CHAPTER II
OBJECTIVES OF CONVENTIONS

There exists a general consensus that the standard-setting at the ILO should continue to be on a universal basis and that the differences in national conditions and levels of development should be taken into consideration by the inclusion of appropriate flexibility devices.¹ The most complex problem encountered in the drafting of a standard is regarding the inclusion of flexibility which is imperative to meet the needs of different countries differing widely in social structure and industrial development.² In short, standard-setting must be responsive to economic, social and technological changes. Hence, the ILO has tried to meet the situation by introducing many and varied forms of flexibility in its standards. Specifically, they may arise not only from the changes permitting specific exceptions, derogations, variations, but also from the basic conception of the instruments, such as the adoption of promotional Conventions.³

The nature and kind of flexibilities introduced in a Convention can be understood on the basis of the form and substance of the Convention. The form and substance of the Convention are to be understood in the light of the objectives enshrined in the Convention itself. Some Conventions are directed to fulfil either certain policy objectives or specifically defined objectives or even both. Accordingly, on the basis of objectives, certain Conventions can be categorised into (i) promotional Conventions and (ii) Convention of principle. However, there is only one Convention of principle, namely the Forty-Hour Week Convention, 1935 (No.47). Therefore, the chapter focuses primarily on promotional Conventions.

II.1. Promotional Conventions⁴

An important form of flexibility is provided by the adoption of promotional Conventions.⁵ They do not set a definite objective to be attained immediately, but

⁴ Promotional Conventions are sometime referred to as “programmatic” Conventions also; see ILO, Manual for Drafting ILO Instruments (Geneva: International Labour Office, 2005), p.56.
formulate a general policy in a given field to be followed by each country with due regard to its particular circumstances. Instead of laying down specific rules, they require ratifying Member States to accept and pursue defined policy objectives, while leaving considerable freedom in determining the nature and timing of the measures through which to attain these objectives. In other words, promotional Conventions call for the pursuit of a national policy in the given field rather than laying down precise standards. Besides, where the objective to be attained can be defined with relative precision, such Conventions can be a powerful stimulus to national action. The nature and meaning of promotional Conventions can be better understood in the light of the remarks made by the Committee of Experts in its General Survey on the Application of Conventions on Human Resources Development. The Committee of Experts stated that when it introduced the concept of "promotional Conventions" a few years ago, it used the term to describe a number of Conventions which, rather than laying down precise standards which a state binds itself to apply on ratification, set objectives to be attained by means of a continuing programme of action. According to the Committee certain governments state that although they adhere to the objectives of these Conventions and are developing corresponding policies, they are unable to ratify them on the ground that they have not yet attained all the objectives. In this respect the Committee recalls that becoming a party to this type of Convention does not imply that all of the prescribed objectives have already been achieved or must be achieved in the immediate future, but involves commitment to implement them gradually by adopting appropriate policies, attitudes and measures. Then a question becomes relevant- what is the nature of a promotional Convention in the legal sense? The Committee provides that the designation

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6 Ibid. The Employment Policy Convention, 1964 (No.122), which was ratified by India, is an example in this respect.
7 The Equal Remuneration Convention, 1951 (No.100), and Discrimination (Employment and Occupation) Convention, 1958 (No.111) can be cited as examples in this respect; see Report of the Director-General, n.1, pp.15-16.
9 Ibid., para.484, p.172.
10 The Committee of Experts takes note of the reference made by several governments on the implementation of Conventions Nos. 140 and 142 as promotional Conventions.
11 General Survey on Human Resources Development, n.8, para.484, p.172.
of a Convention as promotional in no way implies that it is not a legal instrument containing concrete obligations. Nor does the flexibility of a promotional Convention imply the absence of substantive requirements; rather this flexibility lies in the discretion of the Member States to define, within the context of ongoing efforts, the nature and pace of the measures to be taken to achieve the objectives laid down.\textsuperscript{12}

Therefore, the study will explore and analyse five up-to-date Conventions, falling within the scope of the study, as they are understood as promotional in their nature, in order to see how far they are helpful in promoting ratification and effective implementation by Member States at the national level, particularly in India.

\textbf{II.1.1. Discrimination (Employment and Occupation) Convention, 1958 (No.111)}

The question of the observance of the principle of equality of opportunity and treatment has been one of the fundamental objectives of the ILO; and the Constitution of the ILO indicated that this principle is among those that are of special and urgent importance, which should guide the policy of the ILO.\textsuperscript{13} In this respect, it is worth mentioning that the declaration of Philadelphia concerning the aims and purposes of the ILO, adopted in 1944 and annexed to the Constitution, states that the attainment of conditions in which the principle of equality of opportunity and treatment shall be possible must constitute one of the central aims of national and international policy, and further that “all national and international policies and measures, in particular those of an economic and financial character should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective”.\textsuperscript{14} The most comprehensive international labour Convention in this field is the Discrimination (Employment and Occupation) Convention, 1958 (No.111).\textsuperscript{15} Though the

\textsuperscript{12}Ibid., pp.172-173.


\textsuperscript{15}The Convention No.111 aims at the elimination in the field of employment and occupation of discrimination based on race, colour, sex, religion, political opinion, national extraction, social origin, and all other causes determined by a ratifying Member State. It has been ratified by 166 Member States including India as on 01 March 2008. Article 1(1)(a) Convention No.111 defines the term “discrimination”
principles contained in the Convention are universal in character, it was essential to ensure that the Convention itself was flexible enough to be applied in countries with disparate economic and social conditions. When the Convention was adopted, emphasis was laid on defining the objectives to be achieved by declaring and pursuing a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation.16

Precisely, the Convention provides that, "Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof".17 The Convention thus obliges the ratifying Member States at two levels: first, Member States are required to declare a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation; second, they are required to pursue such national policy,18 which strengthens the efficacy of the implementation process of the Convention at the domestic level. However, the provisions of the Convention do not impose any inflexible obligation to introduce legal standards, leaving the choice and combination of possible measures for the formulation and application of such a policy to the Member States concerned.19

The Committee of Experts underlined that while affirmation in legislation of the principle of equality may be an element of national policy aimed at equality of opportunity and treatment in employment, it can not by itself constitute a policy within

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17 Article 2 of the Discrimination (Employment and Occupation) Convention, 1958 (No.111).
the meaning of Article 2 of the Convention. The incorporation of a Convention in internal law by virtue of ratification is not sufficient to ensure its application in law and in practice. Similarly, the absence of laws and administrative measures expressly introducing inequalities is not sufficient to meet the requirements of the Convention for the elimination of all forms of discrimination. Besides, specific action must also be taken at the national level to help promote the essential conditions for all workers to benefit in practice from equality in employment and occupation.

The Committee of Experts has noted that although the formulation of the national policy in question must comply, in substance, with conditions laid down in the Convention, it must be underlined that its form is not subject, under these circumstances, to any particular conditions. In other words, the Convention requires that Member States take necessary measures to render the document effective. In this respect, Article 2 provides that in order for the Convention to become effective, a Member State must develop and carry out a national policy in accordance with its internal procedures, which can be understood clearly from the language used through the words- “by methods appropriate to national conditions and practice”.

Adjustment to national conditions and practice concerns the methods by which the principles of the Convention are to be implemented within the framework of the national policy of equality which the Government is to declare and pursue; it is not to affect the principles to be applied. The Convention leaves it to each Member State to use methods which, taking into account national conditions and practice, appear to be the most appropriate in view of their nature, time scale and their timeliness, in order to promote equality of opportunity and treatment in employment and occupation.

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22 Special Survey on Equality in Employment and Occupation, n.20, para.279, p.113.
Convention indicates that implementation of the national policy may be gradual, although some obligations have immediate effect, such as those of declaring a policy, repealing statutory provisions and eliminating administrative practices which are discriminatory, and the duty to report on results obtained. The Committee of Experts opines that the Convention thus allows considerable flexibility as regards the manner of declaring the policy of equality and of pursuing action designed to implement the principle of equality. It further notes that a declaration of policy may result from constitutional norms or from legal provisions or be expressed in a declaration of government policy submitted to Parliament or another appropriate body or in any other manner consistent with national practice; which may also result from a combination of such methods. It emphasises that from the point of view of the Convention, it is essential to see that the formulation of policy should be such as to define a real "national policy" and it should cover all the objectives of the instrument.

Commenting on the content of the national policy, the Committee observed that in order to preserve flexibility which is essential for its application, the Convention does not specify the content of measures which may be adopted for the promotion of effective equality of opportunity and treatment in employment and occupation, and allows the Member States to determine the content of such measures in accordance with the objective of the Convention. Albeit, the contents of the national policy should be inspired from the principles of the Convention in such a way that it should be designed to promote equality of opportunity and treatment by eliminating all distinctions, exclusions or preferences in law and in practice. It should cover the different grounds of discrimination expressly referred to race, colour, sex, national origin, religion, political opinion and social origin; and it should also provide for the implementation of the principle in all fields of employment and occupation.

26 Ibid., pp.170-171.
27 During the drafting of the Convention No.111 including its corresponding Recommendation No.111 the words "public policy" were replaced by "national policy" to avoid any implication that responsibility for promoting equality of opportunity and treatment in all fields of training and employment falls only on the public authorities; ibid., para.157, p.167.
28 Ibid., para.160, p.171.
29 Ibid., para.162, pp.172-173.
Apart from the above-mentioned measures, to be contained in the national policy, based on the spirit of the principle of equality, Article 3 prescribes certain specific measures required to be taken by Member States in carrying out the national policy. In accordance with Article 3, “Each Member State bound by the Convention undertakes, by methods appropriate to national conditions and practice: (a) to seek the co-operation of employers’ and workers’ organisations and other appropriate bodies in promoting the acceptance and observance of this policy; (b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy; (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy; (d) to pursue the policy in respect of employment under the direct control of a national authority; (e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority; (f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action”.

It can therefore be understood that while the Convention allows considerable leeway to Member States through national policy, it has to be implemented at the domestic level in accordance with the provisions contained in Article 3 of the Convention. This fact makes it explicit that though the Convention No.111 is promotional in nature, still it contains certain prescriptive measures though less substantial in nature.

