

## CHAPTER III

# PROTECTION OF CUSTODIAL DIGNITY UNDER INTERNATIONAL LAW

The concept of custodial dignity under human rights movement being a global phenomenon, has been exercising profound influence among the world community. The fight for human dignity has to be universal. The protection of inherent dignity of a human being is regardless of his nationality and socio-political status.

The last decade has witnessed a world wide movement for the protection of fundamental human rights, however, the idea of inalienable human rights are not new and its origin can be traced to the concept of Natural law and Natural rights. In the time frame of the universe measured in millennium, the systematic proclamation of declarations of human rights is recent; its beginning can be traced to Magna Carta (12,15), the English Bill of Rights (1688), the American Declaration of Independence (1776), and the French Declaration of the Rights of Man (789).<sup>223</sup>

The legal process towards the universalization of human rights started in the mid Twentieth Century after the Second World War<sup>224</sup>. The world was witnessed of the horrors of two world war and its impact compelled the Nation representative to assembled and met at San Francisco on 20<sup>th</sup> June, 1945 and adopted the United Nations Charter which inter alia is declaration of faith "in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations, large and

---

223. K.I.Vibhuti, Criminal Justice,[1<sup>st</sup> Edition,2004], Eastern Book Co. Lucknow,P. 96.

224. Dr. B.P. Dwivedi, "New Modes of Human Rights: The Protection Against Custodial Violence And Disappearances", A Paper Presented in the National Seminar,2001.At the Department of law, University of North Bengal.

small. The preambles as well as Article 1, 55, 56, 62, 68 and 76 of the U.N. Charter provide the basis for elaboration of the content of standards. It has laid down machinery for implementing protection of the human rights. The charter of the United Nations declares in its preamble its determination to reaffirm faith in fundamental human rights, and to promote social progress and better standards of life in larger freedom. One of the purposes of the United Nations Charter 1945 is to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction to race, sex, language or religion.<sup>225</sup> They also imposed an obligation upon the U.N. and its member states to promote universal respect for, and observance of, human rights and fundamental human rights and fundamental freedom for all without distinction as to race, sex, language or religion. The members of U.N. are under a legal obligation to act in accordance with these principles and it is their duty to respect and observe fundamental human rights and freedom.

#### **Universal Declaration on Human Rights 1948 :**

On 10<sup>th</sup> December 1948<sup>226</sup>, the general Assembly of the United Nations adopted Universal Declaration of Human Rights. This was the first positive manifestation of internationalizing of human rights values though it was not binding rather than an authoritative guide. The preamble of universal Declaration of Human Rights, 1948 declares that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, Justice and peace in the world."<sup>227</sup> It comprises a broad range of rights, has inspired more than 60 human rights instruments which together constitute an international standard of human rights. Article 1 forms the basis of the Declaration which

---

225. The Charter of United Nations, 1945.

226. The Universal Declaration on Human Rights, 1948.

227. The Preamble of Universal Declaration on Human Rights, 1948

says: All human beings are born free and equal in dignity and rights. A group of articles 3 to 21 contain civil and political rights. Out of these, Article 3 is of the fundamental importance which says that everyone has the right to life, liberty and security of persons.<sup>228</sup> This right is further strengthened by the freedom from torture or cruel, inhuman or degrading treatment or punishment,<sup>229</sup> the right to recognition everywhere as a person before the law, freedom from arbitrary arrest, detention or exile<sup>230</sup>, the right to fair trial and public hearing by an independent and impartial tribunal the presumption of innocence of a person charged with a penal offence until proved guilty as contained in Article 11(a) is meant to insult him against any high-handed treatment by the authorities declining with him in the matter.

**Implementation of Universal Declaration in India:** Human Rights law is both domestic and international which is intended to promote Human Rights, which are universal legal guarantees protecting individuals against actions and omissions that interfere with fundamental freedoms and Human Dignity. The Universal Declaration has exercised a great influence both internationally and nationally. It is a message to all who are committed to freedom, justice and peace in the world. It has been the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in a number of international human rights treaties. It has inspired a number of Declarations and international conventions concluded under the auspices of the United Nations and of the specialized agencies.

The provisions of Universal Declaration of Human Rights have also influenced various national constitutions, national legislations, regulations and politics that protect fundamental Human Rights. These domestic

---

228. "Everyone has the Right to life, liberty, security or person."

229. Id. Article 5.

230. Id. Article 9.

manifestations include direct reference to the Universal Declaration or incorporation of its provisions. The Indian Constitution bears the impact of the Universal Declaration. Drafted around the same time as the Universal Declaration of Human Rights, 1948, the Indian Constitution captures the essence of Human Rights in its Preamble and the Articles on Fundamental Rights and the Directive Principles of the state policy. Undoubtedly, the founders of the Constitution, it appears, were conscious about content of declaration, and therefore they gave due recognition to its provisions. The Preamble of the Constitution stated "dignity" of the individuals which implied that the worth inherent in the human person was well recognized. A number of fundamental rights guaranteed to individuals in part III of the Indian Constitution which were similar to the provisions of Universal Declaration 1948.

In **Keshwananda Bharati v. State of Kerala**,<sup>231</sup> the Supreme Court observed that "The Universal Declaration of Human Rights may not be a legally binding instrument but it shows how India understood the nature of Human Rights at the time the Constitution was adopted. Thus although the Supreme Court stated that the Declaration cannot create a binding set of rules, and that even international treaties may at best inform judicial institutions and inspire legislative action, Constitutional interpretation in India has been strongly influenced by the Declaration.

In the judgment given in **Chairman, Railway Board and others v. Mrs. Chandrima Das**,<sup>232</sup> the Supreme Court observed that the Declaration has the international recognition at the "Moral Code of Conduct "having been adopted by the General Assembly of the United Nations .The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence.

---

231. AIR 1973 SC 1461

232. AIR 2000 SC 988.

Moreover, the Supreme Court of India, reiterating its earlier decision in **Bodhisattwa v. Ms Subhra Chakroborty**,<sup>233</sup> and observed that the Fundamental Rights under the Constitution of India are almost in consonance with rights contained in the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights and the Covenant on Social Economic and Cultural Rights to which India is a party.

In **Prem Shankar Sukla v. Delhi Administration**,<sup>234</sup> while dealing with the handcuffing of prisoners and other humiliations inflicted on persons in custody, the Supreme Court of India observed :

“ After all, even while discussing the relevant Statutory Provisions and Constitutional requirements, Court and Counsel must never forget the core principles found in Article 5 of the Universal Declaration of Human Rights,1948.i.e.” No one shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment.”

While international treaties do not automatically become part of domestic law upon ratification,<sup>235</sup> the Constitution provides, as Directive Principles of State Policy, that the government shall Endeavour to foster respect for international law and treaty obligations in dealing of organized people with one another<sup>236</sup> and also authorizes the Central Govt. to enact legislation implementing its International law obligations without regard to the ordinary division of central and state govt. powers. The Supreme Court of India has frequently interpreted the India’s International law obligations.<sup>237</sup> Justice A.S. Anand argues that any interpretation of a national law or Constitution which advances the cause of human rights and seeks to fulfill the purposes of international instruments must be preferred to a sterile alternative. He further argues that it is a proper part of judicial process and

---

233. AIR 1996 SC 922.

234. AIR 1980 SC1535.

235. State of Madras v. G.G, Menon, AIR 1954 SC 517.

236. Article 51(c) and 253, of the Indian Constitution.

237. People’s Union for Civil Liberties v. Union of India, AIR 1998 SC 568.

a well established judicial function for national courts to have regard to the International obligations under taken by the country in question whether or not these have been incorporated into domestic law for the purpose of removing ambiguity or uncertainty from national Constitution, legislation or common law.

Article 22 to 27 declares the provision of economic social and cultural rights among which Article 25 recognized right to a standard of living adequate for the health and well being himself and of his family, including food, clothing, housing and medical care. These are inherent rights to be enjoyed by all human beings of the global village – men, women and children, as well as by any group of society, disadvantaged or not – and not 'gifts' to be withdrawn, withheld or granted at some one's whim or will.

Further having regard to the non – binding nature of the universal declaration of human rights, in 1966, two more international covenants have been adopted. These did set the standard and measures of implementation in addition to the ordinary working of the national legal systems of Nation states. These covenants civil and political rights<sup>238</sup> and economic, social and cultural rights<sup>239</sup> are thus intended to modify the universal declaration of human rights in as much as the covenants have legal force as treatise.

#### **International Covenant On Civil and Political Rights 1966:**

In 1966 the general Assembly adopted the International Covenant on civil and political rights which came into force on 23<sup>rd</sup> March 1976: Article 6 of the covenant declares inherent right to life of a human being. Article 7 covenanted that no one shall be subjected to torture or to cruel, inhumane

---

238. The International Covenant on Civil and Political Rights 1966.

239. The International Covenant on Economic, Social and Cultural Rights, 1966.

or degrading treatment or punishment.<sup>240</sup> Article 9 declares the prohibition of arbitrary arrest or detention. Under Article 10 of the said covenant all persons deprived of their liberty shall be treated with humanity and with respect for inherent dignity of the human person and the accused person shall, save in exceptional circumstances, be segregated from convicted persons and shall be subjected to separate treatment appropriate to their status as un-convicted persons. The minimum guarantees to which everyone charged with a criminal offence, is entitled in full equality covenanted in Art 14(3), inter-alia, provide that no one shall be compelled to testify against himself or to confer guilt, which obviously will rule out use of force of any kind on a person accused of any crime.<sup>241</sup>

**Implementation of the provisions of International Covenant on Civil and Political Rights in India:** The keystone of the Covenant on Civil and Political Rights 1966, are the Charter provisions concerning human rights and the Universal Declaration, 1948, which rightly reckoned as the mine from all instrument on human rights have quarried. International Covenant on Civil and Political Rights came into on 23<sup>rd</sup> march, 1976 containing 53 Articles divided into VI parts. India acceded to International Covenant on Civil and Political Rights and India signed and ratified the international Covenant on Civil and Political Rights to implement the standard set forth in the International Covenant on Civil AND Political Rights. The provisions of International Covenant on Civil and Political Rights are reflected in our Constitution in part III as Fundamental Rights. The part III of the Constitution of India specially the Article 21, guarantees to the people certain fundamental Rights and freedom as like the International Covenant on Civil and political Rights such as equality before law, equal protection of law, right to life, prohibition of torture or cruel, inhuman and degrading treatment or punishment, prohibition of arbitrary arrest and detention etc.

---

240. Article 7 of the International Covenant on Civil and Political Rights, 1966.

241. Id. Article 14(3)

These rights are available against the state in the sense that it constitutes restraint on the legislative and executive powers of the state. A fundamental right can not be destroyed even by an amendment to the Constitution if it forms the basic structure of the Constitution.

The right of liberty is also protected by several other provisions of the Indian Constitution apart from Article 21. Article 20, in keeping with Article 9(3) of the International Covenant on Civil and Political Rights, provides that a person who is arrested must be produced before a judicial officer within 24 hours of arrest, as provided in Article 9(2) of the ICCPR, he must be informed of the grounds of arrest at the time of his arrest. The arrest can not be made except under the authority of and in accordance with law mentioned in Article 9(1) of the ICCPR. If a person is unlawfully arrested or detained what is his remedy? Of course he is entitled to a writ of habeas corpus. But can he get compensation? There is no provision in Indian Constitution in giving right of compensation to a victim of unlawful arrest and detection. But article 12(4) of the ICCPR provides for it. The Supreme Court of India fills this gap in the case of **Rudal Shah's**<sup>242</sup> case, where the petitioner was released 14 years after he was acquitted, the Supreme Court directed payment of compensation by the state saying that payment of compensation was the only way in which the violation of Article 21 could be redressed. Similarly the Supreme Court awarded compensation for unlawful detention in **Bhim Singh's**<sup>243</sup> case and for death on account of police firing in *People's union for Democratic Rights v. State of Bihar and Others*.<sup>244</sup> Wrongful handcuffing was the reason for compensation in **Ravikant's** case<sup>245</sup> and in **Nilavati Behera's**<sup>246</sup> case where the compensation was awarded to a mother whose child died in police custody. The plea of

---

242. *Rudal Shah v. State* AIR 1983 SC 1086.

243. *Bhim Singh v. State of J&K* AIR 1986 SC 494.

244. (1987)I SCR 631.

245. (1992)2 SCC 373.

246. (1993)2 SCC 746.

Sovereign immunity by way of defense against the claim for compensation was rejected. Thus by a process of judicial law making, Article 12(4) of the ICCPR was incorporated in domestic jurisprudence. The Supreme Court has also made liberal use of the international conventions and norms to expand the scope of human rights guaranteed under the domestic law. It has held that the void in the domestic law can be filled and the meaning and content of a human rights can be enlarged with the aid of International Conventions, where there is no inconsistency between the two.<sup>247</sup>

For instance, in **Jolly George Verghese v. Bank of Cochin**,<sup>248</sup> the Supreme Court read the proviso to section 51 of the Civil Procedure Code by importing the International Covenant on Civil and Political Rights. In **Sunil Batra v. Delhi Administration**,<sup>249</sup> the Supreme Court took note of Article 10 of the International Covenant on Civil and Political Rights. In **Sheela Barse v. Secretary, Children's Aid Society**,<sup>250</sup> the Supreme Court held that the international instruments which have been ratified by India and which elucidated norms for the protection of the children cast an obligation of the state to implement their principles.

### **International Covenant on Economic, Social and Cultural Rights 1966:**

The international conference of Human Rights at Tehran has pointed out that without full realization of economic, social and cultural rights the implementation of civil and political rights was not possible. Economic, social and cultural rights are incorporated in the covenant on Economic, Social and cultural rights which were adopted by the General Assembly on 16<sup>th</sup> December, 1966 and entered into force on 3<sup>rd</sup> January, 1976. The

---

247. AIR 1980 SC 470.

248. AIR 1980 SC 470

249. AIR 1978 SC 1675.

250. AIR 1987 SC 656.

covenant includes the following rights: right to health,<sup>251</sup> right to adequate food, the right to adequate standard of living<sup>252</sup>.

It may be mentioned here that under the international covenant on economic, social and cultural rights the states parties undertake "to take steps", progressively for the full realization of the rights recognized in the present covenant. The obligation of the state parties under this covenant is only "to take step". It may be compared with their obligation under the international covenant on civil and political rights under which the state parties undertake "to respect and ensure" to all individuals within its territory the right recognized in the said covenant<sup>253</sup>. Thus, state parties under the international covenant on economic social and cultural rights are not under an obligation "to respect and ensure, rather they are under an obligation "to take steps towards the realization of those rights incorporated therein.

**Implementation of International Covenant on Economic, Social and Cultural Rights in India:** India has signed and ratified the International Covenant on Economic, Social and Cultural Rights. The right guaranteed under the Indian Constitution comprised both Civil and Political rights and Economic, Social and Cultural Rights that are described in the respective Covenants. The former is incorporated in Indian Constitution as fundamental rights which are enforceable by High Court and Supreme Court. The Economic, Social and Cultural Rights include the right to free legal aid, to education, to health, minimum wages for workers are to be found under the description of Directive Principles of State Policy contained in part IV of the Indian Constitution, which according to Article 37"shall not be enforceable by any court but the principles therein laid down are

---

251. Article 12 of the International Covenant on Civil and Political Rights 1966

252. Id. Article 11

253. Id. Article 2

nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply those principles in making law.

The Directive Principles of State Policy which reflects the provision of the Covenant on Economic, Social and Cultural Rights, are the embodiment of the principles of Social Engineering and ideas of the social order that contains popular aspirations and expectation of the people, move particularly the economic democracy. Indeed they are comprises between ideas and reality. The Directive Principles set the goals to be achieved in accordance with available material resources and economic capacity of the state from time to time. It is interesting to see that just like the covenant on Economic, Social and Cultural Rights is made flexible so far as its implementation is made subject to the capacity of the state, Part IV of the Constitution is also made flexible. The goals sets in the Directive Principles of State Policy is to advance the aims and objectives stated in the Preamble to the Constitution i.e. to establish a equalitarian society based on social, economic and political justice.

The Hon'ble Supreme Court in **Panchayat Varga Sharmajivi Sahakari Khetat Co-op. Society Ltd. And Others v. Haribhai Mebabhai and Others**,<sup>254</sup> observed that by operation of Article 46 read with Article 39(b) of the Constitution the material resources of the state should be so distributed as to sub-serve the common good. Article 46 enjoins that the state shall promote with special care the economic interest of the weaker section of the people in particular the schedule castes and schedule tribes and shall protect them from social injustice and all forms of exploitation. Consequently Preamble of the Constitution assures socio-economic justice to every citizen to provide dignity of persons.

---

254. AIR 1996 SC 2578.

In **Dalmia Cement (Bharat)Ltd. v. Union of India**,<sup>255</sup> a bench of three judges has held that "Social Justice in the comprehensive form to remove social imbalances by law harmonizing the rival claims or the interest of different groups and or sections in the social structure or individuals by means of which alone it would be possible to build up a welfare state. The idea of economic justice is to make equality of status meaningful and the life worth living at its best removing inequality or opportunity and of status-social, economic and political rights to cultivations or agricultural land was held to be a socio economic justice to an agriculturist as fundamental rights.

