 1970 the Food Corporation of India (hereinafter referred as FCI) and Agricultural Prices Commission (hereinafter referred as APC) was established in India. Because of extensive growth in the sectors of poultry,fisheries, vegetables and fruits as well as growth in the agricultural market remarkable increase in the agricultural GDP during the 1980's was seen. There was tremendous awareness in the agricultural market on international level and many international trade accords were entered into as well as the World Trade Organisation was established in post 1991 era. Thus,due to boom in the agricultural sector at the national level, the Government had to participate to keep as well as motivate the growth in the agricultural sector also.[58] This compelled the need of a stable and strong agricultural policy at the national level.

Thus, the first National Agricultural Policy was announced on 28th July2000.The major objectives of the National Agricultural Policy (hereinafter referred as NAP) was to give support and strength to the rural infrastructure and to cash in the vast but yet untapped potential of the agricultural sector as well as to give boost to agro-business by creating employments. Broadly NAP was formulated to attain the goal of sustainable development in the agricultural sector.[59] The NAP aims to achieve some of the following objectives such as-

- growth rate of above 4% per annum in the agricultural sector;
- growth based on efficient use of resources and conservation of natural resources;
- making provisions for soil conservation, water conservation and bio-diversity;
- equitable growth in agriculture sector and the impacts of which should be wide spread across regions and different classes of farmers;
- attainment of demand driven growth catering to the needs of domestic markets by exports of agricultural products; and
- attaining an environment friendly growth with economy towards the goal of sustainable agriculture.

To achieve these objectives some strategies have been devised by the policy which *inter-alia* includes-

- to use the wastelands lying unutilized for agriculture and forestation;

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58. Dhoot, Swati "National Agricultural Policy:A Critical Evaluation"*Cuts Centre for International Trade, Economics & Environment, Jaipur* (2006), available at, www.cuts-citee.org/pdf.

59. See, agropedia.iitk.ac.in/content/national agricultural policy .

- introduction of multi-cropping and inter-cropping for betterment of crop yields;
- to check the overuse of ground and surface water by introducing techniques like drip and sprinkler system for use of agriculture purposes;
- adopting watershed approach and water harvesting methods for long term plan for rain fed agriculture;
- making farmers aware and educated about environmental concerns;
- evaluation and survey of genetic resources as well as conservation of indigenously introduced genetic variability in crops productivity;
- more use of bio-technology to develop plants which consume less water and are pest and drought resistant; and
- to develop crops which are more nutrient, environmentally safe and give more yields.[60]

Besides this, emphasis on rain-fed irrigation, aromatic and medicinal plant, horticulture, development of aquaculture, poultry and animal husbandry has been given importance in the policy. The policy suggests that the Government will encourage application of bio-technology, energy saving technologies and shall involve private sectors as well as co-operatives for development of agriculture, poultry and dairy. Attempts will be made to review the tax structure on food grains and commercial crops. Agricultural subsidies will be liberally given. Apart from this the statement of policy acknowledged that there is great need of public sector investment in agricultural sector to build better infrastructure. The investment by private sectors would also be encouraged in areas like research, post-harvest management and human resource development. Due consideration was given in the policy for insurance of crops and farmers by way of National Agriculture Insurance Scheme.[61]

As a gist, the National Agricultural Policy is an effort and approach towards not only a revolution in the field of agriculture but also in the field of dairy and milk product as well as aquaculture and fisheries. The policy includes several initiatives like objective achievements in the field of sustainable agriculture, food security, nutritional food, development and implementation of new technologies, incentives and subsidies for agriculturists, risk management and management reforms.[62]

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60. Shetty, Vidya"Agricultural Policy of India-Explained" available at,www.yourarticlelibrary.com/agriculture/agriculture policy of India explained/62860/.
61. *Ibid*.
62. *Supra* note 57 at p.1.

As well as the practical aspectsare concerned the growth rate per annum in agricultural sector, as conceived by the National Agricultural Policy,2000 is not satisfactory and it has rarely achieved its target of 4% and on decline. According to Government data in 2009-2010, it was 1%, in 2010-11 it touched 7% but again came down to 2.8%.[63]It was last valued at 1.25% in 2015 according to the World Bank.[64] Under the 11th FiveYear (2007-2011), the growth rate was placed at 3.3%. This is significantly less than the target of 4%but the consoling factor is that it is better than 2.4% in the 10th Five Year Plan. This may be due to inflation in food prices.[65]

In its report on the current Twelfth Five Year Plan (2012-2017) the Planning Commission of India in its detailed study and report[66] has suggested various issues which need to be focused on in the field of agriculture in order to achieve the objectives enshrined in the National Agricultural Policy, 2000. Some of the issues which need focus are-

- decentralization of Rashtriya Kisan VikasYojna;
- reduction in number of centrally sponsored schemes as well as fertilizer and food subsidies;
- emphasis on research and development technologies;
- initiating a shift towards sustainable and climate resilient agriculture by emphasis on rain-fed agriculture areas and shifts of water intensive rice cultivation from water stressed North-West India to Eastern India; and
- growth through diversified agriculture.[67]

The National Agricultural Policy, 2000 has some very-good objectives and strategies but if seen practically there is a regular decline in the share of agriculture sector capital formation in the GDP. The increase in labour forces engaged in agriculture sector is giving rise to unproductive employment which is increasing poverty. The share of agriculture in exports is also towards a downward trend. The main focus of government today has shifted from agriculture to industry, trade and commerce. Thus presently, in order to achieve the targets of sustainable agriculture, there is need for stringent policy and plans and its strict implementation. The ground realities of farmers and agriculture sector are needed to be kept in mind while making policy decisions. There has to be follow ups and checks on the

63. See,planning commission.nic.in/hackathon/agriculture.pdf. .

64. See, www.tradingeconomics.com/india/agriculture value added annual percent growth web data.html.

65. *Supra* note 62.

66. *Ibid*.

67. *Id*., at p. 49.

implementation of schemes for agricultural sector and need of time-bound strategies and policies.

According to a Report[68] the Government is planning to come up with a new Agricultural Policy. Mr. Nitin Patel has been appointed as a member in the National Committee for Consultation on the proposed new policy.

It is hoped that the Government would not only come up very soon with a new more concrete and effective National Policy for Agriculture but would also work towards its proper and effective implementation at the Centre and State levels. More budget allocation in the agricultural sectoris the need of the present. The recent budget for 2017-2018 has shown some promises in the agricultural sector with the total allocation for agricultural, rural and allied sectors being raised by 24% from last year to Rs. 187223 Crores.[69]

6.4. Niti Aayog

The National Institution for Transforming India(hereinafter referred as NITI) Aayog was established on 1st January 2015 vide a resolution of the Union Cabinet. It was formed to act as a 'think tank' for policies of Government of India in order to provide the right directions and inputs for policies regarding various issues and sectors of the country. It designs strategic as well as long term policies and programmes of the Government of India besides providing technical guidance, advice and knowledge to States and Center.[70] It was constituted to replace the 65years old Planning Commission. As expected by the Government of India, it would give the State Governments much larger say in crucial decisions.[71] It will serve under the Chairmanship of the Prime Minister of India.

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68. See, "Centre Working on New Agriculture Policy" *Times of India* (13th May 2015), available at, times of india.indiatimes.com/india/centre working on new agriculture policy/article show.

69. See, "Budget 2017: How the Agriculture Sector will Benefit" *Times of India* (February 1, 2017), available at,times of India.indiatimes.com,/business/india business/budget 2017 how the agriculture sector will benefit/article show and report feb., 1, 2017; see also, "Union Budget 2017: Agriculture Credit raised to record rs. 10 lakh crore"*The Indian Express*(February 1, 2017), available at, indianexpress.com/article/business/budget/union budget 2017 agriculture credit raised to record rs.10 lakh crore.

70. See, niti.gov.in/content/overview.

71. See, *The Report of NDTV*(January2, 2015), available at, www.ndtv.com/cheat-sheet/nitiayog replaces planning commission-10 points on what you need to know.

The NITI Aayog has two hubs. The 'Team India Hub' leads the engagement of States with the Central Government while 'Knowledge and Innovation Hub' builds the Aayog's think-tank capabilities.[72]

In the field of agriculture, the NITI Aayog vide its Paper on "Raising Agricultural Productivity and Making Farming Remunerative for Farmers" on 16th December 2016 analysed the position of agricultural sectors and the reforms and steps needed for the improvement of the same. The paper was based on the work of 'Task Force on Agricultural Development' constituted by the Aayog in March 2015.[73]

After making detailed study of the prevailing status of IndianAgriculture and issues related to it,the 'Paper'accepted and acknowledged five majorareas demanding urgent attention. These areas were-

i. low output per hectare for crops as compared to other countries due to poor use of inputs, low access to modern technologies as well as no major breakthrough in technology;

ii. farmers have very limited reach of the Minimum Support Price (hereinafter referred as MSP) and faulty marketing system that delivers only a small fraction of final price to the farmers;

iii. declining of farm sizes of average farmers are forcing them to look for other employment opportunities discarding agriculture and as such even the rich productive lands are lying uncultivated. This calls for changes in the land leasing laws;

iv. no support from the Government of Centre or State during losses due to natural disasters and calamities and no relief for crop losses; and

v. the potential of rich soil of eastern regions has to be efficientlytapped by providing institutional support.[74]

Considering all these issues, the NITI Aayog has suggested various steps and guidelines for bringing about sustainability in the agricultural sector. It observed that while Punjab and Haryana were doing well in the fields of yield of crops per hectare, Madhya Pradesh, Rajasthan, Maharashtra, Oddisha and Karnataka had low yields. The foremost step to be taken therefore is to increase the productivity off arming land. According to the observation of the Aayog to increase productivity main steps which has to be required are –

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72. *Supra* note 69.

73. See, niti.gov.in/writereaddate/files/document publication/Raising Agricultural Productivity and Making Farming Remunerative for Farmers.pdf.

74. *Id*., at p. 3.

- quality and judicious use of water, seeds, fertilizers and pesticides;
- judicious exploitation of modern technology including genetically modified seeds;
- shifting into high value commodities like fruits, vegetables, flowers, fisheries and poultry;
- appropriate crops and input usage for given soil type;
- discovery of robust seed varieties; and
- restructuring of Research and Development systems.[75]

The NITI Aayog has also recommended for crop insurance schemes for loss of crop produce during natural disasters, famine and floods as well as restructuring of land lease laws. Water resource management is another field on which there is need to stress. Several States of India face acute water crisis and uneven rainfalls. Statistics show that India uses 2-3 times of water used to produce one tons of grain as compared to countries like Brazil, United States of America and China.[76]

Quality seeds are also a major need of agriculture sector. It is suggested that good quality seeds and hybrid seeds may be made available to farmers who are unable to afford them by creating 'Community Seed Banks'. There should also be proper infrastructure for storage of seeds.

Farmers must be encouraged to use genetically modified seeds and organic fertilizers and pesticides. It was also suggested that the farmers should get good price for their produce in order to that, the system of 'Price Deficiency Payment' must be initiated under which subsidy should be provided for produce in case the price falls down below a pre-specified assured threshold.[77] The other solutions given are by way of contract farming where the buyer can provide the farmer access to modern technology, support and guaranteed price and by way of direct sales by farmers to consumers as an individual or as an organization.[78]The NITI Aayog also has vision to move towards National Agricultural Markets as announced in the Union Budget of 2015-16.[79]

75. *Id*.,at p. 8.
76. See,Agricultural Produce Marketing Committees Act, 2003 at p. 11-12.
77. *Id.*,at p. 29.
78. Such direct Sales Models have been developed in some States like Punjab (ApniMandi), Haryana, Andhra Pradesh (RaythuBazaar) and Tamil Nadu (UzavaarSandhai) .
79. *Supra* note 75 at p. 32.

The suggestions and guidelines of NITI Aayog are a positive step towards attainment of goal of sustainability in agriculture sector. The Planning Commission in all its 65 years did little and only made five year plans which were rarely sufficient to achieve desired targets. It is a hope that NITI Aayog would help in giving a concrete path and technical guidance needed to achieve boom in the agricultural produce, marketing and availability of nutrient and healthy crops and other agricultural produce.

7. Judicial Response to Sustainable Agriculture In India:

The Indian judiciary is not unaware of the efforts being made in thecountry towards attaining sustainability in agriculture sector and is doingits efforts by giving support due and expected from it in this regard.Unlike United States of America or the Canadian Supreme Court,the judicial response towards agriculture sector in our country arrived a bit late.No doubt, the Courts in India had done commendable jobs since long in the field of environmental issues, global warming and climate change. However the shift of attention towards sustainable agriculture is a welcome change, as judiciary is one of themost important pillars of Indian Constitution.

The Supreme Court of India in *K.K. Saxena*v *International Commission on Irrigation and Drainage and Others,*[80] heard on appeal from the judgement dated 25th April 2011 passed by the Delhi High Court holding that the writ petition against respondent no. 1 namely International Commission on Irrigation and Drainage under Article 226 of the Constitution of India is not maintainable as it is not a 'State' under Article 12 of the Constitution. The High Court also held that the actions of respondent no. 1 cannot be judicially reviewed under Article 226 of the Constitution.

The Supreme Court in the instant case observed that,"the mission of International Commission on Irrigation and Drainage is to stimulate and promote the development of arts, sciences and techniques of engineering, agriculture, economics, ecology and social science in managing water and land resources for irrigation, drainage, flood control and river trainingapplications including research and development and capacity building, adopting comprehensive approaches and up-to-date techniques for sustainable agriculture in the world".[81]

The Court further observed that the Commission has been established as a scientific, technical, professional and voluntary non-governmental organization dedicated to enhance the world

80. (2015) 4 SCC 670.

81. *Ibid*.

wide supply of food and fiberfor all people by improving water and land management for the productivity of irrigated and drained lands so that the appropriate management of water environment and the application ofirrigation, drainage and flood control techniques may be done. The Commission is aNGO and its functions are not related to 'State in a sovereign capacity'.[82]

The issue of sustainable agriculture featured also in a number of cases relating to Narmada River adjudicated by the Supreme Court. The landmark case of *Narmada BachaoAndolan*v *Union of India,*[83]which was related to the construction of Sardar Sarover Dam in Gujrat for irrigation water. The Andolan was a social movement of farmers, tribals, human right activists and environmentalists against the dams being constructed on Narmada River which flows through the States of Gujrat, Maharashtra and Madhya Pradesh. The aim of construction of dams was to provide irrigation water to people of these States. The construction of Sardar Sarovar Dam Project was being done without consulting villagers and people likely to be effected by it. The compensation being offered by the Government to farmers and villagers affected by the said Dam Project was for standing crops only without any compensation for their rehabilitation. A number of popular personalities and activists joined the Andolan protesting for closure of the project.

The Court initially ruled in favour of the Andolan directing immediate closure of the work at the dam and also directed the States to first of all complete their rehabilitation work of effected farmers.[84] However, in the instant case the Supreme Court upheld the award of the Tribunal[85] and allowed the construction of dam subject to some conditions. The Court directed *inter-alia* that -

- construction of the dam will continue as per Award of the Tribunal;
- the construction up to 90 meters can be taken up immediately but further raising of height would be on an equal footing with the implementation of the relief and rehabilitation and on clearance by the Relief and Rehabilitation Sub-Group;
- the Environment Sub-Group under the Secretary, Ministry of Environment and Forests, Government of India will give environmental clearance at each stage of construction of the dam before constructions can beyond 90 days; and

82. *Id*.

83. AIR 2000 SC 3751.

84. See also, Miller, Susan Kutz& Kumar, Sanjay "Narmada Dam Fails World Bank's Final Test"(10th April 1993), available at, https://www.newscientist.com/article/mg 138 18680.400-narmada fails world bank final test.

85. Narmada Water Disputes Tribunal.

- even though there has been substantial compliance with the conditions imposed under the environment clearance, the Narmada Control Authority and the Environment Sub-Group will continue to monitor and ensure that all steps are taken not only to protect but also to restore and improve the environment.[86]

In this case the Supreme Court not only gave due regard to the facilities of irrigation for farmers but also to the wellbeing and rehabilitation of farmers being effected by the building work of SardarSarovarProject. Due consideration was also given to environmental issues.

Another case of importance relating to sustainable agriculture was that of*Aruna Rodrigues and Others* v *Union of India&Others*.[87]It is a very interesting case since it related to genetically modified seeds & crops which are being considered as a concrete step towardsattainment of sustainable agricultural targetworld over. In this case Aruna Rodrigues a public spiritedindividual approached the Court stating that a dangerous situation which is raising bio-safety concerns, is developing in the countrydue to release of Genetically Modified Organisms (hereinafter referred asGMO). The GMO isbeing allowed to be released in the atmosphere which is effecting the environment and is creating health issues.

In this petition, she prayed that the Union of India may be directed not to allow release of GMO into the environment and the Union of India must frame relevant rules and regulations in this regard and ensure their implementation.[88]

Being convinced by the after effects of GMO, the Court directed that field trials of GMO shall beconducted only with the approval of the Genetic Engineering ApprovalCommittee (hereinafter referred asGEAC) but the Court declined to issue directions to stop the field trials of all genetically modified products anywhere. Vide its further order on 22nd September 2009, the Court directed GEAC to withhold approvals till its further orders. The Court observed that as of 2007, nearly 91 varieties of plants (GMO) were being subjected to open field tests, although in its orders the Court had not permitted field tests nor GEAC had granted any approval except with the authorization of the Court. The Court not being an expert on this scientific question had given directions on 8th May 2007 to maintain a 200 meters of isolation distance while performing field tests for GMO. Later in a meeting on 15th March 2011 in which the petitioner also participated along with Ministry of

86. *Supra* note 82.

87. (2012) 5 SCC 331.

88. *Id*., at para1.

Environment and Forests, it was suggested that an Expert Committee may be formed for its recommendations on this subject.[89]

The Supreme Court vide its order in the present case directed for constitution of a Technical Expert Committee (hereinafter referred as TEC) consisting of Prof.V.L. Chopra, former member of Planning Commission and former member of Science and Advisory Committee to PMO, Dr. Imran Saddiqui, Plant Development Biology Scientist and group leader Centre for Cellular and Molecular Biology, Prof. P.S. Rama Krishnan and other prominent scientists and experts in this field.

The Supreme Court directed that the terms of reference of the Committee would be to:

- review and recommend the nature of sequencing of risk assessment (environment and health safety) studies that need to be done for all GM Crops before they are released in the atmosphere;
- recommend the sequencing of these tests in order to specify the point at which environmental release through open field trials can be permitted;
- advise on whether a proper evaluation of genetically engineered crop/plants is scientifically enable in the green house conditions and whether it is possible to replicate the conditions for testing under different agro ecological regions and seasons in greenhouse; and
- advise on whether specific conditions imposed by the regulatory agencies for open field trials are adequate. If not recommend what additional measures and safeguards are required to prevent potential risks to the environment?[90]

Besides these above, other important terms of reference were also given. Due to the extreme interest taken by the Supreme Court in the case,the Technical Expert Committee was constituted.

The final report of the Technical Expert Committee on GM Crops was submitted on 30th June 2013. The report so released after reviewing of evidences given by 50 Organisations and receiving 467 Memorandums and 14682 documents,[91] found faults in the existing regulatory system and as such rejected the proposal to release GM Crops. The report said that they found no reason for allowing GM Crops trial or use as it would have a negative effect on the non-GM crops. It was suggested in its final report as well as in interim report

89. *Id*., atpara 4 & 5.

90. *Id*.,at para 6.

91. *Summary of recent TEC Report on GM Crops* (23rd October 2012), available at, www.simplydecoded.com/2012/10/23/summary of recent tec report on gm crops.

in October 2012 to stop field trials of GM Crops until more definite information and studies recommend otherwise. The Committee appointed by the Supreme Court also saidthere are yet no such examples worldwide for use of GM Cops for human consumption.The Commuted was of the view that such crops would exert anadverse effecton sustainable agriculture, environment and rural livelihoods.[92]

There has been great contribution of the judiciary in India which vide its broad vision displayed in many cases has played and is playing a great role in the attempts to achieve sustainability not only in environment but also in agriculture sector as the courts knew and realize the importance of this sector which is directly connected with the advancement of the country and the social status as well as health of its society and the sufficiency of food for all.

8. Conclusion:

The idea of sustainability has been embedded in the human imagination for a very long time and is expressed through our ideas of nature, society economy, and environment. But it has become formally a part of discourse. The nucleus of the idea of sustainable agriculture is the discard of an industrial approach to the production of food developed in last few years.

Promotion of sustainable agriculture is a priority area for India. There is a growing need for a multi-sectorial approach. The policies and programmes of various ministries should be converged for better results. The system of regulation of insecticides and pesticides in India is obsolete. A forward looking farm policy would minimize the use of toxic chemicals and encourage organic methods where they are efficacious. It can be achieved by streamlining some recently announced initiatives such as assessing soil health through soil health cards and rationalizing fertilizers and water usage by insuring only the efficient cost of production. Step by step or transformative changes must be considered to keep the planet safe for the future. This will not only transform India's agricultural practices but also spread awareness about sustainable agriculture among general public.

As well as the legal measures and governmental initiatives are concerned, the conditions of farmers and farming clearly show that the perception of the governments towards agriculture and farmers has not been positive. As per scheme of distribution of legislative powers, agriculture is in the State list. Though, the agriculture is in the State list but all the policies related decisions are taken by the Central Government. For the promotion and betterment of agriculture and to promote sustainable agriculture, it should be in placed

92. Rajalakshmi, T. K., "No To GM Crops" *Frontline* (6th September 2013), available at,www.frontline.in/social issues/general issues/no to gm crops/article 5037750.ece

under 'Concurrent list' as per the recommendations of the National Farmer Commission forwarded to the Government about 12 years ago.

The modern scientific man has become out of time with nature. There is an urgent need to connect the people by creating awareness and respect about the nature. Apart from this, research and development in the field of agroforestry, crop rotation, increasing productivity of soil and organic farming should be encouraged and stimulated.

Sustainable agriculture is a collection of practices and to give strength to it, the Government has to come forward with strong and effective policies, subsidies and financial assistance to farmers. The Executive bodies have to implement the policies and laws in a way that farmers may extract the full benefit of it. Only a combined effort on part of people and Union of India along with its States would bring about the improvement and change needed in our society to march towards the goal of self-sufficiency in food and sustainability in agriculture within environmental circle to health for all.

Therefore, the ultimate goal of all the stakeholders in agriculture should be to find an integrated means for maintaining the proper ecological balance necessary to support the good health of soil. If the society stays within the boundaries, it will lead a proper and prosper life along with all other forms of existence. If not, he will cause his own destruction and perish. Thus, it all depends on how we use our own mind.

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Implementation Of Indigenous And Tribal Law In India: A Comparative Study On Legal Obligations

By Mrs. Sakshi Pathak*[1]

Abstract : *There are about 370 million people spread in over 70 countries that recognize themselves as Indigenous or Tribal population.[2] India alone is home to more than Half of the world's Tribal Population which constitutes about 8.2% of the population of the country.[3] Thus, it becomes particularly important to analyse whether there is adequate protection and whether the Tribal laws of the country comply with International standards.*

Moreover, even after more than 70 years of guaranteeing the protection and promotion of the Tribal rights under the constitution and various statutes, the Tribal society still suffers from many human right violations.[4] Among these come Land Alienation to non-tribal, Failure to ensure forest rights, disadvantages of development policies, culture and language rights and the various violations of PESA Act in India.[5]

The present paper seeks to highlight the regime under International Law for the protection, preservation and advancement of the Tribal society. The paper shall further, after a thorough study of the Domestic structure of Tribal Laws in India, throw light on whether the standard of protection under the International Law regime is followed or not. The paperal so throws brings out the global best practices in the most important areas relating to tribal rights and compare the same with the threshold of protection in India.

Keywords : Indigenous People, Tribal Law, Comparision, Legal Obligation.

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2 Who are the indigenous and tribal peoples? International Labour Organization, Available at https://www.ilo.org/global/topics/indigenous-tribal/WCMS_503321/lang--en/index.htm. Last accessed on 09.04.2020.

3 Office of the Registrar General and Census Commissioner ((2011) Total population, population of scheduled castes and scheduled tribes and their proportions to the total population New Delhi: Office of the Registrar General and Census Commissioner

4 Poulter, S. (1998). Ethnicity, Law and Human Rights. The English Experience, Oxford Clarendon Press

5 Krishna Halavath, Human Rights and Realities of Tribals' Lives in India: A Perfect Storm, IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 19, Issue 4, Ver. II (Apr. 2014), PP 43-46.

1. Introduction

"Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"[6]

The 'Adivasis' literally translated as 'original inhabitants' is a term used to refer to the Tribal population in the country classified by the International Labour Organization as the 'indigenous' population. While there is a very thin line of difference between the term Tribal and Indigenous, the International Labour Organization rightly decided to include both the terms so as to covert he maximum number of people. This to ensure that there is no question of being the Original inhabitants of the region but having a prior claim to the natural resources against the outsiders.[7] The Constitution of India defines the Scheduled Tribes negatively, as groups that are not 'castes. Such a classification is based on very many factors like Social organization, economy and living conditions, Language and religion.

For the ease of discourse and effective delineation of issues, the paper shall be dealing with three broad sub topics. ***Firstly,*** dealing with the International obligations vis-à-vis India's Domestic Legal structure, ***Secondly,*** the Global best practices vis-à-vis the status in India and ***Lastly,*** the Conclusions and Recommendations.

2. Human rights and 'Special' Tribal Rights

The human rights are of great importance has been recognized world wide.[8] Seeing tribal rights in isolation of Human rights, dangers treating these groups as a charity and not as a group of people towards whom the state has responsibilities.[9] While Human Rights necessarily extends to Tribal People, the question is, "Why special rights for Tribal and Indigenous groups?"

The relationship between Human rights and Tribal Rights has been a topic of debate for many. A few scholars vehemently opine that these are two absolutely disjunctive branches that are

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6 Article 3 of the Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994)

7 Virginius Xaxa. "Tribes as Indigenous People of India." Economic and Political Weekly, vol. 34, no. 51, 1999, pp. 3589–3595. JSTOR, www.jstor.org/stable/4408738. Accessed 9 Apr. 2020.

8 Baxi, Upendra. (2002). The future of human rights. New Delhi: Oxford University Press.

9 Krishna Halavath, Human Rights and Realities of Tribals' Lives in India: A Perfect Storm, IOSR Journal of Humanities And Social Science (IOSR-JHSS) Volume 19, Issue 4, Ver. II (Apr. 2014), PP 43-46.

antithetical to one another. Such assertions come on the twin argument that ***firstly,*** Human rights find most of the Tribal laws incompatible and hence, endanger their sustenance and ***secondly,*** guaranteeing Human rights to the society through development often devastates the health, economic sustenance and land of the Indigenous people.[10] While on the other hand, many strongly believe that Tribal Laws complement and further the already in stated Human rights.[11] The debate seems to have found its end with the conclusion that Tribal law has thought fully integrated and furthered human rights norms to 'uncover and revitalize' their own legal traditions and support claims for religious freedom, natural resources and equality.

Tribal Law has now become a more specialized branch of Human Rights for bridging divide in the area of development and social justice.[12] While the law deals with various aspects of protection of these population, the Human rights regime remains the most extensive and exhaustive protection mandate in all aspects.[13] Thus, the implementation of the Human right obligations in letter and spirit while making it especially tailored to suit the varied problems of the Tribal communities,[14] has become the way to enhance protection especially when it comes to socio economic discussions.[15]

The international conventions and agreements can help us understand the dimensions of Tribals' Human right sin the Indian society.[16] The crux of the discussion thus, is that

10 James S. Phillips (2015) The rights of indigenous peoples under international law, Global Bioethics, 26:2, 120-127, DOI: 10.1080/11287462.2015.1036514

11 Kristen A. Carpenter & Angela R. Riley, Tribal Rights, Human Rights, 2013 Mich. St. L. Rev. 293, available at http://scholar.law.colorado.edu/articles/94/.

12 Tribal rights are human rights as standard for bridging divide between development, social justice, New Delhi, Business Standard. Available at https://www.business-standard.com/article/news-ani/tribal-rights-are-human-rights-as-standard-for-bridging-divide-between-development-social-justice-116122700161_1.html.

13 Nair, R. (2006). Human rights in India: Historical, social and political perspectives. New Delhi: Oxford University Press

14 Poulter, S. (1998). Ethnicity, Law and Human Rights. The English Experience, Oxford Clarendon Press.

15 Tribal rights are human rights as standard for bridging divide between development, social justice, New Delhi, Business Standard. Available at https://www.business-standard.com/article/news-ani/tribal-rights-are-human-rights-as-standard-for-bridging-divide-between-development-social-justice-116122700161_1.html.

16 Krishna Halavath, Human Rights and Realities of Tribals' Lives in India: A Perfect Storm, IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 19, Issue 4, Ver. II (Apr. 2014), PP 43-46.

the Human Rights guaranteed to all also extends to the Tribal and Indigenous population but since the histories of these people have been marked by discrimination, ethnocide, marginalization and they face human right violation seven today, they requirea 'special' *"articulations of universal human rights, as they apply to indigenous peoples"*.[17] This thus, requires conceptualization and special measures or privileges to ensure effective equality with all sectors of the society.[18]

3. The History of International Obligations for Indigenous

The history of International Obligation for Tribals is a history of struggle for the legal protection and survival of these historical communities lacking land entitlements, that began in the 1970s.[19] Various NGOs[20] and indigenous groups appealed to the International community extending the request for special recognition of principles like self-determination and non- discrimination as they apply to these groups.[21] In addition to scholarly writings from legal publicists, and sociological activists, various international conferences were attended by the representatives of these groups, most importantly, the 1977 International Non-Governmental Organizations Conference on Indigenous Populations in the Americas, held in Geneva, Switzerland. This is the first time these groups could speak for themselves at the UN.[22] The resolution recognized that;

"The brutal colonization to open the way for the plunder of their land and resources by commercial interests seeking maximum profits; the massacres of millions of native peoples for centuries and the continuous grabbing of their land which deprives them of the possibility

17 Understanding the Indigenous and Tribal, Peoples Convention, 1989 (No. 169), HANDBOOK For ILO Tripartite Constituents. Available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_205225.pdf.

18 Understanding the Indigenous and Tribal, Peoples Convention, 1989 (No. 169), HANDBOOK For ILO Tripartite Constituents. Available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_205225.pdf.

19 Marks, G., 2000. Sovereign States vs Peoples: Indigenous Rights and the Origins of International Law. Austl. Indigenous L. Rep., 5, p.1.

20 Clarke, G., 1998. Non□governmental organizations (NGOs) and politics in the developing world. Political studies, 46(1), pp.36-52.

21 Mary B. Davis, Native America in the Twentieth Century: An Encyclopedia, First Published in 1996, Routledge, First Published in 1996.

22 Sanders, D., 1989. The UN working group on indigenous populations. Human Rights Quarterly, 11(3), pp.406-433.

of developing their own resources and means of livelihood; the denial of self-determination of indigenous nations and peoples destroying their traditional value system and their social and cultural fabric. The evidence pointed to the combination of this oppression resulting in the further destruction of the indigenous nations."[23]

The result was the establishment of UN Working group on Indigenous Population,[24] for the "*promotion and protection of human rights and fundamental freedoms of indigenous peoples; to give attention to the evolution of international standards concerning indigenous rights***.**"[25] India is very active to make oral and written submissions in the group.[26] These efforts resulted in the development of a new segment of rights under the recognized Human rights.[27]

While the ILO had a Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries,[28] but the same to be revised as it was highly criticised. Thus, pursuant to a 'Meeting of experts' in 1986 in 1989, the Convention on Indigenous and Tribal Peoples was unanimously adopted.[29] Furthermore, therearevariousdocumentsintheInter-AmericanCommissionofHumanRights likethe1973 Policy Guidelines, and the 1989 OAS General Assembly resolution. In this manner, the world has come to agree on a common ground as to the governance on the minimum standards that must apply to the Indigenous populations.[30]

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23 The 'Geneva Conference: Official Report', in (1977) 1 (77), Treaty Council News.

