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(The Founder of Banaras Hindu University)

(25.12.1861 - 12.11.1946)

"It is my earnest hope and prayer, that this centre of life and light, which is coming into existence, will produce students who will not only be intellectually equal to the best of their fellow students in other parts of the world, but will also live a noble life, love their country and be loyal to the Supreme Ruler."

- Madan Mohan Malaviya

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ARTICLES

SHORTER ARTICLES

BOOK-REVIEW

CITIZENSHIP BETWEEN STATELESS AND MULTI NATIONALITY IN INTERNATIONAL LAW (A CASE STUDY TO THE SITUATION IN KUWAIT)

EISA AL ENEZY*

ABSTRACT : Citizenship is a fundamental human right upon which other fundamental human rights are relying. When national citizenship legislations lack enforcement, exceptional situations will occurred and affect other groups of people. If Kuwaitis are subject to inequality as a result to the misinterpretation of the Kuwaiti citizenship law, stateless cannot be in a favorable situation. Despite the fact that the regulation of citizenship is a pure internal affair, International law is competent to assure that no individual should be exempted from his rights as a result to the miss -codification of the citizenship code. Moreover, international law should be competent to assure that no national legal system support the dual or the multi-citizenship in a climate full of stateless.

KEY WORDS : Citizenship, Statelessness, International Law, Fundamental Human Rights.

I. INTRODUCTION

Citizenship is a fundamental human right upon which other fundamental human rights are relying. In order to assure and maintain fundamental human rights, including citizenship, most national legal systems reserve portion of their constitution or basic laws to such rights. For instance the Kuwaiti Constitution specifies few articles to deal with citizenship issues,[1] and the National code of Citizenship was created for such purpose.[2] However, both sources of regulations failed to deal with citizenship without side effects. For instance, an increasing number of stateless people in Kuwait are prevented from basic human rights, and Kuwaiti citizens who enjoy other countries citizenship are threatened to be deprived from the Kuwaiti citizenship.[3]

The citizenship is not a goal itself, but only a path according to which several fundamental human rights, such as rights to work, education, health care, social services… etc., can be accorded.

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1. *Kuwaiti Constitution of 1961.*
2. *Kuwaiti Citizenship Law of 1959.*
3. *As a result to the confrontation between the Minister of Interior and the Bedwin PMs who have a family ties with some Gulf countries, especially Saudi Arabia, and believe to possess its citizenship, were threatened by the Minister and his PM supporters to unmask all PM with dual citizenship and to withdraw their Kuwaiti citizenship.*

Citizenship used to be and always is an internal affair regulated by national legislations. Accordingly, the international law is prevented from interfering in the internal affairs of any state, unless there is a severe violation to the human rights' protection. International law, vis-à-vis to human rights issues, including citizenship, is always in alert position, monitoring the national treatment of human rights, and be ready to interfere whenever there is a national failure in protecting human rights. This harmony between national and international law attribute the priority to examine human rights issues- including citizenship- to the national legal system. The international legal system has no place unless there is a flagrant national failure.

A quick survey to the legal system of citizenship will illustrate unjustified national situations, where in some countries a group of people are completely prevented from the right to citizenship, meanwhile, some other group of people are enjoying more than a single citizenship, which entitle them several human rights in several countries.

Citizenship is not a new issue in the national or the international levels. The approximate number of stateless individuals around the world is 15 million[4], meanwhile another number enjoy double or multi-citizenship.

The occurrence study attempts to examine the citizenship's issue from a comparative point of view between statelessness and multinational ties, which can, easily, illustrate the unfairness and injustice in dealing with the citizenship issues, especially that when a group of people are suffering and dying as a result from the lack of citizenship some other people are enjoying double protection in different countries. It is unjustified to accord fundamental and non-fundamental human rights to individuals with dual or multi-citizenship, with the knowledge that they are enjoying such rights else where, meanwhile preventing stateless from basic human rights with the knowledge that they do not enjoy such rights any where is also unjustified. Therefore, international law should interfere to regulate such unjustified situation, provoke the principle of equality among humans and prevent any discrimination based on any reason. As long as national legal systems fail to accord citizenship to all individuals under its sovereignty, it should prevent them from enjoying citizenship from other countries. In another meaning, national legal system should not be able to accord citizenship or citizenship's rights to citizens of another state as long as there are still stateless who are not enjoying any citizenship.

A person not having a nationality under the law of any State is called "Stateless". He may either be stateless at birth, as a result of the fact that he does not acquire a nationality at birth according to the law of any state, or he may become stateless subsequent to birth by losing his nationality without acquiring another. As a matter of International Law, citizenship and nationality are congruous, although there may be difference between the two concepts in the domestic laws.

The term "Nationality" in the sense in which it is used is a politico-legal term denoting membership of a State. It must be distinguished from nationality as a historic-biological term denoting membership of a nation[5]. In the latter sense it means the subjective corporate sentiment of unity of members of a specific group forming a "race" or "nation" which may,

4. N. High Comm'r for Refuges, 2006 Global Trend: Refugees, Asylum-Seekers, Returners, Internally Displaced and Stateless Persons 14(June 2007), available at http://www.unhcr.org/statstics/STATISTICS/4676a71d4.pdf

5. Cf. Vishnaik, "Le Statut International des Apatrides", in Recueil des Cours, 43 (1933) (i)'pp. 115-246,at p.135.

thought not necessarily, be possessed of a territory and which, by seeking political unity on that territory, may lead to the formation of a State[6].

One of the terms frequently used synonymously with nationality is citizenship. Conceptually and linguistically, the terms "nationality" and "citizenship" emphasis two different aspects of the same notion: State membership. "Nationality" stresses the international, "citizenship" the national, municipal aspect[7].

Being Stateless means you do not have any civil rights, such as, personal documents, education, employment or access to medical care. In Kuwait there are around 107 thousand stateless people[8]. Anyone who wants to be a citizen of Kuwait must be registered in the 1965 census. Otherwise he would be considered as illegal resident by the Government[9]. Usually they are Arabs who have long lived in Kuwait and who either have no documentation or do not declare it in order to maximize their chances of remaining in the country. 'bidouns", as they are called have suffered discrimination in all avenues where documentation has increasingly come to be required in all aspects of life: education, health, employment and travel[10].

1986 Amendment of The Kuwait Nationality Law, in order to demarcate the privileges of Citizenship from migrant workers.

Bidoun means 'without' and connotes those whose legal status is unclear, who are undocumented and may effectively be stateless. Whilst the Kuwaiti Government claims that most Bidouns are concealing their nationalities out of depict, the Kuwaiti bureaucracy was lax about requiring documentation before 1986 and many Bidouns actually worked in the government machinery (especially armed forces), studied at schools, were treated in the healthcare system and travelled freely before the tightening up of ID requirements by the Government.

Some Bidouns therefore 'missed out' the opportunity to become citizens by not applying in the 1950-60s for registration or may have travelled for work to Kuwait without passports from their countries of origin before its independence.[11]

This study has two aims. It gives an overview of the nature of the nature, backgrounds of statelessness and of the global efforts against statelessness. More importantly. It provides information on the situation of stateless persons in the State of Kuwait, and advances policy suggestions for both improving administrative practices and the institutional groundwork for the treatment of stateless persons, and reducing statelessness. The study canvasses the current international legal regime for the protection and reduction of stateless persons, which is divided into several headings. Such as Statelessness in International Law is dealing with rights and duties of stateless guaranteed in a state; Statelessness in International Law Instruments, deals with the specialized instruments meant for statelessness as well as other general Instruments that spot light over statelessness; International Law in Kuwait Legislation, gives glimpses of the influence of International Law in Kuwait

6. State Nation": cf. joseph, Nationality, Its Nature and Problems, passim, esp. at p.353.
7. Cf. Gargas, "Die Staatenlosen," in Bibliotheca Visseriana, vol. VII (1928), p.6: "Nationality is the delimitation of personal jurisdiction, while citizenship reers to the legal relationship of the citizens of the state." (Author's translation)
8. "World Directory of Minorities and Indigenous People "available at: http://www.minorityrights.org/4278/kuwait/bidoun.html (last visited on April 19, 2014)
9. The Report from Amnesty: "The With outs of Kuwait" (published on September 17, 2013) available at: http://www.reliefweb.int/report/kuwait/'withouts'-kuwait (last visited on April 2, 2014).
11. See Nationality Law 15/1959, creating a period of registration of citizenship in 1960.

Legislation with regard to statelessness; The Role of International Organisations in Fighting Statelessness, deals with different International organizations that fight to protect and decrease the problem of statelessness; Citizenship Laws in International Law, deals with the types of citizenships and the laws dealing with such citizenships in the International sphere; Citizenship Laws in Kuwait, deals with the influence of citizenship laws over statelessness prevailing in Kuwait; Conclusion, deals with the conclusion to the above study.

II. STATELESSNESS IN INTERNATIONAL LAW

Stateless is the opposite of citizen, which identify someone "who is not considered as a national by any state under the operation of its law,"[12] or "any person who is not considered as a national by any state through its nationality legislation or constitution."[13] Accordingly, citizenship is subjected to the national legislation of each state, which may create bizarre situations, such as stateless. International law may only intervene in the internal affairs, to assure the enjoinment of every one of basic human rights and services, where number of stateless live and die "unprotected and unrecognized."[14]

Stateless exist in most of the states, such as Kuwait, United Arab Emirates, Taiwan, Saudi Arabia … etc. This phenomenon appeared as a result to the weakness of the national legal systems, which cannot, or do not want to, cover all the actual subjects under its umbrella. Stateless issue would not appear to the surface if all individuals are enjoying their basic human rights, but the systematic violation of such rights and the negligence of the local authorities were always behind the escalation of such matter to reach the international level. Stateless used to live in Kuwait for ever, and the issue was never come up to the surface, because they used to enjoy their rights almost like citizens. When Iraq invaded Kuwait, a number of stateless supported and joined the Iraqi armed forces, which spotted the light over their legal situation in Kuwait, especially that their presence cost the government a considerable amounts for their education, healthcare, work and social services.

So, it was an opportunity to get rid of such financial costs by making pressure and pushes them to find another hosting country. This policy was successful in decreasing the number of stateless to the minimum. Today, the number of stateless in Kuwait went down from 500.000 stateless to 130.000 stateless. The lack of codification of stateless imposes them to sever violations of human rights, such as sexual trafficking, illegal exploitation, theft, and child trafficking.

International law does not differentiate between humans, and seeks human rights protection without regard to neither the beneficiaries nor discriminating among them.

Some states, such as Kuwait, under the pretext of national security, restrict nationalization. Meanwhile, nationalization policy is always recommended and serves the national security, because some crimes, if committed by nationals will be harshly prosecuted, but if committed by foreigners or stateless, the punishment will be attenuated. For instance, espionage and high treason are subject to harsher punishment if committed by citizens than

12. *Convention Relating to the Status of Stateless Persons, art. 1, Sept. 28, 1954, 360 U.N.T.S. 117, [hereinafter CRSSP.]*

13. *Interview with Philippe Leclerc, Chair, U.N. H. C.R. Statelessness Unit, Reuters Alert Net (May18,2007), available at http://www.alertnet.org/thenews/newsdesk/UNHCR/14bbdcab1076d21f508b51057342262f.htm (last visited May 13, 2010).*

14. *Maureen Lynch, U.S. Congress Holds Briefing on Stateless Children, REFUGEES INT'L, Feb. 16, 2007, available at http://www.refint.org/content/article/9853/? ,[hereinafter Lynch, U.S. Congress].*

if committed by non citizens. Article 41 of the Additional Protocol to the Four Geneva Conventions provides that "3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage. 4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs."[15] Moreover, the Kuwaiti Criminal Law No. 31/1970 modifying the criminal law provides in article 1(B) that "Any Kuwaiti join hold arm against Kuwait or join armed forces in status of war against Kuwait will be punished with the death penalty."[16] The threat will increase if stateless are working in sectors related to the national security, such as Minister of Interior, Armed forces and National Guards, which is the case in Kuwait.

International Law guarantees certain rights and duties for the Stateless. In the following sub sections of this chapter, we shall have a glimpse of the rights and duties of the Stateless people.

A. Stateless Rights

"Every person has the right to a nationality. Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality. No one shall be arbitrarily deprived of his nationality or of the right to change it"[17]

The rights guaranteed by International Law to the Stateless are:

1. Non-Discrimination Against Stateless

In language, culture and social customs the Bidouns are essentially indistinguishable from that of Kuwaiti citizens. Under the Kuwaiti Law, nationality is passed through the father to the children but not through the mother unless she is either widowed or divorced. As a result children born to a Kuwaiti woman and her Stateless Bidoun spouse are considered as Stateless[18].

Lack of citizenship contributes to cycles of poverty and vulnerability. Unable to locate a birth registration or citizenship document, children are unable to attend schools. They may fall victims of abuse and exploitation including gender- based violence, trafficking in persons, and arbitrary arrest and detention.

Until the mid of 1980's even though they were denied automatic nationality, the Bidouns were treated as lawful residents of Kuwait, whose claim for citizenship was under consideration. In 1985, the government began applying provisions of the Alien residence Law 7/1959 to the Bidouns and subsequently issued a series of regulations stripping them of almost all the previous rights and benefits. In 1985, the government restricted the Bidouns' rights for travel documents and fired many of the Bidouns employees (except from that of

15. *API to the Four Geneva Conventions, art. 41 (3,4).*
16. *Kuwaiti Criminal Law No. 31/1971 Modifying the Criminal Law No. 16/1960*
17. Article 20 of the American Convention of Human Rights (1969).
18. An Article by Refugee International titled "Kuwait Gender Discrimination Creates Statelessness and Endangers Families" (published on October 17, 2011) available at: http://www.refintl.org/policy/field-report/kuwait-gender-discrimination-creates-statelessness-and-endangers-families (last visited on March 31, 2014)

police and military.) who could not provide valid passport; private employees were also included in this. In 1987, the government began to refuse the Bidouns from automobile registration and application for driving, thereby restricting their freedom of movement. In the same year, the Bidoun children were deprived of attending schools and in 1988, this was extended to the Universities.[19]

Despite the fact that many Bidouns have lived in Kuwait for generations, have effective links to e national society, and reasonably consider Kuwait as their home Country, their access to Kuwait citizenship is increasingly blocked.

2. Protection of Rights Of Child

Affirmation of rights of child has become a matter of International concern now a days. Child abuses and trafficking in children are increasing day by day. Hence various Organizations such as the Organization of African Unity[20] (now the African Union) adopted the African Charter on the Rights of Child[321]. Modeled on the convention on the Rights of Child, the Charter shares some key principles with that early treaty, including non- discrimination and the primary consideration of the best interest of the child. Article 6 of the Charter, which focuses on name and nationality, asserts that:

i. Every child shall have the right from his birth to a name;

ii. Every child shall be registered immediately after the birth;

iii. Every child has the right to acquire a nationality; State parties to the charter shall undertake to ensure that their constitutional legislature recognizes the principles according to which a child shall acquire the nationality of the state in which he is born if, at the time of the child's birth, he is not granted nationality by any other state in accordance with its laws.[22]

In Kuwait Bidoun Children are deprived of the right to nationality as well as right to education. A recent incident is that: a group of Bidoun students were deprived of attending their evening classes (Abdullathif Al Shamlan middle School and Al jahra School) this October[23]. The Government Ministries continues to restrict Bitouns' rights to access continues to restrict Bitouns' rights to access different services.

If statelessness prevents adults from accessing wide variety of rights, such as marriage, real estate ownership, employment and political rights, it is devastating issue for children, where they will have no access of basic human rights such as right to identity, education and health care. All States shall accord to stateless children within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.[24] National and international laws accord right of education to all children without regard to their parents' legal status.

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19. See Human Rights Watch "Kuwait Promises Betraid: Denial of Rights of Bidun, Women and Freedom of Expression (2000): 'The Biduns of Kuwait: Citizens without Citizenship"
20. The Organization Of African Unity was established on 25th May 1963 with 32 signatory governments. It was disbanded on 9th July 2002 by its last chairperson, the South African President Thabo Mbeki and is now replaced by the African Union. 2. African Charter On The Rights And Welfare Of The Child OAU.DocCAB/LEG/24.9/49 (1990) entered into force in 1999.
21. African Charter On The Rights And Welfare Of The Child OAU.DocCAB/LEG/24.9/49 (1990) entered into force in 1999. See Human Rights Watch "Kuwait Promises Betraid: Denial of Rights of Bidun, Women and Freedom of Expression (2000): 'The Biduns of Kuwait: Citizens without Citizenship"
22. Report by Central Agency, Education (published on October 7 , 2013) available at: http:// www.bedoonrights.org/about/ (last visited on 10th April 2014)
23. See -Lynch, supra note ( ).
24. CRSSP, supra note ( ), art. 4.

Since public schools are prevented from accepting stateless children, in the recent years, a Kuwaiti fund was established, by charitable organizations, to accord stateless children the right to enjoy educational rights in private schools. In accordance with this trend some countries provided all children with educational rights without regard to their legal status. Among those countries Thailand, which adopted the policy of "Education is for all" includes those who lack Thai citizenship.[25] But when school officials in Thailand "stamp their diploma with bright red letters indicating that the student is not a Thai citizen"[26] violate other rights, because normally educational rights lead to right to work, which may be affected by such stamp.

3. Right to Speedy Trial on the Matter of Stateless Legal Status

Right to speedy trial is regarded as a fundamental right of an every person. It should be regarded as a Constitutional Right. All International Instruments guarantee the right to have a fair and speedy trial for a person.

A reasonable time limit to decide about the legal status of stateless is primordial issue, where some governmental process may last for decades. For instance, in Kuwait, some stateless cases, even after forty years are not solved yet. In Thailand, the process to receive recognition and documentation of their status, can take almost five years for a citizenship application to be processed.[27]

The question that might arise is what is the time limit that can be described as reasonable? There is no criterion to indicate the reasonable time limit, but no one can argue that forty years is not reasonable time limit. Today, in Kuwait, the fourth generation of stateless is born, and their status is not yet settled.

Unfortunately, spreading bribes among governmental workers became an obstacle preventing qualified stateless from obtaining citizenship within the right timeline, unless they pay bribes. On the other hand, unqualified stateless may possess citizenship if they were able to pay bribes. High-ranking personnel are Involved in such crime, such as members of the family Royal, Ministers, and Parliament members.[28]

Right to speedy trial also means right to fair trial. The right to a fair trial is one of the cornerstones of a just society. Without fair trials, innocent people are convicted and the rule of law and public faith in the justice system collapses.

Fair Trial is defined as a trial by a neutral and fair court, conducted so as to accord each party the due process rights required by applicable law; of a criminal trial, that the defendant's constitutional rights have been respected.[29] As a minimum the right to fair trial includes the following fair trial rights in civil and criminal proceedings.

i. The right to be heard by a competent, independent and impartial tribunal
ii. The right to a public hearing
iii. The right to be heard within a reasonable time
iv. The right to counsel
v. The right to interpretation

25. Joy K. Park et all, A Global CrisisWrit Large: The Effect of Being Stateless in Thailand on Hill-Tribe Children, 10 San Diego Int'l L. J. 495, 500 (2009)[hereinafter Joy Park et all].
26. Joy Park et all, supra note ( ) at 499-500.
27. Joshua Stiff, supra note ( ).
28. Nawaf Al-Fozeia, a Kuwaiti lawyer and a political activist, declared that he is willing to receive and follow any information from Stateless who were asked to pay bribes in view to settle their situation. Al-Watan Kuwaiti Newspaper, Apr. 15, 2010, During A Lecture to the Association of Abatement of Racial Discrimination: Politicians Financially Benefited From The Stateless Case, available at http://www.alwatan.com.kw/ArticleDetails.aspx?Id=22034 (last visited Apr. 22, 2010).

States may limit the right to a fair trial or derogate from the fair trial rights only under circumstances specified in the human rights instruments.[30]. Doebbler, Curtis (2006). Introduction to International Human rights Law. CD Publishing. p. 108. ISBN 978-0-9743570-2-7.

Based on the legal and human rights any accused person must have a fair trial with all the guarantees that save and preserve his/her human gains and rights. This is approved by The Kuwaiti constitution and agreed with all the international treaties and conventions, which are ratified by the State of Kuwait.

Rights are considered to be essential for the expansion of human personality. They offer to the individual a sufficient scope for free action and thus prepare ground for self-development.

B. Stateless Duties

Rights become meaningless in the absence of duties. Rights involve obligation as well. Every right involves a corresponding duty of others. In other words, every right is a duty in itself. If an individual exercises a right, he must bear in mind the same right belongs to others as well.

It became clear that statelessness impairs the ability of an individual to function as a member of a society.[31] For instance, in Kuwait number of deadly sacrifice were been made by stateless members of the Kuwaiti armed forces, such as saving the former Kuwaiti Amire, Sheikh Jaber Ahmad Al-Sabah, in the 1980s from a deadly attempt of assassination, which resulted in the death of three Stateless of his personal guards.

Similarly, after the Iraqi invasion to Kuwait, some of the stateless played a major role in escorting the Amire and most of the members of Family Royal to Saudi Arabia, without underestimating their role in resisting the attacking Iraqi armed forces and smuggling Kuwaiti arms and tanks from occupied armed forces to Saudi Arabia. All those scarifies are attributed to the fact that there was no differentiating in the treatment between Kuwaitis and stateless. With new governmental policy, anti-stateless policy, we do not hear nor witness any of those heroism among stateless in Kuwait.

If the national legal system classifies an individual as a Stateless, he will be bound to respect the sovereignty of the hosting country and conform to the national legislations.

1. Respect State Sovereignty

State sovereignty is intangible right in international law, confirmed by the Charter of United Nations. Accordingly, stateless should not enter any part of the country unless permitted. Otherwise no legal right should be established as a result to such violation, unless provided by the international law. Illegal action cannot establish legal rights, except for the children of the violators and within the limits provided by the international law, such as their right to education and healthcare.

Thailand adopted such rule when prevented any person who illegally entered Thailand from being eligible for Thai citizenship.[32]

Respecting the hosting countries' extends beyond their entrance to the country, to include abstaining from assisting relatives or friends to join them by breaching the sacredness of borders. Most stateless cases in Kuwait were resulted in by assistance from the part of already settled stateless in Kuwait. Kuwait is a bordering Saudi Arabia, Iraq, and Iran, from

29. Webster's New World Law Dictionary.

31. Stacie Kosinski, State of Uncertainty: Citizenship, Statelessness, And Discrimination in the Dominican Republic, 32 B. C. Int'l & Comp. L. Rev. 377, 397(2009)[hereinafter Kosinski.]

32. Joshua Stiff, Admin. Intern Thail, Int'l Justice Mission, in, Chiang Mai, Thail. (Mar. 4, 2008).

which the majority of stateless believed to be originated. In 1960s, in synchronism with the economic outburst, smuggling business, from surrounding countries, Syria, and Jordan to Kuwait flourished.

Today, Al-Qaeda, under the pressure of international governmental fight, found that dispirit stateless can be militarized and used to achieve its goals in hosting countries[33]. Earlier, in 1990-91, during the Iraqi invasion to Kuwait, Some stateless were useful to the invader army, providing critical information causing the capture of key figures in the Kuwaiti armed forces and the ceasing of arms in other cases. Some stateless continue to work normally, like the country never been invaded. Some of the traitorous were moving under the will to revenge from the government that mistreat them and the country mis-host them. The traitorous names were left behind by the retreating armed forces and ceased be the liberating armed forced, and used to prosecute them. With the retreating Iraqi armed forces, a great number of stateless traitorous and their families left the liberated country.

2. Respect the national legal system

Every hosted individual, citizens, foreigners and stateless are bound by the national laws, regulations, and measures taken for the maintenance of public order in the hosting country.[34] In view to be registered and enjoy human rights and services provided by the hosting countries, stateless should register them as provided by the national legislations. In Kuwait, no service can be provided unless certain documents should be presented. However, regulating any matter in the daily life should not reach to the level of preventing it. In another meaning, regulating the legal status of stateless is the state's right, but such regulation should not cause a barrier preventing the stateless from enjoying their basic human rights.

Prior to the Iraqi invasion to Kuwait in 1990, stateless were treated as Kuwaitis, study in public schools, treated in public hospitals, possess driving licenses, practice the business, enjoy housing services, and security social for members of the armed forces who fought beside Kuwaiti armed forces. After this date, hell was open in the face of stateless and their families. All previous rights were restricted by the security identification, which can only be issued by a new established committee, Illegal Residents Committee (IRC). The declarative purpose of IRC is to identify stateless that deserve citizenship, those who deserve permanent residency, and those who should leave back to their home countries.

The effective goal of IRC is make pressure over all stateless to recognize their home countries if they have one, otherwise to find, by all methods, countries that accept to host them. As a result, a great number of stateless in Kuwait bought citizenships in poor countries, Yemen, Comer Islands, Chad etc, which subjected them to be victims of organized crime who sell them counterfeiter documents, threatening them to be subject to criminal responsibly.[35]

Today, civil identification is the main document that is required by all governmental departments, which cannot be issued without a birth certificate. All Kuwaiti hospitals provide birth declaration, which is required for the issuance of birth certificate. However, only the Ministry of Health (MoH), Neonate and Late Department (NLD), that is eligible to issue the

33. Al-Watan, Kuwaiti Newspaper, March 11 March, 2010, at 1, available at http://www.alwatan.com.kw/ArticleDetails.aspx?Id=13367 (last visited on March 28, 2014).
34. CRSSP, supra note ( ), art.
35. A stateless family offered to by South Yemenis passports in beginning of the 1990s, and after they paid the requested amount, the Kuwaiti authorities, in cooperation with the Yeminis, found that such documents are counterfeiter. The family members face a possible punishment for committing the crime of counterfeit official documents, which may reach up to 5 years in prison. This is a case that was consulted by the author, and attributed to the Attorney Mubarak Saadoon Al-Motawaa.

birth certificate. This NLD is directed not to issue Birth certificate unless the parent citizenship is indicated. In a stateless case, they have to provide a "To Whom It May Concern" letter from the IRC attesting the nationality of parents. The IRC provides letters with primary guessing of the nationality of parents, which is denied by the parents and consequently shut out the issuance of birth certificate. Number of Court Orders required that the MOH should not delay the issuance of Birth Certificate, because it is a violation to the international law requirements regarding those rights of child to be recognized and have a nationality. This obligation was set fourth in the United Nations Convention on the Rights of Child, to whom Kuwait took part.[236] On the other hand, abstaining from providing a child a birth certificate is denying a fact that the child is born to those parents, which may qualify him citizenship based his mother's blood right. So, if the local authorities in Kuwait abstaining from verifying the location of birth, they should not abstain from verifying the parents of the child.

Today, the majority of stateless in Kuwait, as a result to the lack of Civil Identification, have no Driving Licenses, no job, no education, no health care, living in jail after passing the punishment because there are no country accepting to host them, and the government do not want to release them.

Duty is a phrase used to express some sense of moral dedication or responsibility to something or someone. Rights are permissible, communal or moral doctrines of sovereignty or power. As much as rights are important itself- governing they are incomplete without duties attached to them. The relationship between rights and duties is that every right of an entity involves a subsequent duty of others. We shall abide by the rights and duties over a State in which we live for the upliftment and wellbeing of mankind

III. STATELESSNESS IN INTERNATIONAL LAW INSTRUMENT

Many efforts have been taken by the International Organizations for the elimination or reduction of Statelessness, mainly by treaty, has been frequent. It is obvious that jus sanguinis is more apt to lead to statelessness since it makes it hereditary. The adoption of jus soli as a secondary principle for the acquisition of nationality by jus sanguinis countries, and the adoption of the rule prohibiting loss of nationality except concurrently with the acquisition of another nationality would lead to the elimination of statelessness. So far States have not, however, been willing to accept these rules.

The United Nations has resumed the efforts for the reduction and elimination of statelessness. The Commission on Human Rights[37] at its second session in 1947 a Resolution on Stateless Persons. The Universal Declaration of Human Rights, which was prepared by the Commission and adopted by the General Assembly of the United Nations on December 10, 1948, proclaims the "right to nationality."[38]

It is interesting to note from the foregoing that two different methods have so far been adopted by the United Nations in their efforts to reduce or eliminate statelessness: first, by

36. Convention on the Rights of the Child, opened for signature Jan. 26, 1990, G.A. Res. 44/25, U.N. GAOR 61st. plen. mtg. at 166, U.N. Doc. A/44/736 (1989), reprinted in 28 I.L.M. 1448 (1989) with corrections at 29 I.L.M. 1340 (1990) [hereinafter UNCCR].
37. The United Nations Commission on Human Rights (UNCHR) was established in 1946 by the ECOSOC, and was one of the first two "Functional Commissions" set up within the early UN structure. In 2006, it was replaced by the United Nations Human Rights Council.
38. The Universal Declaration of Human Rights (UDHR), proclaimed by the United Nations General Assembly in Paris on 10 December 1948, General Assembly217 A (III) (French) (Spanish).

recommendations on the governments in the form of resolutions adopted by the Economic and Social Council, and secondly, by the preparation of binding multilateral agreements, i.e., the method of international legislation.

International law recognized the stateless and dealt with them as subjects of the international law. Several instruments directed to human rights including stateless, and few other instruments were directed only to the protection of stateless rights. The next few pages will spot light, in the first part, over specialized instruments that were only scarified to the stateless protection. The second part will treat the general instruments of human rights that spot light, among other issues, over the rights of stateless.

A. Specialized Instruments For The Protection Of Stateless

The 1954 Convention relating to the Status of Stateless Persons[39] and the 1961 Convention on the Reduction of Statelessness[40] are the key legal instruments in the protection of stateless people around the world and in the prevention and reduction of stateless. While they are complemented by regional treaty standards and International human Rights law' the two Statelessness Conventions are the only global Conventions of their kind.

1. Convention Relating To the Status of Stateless Persons (CRSSP)

a) History of the Convention: Most of international law documents connect between refugees and stateless,[41] and this connection find its roots in the fact that the Convention Relating to the Status of Refugees, of 28 July 1951, was planned to be annexed with a protocol relating to the status of stateless.

However, the vote of member states, that time, resulted in the separation between both documents.[42] The decision to have a convention instead of a Protocol was taken by 12 votes to none, with 3 abstentions.[43]

b) Stateless Definition: According to the CRSSP Stateless person is "a person who is not considered as a national by any State under the operation of its law."[44] In this article the CRSSP excluded individuals

Receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance, … persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country, … and persons…committed a crime against peace, a war crime, or a crime against humanity, committed a serious non-political crime outside the country of their residence prior to their admission to that country, or been guilty of acts contrary to the purposes and principles of the United Nations.[45]

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39. Convention relating to the Status of Stateless Persons, NY, Sept. 28,1954,360 U>N>T>S> 117, entered into force June 6, 1960
40. Convention on the Reduction of Statelessness, done at New York on 30 August 1961. Entered into force on 13 December 1975, United Nations, Treaty Series, vol.989, p.175.
41. Convention relating to the Status of Stateless Persons, 360 U.N.T.S. 117, entered into force June 6, 1960, at Preamble, [hereinafter CRSSP].
42. Nehemiah Robinson: A Commentary: Convention Relating To The Status Of Stateless Persons: Its History and Interpretation, Institute Of Jewish Affairs, World Jewish Congress 1955, Reprinted by the Division of International Protection of the United Nations High Commissioner for Refugees 1997, at 2-3.
43. Id., fn. 13. 47
44. *CRSSP,* supra *note ( ) art. 1 (1).*
45. CRSSP, supra note ( ) art. 1 (2).

The content of this article matches the trend of international law, which seeks to protect unprotected individuals, such as stateless. Therefore, individuals enjoying citizenship and consequently protection and assistance from their states and enjoying international organization's protection and assistance are not treated as stateless. Since the purpose of attributing the stateless status to certain individuals is to assure their protection, any individual enjoying the "rights and obligations which are attached to the possession of the nationality" of the host country will be excluded from the definition.

Moreover, the host country is always eligible to host and provide citizenship to distinguished individuals, and, in the meantime, refuse to host or provide citizenship to criminals, whether international crimes or serious non-political crimes outside their host country and before their admission. Basically, only ideal and distinguish individuals who lack assistance and protection can be treated as stateless.

Any individual that is not included in this definition may not enjoy rights provided by the convention, but this does not prevent national authorities from including certain individuals under their umbrella of protection despite the international exclusion.

c) Exceptional Circumstances: Despite the importance of stateless rights in international law, most of international law instruments regarding human rights provide member states exceptional authority in special circumstances to trespass over the pre-designed limits. For instance, the International Covenant On Civil and Political Rights (ICCPR) empowers member states to violate certain human rights, and so does the European Convention on Human Rights and Fundamental Freedoms (ECHRFF)[46]. Similarly, the occurrence convention provides member states the same exoneration in times of wars and for national security reasons.[47]

The limited purpose of the CRSSP, which are, to define a class of stateless persons and to regulate and improve their status and to assure them the widest possible exercise of fundamental rights and freedoms. The reduction and elimination of stateless, however, were to require further international cooperation and coordination and harmonization of national laws. This was the role set for the International Law Commission and its work towards the 1961 Convention on the Reduction of Statelessness.

2. Convention on the Reduction of Statelessness (CRS)

a) History: The 1954 Convention relating to the Status of Stateless Persons had limited purpose, namely, to define a class of stateless persons, to regulate and improve their status, and to assure to them the widest possible exercise of fundamental rights and freedom. The reduction and elimination of statelessness, however, required further international cooperation and would need national laws to be harmonized, "at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness.[48]

At its 6th Session, in 1954, the United Nations Law Commission reviewed the special Rapporteur introduced two working papers on present statelessness, one each on elimination

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46. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, article 4(1); Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols No. 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*, art. 15.
47. CRSSP, supra note ( ), arts. 8 & 9.
48. United Nations Economic Social Council in resolutions 319 A and B (XI), 11 and 16 August 1950.

and reduction.[49] The Commission discussed an alternative Convention on the Reduction of Present Statelessness", nothing that the solution laid normally be that of their country of residence. The Special Rapporteur had also proposed that stateless persons be accorded the special status of "protected person" pending acquisition of nationality, entitling them to civil rights and diplomatic protection.[50]

In the case of occupied Kuwait, the Commission gave the Special Rapporteur "the mandate to examine the human rights violations committed in occupied Kuwait by the invading forces of Iraq"[51], thereby limiting the report to Iraq activities on Kuwaiti territory during the period of occupation and excluded. Alleged human rights violations in Kuwait after the complete retreat of Iraqi armed forces.[52]

b) How The Convention Works To Reduce Statelessness: In respect of contracting States:

i. 'Stateless birth' on their territory attracts the grant of their nationality; Transfer of territory must occur in a manner that avoids the occurrence of statelessness for persons residing in the territory transferred. When a State acquires its territory, the inhabitants of that territory presumptively acquire the nationality of the State;
ii. persons otherwise stateless shall be able to take the nationality of one of their parents (possibly prior to a period of prior residence not more than three years);
iii. absent circumstances of fraudulent application or disloyalty towards the Contracting State, deprivation of citizenship shall and renunciation shall only take effect where a person has or subsequently obtains another nationality in replacement;
iv. the United Nations High Commissioner for Refugees (UNHCR)[53] will issue travel documents evidencing nationality to persons, otherwise stateless, having a claim of nationality under the Convention.

One of the most significant elements in the 1961 Convention is the fact that it imposes positive obligations on States to grant nationality in certain circumstances, by contrast with the essentially negative obligations contained in the Convention on certain questions adopted in the Hague in 1930.[54]

The prevention and elimination of statelessness is the ultimate goal of the international community. However, Statelessness inevitably occurs as long as the granting of nationality remains a sovereign preserve of states. The Convention provides for civil, economic and social rights. The degrees to which those rights should be guaranteed by the contracting states differ according to the nature of each right.

B. Other General International Instruments That Spot Light Over Stateless Rights

Apart from the two Conventions relating to the status of Stateless as well as for the reduction of Statelessness, there are certain other International Instruments that give importance to the matter of Statelessness. They are:

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49. Year Book of the International Law Commission, 1953 vol. II (doc. A/CN.4/75)
50. Year Book of The International Law Commission, 1954, vol. II (doc. A/CN. 4/81)
51. Resolution 1991/67, para.9
52. For a discussion of these and other limitations of mandate, see Report, para 12-16, infra p.74. See also infra p.13
53. "History of UNHCR: A Global Humanitarian Organization of humble origins ". UNHCR. Retrieved 2009-11-01
54. Convention on certain Questions relating to the conflict of Nationality Laws, The Hague, 12 April 1930, League of Nations, Treaty Series, Vol. 179, p.89.

1) The Universal Declaration of Human Rights: The UDHR, as a common standard of achievement for all people and all nations, to the end that every individual and every Organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedom and by progressive measures, national and international, to secure their universal and affective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[55]

The UDHR declares in Article 15 that "everyone has the right to nationality and no one shall be arbitrarily deprived of his or her nationality."[56] Despite the beauty of this article, it does not provide enough protection to stateless. Firstly, it examines the right citizenship without obliging hosting countries to provide such citizenship. Secondly, it does not object over depriving individuals from their citizenship if it was not arbitrarily.[57]

The question that might be posed here, why certain countries should provide citizenship to stateless, meanwhile, some other countries do not? Stateless is an international problem, and the international community should unite to solve it. If the right of stateless to possess citizenship is undisputable, then, the participation of all countries in the solution is required. It is unjustified to nationalize all stateless in Kuwait, meanwhile Switzerland is just monitoring.

As member of the United Nations, Kuwait is bound by the UDHR, however, violations of the UDHR will not result international responsibility, because it only includes general principles that are accepted by the international community.

2) The International Covenant on Civil and Political Rights (ICCPR): Articl.2, para.1 of the Covenant on Political and Civil Rights[58] obliges each State party to ensure the rights of the Covenant "to all individuals within its territory and subject to its jurisdiction". This means that every individual who lives irrespective of caste, creed etc. He should be given the opportunity to enjoy the Civil and Political Rights ensured by the Constitution of the Country.

Human Rights Conventions normally apply wherever the contracting party has jurisdiction and whenever its agents, regardless of the normality of the person concerned, act. In this sense, the Convention "in any territory under its jurisdiction"[59], the Covenant on Economic, Social and Cultural Rights, does not even mention its scope of application *ratione persone et loci.*

3) The United Nations Convention on Child Rights (UNCCR): The UNCCR grants children the right to be registered immediately after birth, the right to name from birth, and the right to acquire a nationality[60]. Kuwait is a signatory to the UNCCR.

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55. Universal Declaration of Human Rights, adopted Dec.10, 1948, G.A. Res. 217 A (111), 3. U>N> GAOR (Resolutions, part 1) at 71, U.N. Doc. A/810 (1948), reprinted in 43 am. J. INT'l. SUPP. 127 (1949).
56. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., art. 15, U.N. Doc. E/CN41AC.1/5R.2(1948) [hereinafter UDHR], available at <http://www.unhchr.ch/udhr/lang/eng.pdf.>.
57. Emanuel Gross, Defensive Democracy: Is It Possible To Revoke The Citizenship, Deport, Or Negate The Civil Rights Of A Person Instigating Terrorist Action Against His Own State?, 72 UMKC L. Rev. 51, 62 (Fall 2003).
58. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U>N>T>S> 171, art.24 (hereinafter ICCPR)
59. Article 2 of ICCPR against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 Dec. 1984.
60. UNCCR, supra note ()art.7

Article 16 of the UNCCR provides that every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially- recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at last in the elementary phase, and to continue his training at higher levels of the education system[61].

4) Convention on the Elimination of All Forms of Racial Discrimination (ICERD): The Charter of United Nations[62] is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in cooperation with the Organization, for the achievement of one of the purposes of the United Nations rights and fundamental freedoms for all, without distinction as to race, sex, language and religion.

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference base on race, color, descent, or national or ethnic origin which has the purpose of effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[63]

Alarmed by manifestation of racial discrimination, still in evidence in some parts of the world, including Kuwait, and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation.

5) The International Covenant on Economic, Social and Cultural Rights (ICESCR): The State Parties have agreed upon the said Covenant[64] considering that, in accordance with principles proclaimed in the Charter of the UN, recognition of the inherent dignity and equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Article 1 says that, "All peoples have the right of self- determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

In fact, economic, social and cultural rights contain three layers of State obligations, namely:

1) Obligation not to destroy minimal essential levels of economic, social and cultural achievements referred to by the Committee[65] which exist in a given society at a given time and not to reduce standards above these core guarantees except on grounds spelled out in Article 4 of the covenant.[66]

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61. Convention on the Rights of Child, adopted Nov.20, 1989, G.A. Res.44/25, 44 UN GAOR Supp. (No.49) at 165, U.N. Doc. A/44/736 (1989) reprinted 28 INT'L LEGAL MATERIALS 1448 (1989)
62. United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930/.html [accessed 10 April 2014]
63. International Convention on the Elimination of All Forms of Racial Discrimination, adopted December 21, 1965, 660 U.N.T.S. 195 (entered into force January 4, 1969)
64. General Comment No.3, see Supra at note 119.
65. ASBJORN EIDE, strategies for the Realization of the Right to Food, in: Katheleen. E. Mahoney/ Paul Mahoney, Human Rights in the 21st Century, Dord- recht/Boston/London, 1993, freedom of action and the use of resources against other, more assertive or aggressive subjects (more powerful economic interest ; protection against fraud…)
66. EIDE (note 122) p. 465.

2) The obligation not to discriminate in limiting access to goods and services protected by such rights solely on grounds of race, color, sex, language, religion, etc. This obligation is clearly stated in Article 2, Para 2 of the Covenant.
3) The obligation to progressively take all steps necessary for the full achievement of these rights, i.e., a duty "to fulfill the exceptions of all for the enjoyment of such rights.

The provisions of these International Instruments are not strong enough to irradicate the problem of statelessness through out the world. The support for these instruments has been minimal. Hence the UN General Assembly should adopt more adamant provisions for the reduction of statelessness such as to give UNHCR the role to work with governments on solving this problem and protecting those affected by it.

IV. INTERNATIONAL LAW IN KUWAIT LEGISLATION

Kuwait's human rights record drew increased international scrutiny in 2010, as proposed reforms for stateless persons, women's rights and domestic workers remain stalled. Freedom of expression deteriorated as the government continued criminal prosecutions for libel and slander, and charged at least one individual with state security crimes for expressing non-violent political opinions.

Kuwait continues to exclude the stateless Bidouns from all citizenship, despite their longstanding roots in Kuwait territory. The Bidoun also face discrimination accessing education, healthcare and employment, as well as violations of their right to marry and establish a family because they are not allowed to register births, marriages or deaths.

Kuwait hosts up to 120,000 stateless persons, known as Bidouns. The State classifies these long- term residents as "illegal residents", maintaining that most do not hold legitimate claims to Kuwait nationality and hide "true" nationalities from Iraq, Saudi Arabia or Iran, Law makers in December 2009 failed to reach the quorum required to discuss a 2007 draft law that would grant the Bidoun civil rights and permanent residency, but not nationality. In January 2010, the assembly tasked the Supreme Council for Higher Planning with reporting on the Bidoun situation. Bidoun from Kuwait continued to seek and receive asylum abroad in countries including the United Kingdom and New Zealand, based upon their treatment by Kuwaiti government authorities[67]. However, the Resolution of Statelessness passed in May 2013, by the National Committee[68] gives a ray of hope for a revolutionary change in the pathetic condition of the Bidouns.

In respect to the ratification of the International Instrument of CRS, the Kuwait government has established a National Committee for the Reduction of Stateless residing in her territory.

A. National Committee for the Resolution of Statelessness in Kuwait

The important aims of the Committee are:

i. The National Committee for the Resolution of Statelessness in Kuwait[69] held its first meeting on May 5 2013. The participants discussed the proposed solution draft and
ii. Adopted it in its final form as follows:

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67. Human Rights Watch, World Report, 2011.
68. "The National Committee for the Resolution of Statelessness" available at: http://www.statelessinq8.org/national-committee-for-the-resolution-of-statelessness-in-kuwait-statement/ (last visited on April 1, 2014)
69. Available at: http://www.statelessinq8.org/national-committee-for-the-resolution-of-statelessness-in-kuwait-statement/ (last visited on March 30, 2014).

iii. Suggested time for implementation: 4years
iv. Change the terminology and legal status of Bidouns from "illegal residents" to "Stateless" and grant Civil and Human Rights.
v. Legal and legitimate reasons to change the term "illegal residents" to "stateless" in reference to Bidouns in Kuwait.

a) Benefits:

i. Ending the increasing number of stateless population
ii. Newborn will not be a burden on state service, since the State will have the time needed to prepare before they enter schools or labor market.
iii. Preparing Kuwait Society to accept "Stateless" and to remove the social, cultural and ideological barriers and the fear that naturalization of the Bidouns will disturb the social structure.

B. A Case Study On The Issues Of Bedouns In Kuwait

1) Yousuf H. was born in Kuwait in 1934 and since 1967 has been married to a Kuwaiti citizen. In November 1990, the Iraqi occupation force, having been suspected of residence acts, killed Ya'qoub, their 23-year-old son. They have 3 other sons, ages 22, 17 12 and a 25 year old daughter. Yousef and his 4 children are considered illegal residents: they have no permits to work or drive the family car, and are threatened with deportation[70].

2) Mohammed I. was born in 1926 to an unknown father, and heas documents provin he has lived in Kuwait since 1958, he has been married to a Kuwaiti citizen and they have 5 sons ranging in age between 22 and 33 years of age. In 1990, he was dismissed from his government job and lost his laissez-passer and driving license[71].

3) Hassan Muslim A. was born in 1959 in Kuwait and worked as locomotive engineer for the Ports Authority, a government agency. He was dismissed, with all other Bidouns, effective August 1990, but rehired after liberation under a new contract with less than half of his former salary of KD.700 ($2,345) to KD.250 ($837.50)[72]

4) Ahmed Ali Mohammed Awadh was born in Kuwait in 1948 and has been married to a Kuwaiti citizen since 1966. They have a 13year old daughter and 4 sons, aged 24,22,20,17 years old – all classified Bidouns. Their adult children have been denied admission into the University and he was dismissed from his government job of 60years service at the Ministry of Social Affairs and Labor.[73]

5) Jassem Ghaleb M. was born in Kuwait in 1940 and has been married to a Kuwait citizen since 1963. He left Kuwait during the occupation, but has not been permitted to return since then, despite his wife's repeated petitions to sponsor him to return to Kuwait.[74]

6) Hani is a 25year old High School graduate who has never worked in his life because he is a Bidoun. He was born in Kuwait to Bidoun parents; he has documents dating to the 1950s showing his father had lived in Kuwait for many years before that, but he said the documents were not considered sufficient by the nationality committee. He told an interviewer, " I am not allowed to work or continue my education. I am not even allowed to get married. What kind of a future do I have?[75]

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70. Human Rights Watch interview, January 1994
71. Human Rights Watch interview, Kuwait, January 1994
72. Human Rights Watch interview, Kuwait, January 1994
73. Human Rights Watch interview, Kuwait, December 1993. The mass dismissal was retroactive to August 2, 1990, the day of the Iraqi invasion.
74. Human Rights Watch interviews, Kuwait, December 1993 and telephone interview February 1994
75. Human Rights watch interview, Kuwait, December 1993

7) F, al Anezy, is a Bidoun married to a Kuwaiti citizen. In 1992, upon finishing his studies in the United States, he attempted to return to Kuwait, but was denied entry because his laissez-passer had expired. Although he was born in Kuwait, and many in his family, including 2 of his brothers, were Kuwaiti Citizens (and high ranking police officers), he was denied entry to be with his wife. Later, he was able to secure Canadian travel documents and was able to return to Kuwait as a foreign resident[76].

8) Ayed is a 49-year-old Bidoun, former police sergeant. He is living with his brother, who has been rehired by the army. Ayed was dismissed with the rest of the Bidouns after the war and has not been reinstated. He has been unemployed for 3years. He also lost his government – provided house since he was not rehird. "I saw many Bidoun families evicted from their military homes, where many are out on the street. Some stay at their homes, even after the government disconnected electricity and water[77].

9. Ali Hajj Ramadhan Ali was born in Bahrain in 1925 and came to Kuwait in 1945. He was classified as bidoun in both countries. In 1960, he married a Kuwaiti citizen and they now have 11 children, all born in Kuwait and all Bidoun. He was dismissed from his job in Ministry of health without a pension. The adult children are treated as foreigners in regard to residence permit requirements and were not accepted in the University because of their Bidoun status[78].

10. Halima Muhammed A, aged 48 is a Kuwaiti citizen. In 1966, she married Abdel Karim Hussain, a Bidoun, who died in 1987. She has 5 daughters, ages 25,19,14,8 years and 3 sons, ages 26,24,22 years. All children are classified as Bidouns, despite the fact that Article 5 of the Citizenship Law[79] clearly entitles them citizenship since their mother is a citizen and their father is deceased. Further, more, the adult children are still considered illegal residence and therefore unable to work.[80]

V. INTERNATIONAL ORGANIZATIONS' ROLE IN FIGHTING STATELESSNESS

These organizations with other NGOs are working together to define stateless populations, provide guideline and support for timely birth registrations, and combat the arbitrary deprivation of nationality.[81]

A) U.N. High Commission On Refugees (UNHCR)

B) U.N. Children Fund (UNICEF)

C) U.N. Population Fund (UNEPA)

A. United Nations High Commission for Refugees[82] (UNHCR)

Although stateless people may sometimes be refugees, the two categories are distinct and both groups are concern to UNHCR. Statelessness is a massive problem that affects at least 10 million people worldwide. Statelessness also has a terrible impact on the lives of individuals. Possession of nationality is essential for the enjoyment of the full range of human rights.

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76. Human Rights Watch interview, New York, September 1994
77. Human Rights Watch interview, Kuwait, January, 1994
78. Human Rights Watch interview, Kuwait, January 1994
79. The Citizenship Law of Kuwait, promulgated in 1959 via, Amiri Decree, edited and re-editted, written and re-written, promulgated and un- promulgated over and over throughout years; 1959, 1960, 1965, 1966, 197, 1980, 1982, 1986, 1987, 1994, 1995, 1998, 2000…
80. Human Rights Watch interview, January 1994
81. Interview with Leclerc, supra note ( ).
82. United Nations High Commission for Refugees (herein after UNHCR) , adopted on December 14, 1950, by the UN General Assembly, is the main advocacy group in the international sphere for those displaced by war, natural disaster and political or religious persecution. They provide protection for the rights of people displaced across borders and work to repatriate refugees.

Given the seriousness of the problem, the UN in 1954 adopted the Convention Relating to the Status of Stateless Persons.[83]

Yet the problem can be prevented through adequate nationality legislation procedures as well as universal birth registration. UNHCR has been given a mandate to work with governments to prevent statelessness from occurring, to resolve those cases that do occur and to protect the rights of stateless people. A first step is for States to ratify and implement the 1961 Convention on the Reduction of Statelessness.[84]

B. United Nations Children's Fund[85] (UNICEF)

UNICEF is the driving force that helps build a world where, the rights of every child are realized. They have the global authority to influence decision makers, and the variety of partners at grass route level to turn the most innovative ideas into reality. This makes it unique among world organizations, and unique among those working with the young. The advocate for measures to give the best start in life, as proper care at the youngest age forms the strongest foundation for a parson's future. They promote education of children, especially of girl children.

a) Some Recent Activities of UNICEF[86]:

i. UNICEF condemns attack on school in Domascus, Syria;
ii. UNICEF calls for immediate release of abducted school girls in Chibok, Borno State, Nigeria;
iii. Children malnutrition in South Sudan could double, warns UNICEF;
iv. Bridging the gap: Leaders to map future of investments in water, sanitation and hygiene.

