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ARTICLES

BOOK & REVIEW

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A LEGAL OVERVIEW OF DEROGATION FROM FUNDAMENTAL RIGHTS UNDER THE NIGERIAN CONSTITUTIONAL SYSTEM

ANDREW EJOVWO ABUZA*

ABSTRACT : The 1999 Nigerian Constitution guarantees to Nigerian citizens the fundamental rights contained in its chapter IV. This article undertakes a legal overview of derogation from fundamental rights under section 45(1)(a) of the 1999 Constitution. It is the writer's view that the enactment of laws which derogate from the fundamental rights envisaged in the section above other than in the interest of defence, public safety, public order, public morality and public health is unconstitutional. The writer suggests the amendment of the Constitution to define the elastic terms-defence, public order, public safety, public morality and public health.

KEY WORDS : Derogation, Fundamental rights, Reasonably justifiable in a democratic society, Defence, Public order, Public morality, Public safety, Public health, Selfish or Vested interest.

I. INTRODUCTION

The Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution)[1] came into force on 29 May 1999 signaling the beginning of Nigeria's fourth Republic. Chapter IV of the 1999 Constitution contains the fundamental rights guaranteed to all citizens of Nigeria. The Nigerian Constitution provides for two categories of derogation from fundamental rights guaranteed to all citizens of Nigeria. The first category of derogation consist of derogation set out in different sections of the 1999 Constitution which contain fundamental rights guaranteed to all citizens of Nigeria. While the second category of derogation consist of derogation set out in section 45 of the 1999 Constitution. Section 45(1) of the 1999 Constitution, specifically, allows the law-making authorities in Nigeria to make a law which

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1. Cap C 23 Laws of the Federation of Nigeria (LFN) 2004.

derogates from the fundamental rights guaranteed to all citizens of Nigeria in sections 37, 38, 39, 40 and 41 of the 1999 Constitution provided it is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health or (b) for the purpose of protecting the rights and freedom of other persons.[2] It is disappointing that based on the provisions of section 45(1) (a) above, the law-making authorities in Nigeria have made numerous laws which derogate from the fundamental rights guaranteed to all citizens of Nigeria in the sections above for the selfish or vested interest of Nigerian leaders rather than in the interest of the public or good of all Nigerians as a whole. The 1999 Constitution is blame-worthy for allowing this problem to emerge, as it is silent on the meaning of defence, public safety, public order, public morality and public health.

This article undertakes a legal overview of derogation from fundamental rights under section 45(1)(a) of the 1999 Constitution, analyses the relevant statutory provisions and case-laws, identifies the short-comings in the various laws, highlights the practice in some other countries and offers suggestions, which if implemented would eradicate the problem of the law-making authorities in Nigeria making laws which derogate from the fundamental rights guaranteed to all citizens of Nigeria in sections 37, 38, 39, 40 and 41 of the 1999 Constitution pursuant to section 45(1) (a) of the 1999 Constitution for the selfish or vested interest of Nigerian leaders rather than in the interest of the public or good of all Nigerians as a whole.

II. CONCEPT OF FUNDAMENTAL RIGHTS

The *Black's Law Dictionary* defines a right as: [3]

> …that which is proper under the law, morality or ethics or something that is due to a person by just claim, legal guarantee or moral principles or a power, privilege or immunity secured to a person by law or a legally enforceable claim that another will do or will not do a given act or a recognized and protected interest the violation of which is wrong.

A note worthy point is that rights can be either fundamental or non-fundamental. Fundamental rights are so critical in the lives of citizens of a country. These rights are called fundamental rights because they are provided for or guaranteed in the

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2 The provisions of section 45(1) above is similar in wording to the provisions of section 41 (1) of the Constitution of the Federal Republic of Nigeria 1979 (1979 Constitution). Cap 62 LFN 1990.

3 BA Garner et. al (eds) *Black's Law Dictionary* (St Paul MN: 8th edn, West Publishing Co 2004) 1347.

fundamental law of the land, that is, the constitution of a country. To cut matters short, fundamental rights refer to those rights which are guaranteed to all citizens of a country under the constitution of that country. It is in that sense that the expression 'fundamental rights' is used in this article.

III. BRIEF HISTORY OF FUNDAMENTAL RIGHTS

Fundamental rights have a long history. It suffices to state that fundamental rights emanated from the notion of natural rights. The latter are regarded as being possessed by human beings prior to their recognition by a legal system. It is settled that the formulation of natural rights dates from the second half of the 18th century, the revolutionary period in America and France. Both the United States of America (USA) and France borrowed largely from English experience and thought, particularly as embodied in the writings of early naturalists, namely, Thomas Paine, Thomas Hobbes and John Locke. The latter, for instance, postulates the doctrine: '… that nature had endured human beings with certain inalienable rights that could not be violated by any government authority'.[4] There were times when the writings of publicists had a great impact on law and society within which the law operates.[5] In the view of these philosophers, every individual within society possesses certain rights which are inherent and which cannot be wantonly taken and for which man is beholden to no human authority.[6] The major reasons for individuals coming together to form a government, according to them, is to enable these rights to be protected and fostered.[7] Social contract,[8] which is traceable to the origin of the society itself, is based on a concept of natural law, that is rational and unalterable. The right conferred by natural law is considered to be something to which every human being

4. For details on brief history of fundamental rights, see AS Hassan, 'Derogatory Provisions on Fundamental Human Rights: A Perspective from Nigeria's 1999 Constitution' (2003) 6 *The University of Maiduguri Law Journal* (UMLJ) 99-100.
5. See *Ibid.*
6. *Ibid.*
7. *Ibid*
8. *Note* that the major social contract theorists are: Thomas Hobbes; Jean Jacque Rousseau; and John Locke. For details on their views, see WT Jones, Masters of Political Thought: Machiavelli to Bentham (London: vol 2, G Harrap and Co. Ltd. 1947); L Strauss and J Cropsey (ed.) History of Political Philosophy (Chicago: R McNally and Co. 1963); and R Nisbet, The Social Philosophers: Comment and Conflict in Western Thought (London: Heinemann Education Books Ltd. 1974), quoted in AE Abuza, 'Environmental Law: Post-Rio Discussions on Environmental Protection – A Reflection,' BC Nirmal and RK Singh (eds.) *Contemporary Issues in International Law – Environment, International Trade, Information Technology and Legal Education* (New Delhi - 11002: Satish Upadhyay, Satyam Law International, 2014) 106.

is entitled by virtue of the fact of being human and rational. [9]

In the case of America, the adoption of the principle of natural rights was influenced by Coke's Commentaries on Magna Carta and Blackstone's Commentaries. Blackstone, for one, postulates that the absolute rights of Englishmen are: right to personal security; right to liberty; and right to private property. At the time of independence from Britain in 1776, many Americans had fully embraced the notion of natural rights. It was, therefore, not a surprise that the United States Declaration of Independence in 1776 states that: 'all men are created equal and among their inalienable rights are the rights to life, liberty and pursuit of happiness.'

The USA and other powerful nations of the world worked assiduously to ensure that these inalienable rights of man received recognition and respect at the international level. One major outcome of the efforts of these powerful countries in this regard was the Universal Declaration of Human Rights which was proclaimed on 28 December 1948 by the United Nations General Assembly. This was followed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 which was drawn up in Rome. Africans came up with their own version of the declaration of human rights. This can be seen in the African Charter on Human and Peoples' Rights of 1981 (African Charter) which was adopted in Banjul. It is significant to note that the African Charter enjoined state-Parties to the Convention to enact local legislation to, give effect to or domesticate, the provisions of the Charter in their various countries.

With regards to the history of fundamental rights in Nigeria, it should be recalled that about the time of Nigeria's independence some minority ethnic groups had expressed the fear of domination by the majority ethnic groups. This prompted the British Colonial Government of Nigeria to set-up the Willink's Commission to examine the matter. The Commission found that the fear was genuine and consequently recommended that provisions on fundamental rights be entrenched in the 1960 Independence Constitution of Nigeria. This recommendation was warmly embraced and accordingly provisions on fundamental rights were entrenched in the Constitution of the Federation of Nigeria 1960. [10] The provisions, as stated above, were later entrenched in the 1979 and 1999 Constitutions. Specifically, the provisions on fundamental rights are entrenched in chapter IV of the 1999 Constitution. A vital point to make at this juncture is that the entrenchment of the provisions on fundamental rights in the Constitution is not peculiar to Nigeria. It is in consonance with what obtains in other countries, including South Africa, Zimbabwe, Ghana, Tanzania

9. See Hassan, see above *note* 7, 100.
10. See The Constitution of the Federation of Nigeria 1960, sections 17 – 28.

and India. [11] In Nigeria, there is double guarantee for fundamental rights, that is, by the provisions in chapter IV of the 1999 Constitution and provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act [12] enacted in tune with section 12(1) of the 1999 Constitution by the National Assembly of Nigeria a state-Party to the Charter in a bid to domesticate the provisions of the African Charter as enjoined by its provisions. In the Nigerian case of *General Sanni Abacha and Three Others v Gani Fawehinmi,* [13] the Supreme Court of Nigeria held that the Act above being a statute with international flavour is superior to any other Nigerian Act. According to the apex court, where there is a conflict between the Act above and another statute, its provisions would prevail over those of that other statute for the reason that it is presumed that the legislature did not intend to breach an international obligation.[14] In this way, no Act of the National Assembly of Nigeria can take away from Nigerians the rights guaranteed by the African Charter.

IV. FUNDAMENTAL RIGHTS UNDER THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999

The Fundamental rights guaranteed to all citizens of Nigeria under chapter IV of the 1999 Constitution are as follows:

(a) Right to freedom of expression and the press This right is guaranteed under section 39 of the 1999 Constitution.

