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FOREWORD

Close involvement with society is the destiny of Law and law makers. In order to understand the concurrence of the latest developments in the area of law and society at large, NULJ has yet again achieved relevance by presenting a very diverse and meaningful collection of articles. We are a movement journal - committed to supporting, enhancing, and privileging all the diverse voices in and outside the country. This of course may lead to a contribution leading to the steady march towards justice. We are a collaborative journal, uniting the energy of law school students, lawyers, activists, and community members to generate important practitioner-oriented scholarship. We are a journal striving to live by the social justice values we espouse by sharing resources, rejecting internal hierarchy, and promoting vigorous discussion, and even dissension, within the pages of our journal. The authors have presented ideas and trajectory of thought process that would surely lead us to new paths of enquiry and deliberations. The NULJ Team appreciates their valiant efforts and looks forward to continued support and zeal in encouraging us.

We believe that as a reader you are as inspired, as impassioned, and as motivated to action as we have been through this process. We hope that you will allow us to partner with you in making our unique corner of the earth a more just and equitable place to live.

Prof. (Dr.) Purvi Pokhariyal
Chief Executive, Nirma University Law Journal
I/c Director, Institute of Law, Nirma University

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THE DEMISE OF CONSIDERATION

Rangin Pallav Tripathy*

The doctrine of consideration is a peculiar feature of the common law jurisdictions which prescribes that in the absence of consideration, no promise howsoever seriously made would be binding. The author argues in this article as to the redundancy of this doctrine in the light of developments in the last century in certain aspects of contract law.

The focus of this article is not on the unfairness that may be perpetrated by a strict adherence to the doctrine but on its conceptual non-sustainability in light of developments subsequent to its origin. It is the contention of the author that continuing with consideration as the central notion of contractual liability would be misconceived.

In the first part of the article, the author establishes the function this doctrine is supposed to serve in the arena of contract law.

Then the author argues how the same function can now be served by more evolved and equitable techniques and how the doctrine of consideration can at best play a subsidiary role. In the second part, the development of the two concepts which undermine the central position of the intention to create Legal Relationship and Promissory Estoppel, is explored both in the legal system of England and India.

* *Asst. Professor of Law, National Law University, Odisha*

It is submitted that though the degree of development of these concepts in both the countries are varied, the cumulative impact is that the doctrine of consideration has been rendered a complicated and unnecessary position in the legal framework. The doctrine can still be of relevance in terms of its evidentiary function but an endeavour to place it in a pedestal any higher would be an ego-centric and superficial exercise.

Thus the traditionally sacrosanct position of the doctrine of consideration has lost its context and relevance. The legal systems of both these countries are inevitably progressing towards the extinction of the doctrine of consideration in its historical design.

I. INTRODUCTION

Law of contract can be explained in terms of its basic framework as the law of limiting principles.[1] This explanation refers to the fact that the law of contract is but a body of boundaries within which parties are permitted to enter into enforceable private understandings. These boundaries limit the scope of enforceability of these understandings in terms of content, modality, parties involved and other related parameters. The law of contract determines the conditions under which promises will be legally binding by setting forth a number of limiting principles subject to which the parties may create rights and duties for themselves which the law will uphold.

Most of the foundational principles of contract law are but limitations beyond which or in violation of which agreements will not be enforceable in law. The most obvious example would the law relating to minority wherein unless the persons contracting are of the age of majority, the agreement remains unenforceable.[2]

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[1] J. Beatson, A. Burrows & J. Cartwright (eds), Anson's Law of Contract, Oxford University Press, New York, pp. 1-2 (2010); "The law of contract may be provisionally described as that branch of the law which determines the circumstances in which a promise shall be legally binding on the person making it."

[2] Indian Contract Act, 1872, Section 10 & 11.

In common law jurisdictions, one of the ubiquitous principles is the principle of Consideration.[3] Of all the limiting principles such as minority, free consent, mistake, frustration etc., the doctrine of consideration perhaps presents the most delicate dilemma in terms of its continued relevance.[4]

There has been mostly an overall agreement among jurists on the purpose of this particular doctrine. As has been the general opinion[5] this doctrine is supposed to serve as a distinguishing marker between agreements which should be legally enforceable and those that should not be. It eliminates the possibility of agreements made on impulse being agitated in litigation and presupposes an inevitable deliberation on the part of the parties to finalise their understanding.[6] It has been stressed that "Only those undertakings that are supported by legal consideration are legally binding; other undertakings are not binding even if the speaker intends to bind himself by his undertaking."[7]It has also been pointed out that consideration brings out the idea of reciprocity as the distinguishing mark of English in terms of the obligatory nature of a promise.[8]The doctrine is supposed to identify the intention of the parties as to their desire to make the agreement legally enforceable.[9] It has been to its reiterating relevance that the doctrine of consideration serves as a safeguard against possibilities where parties may accidentally bind themselves on impulse.[10]

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[3] See Arthur T. Von Mehren, Civil-Law Analogues to Consideration; An Exercise in Comparative Analysis, Harvard Law Review, Vol. 72 No.6 pp. 1009-1078, (April 1959); "Consideration stands, doctrinally speaking, at the very centre of common law's approach to contract law." Also see 1 R.G. Padia (ed), Mulla& Pollock Indian Contract and Specific Relief Acts, Lexis Nexis Butterworths, New Delhi, p.67 (13th ed. 2009); "The requirements of consideration are peculiar to the countries modeled on the common law system. The continental systems do not require consideration as an element of a contract, though most insist of some formality for gifts or donative promises; here contractual obligations can arise when the parties intend to create legal relations."

[4] *Infra* Note 31,32, 49,50 & 53.

[5] See 1 R.G. Padia *Supra* Note 3, p.66; "The purpose of the doctrine of consideration is to put some legal limits on enforceability of agreements and to establish which promises should be legally enforceable. It ensures that parties have decided to contract after deliberation and not on impulse. It is an index of the seriousness of the parties to be bound by the bargain. Consideration also serves an evidential and formal function"

[6] *Ibid.*

[7] P.S Atiyah & Stephen A. Smith, Atiyah's Introduction to the Law of Contract, Oxford University Press, New York, p. 107 (6th ed. 2007).

[8] See J. Beatson, *Supra* Note 1, p. 91.

[9] *Ibid.*

[10] *Ibid.*

From the above observations, it can be safely summarised that consideration is not simply a proof of the intention of the parties to legally bind themselves, but has been identified as the as the only proof of such intention. As can be seen from the general opinion of jurists and from a consistent judicial policy,[11] in the absence of consideration, no other proof of legal intention, howsoever persuasive can cure the defect.

In fact, that seems to be not only the function the doctrine serves today, but the very reason for its evolution in the first place. The doctrine of consideration is viewed as one of the principal achievements of the sixteenth and early seventeenth centuries as it developed as the doctrine to define the scope of newly recognised promissory liability.[12] As eloquently put by Cheshire; "A consideration meant a motivating reason. The essence of the doctrine was the idea that the actionability of a parol promise should depend upon an examination of the reason why the promise was made. The reason for the promise became the reason why it should be enforced or not enforced." To date, there remains a vigorous debate as to the exact source of its origin,[13] but the functional utility for which it gained the widespread recognition and the purpose is has come to serve in the Common Law Contract System is by far undisputed.[14]

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[11] Balfour v. Balfour (1918-19) All E.R. 860 (CA), White v Bluett 23 L.J. Ex. (N.S.) 36 (1853), Jones v. Padavatton 1969 All E.R. 616.

[12] M.P. Furmston (ed), Cheshire, Fiftoot and Furmston's Law of Contract, Oxford University Press, New York, p. 8 (1st Indian ed. 2007).

[13] For a detailed discussion on the matter, see Pherozeshah N. Daruvala, The Doctrine of Consideration Treated Historically and Comparatively, Butterworths and Co. (India) Ltd. Calcutta, pp. 99-113 (1914). Also See M.P. Furmston, *Supra* Note 12, p. 10: "Whether the doctrine of consideration was an indigenous product, or in part derived from the doctrine of *causapromissionis*of canon or civil law, has long been a matter of controversy, and it cannot be said that its pedigree has yet been explained in a fully satisfactory way."

[14] See P.S. Atiyah, *Supra* Note 7 pp.107-109; though the author presents a nuanced understanding of the perspective that the Doctrine of Consideration does not serve a single purpose, the overwhelming function it serves is quite evident. p. 108; "As we shall see, the reality appears to be that no unitary explanation can explain every aspect of the consideration doctrine." p. 109 "As this historical view suggests, the key to understanding consideration is to recognize that it has served a variety of functions."

Not that the doctrine has been wholly appreciated in course of its entrenched indispensability,[15] Lord Mansfield refused to recognise it as the vital criterion of a contract and regarded it not as the only proof but merely as one of the proofs of the intention of the parties to be bound. He opined that if the same intention could be ascertained otherwise, there would be no logic in insisting on consideration as an essential element in all enforceable agreements.[16] Though his resistance turned out to be a mere blip,[17] it resonates with particular relevance when appreciated for the pragmatism it sought to exude.

The comments of Lord Dunedin in the famous case of Dunlop[18] do not reflect the technical insight which one could glean from Lord Mansfied, but it documents the absurdity of the doctrine in its inability to serve fairness in more situations than one. He stated; "I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce has a legitimate interest to enforce."

The focus of this article is not on the unfairness that may be perpetrated by a strict adherence to the doctrine but on its conceptual non-sustainability in light of developments subsequent to its origin. It is the contention of the author that continuing with consideration as an essential element in the legal system of today is an exercise in redundancy.

There are two sets of developments which have contributed to this perspective on the part of the author. Both these developments will be considered in terms of their variances and consequential impact in England as well as in India.

[15] Wright, Ought the Doctrine of Consideration to Be Abolished From the Common Law, Harvard Law Review, Vol. 49 No. 8, pp. 1225-1253[Jun., 1936); "But I sit in appellate tribunals which administer laws other than the common law, such as the laws of South Africa and Ceylon where the basic law is the Roman Dutch law, or of Scotland where the basic law is the civil law: in these jurisdictions consideration has no place; nor has it a place in the laws of France, Italy, Spain, Germany, Switzerland and Japan. These are all civilised countries with a highly developed system of law; how then is it possible to regard the common law rule of consideration as axiomatic or as an inevitable element in any code of law?"

[16] Pillans v. Van Mierop (1765) 3 Burr 1664.

[17] Rann v. Hughes (1778) 7 Term Rep 350.

[18] Dunlop Pneumatic Tyre Co.Ltd. v.Selfidge and Co. Ltd. 1915 A.C. 847.

The two developments are the concepts of (i) Intention to Create Legal Relationship and (ii) Promissory Estoppel.

II. INTENTION TO CREATE LEGAL RELATIONSHIP - ENGLAND

With a long line of judicial pronouncements, mainly in the 20th Century,[19] the intention to create legal relationship is a firmly rooted requirement in English Law of Contract in order to sustain the legal enforceability of any contract. This requirement is in addition to the other classical elements like free consent, competence of parties and even consideration.[20] Simply put, this principle requires that only such agreements should result in legally binding obligations which were concluded with that intended result. Agreement concluded without contemplation of legal consequences should not be enforceable. The development of this doctrine has been explained on the ground of the necessity to distinguish between agreements which are mere social engagements and those that are intended to have legal consequences attached.[21] This distinction has been very starkly mentioned in the case of *Balfour v. Balfour* where Atkin L.J. states the principle thus; "...it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract..."[22]

The emphasis of this doctrine is not on the supposition that certain social engagements are incapable of being legally enforced. The focus at all times is to determine the true nature of the transaction between the parties. Thus seemingly social agreements have been held to be legally enforceable[23] and

[19] Balfour v. Balfour (1918-19) All E.R. 860 (CA), Jones v. Padavatton 1969 All E.R. 616, Rose and Frank Co. v. Crompton and Bros Ltd. [1925] AC 445.

[20] Edwin Peel (ed.), Trietel on the Law of Contract, Sweet and Maxwell, p. 190 (12th ed. 2007). It has been emphasised that the element of Intention to Create Legal Intention is an independent and additional requirement in creating contractual liabilities apart from the other traditional elements.

[21] SeeJ. Beatson, *Supra* Note 1, p. 70.

[22] Balfour v. Balfour (1918-19) All E.R. 860 (CA).

[23] Meritt v. Meritt (1970) 1 WLR 211.

prima facie commercial agreements have been denied legal enforceability.[24] The difference lies primarily in the initial presumption of the law. As has been put forth in the case of *Rose and Frank Co. v. Crompton and Bros Ltd;* "in the case of agreements regulating social relations, it follows almost as a matter of course that the parties do not intend legal consequences to follow. In the case of agreements regulating business relations, it equally follows almost as a matter of course that the parties intend legal consequences to follow."[25] Cheshire also notes that in case of social, family or other domestic agreements, presence or absence of intention is to be ascertained by an analysis of the circumstances, whereas in case of commercial agreements, this intention is presumed and must be rebutted by the party seeking to deny it.[26]

It has been clear from a long line of judicial pronouncements[27] that this requirement of Intention to create Legal Relationship is a necessity in addition to the requirement of Consideration as an element in the transaction.[28]

This development seems incongruous and confused. With consideration serving as an evidence of the intention to create legal relationships, the additional requirement to prove intention to create legal relationship as an independent element suggests that Consideration is no longer a given proof of the intention of the parties to bind themselves legally.

This duplication of functions by these separate elements has not been unnoticed. Williston has strongly suggested that the separate element of intention is foreign to the common law, imported from the Continent by academic influences in the nineteenth century and useful only in systems which lack the test of consideration to enable them to determine the boundaries of contract. [29]

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[24] Rose and Frank Co. v Crompton and Bros Ltd. [1925] AC 445.
[25] *Ibid.*
[26] See M.P. Furmston, *Supra* Note 12, pp. 143-44.
[27] *Supra* Note 19.
[28] See Edwin Peel *Supra* Note 20, p. 190.
[29] Williston on Contracts, (3rd ed.) Cited in M.P. Furmston, *Supra* Note 12, pp. 142-43.

The point is well made when we consider that the very presence of consideration is supposed to normally imply the existence of a legal intention. When the said element is supposed to be already present in the transaction through the element of consideration, the requirement to essentially prescribe a separate proof of the intention is but institutionalising redundancy.

If this insight has to be taken to its due logical conclusion, it would seem that either one of the doctrines must give way to the other because the presence of both in the legal system is prone to create more confusion.

In this scenario, it is the contention of the author that it is the doctrine of consideration which must be marginalised as an essential requirement of all contracts. The test of intention to create legal relationship undertakes a wider perspective of human interaction. As has been judicially recognised in earlier cases[30], the presence of consideration does not always mean that the parties intended to create legal relations. Though the converse is yet to be recognised, it should be well within the realm of legal understanding that absence of consideration by itself must not preclude the presence of intention to create legal relationship.[31] The doctrine of Consideration may serve as a persuasive element to infer intention to create legal relationship but need not necessarily act as the only stepping stone to the said intention.[32] This marginalised application of the doctrine of consideration has also been advocated by Porf. William S. Holdsworth.[33] He has stressed that every contact entered into with the intention to affect legal relations should be enforceable if it is in writing or if it is supported by consideration. In this approach, consideration serves only an evidentiary purpose to support the

[30] See Balfour v. Balfour (1918-19) All E.R. 860 (CA), Jones v. Padavatton 1969 All E.R. 616.

[31] See Wright *Supra* Note 15; "I may, however, first note that, if consideration is taken by the common law as the 'sole' test of contractual intention (it being always herein understood that the formality of the deed is not in the question), it is not true to say that this test is by itself conclusive or that the necessity of deciding whether there is a deliberate intention to enter into an enforceable contract is eliminated because there is consideration."

[32] *Ibid* ; "It is thus clear that even at common law, consideration cannot be regarded as the conclusive test of a deliberate mind to contract: whether there is such a mind must always remain as the decisive and overriding question. In any system of law, consideration may be introduced as evidence of that deliberate mind; but it cannot, even under the common law, be decisive: the only question is whether it can be put on a pedestal as the 'sole' test."

[33] William S. Holdsworth, A History of English Law, Methuen & Co. Ltd., London, pp. 46-48 (1925).

greater requirement of the intention to create legal relationship. In the absence of consideration, the said intention can also be evidenced by the contract being reduced to writing. This view has also been endorsed by the Law Revision Committee in England.[34]

The thrust of the test has to be as to whether the parties intended to be legally bound. If parties are willing to bind themselves legally without a reciprocating benefit in the form of consideration, then the same does not violate any fundamental objectives of contract law. In fact, the said approach would be more in line with the idea of consent as the touchstone of contract law. The earlier hesitancy to accept the requirement of intention to create legal relationship on the ground that it is not possible for law to judge the inwards of the man's heart has long since vanished.[35]

III. PROMISSORY ESTOPPEL- ENGLAND

The development of the principle of Promissory Estoppel can be traced back as a more satisfactory approach to the problems posed by the common law rules as to waiver in the sense of forbearance.[36] The new approach put more concentration on the conduct of the party and its effect on the position of the party rather than on the intention of the party granting forbearance.[37] Promissory estoppel is one strand in a broader equitable principle whereby parties to a transaction who have conducted their dealings relying on an underlying assumption as to a present, past or future state of affairs, or on a promise or representation by words or conduct, will not be allowed to go back on that assumption, promise or representation when it would be unfair or unjust to do so.[38] Thus the principle of promissory estoppel protects the interests of a party who on the faith of a promise made to him has altered his

[34] Sixth Interim Report of the Law Revision Committee, 1937, cited in the 13th Report of the Law Commission of India,1958 on Contract Act 1872, July 13, 2013, http://lawcommissionofindia.nic.in/1-50/Report13.pdf.

[35] See M.P. Furmston, *Supra* Note 12, p.15: "Another new development was the reception of a requirement that there must be an intention to create legal relations for there to be a binding contract. The earlier common law scorned at such a requirement for "of the intent inwards of the heart man's law cannot judge." The doctrine in one form or another was commonplace in continental legal thought."

[36] See Edwin Peel, *Supra* Note 20, p. 114 .

[37] *Ibid.*

[38] See J. Beatson, *Supra* Note 1, p. 117.

position and who would not otherwise be entitled to a contractual remedy due to the lack of a reciprocal consideration against the said promise.

The most categorical extent of this doctrine has been laid down by Lord Denning J. in the case of *Central London Property Trust Ltd. v. High Trees House Ltd.*[39] Though the observations by Lord Denning were more in the nature of an obiter as they dealt with a hypothetical conduct on the part of the claimant,[40] his observations truly reflect the evolved standard of promissory estoppel. The spirit of promissory estoppel, which even Lord Denning relied on and which established the phenomena of promissory estoppel in the English legal framework can be traced back to the case of Hughes v Metropolitan Railway Co.[41]

While the essential parameters in relation to the application of the principle of Promissory Estoppel are clearly established,[42] the contention which deserves the greatest attention is the scope of utilising the principle of Promissory Estoppel as a cause of action. As can be seen in the case of Hughes v. Metropolitan Railway Co., the principle of promissory estoppel has been used in cases where parties are already contractually bound and a promise has been made to waive, modify or suspend the legal rights under that contract to enforce this said promise even when it is without consideration.[43] The next aspect in a logical sequence would be to consider whether the same principle of promissory estoppel can be applied in the formation of contracts dispending with the requirement of consideration as

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[39] 1947 K.B. 130.

[40] The claimant argued that he had allowed a reduction of rent in 1940 as a temporary expedient while the flats could not be fully let due to the ongoing war. The war had ceased in 1945 and thus he was claiming full rent for only the last two quarters of 1945. The understanding of promissory estoppel can be derived from the statements of Lord Denning that had the claimant sued for the full rent between 1940 and 1945, it would have been stopped by its promise from asserting its legal right to demand payment in full.

[41] 1877 2 App Cas 439.

[42] A clear promise, alteration of position etc... See J. Beatson, *Supra* Note 1, pp. 119-122, See See Edwin Peel, *Supra* Note 20, pp. 114-120.

[43] The dispensability of consideration for modification of contracts is also reflected in the United Nations Convention on International Sale of Goods. See United Nations Convention on Contracts for the International Sale of Goods, Art. 29, April 11, 1980 A/CONF.97/19 1489 UNTS 3. An even more evolved can be seen in the UNDROIT Principles where consideration is not a necessity even for creation of contractual liabilities. See The UNDROIT Principles of International Commercial Contracts, 2010, art. 3.1.2, (July 13, 2013) http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf.

one of the elements in the transaction. The question is whether a person who on the faith of a promise made to him has acted upon it and has altered his position can claim for its enforcement as a plaintiff when there is no consideration in exchange of the said promise?

The definitive answer by the courts in England has been an emphatic negative. As was observed by Roskill LJ; "it would be wrong to extend the doctrine of promissory estoppel, whatever its precise limits at the present day, to the extent of abolishing in a back-handed way the doctrine of consideration."[44] An even more categorical assertion has been made by Denning LJ in the case of *Combe v. Combe*;[45] "... the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. *The doctrine of consideration is too firmly fixed to be overthrown by a side-wind.*[46] Its ill-effects have been largely mitigated of late, but *it still remains a cardinal necessity of the formation of contract,*[47] though not of its modification or discharge."