C. United Nations Population Fund[87] (UNFPA)

The work of UNFPA involves promotion of rights of every woman, man and child to enjoy the life of health and equal opportunity. This is done through major national and demographic surveys and with population censuses. The data generated are used to create programs to reduce poverty and address issues concerning the rights of particular minority population groups. One of their aims is to ensure that "every pregnancy is wanted, every birth is safe, every young person is free of HIV and sexually transmitted diseases, and every girl and woman is treated with dignity and respect.[88]

The UNFPA supports programs in more than 150 countries, territories and areas spread across four geographical regions: Arab States and Europe, Asia and the Pacific, Latin America and the Caribbean and sub- Saharan Africa. Around three quarters of the staff work in the field.[89]

At the operation level, UNHCR works with several non- governmental organizations (NGO)to address statelessness. They provide legal advice and assistance so that stateless

83. Convention relating to the Status of Stateless Persons, 360 U.N.T.S. 117, entered into force June 6, 1960, at Preamble, [hereinafter CRSSP].
84. Convention on the Reduction of Statelessness, done at New York on 30 August 1961. Entered into force on 13 December 1975, United Nations, Treaty Series, vol.989, p.175.
85. United Nations Children's Fund, established by the General Assembly, on December 11, 1946 and is originally known as the United Nations International Children's Emergency Fund. (herein after UNICEF).
86. "From The Press Centre" available at: <http://www/unicef.org/> (last visited on April 21, 2014)
87. United Nations Population Fund (herein after UNFPA) began operations in 1969 as the United Nations Fund for Population Activities (the name was changed in 1987), under the adminis tration of the United Nations Development Fund. In 1971 it was placed under the authority of the UN General Assembly.
88. "UNFPA - About UNFPA". UNFPA. Retrieved 28 July, 2011
89. UNFPA in the UN system. Retrieved 28 February, 2013.

people have less difficulties confirming their nationality, acquiring documentation that proves their nationality or going through naturalization procedures. They also conduct outreach campaigns to inform the public about citizenship. NGOs also help address statelessness through advocacy at national and international level.

VI. CTIZENSHIP IN INTERNATIONAL LAW

In a regular situation a country's nation is divided, excluding the stateless, between citizens and foreigners. Both groups are citizens of the host country or the home country. Citizenship "provides a link between an individual and the nation and carries with it fundamental benefits and rights."[90] The citizenship is not a goal per se. The rights and advantages attributed to citizens are the only intensive behind seeking citizenship. For instance, financial facilities enjoyed by Kuwaitis, the right to enjoy free housing, security social, free healthcare, and the right to buy real estate encouraged foreigners to seek Kuwaiti citizenship. A strong tie between citizenship and accorded rights, that's why defining citizen, cannot take place without considering human rights. For instance, citizen is defined as a member of a state who is entitled to the rights and privileges of a freeperson.[91]

To define citizens, national laws should adopt clear criteria, which cannot exceed the two traditional theories, the blood or the land criteria. In addition, nationalization policy may add new criteria, such as setting a date for the entrance the country or special services provided in favor of the country

1. Single Citizenship
2. Dual and Multi-Citizenship
3. The Proposed Citizenship System International Law

Article 15 of the Universal Declaration of Human Rights[92] says, "[e]very one has the right to nationality" and that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". Most Articles of the UDHR are considered customary international human rights laws.

The right to citizenship/nationality is clearly stated. In spite of such provisions of the Declaration, there is a global, and particularly in Kuwait problem with statelessness. The types of Citizenship that are internationally accepted are:

A. Types Of Citizenship

The International Law divides citizenship into two, traditionally. They are Single Citizenship and Dual Citizenship or Multiple Citizenship.

1) Single Citizenship

Single Citizenship means a person is a citizen of a country irrespective of whichever State he chooses to live in or belong to. The citizens of Kuwait enjoy Single Citizenship. Similarly in India, it is one person- one vote. If a person is born in a country, he gets the citizenship of the country (that is, single citizenship.)

2) Dual or Multiple Citizenship

Dual Citizenship means simultaneous possession of 2 citizenships. It arises because there is no common International Law relating to citizenship. Dual Citizenship is not accepted by Kuwait. The most common reasons for Dual Citizenship are:

90. Maureen Lynch, Lives on Hold: The Human Cost of Statelessness 3, Refugees Int'l, Feb. 2005, at 3, [hereinafter Lynch, Lives on Hold].
91. Merriam-Webster's Online Dictionary, available at *http://www.merriam-webster.com/dictionnary/citizen/* (last visited on March25, 2014)1.
92. Universal Declaration of Human Rights, adopted Dec.10, 1948, G.A. Res. 217 A (111), 3. U>N> GAOR (Resolutions, part 1) at 71, U.N. Doc. A/810 (1948), reprinted in 43 am. J. INT'l. SUPP. 127

i. Marriage to a citizen of another country;
ii. Adoption by parents who are citizens of another country;
iii. Birth in a country that grants citizenship by birth, to parents who are citizens of a country that grants citizenship by descent.

Multiple Citizenship, also known as Dual Citizenship or Multiple Nationality, is a person's citizenship status, in which a person is concurrently regarded as a citizen of more than one State under the laws of the States. Multiple Citizenship arises because different countries use different or not necessary mutual exclusive criteria for citizenship.

Some countries do not permit Dual Citizenship. This may be by requiring an application for naturalization to renounce all existing citizenships, or by withdrawing its citizenship from someone who voluntarily acquires another citizenship, or by other devices. Some permits a general dual citizenship while others permit dual citizenship, but only of a limited number of countries.

Most countries which permit Dual Citizenship still may not recognize the other citizenship of its nationals within its own territory, for example: in relation to entry into the country, national service, duty to vote, etc. Similarly it may not permit consular access by another country for person who is also its national[93].

a) Dual Citizenship and International law

Three important European Conventions reflect distaste for dual citizenship around the world, especially in Europe, but demonstrate a slow progression toward its acceptance: the Hague Convention of 1930[94], the Council of Europe's 1963 Convention[95], and the Council of Europe's European Convention of Nationality.[96]

i. Hague Convention of 1930

During this Convention, world leaders made clear their opposition to Dual Citizenship. The Hague Convention was written to "codify [the] existing global doctrine on the conflict of nationality laws"[97]. The Preamble of the Hague Convention states, "every person should have a nationality and should have one nationality only"[98]. Article 6 of the Convention also authorizes "a person possessing two nationalities acquired without any voluntary act on his part [to] renounce one of them with the authorization of the State whose nationality he desires to surrender"[99].

ii. 1963 Convention of The Council of Europe

In this Convention, the States of the Council of Europe recognized that "cases of multiple nationality are liable to cause difficulties and that joint action to reduce as far as possible the number of cases of multiple nationality, as between member States, corresponds to the aims of the Council of Europe"[100]. Additionally, the Convention requires citizens of one state who voluntarily accept the citizenship of another state to give up their original citizenship.[101]

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93. See, for example, Egyptian nationality law Dual Citizenship
94. Convention on certain Questions Relating to the Conflict of Nationality Laws, The Hague – 12 April, 1930
95. Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, 1963 (EST No. 43, herein after "the 1963 Convention")
96. The European Convention on Nationality (E.T.S. No. 166) signed in Strasbourg on 6 November 1997.
97. Martin, supra note 2, at 4.
98. Hague Convention Governing Certain Questions Relating to the Conflict of Nationalities, Pmbl, opened for signature Apr. 12, 1930, 179 L.N.T.S. 89 [emphasis added].
99. Id.at art. 6.
100. Id. At pmbl.
101. Id. At arts. 2-4.

iii. Council of Europe's Convention on Nationality

In 1967, the Council of Europe heavily amended the 1963 Convention and opened the door for the legality of dual citizenship. Through a series of additional protocols, the Council of Europe allowed for more liberal dual citizenship laws, while still allowing states to make their own decisions on subjects such as citizen's voluntary acquisition of citizenship of another country.[102]

In the explanatory report of the Second Protocol Amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, the Council of Europe admitted that the "context in which the 1963 Convention came into being has changed considerably"[103] Thus the protocols promote a "less strict attitude to the automatic loss of previous nationality"[104]

Finally, the Council of Europe combined the Protocols and developed the new European Convention on Nationality (the Convention on Nationality), which is much more cooperative regarding instances of dual citizenship.

b) Reasons for Opposition to Dual Citizenship

Many States oppose Dual Citizenship out of fear that Dual Citizenship creates divided loyalties.[105] This argument assumes that people cannot serve two countries at the same time. Just as persons do not belong to two religions or two political parties, so too it is sensible to affirm loyalty to a single state.[106] An example for this argument concerns voting[107] a person may be able to vote in both countries if the country in which the person does not reside permits or requires absentee voting.[108] The concern is that a person may vote in the interest of one country over the other.

A second argument against dual citizenship is that liberal dual citizenship laws create a security threat.[109] This is especially relevant if high officials are allowed to hold dual citizenship because they may use the citizenship of one country to obtain sensitive information for the other. In such case, some states usually require officials to actually renounce all other citizenship.[110]

A third argument holds that dual citizenship hinders integration.[111] In other words, the immigrants maintain ties and attachments to their country of origin instead of integrating into their new society.[112]

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102. Protocol Amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, opened for signature Nov. 24, 1977, Europ. T.S. No.95; Additional Protocol to the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, opened for signature Nov.24, 1977, Europ. T.S. No.96; Second Protocol Amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, opened for signature Feb.2, 1993, Europ. T.S. No. 149.
103. Second Protocol Amending the Convention on the Reduction of Cases of Multple Nationality and Military Obligations in Cases of Multiple Nationality, Intro., Feb. 2 1993, Europ. T.S. No. 149.
104. Id.
105. Hansen & Weil, supra note 54, at 7. See also Aleinik off & Klusmeyer, supra note 21, at 82.
106. Aleinnikoff & Klusmeyer, supra note 21, at 83.
107. Id. at 80.
108. Id. Belgium, Italy, Australia and Greece actually require their citizens to vote, no matter where they are residing. Christopher W. Carmichael, Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting, 23 Hamline J. Pub. L. & Pol'y 255, 313 (2002).
109. Hansen & Weil, supra note 54, at 7.
110. Id.
111. Hansen & Weil, supra note 54, at 7.
112. Id.

Fourth, dual citizenship may create a conflict of laws, since laws differ when it comes to marriage, military services, inheritance, and taxation.[113] Conflict of laws is also an issue when people choose to acquire citizenship for purposes of commerce or convenience.[114]

A fifth argument pints out that dual citizenship creates inequality by providing dual citizens with two support systems, granting them more rights and opportunities than those who hold only one citizenship.[115]

Finally, concerns regarding military service have given rise to the following question: upon which front will persons of dual citizenship fight in times of war. Since many nations no longer practice conscription, this concern has diminished. The Convention on Nationality, for example, determined that "[p]ersons possessing the nationality of two or more states Parties shall be required to fulfill their military obligations in relation to one of those State Parties only".[116]

c) Reasons in Support of Dual Citizenship

As previously mentioned, dual citizenship occurs automatically in certain circumstances. Since states have differing citizenship laws, and an international agreement satisfactory to all countries is unlikely to occur in the near future, certain people will acquire dual citizenship automatically. Moreover, dual citizenship furthers integration due to the correlation between permanent residents who chose to become citizens and dual citizenship laws.[117] Finally, in countries of immigration, dual citizenship may actually help spread western liberal values.[118] This would especially hold true if dual citizens are still able to vote in their country of origin.

The Constitution of Kuwait does not recommend dual citizenship to her citizens. In other words, in the present situation those who hold dual nationality are forced to maintain their nationality only to avail of the privileges the State grants to its people. Under such circumstance having dual nationality is not a question of love and allegiance to two countries as might be perceived in other civilized nations. In the first place, these people hold two citizenships because they are not loyal to any country.

B. The Proposed Citizenship System in International Law

On account of the different political and class interests of States, which results from their different socio- economic systems, few universal international treaties exist in this field. However, there are a number of multi- lateral treaties and bi- lateral treaties. A universal codification of International citizenship is necessary in this post- modern era[119]. This is the age of globalization and globalizing citizenship is in high demands. Citizenship is becoming a globalizing regime to govern mobility and access to rights and resources as nations in the global North harmonize border and detention policies, outsource State functions and power to international organizations and private companies, and rely n technologies to discipline the individual body.

Although many of the rights contained in the UDHR have been elaborated into binding international human instruments, some with treaty bodies to interpret them, International

113. Hansen & Weil, supra note 54, at 7.
114. Aleinkoff & Klusmeyer, supra note 21, at 84. For example, the islands of Dominica, Grenada, and Saint Kitts- Nevis hand out passports to people who invest $50,000 to $250,000. However, it is not clear how often this practice is exercised and what effects it has. Id.
115. Hansen & Weil, supra note 54, at 7.
116. European Convention on Nationality, supra note 84, at art. 21 , para. 1.
117. Id. At 10.
118. Id.
119. The American Journal of International Law, vol.84, p.318

Law has made little progress in developing the right to citizenship/ nationality relative to other rights. This is understandable if one considers that for decades, human rights were so imperfectly defined and poorly respected that most people did not have their rights whether they were citizens or not.

VII. CITIZENSHIP LAWS IN KUWAIT

In Kuwait, Citizenship Laws are based upon the Constitution of Kuwait.[120] Birth within the territory of Kuwait does not automatically confer citizenship. Kuwait has a large number of guest workers living in the country. Kuwait law considers them to be citizens of their country of origin. Children born in Kuwait of long term guest residents do not qualify for citizenship. In all cases, unless the child is born to a Kuwaiti citizen, the child is born a citizen of the parents' country.

Citizenship can also be obtained by descent. Child born in wedlock, whose father is a citizen of Kuwait, regardless of the child's country of birth. Child born out of wedlock, to a Kuwaiti mother and an unknown father, regardless of the child's country of birth.

A foreign woman who marries a citizen of Kuwait may obtain citizenship after 15 years of residency. A foreign man who marries a citizen of Kuwait is not eligible for citizenship.

Kuwaiti citizenship may be obtained by specific conditions like Naturalization. Person is granted citizenship through a special act of Government.

Dual citizenship is not recognized under the Kuwait laws.[121]

As a consequence of their statelessness, the Bidun cannot freely leave and return to Kuwait; the government issues them one-time travel documents at its discretion. As non-Kuwaitis, they face restrictions in employment, healthcare, education, marriage, and founding a family. Kuwait issues Bidun with identity cards, but issue and renewal can be accompanied by pressure to sign affidavits renouncing any claim to Kuwaiti nationality. Prosecution and deportation to Iraq and other countries as illegal aliens are possible consequences of failing to sign such waivers,A 2007 draft law would grant the Bidun civil rights, but not nationality. At this writing it has not been passed.[122]

VIII. CONCLUSION

Despite the fact that the regulation of citizenship is a pure internal affair, International law is competent to assure that no individual should be exempted from his rights as a result to the miss -codification of the citizenship code. Moreover, international law should be competent to assure that no national legal system support the dual or the multi-citizenship in a climate full of stateless.

States are bound by the limits of international instruments regarding who deserve their assistance and protection. However, beyond this limit national authorities are free of any limitation to provide or prevent individuals from their assistance and protection. International law cannot impose over states the duty to host individuals who are enjoying the protection of other countries or international organization, or criminals in term of national or international

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120. The current Kuwaiti Constitution is enacted on June 19, 1961, shortly after Kuwait gained independence from the British Empire. Citation Format: CONST. KUWAIT <article>.
121. "KUWAIT- Non- Commercial Information about Citizenship, Dual Citizenship and Multiple Citizenship". available at http://www.multiplecitizenship.com/wscl/ws_KUWAIT.html (last visited on April 22, 2014).
122. Human Rights Watch, World Report 2010.

law. States are contesting in host distinguish and ideal individuals, and may be attribute them with their citizenship.

It is illogic to provide extra citizenship to individuals who already enjoy it elsewhere. The priority in providing citizenship should be attributed to those who are completely exempted of it. No one can prevent national authority from using its discretionary power in attracting financial capitals, by providing citizenship to foreigners. However, the legal status of stateless should be settled before attributing citizenship to any foreigner.

When national citizenship legislations lack enforcement, exceptional situations will occurred and affect other groups of people. If Kuwaitis are subject to inequality as a result to the misinterpretation of the Kuwaiti citizenship law, stateless cannot be in a favorable situation.

However, the Kuwait Government has made some attempts in recent years to face this issue of discrimination and citizenship, for example: by approving free education for Bidoun children since 2004, beginning to address their health needs and facilitating a process by which some could become documented as citizens. However, the process required proving residency prior to 965, and hence still excluded the vast majority (roughly 10,000 have received citizenship in this manner thus far). Statelessness for Bidouns therefore continues to weigh heavily on the enjoyment of their human rights in Kuwait.

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NEUTRALISING THE CATALYST OF TERROR IN ASIA AND AFRICA THROUGH STRICT REGULATION OF COMMON MATERIALS (INDIA, KENYA AND NIGERIA AS A CASE STUDY)

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OLOKOOBA S.M.**

ABSTRACT : The focus of this paper is on a curious inadvertence omission in the counter terrorism laws and policies in Asia and Africa with focus on India, Kenya and Nigeria. In doing this, the paper examines what constitute 'common materials' and the need to strictly monitor their procurement, handling as well as their use. The paper further examines the limitation in the current regulations of those materials in the countries of focus and posits that the unrestricted use of the common materials accounted for the escalated nature of terrorism in India, Kenya and Nigeria. Based on this, the paper recommends among others for a robust legislative mandate to regulate those common materials. This according to the paper will save the countries of focus and by extension the world at large from the imminent danger of terror attack and the associated agonies of terrorism.

KEY WORDS : Common Materials, Improvised Explosive Devices (IEDs), Strict Regulations, 'Catalyst of Terror'+, consideration.

I. INTRODUCTION

From Nairobi Kenya in Africa where the US Embassy Bombings occurred,[1] to Nigeria, where *Bokko Haram* terrorist groups are now struggling to affiliate themselves with

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1. The United States embassy bombings were a series of attacks that occurred on August 7, 1998, in which hundreds of people were killed in simultaneous trunk bomb explosions at the embassies of the United States in the East African cities of Dar es Salam and Nairobi. The attacks, which were linked to local members of the Egyptian Islamic Jihad, brought Osama bin Laden and Ayman al-Zawhiri and their terrorist organisation al Qaeda, to the attention of the American public and the world at large. This was what brought bin Laden to the tem most wanted fugitives list of FBI.

2 See 'Bokko Haram Declared Allegiance to ISIL's Baghdadi '<mirajnews.con/international/Africa/boko-haram-declares-allegance-isils-baghdadi>(Last visited on March 05 2015)

international terrorist organisation like ISIS[2] and India in Asia, where Mumbai incidence[3] remains fresh in the mind of the Indians, terrorist are now using common materials in manufacturing the Improvised Explosive Devices (IEDs). Recently, terrorist are reported to have adopted a new way of executing their plans by giving unsuspecting citizens armed home-made explosives that they in turn detonate remotes at safe distance[4]. The attackers have been using ordinary home equipment like the transistor radios and gas cylinders in their new methods[5] of terrorism. Terrorism according to Hornby[6] is the use of violent action in order to achieve political aims or to force a government to act. Terrorism is an act which is deliberately done with malice aforethought and which may seriously harm or cause damage to a country and or its citizenry. Terrorism is an act deliberately done with the view of destabilizing or destroys the fundamental political, constitutional, economic or social structures of a country[7]. The unauthorized procurement or possession of explosives or of nuclear, biological or chemical weapons, as well as research into, and development of biological and chemical weapons without lawful authority; the release of dangerous substance or causing of fire explosions or floods, the effect of which is to endanger the society are all acts or omissions that are within the classification of the definition of terrorist act.[8]

The act of terrorism is increasingly becoming wide spread criminal violence in different countries of the world and each of them are having their unique way of perpetration. In Nigeria, the common strategies used by the terrorist are kidnapping, abduction, bombing of multinational pipelines and attacking places of worship[9]. Terrorist attack have resulted in the

3. For detail report as well as Audio-Visual account of 11/26 Mumbai terrorist activities in India, see "Terror in Mumbai" available at<http://www.youtube.com/Natch?v=JDROrLtc6GM>(Last visited on January 04 2015).

4. For detail, see< http://en.wikidia.org/wiki/2011%E2%80%9314_terrorist_attacks_in_kenya> (Last visited on March 05 2015) 5*Ibid*.

6. Hornby A.S *Oxford Advanced Learner's Dictionary of Current English* (7th edition, Oxford University Press, New York, 2004) at p. 1528

7. In the third paragraph of India's Terrorist and Disruptive Activities (Prevention)Act, No. 16 of 1989, Terrorism is defined in detail as 'Whoever with intent to take over the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosives substances or inflammable substances or lethal weapons or poisons or noxious gases or other chemicals or by any other substances(whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act.' In the case of Kenya, the Penal Code of Kenya does not define terrorist activity. However, any act that causes danger to life or property is prosecuted through various provisions of the Penal code Chapter 63 and in Protection of Aircraft Chapter 68 of Laws of Kenya. Similarly, in the Nigerian Anti-Terrorist Act passed in 2013, the word terrorism is not defined but, both terrorist and what constitute terrorist act were outline. See Terrorism (Prevention) (Amendment) Act, 2013 a < www.sec.gov.ng/files/TERRORISM%20PREVENTION%20AMENDMENT%20ACT2013.pdf>(Last visited on March 03 2015).

8. See, the Nigerian Terrorism Prevention Act 2011, Section 1(2)

9. One of the latest in the act of terrorism in Nigerian was the kidnap of over 200 secondary school girls from Government Girls Secondary School, Chibok in Borno, and North Eastern part of Nigeria in 2014. For detail account of series of attack carried out by different terrorist groups in Nigeria for the past 10 years, see, Olokooba S.M. and Olatoke J.O. "Appraising the Constitutionality and Justification for the Use of Amnesty in Tackling Terrorism in Nigeria," 12 (1&2) 2012 *Bangladesh Journal of Law*, pp. 49-72 at pp.50-51.

killing of thousands of innocent Nigerian as well as foreigners since 2006 and this has compounded the already bad economy of the country. Today in Nigeria, increasing violence is becoming a characteristics hallmark of group relations in the country[10].

In India, the occurrence of 26 November 2008 cannot be forgotten easily. It was a horrible day in Mumbai. Ten young men from Pakistan came through the sea and unleashed terror by bombing several places and killing about 170 innocent Indians in the process. The horrible sight and the gravity of the destruction caused by those terrorist is better imagine than seen[11]. In Kenya, the Westgate shopping mall attack remains fresh in the mind of Kenya people. The four days terror by al-Shaba terrorist group left about 67 people dead. The attack which started from 21- 24 September resulted in at least 67 deaths including four attackers. In that attack, over 175 people were reportedly wounded in the mass shooting[12]. In all these occurrences, gun, bombs and other Improvised Explosive Devices (IEDs) were used.

Unfortunately, despite the danger the common materials used in manufacturing these Improvised Explosive Devices (IEDs) posed to the peaceful and harmonious living of the people, most countries of the world including India, Kenya and Nigeria have not adequately tackle and regulate the procurement, proliferation as well as handling of these common materials by all dick and harries. Perhaps, one of the reasons why most countries have not aggressively regulated the handling of those common materials is because of their multipurpose usefulness. As they are useful for domestic and private purpose such as common kitchen device, farm fertilisation; they are also used negatively by the terrorists for terror purposes.

Structured into six sections, the next section discusses the conceptual framework of the study. Section three examines the common materials identified in the study that needed strict regulation to check terrorism in India, Kenya and Nigeria and their catalytic nature. Section four X-Rays the India, Kenya and Nigeria government effort in checking terrorism. The fifth section focuses on how Strict Regulations of Common IEDs Materials would neutralize and check the unrestricted handling of the Common Materials and the paper ends in the sixth section with conclusion and recommendations.

II. CONCEPTUAL FRAMEWORK AND OPERATIONAL DEFINITION OF TERMS

In consideration of the concept of focus in this paper, there are some key words which meaning is to be ascertained from the beginning. The words are 'Common Materials', 'Improvised Explosive Devices (IEDs)', 'Strict Regulations', 'Terrorism'.

Common Materials in this work are the materials that are easy to come by and purchase with little or no statutory regulation that could check, hinder or limit their handling as well as usage. 'Improvised Explosive Devices (IEDs)' are the devices fabricated to achieve destructive result like the originally made explosive devices. 'Strict Regulations' is used as a law that will guide and check the proliferation as well as unregulated use and handling of the common

10. E. John "Youth Violence and Democratic Governance in Nigeria 1999-2009" cited in Tella N.S et al (eds.), *Law and National Security in the Fourth Republic*, IBB University, 2010, pp.133-135 at p.133, A. Makwemoisa "Youth Existence and the Conditions of Exclusion and Underdevelopment in Nigeria" in Y. Udu (ed.), The Dialectics of Cultural development: Special focus on Nigeria. 4 (1) (2002) *Journal of Cultural Studies*, 2002, pp. 117-135 at p.133. see also, Olokooba and Olatoke, *supra*, note 9, p.51

11. see "Terror in Mumbai" *supra* note 3.

12. See, Westgate Shopping Mall Attack<http://en.wikipedia.org/wiki/westgate_shopping_mall_attack >(Last Visited on March 03 2015).

materials. 'Catalyst of Terror' in this work refers to the common materials used in making or fabrication IEDs. They are referred to as the catalyst because, in terror adventure all over the world, these materials are the substances that quicken up the devastating effect of the terrorist devices. 'Terrorism' is the use of threat of action designed to influence the government or intimidate the public in order to advance a political, religious or ideological cause.

III. EXAMINING THE CATALYTIC NATURE OF THE COMMON MATERIALS AND THE INHERENT DANGER IN THEIR NEGATIVE USE

There is strong suspicion that suspected common materials such as fertilizers, gunpowder, extracted from fireworks, glue, nails; fridge or air condition compressors, gas cans; Christmas tree lights and even cell phones could have been easily used by terrorist to achieve their beastly aims. The multiple and multi-functional nature of most of these materials accounted for their easy location as well as easy procurement without any serious legal regulations in most countries of the world. The materials designated as common material in this paper are, fertilizer, pressure cookers and compressor canisters, explosives and fireworks. The reason for designating them as such is the scientific proof of their catalytic nature in fabricating IEDs that terrorists use in carrying out their nefarious acts[13].

A) Fertilizer

Fertilizer is a natural or artificial substance containing the chemical elements nitrogen, phosphorus and potassium which under prescribed conditions improve growth and productiveness of plants. Fertilizers enhance the natural fertility of the soil or replace the chemical elements taken from the soil by previous crops. Modern chemical fertilizers are known for their high content of sulfur, magnesium and calcium in addition to nitrogen, phosphorus, potassium[14] and other chemical specialised compounds. The point made here is that fertilizer in its original or better still, rudimentary use is a common agricultural material that could be 'purchased across the counter'. But in recent times it has the notoriety of been used by terrorist's to create IEDs to catalyses bombs with devastating consequences.

The use of fertilizer as a catalyst to produce an IED has successfully been proved in the case of *United States v. Timothy McVeigh US*. 1995[15] where the accused with the connivance of his conspirator Terry Nicols built a bomb with about $5,00.00 using some chemical compounds including about 2,000 pounds of ammonium-nitrate fertilizer that he purchased from an ordinary farm goods store in Kansas and over 1,000 pounds of diesel fuel.[16]

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13. See Caitlin Dewey "Homeland Security Warned about terrorist use of pressure cooker bombs in 2004 " *Wash Post* (New York), April 16, 2013, also available at < http://www.washingtonpost.com/blogs/worldviews/wp/2013/04/16/homeland-security -warned-about-terrorist-use-ofopressure-cooker-bombs-in-2004/> (Last Visited on October 24 2014). see also < http://en.wikipedia.org/wiki/boston_marathon_bombings#cite_noteglobe-numberinjured-4NYDN-5.2F15-2>(Last visited on October 24 2014). See also http://en.wikipedia.org/wiki/boston_marathon_bombings#cite_noteglobe-numberinjured-cnn-what-we-know-9.
14. This definition is also available at <http://www.merriam-webster.com/dictionary/fertilizer>(Last visited on October 24 2014).
15. *United States v. McVeigh*, 153 F.3d 11666, 1177 (10th Cir. 1998) cert. denied, 526 US 1007 (1999) describing the charges against Oklahoma City bomber Timothy McVeigh).
16. Supra *note* 13. See further Charles C. Sinnard, "Growing Crime: The rising use of fertilizer for illegal purposes and the need for stricter regulatory concerning its sale and storage, 4 *DRAKE J. AGRIC. L.* 505, 510 (1999) (for an in-depth analysis of how fertilizer used in the bomb was purchased legally).

To execute the plan, the 1st accused rented a van, stocked same with the bomb, drove and packed the van in front of the Alfred P. Murrah Federal Building in Oklahoma City after which he detonated the IEDs. The blast killed 168 innocent people[17], while injuring 680 others. As to the extent of damage a total of 324 buildings within a radius of sixteen – blocks valued at $652 million dollars were destroyed[18].

It is trite science that under given chemical circumstances, the compounds that make up the different grades of fertilizers could create effective explosive substance particularly when combined with selected other common materials. The knowledge or methodology of pure science has been used for deadly and unintended out comes several times in the past. For example, in February, 1993, a truck bomb filled with 1,500 pounds of urea-nitrate fertilizer exploded underneath the North tower of the World Trade Center in New York City, killing six people.[19] Two years later, a similar device destroyed the Murrah Federal Building in Oklahoma City.[20] The power of these explosions shows that certain types of fertilizers are extremely prone to use for dangerous purposes, so further regulation and monitoring of certain kinds of fertilizer may be necessary to prevent future acts of terrorism[21].

B) Pressure Cookers and Compressor Canisters

In India, Kenya and Nigeria, pressure cookers and compressor canisters are currently merely monitored by consumer or quality organizations for safety standards. The nexus between most of the common materials particularly explosives, fireworks[22] and fertilizers[23] is the fact that all of these could be packaged or delivered with pressure cookers or spoilt compressor canisters depending on the level of sophistication of the terrorist in question[24]. Yet these materials are not monitored or seen by the India, Kenya and Nigerian government

17. *Ibid*.

18. Alan Calnan & Andrew E. Taslitz, Defusing Bomb-Blast Terrorism: a Legal Survey of Technological and Regulatory Alternatives, 67 *TENN. L. REV*. 177, 181 (1999).

19. World Trade Center 1993 Bombing: NYC Marks 20th Anniversary of Terrorist Attack, *Huffington Post* (New York)February 26 2013, also available at <http://www.huffingtonpost.com/2013/02/26/world-trade-center-1993-bombing-20th-anniversary-photoes-new-york-city-terrorism_n_2763382.html> (Last visited on November 17 2014)

20. *Ibid*. As a further example of failure to regulate ammonium-nitrate fertilizer, and discussing how, under current regulations there is considerable difficulty in implementing the emergency planning and community right-to-know act, see Manny Fernandez & Steven Greenhouse, Texas Fertilizer Plant Fell Through Regulatory Cracks, *NewYork. Times* (New York) April 24. 2013, available at <http://www.nytime.com/2013/04/25/us/texas-fertilizer-plant-fell-though -crackds-of-regulatory-oversight.html? pagewanted=all&_r=0> (Last visited on November 17 2014)

21. Persky, Dori. "Common Materials Turned Deadly: How Much Does America Have to Monitor to Prevent Further Acts of Terrorism?" America University Washington College of Law: National Security Law Brief 4, no. 1 (2013): 43-56.

22. *Ibid*. See also generally Federal Explosives Law, 18 USC. Sections 841-848 (2012); see also Exc. Order No. 13284, 68 Fed. Reg. 4075 (Jan. 23, 2003) this order created DHS to monitor terrorism domestically and internationally; Homeland Security Act (HAS) of 2002, pub. L. No. 107-296 section 101 (b)(1)(A)-(C), further stated that the congressional mandate particularly the mission of DHS: "to prevent terrorist attacks within the united states, reduce the vulnerability of the united states to terrorism; and minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the united states and its allied territories".

23. *Ibid*.

24. See Deborah Kotz, injury Toll from Marathon Bombs reduced to 264, boston globe, apr. 24, 2013, available at <http://www.bostonglobe.com/lifestyle/health-wellness/2013/04/23/number-injured-marathon-bombling-revised-downward/NRpaz5mmvGquP7KMA6XsIK/story.html> (Last visited on July 17 2014).

or any of its military or intelligence agencies as a deadly material, for this the authorities often fail to consider the need to regulate the free flow of these common materials that could be used to create explosives that anyone can purchase of the shelves without let or hindrance. In the US because of environmental safety regulations, there exists some level of controlled placed on compressor canisters. The deadly nature of this material could be seeing from the argument of Persky Dori that in the US Boston Marathon bombing, pressure cocker was used and that that was not the only time these materials were successfully used for the wrong results.

In this bizarre case of terrorism and subsequent related shootings, two immigrant chechen brothers Dzhokhar and Tamerlan Tsarnae masterminded a series of attacks and incidents which began on April 15, 2013, with two pressure cooker bombs which they deliberately exploded during the Boston Marathon at 2:49 pm EDT, killing 3 people and injuring an estimated 264 others.[25] The bombs exploded about 12 seconds and 210 yards (190 m) apart, near the finish line on Boylston Street.[26] Insurgents in Afghanistan and Iraq have been using improvised explosive devices (IEDs) made with pressure cookers for many years[27]. In other words notwithstanding stringent statutory provisions terrorists continue to use more common materials as was the case when pressure cooker bombs were successfully used again in the 2006 Mumbai train explosions, which killed over 200 people[28]. According to Dori in the case of the US, the Department of Homeland Security (DHS) even issued an internal memorandum regarding the likely use of such devices in 2004, warning that "these types of devices can be initiated using simple electronic components including, but not limited to, digital watches, garage door openers, cell phones or pages,[29] which are more easily obtainable items. Unfortunately, due to the fact that pressure cookers and compressor canisters are still viewed either as common kitchen or house-hold device(s).

The intelligence community does not currently regulate pressure cookers. The only rules concerning pressure cookers are from agencies that govern consumer safety.[30] Through DHS is aware that terrorists used pressure cookers to create IEDs before the Boston Bombings, it has not taken any steps towards regulation of this common kitchen appliance.[31] It is unclear if DHS will take such action in the wake of the Boston Bombing.[32]

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25. Available at < http://en.wikipedia.org/wiki/boston_marathon_bombings#cite_noteglobe-numberinjured-4>, (Last visited on July 17 2014).
26. <http://en.wikipedia.org/wiki/boston_marathon_bombings#cite_noteglobe-numberinjured-4NYDN-5.2F15-2>(Last visited on July 17 2014). See also <http://en.wikipedia.org/wiki/boston_marathon_bombings#cite_noteglobe-numberinjured-cnn-what-we-know-9>(Last visited on July 17 2014)..
27. *Ibid* at particularly Dewey's detailed discussion arguing that DHS knew about pressure cooker bombs based on past uses, yet this fact could not stop future acts of terrorism.
28. *Ibid*. Detailing and/or describing previous instances where IEDs were used thus illustrate the potential level of destruction pressure cooker powered IEDs could course under certain conditions. For details, see "Terror in Mumbai", *supra* note 3.
29. *Ibid*. Alluding to the information bulletin, highlighting also the potential of terrorist's using pressure cookers and related materials.
30. For further reading and comparison see Dewey, *supra* note 13 claiming that pressure cookers are often not searched when being brought into the United States.
31. *Supra* note 24 (explaining that DHS has been on alert about pressure cooker bombs for years).
32. Persky, *Supra* note 21

The argument here is that despite of positive statutory and other improved security awareness in the US, yet terrorists were still able to use these materials but with limited success. Therefore, there is the need for India, Kenya and Nigeria should urgently establish statutory monitoring of these materials.

C) Explosives

Explosives includes gunpowder of every kind, rockets, nitroglycerine, dynamite, gun-cotton, blasting powder, detonators, fulminate of mercury or other metals and every other explosive substance being any compound of or having any ingredients in common with any of the substances and related materials.[33]

D) Fireworks

A firework include devices which burn and explode to give a loud noise and a visual effect of different classifications depending on the additive. The India, Kenya and the Nigerian regulatory authorities have limited appreciation of the fact that fireworks are potentially dangerous hence the dearth of regulation. But in the US various statutes appear to have a more comprehensive definition of what fireworks are. In the Act, US fireworks are legally defined as any composition or device designed to produce a visible or an audible effect by combustion, deflagration, or detonation.[34] Another reality is the statutory categorization into two broad categories namely (1) consumer fireworks, and (2) display fireworks.[35] In the USA, dealers are required by statutes and subsidiary regulations including executive orders to a rigorous licensing and permit regime that is a restriction code for buyers, sellers and users of fireworks regardless of circumstances but in India, Kenya and Nigeria, this is lacking.

The argument here is that, although fireworks may have not conclusively been identified as the main IED material or component by the Indian, Kenya and the Nigerian insurgents; the fact that terrorists always attempt to replicate materials and tactics used around the globe, it is in the greater interest of defenseless India, Kenya and Nigerian citizenry that government regulates fireworks accordingly.

In the Boston Bombings, the suspects used fireworks to create the bombs that exploded at the Boston Marathon.[36] Authorities say that Tamerlan Tsarnaev purchased fireworks from a store in New Hampshire, paying over $400 in cash for two "lock and load" reloadable mortar kits, which each contains four tubes and twenty-four shells.[37] Per regulation, the store recorded the name and driver's license number of each customer who purchased items, enabling the authorities to track down Tsarnaev's purchase.[38] However, the types of fireworks purchased by Tsarnaev contain trace amounts of explosive material that is meant to burn rather than to detonate.[39] On this, both the ATF and the American Pyrotechnics Association (APA) say

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33. Emergency Powers Act Subsidiary Instrument No. 8 of [2004], section 4.
34. 27. C.F.R. Section 555. 8-12 (2013).See also Persky, Dori, *supra* note 21.
35. *Ibid*. Section 555. 11.
36. See Holly Ramer & Lynne Tuohy, NH Store: Boston Bombing Suspect Bought Fireworks, *Huffington Post* (New York) April 23, 2013, available at <http://www.huffingtonpost.com/2013/04/23/boston-bombing-suspect-bought-fireworks-n-3143254.html> (Last visited on September 04 2014).
37. *Ibid*.
38. *Ibid*.
39. Press release, Am. Pyrotechnics Ass'n, American Pyrotechnics Association Officers Information Regarding Fireworks Devices Implicated in the Boston Bombing Investigation (April 25, 2013) available at <http://wwwprnewswire.com/news-releases/american-pyrotechnics-association-officers-regarding fireworks-devices-implicated-in-boston-bombing-investigation-20478287.html> (Last visited on September 04 2014).

that consumer fireworks have rarely been used for such destructive purposes.[40] The type and scale of destruction at the Boston marathon almost certainly could not have been caused only by such small amounts of explosives as in the fireworks Tsarnaev purchased.[41] Despite this, it is the argument of this paper that no matter the quantity, the combined effect of negative manipulation of fireworks with some other common materials could produce IEDs, therefore it needed aggressive regulation to forestall the Boston Marathon incidence in India, Kenya and Nigeria.

IV. EXAMINING THE GOVERNMENT'S EFFORT IN TACKLING TERRORISM IN INDIA, KENYA AND NIGERIA

In India, legislations like the Terrorist and Disruptive Activities (Prevention) Act, 1987, as well as Act No 16, 1989, Act No 43 1993 gave wide powers to law enforcement agencies for dealing with terrorist and 'social disruptive' activities. Similar Act was passed by the parliament as Prevention of Terrorism Act 2002. This Act was enacted due to several terrorist attacks that took place in India especially the attack on the parliament. The act replaced the Prevention of Terrorism Ordinance (POTO) of 2001 and the TADA (1985-95). Similarly, in Kenya, The Kenya Anti-Terrorism unit was basically established to counter terrorism. In the same vein, the joint effort by the Kenya Police, Administration Police, National Security Intelligence Service and the Paramilitary General Service Unit always produce a remarkable result both in search for and arrest of terror suspect in Kenya. In Nigeria, the constitutional authority to monitor and regulate common but deadly materials is subsumed in the purpose and objectives of the federation's legislative[42], executive[43] and the judicial[44] powers in the ground num.

India Government Efforts Highlighted

As far back as 1985 the Indian government has put in place a strong statutory institution to check terrorism in India. Apart from the establishment of some special forces to deal with the case of terrorism, the law enforcement agencies were given wide powers for dealing with terrorist and socially disruptive activities. To formalise the terrorist check in India, Terrorist and Disruptive Activities (Prevention) Act commonly known as TADA was enacted. TADA was an anti-terrorism law which was in force between 1985, modified in 1987 and it applied to the whole of India. TADA was the India first anti-terrorism law to counter terrorist activities. Some of the features of the Act that later lead to its lapse were the high handed by the police who were not obliged to produce a detainee before a judicial magistrate within 24 hours and the accused person could be detained up to 1 year etc[45]. Under section 7A of the Act, police officers were also empowered to attach the properties of the accused[46].

Similarly in 2002, the India Government further passed another Act to prevent terrorism in India. The Act was passed by the parliament of India with the aim of strengthening anti-terrorism operations. The Prevention of Terrorism Act, 2002 (POTA) was the Act that replaced TADA and the Preventing of Terrorism Ordinance (POTO) of 2001. To guard against what

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40. *Ibid*.
41. *Ibid*.
42. Constitution of the Federal Republic of Nigeria, 1999 (as amended), Section 4.
43. *Ibid*., Section 5.
44. *Ibid,* Section 6.
45. <http://en.wikipedia.org/wiki/Terrosit_and_Disruptive_Activities _(Prevention)_Act Terrorist and Disruptive Activities (Prevention) Act> (Last visited on January 19 2015).
46. *Ibid*.

necessitated the repealing of earlier Act, some specific safeguards' were built into POTA 2002 to ensure certain powers were not misused and human rights violation would not take place.

Other efforts in this direction were, the Prevention of Terrorism (Amendment) Act 2003 (Act No 4 of 2004, Prevention of Terrorism (Repeal) Act prevention 2004 (Act No. 26 of 2004). Similar effort necessitated the 2007 Delhi Security summit between China, India and Russia where the India foreign ministry released a statement on behalf of all three governments that they'… agree the cooperation rather than confrontation should govern approaches to regional and global affairs[47]. And that 'there was coincided of views against terrorism in all forms and manifestations and on the need to address financing of terrorism and its linkages with narco-trafficking'[48]'.

The establishment of the Anti-Terrorism Squad (ATS) a special force in several India states was also an effort in the direction of tackling terrorism in India. Since inception, the squad has stopped several terrorist attacks in India. In fact, the Anti-Terrorism squad was involved in 26 November hostage rescue operation in multiple locations in Mumbai, India, including the 5 star hotels Taj Oberoi Trident by Lashikai Taiban group[49]. The establishment of National Counter Terrorism Centre (NCTC) which was modeled on the National Counter Terrorism Centre of USA after the 2008 Mumbai attack was a direction in the effort of India to tackle terrorism[50].

Kenya Government Efforts Highlighted

In Kenya, the Westgate shopping mall attack remains fresh in the mind of Kenya people. The four day terror by al-shabab terrorist group left about 67 people dead. This occurred on 21 September 2013 when unidentified human attacked Westgate shopping Mall in Nairobi, Kenya. The attack which lasted till 24 September resulted in at least 67 deaths; including four attackers.[51] Over 175 people were reportedly wounded in the mass shooting.

Earlier in 1975, the first bomb to strike independent Kenya exploded in February; there were two blasts in central Nairobi, inside the Starlight night club and in a travel bureau near the Hilton hotel[52]. The worst terrorist attack in Kenya's history was al-Qaeda's 1998 bombing of the U.S. Embassy in Nairobi, along with the US Embassy in Dar-es-salaam, Tanzania. A total of 224 people, including 12 Americans, were killed.[53]

Unfortunately despite all these and many other occurrences until Kenya president Mwai Kibaki approved the prevention of Terrorist Act 2012 and recently, the passage of the

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47 <http://en.wikipedia.org/wiki/Prevention_Terrorisim_Act_2002 >accessed 19th January 2015. See also, '2007 Delhi Security Summit' <http://en.wikipedia.org/wiki/2007_Delhi_Security_Summit >(Last visited on January 19 2015).

48. *Ibid*.

49. <http://en.wikipedia.org/wiki/Anti_Terrorisim_Squad_(India)>accessed> (Last visited on February 11 2015)

50. <http://en.wikipedia.org/wiki/National_Counter_Terrorism_Centre> (Last visited on January 01 2015).

51. "Westgate shopping mall attack" *supra* note 12

52. 'Terrorism in Kenya'<http://en.wikipedia.org/wiki/terrorism_in_Kenya>(Last visited on February 05 2015).

53. Patrick Goodenough'In Kenya Attack, Terrorist Kill 28 who could not answer Questions on Islam '< http://cnsnews.com/news/article/patrick-goodenough/kenya-attack-terrorist-kill-28-who-could-not-answer-questions-islam>(Last visited on March 05 2015).

controversial[54] anti-terrorism law, Kenya as a nation does not have specific counter-terrorism legislation. Most of the provisions in the Penal Code Law[55] were directed at offences that qualifies for felony[56]

This however does not mean that, the Kenya government was not making effort to check and combat terrorism within and outside the country Kenya troop has been very active in fighting terrors in Southern Somalia[57] and Kenya troops are now part of a larger African Union Peacekeeping force.

Legal efforts were also taken to prosecute suspected terrorists[58]. Apart from this, there are series of institutional effort put in place against terrorism. The Kenya Anti-Terrorism Unit was basically established to counter terrorist activities in Kenya. Similarly, the joint effort by the Kenya police, Administration police, National Security Intelligence Service and the Paramilitary General Service Unit always produce a remarkable result both in search for and arrest of terror suspect in Kenya. The type of joint effort saw the arrest of 83 suspects in connection of series of attacks in 2012 in Kenya.[59]

Furthermore, there were some successful arrest and prosecution in Kenya up till date. Apart from Elgwa Bwire Oliacha's case of 2011 who was sentenced to life in prison after having pleaded guilty to October 2011 blasts in Kenya, Abdimajid Yasin Mohammed was also sentenced to 59 years in prison for been caught with bombs, grenades and a cache of weapons. He was sentenced on 20 September 2012. Other arrests have also been made by police on series of occasions.[60]

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54. Controversial in the sense that some of the parliament and some NGO's in Kenya viewed the law as draconian in nature. In fact, on the day of the passage, fight broke out in Kenya parliament to the extent that the speaker Justin Mutur; was pelted with books and document by opposition MPS. Even though president, Uhurn Kenyatta tried to justify the law as necessary to tighten national security and combat Islamist militants responsible for last year's Westgate shopping mall siege and more recent massacres; the opponent of the bill also argued that the bill is not an anti-terror bill, it's an anti-media, anti-activist, citizen bill. See, David Smith 'Fights broke out in Kenya parliament over controversial anti-terrorism laws'<http://www.theguardian.com/world/2014/dec/18/fights-kenya-parliament-anti-terrorism-laws>(Last visited on March 03 2015). At long last the complete bill only lasted for two weeks before about eight sections of it was suspended by the High Court of Kenya. See Kenya Court Suspends new anti-terrorism laws<http://www.dw.de/kenya-court-suspends-new-anti-terrorism-laws/a-18167213>(Last visisted March 05 2015 see also Peter Snyder' Kenya high court declares portions of anti-terrorism law unconstitutions<http://jurist.org/[a[erchase/2015/02/kenya-high.court-declares-portions-of-anti-terrorism-law-unconstitutional.php>(Last visited on March o5 2015).

55. Penal Code Cap 63 of the Laws of Kenya

56. seeKenya:Terrorismlegislation<http://www.issafrica.org/cdct/mainpages/pdf/terrorism/legislation/kenya/KENYA%20Notes%on%20AntiTerror%20laws.pdf> (Last visited on March 05 2015).

57. In fact this action has accounted for constant terrorist attack by al-shabaab, a Somalia terrorist base organization in Kenya. The latest of such attack was the bus attack in Northern Kenya where about 28 non m Muslims were killed. For detail, see 'Kenya bus attack survivor tells how gunmen selected their victims' '<http://www.theguardian.com/world/2014/nov/23/kenya-bus-attack-survivor-tells-how-gunmen-selected-their-victims>(Last visited on March 05 2015).

58. Elgiva Bwire Oliacha a Kenya Muslim convert was arrested was arrested in connection with bomb blast, pleaded guilty and was sentenced to life in prison in 2011<http://en.wikipedia.org/wiki/2011%E2%80%9314_terrorist_attack_in_kenyaaccessed> (Last visited on March 05 2015).

59. *Ibid*.

60. *Ibid*.

Nigeria Government Efforts Highlighted

Nigeria's response to terrorism reached a new dimension with Boko Haram's purported declaration of an Islamic caliphate in the North East of the country[61]. The government has reluctantly admitted that the terrorists have actually taken over some towns and villages in Borno, Yobe, Adamawa[62] and that "appropriate military operations to secure that area from the activities of the bandits is still ongoing."[63] Also, the National Information Centre (NIC) was established to ventilate and indeed orchestrate government's position or better still, official account of events in the war against terror.

Before this ugly turn of events, the Nigeria government had offered significant anti-terrorism support to the Nigeria Armed Forces through increase in defense budgetary allocation[64] and by way of a fresh $ 1billion to the military authorities with the cooperation of the National Assembly[65]. The government has also allegedly been engaged in diplomatic activities with its West African neighbors; Chad, Niger and Cameroun designed to reduce support for the terrorist organizations and practically deny these groups access to operational territory, informal source of funding and urgently needed counter terrorism weapons[66]. In the legal and policy front, the Nigeria government has introduced land mark legislations. The Terrorism Prevention Act 2011[67] and the Terrorism Prevention Amendment Act 2013[68] is an attempt to demonstrate the heightened or improved priority the government tends to accord the threat of terrorism particularly the Boko Haram insurgency group.

In terms of institutional response the government appears to have prioritized the threat of terrorism as the number one challenge to the armed forces (the Nigeria Army, Navy, Air force), the police and other Para-military and intelligence agencies. All in recognition of the national security implications of the activities of Boko Haram and other terrorist groups to the cooperate existence of Nigeria. In the past the Nigeria government has explored series of options in tackling terrorism. Notably amongst these options were the use of military assault on the terrorists and the involvement of the international community in the effort to counter terrorism in the country[69]. The latest effort was the use of amnesty programme which though unconstitutional[70] but effectively used as a political solution to the problem.

61. <http://www.voanews.com/articleprintview/2427195.html>(last visited on October 21 2014).

62. <http://www.voanews.com/content/boko-haram-claims-control-of-town-military-denies/2427100.html>(last visited on October 21 2014).

63. Defense spokesman Major General Chris Olukolade says "appropriate military operations to secure that area from the activities of the bandits is still ongoing." Also available on <http://www.voanews.com/content/boko-haram-claims-control-of-town-military-denies/2427100.html>(last visited on October 21 2014).

64. The Official Budget of the Federal Government of Nigeria 2011 – 2014 available at <http://www.nassnig.org/nass/acts.php>>(last visited on October 22 2014).