(b) Right to peaceful assembly and association The right is guaranteed under section 40 of the 1999 Constitution. It states as follows:

> Every person shall entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests: provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with

11. See Constitution of the Republic of South Africa 1996, chapter II or sections 7-39; Constitution of Zimbabwe, Amendment (No.17) Act 2005, sections 11- 26; Constitution of Ghana 1992, Articles 12 - 30; Constitution of Tanzania 1977 as amended by Act No. 1 of 2005, Articles 12 -30; and The Constitution of India 1949, Articles 12 - 31.
12. Cap 10 LFN 1990 (now Cap A9 LFN 2004). It came into force on 17 March 1983.
13. [2000] 6 Nigerian Weekly Law Reports (NWLR) (part 660) 228, 251.
14. For a similar decision, see the Nigerian Court of Appeal decision in *Inspector General of Police v All Nigeria Peoples Party and 11 Others* [2007] 18 Nigerian Weekly Law Reports (part 1066) 457, 469.

> respect to political parties to which that Commission does not accord recognition.

(c) Right to freedom of movement

This right is guaranteed under section 41 of the 1999 Constitution. Section 41(1) of the 1999 Constitution, specifically, provides that:

> Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto or exit therefrom.[15]

V. THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999: THE ISSUE OF DEROGATION FROM FUNDAMENTAL RIGHTS

The relevant provision here is section 45 of the 1999 Constitution which deals with restriction on and derogation from fundamental rights. It states as follows:

> (1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society-
> **(a)** in the interest of defence, public safety, public order, public morality or public health; or
> **(b)** for the purpose of protecting the rights and freedom of other persons.

The approach of the Nigerian Constitution is in accord with international instruments. A note worthy international instrument here is the African Charter. It makes the exercise of the right to assemble freely with others subject to necessary restrictions provided for by law, in particular those enacted in the interest of national security,

15. Other fundamental rights under the Constitution of the Federal Republic of Nigeria 1999 are the: right to private and family life guaranteed under section 37 of the 1999 Constitution; right to freedom of thought, conscience and religion guaranteed under section 38 of the 1999 Constitution ; right to life guaranteed under section 33(1) of the 1999 Constitution; right to dignity of human person guaranteed under section 34(1) of the 1999 Constitution; right to personal liberty guaranteed under section 35(1) of the 1999 Constitution; right to fair hearing guaranteed under section 36(1) of the 1999 Constitution; right to freedom from discrimination guaranteed under section 42 of the 1999 Constitution; right to acquire and own immovable property anywhere in Nigeria guaranteed under section 43 of the 1999 Constitution; and right to payment of compensation upon compulsory acquisition of property guaranteed under section 44 of the 1999 Constitution.

the safety, health, ethics and rights and freedoms of others.[16] In a similar vein, the approach of the Nigerian Constitution is in consonance with what obtains in other countries, including India, [17] Ghana, [18] Tanzania [19] and South Africa.[20]

It should be noted that the provisions of section 45 (1) of the 1999 Constitution, ensure that laws made by the Legislature in Nigeria which restrict or derogate from any of the fundamental rights guaranteed in sections 37,38,39,40 and 41are not invalidated on ground of being unconstitutional where they are reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons. This implicates that none of the fundamental rights guaranteed in the foregoing sections is absolute but a qualified right which can be derogated from in accordance with section 45(1) of the 1999 Constitution. [21]

The words to emphasise in relation to the fundamental rights that can be derogated from under section 45(1) of the 1999 Constitution are the terms-'defence', 'public safety', 'public order', 'public morality' and 'public health'. Rather unfortunately, the Nigerian Constitution does not provide in its section 45 or any other provision the meaning of the terms above in relation to the intendment of the framers of the Nigerian Constitution under section 45 above. It is submitted that the terms above are nebulous. A vital question to ask here is: can the provisions of the 1999 Constitution be of assistance in determining whether a law made pursuant to section 45(1) above is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health? The answer is in the negative. What can be safely postulated is that the provisions of section 45(1) above are tantamount to the conferment of dictatorial and wide discretionary powers on the law-making authorities in Nigeria as the definition of what is in the 'interest of defence, public safety, public order, public morality or public health' can

16. See Article 11 of the African Charter on Human and Peoples' Rights, 1981.
17. See Constitution of India 1949, Article 19(2) - (5).
18. See Constitution of Ghana 1992, Articles 21(4), 24(4) & 31.
19. See Constitution of Tanzania 1977 as amended by Act No.1 of 2005, Article 30.
20. See Constitution of the Republic of South Africa 1996, section 36.
21. See, for example, the Nigerian case of *The Registered Trustees of National Association of Community Health Practitioners of Nigeria v Medical and Health Workers Union of Nigeria* [2008] 2 Nigerian Weekly Law Reports (part 1072) 575, 584 where the Supreme Court of Nigeria held that the freedom of association guaranteed under the Nigerian Constitution is not absolute but a qualified right which can be derogated from in accordance with section 45 of the 1999 Constitution. See also the decision of the Supreme Court of Nigeria in *Erasmus Osawe and 2 Ors v Registrar of Trade Unions* [1985] 1 Nigerian Weekly Law Reports (part 4) 755, 756 decided under the 1979 Constitution whose section 41 (1) is similar in wording to the provisions of section 45(1) above.

only be provided by the Legislature and the Executive which are the potential defendants in an action alleging contravention of the rights envisaged in section 45(1) above. Its provisions are susceptible to abuse since there is no clear yardstick in the Nigerian Constitution to determine whether a law made pursuant to the same is reasonably justifiable in a democratic society in the circumstances mentioned in section 45(1) (a) above. Akanle rightly criticises the conferment of wide discretionary powers on public officers.[22] It is submitted that the lacuna, as indicated above, has further compounded the work of the regular courts which are constitutionally empowered to protect or safeguard or uphold the provisions of the Constitution on fundamental rights against any infraction by the Legislature or any other body or citizen of Nigeria. This power of the regular courts, as stated above, is derived from two main sources, that is, the court's power of judicial review and the provisions of section 46 of the 1999 Constitution.

On the first main source, it should be pointed out that in the Nigerian case of *Lakanmi v Attorney-General of the Federation,*[23] the Supreme Court of Nigeria held that the courts are the exclusive agency for the determination of justifiable controversies between citizens and the State and that the legislative enactments or Edicts cannot intrude upon the court's exercise of that judicial responsibility. This principle was incorporated into the 1979 Constitution and permanently retained in the 1999 Constitution.

Hassan states that section 6 of the 1999 Constitution provides that the exercise of legislative powers is subject to the jurisdiction of the courts and that the Legislature has no power to enact a law which purports to oust the jurisdiction of the courts. [24] The learned author is not correct. It is submitted that the correct authority for the assertion above is section 4(8) of the 1999 Constitution. Today, as the law stands in Nigeria, the 1999 Constitution is the supreme law of Nigeria.[25] Any law which is inconsistent with any of its provisions is void to the extent of its inconsistency [26] and the courts are constitutionally empowered to so declare. [27]

On the second main source, it can be seen that section 46 of the 1999

22. O Akanle, 'Pollution Control Regulation in Nigerian Oil Industry' published as *Occasional Paper 16* by Nigerian Institute of Advanced Legal Studies, Lagos 1991 14.
23. [1974] East Central State Law Reports (ECSLR) 713.
24. Hassan, see above note 9, 107.
25. See 1999 Constitution, section 1(1).
26. *Ibid.,* section 1(3). See also Efunwape Okulate v Gbadamasi Awosanya [2000] Federation Weekly Law Reports (FWLR) (part 25) 1666, 1671; *Attorney-General of Abia State v Attorney-General of the Federation [2002] 6* Nigerian Weekly Law Reports *(part 763) 264; and National Union of Electricity Employees and Anor v Bureau of Public Enterprises* [2010] 7 Nigerian Weekly Law Reports (part 1194) 538.
27. See 1999 Constitution, section 315 (3) (d).

Constitution bestows on the High Courts, namely, the Federal High Court, the State High Court and the High Court of the Federal Capital Territory, Abuja the original jurisdiction to hear and determine any application made for the purpose of enforcing any of the fundamental rights constitutionally guaranteed to all citizens of Nigeria. It has been stated earlier that the lacuna above is being misused by the law-making authorities in Nigeria as they have made numerous laws which derogate from the fundamental rights guaranteed to all citizens of Nigeria in sections 37, 38, 39, 40 and 41 of the 1999 Constitution for the selfish or vested interest of Nigerian leaders under the guise of acting in the interest of defence or public safety or public order or public morality or public health.

A pertinent point to underscore here is that most of the enactments on derogation from fundamental rights are predicated on the fundamental right to peaceful assembly and association guaranteed under section 40 of the 1999 Constitution.

VI. ANALYSIS OF CASE LAW ON DEROGATION FROM FUNDAMENTAL RIGHTS

The courts in Nigeria have discussed the issue of derogation from fundamental rights under section 45(1) (a) of the 1999 Constitution in a plethora of cases. It suffices to consider only a few of such cases under the fundamental rights below.

(a) Right to freedom of movement

To start with, the case of *FRA Williams v MA Majekodunmi* [28] is one important Nigerian case in point. In that case, the plaintiff a prominent member and legal adviser of the political party known as Action Group was served a Restriction Order dated 29 May 1962, which the defendant made ordering the plaintiff to be and remain within a distance of three miles from Number 193 Abeokuta Road in the township of Abeokuta. This followed a declaration of State of Emergency in the Western Region by the Federal parliament of Nigeria on 29 May 1962 in the exercise of its powers under the Constitution of the Federation of Nigeria 1960 and the consequent appointment of the defendant to administer the Region as Administrator for the duration of the period of emergency as delineated in a series of Regulations issued under the Emergency Powers Act, 1961.

The Emergency Powers (Restriction Orders) Regulations 1962 which was one of the Regulations so approved empowers the defendant as Administrator, in his name, to cause Restriction Orders to be issued and to be served upon individuals restricting their movements to an area or areas defined in the Restriction Order. The declaration of the State of Emergency was prompted by the crisis in the Action

28. (No.3) [1962] All Nigeria Law Reports (ANLR) 410, 426-427.

Group brought about by the expulsion of Samuel Ladoke Akintola a prominent member of the Action Group and then Premier of the Region by the National Executive of the Party and purported removal of Akintola as premier by the governor of the Region.

A suit was instituted by the plaintiff against the defendant in the Federal Supreme Court under the original jurisdiction of the Federal Supreme Court as provided by the Emergency Powers (Jurisdiction) Act 1962. The Plaintiff sought, among other things, a declaration that the Emergency Powers (Restriction Orders) Regulations 1962 was ultravires, illegal, unconstitutional and void to the extent that it authorised the defendant therein referred to serve or cause restriction orders to be served on the plaintiff.