24 Economic and Social Council resolution 1982/34.

25 Mandate of the Working Group on Indigenous Populations, UNHR Office of the High Commissioner, Available at https://www.ohchr.org/EN/Issues/IPeoples/Pages/MandateWGIP.aspx.

26 Mary B. Davis, Native America in the Twentieth Century: An Encyclopedia, First Published in 1996, Routledge, First Published in 1996.

27 Mary B. Davis, Native America in the Twentieth Century: An Encyclopedia, First Published in 1996, Routledge, First Published in 1996.

28 ILO Convention, No. 107, 1957.

29 ILO Convention, 1989, No. 169.

30 S. James, Cultural Survival Quarterly Magazine, International Law And Indigenous Peoples: Historical Stands And Contemporary Developments. Available at https://www.culturalsurvival.org/publications/cultural-survival-quarterly/international-law-and-indigenous-peoples-historical-stands.

4. International Obligations for the Rights of Tribal People

The struggle brough forth immense developments in the International arena. As discussed in the previous chapter,[31] Human Rights treaties apply to the Indigenous people as well as some special international instruments recognizing their rights. Thus, to summarise the International legal regime for protection of Tribal Rights, we would have:

The system of Human Right Treaties and Soft Law Instruments including the UDHR, ICCPR and the ICESCR as well as its additional Protocols

Special Instruments like the United Nations Declaration on the Rights of Indigenous Peoples and the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No.169)

Human rights and tribal rights under the Regional systems including the African Commission on Human and Peoples' Rights, Organization of American States and the Council of Europe and European Court of Human Rights. This shall not be discussed in depth since the scope of the paperis to analyse International law as it applies to India and hence, such regional systems shall not be evaluated in depth.

There are various International law organs working for the rights as well. The work and cooperation by United Nations on Indigenous peoples' issues and work of the United Nations High Commissioner for Human Rights and Office of the United Nations High Commissioner for Human Rights. This includes other UN agencies working in a specialized way for Food Access and Environmental Rights. It also includes the United Nations Development Programme, UN Environmental Programme, United Nations Educational, Scientific and Cultural Organization,[32] and United Nations Framework Convention on Climate Change and associated instruments.[33]

For a better understanding of these issues, all the instruments and law shall be dealt with separately.

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31 Chapter 3.

32 http://portal.unesco.org/culture/en/ev.php-URL_ID=35393&URL_DO=DO_TOPIC&URL_SECTION=201.html.

33 https://unfccc.int/.

5. Special Instruments for Tribal Rights

Special Instruments for Indigenous Rights includes ***firstly***, the Draft Declaration on rights of Indigenous peoples,[34] formed in furtherance of Human Rights Council Resolution 2006/2,[35] initially drafted by the working group on Indigenous population in 1985.

The Draft Declarations one of the most comprehensive statement and comprises of 46 articles and 9 parts. These include Fundamental Rights, Life and Security, Culture, Religion, and Language Laws, Education, Media, and Employment, Participation and Development, Land and Resources, Self-Government and Indigenous, Implementation and Minimum Standards. The main principles that the declaration seeks to promote are Self Determination,[36] Right to Autonomy,[37] Right to Land, territories and Resources[38] along with right to relief in this regard,[39] Economic, social and cultural Rights,[40] (rights to health, education, employment, housing,sanitation, social security and an adequate standard of

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34 Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994), Available at http://hrlibrary.umn.edu/instree/declra.htm.

35 Human Rights Council Res. 2006/2, Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly res. 49/214 of 23 December 1994 (2006), Available at http://hrlibrary.umn.edu/hrcouncil2-2006.html.

36 Article 18 of the Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

37 Article 4 and Article 34 of the Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

38 Article 26 (1) of the Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

39 Article 27 of the Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

40 Article 3 of the Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

living),[41] Collective Rights like the Right to culture,[42] Equality and Non-Discrimination,[43] and the Right to make Treaties and Agreements with the States.[44]

Secondly, the ILO Convention No. 169 of 1989 is Treaty made specially for preserving the Rights of the Tribal Groups. It is the First convention to elaborately address the specific needs of Tribal groups' human rights. This convention is illustrative of the State's responsibility in promoting and protecting human rights of Indigenous groups. While the convention is often criticised as being less comprehensive than the Declaration, it covers a wider range of rights like rights to development, customary laws, lands, territories and resources, employment, education and health.[45] It is also important to Highlight that the Conventions like the ILO Convention No. 169 present principles of Customary International law and are hence, applicable even to states that are not parties toit.[46]

Thirdly, specialized rights are given under various regional and domestic systems.[47] Furthermore, indigenous people now have the right to appeal to the International forums

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41 Human Rights Committee, general comment No. 23 (1994) on the rights of minorities and Committee on Economic, Social and Cultural Rights, general comment No. 21 (2009) on the right of everyone to take part in cultural life. Note, also, Inter-American Court of Human Rights, Case of the Plan de Sanchez Massacre v. Guatemala, Series C, No. 116, Judgement of 19 November 2004.

42 Article 27 of the Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

43 Article 1 and Article 2 as Interpreted by the Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua; Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Series C, No. 146, Judgement of 29 March 2006.

44 Study on treaties, agreements and other constructive arrangements between States and indigenous populations" (E/CN.4/Sub.2/1999/20).

45 Indigenous Peoples and the United Nations Human Rights System, United Nations Human Rights, Office of the High Commissioner, Page 29, Available at https://www.refworld.org/pdfid/5289d7ac4.pdf.

46 S. James, Cultural Survival Quarterly Magazine, INTERNATIONAL LAW AND INDIGENOUS PEOPLES: HISTORICAL STANDS AND CONTEMPORARY DEVELOPMENTS. Available at https://www.culturalsurvival.org/publications/cultural-survival-quarterly/international-law-and-indigenous-peoples-historical-stands.

47 Indigenous Peoples and the United Nations Human Rights System, United Nations Human Rights, Office of the High Commissioner, page 30, Available at https://www.refworld.org/pdfid/5289d7ac4.pdf

following procedures under the UN, the OAS and ILO, even though the enforcement procedures for Human right violations are limited.[48]

Other general and Human Right Instruments that affect Indigenous peoples' rights are, [49]The Universal Declaration of Human Rights,1948[50],Convention on the Prevention and Punishment of the Crime of Genocide,1951[51],International Covenanton Civil and Political Rights,1966[52], International Covenant on Economic, Social and Cultural Rights, 1966[53], Convention on the Elimination of All Forms of Racial Discrimination, 1966[54], Convention on the Rights of the Child, 1990[55] especially Article 29 and 30 of the convention that relate to right to cultural identity, language and religion for people of Indigenous origin, Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, 1992[56], TheRio Declaration of Environment and Development and Agenda 21 that highlight the need to grant Tribal groups more control over their land, management of resources and participation in decision making,[57] Convention on Biological

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48 S. James, Cultural Survival Quarterly Magazine, INTERNATIONAL LAW AND INDIGENOUS PEOPLES: HISTORICAL STANDS AND CONTEMPORARY DEVELOPMENTS. Available at https://www.culturalsurvival.org/publications/cultural-survival-quarterly/international-law-and-indigenous-peoples-historical-stands.

49 Study Guide on the Rights of Indigenous people, Human Rights Library, University of Minnesota, Available at http://hrlibrary.umn.edu/instree/b1udhr.htm.

50 Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Available at http://hrlibrary.umn.edu/instree/b1udhr.htm.

51 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951.

52 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

53 International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

54 International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force

55 Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990.

56 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993).

57 Rio Declaration, Principle 22 and Agenda 21, Chapter 26.4

Diversity, 1992[58] that calls for the practice and preservation of indigenous knowledge and tradition as well as encourages equitable sharing[59], Vienna Declaration and Programme of action, 1993,[60] which recognizes the contribution of these communities and reaffirms their right to economic, social and cultural wellbeing andthe Report on the International Conference on Population and Development, 1994.[61] This is very important as it highlights the importance of Indigenous Group's say on development and environmental programs as well as their contribution in managing land and protecting natural resources.[62]

Swepston (2015),[63] reiterates that the international tribal law is albeit weak. Only the ILO is responsible for the two international Conventions for the rights of indigenous and tribal people.[64] Consequently,these conventions mark the basic rights and the widely accepted terms and definitions that national laws have put into place. The author further iterates that the UN Declaration on the Rights Of Indigenous Peoples 2007 should thus, be read in conjunction with the ILO Convention169.

Thus, we see that all issues relating to Indigenous Rights are covered in international law including Fundamental Rights, Life and Security, Economic Rights, Development Rights, Culture, Religion, Language Laws, Education, Media, Employment, Participation and Development, Land and Resources, Self-Governance, Implementation and Minimum Standards as well as Environmental Rights.

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58 Convention on Biological Diversity, G.A. res. 49/117, 49 U.N. GAOR Supp. (No. 49) at 143, U.N. Doc. A/49/49 (1994).

59 Article 8(j) of the Convention on Biological Diversity, G.A. res. 49/117, 49 U.N. GAOR Supp. (No. 49) at 143, U.N. Doc. A/49/49 (1994).

60 Vienna Declaration, World Conference on Human Rights, Vienna, 14 - 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993).

61 Report of the International Conference on Population and Development, Available at https://undocs.org/pdf?symbol=en/A/CONF.171/13/Rev.1.

62 Paragraph 6 of the Report of the International Conference on Population and Development.

63 Swepston, L., 2015. *The Foundations of Modern International Law on Indigenous and Tribal Peoples: The Preparatory Documents of the Indigenous and Tribal Peoples Convention, and Its Development through Supervision. Volume 1: Basic Policy and Land Rights*. Brill Nijhoff.

64 The Indigenous and Tribal Populations Convention, 1957 (No. 107) and the Indigenous and Tribal Peoples Convention, 1989 (No. 169).

6. Status of International Law in India

India practices dualism which means that International Law obligations are different from the domestic law of the country. Thus, while there is no automatic translation of international rights, Article 51 of the Constitution of India provides that:

> *"The State shall endeavour to The State shall endeavour to:*
>
> *(c) foster respect for international law and treaty obligations in the dealings of obligations in the dealings of organised peoples with one peoples with one another"*

The International obligations, once ratified by India, do not automatically translate into the municipal law. The penetration of International Law is permitted by the Indian constitution in 3 ways:

By the Legislature under Article 253 read with Entry 13 and 14 of List I under the Seventh Schedule of the constitution of India. The parliament has exclusive power to legislate on all conceivable international matters which have been enumerated under the Union List. Under this list main entries relating to international matters are: foreign affairs,[65] United Nations Organization,[66] participation in international conferences, associations and other bodies and implanting of decisions made thereat,[67] and entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries[68] etc.

a. By the Executive under Article 73 of the constitution of India.

b. By the Judiciary implicit on a conjoint reading of Article 51 (c) and Article 142 of the Constitution of India.

While there is Dualism in India, a much-recognized International Law principle is The Principle of Integration. The principle of Integration implies that the states must strive to integrate into their municipal law, the principles relating to the protection and preservation of the environment that they have consented to be bound by under various treaties.[69] The necessary implication of such a Principle is to make the states comply with the International

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65 Entry 10, List I, VIIth Schedule of the Constitution of India.

66 Entry 12, List I, VIIth Schedule of the Constitution of India.

67 Entry 13, List I, VIIth Schedule of the Constitution of India.

68 Weatherill, S., 1995. Law and integration in the European Union (p. 203). Oxford: Clarendon Press

69 Weatherill, S., 1995. Law and integration in the European Union (p. 203). Oxford: Clarendon Press

Law by making it a part of the domestic legislation of the state.[70] This would ensure that the states are fulfilling their commitment towards a better future.[71]

7. Domestic legal obligations in India

The tribal people have historically been very independent communities. They have majorly relied on the forest for their needs and since the communities were small and close-knit, they never required anything from the modern world. However, unfortunately the position has changed. After the Britishers came, they slowly started sweeping the forest lands for the construction of railway lines, the establishment of industries etc. Due to the loss of their shelter, food and livelihood, tribal people were forced to take but small jobs to make a living. While through the centuries the situation has improved for many families, the Tribal population still faces a lot of problems.

Due to this, India has adopted after its independence, various measures for the protection and promotion of tribal rights. These include the safeguards in the Constitution as well as specific statutes to address the various problems faced by scheduled tribes.

Coming to the constitutional guarantees, we find that Tribal Population enjoys rights such as the Right to Equality,[72] Non -discrimination,[73] reservation in Employment,[74] reserved seats in Lok Sabha,[75] and state legislative assembly,[76] Right to property,[77] right to appoint Commissioner for welfare of tribes,[78] and fund sunder welfare schemes by state government.[79]

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70 Nollkaemper, A., 2012. Three conceptions of the integration principle in international environmental law. In Environmental Policy Integration (pp. 34-44). Routledge.

71 Philippe Sands, Principles of International Environmental Law (Cambridge University Press, Second Edn. 2003), Pat Birnie and Alan Boyle, International Law and the Environment, (OUP, UK, Second Edn. 2002).

72 Article 14 of the Constitution of India.

73 Article 15 of the Constitution of India.

74 Article 16 (4) of the Constitution of India.

75 Article 330 of the Constitution of India.

76 Article 332 of the Constitution of India.

77 Article 19 (5) of the Constitution of India.

78 Article 338 of the Constitution of India.

79 Article 275(i) of the Constitution of India.

In addition to this, Article 46[80] requires the state to promote their economic and educational interests and protect against social injustice and exploitation. The constitution also prohibits any transfer of property belonging to tribal communities or lands that have been used by these people for generation.[81]

Various problems faced by the Tribal people include their own social problems, traditions and customs, Geographical separation, Land Alienation, Cultural problems, Educational problems, Economic problems, Health and Sanitation problems and damage to the environment. To tackle the problem of land alienation, encroachment on forests was made an offence under the Indian Forest Act, 1927 and later the Forest Conservation Act, 1980. The Scheduled Tribe and Other Traditional Forest Dwellers Act, 2006 recognizes ownership rights of tribes and other forest dwellers. Furthermore, many legislations like the Forest Rights Act, 2006, Protection of Civil Rights Act, 1955, Scheduled Castes and Scheduled Tribes (Presentation of Atrocities) Act, 1989 and Panchayat Extension to the Scheduled Areas (PESA) Act 1996 has been put into place along with the establishment of a Ministry for Tribal Affairs.

The contribution of the judiciary has also been immense. They have upheld and advocated certain rights for protection against environmental issues, such as right to healthy and hygienic environment[82], right to safe drinking water,[83] right to livelihood[84] and the right to self- determination by mandatory consultation in Orissa Mining Corporation Vs. Ministry of Environment and Forest & Ors.[85]

8. Comparison: International obligations vis-à-vis India's Domestic Legal structure

India is known for having a very enthusiastic attitude towards participation in International Institutions. However, history seems to show us that the same enthusiasm is not shared when it comes to the ratification of hard law under International Law.

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80 Article 46 of the Constitution of India.

81 Schedule 5 of the Constitution of India.

82 M.C. Mehta vs. Union of India, AIR 1987 SC 1086.

83 P. R. Subhash Chandran v Government of Andhra Pradesh & Others, 2001 (6) ALT 133.

84 Olga Tellis v. Bombay Municipal Corporation, 1985 SCC (3) 545.

85 W.P.(c) 180 of 2011

Coming to India's attitude towards the International instruments made to further the interests of Tribal and Indigenous people, we find that the government has not ratified the Optional Protocols of the ICCPR, the ICESCR and the ILO Convention No. 169. In fact, India's ratification of the ILO conventions is limited to 41 out of 188 conventions. The conventions that have not been ratified include ILO conventions for Forced Labour,[86] Discrimination in employment and occupation,[87] and worst forms of child labour.[88]

India has not been active in taking part in International discussions for the advancement of Tribal people as is reflected by the fact that it has not submitted reports and respond to queries. This expresses the fact that India doesn't take the ILO process very seriously.

It is true that merely because a country has not ratified an act, doesn't mean that it is irrelevant. As per Article 18,[89] after signing a treaty, the country is bound to comply with the objective of the act. However, the need of ratification is not overemphasized. It puts on the state the obligation to integrate international law into their domestic systems and confirm to the meetings and agreements held in furtherance to the conventions.

Furthermore,as much as Human Rights treaties affect the life of Tribal and Indigenous people, so do the instruments of Environmental law and India has been hesitant to enforce these including the Convention on Biological diversity even after ratification. This is evident by the fact that various environmental legislations in the country like the Costal Regulation Zone Notification, 2006, The EIA Notification of 2020 and 2006 among others, have been retrogressed over the years.

Furthermore,in my opinion,it is wrong that India limits the policy assistance to the Scheduled tribes which doesn't include all the tribal and indigenous population in the country. Coming to specific aspects affecting the indigenous people, the following is an analysis of the extent of India's adherence to global standards.

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86 International Labor Organization, Convention No. 29 and International Labor Organization, Convention No. 105

87 International Labor Organization, Convention No.111.

88 International Labor Organization, Convention No. 182.

89 International Labor Organization, Convention No. 29 and International Labor Organization, Convention No. 105

8.1. Self-Governance

Self-governance is one of the most important issues in the debate for a dignified life for the tribal people. This flows from the indelible right to self-determination,[90] which is the right to pursueone's social, economic and cultural development without interference. In fact, to further the right to self determination, the term "population" was change to the term "peoples" in the ILOConventionNo.169.[91] While the ILO Conventions do not refer to self-determination,it is a human right and even the convention notes that the tribal people must have the right to participate and consult in decisions that will affect them and that they should have the right to self-management.

The UN declaration on Rights of Indigenous people, 2007 recognize the right to self determination to "***freely determine their political status and freely pursue their economic social and cultural development",***[92] and***"the right to autonomy or self-government in matters relating to internal and local affairs".***[93]Thus, the various facets of self-determination include autonomy and self-governance, full and effective participation, Consultation and participation in decision making,in formed consent, recognition of traditional institutions and traditions and freedom to pursue economic, social and cultural development.[94]

In India, there has been along-standing discussion regarding this right and consequently,many provisions were put in to place. ***Firstly,***article40oftheConstitutionmandatestheorganization of panchayats and the power of self-governance. This was initially furthered to promote the decentralization of governance and it was felt that in a country as large as India, self- governance for local issues might be a boon. But in effect, majority villages have as mall tribal population and since the caste system is still prevalent in India, these tribal people find it very difficult to be a part of the panchayat decision making in their own villages. Further more,while the 73rdand 74thamendment shifted to decentralized governance, the same was not extended to schedule Vand schedule VI areas, Nagaland, Mizoram and Meghalaya which have a special status.[95] The conception of the Panchayat (Extension to Scheduled areas) Act, 1996 was a major step for furthering the Tribal Rights, via concrete provisions for determination of excise,[96] ownership for Minor Forest produce,

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90 Article 1 of the ICCPR and ICESCR.

91 Article 1 (3) of the ILO convention 169.

92 Article 3 of the UN Declaration on Rights of Indigenous people,2007.

93 Article 4 of the UN Declaration on Rights of Indigenous people, 2007.

94 Article 18, 19, 23, 32 and 38 of the UN Declaration on Rights of Indigenous people, 2007.

95 Article 371A and 371G of the Constitution of India.

96 Section 4 (m) (i) of the Panchayat (Extension to Scheduled areas) Act, 1996.

[97]mandatory consultation with panchayat for cases of land acquisition and debilitation,[98] and for grant of license for extraction of minor minerals.[99]

Unfortunately, the act applies only to 8 states and a special legislation, Panchayat Act, 2001 was enacted for Jharkhand, which has a high tribal population. Furthermore, the PESA suffers from Non-implementation because of the lack of knowledge regarding the legal rights, the lack of a designated ministry for the implementation of its provisions as the PESA falls under the aegis of both the Ministry of Tribal Affairs and the Ministry of Rural development.

Most importantly, the pendency of the Municipalities (Extension to Scheduled Areas) Bill of 2001 has created a gap in the administration of urban areas of the scheduled areas under Schedule V and VI.

This problem has been studied at length by A Kurup,[100] who analyses the Indian Law on tribal rights and found that one of the most important aspects contributing the degradation in the condition of tribal people is the highly decentralized administration. The paper analyses the framework of federalism in the country and traces the authority of the central and state in the affairs of tribal people with an analysis of the fifth and sixth schedule of the Constitution of India. The paper further reviews the Panchayat (Extension to scheduled areas) Act 1996 and finds that the state legislative incompetence and the incrementing environmental degradation has worsened the position of these people. Finally, the paper concludes to say that the institutionalization of autonomous tribal governance in the country is the best measure to ensure the thriving of this population.

8.2. Land, Natural resources, and environment

One of the biggest problems the indigenous populations have faced in the last 4 centuries has been land alienation. The biggest impact of modernization has been directly upon the encroachment into the forest and natural habitats of the tribal people. This has forced them to displace, leave their traditions and look for food and livelihood in the main-stream economy.

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97 Section 4(d) and 4 (m) (ii) of the Panchayat (Extension to Scheduled areas) Act, 1996.

98 Section 4(i) of the Panchayat (Extension to Scheduled areas) Act, 1996.

99 Section 4 (k) and 4 (l) of the Panchayat (Extension to Scheduled areas) Act, 1996.

100 Kurup, A., 2008. Tribal Law in India: How decentralized administration is extinguishing tribal rights and why autonomous tribal governments are better. Indigenous LJ, 7, p.87.

Naturally, due to the unawareness of the modern ways and the lack of education the tribal population, which has a rich and diverse culture of their own, find themselves struggling to meet the basic requirements in the so called "modern mainstream society".

Thus, the ILO conventions have long recognized the right of collective and individual ownership of their lands and the right to not be removed from their lands except legally for "***reasons relating to national security, or in the interest of national economic development or of the health of the said populations***",[101]the protection and preservation of the "***environment of the territories they inhabit***",[102] and to provide adequate compensation and restitution,[103] if such measures are taken.[104] Furthermore, the obligation to respect and foster the customs regarding the use of their lands is also paramount.[105] The lands of the tribal people are called the "traditional homelands",[106] and measures to protect them from land alienation,[107] and participation in decision making,[108]is paramount.

The UNDRIP also recognizes and promotes these rights relating to the lands, territories, and resources,[109] and calls for the establishment of fair dispute resolution process for adjudication of land disputes.[110]

In India, many measures for the protection of tribal lands have been taken collectively by the legislature and the judiciary. In India, any alteration or acquisition of land requires prior consent of the Gram Sabha or the Panchayats or the autonomous District Councils,[111] who are required to consult affected people before rehabilitation as emphasized in the case of Orissa Mining Corporation Vs. Ministry of Environment and Forest & Ors.[112] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 provides

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101 Article 11 of the ILO Convention No. 107.

102 Article 7 of the ILO Convention No. 169.

103 Article 28 of the UNDRIP.

104 Article 12 of the ILO Convention No. 107.

105 Articl 13 of the ILO Convention No. 107.

106 Article 13 and 14 of the ILO Convention No. 169.

107 Article 17 of the ILO Convention No.169.

108 Article 15 of the ILO Convention No.169.

109 Article 26 of theUNDRIP.

110 Article 27 of theUNDRIP.

111 Section 41(3) of RFCTLARR Act, 2013.

112 Orissa Mining Corporation Vs. Ministry of Environment and Forest & Ors., W.P.(c) 180 of 2011

that no member of a forest dwelling Scheduled Tribes or Other Traditional Forest Dweller shall be evicted or without recognition and verification procedure.[113] The 'Right to fair compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 has been enacted to promote transparency and participation",[114] and a National Level Monitoring Committee for Rehabilitation and Resettlement has also been constituted.[115] wrongfully dispossessing members of scheduled classes and tribes from their land is a punishable offence under the Scheduled castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. There are also special provisions for schedule V areas.[116] While many laws are in place, India is often criticised for the lack of implementation and the biggest reason of the same is prejudice and discrimination against these people by the law enforcing officers.

Often the loopholes in these laws are put into place to snatch the tribal land for furthering development, which is apparently, unavoidable.[117]However in this regard, it is highly appreciable that the judiciary has stepped up to resolve the conflicts and maintain a balance between the right to development and the right to forest land and a healthy environment. Various landmark cases can be discussed in this regard.

In *K.M. Chinappa* **v.** *Union of India*[118], the Supreme Court observed that"it cannot be disputed that no development is possible without the adverse effect on the ecology and environment, and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the peopleas well as the necessity to maintain the environment. The balance has to best ruck between the two interests. Thus, the onerous duty lies upon the State under the

113 Section 4 (5) of Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

114 Press Information Bureau, Government of India, Ministry of Tribal Affairs, 22 JUL 2019 4:30PM by PIB Delhi, Land Rights of Scheduled Tribes, Available at https://pib.gov.in/Pressre leaseshare.aspx?PRID=1579747.

115 Section 48 of RFCTLARR Act, 2013 vide DoLR's Order No. 26011/04/2017-LRD.

116 Press Information Bureau, Government of India, Ministry of Tribal Affairs, 22 JUL 2019 4:30PM by PIB Delhi, Land Rights of Scheduled Tribes, Available at https://pib.gov.in/Pressreleaseshare.aspx?PRID=1579747.

117 Article 16 of the ILO Convention No. 169.

118 *K.M. Chinappa* v. *Union of India,* AIR 2003 SC 724

concept of 'sustainable development'[119] recognizedasafundamentalrightunderArticle21[120] to preserve ecology and environment.[121]

8.3. Socio Economic Justice

Right to life is a very broad term that has been interpreted by the Supreme court to include the right to livelihood, shelter, water, health, healthy and clean environment, and dignity. These are not only protected as fundamental rights but are also asserted as directive principles of state policies.[122] These rights are also promoted internationally in traibal rights conventions as well as human rights conventions.

A very necessary interpretation of Right to Life is the Right to Rehabilitation. It is imperative for mere survival and consequently the dignity of a person to have a means of livelihood and shelter, basics of sustenance. This was emphasized in various cases like *Bandhua Mukti Morcha* v. *Union of India*[123] and *Neeraja Choudhary* v. *State of M.P.*[124] and *Public Union for Civil Liberties* v. *State of T.N.*[125] where the court directed to ensure an alternate means of livelihood and to provide adequate food, shelter and medical facilities and education to the children of such families as a "package of rehabilitation".

The right to healthy environment has been incorporated, directly or indirectly, into the judgments of the court. Link between environmental quality and the right to life was first addressed by a constitutional bench of the Supreme Court in the *Charan Lal Sahu Case*[126] while the first indication of recognizing the right to live in a healthy environment as a partof Article 21 was evident from the case of *R. L. & E. Kendra, Dehradun* v. *State of U.P*[127]

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119 Brutland Commission Report, 1983; Principle 2 of Stockholm Conference, 1973; Principle 1 of Rio Declaration, 1992.

120 Madhu Kishore v. State of Bihar, AIR 1996

121 *Research Foundation For Science Technology And Natural Resource Policy* v. *Union Of India And Others,* AIR 2007 SC (Supp) 852

122 Article 38 and 39 of the Constitution of India, 1950.

123 *Bandhua Mukti Morcha* v. *Union of India,* 1984 3 SCC 181.

124 *Neeraja Choudhary* v. *State of M.P.,*1984 3 SCC 243.

125 *Public Union for Civil Liberties* v. *State of T.N.,* (2013) 1 SCC 585.

126 *Subhash Kumar* v. *State of Bihar*, 1991 (1) SCC 598.

127 A.I.R 1985 S.C. 652.

In *Subash Kumar case*[128], the Court observed that:

"right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life."

In *Shanti Star Builders* v. *Narayan Totame*[129], it was held that right to life is guaranteed in a civilized society would take within its sweep the right to food, the right to clothing and the right to a decent environment. Maintenance of health, preservation of the sanitation and environmentfallswithinthepurviewofArticle21oftheconstitutionasitadverselyaffectsthe life of the citizen and it amounts to slow poisoning. This was reaffirmed in *M.C. Mehta* v. *Union of India*.[130] The rights like right to education, food and health support the positive right ofenvironment[131].

Moreover, Education is what making anyone's able to live in this world with dignity. However, speaking of the present context, receiving higher education is sometimes considered as a "privilege", where not the entire population has got the right to be benefited from it.[132] Hence, no one can ever claim of a "right to attend college" and where this privilege can be lost by a variety of reasons.[133] One of the emerging challenges of privatization of higher education, certainly, is the question of how higher learning being a scarce resource to be judiciously distributed to set the tune of democratic practice in a traditionally hierarchical society like India. [134]While India has accepted and acknowledged these rights, it must be noted that the same is not implemented and needs more clarify specially as they apply to the indigenous people.

9. Global best practices vis-à-vis the status in India

In 2008, John B. Henriksen has conducted a "*Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169*" that was adopted by the Programme to Promote ILO Convention No. 169. This document provides us with the global best practices for the tribal rights. This chapter shall provide an overview of these best

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128 *K. Ramakrishnan* v. *State of Kerala*, AIR 1999 Kerala 385.

129 *Shanti Star Builders* v. *Narayan Totame*, 1990(1) SCC 520.

130 *M.C. Mehta* v. *Union of India* (1991) AIR SC 813 (Vehicular Pollution Case).

131 *M.C. Mehta* v. *Union of India*, AIR 1992 SC 382.

132 Pratap Bhanu Mehta, "Brookings-NCAER India Policy Forum 2007" 8 CPR 27-23 (2007).

133 Roy Lucas, "The Right to Higher Education" 41 JHE 55-64 (1970).

134 Aurobindo Sahoo, "Young Scholars of Indian Education" 9 NJPA 22-26 (2011).

practices, covering countries such as Norway,Finland, Sweden over various principles like the right to be consulted, the right to decide developmental priorities, the right to education, recognition of indigenous institutions and recognition of customs and customarylaws.[135]

The right to be consulted, that extends not only to decision-making within the framework of domestic or municipal processes but also to decision-making within the international realm,[136] is enshrined in International law. In Norway, the procedure was consultation is highly advanced. The tribal population has their own parliament known as the Sami Parliament that is required to give feedback to the authorities was various proposals that affect the Sami interests directly. The agreement codifies many objectives among which is the objective to "develop a partnership perspective between the state authorities and Sami parliament" for a common understanding of their situation and developmental needs.

Finland, Norway and Sweden have also appointed a Nordic expert group in consultation with the Sami Parliaments and have supported the adoption of a Sami Convention to further these objectives.

As an example, for the promotion of Socio, economic and cultural rights, the jurisprudence of the UN Human Rights Committee is of immense importance.[137] They have through their decisions emphasised that these rights not only protect the Tribal Peoples traditional means of livelihood and customs but also extend to a positive obligation on the state to help them adapt to modern times.[138]

Self-determination, an important facet of Tribal Rights is a very debatable topic. We find that Bangladesh has set an example by creating within its unitary system of governance, the legal and administrative system in the Chittagong Hill Tracts where 11 separate indigenous

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135 Henriksen, J.B., 2008. Research on best practices for the implementation of the principles of ILO Convention No. 169. OIT, Sitio web: http://www. ilo. org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_118120. pdf, pp.49-51.