65. The House of Representatives on Wednesday 22 October 2014 joined the Senate in approving $1 billion (N165 billion) for President Goodluck Jonathan to purchase military hardware for the fight against Boko Haram. But the law makers cautioned that #30 billion naira to be paid as interest was on the high side. Also available on <http://allafrica.com/view/group/main/main/id/00032806.html>>(last visited on December 20 2014).

66. Available at <http://www.channelstv.com/2014/10/06/jonathan-neighbouring-countries-leaders-meet-in-niger-to-discuss- solutions-to-terrorism/>(last visited on October 21 2014).

67. Terrorism Prevention Act [2011].

68. Terrorism (Prevention) (Amendment) Act [2013].

69. Olokooba S.M and Olatoke J.O *Supra* note 9 at pp. 59-60

70. The programme was unconstitutional because the government of Nigeria failed to follow the due and constitutional process of granting amnesty. For detail see, ibid, 71, 72

These varied responses are at various stages of implementation with some recorded successes[71] and notable failures[72]. Thus there is consensus that the administration's approach and effort so far will remain the basis of critical analysis[73] for a long time to come. This is more so, because to most scholars the burden is on the Nigerian government to demonstrate whether the measures the government has put in place has achieved the set objectives or better still, whether it has done enough in its fight against Boko Haram or Terrorism. To most observers, it is unclear whether the Nigerian government is winning the war on terror, because the government's response compared to the United State of America leaves much to be desired[74]. In the US after September 11 terror attacks government quickly put in place multi facet strategies and institutional frameworks which have, since put the terror threats under check.

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71. Nigerian Tribune reported that the troops had started pushing out the insurgents from the zone, with the arrival of the new equipment. <http://www.tribune.com.ng/news/news-headlines/item/18502-soldiers-shoot-selves-to-avoid-deployment-to-boko-haram-communities>(last visited on February 21 2015).

72. The Nigerian News media also reported that the battle to rout out Boko Haram terrorists from communities seized in Borono, Adamawaand Yobo State continues, military source have disclosed that some soldiers and officers are inventing pranks to avoid deployment to the battlefield. At the weekend, seven soldiers allegedly opened fire on different parts of their bodies and later claimed that Boko Haram terrorists shot them, but when medical examination was carried out on them, it was discovered that the shots were self-inflicted. The army high command has also discovered that information about its strategies and operational road map in the North East were being passed on to Boko Haram terrorists by orderlies and close aides of commanders on the field. It was gathered that some of the perpetrators of the crime had been arrested, while a board of inquiry had been set up to carry out further investigation, after which a court martial to try them would be set up. The source revealed that many of the soldiers had devised means, so as not to be set for battlefield, while others faked strange ailments. It was reliably gathered that the alleged attack on seven soldiers at the weekend were carefully masterminded by the troops, so as to look as if the Boko Haram, terrorists actually attacked them. The source disclosed that when the soldiers were brought to the hospital in Adamawa, the injuries were fresh, while the bullets just pierced through the flesh to the other side, with no bone affected. Also available on <http://www.tribune.com.ng/news/news-headlines/item/18502-soldiers-shoot-selves-to-avoid-deployment-to-boko-haram-communitie>(last visited on October 21 2014). In another mind burgling revelation Nigeria's Chief of Army Staff (COAS), Lt.-Gen. Azubuike Ihejirika (as he then was), said some rogue soldiers have been helping the terrorist group Boko Haram with intelligence and conspiring with them to frustrate military operation against terrorists in Northern Nigeria. Available at <http://www.nationalaccordnewspaper.com/news/crime-news/760-army-chief-says-nigerian-soldiers-aiding-boko-haram?tmpl=component&print=1&layout=default&page>(last visited on October 21 2014).

73. Nigeria's former President Olusegun Obasanjo, blamed the incumbent president Goodluck Jonathan for allowing the Islamic sect, Boko Haram, to grow into a monster that is now uncontrollable by his failure to act on a report submitted to the government. The former president who spoke at a lecture delivered by Professor Bolaji Akinyemi to mark the 40th anniversary of Pastor Ayo Oritsejafor's call to ministry at the Word of Life Bible Church, Warri in Delta State, also tasked Nigerians to choose between a strong leader who might adopt unusual approach to tackle a problem or a weak leader who will leave the problem to fester. Vanguard, 24 2014 also available at <http://www.vanguardngr.com/2012/11/boko-haram-obj-blames-jonathan/#sthash.Iz52IajD.dpuf>(last visited on October 24 2014).

74. In Nigeria, government effort is more of more talk and less action. If not now that forces from countries like Chard, Cameroon and Niger are helping the Nigerian forces, Bokko haram fighters have taken over almost all the North-Eastern part of Nigeria. Terrorism in Nigeria appears to know no bounds because the citizenry are helpless to the extent that in 2013 the US had to put a bounty of $ 7 million on the head Bokko Haram Commander in Nigeria, Abubakar Shekau for anybody who could provide an information that would led to his capture. See Olalekan A and Emma A 'US put $ 7M

V. NEUTRALISING THE CATALYST OF TERROR THROUGH STRICT REGULATIONS OF COMMON IEDS MATERIALS

Across the world, terrorist groups replicate 'tactics' and 'means' so these IEDs made from common materials are of great appeal to terrorists the world over. On April 15, 2013, modified pressure cookers as well as fireworks were used to create bombs which were then exploded near the finish line of the Boston Marathon in the United State of America, killing

bounty on Bokko Hrram leader Shekau', *Punch* (Nigeria) June 04 2013. Also available at< <http:// www.nigerianmasterweb.com/paperfrnes.htm>accssed> (Last visited on July 04 2013). Shekau later that year appeared in a video claiming leadership of the group and threatening attacks on Western influences in Nigeria. In July 2013, Shekau issued a second statement expressing solidarity with al-Qa 'ida and threatening the United States. Under Shekau's leadership, the group has continued to demonstrate growing operational capabilities, with an increasing use of improvised explosive device (IEDs) attacks against soft targets. The group set off its first vehicle-borne IED in October 2010 with the bombing of a police station in Maiduguri. On 16 August 2011, Boko Haram conducted its first attack against a Western interest —a vehicle-bomb attack on UN headquarters in Abuja — killing at least 34 people and injuring more than 80. A purported Boko Haram spokesman claimed responsibility for the attack and promised future targeting of US and Nigerian Government interests. These are basic facts widely reported in the Nigerian media. See <http://www.nctc.gov/site/groups/ boko_haram.html>(Last visited on October 24 2014). Since late 2011, the group has conducted multiple attacks per week against a wide range of targets, including Christians, Nigerian security and police forces, the media, schools, and politicians 74 For detail of these attacks as well as the causalities recorded, see Olokooba S.M. *supra* note 9 pp.50-51. Since late 2012 to 2014, there have been explosions in Maiduguri, this blast killed 50 injuring 68<http://elombah.com/index.php/special-reports/23981-15-killed-in-maiduguri-boko-haram-suicide-bombing>>(Last visited on December 24 2014). Jos market Terminus market bomb blast kills 118 people <http://www.informationng.com/ 2014/05/football-fans-targeted-as-another-bomb-blast-rocks-jos.html>(Last visited on January 24 2015). The Nigerian Federal Capital Territory (FCT) Abuja – Yanyan. See. "Nigerians are tired of excuses" President Jonathan must bear responsibility for Boko Haram attacks- former Lagos State Governor Tinubu, available at <http://abusidiqu.com/nigerians-are-tired-of-excuses-jonathan-must-bear-responsibility-for-boko-haram-attacks-tinubu>.>(Last visited on January 24 2015) EMALD Plaza. See, "Another Boko Haram IED exploded in Nigeria's capital Abuja killing many", available at< http://www.vanguardngr.com/2014/07/emab-plaza-blast-boko-haram-killed-robert-bury-mother>(Last visited on January 24 2015). See further, "Kaduna Nigerian government unable to stop yet IED explosions as Boko Haram bombs in Kaduna killing 39 people" also available at <http:/ /thenationonlineng.net/new/timeline-of-boko-haram-attacks>>(Last visited on January 24 2015). After the unfortunate Kano bomb blast "The Christian Association of Nigeria (CAN) in the 19 Northern States and Abuja in their reaction to the bomb blasts in Kano which led to the killing of over 70 persons said 90 percent of Northern politicians are members of radical Islamic sect, Boko Haram. CAN, the umbrella body of Christians in the country said the recent bombing further exposed the hypocrisy of those canvassing amnesty for Boko Haram members. CAN's Public Relations Officer, Mr. Sunny Oibe, who stated this in an interview, alleged that 90 percent of politicians in the North were members of the sect however counselled Christians in the South not to engage in any reprisal attacks in the interest of the nation saying "the Lord will fight for the Christian". Available at <http://www.frontiersnews.com/index.php/news/3265-kano-bomb-blasts-can-says-90-of-northern-politicians-are-boko-haram-members> (Last visited on January 22 2015). For a detailed timeline on terror attacks related to the sect, see also <http://en.wikipedia.org/wiki/Timeline_of_Boko_Haram_ attacks_in_Nigeria>(Last visited on January 24 2015) Bauchi The Nigerian Government's purported cease fire with Boko Haram is in effective because of the continued IEDs attacks. Only on Thursday, October 23 2014 scores of innocent women and girls from two communities in Adamawa state were kidnapped by suspected Boko Haram Terrorists at night. Among villages attacked are Waga Mangoro and Garta – these are all close to Madagali and Michika towns. In another attack in Azare, Bauchi State, five people were killed in a bomb blast. Bauchi State Police Command has confirmed that five persons were killed in the bomb explosion that also left 12 others injured. Police Public Relations Officer, DSP Haruna Mohammed, said in a statement that the blast occurred at about 21.45 hours on Wednesday October 22 2014 when an improvised explosive device planted at a motor park in Azare was detonated. He disclosed that the injured persons were taken to the Federal Medical Centre, Azare

three people and injuring 264 others[75]. In the investigation that followed, the US Federal Bureau of Intelligence (FBI) and local county police confirmed that the bombs were created using pressure cookers, gunpowder extracted from fireworks, glue, nails as Shrapnel,[76] and what may have been Christmas tree lights as initiators[77]. In the US with the exception of fireworks,[78] all of these other items can be purchased without regulation.[79] Unfortunately, the ease with which the terrorist's use common materials to build IEDs show that common materials such as fireworks, fertilizer, empty compressor cylinders, pressure cooker, diesel fuel, and explosives can be purchased easily, often without any regulation in India, Kenya and Nigeria, and at infinitesimal amounts. For this, this paper argues that the sovereignty of India, Kenya and Nigeria is at risk save urgent action taking through strict regulation of the common materials.

Furthermore, a selected number of methods could be used by the Indian, Kenya and Nigerian government in neutralising the so call catalyst of terror. One of such ways is by constant monitoring of these common but deadly materials in a coordinated counter terrorism strategy. One practical method is to mirror the way in which some 'of the shelf' drugs are currently monitored and regulated in the three countries. In other words, to purchase explosives, fireworks, fertilizers and/ or dispose of these materials including compressors and canisters all individuals be made to document by a valid identification ie a driver's license card and signature so that the state can keep track of how much each person is buying in an attempt to track the movement of these materials. These kinds of records if properly kept in an integrated fashion could help law enforcement agencies to find unusual patterns of purchases and would allow the intelligence community to focus surveillance efforts on the right individuals in the society for the better safety of the general public.

It is further explicated that if this type of subtle but comprehensive monitoring is put in place, the intelligence community with proper training and timely monitoring and update capability over common materials will sooner or later have the capacity to detect IED based terrorist attacks. "The system of monitoring who buys certain materials would be more useful in combating terrorism if the intelligence community were to create a centralized database into which this information must be centered, rather than by asking storekeepers to keep their own individual records of purchases".[80]This strategy is capable of increasing the three countries law enforcement community to monitor and over time develop a functional watch list including data base for critical surveillance activities.

for treatment. See, *Vanguard* (Nigeria) October 25 2014 at p.2. Also available at <http://www.vanguardngr.com/2014/10/terrorism-army-sends-goc-office/#sthash.ogZDOZbV.dpuf>.>(Last visited on December 04 2015). Boko Haram and its splinter group Ansaru has demonstrated their capabilities at using common materials for IEDs thus increasing their international profile and emphasizing the growing threat these common materials pose to Nigeria's attempt at further preventing further acts of terrorism.

75. See Deborah Kotz, *supra* note 24. Similarly, see Dewey, *supra* note 13.

76. Persky, *supra* note 21.

77. Even Perez & Pervaiz Shallwani, FBI Says Devices Suggest Expertise, *WALL ST. J.,* April 26 2013, available at <http://online.ws.com/article /SB10001421278873247437045721219607079 2. html>>.>(Last visited on December 24 2015).

78. See MASS. GEN Laws ANN.ch. 148, 39 (West 2013).

79. *Ibid*.

80. The Comm'n On The Intelligence Capabilities Of The U.S Regarding Weapons Of Mass Destruction, Report to The President Of The U.S 351,366 (2005), *available at* <http://www.gpo.gov/fdsys/pkg/GPO-WMD/pdf/GPO-WMD.pdf>>(Last visited on December 24 2015).

In the meantime a national data base of every consumer buying common materials ie fertilizer or fireworks could be developed using a central information technology (IT) 'back bone' but using local law enforcement out 'posts' as input centers. Because DIA is the umbrella agency in charge of the fight against terrorism and insurgency in Nigeria, DIA should take the lead in creating a program focused on the monitoring of these common deadly materials. In India, Special Forces like Anti-Terrorism squad could be put in to more active operation and the scope of their operation expanded to include checking the proliferation of common materials. In India, the internal special forces- the anti-terrorism squad could be put into active operation again and scope of operation expanded, to be checking the proliferating of common materials.

There are avoidable *lacunae* in the Nigeria's legal response to terrorist materials. The statute that makes provisions for the control of explosives for the purpose of maintaining and securing public safety; and for purposes connected therewith did not identify the cabinet member responsible, instead empowered any member with the responsibility to make regulations. Section 1 of the Nigerian Explosives Act[81] provides

(1) The Minister responsible for explosives may by regulations make such provision with respect to explosives as he considers expedient for the purpose of maintaining and securing public safely.

(2) Without prejudice to the generality of the powers conferred by subsection (1) of this section, regulations made by virtue of that subsection may in particular include provision with respect to all or any of the following matters, that is to say

(a) the importation of explosives into Nigeria;

(b) the manufacture, storage, transport or use of explosives;

(c) the ownership or possession of explosives (including changes of ownership or possession);

(d) fees in respect of licences or other instrument issued in pursuance of the regulation;

(e) penalties for offences against the regulations, not exceeding in the case of any particular offences, imprisonment for a term of two years or a fine of ₦1,000 or to both such imprisonment and fine;

(f) the seizure of explosives in respect of which an offence is alleged to have been or has committed and the forfeiture of explosives in respect of which such offence has been committed.

In Kenya, section 235[82] provides that any person who unlawfully, and with intent to do any harm to another, puts any explosive substance in any place whatever, is guilty of a felony and is liable to imprisonment for 14 years.

The above statutory provisos are at best a passive, repugnant and an inconsequential approach to explosives regulation and monitoring. The fact that explosives are central in the current war on terrorism and insurgency ought to have compelled a better response. This is a reflection of the leadership perception on how the Indian, Kenya and Nigerian Governments.

By way of comparison an analytical survey of the US government's approach reveals a more conscious and 'hands on astuteness'. For example Congress passed the federal explosives law (FEL) in 1970 as part of the Organized Crime Control Act. [83] This statute

81. Explosives Act, Laws of the Federation of Nigeria [2004].

82. Penal Code Cap 63 Laws of Kenya.

83. Federal Explosives Law, 18 USC. Section 841-848 (2012).

comprehensively deals with explosives and related substances[84]. It applies to all the stages of the life circle of an explosive, including, importation, export, manufacture, transportation, handling, purchase, and authorized public or private use or storage of explosive materials.[85]The Act further established a rigorous licensing and permit regime that is essentially a restriction code for buyers, sellers and users of explosives regardless of circumstances, and prohibits the sale or distribution of explosives to unauthorized persons or corporations created designated handling methods with requisite public safety and warning provisions. FEL also designated unauthorized storage or locations.[86] More recently, the Safe Explosives Act[87] updated these regulations.[88] The safe explosives, act requires 'licensees' and 'permits' to keep detailed records of explosives sold and in their inventory.[89] These records must include documentation of the whole life circle of the explosive including exportation, importation, packaging, labeling, production specifications, purchase or order methods, shipment, receipt, or sale of explosive materials howsoever described.[90]

As a precautionary measure The Safe Explosives Act requires all licensed or otherwise authorized dealers to document physical inventories of all their explosive materials as to quality and manufacturers specification, quality control tests, any further packaging and keeps track of them in accurate readable language or inventory record form with inspection dates.[91] Additionally, the act established a strict liability felony in any breach thereto. Thus dealers of explosives regardless of authorization are required to record in a separate reporting form the following information regarding the mode of purchase: date, name or brand of explosive, manufacturer's marks of identification, quantity, description, name of purchaser and valid identification, address, and license or permit number of the person buying the materials.[92] Due to the legal effect of this robust statutory regime in USA, it is the argument of this paper that, putting in place similar robust legislative mechanism to regulate explosive in India, Kenya and Nigeria will go a long way in checking terrorist act in those countries.

Unfortunately, the ease with which the terrorist's use common materials to build IEDs show that common materials such as fireworks, fertilizer, empty compressor cylinders, pressure cooker, diesel fuel, and explosives can be purchased easily, often without any serious regulation in India, Kenya and Nigeria.

However, for a lasting check on this catalyst of terror-the common materials, the government of India, Kenya and Nigeria should enacted a strict law and regulation for both purchase as well as handling of the common materials. The materials should not simply be view only as a home use material but a dangerous one that needed a statutory control. Therefore the supplier, the buyer as well as the purpose of sale should be regulated through a strict law.

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84. *Ibid*. 18 USC Section 1962 (2012)
85. Alan Calnan & Andrew E. Taslitz,, Defusing Bomb Blast Terrorism: A Legal Survey of Technological and Regulatory Alternatives,67 *Tenn. L. Rev*. 177, particularly at 192.
86. *Ibid*.
87. 27 CFR. Section 555.121 (2013)
88. Persky, *supra* note 21
89. 27. CFR . sections 551. 121 (a) (2) (2013)
90. 27. Sections 555.121(2013); see generally 27 CFR. Ch II (2013); see also Explosives industry, Bureau Of Alcohol, Tobacco And Firearms, <http://www.at.gov/content/explosives/explosives-industry> (last visited on October 15, 2014).
91. See Safe Explosives Act, Sections 555.124 (a) ("Each licensed dealer shall take true and accurate physical inventories").
92. Federal Explosive Act. Sections 551.124 (b)(1)-96) (2012). See also the detailed analysis of Persky, *supra* note 21.

VI. CONCLUSION

In Nigeria despite the recorded IEDs bombings, the authorities in their legal and policy response to terrorism has not seen the need to alter the mandate of its counter terrorism agencies to specifically monitor and strictly regulate these common but deadly materials. Similarly in India, there has not been a specific law enacted to check, regulate and monitor the handling of common materials that are useable for fabricating IEDs. Likewise in Kenya, apart from section 235 Penal Code Cap 63 which provides that any person who unlawfully and with intent to do any harm to another, puts any explosive substance in any place whatever, is guilty of a felony and is liable to imprisonment for 14 years, there is no specific law to regulate the handling of materials like fireworks, fertilizer and others to checkmate their abusive use in producing IED's. Based on the foregoing, this article recommends the following for the checking and neutralising of the catalyst of terror through regulation of common materials in India, Kenya and Nigeria.

First, India, Kenya and Nigeria have a lot to learn from the US in counter terrorism particularly, in the area of formulating the correct legal and policy responses. These countries should emulate the aggressive way the USA went after the terrorists via strict terrorism legislations after the incidence of September 11 2001. Starting from 2001, both federal law enforcement and home land security measures in the USA require most local law enforcement agencies to collaborate in a synchronized data sharing portals that help these agencies cross check facts that help them zero in on suspicious purchases of most of the common materials. Also, the CIA and FBI maintain amicable relationship with some critical stakeholders who inform the police of a person they are unfamiliar with buying large quantities of commercial grade fertilizer.[93] Experience has shown that this symbiotic institutional cooperation is obviously is not entirely breach free, because it cannot be said to be 'water tight' or at best perfect. But because the reporting networks cut across various layers of retailers, transporters and other critical cell structures linked to the intelligence community and local police it can trigger the appropriate surveillance alerts that could always almost detect the crime either before or after the actual act. If this can be done in India, Kenya and Nigeria, the catalyst of terrorism will be up rooted or at best check to the barest minimum.

Furthermore, the Attorney general of the Federation of the three countries must act decisively on creating instruments such as executive orders that can effectively aid the agencies leading the country's war on terror. The legislative mandates of key law enforcement and intelligence agencies should be reviewed and the operations of these agencies in actualizing their new robust mandates should be guided by professional ethics, law and kept outside the frays of mucky partisan politics.

Further still, because of the possibility of terrorist's replicating their plots around the globe, the India, Kenya and Nigerian government must regulate and monitor these otherwise common but deadly materials. Regulation and subsequent monitoring must be targeted at suspicious buying patterns. Monitoring by the retail, transport sector and intelligence agencies should be aimed at the whole life circle of these materials with the possibility of expanding the check land watch list as terrorist may shift and their deadly 'material base.'

Finally this paper recommends for a robust legislative mandate to strictly regulate the common materials in India, Kenya and Nigeria by legislating on the purchase, handling, proliferation as well as use. Doing this will save the countries of focus and by extension the world at large from the imminent and constant danger of terror attack and the associated agonies of terrorism.

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93. *Ibid*.

REVISITING THE SCOPE OF A CONTRACT OF SALE OF GOODS UNDER THE OHADA UNIFORM ACT ON GENERAL COMMERCIAL LAW

ROLAND DJIEUFACK *

ABSTRACT : This article primarily deals with the law under the Organization for the Harmonisation of Business Laws in Africa (OHADA).It is concerned with a critical analysis of the scope of a contract of sale of goods under the OHADA Uniform Act on General Commercial Law (UAGCL).It specifically highlights the types of goods forming a contract of sale of goods, necessary for the conclusion of a sales contract. Arguably, the categorisation of goods which couldbe a subject of a contract of sale under the Act is very restrictive. This raises at some point confusion and uncertainty in determining the applicability of the Uniform Act to software licence agreements, sales of custom-made software and sales of electronic software. Thus, this article has the objective of exploring the consistent scheme set up by the UAGCL in determining the scope of a contract of sale of goods and, incidentally, in establishing the seller's duty to deliver conforming goods to a contract of sale. Importantly, contracts of sale of goods governed by the Uniform Act on General Commercial Law, affect principally the duties of the seller guided by the notion of 'conformity'. Adopting an in depth content analysis and critical evaluation of primary and secondary data, the article concludes that the scope of a contract of sale of goods under the OHADA Law should stretch out to cover other components suitable for electronic trade, and, thus, in this regard, it will encourage cross border e-commerce transactions.

KEY WORDS : Contract, Sale of Goods; Commercial Law Uniform Act.

I. INTRODUCTION

Contract of sale of goods is by far the most common type of contracts and often concern goods of a utilitarian nature, with a clearly defined purpose. People enter into agreements every day to buy goods for a variety of reasons. The most obvious, of course, is to enjoy and acquire their ownership and use them for different purposes. But in commercial transactions, traders, not being consumers, are not interested in the goods as such, but rather only in the profit that can be made, or the loss that can be avoided, by reselling them

Most, if not all, contracts, whether they involve goods, real property or services, are necessarily economic activities. Accordingly, in contracts of sale of goods governed by the

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OHADA[1]Uniform Act on General Commercial Law[2], the preoccupation of the Act relates to contracts for the acquisition of goods for business purposes. The categorisation of a contract of sale under the OHADA Uniform Act on General Commercial Law is very restrictive. This is *a fortiori* true of the types of contracts which are the subject of this Uniform Act: contract of sale of manufactured goods purchased for resale. Again, contracts of sale of goods governed by the Uniform Act on General Commercial Law, affect principally the duties of the seller are principally guided by the notion of 'conformity'. Importantly, the utility of these types of goods for the commercial buyer may be influenced by a broad range of factors. The buyer may choose particular goods based on their brand or reputation. The environmental and social practices involved in their manufacture may also be significant. Moreover, consumer tastes and preferences matter to the commercial buyer, as the brand of goods in the markets may rise and fall.

In order to make sense of the web of facts in which these complex transactions occur, this paper is an appraisal of the elements forming a contract of sale within the OHADA Uniform Act, necessary for the conclusion of a sales contract. In other words, it is of interest to look at what the UAGCL considers as part of a contract of sale of goods relevant to the conclusion of such a contract. This paper illustrates that some elements are not expressed in the Uniform Act but are indirectly stipulated. The paper concludes with suggestions for other important components which could be important to fall under the scope of a contract of sale of goods under the UAGCL.

First, this paper defines a contract of sale of goods and identifies the kinds of persons who can undertake such a contract having the status of a trader. In recognition of the fact that the UAGCL specifically identifies certain types of goods, the next step of this paper is to critically examine the scope of a contract of sale of goods, ambit of thecategorization of goods, which could be a subject of a contract of sale under UAGCL, by meticulously discussing its limits in accommodating other kind of goods under its scope. The movable and monetary nature of the goods transactions appears to be the predominant focus of the UAGCL. However, this paper has been able to demonstrate that other types of goods which do not expressly fall under the cover of the UAGCL could arguable be considered as goods, necessary for the conclusion of a contract of sale. The final part is the conclusion, which calls for the application of the UAGCL to other components of goods suitable for e commerce transactions.

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1. This French appellation refers to « Organisation pour L'Harmonisation en Afrique du Droit des Affaires ». The Treaty setting-up OHADA was signed at Port-Louis, Mauritius Island on 17 October 1993, as revised at Quebec, Canada, on 17 October 2008. The revisions became effective on 21 March 2010. As of July 7, 2010, the West African members of OHADA are Benin, Burkina Faso, Cote d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo, and the Central African members of OAHDA are Central African Republic, Chad, Cameroon, Comoros, Congo, Equatorial Guinea, and Gabon. *See* http://<www.ohada.org > and http://<www.ohada.com>. On February 22, 2010, the Democratic Republic of Congo's president ratified the country's adoption of the OHADA treaty. By the treaty's terms, a country becomes a member sixty days after the note has been deposited in Senegal. OHADA Treaty, article52, paragraph 3.
2. Hereinafter referred variously as 'UAGCL' or 'Uniform Act'. This is known in French as OHADA, *Acte Uniforme portant surle Droit Commercial Général*, found in the Official Gazette of OHADA, No. 23, of 15th February 2011. It is also available *at* http://www.ohada.com/textes. The following Uniform Acts are already applicable in Member States: Commercial Companies and Economic Interest Groupings, Law of Securities, Simplified Recovery Proocedures and Measures of Execution, Collective Proceedings for Wping –off Debts, Arbiitration Law, Accounting Law, Law of Co-operatives.Carriage of Goods by Road. Two other Uniform Acts have been enacted and adopted by the Concil of Ministersbut are still inapplicable, to wit; Consumer Law and Contract Law.

II. THE CONTRACT OF SALE GOODS DEFINED

As a general principle, the law relating to a contract of sale is an aspect of the general law of contract. A contract of sale is first and foremost a contract, that is, a binding consensual transaction based on agreement to buy and an agreement to sell.[3] It appears therefore that it cannot be examined in isolation from its very context.

The Uniform Act does not expressly define what constitutes a 'contract of sale.' However, it can be established indirectly from the provisions of the Act setting out the duties of the seller[4] and of the buyer.[5] According to those provisions, the contract of sale is a contract by which one party (seller) is obliged to deliver the goods, and to transfer property on the goods, to the other party (buyer) at an agreed price.[6] This denotes the fact that a sales contract is a reciprocal exchange of goods which one party binds itself to transfer against the price. This is a clear confirmation found under Article 250 para.1 UAGCL; the main obligations of the seller are to deliver the goods, hand over any documents relating to them in the goods. Under Article 262 UAGCL, the main obligations of the buyer are to pay the price and take delivery of the goods.

For more clarification, a contract of sale is defined in Section 2 of the Sale of Goods Act as:

> … a contract by which the seller transfers or agrees to transfer property in goods to the buyer for money consideration, called the price.

Also, in the French Civil code, a sales contract is merely between two parties, one party who is under the obligation to deliver the contract goods and the other one who is under the obligation to pay the price.[7]

To be concise, we can state the general proposition that the Uniform Act follows the positions at Common Law and the Civil code, by holding that for sales contract to exist, the goods, must be definite that is, must exist, be movable, be capable of being determined,[8] and legal.[9] In Common Law these requirements are also observed.

The root definition in the above definitions contains a number of ingredients, which are pointers in perceiving the essential requirements and nature of a sale contract.

We are concerned here with the principal duty of the seller to deliver goods of conformity under a contract of sale as formulated under the UAGCL, the heart of the seller's contract obligation[10] of conformity. Therefore, to identify the ambit of 'conformity', it is relevant to identify the 'goods' that are the object of the OHADA Uniform Act on General Commercial Law and as well as the status of the parties concerned in a contract of sale as covered by the UAGCL.

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3. P.S. Atiyah et al., (Pitman Publishing 11 ed. 2005), p.6.
4. Article 250 (Conforming goods)
5. Article 262 (to purchase)
6. *Ibid,* (refers to buyer's obligation to pay the price)
7. "La vente est une convention par laquelle l'un s'oblige à livrer une chose, et l'autre àla payer. ": See Civil Codes (CC) of Cameroon, Article 1582 CC; Côte d'Ivoire, Article 1582 CC; France, Article 1582 CC.
8. Cameroon, Article 1129 CC; Côte d'Ivoire, Article 1129 CC.
9. Cameroon,Article 1128 CC; Côte d'Ivoire, Article 1128 CC.
10. This duty is governed by Article 255 para.1 UGCL. See also, Larry Dimatteo et al., "The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence", (2004) 24 *Northwestern Journal of International Law and Business*, pp.299-392, p. 292, commenting on Article 35 CISG which also spells out the seller's duties.

III. LEGAL CAPACITY OF COMMERCIAL PERSONS ENGAGED IN BUSINESS

Capacity is very important as far as the conclusion of a sale contract is concerned. Capacity means the ability to perform legally binding acts. The parties must possess the legal capacity before entering into a contract of sale.

The UAGCL subjects the practice of commercial activities to a class of individuals. This is because the practice of business warrants a certain degree of maturity and experience. This is why the UAGCL expressly prohibits minors from delving into such business. The UAGCL stipulates that for a person to engage in trading as a regular occupation, he must be legally fit.[11] This means that such a person must be of the required age and free from any legal restrictions. The UAGCL restricts certain persons to undertake commercial activities due to the complexity of business especially with minors. A minor does not have the legal capacity to have the status of a commercial person or engage in trading, he can only do this if he becomes emancipated.[12]

A minor at Common law is he who has not yet attained the age of 18.[13] As a result of this deficiency on the part of the minor, he is at the mercy of the adult contracting party who often than not, take advantage of the minor's inexperience to exploit him by inserting onerous terms in the contract. The question of capacity of corporations is equally excluded from the ambit of the Act.[14] Capacity to buy and sell is regulated by the general law of contract related to capacity to enter into an agreement. The SGA 1893 contains limited provisions on contractual capacity. Section 2 of the 1893 Act deals only with purchase of 'necessaries', leaving all other matters arising in connection with capacity to buy and sell, and matters of property to the ordinary law of contract.

It is with a view of protecting the minor that the general principle of law is to the effect that contracts entered into by minors are generally voidable and therefore, are not binding upon the minors. However, sub-sections 4 and 5 of Section 2 of the 1893 Act provide an exception to this general rule. That Section provides to the effect that where necessaries[15] are sold and delivered to a minor or to a person who by reason of mental incapacity[16] or drunkenness is incompetent to contract, he must pay a reasonable price for them. Accordingly, the incapacitated person must pay a reasonable price for necessaries that are sold and delivered. This raises three major points:

First, 'necessaries' are defined in general terms by the above section as, 'goods suitable both to the condition in life of the minor' or other incapacitated person and to his actual requirements at the time of the sale and delivery. The definition has been particularly hard to apply in the case of minors. The question whether goods are necessaries is a mixed question of law and fact, so that there must be some evidence on which a finding to that effect can be made.[17] It is the seller who carries the burden of proving that the goods are necessaries[18] and given the nature of the test, it will often be a difficult burden to discharge. The seller will have to show that the goods are necessaries, having regard not only to the condition in life of the

11. Article 6 UAGCL.
12. Article 7 UAGCL; See Djieufack Roland, *The Nature of Agency Relationship under the OHADA Uniform Act on General Commercial Law: A Comparative Study", (*D.E.A. Dissertation, Faculty of Law and Political Science, University of Dschang) p.5
13. The Family Reform Act 1969 reduced the age from 21.
14. See *Palmer's Company Law* (ed. by G.K. Morse and others), (Sweet &Maxwell, London) p. 2-3.
15. Section 2 of the 1893 Act defines "necessaries" as goods suitable to the condition in life of a person.
16. See also sections 1, 2, and 3 of the Mental Capacity Act 2005.
17. *Ryder v. Wombwell* (1868) LR 4 Ex. 32.
18. *Ibid.;Nash v. Inman* [1908] 2 KB 1.

minor, but also to the minor's existing provision of goods of that kind.[19]

Secondly, the section above applies only to necessaries 'sold and delivered'. Where the goods have not yet been delivered, or have been but the property has not yet pass to the buyer, the common law applies and does not give a clear answer to the question whether the seller and/or buyer are bound.[20] Since the minor lacks capacity to contract,[21] there is no reason to give the protection of a binding contract to a seller who can help himself by refusing to deliver, or by taking proceedings for the recovery of goods, in which he has reserved the general property, against a minor unlawfully retaining possession. Nor is there any reason to give the minor a right to compel further performance of the contract by demanding that the seller delivers the goods or convey the property in them.[22]

Thirdly, the contractual price is displayed by the reference to a reasonable price, that is, consistent with the price recoverable on a restitution basis under the old count of goods sold and delivered.[23] It is not necessarily predicated upon a binding contract. The above section does not include the count of goods bargained and sold, applicable where the property had passed but delivery has not yet been made. A seller dealing with a minor in these circumstances is protected by the unpaid seller's right of retention in section 39 and the right of resale in section 48.[24] Such a seller does not need the protection of a personal action as well.

Section 2 of the 1893 Act can therefore be rationalised as minimal legislative intervention designed to avert an unjustified enrichment of the minor. It would take a modern rationalisation of law to interpret it as a partial codification of the law dealing with the enforcement of contracts against minors.

As in English law, those wishing to involve in commerce under the Uniform Act come in different guises. An individual wishing to engage in business may act on his own or a wide variety of business organisations are possible, most being legal or 'moral' persons, that is, having a legal personality in their own right, distinct from that of the natural persons involved.[25] Those who involve in doing business under the OHADA Uniform Act on General Commercial Law must *prima facie* be considered to be *commerçants*,[26] and their acts are deemed to be commercial acts subject to the rules of French commercial law.[27] In English there is no

19. *Nash v. Inman*, supra. For the difficulties of a seller who lacks knowledge, see *Johnstone v. Marks* (1887) 19 QBD 509. For details of nineteenth century case law showing the consumer needs of sons of the nobility, see G.H. Treitel, *The Law of Contract*, *op cit.*,pp. 495-496.
20. See *Nash v. Inman*,*supra*; *Roberts v. Gray* [1913] 1 KB 520 (services).
21. The position of mentally incapable buyers is different. If the seller is unaware of the mental disorder, he need not rely on s. 2 but may enforce the contract at Common law: *Baxter v. Portsmouth* (1826) 5 B & C 170. Otherwise the contract may be avoided by the mentally in capable party: *Imperial Loan Co v. Stone* [1892] 1 QB 599. A drunkard is liable on a contract at Common law unless his unless his condition is so extreme as to be known to the other party: *Gore v. Gibson* (1843) 13 M & W 623.
22. See Jason Chuah, *supra,* at p. 16.
23. Ibid.
24. To be examined later under remedies for breach of contract by parties.
25. Specifically, the businesses of these organisations are governed by the Uniform Act on Commercial Companies and Economic Interests Groups of OHADA. These are profit-making organisations. The general term used in French law is société such as, société anonyme (SA), société en commandite simple (SCS), société en nom collectif (SNC), société a responsabilité limitée (SARL), and Groupements d'Intérêts Economiques (GIE).
26. Article 1 UAGCL.
27. Slyvain Sorel Kuate Tameghe, in *Encyclopedie du Droit OHADA*, (ed. by Paul-Gerard Pougoue et al), (Lamy, Paris 2011) p.3 ; Paul-Gérard Pougoué& Foko Athanase, *Le Statut du Commercant dans l'espace OHADA,* Yaoundé, (P.U.A., Collection vademecum,Yaoundé) pp.19-21.

equivalent defined term. As Article 2 of the Uniform Act puts it:

> Est commerçant celui qui fait de l'accomplissement de commerce par nature sa profession.

(A trader is a person who carries out commercial acts in nature as its profession).

There is obviously circularity in the definition but this has not led to practical difficulties in delimiting the scope of a trader's commercial acts by 'nature' as identified under the Uniform Act. Probably the nearest equivalent in English law to '*un acte de commerce'* is the notion of 'acting in the course of a business'.[28] This word 'profession' translates the fact that a trader must engage in a business. 'Business' includes a profession and the activities of certain professions are not permitted under the Uniform Act.[29] The term is a wide one and denotes any regular activity of a business character carried out by a person on its own account. 'In the course of a business' has a broad meaning. It is not necessary that the transaction should be one of a type conducted with regularity by the seller.[30] From the text of the Uniform Act, it could involve for example a dealer in sales of goods or sales by an agent.[31]

As the characterisation of a person as a commercial person depends on the nature of the particular activities in which it is engaged under the OHADA Uniform Act, registration of the business in the Commercial Registry is also an important factor. This seems to be a permission or admission to commercial professions. The Uniform Act has created a central register[32] to supplement the registers kept at the national courts.[33] The impact of registration differs depending upon whether the name registered is that of an individual or of a company.[34] Registration of the former has merely a declaratory effect: it raises a rebuttable presumption that the acts of that individual are commercial in nature (Article 3 UAGCL). If the individual is not registered, he cannot rely upon his status as a commercial person vis-à-vis other persons but retains the duty to fulfill the obligations which lie upon it as a person. For companies' registration has a constitutive effect: it is only then that the company acquires legal personality.[35]

Likewise, any incidental acts which a trader undertakes in the context of his or her trade or profession are nevertheless classified as commercial acts (*actes de commerce par acessoire).* It is in this concept of 'commercial acts'(*actes de commerce*) that the key to the scope of French commercial law is to be found, for commercial law is essentially about acts and the *commerçants* who engage in them.[36] Some acts under the Uniform Act are considered commercial by virtue of their nature that is, taking account of what is done and by whom (actes de commerce par nature).[37] Certain acts are automatically deemed to be commercial because of the form of the act itself or of the organisation involved: *actes de commerce par*

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28. Brice Dickson, *Introduction to French Law*, (Pitman Publishing, London 1994*)*p.170.
29. Article 9 UAGCL; See Anoukaha François, ''L'incompatibilité d'exercise d'une activité commerciale dans l'espace OHADA: le cas du Cameroun''(2001)1 (5) *Annales de la Faculté des Sciences Juridiques et Poltiques*, Université de Dschang, p.6.
30. Roy Goode, *Commercial Law*, *op cit.,* p.300-301.
31. Slyvain Sorel Kuate Tameghe, *Encyclopedie du Droit OHADA*,*op cit.*, p.23.
32. Article 76-78 UAGCL.
33. The organisation of this registry is contained in Book III UAGCL.
34. This is contained in Book II Chapter 1 of the UAGCL.
35. Article 59-69 UAGCL.
36. John Bell, et al., *op cit.,* pp.432-433; Slyvain Sorel Kuate Tameghe, *Encyclopedie du Droit OHADA*, *op cit*, pp.2-4.
37. Article 3 UAGCL. These acts purposefully constitute a participation in the circulation of wealth (such as, goods and services).

la forme.[38] In addition, acts which normally if they are done as an ancillary part of a commercial activity: *actes de commerce par accessoire*.

Besides that, the OHADA Uniform Act on General Commercial Law now covers a special category of traders known in French as "*entreprenant*". There is still wonder as to what may be the equivalent to this in English. For the sake of convenience, 'entrepreneur' will be referred to in this work. A closest meaning can be derived from the literal meaning given to who an entrepreneur is: "someone who uses money to start business and make business deals".[39] This is a natural person who when sales pass a threshold, will lose that status and, when eligible, acquires that status of a commercial person.[40] The determining factor in circumscribing an entrepreneur's activities will be done particularly to taxes and the obligation to pay social charges in accordance with the national laws of OHADA member States.[41] In other words, it all depends on the income of the individual. This current dispensation is contrary to the spirit of harmonisation as championed by the OHADA Treaty as its principal objective.[42]

> By virtue of Article 30 of the Uniform Act, an entrepreneur is:
> L'entreprenant est un entrepreneur individuel, personne physique qui, sur simple déclaration prévue dans le présent Acte Uniforme, exerce une activité professionnelle civile, commerciale, artisanale ou agricole.

The above text suggests that it is a natural person who undertakes a commercial or civil act, artistic or agricultural activity. It entails therefore that the acts carried by an entrepreneur can be categorised to be '*acte de commerce par nature'* or '*acte de commerce par accessoire'* because acts which would normally be regarded as civil (that is not commercial) will be categorised as commercial if they are done as an ancillary part of a commercial activity.[43] This entails that if any person who is prohibited by the Uniform Act to exercise a trade may fall under this head if he engages in a commercial activity provided it is not incompatible with the rules of his profession.[44]

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38. Article 4 UAGCL. The clearest examples covered by the Uniform Act are the bill of exchange, negotiating instrument and a warrant.
39. *Macmillan English Dictionary for Advanced Learners,*International Students Edition, Macmillan Publishers Limited, 2002, p. 462.
40. Martha Simo Tumnde, ''Cameroon offers a Contextual Approach to Understanding the OHADA Treaty and Uniform Acts'', in *Unified Business Laws for Africa, Common Law Perspectives on OHADA* (ed. Claire Moore Dickerson), *op cit*, p. 66; Paul-Gérard Pougoué, Jean Claude James, Yvette Rachel Kalieu, et al, in *Ecyclopedie du Droit OHADA, op cit.,*p.49.
41. Article 30 para. 7 UAGCL. Such a measure usually scares away some entrepreneurs of this category for fear of paying taxes upon disclosing their business activity to the government. Thus, they usually carry out their different activities hiddenly in most towns of Cameroon. This is even further evidenced by the non-declaration of their business activities at the Commercial Registry. However, based on exchanges which the researcher had with some of these individuals in the city of Douala, the problem stems from lack of information and illiteracy. It also concerns the remote geographical zone where some of these persons are found. Some do migrate from town to town. See Kanchop Thierry Noel, *Le Secteur Informel a l'Epreuve du Droit des Affaires OHADA,* Memoire de D.E.A., Universite de Dschang, 2008, pp.82-83.
42. Paul-Gérard Pougoué, Jean Claude James, Yvette Rachel Kalieu, et al, in *Ecyclopedie du Droit OHADA,* op cit., p.*49*.
43. Donald Harris and Denis Tallon, *Contract Law Today, Anglo-French Comparisons, (*Clarendon Press,Oxford 1991)p. 15.
44. Article 9 UAGCL.

IV. CONSIDERATION

The UAGCL does not expressly define consideration. But, it is deduced from the duties of the parties. The seller agrees to transfer goods to the buyer who in return pays for them. The buyer is further expected to take all necessary steps for the effective payment of the price.[45] Under the Uniform Act, a contract of sale cannot be concluded without the specification of price.

The doctrine of consideration is peculiar to the Common law system. Generally, consideration is something of value in the eyes of the law. It follows that a valuable consideration can be some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other.[46]Whether through doctrine or case law, the appropriate definition of consideration seems to lay emphasis on the value of what is exchanged between the parties.[47] At Common law, it does not matter whether the value is too small or too high. What matters is the mere value of the consideration, no matter how small it is, as it was held in *Thomas v.Thomas*[48]when analysing the adequacy of the consideration.[49]

Consideration can also be described differently in sale of goods, for instance, as the price of the promise, as it was held in the case of *Dunlop Pneumatic Tyre Co. v. Selfridge Ltd.*[50] In such case, the House of Lords decided that a promise can be enforceable if it is bought for a price required; consideration here was the price.

In practice, the doctrine of consideration is divided into two categories: Executory and Executed consideration. In a sale of goods transaction, it will be described as "executory" when a promise is made in return of a counter promise and it will be executed when made against the performance of an act.[51]

While executed and "executory" considerations are valid considerations, common law treats past consideration as an absence of consideration. In *Re McArdle*,[52] the promise was not binding on children and the consideration was past. The Court of Appeal in this decision took in consideration that the children promised to repay the expenses of the plaintiff after the work was completed.

Under Civil law, where a contract arises from an agreement at the meeting of the minds of the contracting parties, Common law departs from a promise supported by consideration.[53] Therefore, consideration at this stage appears to be relevant because a promise is not a contract unless converted into an agreement upon acceptance.[54] The promises lead then the parties to bargain. This might be the reason why consideration might be considered a consensus of intentions, a consensus of two promises. In a comparative perspective, with regard to onerous French contracts for instance, a promise amounting to consideration may fall within the criteria of "*la cause*". Thus, in a sales contract situation, the buyer's obligation to pay for

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45. Article 264 UAGCL.
46. *Currie v. Misa* (1975) LR 10 Exch 153, 162).
47. Hugh Beale et al., *Cases, Materials and Text on Contract Law,*(Hart Publishing, 2002) p.141.
48. (1842) 2 QB 851
49. Michael Furmston, *Cheshire, Fifoot and Furmston's Law of Contract*, 12th edition, Butterworths, ghty p.106 ; Nicholas B, *The French Law of Contract*, *op cit,* p.113.
50. [1915] A.C 847 p 855.
51. Michael Furmston, *op cit.,*p .97.
52. [1951] Ch. 669.
53. Nicholas B., *The French Law of Contract, op cit.,* pp. 39-65;
54. *Carlill v. Carbolic Smoke Ball co.*(1893) 1 QB 257, AC.

the price will be treated as follows; the consideration supporting the contract and "*la cause*" of the seller's obligation to transfer the property of the goods. Consequently, in a sales contract, the cause of the seller remains the delivery of the goods and that of the buyer, why he wants the goods.[55] Based on this example, in a substantive note, what may amount to consideration under English Law, will likely be regarded as cause under French civil law.

In the case of the formation of the contract of sale of goods under English law, the consideration consists of rendering of mutual promise and most importantly the payment of the price. Only promises supported by a legal consideration (price) are legally binding. Generally speaking, the central function of the doctrine of consideration is to prevent people from making gratuitous promises, and the purpose of the law of consideration is to distinguish between gratuitous and non-gratuitous promises. The price is money which has to be paid for the purchase of something.

Just as the CISG,[56] the issue of price under the UAGCL can be inferred from the mutual exchanges of goods on the one hand for price on the other. Article 263 of the Uniform Act stipulates that:

> A sale may not be validly concluded without a specification of the price in the contract of sale, unless the parties referred to the price generally charged at the time of conclusion of the contract in the commercial sector considered for the same goods sold under similar circumstances.

The wording of the above article shows that price is a determining factor in the formation of a contract of sale. It represents a consideration on the part of the seller while transfer of title is for the buyer. There is however, the possibility for concluding contracts without specifying the price by making reference to the price generally charged at the time of the contract.[57] From the consumer's point of view, price is usually defined "as what the consumer must give up to purchase a product or service".[58] Even though the parties in their contract are free to debate on the price of the object to be sold, they are certain prices of certain commodities which have been statutorily fixed by the government, at times in, relation to the trade usage and practice. In practice, sellers usually have discriminative prices to the selling of their goods in their marketplaces. The prices of some goods do not represent the real value of such goods, a situation which may put commercial buyers into difficulties vis-à-vis their customers in particular. However, through the enactment of price control legislations, sellers of certain commodities are under a statutory duty to respect price arrangement. In this regard, a seller has a duty to deliver goods of conformity which correspond with the price imposed by the government. Price control in Cameroon is an evidence of this fact. Price control began in Cameroon, with the Law no. 63/LF/27, of the 19th June 1963, which established a regime of price control.

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55. Henri & Leon Mazeaud et al., *Obligations, théorie générale, Leçons De Droit Civil,* (9 ed., Montchrestien,1998) p.271-272.
56. Article 55 CISG.
57. Edie Diable Pascal, *Contract of Sale of Goods under the OHADA Uniform Act on General Commercial Law, The Common Law and the CISG: A Comparative Study*, (Masters Dissertaion, Faculty of Law and Political Science, University of Dschang, 2011) p.45.
58. J. Paul Peter & Jerry C. Olson, *supra,* p.496.

The substantial provisions on price control in the country consist essentially in placing goods under three different categories, and in attributing to each category a particular method of determining prices.[59] These categories are (a) essential goods (such as foodstuffs and other necessaries), (b) heavy and bulky goods (building materials for example), and (c) luxury goods (jewellery for instance). Different profit margins are allowed to the sellers of these goods. The base-line for the determination of the profit margins is the gross cost of the goods in question, in the case of imported goods, their cost, insurance, freight and other warehouse and transport charges, and in the case of home-product goods, the manufacturers' or producers' prices.[60] Furthermore, different profit margins apply depending on whether the seller is a wholesaler or retailer.[61]

In addition to these general provisions, specific legislation has been enacted to deal with particular businesses. Ministerial Order No. 14/MINEP/DPPM, of March 4th regulates the sales of pharmaceutical products. Another Order, No. 006/MINDIC/DC/82 deals with activities related to the automobile industry.

V. THE CATEGORISATION OF A CONTRACT OF SALE UNDER THE UNIFORM ACT

The categorisation of a contract of sale under the OHADA Uniform Act on General Commercial Law is very restrictive. The preoccupation of the Act relates to contracts for the acquisition of goods for business purposes which can be identified as B2B contracts.B2B contracts refer to sales contracts between two professional sellers. It is often referred to as "business to business contract". On the other hand, business to consumer sales (B2C) contracts refer to sales contracts concluded between a professional seller and a consumer. The UAGCL does not cover B2C contracts but the expected outcome of a B2B contract under the UAGCL is to proceed to a B2C contract. In fact, the goods involved in a B2B transaction are the subject in a B2C contract. Consumers are the end-users of those goods.

Generally, the distinction B2B and B2C in sales contract is often found in civil law countries, whereas; such a distinction does not exist at Common law.