A bench of three judges of Supreme Court in **Consumer Education and Research Centre v. Union of India**,<sup>256</sup> held social justice is the arch of Constitution to ensure life to everyone to be meaningful and leviabie with human dignity In this case the Supreme Court further held that social justice consist diverse of principle essential for the orderly growth and development of personality of every citizen. Justice is the generic term and social justice is its facet a dynamic device to mitigate the sufferings of disadvantaged and to eliminate handicaps so as to elevate them to the level of equality to live life with dignity of persons.

At present the area of human rights is very vast and expanding. The scope of Article 21 of the Indian Constitution has widened and includes economic rights as right of health, freedom from hunger, etc. Moreover, with regard to criminal justice system the Article 21 of the Indian Constitution also includes prisoners rights such as Speedy trial, right to bail, right of Freedom from arrest, Legal aid, Human Treatment etc. The expanding horizon of Article 21 is developed through the different judicial decisions. The right to food is established in Indian Constitution and articulated in part IV as a duty of the state. However, part IV is considered a cluster of

---

255. (1996)10 SCC 104.

256. (1995) 3 SCC 42.

"Directive Principles "judicially. Nevertheless, in the past 20 years, the Supreme Court has recognized the right to food in Article 21 of the Constitution, which provides for the right to life, and thus, it includes in the broad interpretation of Article 21. Moreover, it narrows the distinction between civil rights and social rights. The most recent Supreme Court decision to recognize the right to food is People's Union for Civil liberties v Union of India.<sup>257</sup> In this case, the Supreme Court acknowledged the right to food as a right to life issue under of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, pregnant and lactating omen and destitute children, especially in cases where they or members of their family cannot provide food for themselves.

#### **Standard Minimum Rules for the Treatment of Prisoners:**

These rules were adopted by the United Nation Congress on the prevention of crime and the treatment of offenders at Geneva in 1955 and it was approved by the economic and social council by its resolution 663 (XXIV) of 31<sup>st</sup> July 1957 and 2076 (CXII) of 13<sup>th</sup> May 1977. These rules<sup>258</sup> are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thoughts and the essential elements of the most adequate system of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions. In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constituent endeavor to overcome practical difficulties in the way of their application in the knowledge that they represent as a whole the minimum conditions which are accepted as suitable by the United Nations.

---

257. AIR 1997 SC 1203.

258. Standard Minimum Rules for the Treatment of prisoners ,held at Geneva in 1955

Part I of the rules covers the general management of institutions and applicable to all categories of prisoners, criminal or civil or untried or convicted, including prisoners subjected to security measures or corrective measures ordered by the Judge.<sup>259</sup> In part I it has been made clear that in applying these rules there shall be no discrimination of grounds of race, colour, sex, language, religion, political or other opinion national or social origin, property, birth or other status. On the other hand, it is necessary to respect the religion beliefs and moral precepts of the groups to which a prisoner belongs.

Under different headings, these rules are mentioned in part I.

**Separation of categories** – The different categories of prisoners shall be kept in separate institutions or parts of institution taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

- a) Men and women shall so far as possible be detained in separate institutions, in an institution which received both men and women the whole of the premises allotted to women shall be entirely separate.<sup>260</sup>
- b) Untried prisoners shall be kept separate from convicted prisoners;
- c) Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of criminal offence.
- d) Young prisoners shall be kept separate adults.

**Accommodation** – All accommodation provided for the use of prisoners and in particular all sleeping accommodations shall meet all requirements of health, due regard being paid to elevate conditions<sup>261</sup> and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

---

259. Part 1 of Standard Minimum Rules for the Treatment of Prisoners, 1955.

260. Id. Rules 8.

261. Id. Rules 9.

b) In all places where prisoners are required to live or work: -

1. The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation.

2. Artificial light shall be provided sufficiently for the prisoners to read or work without injury to eyesight.

3. The sanitary installation shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in clean and decent manner.<sup>262</sup>

4. Adequate bathing and shower installation shall be provided so that every prisoners may be enabled and required to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in temperature climate.

#### **Personal Hygiene** -

1. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.<sup>263</sup>

2. In order that prisoners may maintain a good appearance compatible with their self - respect, facilities shall be provided for the proper care of the hair and beared, and men shall be enabled to shave regularly.

#### **Clothing and Bedding** -

3. Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate an

---

262. Id. Rules 9.

263. .Id. Rules 15.

adequate to keep him in good health. Such clothing in no manner be degrading or humiliating.<sup>264</sup>

4. All clothing shall be clean and kept in proper condition, under clothing shall be changed and washed as often as necessary for the maintenance of Hygiene.

**Food** –

1. Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.
2. Drinking water shall be available to every prisoner whenever he needs it.<sup>265</sup>

**Medical Service** –

1. At every institutions there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and in proper cases, the treatment of states of mental abnormality.<sup>266</sup>
2. Seek prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.
3. In women's institutions there shall be special accommodation for all necessary prenatal and post natal care and treatment arrangement shall be made whenever practicable for children to be born in a

---

264. Id. Rules 17

265. Id Rules 20 of Standard of Minimum Rules for the Treatment of Prisoners, 1955

266. Id .Rules 22.

Hospital outside the institutions. If a child is born in prison, this fact shall not be mentioned in the birth certificate.<sup>267</sup>

4. Where Nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a Nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mother.
5. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physicals or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions, the rotting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work<sup>268</sup>.

#### **Instrument of Restraint** –

Instrument of restraint such as handcuffs, chains, irons and stretches, shall not be used as restraints. Other instruments of restraints shall not be used except in the following circumstances.

1. As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before judicial or administrative authority.<sup>269</sup>
2. On medical ground by direction of medical officer.
3. By order or direction, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property, in such instances the direction shall at once consult the medical officer and report to the higher administrative authority.

---

267. Id. Rules 23.

268. Id Rules 24.

269. Id. Rules 33.

4. The patterns and manner of use of instruments of restraints shall be decided by the central prison administration, such instruments must not be applied for any longer time than is strictly necessary.<sup>270</sup>

Part II of this rules contains rules applicable only to the special categories dealt with in each section nevertheless, the rules under section 'A' applicable to categories of prisoners dealt with in section 'B', 'C' and 'D' provided they do not conflict with one rules governing those categories and are for their benefits. The rules mentioned in section 'A' are inter alia: -

1. Imprisonment and other measures which results in cutting off an offender from the outside world are affective by the very fast of taking from the person the right of self – determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggregate the sufferings inherent in such a situation.<sup>271</sup>
2. The purpose and justification of a sentence of imprisonment or a similar measures derivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law abiding and self supporting life.
3. The hygiene of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoner or the respect due to their dignity as human beings.

In section A of part II, some rules have been laid down for the treatment of prisoner under the heading of treatment, which are: -

---

270. Id. Rules 34.

271. Id. Rules 57.

1. The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of a sentence permits, to establish in them the will to lead law abiding and self supporting lives after their release and to fit them to do so.<sup>272</sup>
2. To these ends – all appropriate means shall let used, including religious care in the countries where this is possible, education, vocational guidance and teaching, social case work, employment counseling physical development and strengthening a normal character, in accordance with the individual needs of each prisoner, taking account of his social and criminal history, his physical and mental capacitive and aptitudes, his personal temperament, the length of his sentence and his prospects after release.<sup>273</sup>

In section C of Part II, rules have been framed for the protection of prisoners who are under arrest or waiting for trial. These rules are: -

1. Persons arrested or imprisoned by reason of a criminal charge against them, who are detained either in police or in prison custody (jail) but have not yet been tried and sentenced will the referred to as untried prisoners "herein after these rules".
2. Un-convicted prisoners are presumed to be innocent and shall be treated as such.<sup>274</sup>
3. Untried prisoners shall be kept separate from convicted prisoners.<sup>275</sup>
4. Young untried prisoners shall be kept separate from adults and shall in principle be detained in separate institution.
5. Untried prisoners shall sleep singly in separate rooms, with the reservation of different local custom in respect of the climate.

---

272. Rules 65, of Standard Minimum Rules for the Treatment of Prisoners, 1955

273. Id. Rules 66.

274. Id. Rules 84.

275. Id. Rules 85.

6. If an under trial prisoner wears prison dress, it shall be different from that supplied to convicted prisoners.
7. An untried prisoner shall be allowed to be visited and treated by his own doctors or dentist if there is a reasonable ground for his application.
8. An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interest of administration of justice and of the security and good order of the institution.
9. For the purpose of his defense, an untried prisoner shall be allowed to apply for free legal aid where such aid is available and to receive visits from his legal advisors with a view to his defense and to prepare and hand to him confidential instructions. If these purposes, he shall, if he so desire, be supplied with writing material. Interviews between prisoner and his legal advisor may be within sight but not within the hearing of police.<sup>276</sup>

### **Implementation of U.N. Standards Minimum Rules of Prisoners in India :**

The International Penal and Penitentiary Commission made an Endeavour in 1929 to work out Standard Minimum Rules for the treatment of prisoners which could be uniformly applicable throughout the world, but its attempts failed because of the variations in geographical, physical and political conditions of different countries. Thereafter, in 1949 the United Nations convened a meeting of a group of experts to consider the problem of Crime prevention and to frame standard minimum rules for this purpose.

---

276. Id. Rules 92.

Consequently, a draft of standard minimum rules for the treatment of prisoners was submitted by the First Congress on Prevention of Crime and Treatment of Offenders, U.N.O. Geneva in 1955. The rules sought to eliminate undue torture and suffering to prisoners and narrowing down the gap between the prison life and free-life. There was a grater emphasis on rehabilitation of the prisoner and training him for his return to normal life in society.

The British colonial rule in India marked the beginning of penal reforms in this country. The British prison authorities made strenuous efforts to improve the condition of Indian prisons and prisoner

The legal obligations imposed on India are supplemented by these sets of U.N. guidelines on the treatment of prisoners. The United Nations Standard minimum Rules for the treatment of prisoners, expressly provide that "corporal punishment, punishment by placing in a dark cell, and cruel, inhuman or degrading punishment shall be completely prohibited as punishment for disciplinary offences." The rules also state that "no prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defense. The competent authority shall conduct a through examination of the case.

The surge in human rights consciousness that followed the Second World War and the creation of the United Nations produced the first international documents recognizing rights of prisoners, including Article 10 of the International Covenant on Civil and Political Rights (ICCPR). The first document exclusively dealing with prisoners was the United Nations Standard Minimum Rules for the Treatment of Prisoners. This document is concerned not only with the rights of prisoners, but with the proper management of a penal institution, with a view to avoiding indiscipline, disease, and the induction of inmates into lives of crime; these objectives

one can derive from the nature of the recommendations<sup>277</sup>. These include the separation of different classes of prisoners, individual sleeping accommodation (except where the system deliberately embraces dormitories), decent sanitation, food, clothing and exercise, medical services, fair and not excessive punishment regimes for disciplinary offences, complaints procedures, contact with family and 'reputable friends', access to general news, to reading materials, to respect and facilities for religious observance, respect for property, protection from unnecessary exposure to public insult and curiosity, general respect for dignity, freedom from discrimination, and a regime designed to reintegrate the prisoner into society, with appropriate education and rehabilitative measures. The philosophy of the Rules is encapsulated in Rules 57 and 58, which run as under:

Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

The purpose and justification of a sentence of imprisonment or a similar measure deprivation of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life. Thus, neither the Ancient nor Mediaeval India Imprisonment was

---

277. K.I. Vibhute, *Criminal Justice*, [ First Edition, 2004], Eastern Book Company, Lucknow, P.305.

considered to be a form of punishment. The main features of the prison system as it prevailed in Pre- British period may be summarized as follows:

- i. There were no prisons in the modern sense.
- ii. There was no description of the internal administration of Prisons.
- iii. No separate prison service existed and Courts were not feeding centers for prisons.
- iv. There were no rules for maintenance of prisons.

The British colonial rule in India marked the beginning of penal reforms in this country. The British prison authorities made strenuous efforts to improve the condition of Indian prisons and Prisoners.<sup>278</sup> Reforms in prison administration came to occupy public attention more than 150 years ago when the British Parliament passed an enactment in 1824 in regard to the essentials of prison administration.

In India the first "famous committee" on prison reforms was set up in 1836, the committee had Lord Macaulay as its member. It submitted its report in 1838 and criticized the corruption on subordinate establishment and the laxity of discipline. The main recommendations of the committee were:

\*That central Jails should be built to accommodate not more than 1000 prisoners each.

\*The Inspector General of Prisons should be appointed in all prisons.

\*Those sufficient buildings should be provided in all jails to accommodate prisoners comfortably.

---

278. Dr. Suresh v. Nadagoudar, "Judicial Contribution to Prison Reforms in India": An Overview," I.B.R. VOL. XXXIII 2006. P.41.

Consequently, in 1846 the first central prison was set up in Agra. The erstwhile united provinces, Punjab, Madras, Bombay and Bengal followed suit. A second committee on jail reforms was appointed in 1864 to minimize the high death rates in prisons and for considering other aspects of jail management. The Committee found that in the preceding ten years not less than 46,309 deaths occurred inside the prisons. It came to the conclusion that the sickness and mortality might be mainly due to: a) overcrowding b) bad ventilation c) insufficient clothing d) bad conservancy f) bad drainage g) sleeping on the floor h) deficiency of personal cleanliness i) bad water j) extraction of labour from unfit prisoners k) insufficient medical inspection.

The third prison committee was appointed in 1877. It reviewed "Jail administration generally", the fourth committee, appointed in 1888, suggested change in the rules of prison administration and classification and segregation of prisoners. Most of the recommendations of the committee were incorporated in the jail manual of various provinces. The work of the committee was supplemented by All India Committee, 1892. It resurveyed the whole jail administration and laid down further detailed rules. The prison Act of 1894 was mainly the outcome of the efforts of this committee. Thus, the prison Act of 1894, came into being which governs all the prisons in the country. The Act restricted and regulated the use of whipping, cellular confinement and penal diet. It provided for the classification of different offenders and tried to secure uniformity of treatment of all offenders in jail.<sup>279</sup>

Even though different commissions were appointed the Indian Prison system lagged behind on the reformatory side of the prison work. It failed to regard the prisoner as an individual and conceived of him rather as a

---

279. The Prison Act, 1894.

unit in jail administrative machinery. The Indian jail reforms committee 1919-20 under the chairmanship of sir Alexander Cardew, The All India Jail Manual Committee 1957-59, All India Jail Reforms Committee 1980 under the chairmanship of Justice A.N. Mulla. This report contained 659 valuable recommendations on various aspect of prison development for the consideration of central and state governments. Among the important suggestions made by the committee were<sup>280</sup>:

- Directive Principles of National policy on prisons should be formulated and embodied in part IV of the Indian Constitution.
- The subjects of prison and allied institutions should be included in the concurrent list of Seventh Schedule of the Constitution of India.
- Provisions of an uniform framework of correctional administration by a consolidated, new and uniform comprehensive legislation to be enacted by the Parliament for the entire country.
- Revision of jail Manuals should be given top priority.
- Suitable amendment of Indian Penal Code.

And the Expert Committee on Women Prisoners 1986-87 under the chairmanship of Justice V.R. Krishna Iyer were appointed to suggest suitable measures and accordingly these committees have made far reaching recommendations for jail reforms in India. The major recommendations of this committee were<sup>281</sup>:

- Provisions of a National Policy relating to the women prisoners in India.

---

280. The Recommendations of All India Jail Reforms Committee, 1980.

281. An Expert Committee on Women Prisoners 1986-1987.

- Formation of new rules and regulations relating to their punishment and conduct.
- Maintenance of proper Co-ordination among the police, law and prison for providing due justice to women prisoners.
- Provisions of legal aid for them.
- Constitution of separate prisons for women prisoners.
- Proper care for the baby both in jail to women prisoners and provisions of nutritious diet for the mother and the child.

In West Bengal, the Correctional Services Act, 1992 was enacted in order to provide better treatment of the lifestyle of the prisoners who are detained in jail. This Act<sup>282</sup> is the beginning of the new era, which covers the rights both fundamental and legal of the prisoners on the basis of democratic principles. It also includes the right to live with human dignity. All the relevant amendment have been incorporated in this respect. This Act is based on the principle of rehabilitation, by which prisoners can realize that a commission of a crime is against the society and will learn skills which will help them to lead a law abiding life.

The west Bengal Correctional Services Act 1992, is divided into 35 chapters and include the important provision such as: Admission of prisoners, medical treatment, classification and segregation of prisoners, interviews and communications of under-trial and civil prisoners, religious observances of prisoners, payment to convicts for work done in jail , special provision for female prisoners, juvenile prisoners and children and prisoners condemned to death. etc.