136 Anaya, James S. (2004) Indigenous Peoples in International Law (Second edition), Oxford University Press, pages 153-154

137 Ilmari Länsman et al. v. Finland (Communication 511/1992), Views adopted: 26 October 1994, Report of the Human Rights Committee, Vol. II, GAOR, Fiftieth Session, Suppl. No. 40 (A/50/40), pp. 66–76.

138 Scheinin, Martin (2204) Indigenous Peoples' Land Rights under the International Covenant on Civil and Political Rights

groups reside,each having different customs.[139] Norway has also taken a huge step in establishing the Sami Parliament in 1989 that is given the right over all questions that affect their interests as per the Norwegian Sami Act.

In regards to Education, the ILO has noted that the education of indigenous people as compared to non-indigenous has been pitiful in countries like Guatemala and Peru in Latin-America because of the poor quality of education.[140] Again, Norway has proved to be the country with best practices by implementing policies aimed at furthering both individual and collective rightstoeducationwhilepreservingtheSamilanguageandTraditionswiththehelpofthe1999 Education Act.

Lastly,in regard to the preservation and implementation of customs and traditions, Bangladesh illustrates that the best way is through state recognition and acceptance of indigenous customs and customary laws. There the matters of marriage, inheritance etc re regulated by unwritten customs and usages but the "partially autonomous indigenous-majority self-government system",[141]acknowledges and helps give effect to the indigenous law and jurisprudence. In [138]Scheinin, Martin (2204) Indigenous Peoples' Land Rights under the International Covenant on Civil and Political Rights fact, in Denmark, even the Criminal Code is based on the customary laws of the "Inuit tribe". Kenya on the other hand, demonstrates that the complete toleration of these traditions without any state intervention can lead to many problems as the Maasai female in Kenya still have to suffer from Female Genital Mutilation.

10. Conclusions and Suggestions

This paper has explored the basic international guarantees available to Tribal people under various conventions and has compared it with the law in India. The paper has also studied the global best practices for various tribal rights. Thus, we find that while India, a country with almost 9% of tribal population, makes a sound attempt to foster the rights of tribal people through statutes, constitutional safeguards, and judicial efforts, lacks the implementation measures. There is a lot that we can learn from other countries and a lot of changes can be

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139 These are the Bawn, Chak, Chakma, Khumi, Khyang, Lushai, Marma, Mru, Pankhua, Tanchangya, and Tripura.

140 Williams, Sandra (2007) Indigenous Education Latin America http://poverty.suite101.com/article.cfm/indigenous_education_latin_america

141 Henriksen, J.B., 2008. Research on best practices for the implementation of the principles of ILO Convention No. 169. OIT, Sitio web: http://www. ilo. org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_118120. pdf, pp.49-51.

made to make the various legislations free of loopholes. In my limited knowledge, I propose the following recommendations that should be adopted by the government to further the rights of indigenous people:

- The Indigenous people lack representation. Like Norway, the government should create special Tribal Committees in various are as that have the right of being consulted by the government in creation of policies and laws that will affect them These committees should be locally created with a centralized governance and given the right to represent at the level of state legislature directly. Other wise their voice may be suppressed by the middlemen.
- The Tribal people are still prejudiced against and thus, the formation of such committees headed and run by the tribal people, will help them to raise their voice and avoid suppression by the privileged and majority.
- The government should take measures to ensure the implementation of PESA in all the states having indigenous population. They should also promote self-governance, specially for Tribal people and not only as a measure of local governance.
- India should extend its remedial policies like reservation, the application of SC/ ST atrocities Act etc. to all tribal people regardless of whether they come under the category of Scheduled tribes or not.
- The forced displacement of these people under the garb of development necessity should be avoided as a last resort. Special courts for adjudicating these land disputes should be incorporated. Further, in case of displacement, they must be rehabilitated with an assurance of livelihood, food and education.
- The socio-economic rights should be promoted by providing quality education and health services for free and near the places that these people in habit.
- The government should ratify the ILO Convention No. 169 and should regularly submit reports to the ILO Committee and should take part in multilateral discussions for the promotion of indigenous rights.
- Most importantly, the ministry of tribal affairs should carry on programmes for educating these people of their rights and provide them legal assistance free of cost. The ministry should also establish protocols for the creation of a body that

can consult with Tribal people directly regarding their needs and consequently, draft and propose legislations to address them.

The Human rights extend to all but complex and pitiful past of the tribal people have made them susceptible to exploitation and consequently, they require special care, special laws and positive actions for the promotion of their Rights. The international law has developed tremendously for the promotion of the rights of tribal people and so have the laws in India. But there is still a long way to go for India to provide its Tribal Population the life it deserves and for this, a major overhaul in the system of tribal self-governance is required. Furthermore, strengthening of implementation, creation of special bodies for dispute resolution and proper consultation mechanism is of essence.

Thus,learning from the best practices globally and the international standards of Tribal Rights, India needs to change. After all, there is but light at the end of this tunnel and soon we will have a world that will respect the traditions of these people, provide them the bargaining power to choose a life that they desire to life and all the rights that all humans deserve.

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Climate Change, Sustainable Development: Global and National Concerns

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Abstract: *The Paris Agreement on Climate Change shows the strong commitment of the international community to address the issue of Climate Change. India ratified the Agreement on 2nd October 2016. As the threshold for entry into force of the Paris Agreement was achieved on 5th October 2016, the Agreement entered into force on 4th November 2016. This is a great leap for global environmental governance. This article evaluates to what extent the Paris Agreement could serve as a future roadmap for dealing with climate change and how India's efforts can fulfill its obligations as a responsible global player.*

Keywords: Adaptation, costs, India, mitigation, vulnerability, Climate change

1. Introduction

The World Metrological Organization's (WMO) Statement on 'the status of the climate in 2015' suggests that the average temperature of the Earth has already risen by 0.76°C as compared to 1961-1990 average.1 This proof of rise in temperature is a wakeup call for everyone to leave behind the prejudices or skepticisms about the scientific realities of climate change. There is a need to internalize the human value of cooperation in order to mitigate the adverse impacts of climate change and adapt to the changing scenario.

The year 2015 will be remembered for two landmark international events: the historic climate change agreement under the UN Framework Convention on Climate Change (UNFCCC) in Paris in December 2015 and the adoption of the Sustainable Development Goals in September 2015. The Paris Agreement on Climate Change is considered to be a 'monumental triumph' in international climate change law and policy. After nearly seventeen years of stalemate, 197 Parties to the UN Framework Convention on Climate Change concluded a new international agreement at the 21st Conference of the Parties to the UNFCCC (COP21) in Paris on 12 December 2015. The Treaty aims to strengthen the global response to the threat of climate change in the context of sustainable development. It represents a confirmation that the international community will continue to approach climate change multilaterally. One of the main focus of the agreement is to hold the increase in the global average temperature to well below 2°C above pre- industrial level and on driving efforts to limit it even further to 1.5°C. The Paris Agreement sets a roadmap for all nations in the world to take actions against climate change in the post-2020 period.

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One of the important principles of international environmental law is sustainable development. Like the notion of common but differentiated responsibilities and respective capabilities (CBDRRC), the concept of sustainable development is concerned with the relationship between environmental and developmental considerations.[2] The Brundtland Commission has defined the term sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[3] The Rio Declaration uses the term 'sustainable development' in twelve of its twenty seven principles. But the precise content and contours of this basic concept remains elusive. Rather offer a definition, the declaration outlines various elements of sustainable development. One important element is that development, while essential, must remain within the carrying capacity of the environment and, therefore, that environmental protection must be part of development process.[4]

On 25th September 2015, countries adopted a set of goals to end poverty, protect the planet and ensure prosperity for all as part of a new sustainable development agenda. Each goal has specific targets to be achieved over the next 15 years. The Millennium Development Goals (MDG) that were in place from 2000 to 2015 were replaced by the Sustainable Development Goals (SDG) with the aim of guiding the international community and national governments on a pathway towards sustainable development for the next fifteen years. A new set of 17 SDGs and 169 targets were adopted by the world governments in 2015. Goal 13 specifically provides that world community should take urgent action to combat climate change and its impacts.[5] This article evaluates to what extent the Paris Agreement could serve as a future roadmap for dealing with climate change and how India's efforts can fulfill its obligations as a responsible global player.

2. Understanding Climate Change

Climate change refers to the variation in the Earth's global climate or in regional climates over time. It describes changes in the state of the atmosphere over time scales ranging from decades to millions of years. Climate change has been defined by many in many ways.

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2 Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law,* (Oxford University Press, 2017) pp. 53-54

3 World Commission on Environment and Development, *Our Common Future*(Oxford University Press, 1987) p. 43

4 *Supra* note 1

5 Sustainable Development Goals <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed on 02 January 2018.

While some define it as an offshoot of Earth's natural processes, others define it as a result of human activities. Striking a balance between these two varying perspectives, climate change is defined as "a change which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods". Truly, the present changes in the Earth's climate cannot be explained alone by the natural processes that explain Earth's previous warm periods. There is a broad scientific consensus that most of the warming in the recent decades can be attributed to human activities. If humanity is, in large part, responsible for this change, then whatever choices we make today, w ill have a significant bearing on the climate of the future. This makes climate change a formidable concern.

3. Climate Change: Greatest threat to Sustainable Development

Climate change is the most important challenge to achieving sustainable development, and it threatens to drag millions of people into poverty. The Intergovernmental Panel on Climate Change (IPCC) has noted, from 1880 to 2012, average global temperatures increased by 0.85°C.[6] Global emissions of carbon dioxide (CO2) have increased by almost 50 per cent since 1990, and emissions grew more quickly between 2000 and 2010 than in each of the three previous decades.[7] Developing countries will suffer most from the effects of climate change. Their economies are more dependent on natural resources, such as agriculture, forestry and fisheries, and they often lack the infrastructure, the financing and capacity to adapt to a changing climate.

Climate change has been rising on the political agenda. Climate change involves all three dimensions of sustainable development: the economic, the environmental and the social dimension. Addressing this challenge demands a long term perspective on how our actions today will affect the lives of our children, and it also demands a dialogue with all stakeholders involved in order to reach viable solutions.[8] The prevention of dangerous global warming requires the reduction and limitation of emissions of greenhouse gases. The international response to climate change began at the Rio Earth Summit in 1992, where the

6 Intergovernmental Panel on Climate Change, *'Climate Change 2014 Synthesis Report'* <www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf> accessed on 3 January 2018

7 *Ibid*

8 Keynote Speech by Angel Gurría, OECD Secretary-General, Seminar *on "Sustainable Development and Climate Change: International and National Perspectives"* < http://www.oecd.org/newsroom/seminaronsustainabledevelopmentandclimatechangeinternationalandnationalperspectives.htm/> accessed on 03 January 2018.

UN Framework on Climate Change (UNFCCC) was adopted. This convention set out a framework for action aimed at stabilizing atmospheric concentrations of greenhouse gases to avoid "dangerous anthropogenic interference with the climate system." In 1997 Kyoto Protocol supplemented the framework laid out in UNFCCC, by establishing internationally negotiated, legally binding emission targets for Annex I parties.

4. Paris Agreement on Climate Change

The Paris Agreement marks a historic moment in the international climate change negotiation. It signifies that the international community will continue to approach climate change multilaterally. This universal agreement will succeed the Kyoto Protocol. Unlike the Kyoto Protocol, it provides a framework for all countries to take action against climate change. Placing emphasis on concepts like climate justice and sustainable lifestyles, the Paris Agreement for the first time brings together all nations for a common concern under the UNFCCC. The Paris Agreement sets an ambitious direction for the climate regime and it also establishes a common transparency and accountability framework. The Paris Agreement comprises of 29 Articles and it covers all the crucial areas recognized as essential for a comprehensive and balanced agreement, including mitigation, adaptation, loss and damage, finance, technology development and transfer, capacity building and transparency of action and support. The Paris Agreement provides a remarkably strong basis for future global action on climate change.

The Paris Agreement prescribes a multilateral framework for taking action on climate change in the post-2020 period. It recognizes that developed countries are responsible for the cumulative historic stock of greenhouse gases (GHGs) in the atmosphere and therefore must take the lead in climate actions and also provide financial, technological and capacity building support to developing countries with respect to both mitigation and adaptation. The imperative would be to ensure that UNFCCC and Paris Agreement continue to take cognizance of the fact that developing countries have unique vulnerabilities, special circumstances, and development priorities like eradication of poverty, food security, energy access etc.[9]

There is no question about the Paris Agreement's legal force under international law. After entry into force by 2020, the agreement will be a legally binding multilateral treaty within the meaning of the Vienna Convention on the Law of Treaties. The agreement's provisions

9 Climate Change, Sustainable Development and Energy, *Economic Survey 2016-17,* Volume 2, p. 119

on signature, ratification and entry into force, remove any doubt about the intent of the parties to the agreement to be bound under, and hence governed by, international law.[10]

The focus of the Paris Agreement is on a process for achieving the well below 2°C target. Key to that process is the bottom up submission by parties of "Nationally Determined Contributions" (NDCs).[11] NDCs are high level policy plans setting out what approach each country will take to reduce emissions and contribute to the global well below 2°C goal. The Paris Agreement requires that when countries submit their longer term NDCs, they ensure that the revised commitments reflect the "highest possible ambition".[12] Each NDC is also to be revised every five years "with a view to enhancing the level of ambition".[13]

5. The Gandhian Approach Towards Sustainable Development

Mahatma Gandhi, an ardent champion of sustainable development, advocated harmonious existence of mankind with nature and ecology based on equity and justice. He said long ago in 1924, "Earth provides enough to satisfy every man's need, but not any man's greed". With this world view, Mahatma Gandhi was engaged in criticizing the colonial modernity which went beyond the carrying capacity of the planet earth and exploited people and resources across the planet. Therefore, our freedom struggle under his leadership was in a way the first ever struggle in history for sustainable development. Gandhiji's ideal life was an enlightened unselfish ethical life of plain living and high thinking. He wrote in 1938: "Man's happiness really lies in contentment. He who is discontented, however much he possesses, becomes a slave to his desires….. The incessant search for material comforts and their multiplication is an evil. I make bold to say that the Europeans will have to remodel their outlook, if they are not to perish under the weight of the comforts to which they are becoming slaves…" Mahatma Gandhi was so peeved of the western culture and civilization that he wrote 'if India followed the western model of development she would require more than one planet to achieve the progress they had attained'. The Nicolas Stern Committee Report on Global Warming and Global Economy also underlined the Gandhian philosophy when it observed that at the current rate of consumption of resources and energy of the planet, mankind would require more than one planet for survival. The Stern Committee Report,

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10 Ladan, Muhammed Tawfiq, *Review of the Paris Agreement: The Heart of the Post-2020 International Legal Regime on Climate Change and its Implications for Sustainable Development Goals and the Energy Sector* < https://ssrn.com/abstract=2814652> accessed on 03 January 2018.

11 Article 4

12 Article 4(3)

13 Supra note 9

therefore, stressed on reduction of green house gas emissions by remodeling life style and by transiting from a carbon economy to a non-carbon economy. We need to remodel our outlook and achieve the goal of sustainable development. By adopting a combination of factors which include the adoption of clean technologies, equitable distribution of resources and addressing the issues of equity and justice, we can make our developmental process more harmonious with nature.

6. Scope of Sustainable Development in the Paris Agreement

A promise to sustainable development is clearly reflected in the various provisions of the Paris Agreement. The Preambular recital 11 reads:

Climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.

The Sustainable Development Goals (SDGs) as detailed in the UN Resolution, "Transforming our World: the 2030 Agenda for Sustainable Development"[14] and the Paris Agreement are both universal visions and are both based on being implemented from the "bottom-up", meaning that countries identify their own priorities, needs and ambitions. The 17 SDGs have 169 related targets to be achieved by 2030 and are expected to help organise and streamline development action for achievement of greater human well-being.

The principle of common but differentiated responsibilities and respective capacities is an important component of the Paris Agreement. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.[15] Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.[16] All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of

14 UNGA Res 70/1

15 Article 2

16 Article 4.3

Article 2 taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.[17]

In the Paris Agreement, the principle of common but differentiated responsibilities and respective capacities can also be found in the provisions related to mobilisation of financial assistance[18], assistance in adaptation efforts,[19] facilitation of technology transfer,[20] and capacity-building.[21] For developing countries to effectively implement their NDCs, industrialized countries will have to offer assistance in various forms. The basis for this obligation is traceable to Article 4 of the UNFCCC. Support to developing countries in general should come in the form of finance, technology development and transfer, as well as capacity building.

One important component of sustainable development is precautionary principle which can also be found in the Paris Agreement. The Treaty recognises an urgent 'threat' of climate change and the need to strengthen global response to the threat of climate change and to significantly reduce the risks of climate change. In essence, while references could be more explicit, the Paris Agreement and the UNFCCC are founded on the precautionary principle.[22] In order to stabilise GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system and in order to allow ecosystems to adapt naturally to climate change, so as to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner, mitigation and adaptation actions must be taken even in the event of scientific uncertainty as to the exact contours of the challenge.[23]

The principle of public participation and access to information and justice is emphasised throughout the Paris Agreement, including in provisions on mitigation,[24] adaptation[25]

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17 Article 4.19

18 Articles 9.1–3

19 Article 7.7(d)

20 Article 10.6

21 Article 11.1–3

22 Marie-Claire Cordonier Segger, 'Advancing the Paris Agreement on Climate Change for Sustainable Development', *Cambridge Journal of International and Comparative Law*, (2016) Vol 5 Issue 2, p. 224

23 Ibid

24 Article 4

25 Article 7

and on the Sustainable Development Mechanism and non-market approaches[26] which aim to enhance public and private sector participation in the implementation of NDCs. Further, Parties shall enhance education, training, public awareness, public participation and public access to information, recognising their importance in enhancing actions under the Agreement.[27] In essence, the treaty depends on public engagement, informed by the information that is made available through the national communications that are submitted to international registries, the global stock take, the peer review, and other measures, to assist parties progressively to intensify their contributions to mitigation, adaptation, finance and other aspects of the global response to climate change.[28]

7. Paris Agreement and Sustainable Development Goals

The Paris Agreement is a complimentary mechanism to the SDG's goals that addresses climate change. The SDGs were arrived at through a unique global process, centring on an open working group of member states and consultation with a broad range of stakeholders. The text was subsequently agreed on by all UN member states in the General Assembly in September 2015. While the 2030 Agenda is global in its ambition and universally applicable, it is up to countries to decide how to implement it, and how to prioritize goals and targets, depending on national needs and ambitions. They are free to set up their own national and sub national implementation structures and plans. Countries are also encouraged to work in partnership to learn and assist each other.[29]

The SDGs aim at tackling key systemic barriers to sustainable development, such as poverty, inequality, unsustainable consumption and production patterns, inadequate infrastructure, climate change and lack of decent jobs. The SDGs provide useful guidance for shaping law, policy and practice for implementation of effective and ambitious climate change action. Tackling climate change and fostering sustainable development are two mutually reinforcing sides of the same coin. Sustainable Development cannot be achieved without climate action, as many of the SDGs are actually addressing the core drivers of climate.[30]

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26 Article 6

27 Article 12

28 Supra note 21 pp. 224-225

29 Exploring connections between the Paris Agreement and the 2030 Agenda for Sustainable Development, Stockholm Environment Institute< https://www.sei-international.org/mediamanager/documents/Publications/SEI-PB-2017-NDC-SDG-Connections.pdf> accessed on 05 January 2018.

30 Supra note 9 p. 38

The 17 SDG's are global agenda intended to guide action that balances human needs with environment protection. The problem of climate change can be addressed by SDG's and, if unaddressed, will cause new ones. The coordination between the Paris Agreement and SDG's can achieve the targets necessary to keep the global temperature low enough that society can correct the inequalities that burden our world. The Paris Agreement is an ambitious climate agreement that is critical to achieve the SDGs by 2030. It apparently provides a clear policy framework and legal basis for action on climate change.

8. Conclusion

Climate change is the defining issue of our times. It is perhaps, the greatest challenge to sustainable development. It should be addressed by all countries with a shared perspective, free from narrow and myopic considerations. The developed countries need to look beyond their narrow self interests and work jointly with the developing countries to evolve cooperative and collaborative strategies on the issue of climate change, which is of immense relevance for the future of mankind. However, the efforts so far in the direction of meeting the challenges of climate change have been sporadic and incoherent. We urgently need a new economic paradigm, which is global, inclusive, cooperative, environmentally sensitive and above all scientific. According to Jeffrey Sachs, a perceptive commentator, "The world's current ecological, demographic and economic trajectory is unsustainable, meaning that if we continue with "business as usual" we will hit social and ecological crises with calamitous results". Sustainable development based on addressing the needs of the poor and optimal harnessing of scarce resources of water, air, energy, land, and biodiversity will have to be sustained through more cooperative endeavors. Then alone, we could make some headway in saving our lone planet from the brink of climate disasters

The world is facing the challenge of sustaining its economic growth while dealing with the global threat of climate change. Climate change impacts are part of the larger question of how complex social, economic, and environmental sub-systems interact and shape prospects for sustainable development. The solution to this problem lies in a multilateral action which is positive, constructive and forward looking under the United Nations Framework Convention on Climate Change. The Paris Agreement is an important step in the right direction.

The world has realized and is completely convinced that climate change is affecting global health, poverty, food security, and national and global security. The Paris agreement is a clear indication that our global policy makers and stakeholders of global sustainable development are determined to mitigate the inevitable climate disaster and accelerate

sustainable development for the benefit of the people and the planet. The Paris agreement contains ambitious goals, extensive obligations and comparatively rigorous oversight. Taking into account SDG commitments can help countries to ensure that climate actions promote wider social, economic and environmental ambitions. It is now up to the individual countries to adopt concrete mitigation and adaptation measures. If all the stakeholders of global sustainable development proceed with their respective tasks for the achievement of SDGs, then we will certainly accomplish them in time which will help to improve the lives of people and to build a better and safer future with no one left behind.

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Criminal Liabilities of the 'Public Authorities' under Right to Information Act, 2005

Mrs. Swapnil Pandey,* and Dr. K B Asthana[1]**

Abstract : *Right to Information is a part of Right to Freedom of Speech and Expression which is a Fundamental Right under Article 19 (1) (a) of the Indian Constitution and available to all the citizens of India. Right to Information Act, 2005, has been made, to establish machinery or a process for access the information, by the Parliament of India and came into force on 12th October, 2005 replacing the former Freedom of Information Act, 2002. It extends is to the whole of India and the right to receive the information is only to Indian citizens. Any citizen can get information, by an application, from the Public Authority. All central, state and local institutions come under the Public Authority, as defined in Section 2 (h) of the said Act. This Act has proved to be very beneficial for the people and many corruption cases have also been detected by it. Despite this, there are various cases in which the public authorities failed to do his duty and did not provide information to the information seeker within the stipulated period as per the RTI Act. In such a situation, the applicant can file an appeal before the First Appellate Authority, and even from here, there is no satisfactory reply, he can made a complain to the Central Information Commission and State Information Commission, as the case may be. Central Information Commission and State Information Commission are entitled to entertain complaint directly, without filing any appeal with the First Appellate Authority or during the pendency of the appeal.*

If any Public Information Officer not provide the information to the information seeker within the stipulated time frame, then a penalty can be imposed on and not only this, the criminal cases on Public Information Officers/ First Appellate Authorities/ Central Information Commissioner and State Information Commissioner, can be lodged, if they do not discharge their duty properly, under Indian Penal Code, 1860 and it should be propagated among the peoples, because a lot of people don't know about it. There are need of some amendments in the RTI Act, such as, i) if the First Appellate Authority not takes appropriate decision on any appeal within the stipulated time frame under this Act, then there should be make provision, for penalty; ii) the Right to go to the court, which prohibits by the Section 23 of the RTI Act, should be removed;

The objective of this Paper are to be detected the effectiveness of the RTI Act and find out the ways to make still more effective; examine the available remedies to the information seeker,

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if the proper/ satisfactory information is not received, within the stipulated time frame by the RTI Act. The importance of this paper, in the future, will be firstly, the RTI Act can be made more effective, so that public participation in the functioning of the government will be greater, and secondly, the remedies available to the information seeker, will be made more effective, so that it will be easier to get information and the information officers bound to give the correct information at the right time.

Keywords- 1**.** Information, 2. Information seeker/ Applicant 3. Public Authority/ Public Servant, 4. Criminal Liability. 5. Remedy

1. Introduction

India is a democratic country and to preserve democracy, laws are made and changed from time to time, as per necessity, so that law and order can be maintained and the participation of the citizens in governance can be greater and more. Right to Information Act, 2005, (hereinafter referred to as the RTI Act) which appeared in the year 2005, is also a similar law, under which the democracy of the country is strengthened and the participation of common citizens in administrative work of the various departments of the governments increases. The biggest objective of bringing this law is to give the common people the right to question/ get information to the governments that how the government's departments/ administration are functioning. With the help of this law, any common citizen can get any kind of information by registering his application before the concerned public authority office. This Act contained 31 Sections and 2 Schedules and it extends is to the whole of India. After the introduction of this law, many social workers tried to help people with the help of this law and were called 'RTI Activists'.

In 1976, the Supreme Court of India pronounced, in the case of *Raj Narayan v. State of Uttar Pradesh*, [2] that people/ citizen of India can't express themselves unless they have knowledge, therefore, the base of Right to Information came with the decision of this case that right to information is a part of Article 19 (1)(a). In the same Case the Supreme Court spoke that India is a democracy, people of its are the master, therefore, the masters have a right to know how the government/ s are functioning, meant serve them. Further every citizen of India pays taxes, directly or indirectly, even a beggar pays tax to the governments, in the form of sales tax, excise duty etc. when he buys anything from the market. These three grounds have been laid down by the Apex Court while saying that Right to Information should be provided to the information seeker and that's where it started that Right to Information is a part of Fundamental Right under Right to Freedom of Expression. Therefore, the citizens of India have a right to know that how their money is spending, i.e., the functioning of the government/ s.

2. (1975) 4 SCC 428.

One another important case, *S. P. Gupta v. Union of India*, [3] which was decide on 30th December, 1981, the Supreme Court rejected the central government's claim for protection against disclosure and directed the Union of India to disclose the requested documents. The petitioners sought the disclosure of correspondence between the Law Minister, the Chief Justice of Delhi, and the Chief Justice of India on the appointment and transfer of judges. The Court reasoned that a particular document regarding the affairs of the state is only immune from disclosure when disclosure is clearly contrary to public interest and in this case the appointment and transfer of judges is of immense public interest. Further Court observed that an open and effective participatory democracy requires accountability and access to information by the public about the functioning of the government. Exposure to the public gaze in an open government will ensure a clean and healthy administration and is a powerful check against oppression, corruption, and misuse or abuse of authority. The concept of an open government is the direct emanation from the right to know, which is implicit in the right to freedom of speech and expression guaranteed under Article 19(1) (a) of the Indian Constitution. Therefore, the disclosure of information in regard to government functioning must be the rule; and secrecy, the exception, justified only where the strictest requirement of public interest demands it. [4] In this case it became completely certain that Right to Information is a part of Fundamental Right under Right to Freedom of Expression and the demand for a separate/ specific legislation on the Right to Information have begun.

Right to Information is considered a fundamental right after the proclamation by the Apex Court in above mentioned two cases, yet a separate Act was needed for it because we need machinery or a process through which we can exercise this fundamental right. As a result an Act, namely, Right to Information Act, 2005, has been made and came into force on 12th October, 2005 replacing the former Freedom of Information Act, 2002. However, before that 9 (nine) state governments, J & K, Delhi, Rajasthan, Madhya Pradesh, Maharashtra, Karnataka, Tamil Nadu, Assam and Goa, had passed state acts. [5] This Act laid down the process, for any information, on how and where to apply, how much fees, etc.

This law has proved to be a great medium/ way to stop corruption. Using this, any citizen [6] of India can get various types of information/ details from government offices. But according

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3. (1982) 2 SCR 365.
4. Global Freedom of Expression, 'S. P. Gupta v. Union of India, https://globalfreedomofexpression.columbia.edu/cases/s-p-gupta-v-union-of-india/, Retrieved on 25 February, 2022.
5. Courtesy: www.righttoinformation.org, 'What is Right to Information and how to use it?', https://www.conservationindia.org/wp-content/files_mf/What_is_Right_to_Information_and_how_to_use_it_final.pdf, Retrieved on 25 February, 2022.
6. Section 3 of the RTI Act, 2005.

to Section 6 (1) any person can enjoy the said right. It means Section 6 (1) is wider in its ambit than Section. Here it is not clear that what Corporations, Associations, Companies, Trade Unions, NGOs, Political Agents etc. can enjoy said right or not, which are legal entities/persons, but not citizens. In my opinion, 'Information' is a part of 'Right to Know' and in this way became a facet of 'Right to Freedom of Speech & Expression' under Article 19 (1) (a), which only Indian citizen can enjoy. Therefore, here is also the same meaning of 'citizen' or 'person' which is in Article 19 (1) (a) of the Constitution. So, I think, the legal/ artificial person, such as, an Association or a Partnership Firm or a Hindu Undivided Family or some other group of individuals, constituting as a body or otherwise, are allowed to get information. However, if an application is made by an employee or office bearer of any Corporation, Association, Company, Trade Union, N.G.O. etc. indicating his/her name and such employee/office bearer is a citizen of India, information may be supplied to him/ her. In such cases, it would be presumed that a citizen has sought information at the address of the Corporation, Association, Company, Trade Union, N.G.O. etc.

This law is applicable in all the states of India. By using this law, a person can give his application for information to any public authority, which has to be answered by that authority within just 30 days. Due to this, common people get benefits in many ways and transparency comes in the system. It protects the rights of common citizens and empowers them. By making good use of this law, many types of information can be obtained from government's institutions. Apart from this, no person can ask for opinion under this law. Under this scheme, a person can get all the information which is related to his personal life also, such as passport, tax refund, pension etc. The Act also requires every public authority to computerize their records and upload it on its website for wide dissemination so that the people need minimum resource to request the information formally.

Whether if concerned Public Information Officer (hereinafter referred to as the PIO) does not provide information in time or if the information provided is false/ incomplete or supply information other than the information sought or reject the application with mala-fide reasons; or First Appellate Authority (hereinafter referred to as the FAA) / State Information Commissions (hereinafter referred to as the SIC) / Chief Information Commission (hereinafter referred to as the CIC) decide the date for hearing the appeal/ complain, and after deciding the date he is deliberately absent on that day so that the matter can't be heard, or consciously not hear, even while present; an First Information Report (hereinafter referred to as the FIR) can be lodged against him at a Police Station under Indian Penal Code, 1860 (hereinafter referred to as the IPC).

2. Objective of the Study

The objectives/ aims of this research paper is to analysis the effectiveness of Right to Information Act, 2005, remedy to the information seeker if concerned PIO does not provide information in time or if the information provided is false/ incomplete or supply information other than the information sought or reject the application with mala-fide reasons and criminal liability of the various authority for the same; and to find out the ways to make still more effective of the effectiveness of the RTI Act and available remedies to the information seeker.

3. Scope / Limitations of the study

This research paper cover the impact effectiveness of the RTI Act on the peoples' right to information since its inceptions and till date; remedy to the information seeker if he does not receive proper information, within stipulated time frame and criminal liabilities of the various authorities.