The fact that Member State bears the chief responsibility of declaring and pursuing a national policy, should not lead to overlook the essential role of employers’ and workers’ organisations in promoting the principle of equality at the workplace itself, and the corresponding responsibilities. While the State is a key actor in the fight against

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30 It may be understood that the measures contained in Article 3 has the legal effect to regulate the form and substance of national policy of Member States carried out in accordance with Article 2 of the Convention. The Committee of Experts views that Convention No.111 lays down certain requirements of a clearly defined nature while also calling for promotional measures of a more general character; see Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part 4A, International Labour Conference, 73rd Session, 1987, para.35, p.17.

discrimination and the promotion of equality at work, workers and employers and their representative organisations play an equally important role.\textsuperscript{32}

Therefore, particular emphasis should be placed on the obligations incumbent upon the ratifying Member State, under Article 3 (a) to (d) of the Convention, to seek the co-operation of employers' and workers' organisations in implementing the national policy aiming at the elimination of discrimination in employment and occupation, to enact legislation in support of such policy, to repeal and modify statutory provisions and administrative practices inconsistent with the policy and to apply it to employment under the direct control of a national authority.\textsuperscript{33} In other words, Member States are required to co-operate with workers' and employers' organisations in the preparation and implementation of national policy. Particularly, Article 3(a) of the Convention makes it prescriptive for Member States, by methods appropriate to national conditions and practice, "to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy". These organisations, in turn, must promote national policy in the workplace and within the organisation itself.\textsuperscript{34}

As far as the Member State's requirement to seek the co-operation of employers' and workers' organisations and other appropriate bodies on the formulation and implementation of national policy is concerned, the Committee of Experts underlines the necessity for "active co-operation" with these organisations; and so, the co-operation is aimed not only at the preparation and monitoring of the application of measures adopted within the framework of the national policy mentioned in Article 2 but also at level of the branch of activity as their action is essential to the application in workplaces of the principles of the Convention.\textsuperscript{35} The extent of the co-operation will depend on the characteristics of the industrial relations systems in the various Member States and the degree of involvement of employers' and workers' organisations in the existing


\textsuperscript{33} Special Survey on Equality in Employment and Occupation, n.20, para.204, p.79.

\textsuperscript{34} Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, n.32, p.16.

\textsuperscript{35} General Survey on Equality in Employment and Occupation, n.13, para.185, pp.191-192.
machinery. On the other hand, the co-operation may also proceed from the representation of employers and workers on various bodies responsible for preventing discrimination, and for the application and enforcement of the policy defined under Article 2 of the Convention.36

The Convention was ratified by India on 3 June 1960. Recommending the ratification, the Government of India in its memorandum placed before the Parliament had stated that, “the position in law and practice in India satisfies the requirements of the various provisions of the Convention”; and the memorandum further continued to state that, “the insertion of the phrase “by methods appropriate to national conditions and practice” in the operative part of the Convention37 lends an element of flexibility to the text of the instrument, and allows a degree of freedom on the part of a ratifying country in the matter of deciding upon the measures to be taken to give effect to its provisions”.38 It is significant to note that the Convention did not require the Government to adopt coercion as a method of eliminating discrimination if it preferred to rely on educational methods for the purpose and it declared and pursued a national policy with that end in view.39 It is therefore essential to go through the constitutional provisions and measures undertaken by the Government of India in order to understand clearly the national policy on the implementation of the Convention.

The principle of equality of opportunity in employment and occupation is one of the goals set out by the Constitution of India through various provisions. The principle of equality of opportunity finds mentioning in the Preamble40 to the Constitution which declares: “We the people of India having solemnly resolved to constitute India into a

37 Article 2 of the Convention may be cited as, “Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof”.
40 The Supreme Court in the Golak Nath case held that the Preamble to an Act sets out the main objectives which the legislation is intended to achieve; see I.C. Golak Nath vs. State of Punjab, AIR 1967 SC 1643. Later in the Kesavananda Bharati case the Supreme Court held that Preamble is the part of the Constitution. The Court also held that the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble; see Kesavananda Bharati vs. State of Kerala, AIR 1973 SC 1461.
Sovereign Socialist Secular Democratic Republic and to secure to all its citizens:... equality of status and of opportunity; and to promote among them all;...” This shows that the support for the promotion of the principle of equality of opportunity stems from the Preamble to the Constitution itself; and it is encompassed through various provisions of the Constitution.

While Article 14 of the Constitution guarantees every individual within the territory of India the right to equality before the law,\(^{41}\) Article 15(1) provides that, “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”. Article 16\(^{42}\) specifically deals with equality of opportunity in employment, the relevant portion of which reads as follows: “(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. (3)... (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State...”. Article 16 is an instance of the application of the general rule of equality before law laid down in Article 14 and to the prohibition of discrimination guaranteed by Article 15(1) with special reference to the opportunity for employment or appointment to any office under the State.\(^{43}\)

Article 17 provides for the abolition of “Untouchability”. The Article provides that, “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law”.

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\(^{41}\) Article 14 of the Constitution provides that, “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”.

\(^{42}\) It is essential to note that Article 16 is applicable only to public employment under the State, whereas, Discrimination (Employment and Occupation) Convention, 1958 (No.111) covers both public and private sector employment.

The Constitution (86th Amendment) Act, 2002 has added a new Article 21A after Article 21, and has made education for all children of the age of 6 to 14 a fundamental right. The Article provides that, “The state shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine”.

Article 29(2) provides that, “No citizen shall be denied admission into any educational institution maintained by the State funds on grounds only of religion, race, caste, language or any of them”.

The above provisions come under the Part III of the Constitution and they are called fundamental rights, the violation of which can be challenged by the aggrieved person before the High Court under Article 226 and before the Supreme Court under Article 32 of the Constitution.

There are certain provisions, which come under the Directive Principles of State Policy, Part IV, of the Constitution of India. Article 38(2) of the Constitution provides that, “The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations”.

Article 39 provides that, “The State shall in particular, direct its policy towards securing-(a) that citizens, men and women equally, have the right to an adequate means of livelihood;”. Article 39A provides that, “The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure

45 The Directive Principles of State Policy under Part IV of the Constitution of India, set out aims and objectives to be kept in mind by the States in the governance of the Country. They are non-justiciable; hence, they can not be enforced in the court of law.
46 The Clause 2 to Article 38 was inserted by the Constitution (44th Amendment) Act, 1978. The new clause aims at equality in all spheres of life. It would enable the State to have a national policy on wages and eliminate inequalities in various spheres of life; see Pandey, n.44, p.370.
47 Article 39A was inserted to the Constitution of India by the Constitution (42nd Amendment) Act, 1976.
that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”

Article 45 of the Constitution provides that, “The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years”. Article 46 of the Constitution provides that, “The State shall promote with special care the educational and economic interests of the weaker sections of the people, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation”.

On the basis of the above-mentioned provisions, it can be understood that the Constitution of India prevents discrimination in public employment in all forms particularly through Articles 14, 15, and 16. Yet, it is significant to note that the Government of India has taken certain measures in different fields as part of the national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of public employment in consonance with Article 2 of the Convention.

The Government of India has been implementing the Convention under the Constitutional provisions through various policies and programmes at the national level for the elimination of discrimination and promotion of equality of opportunity. The Government has set up various national bodies for the protection of the rights of women, minorities, and scheduled castes and scheduled tribes, and other weaker sections of the society. Those bodies mainly supervise various polices and programmes of the Government, and recommend measures required for their application and promotion at the ground level.

Concerning the application of the Convention with respect to self-employed women and women in the informal economy aiming at achieving equality of women through their economic and social empowerment, the Government adopted a National Policy for the Empowerment of Women in 2001, which is the result of broad-based

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46 This provision has been reinforced by the insertion of Article 21A to Part III of the Constitution through the Constitution (86th Amendment) Act, 2002.
consultations under the leadership of the Department of Women and Child Development. In this regard the Committee of Experts notes that among the policy’s objectives are the equal access of women to quality education career and vocational guidance, employment, equal remuneration, strengthening legal systems aimed at eliminating discrimination, mainstreaming a gender perspective in the development process, the extension of training programmes for women in the field of agriculture and micro credit facilities, and the recognition of women’s contribution to social-economic development as producers and workers in the formal and informal economy. Equally, the Government has to ensure equal participation of women in education and training in order to ensure their equality of opportunity and treatment in employment or occupation, which can be realised through the National Educational Policy, 1986 adopted by the Government.

For the promotion and implementation of equal opportunity policies for ethnic minorities, including tribal or indigenous populations, the Government has set up a National Commission for Minorities in 1978. The Commission evaluating the effectiveness of a number of guarantees laid down in the Constitution and in Central and State legislations for the protection of minorities makes recommendations in order to ensuring the effective application and enforcement of all relevant legislations and guarantees; and it also examines specific complaints concerning the violation of minority rights and guarantees. Besides, the Commission carries out research and surveys and submits proposals relating to a policy of equality for minorities; and the Commission has published reports containing recommendations for the improvement of affirmative action policies in certain areas, including equality of opportunity in education.

The Government has taken a wide range of measures including grants, subsidised meals, places in university accommodation and the construction of schools for children of scheduled castes and scheduled tribes. The Government has set to implement the

50 Ibid.
52 Ibid.
53 Ibid., para.181, p.187.
National Educational Policy, 1986, aiming at the treatment of members of scheduled castes and tribes on an equal footing with other members of the population at all stages and levels of the programmes. Particularly, at least 75 per cent of children aged from 11 to 14 will attend school until they reach the educational level necessary for admission to higher education; and for achieving this, authorities are required to take action by encouraging families to send their children to school, by recruiting teachers from scheduled castes and tribes, by adapting curricula to the interests of such tribes and by printing textbooks in vernacular languages. On the whole, while it is usual for the State Governments concerned to determine measures for the promotion of training of scheduled castes and tribes, the Central Government plays an important role by adopting directives and incentive measures.\(^54\) It may be noted that the National Commission for Scheduled Castes and Scheduled Tribes was set up by the Government to investigate all matters relating to the safeguards for Scheduled Castes and Scheduled Tribes in various statutes and to report to the President of India upon the working of these safeguards. The Commission was bifurcated into two separate Commissions, namely, the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes by the Government in 2004.\(^55\)

The prevalence of discrimination in employment on the basis of social origin has been a cause of concern for the ILO Committee of Experts. The practice of manual scavenging in certain parts of India has been often reported before the Committee, particularly by the International Confederation of Free Trade Unions (ICFTU).\(^56\) The Government of India in its Report submitted to the ILO in 2005 stated that Article 17 forbids the practice of discrimination in any form. The Protection of Civil Rights Act,

\(^{54}\) Ibid., pp.187-188.