---

282. The West Bengal Correctional Services Act, 1992.

In **Sunil Batra v. Delhi Administration**,<sup>283</sup> the Supreme Court took note of Article 10 of the International Covenant on Civil and Political Right which states as that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. The Court then opined that: "The state shall take steps to keep up to the Standard Minimum Rules for Treatment of Prisoners recommended by the United Nations, especially those relating to work and wages, treatment with dignity, community contact and correctional strategies. In this latter aspect, the observations we have made of holistic development of personality shall be kept in view. The Supreme Court of India has repeatedly condemned the unnecessary use of handcuffs by the police as a violation of the right to personal liberty guaranteed by Article 21 of the Constitution of India. In the landmark Supreme Court case on handcuffing in **Prem Shankar Sukla v. Delhi Administration**.<sup>284</sup> In this case the validity of certain clauses of the Punjab Police Rules, which made handcuffing mandatory during arrest was challenged. In his opinion Justice Krishna Iyer eloquently stated." The guarantee of human dignity which forms a part of our Constitutional culture.....springs into action. When we realize that no manacle man is more than to mortify him, it is to dehumanize him and, therefore to violate his very personhood too often using masque of danger our ness and security"

The U.N. Standard Minimum Rules for the Prisoners ,1955 addressed the restraints in section 33<sup>285</sup> and 34<sup>286</sup>.According to the Rules, instrument of

---

283. Air 1978 sc 1675.

284. AIR 1980 SC 1535.

285. Instrument of restraints, such as handcuffs, chains, irons and strait- jackets shall never be applied as a punishment. Furthermore, chains or irons shall not be used as restraint. Other instruments or restraint shall not be used except in the following circumstances:

- a) As a precaution against escape during transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;

restraints can never be used for punitive purposes, or for longer than is strictly necessary. Although the Rules, do allow the use of restraints, during transfer to prevent escape, it is clear that Indian Police Forces use of handcuffs to humiliate, intimidate and punish is unacceptable. The Code of Conduct for the Law Enforcement Officials adopted in 1979, states that "no law enforcement officials may inflict, instigate or tolerate any act of torture or other cruel, inhumane or degrading treatment or punishment". The Code states:

"The term cruel, inhumane or degrading treatment or punishment has not been defined....but should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental." The breath of the Code's definition of cruel, inhuman or degrading treatment' suggests that abuse of hand cuffs by the Indian authorities violates the Code.

In Prem Shankar Sukla<sup>287</sup> and other leading cases the Supreme Court laid down strict procedural guidelines specifying both when and how the use of handcuffs is appropriate. According to the Court handcuffing is legal only if the arrestee is a) involved in serious non- bailable offence and b) previously convicted of a crime, of desperate characters, likely to commit suicide or likely to attempt to escape. The use of handcuffs and the reason for the use must be recorded. The H.S. conscious Code summed up its opinion of handcuffs in Sunil Batra(11) v. Delhi Administration.<sup>288</sup>

- 
- b) On medical grounds by direction of the medical officer;
  - c) By order of the director, if other method of control fail, in order to prevent a prisoner from injuring himself or others, or from damaging property, in such instances, the director shall at once consult the medical officer and report to the higher administrative authority."

286. "The patterns and the manner of use of instruments of restraints shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary"

287. AIR 1980 SC 1535.

288. AIR 1978 SC1575.

“To fetter prisoners in irons in an inhumanity unjustified, save where safe custody is otherwise impossible. The resort to handcuffs bespeaks a barbarity hostile to our goal of human dignity and social Justice.”

Despite their clear, specific and unambiguous judgment from the Supreme Court that abuse of hand cuffs continues.

There can be little doubt after the dynamic interpretations placed by the Court on Article 21 in **Maneka Gandhi v. Union of India**,<sup>289</sup> that a procedure which keeps such large number of people behind the bars without trial so long, cannot possibly be regarded as reasonable, just or fair so as to be in conflict with the requirements of the Article 21. It was with this observations that the Supreme Court directed the Bihar Government and the Patna High Court to furnish to the supreme Court details of criminal cases pending in Bihar and their year wise breakup.

The Supreme Court there after directed the release of such under-trials who were in detention for any unduly long period.

In **Hussainara Khatoon v. Home Secretary, State of Bihar**<sup>290</sup>, the Supreme Court observed that a procedure which does not make legal services available to a poor under-trials person cannot be regarded as just, fair and reasonable.

In **Citizen for Democracy v. State of Assam**,<sup>291</sup> the Court held that handcuffing and in addition tying with ropes of the patient prisoners who are lodged in the hospital inhuman and in violation of human rights guaranteed to an individual under International law and the la of the land.

---

289. AIR 1978 SC594.

290. AIR 1979 SC 1819.

291. (1995)3SCC 743.

In **Sheela Barse v. State of Maharashtra**,<sup>292</sup> the Supreme Court on a complaint of custodial violence to women prisoners in jail, directed that to those helpless victims of prison injustice, should be provided legal assistance at the state cost and protected against torture and maltreatment. Further, in **Sanjay Suri's** case,<sup>293</sup> the Apex Court held that the prison authorities should change their attitudes towards prison inmates and protect their human rights for the sake of humanity.

The Apex Court in **State of Gujrat v. Hon,ble High Court of Gujrat**,<sup>294</sup> observed that "reformation and rehabilitation is the basic policy criminal law, hence compulsory manual labour from the convicted prisoner is protected under Article 23 of the Constitution. Minimum Wages be paid to prisoners for their labour after deducting the expenses incurred on them. No prisons can be asked to do labour free of wages. It is not only the legal right of a workman to have wages for the work but also the social imperative and an ethical compulsion. Extracting somebody's work without giving him in return, is only reminiscent of the period of slavery and system of beggar.

Generally, most of the prisoners do not enjoy a right to free and qualified, frequent attention. They do not have choice to have physician of their own unless when his condition is critical than the doctor may come. They have no opinion on treatment. Thus, they have become 'double hand cap'. It violates right to health of a prisoner .Besides this the Mental Health Act 1987 provides that mentally ill person shall not be treated with indignity or cruelty. In **Veena Sethi v. State of Bihar**,<sup>295</sup> the Supreme Court held the importance of medical care of prisoners.

---

292. AIR 1983 SC 378.

293. Sanjay Suri v. Delhi Administration, Cr. LJ. 705(SC).

294. AIR 1998 SC 3164.

295. AIR 1983 SC 339.

### **U.N. Basic Principles of Justice for the Victims of Crime :**

Perhaps realizing the gravity of the problem the United Nations General Assembly (UNGA) in 1985 adopted a declaration of the basic principles of Justice for the victims of crime and abuse of power. The Declaration envisages the basic norms to be adhered to for the recognition of victim's right to information, treatment, restitution and compensation. The declaration also suggested certain measures to help victims and repose confidence in them. Prominent among them are : access to justice and fair treatment restitution, assistance and the right based victims movement. The relevant principles of this declaration are: -.

1. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanism of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.<sup>296</sup>
2. Victim should receive the necessary material, medical, psychological and social assistance through government voluntary, community based and indigenous means.
3. Victim should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to victim.<sup>297</sup>
4. Police, Justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims and guidelines to ensure proper and prompt aid.<sup>298</sup>

### **Implementation of Justice Victim to Crime in India:**

The criminal justice system in India in its quest for just and fair trial of an accused, not only generates certain safeguards to, and confer a set of

---

296. Principle 4 of the Declaration of Basic Principles of Justice for Victim of Crime and Abuse of Power,1985.

297. Id. Principle 14

298. Id.Principle 16.

rights-constitutional and statutory-on a accused but also rigorously implements, with utmost zeal for reformation and re-socialization of offenders, its penal system. However it does not exhibit its equal concerns to victims of crime when it comes to re-compensate them for the loss incurred or physical, mental or emotional injury sustained by them. The right of a victim of crime to restitution has not yet merited statutory recognition in India. There is neither a comprehensive legislation nor a well designed statutory scheme or a policy statement in India either allowing a crime victim to seek compensation from offender and/ or state or to participate, as a matter of right in the criminal justice process.<sup>299</sup>

The statutory provision aims at rendering justice rather restorative justice as reflected in the U.N. basic precepts of victims of crime in our country. In Indian legislative framework there are some statutory provisions which may provide justice to victims of crime and array for their proper compensation. Some of these statues are:

#### Victim Compensation Under Code of Criminal Procedure 1973:

The right of a victim of a crime to receive compensation is recognized under the Code of Criminal Procedure 1973. Section 357(3)<sup>300</sup> Cr. P. C. permits the court for grant of compensation in a broader context even where the accused is not sentenced to fine. The right of a victim of crime to receive compensation was recognized even under the code of Criminal Procedure Code 1898 but was available only when a suggestive sentence of fine was imposed and was limited to the amount of fine actually recovered. However, the provision of this section has been involved sparingly and inconsistently by the courts. In **Hari kishan and state of Hariyana v.**

---

299. K.I.Vibhute, Criminal Justice, Eastern Book Company, [First Edition 2004], P.374.

300. "When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order of the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced"

**Sukhbir Singh**<sup>301</sup> , The Supreme Court has directed all criminal courts to make liberal use of this power. In *Delhi Domestic Women's forum v. Union of India*,<sup>302</sup> the court directed the setting up of a criminal injuries compensation board, to award compensation of victims of rape. Moreover, in this case the Court laid down certain broad parameters for assisting the victims of rape. These are:

- The complainants in sexual assault cases should be provided with legal representation.
- The role of victim's advocate would not only be to assist her in police station and in court but also guide her in getting other kinds of assistance like psychiatric counseling and medical help.
- Legal assistance would have to be provided at the police station since the victim of sexual assault might very well be in a distressed state of mind.
- The police should be duty-bound to inform the victim of her right to representation before asking her any questions and the police report should state the victim was so informed.
- A list of advocates willing to act in these cases should be kept at the police station for victims. Such advocates should be appointed by the court, but to avoid delay advocates may be authorized to act in police stations before permission from the court has been obtained.<sup>303</sup>

Under section 359 Cr. P.C.<sup>304</sup> when any complaint of non- cognizable offense is made to a court, the court may, on conviction of the accused,

---

301. AIR 1988 SC 2127.

302. (1995)1 SCC 14.

303. *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14.

304. "Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused , may, in addition to the penalty imposed upon him, order him to pay to the complainant, in whole or in part, the cost incurred by him in the prosecution, and may further order that in default of payment, the accused shall suffer

order them to pay to the complainant, in whole or in a part, the lost incurred by him. In addition to the compensatory provision in Cr.P.C. there are more than 175 legislations in India that seek for compensatory relief to victims who have lost their life, limb, on receiving any injury, whenever with or without fault of others. the judiciary has played positive role by giving various relevant directives in order to give relief to victims of crime and abuse of power in the cases of **Rudal Sah v. State of Bihar**,<sup>305</sup> **Bodhisattva Gautam v. Subhra Chkroborty**<sup>306</sup> and **Venkatesh v. State of Tamilnadu**<sup>307</sup> AIR 1993 SC 123, **Chaban Factory board v. Chandrima Das**<sup>308</sup> (2000) 2' SCC 465.

The law commission of India in its 152<sup>nd</sup> report had recommended the introduction of Section 357-A prescribing inter alia, that compensation be awarded at the time of sentencing to the victims of crime.<sup>309</sup> Again in its 154<sup>th</sup> Report, the law commission of India went one step further and recommended that it was necessary to incorporate a new section 357-A in the code to provide for a comprehensive scheme of payment of compensation for all victims fairly and adequately by the courts. It is noted that none of the above recommendations has been acted upon by the government until now.<sup>310</sup>

#### Victim Compensation under Probation of Offenders Act 1958 :

The probation of offenders Act, 1958, empowers a trial court, at its discretion, to release an offender after due admonition and on probation of good conduct in suitable cases. Under section 5 of the probation of

---

simple imprisonment for a period not exceeding thirty days and such costs may include any expenses incurred in respect of process-fees, witnesses and pleader's fees which the Court may consider reasonable.

305. AIR 1983 SC1086.

306. AIR 1996 SC 922.

307. AIR 1993 SC 123.

308. (2000)2 SCC 465.

309. Law Commission of India, 152<sup>nd</sup> Report on Custodial Crimes (1994).

310. Law Commission of India, 154<sup>th</sup> Report on Custodial Crimes (1996).

offenders Act, 1958, the offender may be required, on released on probation. under section 3<sup>311</sup> or section 4 of the act provides to pay compensation to the victims of the crime. Section 5 of it makes it amply clear that such a power vests only with the court releasing an offender and is purely at its discretion. Even an appellate court or the High Court can not interfere unless it is of the view that the lower court has exercised such power capriciously<sup>312</sup> and unreasonably<sup>313</sup>.

It is thus evident that the Indian legal framework providing for compensation by an offender to his victims for loss suffered or injury caused by commission of the offence is inadequate. It does not provide a comprehensive legislative scheme for either compensating victims of crime or the payment of compensation and specified amount awarded to them. It neither mandates courts to compensate the victims nor creates any legal right in their favour. It is entirely left to the discretion of the court to compensate victims of crime as well as to include legal actions to recover the fine, out of which compensation is ordered.

#### **U.N. Body of Principles 1988:**

In 1988 the General Assembly Adopted the Body of principles for the protection of all person under any form of detention or imprisonment. This

---

311. "When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, 1860 or any offence punishable with imprisonment for not more than two years, or with fine or with both, under the Indian Penal Code or any other law, and previous conviction is proved against him and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offences and the character of the offender, it is expedient so to do, then notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4, release him after due admonition."

312. Manoj Kumar v. State of M.P. 2000.Cr.L.J.1997

313. Rajeswari Prasad v. R.B.Gupta, AIR 1961 Pat.19

Body of principles ensures the dignity, self respect and human right of person while under any form of detention or imprisonment.<sup>314</sup>

The principles contained therein are of universal application.

1. At the outset it requires that all persons shall be treated in a human manner and with respect for the inherent dignity of the human person.<sup>315</sup>
2. Arrest, detention and imprisonment shall only be carried out in accordance with the provisions of law and by competent authority.<sup>316</sup>
3. These bodies of principles shall be applied to all persons within the territory of any given state, without discretion of any kind, such as race, color sex, language, religion and religious belief, political or other opinion, national ethnic or social origin, property, birth or other status.<sup>317</sup>
4. Measures applied under the law and designed solely to protect the right and special statues of women, especially pregnant women and nursing mothers, children are juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory.<sup>318</sup>
5. No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>319</sup>
6. The authorities who arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of the powers shall be subject to recourse to a judicial or other authority.

---

314. Resolution 43/173 adopted 9<sup>th</sup> December,1988, hereinafter referred to as the Body of Principle.

315. Id. Principle 1.

316. Id. Principle 2.

317. Id. Principle 5(1).

318. Id. Principle 5(2).

319. Id. Principle 6.

7. Anyone who is arrested shall be informed at the true of his arrest of the reason for his arrest and shall be properly informed of any charge against him.<sup>320</sup>
8. An opportunity of being heard shall be given to the person arrested.
9. The following information shall duly recorded by the law enforcement officials: -
  - a) The reason for the arrest.<sup>321</sup>
  - b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority.
  - c) The identity of the law enforcement officials concerned.
  - d) Precise information concerning the place of custody.
10. Such records shall be communicated to the detained person, on his counsel, if any, in the form prescribed by law.

It is significant to note here that the responsibility lies on the authority to inform and explain on their rights and law to avail such rights, to the prisoners and detenué.<sup>322</sup> Further, the person is entitled to receive the above information in a language which he understands and to have the assistance, free of charge, of an interpreter. The place of custody and each transfer from one place to another shall be communicated as of right of the arrestee and detenués to his family members or friends of his choice. In case of juvenile special attention shall be given to notifying parents or guardians.<sup>323</sup> The aforesaid notification shall be required to be made without delay.<sup>324</sup>

---

320. Principle 10

321. Id. Principle 12.

322. Principle 13 of Body of Principles

323. Id. Principle 16(3).

324. Id. Principle 16(4).

The detained or imprisoned person shall be kept in a place of detention or imprisonment reasonably near his usual place of residence.<sup>325</sup> He shall be subjected to any medical or scientific experimentation which may be detrimental to his health even with his consent.<sup>326</sup> Special care is required to be taken during interrogation. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogation as well as the identity of the officials who conducted the interrogation and other persons present shall be recorded<sup>327</sup> and the person and his counsel shall have access to such information. After his admission to that place of detention or imprisonment a proper medical examination shall be offered as promptly as possible.

It is a novel idea that the obligation has been imposed upon the authorities to ensure assistance to dependent and minor members of the families of detained or imprisoned persons and to take care of the appropriate custody of children life without supervision. The right to make complaint or request regarding his treatment is available to the detained or imprisoned person, his counsel, a family member or any other person who has knowledge of the case. In case of death or disappearance of a detained or imprisoned person during his detention or imprisonment or shortly after the termination, an enquiry shall be held by a judicial or other authority.<sup>328</sup> There is a provision of compensation for the damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles.<sup>329</sup> The accused has the right to speedy trial within a reasonable time or to be released pending trial.

---

325. Id. Principle 20.

326. Id. Principle 22.

327. Id. Principle 23.

328. Id. Principle 34

329. Id. Principle 35.

United Nation adopted a body of principles approved by economic and social council in 1984, Which is known as rule of safeguards guaranteeing protection of the rights of those facing the death penalty.

In principle I it contains that the countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes it being understood that their scope should not go beyond international crimes with lethal or other extremely grave consequences.