4. Method of the Study

This paper adopts Doctrinal Method. Since it is doing an analysis of the effectiveness of Right to Information of the citizens of India, remedy to the information seeker if he does not receive proper information and criminal liability of the various authority for this, so in preparing this paper/ study, historical, analytical, critical and evaluative approaches are applied and reviewed/ analyzed discussed and examined the existing policies/ technologies, rule, regulations, laws and their effect. The actions of governments/ enforcement agencies are also examined. And for this purpose, various statutes, books, journals, commentaries, reports, magazines, newspapers, internet surfing etc. has been referred/ used.

5. Importance/ Significance of the Study

Through this research paper, we will be able to know the effectiveness of Right to Information Act, remedy to the information seeker if he does not receive proper information and criminal liability of the various authorities for this, and to know the possibility of amendments in the Right to Information Act, 2005 for its better effectiveness.

6. Some Important Features of the RTI Act

The Right to information in India is governed by two major bodies- i) CIC, and ii) SIC. The head of the CIC, i.e., Chief Information Commissioner who heads all the central departs and ministries with their own PIOs. CIC is directly under the President of India.

State Information Commissioner Head over all the state departments and ministries. SIC is directly under the corresponding State Governor.

An Indian citizen can submit his application under this Act and get the necessary information from any government office/ public authority. The application can be submitted before the concerned Central/ State PIO or Central/ State Assistant Public Information Officer (hereinafter referred to as the APIO), as the case may be. [7] In the case of Central Government Departments, 629 post offices have been designated as APIOs. If any application submits to these APIOs at the RTI counter in these post offices, they will issue a receipt and acknowledgement and it is the responsibility of that post office to deliver it to the right PIO. [8] All central, state and local institutions come under the public authority, as defined in Section 2 (h) of the said Act. Traditionally, information disclosure had been restricted by the Official Secrets Act, 1923 and various other special laws, such as, Indian Evidence Act, 1872, Commission of Enquiry Act, 1952, All India Services Act, 1951, Central Civil Services (Conduct) Rules, Railway Services (Conduct) Rules. Sec. 22 [9] clearly says that this Act would over ride all existing Acts including Official Secret Act. The application of the information seeker can be rejected on any of the reasons specified in Sections 8 and 9. [10] Many institutions, such as, security and intelligence agencies, have been kept out of the scope of this Act; [11] except in case of corruption or human right violation. Such organizations are listed in Schedule 2 of the said Act. Under Section 10 of the RTI Act, partial information may be provided, i.e., to that part of the record which does not contain information which is exempt from disclosure under this Act. If information about a third party has been sought, then except in the case of trade or commercial secrets protected by law, can be given after fulfilling the two conditions, firstly, giving the opportunity for hearing to the third party, and secondly, if the public interest out weights in importance any possible harm or injury to the interests of such third party. [12] One or more existing officers in every department have been designated as PIO. These PIOs act like Nodal Officers. They are responsible for collecting information sought by the applicant from various wings of that department and will provide. In addition several officers have been appointed as APIOs

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7. Ibid, Section 6.
8. Study Adda, 'Essaya Right to Education', https://www.studyadda.com/notes/essays/allsubject/allchapter/right-to-education/391, Retrieved on 28th February, 2022.
9. Supra Note 5.
10. Ibid, Section 7 (1).
11. Ibid, Section 24.
12. Ibid, Section 6.

and their job is only to accept applications from the applicants and forwarded to the PIO. [13] The PIO and the FAA performs their duty as quasi judicial authority. If concerned PIO does not provide information in time or if the information provided is false, or providing incomplete or for rejecting the application for mala-fide reasons, a penalty of Rs. 250/- per day of delay, maximum of Rs. 25000/-, can be imposed by the Information Commissioner, [14] and the amount fined is deposited in the government treasury. Every Public Authority must designate a FAA, who is the officer senior in rank to PIO. If applicant does not receive information or dissatisfied with the information received from the PIO, he can file an appeal before the FAA under Sec. 19 (1) of the said Act without any fee within 30 days of receipt of information or after 30 days & before 60 days of filling RTI application, if no information received. If applicant does not received information even after the first appeal then he can take the next step, means can file second appeal/ complain before the Information Commission without any fee, as the last option under RTI Act. For second appeal against Central Governments, there is CIC and against the State government departments, is SIC in each States. No court shall entertain any suit, application or other proceeding in respect of any order made under this Act and no such order shall be called in question otherwise than by way of an appeal under this Act. [15]

7. Meaning of 'Information' and 'Right to Information'

"information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force. [16]

Right to information means right to information accessible under the RTI Act which is held by or under the control of any public authority and includes the right to i) inspection of work, documents, records; ii) taking notes, extracts or certified copies of documents or records; iii) taking certified samples of material; iv) obtaining information in the form

13. Ibid, Section 5 and Study Adda, 'Essaya Right to Education', https://www.studyadda.com/notes/essays/allsubject/allchapter/right-to-education/391, Retrieved on 28th February, 2022.

14. Supra Note 5, Sec. 20.

15. Ibid, Sec. 23.

16. Ibid, Sec. 2 (f).

of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device. [17]

8. Remedies to the Information Seeker

If a person seeking information is not get proper information within the stipulated time by the authorities then there are two ways for the information seeker:

1. By Appeal/ complain before the higher authority, and
2. By punishing/ penalizing to the guilty officer/ authority.

8.1. By Appeal/ complain before the higher authority-

The step of seeking information, generally, is that firstly, the applicant go to the PIO, If concerned PIO does not provide information in time or if the information provided is false, or providing incomplete or for rejecting the application for mala-fide reasons, then he can go to the FAA, by an appeal and in the last, if he is not satisfy with the decision of the FAA, can go to the SIC or CIC, as the case may be, by a complain.

Now, a question that arises here is whether an applicant, under RTI Act, can complain directly to the SICs/ CICs, if no reply received from the PIO within the stipulated time?

There was a case involving a government official/ authority who failed to do his duty and who did not furnish information within the stipulated period, as per the RTI Act. This happened in 2009, when B Sajikumar, who was a PIO at Kottangal Village, petitioned the Court against the SIC's order and decision to levy a fine of Rs 21,750/- against him towards neglect of duty and delay in providing the information to an RTI applicant. Earlier/ firstly, he argued that the RTI applicant should have approached the FAA instead of complaining directly to the SIC. However, the Court maintained that it was the right of an RTI applicant to approach SIC directly and seek remedy by quoting Section 18 and Section 19 of the RTI Act. The Court said, "It is open to the person seeking information to move the State Information Commission complaining about the inaction of the PIO, instead of filing an appeal before the FAA. The remedies are concurrent and the mere fact that an appeal lies after the expiry of 30 days to the First Appellate Authority is no ground to hold that the State Information Commission cannot exercise the jurisdiction vested in it under Section 18 of the Act, before the first appeal is disposed off. Therefore, the Court overruled the petitioner's contention that the third respondent ought to have filed an appeal under Section 19 of the

17. Ibid, Sec. 2 (j).

Act before the FAA instead of straight away moving the State Information Commission." [18] Here, the second argument of the Petitioner was that he was very busy and there was a lot of work pressure, so he could not provide the required information to the applicant. The Court rejected this argument of the Petitioner and said that this is the duty of a PIO to provide the information to the applicant within the stipulated time and the Petitioner was under pressure of the other work of the office. [19]

Here the Court has made a very good decision by appropriate interpretation of the Sections 18 (1) (c) and 19 (1) of the RTI Act. The text of the said Sections, respectively, as below:

Section 18(1) (c): "Subject to the provisions of this Act, it shall be the duty of the Central Information Commission or State Information Commission, as the case may be, to receive and inquire into a complaint from any person who has not been given a response to a request for information or access to information within the time limit specified under this Act."

Section 19(1): "Any person who, does not receive a decision within the time specified in sub-section (1) or clause (a) of sub-section (3) of Section 7, or is aggrieved by a decision of the Central Public Information Officer or State Public Information Officer, as the case may be, may within thirty days from the expiry of such period or from the receipt of such a decision prefer an appeal to such officer who is senior in rank to the Central Public Information Officer or State Public Information Officer as the case may be, in each public authority".

The point to be noted here that the view of the Court is SICs and CICs are entitled to entertain complaint directly, without filing any appeal with the FAA or during the pendency of the appeal, of the RTI applicants' in case they do not receive any information within a stipulated time frame by the PIO and then the SICs and CICs will investigate and take appropriate action. However, this is only when there is no any reply/ information received by the applicant from the end of PIO or the appeal is pending before the FAA. In case reply/ information are received from the end of the PIO and RTI applicant is not satisfied, then the RTI applicant will have to file first appeal before the FAA.

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18. Moneylife Digital Team, 'RTI applicants can approach info commissioner directly if PIO fails to respond within stipulated time', https://www.moneylife.in/article/rti-applicants-can-approach-info-commissioner-directly-if-pio-fails-to-respond-within-stipulated-time/31971.html, Retrieved on 27th February, 2022.

19. Ibid.

8.2. By punishing/ penalizing to the guilty officer/ authority-

Information seeker can get the guilty officer/ authority punished by two ways- i) by penalty under RTI Act, and ii) Under IPC, 1860.

8.2.1 By penalty under RTI Act-

If concerned PIO does not provide information in time or if the information provided is false, or providing incomplete or for rejecting the application for mala-fide reasons, then he can go to the FAA, by an appeal and in the last, if he is not satisfy with the decision of the FAA, can go to the SIC or CIC, as the case may be, by a complain. And it is found that PIO was guilty, a penalty of Rs. 250/- per day of delay, maximum of Rs. 25000/-, can be imposed by the FAA/ Information Commissioner upon PIO.

Here, one point should be noted that if the FAA not takes appropriate decision within the stipulated time frame under this Act, then there is no any provision in this Act to impose penalty on him by the Information Commissioner.

8.2.2 Under IPC, 1860-

Criminal Liability of the PIO, FAA, SIC and CIC under IPC, 1860- Here another question arises that is whether if concerned PIO does not provide information in time or if the information provided is false/ incomplete or supply information other than the information sought or reject the application with mala-fide reasons; or FAA/ SIC/ CIC decide the date for hearing the appeal/ complain, and after deciding the date he is deliberately absent on that day so that the matter can't be heard, or consciously not hear, even while present; an FIR can be lodged against him at a Police Station under IPC, 1860? We can see it into two parts, i.e., a) liability of the PIO and b) liability of the FAA, SIC and CIC.

- **Liability of the PIO-** The RTI Act makes it clear that it is a legal duty of a PIO to provide/ supply information sought under RTI Act to the RTI applicant and if he doesn't do it, he breaches his duty as a PIO. According to the Section 166 of the IPC, 1860, if any Public Servant breaches his duty, he shall be punished.

  The text of the Section 166 is as: "Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

  Section 166 makes it clear that if PIO not supply the true and complete information to the RTI applicant, so it shall be presumed that he has violated the directions given

by law with the effect that he wants to cause injury to the applicant and he may be convicted under this Section; but this can happen if a PIO is considered a Public Servant, as this Section says. Now the question arises whether PIO is a Public Servant consistent with the feelings of this Section? All the Public Authority are the judicial person constituted under the respective laws and functioning through various minds employed who are the employee of the Public Authority and comes under the definition of Public Servant as defined under the Point of Ninth, Tenth and Twelfth of the Section 21 of the IPC, 1860. It is now crystal clear that if a PIO does not discharge his duty under the RTI Act, then an FIR can be lodged against him under Section 166 of the IPC, 1860.

PIO can be convicted also under Section 167 of the IPC, 1860, if he gives wrong information or gives incomplete information or give information other than the information sought. The said Section is as Follows:

"Public servant framing an incorrect document with intent to cause injury.— Whoever, being a public servant, and being, as such public servant, charged with the preparation or translation of any document or electronic record, frames, prepares or translates that document or electronic record in a manner which he knows or believes to be incorrect, intending thereby to cause or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

It is clear from the text of the Section 167 that if PIO gives/ supply wrong information or incomplete information or information other than the information sought, can be convicted under this Section.

- **Liability of the FAA, SIC and CIC-** Section 166A of IPC, 1860 says that:

"Public servant disobeying direction under law.— whoever, being a public servant,—

(a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or

(b) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or

(c) fails to record any information given to him under sub-section (1) of section 154 of the Code of Criminal Procedure, 1973 (2 of 1974), in

relation to cognizable offence punishable under section 326A, section 326B, section 354, section 354B, section 370, section 370A, section 376, section 376A, 2 [section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB], 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.

Sub-section (c) has no use but Sub-section (a) and (b) are useful here. Sub-section (a) and (b) of the Section 166A can't apply to the PIO because he doesn't investigate into any matter, his job is only to provide/ supply information. But both Sub-sections may apply to the FAA and SIC/ CIC. If any RTI applicant appeal to the FAA or complain/ appeal to the SIC/ CIC and the concerned authority decide the date for hearing the appeal/ complain, and after deciding the date he is deliberately absent on that day so that the matter can't be heard, or consciously not hear, even while present, then he can be convicted under these Sub-sections. The reason behind is that CIC/ SIC, on its satisfaction, inquires into the matter/ appeal, as has also been stated/ required in Sub-sections (a) and (b) of the Section 166A.

9. Conclusion

Since the enactment of the RTI Act, 2005, many people are benefiting. Through this Act, a lot of corruptions have also been exposed. Under this Act, FAA is constituted, for appeal by the applicant/ information seeker, if concerned PIO does not provide proper information within the stipulated time. If any information seeker is not satisfy with the decision of the FAA, then he can make a complaint with the SIC or CIC, as the case may be. An applicant, under the Act, can complain directly to the SICs or CICs if no reply received from the PIO within a stipulated time. SICs and CICs are entitled to entertain complaint directly, without filing any appeal with the FAA or during the pendency of the appeal, of the RTI applicants'. It is open to the person, seeking information, to move SICs or CICs the complaining about the inaction of the PIO, instead of filing an appeal before the FAA because the remedies are concurrent. If concerned PIO does not provide proper information within the stipulated time, penalty can be imposed. PIO can be convicted under Sections 166 and 167 of the IPC, 1860, if he gives wrong information or gives incomplete information or give information other than the information sought. If any RTI applicant appeal to the FAA or complain to the SIC/ CIC and FAA or SIC or CIC decide the date for hearing the appeal/ complain, and after deciding the date he is deliberately absent on that day so that the matter can't be heard, or consciously not hear, even while present, then he can be convicted under these Sub-sections (a) and (b) of the Section 166A of IPC, 1860.

According to Section 23 of the RTI Act, any person can appeal under the same Act against any order passed under this Act, and no court shall entertain any suit, application or other proceeding in this regard. It means, the victim can approach the High Courts and Supreme Court under Articles 226 and 32 of the Indian Constitution only, which becomes a very large process for only information.

Suggestions/ Recommendations

1. If the FAA not takes appropriate decision within the stipulated time frame under this Act, then there should be make provision, for penalty by the Information Commissioner, so that a penalty can impose on FAA by the Information Commissioner.

2. The Right to go to the court, which prohibits by the Section 23 of the RTI Act, should be removed.
3. It should be propagated, among the people, that if PIO does not supply proper information within stipulated time, then he can also be convicted under Sections 166 and 167 of the IPC, 1860 in addition to the penalty. Further, FAA, CIC and SIC, if they do not discharge their duty properly, they can also be convicted under Section 166A of the IPC, 1860.

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Law and Economics: Its relevance in Reality

Dr Shweta Mohan*[1]

If economic factors and economic interests have partly determined the legal framework, it is even more true that law has furnished the of economics the whole general framework of rules within which and under which the factors and interests of economics have had to worked.

Abstract : *Now days it is more and more becoming very vital in law school to have an interdisciplinary approach to law. The idea is to have a holistic approach to the subject so as to impart rational and value education. Law as a subject cannot be deliberated in isolation therefore it's very vital to know the nexus between law and any discipline. Economic training is very important for lawyers to understand economic analysis, just as legal training is vital for economists to appreciate legal reasoning. It was my long cherished wish to write on law and economics. The present article attempts to explore the co-relation between Economics and Law. Law is a perfect subject for economics to study because it provides ample material for evaluating theories of rational behavior. And according to this economic principle an individual always makes prudent and logical decisions to get the optimum benefit or satisfaction. The assumption of economic approach to law is that people visualize legal sanctions as implied prices for certain kinds of behavior. Therefore we may say that economic analysis has gone beyond its traditional area of marketplace and expanded itself towards law. The second half of the twentieth century came up with economists and public choice theorists in the connection between economics and law which is easily also accessible in the writings of many classical economists .This paper is divided into seven sections. The first section deals with the introduction of the subject. This section discusses the co-relation between the two disciplines i.e., Economics and Law and also tries to state that the application of economics to the law. It states that economics is not confined to those areas of law that directly affect markets or economic activity. It goes well beyond the fundamental legal institutions. The second section attempts to mark out economic development approach with reference to the work of Chicago School, public choice regulations, property rights theorist and Ponser's efficiency analysis. It deals with the model of regulation, its nature, growth and effects as an outcome of the interaction between politics, economics and law. The paper attempts to arrives at the conclusion that how economics and law together can provide an insight in places where traditional legal analysis fails to penetrate.*

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Keywords : Economic Training, Rational Behaviour, Market Place, Posner's efficiancy analysis

- Earnest Baker

1. Introduction

The movement of law and economics originated in Europe but reached United States through the institutional progress.[2] The heart on law and economics is embarrassed to faculties of law and economics of University of Chicago. After the appointment of Henry Simons in 1940 as a law faculty and therefore after his death in 1947, Aaron performed his responsibilities by exerting a substantial rational influence on the economics of antitrust through the work of his students, such as Bowman, Bork and Manne.[3] It was during 1960's and 1970's that the movement of law and economic started taking pace and different but associated endeavor occurred largely within the economics profession. One may say that rather it reflected a mounting discontent with the capability of economics to sufficiently elucidate basic features of the economy and the way that the economy and industry worked. This emphasized the extending economics to explain the nature and effects of structure of economics with respect to regulation, and reformulation.

Gradually economics has extended it branch outside its traditional areas of the marketplace and the economy. One attempt that has gained uprightness is the economic approach to law. Where we can see the relevance of legal procedures and institutions with respect to modern price theory and empirical techniques to the analysis, interpretation, assessment by the regulations.

There is a complementing nature of the two disciplines, yet corrective divide between law and economics still exist .And Veblen has rightly said that both disciplines suffer from trained incapacity. The economics of law is the application of economic theory, mostly price theory, and statistical methods to examine the formation, structure, processes. There has been no consensus among economists to possess a unified theory of law. Nevertheless, the economics of law is developing into distinct field of study, indicating that the interest in the area is growing.

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2 Ejan Mackaay ,History of Law and Economics

3 Two important statements of Chicago antitrust economics are R. H. Bork, The Antitrust Paradox – A Policy at War with Itself, Basic Books, New York, 1978; R.A. Posner, Antitrust Law – An Economic Perspective, University of Chicago Press.

Economics of law is concerned with laws that regulate economic activity. It takes into account the laws that affect markets, industries and firms, and economic variables such prices, investment, profits, income distribution and resource allocation generally. It includes competition law (antitrust), industry or utility regulation (the regulation of the privatised utilities and state-owned industries), company, securities, tax, trade, investor and consumer protection laws. This application has grown over the last decade as supply-side reforms have led to the privatization and liberalisation of industries. The application of economics to the law is not confined to those areas of law that directly affect markets or economic activity. It goes well beyond these to examine fundamental legal institutions. The more innovative extension of economics is the so-called economics of law or law-and-economics, which takes as its subject matter the entire legal and regulatory systems irrespective of whether or not the law controls economic relationships. It looks in detail at the effects and the structure of the legal doctrines and remedies that make up existing laws. This branch of the economic approach to the law is often seen as synonymous with the analysis of the common law – judge-made law on contract, property and tort (the area of the common law that deals with unintentional harms such as accidents and nuisance) – and family and criminal laws, and many other areas such as legal procedure.

2. The background of the economic approach to law

The blend of Law and economics is not new, the loom of Economics as a subject to law originated in the concept of economy of Adam Smith (1776)[4] and Karl Marx (1861)[5] .The same can also be found in the utilitarian theory of Cesare Bonesara (1764)[6] and Jeremy Bentham (1789)[7] the idea was by and large associated to the political economy. In fact, the present-day economics grew as a subject out of the moral and political philosophy of Adam Smith, the father of economics. Smith's Wealth of Nations was espousal of moral philosophy, economics and the law.[8]The work of John R. Commons (1929)[9]an American Institutionalist was affected by the common law of Anglo-American as well as the political economy of the eighteenth century. We can see in many legal judgments and judicial writings of Judges, politicians and political economist of that era as an appreciation, of the economic approach to law but certainly not the application.

4 A. Smith, The Wealth of Nations, 1776

5 K. Marx, Das Kapital, 1861

6 . Bonesara, An Essay in Crime and Punishment, 1764

7 J. Bentham, An Introduction to the Principles of Morals and Legislation, 1789.

8 His Lectures on Jurisprudence were, unfortunately, never completed.

9 J. R. Commons, *Legal Foundations of Capitalism,* Macmillan, New York, 1924.

The approach of‟ Chicago School's to economics and law is a hallmark because it explains that simple market economics has an extra ordinary expounding power in all fields of human and institutional activity. It applies the simple tenets that human behave rationally in life to obtain maximum satisfaction from the scarce resources, and to make proposals for legal reform based on the criterion of economic efficiency. This approach is very profound in Gary Becker's work, though its focus was not law. His application took economics out from the market to a thick array of non-market behaviors such as family, education, health, charity one hand to crime, punishment and politics on the other[10]. The Chicago School to great extent had explored the wider context of the law, and also broadens the base of legal education.

3. Public choice Theory

It was during the 1960s that economists started inquiring the relevance of orthodox economics because the entire world was transforming into new economic era where the study of fiscal policy and taxation had started to showing their significance. James Buchanan and Gordon Tullock, the Public choice theorists, made government behaviour subject to yield policy proposals ,which included the behaviou r of bureaucrats and politicians. Economists like Wicksell, Lindahl and others, began to include government and bureaucracy into their models. This led to the expansion of the 'economics of politics 'or public choice. (known as the 'Virginia School'). The public choice theory had the positive as well as the negative feature. But the economic postulate was very clear that politicians and civil servants are predominantly forced by self-interest. Normative public choice theory required to set out justifiable limits to the state in a free society based on individualistic principles and constitutions. Positive public choice wanted to develop descriptive theories, most notably the theory of rent-seeking,[11] to test rigorous statistical analysis. The rising weight of government intervention in the US economy prompted other economists to sculpt and assess the effects of regulation on industry.

George Stigler developed more positively the nature and growth of regulation[12],and the hypothesis that he created was that government is not likely to be interested in economic efficiency or public interest rather the idea of regulation was secured by politically efficient interest groups, his work stimulated economists in the 1970s to undertake empirical studies

10 G. S. Becker, *The Economic Approach to Human Behavior*.

11 G. Tullock, 'The welfare cost of tariffs, monopoly, and theft', *Western Economics Journal,* 1967, 5: 224–32.

12 G. J. Stigler, 'The theory of economic regulation', *Bell Journal of Economics and Management Science,* 1971, 2: 3–21.

of the effects of regulation on industrial performance and altogether with work in the area of public utilities.

One of the important developments in this field was by Alchian[13] and Demsetz who added institutional aspect to the aspect of economics on property rights. Their focus was on fundamental economic theories which focused on the production, distribution and consumption of physical goods and services. They came to be known as Property rights theorists who emphasized on the 'legal rights' of goods and services, and those markets operate in these legal rights. Property rights theorists redefined 'prices and the allocation of resources with respect to property rights'. They also addressed the situation of market failure without enforceable property rights, and questioned the overexploitation of the environment, oceans and natural resources. This ultimately led to the concept of control for overuse to maximize efficiency. Hence they developed the dynamic theory of legal evolution which 'predicted' that property rights were subjective to economic considerations. Therefore the more valuable the prospective property rights the more possible it is that new rights will be defined.

4. Coase Theorem

Ronald Harry Coase, the Nobel Prize winner for Economics in 1991 pioneered research in which the transaction costs and property rights affect business and society. This field came to be known as new institutional economics, which attempted to explain political, legal, and social institutions in economic terms to create an understanding of institutions in promoting and obstructing economic growth. In his paper, "The Problem of Social Cost" (1960), he developed "Coase theorem", that was central to economic theory, to bridge the gap between law and economics with the help of legal cases. The purpose of the paper was to rectify the fundamental error of economists on the issues of public policy. Economists had always given policy suggestion on the basis of the theory of market failure. But Coase recommended practical policy subjected to detailed investigation based on comparing the total costs and benefits of actual and proposed policy alternatives. in 'Social Costs' Coase highlighted the reason for markets failure i.e. high transactions costs. He elaborated a proposal which became famous 'Coase Theorem', as an example he used trespassing cattle, and by English and US nuisance cases. His argument was on that the legal position for a rancher and a farmer to be 'liable' for the damages caused by trespassing cattle trampling wheat fields would not affect the efficient outcome provided that transactions costs were zero. Theorem holds that in a world where bargaining is costless, property rights will be

13 A.A. Alchian, *Some Economics of Property Rights,* Rand Paper no. 2316, Rand Corporation, Santa Monica, CA, 1961; Pricing of Society, IEA, London, 1967

transferred to those who value them the highest. It is the potential gains-from-trade, and not the law, that determines the allocation of resources. This was the beginning of contracts, laws and institutions to manage transactions costs that is have less costly way of organizing economic activity.

5. Posner's Economic analysis of Law

By 1980s the law-and-economics movement had established itself as a component repute of legal studies. This was the time when economics was used to rationalize and appraise the law.

Richard Posner established simple economic concepts which were used to analyze all areas of law – contract, property, and family, criminal, commercial, constitutional, administrative and procedural laws. His exposition, Economic Analysis of Law, is a detailed application of economics to law which reveals many legal doctrines and procedural rules that provides economic explanation and rationalization. According to Posner fundamental logic of the common law was economics. His argument is that judges accidentally resolute cases in a way that encouraged a more efficient allocation of resources. Economist, take it for two reasons one that judges typically ignore and occasionally reject economic arguments other that when they do employ economics, it is perpetually incorrect.

6. 1980 to date

During Mid-1980s; law-and economics programmers and courses started up emanating in the top universities which established the fact that law and economics was major branch of legal studies in North America. Many economists, such as William Landes, Mitch Polinsky, Steven Shavell and George Priest, started organizing dynamic programmers' on the same. There emergence of New Institutionalist Economics (NIE), the behavioural law-and-economics, created more descriptive models of individual decision-making, the Competition law which was invented in 1990's.The resurgence in comparative economics, with respect to privatisation of the state sector and the collapse of communism. These were some of the major issues to the approaches of economics on different considerations to create different views on law, institutions and economics. Nevertheless, the decade witness significant developments of economic approach to the legal transformation and enforcement. One of the major revolutions was cost and benefits analysis with its adverse effect on the competitiveness and productivity of the economy, the modernization of competition and merger laws, the introduction of private enforcement have brought the courts into the process and often into conflict with regulators

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7. Conclusion

The law and economics approach basically applies economic theories and manner by which the law is practice. It affirms that the apparatus of economic reasoning proposes the best possibility for justified and consistent legal practice. It is one of the central theories of jurisprudence that offers a basic theory of law as well as theoretical paraphernalia for the clarification and improvement of its practices on economic issues. The general concept is that legal sanction is social tool that promotes economic efficiency, Law and economics offers a structure which comes out as common legal model to combine disparate areas of legal activity. Therefore there is still scope to bring together the legal theory and economic reasoning to create new research agendas in the fields of behavioral economics that is how rationally people behave within legal scenarios, the approach should also ponder over public choice theory and its effect on legislation; the very important game theory and its understanding strategic action in the legal context.

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Choice of law in contract

Dr. P.P. Rao*

Abstract: *As the cross boarder contractual transactions are being increased and number of issues/cases are coming for adjudication before the foreign courts and Indian courts particularly in the present day globalization era and the law to be applied in these cases is Private International Law/Conflict of Laws and different countries having different legal systems and causing much difficulty in finding the governing law, the principles evolved by various courts and the statutory provisions which are scattered in nature and application of those is needed in these cases, an attempt is made in this paper to present the principles which address the questions of jurisdiction and proper law of contract in general (most of our private international principles are taken from English law). Further, there are certain international attempts in codifying the law relating to choice of law in contracts through Rome convention and The Hague principles. Thus, it is tried in this paper to examine, the rules of the said international instruments, the English law and the Indian courts approach in addressing the questions of choice of law in contracts.*

Keywords: Cross Border, Contract, Conflict of Law, Private International Law

1. Introduction:

Generally Conflict of laws or Private international law comes into operation whenever a municipal court is faced with a case involving a foreign element. For example foreign elements may arise in such cases where two parties belonging to two different countries, or cause of action takes place in different countries like a contract entered into in one country and is to be performed in some other country or countries or in any way some foreign country's law either directly or indirectly having connection. Private International Law is that part of a municipal law which deals with cases having a foreign element or elements.[1] This law refers to the disparities among laws, regardless of whether the relevant legal systems are international or inter-state. It deals with three important functions) i) Jurisdiction, ii) Choice of Law and iii) the Enforcement of Foreign Judgment. In conflict of laws cases the court has to decide first, the issue of jurisdiction so to say whether it has authority or not and the second, appropriate law (*lexcausea*) to begin the dispute. The other question relates to the enforcement of foreign judgment.

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Articles 1&10.

For the rationale behind the application of foreign laws particularly in reference to choice of law, various reasons have been given from time to time to explain as to why municipal courts apply foreign law. Comity of nations was the earliest and another is that foreign law is applied because it is necessary for the determination of the rights of parties. Third important reason or basis for the application of the foreign law is said to be the demand of justice. The protagonists of this view say that invariable application of the *lexfori* (law of the forum) would often lead to injustice which may defeat the purpose of private international law. Whatever may be considered to be the basis of the application of foreign law, it is now accepted principle that in a case having foreign elements, appropriate foreign law/s is applicable. It may be easy to say that in certain circumstances of a case in which foreign element is involved another country's municipal law has to be applied but a judge who has to decide the matter will face much difficulty in finding out the governing law in that case. As the number of cross boarder contractual transactions have been increased in the present globalization era, an attempt is made in this paper to find out the rules of choice of law in contract in conflict of laws cases in general and Indian law in particular. In resolving the disputes or settle the issues between parties to a contract, the courts in course of time have developed standards for choosing between conflicting laws of two or more jurisdictions in the prime areas of contract law: formal validity, and substantive validity. Three principal rules have been stated in the cases considering substantive validity: *lex loci contractus*, *lex loci solutionis*, and the party-autonomy rule.

2. lex loci contractus:

It means the law of the place where the contract is made. It is often used to determine its validity. The rationale of this rule is that parties are presumed to have contracted with reference to or in contemplation of the place where they entered the contract. If two parties were in the same state at the time of making and intended performance there, but subsequently litigate their contractual rights in another forum, the rule merely states that the forum state will apply the law that would have governed their rights had they stayed at home. However, if the parties at the time of the contract contemplated that their contract would have effects in another state this rule would arbitrarily cut off consideration of other issues relevant to the choice of substantive law.

3. lex loci solutionis:

It means the law of the place where the contract is to be performed. When this intent is inferred from the terms of the contract, the case is said to be taken out of the general rule of *lex loci contractus* because the actual intent of the parties governs. The third and most

liberal conflicts rule is that the express or implied intent of the parties to be governed by the law of a particular place determines the choice of substantive law.