\(^{56}\) According to the ICFTU the Government statistics suggests that an estimated one million Dalits in India are manual scavengers. They may be paid as little as 12 rupees (US$ 0.30) a day for unlimited hours, and sometimes they do not receive their pay; and they are exposed to the most virulent forms of viral and bacterial infections, including tuberculosis; see Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part 1A (Individual Observation Concerning Convention No.111), International Labour Conference, 93\(^{rd}\) Session, 2005, para.2, p.268.
1955 was enacted in order to enforce these Constitutional provisions.\(^{57}\) It is further stated in the Report that the eradication of manual scavenging in the country is a matter of priority to the Government of India. Manual scavenging still exists in the country in certain pockets due to the existence of dry latrines, for which, the Government mentions, the existence of unchanged societal structure/mores is one of the main reasons.\(^{58}\) In order to solve the problem the Government has enacted the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibitions) Act, 1993, which came into force on 26 January 1997.\(^{59}\) Further, the offenders can be made liable to be prosecuted under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.\(^{60}\) In order to convert the existing dry latrines into low cost pour flush latrines and provide alternative employment to liberated scavengers, the Government in 1980-81 initiated a Centrally sponsored scheme of Urban Low Cost Sanitation for Liberation of the Scavengers, under which towns are selected from various States and Union Territories on the basis of the urban population and the extent of prevalence of manual scavenging; and also a National Scheme of Liberation of the Scavengers and their Dependants, was launched in March 1992.\(^{61}\) To further aid the solution of the problem, the Government has set up a National Commission for Safai Karamcharis vested with sufficient powers to effectively monitor and advice the Government on the liberation and rehabilitation of scavengers.\(^{62}\)

Albeit, it is important to note that the ICFTU in its communication to the ILO submits that the Government of India has failed to fulfil its obligation under Article 2 of the Convention to pursue a policy to eliminate discrimination in employment, and its obligation under Article 3(d) to implement this policy in respect of employment under the


\(^{58}\) Ibid., p.2.

\(^{59}\) The 1993 Act punishes the employment of scavengers or the construction of dry (non-flush) latrines with the imprisonment up to one year and/or a fine up to Rs.2000.

\(^{60}\) The 1989 Act, came into force on 30 January 1990, is intended mainly to prevent the commission of offences of atrocities against the members of Scheduled Castes and Scheduled Tribes, providing special courts for the trial of such offences and rehabilitation of victims of such offences.


\(^{62}\) Ibid., p.3.
direct control of a national authority. Further, the ICFTU asks the Government to pursue actively the full implementation of the 1993 Act and to provide details regarding prosecutions and punishments for failure to implement the Act.

As far as the implementation of the national policy, apart from the above mentioned national bodies and programmes, is concerned, it is significant to note that the representative of the Government of India before the ILO Governing Body Committee on Legal Issues and International Labour Standards in 1998 has stated that one of the authorities entrusted with the enforcement of the national policy of equal opportunity and treatment is the employment exchanges at the state and local levels.

On the basis of the above analysis it can be understood that India has been implementing the Convention No.111 through various policies and programmes with the help of central and state level bodies. On the whole, therefore, the above analysis may lead to an understanding that even though Article 2 of the Convention requires the ratifying Member State to implement its provisions through “a national policy”, the State can implement them with the help of various national policies. Since the Convention is promotional in its nature and objective, India in accordance with its Constitutional and legislative provisions has been able to implement the Convention in a judicious way in respect of public employment through various policy measures.

II.1.2. Equal Remuneration Convention, 1951 (No.100)

Adherence to the principle of equal remuneration has been one of the objectives of the ILO since its inception. The original text of the Constitution already recognised in its Article 41 among the general principles “of special and urgent importance”, the principle that men and women should receive “equal remuneration for work of equal

64 Ibid., pp.268-269.
value”, and the principle is again enshrined in the preamble to the present Constitution.\(^{67}\)

In its efforts on elimination of discrimination based on sex, the ILO has taken concrete steps in 1951 adopting instruments on equal remuneration\(^{68}\) earlier to the 1958 Convention (No.111) and its corresponding Recommendation (No.111). Article 2(1) of the Equal Remuneration Convention, 1951 (No.100) provides that, “Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value”.

One of the main problems in the elimination of discrimination based on sex is the existence of some “women jobs”, or occupations in which only women are employed, from which direct comparison of rates of remuneration for men and women does not arise. The solution provided for this problem in the Convention is an “objective appraisal of jobs on the basis of the work to be performed”.\(^{69}\) Such an evaluation can help secure the application of two fundamental principles of equality of treatment: first, equal remuneration for work of equal value; second, the structure of remuneration should reflect any differences ascertainable in the job content of different occupations and in the effort they require in terms of education, training, personal diligence and adjustment to unfavourable working conditions.\(^{70}\) In other words, job evaluation and classification

\(^{67}\) General Survey on Equal Remuneration by the Committee of Experts on Application of Conventions and Recommendations, Report III, Part 4B, International Labour Conference, 72\(^{nd}\) Session, 1986, para.3, p.2. It may be viewed that in the inter-war period although the principle of equal remuneration was reaffirmed in the Minimum Wage-Fixing Machinery Recommendation, 1928 (No.30) and in resolutions adopted by the 1937 and 1939 Sessions of the Conference, the most countries at that time had differences so deeply in their actual practice on wages between men and women that it was impossible to take steps to give concrete international application to the principle. Again in the 1944 Recommendation on employment in the transition from the war to peace reflected, among other things, that, “In order to place women on a basis of equality with men in the employment market... steps should be taken to encourage the establishment of wage rates based on job content, without regard to sex”; see G. A. Johnston, The International Labour Organisation: Its Work for Social and Economic Progress (London: Europa Publications, 1970), pp.160-161.

\(^{68}\) In 1951 the ILO has adopted Equal Remuneration Convention, 1951 (No.100), and Equal Remuneration Recommendation, 1951 (No.90). The Convention No.100 has been ratified by 164 Member States including India as on 01 March 2008.

\(^{69}\) Report of the Director-General, n.19, p.56. In this regard Article 3(1) provide that, “Where such action will assist in giving effect to the provisions of this Convention measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed”.

\(^{70}\) Ibid., pp.56-57.
imply that different individuals should be treated in the same manner to the extent that the requirements of their employment are equal, but in a different manner to the extent they are not.\textsuperscript{71}

From the text of Article 2(1) it becomes clear that the Convention aims at the application to all workers of the principle of equal remuneration for men and women for work of equal value, but the Member States are to choose the means of achieving that objective. The language of the Convention specifies that wherever the Member State is not in a position to ensure the application of the principle of equal remuneration, it must promote its application in accordance with Article 2(1).\textsuperscript{72} Although the Convention does not specifically call for the formulation of a national policy by the Member States, it is evident particularly from the fact that the Committee of Experts in a number of occasions urged the Member States to adopt and implement the principle of equal remuneration through a national policy.\textsuperscript{73} It can therefore be considered that the principle of equal remuneration can at least be implemented with help of the national policy adopted under Convention No.111 relating to non-discrimination in employment and occupation, by the Member States.\textsuperscript{74}

\textsuperscript{71} Ibid., p.57.
\textsuperscript{72} General Survey on Equal Remuneration, n.67, para.29, p.15.
\textsuperscript{73} The Committee of Experts in its 1986 General Survey on Equal Remuneration, quoting paragraph 38 of its general report of 1980, noted that law and practice in a growing number of countries are inclined to recognise that the aim of eliminating discrimination between men and women workers in respect of remuneration for work of equal value “cannot be reached in a satisfactory way unless national policy also aims at eliminating discrimination on the basis of sex in respect of access to the various levels of employment, as provided by Convention No.111”; see General Survey on Equal Remuneration, n.67, paras.100, 250, pp.71, 188.
\textsuperscript{74} It may well be noted that Trebilcock views that the Equal Remuneration Convention, 1951 (No.100) applies to “all workers”, but its application calls for creative policy-making in relation to workers in the informal economy; see Anne Trebilcock, “International Labour Standards and the Informal Economy”, in Jean-Claude Javillier et Bernard Gernigon (sous la direction de), \textit{Les normes internationales du travail: un patrimoine pour l'avenir- Melanges en l'honneur de Nicolas Valticos} (Geneve: Bureau international du travail, 2004), p.607. As a whole it can be pointed out that the obligations stemming from Conventions Nos. 100 and 111 are not identical. Under the terms of Convention No.111 the elimination of discrimination based on sex in respect of remuneration is one of a number of elements in a general policy intended to promote equality of opportunity in respect of employment and occupation, which allows in some respects for a greater degree of flexibility than Convention No.100. The Committee of Experts regarded that when it is not considered possible to ratify Convention No.100, this does not necessarily imply an impossibility to give effect to Convention No. 111 in this sphere; see General Survey on Equal Remuneration, n.67, footnote 3, p.3.
The Committee of Experts further felt that the obligation to promote the application of the principle under Article 2(1), as well as the obligation to co-operate with the employers' and workers' organisations for the purpose of giving effect to the provisions of the Convention under Article 4 calls for positive action. The Convention refers to a variety of means by which the application to all workers of the principle of equal pay for work of equal value is to be furthered, where appropriate. While the Convention is flexible regarding the choice of measures to be taken for its implementation, it allows no compromise regarding the objective to be pursued. It is instructive to note that various proposed “saving clauses” to take account of the financial and economic conditions of countries were rejected by the competent Conference Committee when preparing the Convention.

The Convention may therefore be considered to be also a promotional Convention by its nature and objective. It is here significant to note that in respect of the Convention the Committee of Experts recalls the approach adopted with regard to promotional Conventions which, rather than laying down rigid standards which Member State is obligated to implement on ratification, set objectives to be pursued by a continuing programme of action.

India has ratified the Convention on 25 September 1958. Equal pay for equal work is one of the goals set by the Constitution to be realised by labour and other concerned legislation in India. In this respect, Article 39(d) of the Constitution requires

75 Article 4 of the Equal Remuneration Convention (No.100) provides that, “Each Member shall co-operate as appropriate with the employers’ and workers’ organisations concerned for the purpose of giving effect to the provisions of this Convention”.

76 General Survey on Equal Remuneration, n.67, para.29, p.15.

77 Ibid., para.30, p.15.

78 Ibid., para.246, pp.185-186. The Committee of Experts in its 1987 General Report views that some Conventions while laying down certain requirements of a clearly defined nature also call for promotional measures of a more general character. Examples of this type of instrument are the Conventions relating to equal remuneration (No.100), discrimination in respect of employment and occupation (No.111) and rural workers’ organisations (No.141); see Report of the Committee of Experts, n.30, para.35, p.17.