Section 26 (1) and (2) of the Constitution of the Federation of Nigeria 1960 was one of the relevant provisions considered by the Federal Supreme Court. Section 26(1) of the Constitution of the Federation of Nigeria 1960 is now section 41(1) of the 1999 Constitution. Section 26 of the Constitution of the Federation of Nigeria 1960 states as follows:

> 1) Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof; and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereto.
> 2) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society-
> a) restricting the movement or residence of any person within Nigeria in the interest of defence, public safety, public order, public morality or public health, etc.

Justice Baramian, FJ delivering the leading judgment of the Federal Supreme Court, to which the other three Justices in the case concurred, upheld the fundamental right of the plaintiff to the freedom of residence and movement as guaranteed under section 26(1) of the Constitution of the Federation of Nigeria 1960. His Lordship set aside the Restriction Order of 29 May 1962 on the ground that it was not reasonably justifiable in a democratic society in the interest of public order. The decision of the Federal Supreme Court in the case above is acceptable.

(b) Right to freedom of expression and the press

The Nigerian case of *Arthur Nwankwo v The State* [29] is another case in point. In that case, the appellant/accused was tried by an Anambra State High Court in

29. [1985] 6 Nigerian Constitutional Law Reports (NCLR) 228, 237.

Onitsha summarily for the offences of 'Publishing seditious publication,' and 'Distributing seditious publications' both counts under section 51(1)(c) of the Criminal Code Law Chapter 30 Laws of Eastern Nigeria, 1963 applicable to Anambra State. The appellant/accused had published a book titled 'HOW JIM NWOBODO RULES ANAMBRA STATE' which was alleged to have contained matters which were seditious against the person of the Governor of Anambra State Jim Ifeanyichukwu Nwobodo and the Government of Anambra State of Nigeria. The trial Judge, FO Nwokedi, J convicted the appellant/accused on both counts on the charge and sentenced him to 12 months imprisonment with hard labour and fifty naira (₦) fine, respectively. Being aggrieved with the judgment of the trial judge, the appellant/accused appealed to the Court of Appeal. Sections 36 of the 1979 Constitution (now section 39 of the 1999 Constitution) and 41(1) (a) of the 1979 Constitution (now section 45 (1) (a) of the 1999 Constitution) were among the relevant provisions considered by the Court of Appeal.

Justice Salihu Modibbo Alfa Belgore, JCA delivering the leading judgment of the Court of Appeal, to which the other two Justices in the case concurred, allowed the appeal of the appellant/accused. His Lordship upheld the right of the appellant/accused to the freedom of expression as guaranteed under section 36 of the 1979 Constitution and entered a verdict of discharge and acquittal on the two counts in setting aside the conviction and sentence passed by the trial judge. The learned Justice Belgore held that:

> It is my view that section 50(2), and section 51, and section 52 which covers them are inconsistent with the provisions of section 36 and section 41 of the Constitution 1979 and are by implication repealed from 1st day of October 1979. There is no ban in the Constitution 1979 against publication of truth except for the provisos and security necessities embodied in those sections. If a publication is false news with intent to cause fear and alarm in public there is section 59 of the Criminal Code to cover it. If a person feels defamed there is the civil remedy of suing for libel or slander. There are also provisions in chapter XXXIII of the Criminal Code Law as to criminal defamation-see section 374 thereof.

The decision of the Court of Appeal in the case above is acceptable.

(C) Right to peaceful assembly and association

The Inspector General of Police v All Nigeria Peoples Party and 11 Others [30] is another case in point. In that case, the respondents/plaintiffs being registered political parties in Nigeria requested the appellant/defendant, by a letter dated 21 May 2004, to issue police permit to their members to hold unity rallies throughout the country to protest the rigging of the 2003 elections pursuant to the provisions of the Public Order Act Chapter 382 Laws of the Federation of Nigeria 1990, particularly sections 1(2), (3), (4), (5) and (6), 2,3 and 4 which require, among other things, police permit before rallies are held in Nigeria. The request was refused. Nevertheless, a rally was held in Kano on 22 September 2003. It was violently disrupted by the police on the ground that no police permit was obtained for it. The respondents/plaintiffs instituted an action at the Federal High Court, Abuja by way of originating summons against the appellant/defendant claiming, among other things, certain declaratory reliefs. The reliefs claimed by the respondents/plaintiffs were granted by the trial Court. It declared, among other things, that the provisions of the Public Order Act Cap 382 Laws of the Federation of Nigeria, 1990 which require police permit or any other authority for the holding of rallies or processions in any part of Nigeria was illegal and unconstitutional as they contravened section 40 of the 1999 Constitution and Article 7 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap10 Laws of the Federation of Nigeria, 1990. Aggrieved by the Judgment, the appellant/defendant appealed to the Court of Appeal. Justice Olufunlola Oyelola Adekeye, JCA delivering the leading Judgment of the Court of Appeal, to which the other two Justices in the case concurred, dismissed the appeal of the appellant/defendant. His Lordship, while affirming the decision of the lower court, considered the provisions of the Public Order Act, particularly that which require conveners of meetings or political rallies to obtain police permit in the exercise of their constitutional rights to freedom of expression and assembly guaranteed by sections 39 and 40 of the 1999 Constitution, respectively - not to be a law reasonably justifiable in a democratic society under section 45(1) of the 1999 Constitution. The learned Justice Adekeye held that section 1(2), (3), (4), (5) and (6) and sections 2,3and 4 of the Public Order Act were inconsistent with the 1999 Constitution and therefore they were null and void to the extent of their inconsistency. Justice Adekeye went further to declare that:

> Public Order Act should be promulgated to compliment sections 39 and 40 of the Constitution in context and not to stifle or cripple it. A rally or placard carrying demonstration has become a form of expression of

30. [2007] 18 Nigerian Weekly Law Reports (part 1066) 457, 479, 480, 495, 499-500.

> views on current issues affecting government and the governed in a sovereign state. It is a trend recognised and deeply entrenched in the system of governance in civilised countries-it will not only be primitive but also retrogressive if Nigeria continues to require a pass to hold a rally. We must borrow a leaf from those who have trekked the rugged path of democracy and are now reaping the dividend of their experience.

The decision of the Court of Appeal above is acceptable.[31] Nigeria should emulate the practice in some other countries like the United Kingdom (UK) where the law has not empowered the police to ban rallies or protests or meetings held without

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31. A related matter is the issue of the ban placed on the 'Bring Back Our Girls' group not to hold rallies, protests and demonstrations over the abducted Chibok Secondary School girls by a police officer. It should be recalled that on 2 June 2014 the 'Bring Back Our Girls' group had instituted an action in the High Court of the Federal Capital Territory, Abuja against Joseph Mbu the then Commissioner of Police, Federal Capital Territory, Abuja for allegedly banning protests, rallies and demonstrations over the abducted Chibok Secondary School girls by the dreaded Islamic sect called Boko Haram. In a judgment of the High Court of the Federal Capital Territory, Abuja delivered on 30 October 2014, the trial judge Justice Sunday Aladetoyinbo held that the defendant was in breach of the 1999 Constitution when he banned the group from holding peaceful rallies. His Lordship declared that the right to freedom of association and assembly was the bone of any democratic governance and that such right was a constitutionally defined and guaranteed right nobody had any authority to breach. See *The Guardian* (Lagos, 31 October 2014) 6. The judgment of the High Court of the Federal Capital Territory, Abuja is acceptable. Note also the recent Nigerian case of *Centre for Social Justice, Eze Onyekpere and Five Others v Inspector General of Police, Commissioner of Police, Federal Capital Territory, Abuja, Ministry of Police Affairs and The Police Service Commission (unreported) Suit No. CV/1624/2013* where the applicants had filed an application before an Abuja High Court seeking for the enforcement of their fundamental rights against the respondents. In his judgment, the trial judge Justice Hussein Baba-Yusuf held that the violent disruption of the applicants' meeting and peaceful rally or assembly at the Millennium Park in Abuja on 21 November 2013 by armed officials of the respondents was a wanton violation of the applicants' fundamental rights guaranteed by section 40 of the Constitution of the Federal Republic of Nigeria 1999, as amended.' His Lordship held further that the action of the armed officials of the respondents in forcefully preventing the applicants from marching to the National Assembly to lodge their complaint was a violation of the applicants' right to freedom of movement as enshrined in section 41 of the 1999 Constitution. See *Vanguard* (Lagos, 29 December 2015) 9. This decision is also acceptable.

police permit or license.[32]

The *Independent National Electoral Commission and Another v AbdulKadir Balarabe Musa (for and on behalf of Peoples' Redemption Party) and Four Others* [33] is another Nigerian case in point. In that case, the respondents/ plaintiffs were associations which sought registration as political parties. The respondents/plaintiffs each applied to the 1st appellant/defendant for registration as a political party. On 17 May 2002, the 1st appellant /defendant released guidelines for the registration of political parties. Being of the view that certain guidelines, including guideline 5b were inconsistent with the provisions of the 1999 Constitution and that they should not be made to comply with the guidelines, the respondents/ plaintiffs instituted an action in the Federal High Court, Abuja by way of originating summons whereby they sought, among other things, declarations of invalidity of those impugned guidelines and also of certain sections, including section 79(2) (c) of the Electoral Act 2001. The section states that a person shall not be eligible to be registered as a member of a political party, if he is a member of the Public Service or Civil Service of the Federation, a State or Local Government or Area Council as defined by the Constitution. While Guideline 5(b), which is hinged on section 79(2)(c) above, stipulates that a person shall not be eligible to be registered as a member of political association seeking to be registered as a political party if he or she is in the Civil Service of the Federation or of a State.