Until the middle of the 19th century, the courts applied the *lex loci contractus* or the law of the place where the contract was made to decide whether the given contract was valid. The apparent advantage of this approach was that the rule was easy to apply with certain and predictable outcomes. Unfortunately, it was also open to abuse, e.g. the place could be selected fraudulently to validate an otherwise invalid contract; it might lead to the application of laws with no real connection with the transaction itself, say, because the parties signed the agreement while on holiday; or it might have been difficult to decide where the contract was made, e.g. because it was negotiated and signed on a railway journey through several states.

To avoid these difficulties, some courts proposed applying the *lex loci solutionis* or the law of the place of performance of the contract. This produced difficulties in cases where the contract required each party to perform its obligations in a different country, or where the place of performance was dictated by later circumstances. However, as the public policies driven by the theory of freedom of contract evolved, the Doctrine of Proper Law emerged.

4. Proper law:

The proper law of the contract is the main system of law applied to decide the validity of most aspects to the contract including its formation, validity, interpretation, and performance. This does not deny the power of the parties to agree that different aspects of the contract shall be governed by different systems of law. But, in the absence of such express terms, the court will not divide the proper law unless there are unusually compelling circumstances. And note the general rule of the *lexfori* (law of the forum) which applies the provisions of the proper law as it is when the contract is to be performed and not as it was when the contract was made.

The parties to a valid contract are bound to do what they have promised. So, to be consistent, the Doctrine of Proper Law examines the parties' intention as to which law is to govern the contract. The claimed advantage of this approach is that it satisfies more abstract considerations of justice if the parties are bound by the law they have chosen. But it raises the question of whether the test is to be subjective, i.e. the law actually intended by the parties, or objective, i.e. the law will impute the intention which reasonable men in their position would probably have had. It cannot safely be assumed that the parties did actually consider which of the several possible laws might be applied when they were negotiating

the contract. Hence, although the courts would prefer the subjective approach because this gives effect the parties' own wishes, the objective test has gained in importance. So the proper law test today is three-stage:

- it is the law intended by the parties when the contract was made which is usually evidenced by an express choice of law clause; or
- it is implied by the court because either the parties incorporated actual legal terminology or provisions specific to one legal system, or because the contract would only be valid under one of the potentially relevant systems; or
- if there is no express or implied choice, it is the law which has the closest and most real connection to the bargain made by the parties.

It is only fair to admit that the task of imputing an intention to the parties in the third situation presents the courts with another opportunity for uncertainty and arbitrariness, but this overall approach is nevertheless felt to be the lesser of the available evils.

5. Putative Proper law:

If the dispute relates to the formation of the contract the courts apply putative proper law, ie the would-be proper law had the contract been effectively created.

6. Rome Convention

The Convention on the Law Applicable to Contractual Obligations 1980, or the "Rome Convention", is a measure in private international law or conflict of laws which creates a common choice of law system in contracts within the European Union[2]. Under the rules of this Convention in relation to all issues, subject to restrictions or scope of the convention,the *lexcausae* will govern the following:

(a) interpretation;

(b) performance but, in relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the *lex loci solutionis*, i.e. law of the place in which performance takes place;

(c) within the limits of the powers conferred on the forum court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and the limitation of actions; and

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2 It was signed in Rome, Italy on 19 June 1980 and entered into force in 1991.It has now been replaced by the Rome I Regulation (593/2008).

(e) the consequences of nullity of the contract.[3]

Under the convention a number of issues with a separate characterization are excluded, namely: the status or capacity of natural persons, contractual obligations relating to succession and all rights claimed in property in a marriage or family relationship, obligations arising under negotiable instruments including bills of exchange, cheques, and promissory notes and connected to their negotiable character, arbitration agreements and agreements on the choice of court, questions governed by the law of companies and other bodies corporate or unincorporated the question whether an agent is able to bind a principal, to a third party etc,. The convention has also excluded the operation of renvoi. In this context, it is to be noted that the application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law[4].The parties to a contract may choose the governing law. It may be applied to only a part or the whole of the contract. Provided that all the parties agree, the applicable law may be changed at any time. If the law chosen is that of a country other than that relating most closely to the contract, the provisions of the latter law need to be respected. If the contract relates to one or more Member States, the applicable law chosen, other than that of a Member State, must not contradict the provisions of Community law[5].

Where the parties have not chosen the applicable law the contract has to be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country. It shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporated, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

For contracts concerning immovable property, the law of the country where the property is located (*lex situs*) is applied, except in the cases of temporary and private tenancy. In such cases the applicable law is that of the landlord's country of residence. In the case of

3 Articles 1&10.

4 Article 15.

5 Article 3.

sale of goods by auction, the law of the country of the auction will apply. With regard to certain financial instruments governed by a single law, the applicable law will be that law. If none, or more than one of the above rules apply to a contract, the applicable law will be determined based on the country of residence of the principal actor carrying out the contract. If, however, the contract is related more closely to another country than provided by these rules, the law of that country will be applied. The same applies when no applicable law can be determined[6].

For consumer and employment contracts the selection of applicable law is; law of the country of the carrier, the place of receipt or delivery, residence of the consignor, residence of the insurer, country of residence of the consumer and in case of passengers, place of departure and destination may also be considered. In reference to individual employment contracts the applicable law may be determined on the basis of the freedom of choice principle, provided that the level of protection granted to the employee remains the same as with the applicable law in the absence of choice. In the latter case, the law governing the contract will be that of the country where, or from where, the employee carries out his/her tasks. If this cannot be determined, the applicable law will be that of the country where the place of business is located. However, if the contract is more closely related to another country, that country's law will apply[7].

7. Hague Principles:

These Principles[8]are intended to be used as a model for national, regional, supranational or international instruments. They deal with the effectiveness and effect of a choice of law in cross-border trade/business contracts, but not consumer or employment contracts[9]. They allow a choice of national law[10] and a choice of non-national rules of law[11].They also deal with the aspects of choice of law; express and tacit choice, formal validity, law to be applied in determining choice, severability, renvoi, scope of chosen law, assignment, mandatory provisions and public policy.

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6 Article 4.

7 Article 5&6.

8 On 16 November, 2012 a Special Commission of the Hague Conference on Private International Law approved the text of the Hague Principles on the Choice of Law in International Contracts.

9 Article 1.

10 Article 2.

11 Article 3.

Under these Principles, a contract is international unless the parties have their establishments in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State. The issues viz., capacity of natural persons, arbitration agreements and agreements on choice of court, companies or other collective bodies and trusts, insolvency, the proprietary effects of contracts and the issue of whether an agent is able to bind a principal to a third party are out the scope of these principles. Under Article 2 parties have full freedom to choose the governing law to the whole contractor to only part of it and different laws for different parts of the contract. The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties and no connection is required between the law chosen and the parties or their transaction. A choice of law, or any modification of a choice of law, must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law[12]. Regarding formal validity of choice of law it is clearly stated that a choice of law is not subject to any requirement as to form unless otherwise agreed by the parties. Article 6 specifies the requirements under which parties agreed for a choice of law may be deduced. The said article, which runs as follows-

"1. Subject to paragraph -2,

a) whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to;

b) if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in those terms applies; if under these laws different standard terms prevail, or if no standard terms prevail, there is no choice of law.

2. The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1".

The law chosen by the parties governs all aspects of the contract between the parties, including but not limited to interpretation, rights and obligations arising from the contract, performance and the consequences of non-performance, including the assessment of damages, the various ways of extinguishing obligations, and prescription and limitation periods, validity and the consequences of invalidity of the contract, burden of proof and legal presumptions and pre-contractual obligations.

12 Article4.

These Principles do not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.A court may only exclude application of a provision of the law chosen by the parties if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.The law of the forum determines when a court may or must apply or take into account the public policy of a State the law of which would be applicable in the absence of a choice of law.A choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise[13].

8. Indian Courts Approach:

As it is pointed out above, as per the most important and popular principle of private international law contracting parties have a right to choose the governing law of a contract. But in a situation where the contracting parties do not choose the governing law, courts have taken different views when dealing with this issue. One of the courts' views: infer from the contracts' terms and circumstances as to what the common intention of the contracting parties would have been at the time the contract was executed by them. Another view indicates that it is for the court to determine on behalf of the parties what they ought to have intended, had they considered the issue. In other words, the court has to either imply a [term] within the contract or apply the extraneous standard of a reasonable man. There has been a transition towards this view over a period of time.During the course of conflict of laws, the courts had widely believed that if there was no expressed intention, then they were bound to infer the parties' intention from the terms and nature of the contract, and further from the general circumstances of a particular case (theory of intention). But Cheshire had taken an objective stance.So, the proper law is the system with which the contract has the most substantial connection."

9. Proper law:

The Supreme Court of India in Delhi Cloth and General Mills Co. Ltd. v. Harnam Singh[14]has made it very clear that the proper law is "the law of the country in which its elements were most densely grouped and with which the facts of the contract has most closest and real connection. This decision of the Supreme Court is further followed by other high courts

13 Article8.

14 A.I.R. 1955 S.C. 590.

of India, like Calcutta High Court in the case of Rabindra N. Maitra v. L.I.C. of India[15] expressed its views in favor of the application of theory of localization of the contract for the determination of proper law. In this theory, various factors need to be looked into - the place where the contract was made; place of performance; place of domicile; residence or business of the parties; national character of corporation; subject matter of contract; and all other facts that help to localize the contract. In the case of National Thermal Power Corporation v. Singer Company[16], also the Supreme Court reiterated the view as the "court would endeavor to impute an intention by identifying the legal system with which the transaction has its closest and most real connection". It is worth mentioning that the law of place of performance assumes greatest importance, especially when the contract is to be wholly performed at that place, or where there are several places of performance that the court finds to be the 'primary place'. This is because the contract is most closely connected with such a law than any other. From the decision of Yograj Infrastructure Ltd. v Sang Yong Engineering and Construction Co. Ltd,[17]it can be found that the Indian law respects the parties' choice regarding governing law.But in certain situations Indian courts can invalidate a choice of law clause if they perceive it as being opposed to Indian "public policy"[18]such as on the ground that a foreign law has been chosen as the governing law to evade provisions of mandatory Indian laws. As a matter of Indian public policy, Indian nationals contracting between themselves are not permitted to contract out of the application of Indian law[19]. This rule extends even to companies incorporated in India whose "central management and control" is located outside India such as, for instance, wholly owned subsidiaries of foreign companies.

10. Proof of Foreign Law:

As it is said above the expressed intention of the parties is generally decisive in determining the "proper law of the contract." If it is foreign law and a party wants to rely on that law, it should be pleaded like any other fact and be proved by evidence of experts in that law. In

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15 A.I.R. 1964 Cal. 141.

16 AIR 1993 SC 998.

17 [2011] 14 (ADDL.) S.C.R. 301.

[22] National Thermal Power Corporation v Singer Corporation, (1992) 3 SCC 551.

18

19 TDM Infrastructure Private Limited v UE Development India Private Limited, (2008) 14 SCC 271. See alsoBharat Aluminium Co. v Kaiser Aluminium Technical Services Inc. (Civil Appeal No. 7019 of 2005).

Harishankar Jain v. Sonia Gandhi[20] the Supreme Court held that it would be able to interpret the agreement's choice of law provisions only if the parties adduced evidence thereof.

11. Jurisdiction:

All civil courts in India below the High Court derive their authority to try all kinds of civil suits from Section 9 of the Code of Civil Procedure, 1908 (the Code).This jurisdiction is normally subject to territorial and pecuniary limitations further set out in the Code and the concerned state law creating the civil court. In Hakam Singh v. Gammon (India) Ltd[21], the Supreme Court of India added legal clarity to the jurisdiction of courts. It held that it is not open to the parties by agreement to confer jurisdiction on a court which it does not possess under the Code. However, it clarified that in a scenario where two courts or more have jurisdiction under the Code to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy. Such an agreement does not contravene Section 28 of the Indian Contract Act, 1872.According to Section 20 of the Code, a suit shall be instituted in a court where the defendant, at the time of commencement of the suit, actually and voluntary resides, or carries on business, or personally works for gain. Further, it may be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises. The explanation to this section says that a corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place. The expression 'cause of action' has acquired a judicially settled meaning. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but the infraction coupled with right itself. As extrapolated from Rajasthan High Court Advocates Association v. Union of India[22], cause of action consists of a bundle of facts that give cause to enforce the legal injury for redressal in a court of law. The cause of action means every fact, which if traversed, would be necessary for the plaintiff to prove in order to support his right to a judgment of the court.

With reference to cross border transactions the Supreme Court of India in British Steam Navigation[23], had further interpreted Section 28 of the Act as applied to cross border transactions. It held that the term "absolutely" in Section 28 is critical. The apex court

20 AIR 2001 SC 3689.

21 [AIR 1971 SC 740; also refer to ABC LaminartPvt. Ltd. v. A.P. Agencies, Salem, AIR 1989 SC 1239; Globe Transport Corporation v. Triveni Engineering Works, 1983 (4)SCC 707],

22 [AIR 2001 SC 416],

23 [1990 2 Comp LJ1 SC],

considered that clauses which are in restraint of judicial/ legal proceedings are void only if the restraint is absolute in nature. However, in such a case the specific court referred to in the contract should have jurisdiction (under the Code) i.e., "competent to try the suit". Since partial restraint of the party to limit its legal relief to one court is not against public policy (waiver of private rights under a contract is lawful as long as such waiver is not against public policy), the clause will be enforceable. In a proceeding before an Indian court, if it is proved as a matter of fact that the other party to the contract has legal remedy in a foreign jurisdiction, then the Indian court would not further interfere in the matter since the plaintiff still has legal remedy in foreign jurisdiction. The balance of convenience needs to be looked into by the courts in terms of cross border transactions and foreign jurisdictions.

If a person to the court submits to the jurisdiction then the court gets the jurisdiction to try the action and a decree or an order is passed in such action will be valid internationally. Mere appearance in the court is considered to be the submission. A person may submit to the court either impliedly or by way of express stipulation in the contract. If a person is outside the jurisdiction, the court will have the jurisdiction on him only if he submits to the jurisdiction of the court. In case, the foreign defendant does not submit to the jurisdiction of the court, then the judgment delivered in his absence would be null and void[24]**.** Further, the Indian Supreme Court held that foreign law can be relied upon to assess whether an Indian court has jurisdiction in a particular case[25].

In Pantaloon Retail (India) Ltd. vs Amer Sports Malaysia SdnBhd&Anr.,(2012)the Delhi High court held that the court does not convert the clause of non exclusive jurisdiction into exclusive one but, rather giving effect to the word of the contract as agreed to between the parties. If non exclusive choice would mean normally and invariably a departure from the agreed forum, then, the words and stipulations in the contract shall be reduced to dead letters which is impermissible in law. The court clarified the judicial opinion prevalent in India leans towards giving effect to terms of the contract when it comes to international commercial disputes and not in favor giving the parties unfettered liberties to approach any forum on the counts of non exclusive jurisdiction clauses and it does not mean that the courts do not have discretion but, that has to be exercised sparingly, circumspectly and on the basis of sound judicial principles. It is also clarified in this case that if parties agree only for choice of law but not the choice of forum, then the courts should not be insistent upon the parties to approach the court of jurisdiction as per the law which has been chosen by the parties in the agreement.

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24 Jayant Bhatt &Tanvi Kapoor, "The Rules To Be Followed By A Court In Applying Appropriate Law In Cases Having A Foreign Party" (2000-2013).

25 British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries, 1990(3) SCC 481

SC/ST Act: Welfare Legislation or a Tool for Misuse

Dr. Surendra Kumar*

Abstract: *The framers of our Constitution were very well aware of the situations prevalent in the society as well as their responsibilities in this regard. As such the Preamble of our Constitution itself contains the words 'secular' as well as incorporates equality of status and opportunity*[1]*. Further while Article 14 imposes upon the State a duty to ensure equality before law to every person irrespective of his/her religion, caste, race, sex or place of birth. Article 17 specifically abolishes untouchability in any form and also makes it an offence*[2]*. Moreover, the Directive Principles of State Policy not only direct the State to make provisions and laws for maintaining social order and justice to all but under Article 46 specifically directs the State to promote the educational and economic interests of weaker sections the Scheduled Castes and Scheduled Tribes (hereinafter referred as SC and ST) and also to protect them from social injustice and exploitation in all form. Moreover, sections 153 A and 153 added by way of amendment in the Indian Penal Code, 1860 in 1898 and 1972 respectively prescribe punishment for offences for promoting disharmony, enmity and acts prejudicial to national integration on the basis of religion, race and caste.*

Keywords : Constituion, Secular, SC/ST, Untouchability

1. Introduction:

In any democratic country it is the prime duty of the State to not only ensure the welfare, security and wellbeing of its citizens but also to establish and insure equality and equal treatment of all irrespective of the status, caste, creed and religion of the person. However, facing the stark reality we have to admit that the people of India have always stood divided in the name of caste and the history. From times immemorial this practice has been full of atrocities, exploitation and barbarity inflicted by high caste groups and people on those belonging to lower, deprived and the disadvantageous caste especially those considered

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. The Preamble declares: "We, the people of India having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all; Fraternity assuring the dignity of the individual and the unity and the integrity of the Nation.

2. Article 17 abolishes 'untouchability' and forbids its practice in any form. The enforcement of any disability arising out of untouchability is to be an offence punishable in accordance with law.

untouchables among and the higher caste people. As such a country like ours requires and demands not only a general welfare provisions under the Constitution and the law but also provisions which would tend to abolish or diminish the concept of such practices as well as bring equality and equal treatment for those belonging to so called lower caste people.

The framers of our Constitution were very well aware of the situations prevalent in the society as well as their responsibilities in this regard. As such the Preamble of our Constitution itself contains the words 'secular' as well as incorporates equality of status and opportunity[3]. Further while Article 14 imposes upon the State a duty to ensure equality before law to every person[4]irrespective of his/her religion, caste, race, sex or place of birth[5]. Article 17 specifically abolishes untouchability in any form and also makes it an offence[6]. Moreover, the Directive Principles of State Policy not only direct the State to make provisions and laws for maintaining social order and justice to all but under Article 46 specifically directs the State to promote the educational and economic interests of weaker sections the Scheduled Castes and Scheduled Tribes (hereinafter referred as SC and ST) and also to protect them from social injustice and exploitation in all forms[7]. Moreover,sections 153 A[8] and 153 B[9]

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3 * Assistant Professor, Govt. J.Yoganandam Chhattisgarh College Raipur, Chhattisgarh.

. The Preamble declares: "We, the people of India having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all; Fraternity assuring the dignity of the individual and the unity and the integrity of the Nation.

4. Article 14 declares that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

5. First clause of Article 15 directs the State not to discriminate against a citizen on grounds only of religion, race, caste, sex or place of birth or any of them.

6. Article 17 abolishes 'untouchability' and forbids its practice in any form. The enforcement of any disability arising out of untouchability is to be an offence punishable in accordance with law.

7. Article 46 obligates the State to 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 to protect them from social injustice and all forms of exploitation.

8. Section 153-A provides punishment for promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, *etc*., and doing acts prejudicial to maintenance of harmony.

9. Section 153-B provides punishment for imputations, assertions prejudicial to national integration by words either spoken or written or by signs or by visible representations or otherwise.

added by way of amendment in the Indian Penal Code, 1860 in 1898 and 1972 respectively prescribe punishment for offences for promoting disharmony, enmity and acts prejudicial to national integration on the basis of religion, race and caste.

However, the above provisions were not found to be enough and so a separate Act in form of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 was enacted. Though, the present circumstances and scenario in the country show that not only the said Act and provisions been ineffective to remove the bias among people on basis of caste but also that the exploitation of the SC/ST and other backward class people very much prevails within the society.

Surprisingly, the Constitution (Scheduled Castes) Order, 1950 lists 1108 castes across the country which come under Scheduled Castes category and the Constitution (Scheduled Tribes) Order, 1950 categorizes 744 Scheduled Tribes across the States in India. Moreover, many of other castes and tribes have been proposed by the different States to be included in this category. Many of these castes are considered as untouchables and thus in the country especially in rural areas subjected on its basis to various degrading forms of treatment, atrocities, humiliation and exploitation. The disharmony and social division of the SC and STs' within the society has been continuing for ages. Mention of caste system can even be found in the *Rig Veda* which classified society into four 'Varnas' namely the Brahmins, Kshatriyas, Vaishyas and the Shudras. Similar mentions can even be found in *Manu Smriti* which dates back to 200 BC-200 AD.[10] In fact the term 'dalit' was conceived by the social activist and anti-caste social reformer Jyotirao Phule (1827-1890) with which he referred to the outcastes and untouchables. The Britishers named them "the 'Depressed Classes', Gandhijicalled them 'Harijans' while Dr. B.R. Ambedkhar referred to them as 'Protestant Hindus'. It was in 1935 that the British Government defined them as 'Scheduled Castes'.[11]

Minor and major episodes of abomination and acts of brutality have been continuing for years against the SC/STs due to plague of caste-bias. The killing of dalit leader Emmanuel Sekaram in Tamil Nadu for raising voice against untouchablity in 1957, the killing of 42 dalits in 1968 in Tamil Nadu, killing of 15 dalits by police in a land dispute in Andhra in 1978 to the very recent cases of objection by higher caste people for taking out marriage procession of a dalit in Kasaganj, Uttar Pradesh and the battle between dalits and upper caste people in January 2018 in Maharashtra for celebration of 200th anniversary of Battle

10. Mittal, Abhishek"A Brief History of the Caste System and Untouchability in India"(30th September 2016), available at, https://thelogicalIndian.com.

11. Mondal, Puja "Dalits and the Origin of Un-touchability in India: Origin of Untouchability", courtesy: www.yourarticleibrary.com.

of BhimaKoregaonare glowing examples that the atrocities against dalits is not a thing of the past but very much prevails today.

It is very clear that the constitutional and other stray provisions under the law were and are to enough and sufficient to contain and restrict the bias of society against the SC/STs and also to punish acts of brutality and savagery committed against them from time to time. Viewing the earlier responses an Untouchability Offences Act was enacted in 1955. While the Act proved to be important in curbing prevalence of untouchability. From 1976, the Act was given a new structure as the Protection of Civil Right Act. However with failing of all these measures as well as other economic and social measures taken to uplift the lower castes, the problem was recognized and accepted in 1987 and this view and acceptance took form of a separate Act in 1989 called the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 or popularly known as the SC/ST Act.

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989[12]was enacted for the purposes of preventing the atrocities against the members of SC and STs and to rehabilitate and grant relief to the victims of such offences as well as setting up of Special Courts for trial of offences under it. Under the Act various offences have been mentioned in detail,[13]which would constitute an offence under the Act committed against an SC/STs person. These practices include various acts of dispossession of SC/STs from their lands, forcing or intimidating to do certain acts as well as other malicious acts committed against them prescribes punishments from six months to five years for such acts.[14] There is also the prescription of enhanced punishment for repetition of offences committed under the Act[15] as well as punishment for neglect of duties under the Act by a public servant.[16]In addition the person accused of committing crimes against SC/STs person under the Act may also face the punishment of forfeiture of his property.[17]

The most striking feature of the Act is the presumption of offence under the Act which lays down that it shall be presumed under the Act that the person suspected or accused has committed the crime unless the contrary is proved.[18] For speedy trials of cases of

12. Act No. 33 of 1989 came into force *w. e. f.,* 11th September 1989.

13. Sections 3 (1) & (2),Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

14. *Ibid*.

15. *Id*., Section 5.

16. *Id*., Section 4.

17. *Id*., Section 7.

18. *Id*., Section 8.

violation of provisions of this Act, the State Government has been directed to constitute Special Courts.[19] The other significant feature of this Act is that a person accused of having committed and offence against a SC/STs person shall not be entitled to apply for or get anticipatory bail under section 438 of the Criminal Procedure Code, 1973.[20] As a welfare feature the Central Government is directed to make rules and the State Governments to take suitable measures for welfare and assistance of victims of crimes committed against them under this enactment such as legal aid, payment of travelling and other allowances to the victim and the witnesses and economic and social rehabilitation of victims as well as other suitable measures.

In addition to this enabling Act of 1989, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 were framed. Again using the powers under the Act conferred to the Central Government[21], the Government vide a notification[22]amended the said Rules of 1995 by setting up of a Vigilance and Monitoring Committee for each Sub-Division of the State headed by the Sub Divisional Magistrate for review of implementation of provisions of the Act, relief and rehabilitation facilities and other related issues consisting of members such as elected members of Panchayati Raj Institutions belonging to the SC or STs, the Deputy Superintendent of Police, Tehsildar, the Block Development Officer and others.[23]

Despitethe coming into force and implementation of this Act of 1989, the atrocities against the SC/STs class persons continued to rise. As such the legislature was forced to strengthen the provisions of the Act by bringing about the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Bill, 2013[24] but this could not be taken up in the Parliament. As such, while the Parliament was not in session, the President of India promulgated the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Ordinance, 2014.[25]

By way of this Ordinance new offences were added to the already existing 19 offences punishable under the Original Act including act of tonsuring of head, hurting the modesty

19. *Id*., Section 14 & 15.

20. *Id*., Section 18.

21. Id., Section 23 (1).

22. Amended rules were notified on 8th November 2013.

23. Section 17A, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995.

24. The Amendment Bill was introduced in LokSabha on 12th December 2015.

25. The Amendment Ordinance was promulgated on 4th March 2014.

of Dalit/Aadivasi women by removing her garments and preventing a SC/ST person to vote among others. Besides this, it was provided that other offences under the Indian Penal Code, 1860 like hurt, grievous hurt, intimidation, kidnapping, rioting and assault *etc*., would be attracted for offences committed under the Act.

In addition to it, there was provision for setting up of 'Exclusive Special Courts' and 'Special Public Prosecutors' for trial of cases of offences under the Act of 1989 defining of act constituting willful negligence of duties by a public officer as well as additional presumption that if the accused was known to family of victim or him, it would be assumed that he knew the SC/ST identity of the victim unless otherwise proved. The life of any Ordinance is barely 6 months and so the Ordinance became inflective after 6 months.

Since the provisions of the said Ordinance were felt to be necessary to contain atrocities on the rise against the dalits, the legislature enacted and introduced the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 which later amended the Act as it stands today. The final Act of today incorporates the amendments of this Act of 2015 which amends provisions of Act of 1989 as set up in the Ordinance of 2014.[26]

Generally, whenever any welfare or enabling legislation is passed and enforced it always entails with it the risk of being misused by people for their own malicious and selfish purposes. The SC/ST Act which was also meant and being implemented and used for the safety, welfare and upliftment of the SC/ST communities is not exception in this matter. Many a times and from the initial time when it was enforced, the Act has become a means for the person belonging to SC/ST class to black mail their enemies and adversaries including the government officials.

Undoubtedly, the atrocities against the SC/ST people have been generally on the rise. The National Crime Record Bureau data records for 2014-2016 reveal that while as compared to the dates of 2014, the crimes against SC/ST dropped a little in 2015 but again shamed a surge in 2016 both in case of States and Union Territories.[27]Highest incident of crimes were reported from Uttar Pradesh, Rajasthan, Bihar and Andhra Pradesh in that order. For example in the year 2015, about 303605 persons were under trial for committing various crimes against SCs out of which merely 9566 persons were convicted by the court while 25385 persons were acquitted. 500 persons were also discharged by the courts for want of

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26. The Amendment Act, 2015 (Act 1 of 2016) was introduced on 31st December 2015, notified on 1st January 2016 and came into force *w. e. f*., 26-01-2016.

27. See, Table 7A-1, NCRB Data Report, available at, ncrb.gov.in/State Publication CII/CII2016/Pdfs/Table.

evidence.[28]In the years 2015 in context of STs, 30489 cases were under trial for atrocities against them out of which in 4894 cases, trial was completed and only 1349 cases ended in conviction.[29] Shockingly in the year 2016, a total of 1.44 lakh cases of atrocities against SCs and 23408 cases of atrocities against STs came for trial before the court. In cases of SCs, only in 10% trial was completed ending in conviction in just one fourth of cases, while in cases of STs, only in 12% cases trial was completed ending in conviction of barely one fifth of cases.[30]For examplein Maharashtra conviction rate under the SC/ST Act, 1989 have been below 10% always. It was only 5.95%in 2017. Until February 2018 in Maharashtra, 312 cases were charge sheeted by Police, out of which 27 were found to be false complaint. In 2017, similarly out of 1637 charge sheeted cases, 160 were found to be false. But majority of cases tried ended in acquittal of the accused.[31]

While some of the blame for such low conviction rates can be attributed to slack prosecution and lapses on the part of investigative agencies yet undoubtedly the main reasons which shine throughout is the misuse of the said Act and laws by the various complainants. Many a times, bogus and false complaints are lodged by the vulnerable SC/ST groups and persons against famous political and other personalities or major adversaries by the complainant on own instance or on instigation by rival political groups. Also in many such lodged cases, the person accused is not even aware of the SC/ST status of the complainant.

Analysing further it becomes evident that the misuse is more so because of certain provision of the SC/ST Act, 1989 which are debatable and controversial. First of all,there is no provision under the Act for grant of anticipatory bail for supposed violation of the provisions of the Act. Secondly, whenever a complaint is lodges or FIR made under the Act, the police without verifying the facts or without any preliminary investigation arrest the accused accepting no explanation or defence from him and moreover the burden of proof under the Act is on the accused to prove that he did not commit any such offence attributed to him under the FIR. All these factors give boost to malicious and false complaints thereby making the Act very much prone to measure and a means of harassment rather than welfare legislation.

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28. *Id*., at p.111.

29. *Id*., at p. 117.

30. *Ibid*.

31. Rajput, Rashmi "SC/ST Atrocities Act: Conviction rate remains low but dip in false cases field" *Indian Express*(Mumbai Ed., April 11,2018).

Some prominent recent instances like that of ADGP of State Reserve Police, Karnataka accused of taking objectionable pictures of a women, accusing City Police Commissioner of practicing untouchability against him and lodging a complaint under the SC/ST Act, 1989[32] and the case of a dalit family of Aligarh lodging 10 fake cases under SC/ST Act in aspan of 6 years against another person with whom they had a land dispute case and thereby extorting close to Rs. 3 lakh from him[33]and such other numerous cases display clearly the misuse of the Act for various selfish and political purposes. As such some kind of rein on the application of the provisions of this Act as well as some major amendment in the Act are very much needed.

While the judiciary, in general is all for upliftment, safety and security of the SC/ST but is also very much aware of the present prevailing situations and circumstances under which the Act is being put to misuse and a source of exploitation and upmanship. Thus, the Supreme Court in *State of Karnataka* v *Appa BaluIngale and Others*[34] way back tracing the complete history of and denouncing untouchability as well as referring to various constitutional provisions there of remarked that more than 75% of the cases brought under the SC/ST Act end in acquittals.