In principle 2 it was laid down that capital punishment may be imposed only for a crime for which the death penalty is prescribed by law of the time of its commission.<sup>330</sup>

In principle 3 it contains the provision that persons below 18yrs of age at the time of the commission of crime shall not be sentence to death, nor shall the death sentence be carried out on pregnant women, or on new mother or on persons who have become insane.<sup>331</sup>

In principle 5, it contended that capital punishment may only be carried out pursuant to a final judgment rendered by a complaint court after legal process. Which given all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the international covenant on civil and political rights, including the rights of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.<sup>332</sup>

**The Implementation of U.N. Body of Principles and provisions of death penalty in India:** India's commitment to U.N. Body of Principles is enshrined in Indian Constitution and the various statutory laws such as Penal law, Criminal Procedure code and Police act etc. Death penalty is infliction of highest and extreme penalty. Death penalty is supreme

---

330. Principle 1 of Safeguard Guaranteeing Protection of the Rights of those Facing the Death Penalty.

331. Id .Principle 3.

332. Id. Principle 5.

punishment because it effects the very existence of human life. Death and exile were two principle devices to eliminate dangerous elements from the society. Death was the quickest mode of retribution as well as deterrence. In the form of legalized and justifiable homicide, the capital punishment seems to have originated with the concept of an orderly society only to deal with such extreme cases of disorderly deprivation of antisocial element as may be prescribed by it from time to time in accordance with social needs and exigencies.<sup>333</sup> But in 19<sup>th</sup> century ,the debate over the death penalty has acquired new dimension. The government of India has been insisting on the increased use of death penalty for particularly rape crimes instead of crime of murder .The judiciary too has been awarding the death penalty for violent crimes with increased regularity.<sup>334</sup>

Even in 21<sup>st</sup> century, many countries in the world award death penalty to the convicts and execute it in various forms according to their law of land. India is one of the few states in the world to have retained death penalty for murder. Indian government is contemplating to legislate and include a few others crime as capital crimes. The capital punishment is an affront to human dignity and human rights, yet others regard as marching forward to an orderly society. The discussion for and against the death penalty continues to be polemical, and so its solution runs up against a thousand obstacles.<sup>335</sup>

In India, the Code of Criminal Procedure required a Court sentencing a person convicted of an offence punishable with death to a punishment other than death to state the reason why it was not awarding death sentence.<sup>336</sup> In 1955, the amendment deleted this provision of the Criminal Procedure code but there was no indication either in Criminal Procedure

---

333. Anup Kr. Varshney, *Death Penalty :Its Emergence and Practice*, June, L.N.V. (1998). 25.

334. S. Murlidhar, ' Hang Them Now,' 40 J.I.L.I. (1998) 143.

335. Fr. Jeyaseelan, S, J. ' Hang the Death Penalty,' Jan, L.N.V.(2000)18.

336. Section 367(5) of the Code of Criminal Procedure ,1898.

Code , or in the Indian Penal Code 1860, as to which cases called for life imprisonment and which the alternative death penalty. The unsatisfactory state of the criminal law, the use of torture, the wide spread use of capital punishment, and other brutal and degrading penalties received the critical attention of writers of the Enlightenment. The movement to restrict or abolish the death penalty, launched in eighteenth century enlightenment exerted important influence throughout the civilized world, and that influence persisted to the present day. This century has given birth to numerous documents extolling human rights, including the rights of prisoners and convicts. Particularly in 1931, the question of abolition of death sentence was raised, but this time was rejected. After 1931, on several times the issue was raised, but due to various reasons such as political, social, this attempt was rejected. In 1962, a resolution was made in the parliament to abolish capital punishment in India. The government of India referred the question to the law commission of India, which submitted its report. The law commission did not approve the abolition of capital punishment. It however, recommend certain changes in penal provisions. In *Jag Mohan Singh v. state of U.P.*<sup>337</sup> the Supreme Court held that the sentencing discretion is to be exercised judicially on "well recognized principles", after balancing all the aggravating and mitigating circumstances of the crime. By well recognized principles, the Court meant the principles crystallized by judicial decisions, illustrating as to what were regarded as in aggravating and mitigating circumstances in those cases. The application of these well recognized principles are now guided by legislative policy embodied in section 235(2)<sup>338</sup> and 354(3)<sup>339</sup> of the Code of Criminal

---

337. AIR 1973 SC 547.

338. "If the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

339. "When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term or years, the judgment shall state

Procedure, 1973. Section 235(2) speaks of the right of sentences hearing to be given to the offender and section 354(3) speaks for the special reason to be stated for awarding death penalty and lays down life imprisonment as a rule and death sentence as an exception in murder cases.

Today, non deprivation of life is the core of the right of person, recognized by almost every nation of the world in their respective Constitution. The death penalty is characterized as cruel, degrading and inhuman punishment which infringes the basic rights expressed in Article 3 of the European Convention on Human Rights and in Article 3 of the Universal Declaration of Human Rights .In 1989, the Assembly of the United Nations adopted 2<sup>nd</sup> Optional Protocol to the International Covenant on Civil and Political Rights which states that death penalty may not be enforced any more. In 1997, the Human Rights Commission of the United Nations adopted a resolution which demands for a moratorium on the death penalty and consideration of complete abolition of the death penalty.

The Indian Constitution ensures that "No person shall be deprived of his life or personal liberty, except according to procedure established by law." The Supreme Court of India has ruled that the capital punishment is not forbidden by law, and therefore it is permissible in rarest of rare cases and death penalty is perse is not constitutionally violative. The Supreme Court also suggested that to impose death penalty, the procedure of law has to be followed.

The Supreme Court in *Bachan Singh v. State of Punjab*,<sup>340</sup> on a majority verdict with P.N. Bhagwati J. expressing his powerful dissent –held that death penalty for murder was constitutional. Not long ago death penalty for murder was the rule in India. The underlying policy of the state was that

---

the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence”

340. AIR 1980 SC 898.

death penalty would work as deterrent. However, there was discern<sup>341</sup>able change with the amendment of section 367(5) of the old Criminal Procedure Code by the Criminal Procedure (Amendment) Act, 1955. There was thus a definite swing in the Code in favour of life imprisonment consistent with the changes in the criminological thought. It is now the discretion of the court to award either of the two sentences envisaged in section 302 I.P.C depending upon the fact situation.

The principle of law enunciated by Supreme Court for awarding death sentence in the case of **Bachan Singh v. State of Punjab**,<sup>342</sup> are reiterated by the Supreme Court as follows:

- (i) The extreme penalty of death need not be inflicted in gravest case of extreme capability.
- (ii) Before opting for the death penalty, the circumstances of the offender also require to be taken into consideration along with the circumstances of crime.
- (iii) Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime.
- (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so mitigating circumstances have to be accorded full weight age and a just balance has to be struggle between the aggravating and mitigating circumstances before the option is exercised.

The majority of the four judges in **Bachan Singh**<sup>343</sup> negated the challenge to the constitutionality of the death penalty, affirmed the decision in

---

341. "Whoever commits murder shall be punished with death, or [imprisonment for life]and shall also be liable to fine."

342. AIR 1980 SC 494.

343. **Bachan Singh v. State of Punjab**, AIR 1980 SC 898.

Jagmohan<sup>344</sup> and overruled the case of Rajendra Prasad<sup>345</sup> in so far as it sought to restrict the imposition of death penalty only to cases where the security of the state and society, public order and the interest of the general public were threatened. The majority view was that death penalty as an alternative punishment was neither unreasonable nor lacking in public interest.

The court rejected the second limb of the challenge of the validity of section 354(3) of the Code of Criminal Procedure, 1973, on the ground that it permitted the imposition of death penalty in an arbitrary and whimsical manner. It explained that the requirements under section 235(2) for a pre-sentence hearing of the accused coupled with the requirement that the sentence of death had to be confirmed by High Court under section 366(2) of Criminal Procedure Code meant that errors in the exercise of judicial discretion could be corrected by the superior courts. Although the court was not inclined to lay down standards or norms for guiding the exercise of judicial discretion. It accepted the suggestion of amicus curia.

Once the death penalty was challenged in **Mithu v. State of Punjab**,<sup>346</sup> this time section 303 of Indian Penal Code, was the subject of challenge. This section prescribes that if a person under sentence of life imprisonment commits murder, he must be punished with death. This section was declared unconstitutional under Article 21 because the procedure by which section 303 of Indian Penal Code authorized the deprivation of life was unfair and unjust. This was an instance judiciary unanimously supported justice Krishna Iyer in **Maneka Gandhi**<sup>347</sup> that law could be tested under Article 21 also. In this case, Chandrachud, C.J, emphasized that the last word on

---

344. Jagmohan Singh v. State of U.P. AIR 1973 SC 947.

345. Rajendra Prasad v. State of U.P. AIR 1979 SC 916.

346. Mithu v. State of Punjab, AIR 1973 SC 473.

347. Maneka Gandhi v. Union of India, AIR 1978 SC 597.

the question of justness and fairness did not rest with legislature. It was for the court to decide that the deprivation was fair, just and reasonable.

In **Machhi Singh v. State of Punjab**,<sup>348</sup> the court emanating from **Bachan Singh's**<sup>349</sup> case and spelt out the task for the sentencing judge. It said:

"A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weight and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised". The court then explained how the guideline would be exercised. A moment reaction was encouraged against the execution of **Dhananjay Chatterjee**<sup>350</sup> whose conviction and sentence under sections 376,380 and 302 IPC was upheld by the Supreme Court holding the same as rarest of rare case, as is also found in the case of Bachan Singh.<sup>351</sup>

Thus, both in **Jagmohan**<sup>352</sup> and in **Bachan Singh**,<sup>353</sup> the court bowed to legislative wisdom and shrank away from striking down the death penalty. But the similarity in the two decisions ended there. The change brought about by Bachan Singh, as explained by Machhi Singh, was significant. There was an affirmation that death penalty was the exception and not the rule. The formulation of the rarest of the rare test, credited craftily by the court, still shy of being accused of legislating, to the amicus curiae who assisted it, has actually crystallized into applicable law. Bachan Singh also witnessed the judicial acknowledgement of reformation and rehabilitation of the delinquent as one goal of punishment.

---

348. **Machhi Singh v. State of Punjab**, (1983) 3 SCC 470.

349. **Bachan Singh v. State of Punjab**, AIR 1980 SC 898.

350 **Dhananjay Chatterjee v. State of W.B.** (1994) 2 SCC 220.

351. AIR 1980 SC 898.

352. **Jagmohan Singh v. State of U.P.** AIR 1973 SC 947.

353. **Bachan Singh v. State of Punjab**, AIR 1980 SC 898.

## **U.N. Convention against torture and other cruel inhuman and degrading treatment or punishment 1984.**

The U.N convention against torture and other cruel inhuman and degrading treatment or punishment was adopted by the united Nation Assembly on 10<sup>th</sup> December 1984. The adoption of this convention<sup>354</sup> rounded off the codification process to combat the practice of torture around the world. In developing this valuable instrument, the United Nations not merely put in writing in a series of articles, a body of principles and pious hopes, the implementation and observance of which would not be guaranteed by anything or any one, it also set up a monitoring body, the committee against torture, whose main function is to ensure that the convention is observed and implemented. The convention not only specifies that the state parties will outlaw torture in their national legislation, but also notes explicitly that no order from a superior or exceptional circumstance may be invoked as a justification torture. The convention consists of 33 articles, which became effective as of 26 June 1987, among which following are important provisions: -

1. a) Each state party shall ensure that education and information regarding the prohibition against torture are truly included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment or any individual subjected to any form of arrest, detention or imprisonment.<sup>355</sup>
- b) Each state party includes this prohibition in the rules or instructions issued in regard to the duties and functions of any such person<sup>356</sup>.

---

354. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment 1984.

355. Id. Article 10.

356. Id. Article 10(2)

2. Each state party shall ensure that its component authority's proceeded to a prompt and impartial investigation, whenever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.<sup>357</sup>.
3. Each state party shall keep under systematic review interrogation, rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any case of torture<sup>358</sup>.
4. Each state party shall ensure that any individual who alleges he has been subject to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by its competent authorities. Steps shall be taken to ensure that the complaint and witness are protected against all ill treatment or intimidation as a consequence of his complaint or any evidence given.<sup>359</sup>
5. Each state party shall ensure its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.<sup>360</sup>
6. a) Each state party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or as the investigation of or with the consent or acquiescence of a public officer or other person acting in an

---

357. Id. Article 12.

358. Id. Article 11.

359. Id. Article 13.

360. Id. Article 14.

official capacity. In particular, the obligation contained in article 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment of punishment.<sup>361</sup>

- c) The provisions of this convention are without prejudices to the provisions of any other international instrument or natural law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.<sup>362</sup>

### **Implementation of Torture, Cruel, Inhuman and Degrading Treatment in India:**

India has signed (14<sup>th</sup> October)1997 but not yet ratified the Convention Against Torture .There are no explicit provisions in the Indian Constitution regulating the incorporation and status of international law in the Indian legal system. However, Art. 51(c) stipulates as one of the Directive Principles of state policy, that: "The state shall Endeavour to foster respect for international law and treaty obligations in the dealings of organized people with another."

While national legislation has to be respected, even if it contravenes rules binding on India under international law, Indian Courts, in particular the Supreme Court, have consistently construed statute so as to ensure their compatibility with international law. The judicial opinion in India as expressed in numerous recent judgment of the Supreme Court of demonstrates that the rules of international law and Municipal law should be construed harmoniously, and only when there is an inevitable conflict between these two laws should municipal law prevail over International law.

The Supreme Court has even gone a step further by repeatedly holding, when interpreting the fundamental rights provisions of the Constitution,

---

361. Id. Article 16(1)

362. Id. Article 16(2)

that those provisions of International Covenant on Civil and Political Rights, which elucidate and effectuate the fundamental rights guaranteed by the Constitution can be relied upon Courts as facets of those fundamental rights and are therefore, enforceable.

Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it. Torture is the very negation of the human dignity and cuts at the root of the culture of Human Rights. Torture vests the investigating authorities with the power to pre-determine the guilt of the accused. It even allows them to prescribe punishments other than the fines and imprisonments provided for the offences. It dehumanizes both, those who are tortured and those who inflict it. By its very nature torture is a denial of right to human dignity.

India's commitment to prohibit acts of torture and of cruel, inhuman or degrading treatment or punishment is so evident under the international Covenant of Civil and Political Rights to which India is a party and by the unilateral Declaration that it would comply with the rules of the General assembly Declaration.

Torture is neither defined in the constitution of India or in any Penal Law in India. But it is well understood and treated as violating Constitutional guarantee of life and liberty enshrined in Article 21. the Article 21 of the Constitution guarantees life which means every person should be treated as persons entitled to human dignity. Any kind of cruel treatment perpetrated on any individual is against law for which perpetrators should be punished and victims compensated and rehabilitated.

Torture has been practiced frequently in India since independence regardless of the government in power. While torture is committed on a regular basis by law enforcement officials in the course of Criminal investigations ,it was employed systematically during the emergency period of 1975 to 1977. Reportedly, torture has frequently been resorted to in the

course of the armed conflict in Jammu and Kashmir, the militant struggle in Punjab and in other regions undergoing a political crisis. The Prevention of Terrorism Ordinance and the Prevention of Terrorism Act, adopted in 2000 and 2002 respectively, are widely seen as facilitating the use of torture against those who are either suspected of being terrorist and are simply labelled as terrorist by the police and the army. The police have also been accused of encouraging inter communal violence involving acts amounting to torture, such as in early 2002 in the states of Gujrat.

The main perpetrators of torture have been police officers and other law enforcement officials, such as paramilitary forces and those authorities having the power to detain and interrogate persons. The victims of torture have been those who come into contact with the law enforcement personnel, especially those suspected of having committed crimes, themselves belonging to marginalized groups and ethnic communities who are believed to engage in a terrorist struggle against the Indian Government. Women have also been suspected to torture, particularly in form of rape in custody, a phenomenon that appears to have increased over the last few years. Torture is predominantly employed to obtain confessions or information in criminal cases, as a means of extortion or to break political opposition while torture generally takes the form of severe beatings, there have been numerous reports of more severe form of torture, many of which resulted in the death of the victims. The number of death in custody cases is particularly high in India.

The Supreme Court and High Courts have adopted a proactive stand in directing the government and /or law enforcement bodies to take various steps to tackle torture and have repeatedly rebuked the latter for failing to do so. Civil Liberties and Human Rights group in India have played a major role, through public interest litigation and other means, to seize the Supreme Court and High Court and combat the prevalence of torture.

The National Human Rights Commission has taken a proactive role in advocating against torture and urging the government of India to ratify the Convention against Torture. In this regard it noted in its annual report 1998-1999 that it is distressing to know that, even though the permanent representative of India to the United Nations signed the Convention on 14<sup>th</sup> October 1997, the formalities for ratification are yet to be completed. The Commission urged the earliest ratification of this key Convention and the fulfillment of the promise made at the time of signature, namely that India would "uphold the greatest values of Indian Civilization and our policy to work with other members of the International community to promote and protect human rights". It is important to note, however, these measures by the N.H.R.C have not been successful.

Another body, the National Police Commission was appointed by the Govt. of India in 1977 with wide terms of reference covering police organization, its role, functions, accountability, relations with the public, political interference in its work, misuse of powers, evaluation of its performance etc. The NPC made several recommendations aimed at reducing the use of torture, which were subsequently not implemented by the government. In 1996 a writ petition was filed in the Supreme Court by two retired police officers requesting that the Government of India be ordered to implement the recommendation of the NPC. Following the Supreme Courts order in this case, a committee on Police Reforms was set up by the Government under the leadership of J.F.Ribeiro (a retired police officer). The report of the Reibeiro committee was finalized in october,1998 but no subsequent action has yet been taken.

Several proposals for reform, such as inserting a section 113B into the Indian Evidence Act, the passing of a state liability in Tort Act, compensation for custodial crimes and for victims of rape and sexual assault have all failed to win sufficient political support enacted. Equally,

the recommendation to incorporate a specific right against torture and compensation proposed by the National Commission to Review the working of the Constitution in February 2002 still awaits implementation.