This line of reasoning has been unequivocally confirmed in the case of *Baird Textile Holdings Ltd. v. Marks & Spencer plc.*[48] It is the submission of this author that clear as it may be, these protective instincts[49] are misplaced and seeks to hold onto a legal tradition that has outlived its utility.[50] As is clear from the developments in India[51] and in some other jurisdictions[52], this perspective defeats the objectives of justice with a view to protect a disproportionate and misplaced importance[53] of the doctrine of

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[44] Brikom Investment Ltd. v. Carr 1979 Q.B. 467, at 484.
[45] 1951 2 K.B. 215, at 220.
[46] Emphasis Supplied.
[47] Emphasis Supplied.
[48] 2002 All E.R. (Comm) 737.
[49] See J. Beatson, *Supra* Note 1, p. 125: "The step taken in Walton Stores has not been taken in England, in part because of the perceived need to protect the doctrine of consideration."
[50] See Wright *Supra* Note 15; "Rules of law like everything else in this age must be prepared to justify themselves against attacks and cannot shelter behind antiquity or prescription."
[51] *Infra* Note 60,61 & 62.
[52] Waltons Stores [Interstate] Ltd. v Maher (1988) 164 CLR 387; (Australia).
[53] See Wright *Supra* Note 15; "If it is neither theoretically necessary nor practically satisfactory, is there any need to preserve the idea other than legal conservatism?" Also See 13th Report of the Law Commission of India, *Supra* Note 34, pp. 4-8.

consideration. While in India, the principle of Promissory Estoppel has been allowed to expand with the clear idea that even if it hampers the position of the doctrine of consideration, it is an acceptable bargain; the law in Australia has developed with an understanding that allowing promissory estoppel to find a cause of action would not abolish the doctrine of consideration as contracts founded on promissory estoppel would protect promisee's reliance and contract founded on consideration would protect the promisee's expectation.[54]

The introduction of an intention to create a legal relationship as an independent element has already drawn a line over the continued relevance of the doctrine of consideration. A line which not everybody is prepared to recognise. It would be only a matter of time before the futility of this redundancy dawns upon the legal fraternity and the logical consequence understood. Expanding the operational scope of promissory estoppel would hopefully hasten this realisation in terms of its proper implication. If promissory estoppel were to be utilised for generating cause of action, it might be the beginning of the process by which the doctrine of consideration would undergo its inevitable marginalisation. In itself, the expanded approach to promissory estoppel may not render the doctrine of consideration completely irrelevant[55] but would marginalise its importance in popular consciousness. In terms of the actual content of law, consideration is already a reduced technique but the same needs to be effective permeate into the consciousness of the English Legal System. The law in terms of its technicality should now be considered free from the rigid requirement of consideration but the rigid mindset needs to reflect on and admit to this reality.

[54] *Supra* Note 52; This distinction has not been approved universally with the realization that the reach of promissory estoppel can very well extend beyond the current dependency on reliance. See J. Beatson, *Supra* Note 1, p. 126.

[55] There is a school of thought, which formed the basis of the decision in the case of Walton Store [*Supra* note] that the doctrine of consideration and the doctrine of promissory estoppel protect different interests and would not overshadow the other. See J. Beatson, *Supra* Note 1, p. 125.

IV. INTENTION TO CREATE LEGAL RELATIONSHIP- INDIA

The position in India in relation to the doctrine of Intention to Create Legal Relationship is less straightforward. Unlike England, where the law of contract developed through a progression of judicial decisions, the contract law in India is primarily governed by the statutory framework created in the Indian Contract Act, 1872. As has been firmly established[56] it is not proper to refer to English Law to decide a question arising under an Indian Statute unless the matter is such that it cannot be understood without assistance from English Law.

The Indian Contract Act, 1872 in Section 10 lists the essential requirements for a contract to be enforceable in a court of law. It is to be noted that intention to create legal relationship has not been incorporated as an element essential for determining the enforceability of a contract. Nevertheless, there seems to be perception that the English principle of Intention to Create Legal Relationship is automatically applicable in India.[57]

In the absence of any statutory requirement for the same, unless there is a definitive pronouncement by the Supreme Court on the issue, it would not be possible to maintain that intention to create legal relationship is a necessity as it is in England. The issue of whether intention to create legal obligations is a mandatory requirement for a contract to be valid was raised in the case of *Commissioner of Wealth Tax v. Abdhul Hussain*[58] but as per the facts of the case, the court restrained itself from providing a ruling on the issue stating that resolving this issue was not necessary for the disposal of the case. The same was done because the initial argument raised from the side of Mr. Abdul Hussain was for exemption from wealth tax on the basis that the transaction lacked legal character due to a certain Muslim custom. The plea in terms of lack of intention to create legal relationship in the arena of contract law was raised from the first time before the Supreme Court and not in any of the lower courts. In the words of the court;

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[56] State of West Bengal v. B.K. Mondal& Sons A.I.R. 1962 SC 779.
[57] See 1 R.G. Padia*Supra* Note 3, p. 57.
[58] A.I.R. 1988 SC 1417, ¶ 11.

"The non-enforceability of debt was pleaded not as a part of what is permissible in law of contracts, but specifically as some inexorable incident of a particular tenet peculiar to and characteristic of the personal law of the Muslims. That not having been established, no appeal, in our opinion, could be made to the principle of permissibility of exclusion of legal obligations in the law of contracts."

Thus as yet, intention to create legal relationship cannot be assertively claimed as an essential element in contract formation in India.

V. PROMISSORY ESTOPPEL- INDIA

Promissory Estoppel[59] as a doctrine has found a more expansive interpretation in India. In addition to its role as a shield against claims of liability, it has also been held that this principle can be used as a cause of action to enforce promises made when not enforcing the promise would lead to inequitable and unjust results.[60]

The most authoritative and landmark pronouncement in this regard was made in the case of *MP Sugar Mills v. State of U.P.*[61] This case concerning the representation made by the Govt. of U.P. in relation to exemption of sales tax to new industrial units for a definite period covers a very dynamic approach to this doctrine otherwise rooted in traditional rigidity. The court in this case took notice of the fact that allowing promissory estoppel to found a cause of action would severely dilute the doctrine of consideration but held that the same cannot be a sufficient reason in itself to restrain the progressive evolution of an equitable principle. The court held;[62] "...having regard to the general opprobrium to which the doctrine of consideration has been subjected by eminent jurists, we need not be unduly anxious to project this doctrine against assault or erosion nor allow it to dwarf or stultify the full development of the equity of promissory estoppel or inhibit or curtail its operational efficacy as a justice device for preventing injustice."

Thus the position of consideration as the sole basis on which one may be

[59] For meaning, see *Supra* Note 38.
[60] MotilalPadampat Sugar Mills Co Ltd. v. State of U.P., A.I.R. 1979 SC 621.
[61] A.I.R. 1979 SC 621.
[62] *Ibid*¶17.

sued upon a promise has been effectively compromised by this liberal interpretation. Though the court has limited the widespread application of this principle by incorporating the caveat that this approach may be adopted where this becomes the only way in which injustice can be avoided, the very recognition of the fact that a promise unsupported by consideration can nevertheless be enforced is a substantial development in a system mostly rooted in common law traditions.

The court summarised the principle of promissory estoppel in the following words;

> "...where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not."[63]

It needs to be noted that one of the primary requirements in order to apply the principle of promissory estoppel is that the promise must have been made with the intention to create legal relations and with knowledge or intention that the said promise may be acted upon. In addition to that, there are two substantial elements which are necessary;

a. That the promise must have been acted upon.

b. It would be inequitable to allow the promissory to go back on his promise.

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[63] *Ibid* ¶13.

Thus, that the promise must have been made with the intention to create legal relationship is just one of the requirements and is not sufficient in itself to sustain the enforceability of a promise but this must be appreciated as the only legal formulation where the element of intention to create legal relationship has been recognised.

This proposition of the Supreme Court has also been endorsed[64] by the Law Commission of India in its 108th Report[65] wherein it has recommended the insertion of a new provision (Section 25A) in the Indian Contract Act to provide a statutory and standardised basis to this proposition. The relevant portion of the said recommendation is as follows;

Section 25A

(1) Where

(a) A person, has, by words or conduct made to another person, an unequivocal promise which is intended to create legal relations or to affect a legal relationship to arise in the future; and

(b) Such person knows or intends that the promise would be acted upon by the person whom the promise is made; and

(c) The promise, is, in fact so acted upon by the other person, by altering his position, then, notwithstanding, that the promise is without consideration, it shall be binding on the person making it, if, having regard to the dealings which have been taken place between the parties, it would be unjust not to hold him so bound.

The author admits that the actual impact of this decision of the Supreme Court and the subsequent recommendation by the Law Commission can be appreciated more at the conceptual level than in the realm of real operation

[64] The decision has been criticized by the Law Commission of India on many counts but when one peruses the final recommendations made, one can see that many aspects of the decision in the said case have been retained in the recommendations of the Law Commission.

[65] 108th Report of the Law Commission of India on Promissory Estoppel, July 13, 2013, http://lawcommissionofindia.nic.in/101-169/Report108.pdf p. 25.

of law because of the severe caution which has been made in inherent in applying the doctrine of promissory estoppel as a cause of action. This development though, provides the most real reflection of the fact that the domain of contractual liabilities cannot forever be constrained by the rigours of the doctrine of consideration and that the true test of contractual liability must eventually rest with the intention which the parties had while entering a transaction.[66]

Unless and until intention to create legal relationship is recognised as a driving force in itself to validate the enforceability of a promise, the doctrine of consideration will hold sway but the judicial expansion of the scope of promissory estoppel can be seen as the step towards an increasing irreverence in relation to the doctrine of consideration.

VI. CONCLUSION

The position in England and in India in relation to the doctrine of consideration is but a picture of inversed reality. In England, the legal development on the principle of intention to create legal relationship has ensured that the marginalisation of consideration only as an evidentiary factor is all but inevitable, but there is great resistance which can be seen in judgments connected with promissory estoppel to accept this reality. There is still a strong current to somehow retain the doctrine of consideration in terms of its indispensability.

On the other hand, in India, there is no such reverence towards the doctrine of consideration. The courts have been extremely categorical that the tradition of the doctrine cannot be its saving grace and that evolution of law will not be curtailed in order to maintain the relevance of the doctrine. Consequently, there has been remarkable dynamism in expanding the operational affectivity of the doctrine of promissory estoppel and reducing doctrine of consideration from its sacrosanct heights to the level of a dispensable legal doctrine. The substantial change in the contours of law,

[66] See Wright *Supra* Note 15; "The test of contractual intention is thus external, objective, realistic. The question is, why any such external test is needed? Why is not the contractual intention, if it is properly established, enough in itself?"

though, is yet to take effect. Till date, there has been no authoritative statutory or judicial pronouncement which would necessitate the proof of intention to create legal relationship as a non-negotiable element in the formulation of binding contractual liabilities.[67]

Regardless of the fact that the evolution of law and legal approach in both these countries is at a different stage, it is the conclusion of this author that the extinction of the doctrine of consideration in its former self is not simply the logical evolution but inevitability. It may serve an evidentiary purpose in the larger scheme of proving the intention to create legal relationship but can no longer sustain itself as the fulcrum of contract law in either of these jurisdictions.

[67] It is not so that the same can be done without some structural adjustments in the scheme of the Indian Contract Act. It would require a reconfiguration of certain established legal principles connected with contract law in India. The same may be discussed in another place as this paper does not offer the scope to explore that perspective in detail.

EDUCATIONAL SERVICES IN SAARC: A CASE FOR DEEPER INTEGRATION

Rejitha Nair*

In the last few years, especially after the establishment of World Trade Organisation, the world has seen an upsurge in Regional Trade agreements. While many RTA's are flourishing worldwide, the South Asian Association for Regional Cooperation (SAARC) is already considered to be dead by some scholars. On one hand we have the global Regional Trade Agreements which are devising strategies to strengthen intra-regional trade relations, the South Asian countries on the other hand are entering into more and more bilateral treaties with the countries within and outside the region, shifting the focus from SAARC. The thorny relationship between the two big countries of the region, India and Pakistan and the lack of complementarities in trade in goods are also considered to be major road blocks. However, great potential of reviving intra-regional trade and cooperation in this region lies in the service sector. All the countries in the

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region have seen a shift in the structure of their economies moving away from agriculture and towards services.[1] There is a considerable variation across countries in this region in terms of size of their service economies, the output and export growth performances of services, the relative shares of individual economies in regional services trade and their revealed comparative advantage indices.[2] Through this paper the author is trying to make a case for deeper integration in South Asian region through intra-regional cooperation in the services sector. The focus is on the most important yet most neglected sector of educational services. In recent years there has been a growing trend towards internationalisation of education globally with many regions coming up with concrete strategies in this regard. The paper will study the potentialities and complementarities in cooperation with the education sector and the lessons from other regional initiatives to chalk out an action plan for SAARC.

I. INTRODUCTION

Seven South Asian countries Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka launched the economic and political organization, South Asian Association for Regional Cooperation (SAARC) on 8 December 1985[3]. The SAARC countries share certain common social and economic problems, including those related to low literacy rates, poor infrastructure, substandard quality of education, heavy dropout rates, and inadequate funding.[4] In this backdrop, SAARC as a regional organization for socio-economic development of the South Asian Region serves as a platform for these countries to work together in a spirit of friendship, trust, and understanding to accelerate economic and social development in this region. For achieving their development objective SAARC countries have identified fifteen areas of cooperation; human resource development and education being some of them.

[1] The average annual growth of service sector output has consistently moved upward, from little under 4.5% in 1970's to a little over 6% in 1860's, over 6.5 % in 1990's and further 8.3%in 200-07. See UNCTAD Hand Book of Statistics, 2008 (online version) accessed on 26 June 2012.

[2] Rupa Chanda, Integrating Services in South Asia-Trade, Investment and Mobility. 41-45 Oxford University Press.(2011).

[3] Afghanistan joined SAARC in April 2007.

[4] P.V.Rao, "Globalisation and Regional Cooperation: Perspectives on India's Role", in, Rama S. Melkote,ed., MEANINGS OF GLOBALISATION: INDIAN AND FRENCH PERSPECTIVES, Sterling Publishers, New Delhi, (2001).

One fourth of the world's population resides in South Asia, making it both the most populous and most densely populated geographical region in the world.[5] Despite being rich in human resources and sophisticated technical skills, yet the number of people unemployed is climbing new heights in the South Asian Region.[6] This is because the region has not paid much attention on enhancing its ability to nurture its human capital. The important role education plays in the development of a nation can never be overemphasised. Education is an essential foundation for the social and economic success of a global economy. It expands choices and opportunities for the individuals and reduces poverty and social injustice by providing the underprivileged resources and opportunities for upward social mobility and social inclusion. The focus on the 'knowledge economy' in the present globalised world has also made this sector more significant in the development of human capital.

When we talk about education, higher education deserves a special attention as it affects almost every area of national as well as regional development. An educated labour force is much more likely to be able to work productively and to be able to adapt to the rapidly changing demands of an ever changing global economy. All SAARC countries have more or less similar higher education structure including entry qualifications, age, duration of courses, and instructional management system.[7] The pressing demand for higher education and a strong desire for foreign qualification by youth are common issues.[8] Opportunities are limited in this area with gross enrolment ratios varying among SAARC countries being less than 5% to 10%[9]. The participation of women is not more than 40 % in any SAARC country[10], and

[5] Refer to Table V.

[6] Youth Unemployment in South Asia as high as 9.6%; Times of India, January 22, 2013, available at <*articles.timesofindia.indiatimes.com › Collections › South Asia*>.

[7] All the SAARC countries share the same colonial past. These countries were formerly British colonies hence, they all follow the same British education system.

[8] India accounts for 70% of the outward mobility of students in the region. Around 140000 students went abroad to study in 2005 and the country imported higher education to the tune of US$3.5 billion in 2004. More than 20,000 Pakistani students went abroad for studies in 2005 and this number has been rising by 13%-15% per year. Likewise, in 2005, around 14,500 Bangladeshi students and 9000 Nepalese Students and 1000-1500 Maldivian Students were studying abroad. The market for South Asian Countries is the English speaking countries like the US, UK, Australia, Canada, and others such as Singapore Malaysia and several other developing countries like India. *See* Rupa Chanda, INTEGRATING SERVICES IN SOUTH ASIA-TRADE, INVESTMENT AND MOBILITY. Oxford University Press.2011, p 228.

the quality of education is second-rate. Spending on education ranges from 2% to 4% of the gross national product (GNP)[11], which is less than the UNESCO standard of 6% for developing nations. Private enterprise, a recent phenomenon, limits its role to market-oriented, professional, and technical education.

Education in South Asia suffers from twin problems of lack of excellence and of access. The idea of cooperation in education sector was floated in the very first SAARC summit but little development in this regard has taken place in last 25 years. The piecemeal strategies and division of education objective into different committees and sub-committees has only further slowed down the pace of development. SAARC countries have formed convergence on major issues concerning education, such as standardizing education, granting equivalence and harnessing the potential of open distance education, but the major issue that is affecting educational sector is the lack of implementation. It is high time for SAARC countries to evolve common educational forums and collaborative strategies to deal with the situation. It is no secret that education cooperation amongst SAARC countries would help raise the overall human capital of the people and will hence contribute to the economic development of the region. The object of this paper is to assess current status of higher education in SAARC countries and examine emerging trends. The discussion concentrates on structure, access, quality, funding patterns, and future prospects of cooperation in higher education within the region. Such an assessment might help in promoting interstate cooperation and planning better strategies. Today all countries across the globe report an increased emphasis on ensuring that young people can meet the challenges and needs of rapid transformation, and can participate effectively in the globalized environment. Hence, one can find a growing number of cooperation agreements between governments of various

[9] Interview with Mr. Sambhav Srivastava, Section Officer, Association of Indian Universities new Delhi, December 9,2010.

[10] S. K. Sahni and R. N. Srivastava, *"Millenuim Development Goals and SAARC"*, SAARC- THE ROAD AHEAD, Foundation for Peace and Sustainable Development, 2007, 333, Iqbal Ahmed Saradgi [Et al] (ed).

[11] Higher education in Developing Countries: Peril and Promise, World Bank-UNESCO, Washington D C, 2000 available at http:// siteresources.worldbank.org/.../Resources/ Peril_and_Promise.pdf , accessed on (March 18,2011). Also see *Students Demand Hike in Funds for Education*, The Hindu, Feb 3, 2010.

countries as well as amongst educational institutions across nations. Against this backdrop a thorough study on cooperation between the SAARC member countries in partaking and sharing their educational services becomes imperative.

Table I: Literacy Rate in SAARC Countries

	Afghanistan	Bangladesh	Bhutan	India	Maldives	Nepal	Pakistan	Sri Lanka
Adult literacy rate MF	.	57.7	52.8[c]	62.8[d]	98.4[d]	57.4	54.9[f]	90.6[e]
Adult literacy rate M	...	62.0	65.0[c]	75.2[d]	98.4[d]	71.1	68.6[f]	92.2[e]
Adult literacy rate F	...	53.4	38.7[c]	50.8[d]	98.4[d]	46.8	40.3[f]	89.1[e]
Youth literacy rate MF	...	78.7	70.4[e]	81.1[d]	99.3[d]	82.4	70.7[f]	80.7[e]
Youth literacy rate M	...	77.1	80.0[e]	88.4[d]	99.2[d]	89.2	79.1[f]	86.8[e]
Youth literacy rate F	...	80.4	68.0[e]	74.4[d]	99.4[d]	77.5	61.5[f]	74.9[e]

Source: UNESCO Institute of Statistics.
Note: The literacy data, refer to the year 2011 unless otherwise noted.
[a]1982, [b]2002, [c]2005, [d]2006, [e]2008, [f]2009, [g]2010. (...) data not available

Table II: Gross enrolment Ratio

	Afghanistan	Bangladesh	Bhutan	India	Maldives	Nepal	Pakistan	Sri Lanka
Gross Enrollment ratio Tertiary Education MF	.	14	9	10[b]	...	5[b]	8	14
Gross Enrollment ratio Tertiary Education ratio M	...	16	10	12[b]	...	8[b]	9	10
Gross Enrolment ratio Tertiary Education ratio MF	...	11	7	8[b]	...	2[b]	8	19
Gross Enrolment ratio Secondary Education MF	49	52	70	47[b]	64	42[b]	35	102
Gross Enrolment ratio Secondary Education M	62	48	69	54[b]	59	48[b]	40	100
Gross Enrolment ratio Secondary Education F	34	46	71	40[b]	68	35[b]	30	104
Gross Enrolment ratio Primary Education MF	98	...	111	94[b]	104	115[b]	92	97
Gross Enrolment ratio Primary Education M	114	...	111	101[b]	105	123[b]	101	98
Gross Enrolment ratio Primary Education F	81	...	112	87[b]	103	106[b]	83	97

Source: UNESCO Institute of Statistics.
Note: The literacy data, refer to the year 2011 unless otherwise noted.
[a]1982, [b]2002, [c]2005, [d] 2006, [e]2008, [f]2009, [g]2010. (...) data not available

Table III: Public expenditure on education (SAARC Countries)

	Afghanistan	Bangladesh	Bhutan	India	Maldives	Nepal	Pakistan	Sri Lanka
Gross public expenditure on education as a% of GDP	1.7[a]	2.2[f]	4.7	3.3[g]	7.2[g]	4.7	2.4	2.0
Public expenditure on education as % of total government expenditure	.	14.1	11.5	10.5	16.6	20.2	9.9	12.9

Source: UNESCO Institute of Statistics.
Note: The literacy data, refer to the year 2011 unless otherwise noted.
[a]1982, [b]2002, [c]2005, [d]2006, [e]2008, [f]2009, [g]2010. (...) data not available

Table IV: Table III: Public expenditure on education (Other Countries)

	Burundi	China	Ghana	Republic of Moldova	Timor Leste	Swaziland	United Kingdom	United States of America
Gross public expenditure on education as a% of GDP	6.1	...	8.2	8.6	10.1	7.8	5.9	5.6
Public expenditure on education as % of total government expenditure	24.1	20.1	...	...	8.1	21.0	11.3	13.1

Source: UNESCO Institute of Statistics.
Note: The literacy data, refer to the year 2011 unless otherwise noted.
[a]1982, [b]2002, [c]2005, [d]2006, [e]2008, [f]2009, [g]2010. (...) data not available

Regional profile of South Asia with respect to education sector

South Asia is an important contributor to the growing global demand for education given its sizeable young population and growing middle class. The region accounts to a large number of internationally mobile students.[12] The low educational status indicators[13] in part reflect inadequate funding of educational sector, in particular the inability of the governments to provide adequate financial resources to augment capacity and quality. The share of education expenditure in GDP as well as the share of education in total government expenditure is lower than that in comparable developing

countries in other regions.[14] The region spends less than 4.2% of GDP on education.[15] The trend in educational indicators over time further indicates that although there has been improvement in some areas, such as literacy rate and gross enrolment ratio at some levels, by and large the extent of these improvements is rather limited.[16] If one carefully studies the education related statistics of South Asian countries, the picture that emerges is of a region which is unable to meet the demand for education due to its growing population, as observed in rising student-faculty ratios, a region which is unable to devote sufficient resources to education as reflected in declining or stagnant public expenditure allocation in overall GDP, and growing reliance on private providers and overseas institutions and a region which is unable to address issues of quality and governance as reflected in high dropout rates in most of the countries.[17]

Such limitations notwithstanding, the South Asian countries have witnessed considerable growth in their education system in terms of enrolment numbers and the number of educational institutions and universities. Several common features emerge as a result of this growth. The most important of these is the privatization of education and the growing contribution of private education providers in past decade in almost all the South Asian countries, particularly in higher education segment.[18] There are many educational institutions that are operating in South Asia, through partnership arrangements, local campuses, franchises, certificate, diploma granting programmes and online education.[19] There is also some outward

[13] Today a large number of students study abroad and as per the UNESCO Statistic's institute, the international student mobility has increased over 2 million since 2000.