79 In Randhir Singh vs. Union of India (AIR 1982 SC 879) the Supreme Court has held that the principle of “equal pay for equal work though not a fundamental right” is certainly a constitutional goal and, therefore, capable of enforcement through constitutional remedies under Article 32 of the Constitution; see Pandey, n.44, p.373; see also J.K. Mittal, “Casual Labour and “Equal Pay for Equal Work”, Journal of the Indian Law Institute, vol.28, no.2, 1986, p.260.

80 Article 39 (d) reads that, “The State shall, in particular, direct its policy towards securing...(d) that there is equal pay for equal work for both men and women”. Besides, Articles 14, 15, and 16 of the Constitution,
the State to strive for securing equal pay for equal work of both men and women.\textsuperscript{81} The
Ministry of Labour, Government of India informed the ILO that though the principle of
"equal pay for equal value" was embodied in Article 39(d) of the Constitution of India as
one of the Directive Principles of State Policy and was accepted by the Central Pay
Commission, the Fair Wages Committee, and a number of industrial tribunals, actual
application of the principle would have to be gradual in view of the practical difficulties
involved.\textsuperscript{82} The Convention was, however, ratified by India in 1958 following the
recommendation of the Committee on Conventions made at its fourth Session in 1957.

The Implementation of the Convention has been subject to criticism by the
Committee of Experts, which has repeatedly drawn the attention of the Government of
India to the differences in wages of men and women workers prevailing in occupations
covered by the Minimum Wages Act, 1948. In response, the Government had argued that
such wage differences were mostly due to the fact that the work allotted to the women
workers was light or their output was less; and in those circumstances "insistence on the
payment of equal wages might lead to a shrinking of employment opportunities for
women workers concerned and harm their interests".\textsuperscript{83} However, the Committee of
Experts did not concede with the argument of the Government.

Pursuant to Article 39(d) of the Constitution, the Government has enacted Equal
Remuneration Act, 1976, paving the way for more effective implementation of the
Convention. The 1976 Act requires the payment of equal remuneration for men and
women workers and prevention of discrimination on the ground of sex in the matter of
employment. The 1976 Act also stipulates that in the recruitment of men and women and
in their promotion the same principle shall be followed; no discrimination will be allowed
in either sphere.\textsuperscript{84} It is however important to note that under the 1976 Act India uses the

\begin{footnotesize}
\textsuperscript{81} Suresh C. Srivastava, "Equal Remuneration for Men and Women", \textit{Journal of the Indian Law Institute},
vol.32, no.1, 1990, p.84.
\textsuperscript{82} Vaidyanathan, n.39, p.47. This shows that promotional Convention also involves an aspect of gradual
implementation of its provisions at the national level by the Member State.
\textsuperscript{83} Ibid., p.107.
1976 Act was amended through the Equal Remuneration (Amendment) Act, 1987, which came into force in
December 1987. By virtue of this amendment, the Equal Remuneration Act, 1976 currently: (i) prohibits
\end{footnotesize}
concept of “equal remuneration for the same work or work of a similar nature”; which means that employers are obligated to pay equal remuneration to workers of both sexes for the same work or work of a similar nature.\textsuperscript{85} In this respect, the Committee of Expert has observed that the scope of the principle of equality of remuneration under the 1976 Act is more limited than the principle of the Convention, as it covers only men and women performing the same work or work of a similar nature for the same employer as against the principle of equal pay for work of equal value.\textsuperscript{86} The Government in this regard has taken the view that as the principle of equal pay for work of equal value is an advanced concept, it may not be possible to introduce it at the present stage of development; and that priority should be given to the full implementation of the 1976 Act.\textsuperscript{87} The Government further holds that the 1976 Act ensures equal remuneration to men and women for work which is of equal value to the same employer and that “it is neither possible nor necessary for legislation alone to meet the principles of the Convention”; and that other options identified in the Convention itself may be expected to play the complementary role.\textsuperscript{88} The Committee of Experts however is of the opinion discrimination against women, not only in making recruitment for the same work or work of a similar nature, but also in relation to conditions of service such as promotions, training or transfer under section 5; (ii) provides for substantially increased penalties for offences under the Act under section 10; and (iii) empowers the courts to try any offence punishable under the Act upon its own knowledge or upon a complaint made by the appropriate government or authorised officer, an aggrieved person or any recognised welfare institution or organisation under section 12; see Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part 4A, International Labour Conference, 78\textsuperscript{th} Session, 1991, para.1, p.296; see also Mishra, ibid., pp.571-575.\textsuperscript{89} Paula Maatta, “Equal pay policies: International review of selected developing and developed countries”, http://www.ilo.org/public/english/dialogue/govlab/legrel/papers/equalpay/8_1.htm, 23 June 2006.\textsuperscript{90} Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part 4A, International Labour Conference, 79\textsuperscript{th} Session, 1992, p.295.\textsuperscript{91} Ibid., see also Report of the Committee of Experts, n.84, para.3, p.298. However, it is essential to note that the Centre of Indian Trade Unions (CITU) in its communication to the ILO stated that there remained many shortcomings in the implementation of the 1976 Act; particularly in certain industries, employers used a piece-rate system to avoid paying equal wages for women or they claimed that the work performed by women was of a different nature to that performed by men, whereas the nature of the work was the same or similar. Therefore, women workers in beedi, construction, garment, agriculture and other industries continued to receive lower wages than male workers; see Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part 4A, International Labour Conference, 80\textsuperscript{th} Session, 1993, pp.265-266.\textsuperscript{92} Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part 4A, International Labour Conference, 82\textsuperscript{nd} Session, 1995, para.1, p.257. It may be noted that in order to ascertain what constitutes work of equal value, systems of objective appraisal of work which is to be performed is stipulated by the ILO standards. Whereas, Indian legislation in order to circumvent the problems raised by systems of appraisal have preferred to use the expression “same or similar work” performed in the various employments covered by the 1976 Act; see Kamala Sankaran, “Human Rights and the World of Work”, Journal of the Indian Law Institute, vol.40, 1998, p.293.
that where equal pay legislation exists, it must be consistent with the principle set out in the Convention.\textsuperscript{89} It has further opined that the language of the Convention calls for equal remuneration for men and women workers to be established "for work of equal value", which goes beyond a reference to the "same" or "similar" work choosing the "value" of the work as the point of comparison.\textsuperscript{90}

In order to promote and strengthen the enforcement machinery under the 1976 Act as part of the implementation process of the Convention, the Government has taken certain measures at the national level. As an educational measure, the tripartite Central Board for Workers' Education trained 91,920 women workers during the period 1990-91 and 50,604 during 1991. The Department of Women and Child Development has developed the legal literacy manuals. Besides, the Union Ministry of Labour has introduced two new projects aimed at organising women in construction industries to upgrade their skills, improve their conditions of work, give them functional literacy and to provide them with support services.\textsuperscript{91} Under the Eight Five-Year Plan the Government has planned a pilot scheme of providing financial assistance to state governments for enforcing legislation relating to women and children. In this respect, the Government has initiated a process of active consultation with workers' and employers' organisations at the central level to secure their support in improving implementation of the legislation.\textsuperscript{92}

The Government has set up a Central Advisory Committee under the 1976 Act, which oversees the implementation of the provisions of the Act and advises the Government with respect to the creation of employment opportunities for women workers.\textsuperscript{93} The Government has included policies for the empowerment of women in the

\textsuperscript{89}Report of the Committee of Experts, ibid., para.2, p.257. In this respect, strengthening its consideration the Committee of Experts mentions the decision of the Supreme Court in D'Costa v. MacKinnon MacKenzie and Company ((1987) 2 SCC at 469-482), in which the Court has held that the scope of the Equal Remuneration Act is indeed more limited than that of the principle of the Convention; ibid., para.1, p.257.
\textsuperscript{91}Report of the Committee of Experts, n.87, p.266.
\textsuperscript{92}Report of the Committee of Experts, n.49, p.395. This has in fact been in the form of response by the Government to the observations communicated to the ILO by National Front of Indian Trade Unions (NFITU), which claimed that the principle of equal remuneration for men and women workers for work of equal value is not respected in the informal and unorganised sectors, particularly in stone quarries, stone
Ninth Five-Year Plan (1997-2002). The Plan for this purpose has intended to make special efforts to ensure that the laws relating to both the minimum wage and equal pay will be strictly implemented in the unorganised sector. The Government has also brought together certain measures designed to achieve de facto equality of women through their social and economic empowerment under a National Policy for the Empowerment of Women, 2001. Such policy measures include equal access for women to quality education and vocational guidance, employment and remuneration. In the Tenth Five-Year Plan (2002-2007) the Government has adopted a more proactive approach on monitoring compliance with minimum wage and equal pay legislation in the unorganised sector, which provides for the reduction of gender pay gaps by at least 50 per cent by 2007.

The above-mentioned measures implemented by India, in accordance with the 1976 Act and in the light of various Five Year Plans, in order to give effect to the Convention can be considered as programmatic measures, which consequently imply that the Convention is of promotional nature. Besides, continuing programmes of action carried out by India at the national level indicate that India has been effecting gradual compliance of the Convention, which is also one of the features of a promotional Convention as it does not normally provide for prescriptive approach of immediate effect.

crushing and agriculture due to the monitoring system not functioning. For that, the NFITU provides also that the machinery for supervising the implementation of the Convention needs to be improved; see Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part 1A, International Labour Conference, 90th Session, 2002, p.409.

94 The International Confederation of Free Trade Unions (ICFTU) in its communication to the ILO claimed that despite the Equal Remuneration Act, 1976, wage gaps between men and women persist across all sectors. It was asserted that the policies and programmes adopted to promote the empowerment of women, included in the Ninth Plan, were superficial and that further action was necessary, especially in the traditional sectors. In this regard, the Government in its reply stated that there are no major violations of the provisions of the 1976 Act; and also maintained that wage differences in an occupation at unit level could be due to differences in qualification, experience, length of service, employment status, or difference in output; see Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III, Part 1A, International Labour Conference, 92nd Session, 2004, paras.1-3, pp.211-212.

95 Ibid., para.3, p.212.

II.1.3. Rural Workers’ Organisations Convention, 1975 (No.141)

The promotional and prescriptive approaches may also be combined. This can be observed in the Rural Workers’ Organisations Convention, 1975 (No.141). On the one hand, it sets out a series of guarantees to be enjoyed by rural workers and their organisations, and on the other, it goes on to provide for measures by the government to encourage and facilitate the establishment and growth of such organisations. The Convention deals with the right of rural workers, whether they are wage earners or self-employed, to establish and join organisations of their own choosing without prior authorisation. The Convention reaffirms the principle of the right of association of rural workers, a right that is already recognised by Convention No.11 dealing with right of association of agricultural workers, as well as Convention No.87 on the freedom of association and protection of right to organise.