### **U.N. Code of Conduct for law Enforcement Officials 1979.**

As every law enforcement official is a part of the criminal justice system, which aims to prevent and control crime, the conduct of the functionary will have an impact on the whole system. There is need to have special standards through a well conceived and defense Code of Conduct sets before law enforcement officials ideal and special standards of behavior. The United Nations General Assembly on December 17, 1979 adopted a resolution prescribing a code of conduct for law enforcement officials: at the outset it declares that all those who exercise police powers shall respect and protect human dignity and uphold the human right of all persons. This resolution consists of an articles, in which following are the important: -

1. Law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.<sup>363</sup>
2. Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.<sup>364</sup>
3. No law enforcement official may inflict, investigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official such as state or war on a threat of war a threat to National Security, internal political instability or in any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.<sup>365</sup>

---

363. Article 1 of the Code of Conduct for Law Enforcement Officials.

364. Id. Article 2.

365. Id. Article 5.

4. Law enforcement official shall ensure the full protection of the health of persons in their custody and in particular, shall take immediate action to secure medical attention whenever required.<sup>366</sup>
5. Law enforcement officials shall not commit any act of corruption. They shall also vigorously oppose and combat all such acts.<sup>367</sup>

The Eighth United Nation Congress on the prevention of crime and the treatment of offenders adopted the above principles in view of the vital role of the law enforcement official in the protection of the right to life, liberty and security of the person and a treat to their life and safety. The basis of these principles is the special issues associated with the use of force. It requires that the enforcement agencies should be equipped with various types of weapons and ammunition and self defensive equipment such as shields, helmets, bullet proof vests and bullet proof means of transportations, in order to decrease the need to use weapons of any kind. The use of such weapons should be carefully controlled. The official is carrying out their duty, shall as far as possible, apply non violent means before resorting to the use of force and frames. The use of force is subjected to the following conditions: -

1. Exercise restraint in such use and act in proportion to the seriousness of the offence and legitimate objective to the achieved.<sup>368</sup>
2. Minimize damage and injury and respect and preserve human life.
3. Ensure the assistance and medical aids are rendered to any injured or effected persons at the earliest possible moment.
4. Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment<sup>369</sup>.

---

366. Id. Article 6.

367. Id. Article 7.

368. Principle 5 , of Use of Force and Firearms.

369. Id. Principle 5(3).

The duty has been imposed upon the government to ensure that arbitrary or abusive use of force and firearms by the law enforcement officials is punished as criminal offence under the law. Therefore it lays down that they shall not use force on firearms except in self-defense or defense of other against the imminent threat of death or serious injury and they shall give a clear warning with sufficient time. In the matter of policing person in custody or detention force shall not be used except when strictly necessary for the maintenance of security and order within the justification or when personal safety is threatened.<sup>370</sup>

There are also provisions prescribing for the qualification, training and counseling of the officials. The Government shall ensure that all laws enforcement officials have appropriate moral psychological and physical qualities for the effective exercise of their function and receive continuous and through professional training. They are tested in accordance with appropriate proficiency standard in the use of force.<sup>371</sup> In their training the government shall give special attention to issue of police ethics and human rights, alternatives to the use of force and firearms, the understanding of crowd behavior and the method of persuasion and stress counseling.<sup>372</sup> There should be effective reporting and review procedures to the superior officers. The superior officers shall be responsible if they know or should have known about the unlawful use of force.<sup>373</sup> The obedience to superior orders shall be no defense in such cases. The law enforcement officials can refuse to carry out an order to use force and firearms in compliance with the above principles and for that reason no criminal or disciplinary sanction shall be imposed upon them. Thus while adopting the principles of

---

370. Dr. S. Subramaniam, *Human Rights International Challenges*, [1<sup>st</sup> Edition, 2004], Manas Publications, New Delhi, P.266.

371. Principle 18, of Use of Force and Firearms.

372. Principle 20, of Use of Force and Firearms.

373. Id. Principle 24.

individual accountability the above basic principles have been given overriding effect.

The Assembly of the United Nations is deeply concerned that in many countries, often in a persistent manner, enforced disappearance occurs, in the sense that persons are arrested, detained or abducted against their will followed by a refusal to disclose the fate or whereabouts of the persons concerned thereby placing such persons outside the protection of law. Further in view of the various measures including the Basic principles on the use of force and confirming the body of principles for the protection of all persons under any form of detentions or imprisonment. The general Assembly proclaimed the "declaration on the protection of all persons from enforced disappearances. It declared the act of enforced disappearance as an offence to human dignity and violation of human rights under UDHR<sup>374</sup> and a grave threat to the right to life.<sup>375</sup> Therefore the practice of enforced disappearance has been declared illegal and states are required to take effective steps for the preservation and eradication of such practices. All Acts of enforced disappearance shall be offences under the criminal law punishable by appropriate penalties. Even during the war time the enforced disappearance can not be justified. The declarations also includes the right to a prompt and effective judicial remedy for determining the whereabouts or state or health of persons and in such proceedings a competent national authority shall have access to all places.<sup>376</sup>

It provides for accountability of officials by requiring that the state shall establish rules stipulating penalties for officials who without legal justification, refuses to provide information of any detention.<sup>377</sup> The state shall ensure that any person can complain to a competent and independent

---

374. The Universal Declaration on Human Rights, 1948.

375. Article 1&2 of Declaration on the Protection of All Persons from Enforced Disappearances.

376. Id. Article 9.

377. Id. Article 12.

state authority about enforced disappearances. There shall be prosecution and trial of the person who has perpetrated such act.<sup>378</sup> They shall be suspended from any official duties during the investigation and be tried by a competent ordinary court. No privileges, immunities or special exemption shall be admitted in such trials.<sup>379</sup> The right to adequate compensation shall also be available to the victims and their families. State shall present and suppress the abduction of children of parents subjected to enforced disappearances and of children born during their mother's enforced disappearance, and shall devote their efforts to be search for and identification of such children and to the restitution of the children to their family of origin.<sup>380</sup>

### **Implementation of U.N. Code of Conduct for law enforcement officials in India;**

We have inherited our police system from our British masters. All of the police acts are in line with the Police Act, 1861. All statutes contain provision for the constitution of the force; procedure of appointment, removal et al; powers of the police officers and their duties. Sometimes duties comprise ethical standards as well. But duties in the police act are statutorily prescribed which include, inter alia:

- a) to obey and execute all lawful orders
- b) to collect and communicate intelligence affecting public peace
- c) to prevent offence and public nuisance
- d) to detect and bring offenders to justice

---

378. Id. Article 14.

379. Id. Article 16.

380 Id. Article 20.

- e) to apprehend all who are to be apprehended on sufficient ground; and
- f) to enter and inspect drinking shops, gambling places and places of resort to loose and disorderly characters.

From an universal legal point of view we may note that the Code Of Conduct for the Law enforcement officials has been well accepted by the comity of nations and this is also reflected as a code of conduct in our country (conference of Inspector generals of Police in India- 1960) however, the third National Police Commission suggested a marginal change in the twelfth clause of the code by suggesting that the police must act as a servant of the law and not as a servant of the government in power. In addition it was also suggested that the "obedience to superiors" must be in consonance with the law of the land and that illegal orders are not to be obeyed blindly.

#### **THE CODE OF CONDUCT OF POLICE IN INDIA:**

1. The police must bear faithful allegiance to the Constitution of India and respect and uphold the rights of the citizen as guaranteed by it.
2. The police should not question the propriety or necessity of any law duly enacted. They should enforce the law firmly and impartially, without fear or favour, malice or vindictiveness.
3. The police should recognize and respect the limitations of their powers and functions. They should usurp or even seem to usurp the functions of the judiciary and sit on judgment on cases to avenge individuals and punish the guilty.
4. In securing the observance of law or in maintaining order, the police should, as far as practicable, use the methods of persuasion, advice

and warning. When the application of force becomes inevitable, only the irreducible minimum of force required in the circumstances should be used.

5. The prime duty of the police is to prevent crime and disorder and the police must recognize that the test of their efficiency is the absence of both and not the visible evidence of police action in dealing with them.
6. The police must recognize that they are members of the public, with the only difference that in the interest of the society and on its behalf they are employed to give full time attention to duties which are normally incumbent on every citizen.
7. The police should realize that the efficient performance of their duties will be dependent on the extent of ready cooperation that they receive from the public. This, in turn, will depend on their ability to secure public approval of their conduct and actions and to earn and retain public respect and confidence.
8. The police should always keep the welfare of the people in mind and be sympathetic and considerate towards them. They should always be ready to offer individual service and friendship and render necessary assistance to all without regard to their wealth or social standing.
9. The police should place duty before self, should remain calm in the face of danger, scorn or ridicule and should be ready to sacrifice their lives in protecting those of others.
10. The police should always be courteous and well mannered; they should be dependable and impartial; they should possess dignity and courage; and should cultivate character and the trust of the people.

11. Integrity of the highest order is the fundamental basis of the prestige of the police. Recognizing this, the police must keep their private lives scrupulously clean, develop self restraint and be truthful and honest in thought and deed in both personal and official life, so that the public may regard them as exemplary citizens.
12. The police should recognize that their utilities to the state is best ensured only by maintaining a high standard of discipline, faithful performance of duties in accordance with law and implicit obedience to the lawful directions of commanding ranks and absolute loyalty to the force and by keeping themselves in a state of constant training and preparedness.
13. As members of a secular, democratic state the police should strive continually to rise above personal prejudices and promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities and to renounce practices derogatory to the dignity of women and disadvantaged segments of the society.

**U.N. Convention on the Elimination of Discrimination against Women(CEDAW) :**

Unequal status of women all over the world being offensive to human dignity and violative of human rights has emerged today as a fundamental crisis in human development.

The fight against unequal law and for equal states by women resulted in series of international conventions.

The first International treaty the charter of the U.N organization opened a new chapter in the international law of human rights and individual freedom. It expressed in its preamble of faith in the dignity and worth of human person as well as "in equal rights of men and women". It declared

its determination to eliminate all form of discrimination in order "to promote social progress and better standards of life".<sup>381</sup>

To fulfill this purpose and aspirations the U.N. in 1948 adopted the universal Declaration of Human Rights which sets out the principles and normative standards securing respect of human rights everywhere in the world.

Universal Declaration which is golden piece of document of human rights is based on certain philosophy which assumes that the right to equality and liberty is the birth right of every human being can not be alienated. It also proclaims that every one is entitled to all rights and freedom set forth in the declaration without any distinction of any kind including sex.<sup>382</sup>

In its preamble to the Declaration on the elimination of discrimination against women,<sup>383</sup> it expressed its concern about the continued discrimination against women and reiterated the fact that this was "incompatible with human dignity and with welfare of the family and society".

This international instrument reiterated that discrimination against women violates the principles of equality of rights and respect for human dignity and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country. It hampers the growth of the personality from society and family, making more difficult for the full development of potentialities of women in the service of the respective countries and of humanity<sup>384</sup>. The above convention expressly states that discrimination against women is socially and culturally constructed and encompasses both the public and private spheres. In the

---

381. Article 1 & 55, United Nations Charter (1945).

382. Article 2, Universal Declaration on Human Rights 1948.

383. Declaration on the Elimination of Violence Against Women, 1993.

384. Article 3, Convention on Elimination of Discrimination Against Women, 1979.

administration of criminal justice system, the women prisoners have right within the wide range aspect of human rights.

### **Implementation of the provision of CEDAW in India:**

In December 1978, the United Nations General Assembly adopted the UN convention on Elimination of All Forms of Discrimination against women (CEDAW). This was considered as the landmark in the protection of women's human rights. The convention set up the foundation and universal standards for women's equal enjoyment without discrimination of civil, political, economic, social and cultural rights. The recognition and protection of women's human rights was advanced by the approval of new UN treaties, declarations and mechanisms. The urgency for the protection of women's rights was felt everywhere around the world. Resulting to it, many organizations have emerged throughout the United States and around the globe to promote awareness of women's human rights and advocate for their defense. The issue whether women's human rights can be equally protected as human rights became a general concern to the nations. In 1993 The World Conference of Human Rights was held at Vienna. This was one of the turning points in recognizing women's rights and the gender based violence against women in general. The cry of the Vienna Declaration was for condemning gender based violence and all forms of sexual harassment and exploitation against women.

India was not lagging behind in recognizing the need for protecting women's rights. Being a signatory to various international convention, covenants and protocols on human rights, India has admitted responsibility for providing protection of the rights of the women. It also guarantees the equality before law and equal protection of law to women. In doing so, India confers certain affirmative rights. "Where Articles 14,15(1) and (2) and 16(1) and (2) prohibit discrimination against any citizen, person on the ground of sex among other grounds, the preamble aims at equality of

status and opportunities for 'we', the people obviously includes women also."<sup>385</sup>

Protection of women's rights was also mentioned in the Directive Principles of state policy. It contained in Part IV of the constitution the direction to the state to protect human rights of women including the right to equal pay for equal work, the right to health and hygienic conditions, the right to maternity benefit and the right to gender justice etc. the state is empowered to make special provision for women and children under Article 15(3). State has also introduced reservations for women in public employment and admissions into educational institution and the legislatures at least at the local self government level, among other schemes for their benefit. The fundamental duties contained in part IV -A of the constitution (Article 51 A) also enshrines the principles of dignity of women. Thus the spirit of gender equality, dignity and justice pervades the entire framework of our constitution. The fundamental rights are almost in consonance with the rights contained in the United Nations Declarations of Human Rights, International Covenant On Civil and Political Rights, I.C.E.S.C.R to which India is a party having ratified them.

There is an elaborate system of Laws to protect the rights of women, including the Equal Remuneration Act, 1976, the Maternity Benefit Act, 1961, the pre natal Diagnostic techniques (Regulation and Prevention of Misuse) Act, 1994, the Dowry Prohibition Act, 1961, and the protection of women from Domestic Violence Act, 2005. even the Indian Penal Code 1860, also contains number of provisions to prevent domestic violence against women on the ground of demand for dowry.

---

385. K. Vijaya Lakshmi, "Women's Rights are Human Rights," AIR Journal, 2009(Feb) P. 23.

The protection of Human Rights Act,1993, has been passed and according to which Human Rights means rights relating to life, liberty, equality and dignity of the individual as guaranteed by the constitution or embodied in the International Covenants and enforceable by courts in India.<sup>386</sup>

Not only the Constitutional provisions but also some other measures have been taken up for the protection of Human Rights. The National Commission for women and The National Human Rights Commission have been set up to fulfill the objective of achieving equality of status and opportunity for women, safeguarding their interests and culminating all forms of discriminations against women as laid down by the constitution with the glaring testimonies that effect.<sup>387</sup>

Gender equality becomes elusive in the absence of right to live with dignity. In **Neera Mathur v. LIC**<sup>388</sup>, the court recognized that privacy was an important aspect of personal liberty. In this case, the Supreme Court was shocked to learn that an LIC questionnaire sought information about the dates of menstrual periods and past pregnancies, and the petitioner was terminated for not providing correct information to the LIC. The Supreme Court held that the questionnaire amounted to invasion of privacy and that, therefore, such probes could not be made. The right to personal liberty guaranteed under Article 21 included the right to privacy. Information about health could be sought where such information was relevant- it was relevant for selling insurance cover but not for the person seeking employment.

---

386. Section 2(d) of the Act Human Rights Act, 1993.

387. A.S. Anand, C. J. Justice for Women- Concerns and Expressions, [2002Edition], Universal Law Publishers Co. Pvt. Ltd.,Delhi.P-21.

388. (1992) 1 SSC 286

In *Gautam Kundu v. State of West Bengal*<sup>389</sup>, the Apex Court ensured that an application for a blood test to disapprove paternity of a child in a maintenance suit was rejected. It was held that a child born of a married woman is deemed to be legitimate unless the contrary is proved. Such a presumption could be rebutted by a strong preponderance of evidence and not a mere balance of probabilities. The court laid down the following principles:

- a) that courts in India cannot order a blood test as a matter of course;
- b) an application for subjecting a child to a blood test, made in order to have a roving inquiry, cannot be entertained;
- c) there must be a prima facie case for suspecting the fatherhood of a child which can be established by providing non-access;
- d) the court must carefully examine as to what be the consequences of ordering a blood test: whether it would have the effect of branding a child as a bastard and its mother as an unchaste woman.

The court observed that such a demand for subjecting the child to a blood test was contrary to the right to personal liberty guaranteed by Article 21 of the Constitution and said: "Permitting blood tests to prove or disprove paternity unless there is a strong case and access was ruled out would be slanderous, embarrassing and humiliating for the woman."

In ***Surjit Singh v. Kanwaljit Kaur***<sup>390</sup>, the High Court held:

"Allowing the medical examination of a woman for her virginity would certainly violate her right of privacy and personal liberty enshrined under Article 21 of the Constitution. Such an order would amount to a roving

---

389. (1993) 3 SSC 418.

390. AIR 2003 P&H 353.

enquiry against a female who are vulnerable even otherwise. In the instant matrimonial case the question of virginity of the wife is not in issue and the virginity test cannot constitute the sole basis to prove the consummation of marriage. Allowing such a medical examination of the wife would be holding a roving enquiry which is not permissible. Thus, order of Lower Court dismissing application by husband for getting wife medically examined in order to prove her virginity is proper.”

In **Bodhisattwa Gautam v. Subhra Chakraborty**<sup>391</sup> the complainant, a student, was induced by the accused, a teacher, on false assurance of marriage to cohabit with him. He not only made false assurance of marriage but also fraudulently went through marriage ceremonies. When she becomes pregnant the accused made her undergo an abortion. When she asked him to maintain her, he disowned her on the ground that there was no marriage. He was prosecuted under various sections of the IPC. The Supreme Court refusing to quash the prosecution ruled that rape was not only an offence under the Penal Code but was also a violation of a woman’s right to live with dignity and personal freedom.