Besides this, the need for a thorough investigation preferably by an officer not below the rank of Deputy Superintendent of Police in cases of complaints and FIR under the SC/ ST Act, 1989 were emphasized by the Madras High Court in *M.Kathiresam*v *State of Tamil Nadu*[35] and the Andhra Pradesh High Court in *D.Ramalinga Reddy* v *State of Andra Pradesh*.[36]

The most disputed and arguable provision of the SC/ST Act, 1989 is its section 18 which bars the application of section 438 of the Criminal Procedure Code, 1973 relating to anticipatory bail for acts committed under the Act. This issue came up before the Madhya Pradesh High Court in *Dr. Ram Krishna Balothia*v *Union of India and Other*[37] quite early in 1994. The Madhya Pradesh High Court while describing the legislation as a welfare and extremely necessary one for SC/ST groups and for prevention of untouchability remarked

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32. See, "Clear Case of Misuse of SC/ST Act, 1989, (31 May2014), courtesy: praja.in/blog/murali772.
33. See, "SC/ST Act 'misuse': 10 fake cases in 6 years, dalit family earns Rs. 3 lakh" *Navbharat Times*(12th April 2018).
34. AIR 1993 SC 1126.
35. 1999 *CrL J* 3938.
36. 1999 *Cr LJ* 2918.
37. AIR 1994 MP 143 : 1994 *Cr. L. J.*, 2658.

and vehemently pointed out that the Act is capable of being misused considering the wide amplitude of offences created thereunder. The wider the amplitude of the offence, the greater is the scope of misuse".[38] However, the Court was of the view that section 18 of the Act in its present form renders the procedure of the Act unfair and unreasonable and offends the very soul and spirit of Article 21 of the Constitution. Thus holding the Act of 1989 as wholly valid the Court however was of the view that section 18 of the Act does not confirm to the norms of justice and fair play and is liable to be stuck down.[39]

Similarly, the Madhya Pradesh High Court in *Karan Singh and Others* v *State of M.P.*,[40] pointed out thatbefore leaving this case, I consider it to be my duty to point out that these days several cases are being registered by the police under the Act without carefully considering whether the offence under the Act is made out or not. As special and stricter provisions have been made under the Act, it is the duty of the prosecution to examine the case more carefully. They have to be vigilant for avoiding any possibility of the Act being misused for harassment of the citizens who have not committed an offence under the Act.[41]

It is noticeable that the Supreme Court in *Vilas PandurangPawar v State of Maharashtra*[42] were of the view that when a provision has been enacted in a Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under section 438 of the Code of the Criminal Procedure, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence.[43] While the Court in *Asharfi*v *State of U.P.*,[44] have supported the application of purposes and application of the SC/ST Act, 1989 yet the misuse of the said Act has been always a question before the courts and the courts have encountered many cases of such misuse.

Noticing all this and taking the probability of misuse of provisions of the Act due to some of its controversial provisions, the Bench of Adarsh Kumar Goel and Uday Umesh Lalit *JJ.*,of the Supreme Court for the time being at least, put the controversies and debates at rest in the landmark recent case of *Dr. Subhash Kashinath Mahajan* v *State* of *Maharashtra and*

38. *Id*., at para 23.

39. *Id*., at para 23&24.

40. 1992 *Cr. L. J*., 3054.

41. *Id*., at para 6.

42. (2012) 8 SCC 795.

43. *Id*., at para 9.

44. Criminal Appeal No. 1182 of 2015.

Another[45]. The case concerned certain adverse remarks made against the Respondent No. 2 Mr. BhaskarKarbhariGaikwad by the Petitioner in respect of which a complaint under the SC/ST Act, 1989 was filed by him.

An appeal to the Supreme Court was made against the orders of the Mumbai High Court which refused to quash the said complaint. The question before the Apex Court was of false allegations and protection available under the SC/ST Act, 1989 so that the provisions of the said Act are not misused. The Court at length discussed all aspects of the Act, provisions of sections 182, 192, 193, 203 and 219 of the Indian Penal Code, 1860 including the powers of arrest by police, the anticipatory bail provisions and spirit, the constitutional safety provided under Article 21 and other aspects concerning the chances and instances of misuse of SC/ ST Act, 1989.

The Court in general was of the view that the issue of safeguards against arrest and false implications under the Act need to be restricted and reviewed. Taking all factors into consideration and delving deeply into all issues the Court was of the view that proceedings in the present case were clear abuse of process of court and the law. In its historic judgementthe Court not only removed the bar against grant of anticipatory bail in cases under the SC ST Act but also ordered and directed that in order to restrict abuse of law of arrest under the Act the arrest of a public servant can only be made after approval of appointing authority and that of a non-public servant, only after approval by the SSP, who would grant permission of arrest only after recording the reasons for the same. Besides this it was directed that to avoid false implication of an innocent a preliminary inquiry may be conducted by the DSP concerned.[46]

Though the directions issued and the judgment of the Court seems to be fair and unbiased, the case would be remembered more for the outrage and riots its judgment created across India. However the Court stood by its judgment in the review petition filed by the Government against its order in present case saying that ban of immediate arrest of an accused person under the Act is for protection of innocent from arbitrary arrest and not against Dalit rights. Terming the judgement as a balance between Dalits right and right of an innocent person against false arrest and case, the court remarked thatour judgement implements what is said in the Constitution. We are conscious of the right of the under privileged and place them at highest pedestal but at the same time an innocent person cannot be falsely implicated and arrested without proper verification.

45. Criminal Appeal No. 416 of 2018 arising out of Special Leave Petition (Cr.) No. 5661 of 2017.

46. *Id*., at para 83; see also, *Dr. NT Desai* v *State of Gujarat*, (1992) 2 GLR 942; *Jones* v *State*, 2004 *Cr LJ* 2755&*Manju Devi* v *Onkarjit Singh Ahluwalia*, (2017) 13 SCC 439.

2. Conclusion:

It is absolutely true that from times immemorial the Scheduled Castes and Scheduled Tribes people and communityare being ill-treated and subjected to inhuman treatments, exploitation, atrocities and cruelty by the higher caste people in the name of untouchability. These acts are highly deplorable and liable to be condemned by any society. To put an end or at least bring about an effective control on such acts, the SC ST Act, 1989 and its amendments in 2016 came as a real savior and the intentions of the legislature, the government and the judiciary thereto have been honest one seeking overall welfare of the community in question and in line with the ideologies of the United Nations Convention on the Elimination of Racial Discrimination.

While the purpose of the Act is honest, the same cannot be said about its implementation by the police or the concerned administrative authorities. Besides this, there have been ever rising incidences and cases of the misuse of the provisions of the said Act as well as instances where the Act has been made a weapon and tool for harassment and defaming of innocent people. These factors also attribute to the low conviction rates of crimes registered and investigated or adjudicated upon by the court. While the protection and welfare of the underprivileged is a prime concern, the growing cases of its misuse ought to be controlled and checked also.

Therefore, the recent decision of Supreme Court allowing anticipatory bail and barring immediate arrest without reasons seems to be with good intentions and bonafide. Thus, the incidences of violence in wake of this decision cannot be supported and are without due reasons. The basic idea of Supreme Court seems to be to balance the need of welfare of the SC/ ST community as well as the safety and safeguards for the innocent being harassed in the garb of application of provisions of the Act. What is required is the bonafideuse of the provisions of the said Act and the change in outlook of the society towards the evil of caste bias and untounchability and its political use or benefit to fix the castes vote and politics.

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Reformative Juvenile Justice: The Right Approach Perspective

Dr. Devadutta Prusty*

Abstract: *Some popularly accepted sayings like 'hate the crime and not the criminal', 'every person can be reformed' and 'an eye for an eye will from the whole world blind' form the basic concept of reformative justice. Guided and governed by this ideology, it has been universally accepted that the main object of punishment is to reform a criminal and not to make him a hardened criminal. This concept is more significant in case of juveniles. As well as anatomy and physiology of the human body is concerned, they are raw having undeveloped and confused mindset specially so, when they are in their teenage and the impacts in their minds at that age constitute their vision and outlook turning them into a good or bad human being. While punishing a child instead of viewing and analyzing the offence and its severity committed by him, we should rather go into his education level, upbringing, circumstances governing his growth years, the environment and state of mind in which he committed the offence.*

Keyword: Reformation, Juvenile Justice, Juveniles, Right Approach Perspective

1. Introduction:

Over the last few years the involvement of juveniles in crimes specially cognizable ones has been on the rise. Apart from this, there has been steady increase in the cases of juvenile crimes in our country specially rape, kidnapping, dacoity, robbery, theft and cheating *etc.* According to the Government's estimate and statement in 2010, there were 22740 cases of juvenile crimes reported which rose to 33 526 in 2014. Most of these crimes were heinous in nature.There has been an alarming 47% rise in crimes committed by juveniles between 2010 and 2014.[1]

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. Crime-Statistical Year Book India 2016, Ministry of Statistics and Program Implementation, Government of India, available at,www.mospi.gov.in/ statistical-year-book-India/2016/206; see also, "Juvenile Crimes up 47% in 5 Years"*Times of India*(26th February 2016), available at, https://times of India.indiatimes.com.

In spite of the Report of J. S. Verma Committee[2] formed after the 'Nirbhaya Gangrape' to review criminal justice system in the country which was against the lowering of age criteria for juveniles accused of heinous crimes like rape and murder stating therein that we cannot hold the child responsible for a crime without providing to him/her basic rights provided under the Constitution. The Government in haste to curb rising social sentiments introduced the Juvenile Justice (Care and Protection of Children) Act, 2015 and providing therein for children between the ages of 16 to 18 years to be tried as adults for heinous offences.[3]

While the country is aghast and stunned by the rising juvenile crimes in the country, the society, government, law makers and law enforcing agencies are all thinking in terms of lowering the specified age of juvenile under the law or trying juveniles for heinous crimes especially in the age group of 16 to 18 years as adult but nobody is trying to study and analyse the true reasons behind the rise of juvenile crimes, and as such are the solutions suggested by them to control the crime by retributive justice adequate and effective is the real question.

It is true that children committing serious and heinous crimes should not be treated at par with children having committed petty offences but on the other hand the law as envisaged under the Juvenile Justice (Care and Protection of Children) Act, 2015 also seems to be contrary to the contemplation of child welfare and security under International Covenants and our Constitution. What is required is a change of vision and approach towards the treatment of crimes committed by children keeping due regard of reformative justice instead of retributive one. Perhaps, this was also the intention of the Supreme Court when it directed enactment of special law for children and their treatment in *SheelaBarse*v *Union of India*.[4]

Some popularly accepted sayings like 'hate the crime and not the criminal', 'every person can be reformed' and 'an eye for an eye will from the whole world blind' form the basic concept of reformative justice. Guided and governed by this ideology, it has been universally accepted that the main object of punishment is to reform a criminal and not to make him a hardened criminal. This concept is more significant in case of juveniles. As well as anatomy and physiology of the human body is concerned, they are raw having undeveloped and confused mindset specially so, when they are in their teenage and the impacts in their minds at that age constitute their vision and outlook turning them into a good or bad human

2. The Committee was formed on 23rd December 2012 and submitted its Report to the Government of India on 23rd January 2013.

3. Sections15, 16 & 19,Juvenile Justice (Care and Protection of Children) Act, 2015.

4. JT (1986) 136 ; 1986 SCALE (2) 230.

being. While punishing a child instead of viewing and analyzing the offence and its severity committed by him, we should rather go into his education level, upbringing, circumstances governing his growth years, the environment and state of mind in which he committed the offence.

Reformative theory of punishment believes that by proper guidance, due care, love and a balanced and sympathetic approach, the mind of child can be set towards virtues and goodness.

Harsh and retributive punishment would instead of reforming the child make him a habitual and desensitized criminal spoiling his future. On the contrary, reformative approach can make him an asset for the society. After all, children are the future of society and country and one must analyse what great contribution he can make for our country and society once he is reformed into a good human being. More so, in our country prisons are another name for hell and treating a juvenile as an adult and confining him to prison would decorate his outlook towards life.So, our approach should be to make him and turn him into a law-abiding adult in his future life.

Reformation and forgiveness can change any human being and a juvenile is no exception. Perhaps commission of a serious offence by a juvenile may be due to temptation and circumstances and the whole theory of reformation of a child cannot be thrown out merely on basis of few stray cruel incidents. Reformists believe that concept of reformative justice is to turn a child into a law-abiding and useful member of society by changing his character, thinking and approach. The reformative theory of juvenile justice recommends more stress on rehabilitation and reformation of a juvenile.

2. Conception of Reformative Justice

The concept of reformative justice is supported by earlier decisions of Supreme Court and the approaches of the United Nations and various countries under their laws.[5]

The Juvenile Justice (Careand Protection of Children) Act, 2015[6] amended in the wake of NirbhayaGang rape case of Delhi provides that in case of heinous offences alleged to have been committed by a child who has completed or is above the age of 16 years shall be assessed by Juvenile Justice Board in assistance with psychologists and psycho-social

5. See, Article 40.1, UN Convention on Rights of Child, 1989; see also, *Narotam Singh* v *State of Punjab*, AIR 1978 SC 1542;*Musa Khan* v *State of Maharashtra,* AIR 1976 SC 2566; *Rattan Lal*v *State of Punjab*, AIR 1965 SC 444&*Mohammad Glasuddin*v *State of Andhra Pradesh,* AIR 1977 SC 1926.,

6. Act No. 2 of 2016.

workers preliminarily as regards his mental and physical capability,the capacity to commit said offence, understanding the consequences thereof and the circumstances engulfing the offence committed by the him. Where it is found that there is a need to trial of said child as an adult, the same would be proceeded as per provisions of the Act.[7]

It can be well conceived that the idea of amendment of the earlier provisions of the Act and providing of children to be tried as an adult for heinous crimes, those between the ages of 16 to 18 years was done to settle the growing rage among the society against risingjuvenile crimes. However, it would seem that the matter was dealt with as revenge against the youth and teenagers of the country giving it form of retributive reaction under the law. The action of the Parliament can be said to be retaliatory, punitory and vindictive.According to demand of circumstances, it would have been more appropriate to go behind the curtain and deeply study and pursue the main reasons behind growth of commission of heinous and sexual crimes by the juveniles and the circumstances and mentality developing in their minds.

The approach, if properly assessed would have been to strike at the root of the problem rather than merely cutting branches, which would grow again after a period of time. The rise of juvenile delinquency especially in the field of rape, cyber crimes, brutal murders and dacoity in India till date reveal that the purpose behind the enactment of Juvenile Justice (Care and Protection of Children) Act, 2015 stands defeated. It seems that this approach has been totally wrong and misdirected by decisions taken in haste without going into the fundamental causes of the problem. The earlier law as envisioned under Juvenile Justice Act of 2000 provided for Juvenile Justice Boards, Child Care Committees and Welfare Committees and rehabilitation *etc*., of children in conflict with law. Instead of going into proper, effective and productive implementation of the provisions as per spirit and essence of law, we went into framing of a more retributive and punitive amendment to turn the tide but the effort backfired and proved to be ineffectual.

The United Nations Convention on Rights of Child, 1989 and other Covenants like Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political Right, 1966 stress on the welfare and security of children but the main stress is on welfare, rehabilitation, environment for growth and education of child rather than control of acts of children by way of punishments and retribution. According to UNICEF India as such the framing of Juvenile Justice (Care and Protection of Children) Act of 2015 is a step back from bringing the care and child protection in line with Convention of Rights of Child and international standards. Article 40.1 of the United Nations Convention on Rights of Childspecifically directs that children should be tried separately from adults. In the view of

7. Sections 15, 18 & 19,Juvenile Justice (Care and Protection of Children) Act, 2015.

Louis-Georges Arsenault, the former UNICEF Representative,worldwide evidence shows that the process of judicial waiver or transfer of juvenile cases to adult courts have not resulted in reduction of crime or recidivism. Instead investments in a working system of treatment and rehabilitation of children have shown to lead to better results in reducing recidivism.[8]

According to a study on behavior of adolescent and mental growth of child, the brain maturation continues well into young adulthood and barring a few cases in which children by the time they are 16 years perform at adult-levels, most of them do not attain social and emotional maturity until adulthood and as such children are more vulnerable to parental and elder influence and much more impulsive and sensitive. Children make decisions more out of fear and anger rather than logic.[9]

Reformative juvenile justice gains importance and priority over retributive justice methods more so because of other reasons. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 provides for reforming a juvenile under least governing conditions of intervention by judicial bodies.

The Juvenile Justice Model Rules of 2000 and 2016 provide for treatment of child with dignity and honour based on principles of best interests of a child. The Constitution of India[10] also provides for policies to be made by the State for development of a child in a healthy, dignified and free manner.[11]

As well as the objects of the reformative theory for juvenile justice is concerned, it also provides for reestablishment and integration of children into the society by giving them access to future betterment instead of punishments which would turn them into habitual criminals. This concept is based on the popular doctrine and principles of 'fresh start'. It stresses on expunging all contrary criminal records of a juvenile after giving the delinquent juvenile proper guidance and rehabilitation and by treating him psychologically for any anger or fear within him which prompted or encouraged him to commit the offence. This concept wasrecognised under the Juvenile Justice Act of 2000 but the application of the same is another story altogether. It has also been recognized by the courts of our country

8. See, UNICEF Press Release, available at, unicef.in/Press Releases/5/UNICEF- India-urges-focus-on-reformative-juvenile-justice-system-and-shares-concerns-about-Juvenile-Justice-Act-amendment.

9. Steinberg, Laurence "Adolescent Development and Juvenile Justice" *Annual Review of Clinical Psychology* (2009), availableat,https://pdfs.semanticschstar.org/3076/.

10. Article 39, Constitution of India.

11. *X Minor through Father National Guardian* v *State &Others*, Cr. Rev. P. No. 356/2011.

as a foundation for integration of children delinquents and for reformative justice.[12] The remarks of Lynch, *C. J.*, in the case of *United States* v *Dancy*[13]are especially important. To quote him, the stigma of a criminal conviction may itself be a greater handicap in later life than an entire misspent youth.

The value and significance of reformative justice for juveniles was explained in a clear and comprehensible manner by Hon'bleR.S. Chauhan*J.*,in *Om Singh alias Kuldeep Singh* v *State of Rajasthan*[14]asthe Juvenile Justice Act is not meant to be used as a revolving door by the juvenile delinquent. One of the aims of the Juvenile Justice Act is to reform the juvenile delinquent so that he is prevented from graduating to being a hardened criminal.

The law of transfer of offender juveniles of heinous crimes to be tried as an adult has already been tried in United States and has been a complete failure resulting in recommitting and rearrest of many such juvenile delinquents in further crimes. Thus, many States of the United States who applied this system had to turn back to reformative and rehabilitative systems.[15]As such even with such examples in front of us, the new Juvenile Justice (Care and Protection of Children) Act, 2015 seems to be a mistake as ignoring historical value of application of laws and a case of not taking a lesson from other countries. An in-depth study of improvement on effectiveness of juvenile justice programmessuggest that prevention programmes and approach for juvenile delinquent by way of co-ordination of schools, social service agencies, mental health agencies and law enforcement agencies for prevention of crimes rather than punishments are more effectual.[16]

The right approach in the wake of growing juvenile delinquency instances would be to develop an infrastructure of reformation of juvenile delinquents to reform him and to make him useful for the society. This would of course involve suitable measures to be taken

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12. *Ibid*;see also,*Bharat Ratan Shah* v*State*, Cr. Rev. P.No. 362/2012; *SuoMotu*v *State of Karnataka*, W.P. No. 4840/2012 connected with W.P. No. 11271/2012; *Sartaj S/o Mohd. Hussain and Another* v *State of U.P., through Home Secretary*, Habeas Corpus No. 383 of 2010.

13. 640 F 3d 455 (1st Circuit 2011).

14. S.B. Cr. Rev. 1277/2010.

15. Hahn, Robert &McGowan, Angela et al., "Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System" Vol. 56, No. RR-9*Morbidity and Mortality Weekly Report*(November 30, 2007), available at, www.cdc.gov/mmwr.

16. WLipsey, Mark & CHowell, James et al., "Improving the Effectiveness of Juvenile Justice Programs: A new Perspective on Evidence - based Practice" *Centre for Juvenile Justice Reform*(December 2010), available at,https://cjjr.georgetown.edu/wp-content/uploads/2014/12/ebppaper.pdf.

by the Juvenile Justice Agencies, Government, Ministries, Judiciary and making juveniles aware of their importance to society and disadvantages of turning towards crimes by way of a structured education programme to be specifically and mandatorily included in our education system and syllabus.

3. Conclusion:

The growing instances of heinous crimes and the tendency of a convicted juvenile delinquent to reoffend even after coming into force of Juvenile Justice (Care and Protection of Children) Act of 2015, which provides for juveniles between 16 to 18 years of age to be tried as adult for serious crimes reveal that our approach towards control and prevention of juvenile crimes is not appropriate and effective. There are many reasons for it. Firstly, the overall working and management of our Child Welfare Committees and Child Welfare Institutions is not up to the mark.Secondly,the children confined in these homes face humiliation and harassment turning them into hardened, stone hearted and cruel individuals.Thirdly, the conditions of our prisons to which a juvenile in cases of heinous crimes are confined are worse than hell and instead of reforming them is turning them into hardened criminals. Lastly,there is little attention paid to rehabilitation and reformation of a juvenile post crime and conviction.

Taking juvenile delinquency incidences on case to case basis would not help. More attention needs to be paid to prevention of crimes among juveniles. As such a retributive approach would be improper and of little help as can be assessed from experiences of other countries.The *corpus juries* of rights of children need and attract some special procedures and considerations which must be taken into account before or after connecting them to criminal proceedings and punishments. Most of these procedures and considerations are required to be based on a rehabilitative and reformative approach to be taken after they are found to indulge in criminal activities.As a part of prevention of such activities, proper awareness of theory that ‘crime does not pay’, systematic approach to sex education and inclusion of some part of juvenile criminal law is essential in the education system.

Mechanisms like psychoanalysis, criminal mediation, conciliation, repair of damages caused to victim and application of theories of best interest of child and ‘principles of fresh start’ have to be included and applied and a coordination of law enforcement agencies, education boards and ministry and government programmes is mandatory for this. The juvenile justice policy, programmes and initiatives must contain an essence of reformative and rehabilitative approach so that a proper balance betweensecurity and safety of the society and welfare of juvenile delinquents is effectually achieved.

Law and Policy to Combat Corruption in India

Vandana Singh[1]

Abstract: *The Preamble which we gave unto ourselves promised of - Justice, Liberty, Equality, and Fraternity. These words were alien for the poverty-stricken people of India who were being ruled by their imperial masters and had got used to the tyranny and oppression. We made a tryst with destiny to wipe out tear from every eye, hunger from every stomach, and fear from every mind. But sadly this never happened, the major cause being this cancer of corruption which destroys the very fabric of the society. Corruption has become an all-pervasive phenomenon, and has badly affected all institutions of governance that are working towards the protection and promotion of basic human rights. In a welfare state like ours, adequate financial provisions have to be made to fulfill the basic human rights like food, shelter, education, and health care. But corruption gives a lethal blow to all these developmental activities, and the state's largesse fail to get an equitable distribution. Corruption is no more a moral issue, rather it has a huge socio-economic impact on good governance of a sovereign state and hinders the complete realization of civil, political, economic, and social rights. Corruption ensures that all institutions of governance crumble and gives way to a vicious network of criminals, politicians, mafias, and bureaucrats, as has been endorsed by the Vohra Committee. In spite of having a plethora of anti-corruption legislation, we have been riding high on the barometer of corruption. Due to lack of independence and institutional autonomy of anti-corruption agencies, the desired results in curbing this menace is far from reality as there is extraneous influence in investigation and trial, giving a serious blow to the rule of law .This paper not only deals with corruption and its relationship with human rights but also gives an insight into the law and policy to deal with corruption in India. The paper is aimed towards highlighting the present framework to combat corruption and the need to recognize it as the greatest obstacle towards fulfillment of the constitutionally enshrined human rights.*

Keywords : Poverty, Corruption, Human Rights, Investigations

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1. Meaning of corruption

The noun corruption comes from latin–*com,* meaning "with, together", and *rumpere,* meaning "to break." Engaging in corruption can break or destroy someone's trustworthiness and good reputation with others.[2]

Aristotle, the third-century Greek philosopher, defined corruption as the practice of leaders who rule with a view to their private advantage rather than the pursuit of the public interest.[3]

Corruption is a wrongdoing on the part of an authority or powerful party through means that are illegitimate, immoral, or incompatible with ethical standards. Corruption often results from patronage and is associated with bribery.[4]

Corruption is an illegality; a vicious and fraudulent intention to evade the prohibitions of the law. The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and right of others.[5]

Corruption is a dishonest or illegal behavior especially by powerful people (such as government officials or police officers): the act of corrupting someone or something.[6]

Corruption is a dishonest or fraudulent conduct by those in power, typically involving bribery.[7]

Transparency International defines Corruption as "the abuse of entrusted power for private gain". Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs.

Grand Corruption consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at expense of the public good. Petty corruption refers to everyday abuse of entrusted power by low- and mid- level public officials in their interactions with ordinary citizens, who often are trying

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2 https://www.vocabolary.com≥dictionary,last accessed on 12.05.2019.

3 Available at< https://www.encyclpedia.com>political corruption, last accessed on 22.5.19

4 www.business dictionary.com/definition/corruption.html last accessed on 08/12/2017.

5 https://the law dictionary.org/corruption last accessed on 08.12.2017.

6 https:// www.merriam-webster.com/dictionary/corruption last accessed on 08.12.2017.

7 https://en.oxforddictionaries.com/definition/corruption last accessed on 08.12.2017.

to access basic goods or services in places like hospitals, schools, police departments and other agencies.

Political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.[8]

Corruption is an insidious plague that has wide range of corrosive effects on societies. It undermines rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human society to flourish.[9]

Corruption is the behavior which deviates from the normal duties of a public role because of private- regarding (family, close private clique), pecuniary or status gain, or violates rules against the exercise of certain types private- regarding influence. This includes such behavior as bribery(use of reward to pervert the judgement of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private- regarding uses).[10]

The World Bank has given a usable and straightforward definition of corruption -'the abuse of public office for private gain.'[11]

The problem of corruption is complex having roots and ramifications in society as a whole. In its widest connotation, corruption includes improper or selfish exercise of power and influence attached to a public office or to the special position one occupies in public life.[12]

Thus the broad meaning of corruption, both in dictionary and in popular usage, refers to any form of perversion and debasement from accepted social norms. The narrow meaning of

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8 Available at https://www.transparency.org/what-is-corruption, last assessed on 21.05.2019.

9 Forward by Kofi Annan, Secretary -General, United Nations Convention Against Corruption, New York,2004, available at https:www.unodc.org>brussels>UN_…last accessed on 13.5.19.

10 Joseph Nye in "Corruption and Political Development :A Cost-Benefit Analysis", American Political Science Review, vol. 61,No.2,June 1967,quoted by ChitraG.Lele,in Corruption in India, Causes, Effects and Reforms, Atlantic Publishers, page 7.

11 Helping countries combat corruption: The role of the World Bank, available at www1. world bank. org> corruption>cor02,last accessed on 13.5.19.

12 India, Government of, "*Report of the Committee on Prevention of Corruption,*" New Delhi: Ministry of Home Affairs,1964,P.5 available at www.cvc.nic.in>sites>files>scr_rpt_cvc last accessed on 13.5.19.

corruption is concerned mostly with 'bribe' and its several variants, i.e.,(a) demanding and accepting pecuniary favors by public persons (both public officials and politicians), either for performing their assigned job, or for extending out of turn favor;(b) offering bribe, particularly for undue and out of turn favor; (c) pilferage and seepage of public funds;(d) use of public office for personal pecuniary gains; (e) demanding and accepting commission, etc. The popular perception of corruption, whether shaped by personal experience or on hearsay, normally uses the narrow meaning within the perspective of the broader meaning. That is, corruption as defined narrowly is a manifestation of general decline in standards and morality in public and civic life. Hence, any complaint, or charge of corruption against an individual, a public official of any rank, or a politician, viewed in the perspective of a general decline in morality, is believed. In the developmental perspective, however, corruption appears as a symptom reflecting that something has gone wrong in the management of the state. Consequently,"Institutions designed to govern the interrelationships between the citizen and the state are used instead for personal enrichment and the provision of benefits of the corrupt."[13]

The term corruption can be summed up as an abuse of office or power for personal gain which results in subversion of public welfare and public resources and weakens democratic institutions and rule of law. It is also demonstrative of betrayal of public trust for private gain and has far reaching social, economic and moral implications on the society.

2. Historical Perspective

Corruption is a phenomenon which has co-existed with human civilization and no wonder our ancient scriptures are replete with various forms of corruption as well as the reasons and prayers for exterminating the degenerate, the criminal and the corrupt for the sake of humanity.

Rig.1,4,10.8

Oh Lord, knowing everybody and everything in the most accurate manner, Thou knowest the regenerate of good conduct and the degenerate, the destroyers of good works for general Public. Do thou exterminate the latter from their roots.[14]

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13 Ajay K. Mehra, "Corruption and Criminalization in Public Life in India: An Historical view' in Subhash Kashyap(ed.), *The Constitutional History of India: Federalism, Elections, Government and Rule of Law*, Vol.XIV,Part 5B, New Delhi: Centre for Studies in Civilizations, 2015, page. 526.

14 Ibid.

Sama Veda 179 and 913 describes corruption as hydra headed, having nine heads (nine kinds) and it enters the human body through ninety-nine sources i.e. nine kind of corruption enters through five senses, five sense organs and ***etani***i.e the outward looking mind (9 x 11= 99). Later Ramayana described this evil through nine corrupt heads of Ravana. We burn his nine corrupt heads every year on Dussehra day. Similarly later Mahabharata described 99 sources of corruption through 99 corrupt sons of blind kaurvaking Dhritrashtra.[15]

Bhagvat Geeta in chapter II, Verses 62 & 63 tresses the root cause of corruption.

ध्यायतोविषयान्पुंसरू सङ्गस्तेषूपजायतेद्य
सङ्गात्सञ्जिायतेकामरू कामात्क्रोधोऽभिजायतेद्यद्य[16]

dhyāyatoviṣhayānpuṁsaḥsaṅgasteṣhūpajāyate
saṅgātsañjāyatekāmaḥkāmātkrodho'bhijāyate

While contemplating on the objects of the senses, one develops attachment to them. Attachment leads to desire, and from desire arises anger.[17]

क्रोधाद्भवतिसम्मोहरू सम्मोहात्स्मृतिविभ्रमरू द्य
स्मृतिभ्रंशाद्बुद्धिनाशोबुद्धिनाशात्प्रणश्यतिद्यद्य[18]

krodhādbhavatisammohaḥsammohātsmṛiti-vibhramaḥ
smṛiti-bhranśhādbuddhi-nāśhobuddhi-nāśhātpraṇaśhyati

Anger leads to clouding of judgment, which results in bewilderment of the memory. When the memory is bewildered, the intellect gets destroyed; and when the intellect is destroyed, one is ruined.[19]

In the *Arthashastra*, Kautilya spoke very elaborately about corruption and laid down general principles for running an efficient and disciplined administration. The first is that, unless controlled, civil servants will make money in unauthorized or fraudulent ways. The second

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15 http://prem.sabhlokcity.com/2010/01/16/what-vedas-say-about-deadly-disease-corruption,last accessed on 11.12.17.

16 www.bhagavad-gita.org/Gita/verse-02-62.html last accessed on 11.12.2017.

17 Ibid.

18 www.bhagavad-gita.org/Gita/verse-02-63.htmllast accessed on 11.12.2017.