1. Business to Business

Today, the Uniform Act is the applicable governing law in the OHADA Member States with regard to the B2B contract.[62] Under the Uniform Act, a B2B contract is conducted by a trader (*commerçant*).[63]

Generally, in order to determine whether a person or an entity is a trader, it is important to find out whether it carries out a particular transaction on a regular basis. Traders are considered to be those who engage in commerce as their usual professional activities.[64] Thus, traders in this sense could be anyone, a human being, a legal person including all

59. Arrêté no. 0196/MINCOMMERCE du 13 April 2007 portant fixation de la liste des produits et services dont les prix et tarifs sont soumis a la procédure d'homologation préalable.
60. Arrêté no. 100/MINDIC/DPPM du 12 Décembre 1988 fixant les éléments constitutifs du prix de revient etles marges bénéficiaires applicable aux produits importés, aux produits de fabrication locale et aux prestations de services.
61. Details are spelt out in Decree No. 69/DF/409 of October 2nd 1969.
62. These contracts are regulated by all the Articles which fall under Book IV of the UAGCL.
63. Athanase Foko, *Le Statut du Commerçant dans l'espace OHADA*, (P.U.A., Collection Vade-Mecum, Yaoundé, 2005) p.19-20; Jean-Marie Nyama, *Eléments de Droit des Affaires Cameroun-OHADA*, (Presse de l'UCAC, Collection Apprendre, Yaoundé 2002) p.18-19.
64. Article 2 UAGCL. The language in this text is ambiguous to a Common law reader.

commercial companies, or a person governed by public law.[65] As concerns contracts of sale of goods, the Uniform Act has provided rules for natural persons and corporations who may exercise such sales contract.[66]

However, it would not be necessary here to elaborate on the broad categories of legal persons that may be involved in commercial activity under the Uniform Act on General Commercial Law.

Under the UAGCL, the seller and the buyer must be traders. In fact, the Uniform Act restricts the status of the parties that may be party to a contract of sale. The status of the traders, either a physical person[67] or a company,[68] must be acquired by registration in the Commercial Registry.[69]

The Uniform Act has listed out the different types of business transactions it intends to cover. These transactions include; the purchase of movable or immovable property for resale; banking, stock-exchange, currency exchange, brokerage, insurance, and transit transactions; contracts between traders for business purposes; the industrial exploitation of mines, quarries and any natural resource deposit and rental of movable property; manufacturing, transportation and telecommunication operations; the operations of trade middlemen such as commission, brokerage and agency, as well as middleman's operations relating to the purchase, underwriting, sale or rental of immovable, property, businesses, shares in commercial companies or property development companies; A bill of exchange, a promissory note, and a warrant.[70] The list is not exhaustive.

The type of B2B contract with which we are concerned here is a contract between traders for business purposes what is here referred to as contract for sale of goods. The predominant feature of this type of contract is that it involves the selling of goods between the seller and commercial buyer. The purpose for which the goods are bought is of special relevance. This leads to the justification that the OHADA Uniform Sales law is entirely concerned with the reselling business of goods to non -consumers.[71] Again, undeniably, the idea connected with this issue of reselling of goods under the Uniform Act concerns expressly commercial buyers (acting as retailers or wholesalers), exercising trade for the purpose of the goods which are bought for resale and not for personal consumption.[72]

In a B2B contracts under the Uniform Act, if a dispute arises that is not covered by the provisions of this Act, domestic law rules shall apply to resolve the dispute.[73] These include the commercial code, the civil code or other national sources of law in force in the OHADA

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65. Article 1 Uniform Act. To a Common law lawyer, this notion seems strange since it has no specific legal connotation in the Common law system. A close idea to this in view to ease understanding may relate to public sector of the economy, that is public enterprises. Many public bodies are corporations in a similar sense to private companies operating in a private sector. Therefore, a public body is an organisation set up in the public interest to carry out a public service function. It may be a public enterprise of an administrative or commercial kind. They have an inherent power to protect the public interest.
66. Book IV UAGCL.
67. See Article 44 UAGCL.
68. See Article 46 UAGCL.
69. Book II UAGCL; Article 6 Uniform Act on Commercial Companies and Economic Interest Groups.
70. Articles 3-4 UAGCL.
71. Article 235 para.1 UAGCL.
72. PedroSantos Akuété and Jean Yado Toé, O*HADA Droit Commercial Général*, (Bruylant, Bruxelles 2002), p. 341.
73. Article 237 UAGCL.

Contracting States. In practice, the civil code and the commercial code are the primary reference in term of B2B and B2C contracts.[74]

2. Business to Consumer

The Uniform Act expressly excludes business to consumer (B2C) contracts that is, a contract between a professional trader and a consumer.[75] As aforesaid, what the Uniform Act covers is a contract between two professionals, that is, a seller and a commercial buyer, acting in their usual business activities.[76]

As a matter of distinction, the Uniform Act expressly defines who is a consumer different from a trader (*commerçant*).It follows that a consumer is a person who buys goods for personal, family or household use[77] and not acting for purposes of buying and selling.[78] Therefore a consumer is neither a commercial operator nor a person acting within his professional capacity. In short, the consumer is outside the provisions on contract of sale governed by the Uniform Act and consequently, B2C contracts are undoubtedly not covered by the UAGCL.[79]

Even though in the past there has been an effort in putting in place a draft OHADA Uniform Act on Consumer Law, by virtue of Article 237 of the Uniform Act, it could be inferred that the governing law for B2C contracts in most OHADA Member countries is found in the ordinary law rules. Majority of these countries rely on Presidential decrees and ministerial orders rather than legislations passed to remedy the situation. Such countries include Cameroon,[80] Côte d'Ivoire[81] and Senegal.[82]

The reason for examining B2C contracts in the light of the OHADA Uniform Act on General Commercial Law, stems from the fact that practice dictates that the usual transaction of the goods between the seller and the commercial buyer under the Act, is also by extension involves the selling of those goods to the consumers who are the end-users of the goods. In fact, the very purpose for which the goods are bought under a sale contract is for resale in view of making profits. In other words, attention is given to consumers here only because they buy directly from the ultimate commercial buyer, and that, consequently, what consumers can demand as quality matters to the commercial buyer. In another respect, the standard of determining resale here would be to distinguish between a retailer and a wholesaler. A retail seller may normally sell the goods bought to his usual customers, while a wholesaler usually has better access to different markets, for example in different countries, and hence, to more or usual customers who may still be interested in the goods.[83]

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74. For example, in Senegal, it is the Civil and Commercial Code of Obligations.
75. Article 235 (a) UAGCL.
76. Anne-Catherine Imhoff- Scheier, *Protection du Consommateur et Contrats Internationaux, (*Librairie de L'Université George & Cie S.A., Genève 2002) p. 76-95.
77. Article 235 (b) UAGCL.
78. Articles 1 and 3 UAGCL.
79. This is the same position under Article 2 of the CISG and the EC Directives on Unfair Contract Clause, See Official Journal, 1993 L-95/29-34, April 5, 1993.
80. See Cameroon, Law n°90/031, August 10th 1990 Organising Commercial Activities in Cameroon. ; Loi-cadre no 2011/012 du 06 mai portant protection du consommateur.
81. See Côte d'Ivoire, Article 1, loi n° 91-999 du 27 décembre 1991; *Pour la vente entre professionnel et consommateur*, (sales between professional traders), see Article 6-3 du décret 95-29 du 30 janvier 1995.
82. See Sénégal, loi n°94-63 du 22 aout 1994 sur le prix, la concurrence et le contentieux économique.
83. Benjamin K. Leisinger, *Fundamental Breach: Considering Non-Conformity of the Goods*, (Sellier, European Law Publishers GmbH, Munchen 2007) p.47.

VI. THE LEGAL CONCEPTION OF GOODS

'Goods' form the subject-matter of commercial sale contracts between the seller and the buyer. There is no definition of 'goods' in the UAGCL. Nor is it possible to deduce the meaning of the term by analysing different language versions of the statute. The Uniform Act seems to embody a rather conservative concept of 'goods', as it is considered both in legal writings and case law to apply basically to moveable tangible goods. Thus, according to most commentators intangible rights, such as patent rights, trademarks, copyrights, a quota of a limited liability company, as well as know-how, are not to be considered 'goods.' The same is true for immovable property.

Under the Uniform Act, the notion of 'goods' relates basically to movable and tangible objects. The notion of 'goods' serves to quantify the main obligation of the seller contained in Article 250, which requires that '… the seller must deliver the 'goods'… as required by the contract and this Uniform Act'. Therefore, to identify the ambit of the seller's conformance duty, it is relevant to identify the 'goods' that are the object of this Uniform Act. The term 'goods' is not defined in the Uniform Act as the case under the CISG.[84] However, its meaning can be understood by reference to the Uniform Act's Scope and General Provisions.[85] In particular, Article 234 (a) provides that "the provisions of this shall apply to contracts of sale goods'', whereas Articles 235 and 236 restrict the ambit of the Act, and by implication, the ambit of 'goods'. By inference from the restrictions imposed by Article 236 UAGCL, it may be understood that the term 'goods' is fairly not extensive, indeed, virtually not all-embracing. It clearly excludes to a greater extent non-physical items, such as electricity, negotiable instruments, company shares, which are technically 'things in action' or incorporeal movables and so are excluded by the plain words of Article 236. Similarly, items of 'intellectual property' such as copyrights, patents and trade marks are not corporeal movables and so fall outside the definition, although of course goods may exist which embody these intellectual property rights as been discussed in chapter three.

The reason which may be advanced for dismissing intangible or immovable goods from the scope of the OHADA Uniform Act could be that even though these are assets available for trade, they can only be disposed by way of trade or security and not possibly to be transferred physically to another party. The absolute interest in such types of goods may be disposed of outright or may be made the subject of security. Since by virtue of Article 250 para. 1 UAGCL, the main duty of the seller under the contract of sale is to deliver the goods to the buyer, what matters here is the physical transferability of the goods and not necessarily the transfer of a legitimate interest in the goods. The peculiar consideration here does not lie on the identification of the type of goods but rather on the physical segregation and ownership of it. Only in this situation is segregation both possible and necessary to identify the subject of the transfer obligation of the seller under the Uniform Act.

In modern commerce, an important point , not yet resolved by the OHADA Uniform Act on General Commercial Law, is whether computer software may constitute 'goods' within the meaning of Article 234 para. 1. Software is normally embedded in some physical form, such as disks, or as part of a package in which it is sold along with computer hardware, that is, computers or computer parts. Therefore, it could be considered as a tangible object capable of it being possible to be transferable. This raises an argument in trying to understand why such an item cannot be considered as a 'good' under the Uniform Act. It could without

84. Article 30.
85. See Chapter1.

any doubt be covered by the OHADA Uniform Act because such a good is being able to be transferred to another person in a contract of sale in its physical form. Again, there is probability that a disk be physically defective due to a virus for example. In this case, the seller should be liable as the seller of a physically defective car.

Under French law, goods are known as *marchandises*. This simply entails a collection of movable assets forming the subject-matter of a contract of sale. This is actually an element of *fond de commerce*. From this standpoint, there is one clear limit: this meaning will not include any form of immovable property in a contract of sale. Consequently, it can be inferred from the meaning of Article 235 para. 1 UAGCL that it limits the meaning of goods to movable property by its reference to *commerçants*. The meaning of 'sale of goods' limits the very meaning of 'goods'. Also, this would mean that no sale with a non-trader is of a 'good'. The general approach that is adopted under the Uniform Act is to apply the OHADA Uniform Act to the *commerçant* and not to non-commerçant.

1. Purpose of the Goods

In cases where there is ambiguity on the content of the contract of sale binding the parties, the Uniform Act provides for different tools to interpret the contract accordingly.[86] In fact, according to Article 238 UAGCL, in order to determine the intent of the contracting parties, "due consideration is to be given to all relevant circumstances". Those relevant circumstances, other than those explicitly listed in same Article 238 and Article 239 UAGCL, that is,.negotiations, any practices which the parties have established themselves, known commercial conduct of the parties, or usages. Another relevant circumstance is the purpose for which the goods were purchased.[87] To give an example, if a well-known producer of foodstuffs for small children orders certain products and mentions that those products have to be "completely harmless", the circumstances sufficiently show that the products must be suitable for consumption by small children and that this feature is of primary importance.

Consequently, on the basis of the above, the purpose for which the goods are bought is of special relevance in interpreting the contract of sale and when establishing whether there has been a breach of the contract under the OHADA Uniform Act. When a party is a commercial buyer under the UAGCL, the purpose for which the goods are usually bought is resale. This is evident by the fact that the Act does not govern consumer sales in the first place and also covers the commercial relationship only between professional business men: sellers and commercial buyers and not consumer buyers. This leads to the following consequences of the breach of Article 255 UAGCL by the seller, standing as a fundamental detriment if the commercial buyer is substantially deprived of what he is entitled to expect under the contract. Hence, in the case of a reseller, the goods must be fit for resale as this is what a commercial buyer under the Uniform Act expects under the contract. In cases where such resale is not possible at all, for example due to the fact that the goods are severely damaged, not packaged in a manner appropriate for resale, not labelled in a way mandatory for such kinds of goods in the intended market, or do not comply with applicable standards or other relevant public law regulations, there is a substantial deprivation of the expectation under the contract.[88]

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86. Articles 238-239 UAGCL.
87. This method of interpretation is called "*in favor negoti*". The idea behind that interpretation is that the parties wanted a valid contract.
88. Donald Harris and Denis Tallon, *Contract Law Today Anglo-French Comparisons,* Oxford, Clarendon Press, 1989, pp.45-46.

2. Classification of Goods

The English Sale of Goods Act (SGA) classifies the types of subject matter of the contract of sale as existing or future goods.[89] This classification is also acknowledged in the Civil Code. Moreover, there is another important classification which cuts right across this one. This is the Common law distinction between specific and unascertained goods.[90]

3. Existing Goods

As a general rule of contract law, for an agreement for sale to be valid, the goods sold must exist. Existing goods may be either specific or unascertained. The main idea here is that the goods forming the subject-matter of the contract must be present and visible during the period of the formation of the contract. Existing or specific goods are goods identified and agreed upon at the time a contract of sale is made.[91] These are goods owned or in the seller's possession before or at the execution of the contract.[92] Similarly, as per the civil code, the goods, subject- matter of the transaction, must exist at the time of the execution of the contract.[93] Again, the presumption rests on the fact that for such a dealing to amount to a contract, the goods must be physically present under the seller's keeping and control.

Even though the Uniform Act does not clearly define what is a 'good(s)' under a contract of sale it covers, it would be understood to mean tangible goods necessary to conduct the business of sale of goods.[94]

The Uniform Act does follow this position; it has already expressly identified the type of goods in a contract of sale it intends to cover [95] and by also excluding others which will not form a subject-matter of a sales contract.[96] This is another clear indication by inference of Article of 250 of the Uniform Act which considers the transfer obligation of the seller in a contract of sale of goods- meaning the existence of goods in their physical forms to the buyer together during the formation of the contract.[97] Equally, this warrants the seller not only to deliver the goods but be sure of the conformity of the quality of the goods during the formation of the contract as the contract description. This goes to explain that the essential feature of a contract of sale under the Uniform Act is that goods must exist so that in case of any defectiveness the seller should incur liability as laid down in the provisions relating to the seller's duty of conformity in the Uniform Act. Again, the seller's liability for defective goods should in principle depend upon the physical characteristics of the goods, which demands that the goods should be identifiable and be in the possession of the seller during the transfer obligation of the seller.

4. Future Goods

Generally, 'future goods' include goods not yet in existence and goods in existence but not yet in the seller's possession. It is prudent to say that future goods are not existing goods nor specific goods. Goods to be manufactured are a typical example of future goods or any goods that can only be acquired by the buyer after the contract of sale has been

89. See SGA 1979 s 5(1).
90. This distinction is of greatest importance in connection with the passing of the property and risk in the contract of sale.
91. See SGA 1893 s 62 (1).
92. See SGA 1893 s 5 (1).
93. Pedro Santos Akuété and Jean YadoToé, *OHADA Droit Commercial Général*, *op cit.,* p. 342.
94. *Ibid*, p. 344.
95. Article 234 para.1UAGCL.
96. Article 236 UAGCL.
97. Article 234.

executed.[98] In accordance with the Sale of Goods Act, these goods are existing or future goods and therefore can be the subject of a sales contract.[99] What may constitute future goods may be when a manufacturer agrees to build a specified piece of furniture, equipment or machine for sale to a customer.

Similarly, under the OHADA Uniform Act, these kinds of goods can form the subject-matter of sales contract especially when the goods must have been made available to the buyer to take delivery. One of the fundamental obligations of the seller is to hand over the goods to the buyer.[100] In reality, the buyer can only perform his payment obligation when the goods have been delivered to him in their physical state. Consequently, under the Uniform Act, it is possible for parties to enter into such an agreement for future goods. This position therefore follows the Common Law knowledge of specific and unascertained Goods.

5. Specific and Unascertained Goods

Specific goods or determined goods are goods identified and agreed on at the time a contract of sale is made, that is, specific car.[101] Unascertained goods are those goods that, at the date of the contract, are not specific goods. An unascertained or generic goods, though not defined by the SGA has been referred to by scholars as goods to be manufactured which are necessarily future goods,[102] purely generic goods (10 kilos of rice) or an unidentified part of a specified whole (4 bottles of beer in a tray of 12 bottles of different beer).

However, a distinction should be drawn between existing and future goods. Existing goods may be either specific or unascertained; while future goods are nearly always unascertained and specific goods are almost always existing goods. For example, a contract to sell a fungible item possessed in bulk by a seller in his store room will involve goods that are both existing and unascertained.[103]

The Uniform Act does not make references to ascertained goods, which are nowhere defined. By inference, however, like in most legal systems, it is a fundamental requirement in the sales contract that unascertained goods must be ascertained or ascertainable upon performance of the contract. As a matter of interpretation under Civil law, the "goods" must either be determined or subject to be determined.[104] Hence, it must be specific, stating for instance its specified name and if relevant with the quality, quantity or weight. But, if the contracting party fails to determine the quantity or quality of the goods, the civil code authorises a delivery of an average quality or quantity of the goods determined. The goods so identified are treated under the civil code as determined goods.[105]

VII. GOODS THAT ARE NOT SUBJECT TO A CONTRACT OF SALE

Generally, ordinary law and UAGCL have expressly excluded all goods being immovable or intangible.[106] In addition, the UAGCL makes express exclusion of sales to consumers,[107] sales after seizures, sales by order of the court, sales by auction,[108] sales of transferable

98. SGA 1893 s 5 (1).
99. SGA 1893 s 5 (1).
100. Article 262 et seq. of the Uniform Act. (Article 267 is more illustrative).
101. SGA 1979 s 61(1).
102. Roy Goode, *Commercial Law,* (3rdedition, Penguin Books, 2004), p. 210.
103. Michael Bridge, *The Sale of Goods, op.cit.*, p. 41
104. See Cameroon, Article 1129 CC; Côte d'Ivoire, Article 1129 CC; France, Article 1129 CC.
105. See Cameroon, Article 1126 CC; Côte d'Ivoire1126; France, Article 1126 CC.
106. Pedro Santos Akuété and Jean Yado Toé, *OHADA Droit Commercial Général, op cit.,* p. 346.
107. Article 235 (a) UAGCL.
108. Article 236 (b) UAGCL.

securities, negotiable instruments, currency or foreign exchange[109] and transfer of debt as well as to contracts in which a major part of the obligations of the party that delivers the goods shall be the supply of services.[110]

The sales of vessel, aircraft, and ships, though within the definition of movable and tangible goods, remain subject to special rules applied to immovable goods.[111] Under the CISG, they have expressly been excluded.[112] However, the UAGCL treats these goods as intangible and immovable goods and excludes them as 'goods' forming the subject- matter of a sale contract.[113]

Though the issue is rather less important, it may still be important for various reasons to distinguish sale of goods contract from related contracts involving the transfer of goods.

In accordance with the UAGCL, intangible and immovable goods are excluded from sales contract. Put differently, these are goods that cannot be the subject matter of sales.[114]

1. Intangible Goods (stocks, shares, investment securities etc...)

Intangible goods as opposed to tangible goods are incorporate and immovable goods. Intangible goods are unascertained and not physically determinable.[115] To the UAGCL, intangible or incorporate goods are totally excluded from sales and thus stocks**,** shares, investment securities, currencies, foreign exchange and the transfer of debt are not considered by the UAGCL as subject matter of a sales contract.[116]

Intangible goods in law are personal rights which are often legally acquired. In the Civil Code, intangible goods may be right to acquire credit, or any intellectual property right.[117] As a general rule, they cannot be the subject matter in sales of goods contract.[118] This Civil law helps us here in interpreting the UAGCL.

Similarly, under the SGA, the definition clearly excludes non-physical goods, such as company shares, which are technically "things in action" or incorporate movable and so are excluded by the plain words of the definition.[119] Similarly, items of "intellectual property" such as copyrights, patents and trademarks are not "personal chattels" or corporeal movable and therefore fall outside the definition.[120] Obviously there are goods that may exist and which embody these intellectual property rights.[121] The exclusion at Common law here is clearly fairly extensive than that under the Uniform Act. This comes in to fill in the gap in interpreting the UAGCL.

Also, there has been exclusion of anything that can only be claimed or enforced by action rather than taking physical possession.[122] In short, anything not physically identifiable,

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109. Article 236 (c) UAGCL.
110. Article 235 (b) UAGCL.
111. Santos PedroAkuété and Jean Yado Toé, *op cit.,* p. 345.
112. See Article 2 (e) CISG.
113. See Article 236 (e) UAGCL; Akuété Pedro Santos and Jean YadoToé, *op cit*, p. 345.
114. See Articles 235-236 UAGCL; Articles 1-2 CISG.
115. Philippe Malaurie, Laurent Avnes & Phillippes Stoffel-Munck, *Les Obligations,*(3rd édition, Défrenois, Paris2008) p. 115.
116. See Article 236 (c) UAGCL; Article 2 (d) CISG.
117. See Cameroon, Article 1689 CC; Côte d'Ivoire, Article 1689 CC; France, Article 1689 CC.
118. Philippe Malaurie, Laurent Avnes & Phillippes Stoffel-Munck, o*p cit*., p. 115.
119. See SGA 1893 s 62 (1).
120. P.S. Atiyah et al, *op cit.*, p. 77.
121. By contrast, for the purposes of the Law of Property Act 1925, "property" is defined so as to include intellectual property.
122. Igweike K.I*., op cit*., p. 35.

whether partly or wholly, falls directly outside the scope of the SGA. Thus chattels real, *choses in action* and money are not goods in accordance with the Sale of Goods Act.[123] However, the restriction on money can be lifted when the money becomes an antiquity.[124] This is similar to the position of the UAGCL in its Article 236 (C) and (d).

2. Sales of Immovable

In line with the general principle of domestic law, scholars' interpretation of the UAGCL has established the general rule that immovable goods are excluded as subject matter in a sale of goods transaction.[125] The very notion of 'goods' under the UAGCL as already explained excludes anything outside commerce that is, goods, subject matter in a sales contract.[126] However, sales of immovable goods in domestic law are subject to a special type of contract.[127]Even though not expressly excluded from the sales contract under the UAGCL, immovable cannot be goods, subject matter of the sales contract.[128] The UAGCL therefore impliedly makes it clear that provisions relating to sales contracts govern only sales of movable and corporate goods.[129]

3. Electricity and Gas

Generally, electricity and gas are goods outside commerce in domestic law.[130] Moreover they are neither moveable nor tangible goods. Therefore, they cannot be treated as goods, subject- matter of a sale contract. In the UAGCL as the case under the CISG, electricity has expressly been excluded and the reason is that the contract for the supply of electricity often contains special conditions for which the CISG's rules are unsuitable.[131] But it is pointed out that the sales of gas, oil or other energy sources are subject to condition of sales more suitable to statutes and therefore, cannot be subject to the same exception as the sale of electricity.

As a contrast, it was held in the case of *Singer Co. Link Simulation Systems Div v. Baltimore Gas and Electricity Company*,[132] that electricity in an electricity company's distribution system was not a 'good; within Section 2-105 of the American Uniform Commercial Code (UCC). However, electricity is a 'good' for the purposes of product liability because the term 'product' is defined by Article 2 of the Directive 99/34/EC Directive on Liability for Defective Products as '…includes electricity'. This is a little wider than the definition of 'goods' inferred from Article 234 para. 1 UAGCL in that it includes things attached to or comprised in another product. Presumably, this means that there could be liability under the Directive for damage done by defective electrical failures of the electricity distribution system. This area may be said to have been excluded by the UAGCL because it is presumably within the province of product liability law.

As concerns gas, the UAGCL is silent on this. Arguably, it does not fall within the scope of the contract of sale of goods because it is considered as an immovable object. But

123. See SGA 1893 s 62 (1).
124. E.E. Uvieghara, *Sales of Goods (and Hire Purchase) Law in Nigeria*, (Mathouse Press Ltd., Ibadan 1996) pp. 4-5.
125. See Articles 235- 236 UAGCL; Articles 1-2 CISG.
126. See Article 234 para. 1 UAGCL.
127. Pedro Santos Akuété and Jean Yado Toé, *op cit.,* p.346,347.
128. See Article 236 (C) UAGCL; Article 2 CISG.
129. Pedro Santos Akuété & Jean Yado Toé, *op cit.,* p. 347.
130. See Cameroon, Article 1598 CC; Côte d'Ivoire, Article 1598 CC; France, Article 1598 CC.
131. See Article 236 (f) UAGCL; Article 2 (f) CISG.
132. 558 A 2d 419.Also, for an example of American example for liability for electricity, see *Ransome v Winconsin Electric Power Co.* 275 NW 2d 641 (1979).

as a matter of fact, gas could be regarded as 'goods' under the UAGCL when it is in a fixed form loaded in a bottle, capable of being weighed and transported. In this case, the seller may incur any liability for the warranty of the quality, weight, packaging and labelling of the gas.

4. Companies

The sales of companies, a business generally known as *"fonds de commerce"* constitutes goods under the UAGCL.[133] Therefore, a business can be a subject matter of a sales contract. According to the UAGCL, the sale of a business are subject to the general rules of sales as well as specific provisions governing the doing of commercial activities.[134]

In Common Law countries, in line with the Statute of Frauds,[135] it has been held that shares in a stock company are not goods, wares or merchandise. [136] As an example, the Ghanaian Court of Appeal made it clear in the case of *Halaby v. Wireldu*[137]that, as per the SGA,[138] the sale of a business does not amount to a sales contract. The court in this case took the position that, selling a business is selling more than mere goods. The judges in this case were unanimous on the opinion that the sale of a business entails the sale of the goodwill and that of the whole business organisation.

The above decision should help us to understand that the concept of "*fonds de commerce"* which is a distinctive feature of French Commercial law. This embraces the various assets of a business, that is, assets in use, directed to the common goal of serving the customers of the business. The clientele are thus fundamental to the *fonds*. However, the *fonds de commerce* is not simply a convenient collective term to describe the property of a business, in the way that 'assets', for example, is in English. Being made up of moveable assets, the *fonds* de commerce is itself regarded as a species of movable property. However, although many of its components may be tangible assets, it is itself treated as intangible property. The disposition of *fonds* will generally be considered to be a sale (*acte commercial*) and subject to special rules as the case under the UAGCL.

So, a Common law lawyer should understand that a sale of *fonds* under the UAGCL is a sale which falls under the meaning of its Articles 147 and 234. Arguably, the Civil law interpretation helps in eliminating any ambiguity, thus avoiding making reference to *droitcommun*.

VIII. CONCLUSION

It is clear that the UAGCL will not apply to immovable property, sales to consumers and e-commerce and it is at best doubtful whether the UAGCL will apply to software licence agreements, sales of custom-made software and sales of electronic software. There are significant difficulties involved in determining the parties' place of business or the place of conclusion of the contract, for the purposes of determining the applicability of the UAGCL. And the application of many of the provisions of the UAGCL to electronic contracts is problematic. It can therefore be concluded that the UAGCL is not well suited to the regulation of electronic sales contracts.

It would, of course, be possible to amend the UAGCL so that it specifically addressed the problems associated with cross-border e-commerce transactions. This suggestion may

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133. See Articles 147 and 148 UAGCL.
134. See Article 147 UAGCL. This is the author's translation.
135. Statute of Fraud 1677 s 17.
136. *Humble v. Mitchell* [1839] 113 ER 392.
137. [1973] 2 GLR 249
138. Ghana SGA 1962.

govern the sales of immovable goods which are of a very high value. Rather, the OHADA draftsmen should focus on establishing a stable legal and regulatory framework for e-commerce. In other words, there should be in place a specific Uniform Act on e-commerce. E-commerce is clearly a major issue in international trade. As more and more transactions are conducted electronically between parties in all the countries of the world, the need for clear, certain and easily applicable rules for international e-commerce contracts becomes more and more pressing. If not, it means that the significance of the OHADA treaty as a tool for the regulation of cross-border sales contracts is diminishing.

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E-CONTRACTS IN TECHNOLOGICAL AGE: NEW PROBLEMS AND CHALLENGES

R.P.RAI*

ABSTRACT : E-contracts are rapidly becoming an important component for conducting business in cyberspace since their advent in the business negotiation scenario. This new path of business has been referred to as E-commerce. With their use, it is becoming plausible to optimise the negotiation phase and the contract management process. It is highly likely that different forms of e-contracts will emerge, depending on the type of industry; and that the existing market places will extend their services along with the e-contracting services. The problem here lies in transforming traditional contracts into executable e-contracts. The challenges that e-contract poses to the traditional model such as issues regarding offer and acceptance, jurisdiction, state of mind and enforceability of electronic contracts as opposed to the traditional model of contract.The e-contracts problem requires a comprehensive integrated solution, and not a loosely coupled solution of various disparate components. It is now essential to develop a comprehensive solution to this problem.This paper discusses the problems and challenges created by e-contracts in the age of new technology and globalization.

KEY WORDS : E-Contract; Digital Signature, E-Commerce, Web Contract, UNICITRAL, UNICIC, e-catalogue.

I. INTRODUCTION

Contracts play a major role in establishing binding relationships between various business units and also between businesses and their customers. A contract consists of numerous activities that have to be carried out by the involved parties and contract clauses that address specific concerns in the business process interaction. In the last few decades, the business world witnessed a growing need in exploring innovative ways of automating the regulation of business interactions electronically. In recent years, there is an explosion of business applications exploiting Internet and Web as a medium. Business trends have been observed from on-line shopping to on-line auctions to business-to-Business interactions.

In this article, various aspects have been looked into with regard to contract formation such as time and place, validity of contracts, electronic signatures, attribution of electronic data messages and signatures, automated transaction, as well as select aspects of e-jurisdiction.*The Information Technology Act, 2000* whereby by way of Sec 11 the legislators accept offer by way of data message either by himself or by any electronic system programmed for that specific purpose (which would include offer in case of click-wrap) but is silent as regards mode of assent or acceptance of the same. Thus, click-wrap agreements are valid and

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enforceable contracts as far as offer and acceptance is concerned. The legal issues have been examined from Indian standpoint and are reviewed on a comparative basis with international model laws and conventions and laws of other countries.

The present Law of the Contract could not face the problems posed by new technologies such as e-mail contracts and other transactions through media and technological devices. Thus, the law makers felt a strong need for a law to meet the challenges posed by electronic devices. The law makers then decided to form a new legislation called the Electronic Commerce Act, 1998. Many provisions of the Act have been borrowed from foreign laws, including the UNCITRAL Model Law on Electronic Commerce. The present study is in the context of the guidelines as proposed by the United Nations Commission on International Trade (UNCITRAL) Model Law[1] and the UNECIC (2005).[2]The legal issues addressed in this paper have a direct bearing on commercial transactions on the internet and are of great importance.

II. WHAT IS E-CONTRACT

Electronic contracts (or simply e-contracts) is any kind of contract formed in the course of e-commerce by the interaction of two or more individuals using electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract. An electronic contract is an agreement created and "signed" in electronic form—in other words, no paper or other hard copies are used. For example, one can write a contract on his/her computer and email it to a business associate, and the business associate emails it back with an electronic signature indicating acceptance.

Electronic contracts can be defined as legally enforceable promises or set of promises that are concluded using electronic medium. The United Nations Commission on International Trade Law (UNCITRAL), the Model Law on Electronic Commerce states in Article 11 that a contract can be made by exchanging data messages and when a data message is used in the formation of contract, the validity of such contract should not be denied.Electronic contracts helps in building such new business relationships and fulfill contractual agreements through electronic contracting systems.[3]

E-contracts enable precise specification of contractual activities, terms and conditions, compliance checking and enforcement. In addition to legal binding between parties, e-contracts are also used across different workflows systems to fulfill cross-organizational business processes and integrating different web services. Thus, an e-contract is viewed from a simple electronic contract document to a computerized facilitation or automation of a contract.

There are in principel four different ways of e-contracting but the first and most important method of internet contracting is similar to a negotiation of one or more infrequent transactions by exchange of letters and documents – known as e-mail contract formation.[4] In this method the parties can exchange e-mail messages and even attachments setting out the terms and conditions of their contract in detail. This is quite similar to offer and acceptance between the

1. UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, Part I, Resolution 51/162 adopted by 85th General Assembly at a plenary meeting (A/51/628) (December, 1996).
2. UNCITRAL Convention on the Use of Electronic Communications in International Contracts, Resolution 60/21 adopted at the 60th Session of the General Assembly (December 2005).
3. UNCITRAL Model Law, Article11.
4. D Kidd Jr& W DaughteryJr, Adapting Contract Law to Accommodate Electronic Contracts, (2000) 26 *Rutgers Computer & Technology Law Journal* at 232.

parties by way of letter or faxes. The second method, similar to contract formation via a mail order, is known as contracting on the World Wide Web (www). In this method, one party maintains the website at which goods and services are advertised. The prospective buyer accesses the website and then completes an electronic form whereby goods or services are ordered from the seller.

An e-contract can also be in the form of a "Click to Agree" contract, commonly used with downloaded software: The user clicks an "I Agree" button on a page containing the terms of the software license before the transaction can be completed. Since a traditional ink signature is not possible on an electronic contract, people use several different ways to indicate their electronic signatures, including typing the signer's name into the signature area, pasting in a scanned version of the signer's signature, clicking an "I accept" button, or using cryptographic "scrambling" technology. Though lots of people use the term "digital signature" for any of these methods, it is becoming standard to reserve the term "digital signature" for cryptographic signature methods and to use "electronic signature" for other paperless signature methods. Cryptography is the science of securing information. It is most commonly associated with systems that scramble information and then unscramble it.

Electronic contracts and electronic signatures are just as legal and enforceable as traditional paper contracts signed in ink. This e-signature law made electronic contracts and signatures as legally valid as paper contracts, which was of great value for companies that conduct business online, particularly companies that provide financial, insurance, and household services to consumers. The law also benefits business-to-business websites who need enforceable agreements for ordering supplies and services. For all of these companies, the law helps them conduct business entirely on the Internet. This results in substantial savings to businesses, which can be passed on to consumers.

III. THE FORMATION OF ELECTRONIC CONTRACT

The formation of electronic contracts in the new technological age and electronic commerce has brought with it world-wide legal uncertainty as to whether electronic contracts concluded by electronic means can be recognised as valid and enforceable agreements compared to the traditional paper-based method of writing and signing. It is a common perception that the law, and more particularly the law of contract, has been lagging behind in the development of solutions for the use of electronic communication in commerce. This has led to uncertainty which, in turn, creates an obstacle to trade at a national and international level.[5]

The original principles of contract law are outdated and it is clear that at the time these principles were formulated the world was run on paper and ink. Certainly, the meeting of minds in cyberspace was never envisaged and the validity and effect of electronics in commercial communication was never contemplated.[6] The use of electronic communications for the purposes of trade posed unexpected and complex legal problems and it was clear, as early as the early 1980s, that there was a need for legal redress of these issues on both local and international levels.[7]

5. S. Eiselen, 'Principles of the UNECIC' in Sharing International Commercial Law Across National Boundaries, (2008) at 106.
6. T Pistorius, 'From Snail Mail to E-mail—A South African Perspective on the Web of Conflicting Rules on the Time E-contracting' (2006) 39 *Comparative and International Law Journal of Southern Africa*, at 179.
7. *Ibid*.

As individuals and businesses interact they may enter into contracts in which rights and obligations are created. In certain instances contracts are breached and a party may want to claim specific performance or cancel the agreement and claim damages. To establish whether a legally binding agreement or a contract exists one looks first for the agreement by consent of the two or more parties involved. A contract is defined as an agreement (arising from either true assent consensus or quasi-mutual assent) which is, or is intended to be enforceable at law as a result of a valid offer and acceptance. Indian case law suggests that consent is the foundation or basis of a contract. Accordingly, if any electronic communication between two or more parties (e.g. e-mail or SMS) can be interpreted as having complied with the formal constitutive requirements of a contract, as stated above at common law, it could be inferred without any reference that a valid contract has been concluded. If any of the said requirements is not present, or doubt exists as to the genesis thereof, it may be declared void or voidable by a court of law.

The first question that one needs to ask when examining the validity of an electronic contract is whether the contents of a website can constitute a valid offer in the eye of law. A person is said to make an offer when he puts forward a proposal with the intention that, by its mere acceptance and without more, a contract should be formed. The offer must embody or contain sufficient information to enable the person to whom it is addressed to form a clear idea of exactly what the offeror has in mind. In other words, the offer must set out the exact essential and material terms of the agreement to be unequivocally accepted by the offeree.[8]

The offer must be a firm offer which means that the offeror has addressed a specific person or group of persons with the intent to be contractually bound. A tentative statement with a possible agreement in mind is not sufficient. It should also be noted that an advertisement does not generally constitute an offer, it merely amounts to an invitation to do business. It should be noted, however, that an advertisement may, depending on its wording, qualify as an offer. This might be a grey area especially when dealing with website-based advertisements and advertisements by e-mail. Such interactive applications might be regarded as an offer open for acceptance, while stocks last, 'as opposed to an invitation to treat'.

A binding contract is created when there is an acceptance of an offer. The acceptance must be manifested or be indicated by some form of an unequivocal act from which the inference of acceptance can logically be drawn. It stands to reason that consent is possible only where the whole offer and nothing more or less is accepted. When the acceptance is coupled with reservation, it is no acceptance but is in fact a counter-offer, which the offeror may accept or reject. There is no specific requirement that an agreement must be in writing, however, the legislator has created laws to ensure that certain agreements, once concluded, will be prima facie evidence of the agreement between the parties. Subject to certain exceptions, mainly statutory, any contract may be verbally entered into; writing is not essential to contractual liability.

Therefore, it is crystal clear that the law recognises electronically formed contract as valid contract. There are two main ways in which contract of sale of goods can be made via Internet. A common method is through the exchange of e-mail.[9] E-mail can be used to make an

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8. In this context it is important to note that the Information Technology Act, 2000 ("IT Act") provides fortification for the validity of e-contracts.
9. Rebecca Ong, Consumer Based Electronic Commerce: A Comparative Analysis of the Position in Malaysia and Hong Kong, *International Journal of Law and Information Technology*, 12(1): 101-122 (2004).

offer and to communicate an acceptance of that offer. The other method of contracting is by using the World Wide Web or also known as web contract. In this regards, a web site can operate as a shop window and it can act as a cashier.[10] Normally, the vendor would provide a display of products on his website and indicate the cost of such products. A customer can scroll through the website previewing the items or products on offer in e-catalogue, click on the item for further information and if interested in the purchase, can place an order by filling in an order form and provides the credit card number. Then click "Pay" or "I accept" and clicking "Submit".

Another method that attracts e-consumers nowadays to buy goods on-line is through the chat services or social website. Among examples of chat services or social website are Internet Relay Chat (IRC), Yahoo Messenger (YM), Skype, Facebook, Twitter, MySpace, Where Are You Now (WAYN), Friendster, and many more. This method can be considered as a safe way to buy goods online because the goods being promoted and offered only among social friends that listed in one's account. Therefore, based on trust and know who the trader, some e-consumers prefer to use this kind of method. Among these three medium of contracting online, the most popular method amongst the e-consumer is via website,[11] where the e-consumer can easily obtain the information of variety of goods, select and order just by browsing the e-catalogue.

Regardless of whatever medium used in concluding an e-contract, what is pertinent and should be noted is that contractual issues on the Internet been plagued by legal questions, as there are no specific provisions dealing with contract online especially in sale of goods transactions. The discussion related to e-contractual formation began with the issue whether a computer was capable of making a contract. However, this issue is obsolete due to recent development of law where it is accepted globally that computers can be used to reach an agreement without any human involvement.[12]

The UNCITRAL Model Law in E-commerce and United Nations Convention on the International Sale of Goods (the Vienna Convention) as well as Article 2B of the US Uniform Commercial Code clarify that contract can be performed with intelligent agents without human involvement.[1313]Patrick Quirk, Jay Forder, Nonetheless in a view to preserve the rights of e-consumers, the issue remains with regards to principles of formation of e-contract when the human element in the processing of the transaction is removed and the contract is performed electronically. For a contract to be valid, the essential ingredients of a contract must be present. The common requirements to be present in an enforceable contract are offer, acceptance, consideration and capacity.[14] The element of intention to create legal relation is not expressly required under the Contract Act of 1872 as one of the elements but it has been added following the common law. The technology does not change the necessities of these elements to form a valid e-contract of sale of goods but it creates new problems and challenges. However, the applicability of the existing law to the new problems without modification is questionable.

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10. See NabarroNathanson, *Laws of Internet* (Butterworths Asia, 1997).
11. Adeline Chua PhaikHarn, Ali Khatibi, Hishamuddin Ismail, E-commerce: A Study on Online Shopping in Malaysia, *Journal of Social Science*, 13(3): 231-242 (2006).
12. Nicol, C.C., Can Computers Make Contracts? *Journal of Business Law*, January Issue (1998), 35-49. Also see, *Carlill* v. *The Carbolic Smoke Ball Company* (1893) 1 QB 256; *Chapple* v. *Cooper* (1844) 153 ER 105.
13. Patrick Quirk, Jay Forder, *Electronic Commerce and the Law* (John Wiley & Sons Australia Ltd,2003).
14. TreitelGuenter Heinz, *The Law of Contract* (London: Sweet & Maxwell, 2003).

(a) Opting Out of Electronic Contracts

While the e-signature system makes paper unnecessary in many situations, the consumers and businesses have the right to continue to use paper where desired. The system provides a means for consumers who prefer paper to opt out of using electronic contracts.Prior to obtaining a consumer's consent for electronic contracts, a business must provide a notice indicating whether paper contracts are available and informing consumers that if they give their consent to use electronic documents, they can later change their mind and request a paper agreement instead. The notice must also explain what fees or penalties might apply if the company must use paper agreements for the transaction. And the notice must indicate whether the consumers' consent applies only to the particular transaction at hand, or to a larger category of transactions between the business and the consumer—in other words, whether the business has to get consent to use e-contracts/signatures for each transaction.

A business may also provide a statement outlining the hardware and software requirements to read and save the business's electronic documents. If the hardware or software requirements change, the business must notify consumers of the change and give consumers the option (penalty-free) to revoke their consent to using electronic documents.Although the e-signature law does not force consumers to accept electronic documents from businesses, it poses a potential disadvantage for low-tech citizens by allowing businesses to collect additional fees from those who opt for paper.

(b) Contracts That Must Be on Paper

To protect consumers and general public from potential abuses, electronic versions of the following documents are invalid and unenforceable:

* wills, codicils, and testamentary trusts
* documents relating to adoption, divorce, and other family law matters
* court orders, notices, and other court documents such as pleadings or motions
* notices of cancellation or termination of utility services
* notices of default, repossession, foreclosure, or eviction
* notices of cancellation or termination of health or life insurance benefits
* documents required by law to accompany the transportation of hazardous materials.
* documents required by law to be registered, properly stamped and witnessed.

These documents must be provided in traditional paper and ink format.

(c) Digital Signature

Other issues of e-contracts entail validity of digital signature and authentication of contracting parties. A signature is the writing of some name or identifying mark on a document. However, a digital signature is not a signature but a process that uses encryption and algorithms to encode documents. The process creates a product that identifies the person who uses the process. As theperson using that particular process is only one or his agent, the other party can safely rely on that process or digital signature.[15]

Digital signatures are the equivalent of the traditional handwritten signature and, if properly used, are even more difficult to forge than the traditional handwritten signature. They are also important to prove nonrepudiation of agreements as they may, in certain instances, even use a time stamp. The use of encryption technology to create digital signatures

15. Naemah Amin, RoshazlizawatiMohdNor,Issues on Essential Elements of Formation of E-Contract in Malaysia: E-Consumers' Perspective, *Journal of Applied Sciences Research*, 7(13): 2219-2229, 2011.

makes it possible to verify that: (a) persons exchanging documents electronically are who they say they are; (b) the message exchanged between them has not been altered; (c) the sending party cannot deny having sent them; and (d) that the messages were sent by the parties. Encryption therefore provides electronic communication with authentication, integrity, non-repudiation and confidentiality.[16] J S Forster, Although it is expected that secure methods of electronic signatures will become as commonplace and safe as credit cards, some consumer advocates are concerned that if a consumer uses an unsecure signature method (such as a scanned image of a handwritten signature), identity thieves could intercept it online and use it for fraudulent purposes. The Electronic Commerce Act, 1998 addresses the integrity and authentication of secure electronic signature.[17]

IV. INTERNATIONAL RESPONSES TO ELECTRONIC CONTRACTS

The formation of electronic contracts in this new age of technology and era of globalization, initially caused a world-wide legal uncertainty as to how and whether electronic contracts concluded by electronic means can be recognized as valid and enforceable agreements. In response to this legal gap the United Nations Commission on International Trade Law (UNCITRAL) and governments of various countries called for the drafting of internationally recognized uniform electronic transactions legislation. In 1985 UNCITRAL drafted the Recommendation on the Legal Value of Computer Records which amongst other principles advices that:

"Considering …… that there is no need for a unification of the rules of evidence regarding the use of computer record in international trade, in view of the experience showing that substantial differences in the rules of evidence as they apply to the paper-based system of documentation have caused so far noticeable harm to the development of international trade ...."[18]

The UNCITRAL Recommends to Governments:

(a) to review the legal rules affecting the use of computer records as evidence in litigation in order to eliminate unnecessary obstacles to their admission, to be assured that the rules are consistent with developments in technology, and to provide appropriate means for a Court to evaluate the credibility of the data contained in those records;

(b) to review legal requirements that certain trade transactions or trade related documents be in writing whether the written form is a condition to the enforceability or to the validity of the transaction or document, with a view to permitting, where appropriate, the use of electronic authentication;

(c) to review legal requirements of handwritten signature or other paper-based method of authentication on trade related documents with view to permitting, where appropriate, the use of electronic means authentication.[19]

In 1996, the United Nations adopted the UNCITRAL Model Law on E–Commerce[20] to assist countries in drafting and enacting laws to give legal recognition to electronic contracts

16. J S Forster, 'Electronic Contracts and Digital Signatures—The Future is Closer than You Think (2000) 3, available at www.corinball.com/articles/art-digitalcontracts.html.
17. See Part III of the Electronic Commerce Act, 1998.
18. UNCITRAL, Recommendation on the Value of Computer Records (1985).
19. *Ibid*.
20. UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, Part I, Resolution 51/162 adopted by 85th General Assembly at a plenary meeting (A/51/628) (December, 1996) available at www.uncitral.org/en-index.html.

as well as the UNCITRAL Model Law on Electronic Signatures[21] in 2001. The UNCITRAL Model Law on Electronic Commerce[22] was adopted on 12 June, 1996 and aimed to create a more certain legal environment for what had become known as electronic commerce by providing a tool for states to enhance their legislation of paperless communication and storage of information.[23] Its main purpose is to give effect to the Recommendation on the Value of Computer Records as adopted by the UNCITRAL in 1985.[24] The purpose of the Model Law was to offer national legislators a set of internationally acceptable rules for the enhancement of legal certainty.[25] The principles expressed in the Model Law were also intended to be of use to individual users of electronic commerce in drafting solutions for contracts that are concluded electronically. The UNCITRAL Model Law on E-Commerce provides a functional equivalent for terms like writing, signature and original in electronic form. This was followed by the UNCITRAL Model Law on Electronic Signatures[26] and the United Nations Convention on the use of Electronic Communications in International Contracts which sought to harmonise the provisions of the two Model Laws to form an international law instrument regulating international electronic cross-border contracts. One must mention the interesting fact that the UNCITRAL Model Law on E-Commerce, the UNCITRAL Model Law on E-Signatures as well as the United Nations Convention on the use of Electronic Communications in International Contracts paved a way for national legislation and policy framework.

V. POSITION OF E-CONTRACT IN INDIA

In India, e-contracts like all other contracts are governed by the basic principles governing contracts in India, i.e. the Indian Contract Act, 1872 which *interalia* mandate certain pre-requisites for a valid contract such as free consent and lawful consideration. What needs to be examined is how these requirements of the Indian Contract Act would be fulfilled in relation to e-contracts. In this context it is important to note that the Information Technology Act, 2000 provides fortification for the validity of e-contracts.[27]Some of the important requirements of a valid contract under the Indian Contract Act are as follows:

i. The contract should be entered into with the free consent of the contracting parties;
ii. There should be lawful consideration for the contract;
iii. The parties should be competent to contract;
iv. The object of the contract should be lawful.[28]

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21. UNCITRAL Model Law on Electronic Signatures. Resolution 56/80 adopted by the 87th plenary meeting of the General Assembly (December, 2001) available at www.uncitralwww.uncitral.org/en-index.htm.
22. UNCITRAL Model Law on Electronic Commerce, *supra* note 20.
23. T Pistorius, Contract Formation: A Comparative Study of Legislative Initiatives on Select Aspects of Electronic Commerce (2002) 25 CILSA at130. Also see C Glatt, Comparative Issues in the Formation of Electronic Contracts (1998) 1 JLIT 6 at 57.
24. See official records of the UN General Assembly, UNCITRAL Supplement No. 17 (A/40/17) Chapter VI section B (1985).
25. See UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, Part I, Resolution 51/162 adopted by 85th General Assembly at a plenary meeting (A/51/628) (December, 1996) available at www.uncitral.org/en-index.html.
26. See UNCITRAL Draft Uniform Rules on Electronic Signatures, July 10, 1998.
27. Nishith Desai Associates, *E-Commerce in India: Legal, Tax and Regulatory Analysis* (2015). Available at www.nishithdesai.com
28. *Ibid*.

Unless expressly prohibited under any statute, e-contracts like click-wrap agreements would be enforceable and valid if the requirements of a valid contract as per the Indian Contract Act are fulfilled. Consequently the terms and conditions which are associated with an e-commerce platform are of utmost importance in determining and ensuring that e-commerce transactions meet with the requirements of a valid contract.The IT Act, however, is not applicable in relation to negotiable instruments, power of attorneys, trust, wills contracts for sale or conveyance of immovable property. In some instances criminal liability is associated with intentional evasion of stamp duty. However, the manner of paying stamp duty as contemplated under the stamp laws is applicable in case of physical documents and is not feasible in cases of e-contracts.

VI. UNCONSCIONABLE TERMS AND E-CONTRACTS

In general there is little or no scope for negotiations to be held between e-commerce platforms and customers regarding the terms of the online contracts. The question then arises whether such standard form contracts are to be considered unconscionable and may be struck down by the courts. In the US, there have been instances where the courts have struck down specific terms of contracts which were held to be unconscionable. In the case of *Comb* v. *PayPal, Inc*[29] the California courts found that the e-commerce agreement which obligated users to arbitrate their disputes pursuant to the commercial rules of the American Arbitration Association which is cost prohibitive in light of the average size of a PayPal transaction. Accordingly, the court denied motions by PayPal to compel users who commenced putative class action suits arising out of PayPal's allegedly inappropriate handling of customer accounts and/or complaints to resolve their claims via arbitration. The Court argued that the dispute resolution program of PayPal was unconscionable*interalia* because it mandatorily required that disputes were resolved in Santa Clara County, California, where PayPal is located and PayPal maintained possession of customer funds until any dispute is resolved.