“...It is a crime against basic human right and it is also violative of victim’s most cherished of Fundamental Rights, namely, the right to life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women.”<sup>392</sup>

In **State of Maharashtra v. Madhukar N.Mardikar**<sup>393</sup>, the Supreme Court said with reference to rape, that unchastity of a woman does not make her “open to any and every person to violate her person as and when

---

391. (1996) 1 SSC 490.

392. Bodhisattaw Goutam v. Subha Chakraborty, AIR 20073 P&H 353.

393. (1991) 1 SSC 57.

he wishes". Even a prostitute has a right to privacy under Article 21 and no person can rape her just because she is a woman of easy virtue.

Another dynamic judgment with reference to Article 21 is **Chairman, Railway Board v. Chandrima Das**<sup>394</sup>. The Court in this case observed that the word 'life' as used in the Universal Declaration must get the same meaning as in Article 21. Its meaning cannot be narrowed down. Here relief was provided to a Bangladeshi woman who was raped. The term life in the International Conventions relating to Human Rights and Article 21 were interpreted to mean life worth living, meaningful and dignified.

In **Viskha v. State of Rajasthan**<sup>395</sup>, the Supreme Court, in the absence of legislation in the field of sexual harassment of working woman at their place of work, formulated guidelines for their protection. The court said:

"Gender equality includes protection from sexual harassment and right to work with dignity which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Article 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein and for the formulation of guidelines to achieve this purpose."

#### **United Nations Standard Rules for Juvenile Justice 1985 :**

All societies recognize that special conditions are necessary for children to blossom into adults ensuring them a meaningful and socially productive life.

---

394. (2000) 2 SSC 465: AIR 2000 SC 988.

395. (1997) 6 SCC 241.

It has been also recognized that juveniles are prone to deviant behavior and are likely to take to crime more as a demonstration of defiance. Application of adult criminal justice system standards and provisions are likely to cause permanent damage to their personality. A special system of criminal justice tempered with compassion and understanding is called for. The United Nations proclaimed a set of standard rules for juvenile justice in 1985, known as 'the Beijing Rules' to ensure uniformity of practices and procedures. These rules provide that member state shall seek, in conformity with their respective general inherent to further the well being of the juvenile and her or his family.<sup>396</sup> This rules clearly indicated that juvenile justice shall be conceived as an integral part of the national development process of each country. It also directs the member states to take measures for the protection of the young and as well as the maintenance of a peaceful order in society within a comprehensive frame work of social justice.<sup>397</sup> It was suggested in the rule that the concept of the age of criminal responsibility for the juvenile should not be fixed at too low an age level. In this regard it should be bear in maid regarding his emotional, mental and intellectual maturity further this rule provide that the juvenile justice system shall emphasize the well being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.<sup>398</sup> Rules 6.1, 6.2 and 6.3 combine several important features of effective, fair and human juvenile justice administration, the need to permit the exercise of discretionary power at all significant levels of processing so that those who make determination can take the actions deemed to be the most appropriate in each individual case; and the need to provide checks and

---

396. Principle 1, Fundamental Principle of United Nations Standard Minimum Rules for the Administration of Juvenile Justice(The Beijing Rules)

397. Id. Principle 1

398. Id. Principle 5.

balances in order to curb any abuse of discretionary power and to safeguard the right of the young offender. The Accountability and professionalism are instrument to curb broad discretion. Thus professional qualifications and expert training are emphasized here as a valuable in means of ensuring the judicious exercise of discretions in matters of juvenile offenders. Rule 7.1 emphasizes some important points that represent essential elements for a fair just trial and that are internationally recognized in existing human rights instruments. The presumption of innocence, for instance, is also to be found in article 11 of the UDHR and in article 14, paragraph 2 of the international covenant on civil and political rights. Rule 10.3 states that contact between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal statues of the juvenile, promote the well being of juvenile and avoid harm to her or him, with due regard to the circumstance<sup>3s</sup> of the case. Rule 24.1 mentioned that the promotion of the well being of the juvenile is of permanent consideration. The objective of institutional treatment as stipulated in Rules 26.1 and 26.2 would be acceptable to any system and cultures medical and psychological assistance, in particular is extremely important for institutionalized drug addicts, violent and mentally ill young person. Rule 27.1 prescribed that the standard minimum rules for the treatment of prisoners were among the first instruments of this kind to be promulgated by the United Nations.

The idea of regional arrangements for the promotion and protection of human rights has been gaining recognition since the adoption of the universal declaration of Human Rights. The regional bases are likely to help the promotion in a more effective manner than to the machinery of the United Nations which is already very complex and over – surrender. The United Nation in its character gave due importance to regional

arrangements chapter VIII of the charter consisting of Article 52 to 54 is devoted exclusively to regional arrangements. Three regional agencies were established for the promotion and protection a Human Rights.<sup>399</sup>

### **The Implementation of U.N. Standard Rules for Juvenile Justice in India:**

A staggering 30 million children in India belongs to families living in conditions of extreme distress and deprivation. Violence against girls, child labour, children living on the streets, trafficking, violence in school and violence in conflict situations have all been reportedly on the rise. The need for specific instrumentality for children stems from this pressing situations.

Juvenile Justice Policy in India is largely governed by the constitutional mandate given under Article 15 that guarantees special attention to children through necessary and special laws and policies that safeguard their rights. The Right to equality, Protection of life and personal liberty and the right against exploitation is enshrined in Articles 14,15,16,17,21,23 and 24. The Constitution of India recognizes the vulnerable position of children and their right to protection.

The course of events concerning juvenile justice in this country was equally influenced by several International developments. It primarily includes the UN Convention of the Rights of the Child (UNCRC) 1989, the UN Standards Minimum Rules for the Administration of Juvenile Justice( The Beijing Rules) 1985. driven by constitutional guarantees for protecting children as well as recognizing International concerns for child, the Indian state has made numerous arrangement in this direction. To give effect child protection, a number of laws were brought in.

---

399. Dr.H.O.Agarwal,Human Rights,[7<sup>th</sup> Edition,2008],Central Law Publishing Co., Allahabad.P. 179.

The Ministry of Women and Child Development has been instrumental in this direction and it has particularly catered to children in crisis situation such as street children, children who have been abused, abandoned children, orphaned children, children in conflict with law and children affected by conflict or disasters etc.

- The official stand of child protection is marked by many programs in keeping with the current developments, is visible in the approach of the Ministry of Women and child Development. The National Plan of Action for Children 2005 articulated the rights agenda for the development of children. The existing mechanism of child protection at official level mainly include the following programmes;
- Juvenile Justice Act
- Integrated programme for streets children
- Child Line service.
- Shishu Griha Scheme
- Scheme for working children in need of care and protection
- Rajib Gandhi Nation crèche scheme for the children of working women
- Scheme to combat the trafficking of women and children for commercial sexual exploitation.
- Central Adoption Resource agency(CARA)
- National Child labour Project (NCLP) for rehabilitation of child labour.

In addition to the above the ministry has just released its Draft Scheme 'the integrated child protection'. This scheme envisages a holistic approach to combat the issues affecting children.

In order to reach out to all children, in particular to those in difficult circumstances, the ministry of women and child Development proposes to concise its existing child protection scheme under a centrally sponsored scheme titled Integrated child Protection Scheme (ICPS). The proposal ICPS brings multiple vertical schemes under one comprehensive child protection programmes and integrates interventions for protecting children and preventing harm.

### **Juvenile Justice Act**

The Juvenile Justice ( care and protection of children) ACT,2000 is more in the recent thinking and the emerging need of the treatment and handling of Juveniles. The objective of this legislation is to ensure the care, protection and development needs of the children who are either neglected or have into conflict with law constituting delinquencies. The statute of implementation of Juvenile Justice Act has been notified on the website of the Ministry of Child and Family Welfare. The information columns of different states show their progress mainly about establishment of various institutions as per provision of this act while this information merely gives a very primary idea about basic preparation made in states, it definitely does not provide any clue about the quality and affective ness of the enforcement of this Act.<sup>400</sup>

The Juvenile Justice system in India is an offshoot of the Criminal Justice System. Because of this its approach towards children has always been

---

400. Kumkum Rani, Commentaries on the Juvenile Justice Act, 1986 along with the Juvenile Justice(Care and Protection of Children) Act, 2000, [1<sup>st</sup>. Edition 2001], Asia Law House, Allahabad.P. 891.

marked by the tension between the protective approach of juvenile justice and the traditional approach of dealing with crime. The Juvenile Justice Act does not perceive the delinquency or the issue of children exploitation in holistic terms, resultantly; this law does not emerge as progressive legislation. Its emphasis, though it seems I obvious terms, is not toward solving the problem of child. The institutional set up suggested in the law seems, at best, interventionist, and not essentially professional.

The Juvenile Justice Act does not cast any obligation on the part of the state. A right based perspective is a missing dimension in this law. In its present shape, child protections become more charity than a commitment. Protection of such children is not seen as a right but as chaity or welfare.

The Juvenile Justice Act does not have specific provision ensuring services for children relating to education, health, legal and social. In the absence of any mechanism of identification of juvenile in need of care and protection , the reach of this law becomes restricted.

The coverage of the Act is quite limited and a large number of children technically fall away from the purview of this law. The resources and infrastructure required for the effective implementation of this law is hardly proportionate to the population and geographical regions covered under it.

Children caught in the system are often helpless with very little redressal. Children effected by the problem like HIV/AIDS, drug abuse, militancy, disaster, etc. do not have any redressal under this law. Similarly, the concomitant issues like child marriage, female feticide, street children, working children too far away from being covered in it.

The lack of institutional infrastructure and trained man power in the states has blunted the whole objective of this legislation. The requirement of

Constitution of child welfare committees and juvenile justice board is largely remain unfulfilled resulting in the delay of disposal of cases.

The problem of enforcement of this law is also characterized by the lack of support services to vulnerable families, which becomes a major factor in turning their children into delinquency. The Juvenile Justice Act has got relatively greater emphasis on institutional setup as compared to non institutional services. The facilities and services in the institution in different states are found to be varying and lacking and there is no yardstick to standardize them. There is a dearth of services and programs to the children of special needs.

There are number of incidences violating the procedure of handling of juveniles by the police. In fact the indifference of police towards this law is most disappointing feature. The basic idea of this law has not been internalize by the police due to insufficient training and orientation. The instances of bringing age of juvenile into adult range while writing the F.I.R by the police are often heard. Handcuffing and keeping the juvenile in police lockup is not unusual.

In **Lakshmi v. Sub- inspector, Police Station**,<sup>401</sup> the juvenile was taken into police custody against the provisions of sections 18 and 21 of the juvenile Justice Act. Because of invalidity, the court awarded to the juvenile compensation to the tune of Rs. 25,000/-. The court held that a juvenile accused at the time of incident was entitled to bail in absence of anything which indicated that his release on bail was likely to bring him into association of only known criminal or expose him to moral danger or that his release would defeat the ends of justice. If there was a case of a doubt as to the person being a juvenile, it was necessary that when he was produced before the Magistrate, the Magistrate took notice of the age and if

---

401. 1991 Cri.L.J. 608.

his doubts persisted. Held such inquiry as he deemed fit to find out whether the person was a juvenile and needed to be dealt with in accordance with the provisions of the Juvenile Justice Act.

In **Krishna Bhagwan v. State of Bihar**,<sup>402</sup> with respect to the provisions under the juvenile Justice Act is a reiteration of the statements made by the Supreme Court of India in the case of **Sheela Barse v. Union of India**<sup>403</sup> The Supreme Court observed as under: "If a child is a national asset, it is duty of the State to look after the child with a view to ensure full development of its personality. That is why all the statutes dealing with children provide that a child should not be kept in jail. Even apart from the statutory prescription it is elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarnation in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from society."<sup>404</sup>

In **Ram Inder v. State**,<sup>405</sup> accused of an offence punishable under Section 302, I.P.C. was allowed bail, keeping in view the fact that the investigation carried out till that time indicate that he was a child less than 16 years of age and there was no other material so as to hold that he was not entitled to be released on bail. Following this judgment, High Court allowed the bail to the juvenile in **Mohd. Elias v. State**.<sup>406</sup>

---

402. AIR 1989 Pat 207.

403. AIR 1986 SC 1773.

404. Sheela Barse v. Union of India, AIR 1986 SC 1773.

405. 1993 (1) SCC 327 (P & H)

406. Mohd. Elias v. State, 1994 (1) SCC 10 (P & H).

In the case of **Guddu v. State of U.P**<sup>407</sup>, it was held that repetition of crime could be a ground for refusing the bail but the petitioner was allowed bail since no reason has been given by the courts below while refusing bail.

In **Daljit Singh v. State of Punjab**,<sup>408</sup> it was held that under Section 18, a delinquent juvenile has to be released on bail in spite of the fact of having committed heinous crime of murder or rape. If he is not to be enlarged on bail he is to be kept in safe custody/place as ordered under the Act.

In the case of **Chandra Sekhar Kumar v. State of Bihar**,<sup>409</sup> it was held that bail to a delinquent offender is a rule and mandate of the act, which provides for grant of bail irrespective of the nature and seriousness of the offence committed by him.

The basic idea of juvenile justice was to reintegrate the child into family and society. This needs a proper network of rehabilitation and after care services. Unfortunately, this arrangement is almost nonexistent. The current juvenile justice policy is a preventive approach. The delinquency prone situations are increasing but there is no substantial mechanism to check it.

#### **European Conventions on Human Rights:**

The statues of council of Europe, established by the congress of Europe consisting of members who were likeminded and have a common heritage of political tradition, deals, freedom and the rule of law, stressed that the maintenance and promotion of human rights were one of the means to achieve the ultimate objective of European unity. This convection came into force in 1953, and it is legally binding on the ratifying states. European convention has played an important role for the crime world concerned with

---

407. 1990 Cr. L.J. 1531 (ALL).

408. 1992 Cr.L.J. 105 (P & H).

409. 1998 (2) Crimes 481(Pat).

the constitutional protection of Human Rights. This conviction provided rights and freedom including right to life,<sup>410</sup> right to liberty and security of persons,<sup>411</sup> freedom from torture or to inhuman and degrading treatment or punishment<sup>412</sup> and right to have effective remedy before a national tribunal against violation of the rights and freedom.<sup>413</sup> The convention has set up a European court of Human Rights in 1959, the decision of which are pronounced in the form of legal judgments, involving the interpretation of text of the convention, and are valuable guides for the interpretation of any nation constitution which incorporates identical or similar guarantee of fundamental rights.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred as ECHR) rights concerned with civil and political rights. It is still the only international human rights agreement providing such a high degree of individual protection whereby any person who feels his right have been violated under the Convention by a state party can take a case to the European court of Human Rights. The decisions of the Court are legally binding and the court has the power to award damages.

In addition, European social charter is adopted by the council of Europe with a view to develop and protect social and economic rights and to achieve greater unity between its members of the purpose of safeguarding and realizing the ideals and principles which are their common heritage. The charter protects rights such as to work, to just conditions of work, to safe and healthy working conditions, to freedom of association, to social security, to benefit from social welfare services etc.

---

<sup>410</sup>. Article 2 of European Convention on Human Rights.

<sup>411</sup>. Id. Article 5

<sup>412</sup>. Id. Article 3

<sup>413</sup>. Id. Article 3.

In **Soering v. United Kingdom**,<sup>414</sup> Soering was a German national and after committing murder, he fled to the U.K. When the United States sought his extradition from the United Kingdom, it was arranged that his extradition would be a breach by the United Kingdom of Article 3 of the European Convention on Human Rights which stipulates freedom from torture, or inhuman or degrading treatment or punishment. The court was of the view that the Convention is a living instrument which... must be interpreted in the light of present day conditions, and in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purpose of Article 3. The court held that the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3.

#### **American Convention on Human Rights:**

The American Convention was adopted in the Inter-American Specialized Conference on Human Rights held at San José, Costa Rica in November 1969 and the Convention came into force on July 11, 1978. The preamble of the Convention stated that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality. The Convention stipulated a number of civil and political rights for all persons subject to the jurisdiction of the state parties. The Convention guarantees the right to life from the moment of conception,<sup>415</sup> the right to human treatment,<sup>416</sup> the right to personal freedom, the right to a fair trial<sup>417</sup> etc. Although the American Convention on Human Rights clearly separates that no one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment, the American states in order to elaborate the

---

414. (1989)11ECHR 439.

415. Article 3 of the American Convention on Human Rights.

416. *Id.* Article 5.

417. *Id.* Article 8.

above right considered themselves necessary to conclude a convention that prevents and punishes torture. Accordingly, in 1985 a convention known as American convention to prevent and punish torture was adopted.

The American Convention was adopted at the Inter-American Specialized Conference on Human Rights in 1969 known as 'Pact of San Jose de Costa Rica'. The preambles of the convention state that the essential rights of man are not derived from one's being a national of certain state, but are based upon attributes of the human personality, and they therefore, justify international protection in the form of a convention reinforcing or implementing the protection provided by the domestic law of the American State. Beside the convention, in American region there are also Inter-American Commission on Human Rights and Inter-American Court of Human rights.