[14] Refer to Table V.

[15] Refer to Table III.

[16] *Ibid.* The 4.2 average is much less than the UNESCO prescribed standard of 6% for developing countries. A comparative analysis with data in Table IV will show that the public expenditure of South Asian countries on education is lesser than other equally developed and least developed countries.

[16] Refer Table II.

[17] Refer The Global Education Digest 2012 by UNESCO available at „ *www.uis.unesco.org › Home› Education› Global Education Digest.*

[18] *Supra* note 2, p. 230.

[19] In online education Massive Open Online Courses (MOOCs) like *courser* are gaining huge popularity. MOOCs are online portals where various universities offer certificate/ introductory courses to the global student market through through internet (falls under cross border exchange mode of rendering services under GATS).

presence by the educational institutions in this region mainly from India which have set up their operations abroad like Dubai, Malaysia and Singapore in order to serve the local student population and also students from the region, who are studying abroad in these markets. In India, according to a 2005 study, there were 131 foreign education providers mostly operating through twinning and collaborative programmes with local partner institutions.[20] Foreign providers in India have also been engaged in recruiting students from the home region for study in their home campuses abroad. However there are only university franchises operating with no foreign campuses in India. The latter could change once the Foreign Higher Education Providers Bill that is pending in the parliament is passed.[21] In Pakistan, both public and private foreign Institutions are allowed to operate and collaboration between foreign and local education providers is encouraged by the Higher education Commission.[22] In Bangladesh, internationalization of higher education sector has resulted in proliferation of private institutions that have partnership arrangements and joint ventures with foreign providers.[23] In Sri Lanka, there are several higher education degree programmes that are offered by foreign universities in partnership with Sri Lankan institutions, as well as foreign institutes which offer higher education qualifications.[24] Similar kind of arrangements also exist in Maldives to address the growing need of skilled man power in tourism and hospitality sector. The degree of internationalization in Nepal and Bhutan, in comparison to other South Asian countries, remains comparatively limited. It has been mainly in the form of foreign assistance for setting up local educational institutions or for developing capacity in local universities.

Privatisation and internationalization of education services in South Asia has in turn given rise to several regulatory concerns and challenges akin to those

[20] P. Agarwal, Privatisation and Internationalization of Higher Education Services In the Countries of South Asia- An Empirical Analysis; ICRIER, New Delhi. 2006. P 21.

[21] *Ibid.* p 22. There are eight collaborative degree programmes in Pakistan as well as programmes run by reputed foreign institutions with local partners with only minimal regulation.

[22] *Ibid.*

[23] *Ibid.*

[24] Refer *Sri Lanka as an Education Hub For International Students*, World Bank.(2010),available at, worldbank.org/INTSOUTHASIA/Resources/50_Sri_Lanka_as_an_Education_Hub_for_International_Students.pdf.

seen globally. For instance, in Pakistan, the main challenge is that public sector institutions, though equitable, lack quality while the private institutions that are of higher quality are often unaffordable for most people. The same holds true in the case of India and Bangladesh. There is a considerable debate in some of the countries regarding public versus private educational institutions and the implications of private and international education providers on cost, quality and equity. Meanwhile, the public sectors contribution has declined and capacity constraints in this segment have grown. The private education system tends to be relatively expensive while the public education system is characterised by very low tuition fees and is highly subsidised by the government. This financing structure has resulted in problems of cost recovery and difficulties in funding capacity have increased in public education system giving rise to an inequitable education system and a marked disparity between public and private segments (with private education system which mainly catering to the higher income groups).

Table V: Tertiary education sector- Country profile

Year	2008	2009	2010	2011	2012
Afghanistan					
Total population	29839994	30577756	31411743	32358260	33397058
Enrolment in education. Tertiary. Total	...	...	...	...	...
Number of students in tertiary education per 100,000 inhabitants. Total	...	323.69131	...	...	...
Gross enrolment ratio. All levels combined (except pre-primary). Total	...	54.18406	...	...	...
Outbound mobile students (students from a given country studying abroad)	3485.93333	4126.16667	5967.5	...	...

Outbound mobility ratio (%)	...	4.33489	...	...	...
Gross outbound enrolment ratio	-	-	-	...	...
Bangladesh					
Total population	145478300	147030145	148692131	150493658	152408774
Out-of-school children of lower secondary school age. Total	...	2676916	1980548	2644537	...
Enrolment in education. Tertiary. Total	14626	19727	...	31733	...
Number of students in tertiary education per 100,000 inhabitants. Total	...	...	...	...	...
Gross enrolment ratio. All levels combined (except pre-primary). Total	...	...	...	...	...
Outbound mobile students (students from a given country studying abroad)	16317.33333	19009.41667	21221.5	...	...
Outbound mobility ratio (%)	1.26048	1.20147	...	...	...
Gross outbound enrolment ratio	-	-	-	...	...
Bhutan					
Total population	701363	713665	725940	738267	750443
Enrolment in education. Tertiary. Total	...	...	1571	1506	...
Number of students in tertiary education per 100,000 inhabitants.	735.42045	...	772.12325	947.23868	...

Number of students in tertiary education per 100,000 inhabitants. Total	735.42045	...	772.12325	947.23868	...
Gross enrolment ratio. All levels combined (except pre-primary). Total	60.23504	...	65.55197	67.60322	...
Outbound mobile students (students from a given country studying abroad)	938.6	1106	1227.5	...	...
Outbound mobility ratio (%)	18.58246	...	22.32224	...	...
Gross outbound enrolment ratio	1.21089	1.41775	1.5735	...	...
India					
Total population	1190863679	1207740408	1.225E+09	1.241E+09	1.258E+09
Enrolment in education. Tertiary. Total	...	...	...	...	...
Number of students in tertiary education per 100,000 inhabitants. Total	1477.56238	1578.26437	1730.6242	...	...
Gross enrolment ratio. All levels combined (except pre-primary). Total	63.57788	63.21893	65.07499	...	...
Outbound mobile students (students from a given country studying abroad)	179437.9333	198886.9167	203480.5	...	...
Outbound mobility ratio (%)	1.04256	1.06648	0.98107	...	...
Gross outbound enrolment ratio	-	-	-	...	...
Maldives					

Total population	307632	311739	315885	320081	324313
Enrolment in education. Tertiary. Total	...	...	...	...	...
Number of students in tertiary education per 100,000 inhabitants. Total	1710.60336	...	...	...	...
Gross enrolment ratio. All levels combined (except pre-primary). Total	...	...	...	...	...
Outbound mobile students (students from a given country studying abroad)	1912.33333	1792.16667	1996	...	...
Outbound mobility ratio	36.98189	...	...	...	...
Gross outbound enrolment ratio	4.81114	4.48602	5.02012	...	...
Nepal					
Total population	...	...	...	...	...
Enrolment in education. Tertiary. Total	96023	98987	152695	150814	...
Number of students in tertiary education per 100,000 inhabitants. Total	...	...	...	...	...
Gross enrolment ratio. All levels combined (except pre-primary). Total	...	...	...	...	...
Outbound mobile students (students from a given country studying abroad)	17953	22296	24202	...	...
Outbound mobility ratio (%)	6.2999	7.70789	6.42186	...	...

Gross outbound enrolment ratio	...	...	...	...	...
Pakistan					
Total population	167442258	170494367	173593383	176745364	179951140
Number of students in tertiary education per 100,000 inhabitants. Total	597.2356	739.04544	...	914.33089	...
Gross enrolment ratio. All levels combined (except pre-primary). Total	42.87393	43.70843	...	44.25647	...
Enrolment in education. Tertiary. Total	...	...	...	...	...
Outbound mobile students (students from a given country studying abroad)	29458.83333	33442.51667	36386.3	...	...
Outbound mobility ratio (%)	3.02517	2.72777	...	...	...
Gross outbound enrolment ratio	-	-	-	...	...

Source: UNESCO Institute of Statistics.
Note: The literacy data refer to the year 2011 unless otherwise noted.

II. EDUCATIONAL SERVICES IN SAARC: TRADE OR COOPERATION?

Before going into any further details of educational services in SAARC, it is important to have a shared understanding of the key terms and ideas that define what is meant by international educational cooperation. Educational services are one of the twelve categories of services recognized by the United Nations Central Product Classification (UNCPC) and World Trade Organization (WTO)[25]. But the way SAARC countries look at education is

[25] THE WORLD TRADE ORGANIZATION: LAW PRACTICE AND POLICY, Oxford University Press, 2006. 611 -616, Mitsuo Matsushita [Et al].

broader than the WTOs definition of services.[26] The 14th SAARC summit in the year 2007, proposed integration of services into SAFTA and called for a collective vision of free flow of trade in services[27]. Though some convergence of trade interests are seen in transport, telecommunication and energy services but education is still seen as means of co-operation rather than a sector of developing trade relations. This is because both the extent and quality of educational services matter for the overall socio-economic empowerment of the people of South Asia where large sections still lack literacy and restricting this sector in the four corners of trade will be detrimental for the overall development of the region.

The WTO's approach towards education is driven by its market philosophy. WTO rules do not differentiate between a commercial service like telecommunication, insurance, banking etc. and a public utility service like educational services. WTO envisages opening up of a country's educational sector and liberalizing the rules governing educational institutions, making it conducive for the foreign universities to invest and set up branches in that country purely for commercial purposes. On the other hand, Educational cooperation occurs whenever two or more states work together to share their educational capabilities, resources and expertise. Cooperation between countries is always done in a spirit of friendship and not with the motive of capturing market. Knowledge is meant for the benefit and welfare of the society. The aim of cooperation in education is to open the contours of education so that knowledge is not restricted within boundaries of a country. Free flow of knowledge and expertise across the borders, unrestricted exchange of ideas and intellect amongst people is the basic underlying philosophy of cooperation in educational sector.

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[26] Under Article 3(b) of General Agreement on Trade in Services (GATS) the term service has been defined as; "services" includes any service in any sector except services supplied in the exercise of governmental authority." Further "a service supplied in the exercise of governmental authority" is defined under Article 3(c) of GATS as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers. *Also see*"Higher education in Developing Countries: Peril and promise", World Bank-UNESCO, Washington D C, 2000. (available at http:// siteresources.worldbank.org/.../Resources/Peril_and_Promise.pdf , accessed on March 18,2011).

[27] http://www.saarc-sec.org/areaofcooperation/cat-detail.php?cat_id=53, accessed on March 3, 2011.

Modes of cooperation

The modes of educational cooperation can be divided into four levels. These are i) between governments; ii) between institutions; iii) between staff; and iv) between students of two countries.[28] International partners working together towards an educational objective may be playing similar roles e.g. two countries cooperating on an exchange program; in a purchaser-provider relationship (i.e. trade in educational services); or in a donor-recipient relationship (i.e. development assistance).[29] At the government to government level, educational co-operation can be classified into five categories:

1. People Exchange (e.g. students and teacher exchange programme),
2. Information Exchange (e.g. conducting international workshop, setting up distance education centres and e-library networks);
3. Facilitation of Trade in Educational Services (e.g. liberalizing the rules relating to establishment of educational institutions);
4. Regulatory Reform (e.g. relaxing visa rules, simplifying equivalence procedure);
5. Development Partnerships (e.g. scholarship programmes for students and research scholars from the region or giving financial assistance in setting up university in another member country).

This paper focuses on regional cooperation amongst government and the role they can play in stimulating, supporting and where necessary, regulating educational cooperation to maximize its contribution to economic and social development.

MULTILATERAL COMMITMENTS UNDERTAKEN BY SAARC COUNTRIES OUTSIDE THE REGION

Trade in education sector under GATS is covered under five categories – Primary education, secondary education, higher education, adult education

[28] *Supra* note 9.
[29] Interview with Mr. Manish Mohan, Additional Director and Head, SAAC Division, FICCI, New Delhi on (December 10, 2010). These different forms of cooperation should not be viewed as alternatives to each other, but as complements and mutually reinforcing.

and other education services. During the Uruguay round only 29 member countries made commitment in education services. Thus the sector was not a thrust area for negotiations in WTO. In south Asia barring Nepal, none of the other member countries from this region has scheduled education services in Uruguay rounds of GATS negotiations. This implies that the South Asian countries, notwithstanding their autonomous liberalisation of this sector, would like to preserve their policy flexibility by excluding this sector form scheduling commitments. India and Pakistan have however tabled education services in the subsequent request offer negotiation, reflecting the fact that these countries have received request in this sector for other WTO member countries and have also become more willing to negotiate this sector given their autonomous liberalisation of education services since the Uruguay round. Rest of the South Asian countries have however not changed their stance in education services.

Though the sector is open for negotiation the commitments and offer vary in nature. India has been the most restrictive offering only higher education, with various regulatory conditions imposed on foreign education providers. Nepal, on the other hand has made commitments in three segments of education services, but has placed foreign equity participation limits and also phased in liberalization by gradually relaxing the limit. The negotiating stance of both these countries suggest that even where education services have tabled by the South Asian Countries, there has been an attempt to preserve regulatory autonomy in the interest of consumer protection and quality assurance. Education is not an important sector in the trade and cooperation agreements signed by South Asian Countries with the countries outside the region. Some of these agreements have a bearing on education services when they talk about mutual recognition of professionals and IT development. India- Singapore Comprehensive Economic Cooperation Agreement (CECA) and Pakistan- China Free Trade Agreement (FTA) are most significant agreements in this regard. But as a whole, SAARC countries reflect a reluctance to multilaterally commit to full-fledged liberalization in education so as to safeguard their concerns in this sector. And this sector does not form a significant part of their bilateral and multilateral trade treaties.

Intra-regional collaborations and inter-governmental Initiatives (within SAARC)

Since its inception in 1985, the significance of human resource development at the regional level has been well recognized by SAARC. Commitments were made and even a SAARC literacy year was declared as far back as 1996. At the ninth SAARC summit held at Male in 1997, illiteracy was identified as one of the major cause of hindrance to the social and economic development of the region and a major factor contributing to the region's backwardness and social imbalance. Further, since reorganization of SAARC Integrated Programme of Action (SIPA) in 1999, education was included as an area of cooperation under the purview of Technical Committee on human Resources development.[30] In this context, SAARC Chair, SAARC fellowship and scholarship schemes are in operation in the region[31]. A SAARC Consortium of Open and Distance Learning (SACODIL) have been created with a view to standardise curricula and mutual recognition of various educational and vocational courses. Besides, various regional centres have been established from time to time in the member countries of SAARC to promote regional cooperation in practical implementation of the SIPA.[32] The SAARC Human Resource Development Centre was established in Islamabad in 2002 with an objective to undertake research, training and dissemination of information on human resource development issues such as health, education, gender, poverty, children and environment.[33] The importance of development of education also assumes a special place in the SAARC Development Goals (SDGs) adopted by the 12th summit at Islamabad in 2004. The SIPA has identified certain priority themes for cooperation in the field of education. These are Women and Education; Universal Primary Education; Literacy, Post Literacy and Continuing Education; Educational Research; Science and Technical Education, Education for the Underserved Areas and Distance

[30] http://www.saarc-sec.org/areaofcooperation/cat-detail.php?cat_id=53, accessed on April 20, 2011.

[31] http://www.saarc-sec.org/areaofcooperation/detail.php?activity_id=16, accessed on April 20, 2011.

[32] http://www.saarc-sec.org/areaofcooperation/detail.php?activity_id=15, accessed on April 20, 2011.

[33] Interview with P.K.Prabhakaran, Programme Director, South Asian Foundation, New Delhi on (April 18, 2011).

Education. The nominations of nodal agencies for each of the priority themes have been completed and appropriate Action Plans are being prepared[34].

In the Eleventh Summit[35], the leaders of SAARC member countries underlined the need to devise appropriate strategies for raising the quality of education through exchange of information among universities in the region. This was followed by the first meeting of the Committee of Heads of University Grants Commission/Equivalent Bodies, held in Dhaka in October 2003 to propose modalities for implementation of the recommendations of the Eleventh Summit. The meeting of UGCs work closely with UNESCO; and SAARC also has a memorandum of understanding with UNESCO to that effect. Till date there had been 6 such meetings in which many landmark decisions have been given; like the minimum period to acquire a Bachelor's Degree (excluding Professional Degrees) is agreed to be made as 12 +3 years of Education in all member States, chapter on introduction to SAARC is resolved to be included in the curricula at secondary level Social Science courses, certain degree of understanding has also been converged regarding chartered university. It is decided that the degrees awarded by chartered universities in the region should be recognized by all member states on the basis of number of years' studies, grades and credits obtained. Considerable progress is also seen in preparation of SAARC Regional Handbook on Chartered Universities/Degree Awarding Institutions in the Member States and standardization of education curriculum of South Asia.

However, only some limited engagement in educational services, mainly in the form of student mobility within the region and through cross-border establishment of franchises and subsidiaries in other countries within the region. India is one of the main destinations for Nepali students pursuing higher studies. Bhutan also sends considerable number of students for higher education in India compared to other English speaking countries. India is also a main destination for higher education for Maldivian students studying abroad through scholarship or self-financing. India received 320

[34] Interview with Sambhav Srivastava, Section Officer, Association of Indian Universities (AIU), (December 19, 2010). Also see < http://www.saarcsec.org/areaofcooperation/detail.php?activity_id=12>, accessed on April 20, 2011.

[35] Kathmandu, 4-6 January 2002.

Bangladeshi students in 2003, down from 736 in 1993-94, though it is likely seen that more number of Bangladeshi students are studying in India.

Intra-Regional investment is another means of engagement in regional educational services. As in case of students mobility it is primarily from other countries to India, in investments also the flow in mostly in one direction that is from India to other South Asian countries. Till date, however, these investments are rather limited in terms of sectorial orientation as well as the range of institutions. They are mostly confined to Medical Education and Information Technology and a few Indian institutions such as Manipal, NIIT and Aptech. At school level, there have been few such ventures like the Delhi Public School franchise in Kathmandu. One of the most prominent examples of regional investment and collaboration in education is the Manipal College Of Medical Science (MCOMS), Pokhra established in Nepal in collaboration with Government of Nepal in 1994, and is affiliated to Kathmandu University.[36] In information technology, National Institute of Information Technology NIIT, the Indian software and computer training company has opened their branches in Sri Lanka, Nepal, Bhutan and Bangladesh. These institutes are either managed directly by NIIT or are in partnership with the local institutions. The institute does not just have presence in cities but have catered to the rural population of these countries as well.[37]

Another Indian IT education institute Aptech had also opened its branch in Bangladesh and in 2006-07 was catering to 40% of Bangladesh's IT training market.[38] Also noteworthy is the 2.5 million Ngultrum "total solution" project funded by India in Bhutan.[39] The aim of this project is to help create knowledge based Bhutanese society by providing access to IT and IT

[36] This is a well-recognised institute and is listed in WHO directory of medical schools and the International Medical Education Directory of Education Commission for Foreign Medical Graduates (ECFMG).

[37] http://www.niit.com/aboutniit/Pages/GlobalPresence.aspx, accessed on on January 7, 2013. Also see, NIIT LAUNCHES SPECIALIZED TRAINING PROGRAMS TO DEVELOP HUMAN CAPITAL IN SRI LANKA. available at: <http://www.niit.com/newsandevents/Lists/NIIT%20News/disformCustomv3.aspx?List=a325a1cf%2Da064%2D4573%2Db17a%2D3ce893a0d178&ID=208#sthash.BZj5NKDP.dpuf.. Accessed on January 7, 2013.

[38] *Supra Note*, p 212.

[39] Interview with Amb. A.N Ram, former ambassador of India to Bhutan, on (March 22, 2011).

solutions to a large proportion of Bhutan's population including government officials, teachers, entrepreneurs and rural children. The Bhutanese government has also held discussions with IT majors, such as Infosys, seeking their support for developing IT infrastructure in the country.[40]

Apart from this, the establishment of South Asian University in the Jawaharlal Nehru University campus in New Delhi is a major milestone in the history of educational cooperation in SAARC region. South Asian University is the brain child of the Indian Prime Minister, Dr. Manmohan Singh, who floated the idea at the 13th summit at Dhaka; an inter-governmental agreement was signed at the 14th summit at New Delhi in the year 2008 to set up the South Asian University. The university is jointly funded by the members of SAARC[41] and its objective is to harness the potential of the talented brains of this region and to promote cutting edge scientific and technological research by providing a forum where academicians, scholars, researchers and gifted students can work together in the service of human advancement. The First Academic Session of South Asian University commenced on 26 August 2010 with an intake of 50 students.[42]

Role of India in deepening intra-regional ties

The major challenge that SAARC Countries are facing today is with respect to providing tertiary education. As discussed above, the average adult literacy rate in south Asia was 60.9% in the year 2004 with Maldives and Sri Lanka having the highest adult literacy rate of 96.3% and 90.7% respectively, India stood third with 67% and the literacy rate of rest of the SAARC countries was

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[40] *IT Giants Look at Bhutan for Investment, <articles.economictimes.indiatimes.com› Collections › Development Centre>, December 24, 2008.*

[41] The South Asian University is the first international university to be set up in India, with link campuses in other SAARC member countries. The real estate cost of Rs. 750 million has been borne by the Indian External Affairs Ministry and contributions for other expenses are to be determined on a participatory basis. The role of SAARC countries will be to provide annual subsidies while full autonomy is grated to the University. It is a *sui generis* system where in the University is a government funded private University.

[42] The University has special quotas of reservation for students from different SAARC countries. Maximum of 50% seat is allocated to students from the host country i.e. Indian students, 10% reservation is for the students from Pakistan and Bangladesh and at least 4% for students from Nepal, Bhutan, Maldives and Sri Lanka.

less than 50%.[43] Though the literacy rate in India is fairly average compared to the illustrious record set by Maldives and Sri Lanka, still one should not undermine India's role in catering to the needs of higher education in South Asia.