From the wording of Article 4 of the Convention it can be understood that it provides for the “national policy concerning rural development” to be implemented by ratifying Member States, which is a crucial element in deciding whether a Convention is

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97 The Convention No.141 deals with the right of all rural workers, whether they are wage earners or self-employed, to establish and join organisations of their own choice without previous authorisation. It has been ratified by 40 Member States including India as on 01 March 2008.

98 Follow-up to the Report of the Governing Body Working Party, n.5. The adoption of the Convention, which is framed in cooperation with the FAO, clearly indicated the importance of such organisations, not only to protect and further the interests of rural workers, but also to ensure their contributions to economic and social development, particularly by improving employment opportunities and general conditions of work and life in rural areas; see Ann Herbert, “International Labour Standards: Reversing the Race to the Bottom”, (Geneva: ILO, 2005), http://www.ilo.org/text/ilo_en.PDF, 01 July 2006.

99 Article 2(1) of the Convention No.141 provides that, “For the purposes of this Convention, the term “rural workers” means any person engaged in agriculture, handicrafts or a related occupation in a rural area, whether as a wage earner or, subject to the provisions of paragraph 2 of this Article, as a self-employed person such as a tenant, sharecropper or small owner-occupier”.

100 In the 1981 ILO’s Manual titled, “Structure and Functions of Rural Workers’ Organization”, a “rural workers’ organisation” is defined as follows “A Rural Workers’ Organization is formed by the coming together of a number of workers in an association established on a continuing and democratic basis, dependent upon its own resources and independent of patronage, the purpose of which is to further and defend the interests of the members. A rural workers’ organization is a trade union or a trade union type organization of, for and by rural workers”; see Peter Oakley, “Rural Organizations and Peoples Participation: A Review of a Decades Progress for Cooperatives and Rural Workers Organizations”, http://lnweb18.worldbank.org/ESSD/ardext.nsf/PrintFriendly/F1824E8C0E181AFE85256D5D006E1E71?Opendocument, 11 July 2006.

promotional in its nature and objective. For this, Article 4 of the Convention can be quoted as follows: “It shall be an objective of national policy concerning rural development to facilitate the establishment and growth, on a voluntary basis, of strong and independent organisations of rural workers as an effective means of ensuring the participation of rural workers, without discrimination as defined in the Discrimination (Employment and Occupation) Convention, 1958, in economic and social development and in the benefits resulting therefrom”.

It can further be reasoned through Article 5(1) of the Convention, which provides that, “In order to enable organisations of rural workers to play their role in economic and social development, each Member which ratifies this Convention shall adopt and carry out a policy of active encouragement to these organisations, particularly with a view to eliminating obstacles to their establishment, their growth and the pursuit of their lawful activities, as well as such legislative and administrative discrimination against rural workers' organisations and their members as may exist”.

To add, the promotional nature of the Convention can also be traced from Article 6, which provide that, “Steps shall be taken to promote the widest possible understanding of the need to further the development of rural workers’ organisations and of the contribution they can make to improving employment opportunities and general conditions of work and life in rural areas as well as to increasing the national income and achieving a better distribution thereof”.

The Convention imposes certain obligations on Member States preventing them from the undue interference into the functioning of rural workers and their organisations. The organisations should be independent, voluntary, and free from interference, coercion or repression; and conditions imposed for granting legal personality to the organisations should not restrict their rights.102 The rural workers and their organisations in exercising their rights must respect the law of the land but this law must not be such as to impair, nor must it be so applied as to impair the guarantees provided for in Article 3.103 Hence, it

102 Article 3(2) & (3) of the Convention No.141.
103 Article 3(4) & (5) of the Convention No.141. See N. Vaidyanathan, International Labour Standards: A Hand Book (Calcutta: Minerva Associates, 1977), p.20. It may be noted that while Article 4 makes it explicit that the Convention is aimed at promoting voluntary, strong and independent organisations of rural
can be taken into account that while the Convention is prescriptive in its approach as regard its implementation, it is at the same time also flexible enough to allow Member States to carry out promotional measures aimed at facilitating the establishment and growth of voluntary and independent rural workers’ organisations through a national policy.

India has ratified the Convention No.141 on 18 August 1977. The Constitution of India guarantees the right to freedom of associations or unions under Article 19(1)(c). Even before the Convention was ratified, the Indian Trade Unions Act, 1926 gave the workers, including the rural workers, right to form or join an association. The members of the association or union also enjoy immunity from civil suits in certain cases and protection against undue harassment by any vested interest or against criminal proceedings in respect of any agreements for the purpose of furtherance of any legal object of the union. Besides, the Societies Registration Act, 1860 enables co-operative societies and NGOs to promote workers’ welfare and development activities.

Keeping in view the letter and spirit of the Convention No.141, the Government of India has passed several laws and adopted various policies for the promotion of agricultural workers’ organisations and their welfare through participation in development schemes. For the past three decades, the Government of India has launched several anti-poverty programmes and socio-economic projects for the welfare of agricultural and other rural workers. Effective implementation of these anti-poverty programmes requires the involvement of trade unions and other agricultural workers’

workers, Article 3 lays down several legal guarantees to be benefited for the rural workers and their organisations in their functioning.

104 The right to form associations or unions guaranteed under Article 19(1)(c) of the Constitution includes the right of workmen to form trade unions for a lawful purpose; see Mishra, n.84, p.402.

105 T. Haque, “Decent Work in Agriculture in India”, in D. P. A. Naidu and A. Navamukundan (eds.), Decent Work in Agriculture in Asia (Geneva: International Labour Office, 2003), p.252. It may be noted that sections 17 and 18 of the Indian Trade Unions Act, 1926 respectively provides for an immunity of trade unions from civil suits and criminal liability for any act done in furtherance of any lawful object of the trade unions.

106 Particularly, the laws enacted by the Government of India, such as: (i) Bonded Labour System (Abolition) Act, 1976; (ii) Child Labour (Prohibition and Regulation) Act, 1986; (iii) Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979; (iv) Plantation Labour Act, 1951, as amended in 1981, have been helpful in promoting the objective enshrined in the Convention No.141.

107 Haque, n.105.
organisations. The trade unions and other rural workers' organisations through their collective action initiatives can help implement such programmes. However, it is essential to note that the trade union organisations have not been involved much in the implementation of various anti-poverty and rural development programmes. The Government does not encourage involvement of trade unions in the implementation of direct anti-poverty rural development programmes, partly because it feels that this may disturb the social order in rural India in the long run which is partly due to the fear that trade unions are organised along party lines and therefore their involvement would be mainly for meeting party ends. It is also in fact felt that the main reason why the policy makers do not involve either the major trade unions or rural workers' organisations in planning and decision-making process is that trade union movement in India today remains greatly divided and weak.

Besides, India has been under the criticism of the Committee of Experts of the ILO for the ineffective implementation of the Convention at States level, particularly in the State of Maharashtra. It appears from the comments sent by the Hind Mazdoor Sabha (HMS) to both the supervisory bodies, the Conference Committee and the Committee of Experts, that the State Government has considered that the workmen employed under the Employment Guarantee Scheme (EGS), the female workers in the Integrated Child Development Scheme (ICDS), and the workers in the forest and brick-making industries are not wage-earners as covered by the Convention. According to the HMS the State Government issued a notification in 1987 providing that muster assistants, workers who provide water or medical facilities at work sites, under the EGS were not covered under the Industrial Disputes Act, 1947 or the Trade Unions Act, 1926, and even when the notification was struck down by the Bombay High Court, the State Government refused to negotiate with them. The Government has defended its position saying that the work of the muster assistants under the EGS is a public works programme involving an

108 Ibid., p.233.
109 Ibid., p.211.
110 Ibid., p.252. It may be noted that it is substantially true that the trade union movement is weak in the case of workers working in unorganised sector, which covers around 93 per cent of the total working population in the country.
employment guarantee of limited duration by the Government; and also that the Industrial Disputes Act, 1947, and the Trade Unions Act, 1926 do not apply to muster assistants as their work can not be equated with normal employment. The Government has further defended that in the spirit of the Convention, the State Government has taken positive action by passing the Maharashtra Employment Guarantee Act, 1977, to improve employment possibilities of rural workers; and the State Government apparently recognises the rights of the muster assistants to organise and the State Government is not alleged to have impeded the establishment of the union.112 The Government has also made it clear that these workers have been treated as government servants and not as rural workers and therefore the Convention does not apply to them.113

Similarly, the HMS in its comments claimed that in the light of the Convention, inadequate pay and service conditions of female Anganwadi workers employed in the ICDS programme of the State Government constitute unfair labour practices. The Government argued that the ICDS is a centrally sponsored scheme which pays “small honorarium and not any salary as such” to women from local villages who run the local child care centres. The Government considers that these women have the constitutional right to form a union but are not covered in any way under the present Convention because they are not “rural workers” as defined in the Convention. However, the Committee of Experts has considered that like muster assistants in the State programme, the ICDS participants are rural workers as defined by the “related occupations” provision under Article 2 of the Convention. It has urged the Government to take steps for facilitating the establishment and growth, on a voluntary basis, of strong and independent organisations of these workers, without discrimination, as provided in Article 4 of the Convention.114

112 Report of the Committee of Experts, n.87, para.1, p.454. It may be noted that referring to the comments of the HMS, the Committee of Experts reminded the Government in the strongest terms on the provisions of the Convention, in particular Articles 4 and 5 which call on ratifying States to facilitate the establishment and growth of rural workers’ organisations and to eliminate obstacles to this development. It further reminded that, in accordance with Article 3(2), rural workers’ organisations should be able to exercise the principles of freedom of association, such as the right to bargain on behalf of their members; see Report of the Committee of Experts, n.86, pp.494-495.


It may be noted that in the spirit of the Convention the Government has created awareness camps in order to help unorganised workers engage in small-scale industries to learn more about their rights and entitlements under the various laws. These programmes concentrate on special categories of workers, particularly women workers covering a wide range of subjects including the right of association. However, while the Government has reiterated its position that the role envisaged in the ICDS for the female workers is such that it may not be appropriate to compare them with regular employees/workers, the Committee of Experts has maintained that the ICDS participants are rural workers covered by the “related occupations” as defined by Article 2 of the Convention.