In America, the Supreme Court in two major decisions addressed itself to this overcrowding problem. In the case of *Wolf v. McDonal*, 1974,<sup>418</sup> involving pretrial detainees the court held that the principle of one, man, one cell can not be read in the due process clause of the Fifth Amendment. It held that the procedure of pulling two detainees in a cell meant for one person was not unconstitutional. In the case of *Rhodes v. Chapman*, the court went to conclude that the "constitution does not mandate comfortable prison. However, if over crowding is not constitutionally impermissible, it no doubt tells on the health of the prisoner and affects the hygienic conditions. In Indian context, it is absolutely essential to take serious note of this problem.

### **African charter on Human and People's Rights:**

The creation of the regional agency conference on the 'Rule of Law' at Lagos (Nigeria) in 1961. The conference sponsored by the International Court of Justice. The conference invites the African Government to study

---

418. *Wolf v. McDonnel* (1994)418 U.S. 539.

the possibility of adopting the African convention on human rights. The African charters also know as Banjul Charter, was adopted on June 27, 1981 and entered into force in 1986. The charter has been ratified or accorded to by states members of the organization of African unity.<sup>419</sup>

The African charter is unique in the sense that it has given emphasis on people's right which reflects African social traditions of collective and group life. The individual is not seen as independent of society but subordinate to the group, and the group has rights as well and the individual has duties to the group. The charter therefore stipulates rights as well as duties of individual. The African charter has given the recognition of the important rights in charter I which are: -

Equality before law,<sup>420</sup> Right to respect for his life and the integrity of the person,<sup>421</sup> Right to respect to the dignity inherent in a human being and the recognition of legal status,<sup>422</sup> right to liberty and to the security of his person.

In addition to the international covenant on civil and political rights, three regional human rights treaties namely European convention on human rights, the American convention on human rights and African charter also contain provisions similar to the covenant. These are:

1. Right to life.
2. Prohibition of torture and cruel, inhuman or degrading treatment or punishment.
3. Prohibition of slavery, slave trade and servitude.

---

419. Dr.H.Agarwal,Human Rights,[7<sup>th</sup> Edition,2008],Central Law Publishing Co., Allahabad. P. 201.

420. Article 3 of African Charter on Human Rights

421. Id. Article 4.

422. Id. Article 5.

4. Non-imprisonment on the ground of inability to fulfill a contractual obligation.
5. Non-retroactivity of criminal law.
6. Right to recognition as a person before law.
7. Right to freedom of thought, conscience and religion.
8. Non-discrimination on the ground of race, color, sex language, religion or social origin.

These rights are regarded as most basic at all times and hence no derogation from these is permitted even during grave emergency situation. In India, many of the above rights have been made the fundamental rights in part III of the Constitution of India, like no discrimination on the ground only of religion, race, caste, sex and place of birth; abolition of untouchability, trafficking in human being, forced labor; right to life and personal liberty, protection from retrospective criminal law, freedom to practice profess and propagate a religion of one's own choice etc

#### **Implementation of Regional Conference:**

Responsibility for the effectiveness guarantee of human rights set forth in so many international Conventions lies first with the individual state. However experience and history have taught us that status may not only promote human rights, but also dig their grave. Hence, the necessity of additional protection in the form of international control mechanism has arisen. Most of the international treatise dealing with human rights has put such mechanisms in place. They are founded on the idea that states must be accountable to the international community for their behavior in the matter of human rights.

In addition to the international covenant on civil and political rights, three regional human rights treaties namely European convention on human

rights, the American convention on human rights and African charter also contain provisions similar to the covenant. These are:

1. Right to life.
2. Prohibition of torture and cruel, inhuman or degrading treatment or punishment.
3. Prohibition of slavery, slave trade and servitude.
4. Non-imprisonment on the ground of inability to fulfill a contractual obligation.
5. Non-retroactivity of criminal law.
6. Right to recognition as a person before law.
7. Right to freedom of thought, conscience and religion.
8. Non-discrimination on the ground of race, color, sex language, religion or social origin.

These rights are regarded as most basic at all times and hence no derogation from these is permitted even during grave emergency situation. In India, many of the above rights have been made the fundamental rights in part III of the Constitution of India, like no discrimination on the ground only of religion, race, caste, sex and place of birth; abolition of untouchability, trafficking in human being, forced labor; right to life and personal liberty, protection from retrospective criminal law, freedom to practice profess and propagate a religion of one's own choice etc

At the regional level, important treatises have come into being. The advantage of regional system is their ability to address local complaints more efficiently. They also tend to be more sensitive to cultural and regional concerns. Europe has gone a considerable way towards the international guarantee of human rights by putting in place, through the council of Europe, powerful instrument and mechanisms, notably the European Convention for the protection of Human Rights and fundamental freedoms. (1950) and the European Convention for the prevention of

torture an inhuman or Degrading Treatment or Punishment (1987). The American Declaration of the Rights and Duties of Man (1948), the American Convention on Human Rights (1969) and The African Charter of the Rights of Man and Peoples (1981), address human rights issues in these regions. However, no regional or sub-regional group in Asia has any collective Human Rights Convention or officially constituted statutory body. Most countries and regional groups in Asia attempt to justify their failure in adopting a uniform Human Rights Charter and enforcing an official mechanism on the grounds that:

1. Human Rights issue are an internal matter.
2. International Human Rights Treatise are in conflict with certain religious norms, cultural values, customs and practices.
3. National Security and economic consideration must prevail over rights of individuals.
4. A common regional or sub-regional human rights official forum or mechanism is not advisable in view of diversity on many issues among member states of the regional alliances.

Despite these reservations among the Asian countries the need for regional human rights mechanisms cannot be ignored. Ten members of the Association of South East Asian Nations (ASEAN) after debating have deferred the final decision to establish an ASEAN Human Rights Commission. In the meantime, at the domestic level, some of the ASEAN Countries have established official statutory human rights institutions such as the Philippines Commission on Human Rights(1987), The Indonesian National Commission of Human Rights(1993), the National Commission of Thailand(1999) and the Human Rights Commission of Malayasia(1999). These commissions have the power to entertain and examine, complaints

and petitions of individuals or private organizations against Human rights violations, and if necessary, to conduct detailed hearings, enquiries, and trials and to direct remedial measures.

Although public opinion, both internationally and locally is increasingly pressing for the establishment of regional mechanisms to protect and promote human rights in South Asia, the basic objective to establish a common Human Rights charter and effective mechanisms to protect human rights on regional basis among the countries in South Asia has not yet materialized. The respective governments of the countries of the South Asian Association for regional Cooperation (SAARC), Member countries: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Srilanka) are not so far willing to consider adoption of a uniform Human Rights Code or Convention and to provide any common forum or mechanism to supervise adherence to and implementation of the same. These countries have already signed several conventions on Food Security and specific social issues, which requires concerted and coordination actions for the effective realizations of their objectives such as combating smuggling of narcotics, trafficking in women and children for prostitution and promotion of child welfare.

In the 12<sup>th</sup> SAARC Summit held in 2004 at Islamabad, a social charter was signed which spells out laudable goals and objectives, such as poverty alleviation, promotion of the statutes of women, education, human resource development, welfare of children, population control, promotion of tolerance, pluralism, human dignity, social justice, protection of the rights and Interests of minorities elimination of discrimination in all forms, but it stopped short of adopting a uniform human rights convention to create a regional institution for implementation of international human rights treaties signed by the member countries.

In Pakistan, India and other SAARC countries, relief is usually provided to victims of human rights abuses by the ordinary courts. However, they have almost no jurisdiction on collective human rights violations. Their jurisdiction is limited to specific violations of any particular legal right or constitutional provision in their respective countries. Generally, they exercise jurisdiction only on a complaint filed by an aggrieved party and the grant of relief or compensation by the courts is critically dependent upon the quality of evidence in each case. The concept of public interest litigation or representation action is restricted to the superior judiciary. The ordinary courts of law, in any case, are unable to dispense inexpensive justice expeditiously simply because they are already overburdened with millions of cases, pending for many decades. In these countries, the Supreme Court has original jurisdiction to directly entertain, adjudicate and decide public interest matters or human rights issues. Unfortunately, few victims or groups have the means to invoke the jurisdiction of the Supreme Court in a serious and effective manner. Expeditions and inexpensive justice from the ordinary courts is still a far fetched dream for the oppressed people in South Asian Countries.

At least three of the SAARC countries : India(1993), Nepal(1997) and Sri Lanka(1997) have established independent statutory National Commissions for Human Rights, to provide relief to their citizens. The protection of Human Rights Act of India in particular, provides for establishment of not only a National Human Rights Commission at the Federal level, but also establishment of State Human Rights Commission and Human Rights Courts. Other member states must establish the same without further delay to provide the first effective, edifice for the protection and promotion of human rights in the region.

### **Geneva Conventions:**

During the Second World War shocking crimes were committed against the humanity. A regime of complete lawlessness and tyranny was established. Warring parties had barbarously neglected human values and dignity. Belligerents frequently abused the principles contained in the earlier conventions and therefore, it was decided to extend and codify the existing provisions in an international Red Cross Conference in Stockholm held on August 23 to 30, 1948. The conference developed four conventions which were approved in Geneva on August 12, 1949. These conventions were:<sup>423</sup>

1. Conventions for the Amelioration of the condition of the wounded and sick in Armed forces in the field.<sup>424</sup>
2. Convention Amelioration of the condition of the wounded and sick and step walked members of the Armed forces at sea.
3. Convention relative to the treatment of the prisoners of war.<sup>425</sup>
4. Convention Relative to the prosecution of civilian persons in time of war.

These conventions provided a number of humanitarian rules to various classes of person such as the wounded and sick to armed forces in the field as well as at the sea, prisoners of war and civilian person in time of war. These conventions also imposed corresponding duties upon the protecting powers, the international committee of the Red Cross and other humanitarian organizations.

In the advisory opinion given in the legality of the threat or use of Nuclear weapon, the international court of justice observed that great many rules of humanitarian law applicable in armed conflict are so fundamental to the

---

423. Dr.H.Agarwal,Human Rights,[7<sup>th</sup> Edition,2008],Central Law Publishing Co., Allahabad. P. 225.

424. Herein referred to Convention No 1

425. Herein referred to Convention III.

respect of the human person and elementary consideration of humanity that the Hague and Geneva conventions have enjoyed a broad accession.

Geneva Conventions form the major part of the body of the international Humanitarian laws that protects the norm that combatants and the civilian during times of war and conflict. They are also a major component of respect for the Human Right of the individuals. These laws aim at limiting the arbitrary powers of the state against the legitimate rights of the individual, and thereby alleviate the suffering caused by warfare. It is complementary to the laws relating to the Hague Conventions that make provisions relating to conduct of hostilities.

Geneva Conventions are a series of international legal instruments forming part of UN laws that deal with the important issue of treatment of defenseless people in a situation of war. These are 1. Geneva Convention (i) for the amelioration of the condition of the wounded and the sick in armed forces in the field.

2. Geneva Conventions (ii) for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea.
3. Geneva Convention (iii) relative to the treatment of prisoner of war.
4. Geneva Convention (IV) relative to the protection of civilian persons in time of war

These were adopted by the UN in 1949 and entered into force in 1950. Later on, two Additional Protocols were added in 1977. All of these have been accepted by the different nations of the world. These conventions related to the upholding of the dignity of human life and are a sense of prescription that are to be applied in the situation of conflict.

Geneva Conventions in general deal with the Human Rights arising out of a situation of conflict and codifies rules on how to deal with such situations. For the combatants, it entitles human treatment and forbid injuries or killing of an enemy who has surrendered. These include provision relating to use of emblems of Red Cross and Red Crescent on a white background. These emblems are protected under the laws of the convention.

The convention also deals with the provisions of war and the captured civilians and protects their personal right. They are further protected from acts of violence and torture. They also have been given rights as to correspond with their families. Such prisoners are also entitled to judicial guarantees that exist as part of the usual process of law like protection from trials for acts they have not committed.

### **Implementation of Geneva Convention in India :**

The contemporary international Humanitarian law universally accepted. In case of India, it has signed the Geneva Conventions of 1949 in 1950. The Hague Conventions of 1954 in 1958 and the weapons conventions 1980 in 1984. The government of India is yet to sign both Geneva Protocols of 1977.

The Geneva Conventions of 12<sup>th</sup> August ,1949 was ratified by the president of India of October 16,1950 and came into force in India on May 9,1951. To implement the convention, the parliament of India has passed the Geneva Conventions act, 1960 which came into force since 14-08-1961.

Parties to the Geneva Conventions, have under taken to enact legislation necessary to implement certain provisions there of. In pursuance of such undertaking, the parliament of India has enacted the Geneva Conventions Act 1950 which contains 5 chapters and 4 schedules. It is provided that any person regardless of their nationality or citizenship within or without India

commits or attempts to commit or abets or procures commission by any other person of a grave breach of convention, shall be punished with death, imprisonment of life, where the offence involves willful killing of a person protected by any of the conventions.

In any other case the punishment provided is imprisonment for a term which may extend to 14 years. Grave breach of convention means, any of the following acts committed against person or property, protected by the conventions being: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great sufferings or serious injury to body or death and extensive destruction and appropriation of property, not justifiable by military necessity and carried out wantonly or unlawfully.

This provision prescribes punishment of offenders against the 4 conventions. Another significant provision of the Act is Chapter IV. The chapter makes provision against the abuse of the Red Cross and other emblems. The provision is worded in a negative tone that no person shall without the approval of the central government use for any purpose whatever the emblem of red cross with vertical and horizontal arms of the same length on and completely surrounded by a white ground of the designation red cross or Geneva Cross. Further no person shall use design or wording so nearly resemble any of the emblems. If any person contravenes any of the provisions which prohibit use of red cross and other emblems, shall be punishable with fine which may extend to five hundred rupees and liable to forfeit and goods upon or in connection with which the emblems designation, design or wording was used by other person.

The four schedules of the Act have reproduced the four Geneva Conventions. Thus, the 4 Geneva Conventions of 1949 have become

enacted law of India and under a legal obligation to respect the convention, violation of which has penal consequences.

The Geneva Conventions Act 1960 represents a statutory humanitarian law of India implementing the 4 Geneva Conventions. Respect for humanitarian law is a necessity for preventing extensive destruction and bitterness so that a lasting peace is essential.

Even if, the Geneva Conventions have been made enacted law of India, people are not aware enough of the act. No case has been registered under the act and there is no reported case which centers round the Act and interpretation.

### **International Conference on Human Rights :**

The first world wide governmental conference known as international conference on Human Rights, popularly known as Tehran Conference, was held in Tehran in 1968 to review the progress made in twenty years since the adoption of the universal declarations of Human Rights and to evaluate the effectiveness of methods used by the United Nations in the Human Rights field. The conference after having recognized that peace is the universal aspirations of mankind and that peace and justice are indispensable to the full realizations of Human Rights and fundamental freedoms proclaimed by consensus on the major human rights problems which is generally referred to as proclamation of Tehran. The proclamation reaffirmed the primary aim of the United Nations in the sphere of Human Rights is the achievement of maximum freedom and dignity by all individuals.

### **World Conference on Human Rights (Vienna Conference) 1993 :**

The second world conference on Human Rights known as Vienna Conference was held at Vienna from 14 to 25 June, 1993. The Vienna declaration and programme of action reaffirmed that "all human rights are

universal, individual and interdependent and interrelated. The international communities must treat human rights globally in a fair and equal manner, or the same footing and with some emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is a duty of states, regardless of their political, economic and cultural system, to promote and protect all human rights and fundamental freedom. The declarations ensured that the dignity of an individual cannot be divided into two spheres, civil, political, economic, social and cultural. The individual must be able to enjoy freedom from want as well as freedom from fear. Respect for the dignity of an individual cannot be ensured without that person enjoying all his rights. Ultimately, it is a question of putting the human being in the centre, not as an atomistic individual, but as part of a community and an ecological system.

The Vienna Declaration and Program of Action (VDPA) adopted by the World Conference on Human Rights in Vienna in June 1993 marked a major milestone in forging a new consensus on human rights. It underlined the importance human rights on the international agenda as well as the freely-expressed will of the international community to work together to uphold, strengthen and implement international human rights standards and to jointly address what the former Secretary General of the UN described as "the quintessential values through which we affirm together that we are a single human community".

The Five Year Implementation Review of the VDPA, along with the 50th Anniversary of the Universal Declaration of Human Rights (UDHR), provide a good opportunity to assess the progress achieved as well as the shortcomings that remain to be addressed in the international community's efforts to enhance cooperation for the promotion and protection of human

rights. It is an occasion for the international community to collectively rededicate itself to the cause of human rights and to identify further measures, which are necessary to achieve the full realization of the vision elaborated by the VDPA.

### **Implementation of World Conference on Human Rights (Vienna Conference) 1993 in India:**

On this occasion, the Government of India would like to reaffirm its commitment to the promotion and protection of human rights through national efforts as well as international cooperation. As a democratic, multi-cultural, pluralistic and open society, India stands ready to share with the international community its perspectives and experience in the promotion and protection of human rights. It is of the view that the VDPA implementation review should be used to strengthen international cooperation and initiate a process of constructive dialogue among all countries with the objective of ensuring universal support for human rights.<sup>426</sup>

This submission outlines India's viewpoints on the achievements of the last five years and how the international community should approach the task of remedying shortcomings so that the goals set by the VDPA can be realized. Where appropriate, information on specific measures undertaken within the country has been provided by way of example. The framework suggested by the Secretariat for this report has been followed and it is hoped that these views will contribute to a "future-oriented" evaluation of the last five years.