Unlike other SAARC countries, India has the second largest higher education sector in the world. The number of Indian universities increased from eighteen at the time of independence to 493 today (Including 42 central universities, 60 state private universities, 316 state universities, 130 deemed universities and 33 institutes of national importance[44]. India is also the highest educational scholarship providing developing country in the world. Hence it is no surprise that India remains the most preferred destination for students from other member countries. India's comparative advantage in educational sector lies in the strong technical base of higher education in the form of world class Indian Institutes of Technology (IITs) and regional engineering colleges. These technical institutes are offering a wide range of courses in the fields of engineering and manufacturing including the information technology sector (IT) and IT Enabled Services (ITES).[45] The other specialized programmes in demand are Computer Science, Medicine, Marine Science, Biotechnology, Agriculture Technology, Buddhist Studies, and Economics and Management Studies. Indian human resource and educational companies such as Institute of Chartered Accountants and Financial Analyst of India (ICFAI) have already entered the Sri Lankan market.

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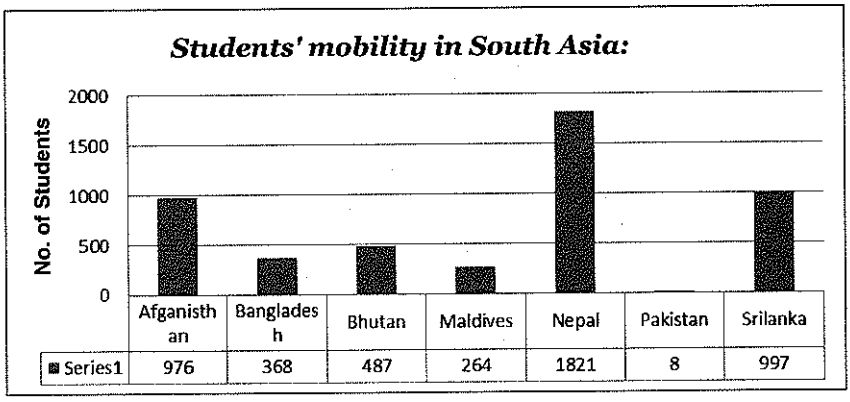
[43] *Supra* note 10 .

[44] University Grant Commission Annual Report 2009-2010, University Grant Commission, New Delhi. 2011.

[45] South Asian Development and Coperation Report, Research and information system for developing countries, Oxford University Press. P 138.



Statistically speaking, during the academic year 2007-08 Nepal had sent the highest number of 1821 students to India to seek admission in higher education, followed by Sri Lanka (997), Afghanistan (976), Bhutan (487), Bangladesh (368), Maldives (264), Myanmar (44) and Pakistan (8). The total number of students from SAARC region to India was 4965 during the above period.[46] Nepali Candidates are permitted to approach Indian educational institutions directly for general courses. As a result, every year hundreds of Nepali students obtain admission directly for general undergraduate courses in India. Sri Lankan students seek admission in Indian universities majorly because of the comparatively shorter duration of course. Many specialized honours courses in Sri Lanka are of 4 years compared to 3 years in India.[47] The students can save one year by studying the same course in India than in their homeland, hence there is a surge in number of students from Sri Lanka.[48] At the same time we can see the least number of students from Pakistan, the reason being the political mistrust between these states ensuing stringent visa rules. The Governments have signed visa agreement to ease travel in a bid to normalise their relationship. This new visa policy

[46] Report on International Students in Indian University 2007-08, Association of Indian University, New Delhi. In 2003-04 over 12,000 international students including 7,380 South Asian students (including Afghanistan), were enrolled in Indian universities and institutions although this number has declined from 13,707 in 1993-94.

[47] *Supra* note 9.

[48] *Ibid.*

mandates a time frame of 45 days for deciding on an application as opposed to the earlier indefinite time taken to process an application.[49]

India realizing its responsibility, as the most technically and educationally developed country in the region has been active in promoting quality education in South Asia. As discussed above, India took a historic step in the history of educational cooperation in SAARC region by setting up of South Asian University in the JNU campus, New Delhi. Besides, the University Grants Commission (UGC) of India has also taken a historic step last year by approving the proposal for reducing fee for the students of SAARC countries. This proposal was originally mooted by Nepal which wanted slight reduction in the fee for its students studying in India. The UGC not only accepted the proposal but also extended it to all the SAARC countries. According to this proposal students from these countries would now be paying the same amount as fees as their Indian counterparts. This positive decision by the UGC will immensely benefit the deserving students from the SAARC region.[50] Apart from the actions taken by the Government of India, there are other organizations like South Asian Foundation which with the aid of UNESCO is persistently working on strengthening the ties between SAARC nations by way of education. South Asian Foundation's core objective is to promote regional cooperation through a number of UNESCO Madanjeet Singh Institutions of Excellence in the eight SAARC countries, offering courses in Preservation of Cultural Heritage (Kabul), Human Rights and Common Law (Dhaka), Forestry Studies (Bumthang, Bhutan), Journalism (Chennai), Kashmir Studies (Srinagar), Regional Cooperation (Pondicherry), Green Energy Technology (Pondicherry), Climate Research (Maldives), Public Health (Kathmandu), Visual Arts (Lahore), South Asian Studies (Lahore), Water Management (Moratuwa, Sri Lanka). The South Asian Foundation provides scholarships to 2 students from each SAARC member country every year to pursue their higher education in any of the UNESCO Madanjeet Institutions of excellence.[51]Another such Scholarship is given by SAARCLAW Centre at National Academy of Legal Studies And Research (NALSAR),

[49] *India Pakistan Ink Visa Agreement*, The Hindu, September 8, 2012.
[50] *Students from SAARC countries to pay less fees in universities*, Deccan Herald, April 22, 2010.
[51] *Supra* note 33.

University of Law, Hyderabad. Since its inception, the University has awarded scholarships to 43 Students.[52] Bhutan is the most active participant by sending 33 students, followed 8 students from Nepal and 2 students from Sri Lanka.[53]

III. EDUCATIONAL COOPERATION IN OTHER REGIONS

Throughout the world there are different groups of countries active in educational cooperation often linked to economic integration. These developments reflect a common concern to strengthen educational systems in order to compete in global markets. This section of the paper examines the role that cooperation in education has played in deepening integration in other regional economic arrangements for the lessons to be learnt.

Bolonga Process

International provision of higher education services in both European and East Asian countries increasingly have a regional dimension. The European Union has since 1987 promoted the mobility of students, faculty, and content through its Erasmus Programmes. The Bologna Process aims to establish a European Higher Education Area (EHEA) in order to enhance quality and to promote mobility between the higher education systems of its 45 member countries.[54] Among the EHEA's features would be a common system of credits for study, a common qualifications framework in three cycles – undergraduate, masters and doctoral, a diploma supplement to serve as a common format for certifying qualifications, and common criteria and methods of quality assurance. Diversity of standards and distance are larger issues for the SAARC than for the Bologna Process countries, which bears upon the methods and the time-scale for achieving a common higher education area. However, discussions on some Bologna elements such as mutual recognition arrangements and credit transfer have already started in

[52] 37 students for LL.B , 5 Students for LL.M and 1 student for Ph.D programme.

[53] *Students form SAARC Countries in NALSAR*, (M.K.Nambiar SAARCLAW) Newsletter, July-December 2009, Hyderabad. at 18.

[54] *Understanding Bolonga Process*, Outline prepared by the Delegation of the Commission of the European Union to Russia, Moscow, December 16, 2005. Also see, http://www.ond.vlaanderen.be/hogeronderwijs/bologna/ and www.ehea.info.

South Asia. The methods by which European countries work together to achieve long term objectives are also of interest to the SAARC countries. Key features of the Bologna Process include biennial conferences of Education Ministers of the participating countries, supported by representatives of the universities and their students. These meetings take stock of progress over the last two years and set directions for the next two, including the identification of targets, common data requirements and indicators of progress. The European Union is constituted very differently from SAARC. The idea here is not to import European models as they stand but SAARC Countries should aim to understand the European experience, and to use it as one ingredient in its own shaping policies. SAARC should develop forums for dialogue with Europe which will enable it to draw on the European experience, and share its own. For example common higher education area proposed by the Bologna Process may be of interest to SAARC. The European Higher Education Area offers a number of benefits to a group of countries aiming at economic integration. It facilitates the flow of highly qualified manpower across national borders, and hence economic integration; it promotes efficiency through widening choice for staff and students; and it enhances educational effectiveness and cultural awareness by promoting staff and student mobility

Educational Cooperation in ASEAN

ASEAN is one of the fast paced economies of the world. The need of educational cooperation in improving the quality of human resources for competition both at regional and global level was felt by ASEAN in the early 1990s. The establishment of ASEAN University Network was a huge step in this regard. AUN is an arrangement between 26 universities in the ten ASEAN countries for harnessing its educational potential. The ASEAN University Network emerged from a highly ambitious idea of the ASEAN leaders and the ASEAN sub-committee on Education (ASCOE) to establish an ASEAN University. A year after this idea was launched, it became clear that this would present too many problems concerning funding, location and leadership. Therefore, in 1994, it was decided that the founding of a network of existing institutions would be more feasible. In its early years

(1995–1999), the AUN focused mainly on the sharing of knowledge and experiences and on small-scale student and staff exchange. Since 1999, the collaborative activities became more complex with programmes like Joint Curriculum Development, cooperation in Information Communication technologies (ICT) and the establishment of sub-networks.[55] This is not only the case for intra-ASEAN cooperation but also for the activities with the dialogue partners. The main objective of the AUN is to strengthen the existing network of cooperation among universities in ASEAN by promoting collaborative studies and research programmes. Furthermore, the AUN attempts to promote cooperation and solidarity among scientists and scholars in the region, and to develop academic and professional human resources as well as to produce and disseminate scientific knowledge and information among the universities in the region.[56] If we analyse the ASEAN experiences in implementing education cooperation in the last few years, we will find some successful measures to be taken into account in order to have successful education cooperation in our region. These are: understanding common problems, exploring common interests and identifying mutual gains of cooperating on a regional basis. Prioritizing the programs/projects that are urgent; in this case, SAARC should be at the driving force to identify priorities that are of interest to SAARC (and the dialogue partners). The willingness among SAARC countries to harmonise regional educational regulations and to that extent, making the domestic laws and national policies governing education is the biggest reason for success of ASEAN, which SAARC member countries should learn. Sharing resources in order to implement special assistance, which focuses on capacity building to bridge development gaps across SAARC nations is also an important agenda. Further, implementing joint efforts, which are about creating and developing regional institutions and implementing the programs through win-win approach, is indispensible.

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[55] See, <www.aun-sec.org> *accessed on April 10, 2011.*

[56] See Soekartawi *[Et al,* "Strengthening education cooperation through ASEAN partnership and networking: *Lessons from Indonesia,"* Country paper presented in *'The First Regional Seminar and Workshop on Strengthening Cooperation on Education to Achieve ASEAN Caring and Sharing'* organized by Ministry of Education, Thailand and Ministry of Foreign Affairs, Thailand at Amari Watergate Hotel, Bangkok, Thailand on 23-25 February 2009. source at <http://www.bic.moe.go.th/th/images/stories/ASEAN/presentation/Indonesia.pdf> accessed on April 10, 2011.

East Asian Cooperation in Education

East Asian countries (10 in ASEAN, plus P.R. China, Japan and South Korea) are also in a process of internationalising their higher education sector with an increasing regional component. Led by Japan, the ASEAN +3 study group on facilitation and promotion of exchange of people and human resource development advanced a comprehensive report which was welcomed by the East Asian leaders meeting in October 2003. The EAS group strives for regional promotion of lifelong learning programs; credit transfer systems; scholarships and exchange programs for students, faculty, staff; research and development cooperation; 'centres of excellence' including e-learning; and curricular development as bases for common regional qualification standards among interested institutions.[57]

The Way Forward

Today in the knowledge era, we have technologies such as, Oceanography, Biotechnology, Air and Space Technology etc. knocking at our doors. Globalization has many unprecedented opportunities to offer to SAARC but how we are going to utilise it is up to us. For making optimum use of the opportunities, we need trained human resource, which could only be produced by a good education system. The onslaught of globalization is merciless, if we do not act, we won't be able to survive the competition from other countries. Though the need for prioritising the development of educational resources of the region is much debated, stronger commitments to that end are lacking. Mutual cooperation is a key factor in dealing with these problems, especially in higher education. SAARC aims to accelerate economic and social development in member states, which requires optimal utilization of human resources. It has, therefore, emphasized the importance of promoting education.

[57] Philip McKenzie, Robert Horne, Andrew Dowling,; and Adrian Beavis, , *Harnessing Educational Cooperation in the East Asia Summit (EAS) for Regional Competitiveness and Community Building* (2008). *Policy Analysis and Program Evaluation.* source at http://research.acer.edu.au/policy_analysis_misc/5 accessed on April10, 2011 .

Higher education is of utmost significance for modernization of an economy and creation of a knowledge-based society. The member countries, therefore, must assess the progress of higher education, both in quantity and quality, and take corrective measures. The foregoing review reveals that in the entire SAARC region, enrolment in higher education in proportion to other countries, the eligible age group is low. The first and foremost task is to increase opportunities for access to higher education to meet the educational needs of various sections of groups, including women. The gross enrolment ratio between age group of 17 to 23 years varies in SAARC countries from less than 1% in Afghanistan to about 10% in India, while it is very high from 50% to more than 90% for some developed countries.[58] Thus, large-scale expansion of higher education facilities has to be undertaken in the entire region. Perhaps, the Open Distance Learning System is the best option to cover the maximal number of learners with minimal financial and physical costs. India has already taken a lead by diverting 25% of the enrolment in post-secondary education to the ODL model and is planning to raise the figure to 50% within a decade[59]. Other SAARC nations should also strengthen this efficient mode of learning.

Improvement in the quality of education is another aspect requiring urgent attention. Establishing world-class schools of higher education will prevent youth from being lured away by foreign institutions. Unconditional cooperation in curriculum development, preparation of instructional material, implementation of innovative practices, use of new technologies, exchange of experts, and promotion of collaborative research are the needs of the hour. SAARC should promote and finance regional conferences on various issues on higher education, including those related to quality improvement. So far, almost all SAARC countries have been financing their education systems out of public funds. But allocation of public funds for education is very low. Keeping in view the degree of underdevelopment, all governments must consider devoting more funds to education. For example, in India public funding of education, in the form of subsidies, has been to the

[58] C.P.S.Chauhan, Higher Education, Current Status and Future Possibilities in South Asia, Analytical Reports on International education, Vol 2 No.1, March 2008, p 31.
[59] Ibid.

extent of 90 to 95% of total expenditure.[60] And still universities are short on funds. The government has proposed to increase public funding on education from the present 3.9% to 6% of GNP in due course.[61] Other countries of the region should also work on similar strategies.

Since large-scale expansion of higher education accompanied by increased financial burden on the public exchequer, the Government of India has encouraged the private sector to establish and manage higher education institutions. Similarly, other countries of the region have also welcomed private for-profit investment in the higher education sector. It has been observed that the impact of private higher education in the region has been positive, because private universities generally pay higher salaries to teachers, offer a good curriculum, and provide high-quality libraries and research facilities. Thus, privatization tends to respond to the popular demand for modern, job-oriented, and practical training in technology and business. But most private universities and colleges are providing professional education and are functioning on commercial lines. Opening private universities and colleges is a lucrative business in India these days. Privatization and commercialization of higher education are two faces of the same coin, and hence, commercialization must be accepted; but at the same time governments must monitor institutions so that such commercialization does not lower the quality of education.

There are several broad segments or issues in the education services sector which can be addressed regionally. These include cross-border mobility within the region, cross border investment, franchise, collaborations, joint ventures, distance education and ICT based programmes (IGNOU can play a major role in this). Also harmonising regulations and recognition of selected degrees and programme and institutions within the region needs to be prioritised. As discussed earlier, there are areas of complementarity in this sector within the region but the ability of the key host countries like India would in large depend on their domestic capacity and quality, several issues need to be addressed to ease mobility of the students within the region. One

[60] Report of Steering Committee, Secondary Higher and Technical Education for Eleventh Year Plan, Government of India Planning commission. p17-29.
[61] *Spending Boost for Health Education in 12th Plan*, Time of India, April 22, 2011.

major issue in this regard is the often stringent visa regime.[62] Today, foreign students coming on scholarship or self-financed basis have to undergo cumbersome visa regulations and documentation requirements when coming to India for studies same is true for mobility of researchers and teachers on exchange programmes. Another area for regional cooperation is facilitating cross border investments by easing the regulation for setting up education institution and harmonising investment regulations pan South Asia. More and more regional scholarship schemes can be introduced for SAARC students. Except the handful of scholarships given by the SAARC secretariat, UNESCO- Madanjeet Institute of excellence, South Asian university and National Academy for Legal studies and Research, Hyderabad etc. the SAARC countries have general scholarship for developing and least developed countries students.

All the member countries must work together, setting aside all bilateral economic, political, and territorial disputes. Sometimes bilateral territorial issues dominate discussions in SAARC meetings and socio-economic matters of common interest take a back seat. SAARC should be a platform for discussing common socio-economic problems and devising collaborative strategies to deal with them. One can see an active growing interest of SAARC countries in developing strong cooperation in the education sector after the 12th SAARC summit in Islamabad. Apart from the strategies being planned at the regional level, countries have also entered into bilateral agreements for cooperation. The recent example in this regard is Pakistani Prime Minister Syed Yousuf Raza Gilani's proposal to Bhutan for cooperation in the fields of education and human development by offering increased number of scholarships for the Bhutanese students particularly in medicine and engineering fields. He also offered training facilities to Bhutanese diplomats in Pakistan's Foreign Service Academy.[63] Expanding cooperation in education will build strong partnerships and support greater mobility for the students and academicians of South Asia. It increases awareness and intercultural appreciation of the other region by working together to build a common future and building networks for education and

[62] *Supra note* , 46.

[63] *Pakistan, Bhutan Vow to Boost Ties in Trade, Tourism,* The Financial Express, March 20, 2011.

youth co-operation that are sustainable and dynamic. The cooperation in educational sector provides an inexhaustible driving force for deepening the relationship amongst SAARC countries. The benefits of international education initiatives go beyond the personal growth and skills obtained by individual participants. These initiatives also have positive cultural, political, academic and economic impacts on our society. The 'people to people' exchange gives an opportunity to the people of one country to explore, appreciate and understand culture, conditions and aspirations of citizens in other countries. It helps in forging good relations between two nations. When a country gives scholarship to the students of other country for achieving their higher education aspiration, it is actually creating its constituency in that other country. The 'people to people' exchange exposes students to social and cultural differences, new educational methods and systems, and unique global perspectives. The cross-border relationships that are formed during the cooperation programmes, for instance, are sometimes lifelong relationships that may become the foundation of future economic transactions or business collaborations.

Though there are many benefits of cooperation in educational sector but these benefits cannot be taken for granted. A number of factors are important for the success of cooperative activities and to ensure that they achieve their objectives. At regional level key success factors include cooperation. It must be seen by all parties as meeting genuine needs. Cooperation needs to be viewed as a two-way process whereby each country shares its strengths to help others as well as receives assistance in meeting its needs. It is imperative to provide a high level political support and strong links into national ministries and networks of education providers needs to be developed. A program framework in which the various components are mutually reinforcing: 'piecemeal programs don't work'. A cooperation policy with realistic timelines should be formulated together with the constitution of well-resourced coordinating group or secretariat which is able to maintain momentum, support national personnel, disseminate good practice, and develop future plans. Building social infrastructure on the solid foundation of education to enhance national capacity should be seen as a core task. Promotion of pioneering tertiary education should be realized as the foremost priority of the SAARC countries.

COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW: The "should have known standard" and the subsequent gulf between liability and culpability

Lakshmi V.*

The objective of the present article is to make a focused analysis of the "should have known" standard of the mental element in command responsibility. The article attempts to answer what the connotation of the "should have known" standard of command responsibility implies, the demerits of this standard of knowledge and prescribes the ways through which this standard of knowledge can be brought in tune with the guiding principles of criminal law philosophy. Inevitably, the doctrinal shortfalls of this standard will be examined, especially with regard to the resultant gulf between liability and culpability.

I. INTRODUCTION: *The "Should Have Known" Standard of Command Responsibility in ICL*

Command responsibility is a form of imputed liability for the crimes of one's subordinates. For engaging command responsibility, the following three conditions must be fulfilled:

- Thatthere existed a superior-subordinate relationship between the accused and the perpetrator of the crime,
- That the accused knew or had reason to know that the crime was about to be, was being or had been committed by subordinates, and;

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- That the accused failed to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrators thereof.

Of these three criteria, this article deals specifically with the prong of knowledge, i.e. about the liability of the category of superiors who "had reason to know" (or "should have known", in the phraseology of the ICC Statute) of their subordinates' crimes. While direct instigation or ordering to commit a crime would engage the superior's responsibility as a co-perpetrator[1], the imputation of liability through the medium of command responsibility when the superior neither ordered nor instigated but merely "should have known" about their crimes is sought to be examined herein. This touches upon core concerns of criminal law philosophy and the larger issue of the actual and perceived legitimacy of ICL. The "should have known" standard presents many difficulties on being viewed from the standpoint of the philosophical foundations of ICL. Some of these legal and philosophical conflicts are sought to be elucidated in the following sections.

II. A BRIEF OVERVIEW OF THE LAW RELATING TO THE "SHOULD HAVE KNOWN" STANDARD

The "Should Have Known" Standard as laid down in International Criminal Statutes

Art. 7(3)[2] of the ICTY Statute imposesliability on superiors for acts of subordinates which they knew or had reason to know. Art. 6(3)[3] of the ICTR Statute lays down the "should have known" standard, echoing the language of the ICTY Statute. It forms the basis of liability by way of omission. On the

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[1] ICTY Statute.Art. 7(1); ICTR Statute. Art. 6(1);ICC Statute. Art. 25(3)(b). See also *Prosecutor v. Kordic&Cerkez*, (Case No. IT-95-14/2), (2001), ¶371: where the liability of a commander who planned, instigated, aided or abetted the crime is discussed.

[2] ICTY Statute.Art. 7(3): The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew *or had reason to know* that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. (Emphasis added).