In India there does not seem to be well developed jurisprudence on the issue of whether standard form online agreements are unconscionable. However, Indian laws and Indian courts have dealt with instances where terms of contracts (including standard form contracts) were negotiated between parties in unequal bargaining positions. Certain provisions under the Indian Contract Act deal with the unconscionable contracts such as when the consideration in the contract or the object of the contract is opposed to public policy. If the consideration or object of the contract is opposed to public policy, then the contract itself cannot be valid.[30] In case of unconscionable contracts, the courts can put a burden on the person in the dominant position to prove that the contract was not induced by undue influence.

The (Indian) Contract law provides that where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.[31] Section 23of the Contract Act provides that the consideration or object of any agreement is unlawful when:

29. 218 F. Supp. 2d 1165 (2002).
30. The Indian Contract Act does not define the expression 'public policy' or what is meant by being 'opposed to public policy'. However this section allows the court to hold clauses opposed to public policy as void.
31. The Contract Act, Section 16(3).

(i) It is forbidden by law, or
(ii) Is of such a nature that if permitted, it would defeat the provisions of any law; or
(iii) Is fraudulent, or
(iv) Involves or implies injury to the person or property of another, or
(v) The Court regards it as immoral or opposed to public policy.[32]

In the case of *LIC India* v. *Consumer Education & Research Center*,[33] the Supreme Court interpreted an insurance policy issued by Life Insurance Corporation of India by bringing in certain elements of public purpose. The Court declared certain term clauses in the policy, pertaining to restricting the benefit of the policy only to those people employed in the Government as void under Article 14 of the Constitution. The Court noted that "In dotted line contracts there would be no occasion for a weaker party to bargain as to assume to have equal bargaining power. He has either to accept or leave the service or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forgo the service forever".In the case of *Lily White* v.*R Munuswami*,[34] the Court held that a limitation of liability clause printed on the back of a bill issued by a laundry which restricted the liability of the laundry to 50% of the market price of the goods in case of loss was against public policy and therefore void.

Every instrument under which rights are created or transferred needs to be stamped under the specific stamp duty legislations enacted by different states (provinces) in India. An instrument that is not appropriately stamped may not be admissible as evidence before a competent authority unless the requisite stamp duty and the prescribed penalty have been paid. In some instances criminal liability is associated with intentional evasion of stamp duty. However, the manner of paying stamp duty as contemplated under the stamp laws is applicable in case of physical documents and is not feasible in cases of e-contracts.

VII. LEGAL ISSUES IN E-COMMERCE AND E-CONTRACTS

(a) Capacity Issues

The main issue worth mentioning in formation of e-contract is on capacity. It is assumed that everyone is capable of entering into a contract. However, minors, mental patients and drunks are in need of legal protection because of their age or inability to appreciate their own actions. Therefore, they are generally not competent to enter into a contract. All agreements are contract if they are made by free consent of the parties competent to contract. Under section 11 of the Indian Contract Act 1872 every person is competent if he is major, of sound mind and not disqualified from contracting by any of the existing law. The main concern in an online contract is the possibility of minors entering into commercial contracts as a common saying is that "on the Internet, no one knows in respect of your capacity; neither anyone can tell if the other parties are drunk, insane, bankrupt or a child". 'Minors' refer to individuals who have yet to attain the status of an 'adult'. A minor is regarded as incapable of entering into a contract as he or she is unable to fully comprehend the seriousness of the contract and only adults who are mentally capable can make legally binding contracts. A person who is below 18 years old is a minor in India as stated under section 3 of the Majority Act, 1875. In other words, one has attained the age of majority at 18. However, one has to be careful when dealing with the Internet. Different countries have different laws, and thus, different age of majority.

32. See Section 23 of the (Indian) Contract Act, 1872.
33. AIR 1995 SC 1811.
34. AIR 1966 Mad 13.

The very nature of e-commerce is that it is virtually impossible to check the age of anyone who is transacting online. This may pose problems and liabilities for e-commerce platforms. The position under Indian law is that a minor is not competent to enter into a contract and such a contract is not enforceable against the minor. The only possibility for an e-business to enforce a contract entered into by a minor is where the minor misrepresented or cheated the other party of his age. However, in the case of *Mohamed SyedolAriffin*v. *YeohOoiGark*,[35] the plaintiff action to enforce a contract entered into by a minor failed because the plaintiff failed to prove that there was a misrepresentation. Thus the court held that the contract is void. If the misrepresentation had been proven in this case the court might have ordered the defendant to restore the benefit received.

In UK the courts developed an equitable principle of restitution which requires the infant to return the benefits received which are still in his possession as decided in *R Leslie Ltd* v. *Sheill*.[36] This is based on the principle that a minor should not be allowed to unjustly retain a benefit received under a contract. In the words of Turner LJ in case of *Nelson* v *Stocker*[37]"the privilege of infancy … cannot be used by infants for the purposes of fraud". However, authorities suggest that equitable relief is given to recover only so much of the money or property as is still identifiable in the possession of the minor (*Stock* v.*Wilson*[38]). Therefore, the equitable principle of restitution is a possible solution that can be applied to preserve the right of e-consumer in the situation where the e-consumer is a buyer of a good offered online and the minor is a seller who makes false representation that he is a major.

Looking in the context of e-consumer protection by viewing the case of a minor that had used his or her parents' credit card to do online purchase, what are the parents right as the third party against both minor and the trader? It may be argued that as long as the minor can claim back the monies from the trader due to a void contract that would not cause a problem to e-consumer. However, if the trader put the liability on the e-consumer to pay on the action did by his minor, then the e-consumer may contend that the person who purported to do the transaction is not authorized to do so. Besides, another way to further protect the identity of an e-consumer in e-contract, the contract should be in written form and there should be a third party to verify the status of each contracting parties upon signing the contract. This can be done by the use of digital signatures which are verified by a certification authority.

Generally, if a minor did make a contract, the contract is regarded as void. In fact, neither the Contracts Act of 1872 nor the Sale of Goods Act of 1930 provide expressly for the effect of an agreement that has been made by parties who are not competent to contract. The Privy Council in the Indian case of *MohoriBibee* v. *DharmodasGhose*[39] held that the combined effects of sections 10 & 11 of the Indian Contract Act, which correspond to the local provision rendered such contracts void. Essentially, this means that in the eyes of the law, a minor cannot sue or be sued upon under such void contract. In the Contract Act, 1872 under section 68, the contracting party can ask for reimbursement if the contract with a minor was entered into for necessaries. The word "necessaries" is neither defined in the Contracts Act 1872 nor under the Sale of Goods Act 1930. All that is said under section 68 of the Act is that

35. (1916) 2 AC 575.
36. (1914) 3 K.B. 607 (C.A.).
37. (1895) 45 AER 178.
38. (1913) 2 K.B. 235.
39. ILR (1903) 30 Cal 539 (PC).

what is supplied must be suited to the minor's condition in life. However, "necessary goods" been defined under section 2 of the English Sales of Goods Act, 1893 as good suitable to the condition in life of such an infant and to his actual requirement at the date of sale and delivery.

Thus the person claiming that he had supplied goods for necessaries has to prove the condition of the life of the minor and the need at the time it was delivered.[40] Like contract for necessary goods, a contract for delivery of necessary services to a minor will also be enforceable. In the contact of on-line shopping, one of main concerns is the ability of minors to access both information and products which may not be sold to minors. The ability of minors to make binding contracts is limited to what is termed as necessaries. If it is for necessaries, then the supplier is entitled to be reimbursed from the minor's property as provided under section 68 of the Indian Contract Act, 1872. However, purchases of goods by minors which are not necessaries do not create any liability for minors.

In an online contract if the minor had purchased unnecessary goods like entertainment CDs, he can claim the purchase money. Similarly, had a minor purchased goods online using his parent's credit card, the minor or his next friend will be able to recover any money paid, even though the contract is discovered to be void. As a precautionary measure, the vendor should obtain as much information on the person clicking the "Accept" button as possible for evidentiary purposes in case enforcement of the terms of the license is required. The vendor also should take opportunity to obtain specific information from the purchaser, such as his/her name, address, age, etc. So, capacity is the one major issue in e-contract and e-commerce that needs to be properly addressed.

(b) Signature and Security Issues

There is no requirement under the Indian Contract Act to have written contracts physically signed. However, specific statutes do contain signature requirements. For instance the Indian Copyright Act, 1957 ("Copyright Act") states that an assignment of copyright needs to be signed by the assignor. In such cases the IT Act equates electronic signature with physical signatures. An electronic signature is supposed to be issued by the competent authorities under the IT Act.

Though the Internet eliminates the need for physical contact, it does not do away with the fact that any form of contract or transaction would have to be authenticated and in certain instances recorded.Different authentication technologies have evolved over a period of time for authenticating documents and also to ensure the identity of the parties entering into online transactions. Further in relation to an e-commerce business, processing payments forms a vital part of the transaction and in this regard various payment systems to carry on an e-commerce business have also developed.

Security experts currently favor the cryptographic signature method known as Public Key Infrastructure (PKI) as the most secure and reliable method of signing contracts online. PKI uses an algorithm to encrypt online documents so that they will be accessible only to authorized parties. The parties have "keys" to read and sign the document, thus ensuring that no one else will be able to sign fraudulently. Many online services offer PKI encrypted digital signature systems that function much like we use PINs for our bank cards.Other e-signature systems have been developed, including a method for digitally recording a ingerprint, and hardware that electronically records one's signature.

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40. *Chapple* v. *Anne Cooper (1834) 153* ER *105.*

VIII. CONCLUSION

As noted above, the formation of electronic contracts in this new age of technology and globalization, initially caused a world-wide legal uncertainty as to how and whether electronic contracts concluded by electronic means can be recognized as valid and enforceable agreements. This article addressed the issues of e-contract which is the fundamental of forming an e-transaction. Despite regulations that have been promulgated by international organizations either by UNCITRAL Model Law or EU Directive or national legislation the uncertainty continues to exist as to when an electronic contract is treated as being concluded. On the whole, e-commerce seems simply to require the application of traditional legal rules to the new context of Internet selling.

Since online contracting is becoming commonplace, the law must change to keep up with the technology where the law must see e-consumer protection as an urgent item to be dealt with in the near future. Therefore, the amendment of existing Indian law on contract generally and a sale of goods contract in particular is timely and very much needed for the protection of e-consumers to increase consumer confidence in e-commerce as well as making them comfortable in utilizing the information dossier for transaction purposes. In the wider context, some of the sections in the existing contract formation principle might be better addressed by a new set of principles specifically designed for on-line transactions. Thus, the idea of having a comprehensive law on e-commerce should be seen as a way forward for this dynamic industry which ultimately benefit all parties involved including e-consumers.

In light of the above, it is extremely important to have well thought out terms which form the online contracts and ensure that adequate opportunity is provided to the customers to familiarize themselves with the terms thereof. The contract and other commercial laws must be suitably amended to face the new challenges of e-transactions.

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41. *Cooper*, (1934) 153 ER 105.

AN ODYSSEY FROM COLLEGIUM TO NJAC : REVISITED

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ANSHU MISHRA**

"The judicial department has no will in any case……. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or in other words, to the will of Law"

Justice Marshal[1]

ABSTRACT : The Supreme Court has pronounced unconstitutional and void to *the Constitution (Ninety-ninth Amendment) Act,* 2014 and accompanying Act - *the National Judicial Appointments Commission Act,* 2014 by majority of four against one in case of *Supreme Court Advocates-on-Record-Ass'n & Anr* v. *Union of India*[1] and thereby struck down the new introduced system for appointing justices in the Supreme Court and High Courts in India. Thus, two decades old collegium system shall remain operative in appointment, promotion and transfer of Judges. The present Article provides an overview of the evolution of collegium system in India; outlines the structure and composition of the proposed system given by the Parliament and finally aims at examining whether NJAC affects the independence of judiciary? The judicial appointments process is one of the essential elements for maintaining judicial independence and public confidence of a court. This Article also analyses the practices of judicial appointments process exercised in higher judiciary.[2]

KEY WORDS : Collegium; Judicial Appointment, Judicial Accountability, Constitutional Law, National Judicial Appointment Commission, and Independence of Judiciary.

I. INTRODUCTION

The Constitution of India has established a democratic republic. In the parliamentary democracy, the governmental powers of the constitutional instrumentalities are typically divided by the Constitution among the Legislature; Executive and Judiciary to practice constitutional governance by the rule of law which is bedrock of democracy. Among these instrumentalities, the judiciary has pre-eminence by the reason for providing effective

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1. *Osborne* v. *Bank of United States*, 9 Wheat 738, 866
2. 2015 (11) SCALE 1

safeguards to the spirit and notions of the Constitution; strengthening the democratic values; protecting individual's rights and maintaining the boundaries sketched by the Constitution for constitutional and public functionary[3]. To be truly great, the judiciary in exercise of democratic powers must enjoy independence of a high order. The independence of judiciary is a necessary concomitant of power of judicial review under democratic Constitution. However, the foundation of judicial review has been evolved without a specific explicit provision by the U S Supreme Court.[4] Subsequently, this implicit power is used by the Supreme Court of India too, while declaring it as an integral component of the unalterable basic structure of the Constitution.[5] If independence of judiciary is compromised by the erosion of the integrity of the judiciary, of course, it shall affect the basic principles and values of democracy. It would be noteworthy to mention that:

> 'Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgement in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by the abuse of power, they violate the law'.[4]

The concept of independence of judiciary is not limited only to independence from the executive pressure or influence but it is a much wider concept which takes, within its sweep, independence from many other pressures and prejudices.[7] It has many dimensions, namely fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong. The principle of independence of judiciary is not an abstract concept but it is a living faith which must derive its inspiration from the constitutional character and its nourishment and sustenance from the Constitutional values.[8]

A judiciary of undisputed integrity is the bedrock institution essential for ensuring the rule of law which is core value of democracy. Even when all other protections fail, it provides a bulwark to the public against any encroachments on rights and freedoms under the law. Judiciary is an institution and every judge, as a public functionary, is accountable to the political sovereign–'we the people'[9] . The question of jurisdiction of judicial review of the court, within the framework of parliamentary democracy, premised on the assumption that people exercise their sovereignty through elected representatives and not through the unelected judges, therefore judicial supremacy, judicial excessiveness or judicial despotism is seen as antithetical to democracy and contrary to its first principles. The administration of justice draws its legal sanction from the Constitution, its credibility rests on the faith of the

3. The Constitution of India, Article 12
4. Marshall, C J has laid down the power of judicial review in *Marbury* v. *Madison in 1803*; as it was quoted by J.S. Verma, CJ in his lecture delivered in First P K Goswami Memorial Lecture at Guwahati in the year 1995 with the title " *The Independence of Judiciary- Some Latent Dangers*"; even though much earlier in 1608, it was Lord Coke whose opinion in Dr. Bonham's case germinated that concept ; the power of judicial review is expressly provided *inter alia* in Articles 13, 32, 136, 141,142 , 147, 226 and 227 of the Constitution.
5. *Keshavanand Bharati* v. *State of Kerala* , AIR 1973 SC 1461
6. Benjamin N. Cordozo, *The nature of the Judicial Process*, Yale University Press, 1921, p 129
7. *S P Gupta* v. *Union of India*, AIR 1984 SC 149, para 26
8. *Id at p. 170*
9. who adopted, enacted, and gave to ourselves this Constitution to ensure Justice – social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and opportunity and.....(Preamble of the Constitution of India).

people. Transparency in functioning and accountability with respect to duties are fundamental in democracy. The representative democracy is as much a part of the basic structure of the Constitution and that the judicial review, although conditionally sanctioned, cannot be exercised to negate or subordinate other fundamental features of its basic structure. So, the judicial accountability also preserves the independence of judiciary.

The courts are the best platonic guardians of democracy and that it is entirely incompatible with the democracy for courts to define their mission as one of correcting elected functionaries who have strayed too far either from what the Judge thinks is right or from what they claim they know that the people really think is right[10] . Judicial independence and judicial accountability are also taken care of under the Constitution. But, it is pertinent to note that independence could become dangerous and undemocratic unless there is a constitutional discipline with rules of good conduct and accountability, without these robes may proves arrogant[11].

Recently, in an eloquent exposition the Supreme Court has, once again, attracted public attention on the process of appointment of judges in the higher judiciary by striking down *the Constitution (Ninety-ninth Amendment) Act,* 2014 (hereinafter referred as '99th Amendment') and *the National Judicial Appointment Commission Act,* 2014 (hereinafter referred as 'NJAC Act') as void and unconstitutional, and therefore, keeping in view the accountability and independence of judiciary, it becomes necessary to re-examine the entire process of appointment that existed in pre-collegiums and post-collegiums era and also suitability of *NJAC* Act*,* which gives a new process.

In usual course, whenever a Judge is appointed, a considerable debate rages simultaneously about inadequacy of the existing mechanism for enforcing the judicial accountability of any erring judge in the higher judiciary and also independence of judiciary. Since, this issue is closely linked with appointment, transfer and removal of judges in higher judiciary, it gives a general consensus that some recent incidents involving a few in the higher judiciary exposing the inadequacy of the existing provisions to deal with the situation; and it calls for ineffective mechanism to enforce the judicial accountability of the higher judiciary, in case of need. The present paper identifies the shortcomings of the both system (old and new) while addressing to the substantial concept, its fairness and failures in the historical, analytical and descriptive perspective.

II. CONSTITUTIONAL TEXTS FOR APPOINTMENT OF JUDGES IN HIGHER JUDICIARY

The issue of appointment of Judges in India has been in controversy sine long. The appointments of judges were made according to the constitutional text but after nineties the process of appointments of judges were started to be made on judicial interpretation of constitutional texts. The founding fathers of the Indian Constitution have wisely built into it checks and balances in order to bring a harmonious balance in the powers, responsibilities and interrelationship among the three governing organs of the State and tried to prevent them becoming unruly or rude and to remain ever sober is obligatory. Under the constitutional scheme, the function of the judiciary has been made impartial, free from any interference and other influences including owns leanings[12]. For this reason, constitution makers has visualised

10. John Hart Ely, *On the Constitutional Ground*, Princeton University Press, 1996
11. V. R. Krishna Iyer J., the Hindu, (18. 08. 2012)
12. Debates in the Constituent Assembly regarding appointments of judges to the higher judiciary were briefed. However, in the discussions which took place, there was a keen perception of the ends which had to be achieved – the independence of the judiciary and safeguarding the dignity of the institution,

in distinguishing institutional independence from individual independence; adjudicative independence from administrative independence and actual independence from perceived independence and finally incorporated various constitutional provisions in it. As it was rightly observed by an eminent scholar G. Austin :

> "The subject that loomed largest in the minds of Assembly members when framing the Judicial provisions were the independence of the courts…….....The assembly went to great lengths to ensure that the courts would be independent[13]……. If the beacon of judiciary was to remain bright, the courts must be above reproach, free from coercion and from political influence.[14]

(i). MERITS, QUALIFICATIONS AND PROCEDURE OF APPOINTMENT

Currently, the mode of appointment of a Judge for Supreme Court or High Courts has become a controversial issue despite clear provisions under the Constitution. The Constitution provides that an appointment of Judge in the Supreme Court and a High Court shall be made by a warrant of the President after consultation with the Chief Justice of India[15]. However, the President shall, in the exercise of his functions, act in accordance with the aid and advice of the Council of Ministers[16]. The act upon such aid and advice is not necessarily implemented merely in an executive functions, it includes judicial function also. Though, the Constitution is not explicit in this regard whether judiciary has final say or executive aid and advice?

Undoubtedly, a Judge has to be competent and impartial. Judges cannot be governed, nor should their decisions be affected, only by the obvious, as proceedings in a court are conducted by taking judicial notice of such facts that may be necessary to decide an issue. It is for this reason that the paramount principle of impartiality that is to be available in the character of a Judge has been humbly expounded by none other than Justice Felix Frankfurter in his words that "a good Judge needs to have three qualities, each of which is disinterestedness."[17] The higher judiciary in India has complete institutional autonomy to

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the interests to be accommodated – a balance between governmental oversight and judicial autonomy in administration, a sharp awareness of the constitutional position in other jurisdictions and equally a realisation of the need to institute a system that would be effective in India's political culture. The framers of our Constitution were aware of these constitutional developments in England and they were conscious of our great tradition of judicial independence and impartiality and they realised that the need for securing the independence of the judiciary was even greater under our Constitution than it was in England, because ours is a federal or quasi-federal Constitution which confers fundamental rights, enacts other constitutional limitations and arms the Supreme Court and the High Courts with the power of judicial review and consequently the Union of India and the States would become the largest single litigants before the Supreme Court and the High Courts. Justice can become "fearless and free only if institutional immunity and autonomy are guaranteed". The Constitution-makers, therefore, enacted several provisions designed to secure the independence of the superior judiciary by insulating it from executive or legislative control. I shall briefly refer to these provisions to show how great was the anxiety of the constitution makers to ensure the independence of the superior judiciary and with what meticulous care they made provisions to that end as quoted in *Shamsher Singh* v. *State of Punjab*, (1974) 2 SCC 831

13. Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, (OIP, 1st Ed. , 1972) p 205
14. *Ibid*
15. Articles 124(2) and 217
16. Article 74
17. quoted in judgment in *Registrar General, High Court of Madras* v *R. Gandhi & Ors* cited from "*of Law and Life and other things that Matter*" edited by Philip B. Kurland, 1965 p.75

manage its own internal affairs under the Constitution.[18] It has been enabled to punish for contempt too.[19]

The Constitution of India provides qualification of three categories to be appointed as a Judge in the Supreme Court.[20] While going through all three categories of the qualification, it seems that the constitution makers, having in-depth deliberations, were of the view to give absolute authority neither to the Executive nor to the Judiciary. The framers were insistent not only that the judiciary be independent from the executive and legislature, but also that judiciary be composed of the most competent people available; and hence, the Constitution gives a wider field of choice to the President in order to appoint a Judge in the Supreme Court[21]. However, such appointments shall always be consulted with the Chief Justice of India. Nevertheless, this provision was the subject of more debate since long than any other twenty four Articles concerning with the apex court and High Courts of Chapter IV of Part V and Chapter V of Part VI. It is, therefore, necessary that the appointment process be looked into two ways.

(ii). PRE -1970 PERIOD

The appointments of the Judges in the Supreme Court were made according to constitutional notions during pre-1970 period. During the period, the head of the State (the President) conceded all the points rose by the Chief Justice of India time to time, if any, in the appointment's process of the Judges. In such an appointment, no alternative names were proposed on the side of the Executive, except to few. There was nothing like horse-trading. Though, the Law Commission of India in its fourteenth report has recommended need to reform of judicial administration. The recommendations of the Commission emphasized on making the appointing process more inclined in favour of meritorious judges.[22]

(iii). POST -1970 PERIOD

The post 1970 period was slightly changed. During the period as it was found that the suggestions of the Chief Justice of India, in case of promotion or elevation, were ignored by the Executive on the one hand and on the other, the names were also began to be proposed on the Executive side in appointment of the Judge. Even, the constitutional practice was not followed in case of appointing the Chief Justice of India and seniority rule abruptly overruled. In this period, an abuse of executive discretion began in appointments of the justices.

III. COLLEGIUM: A NEW *GENRE*

The collegium is a judicial creation and provides a system which authorises Judges to appoint judges. It provides a unique process for appointment, promotion and transfer of Judges in the higher judiciary. It has been developed through interpretations of relevant constitutional provisions by the apex court in a sequence of various judgements popularly called as 'Judges Cases;[23]' and the procedures are formulated in conformity with the decisions given in it. This metodology is not given under any Statute nor provided under the Constitution. It is a '*Judge – selecting – Judge'* method. However, the political circumstances

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18. Articles 145,146 and 229 of the Constitution
19. Articles 129 and 215
20. Article 124(3)
21. Constituent Assembly Debates , VIII (1949), p 241; quoted by George H. Gadbois, Jr., *Judges of the Supreme Court of India,* OUP, New Delhi , 2011, p 89
22. See, Law Commission's *Fourteenth Report*, 1, 35
23. *S. P. Gupta* v. *Union of India; Supreme Court Advocates- on- Record Ass'n & Anr.* v. *Union of India,* and *In Re Presidential Reference* 1998 *as referred first*, *second* and the *third judges* case

taking place in Independent India in seventies are responsible behind the emergence of this system[24] that affected the existing constitutional process of appointments at large. During the period of national emergency and also in post emergency period, such appointments had never been based on merit but based on personal likes and dislikes. An excessive interference of executive in judicial appointments had became a matter of great concern among the judges who valued and treasured the independence of the judiciary and provided further impetus towards doing something to insulate higher judiciary form excessive intervention of the sister organs. Finally, it led to the new approach to interpret the constitutional provisions and gave rise to a new process of appointing judges in the higher judiciary in India. It has been dealt with by the Supreme Court in a series of cases.

(i). *S. P. GUPTA* V. *UNION OF INDIA*

For the first time, a seven-judge Bench of the Supreme Court in *S. P. Gupta* v. *Union of India*,[25] (hereinafter referred as "*First Judges Case*") has discussed in detail the issue of appointment of Judges in the light of constitutional text and by a majority of four against three has held that when the Constitution requires the President to exercise certain powers in relation to the judiciary after consultation with the Chief Justice of India, the opinion of the Chief Justice of India did not have any primacy. In this case, the Supreme Court has upheld the primacy of the Executive in appointment and transfer of judges in higher judiciary. P. N. Bhagwati, J. speaking for the majority stated that:

> 'the opinion of each of the three constitutional functionaries is entitled to equal weight and it is not possible to say that the opinion of the Chief Justice of India must have primacy over the opinions of the other two constitutional functionaries. If primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance, amount to concurrence, because giving primacy would mean that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, which means that the Central Government must accept his opinion. But as we pointed out earlier, it is only consultation and not concurrence of the Chief Justice of India that is provided in Clause (1) of Article 217.'[26]

Thus, in the appointment of judges in the Supreme Court and High Court, the Chief Justice of India did not enjoy primacy. The Court was, also, of opinion that it would, therefore, be open to the Union Government to override the opinion given by the constitutional

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24. The practice of superseding judges of higher judiciary started when executive actions were taken relating to nationalizing the banks and abolition the privy purses of the erstwhile rulers of India in the year 1970 and these actions were declared null and void by the apex court. There action of Executive moved in impeachment of Justice J C Shah, the then Chief Justice and two other Supreme Court Judges. Again, the violation of constitutional practice neglecting the tradition next in line for Chief Justiceship and thus, superseding the seniority rule in appointment of Chief Justice of India were the other serious concerns to the fraternity of higher judiciary. Invalidation of a part of the Constitution (Twenty –Fifth Amendment) Act, 1971 in the Fundamental Right's case (*Keshavand Bharathi* v. *State of Kerala*, AIR 1973 SC 1461 case) was also a major issue to the Executive for demoralising the judiciary and also promulgation of emergency and post emergency situations like birth of a new non-adversarial form of public interest litigation aimed at correcting governance failures and human rights abuses are example of a series of battle.
25. AIR 1982 SC 149; (bench consisting of A.C. Gupta, D.A. Desai, E.S. Venkataramiah, P.N. Bhagawati, R.S. Pathak, Syed M. Fazal Ali and V. D. Tulzapurkar, JJ.)
26. *Ibid,* Para 29

functionaries required to be consulted and to arrive at its own decision with regard to the appointment of a Judge of the High Court or the Supreme Court, so long as such decision is based on relevant considerations and is not otherwise *mala fide*. There was a majority consensus in that case that the constitutional duty to consult did not imply a duty to obtain the concurrence of the person consulted. In short, consultation does not mean concurrence. The Court further stated that:

> "we can always find some reason for bending the language of the Constitution to our will, if we want, but that would be rewriting the Constitution in the guise of interpretation.[27]"

Does the process of appointment of Judges affect the independence of judiciary? On this issue, it was pointed out that the concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It would be wise to cite the view of Krishna Ayer, J as it was reproduced by the learned Judges in the landmark judgement that "Independence of the judiciary is not genuflexion; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor Government's pleasure"[28].

On the issue of merit of the Judges, further, it was noted that:

> 'Appointment of Judges is a serious process where judicial expertise, legal learning, life's experience and high integrity are components, but above all are two indispensables - social philosophy in active unison with the socialistic Articles of the Constitution, and second, but equally important, built-in resistance to pushes and pressures by class interests, private prejudices, government threats and blandishments, party loyalties and contrary economic and political ideologies projecting into pronouncements.'[29]

Furthermore:

> 'what is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half hungry millions of India who are continually denied of their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives.

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27. *Ibid*
28. *Id*, Para 26
29. *Ibid*

> This has to be the broad blue-print of the appointment project for the higher echelons of judicial service. It is only if appointments of Judge are made with these considerations weighing predominantly with the appointing authority that we can have a truly independent judiciary committed only to the Constitution and to the people of India.'[30]

Keeping in view the decision of the *First Judges case*, in 1990 *the Constitution (Sixty seventh Amendment) Bill*[31] was introduced in the Parliament for creation of a *National Judicial Commission* (NJC) to provide a process for appointment of Judges in higher judiciary. The proposed Bill was not passed. In the meantime, during hearing of the case of *Subhash Sharma* v. *Union of India*[32], a prayer was made to the Supreme Court for the constitution of a larger bench to consider the two propositions[33] as laid down in the first judges case, the Supreme Court constituted larger bench.

(ii) *SUPREME COURT ADVOCATES- ON- RECORD ASS'N* V. *UNION OF INDIA*

A decade after the judgement in the *First Judges case*, the Supreme Court of India decided to review its earlier judgement in *Supreme Court Advocates- on- Record Ass'n* v. *Union of India*[34] (hereinafter referred to as "*Second Judges Case*"). A nine-judge Bench of the Supreme Court, with the majority of 7:2, ruled that the provisions of the Articles 124 and 217 of the Constitution with regard to "consultation" had to be interpreted with "purposive and contextual" construction method.[35] By overruling the decision of the *First Judges case*, J. S. Verma, J. while delivering the judgement for the majority laid down fourteen points (propositions) to be followed in this regard, which are as follows:

1. The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, sub serving the constitutional purpose, so that the occasion of primacy does not arise.
2. Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a High Court by the Chief Justice of that High Court; and for transfer of a Judge/Chief Justice of a High Court, the proposal has to be initiated by the Chief Justice of India. This is the manner in which proposals for appointments to the Supreme Court and the High Courts as well as for the transfers of Judges/Chief Justices of the High Courts must invariably be made.
3. In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary symbolised by the view of the Chief Justice of India, and formed in the manner indicated, has primacy.

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30. *Ibid*
31. The proposed composition for NJC was to the Supreme Court, it would comprise the CJI and two Supreme Court Judges next in the seniority, and for High Court it would comprise the CJI, the Supreme Court next Judge in seniority, the Chief Minister of the concerned State, the Chief Justice of the relevant High Court, and High Court Judge next in seniority.
32. 1991 Supp (1) SCC 574
33 the opinion of Chief Justice of India does not have any primacy and, the question of judges strength of the High Court is not justiciable.
34. AIR 1994 SC 268: (bench comprising of S. Ratnavel Pandian, A. M. Ahmadi, Kuldeep Singh, J. S. Verma, M. M. Punchi, Yogeswar Dayal, G. N. Ray, Dr. A. S. Anand and S. P. Bharucha JJ.)
35. *Ibid* Para

4. No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.
5. In exceptional cases alone for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, the appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India, the appointment should be made as a healthy convention. (Emphases Supplied).
6. Appointment to the office of the Chief Justice of India should be of the senior most Judge of the Supreme Court considered fit to hold the office.
7. The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court Judges/Chief Justices.
8. Consent of the transferred Judge/Chief Justice is not required for either the first or any subsequent transfer from one High Court to another.
9. Any transfer made on the recommendation of the Chief Justice of India is not to 26 be deemed to be punitive, and such transfer is not justiciable on any ground.
10. In making all appointments and transfers, the norms indicated must be followed. However, the same do not confer any justiciable right in anyone.
11. Only limited judicial review on the grounds specified earlier is available in matters of appointments and transfers.
12. The initial appointment of a Judge can be made to a High Court other than that for which the proposal was initiated.
13. Fixation of Judge-strength in the High Court is justiciable, but only to the extent and in the manner indicated.
14. The majority opinion *in S.P. Gupta* v. *Union of India* in so far as it takes the contrary view relating to primacy of the role of the Chief Justice of India in matters of appointments and transfers, and the justiciability of these matters as well as in relation of Judge strength, does not commend itself to us as being the correct view. The relevant provisions of the Constitution, including the constitutional scheme must now be construed, understood and implemented in the manner indicated herein by us.

Thus, in the *Second Judges case*, Supreme Court has held that no appointment of any judge to the Supreme Court or any High Court can be made unless it is in conformity with the opinion of the Chief Justice of India. It was further held that the opinion of the Chief Justice of India in the process of constitutional consultation in the matter of selection and appointment of Judges to the Supreme Court and the High Courts as well as transfer of Judges from one High Court to another High Court is entitled to have the right of primacy[36]. The opinion of CJI 'so given has not mere primacy in all the matters, but it is determinative.' The court held that:

> 'like the Pope, enjoying supremacy in the ecclesiastical and temporal affairs, the CJI being the highest judicial authority, has a right of primacy, if not supremacy to be accorded, to his opinion on the affairs concerning the "*Temple of Justice*". It is a right step in the right direction and that step alone will ensure optimum benefits to the society'[37]

A. M. Ahmadi J. opined that:

36. *Ibid, para* 611
37. *Id*

> 'the method of selecting a Judge for the Supreme Court and the High Court is outlined in Articles 124(2) and 217(1) of the Constitution. While in United States, United Kingdom, Australia and Canada appointment to the superior judiciary are exclusively by the executive, our Constitution has charted a middle course by providing for 'prior consultation' with the judiciary the President (i.e. the executive) makes the appointment to the Supreme Court or to the High Court……..symbolic of the views of entire judiciary, the submission cannot be accepted unless the Constitution is amended.[38]'

In accordance with the judgement of the *Second Judges case*, a proposal to appoint Judges was sent by the Supreme Court collegium, was not wholly accepted by the Executive. This made the executive to file a reference under Article 143 (1) of the Constitution in the name of the President for advisory opinion of the Supreme Court. The President of India required clarification on the doubts that have been arisen about the interpretation of the law laid down by the Supreme Court in the *Second Judges case*. A nine-judge Bench of the Supreme Court was again constituted to give its opinion. However, the executive didn't question the correctness and justification of collegiate opinion nor did it question the judgement in the *Second Judges case*.

(iii). *PRESIDENT OF INDIA* V. *SPECIAL REFERENCE NO 1 OF 1998, RE*

While upholding the judgement of the *second judges case*, a nine- judge Bench of the Supreme Court in *President of India* v. *Special Reference No 1 of 1998, Re*[39] (hereinafter referred as "*Third Judges case*") has laid down that the Chief justice of India will consult with a plurality of four senior most judges to form his opinion on judicial appointments and transfers instead of two next in seniority. The apex court has laid down its opinion for the working of the coram for the transfer and appointments which are as follows:

1. The expression "consultation with the Chief Justice of India" in Articles 217(1) and 222(1) of the Constitution of India required consultation with a plurality of judges in the formation of the opinion of the Chief Justice of India. The sole individual opinion of the Chief Justice of India does not constitute "consultation" within the meaning of the said articles.
2. The transfer of puisne Judges is judicially reviewable only to this extent that the recommendation that has been made by the Chief Justice of India in this behalf has not been made in consultation with the four senior most Judges of the Supreme Court and/ or that the views of the Chief Justice of High Court from which the transfer is to be effected and of the Chief Justice of High 38 Court to which the transfer is to be effected, have not been obtained.
3. The Chief Justice of India must make a recommendation to appoint a Judge of the Supreme Court and to transfer a Chief Justice or puisne Judge of a High Court in consultation with the four senior most puisne Judges of the Supreme Court. Insofar, as an appointment to the High Court is concerned, the recommendation must be made in consultation with the two senior most *Puisne* Judges of the Supreme Court.
4. The Chief Justice of India is not entitled to act solely in his individual capacity, without

38. *Id, at paras* 329, 320
39. AIR 1999 SC 1 (bench comprising of S. P. Bharucha, M. K. Mukherjee, S. B. Majumdar, Sujata V. Manohar, G. T. Nanavati, S. Saghir Ahmad, K. Venkataswami, B.N. Kirpal and G.B. Pattanaik, JJ.)

consultation with other Judges of the Supreme Court, in respect of materials and information conveyed by the Government of India for non-appointment of a Judge recommended for appointment.

5. The requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the High Court concerned, does not refer only to those Judges who have that High Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.
6. "Strong cogent reasons" do not have to be recorded as justification for a departure from the order of seniority in respect of each senior Judge who has been passed over. What has to be recorded is the positive reason for the recommendation.
7. The views of the other Judges consulted, should be in writing and should be conveyed to the Government of India by the Chief Justice of India along with his views to the extent set out in the body of his opinion.
8. The Chief Justice of India is obliged to comply with the norms and the requirement of the consultation process, as aforestated, in making his recommendations to the Government of India.
9. Recommendations made by the Chief Justice of India without complying with the norms and requirements of the consultation process, as aforestated, are not binding upon the Government of India.

The view taken in the *second judges case*, as clarified and modified to an extent in third *judges case*, is the law today for appointment and transfer of Judges in higher judiciary. The opinion given in the *third judges case* is nothing but a detailed introspection of the propositions made in *second judges case*. It reiterates all the major issues covered by the majority judgment of the *second Judges case*. It differs only in respect with the number of the judges consisting the collegium to recommend the names of the Judges for selection and appointment etc.. The Court agreed that the opinion of the Chief Justice of India is 'reflective of the opinion of the judiciary, which means that it must necessarily have the element of plurality in its formation'[40]. It further goes on to opine that instead of two, four senior most puisne judges should be consulted in the appointment process. The third judges case makes a clarification as to the phrase used in second judges case *i.e.* 'legitimate expectation'. All that was intended to be conveyed was that it was very natural that senior High Court Judges should entertain hopes of elevation to the Supreme Court and that the Chief Justice of India and the collegium should bear this in mind[41]. The Court further agreed that merit shall be the predominant consideration for the purpose of appointment[42]. Thus, single unanimous judgment pronounced in the third judges case by the apex court is nothing but the projection of the intent of the Court in upholding the majority judgement pronounced in the second Judges case.

However, the decision of the *first judges case* was overruled in the *second judges case*, the sign of collegium-system is seen in the former case which came into existence by getting concrete shape in latter cases. The Collegium- system ultimately recognized in the *third judges case*; thereby, now, it has become the law of the land and followed ever. This system of appointment of justices to the higher courts, as stipulated by the Constitution and as

40. *Id.* at para 6
41. Supra Note 34, para 478
42. Supra Note 39, para 25

interpreted by the Supreme Court, has always placed the higher premium on judicial independence. India is unique in the degree of judicial control over judicial appointments. In no other country in the World, does the judiciary appoints Judge itself.

The Collegium is a judicial creation and syndrome of the personality cult being beyond accountability. It is bizarre in its performance- its selection process is secret and subjected to no scrutiny. It excludes the executive and is in that respect unique in the world. Why India should retain such a bedlam process, akin to a pre-feudal power cult, is unclear. The collegium system is an innovation of the Supreme Court which has ushered in a paradigm shift. It is seen by many as a mechanism that seeks to ensure the independence of judiciary without allowing the vices of arbitrariness or bias cripple or affect the decision making within the collegium. It is praiseworthy to mention that the Supreme Court observed that the concept of plurality of Judges in the formation of the opinion of the Chief Justice of India is one of the inbuilt checks against the likelihood of arbitrariness or bias. The Court also clarified that Supreme Court collegium is not superior to high court collegium. The Supreme Court collegium does not sit in appeal over the recommendation of the High Court collegium. Each collegium constitutes a participant in the participatory consultative process.[43] The concept of primacy and plurality is in effect primacy of the opinion of the Chief Justice of India formed collectively.[44] The apex court further held that:

> 'each constitutional functionary involved in the participatory consultative process is given the task of discharging a participatory constitutional function; there is no question of hierarchy between these constitutional functionaries. Ultimately, the object of reading such participatory consultative process into the constitutional scheme is to limit judicial review restricting it to specified areas by introducing a judicial process in making of appointment(s) to the higher judiciary[45]'.

Over a period of time, the collegium system had been subjected to severe criticism. A vigorous debate arose among the public, former judges, and members of Bar.[46] There has

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43. *Mahesh Chandra Gupta* v. *Union of India,* (2009) 8 SCC 273
44. *Id*. at 305
45. *Id*. at 306
46. As per J. S. Verma, J. one of the chief architect of the Collegium system, while speaking in first P. K. Goswami Memorial Lecture at Guwahai (1995) on the topic "*The Independence of the Judiciary-Some Latent Dangers*" and also in First S. Govind Swaminadhan Memorial Lecture at the Madras High Court Bar in Chennai (2010) on the topic " *Judicial Independence : Is it Threatened*" had expressed his anguish on the inadequacy of existing mechanism for enforcing judicial accountability of any erring judge in the higher judiciary . While delivering lecture at Madras High Court Bar, he has quoted in the beginning the statement of Francis Bacon written in *'On Judicature'* – "the place of justice is a hallowed place, and therefore not only the Bench, but also the foot space and precincts and purpose thereof ought to be preserved without scandal and corruption" which is self-explanatory and further said that true professional practicing the highest standards of professional conduct and ethics in the Bar is the greatest assurance for judicial independence. To him the word 'Bar' denotes the entire legal professional- the practicing lawyers as well as the judges on the Bench; Ruma Pal J., a retired Supreme Court judge and member of the Collegium, while delivering the Fifth V. M. Tarkunde Memorial Lecture in 2011on the topic ' *An Independent Judiciary',* referred to secrecy in the process of appointment of judges as one of the sins being committed by the judiciary. She said that the very secrecy of the process leads to an inadequate input of information as to the abilities and suitability of a possible candidate for appointment as a judge. Independence means institutional independence and independence of a Judge too.

been a murmuring from different corners amongst the legal luminaries[47]. It is advocated that this methodology of appointing justices needs urgent and immediate review.[48] Indian justice system is in dire need of a transformation. Some radical reforms must be introduced for a better tomorrow and discard systems which have outlived their utility. The need of the hours is to remove the lack of transparency and secrecy and replace the existing system with an independent, permanent, well-in-formed Judicial Appointments Commission functioning openly and transparently. This requires constitutional amendment. It would be pertinent to cite here the interview of J. S. Verma, J, who replied on the decision of the *second judges case*:

> 'My 1993 judgement, which holds the field, was very much misunderstood and misused. It was in that context I said the working of the judgment now for some time is raising serious questions, which cannot be called unreasonable. Therefore, some kind of rethink is required. My judgement says the appointment process of High Court and Supreme Court Judges is basically a joint or participatory exercise between the executive and the judiciary, both taking part in it.' He further elaborated:
>
> 'broadly, there are two distinct areas. One is the area of legal acumen of the candidates to adjudge their suitability and the other is their antecedents. It is the judiciary, that is, the Chief Justice of India and his colleagues or, in the case of the High Courts, the Chief Justice of the High Court and his colleagues (who) are the best persons to adjudge the legal acumen. Their voice should be predominant. So far as the antecedents are concerned, the executive is better placed than the judiciary to know the antecedents of candidates. Therefore, my judgement said that in the area of legal acumen the judiciary's opinion should be dominant and in the area of antecedents the executive's opinion should be dominant. Together, the two should function to find out the most suitable (candidates) available for appointment.' [49]

Seniority counts more importance in Judiciary in India than talent or merit[50]. The falling standard in existing system has given strength to an attempt by the Executive to press for change in it. However, several attempts have been made by the Parliament to sort out the inherent lacuna of the collegium system as being pointed out at different *fora* right from its

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47. As per Krshna Ayer, J. "the collegium system is not working satisfactorily, his views encapsulate the public opinion: what is wrong with our courts that they have lost their credibility and prestige? Corruption has crept in…… Another great deficiency is that a collegium that is untrained in the task selects judges in secret and bizarre fashion. There could be room for nepotism, communalism and favouritism in the absence of guidelines……. The collegium is a disaster: the Dinakaran episode is an example. A new code by a constitutional chapter has become an imperative," (The Hindu, 02-12-2009)
48. Frontline (10.10.1998), his interview is reproduced by 18th Law Commission in its 214th Report on '*Proposal for Reconsideration of Judges Cases- I, II, & III*,' (2008) , pp.54-55
49. *Ibid*
50. Abhinav Chandrachud, *'My Dear Chagla*', Frontline (07-02-2014) to quote: "Judges are selected for the Supreme Court on the basis of seniority over merit. Young, junior High Court judges under the age of 55 are considered ineligible for Supreme Court appointment no matter how brilliant they are. Lawyers who are under the age of 45 are likewise considered ineligible to be appointed to the High Court Bench, no matter how brilliant or deserving they are."

inception. This process suffers from lack of transparency and limited scope for proper consultation among the constitutional functionaries. Such appointments are unable to keep pace with nepotism, favouritism, and ad-hocism etc. and stalled by the haggling over political, caste, and communal considerations at every step. No rule ever been followed consistently nor it is open for public scrutiny. It has become a matter of great relevance and importance to be considered by the Parliament to enact law for selection of judges and to make a code of conduct for Judges because collegium, is creature of the Supreme Court judgement to make an appointment and recommend transfer and promotion in the higher courts, has no constitutional foundation under the Constitution. It constitutes a usurpation of the power of the Executive with no guidelines whatsoever. It has played havoc and deserves to be demolished by the parliamentary correction, by means of an amendment to the law. The collegium is answerable to none, and acts without transparency. Instead of waiting for a larger bench to eliminate it, a constitutional provision must extinguish this instrument. As it were suggested by Krshna Ayer, J. that Parliament should wake up and implement '*glasnost'* and '*perestroika'* in the judiciary.[51] In the name of judicial independence, we cannot have judicial absolutism and tyranny. Though, some efforts were started by the introduction of Constitutional Amendment Bills in the Parliament[52]. In the meantime, this has turned the judiciary's position as the champion of the people into something of a contradiction, as being the least accountable branch of government, it has styled itself the most responsive to the people.

But, on the other side, the drawbacks of the collegium system had been highlighted by eminent personalities, and in the recommendation of various commissions and committees with the objections which may be summarized as follows:-

1. The Appointment of Judges by the Collegium system is completely opaque and there was no procedure for checking the reasonableness of appointment,[53]
2. There is a complete lack of accountability on the part of Judiciary. The collegium system has failed. Its decisions on appointments and transfers lack transparency and we feel courts are not getting judges on merit. The Second Administrative Reforms Commission, under the Chairmanship of Mr. Verappa Moily, had also noted that:

   > 'Perhaps in no other country in the world does the judiciary has a final say in its own appointments. In India, neither the executive nor the legislature, has much say in who is appointed to the Supreme Court or the High Courts.'[54]

3. There is a lack of implementation, which was attributed as the major reason for the vacancy in the courts and in turn pendency of cases[55].
4. The executive is thought to perform the function of knowing and informing about the antecedents of the candidates, which the Judiciary was thought incapable of doing as even the senior most judges constituting the collegium would be from outside the state.[56]

Thus, the Collegium system is inaccessible to the people at large. Presently, in several

51. V.R. Krishna Ayer J., The Hindu, (01-09-2010)
52. Supra Note 31;See also, the 82nd Constitutional Amendment Bill in 1997, the 98th Constitutional Amendment Bill in 2003 and the 120th Constitutional Amendment Bill in 2013
53. quoting the then Union Law Minister, Mr. H.R. Bhardwaj, had been reported, The Hindustan Times, (21.10.2008)
54. Second Administrative Reforms Commission, *'Ethics in Governance'*, Fourth Report, (2005), P 50
55. quoting the then Union Law Minister, Mr. Sadananda Gowda, had been reported, The Times of India, (26.09.2014)
56. 214th Report, Law Commission of India, p 59

countries of the Commonwealth, National Judicial Appointment Commissions have been established to appoint Judges and such judicial commissions have worked with success especially in United Kingdom, South Africa and Canada. The process of appointment is transparent in their working even to extent that applications are invited by public advertisement. Recently, in the Supreme Court of U.K., have been the appointments of the Judges were made through public advertisement. Hence, there is need to reconsider the collegium system.

IV. NATIONAL JUDICIAL APPOINTMENTS COMMISSION: THE WAY FORWARD

Keeping in view the criticism of collegium, the Parliament amended the Constitution by passing *the Constitution (Ninety-ninth Amendment) Act,* 2014 and enacted *the National judicial Appointment Commission Act*, 2014. By this Amendment, certain new Articles were inserted[57] in the Constitution and few existing articles of the Constitution were amended[58]. The new Articles provided with the constitution of the National Judicial Appointment Commission; its functions and power of Parliament to make law. Article 124A of the Constitution of India, provided for the composition of the National Judicial Appointments Commission[59].

This mechanism generated fresh concerns for public debate about judicial independence and accountability. The *NJAC Act* regulates the procedure to be followed by the Commission to recommend persons to be appointed as Judge in the Supreme Court and the High Courts, and the transfers as well as promotion. The recommendation for appointment of CJI and Judges has to be made on the basis of seniority, ability, merit, and any other criteria of suitability as may be specified by regulations of the NJAC[60]. The President has to make an appointment on the basis of such recommendations.[61]

By the new enactments, real questions which arise for consideration are whether the NJAC legislation really cures the ailments that the collegium system suffered with? whether the NJAC system of appointment suffers from systematic inefficiency that makes it dangerously susceptible to political influence? whether a virtual veto power is introduced by the Act over any judicial appointment that results in a constitutional crisis? whether the seniority norm, whereby the senior most judge of the Supreme Court is elevated to the office of the Chief Justice of India, when the incumbent Chief Justice leaves the Office, is done away with? And finally by giving no weightage to the voice of the CJI whether that violates the basic structure of the Constitution (*i.e.* independence of judiciary)? As such doubts have been raised from different corners.[62] Subsequently, the Supreme Court Advocates-on-Record Association and Senior Advocates filed writ petitions challenging the constitutional validity of *the Constitution (Ninety-ninth Amendment) Act* 2014 and the *National Judicial Appointment Commission Act* 2014 alleging *inter alia* that it violates the basic structure of

57. articles 124A; 124B and 124C
58. Articles 124, 127, 128, 217, 222, 224, 224A and 231
59. Commission shall consist of the Chief Justice of India (Chairperson); two other judges of the Supreme Court, next to the Chief Justice of India as Member; the Union Minister in charge of Law and Justice as Member all *ex- officio* and two nominated eminent persons under the provision of article 124A (4)
60. Section 5 of the *NCJA Act* provides procedure for selection of Judge of Supreme Court and Section 6 for High Court
61. *Ibid* S 7
62. Katju, M., J. stings *Judiciary again, makes fresh corruption claims*, Business Standard (11-08-2014); Sacin P. Mampatta, *Judges, research analysts and fine art of breach control,* Business Standard*, (13-04-2015)*

the Constitution by compromising with independence of judiciary in the beginning of 2015 before the Supreme Court. A three –Judge Bench was originally constituted for hearing of the matter. But, the matter was heard, finally, on referral by consisting a five-Judge Bench of the Supreme Court headed by J. S. Khehar, J.