In India's view, in the year of the fiftieth Anniversary of the UDHR, the international community must reflect upon these challenges to the

---

426. [http://www.indianambassy.org/policy/Human\\_Rights/vdpa\\_india.htm](http://www.indianambassy.org/policy/Human_Rights/vdpa_india.htm). Visited on 12-10-2009.

universality of human rights, in particular those which result from the nature and language of the current discourse on human rights in international forums. It is imperative that the international community work collectively to meet these challenges. This requires a two fold approach - one based on emphasizing tolerance and pluralism as essential adjuncts to democracy for the full enjoyment of human rights, and the other focusing on the long neglected economic, social and cultural aspects of the UDHR and the VDMA. Both the UDHR and the VDMA are categorical in their recognition of the inherent dignity of all members of the human family. There is need therefore to initiate a dedicated effort aimed at promoting understanding and tolerance in respect of all matters and to propagate diversity and pluralism as values that enrich societies rather than undermine or impoverish them. The UDHR articulates both freedom from fear and want as the highest aspiration of the common people and affirms the need to promote social progress and better standards of life in larger freedom. True meaning needs to be given to these words through action and practice and the pursuit of the Right to Development, if the goal of universality is to be fully achieved.<sup>427</sup>

As a comprehensive right which incorporates within itself all other rights, the promotion of the right to development can provide one of the most effective means of ensuring the promotion of all rights. India agrees with the Office of the High Commissioner of Human Rights that the right to development has the potential of providing the homogenous and integrated approach to human rights that the international community has been searching for over five decades, and that it bears all the necessary components to guide the human rights system into the new millennium. However, there is today an urgent need to infuse new thinking into the

---

427. [http://www.indianambassy.org/policy/Human\\_Rights/vdma\\_india.htm](http://www.indianambassy.org/policy/Human_Rights/vdma_india.htm). Visited on 12-10-2009.

Right to Development and to initiate comprehensive studies and discussions on the subject. In this context, India would like to propose that the Secretary General consider appointing an independent expert to present a comprehensive study on the subject and that the Commission on Human Rights may consider establishing a Working Group comprising all member states to annually discuss and evaluate progress in the realization of the Right to Development.

India remains equally committed to democracy and development, to civil and political rights as well as economic, social and cultural rights. The dynamic interplay between these two sets of rights is reflected in the equal emphasis placed on both democracy and development, and in the complementarity between the rights-based and the development-based approach to human rights in post-independence India. This is also reflected in the evolution in the judicial interpretation of the right to life in India. Empowerment of vulnerable sections and people's participation in development are seen as crucial to the foremost goal of the Government - the economic development of the people of India. National measures to promote the right to development include those aimed at democratic decentralization, establishing grass-roots democratic institutions, constitutionally guaranteed affirmative action programmes for the socially disadvantaged sections of the population, enlarging the role of women in development as well as governance, thereby ensuring that the human person remains the central subject of development and that all plans and policies enhance his/her welfare, quality of life and capacity to contribute freely and effectively to the community at large. Indeed, the entire development project of India with its emphasis on eliminating past

injustices and eradicating poverty, democratically, may be visualized as a vast human rights project.<sup>428</sup>

India attaches importance to international solidarity and cooperation to promote the objectives of the Right to Development. India is of the firm view that the Right to Development in the national context cannot be fully realized without addressing the root causes of under-development, including its historical and international context, in a spirit of international cooperation. For its own part, despite its resource constraints, it has sought to promote more rapid development of other developing countries through the extension of technical cooperation and other forms of assistance. It has also continued to explore avenues for South-South and North-South cooperation, especially through technology transfer, investment and trade.

Since the adoption of VDPA, the international community has made significant strides in promoting the equal status of women. Women's issues today find an important place on the international agenda and gender mainstreaming has been taken up as a priority activity within the UN system. However, much more remains to be done. Violence against women is a sad reality affecting all societies in all parts of the world.

Promotion of women's rights must remain a priority objective of the international community in the years to come.

Nationally, India has adopted a rights-based approach to promoting the equality of women and evolved a multifaceted strategy that aims at their empowerment through awareness raising, economic independence, education, health, legal safeguards and political participation. The objective is to enable women to overcome the disadvantages that they face

---

428. [http://www.indianambassy.org/policy/Human\\_Rights/vdpa\\_india.htm](http://www.indianambassy.org/policy/Human_Rights/vdpa_india.htm). Visited on 12-10-2009.

and play an effective and equal role in society. Among the most important of these measures is the reservation of one-third seats in local and village level government, which has already been mentioned. It is estimated that this measure has resulted in around one million women joining the political life of the nation. A statutory National Commission for Women has been set up and a special Joint Committee of Parliament oversees issues pertaining to the empowerment of women. Among the proposals currently under consideration are an amendment to the Constitution to reserve one-third of the Parliamentary and Legislative seats for women and a proposal to set up an office of a Commissioner for Women's Rights with a three tier structure across the country, mandated specifically to combat violence against women. In a step aimed at transforming social perceptions about the girl child, the Government has also launched a scheme to provide financial incentives to poor families on the birth of a girl child followed by further incentives for primary and secondary school education. Nearly 2.2 million girls born every year amongst the poorest families in India are expected to benefit from this scheme. Moreover, nutritional, health and educational programmes with the girl child as the primary focus and programmes aimed at improving employment opportunities for poor women through asset and skill endowment and provision of micro-credit have also been launched with a view to promoting the economic, social and cultural rights of women.

Children are the greatest asset of any society and the well being of the world's children has been at the centre of the UN's activities since its inception. The near universal ratification of the Convention on the Rights of Child is testimony to the importance attached to these fights in all parts of the world. The establishment of a sound foundation for the promotion of the fights of the child, through the collective efforts of the Committee on

the Rights of the Child and UNICEF, counts among the major successes since the adoption of the VDPA.

Exploitation of children continues to persist in one form or the other throughout the world and the international community has to intensify its efforts to bring an end to this situation. Of particular importance in this regard is to recognize that symptoms of poverty should not be confused with deliberate human rights violations.

Eradication of child labour is one of the most important priorities of the Government of India, which has announced that the fight to free and compulsory primary education shall be made a fundamental right and has pledged to eradicate child labour in all occupations and industries. A frontal attack on parental poverty has been launched through employment generation programmes. A national action plan for children has also been drawn up with quantifiable targets for achievement by 2000 AD in areas of health, nutrition, education, with a special focus on the girl child and children in difficult circumstances. The National Human Rights Commission and many non-governmental organizations have started to play an increasing role for the eradication of child labour.

The oppression, exploitation and dispossession of indigenous people remain one of the most unfortunate legacies of the historic processes of migration to and colonizing of the "new world". While it is gratifying to note that in the last five years a great deal of attention has been devoted to the human rights of indigenous people, a great deal more needs to be done to fulfill the goals set by VDPA.

The VDPA played an important role in highlighting the importance of special attention to the problems faced by minorities and other disadvantaged groups such as disabled persons and migrant workers. However, the world

is today witness to a resurgence of exclusivism and violent expressions of intolerance and extremism. The need of the hour is, therefore, for an active and determined effort on the part of the international community to promote a culture of tolerance and respect for pluralism. The key elements of any such efforts should be national legislation to ensure a regime of equality and nondiscrimination as well as education and awareness raising.

The fights of vulnerable groups have received special attention in India ever since independence and the Constitution itself contains extensive provisions for the promotion and protection of the fights of all minorities, including certain special groups of people unique to Indian society known as the Scheduled Castes and Scheduled Tribes. These measures have been further strengthened through a recent amendment to the Constitution granting Scheduled Tribes local self-government and a high degree of autonomy in the management of their day to day affairs, control over natural resources, and other developmental activities in the areas where they live.

The Government has set up a National Commission for the Scheduled Castes and Scheduled Tribes and a National Commission for Minorities to promote and protect the fights of these vulnerable groups. Further, a National Minorities Development and Financial Corporation promotes economic and developmental activities for minorities.

The Parliament has recently enacted a bill for the empowerment of the disabled which inter alia treats rehabilitation as a fight and aims at the creation of a society which provides opportunities for the development of people with disabilities to their fullest potential. A National Handicapped Finance Corporation has been also created to support self-employment of people with disabilities

The VDPA expressed in very clear terms the dismay of the world community at massive violations of human rights especially in the form of genocide, ethnic cleansing, systematic rape of women in war situations, creating mass exoduses of refugees and displaced persons. It condemned such practices and reiterated the call for the perpetrators of such crimes to be punished. The VDPA also refers to other gross and systematic violations of human rights such as unilateral measures not in accordance with international law and affirmed that food should not be used as a tool for political pressure.

The five years, which have passed since the adoption of the VDPA, has provided an opportunity for a great deal of reflection on how such violations can be prevented. The ongoing efforts for the establishment of an International Criminal Court are extremely important in this regard. The Government of India welcomes the progress achieved so far in these negotiations and looks forward to their being brought to a successful conclusion in May 1998.

In India, the National Human Rights Commission set up in 1993 has pursued its mandate with determination and considerable success. It has received and acted on thousands of individual complaints of violations using its own investigative machinery. Going beyond a mere symptomatic approach, it has made a number of specific recommendations on how human rights violations can be minimized or ended. Guided by the experience of the National Commission, six states of the Union of India have set up State Human Rights Commissions and a few others are in the process of doing so.

**Declaration on the Elimination of Violence Against Women (1993) –**

This declaration was adopted by the general Assembly on 20<sup>th</sup> December 1993 for recognizing the urgent need for the universal application to

women of the rights and principles with regard to equality, security liberty, integrity and dignity of all human beings. This declaration provided that women are entitled to the equal enjoyment and protection of all human rights and fundamental freedom in the political, economic, social cultural, civil or any other field. These rights include – the right to life, right to equality, the right to liberty and security of person, the right to equal protections under the law.

Soon after the Vienna Conference, government obligation to address violence against women was further delineated when the UN General Assembly adopted DEVAW in December 1993. The declaration states that violence against women is a “manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by “men” and that “ violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.” The preamble to the declaration affirms that, “violence against women constitutes a violation of the rights and fundamental freedom of women and impairs or nullifies their enjoyment of those rights and freedoms.

### **Implementation of Declaration on the Elimination of Violence Against Women (1993) in India:**

The phenomenon of domestic violence in India is widely prevalent but has remained invisible in the public domain. The civil law does not address this phenomenon in its entirety. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under section 498A of the Indian Penal Code. In order to provide a remedy in the civil law for the protection of women from being victims of domestic violence in the society, the Protection of Women from Domestic Violence Bill was introduced in the Parliament.

The Monsoons Sessions of August, 2006 of Parliament was marked by the passage of the Protection of Women from Domestic Violence Act, 2005 which was hailed as the first significant attempt to recognize domestic abuse as a punishable offence, to extend its provisions even to those live-in-relationships, and to provide emergency relief for the victims, in addition to legal resource. In spirit and intent, the Domestic Violence Act is unexceptionable. It can not be faulted on the ground of gender discrimination, because in our male-dominated society, women are undoubtedly greater victims of domestic violence than men. The Act has some commendable provisions for protection of women in case of physical and economic abuse.

In India, the common violence against women are wife beating, harassment, torture, bride burning, slavery and exploitation, forced prostitution and sexual harassment, female foeticide and infanticide etc. the nature of violence against women in and outside the families takes the form of injuring women's psychological health as well as their bodies and often involve humiliation in addition to physical violence. The violence caused to women in the family is the domestic violence which includes foeticide, infanticide, marital cruelty, dowry murders, child abuse, incest and battering etc. the violence faced by women in the community level includes rape, sexual harassment, eve teasing, trafficking and sexual discrimination etc. the custodial violence and institutional deprivations are the violence caused to women at the state level.

Domestic violence is physical, economical, sexual or psychological abuse directed towards one's spouse, partner or other family members within the family. Since the term domestic violence is gender neutral, it may refer to abuse of either husband or wife. It gives the impression that men are as likely as women to be victim of such an abuse. Since the police and hospital

records indicate that majority of victims of domestic violence are women, therefore, this term is generally used for violence towards women.<sup>429</sup>

The Act is significant because for the first time, the term 'Domestic Violence' has been widened in the meaning and scope from culture specific restrictions of dowry deaths and penal provisions to positive civil rights of protection and injunction. The passing of the domestic violence act is an important marker in the history of women's movement in India, which has confronted the problem of violence for well over two decades. This enactment sets free the movement from the malaise that has long plagued it, of attributing all categories of violence suffered by women within their families to 'dowry' and widening the scope of the term 'domestic violence'. It acknowledges that domestic violence is a widely prevalent and universal problem power relationship, more than the culture specific phenomenon called 'dowry death'.

The new act not only recognizes an old position that violence, actual or threatened, is not just physical maltreatment, but can be sexual, verbal or psychological abuse as well. It covers women in marriages and live-in relationships, and those living in a shared household related by 'consanguinity or adoption'. The new law also gives a victim right to residence an access to a protection officer, who is answerable to the courts.

In the case of **Sulochana v. Kuttappan**<sup>430</sup>, petitioner and her child approached magistrate with application under section 12 of the Act claiming relief under section 19 and 20 of the Act. Magistrate passed ex-parte interim order directing respondent husband to allow petitioner to reside in his house, restraining from causing any disturbance to peaceful

---

429. Anil Sachdeva, *The Protection of Women From Domestic Violence*, [3<sup>rd</sup> Edition, 2009], Dilight Law Publishers, Jodhpur. P 29.

430. *Sulochana v. Kuttappan* 2007 Cr.L.J 2057 Kerala.

residence of petitioner and to pay Rs 2,000/- & Rs 1250/-. The court held that appeal would be maintainable against interim ex parte order passed under section 23 of the Act.

**Beijing Declaration 1995:**

The fourth world conference on women, held in 1995, in Beijing, commonly called Beijing conference stated that women's rights are human rights. The conference called for the integration of women's human rights in the work of different human right bodies of the United Nations. It considers the issue of violence against women in her public and private life as human right issues. This declaration clearly stated the equal rights and inherent human dignity of women and men and other purposes and principles enshrined in the charter of the united nations, to the universal declarations of human rights and other international human rights instruments, in particular the convention on the elimination of all forms of discrimination against women, as well as the declaration on the Elimination of violence against women and the Declaration on the right to development further more, it also prevent and eliminate all forms of violence against women and girls.

The adoption of the Beijing Declaration and platform for action of the Fourth World Conference on women in 1995 signified the maturation of women's quest for dignity and equality that had spanned all continents. Rights of women, empowerment of women, gender equality, mainstreaming gender and elimination of discrimination against women because the accepted norms by which women's development was to be answered in the future.

The Secretary General's review of the Implementation of the Beijing platform for action and the outcome of the 23<sup>rd</sup> special Session of the General Assembly indicates an increased Awareness of Gender equality among Governments and different parts of society. It reports significant but

uneven national achievements in relation to the implementations of these outcomes. Increased participation of women in the economy, progress in elimination of discrimination, and achievements in women's health and education has left some notable positive developments.

### **Implementation of Beijing Declaration in India:**

This Declaration is of particular significance as because India adopt the Beijing Declaration and platform for Action without reservation, has been fully committed to its implementation.

In India, initiatives to address the situation of women were already under way when the 4<sup>th</sup> world Conference was held. The national Commission for women had been set up by an act of Parliament in 1990 to safeguard the rights and legal entitlement of women. However the most far reaching and influential measures adopted in India were the 73<sup>rd</sup> and 74<sup>th</sup> amendment to the constitution of India in 1993 which provided for reservation for women of one third of all seats, including its chairs, in the local village and municipal bodies laying a strong foundation for their participation in decision making at the local levels. In a powerful revolution, and in an exercise of not only their political and civil rights, but also one that affects economic, social and cultural rights, more than one million women now occupy position as member and chair persons of local bodies. As a single act of empowering women, this has not known parallel in history.

Education, training and self employment strategies are playing crucial role in the emancipation of women from traditional dependence. Over the past decades, women have become more vocal and assertive and have now emerged as articulate, motivated leaders all over the country. Sustained training and networking efforts are being undertaken to ensure that capacity of the elected women representatives to participate improves.

Another development that merits special mention is the progress made in the last few years to reduce the gender gap in enrollment and retention at the school level. Through concerted efforts, female literacy has grown significantly from 39.3% in 1991 to 53.7% in 2001 and the gender gap has narrowed from 25% to 21%. The focus is now on improving women's participation in higher education, technical education and vocational courses.

Legal Protection through the progressive development and strengthening of natural laws, as also elimination of discrimination against women through policy measures, such as the national policy for empowerment of women adopted in 2001 as a follow up action to the commitments adopted in the Beijing Declaration and Plan for Action, have been a vital part of India's efforts to combat practices contrary to the human rights of women and to change social attitudes on which discriminatory practices have been based. These measures are sought to be strengthened further by the new Government through its common minimum programmes which strives to ensure the laws be made more women friendly and enhance the economic empowerment of women through equal rights of ownership of assets such as land /shelter promotion of access by 'self help' groups to micro -finance are important elements.

India's legislative framework is supported by an active and alert judiciary which has infused dynamism into safeguarding and upholding the Constitutional and legal provisions, and has issued directives to the state from time to time to further safeguard and strengthen the rights of women. In addition, independent institutions- the National Human Rights Commission for Women-are actively engaged in protecting the legal and Constitutional Safeguards provided for women.

We, in India are fortunate that is our democracy, a story women's movements and a widespread network of non-government organization which have robust grass-roots presence and deep