[3] Art. 6(3): The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew *or had reason to know* that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. (Emphasis added).

other hand, Art. 86(2)[4] of the Additional Protocol I to the Geneva Conventions[5] significantly refrains from laying down a "should have known" standard but bases liability on the actual knowledge or the information which is available to the commander for the purpose of concluding whether the subordinate was committing or going to commit such a breach as was proscribed.[6]

The Rome Statute of the International Criminal Court, 1998 lays down the provisions relating to command responsibility in Art. 28. The Rome Statute, unlike its predecessors, has dealt with superior responsibility more comprehensively and in a separate provision from the one on individual criminal responsibility.

Difference in the Standard of Knowledge required for Civilian Superiors vis-a-vis Military Commanders

The standard of knowledge is different according to the military or civilian nature of the relationship between the superior and the subordinate. In the case of a military superior, a high duty of care, so to speak, is placed upon the superior, engaging his liability if he knew or "should have known"[7] that the forces under his command were committing or about to commit crimes under ICL. However, in the case of civilian superiors, the only actual knowledge or "conscious disregard" of information which clearly indicated that the subordinates were committing or about to commit such crimes[8] engages the criminal responsibility of the superior. Therefore, we can see

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[4] Art. 86(2): The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, *if they knew, or had information which should have enabled them to conclude in the circumstances at the time,* that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach. (Emphasis added).

[5] Geneva Conventions Relative to the Protection of Victims of International Armed Conflicts, Protocol I, August 12, 1949, 1125 UNTS 3, 16 ILM 1391 (1977).

[6] ICRC Commentary on Protocol I Additional to the Geneva Conventions of 1949 at 10314, states that all negligence may not give rise to liability; but that the negligence may engage liability only if it is so serious that it amounts to malicious intent, apart from any causal link between the conduct and the damage that took place. See also Allison Marston-Danner, Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law,* 93 CALIF. L. REV. 75 – 170 (2005), pp. 125 – 126.

[7] Rome Statute.Art. 28(a)(i).

that under the ICC rubric, the "should have known" standard is applicable to military commanders and not to civilian superiors.

The establishment of a more stringent standard for military commanders vis-a-vis civilian superiors can be justified due to two reasons: firstly, there is a more tightly-knit, hierarchical command and control structure in the military as opposed to civilian institutions whereby the military commander enjoys a higher degree of *de facto* and *de jure* control over the troops than a civilian superior ordinarily exercises over his subordinates. Secondly, the duty of military commanders to supervise their troops and prevent them from committing war crimes or crimes against humanity is arguably higher than that of civilian superiors. The likelihood of commission of such crimes in the theatre of war also provides a justification for lowering the threshold of knowledge to "should have known" in the case of military commanders when juxtaposed to the higher threshold of knowledge (consisting of actual knowledge or wilful blindness) required on the part of a civilian superior.

There are some ambiguities in the jurisprudence of the ICTR on whether it applies the same standard of knowledge for civilian and military commanders alike. The ICTR in *Musema*[9] considered that the applicable standard for criminal responsibility under Art. 86(2) (of the 1st Additional Protocol to the Geneva Conventions) does not distinguish between civilian and military commanders. However, in *Kayishema and Ruzindana*[10], the ICTR seems to favour a differentiated knowledge requirement for civilian and military superiors as envisaged under Art. 28 of the Rome Statute:

"... the distinction between military commanders and other superiors embodied in the Rome Statute is an instructive one. In case of the former it imposes a more active duty upon the superior to inform himself of the activities of the subordinates when he "knew, or owing to the circumstances at the time, should have known that the forces were committing, or about to commit such crimes."

This is juxtaposed with the mensrea element demanded of all other superiors, who must have, "(known) or consciously disregarded information

[8] *Ibid.*, Art. 28(b)(i).
[9] *Infra* n. 25 at ¶ 147.
[10] Prosecutor v. Kayishema & Ruzindana, (Case No. ICTR-95-1-T), Judgment, 21 May 1999.

which clearly indicated, that the subordinates were committing, or about to commit such crimes".[11]

This ambiguity is also reflected in the ICTY standpoint. In the *Delalic* appeal[12], the ICTY held that:

"Civilian superiors undoubtedly bear responsibility for subordinate offences under certain conditions, but whether their responsibility contains identical elements to that of military commanders is not clear in customary law."[13]

However, in *Krnojelac*[14], the Trial Chamber took a different view and held that:

"The same state of knowledge is required for both civilian and military commanders."[15]

The ICC however, as discussed above, has definitively laid this controversy to rest by delineating clearly the different grades of the mental element required in the case of civilian and military commanders. Therefore, civilian leaders unlike military leaders are not imposed with a "*prima facie* duty" to be seized of every activity of their subordinates.[16] The following examination will seek to see how far the imposition of this requirement on military superiors is fair and how far the imputation of criminal liability is sustainable on the "should have known" standard.

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[11] *Ibid.* at ¶ 227.
[12] Prosecutor v. Delalic et al, (Case No. IT-96-21-A), Judgment, 20 February 2001.
[13] *Ibid.* at ¶ 240.
[14] Prosecutor v. Krnojelac, (Case No. IT-97-25), Judgment, 15 March, 2002.
[15] *Ibid.* at ¶ 94.
[16] *Cf.supra* n. 10 at ¶ 228.

The Connotation of the "Had Reason to Know" Requirement: An Overview of the Jurisprudence

For holding a superior criminally responsible for the conduct of subordinates, the requisite mensrea is that the superior knew or had reason to know of such conduct. Both direct and circumstantial evidence may be adduced to prove the knowledge requirement.[17] However, difficulties arise as to the level of proof required to show that a superior had "reason to know".

The ICTY, in *Delalic*[18], did not follow an expansive reasoning and was of the opinion that "it preferred it to be proven that some information be available that would put the accused on notice of an offence and require further investigation by him." The tribunal was inclined to confine imputed responsibility to those cases where a superior wantonly disregarded specific information available to him of a character that should have alerted him that his troops were about to commit criminal activities.[19] In effect, the *Celebici* appeals judgment negated any liability based on a standard of negligence. The tribunal held that under customary international law, a commander was liable only if some specific information relating to subordinates' crimes was available to him. The Chamber proscribed wilful blindness and admitted the difficulties in dealing with scenarios where a commander failed to properly supervise his troops and thereby did not acquire the necessary information. Knowledge of the commander can be proved by direct or circumstantial evidence. *Celebici* case lays down essentially a *doluseventualis* requirement (recklessness is the relevant mental element), which is triggered if the commander fails to follow up on any information indicating that his subordinates are committing crimes. Vicarious nature or strict liability of command responsibility was negated by the ICTY.

However, in the *Blaskic*[20]case, the ICTY lowered the standard to one of simple negligence, whereby the commander would be liable even if he did not have information of the kind which alerts him to the imminent criminal

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[17] Prosecutor v. Bagilishema, (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, ¶ 46.
[18] Supra n. 12.Also known as *Celebici* camp case.
[19] ¶ 388-89.
[20] *Infra* n. 32.

acts of his troops. It is sufficient that he did not take measures to obtain this kind of information; provided that he "should have known" that failure to do so was a criminal dereliction of duty.[21] This lowering of the standard of knowledge required to impute command responsibility raises some fundamental questions, which are discussed in the following sections of this article. The ICTY overturned the *Blaskic* Trial Judgment in appeal[22], influenced perhaps by Damaska's powerful critique of the ignoring of the personal culpability of the accused.[23] The position was restored to the *Celebici* appeals standpoint.

The ICTR, in *Kayishema & Ruzindana*[24], came to the conclusion that a superior would have "had reason to know" where he or she "consciously disregarded information" that his subordinates had committed or were about to commit breaches. In *Musema*[25], the ICTR noted that the drafters of Art. 86(2) of the First Additional Protocol of the Geneva Conventions had been of the opinion that a "should have known" standard "was too broad and would subject the commander, a posteriori, to arbitrary judgments". The Chamber conceded that Art. 6(3) of the ICTR Statute which lays down the knowledge requirement "closely resembles in spirit and form" Art.86(2) of the 1st Additional Protocol. This seems to be a drifting away from the rigours of a "should have known" standard, which the Chamber perceives to be too broad in scope.

In *Akayesu*[26], the ICTR expressed concerns over a rule of strict liability or negligence for command responsibility. It was laid down that command responsibility is premised on individual criminal responsibility and that such responsibility should be based on malicious intent, or even on negligence

[21] *Ibid.* at ¶ 310 -22.
[22] Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-A, Judgement, 29 July 2004.
[23] *Infra* n. 45.
[24] *Supra* n. 10.
[25] Prosecutor v. Musema, (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, ¶ 146.
[26] Prosecutor v. Akayesu, Judgment, ICTR-96-4-T (Sept. 2, 1998), at U 488: "According to one view it derives from a legal rule of strict liability, that is, the superior is criminally responsible for acts committed by his subordinate, without it being necessary to prove the criminal intent of the superior. Another view holds that negligence which is so serious as to be tantamount to consent or criminal intent, is a lesser requirement."

provided such negligence is "so serious as to be tantamount to acquiescence or even malicious intent."[27]

The *Bagilishema*[28] decision is quite instructive. It was observed that though an individual's command position may be a significant indicator of knowledge, such knowledge cannot be presumed on the basis of that position alone.[29] The Chamber outlined the following conditions under which "a superior possesses or will be imputed the *mensrea* required to impute criminal liability":

"He or she had actual knowledge, established through direct or circumstantial evidence, that his or her subordinates were about to commit, were committing, or had committed, a crime under the Statutes; or

He or she had information which put him or her on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such offences were about to be committed, were being committed, or had been committed, by subordinates; or,

The absence of knowledge is the result of negligence in the discharge of the superior's duties; that is, where the superior failed to exercise the means available to him or her to learn of the offences, and under the circumstances he or she *should* have known."[30]

Therefore, under the third prong, there is a "duty to know" on the part of the superior. Responsibility will be imposed upon the superior where he or she "should have known" of the offences, or in other words, where he or she was negligent in his or her duty and with the means available to obtain information relevant to the offences.[31] Therefore, a superior need not necessarily incur responsibility if he or she was diligent in his duty but yet the subordinates committed crimes. The Chamber adopted this position by referring to the decisions of the ICTY Trial Chambers in *Blaskic*[32] and *Aleksovski*[33]. The entire tenor of the judgment seems to lean in favour of a

[27] *Ibid.* at ¶ 489.
[28] *Supra* n. 17.
[29] *Ibid.* at ¶ 45.
[30] *Ibid.* at ¶46.
[31] Jamie A. Williamson, *Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda*, 13 CRIMINAL LAW FORUM 365-384 (2002), p. 377.

negligence standard. However, the *Bagilishema* appeals judgment[34] requires a standard of knowledge of something more than mere negligence. Therefore, as of now, the *Bagilishema* standard requires something more than mere negligence.

The law is therefore well-settled in ICTY and ICTR that command responsibility is triggered by level of knowledge starting at the minimum threshold of at least *doluseventualis* and not a bare negligence standard.[35]

III. DOCTRINAL CONCERNS SURROUNDING THE "SHOULD HAVE KNOWN" STANDARD

The "Should Have Known" Standard: Toning down the mensrea from knowledge to negligence?

The "should have known" standard actually would amount to penalizing a person for being in the wrong place at the wrong time (i.e. being in a position of command when a crime under ICL was committed) if liability attaches notwithstanding the actual amount of involvement. It raises a question of whether command responsibility amounts to a matter of liability for negligence. Here, the observation of Gerhard Werle that the concept of superior responsibility is "an original creation of international criminal law"[36] for which there are no paradigms in national legal systems[37] is

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[34] *Prosecutor* v. *Blaskic*, (Case No. IT-95-14), Judgment, 3 March 2000, ¶332: "(I)f a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute."

[35] *Prosecutor* v. *Aleksovski*, (Case No-IT-95-14/1), Judgment, 25 June 1999, ¶80: "Admittedly, as regards 'indirect' responsibility, the Trial Chamber is reluctant to consider that a 'presumption' of knowledge about a superior exists which would somehow automatically entail his guilt whenever a crime was allegedly committed. The Trial Chamber deems, however, that an individual's superior position *per se* is a significant indicium that he had knowledge of the crimes committed by his subordinates. The weight to be given to that indicium, however, depends inter alia on the geographical and temporal circumstances."

[36] *Prosecutor* v. *Bagilishema*, Judgment (Reasons), ICTR Appeals Chamber, Case No. ICTR-95-1A-A (July 3, 2002), ¶35: "References to negligence in the context of superior responsibility are likely to lead to confusion of thought..."

[37] Allison Marston-Danner, Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CALIF. L. REV. 75 – 170 (2005), p 129.

pertinent. At first blush, a researcher might feel inclined to compare command responsibility with vicarious liability, i.e. the liability of a master for a tort committed by a servant. However, the comparison is misplaced and it is soon discarded on submitting it to analysis. Tort liability is a civil liability. The doctrine of *respondentsuperior* is based on the pragmatic consideration that the master has deeper pockets to pay damages. However, in command responsibility, especially in its imputed form under the "should have known" standard, criminal (as opposed to civil) liability is imposed on the commander on the actions of the subordinate. This might result in toning down the mens rea requirement even of a specific intent crime like genocide to mere ignorance that the crimes were being committed, taking recourse to the "should have known" standard. This results in an anomalous situation of a negligent commander being ascribed full criminal responsibility as a perpetrator of genocide. Vicarious liability as a concept is generally unfit for application in the sphere of criminal law, which is premised on individual criminal responsibility.

To transfer the *actus reus* and *mens rea* of a person wholesale to another person (the commander), who "should have known", imputes a liability for crime where the actual mental element is lacking, or in any event, short of that required for actual commission of that crime. Toning down the *mens rea* requirement from intent, or knowledge as the case may be, is an exercise that should be embarked upon with great caution. "*Actus non facit reum nisi mens sit rea*" is an axiomatic principle, one of the cornerstones of the entire edifice of criminal law. Any dilution of the required standard of *mens rea* for attributing liability for any crime should be done only after the greatest circumspection. Otherwise we may have the anomalous situation of the 'negligent war criminal': is a superior to be penalized for intentional crimes of the most serious nature if he would not have condoned these crimes of his subordinates had he but had knowledge of them?[38]

[36] K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002), p. 667.
[37] Gerhard Werle, *Principles of International Criminal Law*, (The Hague, Netherlands: T. M. C. Asser Press, 2005), p. 128.
[38] *Infra* n. 45 at p. 463.

"Should Have Known" Standard and the Conflict with the Principle of Autonomy of the Individual

Holding a person (i.e. the commander) liable for the actions of another person (i.e. the subordinate) happens in the case of imputed command responsibility. In the case of such imputed responsibility, there is a fundamental philosophical conflict with the Kantian ideal of the autonomy of the individual, according to which a person is held to account for his own actions, and not for the actions of other persons. However, this is reconcilable with the fact that often in the backdrop of war or conflict, it is the commanders who issue orders or who are the driving force behind crimes under ICL. So some amount of the moral responsibility can be traced back to the commanders who instigate or acquiesce in crimes in a direct or indirect manner.

However, when liability is extended to a commander under the "should have known" standard, he is imputed liability for which he can by no stretch of imagination be held to be morally responsible. This would be a flagrant violation of the principle of moral autonomy of individuals, according to which a person should be liable only to the extent of his own involvement in the crime. It is difficult to establish this nexus of moral responsibility in the case of imputed liability under the "should have known" standard. This idea is closely related with the principle of culpability, which is discussed hereafter.

"Should Have Known" Standard and the Principle of Culpability

The principle of culpability is a logical corollary of the idea of the autonomy of the individual. As each individual is a free moral agent who should *ipsofacto* be liable for and liable only for his own actions (made pursuant to his own free moral choices), liability must not be attributed where there exists no moral blameworthiness (knowledge or acquiescence of the crimes of subordinates in the context of command responsibility). Here it may be argued that there is moral blameworthiness even where a commander who

"should have known" of subordinates' crimes, nevertheless failed to discover and prevent them, as he is in breach of his legal obligation to supervise his subordinates properly and prevent and punish any crimes under ICL committed by them. It is here, however, that it is to be noted that the liability attaching to the commander is *not for* failure to supervise his troops, but individual criminal responsibility for the crime(s) committed by the subordinate(s). This translates into imputing liability which is disproportionate to the level of blameworthiness.

To illustrate the above with an example, let us assume that soldier 'B' who is under the command of commander 'A' commits a crime of genocide which requires a specific intent (*dolus specialis*). In imputing responsibility, commander 'A' is treated as if he himself has committed genocide. If he was called to account for failing to supervise 'B' properly, it would have been proportionate; a fair imposition of liability to the extent of culpability. But transferring the *mensrea* of the soldier 'B' to commander 'A' and calling him a perpetrator of genocide, would be disproportionate and a liability far in excess of culpability. This also connects to the problem of fair labelling. 'A' is labelled a perpetrator of genocide, while in all fairness he should be labelled as a negligent commander or as having failed in his supervisory (preventive and punitive) duties in his capacity as commander.

In the case of liability in excess of culpability, legality degenerates into mere legalism. Legal responsibility should run concurrent with moral responsibility. It is true that law aims to be precise where morality may be vague or ambiguous. However, there should not be a broad gulf between the moral responsibility and legal responsibility. This is because the duty of law is to formulate and translate on ground the "minimum morality". Ignoring this would undermine the basic legitimacy and justification of the imposition of legal responsibility. Legal responsibility suffers in validity sans its underpinning of moral responsibility. This is why the "should have known" standard of command responsibility must be carefully scrutinized to ensure that it should not impose liability far in excess of culpability. There should at least be a broad concurrence between liability and culpability.

There is also a gulf between the national law standard of liability of commanders and the standard of liability under ICL. This is because national law systems tend to have a greater regard to notions of culpability than ICL. However, the goal of ICL is basically to promote human rights, and it cannot do so by ignoring the idea of culpability-based liability which is very much a part of fairness, thus having a human rights dimension.

Lack of a Differentiated Model Based on the Qualitative Nature of the Mental Element on Applying the "Should Have Known" Standard

The following table is an attempt to illustrate how the criminal liability remains uniform over a gamut of differing states of knowledge and consequently differing mental element (*mensrea*).

Figure 1[39]

State of Knowledge	Mental Element/ *Mens Rea*	Liability	Degree of Culpability
Self-induced ignorance (wilful blindness)	Tantamount to intent or knowledge	Full criminal responsibility for subordinate's crime	High (Equal to actual knowledge)
Conscious disregard	Recklessness (*doluseventualis*)	Full criminal responsibility for subordinate's crime	Lower than above
"Should have known"	Inadvertent negligence	Full criminal responsibility for subordinate's crime	Lower than both of the above

We can see that though there are gradations in culpability as we go down the list, liability remains the same across the board. By punishing/ castigating crimes equally regardless of the mental element involved, we are diluting the law by applying it indiscriminately. This also ties in with the concerns of fair

[39] *Infra* n. 45 at pp. 462 – 463. Figure 1 is a tabular representation of the three bands of the knowledge spectrum and the corresponding mental element, as discussed by Mirjan Damaska,.

labelling and norm projection. There should be a differentiated model for apportioning liability based on the level of culpability. Liability should strictly be based on culpability *pro tanto* if the law is to be fair, just and reasonable in its formulation and application. There should be a differentiated model of apportioning liability commensurate with the mens rea, i.e., based on the qualitative nature of the mental element. The "should have known" standard is unduly harsh in this regard.

The Concern for Fair Labelling[40]

The concern for fair labelling arises because the liability which is imputed to the superior under command responsibility is individual criminal responsibility for the offence committed by the subordinate, not individual criminal responsibility for his own failure to properly supervise his subordinates. Are we ascribing unfairly to him liability which rightly should have attached to another? This is the crucial question of "fair labelling".

The different degrees of blameworthiness in command responsibility do call for different labelling. It would not be fair to call those who breach command responsibility under the "should have known" standard as war criminals. This is also brought out by the illustration employed in the preceding Section using scenario of the commander 'A' and soldier 'B'.[41]

There is a good reason why labelling should be commensurate with blameworthiness. A question may be raised why labelling should matter if the different degrees of culpability are taken into account while sentencing. However, it should not be forgotten that with labelling there is an element of moral condemnation and resultant stigmatization. The imputation of criminal liability tarnishes more than that of civil liability, and the label applied also determines the degree of stigma attaching to that individual. Therefore it needs to be borne in mind that while imputing command responsibility under the "should have known" standard, we are imputing to a person the moral stigma and condemnation of another individual's crime.

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[40] *Infra* n.45.This section is based chiefly on Mirjan Damska's highly influential article.

[41] See *supra* § 7: "Should Have Known" Standard and the Principle of Culpability.

The argument herein is not that stigma and liability should not attach to a commander for the crimes of his subordinates, but rather that such stigma and liability must be commensurate with his own degree of blameworthiness and not a direct transplantation of that of his subordinates to him.

Another concern of fair labelling concerns the attribution of liability for crimes of the most serious and intentional nature to commanders whose standard of culpability is based on negligence. In most national jurisdictions, liability for negligence is limited to crimes which do not involve serious moral condemnation.[42] However, all crimes in ICL are among the gravest of crimes contemplated by humanity and do involve serious moral condemnation and moral outrage on labelling. Therefore, ICL should be cautious in labelling because of the existing gulf between the actual culpability and the liability imposed in the case of imputed command responsibility under the "should have known" standard.

The Problem of Over-deterrence[43]

Deterrence is one of the well-recognised purposes of ICL. Imposing command responsibility on a "should have known" standard undoubtedly furthers the goal of deterrence. It serves to signify to commanders that as persons in a position of responsibility, they are under a special duty of care[44] to prevent their subordinates from committing crimes under IL. However, projecting the norm that they are as responsible for the crimes they "should have known" about as they are for crimes which they have committed, ordered, planned or instigated, stretches the limits so that it amounts to "over-deterrence" rather than deterrence. It would prevent morally upright persons from occupying positions of command, which they otherwise might have taken up.[45] This would be a loss on a cost-benefit analysis, if ICL itself deters morally upright persons from taking up positions fraught with most

[42] *Commonwealth* v. *Kocwara*, 397 Pa. 575 (1960). However, the felony murder rule in America runs against the principle of culpability by extending vicarious liability for the serious crime of murder committed by another.

[43] This part is based substantially on *infra* n. 45.

[44] The expression is used here in a generic sense, not in a technical sense.