19 Ibid.

is that good civil servants shall be suitably awarded. The third is a very important principle in enjoining civil servants to collect the right amount of revenue, neither more nor less and to reduce expenditure in order to leave a net balance to the state.[20]

These following Services Regulations by kautilya check corruption are prophetic and should be used by the present democracies to curb the menace of corruption:

Just as it is impossible not to taste honey or poison that one may find at the tip of one's tongue, so it is impossible for one dealing with government funds not to taste, a little bit, of the king's wealth.[21]

Just as it is impossible to know when a fish moving in water is drinking it, so it is impossible to find out when government servants in charge or undertakings misappropriate money.[22]

It is possible to know even the path of birds flying in the sky but not the ways of government servants who hide their [dishonest] income.[23]

Those officials who have amassed money[wrongfully]shall be made to pay it back; they shall [then] be transferred to other jobs where they will not to be tempted to misappropriate and be made to disgorge again what they had eaten. [24]

Those officials who do not eat up the king's wealth but increase it in just ways and are loyally devoted to him shall be made a permanent in service.[25]

He who causes loss of revenue eats the king's wealth,[but] he who produces double the [anticipated] revenue eats up the country and he who spends all the revenue [without] bringing any profit eats up the labor of workmen.[26]

History of anti-corruption strategies goes back to various holy literatures like Bible, Quran and Zuardic Law. According to Ralph Briabanti, Government Corruption is found in all

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20 KAUTILYA, *The Arthashastra*, Edited, Rearranged, Translated And Introduced By L.N. Rangarajan, Penguin Books, part vi, page 252

21 Ibid,{2.9.32}, page 251.

22 Ibid {2.9.33} ,page 251.

23 Ibid {2.9.34}, page 253.

24 Ibid{2.9.35} ,page253.

25 Ibid {2.9.36}, page 251.

26 Ibid {2.9 .13, 15, 17}, page.251.

forms of bureaucracy and in all periods of political development. A Review of penal codes in various ancient civilizations clearly demonstrate that bribery was a serious problem among the Jews, the Chinese,the Japanese, the Greeks, the Romans as well as the Aztees of the new world.[27]

During the medieval period,corruption was accepted as a way of life with the advent of the gift system,either willingly or by way of forcible extortion. The Exaction of perquisites and presents by the officials and subedars downward was one of the greatest evils of medieval administration…The pressure passed from the top to the bottom, though it was unintentional and its real effects were not fully realized by the head of the state. The emperor, without meaning it, squeezed the *subedar* and the *subedar* did so to the *zamindar*; the provincial *devan* had to gratify the High *Devan* and therefore he had to squeeze the subordinate Collectors of the revenue; and these men at the bottom of the official ladder squeezed the *ryots.*[28]

Sir Thomas Rao wrote about corruption in Mughal period as "The people of India live as fish do in the sea the great ones eat up the little. For first, the farmer robs the peasants, the gentleman robs the farmer, the greater robs the lesser, and the King robs the all". The colonial government was also a heavily corrupt government, like the government paid to its own officials a handsome salary whereas officials at the lower level were paid poorly,this affected integrity and lead to corruption.[29]

3. Post-independence Scenario

Corruption got a bloom in the post war regime and reasons have been very succinctly explained by the Supreme Court in the following words:

The menace of corruption was found to have enormously increased by the First and Second World War conditions. Corruption, at the initial stages, was considered confined to the bureaucracy which had the opportunities to deal with a variety of State largesse in the form of contracts, licenses and grants. Even after the war the opportunities for corruption continued as large amounts of government surplus stores were required to be disposed

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27 Corruption :An Overview ,Corruption is man's inheritance,ANACLETUS,attributed, *Day's Collacon*,available at shodhganga.inflibnet.ac.in>bitstream,last accessed on 22.5.19.

28 Supra note12,quoting noted historian J.N. Sarkarpage 528.

29 Ghulam Nabi Naz, Corruption in India; Causes and Remedial Measures in World Academy of Science, Engineering and Technology,*International Journal of Humanities and Social Sciences*,Vol:11,No:4,2017 available at https://waset.org>publications >corruption…

of by the public servants. As a consequence of the wars the shortage of various goods necessitated the imposition of controls and extensive schemes of post-war reconstruction involving the disbursement of huge sums of money which lay in the control of the public servants giving them a wide discretion with the result of luring them to the glittering shine of wealth and property[30].

The Father of the nation was extremely worried about the corrupt mindset of the people at large and in his address to Constructive Works Committee on 12.12.1947,Gandhiji said, "…Today politics has become corrupt.Anybody who gets into politics gets contaminated… But in general there is so much corruption today that it frightens me."[31]

A nascent republic was so deep down into corruption from the very outset that Dr. Radha Krishanan had to warn in the following words:

Our opportunities are great but let me warn you that when power outstrips ability, we will fall on evil days. We should develop competence and ability which would help us to utilize the opportunities which are now open to us. From tomorrow morning – from midnight today – we cannot throw the blame on the Britisher. We have to assume the responsibility ourselves for what we do. A free India will be judged by the way in which it will serve the interests of the common man in the matter of food, clothing, shelter and social services. Unless we destroy corruption in high places, root out every trace of nepotism, love of power, profiteering and black-marketing which have spoiled the good name of this country in recent times, we will not be able to raise the standards of efficiency in administration as well as in the production and distribution of the necessary goods of life.[32]

The government had to resort to immediate measures to tackle corruption and hence The Delhi Special Police Establishment was put on a permanent footing by the Delhi Special Police Establishment Act ,1946.The Prevention of Corruption Act became law on 11th March 1947.The Bakshi Tek Chand Committee was set up in 1949 to review the working of the Prevention of Corruption Act, 1947,to make recommendations with regard to any improvement that might be considered necessary in the law as well in regard to the machinery of enforcing them,to assess the extent of success achieved by the Delhi Police Establishment in combating corruption and to make recommendations regarding

30 State of M.P. v Ram Singh (2000) 5 SCC 88, Para 9

31 Gandhiji's address to the Constructive Works Committee on 12th December 1947,quoted in *Who Owns CBI, The Naked Truth*, B.R.Lal, Manas Publication,page.17.

32 *The dawn of freedom*, Sarvepalli Radha Krishnan, *The Great Speeches of Modern India*, Edited by Rudrangshu Mukherjee,Vintage, page.182

continuance,strengthening,etc.of the Special Police Establishment. Some Ministers in Rajasthan and Vindhya Pradesh were prosecuted in 1949-50.There was no hesitation to make over inquiries into allegations against Ministers to the Delhi Special Police Establishment.The Railway Corruption Inquiry Committee under the chairmanship of Acharya Kriplani was appointed in October, 1953.The Administrative Vigilance Division was set up in August, 1955 and the Vigilance units in the Ministries /Departments came into existence.The Vivian Bose Commission was appointed in December 1956. Some leading industrialists of the country were prosecuted in the decade between1950-1960. During this decade the number of cases investigated by the Special Police Establishment alone increased almost two –fold.[33]

A committee was formed under the chairman ship of Astad Dinshaw(A.D) Gorwala, an officer of the Indian Service to look into the menace of corruption in 1951 and the report opined in uncertain terms the lack of integrity in public administration:

"... [A] substratum of truth still remains out of the many allegations of lack of integrity throughout the country. The deviation from moral standards of Ministers, legislators and Administrators takes various forms. These can be classified under three main heads: corruption, patronage (based on communalism, sectarianism, nepotism and favoritism) and influence. Whatever the form, there can be no doubt that it vitiates policy, weakens administration and undermines public confidence.

... It is not surprising that when grave allegations by responsible parties are made against people holding positions of high authority and they continue to remain in power without being cleared of the accusations, the public generally feel that anybody really influential can get away with anything. It seems fairly clear that if the public are to have confidence that moral standards do prevail in high places, arrangements must be made that no one, however highly placed, is immune from enquiry if allegations against him are made by responsible parties and a prima facie case exists…. There should be no hushing up or appearance of hushing up for political and personal reasons."[34]

In 1962, Santhanam Committee was constituted by LalBahadur Sastri under the chairmanship of K.Santhanam to investigate and address issues relating to governmental corruption. The Santhanam Committee is responsible for the creation of the Central Vigilance Commission

33 Supra note 11,(2.6), page.7.

34 India, Planning Commission, Report on Public Administration, New Delhi: Government of India, 1951,13-14.

and the report stated about the magnitude of corruption prevailing in the corridors of power in the following words:

It was represented to us that corruption has increased to such an extent that people have started losing faith in the integrity of public administration. We heard from all sides that corruption has, in recent years, spread even to those levels of administration from which it was conspicuously absent in the past. We wish we could confidently and without reservation assert that at the political level, Ministers, Legislators, party officials were free from this malady. The general impressions are unfair and exaggerated. But the very fact that such impressions are there causes damage to the social fabric.[35]

The horizons of our public institutions have been completely enveloped by the menace of corruption and its presence is reflected in every office,revealing itself at every file. Corruption in most common understanding is an abuse of public resources for private gain. It is a betrayal of trust as the authority which was supposed to protect the interests of community at large starts usurping the resources at its disposal to suit its own personal greed.The Government and its officials are trustees of the public property and the treasury and in no manner its owners,but the corrupt start manipulating it to suit their own needs. Corruption was rampant in authoritarian or totalitarian regimes where public opinion was not of any significance,and in modern democratic societies it should not have any place. However,it is growing.With the change in socio-economic demands of the society, state intervention has increased many fold,giving rise to political and bureaucratic corruption.

The seeds of corruption which were germinated in the Indian soil with the transfer of power from the colonial regime have grown into a full-fledged tree in 2019.Newspapers and news channels are afloat with breaking news of umpteen number of scams. Be it the Bofors pay off (1987),the Securities scam(1992),Hawala scam(1992), Fodder scam (1996), Tehelka scam(2001), Scorpene submarine deal(2005), Telgi scam (2006), Satyam Computers scam (2009), 2G Spectrum(2010), Commonwealth Games (2010), IPLscam (2010),Coalgate scam(2012),Augusta Westland Scam(2013)Mining scams and the list is endless…

The vast expanse of corruption marks a significant threat to the institution of Indian democracy and has deeply damaged the constitutional values which were imbibed to shape the unique trajectory of India.Corruption poses a serious danger to constitutional governance, as has been expressed by the Supreme Court:

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35 Supra note 11,(2.16),p.12 .

Today, corruption in our country not only poses a grave danger to the concept of constitutional governance, it also threatens the very foundation of the Indian democracy and the Rule of Law. The magnitude of corruption in our public life is incompatible with the concept of a socialist secular democratic republic. It cannot be disputed that where corruption begins all rights end. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity which are the core values in our Preambular vision. Therefore, the duty of the court is that any anti- corruption law has to be interpreted and worked out in such a fashion as to strengthen the fight against corruption. That is to say in a situation where two constructions are eminently reasonable; the court has to accept the one that seeks to eradicate corruption to the one which seeks to perpetuate it.[36]

4. Impact of corruption:

Corruption is no more a moral phenomenon. It is reflective of the great disparity of power and resources in a society that gives a severe blow to the concept of equality. Corruption gives might to the mighty and more power to the powerful and allows them to manipulate the rules to suit their ends. This happens at the cost of those who by virtue of their poverty or low position are unable to cater to the demands of a system where no file movement happens without adequate *grease.* Corruption affects the society in myriad ways but here in this chapter, I will be discussing on three areas which are badly hit by the menace of corruption.

5. Human rights

Human rights are those basic inalienable rights which every human being ought to have by virtue of being born as human beings. Former- Secretary General of the United Nations (1992-1996), Buotros Boutros Ghali designates human rights as the "The Common language of Humanity.[37]"

Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.[38]

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36 Subramanian Swamy v. Manmohan Singh, (2012) 3 SCC 64, Para 68.

37 UpendraBaxi quoted in international law & Human Rights ,K C Joshi,EBC, page.465

38 Human Rights |United Nations, available at https://www.un.org>issues-depth>hum…last accessed on 22.5.19.

These rights have been of great concern for the international community and therefore,The Universal Declaration of Human rights was adopted by the United Nations General Assembly in Paris on 10th December 1948(General Assembly resolution 217 A) as the charter of fundamental human rights and all the nations of the world need to acknowledge these rights and aspire towards its protection.

Everyone has the right to a standard of living adequate for the health and well -being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control[39]. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.[40]

Post-Independence, the Constituent Assembly addressed itself towards the formulation of a comprehensive bill of rights coming closely on the heels of the Universal Declaration of Human Rights. The inclusion of fundamental rights in part III of the Indian Constitution was a major step towards recognition of these basic human rights and has been described as the" very foundation and cornerstone of the democratic way of life ushered in this country by the Constitution."[41]

These Fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent.They weave a 'pattern of guarantee' on the basic structure of human rights and impose negative obligations on the State not to encroach on individual liberty in its various dimensions.[42]

Human rights are the basic, inherent, immutable and inalienable rights to which a person is entitled simply by virtue of his being born as a human. They are such rights which are to be made available as a matter of right. The Constitution and Legislations of a civilised country recognize them since they are so quintessentially part of every human being. That is why

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39 Article 25,Universal Declaration of Human Rights, available at un.org/en/universal-declaration-human-rights/ last accessed on 23.5.19.

40 Ibid, Article 26.

41 Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845,para 29.

42 *Justice Bhagwati*, Maneka Gandhi v.Union of India ,AIR 1978 SC 597,para 4.

every democratic country committed to the rule of law put into force mechanisms for their enforcement and protection.[43]

In consonance with the international law, The Protection of Human Rights Act,1993 was promulgated which gives a very comprehensive definition of human rights as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.[44]

The fundamental rights contained in part III of the Constitution are incorporative of the traditional political and civil rights enumerated in the Universal Declaration of Human Rights. Besides the other rights against discrimination,(Art.23&24),right of minorities (Art.29&30), right against exploitation (Art. 15),right to equality of opportunity(Art.16), right to freedom of speech and expression(Art.19), right against exploitation (Art.23 & 24) and right of constitutional remedies (Art.32).However, two rights need special mention as they are badly affected by corruption and these are the right to equality (Art.14) and the right to life and personal liberty (Art.21), which are fundamental rights having universal application and are applicable to all.These two rights have been accorded extremely wide horizons to incorporate all those aspects of life which are essential for a human living and the presence of corruption gives a fatal blow to the implementation of these basic human rights. *In State of Maharashtra v. Balkrishna Dattatrya Kumbhar,*[45]it has been held:

Corruption is not only a punishable offence but also undermines human rights, indirectly violating them, and systematic corruption, is a human rights' violation in itself, as it leads to systematic economic crimes.

This evil phenomenal is found in all countries – big and small, rich and poor – but it is in the developing world that its effects our most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development,undermining the government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.[46]

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43 Ram Deo Chauhan vs. Banikanta Das,(2010)14 SCC 209 , para 47.

44 S.2(d), The Protection of Human Rights Act,1993.

45 (2012) 12 SCC 384, Para 17.

46 Forward by Kofi Annan, Secretary -General, United Nations Convention Against Corruption, New York,2004, available at https:www.unodc.org>Brussels>UN_…last accessed on 13.5.19.

The World Bank group considers corruption a major challenge to its twin goals of ending extreme poverty by 2030 and boosting shared prosperity for the poorest 40 percent of people in developing countries. In addition,reducing corruption is at the heart of the Sustainable Development Goals and achieving the ambitious targets set for Financing for Development.

Corruption has a disproportionate impact on the poor and most vulnerable, increasing costs and reducing access to services, including health, education and justice.[47]

Corruption is a complex phenomenon. Its roots lie deep in bureaucratic and political institutions, and its effect on development varies with country conditions. But while cost may vary and systematic corruption may coexist with strong economic performance, experience suggests that corruption is bad for development. It leads governments to intervene where they need not, and it undermines their ability to enact and implement policies in areas in which government intervention is clearly needed -whether environmental regulation, health and safety regulation,social safety nets,macroeconomic stabilization,or contract enforcement.[48]

Corruption occurs throughout the world but is of special concern in developing countries. Those who pay and receive bribes can expropriate a nation's wealth,leaving little for its poorest citizens. Where corruption is systematic,even countries with extensive natural resources many fail to develop in a way that benefits ordinary citizens. Highly corrupt and developing countries face particular challenges, even when controlled by reform-minded rulers. Reforming public institutions and government policies is essential, but poverty limits available options.[49]

India's stellar performance in rankings on growth indicators and its innovative approaches to poverty alleviation are often compromised due to corruption in all segments of public life. Complete eradication of corruption is achievable only when the root cause of corruption is identified and policies are made accordingly.[50]

The view that the end justifies the means is becoming increasingly convenient cover for the behavior of individuals, groups and governments. Added to this are the two hydra

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47 *Combating corruption* – World Bank Group, available at www.worldbank.org>anti-corruption,last accessed on 13.5.19.

48 Ibid.

49 Susan Rose- Ackerman, *Corruption and Development*, Annual World Bank Conference on Development Economics 1997,at page 35,available at https://documents.worldbank.org/ last accessed on 20.5.19.

50 Mr.Justice P.Sathasivam, *Speedy Disposal of Corruption and Vigilance cases*,(2013) 2LW (JS) 25.

headed monsters – bribery and extortion – which emerge out of rampant corruption. The implications of such lapses are far-reaching. History is witness to the fact that any dilution of morality has eventually led to degeneration of societal values, pushing the country into a quagmire from which it takes ages to emerge. In fact, any ethical lack leads to inefficient or even bad governance.As a direct and immediate consequence, economic growth bypasses the poor, and we fail to reap the full potential of development.[51]

The consequences of corruption are dangerous and damaging,as Corruption occurs at the top, not at the bottom, distorting decisions on development programmes and priorities.

Corrupt money "has wings, not wheels' and is smuggled abroad to safe havens, not ploughed back into the domestic economy. Corruption often leads to promotion, not prison, and 'the big fish'- unless they belong to the opposition- rarely 'fry'![52]

The recognition of corruption as a serious human rights issue is based on the realization that the corruption of the state and its institutions hinders the full realization of civil, political,economic and social rights,which are all related to the exercise of the right to development. Sovereignty as a facet of state responsibility demands that the state exercise its powers in a manner that ensures corruption free governance. This will ensure better protection and promotion of human rights. Further, the recognition of corruption as that undermines the sovereign exercise of power means that our efforts to prevent and fight corruption lead to empowerment of the people.[53]

The adverse impact of corruption on basic human rights has been lamented upon by Justice Venkatachaliah as a Chairman of the Human Rights Commission, when he said; "over 88 percent of pregnant mothers in India are anemic. The IQ of the children born to them gets frozen at 50 percent of the normal level; millions of such children are born here in India in what is the most serious crime, not just against humanity but against our very future as a country."[54]

We are living in conditions where, as a country, we the people, after sixty-five years of living under constitutionalism, rule of law and a republican polity, have amongst us the largest number of illiterates, the poor and unemployed, where hunger is rampant, where more than a lakh village do not have drinking water and where mothers are constrained

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51 Vinod Rai,*Not Just An Accountant*, Rup publications ,p. 199.

52 Fali S. Nariman in *The State of the Nation,* Hay House India, page. 292.

53 C.Rajkumar,*Corruption and Human Rights in India*, page p.63

54 Subhash C kashyap, *We, The People and Our Constitution*, Universal Law Publishing, page. 160.

to kill their children. While crores of public money are spent and armed security forces are engaged in safeguarding the politicians-their sons and daughters and in-laws-many of whom should be behind bars, even the most basic security of life for the ordinary citizen is non-existent. Where political processes and quality itself are so polluted that criminals become lawmakers and rulers, what human rights are we writing about and whose human rights?[55]

6. Weakening of Institutions

Corruption and liberty cannot co-exist and as such it should be detected at the earliest, as explained by the Supreme Court:

Corruption in a society is required to be detected and eradicated at the earliest as it shakes "the socio-economic- political system in an otherwise healthy, wealthy, effective and vibrating society". Liberty cannot last long unless the State is able to eradicate corruption from public life. Corruption is a bigger threat than external threat to the civil society. Corruption is instrumental in not proper implementation and enforcement of policies adopted by the Government. Thus, it is not merely a fringe issue but a subject- matter of gave concern and requires to be decisively dealt with[56].

Liberty is synonymous with the rule of law which ends when corruption begins and anarchy steps in. Decisions are taken in closed doors,and there is widespread discrimination. The lack of transparency in the distribution of state largesse and total denial of any accountability and answer ability to the people at large,leads to unequal distribution of the fruits of development. The poor and underprivileged are devoid of the basic needs and they start losing faith in the democratic institutions and rule of law. The dangerous consequences of this malignant disease have been explained by the Supreme Court in the following words:

Corruption in a civilized society is a disease like cancer which if not detected in time is sure to spread its malignance among the polity of the country leading to disastrous consequences. Therefore, it is often described as royal thievery. Corruption is opposed to democracy and social order, as being not only anti-people, but also due to the fact that it affects the economy of a country and destroys its cultural heritage. It poses a threat to the concept of constitutional governance and shakes the very foundation of democracy and the rule of law. It threatens the security of the societies undermining the ethical values and justice jeopardizing sustainable development. Corruption devalues human rights, chokes

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55 Ibid,p. 161.

56 State of Gujrat v. R.A. Mehta, (2013) 3 SCC 1, para 95.

development and corrodes the moral fabric of society. It causes considerable damage to the national economy, national interest and the image of the country.[57]

Our nation had very deep-rooted ideals of *dharma*, or the rule of law, however corruption corrodes that moral fabric, as the Apex Court opined:

Corruption corrodes the moral fabric of the society and corruption by public servants not only leads to corrosion of the moral fabric of the society but is also harmful to the national economy and national interest, as the persons occupying high posts in the Government by misusing their power due to corruption can cause considerable damage to the national economy, national interest and image of the country.[58]

Corruption has disastrously affected all forms of government administration;

However, we cannot turn our eyes from the fact that because of the mad race of becoming rich and acquiring properties overnight or because of the ostentatious or vulgar show of wealth by a few or because of change of environment in the society by adoption of materialistic approach, cancerous growth of corruption and illegal gains or profits has affected the moral standards of the people and all forms of government administration.[59]

Corruption is lethal to the Preambular vision of Constitutional democracy and the rule of law;

Today, corruption in our country not only poses a grave danger to the concept of constitutional governance, it also threatens the very foundation of the Indian democracy and the Rule of Law. The magnitude of corruption in our public life is incompatible with the concept of a socialist secular democratic republic. It cannot be disputed that where corruption begins all rights end. Corruption devalues human rights, chokes development and undermines justice, liberty, equality, fraternity which are the core values in our Preambular vision.[60]

Corruption in the institutions of the state, including the acts of corruption committed by politicians and bureaucrats,does not allow the state to exercise its sovereign powers properly

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57 Ibid, para.92.

58 J. Jayalalitha v. Union of India , (1999) 5 SCC 138,Para 15.

59 Shobha Suresh Jumani v. Appellate Tribunal, Forfeited Property (2001) 5 SCC 755, Para 11.

60 Subramanian Swamy v. Manmohan Singh, (2012) 3 SCC 64, Para 68.

or responsibly. In fact, corruption in the state and its institutions means that the state is not functioning to capacity and that the law enforcement machinery is weak[61].

Corruption is often spoken of as a serious illness-a cancer or,as one official recently put it "the Aids of democracy"- spreading relentlessly from official to official and agency to agency,undermining institutions until the political system they represent collapses. In this view corruption must be eradicated so that the system can return to health or-better yet-corruption must be stopped before it starts.[62]

Corruption is like AIDS. AIDS comes out of uncontrolled sexual behavior. Corruption is uncontrolled financial behaviors as AIDS knocks out the immune system of the human body and leads to early death,corruption knocks out the immune system in the form of checks and balances to ensure good governance and implementation of the Rule of Law,which results in the society becoming dysfunctional and moving towards anarchy.[63]

7. Criminalization of politics

The far-reaching consequences of lack of honesty in public life was foreseen by C. Rajagopalachari when he was in jail for disobedience and he wrote in his prison diary on January 24, 1922:

"Elections and their corruption, injustice and the power and tyranny of wealth, and inefficiency of administration, will make a hell of life as soon as freedom is given to us. Men will look regretfully back to the old regime of comparative justice,and efficient,peaceful, more or less honest administration"[64]*...*

Corruption and politics are a lethal combination. Politics is now a full-time profession, where the political elite once voted to power has no time left for promoting development or building the nation, rather gets busy in survival of his chair and the dirty game of money and power for personal ends is on the rise. First, the corrupt earn huge money and then invest it into politics, thereafter become law makers, earn more money than protect the

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61 Rajkumar, *Corruption and Human Rights in India*,page.61.

62 Michael Johnston, *what can be done about entrenched Corruption?* Annual World Conference on Development Economics 1997, p. 69, available at https://documents.worldbank. org/ last accessed on 20.5.19.

63 N.Vittal,*Rule of Law in a Free Society,* edited by N.R. Madhawa Menon, Oxford Publication , page. 132.

64 NaniA. Palkhivala, *We the People*, USB Publishers Distributors Ltd, page. 9.

corrupt and the vicious circle goes on. The electoral process leaves no room for poor people and the entire process now involves big money and as such honest candidates with poor economical background have very little to offer. The Supreme Court in the case of *Kanwar Lal Gupta v. Amar Nath Chawla***,** [65]observed :

The other objective of limiting expenditure is to eliminate, as far as possible, the influence of big money in the electoral process. If there were no limit on expenditure, political parties would go all out for collecting contributions and obviously the largest contributions would be from the rich and affluent who constitute but a fraction of the electorate. The pernicious influence of big money would then play a decisive role in controlling the democratic process in the country. This would inevitably lead to the worst form of political corruption and that in its wake is bound to produce other vices at all levels. This danger has been pointed out in telling words in the following passage from the notes in Harvard Law Review, Vol. 66, p. 1260:

"A less debatable objective of regulating campaign funds is the elimination of dangerous financial pressures on elected officials. Even if contributions are not motivated by an expected return in political favors, the legislator cannot overlook the effects of his decisions on the sources of campaign funds."

Similarly in the case of *Ashok Shankarrao Chavan v. Madhavrao Kinhalkar*,[66] the Supreme Court took serious note of the implications of the ever-increasing rise in electoral expenditure:

In recent times, when elections are being held it is widely reported in the press and media that money power plays a very vital role. Going by such reports and if it is true then it is highly unfortunate that many of the voters are prepared to sell their votes for a few hundred rupees. In fact, taking advantage of the weakness of the voters, exploitation to the maximum level is being carried out by those who aspire to become either Member of Parliament or State Legislature. We are pained to state that the sanctity of the status as a Member of the Legislatures, either Parliament or State Legislature is not being seriously weighed even by those who sponsor their candidature. It is a hard reality that if one is prepared to expend money to unimaginable limits only then can he be preferred to be nominated as a candidate for such membership, as against the credentials of genuine and deserving candidates.

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65 (1975) 3 SCC 646, Para.10.

66 (2014) 7 SCC 99, Para 66.

Even the Prime Minister of India, Shri Atal Bihari Vajpayee spoke about criminalization of politics and participation of criminals in the electoral process:

---- "Shri Atal Behari Vajpayee had called for a national debate on all the possible alternatives for systematic changes to cleanse our democratic governing system of its present mess. He has expressed his dissatisfaction that neither Parliament nor the State Vidhan Sabhas are doing, with any degree of competence or commitment, what they are primarily meant to do: legislative function. According to him, barring exceptions, those who get elected to these democratic institutions are neither trained, formally or informally, in law-making nor do they seem to have an inclination to develop the necessary knowledge and competence in their profession. He has further indicated that those individuals in society who are generally interested in serving the electorate and performing legislative functions are finding it increasingly difficult to succeed in today's electoral system and the *electoral system has been almost totally subverted by money power, muscle power, and vote bank considerations of castes and communities*. Shri Vajpayee also had indicated that the corruption in the governing structures has, therefore, corroded the very core of elective democracy. According to him, the certainty of scope of corruption in the governing structure has heightened opportunism and unscrupulousness among political parties, causing them to marry and divorce one another at will, seek opportunistic alliances and coalitions often without the popular mandate. *Yet they capture and survive in power due to inherent systematic flows*. He further stated that casteism, corruption and politicization have eroded the integrity and efficacy of our civil service structure also. *The manifestos, policies, programmes of the political parties have lost meaning in the present system of governance due to lack of accountability*."[67]

Similar views were expressed in the concluding observations by ShriIndrajit Gupta as Chairman of the *National Commission to Review the Working of the Constitution*;

What is needed, however, is an immediate overhauling of the electoral process whereby elections are freed from evil influence of all vitiating factors, particularly, criminalization of politics. It goes without saying that money power and muscle power go together to vitiate the electoral process and it is their combined effect which is sullying the purity of electoral contests and affecting free and fair elections.[68]

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67 *'Whither Accountability'*, published in *The Pioneer*, quoted in People's Union for Civil Liberties (PUCL) v. Union of India, (2003) 4 SCC 399, Para 48.

68 Ibid, para 22.

The Vohra Committee [69]stirred a hornet's nest by laying down a report on the nexus between politics and criminalization. The responses of the Director Intelligence Bureau (DIB) and Director CBI on crime and politics is worth mentioning:

The Director intelligence Bureau (D/B) reported that due to the progressive decline in the values of public life in the country "warning signals of sinister linkage between the underworld politicians and bureaucracyhave been evident with disturbing regularity"[70]----.

The DIB gave the following examples to demonstrate this dangerous nexus:

(i) In certain States, like Bihar, Haryana and UP, these (criminal) gangs enjoy the patronage of local level politicians, cutting across party line and the protection of Governmental functionaries. Some political leaders become the leaders of these gangs/ armed senas (armies) and, over the years, get themselves elected to local bodies, State Assemblies and the national Parliament. Resultantly, such elements have acquired considerable political clout[71]….

(ii) The big smuggling syndicate, having international linkages, have spread into and infected the various economic and financial activities, including havala transactions, circulation of black money and operations of a vicious parallel economy causing serious damage to the economic fiber of the country. These Syndicates have acquired substantial financial and machinery at all levels and yield enough influence to make the task of Investing and Prosecuting agencies extremely difficult, even the members of the Judicial system have not escaped the embrace of the Mafia.[72]

(iii) Certain elements of the Mafia have shifted to narcotics, drugs and weapon smuggling and established narco-terrorism networks, especially in the States of J&K, Punjab,Gujarat and Maharashtra. The cost of contesting elections has thrown the politician into the lap of these elements and led to a grave

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69 Vohra Committee Report (Ministry of Home Affairs), available at https://adrindia.org>sites>default>files, last accessed on 21.05.2019.

70 Ibid 6.1.

71 Ibid 6.2(i).

72 Ibid 6.2(ii).

compromise by officials of the preventive/ detective systems….The coastal and the borderStates have been particularly affected.[73]

(iv) …The investigations into the Bombay bomb blast cases have revealed extensive linkages of the underworld in the various government agencies, political circules, business sector and the film world.[74]

The Scenario described above appears alarming, to put it mildly. The DIB's remark that 'the network of the Mafia is virtually running a parallel Government, pushing the State apparatus into irrelevance' may sound to be an overreaction of a concerned officer, it, however, underscores the gravity of the situation[75].