In respect of workers in the forest and brick-making industries in the State of Maharashtra, the HMS in its comments has stated that the conditions of forest and brick workers are equivalent to that of bonded labour and that the State Government has failed to help and encourage the organisation of these workers. The Government has maintained that the workers working on a daily wage basis cannot be made permanent as their being in employment depends upon the availability of work. Considering the problems faced by these unorganised workers, the Government subsequently brought them under the purview of the Minimum Wages Act, 1948, the Contract Labour (Regulation and Abolition) Act, 1970, the Inter-State Migrant Labour Act, 1979, and the Workmen’s Compensation Act, 1923. The Committee of Experts has urged the Government to indicate specific legislative measures which ensure the rights of forest and brick-making workers to form strong and independent organisations to improve their working conditions in accordance with the provisions of the Convention.

It emerges from the above analysis that the Convention requires Member States to undertake the promotional measures in compliance with Articles 4, 5 and 6 in order to

118 Report of the Conference Committee, n.111. The Government has indicated that enforcement of the labour legislation extended to the unorganised workers has not been managed satisfactorily due to the lack of adequate labour inspection machinery to ensure that workplaces scattered over wide areas are inspected regularly; and also that the resource constraint has come in the way of effective enforcement and bringing about improvements in this direction; see Report of the Committee of Experts, n.88, para.3, p.380.
promote voluntary and independent rural workers’ organisations while prescribing on Member States not to interfere with functions of the organisations. Besides, India has not been able to implement the Convention effectively at the States level, which can be understood as due to the vastness of the unorganised sector, and in which many organisations are not unified for the promotion of their objectives for various reasons.

II.1.4. Employment Policy Convention, 1964 (No.122)

It is significant to note that promotional Conventions cannot be satisfied merely by the process of legislation. As they generally do not lay down precise standards their objectives can only be fulfilled by steady and continuing progress towards the goals set, and action will be needed to be taken at times to resist countervailing tendencies. Many Conventions have elements of this kind but still can rest on the firm ground of legislation properly enforced. One of the examples of such promotional Conventions is concerning employment policy in which the ratifying State binds itself to achieve the set objectives by a continuing programme of action.120 The Employment Policy Convention, 1964 (No.122)121 is often considered as the classic example of a promotional Convention; however, this in no way implies that it is not a legal instrument containing concrete obligations.122

Under Article 1 of the Convention each ratifying State is required to declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment. Specifically, Article 1(1) provides that, “With a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment, each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment”. Further, Article 1(2) lays down that such policy shall

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120 Report of the Committee of Experts, n.30, paras.34-35, pp.16-17. Other such promotional Conventions are relating to Human Resources Development (No.142), Vocational Rehabilitation and Employment of Disabled Persons (No.159), and Occupational Health Services (No.161), which fall outside the scope of present study.
121 The adoption of the Convention No.122 was the first concrete step taken by the ILO in the way of ensuring the full employment. The Convention calls for measures to overcome unemployment and underemployment, and meet manpower requirements with a view to stimulating economic growth and development and raising levels of living; see Vaidyanathan, n.103, p.48. The Convention No.122 has been ratified by 97 Member States including India as on 01 March 2008.
aim at ensuring that (a) there is work for all who are available for and seeking work; (b) such work is as productive as possible; and (c) there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin. Added to that, under Article 1(3) such policy shall take due account of the stage and level of economic development and the mutual relationships between employment objectives and other economic and social objectives, and shall be pursued by methods that are appropriate to national conditions and practices.

Its aim is to achieve “full, productive and freely chosen employment”, requiring a coordinated policy in a wide range of economic spheres, such as investment policy, fiscal and monetary policies, trade policy, policies concerning prices, incomes and wages, and social spheres. Thus, the measures to be adopted so as to attain the employment objectives shall be decided on and reviewed regularly within the framework of a coordinated economic and social policy, and in consultation with representatives of the persons affected thereby, and in particular representatives of employers and workers, with a view to taking fully into account their experience and views and securing their full cooperation in formulating and enlisting support for such policies.\(^{123}\) It may be noted that the reference to the “persons affected” in Article 3 of the Convention suggests that depending on the structure of the economically active population, consideration should be given to the possibility of extending the consultation to representatives of categories that are likely to be affected by employment policy measures, but might not be adequately represented by the employers’ or workers’ organisations.\(^{124}\) Further, the scope of the consultations should not be limited to employment policy measures in a narrow sense but


\(^{124}\) Ibid., para.433, p.117. Article 3 states that, “In the application of this Convention, representatives of the persons affected by the measures to be taken, and in particular representatives of employers and workers, shall be consulted concerning employment policies, with a view to taking fully into account their experience and views and securing their full co-operation in formulating and enlisting support for such policies”.

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should be extended to all aspects of economic policy that have an effect on employment.\textsuperscript{125}

However, an employment policy pursuing the objective of free choice of employment in accordance with the Convention No.122 must be in conformity with the application of the fundamental standards with regard to forced labour and discrimination. Free choice of employment within the meaning of the Convention entails both the prohibition of forced labour, as defined in the Forced Labour Convention, 1930 (No.29), and the elimination of all discrimination on the basis of the criteria defined in the Discrimination (Employment and Occupation) Convention, 1958 (No.111), whose scope covers both access to employment and access to training.\textsuperscript{126} It is here instructive to note that the Conventions Nos. 111 and 122 are mutually reinforcing, and they share the character of promotional instruments that do not primarily call for enactments, but rather for the adoption and consistent implementation of policies and practical measures to achieve their goals.\textsuperscript{127}

From the above analysis it is evident that a formal declaration of employment policy is a basic obligation under the Convention, and an express commitment to the pursuit of an active employment policy as a major national objective is in practice essential if the goals of the Convention are to be given the necessary prominence in government policy and action.

India has ratified the Convention No.122 on 17 November 1998. Owing to acute unemployment problem, India had to delay the ratification of the Convention No.122, though which had been placed before the Parliament in 1965. Despite the efforts made by the Government of India to reduce unemployment through various policies and programmes, particularly through Five-Year Plans, the problem remained more or less constant. It was therefore thought that it would be unrealistic in the present circumstances to expect the realisation of “full employment” in the near future.\textsuperscript{128} Later on, the ILO

\textsuperscript{125} Ibid., para.434, p.117.  
\textsuperscript{126} Ibid., para.45, p.14.  
\textsuperscript{127} Ibid., para.109, p.38.  
\textsuperscript{128} It is relevant to note that the Indian Government Delegate along with many other members from developing countries opposed the adoption of the Convention on the ground that it would be unrealistic.
Committee of Experts had observed that the impossibility of achieving full employment in the immediate future should not be looked upon as an obstacle to the ratification of the Convention, since the obligation arising from the provisions of the Conventions was not to achieve full employment immediately but to pursue a policy designed to promote it. 129

The objective of providing full employment is incorporated in Article 43 under the Directive Principles of State Policy of the Constitution of India, which provides that, "The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life...". 130 Article 16 guarantees equality of opportunity for all citizens in matters relating to public employment, irrespective of race, caste, sex, descent, place of work or residence. Though Article 1(1) of the Convention requires a ratifying State to declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment so as to ensure suitable work for all, there is no separate employment policy in this regard in India. Employment planning and policy forms an integral part of the planning process for the country. Employment generation is aimed at achieving through the development of

from the point of view of developing countries to think of "full employment"; see Vaidyanathan, n.39, pp.82-83. Besides, the general reasons put forward by various countries, though they can vary within them, for non-ratification of the Convention No.122, can be summarised as follows as (i) the scope and coverage of the Convention is too wide to secure full implementation; (ii) it is becoming increasingly unrealistic in relation to emerging economic conditions in developing countries as a result of liberalisation and globalisation policies; (iii) the supervisory bodies which monitor the application of the Conventions tend to adopt an unduly legalistic and rigid approach; and (iv) the underemployment, low productivity and low incomes prevailing in many countries of the region induce a feeling that the goal of full employment, propounded by the Convention, is too remote and difficult to warrant ratification; see Technical Report for Discussion at the Asian Regional Consultation on Follow-up to the World Summit for Social Development-"Towards Full Employment" (Bangkok: 13-15 January 1999), http://ilo.law.cornell.edu/public/english/region/asro/bangkok/feature/f-emp36.htm, 16 October 2006.

129 International Labour Standards Report of National Tripartite Seminar (NOIDA: National Labour Institute, 1993), p.116. This observation of the Committee of Experts strengthens the argument that the promotional Conventions can be implemented progressively.

130 Article 43 of the Constitution of India runs as follows, "The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas". In this regard, Article 41 may pertinently be quoted, which provides that, "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want".
sectors and sub-sectors with sufficient employment potential and keeping in view other economic and social objectives.131

Expansion of employment opportunities has been a major objective in various Five-Year Plans in India and different policy measures have been adopted from time to time with a view to achieving this objective. The policy measures thus adopted in the Five-Year Plans are coordinated with overall economic and social policy of the Government. In addition to employment generation in the normal process of development, special government programmes to provide gainful employment to rural poor have been initiated since the early sixties. Particularly, the Integrated Rural Development Programme (IRDP), The Jawahar Rozgar Yojana (JRY), the Self Employment Programme for Educated Unemployed Youth (SEYYU) and the Employment Guarantee Scheme (EGS) in Maharashtra has been under implementation.132 It may be noted that the enactment of the National Rural Employment Guarantee Act, 2005 by the Central Government has been a major legislative initiative for providing employment for the unemployed poor. The 2005 Act is primarily aimed at enhancing livelihood security in rural areas by providing at least 100 days of guaranteed wage employment in every financial year to those household whose adult members volunteer to do unskilled manual work.133 This Act can be described as a concrete statutory step in carrying out the objectives of the ratified Convention.

Besides, National Employment Service with a network of around 958 Employment Exchanges registers the job seekers for their economic rehabilitation in the labour market. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 makes it obligatory on the part of the employer to notify vacancies occurring in their establishments. The Employment Exchanges operate at the State, District and

133 Ministry of Rural Development, Government of India, “National Rural Employment Guarantee Act, 2005”, http://rural.nic.in/rajaswa.pdf, 25 November 2005. It may be noted that in pursuance to the 2005 Act, the Scheme of National Rural Employment Guarantee was launched by the Government to provide a minimum of 100 days of assured employment to at least one adult member of every rural household, and the Scheme has been expanded from 200 districts to cover additional 130 districts now; see Agenda of the Tripartite Committee on Conventions, 31st Session, 18 January 2008, Ministry of Labour and Employment, Government of India, p.3.
Regional levels and deal with various categories of workers like women, young people, old workers, scheduled castes and scheduled tribes, disabled persons. The provision of separate counters for women registrants at larger employment exchanges, accompanied by the posting of women officers has been made.