The trial Court granted only a few reliefs of the respondents/plaintiffs. Both the respondents/plaintiffs and the 1st appellant/defendant were dissatisfied with the decision of the trial Court and they appealed and cross-appealed, respectively to the Court of Appeal. In its judgment, the Court of Appeal allowed the appeal of the respondents/plaintiffs and dismissed the cross-appeal of the 1st appellant/defendant. The appellants/defendants were dissatisfied with the decision of the Court of Appeal and they appealed to the Supreme Court of Nigeria. Justice Emmanuel Olayinka Ayoola, JSC delivering the leading judgment of the Supreme Court of Nigeria, to which the other six Justices in the case concurred, allowed the appeal of the appellants/defendants in part but upheld substantially the judgment of the Court of Appeal. His Lordship held, among other things, that section 79(2) (c) of the Electoral Act 2001 was invalid because it was inconsistent with section 40 of the 1999 Constitution. Regarding section 45(1) (a) of the 1999 Constitution, the learned Justice Ayoola declared as follows:

32. See, for example, the British Public Order Act 1986. Note that all that is required under this Law is to give six days notice in advance to the police so as to make adequate security arrangement for the protesters or conveners of public meetings. British Public Order Act 1986, section 11(1) & (3).

33. (2003) 3 Nigerian Weekly Law Reports (part 806) 72, 161.

> There is nothing reasonable justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health in prohibiting a member of the Public Service or Civil Service of the Federation, a State or Local Government or Area Council from eligibility to be registered as a member of a political party. The submission that the restriction is a valid derogation from section 40 by virtue of section 45(1) (a) of the Constitution was erroneous.

The decision of the Supreme Court of Nigeria in the case above is acceptable.

A Nigerian case that is also in point is *Erasmus Osawe and Two others v Registrar of Trade Unions*.[34] In that case, the appellants/plaintiffs applied to the Registrar of Trade Unions for the registration of a trade union called 'The Nigerian United Teaching Services Workers Union' otherwise called 'The Nigerian Administrative Staff Union of Primary and Post Primary School in 1980. The Registrar of Trade Unions refused to register the trade union on the ground that there was in existence a trade union, namely, Non-Academic Staff Union of Educational and Associated Institutions which sufficiently catered for the interests of members of the proposed union. The Registrar of Trade Unions relied on the provisions of section 5(5) of the Trade Unions Act 1973 [35] and section 3(2) of the Trade Unions Act as amended by the Trade Unions (Amendment) Decree of 1978.[36] Section 3 of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978, specifically, provides that:

(1) An application for the registration of a trade union shall be made to the Registrar in the prescribed form and shall be signed-
   (a) in the case of a trade union of workers, by at least fifty members of the union; and
   (b) in the case of a trade union of employers, by at least two members of the union.

(2) No combination of workers or employers shall be registered as a trade union save with the approval of the Commissioner[37] on his

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34. [1985] 1 Nigerian Weekly Law Reports (part 4) 755, 762-763.
35. Act No. 31 of 1973 promulgated under the military administration of Lieutenant-Colonel Jack Yakubu Gowon. It sought the legal regulation of trade unions for the first time in Nigeria.
36. No. 22 of 1978 promulgated under the military administration of General Olusegun Obasanjo with effect from 3 August 1977. It was later known as the Trade Unions (Amendment) Act No.22 of 1978.
37 The Commissioner is now the Minister of Employment, Labour and Productivity.

> being satisfied that it is expedient to register the union either by regrouping existing trade unions, registering a new trade union or otherwise however; but no trade union shall be registered to represent workers or employers in a place where there already exists a trade union.

The appellants/plaintiffs appealed to a State High Court in, Benin-City against the decision of the Registrar of Trade Unions and sought an order of the Court compelling the Registrar of Trade Unions to register the proposed union. The order was granted whereupon the respondent/defendant appealed to the Court of Appeal against the order of the State High Court above. The Court of Appeal allowed the appeal of the respondent/defendant and set aside the order of the State High Court above. Being dissatisfied with the decision of the Court of Appeal, the appellants/plaintiffs appealed to the Supreme Court of Nigeria. Justice Boonyamin Oladiran Kazeem, JSC delivering the leading judgment of the Supreme Court of Nigeria, to which the other four justices in the case concurred, dismissed the appeal of the appellants/plaintiffs. The learned Justice Kazeem stated that it was not disputed that the fundamental right enshrined under section 37 of the 1979 Constitution (now section 40 of the 1999 Constitution) for freedom of association as trade unions was subject to the derogation set out in section 41(1) (a) of the 1979 Constitution (now section 45(1) (a) of the 1999 Constitution). Hence, according to His Lordship, section 37 of the 1979 Constitution was not absolute as it could not invalidate any law that was reasonably justifiable in a democratic society 'in the interest of defence, public safety, public order, public morality, or public health'. Justice Kazeem, specifically, held that section 3(2) of the Trade Unions Act as amended by the Trade Unions (Amendment) Act 1978 did not contravene section 37 of the 1979 Constitution and that it was a law reasonably justified in a democratic society. According to the learned Justice of the Supreme Court of Nigeria, prior to the re-organisation of trade unions carried out in 1978 by the Federal Military Government under Obasanjo:

> … the position of registered trade unions in this country, was rather chaotic; and there was a proliferation of some 800 different registered trade unions with varied objectives and aspirations. It was in order to correct that situation and to bring sanity to the organizations, that the Federal Military Government in order to maintain public order and good government embarked upon the exercise of restructuring all registered trade unions as set out in the Nigeria Official Gazette No. 6 volume 65 of 8th February, 1978. That exercise

> culminated in the recognition and registration of some 71 Industrial Trade Unions as contained in schedule 3 of the Trade Unions (Amendment) Act 1978. Consequently, the registrations of all the other registered trade unions were cancelled. Among those cancelled was the union of Administrative Staff of Mid-West College which is another name for the proposed union.

The decision of the Supreme Court of Nigeria above was followed in another Nigerian case in point, that is, *The Registered Trustees of National Association of Community Health Practitioners of Nigeria and Two Others v Medical and Health Workers Union of Nigeria.*[38] In that case, the 1st appellant/applicant an Association registered with the Corporate Affairs Commission as an incorporated trustee under Part C of the Companies and Allied Matters Act 1990 [39] applied to the 2nd appellant /respondent, that is , Minister of Employment, Labour and Productivity for registration as a Senior Staff Professional Association. The 2nd appellant/respondent directed the 1st appellant/applicant to the 3rd appellant/ respondent, which directive the 1st appellant/applicant complied with. The 3rd appellant/respondent subsequently refused to register the 1st appellant/applicant as a trade union and as a result the 1st appellant/applicant instituted an action against the 2nd and 3rd appellants/respondents at the Federal High Court, Ilorin by way of application for judicial review seeking, among other things, an order of certiorari, mandamus and declaration against the 2nd and 3rd appellants/respondents.

The trial Court granted the application and held that the 1st appellant/ applicant was entitled to the reliefs sought, including an order of mandamus to compel the 3rd appellant/respondent to register the 1st appellant/applicant as a trade union. Being aggrieved with the decision of the trial Court, the 2nd and 3rd appellants/respondents appealed to the Court of Appeal, which allowed the appeal. It set aside the decision of the trial Court. Aggrieved by the decision of the Court of Appeal, the 1st appellant/applicant appealed to the Supreme Court of Nigeria. The 2nd and 3rd appellants/respondents also appealed to the Supreme Court of Nigeria against the finding of the Court of Appeal that the International Labour Organisation Conventions 87 and 98 were not justiceable in Nigeria having not been enacted into law by the National Assembly of Nigeria. Justice Aloma Mariam Mukhtar, JSC delivering the leading judgment of the Supreme Court of Nigeria, to which the

38 The Registered Trustees of National Association of Community Health Practitioners of Nigeria and Two Others v Medical and Health Workers Unions of Nigeria, see above note 21, 609 – 623.

39 Cap 59 LFN 1990 (now Cap C 20 LFN 2004).

other four justices in the case concurred, dismissed the appeals.

The learned Justice Mukhtar found that the circumstances, the facts and the outcome of the Osawe case and the case above as well as appeals at each step of the litigation as they transpired in both cases were the same, with no difference whatsoever, as the 1st appellant/applicant had wanted the Supreme Court of Nigeria to believe, inspite of the minor difference that another union was alleged to have contended with 3rd respondent for the representation of the members of the Association. His lordship considered the provisions of sections 3(1) and (2) and 5(4) of the Trade Unions Act 1990.[40] Section 3(1) of the Trade Unions Act 1990 is the same with section 3(1) of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Act 1978. While section 3(2) of the Trade Unions Act 1990 is the same with section 3(2) of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Act 1978, except that the word 'Minister' instead of the word 'Commissioner' is used in the former enactment. Section 5(4) of the Trade Unions Act 1990 states that:

> The Registrar shall not register the trade union if it appears to him that any existing trade union is sufficiently representative of the interests of the class of persons whose interests the union is intended to represent.

Justice Mukhtar held that there were many materials in the documents before the apex court that confirmed that the 1st appellant/applicant had all long been catered for by a wider and encompassing body, the 3rd respondent. Thus, according to His Lordship, after an investigation, there was no way the 1st appellant/applicant would have been registered in the circumstances. She further held that registration of a trade union was not automatic, such registration being at the discretion of the Registrar of Trade Unions after he would have made his investigations and became satisfied.[41] Furthermore, on the issue whether section 40 of the 1999 Constitution is absolute, the learned Justice of the Supreme Court of Nigeria stated that: 'section 40 of the 1999 Constitution which guarantees the right to freedom of association is not absolute'. In addition to this, His Lordship stated, while disagreeing on the issue that the provisions of sections 3 and 5 of the Trade Unions Act 1990, are inconsistent with, or contravene, the provisions of section 40 of the 1999 Constitution as submitted by counsel to the 1st appellant/applicant, as follows:

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40. Cap 437 LFN 1990 (now Cap T14 LFN 2004).

41. This may be considered to be dictatorial and a clear case of wide discretionary power being conferred by law on the Registrar of Trade Unions. This powers is susceptible to abuse. As indicated before, Akanle criticises the idea of vesting wide discretionary powers on public officers.

> …the provisions of sections 3 and 5 of the Trade Unions Act Cap. 437 Laws of the Federation of Nigeria 1990 are not inconsistent with the provisions of the said section 40 of the 1999 Constitution. Neither do the provisions of the said sections of the Trade Unions Act contravene section 40 of the 1999 Constitution.