(i). SUPREME COURT ADVOCATES-ON-RECORD ASS'N & ANR.* V. *UNION OF INDIA

The Supreme Court, in case of *the Supreme Court Advocates-on-Record Ass'n & Anr.* (*SCAORA*) v. *Union of India* [63] (hereinafter referred as *NJAC* case, has delivered its landmark judgement on October 16, 2015 by a majority of four against one and invalidated the impugned amendment and accompanying Act as well for violating the basic structure of the Constitution, and declared them void and unconstitutional.[64] Thereby pre-existing scheme of appointing judges stands revived. The court ruled that ousting of judicial primacy and presence of the voice of the Union Minister for Law and Justice and others as well are unconstitutional. The full judgement of *NJAC* case consists of three parts – recusal order; reference order and order on merits.

Firstly, in recusal order the Court considered objection of the petitioners which was against participation of justices in the hearing of the petitions being as member of the "collegium, who could not be impartial, if exercise 'significant constitutional power' in the judicial appointments process especially for J. S. Khehar. The objection was dismissed by the court unanimously by saying that there is no principle of law which warrants Justice Khehar's recusal from the proceedings. If it is so, every Justice of the Supreme Court would be disqualified because any of them could potentially serves on the collegium[65]. *Secondly*, in reference order the respondents, the Union of India, filed a motion seeking a review by a bench of nine Judges the validity of two judgements (the precedents that were directly relevant to the case- *the second and third judges cases*) as various vital aspects of the matter had not been brought to the notice of the Court. The Court denied the request in the first part of his opinion, prior to reaching the merits. However, it was discussed in detail later while considering the merits. The Court held that:

> 'the Constitution mandates judicial primacy in appointments based on the constitutional text and longstanding practice, the judicial primacy is not only constitutionally required, but is also part of the unamendable basic structure because it is integral to the independence of the judiciary". The court held that contention of respondents for revisiting or reviewing the judgments rendered by this Court earlier in *the Second and Third Judges cases*, cannot be acceded to.'[66]

Thirdly, the Court pointed out that the power of Parliament to amend the Constitution did not include the power of amending the 'core' or the 'basic structure' of the Constitution. The Court held that the new scheme damages the basic feature of the Constitution under which primacy in appointment of Judges has to be with the judiciary. Under the new scheme such primacy has been given a go-bye. Thus, the impugned amendment cannot be sustained. The system of appointment of Judges to the Supreme Court, and Chief Justices and Judges to the High Courts; and transfer of Chief Justices and Judges of High Courts from one High

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63. 2015 (11) SCALE, 1 (bench consisting of Jagdish Singh Khehar, Madan B. Lokur, Kurian Joseph, Adarsh Kumar Goel, J. Chelameswar, JJ.)
64. Indeed Chelameshwar ,J. in his sole dissent, did not examine the validity of the Act
65. Supra Note 63, para 18
66. *Id* at para 80 (62)

Court, to another, as existing prior to this amendment (called the "collegiums system") is declared to be operative.[67] Since, amendment is beyond the competence of the Parliament and once the amendment is struck down, the validity of the NJAC Act cannot survive.[68]

V. COLLEGIUM *vis–a–vis* NJAC : RETROSPECT AND PROSPECT

Whether the *NJAC* Act provides adequate provisions for bringing out transparency in appointment of Judges and ensures accountability? Or the collegium is itself a foolproof system? The recent jugement has opened a scope for new arguments in favour and against of the both the systems and compelled the scholars for speculation. The Executive has its own voice that *NJAC* Act cures the defects that inflicted the collegiums *vis-a-vis* Judiciary has its own say that the Act suffers from apprehension of possible misuse of powers entrusted to the other functionaries, that may ruin the constitutional values of Judicial life. Hence, the NJAC judgement needs a minute analysis to sort out the implications arising out of it and requires to propose a suitable constitutional mechanism that can strengthen the fundamental objectives of the Constitution- transparency; accountability and primacy of judiciary. In order to provide appropriate suggestions, it would be pertinent to examine the majority, concurring and dissent opinions of the Judges associated with the judgement of NJAC.

The majority opinion of the Court negates the criticism labeled against the collegium, and thus, categorically observed that:

> 'It is not possible to accept, that in the procedure contemplated under the Second and Third Judges cases, Judges at their own select Judges to the higher judiciary, or that, the system of *Imperium in Imperio* has been created for appointment of Judges to the higher judiciary. It is also not possible to accept, that the judgment in the Second Judges case, has interfered with the process of selection and appointment of Judges to the higher judiciary, by curtailing the participatory role of the executive, in the constitutional scheme of checks and balances, in view of the role of the executive.'[69]

Court further expressed its concern on the composition of the NJAC and its possible shortcomings:[70]

> 'It is not possible to accept, that the primacy of the judiciary would be considered to have been sustained, merely by ensuring that the judicial component in the membership of the NJAC was sufficiently capable, to reject the candidature of an unworthy nominee. In the matter of primacy,..... This would be out-rightly obnoxious, to the primacy of the judicial component. The magnitude of the instant issue is apparent from the fact that the two 'eminent persons', could defeat the unanimous recommendation made by the Chief Justice of India and the two senior most Judges of the Supreme Court, favouring the appointment of an individual under consideration, without any doubt, demeaning primacy of the judiciary, in the matter of selection and appointment of Judges to the higher judiciary'.

67. *Id* at paras 377(1), 378(2), 381(5)
68. *Supra* note 64
69. *Supra* note 63, para 90.
70. *Id*, para 275

In concurring opinion Lokur J., has observed that:

> "there is no clarity on the role of the President. In any event, the discretion available to the President to consult Judges of the Supreme Court in the matter of appointment of Judges is taken away; the decision of the President is subject to the opinion of two eminent persons neither of whom is constitutionally accountable; there is a doubt on the well established principle of Cabinet responsibility; a statute - the NJAC Act, not the Constitution binds the President contrary to the constitutional framework; the 99th Constitution Amendment Act makes serious and unconstitutional inroads into Article 124(2) of the Constitution, as originally framed."[71]

He further concluded that:

> "If the establishment of the NJAC by the 99th Constitution Amendment Act alters the basic structure of the Constitution, ……the Amendment Act and the NJAC Act and they are not severable and cannot stand alone, they too must be declared unconstitutional."[72]

The minority opinion supports the arguments of the Executive. Chelameswar, J., in his dissenting opinion observed:[73]

> "Transparency is a vital factor in constitutional governance. Transparency is an aspect of rationality. The need for transparency is more in the case of appointment process. Proceedings of the collegium were absolutely opaque and inaccessible both to public and history, barring occasional leaks.

He further opined that:[74]

> "all power could be misused including judicial power. The remedy is not to deny grant of power but to structure it so as to eliminate the potential for abuse. The power to nominate two eminent persons is conferred upon three high constitutional functionaries –the Prime Minister, the Leader of the Opposition and the Chief Justice of India. It is elementary political knowledge that the Prime Minister and the Leader of Opposition would always have conflicting political interests and would rarely agree upon any issue. Nonetheless, possibility of a bipartisan compromise cannot be ruled out. Though, the presence of the Chief Justice of India in the Committee should normally be a strong deterrent, the possibility of the Chief Justice of India failing to perceive a political compromise or helplessness in the event of such compromise cannot be ruled out".

Again, he justifies incorporation of 'eminent person' to counter 'bipartisan compromises' and said that there must be an entrenched process of nomination of eminent persons which eliminates risk of possible bipartisan compromises.'[75]

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71. *Id*, para 1025.
72. *Id*, para 1101
73. *Id.,* para 524.
74. *Id*., para. 515
75. Id., 516

VI. CONCLUSION

The *NJAC* judgement has arisen a deep skepticism in legal circles on the issue whether the NJAC is better than the collegium in bringing out integrity and more transparency in selection and appointment, transfer and promotion of Judges in higher judiciary while maintaining the independence of judiciary which is *sine qua non* for the success of democracy or *vice-versa*? It's very difficult to expunge such incredulity against any system.

It is one of the settled principles of a civilized legal system that a Judge is required to be impartial. Existence of an impartial Judge is the hallmark of democracy.[76] A humane Judge, who believes in judicial ideology, is rational and impartial in true sense. No system can ensure independence of this institution, unless and until, the judicial ideology is followed in practice in its strictest sense in judicial process. The 'ideology,' broadly, influences decision making. This is rightly quoted for a Judge :

> 'law is business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitate to point it out and to press toward it with all my heart'[77].

However, a Judge is, also, a human being, with all passions and prejudices, likes and dislikes, affection, ill-will, hatred and contempt and fear and recklessness[78]. He possesses all the ills and wills of human traits. These intrinsic human phenomenona are known as *Shadripu*[79]. Of course, these may affect the integrity and accountability of the institutions. So, first a Judge should be nonchalant. Self restraint is not self abnegation. Hence, to curb the human traits and to keep the institution under restraint, there is need to develop sense of humanity and dedication to duty (perform your duties- *niyatang kuru Karma*[80]) among the Justices. These good practices should be inculcated right from their professional studies and should go throughout in their every action of social life in the Bar as well as Bench both. It may be an amelioristic path in inventing out mostly a non-erroneous system in selection

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76. Supra Note 63 para 391
77. Oliver Wendell Holes, *The Path of the Law,* in a collected Legal papers, New York, Harcourt, Brace and Company, (1920), p 174
78. Supra Note 7 para1256
79. The main enemy of the human beings are *Kaam* (desires) , *Krodh* (anger), *Lobh* (greed), *Mad* (pride or ego), *Moh* (attachment or delusion), and *Matsar* (jealousy) and they attack upon mind of mankind that distract the mind away from right direction; Lord Shri Krishna, *Shrimad Bhagawad Geeta*, (3:37)–'काम एष क्रोध एष रजोगुणसमुद्भवः, महाशनो महापाप्मा विद्ध्येनमिह वैरिणम्।।
80. *Id, at (3:8)*- नियतं कुरू कर्म, त्वं कर्म ज्यायो ह्यकर्मणः ; Judges are oath bound by the Constitution to decide within the prescription and proscription of Law; "While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own senses of self-restraint", Harlan F. Stone in *United States* v. *Butler*, 297 US 1, pp 78-79 (1936)
81. That the Judges of the supreme Court and High Courts hold their tenure not at the pleasure of the President but till they attain the prescribed age of retirement, Arts.124(2), 217; that their removal is possible only after following an elaborate procedure, Art. 124(2)(b); that their salaries and allowances and pension are charged on the consolidated funds of the Union or the States, art. 112(3)(d); that no discussion can take place in the Legislature with respect to their conduct in the discharge of their duties except on a motion for their removal, Art. 121; that they have the power to punish a person for contempt of court, Arts. 129, 215 and they are protected by a host of other provision of law which are intent to make them feel and to remain independent of any external agency such as the executive, Art 50. However, the concept of judicial infallibility is valid, but a legal pronouncement need not always be the last word on a given subject as suggested by Krishna Ayer, J, The Hindu, (12-03-2012)

and appointment of wise men for the judgeship who are the real guardian, armed with infallible weapon of constitutional powers,[81] for maintaining Independence of Judiciary. Bhartruhari aptly writes in *'Neeti Shataka*', which is a message to all of the true traits of men with discretion that 'let men trained in ethics or morality, insult or praise; let Lakshmi (wealth) accumulate or vanish as she likes; let death come today itself or at the end of a Yuga (millennium), men with discretion will not deflect from the path of rectitude.'[82]

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82. निन्दन्तु नीतिनिपुणा यदि वा स्तवन्तु, लक्ष्मी समाविशतु गच्छतु वा यथेष्टम् । अद्यैव मरणमस्तु युगान्तरे वा, न्यायात्पथः प्रविचलन्तु पदं न धीराः।। ; "were I not to follow the straight road for its straightness, I should follow it for having found by experience that in the end it is commonly the happiest and the most useful track- Michel De Montaigne- one of the most significant Philosopher of the French Renaissance".

HUMAN EMBRYONIC STEM CELL PATENT : A HUMANITERIAN APPROACH

AJAI KUMAR*

ABSTRACT : As the topic of research indicates, the research article is related with area of Patent (a part of Intellectual Property Rights). The article highlight benefits of researches on Human Embryonic Stem Cells in saving the precious life of the mankind. The author discussed in the article the qualities of stem cells. These cells have ability to produce similar cells. Many tissues they serve as a sort of internal repair system, dividing essentially without limit to replenish other cells as long as the person or animal is still alive. Recently, scientists primarily worked with two kinds of stem cells from animals and humans: embryonic stem cells and non-embryonic "somatic" or "adult" stem cells. The functions and characteristics of these cells have been explained in this document. The embryonic stem cell (ESC) is the 'mother' of all other cell types in the body and is derived from early stage of the human embryo, i.e. blastocyst. Blastocyst formation takes place after four days of fertilization. Given their unique regenerative abilities, stem cells offer new potentials for treating diseases such as diabetes, and heart disease. The Department of Biotechnology under the Ministry of Science and Technology and Indian Council of Medical Research have jointly formulated draft guidelines for stem cell research. However, embryonic stem cell research falls under restricted category under the guidelines. It can be carried out with the approval of institutional committees and National Apex Committee. On other hand, a controversy prevailing throughout world that whether a patent may be granted in respect to the researches and product of this kind of cell? The submission of the author is that the courts (Indian) should take a liberal approach and patent should be allow to be granted in researches & products in this area. This will be a great help to mankind who are suffering with fatal diseases, organ failure and here diatry diseases. The Parliament should take liberal attitude and allow grant of patent in such researches and products by introduce an amendment in the Patent Act, 1970. It is also objective of the article to draw attention of the government that such researches should be funded by him.

KEY WORDS : Stam cells, Human embronic stem cell, Pluripotent stem cell (ipscs), Bone marrow stromal cell, DNA (Deoxy ribonucleic acid.

I. INTRODUCTION: WHAT ARE STEM CELLS, AND WHY ARE THEY IMPORTANT?

Stem cells have the remarkable potential to develop into many different cell types in the body during early life and growth. In addition, in many tissues they serve as a sort of internal repair system, dividing essentially without limit to replenish other cells as long as the

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person or animal is still alive. When a stem cell divides, each new cell has the potential either to remain a stem cell or become another type of cell with a more specialized function, such as a muscle cell, a red blood cell, or a brain cell.

Stem cells are distinguished from other cell types by two important characteristics. First, they are unspecialized cells capable of renewing themselves through cell division, sometimes after long periods of inactivity. Second, under certain physiologic or experimental conditions, they can be induced to become tissue- or organ-specific cells with special functions. In some organs, such as the gut and bone marrow, stem cells regularly divide to repair and replace worn out or damaged tissues. In other organs, however, such as the pancreas and the heart, stem cells only divide under special conditions.

Until recently, scientists primarily worked with two kinds of stem cells from animals and humans: embryonic stem cells and non-embryonic "somatic" or "adult" stem cells. The functions and characteristics of these cells will be explained in this document. Scientists discovered ways to derive embryonic stem cells from early mouse embryos more than 30 years ago, in 1981. The detailed study of the biology of mouse stem cells led to the discovery, in 1998, of a method to derive stem cells from human embryos and grow the cells in the laboratory. These cells are called human embryonic stem cells. The embryos used in these studies were created for reproductive purposes through *in vitro* fertilization procedures. When they were no longer needed for that purpose, they were donated for research with the informed consent of the donor. In 2006, researchers made another breakthrough by identifying conditions that would allow some specialized adult cells to be "reprogrammed" genetically to assume a stem cell-like state. This new type of stem cell, called induced pluripotent stem cells (iPSCs).

The embryonic stem cell (ESC) is the 'mother' of all other cell types in the body and is derived from early stage of the human embryo, i.e. blastocyst. Blastocyst formation takes place after four days of fertilization. The blastocyst has an outer layer of cells while inside it has a hollow sphere with a cluster of cells called the inner cell mass. These inner mass cells are pluripotent in nature and may undergo further specialization into stem cells and give birth to cells having a particular function. These cells have the capability to turn into different types of tissues in the human body. The inner cells give rise to the entire body of the organism, including all of the many specialized cell types and organs such as the heart, lungs, skin, sperm, eggs and other tissues. In some adult tissues, such as bone marrow, muscle, and brain, discrete populations of adult stem cells generate replacements for cells that are lost through normal wear and tear, injury, or disease.

Given their unique regenerative abilities, stem cells offer new potentials for treating diseases such as diabetes, and heart disease. However, much work remains to be done in the laboratory and the clinic to understand how to use these cells for cell-based therapies to treat disease, which is also referred to as regenerative or reparative medicine.

Laboratory studies of stem cells enable scientists to learn about the cells' essential properties and what makes them different from specialized cell types. Scientists are already using stem cells in the laboratory to screen new drugs and to develop model systems to study normal growth and identify the causes of birth defects.

Research on stem cell continues to advance knowledge about how an organism develops from a single cell and how healthy cells replace damaged cells in adult organisms. Stem cell research is one of the most fascinating areas of contemporary biology, but, as with many expanding fields of scientific inquiry, research on stem cells raises scientific questions as rapidly as it generates new discoveries.

II. WHAT ARE THE UNIQUE PROPERTIES OF ALL STEM CELLS?

Stem cells differ from other kinds of cells in the body. All stem cells—regardless of their source—have three general properties: they are capable of dividing and renewing themselves for long periods; they are unspecialized; and they can give rise to specialized cell types.

Stem cells are capable of dividing and renewing themselves for long periods. Unlike muscle cells, blood cells, or nerve cells—which do not normally replicate themselves—stem cells may replicate many times, or proliferate. A starting population of stem cells that proliferates for many months in the laboratory can yield millions of cells. If the resulting cells continue to be unspecialized, like the parent stem cells, the cells are said to be capable of long-term self-renewal.

Scientists are trying to understand two fundamental properties of stem cells that relate to their long-term self-renewal:

1. Why can embryonic stem cells proliferate for a year or more in the laboratory without differentiating, but most adult stem cells cannot; and
2. What are the factors in living organisms that normally regulate stem cell proliferation and self-renewal?

Discovering the answers to these questions may make it possible to understand how cell proliferation is regulated during normal embryonic development or during the abnormal cell division that leads to cancer. Such information would also enable scientists to grow embryonic and non-embryonic stem cells more efficiently in the laboratory.

The specific factors and conditions that allow stem cells to remain unspecialized are of great interest to scientists. It has taken scientists many years of trial and error to learn to derive and maintain stem cells in the laboratory without them spontaneously differentiating into specific cell types. For example, it took two decades to learn how to grow human embryonic stem cells in the laboratory following the development of conditions for growing mouse stem cells. Likewise, scientists must first understand the signals that enable a non-embryonic (adult) stem cell population to proliferate and remain unspecialized before they will be able to grow large numbers of unspecialized adult stem cells in the laboratory.

Stem cells are unspecialized. One of the fundamental properties of a stem cell is that it does not have any tissue-specific structures that allow it to perform specialized functions. For example, a stem cell cannot work with its neighbours to pump blood through the body (like a heart muscle cell), and it cannot carry oxygen molecules through the bloodstream (like a red blood cell). However, unspecialized stem cells can give rise to specialized cells, including heart muscle cells, blood cells, or nerve cells.

Stem cells can give rise to specialized cells. When unspecialized stem cells give rise to specialized cells, the process is called differentiation. While differentiating, the cell usually goes through several stages, becoming more specialized at each step. Scientists are just beginning to understand the signals inside and outside cells that trigger each step of the differentiation process. The internal signals are controlled by a cell's genes, which are interspersed across long strands of DNA and carry coded instructions for all cellular structures and functions. The external signals for cell differentiation include chemicals secreted by other cells, physical contact with neighboring cells, and certain molecules in the microenvironment. The interaction of signals during differentiation causes the cell's DNA to acquire epigenetic marks that restrict DNA expression in the cell and can be passed on through cell division.

Many questions about stem cell differentiation remain. For example, are the internal and external signals for cell differentiation similar for all kinds of stem cells? Can specific sets of signals be identified that promote differentiation into specific cell types? Addressing these questions may lead scientists to find new ways to control stem cell differentiation in the laboratory, thereby growing cells or tissues that can be used for specific purposes such as cell-based therapies or drug screening.

Adult stem cells typically generate the cell types of the tissue in which they reside. For example, a blood-forming adult stem cell in the bone marrow normally gives rise to the many types of blood cells. It is generally accepted that a blood-forming cell in the bone marrow—which is called a hematopoietic stem cell—cannot give rise to the cells of a very different tissue, such as nerve cells in the brain. Experiments over the last several years have purported to show that stem cells from one tissue may give rise to cell types of a completely different tissue. This remains an area of great debate within the research community. This controversy demonstrates the challenges of studying adult stem cells and suggests that additional research using adult stem cells is necessary to understand their full potential as future therapies.

III. WHAT ARE EMBRYONIC STEM CELLS?

A. What stages of early embryonic development are important for generating embryonic stem cells?

Embryonic stem cells, as their name suggests, are derived from embryos. Most embryonic stem cells are derived from embryos that develop from eggs that have been fertilized *in vitro*—in an *in vitro* fertilization clinic—and then donated for research purposes with informed consent of the donors. They are *not* derived from eggs fertilized in a woman's body.

B. How are embryonic stem cells grown in the laboratory?

Growing cells in the laboratory is known as cell culture. Human embryonic stem cells (hESCs) are generated by transferring cells from a preimplantation-stage embryo into a plastic laboratory culture dish that contains a nutrient broth known as culture medium. The cells divide and spread over the surface of the dish. In the original protocol, the inner surface of the culture dish was coated with mouse embryonic skin cells specially treated so they will not divide. This coating layer of cells is called a feeder layer. The mouse cells in the bottom of the culture dish provide the cells a sticky surface to which they can attach. Also, the feeder cells release nutrients into the culture medium. Researchers have now devised ways to grow embryonic stem cells without mouse feeder cells. This is a significant scientific advance because of the risk that viruses or other macromolecules in the mouse cells may be transmitted to the human cells.

The process of generating an embryonic stem cell line is somewhat inefficient, so lines are not produced each time cells from the preimplantation-stage embryo are placed into a culture dish. However, if the plated cells survive, divide and multiply enough to crowd the dish, they are removed gently and plated into several fresh culture dishes. The process of re-plating or subculturing the cells is repeated many times and for many months. Each cycle of subculturing the cells is referred to as a passage. Once the cell line is established, the original cells yield millions of embryonic stem cells. Embryonic stem cells that have proliferated in cell culture for six or more months without differentiating, are pluripotent, and appear genetically normal are referred to as an embryonic stem cell line. At any stage in the process, batches of cells can be frozen and shipped to other laboratories for further culture and experimentation.

C. What laboratory tests are used to identify embryonic stem cells?

At various points during the process of generating embryonic stem cell lines, scientists test the cells to see whether they exhibit the fundamental properties that make them embryonic stem cells. This process is called characterization.

Scientists who study human embryonic stem cells have not yet agreed on a standard battery of tests that measure the cells' fundamental properties. However, laboratories that grow human embryonic stem cell lines use several kinds of tests, including: growing and subculturing the stem cells for many months. This ensures that the cells are capable of long-term growth and self-renewal. Scientists inspect the cultures through a microscope to see that the cells look healthy and remain undifferentiated.

Using specific techniques to determine the presence of transcription factors that are typically produced by undifferentiated cells. Two of the most important transcription factors are Nanog and Oct4. Transcription factors help turn genes on and off at the right time, which is an important part of the processes of cell differentiation and embryonic development. In this case, both Oct 4 and Nanog are associated with maintaining the stem cells in an undifferentiated state, capable of self-renewal.

Using specific techniques to determine the presence of particular cell surface markers that are typically produced by undifferentiated cells.

Examining the chromosomes under a microscope. This is a method to assess whether the chromosomes are damaged or if the number of chromosomes has changed. It does not detect genetic mutations in the cells.

Determining whether the cells can be re-grown, or sub-cultured, after freezing, thawing, and re-plating.

Testing whether the human embryonic stem cells are pluripotent by 1) allowing the cells to differentiate spontaneously in cell culture; 2) manipulating the cells so they will differentiate to form cells characteristic of the three germ layers; or 3) injecting the cells into a mouse with a suppressed immune system to test for the formation of a benign tumour called a teratoma. Since the mouse's immune system is suppressed, the injected human stem cells are not rejected by the mouse immune system and scientists can observe growth and differentiation of the human stem cells. Teratomas typically contain a mixture of many differentiated or partly differentiated cell types—an indication that the embryonic stem cells are capable of differentiating into multiple cell types.

D. How are embryonic stem cells stimulated to differentiate?

As long as the embryonic stem cells in culture are grown under appropriate conditions, they can remain undifferentiated (unspecialized). But if cells are allowed to clump together to form embryoid bodies, they begin to differentiate spontaneously. They can form muscle cells, nerve cells, and many other cell types. Although spontaneous differentiation is a good indication that a culture of embryonic stem cells is healthy, the process is uncontrolled and therefore an inefficient strategy to produce cultures of specific cell types.

So, to generate cultures of specific types of differentiated cells—heart muscle cells, blood cells, or nerve cells, for example—scientists try to control the differentiation of embryonic stem cells. They change the chemical composition of the culture medium, alter the surface of the culture dish, or modify the cells by inserting specific genes. Through years of experimentation, scientists have established some basic protocols or "recipes" for the directed differentiation of embryonic stem cells into some specific cell types.

If scientists can reliably direct the differentiation of embryonic stem cells into specific cell types, they may be able to use the resulting, differentiated cells to treat certain diseases

in the future. Diseases that might be treated by transplanting cells generated from human embryonic stem cells include diabetes, traumatic spinal cord injury, Duchenne's muscular dystrophy, heart disease, and vision and hearing loss.

IV. WHAT ARE ADULT STEM CELLS?

An adult stem cell is thought to be an undifferentiated cell, found among differentiated cells in a tissue or organ. The adult stem cell can renew itself and can differentiate to yield some or all of the major specialized cell types of the tissue or organ. The primary roles of adult stem cells in a living organism are to maintain and repair the tissue in which they are found. Scientists also use the term somatic stem cell instead of adult stem cell, where somatic refers to cells of the body (not the germ cells, sperm or eggs). Unlike embryonic stem cells, which are defined by their origin (cells from the preimplantation-stage embryo), the origin of adult stem cells in some mature tissues is still under investigation.

Research on adult stem cells has generated a great deal of excitement. Scientists have found adult stem cells in many more tissues than they once thought possible. This finding has led researchers and clinicians to ask whether adult stem cells could be used for transplants. In fact, adult hematopoietic, or blood-forming, stem cells from bone marrow have been used in transplants for more than 40 years. Scientists now have evidence that stem cells exist in the brain and the heart, two locations where adult stem cells were not at first expected to reside. If the differentiation of adult stem cells can be controlled in the laboratory, these cells may become the basis of transplantation-based therapies.

The history of research on adult stem cells began more than 60 years ago. In the 1950s, researchers discovered that the bone marrow contains at least two kinds of stem cells. One population, called hematopoietic stem cells, forms all the types of blood cells in the body. A second population, called bone marrow stromal stem cells (also called mesenchymal stem cells, or skeletal stem cells by some), were discovered a few years later. These non-hematopoietic stem cells make up a small proportion of the stromal cell population in the bone marrow and can generate bone, cartilage, and fat cells that support the formation of blood and fibrous connective tissue.

In the 1960s, scientists who were studying rats discovered two regions of the brain that contained dividing cells that ultimately become nerve cells. Despite these reports, most scientists believed that the adult brain could not generate new nerve cells. It was not until the 1990s that scientists agreed that the adult brain does contain stem cells that are able to generate the brain's three major cell types—astrocytes and oligodendrocytes, which are non-neuronal cells, and neurons, or nerve cells.

A. Where are adult stem cells found, and what do they normally do?

Adult stem cells have been identified in many organs and tissues, including brain, bone marrow, peripheral blood, blood vessels, skeletal muscle, skin, teeth, heart, gut, liver, ovarian epithelium, and testis. They are thought to reside in a specific area of each tissue (called a "stem cell niche"). In many tissues, current evidence suggests that some types of stem cells are pericytes, cells that compose the outermost layer of small blood vessels. Stem cells may remain quiescent (non-dividing) for long periods of time until they are activated by a normal need for more cells to maintain tissues, or by disease or tissue injury.

Typically, there is a very small number of stem cells in each tissue and, once removed from the body, their capacity to divide is limited, making generation of large quantities of stem cells difficult. Scientists in many laboratories are trying to find better ways to grow large

quantities of adult stem cells in cell culture and to manipulate them to generate specific cell types so they can be used to treat injury or disease. Some examples of potential treatments include regenerating bone using cells derived from bone marrow stroma, developing insulin-producing cells for type 1 diabetes, and repairing damaged heart muscle following a heart attack with cardiac muscle cells.

B. What tests are used to identify adult stem cells?

Scientists often use one or more of the following methods to identify adult stem cells: (1) label the cells in a living tissue with molecular markers and then determine the specialized cell types they generate; (2) remove the cells from a living animal, label them in cell culture, and transplant them back into another animal to determine whether the cells replace (or "repopulate") their tissue of origin.

Importantly, scientists must demonstrate that a single adult stem cell can generate a line of genetically identical cells that then gives rise to all the appropriate differentiated cell types of the tissue. To confirm experimentally that a putative adult stem cell is indeed a stem cell, scientists tend to show either that the cell can give rise to these genetically identical cells in culture, and/or that a purified population of these candidate stem cells can repopulate or reform the tissue after transplant into an animal.

C. What is known about adult stem cell differentiation?

As indicated above, scientists have reported that adult stem cells occur in many tissues and that they enter normal differentiation pathways to form the specialized cell types of the tissue in which they reside.

Normal differentiation pathways of adult stem cells. In a living animal, adult stem cells are available to divide for a long period, when needed, and can give rise to mature cell types that have characteristic shapes and specialized structures and functions of a particular tissue.

Transdifferentiation. A number of experiments have reported that certain adult stem cell types can differentiate into cell types seen in organs or tissues other than those expected from the cells' predicted lineage (i.e., brain stem cells that differentiate into blood cells or blood-forming cells that differentiate into cardiac muscle cells, and so forth). This reported phenomenon is called transdifferentiation.

Although isolated instances of transdifferentiation have been observed in some vertebrate species, whether this phenomenon actually occurs in humans is under debate by the scientific community. Instead of transdifferentiation, the observed instances may involve fusion of a donor cell with a recipient cell. Another possibility is that transplanted stem cells are secreting factors that encourage the recipient's own stem cells to begin the repair process. Even when transdifferentiation has been detected, only a very small percentage of cells undergo the process.

In a variation of transdifferentiation experiments, scientists have recently demonstrated that certain adult cell types can be "reprogrammed" into other cell types in vivo using a well-controlled process of genetic modification. This strategy may offer a way to reprogram available cells into other cell types that have been lost or damaged due to disease. For example, one recent experiment shows how pancreatic beta cells, the insulin-producing cells that are lost or damaged in diabetes, could possibly be created by reprogramming other pancreatic cells. By "re-starting" expression of three critical beta cell genes in differentiated adult pancreatic exocrine cells, researchers were able to create beta cell-like cells that can secrete insulin. The reprogrammed cells were similar to beta cells in appearance, size, and

shape; expressed genes characteristic of beta cells; and were able to partially restore blood sugar regulation in mice whose own beta cells had been chemically destroyed. While not transdifferentiation by definition, this method for reprogramming adult cells may be used as a model for directly reprogramming other adult cell types.

In addition to reprogramming cells to become a specific cell type, it is now possible to reprogram adult somatic cells to become like embryonic stem cells (induced pluripotent stem cells, iPSCs) through the introduction of embryonic genes. Thus, a source of cells can be generated that are specific to the donor, thereby increasing the chance of compatibility if such cells were to be used for tissue regeneration. However, like embryonic stem cells, determination of the methods by which iPSCs can be completely and reproducibly committed to appropriate cell lineages is still under investigation.

V. WHAT ARE THE SIMILARITIES AND DIFFERENCES BETWEEN EMBRYONIC AND ADULT STEM CELLS?

Human embryonic and adult stem cells each have advantages and disadvantages regarding potential use for cell-based regenerative therapies. One major difference between adult and embryonic stem cells is their different abilities in the number and type of differentiated cell types they can become. Embryonic stem cells can become all cell types of the body because they are pluripotent. Adult stem cells are thought to be limited to differentiating into different cell types of their tissue of origin.

Embryonic stem cells can be grown relatively easily in culture. Adult stem cells are rare in mature tissues, so isolating these cells from an adult tissue is challenging, and methods to expand their numbers in cell culture have not yet been worked out. This is an important distinction, as large numbers of cells are needed for stem cell replacement therapies.

Scientists believe that tissues derived from embryonic and adult stem cells may differ in the likelihood of being rejected after transplantation. We don't yet know for certain whether tissues derived from embryonic stem cells would cause transplant rejection, since relatively few clinical trials have tested the safety of transplanted cells derived from hESCS.

Adult stem cells, and tissues derived from them, are currently believed less likely to initiate rejection after transplantation. This is because a patient's own cells could be expanded in culture, coaxed into assuming a specific cell type (differentiation), and then reintroduced into the patient. The use of adult stem cells and tissues derived from the patient's own adult stem cells would mean that the cells are less likely to be rejected by the immune system. This represents a significant advantage, as immune rejection can be circumvented only by continuous administration of immunosuppressive drugs, and the drugs themselves may cause deleterious side effects.

VI. WHAT ARE THE POTENTIAL USES OF HUMAN STEM CELLS AND THE OBSTACLES THAT MUST BE OVERCOME BEFORE THESE POTENTIAL USES WILL BE REALIZED?

There are many ways in which human stem cells can be used in research and the clinic. Studies of human embryonic stem cells will yield information about the complex events that occur during human development. A primary goal of this work is to identify how undifferentiated stem cells become the differentiated cells that form the tissues and organs. Scientists know that turning genes on and off is central to this process. Some of the most serious medical conditions, such as cancer and birth defects, are due to abnormal cell division and differentiation. A more complete understanding of the genetic and molecular controls of

these processes may yield information about how such diseases arise and suggest new strategies for therapy. Predictably controlling cell proliferation and differentiation requires additional basic research on the molecular and genetic signals that regulate cell division and specialization. While recent developments with iPS cells suggest some of the specific factors that may be involved, techniques must be devised to introduce these factors safely into the cells and control the processes that are induced by these factors.

Human stem cells are currently being used to test new drugs. New medications are tested for safety on differentiated cells generated from human pluripotent cell lines. Other kinds of cell lines have a long history of being used in this way. Cancer cell lines, for example, are used to screen potential anti-tumour drugs. The availability of pluripotent stem cells would allow drug testing in a wider range of cell types. However, to screen drugs effectively, the conditions must be identical when comparing different drugs. Therefore, scientists must be able to precisely control the differentiation of stem cells into the specific cell type on which drugs will be tested. For some cell types and tissues, current knowledge of the signals controlling differentiation falls short of being able to mimic these conditions precisely to generate pure populations of differentiated cells for each drug being tested.

Perhaps the most important potential application of human stem cells is the generation of cells and tissues that could be used for cell-based therapies. Today, donated organs and tissues are often used to replace ailing or destroyed tissue, but the need for transplantable tissues and organs far outweighs the available supply. Stem cells, directed to differentiate into specific cell types, offer the possibility of a renewable source of replacement cells and tissues to treat diseases including macular degeneration, spinal cord injury, stroke, burns, heart disease, diabetes, osteoarthritis, and rheumatoid arthritis.

For example, it may become possible to generate healthy heart muscle cells in the laboratory and then transplant those cells into patients with chronic heart disease. Preliminary research in mice and other animals indicates that bone marrow stromal cells, transplanted into a damaged heart, can have beneficial effects. Whether these cells can generate heart muscle cells or stimulate the growth of new blood vessels that repopulate the heart tissue, or help via some other mechanism is actively under investigation. For example, injected cells may accomplish repair by secreting growth factors, rather than actually incorporating into the heart. Promising results from animal studies have served as the basis for a small number of exploratory studies in humans (for discussion, see call-out box, "Can Stem Cells Mend a Broken Heart?"). Other recent studies in cell culture systems indicate that it may be possible to direct the differentiation of embryonic stem cells or adult bone marrow cells into heart muscle cells.

Can Stem Cells Mend a Broken Heart?: Stem Cells for the Future Treatment of Heart Disease Cardiovascular disease (CVD), which includes hypertension, coronary heart disease, stroke, and congestive heart failure, has ranked as the number one cause of death in the United States every year since 1900 except 1918, when the nation struggled with an influenza epidemic. Nearly 2,600 Americans die of CVD each day, roughly one person every 34 seconds. Given the aging of the population and the relatively dramatic recent increases in the prevalence of cardiovascular risk factors such as obesity and type 2 diabetes, CVD will be a significant health concern well into the 21st century.

Cardiovascular disease can deprive heart tissue of oxygen, thereby killing cardiac muscle cells (cardiomyocytes). This loss triggers a cascade of detrimental events, including formation of scar tissue, an overload of blood flow and pressure capacity, the overstretching of viable cardiac cells attempting to sustain cardiac output, leading to heart failure, and

eventual death. Restoring damaged heart muscle tissue, through repair or regeneration, is therefore a potentially new strategy to treat heart failure.

The use of embryonic and adult-derived stem cells for cardiac repair is an active area of research. A number of stem cell types, including embryonic stem (ES) cells, cardiac stem cells that naturally reside within the heart, myoblasts (muscle stem cells), adult bone marrow-derived cells including mesenchymal cells (bone marrow-derived cells that give rise to tissues such as muscle, bone, tendons, ligaments, and adipose tissue), endothelial progenitor cells (cells that give rise to the endothelium, the interior lining of blood vessels), and umbilical cord blood cells, have been investigated as possible sources for regenerating damaged heart tissue. All have been explored in mouse or rat models, and some have been tested in larger animal models, such as pigs.

A few small studies have also been carried out in humans, usually in patients who are undergone open-heart surgery. Several of these have demonstrated that stem cells that are injected into the circulation or directly into the injured heart tissue appear to improve cardiac function and/or induce the formation of new capillaries. The mechanism for this repair remains controversial, and the stem cells likely regenerate heart tissue through several pathways. However, the stem cell populations that have been tested in these experiments vary widely, as do the conditions of their purification and application. Although much more research is needed to assess the safety and improve the efficacy of this approach, these preliminary clinical experiments show how stem cells may one day be used to repair damaged heart tissue, thereby reducing the burden of cardiovascular disease.

In people who suffer from type 1 diabetes, the cells of the pancreas that normally produce insulin are destroyed by the patient's own immune system. New studies indicate that it may be possible to direct the differentiation of human embryonic stem cells in cell culture to form insulin-producing cells that eventually could be used in transplantation therapy for persons with diabetes.

To realize the promise of novel cell-based therapies for such pervasive and debilitating diseases, scientists must be able to manipulate stem cells so that they possess the necessary characteristics for successful differentiation, transplantation, and engraftment. The following is a list of steps in successful cell-based treatments that scientists will have to learn to control to bring such treatments to the clinic. To be useful for transplant purposes, stem cells must be reproducibly made to -

1. Proliferate extensively and generate sufficient quantities of cells for making tissue.
2. Differentiate into the desired cell type(s).
3. Survive in the recipient after transplant.
4. Integrate into the surrounding tissue after transplant.
5. Function appropriately for the duration of the recipient's life.
6. Avoid harming the recipient in any way.

Also, to avoid the problem of immune rejection, scientists are experimenting with different research strategies to generate tissues that will not be rejected.

To summarize, stem cells offer exciting promise for future therapies, but significant technical hurdles remain that will only be overcome through years of intensive research.

VII. PATENT CONTROVERSIES IN AREA OF EMBRYONIC STEM CELL IN U.S.

In US law poses no morality-based barrier to patenting human stem cells Public Law[1].

1. Public Law 104-99 §128 (1996).

In the US, patent eligible subject matter is "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof."[2]Although the US Supreme Court noted that "Congress plainly contemplated that the patent laws would be given wide scope," the Court has created three exceptions to patent eligible subject matter: laws of nature, natural phenomena, and abstract ideas (*Diamond v. Diehr*[3]; USPTO, 2014)[4].

For a particular kind of human stem cell to be eligible for patents, it must not fall under any of the three exceptions, the most relevant of which is the natural phenomena exception. In *Diamond v. Chakrabarty*,[5] the US Supreme Court clarified that merely being alive is not sufficient to exclude an invention from patent eligible subject matter under[5]. Namely, merely being alive does not cast an invention into the natural phenomena exception. Stem cells have been patented in the US under this pretense for the past thirty years.

On the other hand, with regards to the government funding of human embryonic stem cell research, from 1996 to 2009, the Dickey-Wicker Amendment of 1996 prohibited the use of government funds for any research that destroyed and created human embryos[6]. In 2009, President Obama's Executive Order allowed the funding of research that employed embryos, if these embryos were created during *in vitro* fertilization for reproductive purposes but were no longer needed for such purposes[6].The NATIONAL ACADEMIES' GUIDELINES, 2010 have been issued for institutions eligible in getting federal funding in this researches.

The recently enacted Leahy-Smith America Invents Act (AIA) and influential Court decisions regarding BCRA1/2 and cell-free fetal DNA may significantly limit, however, the scope of biotechnology patent eligibility in the US. These dramatic changes in the law may directly oppose the vision of Shinya Yamanaka[7], a strong believer in the importance of stem cell patenting to promote research, drug discovery, regenerative medicine, and global access[7].

The AIA, passed in September 2011, provides that "no patent may issue on a claim directed to or encompassing a human organism. The AIA is the most significant patent change in the US since 1952. The legislative history of AIA clarifies that under this act, stem cells are patent eligible but patent claims directed to or encompassing a human organism, including human embryos are prohibited[8]. The AIA, however, does not define the term "human organism." In the future, if the US Supreme Court interprets "human stem cells" as being a kind of "human organism," stem cells would be patent ineligible. After this ruling, in late 2011, Geron–a biotechnology company that develops and commercializes therapeutics for cancer by inhibiting telomerase—announced an abandonment of hESC research[9].

In *Association for Molecular Pathology v. Myriad Genetics, Inc*.[10], (hereafter referred to as the *Myriad* decision) the Supreme Court ruled that cDNAs are patent eligible, but

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2. 35 USC §101.
3. 450 US 175, 185 (1981).
4. *USPTO (2014*). Guidance For Determining Subject Matter Eligibility Of Claims Reciting Or Involving Laws of Nature, Natural Phenomena, & Natural Products.
5. 447 US 303 (1980).
6. Zachariades N. A. (2013). Stem cells: intellectual property issues in regenerative medicine.Stem Cells Dev.*22, 59–62. 10.1089/scd.2013.0287*.
7. Yamanaka S. (2015). Using patents to ensure access to pioneering cell technology. *WIPO Magazine; www.wipo.int* .
8. Leahy-Smith America Invents Act (AIA), Pub. L. 112-29, sec. 33(a), 125 Stat. 284.
9. Torrance A. (2013), The Unpatentable Human Being. *The Hastings Center, Hastings Center Report,* 10–11. [PubMed].
10. 133 S.Ct. 2107, 2116-17 (2013).

isolated DNAs are not. The case revolved around two important societal issues: breast cancer and gene patenting. In the mid-90s, Myriad Genetics Inc. successfully sequenced and developed a comprehensive diagnostic test for hereditary breast cancer based on mutations in the BRCA1 and BRCA2 genes. Myriad's US Pat. No. 5,747,282 claimed, "An isolated DNA coding for a BRCA1 polypeptide, said polypeptide having the amino acid sequence set forth in SEQ ID NO:2."

As per the *Myriad* decision, DNA means genomic DNA that has been "isolated" from the body, and "isolated" means merely removed and separated "from the surrounding genetic material"; cDNA means "synthetically created DNA…which contains the same protein-coding information found in a segment of natural DNA [exons] but omits portions within the DNAsegment that do not code for proteins [introns]." The *Myriad* decision explains "what is *not* implicated by this decision" and states, "We merely hold that genes and the information they encode are not patent eligible under §101 simply because they have been isolated from the surrounding genetic material." But notwithstanding the disclaimer, the lower courts may apply the *Myriad* decision to imply that if a stem cell is closer to being merely "isolated" from the body, the stem cell is likely not patent eligible. Conversely, if a stem cell is a synthetically created stem cell that contains the same information found in a natural stem cell but omits portions within the natural stem cell, e.g., portions that cannot replicate, then the synthetically created stem cell is likely patent eligible.

The *Myriad* decision appears to undermine the patent eligibility of hES Cells because isolated and purified hES Cells are essentially identical to hES Cells in human blastocysts. Such a contention resonates with many people who are either against patenting any part of the human body or interfering in the natural processes of human development.

In fact, Consumer Watchdog used AIA and *Myriad* as the basis to challenge WARF and thus appeal to the courts to repeal patents on isolated stem cells. However, in June 2014 the Federal Circuit Court said that it was required that there be an "actual case or controversy"—because WARF never sued Consumer Watch, the courts said the group did not have standing to appeal[11]. This demonstrates that in the future, other patent petitioners on behalf of public health (like in the *Myriad* decision) will likely attempt to repeal patent protection of isolated stem cells.

It does not matter, for the purposes of defining something as a product of nature, whether the product contains only one or millions of nucleotides or amino acids. What matters is whether the nucleotides or amino acids are in their natural form that exists in the body, other than having been isolated from their natural environment. If so, then these products are not patent eligible. If, however, the products are not only isolated from their natural environment, but also purified such that they are no longer in their natural form (such as by removal of introns), then such purified and isolated products are patent eligible.

A more recent decision in June 2015 further supported this trend of legal change with respect to patent eligible subject matter in biotechnology. In *Ariosa Diagnostics Inc. v. Sequenom Inc*. [12] (hereafter referred to as the *Sequenom* case), the US Court of Appeals for the Federal Circuit invalidated Sequenom Inc.'s patents on methods of using cell-free fetal DNA (cffDNA)—a naturally occurring extracellular fetal DNA that circulates in the blood stream of an expecting mother–for the efficient detection of fetal genetic defects. Although

11. Sherkow J. S., Scott C. T. (2015). Stem cell patents and the America Invents Act. Cell Stem Cell 16, 461–464. 10.1016/j.stem.2015.04.015 [PubMed].

12. *Ariosa Diagnostics, Inc., et al.* v. *Sequenom Inc., et al.,* No. 14-1139 and -1144 (Fed. Cir., June 12, 2015).

the court acknowledged that the Sequenom claims represented an important scientific breakthrough, the fact that cffDNA in the maternal blood is a natural phenomenon is indisputable. Moreover, the Federal Circuit concluded that the routine and well understood methods of DNA detection were not sufficient to transform the claimed subject matter into a patentable application. In the US, a method claim is patentable if either the composition of matter in the claims is patent eligible, novel, and non-obvious or the method steps are novel and non-obvious. In *Sequenom*, the courts decided that cffDNA (composition) was not patent eligible and that the methods of detection were obvious.

These cases bring to question—what extent of man-made alteration is necessary for a stem cell to not simply be considered an isolated form? *Myriad* demonstrates that while cDNA is patentable, isolated DNA is not; it is unclear how these cases will affect the patentability of stem cells in US.

In the US, however, the fate of hESC patents is tremendously uncertain. As explained in the above discussions, as the US significantly narrows the scope of patent eligible subject matter in biotechnology, stem cells face the risk of becoming classified as patent ineligible subject matter. Despite the absence of a morality clause, one could foresee the US hESC patent policies approaching those of the EU.

Indeed, the dramatic change in the law in recent years may set the stage for how future issues will be decided in the US. The next center of debate may well be the patents regarding hESCs held by WARF. WARF[13] US Patent No. 7,029,913 relates to a replicating *in vitro* cell culture of human embryonic stem cells. The WARF patents have been challenged on grounds of patent eligibility by Consumer Watchdog and the Public Patent Foundation. At the core, the prosecutors categorize the hESC patents as naturally occurring phenomenon. In this light, comparisons are made between the original stem cells and naturally occurring DNA, and the cultured stem cells and artificial cDNA. Thus far, the patents have survived at the US Court of Appeals of the Federal Circuit, which rather than ruling on the validity of the patents, ruled that as a third party not directly harmed by the decision, Consumer Watchdog did not have the legal standing, but this could change.

Looking ahead, the curtain is far from being closed. If the right group with standing litigates and succeeds in spurring a widespread social movement, it is unknown whether hESC patents will survive in the US. Indeed, the convergence of US and EU laws regarding stem cell patent eligibility may be inevitable.

Human embryonic stem cell line presented two special circumstances that aggravated the usual problems with the terms of exchange for research tool. First, prohibition on the use of U.S. government funding for Human embryo stem cell (hES Cell) research forced universities – specially University of Wisconsin – to turn to private sponsors at an early stage, compromising its control over the relevant patents long before specific commercial applications come into view. Second, the Bush administration compromise itself, which limits future use of federal funds to research with existing hES Cell, greatly enhanced the bargaining power of the institutions that had already developed the approved cell lines.

Both of these circumstances arose because of the ethical controversy surrounding hES Cell research. Such research is ethically controversial because extracting HES Cell requires destroying a fertilized human egg. Since 1995, Congresshas put language in its appropriations bills prohibiting the NIH from funding research in which human embryos are created or

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13. Consumer Watchdog v. *Wisconsin Alumni Research Foundation,* No. 2013-1377 (Fed. Cir. 2014).

destroyed. Despite these prohibitions, the U.S. federal government has from the outset, been the primary sponsor of embryonic stem cell research using nonhuman tissue. In 1990s, the NIH funded pioneering work by Dr. James Thomson and his colleagues at the university thatsucceeded in deriving embryonic stem cell from rhesus monkeys and macaques consistent with the broad discretion to patent enjoyed by grantee institutions under the Byhn - Dale Act, WARF sought to patent this advance and ultimately obtained a very broad patent. Indeed, although the Wisconsin researchers had not, at the time of application, which was granted in 1998, covered all PES cell lines. (WARF - US Patent No. 7,029,913)

To actually work with HES Cells, however, the Wisconsin researchers had to look beyond federal funding. Dr. Thomson and his colleague, therefore, setup a separate laboratory to work on HES Cells and secured private funding from Geron Corporation, a small bio-technology company based in Menlolark, California. In Nov. 1998, the Wisconsin researchers succeeded in isolating hES Cells and WARF filed a second subsidiary application with claims specifically drawn to hES Cell, A broad patent based on this application, which covers all HES Cell line, not just a particular cell line derived with Geron funds was issued on March 13, 2001. The hES Cell patent relies on precisely the same scientific discloser as the prior patent that covers PES Cell and is, therefore, merely a subset of this initial patent.

When the National Institute Health (NIH) sponsors research universities enjoy considerable latitude to deploy the resulting patent rights as they wish, subject to the right of the sponsor to intervene if the resulting inventions are not being used. In contrast, when private company's sponsor research, they usually demand at least an option to acquire an exclusive license to the resulting patents. Operating within these constraints, WARF initially granted Geron exclusive rights to develop therapeutic and diagnostic products based on sex important differentiated cell types derived from HES Cells. Following widespread media attention to this exclusively, as well as to litigation, the parties agreed to narrow Geron's exclusive license to product involving nerve, heart, and pancreatic cells. Wisconsin retained to distribute HES Cell lines for research purposes, but Geron's exclusive commercial license constraints the terms of the research license.