Over the years the employment exchanges have adopted a number of special measures to safeguard the interests of jobseekers belonging to scheduled castes and scheduled tribes. These measures include providing vocational guidance and imparting pre-recruitment training, sponsoring suitable candidates against unreserved vacancies, and enlisting the cooperation of scheduled caste and scheduled tribe associations in locating suitable candidates. Further, twenty-two coaching-cum-guidance centres for scheduled tribes provide occupational information, vocational guidance and counselling, together with information on job requirements and the types of tests and interviews they are likely to undergo when called by employers. In order to protect the interests of the disabled persons, the Government has enacted the Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which has come into force on 7 February 1996. The Act mainly provides for both preventive and promotional aspects of rehabilitation like education, employment, vocational training. Further, private placement agencies are growing in big towns and cities, totalling around 769 of such agencies. As career institutions there exist 82 university employment information and guidance bureaux for students in the country. Vocational guidance services are provided to all categories of clients through 362 vocational guidance units attached to employment exchanges.

It is evident from the above analysis that since the 1960s the Government has been implementing a number of programmes in respect of promoting the employment generation in different sectors under the guidance of various policy measures as well as some legislative initiatives. It shows in turn that the Convention requires programmatic

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135 General Survey on Promoting Employment, n.123, para.126, p.43.
136 Ibid., para.142, p.48.
138 General Survey on Promoting Employment, n.123, para.296, p.86.
139 Ibid., para.307, p.88.
140 Ibid., para.308, p.89.
measures to be applied at the national level for carrying out its objectives by a ratifying State. Since India has already been implementing various employment generation programmes, the ratification of the Convention in a sense has become practical. This can be substantiated from the analysis that the Convention does not require the realisation of the objective of full employment immediately but at a future date. This allows the implementation of the Convention gradually but obligatorily.

II.1.5. Minimum Age Convention, 1973 (No.138)

Though the Minimum Age Convention, 1973 (No.138) is primarily of prescriptive kind, it contains an initial obligation of promotional nature. Article 1 of the Convention provides that, “Each Member for which this Convention is in force undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons”.

Hence, under Article 1 the primary objective is the pursuit of a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age of admission to employment or work. For this, the aim of the national policy is to enable young persons to achieve their fullest physical and mental development. It may here be noted that in contrast with the Worst Forms of Child Labour Convention, 1999 (No.182), which does not provide for a national policy, it is not a requirement of the Convention No.138 to take measures in order to abolish child labour within a certain time frame.

The Committee of Experts has pointed out that it is the first time the terms “national policy” has been used in a minimum age Convention. Further, the first preliminary report sent to governments suggested that under the proposed Convention the two objectives of total abolition of child labour, and the general and progressive raising

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141 The Convention No.138 aiming at the effective elimination child labour sets the general minimum age for admission to employment or work at fifteen years. It has been ratified by 150 Member States as on 01 March 2008.
of the minimum age for admission to employment or work "would be pursued by ratifying States as a matter of national policy. Such a provision would make it clear from the beginning that the Convention is not intended simply as a static instrument prescribing a fixed minimum standard but as a dynamic one aimed at encouraging the progressive improvement of standards and of promoting sustained action to attain the objectives". 144

At a later stage of the preparatory work it has been stated that, "Article 1 does not impose an obligation to take any specific measures beyond those described in the subsequent provisions". The requirement is that policies and measures must be oriented so as eventually to achieve the stated objectives, and so Article 1 must be read together with the other Articles of the Convention. Besides, it is clear that the obligation to carry out such policies is a graded one, and is conditioned by national circumstances and the level of the standards already achieved in the country. 145

It is instructive to note that ratifying Member States have the right to choose the means which will be used to attain the objective. Yet, it is necessary to stress that a child labour policy becomes efficient only if it is co-ordinated with the entire set of policies relating to children education, children health, support for families and so on. In particular, the minimum age for employment must correspond to the age of completion of compulsory schooling in accordance with Article 2(3). In addition, a policy aimed at the effective abolition of child labour must be co-ordinated with employment policy, incomes policy and in particular with those measures taken for the reduction of poverty and the risks of exclusion, as well as social security measures. 146

Besides, in its 1992 Report the Committee of Experts has drawn the attention of the governments to the importance of the existence of legislation, which establishes an

145 Ibid., paras.58-59.
unequivocal minimum age for admission to all types of employment and occupation, however, subject to the provisions of the Convention which admit individual or collective exceptions in respect of certain forms of light work, within the framework of a national policy.\(^{147}\)

Since there is no omnibus provision prohibiting children below certain age from entering into any employment or work, India has not been able to ratify the Convention No.138. Current labour legislations dealing with various sectors of employment prescribe different minimum age for admission to employment. For instance, the Factories Act, 1948, the Plantations Act, 1951, the Motors Transport Workers Act, 1951, the Mines Act, 1952, the Merchant Shipping Act, 1958, the Apprentices Act, 1961, and the Bidi and Cigar Workers (Condition of Employment) Act, 1966 prohibit employment of children below a certain age. Therefore, in order to ratify the Convention No.138, a suitable all encompassing Central legislation specifying a minimum age for admission to employment is needed to be enacted.\(^{148}\)

However, the principle of the effective abolition of child labour is recognised in the Constitution of India. Article 24 of the Constitution requires that, “No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment”.\(^{149}\) Further, Article 39 of the Constitution states that, “The State shall, in particular, direct its policy towards securing... (e) that the health and strength of workers, men and women, and the tender age of children are not abused and

\(^{147}\) Report of the Committee of Experts, n.86, para.59, p.23.


\(^{149}\) It is essential to note the efforts made by the Indian judiciary in eradicating the problem of child labour through its various decisions. The Supreme Court of India in People's Union for Democratic Rights vs. Union of India (AIR 1983 SC 1473), rejecting the contention that the Employment of Children Act, 1938 was not applicable in case of employment of children in the construction work of Asiad Projects in Delhi as construction industry was not a process specified in the schedule to the Children Act, has held that the construction work is hazardous employment and so under Article 24 no child below the age of fourteen years can be employed in the construction work even if construction industry is not specified in the schedule to the Employment of Children Act, 1938. Further, the decision prohibiting the employment of children below the age of fourteen years in construction work as hazardous employment has been reiterated by the Supreme Court in Labours Working on Salal Hydro Project vs. Jammu and Kashmir (AIR 1984 SC 177). More constructively, the Supreme Court in M.C. Mehta vs. State of Tamil Nadu (AIR 1997 SC 699) has held that children below the age of fourteen years can not be employed in any hazardous industry, mines or other works and has laid down other exhaustive guidelines required to be followed by the State authorities for protecting economic, social and humanitarian rights of millions of children working illegally in public and private sectors; see Pandey, n.44, pp.290-291.
that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength". The Government of India in its 2002 Annual Report supplied to the ILO on the elimination of child labour states that there is a national policy aimed at ensuring the effective abolition of child labour. It is one of the important objectives of the country’s social policy. In accordance with the Constitutional provisions and the 1979 Resolution on child labour adopted at the International Labour Conference, a National Policy on Child Labour was announced in 1987, which contains the action plan for tackling the problem of child labour.\(^{150}\)

In addition to the several legislations containing provisions on the restriction and prohibition of child labour, the Child Labour (Prohibition and Regulation) Act, 1986 is the direct legislation applicable on the subject. However, it does not establish a general minimum age for admission to employment. Though the term "hazardous work" has not been specifically defined in the 1986 Act, it prohibits the employment of children, below the age of 14 years, in 13 occupations or activities in Part A, and in 57 processes in Part B of the Schedule. Nevertheless, this does not apply to any workshop where any process is carried out by the occupier with the aid of his family, or to any school established by, or receiving assistance or recognition from, the Government.\(^{151}\) It may be noted that the 1986 Act while prohibiting employment of children in the occupations and processes listed in the Schedule to the Act, regulates the conditions for employment in others. But the 1986 Act does not cover the informal sector. Under section 5 the Central Government is empowered to constitute a Child Labour Technical Advisory Committee for the purpose of making recommendations to the Government for the inclusion of additional occupations and processes in the Schedule to the 1986 Act.\(^{152}\)

The Government in its 2006 Annual Report supplied to the ILO on the subject states that in order to provide for compulsory schooling for children, the Constitution of

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\(^{151}\) Section 3 of the Child Labour (Prohibition and Regulation) Act, 1986 provides that, "No child shall be employed or permitted to work in any of the occupations set forth in Part A of the Schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule is carried on: Provided that nothing in this section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family or to any school established by, or receiving assistance or recognition from, Government".

\(^{152}\) Governing Body Review of Annual Reports, n.150, pp.368-369.
India was amended through the Constitution (86th Amendment) Act, 2002 inserting Article 21A, which makes education for children in the age group of 6-14 years a fundamental right. In respect of policy on education, the 2002 Annual Report mentions about the National Policy on Education, 1968, which states that, “Strenuous efforts should be made for the early fulfilment of the Directive Principle under Article 45 of the Constitution seeking to provide free and compulsory education for all children up to the age of 14. Suitable programmes should be developed to reduce the prevailing wastage and stagnation in schools and to ensure that every child who is enrolled in schools successfully completes the prescribed course”. Further, the National Policy on Education, 1986 states that, “It shall be ensured that free and compulsory education of satisfactory quality is provided to all children up to 14 years of age before we enter the twenty-first century. A national mission will be launched for the achievement of this goal”. 

153 Article 21A states that, “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine”. As far as the minimum compulsory education is concerned, the Constitution of India under Article 45 as a Directive Principle of State Policy states that, “The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years”. Further, it may be noted that newly inserted clause (k) to article 51A imposes on a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years. See Governing Body Review of Annual Reports under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (Geneva: International Labour Office, 2006), p.247. However, before the Constitution (86th Amendment) Act, 2002 inserting Article 21A, the gap was taken over in 1993 by a judgment of the Supreme Court of India in Unni Krishnan vs. State of Andhra Pradesh ((1993) 1 SCC 645). The Court has held that the right to free education as a fundamental right under Article 21 of the Constitution is available only to children until they complete the age of fourteen years, but after that the obligation of the State to provide education is subject to the limits of its economic capacity and development. In fact, this was the result of consequences arose after the judgment of the Supreme Court in Mohini Jain vs. State of Karnataka ((1992) 3 SCC 666), where without specifying the age of person it was held that the right to education was a fundamental right under Article 21 of the Constitution as that flows directly from the right to life; see Pandey, n.44, pp.240-241.