[45] Mirjan R. Damaska, *The Shadow Side of Command Responsibility*, 49 American Journal of Comparative Law 455 (2001).

responsibility, in a scenario where morally upright persons are badly needed at the helm of affairs to prevent international crimes.

Holding a person accountable to the extent of (and not beyond) their culpability would help to solve the problems posed by over-deterrence. As liability is still attached, this would not dilute the effect of deterrence.

"Just Desserts": The Impact of the "Should Have Known" Standard on the Perceived Legitimacy of ICL[46]

Many national law systems have provisions which restrict liability in tune with culpability. Flying in the face of this: if ICL seeks to impute liability in excess of culpability by taking recourse to the "should have known" standard, it might be widely perceived that it is not meting out "just desserts". The important thing to be borne in mind is that ICL is a human rights endeavour from start to finish. Therefore, it cannot take on a utilitarian angle and weigh the rights of one in the balance and find it to be less weightier than the rights of many. Each individual must be given "just desserts", i.e. only that moral condemnation which they deserve for their own actions. No less a standard can be imposed, no lower a benchmark can be set for apportioning blame to a commander as the culpability principle runs like a golden thread through the human rights guarantees of the accused.

It is to be noted that any deviation, actual or perceived, from the idea of "just desserts" would dilute the norm projection function of ICL. This is because the intrinsic merit or validity of a norm is difficult to judge and the only perceptible yardstick is the perceived validity or acceptance of a norm. If people at large, i.e., individuals, who are ultimately the subjects of ICL, feel that it metes out some liability on technical grounds and not according to what the individual deserves, the entire normative endeavour of ICL is thereby foiled. This concern emphasizes yet again the importance of culpability and "just desserts."

[46] This part is substantially based on *supra* n. 45.

Given the many arguments raised against ICL such as selectivity, victors' justice etc., it should be like Caesar's wife: above suspicion. For this, justice must not only be done but also seen to be done. If the widespread perception is that ICL holds individuals criminally liable under fanciful doctrines or laborious constructs, then public perception of its legitimacy would be irrevocably eroded. Therefore, it is in the interests of the larger enterprise of ICL to reduce its reliance on doctrines which have only a veneer of legality, like the "should have known" standard. The "should have known" standard is a legal fiction, and painfully so, in the chaotic conditions surrounding armed conflict. This is exemplified by the *Yamashita Case*[47], where a commander was literally a martyr to the "should have known" standard of imputed responsibility. If the public feels that commanders are made martyrs of for things over which they had no control, the moral authority of ICL would suffer. Of course, the last thing ICL as a form of transitional justice would want to do is to make martyrs out of those whom it tries to hold accountable.

Here, a question naturally arises as to how far ICL can afford to be populist or pander to public notions of what are "just desserts". As a form of justice, ICL cannot afford to bow to public opinion. It should not be a "mob" justice, but nor can it afford to ensconce itself in a cocoon of doctrine far removed from reality and relegate itself to being an "ivory tower" form of justice. It should derive its legitimacy from strict adherence to legality and the axiomatic principles of criminal law like the principle of culpability and "just desserts." The "should have known" standard needs to be reassessed from a doctrinal standpoint.

Jurisprudential Dilemma in the "Should Have Known" Standard

The "should have known" standard of liability is a classic case of human rights jurisprudence gaining an upper hand over criminal law jurisprudence. A human rights friendly approach is always victim-oriented and would seek to enlarge the liability net to make sure that the maximum number of

[47] *In re Yamashita*, 327 U. S. 1 (1946): It involved the application of strict liability and resulted in imposition of liability far in excess of culpability. The factual matrix was a poignant reminder of how the "should have known" standard looks more and more like a quaint legal fiction in the chaotic conditions of battle.

persons in responsible positions are held accountable for gross human rights violations. In stark contrast, the criminal law model is highly conscious of the rights of the accused and places a high premium on liability being linked with culpability. This is because of the inherently different yet not inconsistent objectives of the two legal frameworks. The criminal law model attaches great importance to the substantive and procedural safeguards to be provided for the accused, while the human rights model focuses on giving justice to the victims.

ICL cannot afford to ignore either model. ICL is a vehicle for the vindication of human rights through the instrument of criminal law. Criminal law itself cannot be seen as divorced from human rights; as the safeguards for the accused are very much a part and parcel of human rights. How far can we vindicate human rights if we ignore some of them in the process? The debate of 'ends' versus 'means' has been the classical ethical dilemma. However, as for ICL, both the ends and means must be human rights friendly if its larger goals are to be attained. Imputing liability in excess of culpability, and the various problems outlined herein should not take away from the perceived legitimacy of ICL. Enthusiasm to nail all the culprits must not result in superiors being hauled up for crimes for which they bear no moral responsibility whatsoever. This might step up the conviction rate but it would weaken the moral authority of the entire enterprise of ICL.

Absence of the Necessary Nexus of Causality under the "Should Have Known Standard"

All forms of criminal justice generally contain some requirement of causality, in that the conduct of the accused should have caused the criminal consequence sought to be avoided. For instance, under the English law, criminal responsibility hinges on the "but for" test: but for the acts of the defendant, would the harmful result have come about? It should be remembered that the act of the defendant which precipitates the harmful result need not be direct.[48] However, such act must be substantial[49], that the act of the defendant was not the only cause is irrelevant.[50]

[48] *R.* v. *Mackie,* [1973] 57 Cr App. R 453.
[49] *R.* v. *Hennigan,* [1971] 3 All E.R. 133.
[50] *R.* v. *Pagett,* [1983] 76 Cr. App. R 279.

The law depends on the concept of causality to justify the criminal liability of the person who engages in certain conduct, when such conduct causes the harm inherent in the offence under consideration. The nexus between the harm and the act in question is imperative in establishing criminal liability, unless the chain of causality has been broken by an intervening act.

The earlier jurisprudence on command responsibility has not gone into the relevance of causality for engaging command responsibility. A superior's culpable omission having a link of causality with subordinates' wrongful conduct is relevant in determining command responsibility, but it has more often been assumed than weighed and factored in carefully. The approach of the ICTY in *Delalic*[51] dismissed any causality connection in the command responsibility doctrine and this has generally been the stand of other ICTY Chambers too. Further, the ICTR in the *Akayesu*[52] decision has negated causation as a necessary element of command responsibility. Gunal Mettraux has opined that causality is a *sine qua non* for command responsibility under customary international law.[53]

Thus, accepting as a working premise that causality is a general requirement to engage criminal responsibility, the exercise is to be embarked upon to examine how far the connection of causality is present in the "should have known" standard of command responsibility. The nexus of causality under the "should have known" standard is nebulous, to say the least. When a commander actively aids, instigates, orders or abets subordinates' crimes, the causality is as plain as daylight. Even when he is wilfully blind or in conscious disregard of information enabling him to know of subordinates' crimes, there is a reasonably concrete nexus of causality.

However, this nexus of causality[54] becomes something intangible or merely *in potentia* in the case of imputed liability based on the "should have known"

[51] *Supra* n. 12.

[52] *Supra* n. 26 at ¶398: "Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates."

[53] Gunal Mettraux, *The Law of Command Responsibility,* (Oxford: Oxford University Press, 2009), p. 336.

[54] Which is arguably, a *sine qua non* for engaging criminal responsibility in general, and command responsibility in particular.

standard. While it can incontrovertibly be said that the turning of a blind eye ("wilful blindness") or conscious disregard on the part of the commanders "causes" the harmful consequences of the crimes of the subordinates, this proposition becomes illogical and untenable in the case of the "should have known" standard. It cannot be said that the harmful results of the crime occurred because the commander "should have known" about the crime committed by his subordinates. Criminal responsibility must be predicated on a tangible standard rather than an imaginary standard, which the "should have known" standard rather borders on.

The "Should Have Known" Standard and Personal Predilections of the Subordinates

The question naturally arises whether, under the "should have known" standard, the commander is required to know the personal predilections of his subordinates, such as criminal tendencies, inherent cruelty, mental perversity etc. An example which readily springs to mind is Jelisic, a Serb commander of a detention camp, who was of such an unnaturally cruel nature that he notoriously "could not drink his coffee in the morning unless he had executed between 20 and 30 detainees."[55] Should the commander of a person like him have known about the criminal tendencies of his subordinates? Or should he have the standard of knowledge assuming that his subordinates are rational human beings?

Arguments can be advanced both ways, i.e., either tending to the view that it is the duty of commanders to know the peculiarities of the people that they are to supervise (subjective knowledge requirement) or the more permissive view, that the commanders are required to know only in general the nature of their subordinates or of circumstances under which their subordinates are going to commit crimes (objective knowledge requirement). The objective knowledge requirement seems to be more fair, especially as we go higher up in the chain of command, where it is unrealistic to expect the commander to know of the personal quirks (which may tend to criminality) of his subordinates.

[55] GuglielmoVerdirame, *The Genocide Definition in the Jurisprudence of the ad hoc Tribunals*, 49 ICLQ 578 – 598 (2000), p. 587, at n. 45.

The Practice of Non-Penal Sanctions for some forms of Command Responsibility[56]

It is difficult to canvass a view that non-criminal sanctions should be imposed for the lesser breaches of command responsibility, viz. those under the "should have known" standard. However, there is some national practice in this regard, though not directly bearing on the "should have known" standard. Failure to report war crimes[57] or to supervise troops[58] are crimes under the German code of crimes under international law. These are eligible for conditional dismissal[59], i.e., on a showing of imposition of non-criminal sanctions. It is noteworthy that conditional dismissal is not available for felonies with a minimum term of imprisonment of one year. There seems to be some conflict herein. How can, what might amount to a *jus cogens* crime be let off without even a prosecution? If the provision is intended to mitigate the rigours of ascription of equal liability despite different levels of blameworthiness, then the solution would lie in rethinking the normative framework of command responsibility. Can the alternative of non-penal sanctions be availed of in case of breaches under the "should have known" standard?

Conditional dismissal under the German law is resorted to when there is no overly blameworthy action or the public's demand for prosecution is satisfied through the application of non-criminal sanctions. Given the absence of great culpability (moral blameworthiness) and *mens rea* in the "should have known" category of offenders, it is worthwhile to explore whether non-criminal sanctions would suffice to deal with them. This would be in keeping with the scholarly opinion that ICL must limit prosecutions to those who are "most" responsible for perpetrating heinous or egregious crimes. It can be argued that those superiors who fell short of actually ordering, instigating or planning crimes, those who did not even have any information that enabled them to come to the conclusion that their subordinates would indulge in war crimes or crimes against humanity, though doubtless bearing some

[56] This Section relies to some extent on Frank Meyer, *Complementing Complementarity*, 6 INT'L CRIM. L. REV. 549 (2009).
[57] Section 13, VstGB – *Verletzung der Aufsichtpflicht.*
[58] Section 14, VstGB – *Unterlassen der Meldungeiner Straftat.*

responsibility, can be said to be not the persons "most" responsible for the international crimes. It is also felt that as command responsibility under the "should have known" standard is more akin to a vicarious liability than criminal liability strictosensu, when examined under the lens of jurisprudence, civil consequences are not unsuited for such a kind of liability. The imposition of non-criminal sanctions for responsibility under the "should have known" standard, would not, therefore, be inappropriate.

However, as the goal of ICL is to end impunity, weakening the norms or circumscribing the set of persons who can be prosecuted is not advocated hereby. However, it is desirable to explore alternative mechanisms of accountability for those who might not be as liable as the others, without bracketing them all together.

IV. CONCLUSION AND SUGGESTIONS

The ascription of imputed criminal liability through command responsibility under the "should have known" standard appears, from the above analysis, to be iniquitous and unduly harsh. It is also not in keeping the ground realities of war situations. Therefore, the following suggestions are advanced by the present researcher[60] to remedy the anomalies created by the "should have known" standard:

- Command responsibility under the "should have known" standard should involve criminal liability *for failing to supervise* the subordinates properly, and *not for* the crimes committed by the subordinates.

- The role of the commander in causing or encouraging the subordinates' criminal conduct is always to be evaluated separately. It is not to be assumed solely relying on the "should have known" criterion (Independent evaluation of the causal nexus).

[59] Section 153a of the German Code of Criminal Procedure.
[60] Based on the literature referred to.

- A differentiated model for ascribing responsibility based on degree of mensrea is to be arrived at.

- The perceived legitimacy of ICL must not be eroded by indiscriminate imputation of liability under the "should have known" standard.

- The imposition of non-criminal sanctions for command responsibility under the "should have known" standard is well-worth exploring as this liability is almost a kind of vicarious liability rather than criminal liability in its classic form.

On an examination of the text, the ICC Statute (Art. 28: "knew or, owing to the circumstances at the time, should have known") seems to impose liability on military commanders of a broader scope[61] than does the ICTY and ICTR Statutes (Arts. 7(3) and 6(3) respectively: "knew or had reason to know"). Much will, however, depend on the construction placed on the "should have known" standard in the process of its judicial interpretation by the ICC. Will it rely on the ICTR and ICTY standard of "had reason to know" or will it make a break with that jurisprudence and enter new doctrinal ground? Only time will tell but the indications are that with a more detailed provision in Art. 28 and its different wording of the required standard of knowledge, the prognosis seems to be that the ICC may interpret the "should have known" standard after its own fashion.

It is indeed a daunting task to work out a fair model of liability without leaving loopholes of impunity. This is the challenge before the ICC while operating on the "should have known" standard. The idea is advanced herein that commanders should be held liable and accountable for their conduct in supervising their subordinates and not for the crimes of their subordinates *per se*. This would give due deference to the fundamental philosophical underpinnings of criminal law: namely culpability, fair labelling and responsibility for one's own acts. The legal fiction of "should have known" must be demystified and a concrete normative framework for commanders' liability must be established.

[61] *Op. cit* Marston-Danner, Martinez, *Supra* n. 6 at pp. 129 – 130, where this standard is described as "less demanding and closer to negligence".

REVISITING RAPE LAWS - NEED OF THE HOUR

K. K. Geetha*

Rape is a sordid reality in India; in all its gruesome manifestation, it reflects society's attitude to treat women as subservient. The distress and the psychological damage that is caused to a victim of rape destroys her aspirations in life, is unendurable and deplorable. The mindset of the society adds fuel to her intolerance. The Delhi incident awakened the conscience of the citizens and their solidarity compels the law makers to think about a change of law. In India we have no dearth of laws. However, drastic changes are required in the system of investigation, prosecution and trial process. Death penalty or castration of the accused is not a solution to minimise rapes. Speedy and effective justice delivery and the prevention of crime is the only deterrence. A mere amendment in the penal law will not serve the purpose. There is a need of classification of rape according to gravity within the section. Like incest, a more horrific crime committed by a protector is not addressed specifically in the section. Aggravated penetrative sexual assault should be defined and incorporated in the IPC. Revisiting the Substantive and Procedure laws is the need of the hour.

This paper discusses the amendments required in the substantive and procedural laws, with specific reference to the Criminal Law (Amendment) Bill, 2012.

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I. INTRODUCTION

Rape is a sordid reality in India; in all its gruesome manifestation, reflects society's attitude to treat women as subservient. The distress and the psychological damage caused to a victim of rape destroys her aspirations in life, is unendurable and deplorable. The mindset of the society adds fuel to her intolerance. The Delhi incident awakened the conscience of the citizens and their solidarity compels the law makers to think about a change of law.

"Law should not sit limply; while those who defy it go free and those who seek its protection lose hope".[1] The criminal justice system in India is under serious strain. It is not because of dearth of effective laws. The two major problems that have besieged the criminal justice system are the huge pendency of criminal cases and the inordinate delay in disposal of criminal cases on the one hand and the very low rate of conviction in cases relating to serious crimes.[2] Low conviction rate leads to loss of faith in the criminal justice system. The real reason for the huge pendency and delay is not addressed by many committees constituted for this purpose. In many cases, the institutional prejudices make the system ineffective and its impact is much on the vulnerable sections of the community. Certain judgements of the Superior Court reflects the mythology that prior experience on the part of the victim of rape is a reasonable provocation to the perpetrators to commit this heinous crime and absence of medical evidence to prove resistance has often been interpreted as consent.[3] However, there is a change in the approach of the judiciary in last decade.

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[1] Jennison v. Baker, (1972) 1 All E.R. 997 as cited in *Committee on Reforms of Criminal Justice System*, Ministry of Home Affairs, Vol. I, 2003.

[2] Government of India, Committee *on Reforms of Criminal Justice System*, Ministry of Home Affairs, Vol. I, 2003.

[3] Prem Chand v. State of Haryana, A.I.R. 1989 SC 937, the Supreme Court held that the mandatory minimum sentence of 10 years awarded to two police officers for raping a woman was reduced to 5 years only because the woman was of easy virtue and there was no proof of physical resistance. In Tukaram v. State of Maharashtra, A.I.R. 1979 SC 185 (Mathura case), the Supreme Court overruled the judgement of the Bombay High Court's conviction of two police officers by saying that though there was sexual intercourse there was no rape because there was no mark of physical injury and hence no proof of physical resistance. Moreover, Mathura had not "raised any alarm for help" and the "absence of any injuries or signs of struggle" on her body. It is harsh to observe that a tribal illiterate girl did not resist the barbaric act of the police officers inside the police station. The Criminal Law Amendment Act, 1983, made custodial rape

Rape is viewed as an aggressive act against women, which symbolises social and cultural attitudes. As the incidence of rape increases, the attention should focus not mainly on increasing the punishment but to understand the offender and the social patterns that perpetuate the crime and social background of the offender. The basic experience of the rape victim is isolation and rape destroys simultaneously the sense of community and the sense of person.[4] A murderer kills the body but a rapist kills the soul.[5]Although the social community is the appropriate centre for the restoration of the spirit lost by the rape victim, but in reality the same community makes her future miserable. The element of chance in most rapes reinforces the nonperson status of the rape victim. Trauma of the rape victim continues till the time the literary, mythic, and historic attitudes toward rape changes.

II. ROLE OF LAW COMMISSION OF INDIA

The existing literature on rape is concentrated more on the change of definition of rape. The Law Commission of India, the only duly constituted law reform agency in India, is a toothless tiger. It suggestions are recommendatory in nature and the unenforceability of its recommendations cannot be questioned unlike other statutory bodies created by the Government of India during the same period of 1955.[6] Due to the inaction of

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punishable as a consequence of this judgment. In Mohd. Habib v. State, 1989 Cr.L.J. 137 Del., the Delhi High Court acquitted an accused who raped a seven year old child merely on the ground that there were no marks of injury on his penis by ignoring the fact that the victim suffered a ruptured hymen and the bite marks on her body and there were eye witnesses also. The court is under the impression that injury on the penis is a mark of resistance. But later on in some cases the Supreme Court disagreed with the earlier views. In State of Maharashtra v. Madhukar N. Mardikar (1991) 1 S.C.C. 57 the Supreme Court held that "the unchastity of a woman does not make her open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate her person against her wish. She is equally entitled to the protection of law. Therefore merely because she is of easy virtue, her evidence cannot be thrown overboard." Likewise in State of Punjab v. Gurmit Singh (1996) 2 S.C.C. 384, the Supreme Court has advised the lower judiciary, that even if the victim girl is shown to be habituated to sex, the Court should not describe her to be of loose character.

[4] Metzger, *It is Always the Women Who is Raped* https://www.ncjrs.gov/App/publications/Abstract.aspx?id=44701 NCJ 044701. (last visited on January 11, 2013)

[5] Rafiq v. State 1980 Cr.L.J. 1344 SC.

[6] Like, the University Grant Commission which was given statutory recognition and autonomy by an Act of the Parliament.

law makers many of the far reaching suggestions made by various commissions and Supreme Court guidelines are not incorporated in the statutes. From 1860 to 2012, the Law Commission has submitted four Reports relating to rape laws.[7]

The 42nd Law Commission Report was the first step towards the reforms in rape laws. It suggested change in the definition of rape and punishment for custodial rape, which was not severe. It discussed consent in view of section 90 Indian Penal Code (IPC). It suggested insertion of the words 'either to herself or anyone else' in section 375. The Commission was against criminalization of marital rape. The Commission recommended enhanced punishment of rigorous imprisonment up to 14 years for rape. The law remained unamended due to the dissolution of the Lok Sabha in 1979.

The *Mathura* case,[8] an unfortunate decision of the Supreme Court, sacrificing the dignity and human rights of women, led to public outcry, coupled with the intensification of pressure by the legal fraternity and social organizations paved the way to the 84th Report.[9] The role played by the legal fraternity by strongly responding against the judgment of the Supreme Court was extraordinary.[10]The response against the judgment in *Mathura* case was an eye opener to the policy makers to make proper law to tackle with the indignity suffered by women. In the 84th report, the Law Commission pointed out that the victim needs empathy and safety and a sense of reassurance. In the absence of public sensitivity in these needs the experience of figuring of the offence is an injury than an assault.[11] The report considered the 42nd Law Commission recommendations, for example, changing the definition of rape, incorporating custodial rape as a specific offence, etc. The major concern of the Report is defining the term 'consent', since the nuances of consent is

[7] See, the 42nd Report, 84th report, 156th report and 172nd report of the Law Commission of India.

[8] Tukaram v. State of Maharashtra, A.I.R 1979 SC 185.

[9] *Rape law in India - The Need for an Overhaul*, http://legalservices.co.in/blogs (last visited on January 12, 2013).

[10] Upendra Baxi *et, al., An Open Letter to the Chief Justice of India*, (1979) 4 S.C.C. 17 (J) .The letter highlighted Indian judiciary's approach towards the downtrodden and the affluent. If the relief is sought by affluent people like Nandini Satpathy and Maneka Gandhi, the judiciary is much concerned about the violation of fundamental right.