The Bush administration introduced another important constraint by setting limits on which cell lines NIH funded researchers could use. This restriction greatly increased the bargaining power of the holders of cell lines on the approved list, inasmuch as researchers who did not like the terms offered by approved cell line holders could not avoid these terms by simply making their own new cell lines. In particular, the bargaining power of WARF was enhanced. The bush compromised ensured that even if the WARF patent were invalidated – or simply ignored, an illegal practice in which academic scientists nonetheless often indulge – NIH – funded researchers would still be bound by WARF's restrictions on its tangible all lines.

VIII. PATENT CONTROVERSIES IN AREA OF EMBRYONIC STEM CELL IN E.U.

Patent eligibility of human stem cells faces resistance in the Europe Union on morality grounds. Directive on the Legal Protection of Biotechnological Inventions (the "Biotech Directive") regulates the legal protection of biotechnological inventions across the EU. The Biotech Directive prohibits patenting uses of human embryos for industrial or commercialpurposes on a morality ground[14]. The *EPO's Enlarged Board of Appeal* (EBoA) applied the Biotech Directive and ruled that claims directed to products which, at the filing

14. Directive 98/44/EC, Article 6(2)(c).

date, could be prepared *exclusively* by a method *necessarily* involving the destruction of human embryos are not patent eligible, even if the said method is not part of the claims[15]. The impact of the EBoA decision thus depends on the definition of "human embryo" under the Biotech Directive.

In *Brüstle v. Greenpeace*[16], the Court of Justice of the European Union (CJEU) interpreted the term "human embryo." The CJEU included into the scope of "human embryo" not only fertilized human ovum, but also:

> '…non-fertilised human ovum whose division and further development had been stimulated by parthenogenesis. Although those organisms have not, strictly speaking, been the object of fertilisation, due to the effect of the technique used to obtain them they are, as is apparent from the written observations presented to the Court, capable of commencing the process of development of a human being just as an embryo created by fertilisation of an ovum can do so.'
>
> (Emphasis added).

As a result of this interpretation, the CJEU held that a claim directed to "A cell culture comprising primate embryonic stem cells" was patent ineligible under the Biotech Directive. Directly following this decision, scientists were anxious that funding for stem cell research and market competitiveness for stem cell therapies would decrease in EU[17].

The CJEU apparently drew the line around "human embryo" by the capability of "commencing the process of development of a human being." However, the capability is not fixed but may change over time when new scientific discoveries make tissues previously not capable of "commencing the process of development of a human being" capable of doing so.

This changing scope of "human embryo" due to new scientific development was recently manifested in a case before the CJEU. International Stem Cell Corporation (ISCC) applied in the UK for two patents relating to methods where parthenogenesis is used to activate a human oocyte. Using the *Brüstle* decision as a precursor, the UK Patent Office concluded that because the partheno-genetically derived structure (parthenote) was analogous to the blastocyst stage of normal embryonic development, this fell within the definition of "human embryo," and was thus excluded from patentability. A parthenote is an unfertilized egg chemically induced through a process called parthenogenesis to begin developing as if it had been fertilized, and behaves like an embryo in early development.

ISCC appealed to the English High Court questioning the clause—"capable of commencing the development of a human being (*International Stem Cell Corporation v. Comptroller General of Patents,[17])*." ISCC argued that a parthenogenetically stimulated human oocyte was not capable of producing an embryo due to its inherent biological limitations, explaining that a parthenote contains only the maternal nuclear chromosome but no paternal DNA and is known to not undergo full development to give rise to an embryo.

It is clear from the CJEU's analysis of the *Brüstle* case that at the time, scientific knowledge stated that an unfertilized human ovum whose division and further development had been stimulated by parthenogenesis *did* have the capacity to develop into a human

15. G2/2006 WARF, 2009 OJ EPO 306 (the "WARF decision").

16. *Brüstle* v. *Greenpeace eV* (C-34/10) (2012) 1 C.M.L.R. 41 (the "Brüstle decision").

17. *International Stem Cell Corporation* v. *Comptroller General of Patents , UK Patents Court,* 17 April 2013, Case No. [2013] EWHC 807 (Ch).

being. However, current scientific knowledge has established that mammalian parthenotes cannot develop into viable human beings because they lack the paternal DNA necessary for the development of extra-embryonic tissue[18]. Human parthenotes have been shown to develop only to the blastocyst stage over about five days. Thus, on December 18, 2014, the CJEU concluded "that unfertilized human ovum whose division and further development had been stimulated by parthenogenesis does not constitute a 'human embryo'" (*International Stem Cell Corporation v. Comptroller General of Patents, CJEU*[19]). By narrowing the definition of "human embryo," the CJEU indirectly reduced the reach of the WARF decision of the EBoA and the *Brüstle* decision and opened the door for patenting hpSCs.

The ISCC decision differentiating a parthenote from an embryo invites at least two questions. First, if a human parthenote is not a potential human life but a human embryo is, what exactly is the characteristic of life that is present in the embryo formed from blastocyst during fertilization but not in the parthenote-derived blastocyst from which stem cells are harvested, disregarding paternal DNA contribution? Second, what is the definition of "human"? Since genetically-engineered humans cannot be patented either in the EU or in the US, but genetically-manipulated animals (e.g., oncomouse) can be patented in the US, what fundamentally is the difference between an animal, such as a monkey, and a human being? This is not just a rhetorical question, since a patent application for a part-human part animal-chimera was filed to the USPTO in 1998 but rejected on the grounds of the 13th amendment of the US Constitution prohibiting slavery and ownership of human beings[20]. Nevertheless, the pertinent question, both moral and legal, is how many human characteristics, including certain number of human genes, must be present in an animal to give it the legal status of a human? The problem is more acute in the EU where the *ordre public* and morality clause prevent patenting of not only humans but also human cells or organs.

In summary, though the ISCC decision allows patenting of both iPSCs and parthenotes, (as these cells are incapable of becoming human beings), the EU still remains strict on its policy against patent protection of hESCs.

IX. PATENT CONTROVERSIES IN AREA OF EMBRYONIC STEM CELL IN INDIA DRAFT GUIDELINES FOR STEM CELL RESEARCH

In India, clinical research using stem cells is in its infancy stage. The Department has supported Phase I multi-centric clinical trial using bone marrow mononuclear cells on Acute myocardial infarction at five hospitals in the country.[21] Apart from the government, some industries are also involved in stem cell research. Reliance Life Sciences, Mumbai has characterised 10 stem cell lines, including two neuronal cell lines, dopamine producing neurons and neurons for patients of stroke. One cell line has been deposited in National Centre for Cell Science (NCCS), Pune. Their research focus is on ESC, HSC etc. for treatment of leukaemia,

18. Brevini T. A., Pennarossa G., Antonini S., Gandolfi F. (2008). Parthenogenesis as an approach to pluripotency: advantages and limitations invovled. *Stem Cell Rev. 4,127–135*. 10.1007/s12015-008-9027-z [PubMed].

19. *International Stem Cell Corporation* v. *Comptroller General of Patents,* CJEU, 18 December 2014, Case C-364/13.

20. Chakrabarty A. M. (2003). Crossing species boundaries and making human- nonhuman hybrids: moral and legal ramifications. *Am. J. Bioeth*. 3, 20–21. 10.1162/15265160360706453 [PubMed].

21. Sanjay Gandhi Post Graduate Institute for Medical Sciences (SGPGIMS), Lucknow; Post Graduate Institute of Medical Education & Research (PGIMER), Chandigarh;Research & Referral Hospital, New Delhi; Air Force Medical College (AFMC), Pune and All India Institute of Medical Sciences (AIIMS), New Delhi.

sickle cell anaemia, skin and tissue engineering.[22] The strategy for promoting stem cell research is gradually taking shape. The main features of strategy for stem cell research are to promote basic and translational research in the country; establish Centre of Excellence (CoE); virtual network of centres; generation of adequate human Embryonic Stem Cell (hESC) lines; human resource development through training; short and long term overseas fellowships. In order to boost public-private-partnership effort in the country, the Department of Biotechnology has initiated a new scheme called Small Business Innovation Research Initiative (SBIRI). The distinctive feature of SBIRI is to provide support to the high-risk pre-proof-of-concept research and late stage development in small and medium companies, lead by innovators with science backgrounds, which is unique in nature to support private industry. It also gets them involved in development of such products and processes, which have high societal relevance. SBIRI has unique process for generating ideas by bringing users and producers of technology together.

The Department of Biotechnology under the Ministry of Science and Technology and Indian Council of Medical Research have jointly formulated draft guidelines for stem cell research. The guidelines are currently being placed for public debate. As per the guidelines, stem cell research has been classified under permissible, restricted and prohibited categories. The research pertaining to adult and umbilical cord blood stem cells would be classified as permissible. It would require approval from institutional committee. However, embryonic stem cell research falls under restricted category. It can be carried out with the approval of institutional committees and National Apex Committee. Research pertaining to reproductive cloning and introducing animal embryos in humans has been categorised as prohibited.[23]

A distinction has been made between establishing embryonic stem cell lines from spare embryos and embryos specifically made for the purpose, including both *in vitro* fertilization and somatic cell nuclear transfer techniques. The former is placed in the permissive category provided spare embryos are obtained in an ethically acceptable manner while the latter is restricted in its category to require specific scientific justification and proof of technical competence of the investigator. It has been done to dissuade frivolous creation of embryos for establishment of hES cell lines.[24]

It has also set standards for the collection, processing and storage of cells intended for clinical use. All cord blood banks would have to be registered with the Drug Controller-General of India (DCGI). The NAC-SCRT (National Apex Committee-Stem Cell Research Therapy) and IC-SCRT (Institutional Committee-Stem Cell Research Therapy) have been constituted as a separate body to address the regulatory issues. The National ApexCommittee shall serve to register all the stem cell research centres, available stem cell lines in India, including the newly developed ones, and ongoing clinical stem cell trials in the country. It will also receive periodic reports from the Institutional SCRTs and provide the status of SCRT from time to time. The National Bioethics Committee has prepared the consent protocol for tissue collection for human stem cell research. Thus, the Indian Government is playing a proactive role in guarding research ethics.[25]

In India any product or process of a technology is patentable subject matter. However, the Patents Act, 1970 under Section 3 provides a long list of inventions that are excluded

22. www.expresspharmaonline.com assessed on 21-05-2015.
23. www.expresspharmaonline.com assessed on 21-05-2015.
24. Annals of Neurosciences, *annalsofneurosciences.org › Home ›* Vol 17, No 3(2010).
25. Annals of Neurosciences, *annalsofneurosciences.org › Home ›* Vol 17, No 3 (2010).

from patentable subject matter, which includes biotechnology inventions. Discovery of any living thing occurring in nature is not patentable subject matter in India. However, microorganisms and microbiological processes are patentable subject matter. Genetically modified multicellular organisms including plants, animals, human beings and their parts are excluded from patentability in India. Gene sequences and DNA sequences having disclosed functions are considered patentable in India. However, human beings and embryonic stem cells are not patentable. Furthermore, methods of medical treatment are also prohibited from patentability in India.[26]

This is a never ending speech of whether patents on stem cells should be granted or not. This is because of the reason that this technology has many pros and cons. Pros of this technology includes regenerative medicine, no clinical trials (saving animals), and cure for incurable diseases. Cons of this technology include cloning, use of this technology to make bio-weapons, and other threats.

From my perspective patents should be granted on human embryonic stem cells because with the advancement in this technology there will be more growth of the nation and ailments won't be there. Even if there are ailments than they would be curable by use of stem cell therapy. From the perspective of requirement of patent law, primary requirement is that it should come under purview of 'invention'. The Indian Patent Act defines invention as 'new product or process involving inventive step and capable of industrial application.[27] Inventive step further been defined as a feature of an invention that involve technically advance as compare to the existing knowledge or having economic significance or both and that makes the invention not obvious to person skilled in the art.[28] The basic requirements for invention under Indian law are:

- It should be new (novelty),
- It should involve an inventive step (non- obviousness of the invention) and
- It should be capable of Industrial application.

All these requirements have been fulfilled if the case for patenting of hES Cell has been consider because this is new area of invention earlier unknown and containing inventive step because of the fact that this knowledge is advance than existing one. The last ingredient for patenting of any invention has also been complied in hES cell i.e. industrial application. It has been very useful in treatment of certain diseases and also effective in replacing week and failed organs. Like Parkinson, Alzeimer, spinal cord injury, stroke, burns heart diseases etc.

Another aspect of the debate regarding patenting of hES cell is whether it falls in any of the categories stipulated in section 3 of the Patent Act, 1970. The section declares that inventions in certain areas (fields) do not consider as invention. The relevant sub-sections related to the area of hES cells are – sub section (c)& (j) where hES Cells may fall. The first sub section (c) prohibits patenting of discovery of living & non- living substances occurring in nature and second sub-section (j) excludes plants and animals in whole or any part thereof other than micro-organism but includes seeds, varieties and species and essentially biological processes for production or propagation of plants and animals. The arguments may put in favour of patenting of hES cells as patentable subject matter and does not fall in grips of both sub sections – (c) and (j). The first argument is – that developing hES cells in to developed

26. *ipandbusiness.com/stem-cells-patentable? Visited on 21-05-2015.*
27. *Section 2(i) (j) of (Indian) Patent ACT,1970.*
28. *Section 2(i)(ja)* of (Indian) Patent ACT,1970.

organs outside body into laboratory through scientific methods is not discovery of living or non-living substances occurring in nature as per provision of sub-section (c) of section 3 of the Act, 1970. In the similar way, the second argument may be given – that hES cells may come in the category of micro-organism which is a sort of exception provided in sub-section (j) of section 3 and put in the category of invention. The third argument in this line is – that developing hES cells into developed organs for human beings, and it is not a biological process for production and propagation of plants and animals as provided in sub-section (j) of the section 3 of the Act, 1970.

Moreover, the researches in the area of hES cells are useful for human beings and patients who are hopeless due failure of any organs of their body get life again. This may be a great service to mankind, therefore, a step requires to be taken from legislature (Parliament) and government to make amendment in the provisions of the Patent Act, 1970 and permits the researches in this area by granting patent right. It is also desirable towards government to take liberal approach in releasing the grant for the researches in this area. Once the patent right is recognised in the area, there is every possibility that private companies will jump in conducting researches in the area.

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MERGER AND ACQUISITION IN INDIA : AN OVERVIEW

C. P. UPADHYAY*

ABSTRACT : In the era of globalisation, restructuring of corporations has not only been a mode of their survival but has become a trend to pace their growth with global competitiveness. The corporate sector all over the world is restructuring its operations through different types of consolidation strategies like mergers and acquisitions in order to face challenges posed by the new pattern of globalization, which has led to the greater integration of national and international markets. The intensity of such operations is increasing with the de-regulation of various government policies. The reforms process initiated by the Indian government since 1991, has influenced the functioning and governance of Indian firms which has resulted in adoption of different growth and expansion strategies by the corporate firms. In that process, Indian organizations are facing challenges from both, domestic competitors as well as foreign competitors, who can suddenly appear from anywhere on the globe. The increased competition in the global market has prompted the Indian companies to go for mergers and acquisitions as an important strategic choice. With the increasing trends it has become important to review the Indian legal and corporate framework to tackle the problems and challenges posed by it in present time. Apart from the Companies Act 2013, various other legislations are the guiding factor for correct plane for Merger and acquisition. The present study tries to analyse trends, considerations and problems to access the advantages and disadvantages of Merger and Acquisition, furthermore, to explore the future outlook of M&A activities in India. Conceptual understanding of the concept can only help in analyzing pros and cons of these corporate measures. Solution of problem relating to cultural differences, human resource management, due diligence, insider trading in merger and acquisition are key areas which require considerable attention. Moreover, problems relating to compliances formalities, procedure related issues are required to be overhauled to ease the process. Good restructuring scheme provide better options to a corporation to be revived and grow especially to those looking for global names.

KEY WORDS : Fast Track Merger, Amalgamation, Acquisitions, Competition Commission of India, Cross Border Mergers, Globalization.

I. INTRODUCTION

Corporate sector is an attractive mode of carrying business as if offers a lot of benefits. In the dynamic and fast changing environment corporate restructuring is an inevitable event. One of the ways to carryout restructuring process is acquisition and merger of corporations.[1]

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1. PPS Gogna, *A text book of Company Law* 438 (S Chand, New Delhi, 11th Edn. 2016).

Sometimes, due to internal problems in the company, some internal organizational changes are required in the company. Such problems may give way to the winding up of the company. Since winding up of the company may not be a good remedy, it may be more convenient and beneficial that company is being carried on by scheme of compromise and arrangement or reconstruction and amalgamation.[2]

Corporate restructuring is an inevitable event in life of a corporation in dynamic and fast changing environment. It is a collective term and can be understood as an inorganic growth strategy of redesigning one or more aspects of a business. Restructuring typically occurs as a result of business analysis that shows a need for greater efficiency to complete tasks. Sometimes a segment of the business will start to fail, and the company will need to reallocate resources in order to support it. Sometimes a business may have expanded too much and needs to refocus on its core abilities. At other times a business may need to restructure its financial position in order to continue making profits. Often, restructuring plans are necessary simply to meet the constantly changing demands of technology that competitors are embracing, survive a currently adverse economic weather, or poise the corporation to move in an entirely new trend. Mergers, amalgamations, acquisitions, takeovers, divestitures, demergers, slump sale, business sale, joint venture, strategic alliance, financial restructuring (buy-back, alteration & reduction) are all different forms of corporate restructuring exercises in the corporate world.

In past, 2,253 merger cases have taken place during thirty-year period from 1973-74 to 2002-2003. The time period is divided into three sub-periods, based on annual intensity of merger activity, such that the highest number of mergers in a year in one sub-period is lower than the lowest number of mergers in the immediately succeeding sub-period. Based on this division, we identify three distinct periods of merger activity in India; low and stagnant merger activity, from 1973-74 to 1987-88; moderate merger activity, from 1988-89 to 1994-95; and high merger activity, from 1995-96 to 2002-03.[3]

One of the oldest business acquisitions or company mergers in India was attempt by Swaraj Paul to overpower DCM Ltd. and Escorts Ltd. in 1988.[4] Thereafter, many other Non-resident Indians had put in their efforts to take control over various companies through their stock exchange portfolio. Earlier a very small percentage of businesses in the country used to come together, mostly into a friendly acquisition with a negotiated deal. The key factor contributing to fewer companies involved in the merger was the regulatory and prohibitory provisions of the Monopolistic and Restrictive Trade Practices Act, 1969. According to this Act, a company or a firm must follow a burdensome procedure to get approval for merger and acquisitions. However, after 1991, the main thrust of Industrial Policy, 1991 was on relaxations in industrial licensing, foreign investments, and transfer of foreign technology, etc. With the economic liberalization, globalization and opening-up of economies, the Indian corporate sector started restructuring businesses to meet the opportunities and challenges.

II. MEANING AND NATURE

Reconstruction is a process which involves (i) the transfer of undertaking of an existing company to another company (ii) carrying on of substantially the same business by same

2. *Ibid*.
3. Manish Agarwal and Aditya Bhattacharjea, "*Mergers in India: A Response to Regulatory Shocks*" 42 *Emerging Markets Finance & Trade*, 46 2006.
4. The Institute of Company Secretaries of India, *Corporate Restructuring Insolvency Liquidation and Winding up*, Study Material by the Ministry of Corporate affairs, 2014.

persons (iii) rights of shareholders in the old company are satisfied by allotting shares in the new company. Reconstruction implies continuance of an existing business in some altered form so that persons interested in the business may remain the same. Amalgamation is blending of two or more undertakings into one undertaking. The term 'amalgamation' has not been defined in the Act. The ordinary dictionary meaning of the expression is combination.[5] Merger is a form of Amalgamation where all the properties and liabilities of Transferor Company get merged with Transferee Company. In reality companies do not merge only the assets and liabilities merge.[6] Amalgamation may take the form of takeover (acquisition) or merger. In acquisition the direct or indirect control over the assets of acquired company passes to the acquirer, in merger the shareholding in the combined enterprise will be spread between the shareholders of the two companies.[7] However, the Competition Act, 2002 connotes the meaning of the term combination in broader way. It defines a "combination" as any merger or acquisition in which the firms' combined assets or turnover exceed Rs 1,000 crore (approximately $ 250 million) and Rs 3,000 crore (approximately $ 750 million) respectively in India or $ 500 million and $ 1,500 million worldwide, Mergers and Acquisitions (M&As) that fall below these thresholds are not considered in the expression combinations and are outside the ambit of the Act.[8] The Act provides for voluntary notification of combinations to the CCI.

III. DIFFERENT FORMS

Mergers and Acquisitions popularly called M&A transactions are part of strategic management that allows enterprises to grow, shrink, and change the nature of the business or competitive position. However, there is a marginal difference between the two. Merger may be of 2 types (i) merger by absorption – where undertaking properly and liabilities of one or more companies are transferred to another existing company, (ii) merger by formation of a new company- where undertaking, property and liabilities are transferred to a new company.[9]

Amalgamation may take any of the following forms- (i) by sale of shares, (ii) by sale of undertaking, (iii) by scheme of arrangement. Sale of the shares is the simplest process of amalgamation. Shares are sold and registered in the name of purchasing company. The selling shareholders receive either compensation or shares in the acquiring company.[10] The second method involves a sale of the whole undertaking of the transferor company as a going concern. Amalgamation by outright purchase by transferee company is recognized by the Accounting Standards of Institute of Chartered Accountants. Section 232 applies to every scheme which involves transfer of the whole or any part of the undertaking or liability of a company to another company.[11] According to section 232 where application is made to the tribunal under section 230 and shown to the tribunal that amalgamation of two or more companies is proposed. Such application may be made by any person entitled to move it under the section. The tribunal may sanction the scheme and make necessary orders.[12] Merger/amalgamation may require compliance with a number of regulations viz. the Companies Act 2013, The Indian Stamp Act 1899, The Competition Act 2002 etc. Regulatory

5. *Id*.
6. *ArevaTand D India Ltd., In re* (2008) 81 SCL 140 (Cal.).
7. *Bihari Mills Ltd. In re* (1985) 58 Comp. Cas. 6 (Gey.).
8. Manish Agarwal and Aditya Bhattacharji, "*Are Merger Regulations Diluting Parliamentary Intent?" 43 EPW 10 2008*
9. Section 232 (Exp), the Companies Act 2013
10. *Tata Oil Mills Co. Ltd*. v. *Hindustan Lever Ltd*. (1994) 81 Comp. Case 754 (Bomb.).
11. Section 232 (1)(a) and (b), the Companies Act 2013

regime for merger and acquisitions in India require approvals from Competition Commission of India, Income Tax, Stock Exchange, SEBI, RBI, ROC etc.

Amalgamation between two or more small companies or between a holding and its subsidiary company may be done and it is called fast track merger.[13] Company secretary plays an important role in the restructuring process and advises the clients about the procedure to be adopted. This provision lays a more simple process for amalgamation with an aim to accelerate the procedure for mergers which do not require the approval of Tribunal. Fast track merger regime provides relaxation from obtaining clearance from other regulatory bodies.

Earlier only inbound mergers were allowed but after enactment of Companies Act 2013 both inbound and outbound mergers are now allowed. This is also called as cross border merger.[14] Cross border merger is permitted with only those countries that fulfill the jurisdictional test. There is one restriction on such mergers that approval of RBI must be obtained for both inbound and outbound mergers. A Foreign Company may merge with a company registered under this Act or Vice Versa.[15] The scheme of merger may provide for payment of consideration to shareholders of merging company in Cash or in Depository Receipt or a combination of the two. The expression foreign company means any company or body corporate incorporated outside India whether having a place of business in India or not.[16]

Further there is provision for amalgamation of companies in public interest. Where central government is satisfied that amalgamation of two or more companies is essential in public interest, it may order the amalgamation of those companies into a single company.[17] The order may also contain consequential, incidental and supplementary provisions. Before making any order of amalgamation, central government is required to send a copy of proposed order in draft to each of the companies concerned, so that they can file their objections and suggestions.[18]

A merger is a legal consolidation of two entities into one entity which can be merged either by way of amalgamation or absorption or by formation of a new company. The Board of Directors of two companies approves the combination and seek shareholders' approval. After the merger, the acquired company ceases to exist and becomes part of the acquiring company. Many a times it also refers the consolidation of two companies. When companies with similar products in the same market and in direct competition and share the same product lines and markets are merged it is generally known as horizontal merger. Recently, Instagram acquisition by Facebook in 2012 for a reported $1 billion has become final. Both Facebook and Instagram operated in the same industry and were in similar production stages regarding their photo-sharing services. Facebook, looking to strengthen its position in the social media and social sharing space, saw the acquisition of Instagram as an opportunity to grow its market share, increase its product line, reduce competition and access potential new markets. This kind of mergers also decreases competition in the market and benefit the company with economies of scale.

However, vertical merger takes place between companies in the same industry but at

12. Section 232 (3), the Companies Act, 2013
13. Section 233, *Ibid*.
14. Section 234, *Ibid*.
15. Section 234(2), *Ibid*.
16. Avtar Singh, *Company Law* 630 (Eastern Book Company, Lucknow, 17th Edn.)
17. Section 237(1), *Ibid*.
18. *Supra note* 16 at 635.

different stages of production process. Illustratively a company producing shoes may merge with a company producing leather. This helps companies in cutting cost and accelerating their profits. Sometimes merger takes place between companies that have no common business areas. These mergers are called conglomerate mergers [19] For example, a watch manufacturer acquiring a cement manufacturer, a steel manufacturer acquiring a software company, etc. The main objective of a conglomerate merger is merely to achieve bigger size.

In addition to merger and amalgamation, acquisition or take over occurs when one entity takes ownership of another entity's stock, equity interests or assets. It is the purchase by one company of controlling interest in the share capital of another existing company. Even after the takeover, although there is a change in the management of both the firms, companies retain their separate legal identity. The companies remain independent and separate; there is only a change in control of the companies. There is thin line distinction in merger and acquisitions. In case of merger old company cease to exist and a new company emerges whereas in case of acquisition, a new company does not emerge. It only occurs when one company takes over all the operational management decisions of another. If the takeover is friendly, it is called merger are usually friendly where acquisitions are hostile in nature.

IV. AIMS AND OBJECTIVES

Regardless of their category or structure, all mergers and acquisitions have one common goal: they are all meant to create synergy that makes the value of the combined companies greater than the sum of the two parts. The success of a merger or acquisition depends on whether this synergy is achieved. Synergy takes the form of revenue enhancement and cost savings. By M & A transactions, the companies hope to benefit by becoming bigger, pre-empted competition, domination, tax benefits, economies of scale, acquiring new technology improved market reach and industry visibility etc. Many companies use M&A to grow and leapfrog their rivals. While it can take years or decades to double the size of a company through organic growth, this can be achieved much more rapidly through mergers or acquisitions. This is a very powerful motivation for mergers and acquisitions and is the primary reason why M&A activity occurs in distinct cycles. Companies also engage in M&A to dominate their sector. However, since a combination of two behemoths would result in a potential monopoly, such a transaction would have to face regulatory authorities. Companies also use M&A for tax purposes, although this may be an implicit rather than an explicit motive. Mergers also translate into improved economies of scale which refers to reduced costs per unit that arise from increased total output of a product. To stay competitive, companies need to stay on top of technological developments and their business applications. By buying a smaller company with unique technologies, a large company can maintain or develop a competitive edge. Companies buy other companies to reach new markets and grow revenues and earnings. A merger may expand two companies' marketing and distribution, giving them new sales opportunities. A merger can also improve a company's standing in the investment community. Bigger firms often have an easier time raising capital than smaller ones.

There might not be any specific statute governing only M&A, but various aspects of M&A are dealt with in the Companies Act, 2013, the Income Tax Act, 1961, the Securities and

19. Harpreet Singh Bedi "Merger and Acquisition in India: An Analytical Study" by at p. 2. *available at:* file:///C:/Users/hp%20pc/Downloads/SSRN-id1618272.pdf

Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, and so on. Further, with the advent of time and recent contemporary laws, there are various inter-linkages which cannot be catered to with a narrow understanding of the law. Each and every facet of an M&A deal needs to be studied from all viewpoints, be it labour law, insolvency law, securities and investment law, or anti-trust law, for all these considerations have a bearing on the mechanics of a deal.[20]

V. CHALLENGES OF MERGER AND ACQUISITION

The greatest problem that the companies face in the post mergers and acquisitions is differences of culture. Organisational culture provides meaning, direction and coordination and it influences the top management conduct, organisational practices, strategy formulation and leadership styles It helps the management to cope with the external environment and its internal functioning. In Mergers and acquisitions, different cultures meet each other and subsequently, there is assimilation and/or accommodation of the companies' cultures. The basic cause of merger difficulties lies in the differences of cultures of the organisations which are manifest in differences of thought, action and behavior.[21]

The management of human resource poses another challenge in merger and acquisition. Such management responses should be so directed that the managers must be able to handle these and also help the peers and subordinates to deal with them. Employees of different levels in the organisation would have to be assessed-and taken care of. For bringing about change, adequate groundwork is very important for reduced resistance.

The human resource systems define the terms of relations exchange, communication and linkages between the individuals and the organisation and these vary depending on factors like the market or industry characteristics, and the strategy the firm wishes to adopt.[22]

In merger and acquisition, the process of conducting an effective legal due diligence cannot be underestimated. Unlike a private equity transaction, the erstwhile shareholders exit as part of the acquisition. Undertaking a comprehensive assessment of the business, regulatory, environmental and legal risk factors involved in acquiring the company is critical. In India, the Due Diligence process commences with a review of data that is provided by the target company itself. Data except in a few instances is not publicly available and even if available may not be updated or carry any statutory or regulatory certification, especially in critical aspects such as property ownership, share ownership and litigation. India does not have a government backed title registry which serves as conclusive proof of ownership. As such, no counsel can conclusively certify the status of the company and any diligence is therefore dependent on the quality and integrity of data being made available. Additionally, the closing of an acquisition transaction is often delayed requiring bringdown diligence procedures for the period between the date of completing the Due Diligence and the closing date. In India, due Diligence generally does not cover financial and tax matters (both direct and indirect tax) and often there are separate firms engaged for financial due diligence which includes taxation and accounting matters. To effectively understand the risks, it is critical for the acquirer to view the findings of due diligence on the target company. The standards of

20. "Merger and acquisition in India" *available at:* http://www.nishithdesai.com/fileadmin/userupload/pdfs/Research%20Papers/Mergers Acquisitions_in_India.pdf
21. V. Mariappan, "Mergers and Acquisitions: The Human Issues and Strategies" 39 *Indian Journal of Industrial Relations*,84 2003
22. *Ibid*.

corporate governance and regulatory compliance may often fall short of the expectations of foreign acquirers. This is especially so in areas such as board independence, environment, labour, related party transactions and formalisation of arrangements with key customers and suppliers. Valuation differences occurring because of differences in accounting or revenue recognition standards between those used by the company prior to the acquisition and that applied by the acquirer post-acquisition also become contentious, particularly in the case of an acquisition that is consummated in tranches.

For a merger between two Indian companies, approval of the relevant court (Jurisdictional Company Law Tribunal) as well as approvals from the Registrar of Companies, income tax authorities, creditors and shareholders may be needed.[23] For an acquisition, the need for and timing of regulatory approvals to be obtained depend on the nature of activity of the target company, its status (private or publicly listed) and its turnover and asset threshold. In general, the acquisition of a mid-size knowledge-based services company (such as information technology) that is privately held, would require minimal regulatory approvals. Costs of obtaining such approvals are usually borne by the acquirer but these are sometimes negotiated such that these costs are factored into the transaction consideration. Approval of other regulators for change in control is often necessitated in companies that have been allotted land by the Government or which enjoy certain specific benefits and exemptions. The approvals from different government desk and its procedure amount to considerable cost and time consuming. That plays role of back off the companies willing to initiate for merger and acquisitions. Moreover, these provide an opportunity to officials of different government department to indulge in corrupt activities for compliances and formalities. To check this issue government may provide one window measure by amending the legal provision under different concerned statutes.

VI. CONCLUSION

No doubt there is little to stop Indian companies that desire to be global names for playing the merger and amalgamation game globally but Another obstacle in merger and acquisition is that it remains the often long drawn out court procedure required for the sanction of a scheme of arrangement. The new Companies Act 2013 has provided a solution by constituting special tribunal, the National Company Law Tribunal. If a scheme for restructuring is a corporate entity is approved by majority of creditors or members, it may then be sanctioned by the tribunal. Tribunal's sanction imparts a binding touch not only to the scheme but the whole restructuring process. The new companies Act 2013 has provided a panacea for the plagued court system in India but if not contracted with same disease.

Apart from above peculiarity of different sectors poses other challenges for its corporations. With regard to amalgamation of Baking Companies section 44-A of the Banking Regulation Act 1949 is a complete self-contained code.[24] Under this provision instead of Tribunal, RBI is empowered to grant approval to the scheme of merger of Banking Companies. Further, RBI is empowered to determine market value of shares as well as to direct payment of value to the dissenting shareholder.[25] Though, under the supervisory framework of RBI, the bank mergers and acquisitions schemes also require great attention. In current economic

23. NPS Chawla "*Case Studies and Practical Aspect of mergers and demergers*" *available at:* https://icsi.edu/media/portals/70/EDSG29062013.pdf
24. *Supra note* 16 at 630.
25. *Bank of Madur Shareholders Welfare Association* v. *RBI* (2001) 105 Comp. Case 663 (Mad.).

scenario when most of the big banks are plagued with NPA disease, the concept of merger may aggravate the problem. Most of the times, bank mergers take place for rejuvenation of sick banks to overhaul the economic and banking sector. However, the measure itself becomes the problem when the acquiring bank has high NPA ratio. In that case remedy of M&A only works to mount the NPA of acquiring bank and to worsen its balance-sheet. Therefore, banks also formulate such scheme that may benefit it in true sense.

With a plethora of financing options, this aspiration has become a reality for many corporate houses, who can now boast of having the best in the industry under their wings. Indian companies have often surpassed their foreign counterparts in corporate restructuring both within and beyond the national frontiers. Mergers and acquisitions are powerful indicators of a robust and growing economy. The legal framework for such corporate restructuring must be easy and facilitative and not restrictive and mired in bureaucratic and regulatory hurdles.

As George Bernard Shaw is reputed to have said "we are made wise not by the recollection of our past, but by the responsibility for our future", and the future of India rest only on well directed corporate strategies.

■

LATE PROF LOTIKA SARKAR : CRUSADER OF GENDER JUSTICE IN INDIA

BIBHA TRIPATHI*

"You are India's tomorrow may you have strength and courage to lead the country forward."

-Prof. Lotika Sarkar for the Students[1]

ABSTRACT : The present write up does not take any particular legal issue to comment upon rather it intends to initiate a trend paying tribute to academicians par excellence who serve the nation throughout their life with their teachings, academic writings, and contributions in the form of dedication for a scrupulous cause. The paper attempt to recall the enormous works done by Prof. Lotika Sarkar, who was born on 4th January, 1923 and died on 23rd February 2013, to pay tribute to life long crusader of gender justice in India.

KEY WORDS : Gender Justice, Rape Law Reforms, Women's rights, Tribute.

I. INTRODUCTION

I am compelled to write on Professor Lotika Sarkar, an inclusive, sharp, humorous, pioneer, activist and multifaceted figure, who always fought for the cause of women. Ironically, she had also suffered enormous agony and trauma when she had to go from pillar to post to get back her property at the fog end of her life. Her beginning as a law teacher in Delhi University in 1950s also reveals a story of discrimination when she was not allowed to teach Criminal Law on the grounds that a woman law teacher could not teach the law on rape to men and women students[2]. It seems that on the one hand she came across with the patriarchal prejudices whereas on the other hand the vulnerability of widowhood too could be seen in her sufferings. It leaves a daunting effect on the minds of laymen in general and lawmen in particular that if personalities like her could suffer than who else would be escaped from the deep rooted prejudices unless the societal mindset is changed.

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1. Lotika Sarkar, In Fond Memory, YouTube, https://www.youtube.com/watch?v=6tD0xY5aGsU Jul 4, 2013 - Uploaded by ADAPT Mumbai, accessed on Feb,15,2015
2. Kalpana Kannabiran & Padmini Swaminathan, Eds, *Representing Feminist Methodologies : Interdisciplinary Explorations*, Rutledge Publications, 2017

Rajeeva Dhavan[3], wrote an article on "*Death of Distinguished Lawyers Where will the Next Ones Come From*[4], In the article, he has not only paid tribute to two eminent lawyers Anil Divan and Tehmtan Andhyarjuna, but also taken a discourse on a significant aspect in the legal space. He wrote in the article about a full court reference on the death of such Advocates.

Against this backdrop, the paper proceeds to acknowledge the major contributions of Prof Lotika Sarkar, a legal laureate, a doyenne in the field of law. An attempt has been made to submit through the article that there should also be a full court reference on the death of an academician *par excellence* because she also serve the nation through their academic writings.

II. EARLY LIFE AND TEACHINGS

Lotika Sarkar had not suffered in her early age as she was born in an aristocratic family in West Bengal. Her father Sir Dhiren Mitra was a leading lawyer of India and it can be presumed that she could get herself oriented in the field of law in the very initial years of her life. Her mother's name was Suchandra Mitra and her sister's name was Basanti Mitra. She was married with the famous journalist Chanchan Sarkar.

She studied law at Newnham College, Cambridge and became the first woman to study and also then graduate from the university. She got her PhD awarded also at Cambridge University in 1951. In 1960 she studied International Law at the Harvard University and returned to India in 1961.

She started teaching at the Law Faculty, University of Delhi; she was the first female lecturer in the faculty. Law was still a new field for women; initially there were only 10 girls in the course, a number which grew to 80–100 by the 1960s. She taught there till 1983, teaching eminent jurist and lawyers, and finally became the Head of the Law Faculty, and also the Dean, Faculty of Law, and thereafter she taught at Indian Law Institute. She was a founding member of Centre for Women's Development Studies (CWDS), Delhi, established in 1980 for which she took premature retirement from the University of Delhi, she was also member of Indian Association for Women Studies, established in 1982[5].

Her contribution can be cherished in the following sequences;

She lived in emergency and she was the conscience keeper of the nation.

i) Academic Contribution of Prof. Lotika Sarkar

Professor Lotika Sarkar has given enough food for thought through her academic writings[6]. In the very beginning of her career she wrote on Criminal Law and got her write-up entitled 'Criminal Law' published in the Journal of Indian Law Institute under the Notes and Comments column[7] in which she along with R.V.Kelker attempted to highlight certain aspects of the decisions of the Supreme Court and of the High Court's reported in 1964. The legislation part covered only the Acts passed by Parliament.

3. An advocate par excellence, a human rights activist, and a Commissioner of the International Commission of Jurists, author and co-author of numerous books on legal and human rights topics, a regular columnist in the leading newspapers and reputed journals in India
4. EPW,24th JUNE, 2017.
5. Wikipedia, en.wikipedia.org>wike>Lotika_Sarkar visited on 23rd August 2014.
6. *Lotika Sarkar, The Proper Law Of Crime In International Law, International And Comparative Law Quarterly*. 11(2):446-470; British Institute Of International And Comparative Law, 1962. Database: JSTOR, see also, lotika sarkar(ed) women and law, **Sarkar**, **Lotika, law and status of women in india,** Columbia Human Rights Law Review, Vol. 8, Issue 1 (Spring-Summer, 1976), pp. 95-122, she also wrote on criminal law and press and conflict of laws see also, lotika sarkar,rape: a human right versus a patriarchal interpretations, sage journal
7. *JILI,* 1965, Vol.7

She has written a book review[8] of the Turkish Criminal Code[9] and apart from evaluating the book she remarked that it is, however, hoped that when Turkey does decide to revise the Penal Code it will rectify, among other things, the present approach to punishment and incorporate in the Code some of the principles accepted by the Congress of the Prevention of Crime and Treatment of Offenders, 1955. This would be a much-needed step forward towards universal principles of criminal law.

Professor Lotika Sarkar has written another Book Review[10] of the book authored by Professor Istvan Szaszy[11], which is a comparative study of the law in and outside the people's democracies. Lotika Dee has observed that His comparison of family law in socialist countries with that in capitalist countries provides an illustration. In the latter, according to the author, family law "is characterized . . . by the unconditional dominance of the husband over wife and children (and) the family is . . . based on private property . . . .' On the other hand, family in the socialist countries, according to him, is "not subjected to economic considerations . . . (and) is a free and voluntary association of man and woman." She further observed that To be able to appreciate the line of reasoning of the author one has to keep in mind that the approach to law and legal system adopted in the socialist countries is totally different from the one prevalent in the common law or civil law countries. She has also observed that the great merit of the book is that we get for the first time an idea of the functioning of private international law in the socialist countries. In the end she expressed her desire that the book should help us to realize that British rules of private international law which were applied by our courts at least up to independence need to be examined afresh and, wherever necessary, modified or changed.

As Professor in Faculty of Law, University of Delhi, she wrote an article on Status of Women and Law as an Instrument of Social Change[12], in which she raised questions regarding female infanticide, dowry death, dignity at workplace and discriminatory rule of appointment of women in public services. She submitted that discrimination of individuals or groups of individuals cannot exist in a civilized society. She argued in the article that mere affirmation and declarations on Human Rights do not bring about a change. It requires a firm determination to break the citadel of male dominance and change customs and traditions rooted in the belief of women being inferior and their contribution to the national economy being marginal[13].

She deliberately chose to write a book on the functioning of Law Commission of India[14]. It is candid and critical assessment of the work of the Law Commission of India[15].The work categorizes the reports of the Law Commissions into two, viz; Women Specific and Family Laws for study. She criticised the report first for not identifying the measures which the government may take for preventing prostitution, second for its reluctance to deal with

8. JIJI, Vol.7,1965
9. The Turkish Criminal Code. The American Scries of Foreign Penal Codes, 9. Translated by the Judge Advocate's Ofiice of the Joint United States Military Mission for Aid to Turkey, *et al.,* With an Introduction by Nevzat Gurclli. New Jersey: Fred B. Rothman & Co., London: Sweet & Maxwell Limited. 1965.
10. *Journal of The Indian Law Institute,* Vol. 8,1966
11. Private International Law in the European People's Democracies. Budapest: Publishing House of the Hungarian Academy of Sciences. 1964.
12. *JILI,*1983
13. Ibid at, 262
14. *Lotika Sarkar,* National Specialised Agencies and Women's Equality: *Law Commission of India,* (1988) Centre for. Women's Development Studies, New Delhi.
15. Prof. B. Sivaramayya, Book Review of *Lotika Sarkar,* National Specialised Agencies and Women's Equality: *Law Commission of India,* (1988) Centre for. Women's Development Studies, New Delhi. published in *JILI,* 1989. Available at, *www.jstor.org/stable/43951223*

male prostitution and third, for evading the issue whether a person who hires a prostitute should be punished. Further, she highlighted the 84th Report of Law Commission dealing with rape and allied offences, for not only rejecting her suggestion that there should be a mandatory punishment provided for the offence of rape but also for not making a study of the punishments that courts have often imposed. She also criticised the 59th and 110th report of the commission.

In the book she portrayed many faults of the Commissions during their tenure. In this book she urged that the Law Commission should be the pace setter for what needs to be done to make social justice a reality for those who have so long been underprivileged.

Prof. Lotika Sarkar on Gender, Patriarchy and Law in India

> The inconsistencies with which even she had to suffer at some point of time of her life, made her to argue that why the reformist attempts project the women's question as sign of social progress and not as economic justice or political necessity? She further opined that this approach not only continues to influence, or dominate the mind, of the middle class but also members of the judiciary and police officers who are coming from middle class families. She questioned that why penal laws are also seen as social laws whose enforcement can be subordinate to the particular individual's (judge, jury, police, others) own sense of the social good, rather than the rule of law[16].

III. HER ROLE IN PREPARATION OF "TOWARDS EQUALITY" REPORT

Lotika Sarkar was at the peak of her career, when she was asked to join the Committee on Status of Women in India, in 1972 that prepared 'Towards Equality Report', 1974[17].

As a pioneer in the fields of law, women's studies and human rights, she prepared the chapter on laws concerning women in the Status of Women's Committee Report with gender sensitivity and analytical clarity for furthering women's rights[18]. The most important part of Towards Equality report was the note of dissent by Lotika Sarkar and Vina Mazumdar on the issue of reservation of women in the legislature. They opined that, "when one applies the principle of democracy to a society characterized by tremendous inequalities, such special protections are only spear heads to pierce through the barriers of inequality. An attainable goal is as meaningless as a right that cannot be exercised and equality of opportunities cannot be achieved in the face of tremendous disabilities and obstacles which the social system imposes on all those sections that traditional India treated as second class or even third class citizens. Our investigations have proved that the application of the theoretical principle of equality in the context of unequal situations only intensifies inequalities, because equality in such situations merely means privileges for those who have them already and not for them who need them.[19]" The report has been interpreted[20] as "a founding text" which

16. "Women and Law", in Legal News and Views, Vol 10, No 3, March 1996, cited in " Remembering Lotika Sarkar (1923-2013)", Indu Agnihotri, Economic and Political Weekly, May 18, 2013, 25
17. This state-sponsored report was actually propagated by the state to represent itself in the scheduled United Nation's International Women's Year in Mexico in 1975. But this fact finding mission proved to be a boomerang for the state as the Report ironically mocks the much trumpeted notion of constitutional equality by showing how unequal women are. Sanchayita Paul Chakraborty, "Women And Development: Revisiting The Towards equality Report ", chap,11, *Dynamics Of Development And Discontent,* available at, http://www.academia.edu/17461498
18. Ibid,
19.
20. Gail Pearson, *UNSW Law Journal,* Review Article, Vol.22, 1999

revolutionised thinking about women and "is by far the most important document relating to social, legal, political and economic concerns affecting women".

i) Her role in reform of rape laws

Professor Lotika Sarkar not only taught laws relating to rape to her students but also fought for justice to the victims of rape[21]. It was an era of second wave feminism.Her contribution in the form of an Open Letter to the Supreme Court is known as her dedication for the cause of women. The Open Letter to the Chief Justice authored by Lotika Sarkar, Upendra Baxi, Raghunath Kelkar and Vasudha Dhagamwar made it aptly clear that the Supreme Court had failed to uphold its constitutional role as guardians of its fundamental principles that enabled women's groups and other civil rights/democratic groups to begin the agitation. Finally the Law Commission in its 84th report recommended for amendment in rape laws.consequently, the criminal law amendment act, 1981 prescribed a differential treatment for cases of custodial rape : (a) by transferring the onus of proof of innocence to the accused rather than the victim; and (b) through a mandatory higher minimum punishment (7 years imprisonment).

As we all know the through the Criminal Law Amendment Act, 2013 changes have been brought again in substantive as well as procedural provisions dealing with the offence of rape. Coincidentally, again Lotika Sarkar despite her old age and bad health participated through her students in the whole discourse of amendment.

ii) Her role for the welfare of Vulnerable class and PILs

In 1981 Lotika Sarkar was a co-petitioner in the *Agra Protective Home* case[22]. This public interest litigation sought an examination of the physical and mental health of prostitutes kept in a State run Home for their protection and rehabilitation. The women were kept in appalling conditions. Many were kept illegally and thirteen had gone insane. The matter was kept alive by monthly reports to the Supreme Court on conditions in the home from the District Judge, Agra and reveals the lack of any due process in the incarceration of women under the *Immoral Traffic in Women Prevention Act* 1956 be they prostitutes soon discharged in many cases to the custody of a pimp for "proper care, guardianship, education and training", or respectable married women with children. Justice Bhagvati had directed the State Government by the order dated 8th May, 1981 to put forward a scheme for vocational training and rehabilitation of inmates of Protective Homes.

iii) Lotika Sarkar in view of her contemporaries, stalwarts and students

She was known as Lotika dee, when other stalwarts of women's studies touched our hearts with inspirational speeches at women's movement gathering, Lotika dee floored us with her legal acumen[23]. After her death on the 13th of March, Lotika's friends, colleagues, comrades and acquaintances gathered at the auditorium of ADAPT in Bandra, Mumbai to pay their respects to this exceptional women and talk about her contribution to women's issues and even disability[24]. Terribly eminent persons have expressed their feelings about Lotika Sarkar, to name a few, Lord Anthony Lester expressed his feelings and said that "Her grace and humor and beauty and intelligence matched her selfless devotion to her students and to the dispossessed women in the villages of West Bengal."

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21. *Tukaram* v. *State of Maharastra, 1979 SCR(1) 810*
22. Upendra Bakshi v. State of UP, 982 (1) SCALE 502 a, (1983) 2 SCC 308
23. oneindiaonepeople.com › Great Indians, Torchbearer of Gender Justice, January 1, 2014, Accessed on 17th Feb,2015
24. Supra note, 1

Mrs. Usha Ramanathan, coveyed her feelings about Lotika Sarkar as perceived. "Mutual respect, no hierarchy, unacceptance of nonsense, and a deep sense of fairness, no prejudgment, no prejudice but excellent judgment". She further recalled, "With her friends, it was affection, jollity, respect and a free exchange of thought, opinion and well, lunch… "

Professor Vibhuti Patel extended her gratitude towards Lotika Sarkar by saying, "We salute Lotika Dee, torchbearer of gender justice by continuing her heroic legacy."

Professor Ilina Sen paints the picture of Lotika Dee as charming, cheering, concerned, and caring for trust and charity. She wonders with her magical net of solidarity who used to say for a reimaging a family not tied with blood but sharing.

Ram Manohar Reddy, Flavia Agnes, Sonal Shukla, Dr. C.S. Lakshmi, Mrs. Som Shukla, Dr. Mithu Alur, Prof. Rashmi Ojha were among the others paying tribute to Lotika Sarkar.

Amita Dhanda, the scholar of Prof. Lotika Sarkar, extended her heartfelt regards in highly academic manner. She edited a book entitled, *Engendering the Law: Essays in the Honor of Lotika Sarkar*[25]even in her life time. This volume of eighteen essays is a festschrift to a much loved and respected teacher of law, Prof. Lotika Sarkar[26]. As the editors of this book, her former students, say, "she is a matriarch of the women's movement"[27].

Apart from that Amita pays her tribute to Professor Lotika Sarkar through highlighting her chachterstics as a wonderful teacher. She claims that, "While Lotika Sarkar's contribution to the cause of the rights of women is notable, her contribution as a teacher is exceptional. Despite her multitude of other roles, Professor Sarkar never side-lined her responsibilities as a teacher, she was a teacher who taught enough to excite, to reflect, to question but never to take over. Her probing and persistent questions would get students to realise that appropriating the work of another was both dishonest and painful. And if the pain of justification and defence had to be undergone, it was better to undergo that pain for something you created yourself; with such pain would also came the pleasure of creation and ownership. With this realization she helped her students to internalise the values of intellectual integrity and of doing the right thing, irrespective of consequences, because it is the right thing to do"[28].

She further expressed her feelings and said that, it is ordinarily believed that the classroom is the designated place of operation of a teacher and her teaching responsibilities are primarily to her students. But Lotika Sarkar's teaching activities were neither limited to the classroom nor to her students. All those who came into contact with her, in the university and outside, learned from her. They learned the values of dignity, integrity, humour and grace; learned to stand up for their beliefs; learned to be themselves and to be happy about it. This large family of friends, admirers, students and votaries celebrated her life in a collection of essays entitled Engendering Law - a celebration which did not cease after publication of the essays.