To cut matters short, the Supreme Court of Nigeria had relied heavily on its decision in the Osawe's case above. The decisions of the apex court in the two cases above are not acceptable. The writer actually has reservations about the judgments of the Supreme Court of Nigeria in those cases. Without mincing words, it is the writer's considered view that the Supreme Court of Nigeria is wrong for the ensuing reasons. First, it should be re-iterated that the Trade Unions Act 1973 was an enactment made during a military administration. Also, the Trade Unions Act 1990 was a product of military administration. Section 3 of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Act 1978 and sections 3 and 5 of the Trade Unions Act 1990 are aimed at preventing the proliferation of trade unions as it remained during the pre-1978 days or period. During this period there were nearly 1,000 trade unions in Nigeria, many of which were small, weak and divided by struggle for leadership.[42] Worse still, there were no fewer than four Central Labour Organisations which were divided along ideological lines, namely, the 'Marxists' and 'Democrats'.[43] The military authorities certainly did not like this situation.

The distaste for the proliferation of trade unions by the Nigerian military authorities is attributable to certain factors. For instance, it was difficult for the military to control the nearly 1,000 trade unions and the four Central Labour Organisations. This is the main reason why the Obasanjo military administration carried out compulsory re-organisation of trade unions on industrial lines. It resulted in the dissolution of all existing trade unions and substitution of a new list of 70 registered and recognised trade unions in Nigeria.[44] The Registrar of Trade Unions was enjoined to register the Nigeria Labour Congress as the only Central Labour Organisation with the coming into effect of the Trade Unions (Amendment) Decree

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42. O Ogunniyi, *Nigerian Labour* and Employment Law in Perspective (Lagos: Folio Publishers Ltd 1991) 226.
43. *Ibid.*
44 Forty-two of these so called industrial unions were unions of junior employees, 18 unions of senior staff, nine of employers and the Nigerian Union of Pensioners. See EE Uvieghara, *Labour Law in Nigeria* (Lagos: Malthouse Press Ltd. 2001) 330.

22 of 1978 on 3 August 1977. [45]

Perhaps, it should be pointed out that Decree 22 of 1978 not only recognised the Nigeria Labour Congress as the only Central Labour Organisation in Nigeria but also mentioned the 42 industrial unions by name as the only industrial unions in Nigeria and forced to affiliate with the Nigeria Labour Congress.[46] The senior staff associations are statute barred from affiliation with the Nigeria Labour Congress. Danesi argues that the Obasanjo military administration decreed the Nigeria Labour Congress into existence so that it could accomplish its selfish desire to put labour under governmental control.[47]

Also, the thinking of the military authorities was that the more the trade unions the more incessant strikes by the trade unions. During the military era, many of the trade unions embarked upon incessant strikes to press demands from their employers. The military authorities could not accept this situation. It should be placed on record that section 13(1) of the Trade Disputes Decree [48] 1976 and section 30 (6) of the Trade Unions Act 1990 as amended by the Trade Unions (Amendment) Act 2005 have the net effect of banning and criminalising strike actions in Nigeria. The military authorities could have prosecuted an erring trade union or its officials and or members of the same for violation of the provisions of the enactments above. Furthermore, the thinking of the military authorities was that the employer would have difficulties dealing and negotiating with too many trade unions in the work place. Arguably, this problem has been taken care of by section 24(1) of the Trade Unions Act 1990 as amended by the Trade Unions (Amendment) Act 2005 which states that 'for the purpose of collective bargaining all registered unions in the employment of an employer shall constitute an electoral college to elect members who will represent them in negotiations with the employer'. And lastly, it is a fact that Generals in the military, instinctively and by force of habit and training do not seem to like workers and their trade unions whenever they seize political power.[49] The latter are seen to be noisy, asking too many awkward questions, asserting their rights and capable of directing local and international attention to potentially embarrassing socio-political development. [50] The fewer the trade unions the better for the military authorities.

45 See Trade Unions Act 1990, section 33(1) and section 1(1) of the Trade Unions (Amendment) Decree 1978. Section 3 of this Decree gave the Decree retrospective effect.

46 D Otobo, 'The Generals, Nigeria Labour Congress and Trade Union Bill'. < http://www.nigerdeltacongress.com/garticle> accessed 30 January 2012.

47 RA Danesi, 'The Trade Union (Amendment) Act 2005 and Labour Reform in Nigeria: Legal Implications and Challenges', (2007) 1 Nigerian *Journal of Labour Law and Industrial Relations* 97-98.

48 Decree No.7 of 1976. It subsequently became Trade Disputes Act 1976.

49 Otobo, see above note 46.

50 *Ibid*.

In the second place, section 3 of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Act Decree 1978 and sections 3 and 5 of the Trade Unions Act 1990 are inconsistent with section 37 of the 1979 Constitution and section 40 of the 1999 Constitution, respectively. The provisions of sections 37 and 40 above are mandatory with the compulsory 'shall'. On construction of the word 'shall' when used in a statute, the Court of Appeal in the case of *John O Echelunkwo and 90 Others v Igbo-Etiti Local Government Area*[51] stated as follows:

> Whenever the word 'shall' is used in an enactment, it denotes imperativeness and mandatoriness. It leaves no room for discretion at all. It is a word of command; one which always or which must be given a compulsory meaning as denoting obligation. It has a peremptory meaning. It has the invaluable significance of excluding the idea of discretion and imposes a duty which must be enforced.

The approach of the Court of Appeal is in tune with that of the Supreme Court of Nigeria.[52] The only proviso to section 40 of the 1999 Constitution, for instance, restricts the right to freedom of association and the restriction is to the effect that the provision of section 40 would not derogate from the powers of the Independent National Electoral Commission with respect to political parties to which the Commission does not accord recognition. In other words, section 40 above applies only to the political parties which the Independent National Electoral Commission accords recognition. Of course, section 3(1) of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 and section 3(1) of the Trade Unions Act 1990 militate against the enjoyment of the fundamental right of workers to form a trade union for the protection of their interests as guaranteed under sections 37 and 40 of the 1979 and 1999 Constitutions, respectively. Their implication is that where an industry or company has less than 50 workers, the workers of such organisation may not be able to form a trade union for the protection of their interests, as they may not be able to get 50 workers to sign such an application for the registration of their trade union.[53]

Sections 37 and 40 above do not stipulate that a person must procure other 49 persons before he can exercise the right to form a trade union for the protection of his interests. They, infact, vest in every person the right to freely associate with other persons in order to, among other things, form or belong to a trade union

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51 (2013) 7 Nigerian Weekly Law Reports (part 1352) 1, 8.

52 See, for example, the decision of the Supreme Court of Nigeria in *Ifezue v Mbadugha* [1984] 1 Supreme Court of Nigeria Law Reports 427.

53 Otobo, see above note 50.

for the protection of his interests. It is submitted that the provisions of section 3(1) of the Trade Unions Act 1973 as amended by Trade Unions (Amendment) Decree 1978 and Trade Unions Act 1990 are invalid and void on the ground of inconsistency with sections 37 and 40 above. This submission is grounded on the insightful provisions in section 1(3) of the 1979 and 1999 Constitutions. Section 1(1) of the 1979 and 1999 Constitutions declares the Nigerian Constitution to be supreme. While section 1(3) of the 1979 and 1999 Constitutions states that 'if any other law is inconsistent with any of the provisions of the Constitution, the Constitution shall prevail and that other law shall to the extent of its inconsistency be void.'

It should be recalled that the Committee of Experts on the Application of the International Labour Organisation Conventions frowns at the excessively high requirement of 50 workers to form a workers' trade union as contained in section 3 of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 and Trade Unions Act 1990 and has actually demanded its amendment in order to ensure full compliance with Article 2 of the International Labour Organisation Convention concerning the Freedom of Association and Protection of the Right to Organise 1948 (Convention 87).[54] A point to note here is that Nigeria a member of the International Labour Organisation ratified Convention 87, which came into force on 4 July 1950, on 17 October 1960. [55] The Convention is in force in terms of Nigeria's membership of the International Labour Organisation. Nigeria is obligated under section 19(d) of the 1999 Constitution to respect international law and its treaty obligations. Today, Convention 87 now has the effect of being a domesticated enactment as required under section 12 of the 1999 Constitution[56]

54 See *Sunday Vanguard* (Lagos, 9 November 2003) 8.

55 *Ibid*., 17-18.

56 This argument also applies to the International Labour Organisation Convention concerning the Right to Organise and Collective Bargaining 1949 (Convention 98). See *Aero Contractors Company of Nigeria Ltd v National Association of Aircrafts Pilots and Engineers and 2 Ors* [2014] 42 Nigerian Labour Law Reports (part 133) 64, 717 per Kanyip, Judge of the National Industrial Court. It should be noted also that the argument above applies to the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. Both are multilateral treaties adopted by the United Nations General Assembly in 1966. Nigeria has ratified these treaties. Article 22 (1) of International Covenant on Civil and Political Rights provides that everyone has the right to form and to join a trade union for the protection of his interests. While Article 1(a)-(c) of the International Covenant on Economic, Social and Cultural Rights provides that everyone has the right to form and to join a trade union for the protection of his interests. The International Covenant on Economic, Social and Cultural Rights is part of the International Bill of Human Rights along with the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights adopted and proclaimed by the United Nations General Assembly on 10 December 1948.

and therefore, as already indicated, it is superior to an ordinary legislation of the National Assembly of Nigeria such as the Trade Unions Act 1973 as amended by Trade Unions (Amendment) Decree 1978 and Trade Unions Act 1990.

It should be recalled that in 2010 the 1999 Constitution was amended by the National Assembly of Nigeria through The Constitution (Third Alteration) Act 2010 which came into force on 4 March 2011. Section 254C of the 1999 Constitution, as inserted by The Constitution (Third Alteration) Act 2010, deals with the jurisdiction of the National Industrial Court. Subsections 1(f) and (h), and (2) provide thus:

> (1) Notwithstanding the provisions of section 251, 257, 272 and anything contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the National Industrial Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters:-
>
> (f) relating to or connected with unfair labour practice or international best practices in labour, employment and industrial relation matters;
>
> (h) relating to, connected with or pertaining to the application or interpretation of international labour standards;
>
> (2) Notwithstanding anything to the contrary in this Constitution, the National Industrial Court shall have the jurisdiction and power to deal with any matter connected with or pertaining to the application of any international convention, treaty or protocol of which Nigeria has ratified to labour, employment, work place, industrial relations or matters connected therewith.