156 Governing Body Review of Annual Reports, n.150, p.370. It may be noted that the Government has enacted the Commissions for Protection of Child Rights Act, 2005 in order to ensure that the various child rights enumerated in the UN Convention on the Rights of the Child, 1989, including the right to education get enforced; see the Government of India’s Comments on Observation 2004 made by the Committee of Experts on Application of Conventions and Recommendations (CEACR) (concerning child labour) in Annexure-I to Report of the Government of India under Article 22 of the ILO Constitution on Convention No.29 concerning Forced Labour, 1930 for the period- 1 June 2004 to 31 May 2006, p.16. Besides, the Government has launched a countrywide campaign for education under its Sarva Shiksha Abhiyan (Education-for-All Campaign) for ensuring education to every child below the age of 14 years; see Agenda
The Government in its 2002 Annual Report further states that the employers' and workers' organisations are represented as members of the Central Advisory Board on Child Labour and the National Steering Committee, and the ILO-IPEC (International Programme on the Elimination of Child Labour). They participate in the deliberations of the Board and the Committee; and they are also involved in the implementation of projects at the district level. There are other multilateral agencies with which the Government is working to fight child labour. In addition to the ILO-IPEC, the Government is working with the United Nations Children's Fund (UNICEF). Furthermore, the Department of Women and Child Development, and the Ministry of Labour are working with the UNICEF, and the Ministry of Rural Development is working with the United Nations Development Programme (UNDP).157

There are several successful activities, which have been undertaken under the National Child Labour Projects (NCLPs), the Grants-in-aid Projects, and the IPEC. A number of these have closely involved the employers' and workers' organisations, nongovernmental organisations and representatives of civil society. The number of NCLPs in operation has increased from 93 projects covering 2,00,000 children in 2000, to 100 projects covering 2,13,000 children in 2001.158

Further, under the NCLPs special schools have been established to provide formal and vocational training. Supplementary nutrition, stipend, health care, etc., are provided to children withdrawn from employment. Three main policies are pursued, namely legal action plan for strict law enforcement, use of ongoing development projects to contribute to eliminate child labour, and projects for the welfare of working children in areas of high concentration of child labour. The NCLPs are implemented in 250 districts with 5,394 special schools rehabilitating 2.77 lakh children. An amount of Rs. 93.158 crores have been spent on various schemes for the rehabilitation of child labour in the financial year

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157 Ibid., p.372.
158 Ibid., p.373.
2004-05. Over 3.23 lakh children have already been withdrawn and mainstreamed into
the formal education system.\textsuperscript{159}

In general, the above description on the Constitutional and other statutory
provisions, judicial decisions, and policy-based programmes directed towards the
elimination of child labour makes out that India has been implementing the Convention
No.138 in its spirit despite being unratified. In particular, firstly, it illustrates that the
Convention No.138 has an element of promotional nature providing for the pursuance of
a national policy by ratifying Member States, and secondly, it indicates that the element
of promotional nature of the Convention No.138 even if unratified has been immensely
constructive in implementing different policies and programmes drawn up by the
Government of India aimed at the abolition of child labour.

On the whole, the study has dealt with the Conventions falling under the subjects
relating to non-discrimination in employment, equal remuneration for men and women,
rural workers' organisation, employment policy, and minimum age for admission to
employment. Apart from the above analysed promotional instruments, there are certain
other Conventions,\textsuperscript{160} which may also be identified as promotional in character, falling
outside the scope of the present study.

\textbf{II.2. Convention of Principle}

Like the promotional instruments, a Convention of principle is also based on the
objectives to be attained during its application at the domestic level by a ratifying
Member State. However, contrary to the promotional instruments, it requires a particular
objective to be achieved by a ratifying Member State, while leaving the measures to

\textsuperscript{159} Governing Body Review of Annual Reports, n.153, pp.247-248.
\textsuperscript{160} The Collective Bargaining Convention, 1981 (No.154), and the Workers with Family Responsibilities
Convention, 1981 (No.156), the Human Resources Development Convention, 1975 (No.142), the
Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No.159), the Private
Employment Agencies Convention, 1997 (No.181), the Labour Administration Convention, 1978 (No.150),
the Paid Educational Leave Convention, 1974 (No.140), the Home Work Convention, 1996 (No.177), the
Occupational Safety and Health Convention, 1981 (No.155), the Occupational Health Services Convention,
1985 (No.161), the Chemicals Convention, 1990 (No.170), the Prevention of Major Industrial Accidents
Convention, 1993 (No.174), the Safety and Health in Mines Convention, 1995 (No.176), the Safety and
Health in Agriculture Convention, 2001 (No.184), and the Employment Promotion and Protection against
Unemployment Convention, 1988 (No.168). These up-to-date Conventions have not been ratified by India,
and are outside the scope of the present study.
secure that objective to that State. The Forty-Hour Week Convention, 1935 (No.47)\textsuperscript{161} is the only standard, which can be regarded as a Convention of principle.\textsuperscript{162} Article 1 of the Convention No.47 provides that, "Each Member of the International Labour Organisation which ratifies this Convention declares its approval of-- (a) the principle of a forty-hour week applied in such a manner that the standard of living is not reduced in consequence; and (b) the taking or facilitating of such measures as may be judged appropriate to secure this end; and undertakes to apply this principle to classes of employment in accordance with the detailed provision to be prescribed by such separate Conventions as are ratified by that Member".

The Convention is designed to bring about the introduction of a working week of forty hours, as a means of reducing unemployment and enabling the workers to share in the benefits of rapid technical progress.\textsuperscript{163} From Article 1 it becomes clear that as the Convention sets only the principle of forty-hour week, it requires separate Conventions in order to carry out that principle. In line with the objective of the principle of forty-hour work a week, (only) three sectoral Conventions can be found adopted by the ILO relating to glass bottle works, public works, and textiles.\textsuperscript{164} However the Convention has been registered with only fourteen ratifications. India has not ratified the Convention. India has been implementing a general forty-eight hour work a week in factories and mines, however with certain exceptions, through the Factories Act, 1948 and the Mines Act, 1952.

The purpose of this section is to indicate that the Conventions based on "objectives" contain not only promotional instruments but also a binding instrument of

\textsuperscript{161} The Convention No.47 is no longer a fully up-to-date instrument but remain relevant in certain respects. The Governing Body has decided to maintain the status quo with regard to the Convention No.47 pending the adoption of revised standards on hours of work and working time arrangements; see G. Von Potobsky and J. Ancel-Lenners, "Working Time: Hours of Work, Weekly Rest and Paid Leave" in ILO, International Labour Standards: A Global Approach (International Labour Office, 2001), p.266.

\textsuperscript{162} C. Wilfred Jenks, Flexibility in International Labour Conventions (Geneva: International Labour Office, 1960), p.43.

\textsuperscript{163} Vaidyanathan, n.103, p.76.

\textsuperscript{164} Potobsky, n.161, p.285. The Reduction of Hours of Work (Glass-Bottle Works) Convention, 1935 (No.49) (Shelved), the Reduction of Hours of Work (Public Works) Convention, 1936, (No.51) (Withdrawn), the Reduction of Hours of Work (Textiles) Convention, 1937 (No.61) (Withdrawn) were the three sectoral Conventions adopted by the ILO confirming the principle laid down in the Convention No.47. While the Convention No.49 has been ratified by 9 Member States, the Conventions Nos. 51 and 61 have not been ratified by any Member State till 01 March 2008 and hence have not come into force.
principle, which is the Convention No.47. It is also found that while the ILO has adopted only one Convention of principle, it has experimented with many promotional Conventions providing particularly for a national policy based implementation.

II.3. Summing-up

The Chapter has thus analysed the relevant Conventions based on objectives, which contained promotional Conventions and a Convention of principle. Since there is only one Convention of principle, namely the Forty-Hour Week Convention, 1935 (No.47), the chapter has concentrated primarily on promotional Conventions. The study analysing the Discrimination (Employment and Occupation) Convention, 1958 (No.111) has found that declaring and pursuing a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation with a view to eliminating any discrimination in that respect by the Member States reflect the promotional nature of the instrument. The nature and ingredients of national policy have meticulously been dealt with. The study has emphasised essential role of employers’ and workers’ organisations in promoting the principle of equality at the workplace itself, and the corresponding responsibilities while pursuing a national policy. The study has also analysed how far India with the help of promotional flexibility thorough national policy measures has been able to implement the Convention in a judicious way in respect of public employment while taking into account its Constitutional and legislative provisions. Similarly, the study has analysed how the Equal Remuneration Convention, 1951 (No.100) while not providing specifically for the formulation of a national policy, does promote its objective of equal remuneration for men and women for work of equal value. It is followed by an examination of various policy and legislative measures carried out by India towards the implementation of the Convention.

The study has examined the Rural Workers’ Organisations Convention, 1975 (No.141) in order to see how a promotional instrument can also have prescriptive approaches in its implementation. India’s record of performance in terms of implementation of the Convention is also tested. A classic example of promotional Convention has been discussed in the Employment Policy Convention, 1964 (No.122). It has stressed on an active policy of employment to be pursued by the Member States in
achieving the objective of the instrument. It has set a clear flexibility of promotional nature without laying down any time period for achieving the objective of full, productive and freely chosen employment. India’s policy measures towards employment generation have been considered. The study has analysed how an instrument though primarily of prescriptive kind, does also contain a flexibility of promotional nature, in the Minimum Age Convention, 1973 (No.138). The Convention while principally providing for the implementation of prescriptive provisions, also requires Member States to pursue a policy aiming at effective abolition of child labour and to raise progressively the minimum age for admission to employment or work. For this, the legislative and policy measures being carried out by India to implement this unratified Convention at least in spirit have been analysed. The study throughout the chapter while analysing the flexible nature of promotional Conventions has also considered the role of workers’ and employers’ organisations in achieving the objectives of the Conventions in their implementation by Member States. The study has also examined the only Convention of principle, namely the Forty-Hour Week Convention, 1935 (No.47) in order to clarify that the Conventions based on “objectives” contain not only promotional instruments but also a binding instrument of principle, though it has been less effective in attracting ratifications by Member States.