Lotika Sarkar belonged to an era which believed in relationships not networking. She cultivated friendships for the richness they gave to life; and nurtured friends by helping them believe in themselves. She is survived by all those who feel she made them who they are by giving to each of them a bit of her. It is with eternal gratitude that I, on behalf of her innumerable students, bid farewell to this pioneering feminist of the law academy; to a

25. Eastern Book company, 1999
26. Uma Chakravarty, Book Review, *JILI* Vol. 43, 2001
27. Ibid,
28. *RIP Lotika Sarkar: Pioneering feminist & lawyer but teacher foremost,* http://www.legallyindia.com/Legal-opi.. see also, Mainstream, VOL LI, No 11, March 2, 2013

teacher who revelled foremost in the successes of her creations and who did not cease to give till the very end"[29].

Justice V.R. Krishnaiyer also mourned her demise and said that,

"Lotika Sarkar was a great jurist and the former head of the Faculty of Law, Delhi University. She was a pioneer in the fields of law, women's studies, criminal justice and human rights. She was an active member of the Indian Law Institute. She will be remembered for long as our active member of the Committee on the Status of Women in India. She was member of several institutions—the Indian Association for Women Studies and the Centre for Women's Development Studies. In a world of gender justice she was a prominent writer and her death, although at an advanced age, has been a great loss to the cause of law, women and justice.

Tributes to Lotika Sarkar by Amita Dhanda and V.R. Krishna Iyer,
Mainstream, VOL LI, No 11, March 2, 2013

".Various institutes have also extended tribute to Professor Lotika Sarkar in different forms. The journal of Indian Law and Society decided to publish a special issue in honour of Lotika Sarkar under the caption *"*Indian Feminisms, Law Reform and the Law Commission of India: Special Issue in Honour of Lotika Sarkar*",* Rukmini Sen & Saptarshi Mandal were the editors of that volume.

The idea was conceptualized by them because Professor Lotika Sarkar did an exclusively rare study on critical evaluation of the Law Commission as an institution or its reports from a feminist perspective in 1988, as part of a larger initiative focused on 'National Specialized Agencies and Women's Equality'. On the effectiveness of the Commission, Sarkar wrote :

> [w]hile the prestige of this professional body depends on its performance; its effectiveness certainly lies outside its own choices, between keeping faith with the spirit, or ideology of the Constitution, and what it perceives as immediate political imperatives. (…) Law reform is not a task to be undertaken in haste, by amateurs who are not in a position to examine the full implications and ramification of an existing or proposed measure. The need for a review body of experts, to advise the government, parliament and the public is self-evident. But the conditions, under which the body can function effectively and meaningfully, require critical examination by all who b*elieve in the rule of law and its role as instrumental of social transformation (1988:xxiii[30]).*

In her study, Sarkar focused on reports of the Commission that were 'women specific' and the ones that dealt with Family Laws affecting women. The Campus Law Centre Delhi organises Lotika Sarkar memorial lecture.

IV. FROM OPEN LETTER TO OPEN LETTER

It is ironical that professor lotika sarkar who was instrumental in writing an open letter to the Supreme Court had to undergo with an immense trauma and grief after the death of her husband. Taking advantage of this situation her cook and the police officer whose education they had sponsored, usurped her property and house. Again,her students, India's top lawyers and judges mobilised support and signed an open letter studded with such names as Justice

29. Ibid
30. Posted on January 26, 2014 by jilsblognujs.

V.R. Krishna Iyer, Soli Sorabjee, Gopal Subramaniam and Kapila Vatsyayan. Jurists, advocates, academics, bureaucrats, journalists and human rights activists had signed the open letter demanding justice for her. Finally, during her last days, Lotika Sarkar's property was transferred back to her and her assets handed over to her to allow her to live her life in peaceful serenity, which she so deserved. Lotikadee's traumatic experience invited serious attention to safeguarding the rights of senior citizens by both state and civil society[31].

V. CONCLUSION

The most appropriate tribute to Lotikadee is to proactively pursue the mission she started with her team in 1980 to fight against rape and various forms of structural and systemic violence against women and to strive for social justice, distributive justice and gender justice.

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31. Prof. Vibhuti Patel, www.gandhitopia.org/.../professor-lotika-sarkar-1927-2013-eminent-scholar-and-femini...Mar 2, 2013.

TRUTH OR LAW: THE HALLMARK OF JUSTICE

B. MOHAN RAO*

"Then was born the Law (Dharma), the doer of good. By the law the weak could control the strong." Brihadaranyakopanishad[1]

"When there is a conflict between law and equity; it is the law which is to prevail. Equity can only supplement the law when there is a gap in it, but it cannot supplant the law….", [2]

ABSTRACT : It may be stated that justice has been deviated in a very recent judgment of the Apex Court in Nandlal[3] case. The Apex Court passed a remark that 'Truth must triumph'-is the hallmark of justice.' The Court was anxious to render justice to an undeserving man deviating from the law. The Court has obviously, overruled its precedents which are binding on it.[4] The Court had also ignored to

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1. (I. IV, 14).
2. Markandey Katju, Gyan Sudha Misra *JJ*., Supreme Court of India, *B. Premanand & Ors. v. Mohan Koikal* decided on 16 March, 2011, available at http://www.indiankanoon.org/doc/421654/
3. *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr* decided by Chandramouli Kr. Prasad and Jagdish Singh Khehar JJ., decided on 6 January, 2014, 2014 SCW 506 also available at http:// www.indiankanoon.org/doc/139951018/
4. Article 141 of the Constitution of India.see also In *The Keshav Mills Co. Ltd., Petlad* v. *The Commissioner of Income Tax*, Bombay North, Ahmedabad, (AIR 1965 SC 1636) this Court held:"……When this Court decides questions of law, its decisions are, under Art. 141, binding on all Courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations:- What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good ? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully borne in mind whenever this

invoke purposive rule[5] of interpretation. The Court must have restrained itself from the deviation as it was done by the Naaz Foundation case.[6] The Court must have laudably and purposively deviated to render justice to deserving woman and child as was done in Badshah v. Sou. Urmila Badshah Godse[7] case. In Badshah case the Apex court has adopted purposive and liberal rule of construction in awarding maintenance under Section 125 of The Code of Criminal Procedure, 1973 (Crpc) without insisting on strict proof of marriage. It was reiterated that strict proof of marriage was not a condition precedent to grant maintenance under Section 125 crpc. Nandlal Court has in fact deviated from the law.

KEY WORDS : Justice, Code of Criminal procedure, Indian Evidence Act.

I. INTRODUCTION

'Satyam Sarve Pratisthtam!' is the proverbial saying of our ancient and cultural significance. *But,* there are certain provisions of law such as section 112 of the Indian Evidence Act wantonly drafted by the eminent jurist like Sir James Stephen to render protective justice to vulnerable persons like women and child. The provision reads in effect that during the continuance of a valid marriage, if a child is born the child is presumed legitimate. The presumption extends to 280 days beyond the nullification of marriage. The provision disallows bastardization of child. The strong presumption under Section 112 of the Indian Evidence Act has been deviated by the Supreme Court in *Nandlal Wasudeo Badwaik's* case.[8] The Apex Court has obviously, ignored to follow the law and deviated from the tendency of liberal and purposive rule of construction as has aptly been adopted in *Badshah* case.[9]

The facts of the case in *Nandlal*[10] are that the petitioner is the husband of respondent no. 1, the wife and the daughter,[11] respondent no. 2. The marriage between them was solemnized on 30th of June, 1990 at Chandrapur. The wife filed an application for maintenance under Section 125 of the Code of Criminal Procedure (the Code) which was dismissed by the Magistrate on 10th December, 1993. Thereafter, a fresh proceeding was initiated under Section 125 of the Code claiming maintenance for herself and her daughter. The wife inter alia, alleged

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Court is called upon to exercise its jurisdiction to review and revise its earlier decisions. These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court."

5. See also A.K.Sikri,J., Supreme Court of India, *Badshah v. Sou. Urmila Badshah Godse & Anr* decided on 18 October, 2013, http://judis.nic.in/supremecourt/imgs1.aspx?filename=40886
6. G.S. Singhvi, J.,Supreme Court of India, *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors.* decided on 11 December, 2013, available at http://www.indiankanoon.org/doc/58730926/
7. *Badshah v. Sou. Urmila Badshah Godse & Anr* decided on 18 October, 2013, http://judis.nic.in/supremecourt/imgs1.aspx?filename=40886
8. *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr* decided by Chandramouli Kr. Prasad and Jagdish Singh Khehar JJ., decided on 6 January, 2014, 2014 SCW 506 also available at http://www.indiankanoon.org/doc/139951018/
9. *Badshah v. Sou. Urmila Badshah Godse & Anr* decided on 18 October, 2013, http://judis.nic.in/supremecourt/imgs1.aspx?filename=40886
10. *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr* decided by Chandramouli Kr. Prasad and Jagdish Singh Khehar JJ., decided on 6 January, 2014, 2014 SCW 506 also available at http://www.indiankanoon.org/doc/139951018/
11. Name of the girl child is omitted by the author. Strangely, the Court did not omit to mention the real name. With due respects to the Hon'ble Court it is submitted that the Court had discussed about 'bastardising' of innocent girl child and in fact obviously did for no fault on her part -which is avoidable!

that she started living with her husband from 20th of June, 1996 and stayed with him for about two years and during that period got pregnant. She was sent for delivery at her parents' place where she gave birth to a girl child, the respondent no. 2. Petitioner-husband resisted the claim and alleged that the assertion of the wife that she stayed with him since 20th of June, 1996 was false. He denied that respondent no. 2 as his daughter. After 1991, according to the husband, he had no physical relationship with his wife. The learned Magistrate accepted the plea of the wife and granted maintenance at the rate of Rs.900/- per month to the wife and at the rate of Rs.500/- per month to the daughter. The challenge to the said order in revision had failed so also a petition under Section 482 of the Code,[12] challenging those orders. It was against those orders; the petitioner preferred the special leave petition. Hence, the case.

The *Nandlal*[13] case raises several queries-

* Role of Judiciary vis a vis legislature (doctrine of separation of powers) – 'judges can only declare but cannot make law'- The Golden Rule of Interpretation provides that a statute has to be interpreted by grammatical or literal meaning unmindful of the consequences if the language of the statute is plain and simple.[14]
* 'judicial legislation'- If a judge goes contrary to the law in force, it tantamount to a judicial legislation. In the instant case the Court did neither follow the law nor the judicial precedents referred. It had deviated from the law and judicial precedents whereby the decision can be considered as *judicial impercuriam*.
* Jurimetrics-clash between the law and science and the reliability of science contrary to legal provisions.
* Presumption of conclusive proof under section 112 of Indian Evidence Act, 1872-reason quoted by the Court for deviating from the law;
* Protective Justice -whether courts can support the one who claims Truth based on the modern scientific evidence ignoring legal presumption meant for protecting the deserving and vulnerable persons such as an innocent that to a girl child which should be protected by all means.

The Apex Court had agreed to allow the petitioner's prayer for conducting DNA test for ascertaining the paternity of the child on deposit having been made of maintenance and arrears etc.,[15] In the light of the aforesaid order, the Regional Forensic Science Laboratory, Nagpur has submitted the result of DNA testing and opined that appellant was excluded to

12. Section 482. *Saving of inherent powers of High Court*. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. *The inherent power in this section could be invoked to render justice even deviating from the rule of law in deserving cases*.
13. *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr* decided by Chandramouli Kr. Prasad and Jagdish Singh Khehar JJ., decided on 6 January, 2014, 2014 SCW 506 also available at http://www.indiankanoon.org/doc/139951018/
14. ARIJIT PASAYAT, J., Supreme Court of India, Maulavi Hussein Haji Abraham ... vs State Of Gujarat And Anr decided on 29 July, 2004, available at http://www.indiankanoon.org/doc/699436/ quoted by (Smt.) Ranjana Prakash Desai, J. , for the Constitution bench in *Sarah Mathew v Institue of Cardio Vascular Diseases* decided on 26 November, 2013, available at http://www.indiankanoon.org/doc/89575618/
15. *Prima facie* the Supreme Court must not have ordered for the Test nor should it rule to allow any such test conducted deviating from the law. Even assuming that it had deviated from the law it could only be meant to render justice to the weak deserving person/s under section 125 Cr.P.C. i.e., the wife, child or the parents and not the husband keeping in view of the welfare of the wife and the child.

be the biological father of the respondent no. 2 herein. Respondents, not being satisfied with the aforesaid report, made a request for re-test. The said prayer of the respondents was accepted and the Supreme Court by order dated 22nd of July, 2011 directed, the Central Forensic Science Laboratory, Hyderabad to conduct re-test. The Lab submitted its report and on that basis opined that the appellant could be excluded from being the biological father of respondent no. 2.

Arguments/ Submissions

Mr. Manish Pitale appearing for the respondents had submitted that the appellant having failed to establish that he had no access to his wife at any time when she could have begotten respondent no. 2, the direction for DNA test ought not to have been given. He had submitted that the result of DNA test was fit to be ignored. In support of the submission he had placed reliance on the judgment of the Apex Court in *Goutam Kundu v. State of W.B.*,[16] relevant portions whereof read as under:

> "This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual "cohabitation".
>
> ….From the above discussion it emerges—(1) That courts in India cannot order blood test as a matter of course; (2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained. (3) there must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act. (4) the court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman. (5) no one can be compelled to give sample of blood for analysis.
>
> Examined in the light of the above, we find no difficulty in upholding the impugned order of the High Court, confirming the order of the Additional Chief Judicial Magistrate, Alipore in rejecting the application for blood test……."

Yet another decision on which reliance has been placed was the decision of the Apex Court in the case of *Banarsi Dass v. Teeku Dutta,*[17] which is relevant for the purpose was as quoted below:

> We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard

16. (1993) 3 SCC 418
17. (2005) 4 SCC 449, paragraph 13.

> from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.[18]"

Reliance has also been placed on a decision of the Supreme Court in the case of *Bhabani Prasad Jena v. Orissa State Commission for Women*,[19] in which it has been held as follows:

> In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test."

It is respectfully submitted that despite the above submissions, the Apex Court did not accede to invoke the judicial precedents viz., *Goutam Kundu v. State of W.B.*, [20] *Banarsi Dass v. Teeku Dutta* [21] and *Bhabani Prasad Jena v. Orissa State Commission for Women*,[22] nor did follow the law; The *Nandlal* Court had continued to deviate from the law. There being the strong presumption available under Section 112 of the Evidence Act, and the consequence of the suffering given to the child, especially the girl child, the Court must have avoided the order for conduction of the DNA test. It is for the legislature to take into consideration the change in the advancement of technology to amend the rule and allow such conduction of tests to decide the legitimacy of the child. As long as there is no amendment to the law, the Courts are to confine the interpretation of the letter of the law. The Apex Court has aptly relied upon the constitutionality presumption of the law in *Naaz Foundation* case.[23] The fact that the petitioner did not act to nullify his marriage and there is no claim of the wife living in adultery, the presumption shall apply. Moreover, the appellate Court might give the clarification and it is for the trial courts to consider and weigh the evidence. Unfortunately, the Apex Court had in fact acted contrary to the law and justice.

The Apex Court had acceded to the submission of Miss Anagha S. Desai appearing on

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18. Kamti Devi v. Poshi Ram, 2001 (5) SCC 311
19. (2010) 8 SCC 633
20. (1993) 3 SCC 418
21. (2005) 4 SCC 449, paragraph 13.
22. (2010) 8 SCC 633
23. G.S. Singhvi, J., Supreme Court of India, *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors*. decided on 11 December, 2013, available at http://www.indiankanoon.org/doc/58730926/ The Court was considering the constitutional validity of Section 377 of the Indian Penal Code. It has aptly invoked the Constitutionality presumption and exercised restraint. It was held that it is for the legislature to take into consideration all the social phenomena and amend the law if it feels necessary.

behalf of the appellant that the Court had ordered twice for DNA test and, hence, the question as to whether that was a fit case in which DNA profiling should or should not have been ordered was academic. The Court had found substance in the submission of Ms. Desai. But, it is surprising to note that if mistakes are committed deviating from the law, such mistakes would override the law? It is respectfully submitted that the Hon'ble court must not have found substance in such submissions- in view of the law. When the law of the strong presumption requires the Court not to accept any evidence contrary to the Conclusive Proof, how could the Court permit for the conduction of the test at all? It should have restrained itself for the second time and must have corrected itself! However, it had deviated from the law, twice!

According to the counsel for the appellant, *the DNA* test cannot rebut the conclusive presumption envisaged under Section 112 of the Evidence Act. According to him, respondent no. 2, therefore, had to be treated to be the appellant's legitimate daughter.[24]

In support of the submission, reliance was placed on a decision of the Apex Court in the case of *Kamti Devi v. Poshi Ram*,[25] and reference has been made to paragraph 10 of the judgment, which reads as follows:

> ……The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception……."

Pertinently, at this juncture at least, the Court might have considered the binding nature of the judicial precedents. It must not have been carried away by the rival submissions to the contrary. The Court must have invoked the **purposive rule of construction** as it did in **Badshah**[26] case. When it invokes the rule, it is expected that it could have realized the significance of the provision! It could have gone into the purpose of extending protection to the needy deserving and vulnerable mother and girl child in the case carrying the name of Badwaik. The fact remains that the court shall not entertain such arguments when the respondent did not attempt to nullify his ties with the wife. Even if he wants to do so, the law requires him to pay maintenance! The court had also gone to refer to the earlier case law and had also expressed the cynical consequences of bastardizing a girl! Yet, it had decided in favour of the appellant!

The court had gone into the issues of scientific accuracy of DNA test. It was observed:

> "….Before we proceed to consider the rival submissions, we deem it necessary to understand what exactly DNA test is and ultimately its accuracy. All living beings are composed of cells which are the smallest and basic unit of life. An average human body has trillion of cells of

24. At this juncture even, the Hon'ble court must have realized its mistake. Strangely, it did not do so!
25. K.T. Thomas and R Sethi JJ., *Kamti Devi v. Poshi Ram* (2001) 5 SCC 311,
26. *Badshah v. Sou. Urmila Badshah Godse & Anr* decided on 18 October, 2013, http://judis.nic.in/supremecourt/imgs1.aspx?filename=40886

> different sizes. DNA (Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. Human cells contain 46 chromosomes and those 46 chromosomes contain a total of six billion base pair in 46 duplex threads of DNA. DNA consists of four nitrogenous bases – adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earth's population is about 5 billion, this test shall have accurate result. It has been recognized by this Court in the case of Kamti Devi (supra) that the result of a genuine DNA test is scientifically accurate. It is nobody's case that the result of the DNA test is not genuine and, therefore, we have to proceed on an assumption that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl-child….."

The apex Court has also considered as to whether the DNA test would be sufficient to hold that the appellant is not the biological father of respondent no. 2, in the face of what has been provided under Section 112 of the Evidence Act, which reads as follows:

> "Birth during marriage, conclusive proof of legitimacy.- The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

The Court observed that from a plain reading of the provision (Section 112), it was evident that a child born during the continuance of a valid marriage shall be a conclusive proof that the child is a legitimate child of the man to whom the lady giving birth is married. The provision makes the legitimacy of the child to be a conclusive proof, if the conditions are satisfied.

The Apex Court ruled that '…it can be denied only if it is shown that the parties to the marriage have no access to each other at any time when the child could have been begotten.'

Accordingly, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had or had not any access to his wife at the time when the child could have been begotten**.** The Court was expressing concern about the unfortunate disregard of the plea of the husband about the inaccessibility. But, it is respectfully submitted that the Courts below had an apt disregard in view of the efficacy and 'welfare-ism' embodied in the provisions under section 112 of the Indian Evidence Act and Section 125 Crpc. The combined effect of reading the provisions together and the very fact that the petitioner did not initiate to dissolve the marriage, the wife and the child deserve to get the maintenance. They deserve to get maintenance as per the law even if the marriage is dissolved. Unfortunately, the Court has ignored the efficacy of the legislative intent under the provision

in section 112 of the Indian Evidence Act which is meant to protect the child from being bastardized. Besides, the welfare of the child as well as the wife has been provided under Section 125 of the Crpc. The decision in Nandlal has fare reaching consequences. It is heartening and painful to note that an innocent child is bastardized due to the decision of the Court despite the fact that there is law to protect such children**.**

Pertinently the following points need consideration-

1. The question must have been whether there was continuation of a valid marriage. If there was continuation of valid marriage, the strong presumption would arise.
2. Even in case if there was dissolution, the presumption extends to 280 days. There being no dissolution all other issues whether there was access or not should not arise.
3. The Hon'ble court might give the liberal construction to the remedial and beneficial provision like Section 125 Crpc as was done by the Badshah court. Unfortunately, the Hon'ble Court has continued to rely upon the scientific evidence may be with a passion!

The *Nandlal* Court has observed

> " ….As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl-child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that respondent No. 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us….."

" We may remember that Section 112 of the Evidence Act **was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature**. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former…."

It is supplicated with due respects that the Supreme Court must have conceded that it cannot go beyond its function of legal interpretation and accept scientific evidence! Appreciation of evidence is the function of the lower courts. The social conditions, scientific advancement and such other things must be taken into consideration by the legislature and the court shall stick to the law. The Hon'ble court had in a different occasion did not accede to the contentions of change in the social conditions in *Suresh Kumar Kaushal*[27] case despite the fact that the rights of LGBTs are at stake.

But, the *Nandlal* Court had in fact to support its deviation has differentiated between legal fiction and the presumption and observed:

"We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice."

It is submitted that the hall marks of justice are meant to render justice to the deserving persons. When the law provides for the protection of such deserving and vulnerable persons in the form of a girl child, the Apex Court need not trouble itself to interpret and express its opinions on legal fiction. The law is prima facie evident to protect the child and not to bastardize the child by disallowing evidence to the contrary. In Nandlal the Apex Court's conscious bastardization of an innocent child by all means is respectfully refutable. When the question comes for the protection of the child and consciously if the decision of the Court might lead to bastardizing an innocent girl child it is surely, 'the law' which should triumph despite the 'scientific truth' but to render social justice.

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27. G.S. Singhvi, J., Supreme Court of India, *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors*. decided on 11 December, 2013, available at http://www.indiankanoon.org/doc/58730926/

INTERNET PRIVACY AND CONSTITUTIONAL LAW ISSUES

BINU N.

ABSTRACT : The right to privacy is a fundamental right of a person to enjoy life and personal liberty. In the information technological era, due to technological development, the importance of this right is increasing day by day worldwide. In online as well as off line world, an individual has a right to limit sharing of his personal information with other individuals or entities. Various legislations are enacted and conventions are signed relating to protection of privacy principles nationally and internationally as well. In India, the Information Technology Act, 2000 empowers the Central or State government to issue directions for interception, monitoring, decryption of any information to protect sovereignty or integrity of India, or defence of India. The present paper focused upon the concept of right to privacy and requirement of privacy policy and law in the light of the government interception in India and abroad.

KEY WORDS : Right to Privacy, Data Protection; Information Technology Act, Children Online Privacy Protection Act (COPPA).

I. INTRODUCTION

The right to privacy can be defined as the right of a person to enjoy his own presence by himself and decide his boundaries of physical, mental, and emotional interaction with other persons[1]. It can be a right between private individuals or the constitutional right against the State. In online as well as off line world, a private individual has a right to limit sharing of his personal information with other individuals or entities or the media. In European Union, the Data Protection Directive, 1998 embodies the privacy principles elucidated by the European Convention on Human Rights[2]. The Universal Declaration of Human Rights (UDHR) 1948[3] and the International Covenant on Civil and Political Rights, 1966[4] also ensure the right to privacy. In India, the Constitution guarantees the 'right to privacy[5]'. In U.S, the first, third,

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1. Adam Carlyle Breckenridge, *The Right to Privacy* ,(1971),quoted in ,Madhavi Divan, "*The Right to Privacy in the Age of Information and Communications*, 4 *SCC(j)* 12 (2002);Edward Shils," *Privacy: Its Constitution and Vicissitudes* "31, *Law and Contemprory Problems*,(2 Spring 1966);Alan F. Westin, *Privacy and Freedom* (1967).
2. Article 8, European Convention on Human Rights.
3. Article 12 , Universal Declaration of Human Rights (UDHR) 1948.
4. Article 17, International Covenant on Civil and Political Rights (ICCPR), 1966.
5. Article 21.

fourth, fifth and ninth amendments to the Constitution guarantees 'privacy' as a fundamental right.

Internet users surf the internet and post their personal information on-line in social networking websites including their, personal information comprising of details of parentage, educational qualifications, interests and even private picture and video that are easily accessible to the public. This led to many misuses by private individuals and other entities[6]. A user is often asked to provide personal information in order to register or create a new account to avail services from a website. Advertising companies install cookies to study the preference of web users etc. popularly known as '*behavioral advertising*'. The information so collected is often sold to third parties for commercial gain without taking a prior written consent from the concerned individual. In 'history sniffing', browsers interact with websites and record which sites user has been browsing. Any information which is posted in the internet is no more private. Selling of personal data for unrelated commercial gains without permission has become an international issue. Moreover, State intrudes privacy of individuals through surveillance, phone tapping, electronic interceptions etc.

II. REQUIREMENT OF PRIVACY POLICY AND TERMS

Almost all States mandate declaration of terms of use and privacy policy of a website. In U.S.A and Europe, may consumer protection initiatives have been undertaken. Therefore, most e-commerce websites have a clear privacy policy and their terms of use and disclaimers are posted on their webpages. In *Double Click case*[7], the Superior Court of California held that the unauthorized use of "cookies" to analyse the sensitive information of net surfers, evaded the right to privacy and hence a violation of the Constitution of California. In India, Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 mandates the intermediaries to declare their terms of use and privacy policy on their websites[8];and requires that the privacy policy of the body corporate who collect, store etc. of personal information of individuals, shall contain clear accessible statement of its practices, types of information collected, purpose and use of such data etc, and that such information can be disclosed only with the prior consent of the provider, except when required by law enforcement agencies and use of reasonable security practices[9].

However, in many other States, self-regulatory initiatives have been adopted: websites post their terms of use and privacy policy on their sites, and are liable to a user for any breach of terms stated therein. In India, 'opt-out' provision is available[10].

III. GOVERNMENT'S RIGHT TO INTERCEPTION

The government's right to use surveillance, interception of electronic communications or traffic data retained by internet service providers, is often challenged as violative of right to privacy. In most of the States, this interference by government is allowed in very rare and exceptional circumstances which are clearly specified either in the constitutional provisions or by separate statute governing privacy protection. In U.S, the Communications Assistance

6. For instance, Koobface, a malicious programme steal personal information of facebook users and sell it to make wrongful gains.
7. *Judnick v.Double Click 2001.*
8. Rule 3, Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.
9. Rule 4, *ibid.*
10. Rule 5, *ibid. Dimensions of Cyberspace* (Indian Law Institute, New Delhi,2004).

for Law Enforcement Act provides that all phone calls and internet traffic shall be made available for monitoring by federal law enforcement agencies. Organization for Economic Co-operation and Development (OECD) drafted the Privacy Guidelines, 1980 which deals with protection of privacy and the trans border flow of personal data. In 1994, APEC issued guidelines to prevent intrusions and abuse of personal data. In 1981, the Council of Europe drafted the Convention for Protection of Individuals with regard to Automatic Processing of Personal Data. In 1995, the European Union passed the Data Protection Directive which ensures individual's right to protection against unreasonable or unauthorized interference by the government through interceptions, phone tapping, searches and seizures. In 2010, the ICC issued guidelines which aim to balance the interests of law enforcement agencies, service providers, business entities and customers[11]

In India, *Information Technology Act, 2000* empowers the Central/State government to issue directions for interception, monitoring, decryption of any information to protect sovereignty or integrity of India, defence of India, friendly relations with foreign States, preserve public order etc[12]. The Act also confers power on the Central government to issue directions for blocking for public access of any information through a computer resource[13]. In 2009, the Central Government passed the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules to lay down a framework and legal procedure for such interceptions; and the intermediaries are obliged to provide co-operation and assistance. Interception or monitoring or decryption of information is possible only with the authorization from the Secretary of Ministry of Home Affairs, Central Government or State Government[14]. The sensitive data collected must be maintained by security agency. It must be destroyed after six months unless it is required for further investigation. The sensitive information must be maintained confidentially. Its misuse amounts to 'privacy violation'.

The Information Technology (Procedure and Safeguards for Blocking Access of Information by Public) Rules, 2009 require that every complaint for blocking access to a website must be scrutinized and approved by a designated officer and a committee and finally approved by Secretary of Information Technology. But in emergency situations, direct blocking is permissible. Information Technology (Procedure and Safeguards for Monitoring and Collecting Traffic Data or Information) Rules 2009 allows monitoring of traffic data on order of Secretary to Government of India, for any security reasons; and obligates intermediaries and internet service providers to maintain secrecy of such monitoring and are made responsible for their employees as well. All sensitive data collected for such monitoring shall be destroyed within nine months[15].

IV. IDENTITY OF BLOGGER

Many a times, especially in defamation cases the identity of an anonymous person posting a comment as a blog, become a crucial question. In *Independent Newspaper Inc. v.*

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11. For a discussion on International initiatives, see generally, S.K.Verma and Raman ittal(ed.),*Legal Dimensions of Cyberspace* (Indian Law Institute, New Delhi,2004).
12. S.69, Information Technology Act, 2000. The Right to Information Act, 2005; S.8 deals with national security and individual privacy concerns. Chapter V of Prevention of Terrorism Act, (POTA) 2002 also provides for *interception* of e-mail communications.
13. S.69A, *Ibid.*
14. R.24, Information Technology (Procedure and Safeguards for Inter ception, Monitoring and Decryption of Information) Rules,2009.
15. Rule 5

Brodie[16] , the court of Maryland held that the court can direct the disclosure of details about the anonymous person subject to the following conditions :

i. Reasonable notice has been given to the anonymous person that his identity was being requested by the plaintiff.
ii. Such person has been given sufficient time to oppose disclosure of details.
iii. Alleged defamatory statement has been specified in the notice.
iv. There is a *prima facie* case; and
v. It has been proved that balance of interest lies in favour of disclosure of his identity.

In India, the Code of Criminal Procedure, 1973[17] empowers the police to call for records from telephone companies and Internet service Providers (ISPs) to identify the person who has made a transaction; and obtain his log information content contained in an e-mail/ chat account and IP address details. In civil cases, courts can issue notices to such ISPs directing them to submit the required information. Normally, Internet Service Providers will not entertain direct request for disclosure of identity of a person, and even if the complaint is made against a fake blog or impersonating profile on website, an Internet Service Provider will at most block the subject page from access but do not reveal the person who created it.

V. INTERNET PRIVACY IN U.S.A.

In U.S, the Fourth Amendment lays down the power of government officers to search and make seizures for collection of evidence; subject to two conditions :

i. It does not infringe a person's reasonable expectation of privacy; or
ii. It will be justified by the permissible exceptions.

In U.*S. v. Blas*[18], the court held that every individual has the same expectation of privacy in a pager, or computer or other electronic data storage device as an individual will have in a closed container. In *Katz v. U.S*[19], it was held that the warrantless wire tapping of fixed land line telephones amounted to an unreasonable search. However, government employees cannot rely on reasonable expectation of privacy in government offices. In *U.S. v. Simons*[20] , an employee in the office of the Central Intelligence Agency (CIA) misused the office computer to watch child pornography disregarding CIA policy. The court turned down the contention of the employee and justified the action taken against him by the government.

In US, the Electronic Communication Privacy Act (ECPA) was passed to ban any unauthorized access to a computer network and unauthorized interception of data. For preservation of electronic records, the ECPA empowers the government to direct the ISPs to "freeze" stored records and communications[21]. The Privacy Protection Act, 1980, (PPA) ensures the right of privacy of press against law enforcement officers who may conduct searches to collect "mere evidence of crime". The Computer Fraud and Abuse Act *(CFAA)* bans unauthorized access to computer systems or networks, introduction of virus etc[22].

The *Children Online Privacy Protection Act* (COPPA*)* protects the right of privacy of children below the age of 13 years while they use internet. The Act mandate that the website

16. 966 A.2d 432 (Md.2009)
17. S.91
18. 990 WL 265 at 21.
19. 389 US 352 (1967)
20. 206 F 3d.392 (4th Cir 2000).
21. In India, the law of interception is laid down in the Telegraph Act, Rules framed under IT Act and the principles laid down in *PUCL v. Union of India* (2003) 4 S.C.C 399. *(Telephone Tapping Case)*.
22. In India, Ss.43, 66, 70 of IT Act is applicable.

owner ought to procure the express consent of the parents before they collect, use, circulate any sensitive personal information about children. It also stipulates that on the websites meant for children, disclosure of personal information shall not be a prerequisite[23]. For example, on a gaming website. There is no such a special statute in India. The Video Privacy Protection Act (VPPA) protects the privacy of a consumer who purchases or rents out videos. The Act covers websites that publishes on-line videos for sale or rental activity. The Act disallows disclosing of the videos purchased by consumers without their express written consent[24].

Health Insurance Portability and Accountability Act, 1996 (HIPAA) is the specific legislation that governs privacy protection measures for the medical information about the customers. The Act mandates every health care provider to maintain appropriate safeguards to ensure confidentiality of health records information of its patients[25].In India, doctor-patient relationship is considered "fiduciary" ie, parties have an obligation to preserve confidentiality; and the tort law protection prevails apart from general protection of privacy guaranteed under Article 21 of Indian Constitution. In addition, U.S has Privacy Act, 1974, Electronic Fund Transfer Act, Cable Communications Policy Act, Federal Aviation Act, Right to Financial Privacy Act, 1978 (relating to bank records) and Driver's Privacy Protection Act, 1994.

VI. DATA PROTECTION AND PRIVACY UNDER EUROPEAN UNION

The Council of European Union has passed many directives to protect personal data and secure privacy of individuals. The Data Protection Directive aims the protection of consumer's privacy and sensitive personal data in cyberspace. Data can be collected only with the express consent of the consumer and it shall be kept for such time as is, expressly authorized by the consumer and it is the discretion of the consumer to refuse to submit data for advertising or promotional activities. These provisions are reflected in the Indian Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules, 2011[26]. All call centers have been directed to store their traffic logs for at least one year[27]. However, no mandatory time for retention of records has been prescribed for other intermediaries or corporate bodies so far. The Information Technology (Intermediaries and Guidelines) Rules, 2011 provides only a 90 day period for preserving information related to a complaint made by a person for investigation purpose[28]. It is submitted that this period is really too short for any effective investigation.In U.K., The Data Protection Act, 1998 govern the protection of personal data. It mandates that personal data of consumers cannot be collected without their express consent.

VII. INDIAN LEGAL FRAMEWORK TO PROTECT DATA AND PRIVACY

In *Kharak Singh v. State of U.P*[29], the Supreme Court held that domiciliary visits at night by police violate Article 21of the Constitution of India[30]. In *Govind v. State of*

23. *http://www.ftc.gov/ogc/coppal.htm.*
24. *http://epic.org/privacy/vppa.*
25. http;//www.hhs.gov/ocr/privacy.
26. Rules 4 and 5.
27. See Rule 5(5), Information Technology (Guidelines for Cyber Café) Rules, 2011.
28. Rule 3(4).
29. (1964) ISCR 332.
30. Article 21 declares: No person shall be deprived of his life of personal liberty except according to the procedure established by law.

M.P[31]; it was held that right to privacy can be restricted only in accordance with the procedure established by law.In *PUCL v. Union of India*[32], the petitioner challenged the government's power to tap phones under Section 5(2) of the Telegraph Act, 1885. The court held that such tapping can be resorted to only for the protection of national sovereignty, public order, security of State etc; and that too, strictly in accordance with the procedural safeguards provided under the Indian Telegraph Rules, 1951 which are indented to safeguard privacy of individuals[33].

In addition to the above said Constitutional protections, Information Technology Act,2000,the kingpin legislation governing cyberspace also contain ample provisions to protect data and internet privacy.The relevant provisions of the Act in this regard are:

i. Prohibition of voyeurism and MMS scams[34].
ii. Prohibition of disclosure of information received by a person in his official capacity[35].
iii. Prohibition of pornography (adult as well as child pornography)[36].
iv. Recognition of government's right to interception. Internet can be censored on the grounds of national security, sovereignty and security of India, defence of India, friendly relations with foreign States, public order, prevention of commission of any cognizable offence, or investigation purposes[37].
v. Provisions for blocking of websites containing objectionable items[38].
vi. Recognition of the Central Government's power to monitor, collect traffic data or information generated, transmitted, received or stored in any computer resource. The Act obligates intermediaries to render full co-operation in this regard for the collection of traffic data[39].

Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules 2009 lays down the procedure for interception. For interception, prior approval from the competent authority is necessary. The maximum time of interception is 60 days; and a further renewal not exceeding 180 days. Disclosure can be made only to the authorized officer. The Information Technology (Procedure and Safeguard for Monitoring and Collecting Traffic Data or Information) Rules, 2009 provides liability for intermediaries for unauthorized monitoring committed by their employees. "Contraventions" concerning breach of data are punishable[40]. Some of the other laws that aim data protection and privacy in India are the Indian Penal Code, 1860; Indian Telegraph Act, 1885; Indian Contract Act ,1872; Specific Relief Act, 1963; Consumer Protection Act, 1986; Credit Information Companies (Regulation) Act, 2005; Right to Information Act, 2005; and the Protection of Women from Domestic Violence Act, 2005.

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31. (1975) SCC (Cri) 468.
32. (2003) 4 SCC, 399. In *R.M.Malkani.v. State of Maharashtra*, (1973) SCC 471, the court held that telephonic conversation of an innocent citizen shall be protected against unlawful tapping.
33. In *State of Maharashtra v. Bharat Shantilal Shah* (2008) 13 SCC 5, phone tapping was held to be valid if it is intended to prevent organized crime or collection of evidence relating to such crimes and carried out as per procedure established by law.
34. S.66 E
35. S.72
36. Sections 67,67A and 67 B.
37. S.69
38. S.69 A
39. S.69-B.
40. Sections 43, 43-A and 66.

VIII. THE INDIAN LAW COMPARED WITH THAT IN EUROPEAN UNION

The right to privacy is a basic human right that every State must protect. Europe is known for its pro-consumer approach. In E.U, the Data Protection Directive aims to protect privacy and personal data of users. As said earlier, this directive forms the basis of Indian Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011. The Directive declares that the user is entitled to be provided with prior information before any personal data is collected. He should also be aware of the purpose for which the data being collected will be put to use. The Directive provides the criteria for deciding when data processing is lawful. Only after the individual has given his express consent, his personal data can be processed by an entity. The Directive restricts the processing of data which reveals a person's racial/ethnic origin, political opinions, religious beliefs, trade union membership, health matters or personal life. This information can be collected only in exceptional cases like medical diagnosis. The Directive entitles an individual from which the data is collected (called 'data subject'), a right of access to such data. He has a right to object to disclosure of his personal information to third parties for marketing purpose. He has a right to legal remedy for breach of any such rights. Interception of electronic communication shall be strictly in tune with the European Convention on Human Rights.

In India, *the Information Technology Act, 2000*[41]; and the Rules of 2011 discussed above protect data and privacy. As per the present law, "sensitive personal information" includes such personal information that may comprise of passwords, financial information, health related information, biometric information or other information stored or processed under lawful contract or otherwise[42]. All legal entities shall provide a privacy policy and disclosure information like the type of personal information collected, purpose etc[43]. The collection of sensitive personal information can be made only after obtaining consent through letter, fax or e-mail; and such collection shall be for a lawful purpose and only to the extent necessary for the purpose and shall be retained only till purpose is achieved[44].A consumer is entitled to decline from parting with any requested information or to withdraw its consent and correct or amend any information provided by him.

It is to be noted that, in EU Directive for Data Protection, many other effective safeguards are incorporated. The EU Directive prescribes a "Supervisory Authority" to look after the entire process; and mandates it's "prior permission" before the collection of any personal data by a body corporate. The Directive states that person must be provided with an "opt-in " approach and calls for prior consent from a user before sending unsolicited electronic communications aimed at marketing activities. The Directive permits a trader to use an e-mail address of its customers which was obtained during a sale for the purpose of marketing similar products or services with an "opt-out" approach.

The Indian law requires body corporate to seek permission before disclosing the personal information to any third party unless agreed by contract or to comply with a legal obligation[45]. Transfer of sensitive personal data to another country is subject to certain conditions:

i. The other country has same level of data protection; and
ii. Such transfer is necessary to perform the contract with customer or on obtaining his

41. S.43A.
42. Rule 3.
43. Rule 4.
44. Rule 5.
45. Rule 6.

consent[46].

IX. BASIC PRINCIPLES UNDERLYING THE PRIVACY PROTECTION IN INDIA.

i. Prior notice and express consent :

Before any data is collected, the individual concerned must be given prior notice of the information being sought from him and the purpose of such data collection. Every consumer has the right to deny consent.

ii. Legitimacy of purpose :

The data collected shall be for a clear and legitimate purpose.

iii. Use and disclosure restrictions :

The information collected can only be used for the specific purpose authorized and cannot be used or disclosed for any other purpose.

iv. Time period for retention :

The collected information shall be retained for the period of time that is required to meet the objective of such collection.

v. Right to update information :

Every individual has the right to update information about him and the party requesting such information is under an obligation to maintain its correctness.

vi. Right to access information :

Every individual has the right to check information about him to see how it is depicted or recorded or used by the collecting agency.

X. CONCLUSION

In India, despite the Constitutional protection and statutory safeguards, privacy of individuals is constantly under threat. Introduction of CCTNS (Crime and Criminal Network and Tracking System) and the UID (Unique Identification System) pose new challenges to right to privacy in India. The information stored in the databases under the above said methods may technically fail or be interrupted. The existence of multiple certifying authorities instead of a single repository of electronic signatures provided under the Information Technology Act, 2000 is also a threat.

Maintenance and monthly submission of history of surfing records of internet users by the cyber café is required under IT (Cyber (Cafe) Rules, 2011. This information is likely to be misused by cyber café owners, employees or other users or criminals. Moreover, any information that is posted online may remain in *cache* or in back machine even though it is deleted by an individual. Thus, online chat sessions, online blogs, video conferencing are vulnerable to unauthorized interception by third parties. Social networking sites like Face book; and Twitter are being used by cyber stalkers.

Recently, the Indian Home Ministry declared its proposal to set up a NATGRID to track individuals who surf the internet. Central Bureau of Investigation (CBI); Intelligence Bureau (IB); Research and Analysis Wing (RAW); Enforcement Directorate; National Investigation Agency(NIA); Directorate of Revenue Intelligence; and Narcotics Control Bureau will have access to such data as and when required.However, in India, the Personal Data Protection Bill, 2006 has not received the assent of the Parliament so far. Therefore, there is no law that guides a user on what information he can safely post on the internet.

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46. Rule 7.

BOOK-REVIEW

FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT

(1st Ed., 2011), By Prof. Udai Raj Rai, PHI Learning Private Limited, New Delhi, Pp.xliv+380, Price Rs. 550.00- (Paperback)

> 'The Constitution of India was to foster the achievement of many goals. Transcendent among them was that of social revolution. Through this revolution would be fulfilled the basic needs of the common man, and, it was hoped, this revolution would bring about fundamental changes in the structure of the Indian society- a society with a long and glorious cultural tradition, but greatly in need, Assembly members believed of a powerful infusion of energy and rationalism.'[1]

Salus populi suprema lex[2] is a common phenomenon in legal genre worldwide. This fundamental principle is reflected in the Constitution which is not mere assemblages of words, it contains the supreme law of the land, underlines the basic philosophy of the nation, narrates rights and duties of the citizens, describes obligations and liabilities of the State and more particularly sketches the framework of the structure within which the governance is carried out. The Constitution of India reflects indigenous multiculturalism and aspirations of the people of India. The philosophy underlying our Constitution expresses belief and faith of the Indian people not only in democracy; principle of Justice, Liberty and Equality, it also shows that we are determinant to promote fraternity assuring the dignity of individual by removing all kinds of discrimination against the suppressed and marginalised class of the society. It would be praiseworthy to mention about the Constitution of India that our constitution is mirror of the culture of our nation and the expectations of its people. We believe in democracy and freedom of citizens; we presume the ideology of classless society and principle of equality as part of our national life, we feel that the responsibility of the State is to enable the economically and socially backward class to make them *at par* with everyone by providing special amenities; our belief is that the right to rule is only for the freely and legally elected representatives of the people, none else; we assume that a free and fearless judiciary must be there for fair justice between man and man and man and government; our trust is that anyone should be punished after conviction only after doing justice in accordance with the law; and we acknowledge that the excess accumulation of wealth and it's control or unjust collection of means of production in hands of few can be harmful for society, and this is the duty of State to make such a policy under the law and execute it in a way that can save the nation from such harms. These and many other cannons are the basis of supposition of our countrymen, so, these are the part and parcel of our culture, and, since our constitution is the mirror of our culture, these principles are the life force and the throbs of our constitution.

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1. G. Austin, *The Indian Constitution-Cornerstone of a Nation*, Introduction, xxi, OIP (1999)
2. *let the welfare of the people be supreme law*

Since, these principles are the symbols of aspirations of our countrymen, our constitution dictates the rulers to move accordingly and execute in conformity of these.[3]

The Constitution of India is a compressive code incorporating all relevant provisions for national development and individual progress. It is a legal, social, and political document. It protects the interests of individual by providing specific provisions under the Constitution on one hand and on the other, under Part-IV, it gives a guiding lights to the State to formulate necessary policies in the welfare of the society at large. We have our own brand of socialism.[4]The fundamental rights are the interests of individuals guaranteed under the Part III of the Constitution of India. However, this notion is not new in India. With the advent of the civilization, emphasis has always been given upon duty (कर्म), not upon the rights[5]. The duty was the dharma of the individual that included rights in it. The concept of fundamental right is a new innovation of the contemporary world. By the declaration of independence in various countries across the globe, the fundamental rights have taken a meaningful place in the supreme law of lands in the constitution of civilized countries. Almost all the written Constitutions, promulgated in 18th and 19th century, has adopted declarations of the fundamental rights. Though, *the Government of India Acts* was notable exception to that in pre-independence era but not in post independence. Basu- a celebrated scholar has highlighted the philosophical aspect of the fundamental rights[6]. The importance of the fundamental rights and their enforcement becomes more and more pertinent to the members of the legal fraternity. The constitutional law is an ever growing field in public law, hence, requires constantly encapsulating all the changes in a very articulate, lucid and reader friendly manner. It also needs a critical, analytical and detailed juridical study of the Fundamental

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3. P. K. Tripathi, *Bhratiya Samvidhan Ke Pramukh Tatva*, p. 3
4. 'we must make our political democracy a social democracy as well. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity are the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union or trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. …… Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality would not become a natural course of thing. It would require a constable to enforce them…...On the social plane, we have in India a society based on the principles of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty …….. How long shall we continue to live this life of contradiction? We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy'- Dr B R Ambedkar in Constituent Assembly, quoted by Shri Pranab Mukherjee - the President of India, while delivering Dr. B.R. Ambedkar Memorial Lecture 2014 on '*Vision of India in 21st Century',* (04-09-2014 ; Smt. Indira Gandhi, The Statesman, (25-10- 1976)
5. कर्मण्येवाधिकारस्तु……(Bhagavad-Gita, 2: 47)
6. D.D. Basu, *Commentary on the Constitution of India*, p. 126, 'the concept of fundamental law and fundamental rights are the off springs of natural law and natural rights i.e. of a law which stands above the positive law created by the political society itself being the primary conditions of any civilized existence. It is interesting to note how even in countries having no guaranteed Bill of Rights, Judges have felt the need for regarding certain individual rights as standing above the pale of the ordinary law ; 'Strictly speaking civil rights arise from positive law; but freedom of speech, religion and inviolability of the person are original freedoms which are at once the necessary attributes and modes of self expression of human beings and the primary conditions of their community life within a legal order', Rights Rand. J., of Supreme Court of Canada in *Saumur* v. *City of Quebec* [1953] 2 S.C.R. 299

Rights. Writing a book on any topic of constitutional law is itself a challenging task and therefore, the work of author is commendable.

At the very outset, the book under review, the reviewer finds that the Book on fundamental rights is a modest volume. This volume is a culmination of author's continuous study of the developments in the field of public law, particularly in Constitutional Law. Keeping in view the constitutional amendments and judicial interpretations taking place in India and in other countries, Author has given a better understanding of the Fundamental Rights to the readers. It fulfills, of course, the long awaited requirements of the scholars. The book can be termed as one of the best and useful text written in analytical method. Quality and lucidity are the specific traits of the book, which the author has maintained so commendably. It is credentials to the author that qualify him to write this book. The author's presentation is descriptive in large part, but he sets forth effectively and with conviction the philosophy of fundamental rights enshrined under the Constitution of India. The book covers all new information in different dimensions to the group of readers. The review is highly personal and reflects the opinions of the reviewer. The Author has divided the book into fifteen chapters and all the chapters are based on some specific features.

The book provides comprehensive, systematic and organized approach on *'Fundamental Rights and Their Enforcement'* that is based upon juridical study. The fifteen chapters of the book containing several sub parts within the chapter emphasize on such division in order to bring clarity relating to different dimensions of the fundamental rights developed through judicial pronouncements. Thus, all the chapters may be put into three main parts. Apart from this division of the chapters, author begins the text with general introduction by highlighting nature and concept of fundamental rights that lies upon the legal ideals (values) - Equality and Liberty. He raises certain basic issues in the introductory chapter that sets the tone of the book. The first part contains six chapters where author has discussed liberty based rights with the purpose to observe the principles of natural justice and fair play. Freedom of Speech including the problems of media freedom has gone through an in-depth discussion under chapter first and focus has been given on remaining freedoms of Article 19 under the chapter second. The author has tried to touch all the aspects of the right to freedom in the light of judicial decision and by making a critical analysis and fair comment as well. Since, the Right to Life is main source of all the rights, therefore, a comprehensive out-set has, also, been given to the emerged and emerging dimensions of the right to life and personal liberty under chapter three. Chapter four and five are devoted to punitive deprivation of life and personal liberty and prisoner's rights. The last chapter six of this part deals freedom of religion.

The second part of the book consists with equality based rights that contains four chapters. In chapter seven, author has construed the principle of equality with reference to several judicial pronouncements. Under chapter eight some specific aspect of equality based rights- i.e. non-discrimination and equal opportunity, have been elaborated and chapter nine analyses concept of social reservation from different angle. The last part contains two chapters. These chapters have been discussed through Liberty and Equality based right and the issues unlike social equality, academic freedom and minority's right to establish and administer educational institutions are highlighted there.

At the end, besides this categorization of chapters and sub parts, the author has included in the book some other chapters captioned 'Reach of Fundamental Rights, its Violation, and Enforcement that cover the matters which are useful and informative in this

context. Some focus has also been given to the Directive Principles and Fundamental duties in an independent chapter. The author has incorporated the some leading judgments and commented upon in the Addenda separately.

Under the book in hand, author has used the techniques of analysis and explanation to present the subject in a lucid manner and to clarify the ideas inherent under the Part III of the Constitution of India. The Style of the book is refreshingly clear, *cliché-free*, and lucid which makes it delightful reading. The language is simple and beautiful. Footnotes are quite informative and supportive, Index - the back matter is accurate. Except some typographical errors, book's format- layout and binding is good. There is no bibliography. The book is little too bulky to be held in hand for reading contains 803 pages of materials. The economy paperback volume is priced at Rs 550/ which seems reasonable. The printing style is modern, the binding is good and get-up is simple and attractive. Thus, the book is found extremely useful to the student, the scholars and the teachers.

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