Section 12 of the 1999 Constitution qualifies as both 'anything contained in this Constitution' in subsection (1) and 'anything to the contrary in this Constitution' in subsection (2).[57] As the law presently stands in Nigeria:

> When the term 'notwithstanding' is used in a section of a statute it is meant to exclude an impinging or impending effect of any other provision of the statute or other subordinate legislation so that the section may

57. *Aero contractors Company of Nigeria Ltd v National Association of Aircrafts Pilots and Engineers*, per kanyip, Judge of the National Industrial Court, *Ibid.,* 680.

fulfill itself. [58]

It is submitted that the use of the word 'notwithstanding' in section 254C (I) (f) and (h) and (2) of the 1999 Constitution as amended is meant to exclude the impending effect of section 12 or any other provision of the Nigerian Constitution. What follows is that as used in section 254C (I) (f) and (h) and (2) of the 1999 Constitution as amended, no provision of the Constitution shall be capable of undermining the said section 254C (I) (f) and (h) and (2).[59]

The discussion above is capable of yielding to the pleasant conclusion that international conventions, such as the International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and International Labour Organisation Conventions 87 and 98 have force of law in Nigeria and can be applied by the National Industrial Court in labour matters having been ratified by Nigeria.

In some other countries, the number of workers required to form a workers' trade union is far less than 50. For instance, under the Labour Act of Ghana 2003, any two or more workers can form a trade union.[60] Again, in Tanzania, any 20 or more workers can form a trade union of workers.[61] It is suggested that Nigeria should stick to the position under the Trade Unions Ordinance of 1938 where any five or more workers can form a trade union of workers.[62] Third, sections 3(2) of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 and 3(2) and 5(4) of the Trade Unions Act 1990 also militate against the enjoyment of the fundamental right of workers to form a trade union for the protection of their interests as guaranteed under sections 37 and 40 of the 1979 and 1999 Constitutions, respectively. The right to, belong or join or form a trade union for the protection of one's interest also include the right not to belong to or join a trade union. Workers should be free to join or belong or form a trade union for the protection of their interests. Where they belong to a trade union in their work place and for one reason or the other they no longer want to be members of that trade

58. See decision of the Supreme Court of Nigeria in *Peter Obi v. Independent National Electoral Commission and Ors* [2007] 11 Nigerian Weekly Law Reports (part 1046) 565, 634-636, per Aderemi, JSC.
59. See *Aero Contractors Company of Nigeria Ltd v National Association of Aircrafts Pilots and Engineers* case, see above note 56.
60. See Labour Act (Act No. 651) of Ghana, 2003, section 80 (1).
61. See Tanzanian Employment and Labour Relations Act (Act No.6) of 2004, section 46 (1)(d).
62. Quoted by Y Noah, 'Trade Union Movement and Workers Emancipation within the Context of Contrasting Political Climate in Nigeria'. <http://www.unilorin.edu.ng/publication/ union.htm> accessed 28 December 2015.

union, the workers should be free to withdraw their membership of that trade union and form another trade union for the protection of their interests. This is consistent with section 12 (4) of the Trade Unions Act 1990 as amended by the Trade Unions (Amendment) Act 2005 which brings back the voluntary principle as it remained in the pre-1978 period to trade union membership in Nigeria. It states thus:

> Notwithstanding anything to the contrary in this Act, membership of a trade union by employees shall be voluntary and no employee shall be forced to join any trade union or be victimized for refusing to join or remain a member.

The approach of the Trade Unions Act 1990 as amended by the Trade Unions (Amendment) Act 2005 is in consonance with what obtains in some other countries. For instance, section 71(b) of the Industrial Relations Act [63] 1972 of Trinidad and Tobago guarantees the right not to be a member of any trade union or other organisation of workers or to refuse to be a member of any particular trade union or other organisation of workers. Additionally, in the case of *Young, James and Webster v The United Kingdom* [64] the right to freedom of association was construed by the European Court to include the right to choose not to belong to a trade union. It is submitted that sections 3(2) of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 and 3(2) and 5(4) of the Trade Unions Act 1990, to the extent that these sections militate against the enjoyment of the fundamental right to freely associate with others and form or join or belong to a trade union for the protection of a citizen's interests, are invalid on ground of inconsistency with sections 37 and 40 of the 1979 and 1999 Constitutions, respectively and therefore void. If authority is sought for this submission, the insightful provisions in section 1 (3) of the 1979 and 1999 Constitutions would suffice. A wise admonition to make here is that due cognisance must be given to the import of the provisions of chapter IV of the 1979 and 1999 Constitutions in which sections 37 and 40 are a part, respectively. Indeed, they are sacrosanct, hence; the procedure for the amendment of the chapter is tedious and difficult as spelt out in section 9(3) of the 1979 and 1999 Constitutions.

Fourth, section 3 of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 and sections 3 and 5 of the Trade Unions Act 1990 conflict with the provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act [65] 1983. Article 10 (1) of the Act, which

63. Cap 88: 01 Laws of Trinidad and Tobago 1972.
64. [1981] IRLR 408.
65. Act No 2 of 1983. It later became Cap10 LFN 1990 and now Cap A 9 LFN 2004. The Act came into force on 17 March 1983.

guarantees the right to free association is mandatory with the compulsory 'shall'. It states thus: 'every individual shall be entitled to free association provided he abides by the Law'. This implicates that citizens of Nigeria are free to associate with others to form a trade union, among other things, for the protection of their interests provided they abide, for example, by the law on strike which prescribes the procedure to be followed in the settlement of trade disputes before any strike can take place.[66] Article 10(2) of the Act above is to the effect that no person shall be compelled to join or belong to or remain a member of a trade union. To the extent that the sections above militate against the enjoyment of the fundamental right to free association with others and join or belong to or form a trade union for the protection of a citizen's interest, they are in conflict with Article 10(1) and (2) of the Act. As already stated, where there is a conflict between a statute with international flavour and an ordinary statute in Nigeria, the provisions of the former would prevail over those of the latter for the simple reason that it is presumed that the Legislature does not intend to breach an international obligation. The Act is a statute with international flavour and therefore the provisions of Article 10 of the Act prevail over those of the Trade Unions Act 1973 as amended by Trade Unions (Amendment) Decree 1978 and Trade Unions Act 1990 above as the latter statutes are ordinary statutes in Nigeria.

Lastly, there is nothing reasonably justifiable in a democratic society neither in the interest of public order nor in the interest of defence, public safety, public morality and public health in preventing the proliferation of trade unions on the ground that a trade union exists in the work place which represents or caters for the interests of those workers seeking to register their own trade union. It is submitted that the decision of the Supreme Court of Nigeria that section 3(2) of the Trade Unions Act as amended by the Trade Unions (Amendment) Decree 1978 (now section 3(2) of the Trade Unions Act 1990) did not contravene section 37 of the 1979 Constitution (now section 40 of the 1999 Constitution) and that it was a law reasonably justified in a democratic society is erroneous. The Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 was certainly not for the maintenance of public order as the apex court seemed to hold.

A note worthy point is that the 'interest of defence' comes into play especially during war times.[67] It must also be interpreted to include 'national security'.[68] In the Nigerian case of *Dokubo Asari v Federal Republic of Nigeria,*[69] which related to

66. See for example, Trade Disputes Act Cap T8 LFN 2004, sections 4 -18.
67. S Tar Hon, *Constitutional Law and Jurisprudence in Nigeria* (Port-Harcourt: Pearl Publishers, 2004) 144.
68 *Ibid.*
69 (2007) 30 Weekly Reports of Nigeria 1.

a charge for treasonable felony under Nigerian criminal law, the court stated that where national security was threatened, or there was the likelihood of it being threatened, human or individual rights would take second place, and must be suspended till national security could be protected or well taken care of. It has been argued elsewhere[70] that:

> The phrase public safety, public order, public morality or health mean the same thing: the rights of other members of the public to conducing living. To that extent, therefore, the phrase should be interpreted together with paragraph (b), which talks of 'protecting rights and freedoms of other persons'.

It can be argued that the connection between the restriction imposed under section 3(2) of the Trade Unions Act 1973 as amended by Trade Unions (Amendment) Decree 1978 and public order is not proximate or direct. Put differently, the prevention of proliferation of trade unions is not proximate or direct to public order. If the reverse was the case then the Nigerian Companies and Allied Matters Act [71] 1990 would not have allowed any two or more persons to form a company in Nigeria.[72] A germane question to ask here is: did the military authorities promulgate a law to prevent the proliferation of companies in Nigeria in the interest of public order? The answer is in the negative. The fact is that companies in Nigeria are unlike the trade unions that are often militant, noisy, always criticising the economic policies of governmental authorities, embarking on incessant strikes at the slightest provocation by the employers of their members and very difficult to be controlled by the military authorities; hence, no such law was promulgated by them.

Chianu, for one, argues that a restriction should be held to be in the interest of the public order only if the connection between the restriction and the public order is proximate and direct.[73] The learned writer concludes that indirect, far-fetched or unreal connection between the restriction and public order would not fall within the purview of the expression in the interest of public order in section 45(1) of the 1999 Constitution.[74]

The phrase 'reasonably justifiable' means reasonable within a democratic society. In the Indian case of *State of Madras v G Row*[75] the respondent / applicant

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70 Tar Hon, see above note 67.