[11] Government of India, *Law Commission of India 84th Report on Rape and Allied Offences-Some Questions of Substantive Law, Procedure and Evidence*, 1980, p.1.

important in deciding rape cases. Consent is a concept which is capable of rendering the immoral moral, the painful pleasurable, and the reprehensible commendable. It plays an invaluable role in transforming the illegal into the legal.[12] The difference between consent and submission is misunderstood in many cases. All consents are submission but all submissions are not consent. Submission may be by fear, coercion, and threat or like factors. Inability of the victim to get out of the act of the perpetrators is given paramount importance while considering the concept of consent in sexual offences. In order to get over this situation the 84th Law Commission had suggested adding an explanation to section 375, i.e., "A mere act of helpless resignation in the face of inevitable compulsion, acquiescence, non resistance and passive giving in when volitional faculty is either clouded by fear or vitiated by duress cannot be deemed to be consent."[13] However, this was not materialised. Hence, the Commission suggested to add "free and voluntary consent". When the Criminal Law Amendment Bill 1980 was placed in the Parliament, the same was referred to the joint committee of the Parliament; the committee did not accept the expanded concept of consent. But in the Act the punishment for rape was increased to a term of ten years to life with a mandatory minimum requirement of 7 years. The judge can impose a lesser punishment than the minimum prescribed with adequate and special reasons[14]. But the recommendation to add section 114A in the Indian Evidence Act, 1832, the presumption of guilt of the accused if the victim in her statement admits that she did not consent for the sexual intercourse, was accepted and inserted in the Criminal Law (Amendment) Act, 1983. Since the presumption under section 114A is rebuttable, the non insertion of the explanation to section 375 or adding of free and voluntary consent in the section makes no change from the earlier provision. The Criminal Law (Amendment) Act, 1983, amended sections 375 and 376 and inserted sections 376A, 376B, 376C and 376D.

[12] Stephen Knight, *Libertarian critiques of consent in sexual offences*, UCL J.L. and J. 2012, 1(1), 137-165.

[13] *Ibid.*

[14] This provision has been misused in many cases even without specifying the special reason for reduction of sentence less than the minimum prescribed.

The Government of India directed the Law Commission to submit a report for revising IPC. The Delhi State Commission for Women also submitted its recommendations to the Law Commission. In its report the Women's Commission[15] submitted that the rate of rape in Delhi is twice as that of the whole country. In 88% of the cases, the accused are relatives and acquaintances and 89 % of the cases have happened at home.[16] The Commission recommended amendments in section 375 to include incestuous rape within its ambit.

In the report there was a discussion that virulent form of sexual assault on woman is not addressed in sections 354, 376 and 509 of IPC. The Commission recommended that the existing sections should be amended and sexual assault should be defined to include all violence of sexual violence on woman. This report was not placed in the Parliament.

The Supreme Court of India requested the Law Commission to examine the feasibility of making recommendations for amendment of the Indian Penal Code in view of the precise issues[17] in the Writ petition filed by Sakshi, an NGO, regarding widening the definition of rape by incorporating all sort of penetration within the purview sexual intercourse.[18] The Commission, after detailed discussions with women organizations, gave various recommendations, including, changes for widening the scope of section 375

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[15] Government of India, *156th Report on Indian Penal Code*, p.161

[16] *Ibid.*

[17] The precise issues are the restrictive interpretation of "penetration" in the Explanation to section 375 defeats the very purpose and object underlying section 376(2)(f) in view of widespread prevalence of child sexual abuse and the need of inclusion of all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration within the meaning of the expression "penetration", treat the penetrative abuse of a child below the age of 12 as unnatural offence under section 377 IPC or as outraging the modesty of a woman under section 354, depending upon the 'type' of penetration ignoring the 'impact' on such child and continue to treat non-consensual penetration upon such a child as offence under section 377 IPC on par with certain forms of consensual penetration (e.g. consensual homosexual sex) where consenting party can be held liable as an abettor or otherwise. It also suggested to substitute the definition of 'rape' with the definition of 'sexual assault' and make it gender neutral, and define the expression 'consent', a new section, section 375A with the heading 'Aggravated sexual assault' is sought to be created. This new offence seeks to synthesize the offences now categorized under sub-section (2) of section 376 as well as sections 376B to 376D.

[18] Government of India, *172nd Report on Review of Rape laws*,2000.

by making it gender neutral, changes in sections 376, 376A to 376D, insertion of a new section 376F dealing with unlawful sexual contact, deletion of section 377 of the IPC and enhancement of punishment in section 509 of the IPC. The Committee also recommended various changes in the procedural laws.

The Government of India appointed a Committee on Reforms of the Criminal Justice System in the year 2000 to examine the fundamental principles of criminal jurisprudence, to examine whether there is a need to amend the substantive criminal law and procedural law in tune with the demand of the time and the need of the society. The Supreme Court sought the opinion of the Committee on the widening of the definition of rape as suggested by Sakshi in its Writ Petition. The considered opinion of the Committee to the Supreme Court was that such an interpretation is not reasonable. The Committee therefore recommended that other forms of forcible penetration including penile/oral, penile/anal, object or finger/vaginal and object or finger/anal should be made a separate offence prescribing punishment broadly on the lines of Section 376 of IPC. The Committee also discussed the scope of granting death penalty to rape. After long deliberations, the Committee did not pursue with the death penalty in view of the interest of the victim. The Committee recommended sentence of imprisonment for life without commutation or remission.[19]

The Criminal Law Amendment Bill, 2003, was introduced in the Rajya Sabha after the submission of the Report of the Committee on Reforms of the Criminal Justice System, 2003. The Bill did not contain provision for amendment of rape laws, but substantial amendments in the procedural law were proposed by the Bill. It contained provisions for enhancement of punishment for perjury, introducing plea bargaining, amendment in section 195 IPC. The Criminal Law (Amendment) Act, 2005 was passed on 11th January 2006.

The above discussion shows that the Government of India, the Law Commission and the judiciary had taken lot of efforts to stream line the law relating to rape. For one or the other reasons, many of the suggestions of the

[19] Government of India, *Report of the Committee on Reforms of Criminal Justice System*, 2003.

Committee and the guidelines of the courts were not taken into consideration in its true spirit. The increasing number of gruesome cases of rape compels to find out the real causes and the possible remedy. Drastic changes are required from the initial stage of reporting of the crime to the police, the victim's rights, process of investigation, prosecuting system and the trial process. The real problem starts after the incident. Recording the statement of the victim by the police, testifying before the court where the defence lawyer's examination precipitates the victim's psychological problems, more than what is required as evidence for the case, character assassination by the defence lawyer, society's prejudicial approach towards the victim and unwarranted sexual demands make the offence of rape more horrid.

Death penalty or castration of the offender is not a solution to minimise rapes. Speedy and effective justice delivery by strengthening the prosecution agencies, ensuring efficiency, transparency and accountability of the stakeholders of the system are the important steps to reduce these crimes. A mere amendment in the provision of punishment in the substantive law does not serve the purpose. Adequate amendments are required in the substantive and procedural laws.

III. SUGGESTIONS FOR AMENDMENTS IN THE INDIAN PENAL CODE, 1860

The Criminal Law Amendment Bill, 2012, pending before the Parliament, is intended to make certain effective amendments in the existing law. The Bill has incorporated the recommendation in the 172th Law Commission Report to make section 375 of the IPC gender neutral to replace the word 'rape' by 'sexual assault'. The awarding of less than the minimum required punishment at the discretion of the judge after recording special reason was sought to be deleted from the section. The age when one can give consent is raised from sixteen years to eighteen years. The Bill contains provision for 'incest'.[20] The Bill seeks to penalise mere membership in a group of persons having a common intention to commits sexual assault by altering the existing

[20] Clause 376(2)(e) reads, "being a relative of, or a person in a position of trust or authority towards, the person assaulted, commits sexual assault on such person...".

sub section dealing with gang rape[21]. Four more subsections are added to section 376(2) penalising sexual assault by persons holding dominant positions[22], of persons suffering from mental or physical disability[23], causes, grievous bodily harm or maims or disfigures or endangers the life of a person[24] and commits persistent sexual assault[25]. The Bill has introduced certain changes in the procedural law as well. The bill proposes a provision in the Indian Evidence Act, 1832, that prevents the adducing any evidence relating to the previous character of the preosecutrix while considering 'consent'[26].

However, the proposed provisions in the Bill are not adequate to address the rising number of heinous crimes more amendments are required in the Bill.

Adding a grave offence like incest in the subsection will not serve the purpose effectively. Extremely odious and debased conduct of the father, brother, uncle and near relatives of the victim within the roof is a more atrocious act than rape by a stranger. Treating incest as an ordinary offence of rape and giving the same punishment will distort the severity of the offence. To impose a severe penalty to the near relations and persons in position of trust and authority who more often than not commit the offence of sexual assault on the members of the family or on unsuspecting and trusting young person is essential in view of the enormous number of incest in the country.

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[21] See, the Criminal Law (Amendment) Bill, 2012, cl. 376(2)(e).
[22] *Ibid*, cl. 376(2)(i).
[23] *Ibid*, cl. 376(2)(j).
[24] *Ibid*, cl. 376(2)(k)
[25] *Ibid*, cl. 376(2)(l).
[26] The Criminal Law (Amendment) Bill, 2012, cl. 53A reads, "In a prosecution for an offence under section 376 or section 376A or section 376B of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of his or her previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.". Clause 146 proviso reads, "Provided that in a prosecution for an offence under section 376 or section 376A or section 376B of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to his or her general immoral character, or as to his or her previous sexual experience with any person for proving such consent or the quality of consent".

The Delhi State Commission for Women in its report The Situation of Woman and Girls in Delhi Report 1997 stated that the rate of rape in Delhi is twice as that of the whole country. In 88% of the cases, the accused are relatives and acquaintances and 89 % cases have happened at home.[27] The National Crime Records Bureau's statistics shows the rising number of incestuous crimes that are committed in the country.[28] The 156th Law Commission also suggested inclusion of incestuous rape in section 375.

The 172nd Law Commission Report also recommended provisions for incest and proposed to include rape committed by father, grandfather or brother or any other person being in a position of trust or authority towards the other person within its ambit.

Hence there is a need to consider incest as a separate sexual assault and requires severe punishment than an ordinary case of rape. A wide meaning should be given to incest. A new clause 376C and an explanation can be inserted in the Criminal Law Amendment Bill, 2012, as follows:

> 375C: Whoever being a relative of the woman through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the woman or who is living in the same or shared household with the woman, commits an act of incest within the family with any ancestor or descendant, a brother or sister of the whole or half blood or an uncle, aunt, nephew or niece of the whole blood, grandparents, parents, offspring, siblings, or grandchildren, adopted child or a surrogate, having authority over the victim shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

Explanation-For the purpose of this section, domestic relationship and shared household shall have the same meaning as in section 2 of the Protection of Women from Domestic Violence Act, 2005 (43 of 2005).

[27] Government of India, *Law Commission 156th Report on Indian Penal Code*, 1997.

[28] Crimes in India, NCRB statistics, shows that, in rape cases reported during 2011, in Delhi, 442 reported cases the offenders are known to the victims. Out of this 20 are parents/close family members, 48 relatives, 156 neighbours and 218 other persons known to the victim.

The addition of two sub clauses (k) and (l) dealing with sexual assault causing grievous bodily harm or maiming or disfiguring or endangering the life of a person and persistent sexual assault in the present Bill shows the legislatures interest to treat grave forms of sexual assault to be punished severely. The gruesome acts of violence committed by the offenders are not totally addressed in these two subsections. Hence, there is a need for adding 'Aggravated Penetrative Sexual Assault' as a separate offence in tune with the Protection of Children from Sexual Offences Act, 2012. Clauses 376(2) (k) and (l) shall be deleted and the following clauses can be added in the Bill.

375A. A person is said to commit "Aggravated Penetrative Sexual Assault", if:-

(a) whoever commits penetrative sexual assault on a woman; or

(b) whoever commits penetrative sexual assault on a woman using deadly weapons, fire, heated substance or corrosive substance; or

(c) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the woman;

(d) whoever commits penetrative sexual assault on a woman, which—

(i) physically incapacitates the woman or causes the woman to become mentally ill as defined under clause (1) of section 2 of the Mental Health Act, 1987 or causes impairment of any kind so as to render the woman unable to perform regular tasks, temporarily or permanently; or

(ii) whoever commits penetrative sexual assault on a pregnant woman;

(iii) inflicts the woman with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the woman by rendering her physically incapacitated, or mentally ill to perform regular tasks; or

(e) whoever, taking advantage of a woman's mental or physical disability, commits penetrative sexual assault on the woman; or

(f) whoever commits penetrative sexual assault on the woman more than once or repeatedly; or

(g) whoever commits penetrative sexual assault on a woman knowing the woman is pregnant; or

(h) whoever commits penetrative sexual assault on a woman and attempts to murder the woman; or

(i) whoever commits penetrative sexual assault on a woman in the course of communal or sectarian violence; or

(j) whoever commits penetrative sexual assault on a woman and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or

(k) whoever commits penetrative sexual assault on a woman and makes the woman to strip or parade naked in public.

376(1A): Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for life and shall also be liable to fine.

As per section 160(1) of the Code of Criminal Procedure (Cr.P.C), the attendance of persons before the investigating officer who are acquainted with the facts of the case is essential for collection of evidence in a criminal trial. However, the proviso to the section excludes male persons below the age of fifteen and women from appearing before the police officer in the police station to give the statement. This provision is to a large extent misused by the police officers in sexual offence cases. The victim is literally subjected to a second rape in police station by the police officers while they are compelled to present in the police station to narrate the whole incident amidst the sarcastic comments of the police. There is no substantive punishment provided for penalising these officers for violation of section 160(1) Cr.P.C..

In clause 166A[29] it is desirable to specify punishment for dereliction of duty by the police officers in sexual offence cases. In many of these cases, the accused persons are acquitted because of faulty investigation by the police. The police is reluctant to register FIR in such cases. After registering FIR, no proper immediate investigation is conducted, which ultimately helps the accused to get an acquittal in the trial. If strict punishment is provided in the Penal Code for dereliction of duty by the police officers, proper investigation can be ensured to a great extent. Hence the following clauses may be inserted to the Bill.

166A(c): Any police officer refuses to register the FIR in sexual assault and aggravated penetrative sexual assault cases on the basis of the information given by the complainant, or after registering the FIR, fails to investigate or makes inordinate delay in conducting the investigation, he shall be punished with imprisonment for a term which may extent to 5 years or fine or with both.

(d) Any police officer in violation of Section 160(1) provisos of the Code of Criminal Procedure, 1973, compels any victim of sexual assault and aggravated penetrative sexual assault to come to the police station to record the statement shall be punished with imprisonment for a term which may extent to 2 years or fine or with both.

Section 195 IPC[30] provides punishment for giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life. In the same way, in many cases the witnesses in connivance with the accused give and fabricate false evidence to get an acquittal to the accused in serious offences. The conviction rate in criminal

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[29] Section166A reads: "Whoever, being a public servant,—
(*a*) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or
(*b*) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both."

[30] Section 195 I.P.C. reads: "Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or imprisonment Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which by the law for the time being in force in India is not capital, but punishable with imprisonment for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished".

cases is as low as ten percent due to perjury. Perjury is committed by the witness on his/her own volition or under threat/ allurement/inducement of third party.[31] In order to avoid large number of acquittals in sexual offences, those who are giving and fabricating false evidence, which leads to the acquittal of the accused should also be punished, so that witnesses will be reluctant to give false evidence in favour of the accused person(s). Hence adding a new provision as section 195B is desirable.

195B. Giving or fabricating false evidence with intent to procure acquittal in sexual assault and aggravated penetrative sexual assault cases: Whoever gives or fabricates false evidence or turns hostile to the prosecution, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be acquitted of an offence of sexual assault and aggravated penetrative sexual assault, shall be punished with simple imprisonment for two years, and shall also be liable to fine.

IV. SUGGESTED AMENDMENTS IN THE CODE OF CRIMINAL PROCEDURE, 1973

Justice delivery system is under an obligation to deliver prompt and inexpensive justice to the needy without in any manner compromising on the quality of justice or the elements of fairness, equality and impartiality. The current criminal justice system, owing to its adversarial nature and age old legislations governing it, is unable to provide fair and expeditious dispensation of justice in criminal cases. Speedy trial of a criminal case is considered to be an essential feature of the right to a fair trial, but has remained a distant reality. Many a times, the inordinate delay in conducting trial contributes to acquittal of guilty persons either because the evidence is lost or because of lapse of time, or the witnesses not remembering all the details or their not coming forward to give true evidence due to threats, inducement or sympathy. Whatever may be the reason, it is justice that becomes the casualty. The ultimate aim of criminal law is protection of right to personal liberty against invasion by others – protection of the weak against the strong, law abiding against lawless, peaceful against the violent. To protect the rights of the citizens, the State prescribes the rules of conduct,

[31] Government of India, *111th Report of the Parliamentary Standing Committee on Home Affairs on the Criminal Law (Amendment) Bill, 2003*, 2005.

sanctions for their violation, machinery to enforce sanctions and procedure to protect that machinery[32]. The acquittal rates in sexual offence cases are very low. To strengthen the criminal justice system all functionaries should work effectively. A mere amendment in the substantive law alone is not sufficient. Amendments in the procedural law, in tune with the substantive law are necessary. Suitable amendment should be introduced for improving the investigation, expediting trial procedures, appointing efficient prosecutors for conducting sexual offence cases, making the functionaries accountable for their inaction, giving more participatory role to victims of sexual offences, constituting sufficient number of special courts, etc.

The foundation for the criminal justice system is the investigation by the police. The success or failure of the case depends entirely on the investigation. But unfortunately, many of the cases are acquitted due to the fault of the investigation. In many cases the accused is represented by a competent lawyer of his choice. The job of the prosecutor is not lucrative as compared to a private lawyer. Unless the prosecution system is not strengthened, there will always be disparity in quality. In the adversarial system, the burden is on the prosecution to prove the case beyond reasonable doubt. The State has to take effective steps to enhance the competence of the prosecutors. If the State is not able to provide an effective prosecution system, the victim should be given a chance to participate throughout the proceedings with the help of an independent lawyer of his/her choice. Moreover, the lack of coordination of the investigation and prosecution will also adversely affect proper trial. There is need for amendments in the trial procedure also. The following are the amendments suggested in the Cr.P.C. for an effective and timely conduct of sexual offences.

In section 9[33] of Cr.P.C., the subsection 1a may be inserted:-

> 1a: For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by

[32] *Supra* n. 19, p.5.

[33] Section 9 reads, "Court of Session. (1) The State Government shall establish a Court of Session for every sessions division".

> notification in the Official Gazette, designate, for each district, Special Sessions Courts to try the offences of sexual assault and aggravated penetrative sexual assault cases.

V. VICTIM'S RIGHT TO APPOINT A LAWYER

Section 302 Cr.P.C provides permission to conduct prosecution by private person by filing an application before the court. But in practice, even if applications are filed by the victim for appointment of independent lawyers for conducting the prosecution, majority of the judicial officers are reluctant to allow such applications and even if appointed they are allowed only to assist the prosecutor under section 301 of Cr.P.C. The draft Criminal Law Amendment Bill, 2003, contained a provision that the victim may be permitted to appoint a lawyer to "coordinate" with the prosecution. But it was not incorporated in the Act. It is not necessary that in all cases the Prosecutors are experts in conducting prosecution effectively and is one of main reasons in the low conviction rate in criminal cases. The present Bill has proposed a proviso[34] to section 24(8) [35] that the court may permit the victim to engage an advocate of his choice to assist the prosecution. However, that amounts only to an assistance provided under section 301. Hence, the proviso may be substituted by the following:

> Provided that the court may permit the victim to engage an advocate of his choice to conduct the prosecution under this subsection.

As aforementioned, the State Government shall constitute Special Courts for speedy disposal of cases relating to sexual assault and aggravated penetrative sexual assault. In these Special Courts experienced criminal lawyers shall be appointed as Special Public Prosecutors. For this purpose, a sub clause shall be inserted in section 24(8) as follows:

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[34] Section 24(8) proviso reads: "Provided that the court may permit the victim to engage an advocate of his choice to assist the prosecution under this subsection".

[35] Section 24(8) reads, "The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor".

> 24(8)(1): The State Government shall, by notification in the Official Gazette, appoint a Special Public Prosecutor for every Special Court for conducting cases of sexual assault and aggravated penetrative sexual assault cases.

In cases of sexual offences, to avoid retraction of first information statement given by the victim to the police, section 154[36] shall be amended by incorporating provisos as provided below:

> Provided that such statement of the victim shall also be recorded by audio video electronic means.
>
> Provided that the statement of the victim shall preferably be recorded under Section 164 of the Code of Criminal Procedure.

The delay in submitting the final report of the case within ninety days by the police officer helps the sexual offenders to get bail as of right under section 167 of Cr.P.C. In order to avoid such rights and influencing the investigation by the accused, a time frame should be mentioned in section 173 Cr.P.C in sexual assault and aggravated penetrative sexual assault cases. Hence section 173(1A)[37] may be substituted as:

> (1A) The investigation in relation to sexual assault and aggravated penetrative sexual assault of a child and a woman may be completed within three months from the date on which the information was recorded by the officer in charge of the police officer.

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[36] Cr.P.C., s. 154(1) reads: "154. Information in cognizable cases.- (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Provided that if the information is given by the woman against whom an offence under section 354, section 375, section 376, section 376A, section 376B and section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded, as far as possible, by a woman police officer.".

[37] Section 173(1A) reads: "The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police officer".

VI. SANCTION FOR PROSECUTION

Before taking cognizance in prosecution of judges or public servants, sanction for prosecution from the appropriate Government is required. This privilege of want of sanction for prosecution in respect of certain offences has been given for a pious purpose i.e. for protection of honest public servants, who impartially discharge their duties from vexatious and frivolous prosecution. Privilege of need of prior sanction for prosecution has been overwhelmingly misused and especially by powerful public servants and businessmen. In the light of judicial pronouncements and practical experiences in court, it has been seen that this privilege is being misused by public servants in order to save them from prosecution. The sanctioning authority is generally the Head of the Department or any officer authorized to act as such by the Government. The sanctioning authority has been many a time found to be trying to protect the delinquent official. The law regarding sanction is a highly technical one and the accused, merely by exploiting this technicality of law are able to escape themselves from shackles of law. In sexual offence cases, the requirement of sanction for prosecution should be exempted so as to avoid delay in trial and unnecessary influence by the accused. Hence the following proviso can be added in section 197(1)[38].

> Provided that any public servant accused of sexual assault and aggravated penetrative sexual assault shall be exempted from previous Sanction for Prosecution from the appropriate Government before taking cognizance by the court.

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[38] Section 197 reads: "Prosecution of Judges and public servants. (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b)in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression

"Central Government" were substituted".