The report of the Director CBI to the Vohra Committee was equally disturbing:

… all over India crime Syndicates have become a law unto themselves. Even in the smaller towns and rural areas, muscle men have become the order of the day. Hired assassins have become a part of these organizations. The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country. The existing criminal justice system, which was essentially designed to deal with the individual offences/ crimes, is unable to deal with the activities of the Mafia; the provisions of law in regard to economic offences are weak; there are in surmountable legal difficulties in attaching/confiscation of the property acquired through Mafia activities.[76]

The relationship between corruption and elections has been very poignantly explained by Mr. R.V.Pandit, a writer and an economic analyst in the following words:

"I maintain a Savings Bank account, and from this account drew crossed Account Payee cheques of varying sums of money towards election expenses of candidates I felt would serve the public cause. Armed with my Bank Pass Book, I have discussed the question of elections and corruption with almost all important office-holders since Jawaharlal Nehru. From these discussions, I have drawn the conclusion that most politicians are not interested in honest money funding for elections. Honest money entails accountability. Honest money restricts spending within legally sanctioned limits (which are ridiculously low). Honest money leaves little scope for the candidate to steal from election funds. Honest money funding is limiting. While the politicians want money for election, more importantly, they

73 Ibid 6.2(iii).

74 Ibid 6.2(iv).

75 Ibid 6.3.

76 Ibid 3.3.

want money for themselves — to spend, to hoard, to get rich. And this they can do only if the source of money is black. ... The corruption in quest of political office and the corruption in the mechanics of survival in power has thoroughly vitiated our lives and our times. It has sullied our institutions…. The corrupt politician groomed to become the corrupt minister, and, in turn, the corrupt minister set about seducing the bureaucrat…. THINK OF ANY problem our society or the country is facing today, analyst, and you will inevitably conclude, and rightly, that corruption is at the root of the problem. Prices are high. Corruption is the cause. Quality is bad. Corruption is the cause. Roads are pockmarked. Corruption is the cause. Nobody does a good job. Corruption is the cause. Hospitals kill. Corruption is the cause. Power failures put homes in darkness, businesses into bankruptcy. Corruption is the cause. Cloth is expensive. Corruption is the cause. Bridges collapse. Corruption is the cause. Educational standards have fallen. Corruption is the cause. We have no law and order. Corruption is the cause. People die from poisoning, through food, through drink, through medicines. Corruption is the cause. The list is endless. The very foundation of our nation, of our society, is now threatened. And corruption is the cause."[77]

The recently held Lok Sabha elections was a witness to the usage of huge amount of not only black money but also narcotics, drugs and liquor. President Ram Nath Kovind rescinded the election to the Vellore Lok Sabha seat based on a recommendation of the Election Commission followinga detailed report on the use of money power to influence voters. The I-T Department had seized Rs. 11.48 crore from the house of an alleged associate of DMK treasurer Duraimurugan, whose son Kathir Anand is the party candidate for Vellore.[78]

It has been well known that election funding is a murky affair. That political parties collect huge sums of money, mostly unaccounted for-from unknown sources through dubious means, especially during elections-is generally accepted. There are no reliable estimates of the quantum of funds collected on behalf of parties or candidates, or the amount of money that goes into the electoral process.[79]

It is now well-established that money plays a big role in politics, whether in the conduct, or campaigning……Money, often from illegitimate sources, results in "undisguised bullying" when it is used (both authorized and unauthorized) to buy muscle power, weapons, or to unduly influence voters through liquor, cash, gifts. Currency notes come first in containers,

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77 Article of R.V. Pandit Published in the *Imprint* of September 1988 quoted In Common Cause (A Registered Society) v. Union of India, (1996) 2 SCC 752, para 19.

78 Available at https://www.thehindu.com>arti---16-Apr-2019, last accessed on 27.05.2019

79 T k A Nair, *Funding of elections is, indeed, the mother of black money*, February 9,2017,Economic Times, available at economictimes.indiatimes.com last accessed on

then in truckloads, moving to wholesale/ retail forms, and finally to suitcases and in people's pockets[80].

The following chart of seizure by the Election Commission of India as on 24.05.2019 presents the sordid state of affairs reflecting the usage of black money, gold, liquor and narcotics in the recently held elections.

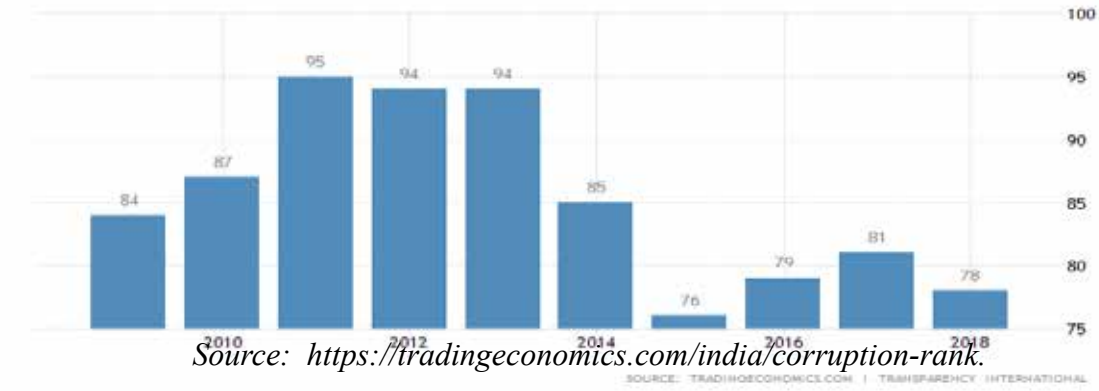
In crores

Total Cash Seizure	844.00
Total Liquor Seizure	304.61
Total Drugs/Narcotics Seizure	1279.90
Total Precious Metals (Gold etc.) Seizure	987.11
Total Freebies/Other Items Seizure	60.15
Grand Total	**3475.76**

Source: Seizure report as on 24.05.19, available at eci.gov.in/files/file/10273-seizure-report-as-on-24052019/

8. Existing legal framework to combat corruption in India

India is the 78 least corrupt nation out of 175 countries, according to the 2018 Corruption Perceptions index reported by Transparency International. Corruption rank in India averaged 75.67 from 1995 until 2018, reaching an all-time high of 95 in 2011 and a record low of 35 in 1995.[81]



Source: https://tradingeconomics.com/india/corruption-rank.

80 255th report on Electoral reforms, Law Commission of India, March 2015, available at lawcommissionofindia.nic.in>Report255 2.4 last accessed on 25.5.19.

81 https://tradingeconomics.com/india/corruption-rank

This ranking is irrespective of the efforts by the government to curb the menace of corruption by proper legislative and enforcement mechanisms and in consonance with the United Nations Convention against Corruption wherein,each state party shall, in accordance with the fundamental principle of its legal system, develop and implement or maintain effective, co-ordinated anticorruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.[82] The following is a comprehensive list of legislative and regulatory mechanism to combat corruption in India.

8.1 Indian Penal Code, 1860

One of the earliest legislations which dealt with corruption and corrupt practices is the Penal Code of 1860. The IPC defines "public servant" as a government employee, officers in the military, navy or air force; police, judges, officers of Court of Justice, and any local authority established by a central or state Act[83]. Before the enactment of the Prevention of Corruption Act (POCA), it was the only statute which dealt with the offences relating to Public Servant taking gratification other than legal remuneration, [84] influencing a Public Servant through corrupt and illegal means,[85] Public Servant obtaining valuable thing without consideration in proceeding or business.[86]

8.2 The Criminal law (Amendment) Ordinance, 1944

In1944, a war time ordinance[87] was promulgated for prevention of disposal or concealment of property procured by certain specific offences.

8.3 The Prevention of Corruption Act, 1947

Immediately after independence, a need was felt for a detailed and specific law on corruption as it was realized that, "The scope for bribery and corruption of public servants had been enormously increased by war conditions and though the war is now over, opportunities for corrupt practices will remain for considerable time to come. Contracts

82 Art.5, United Nations Convention against Corruption, P.V.Ramakrishna, A Treatise On Anti –Corruption Laws In India, S. Gogia& Company.

83 S.21,Indian Penal Code, 1860.

84 Ibid,S.161.

85 Ibid.S.162.

86 Ibid S.165.

87 Ordinance No.XXXVIII of 1944.

are being terminated, large amounts of Government surplus stores are being disposed of; there will be years of shortage of various kinds requiring imposition of controls, and extensive schemes of post-war reconstruction, involving the disbursement of very large sums of Government money. All these activities offer wide scope of corrupt practices and seriousness of the evil and possibility of its continuance or extension in future are such as to justify immediate and drastic action to stamp it out."[88]

> "The existing law has proved inadequate for dealing with the problem which has arisen in recent years and the Bill is intended to render the criminal law more effective in dealing with cases of bribery and corruption of public servants."[89]

8.4 The Prevention of Corruption Act, 1988

The prevention of corruption Act, 1988 (POCA), 1988 was enacted to make the existing anti-corruption laws more effective by widening their coverage and by strengthening the provisions.[90] However, once again amendment has been sought in the POCA Act and the POCA bill finally received the assent of the President of India on 26.7.18 and brought the following key changes:

8.4.1 Definition of undue advantage & Legal remuneration:

The term undue advantage has been incorporated by the amendment to be any gratification other than legal remuneration[91].The term gratification has been clarified to include all forms of gratifications estimable in money besides pecuniary gratification[92]. The term legal remuneration has been clarified to include all remuneration a public servant is permitted to receive by the concerned authority.[93]

8.4.2 Prosecution of bribe-givers :

Now anybody who gives or promises to give 'undue advantage' to a person with an intent to induce or reward a public servant to perform their public duty improperly is

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88 Statement of objects and Reasons attached to the bill preceding the enactment of the Prevention of corruption Act, 1947

89 Gazette of India dated November 23,1946, Part v, page 374.

90 Statement of objects and Reasons attached to the bill preceding the enactment of the Prevention of corruption Act, 1988.

91 S.2(d),Prevention of Corruption Act, 1988.

92 Ibid, explanation(a).

93 Ibid, explanation(a).

liable to be prosecuted with the maximum punishment for a period of seven years.The only immunity from prosecution has been granted in favor of those who are compelled to give such undue advantage provided they report to the law enforcement agencies within seven days from the date of giving the undue advantage.[94]

8.4.3 Criminal misconduct:

Under the amendment, criminal misconduct has been redefined to include: misappropriation of property entrusted to a public servant by dishonest or fraudulent means as well as amassing assets disproportionate to known sources of income.[95]

8.4.4 Investigation without prior permission :

Now police officers have to seek prior approval before conducting an enquiry into any offence committed either by a serving or by retired public servants. The approval has to be sought from the relevant union or state government in whose employment the accused public servant committed the offence in discharge of his official functions or duty. Such decision has to be taken within three months which is further extendable by one month.[96]

8.4.5 Attachment and forfeiture of tainted property:

In order to streamline mechanisms to get hold of the proceeds of corrupt money, the POCA has now incorporated chapter ivA', wherein provisions have been made for attachment of property, confiscation of money and administration of property acquired through corrupt means.[97]Initially it was done under an ordinance of 1944.

8.4.6 Fixation of time limit for trial:

The amendment now seeks to hold trials of offences under the POCA on a day-to-day basis and endeavor to conclude it within two years. If the same is not done,reasons have to be recorded. The trial period is extendable initially by six months for reasons to be recorded and total extendable period shall not exceed more than four years in aggregate.[98]

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94 Ibid, S.8.

95 Ibid.S.13.

96 Ibid S.17A.

97 Ibid S 18A.

98 Ibid S.4(4)

8.4.7 Commercial organizations:

To meet the demands of corruption by commercial organizations, section 9 has been incorporated which specifically deals with commercial organizations and persons associated with these organizations. The term commercial organization is clarified to include all forms of business structures and is wide enough to include employees and vendors.[99]

The term 'public servant' has a wide definition under the POCA, and includes any person in service or pay of any government, local authority, statutory corporation, government companies or other bodies controlled or aided by the government, as also judges, arbitrators, and employees of institutions receiving financial aid from the state.[100] In addition to the categories included in the IPC, the definition of "public servant" includes office bearers of cooperative societies receiving financial aid from the government, employees of universities, Public Service Commission and banks. The Hon'ble Supreme Court of India has also held that employees of bank, public of private are also considered as 'public servant' under the POCA.[101]

Amendments to the POCA are intended to empower citizens to refuse to give bribe and punishing those who willingly offer to bribe.This is a welcome change towards bringing in a *say no to bribe drive*.Earlier sanction was required only for serving officers but now it covers both serving and retired. However, this type of provision has earlier been set aside by the Supreme Court.[102] A Public Interest litigation has already been filed by the Centre for Public Interest Litigation (CPIL) challenging Section 17A(1) of the POCA. The Supreme Court has already issued notice in this matter and the same is pending for further adjudication[103]. The formulation of special courts, day to day basis trial and forfeiture of property under the Act are like fresh hopes of escalating the drive against corruption, but at the same time prior approval before investigation and the diluting of the definition of criminal misconduct are not healthy measures towards corruption eradication.

8.5 Foreign Contribution Regulation Act, 2010

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99 Ibid S.9.

100 Ibid,S.2(c)

101 CBI v. Ramesh Gelli & Ors., (2016) 3 SCC 788.

102 Subramanyam Swami v. CBI,(2014)8 SCC 682.

103 Available at https://www.livelaw.in>prior-sa...Last accessed on 28.05.2019.

The Foreign Contribution Regulation Act, 2010 ('**FCRA**') prohibits the acceptance of hospitality or contributions from 'foreign sources' by persons including legislators, judges, political parties or their office-bearers, government servants and employees of bodies owned or controlled by the government, except with the permission of the central government[104]. The FCRA defines the term 'foreign source' to include any foreign citizen, company, entity, multinational corporation, trust or foundation.[105]Foreign contribution has been defined to include the donation, delivery or transfer of any currency or foreign security.[106] It further regulates the acceptance of foreign hospitality by a member of a legislature or an office bearer of a political party or Judge or Government Servant or Employee of a Corporation or any other body control by the Government. It mandates that these persons shall not accept any foreign hospitality while visiting any country outside India except with prior permission of the Central Government save for medical aid in the event of contracting sudden illness while abroad.[107]Further, non-governmental organizations (including charities) receiving contributions from a 'foreign source' are required to be registered under the FCRA, and report such contributions.[108] A contravention of the FCRA is punishable with imprisonment of up to five years, or a fine, or both[109]. Where the offender is a company, persons such as directors and other managerial personnel may be held liable for the offence[110].

8.6 Right to Information Act, 2005

The Right to Information Act, 2005 ('**RTI Act**') is one of the greatest tools of the Indian citizens to obtain information from any public authority, subject to specified exceptions for national interest, legislative privilege and right to privacy. Further, the RTI Act requires public authorities to publicly disclose certain types of information relating to their functions (for example, they must publish relevant facts while formulating important policies or announcing decisions that affect the public and provide reasons for their decisions). The information requested by a citizen is required to be provided in a timely manner (within a period ranging from 48 hours (if the life and liberty of any person are involved) to 30

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104 S.6 of Foreign Contribution Regulation Act, 2010.

105 Ibid,S.2(j)

106 Ibid ,S.2(h).

107 Ibid S.6.

108 Ibid S.12(1).

109 Ibid,S.35.

110 Ibid S.39(1).

days). [111]An authority has been set up at the central and state levels to monitor complaints from citizens under the RTI Act (including a refusal of access or a failure to respond).

In recent years, the RTI Act has emerged as a key tool in the crusade fight against corruption. Requests for information by activists and citizens have brought to light instances of corruption in government decisions particularly in tenders and public procurement programs. The RTI Act is an armory of the common man to question the government and the bureaucracy and is an effective tool of inclusive governance. promotes transparency in the government and bureaucracy's decision-making, and by facilitating publication of official records, which ensures that any lapses are brought into the public eye.

In the Case of *Namit Sharma v. Union of India,*[112]The Supreme Court has explained the objective of this Act:

Greater transparency, promotion of citizen-Government partnership, greater accountability and reduction in corruption are stated to be the salient features of the Act of 2005. Development and proper implementation of essential and constitutionally protected laws such as the Mahatma Gandhi Rural Guarantee Act, 2005, the Right to Education Act, 2009, etc. are some of the basic objectives of this Act. Revelation in actual practice is likely to conflict with other public interests, including efficiency, operation of the Government, optimum use of limited fiscal resources and the preservation of confidentiality of sensitive information. It is necessary to harness these conflicting interests while preserving the parameters of the democratic ideal or the aim with which this law was enacted. It is certainly expedient to provide for furnishing certain information to the citizens who desire to have it and there may even be an obligation on the State authorities to declare such information suomotu. However, balancing of interests still remains the most fundamental requirement of the objective enforcement of the provisions of the Act of 2005 and for attainment of the real purpose of the Act.

8.7 Central Vigilance Commission Act, 2003

The Central Vigilance Commission Act, 2003 was enacted to provide for the constitution of Central Vigilance Commission to inquire or cause inquiries to be conducted into offences alleged to have been committed under the Prevention of Corruption Act,1988 by certain categories of public servants of the Central Government, corporations established by or under any Central Act, Government companies, societies and local authorities

111 S.7,Right to Information Act, 2005.

112 (2013) 1 SCC 745, Para 38.

owned or controlled by the Central Government and for matters connected therewith or incidental thereto.[113] Under section 8, the CVC exercises superintendence over the Delhi Special Police Establishment Act for the examination of offences under POCA, inquire or cause an investigation to be made on the recommendation of the Central Government for offences under POCA,review the progress of investigations conducted by the Delhi Police Establishment.

8.8 The Controller and Auditor General

The Controller and Auditor General of India (CAG) is a constitutionalmachinery created under Article 148 of the Constitution of India and performs its duties under Article 149.The role the CAG in the recent past has assumed great significance and has acted as the basis for questioning governmental decisions.The role of the CAG as a watchdog of government expenditure has been taken note of by the Supreme Court in the case of ***S.*** *Subramaniam Balaji v. State of T.N.*[114],

-------- the Comptroller and Auditor General of India is a constitutional functionary appointed under Article 148 of the Constitution. His main role is to audit the income and expenditure of the Governments, government bodies and State-run corporations. The extent of his duties is listed out in the Comptroller and Auditor General's (Duties, Powers, etc.) Act, 1971.The functioning of the Government is controlled by the Constitution, the laws of the land, the legislature and the Comptroller and Auditor General of India. CAG examines the propriety, legality and validity of all expenses incurred by the Government. The office of CAG exercises effective control over the government accounts and expenditure incurred on these schemes only after implementation of the same. As a result, the duty of CAG will arise only after the expenditure has incurred.

The Supreme Court also explained the scope of The Controller and Auditor General's (Duties, Powers and Conditions of Services) Act,1971 in the case of *Arun Kumar Agrawal v. Union of India*, [115]

The audit of the Union and the States is under Section 13 of the Act. The scope of the audit extends to the audit of all expenditure so as to ascertain whether the monies shown in the accounts as having been disbursed were legally available for such disbursement

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113 Statement of Object and reasons attached to the bill preceding the enactment of the Central Vigilance Commission Act, 2003.

114 (2013) 9 SCC 659,Para 80.

115 (2013)7 SCC 1, Para 60.

and whether the expenditure conforms to the authority which governs it. The CAG has to satisfy himself that the rules and procedures designed to secure an effective check on the assessment, collection and proper allocation of revenue are being duly observed under Section 16. The CAG also has to examine decisions which have financial implications including the propriety of the decision making.

8.9 The Companies Act, 2013

Under the companies act, 2013, stringent measures have been adopted for keeping a check on political contributions. Neither government companies nor companies that have been in existence for less than three years are permitted to make political contributions.[116] Though contributions have not been specifically defined under the Act but it has been duly specified that a donation, subscription or payment caused to be given by a company on its behalf or on its account to a person who, to its knowledge, is carrying on any activity which can reasonably be regarded as likely to affect public support for a political party shall be considered a contribution.[117] Additionally, the amount of expenditure incurred by a company or an advertisement in any publication-i.e souvenir, brochure, tract, pamphlet or the like– by, or on the behalf or for the advantage of a political party shall also be considered as a contribution. Eligible companies may make a contribution in the financial year provided that such contribution shall not exceed 7.5% of its average net profits during the three immediately preceding financial years.[118]There must be a resolution passed at the Board of Directors meeting authorising such contribution under section 182(1) one of the Companies Act. It is further provided that such contribution must be disclosed in the profit and loss account of the company with the amount and name of the political party. [119]The penalty for non-compliance with the provisions of this section which could be five times so contributed and each officer of the company would be punishable with imprisonment for a term of 6 months and a fine which could be 5 times the amount contributed.[120]

Apart from this the Companies Act also provides for a vigil mechanism for the directors and employees to report genuine concerns in such manner as may be prescribed [121]together with safeguards for victimization of persons using the vigil mechanism and make provision

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116 S.182 (1) of The Companies Act 2013.

117 Ibid. S.182(2)

118 Ibid S.182(1)

119 Ibid.S.182(3)

120 Ibid S.182(4)

121 Ibid S.177(9)

for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases.[122]

8.10 The Lokpal and Lokayuktas Act, 2013

The Lokpal and Lokayuktas Act, 2013 brought in the concept of ombudsman,referred to as the Lokpalin the Centre and Lokayuktas the state level. This Act finally saw the light of the day after a mass movement of the public and is designed to act independently from the executive branch of the government. Lokpal has the jurisdiction to enquire into the allegations of corruption against anyone who is or has been the Prime Minister or a Minister of Union Government or a Member of Parliament as well as officials of the Union Government under groups A,B,C and D. Also covered are chairpersons, members, officers and directors of any board,corporation, society, trust or autonomous body either established by an act of Parliament or wholly or partly funded by the Centre. It also covers any trust or body that receives foreign contribution above Rs.10 lakh.[123]The Lokpal has supervisory powers over the DSPE in thematters referred to for Preliminaryinvestigation.[124] The CVC has to submit periodic reports on cases referred[125] and the officers investigating under the DSPE are not to be transferred except with previous approval of the Lokpal.[126]The Lokpal also has the power to direct the agency to seize relevant documents suspected of being secreted and retain it until completion of investigation.[127] On March 19, 2019, Justice Pinaki Chandra Ghosh was appointed as India's first Lokpal. The appointment of India's first Lokpal is an effort towards achievement of "Zero Tolerance against Corruption". It is also in consonance with the United Nations Convention Against corruption to which India has ratified on 9th May 2011. The appointment of the Lokpal is a recent feature and there arelot of expectations from this institutional mechanism towards eradication of corruption from public life.

8.11 The Prevention of Money Laundering Act, 2002

The Prevention of Money Laundering Act, 2002 ('**PMLA**') criminalizes 'money laundering', which it defines as direct or indirect attempts to knowingly assist or become

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122 Ibid S.177(10)

123 S.14, The Lokpal and Lokayuktas Act, 2013.

124 Ibid s.25(1).

125 Ibid s.25(2)

126 Ibid s.25(3)

127 Ibid s.26.

party to, or actual involvement in, a process or activity connected with the 'proceeds of crime' (including its concealment, possession, acquisition or use) and in projecting or claiming such property to be untainted property.[128] "Proceeds of crime" means any property obtained by a person as a result of criminal activity related to certain offences listed in the schedule to the Act.[129] A person can be charged with the offence of money laundering only if he has been charged with committing a scheduled offence. A crucial aspect of this law is that it permits the attachment of properties of accused persons (and other parties who are connected with the proceeds of crime), at a preliminary stage of the investigation (and even prior to conviction).[130] The penalty for committing the offence of money laundering is rigorous imprisonment for three to seven years and also be liable to fine.[131] If a person is convicted of an offence under the Narcotics Drugs and Psychotropic Substances Act, 1985 the term of imprisonment can extend up to 10 years.[132]

Recent amendment in the PMLA Act in 2019 includes corporate frauds under Section 447 of the Companies Act as scheduled offence under the PMLA to enable the Registrar of the Companies to report such cases for action under the PMLA. This provision is indeed the call of the hour when huge frauds are being committed by corporate houses and shall strengthen the PMLA with respect to corporate frauds.

8.12 The Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act, 2015

This enactment received the assent of the President on the 26th May, 2015 and made provisions to deal with the problem of the Black money that is undisclosed foreign income and assets to provide for imposition of tax on any undisclosed foreign income and asset held outside India and for matters connected therewith and incidental thereto.[133]The Act is targeted towards gating hold of undisclosed incomes and assets (presumably acquired through illegal means, including corruption) which has flown offshore by resident Indians.

8.13 The Fugitive Economics Offenders Act, 2018

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128 S.3, The Prevention of Money Laundering Act, 2002.

129 Ibid S.2(sc)

130 Ibid S.5.

131 Ibid S.4.

132 Ibid Proviso to S.4.

133 Preamble to the Black Money (Undisclosed Foreign Income & Assets) and Imposition of Tax Act, 2015.

In wake of the recent flying of offenders from the country after committing huge economic frauds, the Fugitive Economics Offenders Act, 2018(FEOA) was enacted on July 31, 2018. The FEOA is for booking 'fugitive economic offender' which means any individual against whom a warrant of arrest in relation to a Scheduled Offence has been issued in India and who has left India and refuses to return to India to face criminal prosecution.[134]The strength of the FEOA lies in its far-reaching measures of immediate confiscation of all properties of any absconder, [135]which act as a strong deterrent against any desertion from the country.

8.14 The Benami Transactions (Prohibition) Act, 1988

The Act prohibits any benami transaction (purchase of property in false name of another person who does not pay for the property) except when a person purchases property in his wife's or unmarried daughter's name. Any person who enters into a benami transaction shall be punishable with imprisonment of up to three years and/or a fine.[136]All properties that are held to be benami can be acquired by a prescribed authority and no money shall be paid for such acquisition.[137]

8.15 Service Rules for Government Officials

Government officials in India are also bound to conduct themselves in accordance with the 'service rules' applicable to different classes of officials, including the Central Civil Services (Conduct) Rules 1964 and the All India Services (Conduct) Rules 1968 ('**Service Rules**'). The Service Rules enjoins a member of the Service to ensure standards of integrity and duty in respect of his employment.[138] The Central Civil Services (conduct) Rules 1964 (Central Services Rules) have restrictions on a government servant's connections with press or media.[139] It also prohibits government servants from accepting gifts from foreign dignitaries.[140]The rulesfurther prohibit government officials from receiving gifts, hospitality, transport, or any other pecuniary advantage that exceeds certain amount from individuals other than near relatives or personal friends (with whom such official has no

134 S.2(f) The Fugitive Economics Offenders Act, 2018.

135 Ibid S.5.

136 S.3, TheBenami Transactions (Prohibition) Act, 1988.

137 Ibid. S.5

138 Rule 3(2) of All India Services (Conduct) Rules,1968.

139 Rule 8of Central Services Rules.

140 Ibid Rule 12(4).

business dealings) without the sanction of the government, however, a casual meal, a casual lift, or other social hospitality is permitted.

9. Conclusion

Democratic institutions flourish only when the demands of human rights and human development are met with. To meet the demands of human rights, there has to be good governance and that can be done only through an Inclusive Governance. In modern democracies, inclusive governance is the only tool to ensure that the marginalized and deprived sections of the society are brought to the mainstream through their involvement in the decision making process. Inclusiveness manifests equality and lack of discrimination as it fixes accountability and answerability. Once these two aspects are part of the decision making process, there is absence of discretion and reduced corruption which in turn prevents siphoning of funds and bureaucratic delays. Such 'inclusive democratic governance' then leads to the development and growth of the deprived and disadvantaged sections of the society, which is the mandate of rule of law.

Political corruption has a disastrous impact on education and health,which are basic human rights. Public funds instead of fulfilling these basic goals reach the private coffers of political leaders. Educational institutions and health care centers are understaffed, underfunded and devoid of the required infrastructure to meet the needs of the people. The affluent manage to buy education from private institutions while the poor are left to struggle with illiteracy and unemployment. People get demoralized when their kith and kin die due to lack of vaccine,medicine and drugs. The funds which should have been used for securing drinking water for every household goes to the swimming pool of the ruling elite, be it the politician or the bureaucrat. There is complete mockery of good governance and rule of law. There is erosion of faith in democratic institutions and people start feeling cheated,giving rise to unrest and dissatisfaction.

Sachidanand Sinha, the Provisional Chairman of the Constituent Assembly on the historic day of December 9,1946,quoted Joseph Story in his inaugural address to demonstrate that the constitutional structure of the world's newest democracy might collapse due to corruption and negligence of its people:

---------"The Structure has been created by architects of consummate skill and fidelity; its foundations are solid; its compartments are beautiful as well as useful; its arrangements are full of wisdom and order; and its defenses are impregnable from without. It has been reared for immortality, if the work of man may just aspire to such a title. It may nevertheless perish in an hour by the folly, or corruption, or negligence of its only keepers, THE PEOPLE.

Republics are created -these are the words which I commend to you for your consideration – by the virtue, public spirit and intelligence of the citizens. They fall when the wise are banished from the public councils because they dare to be honest, and the profligate are rewarded because they flatter the people in order to betray them."[141]

The foundations of the Constitution have been shaken by the folly of the people, the corruption of our politicians and the negligence of the elite. In just 30 years, we have reduced the noble processes of our Constitution to the level of a carnival of claptrap, cowardice and chicanery. [142]

At this moment, when the nation is standing on the escalator of anarchy and corruption, right- minded citizens cannot afford to stand frozen in disgust and dismay. We cannot merely look upon the political developments in sorrow and upon our politicians in anger. The problem facing the country has to be solved without delay-we are racing against time. A problem avoided turns into a crisis; and the crisis not mastered can turn into a disaster further down the road.[143]

I cannot but disagree with the prophetic words of the legend called *Palkhivala.* If the menace of corruption is not curbed at the earliest, we are no doubt on the road to disaster. In spite of having a plethora of legislations, corruption is on the rise. At the micro level, it is the people at large who have to stand against corruption. There has to be a denial in not only being part of any system which facilitates corruption but also rejection of the corrupt from the social order. It is high time, the public stop looking at the palatial grandeur acquired through corrupt means with respect and there should be complete abhorrence of filthy display of wealth obtained at the cost of public exchequer. It is now the turn of the citizen, as opined by the highest judicial seat of the nation;

Tackling corruption is going to be a priority task for the Government. The Government has been making constant efforts to deal with the problem of corruption. However, the constant legislative reforms and strict judicial actions have still not been able to completely uproot the deeply rooted evil of corruption. This is the area where the Government needs to be seen taking unrelenting, stern and uncompromising steps. Leaders should think of introducing good and effective leadership at the helm of affairs; only then benefits of liberalization and various programmes, welfare schemes and programmes would reach the masses. Lack of awareness and supine attitude of the public has all along been found to

141 Constituent Assembly Debates, Lok Sabha Secretariat, Book 1, page.5

142 NaniA.Palkhibala, *We the People,* USB Publishers Distributors Ltd. page. 41.

143 Ibid Page.42

be to the advantage of the corrupt. Due to the uncontrolled spread of consumerism and fall in moral values, corruption has taken deep roots in the society. What is needed is a re-awakening and recommitment to the basic values of tradition rooted in ancient and external wisdom. Unless people rise against bribery and corruption, society can never be rid of this disease. The people can collectively put off this evil by resisting corruption by any person, howsoever high he or she may be.[144]

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144 *Neera Yadav v. CBI*, (2017) 8 SCC 757, Para 61.

Statement of Particulars Under Section 19D (b) of the Press & Registration of Book Act Read with Rule 8 of the Registration of Newspaper (Central) Rules, 1956

FORM IV

1.	*Place of Publication*	Chotanagpur Law College, Namkum, Ranchi, Jharkhand
2.	*Periodicity of its Publication*	Bi-Annual
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6.	*Name and address of individual who own the papers and or shareholder holding More than one percent of the total capital*	Chotanagpur Law College, Namkum, Ranchi, Jharkhand

I, P. K. Chaturvedi hereby declare that the particulars given are true to the best of my knowledge and belief. Edited and Published by Chotanagpur Law College, Ranchi, Jharkhand

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लोके धर्मिष्ठं प्रजा उपसर्पन्ति।
धर्मेण पापमपनुदति।
धर्मे सर्वं प्रतिष्ठितम्।
तस्माद्धर्मं परमं वदन्ति।

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