71 Companies and Allied Matters Act Cap 59 LFN 1990 (now Companies and Allied Matters Act Cap C 20 LFN 2004).

72 See Companies and Allied Matters Act 2004, section 18.

73 E Chianu, *Employment Law* (Akure: Bemicov Publication Nigeria Ltd. 2004) 274.

74 *Ibid*.

brought an application in the High Court of Judicature at Madras challenging the declaration by the appellant/respondent that his society called People's Education Society was an unlawful association. Article 19 (1)(c) of the Constitution of India 1949 guarantees to all citizens of India the right to form associations or unions. While Article 19 (4) of the Constitution above states that: 'Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the state from making or imposing, in the interests of public order or morality, reasonably restrictions on the exercise of the right conferred by the said sub-clause'. The appellant/respondent had relied on section 15 (2) (b) of the Criminal Law Amendment Act 1908 as amended by the Criminal law Amendment (Madras) Act 1950, which authorised the Government of the State of Madras to declare an association unlawful in the interest of public order. The Supreme Court of India held that section 15 (2) (b) above fell outside the scope of authorised restrictions under clause (4) of Article 19 and was therefore unconstitutional and void. The Supreme Court of India held further that though no abstract standard or general pattern of reasonableness can be laid down, the nature of the right infringed, the underlying purpose of the restrictions, the extent and urgency of the evil sought to be remedied, disproportion of the imposition and the prevailing conditions at the time must be taken into consideration. Put in another words, the history of the law sought to be impugned, the circumstances surrounding its enactment, its object and the evil it was aimed at preventing must be considered in reaching a conclusion. [76]

Hassan argues that the state must establish that the interference with the freedom of fundamental human rights was prescribed by law.[77] In addition to this, according to the learned author, the state must show that the interference was 'necessary' in a democratic society.[78] In applying this test, the courts have developed the following principles: [79]

i. The adjective 'necessary' is synonymous neither with indispensable' nor with the lower test of 'reasonable' or 'desirable'. What the test connotes is a requirement that the state establishes a pressing social need for the interference.

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75. State of *Madras v V G Row* [1952] All India Reports 196, 199-200 or Supreme Court Reports 597: <http://indiankanooc.org/doc/554839/> accessed 28 December 2015.
76. See *State v Ivory Trumpet Publishing Ltd* (No.2)[1983] 1 Nigerian Criminal Reports 203, 207 which the court considered the Indian case of *Virendra v Punjab* [1958] Supreme Court Reports 308. See also *Inspector General of Police v All Nigeria Peoples Party* and 11 Others, see above note 30, 484.
77. Hassan, see above note 24, 105.
78. *Ibid.*
79. Quoted in *Ibid.*, 105-106

ii. Therefore, it is for the courts to assess whether an interference with the freedom of fundamental human rights exceeds the limit and the necessity for restricting them must be convincingly established.

It is submitted that the Nigerian state had not established a pressing social need for the interference with the right of every person to associate freely with others in order to form a trade union for the protection of his interests in the two cases above. Ofcourse, the interference in the instant cases exceeds the limit as can be discerned from sections 37 and 40 of the 1979 and 1999 Constitutions, respectively. Additionally, the Nigerian state had not convincingly established the necessity for restricting the right above in the two cases above.

The writer does not consider anything fundamentally wrong with the proliferation of trade unions as it is healthy for Nigeria's nascent democracy. Going by section 14(1) of the 1979 Constitution and 1999 Constitution the Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice. Trade unions like political parties are essential organs of the democratic system. Indeed, they are organs of socio-economic discussion and of formulation of ideas, policies and programmes, especially on the social and economic well-being of workers and the citizenry in general.

A noteworthy point here is that a trade union is principally formed for collective bargaining.[80] This can be defined as: '…the process under which rules which will govern employment, wages and conditions of employment are negotiated between employers or association of employers and an organisation of workers or an organisation representing workers'.[81] Negotiation or dialogue is certainly the hallmark of democracy. Without doubt, the plurality of trade unions widens the channel of labour discussion and discourse engenders plurality of labour issues, promotes the formulation of competing ideas, policies and programmes and provides the workers with a choice of forum for participation in governance whether at the level of the corporation or in the nation's governance, thereby ensuring the reality of government by discussion which democracy is all about in the final analysis.

It is submitted that if the members of a trade union have exceeded their bounds or limits in terms of embarking on strike contrary to the statutes on strike the criminal law is there to take care of them.[82] The provisions of the Trade Unions Act 1973 as amended by the Trade Unions (Amendment) Decree 1978 and Trade

80. See section I (1) of the Trade Unions Act, 1990 (now section 1(1) of the Trade Unions Act, 2004).
81. Ogunniyi, see above note 42, 276.
82. Note that both sections 18 (2) of the Trade Disputes Act Cap T8 LFN 2004 and 30 (7) of the Trade Unions Act 1990 as amended by the Trade Unions (Amendment) Act 2005 make it a crime to embark on strike contrary to the provisions of both legislation.

Unions Act 1990-relating to registration of a trade union cannot be used as a camouflage to stifle the citizens' fundamental right to freedom of association under the guise of maintaining public order. To do so, would be undemocratic and against social justice. The right to peaceful assembly and association as guaranteed under sections 37 and 40 of the 1979 and 1999 Constitutions, respectively is to enable citizens, for example, demonstrate and protest on matters of public concern as in the January 9-16 2012 mass protest of workers and other Nigerians under the leadership of the Nigeria Labour Congress and Trade Union Congress over the hike in fuel price from ₦65.00 to ₦141.00 per litre on January 1, 2012.[83] It is a right which is in the public interest and that which individuals must possess and which they should exercise without empediments provided no wrongful act is done.[84] Perhaps, if the learned justices of the Supreme Court of Nigeria, had adverted their minds to the foregoing points they would have come to a different conclusion in the two cases above.

The determination of the veracity of the decision of the Supreme Court of Nigeria in *National Union of Electricity Employees and Another v Bureau of Public Enterprises* [85] which is another case in point is the last issue that would elicit the response of the writer. In that case, the respondent/plaintiff instituted an action in a State High Court in Lagos State against the appellants/defendants (a trade union and its Secretary-General) seeking a declaration that the appellants/ defendants were not entitled to declare and to embark upon any strike action being a body of persons engaged in the provision of an essential service within the meaning of sections 47 of the Trade Disputes Act [86] 1990 and 9(1) of the Trade Disputes

83. Note that the mass protest forced the Federal Government of Nigeria to reduce the pump price of fuel to ₦97.00 per litre. See *The Guardian* (Lagos, 17 January 2012) 1.

84. *Inspector General of Police v All Nigeria Peoples Party and Ors*., see above note 30, 470-471.

85. [2010] 7 Nigerian Weekly Law Reports (part 1194) 539, 546 – 575.

86. Cap 432 LFN1990 (now CapT8 LFN 2004) Essential Services under the Act include the public service of the Federation of Nigeria or of a state which shall include service in a civil capacity of persons employed in an industry or undertakings whose services are consumed by the armed forces, enterprises that supply electricity, power, water, fuel of any kind, workers in sound broadcasting or postal services, telegraphic cable or telephone communications, ports and harbor dock-workers, the Central Bank of Nigeria, the Security, Printing and Minting Company and anybody Licensed to carry-out banking business under the Banking Act. See, section 47(1) of the Trade Disputes Act 1990 (now section 48 (1) of the Trade Disputes Act 2004) which defines essential service to mean any service mentioned in the first schedule to the Trade Disputes Act, 1990.

(Essential Services) Act [87] and for an order of perpetual injunction. The trial Court held that it had no jurisdiction and struck out the respondent/plaintiff's suit. The respondent/plaintiff, being dissatisfied with the decision, appealed to the Court of Appeal. The appellants/defendants cross - appealed on the failure of the trial Court, to pronounce on some issues raised in their notice of preliminary objection. The Court of Appeal allowed the appeal and dismissed the cross-appeal. The appellants/ defendants, still aggrieved, appealed to the Supreme Court of Nigeria. Justice Christopher Mitchell Chukwuma - Eneh, JSC delivering the leading judgment of the Supreme Court of Nigeria, to which the other four justices in the case concurred, dismissed the appeal of the appellants/defendants. His Lordship relied heavily on section 1(1) of the Trade Disputes (Essential Services) Act which authorities the President of Nigeria to proscribe any trade union or association whose members are employed in essential services for acts calculated to obstruct or distrupt the smooth running of any essential service or for failure to comply with the procedure specified in the Trade Disputes Act[88] in relation to the reporting and settlement of trade disputes. The learned Justice of the Supreme Court of Nigeria held that the Trade Disputes (Essential Services) Act was a law reasonably justifiable in a democratic society and made to protect the interest of public safety and order in line with section 45(1)(a) of the 1999 Constitution. He stated that the 1st appellant/ defendant was more or less the sole provider of electricity power a crucial essential service to Nigeria. Justice Chukwuma – Eneh stressed that it is in a bid to checkmate strikes by essential service workers in Nigeria that the Nigerian government enacted the law. The decision of the Supreme Court of Nigeria in the case above is not acceptable. The writer actually has reservations about the judgment of the apex court in that case. Without mincing words, it is the writer's considered view that the Supreme Court of Nigeria is wrong for the ensuing reasons. First, section 1(1) of the Trade Disputes (Essential Services) Act is inconsistent with section 40 of the 1999 Constitution. As pointed out before, the provisions of section 40 above are mandatory with the compulsory 'shall'. The effect of the only proviso to section 40 above has also been indicated before. Of course, section 1 (1) of the Act above militates against the enjoyment of the fundamental right of Nigerian citizens to belong to a trade union or other associations for the protection of their interests as guaranteed under section 40 of the 1999 Constitution. Its implication is that the president can seek sanctuary under section 1(1) above to proscribe a trade union or any other association in the circumstances mentioned in the section above, thus denying the

87. Cap 433 LFN 1990 (now Cap T9 LFN 2004). The definition of essential services in Trade Disputes Act 1990 was repeated verbatim in section 7(1)(a) - (c) of the Trade Disputes (Essential Services) Act 1990.
88. Cap 433 LFN 1990 (now Cap T9 LFN 2004).

members of such a trade union or association the right to belong to a trade union or association for the protection of their interests.