VII. SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES BY APPROPRIATE GOVERNMENTS

Appropriate authorities are vested with the constitutional and statutory power to grant suspension, remission or commutation of sentences on various grounds[39]. This constitutional power cannot be fettered by statutory provisions.[40] A liberal and promiscuous use of this power by the executive allows many offenders, who could have been given death sentence by the court but have been given life imprisonment is saved by the extant rules.[41] The intended public purpose of exercising this power is many times hijacked by influential offenders; thereby, the purpose of the judiciary to punish the offender according to the gravity of the offence committed by him is defeated. Hence, the power of suspension, remission and commutation of sentences under Articles 72 and 161 of the Constitution and sections 432, 433 and 433A of Cr.P.C should not be exercised by the appropriate government in offence relating to sexual assault and aggravated penetrative sexual assault. The following provisos to section 432, 433, 433A and Constitutional amendments in Article 72 and 161 are suggested for the above.

In section 432[42] the following proviso may be inserted:

> Provided that the power under this section shall not be exercised in favour of a person convicted for an offence of aggravated penetrative sexual assault.

[39] See, INDIA CONST. art. 72 and 161 and Cr.P.C., ss. 432, 433 and 433A.

[40] State of Punjab v. Joginder Singh A.I.R. 1990 SC 1396.

[41] K. V. Kelker, THE CODE OF CRIMINAL PROCEDURE, (Eastern Book Company, Luknow, 5th ed. 2003), p.739.

[42] Section 432 reads, "Power to suspend or remit sentences. (1) When any person has-been sentenced to punishment for an offence, the appropriate Government may, at any time, without Conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced".

In section 433[43] the following proviso may be inserted:

> Provided that the power under this section shall not be exercised in favour of a person convicted for an offence of sexual assault or aggravated penetrative sexual assault.

In section 433A[44] insert the following proviso:

> Provided that the power under this section shall not be exercised in favour of a person convicted for murder by sexual assault or aggravated penetrative sexual assault, for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life.

In Article 72[45] of the Constitution insert the following sub clause:

> (4) Nothing in sub clause (1) shall apply to any person convicted for the offence relating to sexual assault and aggravated penetrative sexual assault.

In Article 161[46] of the Constitution insert the following proviso:

> Provided that this power shall not be exercised in cases where any person is convicted for the offence relating to sexual assault and aggravated penetrative sexual assault.

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[43] Section 433 reads: "the appropriate Government may, without the consent of the person sentenced, commute-
(a) a sentence of death, for any other punishment provided by the Indian Penal Code;
(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;
(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine ;
(d) a sentence of simple imprisonment, for fine".

[44] Section 433A reads: "Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

[45] INDIA CONST. art. 72 reads: "the President of India shall have the power to suspend, remit or commute sentence in all cases where punishment or sentence is for an offence against any law relating to a matter to which executive power of the Union extends.

[46] INDIA CONST. art. 161 reads: "The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends".

VIII. NEED FOR CHANGE IN THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

There is a rise in sexual offences committed by juvenile between the age of 16 years and 18 years. Considering the fact that children are attaining maturity much before the age of 18, appropriate amendments need to be made in the Juvenile Justice Act also.

As soon as a juvenile in conflict with law is produced before the Juvenile Justice Board, if the Board feels that the juvenile in conflict with law is below the age of 16 years, the matter has to be considered by the Juvenile Justice Board. If the juvenile in conflict with law is above the age of 16 years and below the age of 18 years, and who has attained sufficient maturity of understanding the nature and consequence of his conduct on that occasion, the act would be treated as an offence and he has to be tried in the ordinary criminal court. For this purpose the Juvenile Justice Board can follow the same procedure followed by a Magistrate under Section 7[47] of the Act.

[47] Section 7 reads, "Procedure to be followed by a Magistrate not empowered under the Act.- (1) When any Magistrate not empowered to exercise the powers of a Board under this Act is of the opinion that a person brought before him under any of the provisions of this Act (other than for the purpose of giving evidence), is a juvenile or the child, he shall without any delay record such opinion and forward the juvenile or the child, and the record of the proceeding to the competent authority having jurisdiction over the proceeding."
(2) The competent authority to which the proceeding is forwarded under sub-section (1) shall hold the inquiry as if the juvenile or the child had originally been brought before it".

IX. CONCLUSION

The Supreme Court, High Courts and the Law Commission of India have from time to time reiterated the need for appropriate amendments in the substantive and procedural laws for tackling the issue of sexual offences against women but are still remaining dormant. Many of the guidelines issued by the Courts are not followed. Elaborate guidelines were laid down by the Delhi High Court in *Delhi Commission for Women* v. *Delhi Police*[48] to effectively tackle the rising menace of sexual offences against women in Delhi.

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[48] Order dated 23.5.2009 in W.P.(CRL) 696/2008. The Guidelines laid down were:

a. Every Police Station shall have available round the clock a lady police official/ officer not below the rank of Head Constable.

b. As soon as a complaint of the offence is received, the duty officer receiving the complaint/ information shall call the lady police official/officer present at the police station and make the victim and her family comfortable.

c. The duty officer, immediately, upon receipt of the complaint/information intimate to the "Rape Crises Cell" on its notified helpline number.

d. After making preliminary inquiry/ investigation, the investigation officer along with the lady police official/ officer available, escort the victim for medical examination.

e. The Assistant Commissioner or Police shall personally supervise all investigation in to the office .

f. The statement of victim shall be recorded in private, however, the presence of family members while recoding statement may be permitted with a view to make the victim comfortable. In incest cases where there is a suspicion of complicity of the family members in the crime such family members should not be permitted.

g. The investigation officer hall bring the cases relating to "child in need of care and protection" and the child victim involving incest cases to the Child Welfare Committee.

h. The accused should not be brought in the presence of victim except for identification.

i. Except the offences which are reported during the night no victim of sexual offence shall be called or made to stay in the police station during night hours. The Social Welfare Department of the Govt. of NCT of Delhi shall ensure that Superintendents of the Foster Home for Women will provide necessary shelter till formal orders secured from the concerned authorities.

j. The Investigation Officer shall ensure that in no case the accused gets the undue advantage of bail by default as per the provisions of Section 167 Cr.P.C. it is desirable that in cases of incest the report under Section 173 Cr.P.C is within 30 days.

k. Periodical training to deal with rape cases should be provided to the Police Officers, Juvenile Police Officers, Welfare Officers, Probationary Officers and Support Persons. A Training Module be prepared in consultation with the Delhi Judicial academy.

l. The police should provides information to the Rape Crises cell regarding the case including the arrest and bail application of the accused, the date of filling of the investigation report before the magistrate.

m. The police should keep the permanent address of the victim in their file in addition to the present address. They should advise the victim to inform them about the change of address in future, etc.

Awarding capital punishment or castration of the offender is not the solution. The Delhi incident shocked the conscience of society and the solidarity of the people all over the country is commendable. Even then during this period many more incidents of rape were reported from various parts of the country, which shows that the perpetrators of this crime are not concerned about the anguish of the people or the plight of the victim. Unless the whole system relating to criminal justice administration system is revamped, the problem cannot be tackled effectively. Hence, it is the state's responsibility to implement appropriate laws to address the need of the society. The state has to strengthen the investigating system, prosecution and the judiciary. If the above suggestions are carried out the problem can be solved to a considerable extent.

LALITA KUMARI V. GOVT OF UTTAR PRADESH: TOUCHING UPON UNTOUCHED ISSUES

Harish Choudhary*

I. INTRODUCTION

The matter relating to the mandatory nature of registration of FIR has plagued and perplexed the judicial mind in Lalita Kumari case.In this case the matter has been referred to constitutional bench of SC.

This case comment aims to analyze *Lalita Kumari v. Govt. of UP and Others*[1], in which a three judges bench of Supreme Court opined for non-mandatory registration of First Information Report (hereinafter FIR). The rationale for the judgment was that,

> *"In the light of Article 21, provisions of Section 154 of Code of Criminal Procedure must be read down to mean that before registering an FIR, the Station House Officer must have a prima-facie satisfaction that there is commission of cognizable offence as registration of an FIR leads to serious consequences for the person named as accused and for this purpose, the requirement of preliminary enquiry can be spelt out in Section 154 and can be said to be implicit within the provisions of Section 154 of Code of Criminal Procedure."*

The author tries to unpack the judgment to understand the legal and socialdilemmas attached with the consequence of non-mandatory

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[1] Lalita Kumari v. Govt. of UP AIR 2012 SC 1515.

registration of FIR. This case raises issues apart from established statutory rules including the issue of preliminary investigation. The article argues that non mandatory registration of FIR is unconstitutional. The article concludes that the judgment ends up showing intentions of giving dictatorial power to police and takes away many rights essential in seeking criminal remedy,thus, defeating the very purpose of people approaching the police for enforcement of their rights, and nullifying the purpose of criminal justice system.

II. LALITA KUMARI V. GOVT. OF UP AT HAND

Facts in Brief

In this case the petitioner Bhola Kamat filed a missing report at the police station as Lalita Kumari, his minor daughter did not return for half an hour and he was not successful in tracing her.[2] Even after registration of the FIR against some private respondents who were the chief suspects, the police did not take any action to trace Lalita Kumari. According to the allegation of Bhola Kamat, he was asked to pay money for initiating investigation and to arrest the accused persons.[3] Ultimately, the petitioner filed this petition under Article 32 of the Constitution before this Court. The court on 14.7.2008 passed a comprehensive order expressing its grave anguish on non-registration of the FIR even in a case of cognizable offence.[4]

The Key Considerations

The counsel for petitioner submitted that it is a settled principle and reiterated by the apex court time and again that whenever a cognizable offence is disclosed, the police officials are bound to register the same and in case it is not done, directions to register the same can be given.[5] Section 156(3) of the Code contemplates the registration before investigation into the case.[6] The use of the word *"shall"* in section 154 is indicative of the

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[2] Ibid ¶ 3.
[3] Ibid ¶ 5.
[4] Ibid ¶ 6.
[5] Ibid ¶10, See also Ramesh Kumari and Bhajan Lal cases.
[6] Ibid ¶26.

mandatory nature of the registration of FIR.[7] Also, the word *information* in section 154(1) is not qualified as *'reasonable complaint'* and *'credible information'* as it is in section 41(1)(a) or (g) of the Code.[8] In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. The concept of preliminary investigation is alien to the criminal law regime except in Prevention of Corruption Act and in respect of the offence under which was to be investigated by the Central Bureau of Investigation (CBI).[9] There would be great temptation in preliminary inquiry.[10]

The counsel for the respondent submitted that the registration of an FIR being an administrative act requires the application of mind, scrutiny and verification of the facts as no administrative act can ever be a mechanical one.[11] This is the requirement of rule of law. Further, the word "shall" used in the statute does not always mean absence of any discretion in the matter.[12] In fake cases, the FIR would become a useless lumber and a dead letter. The police officer would then submit a closure report to the Magistrate.[13] Also, for the receipt and recording of information, the report is not a condition precedent to the setting in motion of a criminal investigation.[14] An illustration was given of preliminary investigation in case of medical negligence.[15] Non-registration of an FIR does not result in crime going unnoticed or unpunished.[16] If he is debarred from holding such a preliminary inquiry, the procedure would then suffer from the vice of arbitrariness and unreasonableness.[17] The provisions of Article 14 which are an anti-thesis of arbitrariness and the provisions of Articles 19 and 21 which offer even a pre-violation protection require the police officer to see that an innocent person

[7] Ibid ¶12.
[8] Ibid ¶32.
[9] Ibid ¶41.
[10] Ibid ¶ 38.
[11] Ibid ¶ 49.
[12] Ibid ¶82-89.
[13] Ibid ¶ 79.
[14] Ibid ¶54.
[15] Ibid ¶ 47.
[16] Ibid ¶53.
[17] Ibid ¶ 93.

is not exposed to baseless allegations and, therefore, in appropriate cases he can hold preliminary enquiry.[18] If an innocent person is falsely implicated, he not only suffers from loss of reputation but also mental tension and his personal liberty is seriously impaired.[19]

III. ANSWERING UNANSWERED QUESTION

Legislative Certainty as a Constitutional Norm

'Certainty' is an essential aspect of rule of law. Vague laws and the resulting uncertainty inevitably lead to misuse and arbitrary exercise of executive power, and therefore fall short of the requirements of Article 14 of the Indian Constitution which guarantees equity, fairness, and reasonableness. There is strong jurisprudence supporting the *'void for vagueness'* doctrine [emphasis supplied], directed at laws that either forbid or require the doing of an act "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[20] Where a provision of law is in boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of Goonda Act.[21] This is not application of doctrine of due process. The invalidity arises from the probability of the misuse of the law or the detriment of the individual.[22] Vague laws may trap the innocent by not providing a fair warning.[23]

While courts would therefore be obliged, first, to look for alternate constructions to the wording of the legislation in order to provide a workable structure for the operation of the statute without distorting the intention of the legislature, in cases where the provision itself is incapable of such alternate constructions, it could be struck down on the ground of being *void for vagueness.*

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[18] Ibid ¶ 61.
[19] Ibid ¶ 57.
[20] Justice Sutherland in Connally v. General Construction Co., 269 U.S. 385 (1926).
[21] State of Madhya Pradesh and Anr v. Baldeo Prasad, 1961 AIR 293; See also KA Abbas v. Union of India AIR 1971 SC 481.
[22] KA Abbas v. Union of India AIR 1971 SC 481.
[23] Kartar Singh v. State of Punjab (1994)3 S.C.C.569.

In US jurisprudence, the void for vagueness doctrine is treated as an integral part of dueprocess requirement under US Constitution. In *Greyned v. City of Rockford,*[24] the court has held that vague laws offend several important values. First, laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing a fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

The nature of criminal statute calls for a more vigorous application of doctrine owing to the widespread application of the statute and the consequences to ordinary citizens. Non mandatory registration of FIR is a serious concern owing to the potential for abuse.

As per the void for vagueness doctrine, a citizen, being entitled to clear notice as in what circumstance the registration is mandatory under the law, the sole method of such a determination cannot be an ex post facto declaration by the authorities resulting in consequent liability. This proposition finds support in the dicta of the Supreme Court in *Kartar Singh v State of Punjab.*[25] A law would be rendered constitutionally void if it uses vague standards and does not provide the executive with sufficient guidelines since it would result in arbitrary and discriminatory enforcement.

Curbing Excessive Discretionary Powers

The fundamental right to equality guaranteed under Article 14 of the Constitution of India acts as bar against arbitrary or unguided exercise of discretionary powers conferred upon authorities by statute.[26] Notwithstanding the presumption in favor of legislative wisdom and authorities exercising powers in good faith, conferment of unfettered discretion upon government authorities by the employment of wide and ambiguous language in the provisions of a statute, strikes against the very

[24] 408 U.S. 104, 108-.
[25] (1994)3S.C.C. 569.
[26] State of Punjab v. Khan Chand, (1974) 2 S.C.R 768, See also KT Moopil Nair v. State of Kerala, (1961) 3 S.C.R. 1.

basis of fairness, non-arbitrariness and equality. Vesting discretionary powers in an administrative authority may not per se attract the prohibitive sweep of Article 14. It is only when discretion conferred upon the authority is so wide and unguided that it allows for a high probability of arbitrary exercise that the sanction of Article 14 is attracted.

This issue of excessive discretion was enunciated significantly in the case of *Shri Ramakrishna Dalmi v SR Tendolkar*[27] where the Supreme Court held that the prohibitive sweep of Article 14 may act at two different levels: First, its assails the very conferment of excessive discretionary powers to authorities unguided by appropriate rules or policies. Secondly, where there is discretion conferred upon an authority by a statute, the exercise of such discretion, if unguided by reason or sound justification, may be struck down. The legislative practice of conferring wide discretionary powers has consistently been subject to judicial disapproval with instance of the Supreme Court and High Courts applying the *doctrine of severability* and striking down statutory provisions conferring such provisions.

The High Courts have made no exception to this principle of law and have followed a similar trend of disclosing legislative conferral of wide discretionary powers. The position has been followed *Dhirajlal Vithalji v.Dy Custodian of Evacuee Property, South Kanara, Manglore;*[28] *Balabhaumanaji v.Bapuji Satwaji Nandanwar and Ors;*[29] *State of Punjab and Ors. v. S Kehar Singh and Ors.;*[30] and in *SM Nawab Ariff v. Corporation of Calcutta and ors.*[31]

While the scope of discretionary powers conferred upon the government may necessarily be wide in certain matters,[32] even such discretion must be guided by appropriate rules and principles that would prevent an unfettered

[27] 1958 A.I.R. 538.
[28] AIR 1955 Mad 75.
[29] AIR 1957 Bom 233.
[30] AIR 1959 P H 8.
[31] AIR 1960 Cal 159.
[32] Khandige Sham Bhat v. The Agricultural Income tax officer, 1963 AIR 591.

exercise of power.[33] Therefore, while limited discretionary powers conferred upon government officials may be permissible, unguided discretion may be struck down under Article 14. Closely connected to the constitutional norm of legislative guidance is another important principle restricting the excessive delegation of core judicial functions.

Registration of FIR v. Arrest

The counsel for the respondent submitted that mandatory registration of FIR is violative of Article 21 of the Constitution. It may be noted that the right to life and personal liberty can be curtailed by the procedure established by law in the interest of society. The expression "procedure established by law" means that procedure by which a person is deprived of his life or liberty must be just, fair and reasonable. In *Abhinandan Jha v. State of Bihar,*[34] the SC gave the stages that once an FIR has been lodged, one of them is of arrest of the suspect(s). The word *suspect* itself suggests that the arrested person is not put behind bars without use of any administrative mind. In this way, the liberty of the person is curtailed with the procedure established by law; it is not made in isolation. Thus, mandatory registration of FIR is in no circumstances violative of Article 21 of the Constitution.

Further, even if mandatory registration of FIR is violative of Article 21, the question must be raised on the issue of *arrest* rather than on registration of FIR, which has the direct nexus with the argument of the counsel for the respondent. Also, the SC court has time and again given guidelines regarding arrest.

Speedy Justice

In a number of cases the apex court has established the proposition that the right to speedy trial is a fundamental right implicit in Article 21 because no procedure can be fair unless it ensures speedy determination of guilt of

[33] Purushottam Govindji Halai v. BM Desai, 1956 AIR 20.
[34] AIR 1968 SC 117.

accused.[35] In USA also, it has been held that apart from the specific guarantee in the 6th Amendment,[36] the guarantee of due process requires that criminal justice should be as speedy as the circumstance permit.[37] Speedy trial is the essence of criminal justice and there can be no doubt that delays in trial by itself constitutes denial of justice.[38] Speedy justice is, therefore, necessary in the interest of both the accused and the society. Delay is the enemy of justice. Delay frustrates the very purpose of the criminal justice system even when the prosecution is justified because of the waning interest of not merely the society, but also the witness with the passage of time which ultimately dilutes the prosecution evidence and facilitates acquittal of guilty.[39] In this way unnecessary preliminary investigation causes hardships for needy people.

Bar on Delegation of Essential Judicial Functions

It is the essential judicial function at the first stageof a criminal case to see whether or not any prima facie case has been made. Making registration of FIR and giving police the power of preliminary investigation in effect, it delegates the essential judicial power. It is a settled principle that purpose of 'Policisation' is mere procedural one. Police cannot be granted authority to go on the merits of any case. It is the judiciary which decides upon the merits of the case. Such provision impermissibly delegates basic policy matters to policemen.

Mere Possibility of Abuse

It is an established principle of law that the mere possibility of abuse is hardly a ground for striking down a law as established by apex court in *Anwar Ali Sarkar v. State of West Bengal*[40] and later on affirmed in

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[35] Hussainara v. Home Secy. (I) AIR 1979 SC 1360. See also Kadra v State of Bihar AIR 1981 SC 939 (§ 2), Mansukhlal Vithaldas Chauhan v. State of Gujrat AIR 1977 SC 3400.

[36] 3 S.C.W 74.

[37] Klopfer v. N. Carolina (1967) 386 U.S. 213.

[38] Hussainara v. Home Secy. (I) AIR 1979 SC 1360.

[39] Delays in Indian Judicial Syetem-remedies-the fifth Bhilwara Orative by Justice J S Verma, former Chief justice of India, and compiled in the book, "The New Universe of Human Rights", p 350.

[40] AIR 1952 SC 75.

Maganlal Chaganlal v. Municipal Corporation of Greater Bombay[41]. It can be logically deduced that the non-registration of FIR in cases concerning illiterates, indigents and oppressed persons as a far greater evil than a temporary garnishment of reputation of high officials in government. Further, as far as loss of reputation is concerned speedy justice would be an adequate deterrent to vexatious litigation.

IV. CONCLUSION AND SUGGESTIONS

In sum, while discussing the nature of registration of FIR, one should not loose sight that firstly, in most of the criminal cases people do not even approach the police and secondly, if the registration of FIR is made non-mandatory the situation would get worse. Undoubtedly, it will cause procedural hardship for the needy people. Non-mandatory registration of FIR can only be argued only at the stage of accountable police system. It is a serious concern owing to the potential for abuse. On account of above arguments i.e. non-mandatory nature of registration of FIR creates legal uncertainty as, in the absence of appropriate guidelines; it is against the constitutional norm. It gives excessive discretionary powers to an administrative body which tends to arbitrariness. Further, mandatory registration of FIR is not violative of Article 21 as it is just, fair and reasonable according to the procedure established by law and a person is not arrested in isolation. Making registration non mandatory, in effect, gives the police essential judicial function which is against the rule of law, purpose of criminal justice system and violates the right to fair trial. Also, a provision cannot be made derogatory in nature merely on account of possibility of abuse.

The author gives the following suggestions regarding the registration of FIR and issues surrounding-

i. To protect the personal liberty of a person, judiciary should touch upon the aspects of arrest rather than registration of FIR.

[41] AIR 1975 SC 2009.

ii. Top police officers can be authorized to quash the FIR in case it is found to be fabricated or mischievous after investigation with some accountable measures.

iii. The FIR copies should be sent to the SP and Area Magistrate only after investigation. The old practice can be abandoned.

iv. The complainant should be given a copy of the pre-investigation report.

v Online FIR registration can also be explored with suitable safeguards.

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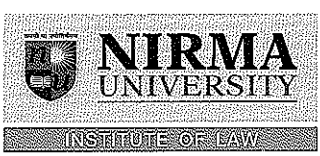

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