It is worth recalling here that the Act above was first enacted as the Trade Disputes (Essential Services) Decree [89] of 1975 under the military administration of Obasanjo which is an aberration or misnomer and a government that is unconstitutional. During the military rulership of Nigeria, a Decree constituted the fundamental law of the land or grundnorm and prevails over the unsuspended part of the Nigerian Constitution where there is a conflict.[90] But since 29 May 1999 when the military era came to a close and democracy or constitutionalism returned back to Nigeria, the Constitution became the fundamental law or grundnorm of Nigeria. The Act above, which is an existing law and deemed to be an Act of the National Assembly of Nigeria by virtue of section 315(1) (a) of the 1999 Constitution, is invalid or void to the extent of its inconsistency with the 1999 Constitution going by its section 1(3) and the courts are constitutionally empowered to so declare under its section 315 (3) (d). A law such as the Act above should have no place under Nigeria's nascent democracy. The Act in actuality reminds Nigerians of the period of authoritarian and dictatorial rule of the military of the time past when fundamental rights of citizens were trampled upon by the military rulers with reckless abandon and there was no adherence to or respect for the rule of law and constitutionalism. It is a very sad past and certainly a great de-service to the nation or Nigerians for anybody, including the Supreme Court of Nigeria, to remind Nigerians of the activities of the military governments, particularly their obnoxious enactments. Second, section 1(1) of the Trade Disputes (Essential Services) Act conflicts with Article 10(1) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act[91] to the extent that it militates against the

89. Decree No. 23 of 1975.

90. See the decision of the Supreme Court of Nigeria in *Military Governor of Ondo State v Adewumi* [1988] 3 Nigerian Weekly Law Reports (part 82) 280, *293-294* and *Attorney-General of Ekiti State* [2001] 91 Law Reports of Courts of Nigeria 3068, 3067, per Karibi-Whyte, JSC as well as the decision of the Court of Appeal in *Commissioner for Local Government, Rural Development and Chieftaincy Matters (Anambra State) v Ezemuokwe* [1991] 3 Nigerian Weekly Law Reports (part 181) 615, 640, per Chigue, JCA.

91. Note also that section 1(1) of the Trade Disputes (Essential Services) Act conflicts with Article 2 of the International Labour Organisation Convention 87, Article 22(1) of International Covenant on Civil and Political Rights and Article 1(a)-(c) of the International Covenant on Economic, Social and Cultural Rights all international conventions which Nigeria has ratified as disclosed before. They have the effect of being domesticated enactments as required under section 12 of the 1999 Constitution and therefore their provisions prevail over those of the Act above due to the conflict. See also the arguments advanced before on the implication of section 254C (1) (f) and (h) and (2) of the 1999

enjoyment of the fundamental right of citizens to, free association with others and, join or belong to a trade union or any other association for the protection of their interests. As disclosed before, the latter Act prevails over those of the former Act,[92] being a statute with international flavour. In the third instance, section 1(1) of the Trade Disputes (Essential Services) Act confers wide discretionary and dictatorial powers on the president of the Federal Republic of Nigeria, as the same may seek sanctuary under the provisions above to proscribe any trade union or association that is opposed to the unpopular policies of the government such as the hike in the pump prices of petroleum products and mass retrenchment of workers, among other things.

A worthy point to note at this juncture is that in a military regime the conferment of wide discretionary powers on the military ruler is the norm as could be discerned from their various Decrees. Such Decrees can abrogate entirely or amend provisions of the Constitution 'protanto' where they are in conflict and the competence of the Federal Military Government to promulgate them cannot be challenged nor would their validity or invalidity be impugned in any court.[93] But in a democratic set up such as it exists in Nigeria today, where the rule of law and constitutionalism are in place, such authoritarianism and absolutism as embedded in the wide discretionary powers conferred on the president under section 1(1) of the Trade Disputes (Essential Services) Act have no place to hide.

Constitution as amended by The Constitution (Third Alteration) Act 2010 and the decision of the Nigerian National Industrial Court in *Aero contractors Company of Nigeria Ltd v National Association of Aircrafts Pilots and Engineers,* per Kanyip, J, see above note 57.

92. It can be argued that the lack of adherence to or respect for the rule of law and constitutionalism made the international community not to accord recognition to a military government anywhere in the world. It should be recalled that on 18 September 2015, the Presidential guard of Burkina Faso sacked the interim president of that country Michel Kafando in a military coup d' tat which produced General Gilbert Diendere, head of the Presidential guard as head of state. The coup was greeted by mass protest of citizens of that country. It was the Economic Community of West African States (ECOWAS) supported by African Union (AU) and other members of international community that finally persuaded Diendere to step down from office. Burkina Faso will be a reminder that coups or military intrusion can no longer be tolerated in West Africa. It is a strong signal to send coup makers home empty handed. Diendere is the third leader removed from power in disgrace. Others are Dadis Gamara of Guinea and Amadou Sanogo of Mali. All these show that democracy has promising days ahead in the region. <http:// www.theguardian.com/ world/2015/sep/25/Burkina-Faso-foiled-military-coup> accessed 11 October 2015.
93. See the decision of the Supreme Court of Nigeria in *Military Government of Ondo State v Adewumi,* see above note 90.

Lastly, there is nothing reasonably justifiable in a democratic society for the maintenance of public safety and public order in empowering the president to proscribe any trade union or association whose members are employed in essential services in the circumstances mentioned in section 1(1) of the Trade Disputes (Essential Services) Act. It is conceded that the connection between the restriction, that is, proscription of a trade union or association whose members are engaged in the provision of essential services in the circumstances mentioned in section 1(1) of the Act above and public safety or public order is proximate or direct. Thus, the restriction of the right to freedom of association guaranteed in section 40 of the 1999 Constitution is in the interest of public safety and public order. Be that as it may, it is submitted that the Act above is not reasonably justifiable in a democratic society.[94]

It is submitted that contemporary Nigerian society is based on the principles of democracy and social justice as disclosed before. The rights to freedom of expression and peaceful assembly and association guaranteed in sections 39 and 40 of the 1999 Constitution, respectively are the bone of any democratic form of government. Besides their embodiment in the supreme law of Nigeria above and the African Charter on Human and Peoples' Rights (Ratification and Enforcement)

94. The Nigerian state had not established a pressing social need for the interference with the right of a citizen to associate with others in order to join or belong to or form a trade union or other associations for the protection of his interests as guaranteed under section 40 of the 1999 Constitution in the case above. Without doubt, electricity supply is an essential service under the Trade Disputes Act, Trade Disputes (Essential Services) Act and International Labour Organisation definition of essential services Note that in 1983 the International Labour Organisation Committee of Experts on Freedom of Association defined essential services as only those services the interruption of which would endanger life personal safety or health of the whole or part of the population, <http://itcilo-it/259 html> accessed 14 July 2009. The apex court rightly held that members of the 1st appellant/ defendant could not embark on a strike because they were involved in the supply of electricity an essential service. But to empower the president to proscribe any trade union or association whose members are employed in essential services, whether in the real sense or not, went too far and certainly exceeds the limit as can be discerned from section 40 of the 1999 Constitution. Having regard to the object of the Trade Disputes (Essential Services) Act as can be discerned from the Preamble of the Act which is to curb incessant labour unrests and strikes by workers' trade unions or associations whose members are employed in essential services as they existed in the pre-1976 period as well as the evil, that is, incessant labour unrests and strikes by workers' trade unions or associations whose members are engaged in essential services, it can be argued that the Nigerian state had convincingly established the necessity for placing restrictions on the right guaranteed in section 40 of the 1990 Constitution. Note that a Preamble of a statute even though not part of the provisions of the Act, can be resorted to as an aid to the

Act, a plethora of decisions of Nigerian courts have endorsed them.[95] Consequently, citizens of Nigeria must be allowed to organise or hold rallies, protests and demonstrate in opposition to unpopular policies or programmes of government. Mention should be made here that the Federal Government of Nigeria had in a

construction of the enactment where there is some difficulty in arriving at the meaning of the words used in the enactment. *Aig-Imoukhuede v Patrick Ifeanyi Uba (*2015) 8 Nigerian Weekly Law Reports (part 1462) 399, 409 (Court of Appeal). But this argument 'falls flat' when the mindset is captured with certain points. To begin with, it is not correct that the 1st appellant/defendant is the sole provider of electricity power in Nigeria as the apex court wanted Nigerians to believe. The truth is that the 1st appellant/defendant is a registered trade union in Nigeria with separate legal personality whose members were junior employees of the National Electric Power Authority a statutory corporation established under the National Electric Power Authority Act Cap 256 LFN 1990 to provide electricity power to the nation. See section 1(1) of the Act. A sister union is the Senior Staff Association of Electricity Employees with separate legal personality whose members were senior employees of National Electric Power Authority. The statutory or government corporation above is not even the sole provider of electricity power in Nigeria. In actual fact, individuals in Nigeria also provide electricity power for themselves through their generating sets. State governments and other non-governmental bodies equally provide electricity power for the use of their members and or citizens through their generating sets or Independent Power Plants. Additionally, whereas the vesting of wide discretionary power and abuse of power are the norm in a military dispensation, they are certainly not embraced under a democratic system of government. For example, under the Nigerian Constitution, the State is obligated to exterminate corrupt practices and abuse of power from the nation's body polity. See 1999 Constitution, section 15 (5). Furthermore, the disregard or non-compliance with provisions of the Trade Disputes Act 2004 with respect to reporting and settlement of trade dispute is a crime under the Trade Disputes Act for which the offenders shall be penalised with terms of imprisonment and or fines under section 18(2) of the Trade Disputes Act 2004. To proscribe a trade union on account of non-compliance as stated above when it is already liable to be penalised under the Trade Disputes Act offends the rule against double jeopardy as enunciated under section 36(9) of the 1999 Constitution. And again, workers in essential services are out-rightly banned from embarking on strike in Nigeria going by the provisions of section 30(6)(a) of the Trade Unions Act 1990 as amended by the Trade Unions (Amendment) Act 2005. In short, strike by essential service workers in Nigeria is a crime and the offenders are liable upon conviction to six months imprisonment and or a fine of ₦10, 000.00 under section 30(7) of the Trade Unions Act 1990 as amended by the Trade Unions (Amendment) Act 2005. Any trade union or association whose members are engaged in essential services could be prosecuted for violating the provisions of the Trade Unions Act 1990 as amended by the Trade Unions (Amendment) Act 2005 on strike as well as the provisions of the Trade Disputes Act 2004 on reporting and settlement of trade disputes rather than being proscribed by the president under section 1(1) of the Trade Disputes (Essential Services) Act.

95 *Inspectors General of Police v All Nigeria Peoples Party and Ors.*, see above note 84 at 466.

broadcast made by former President Obasanjo publicly conceded the right of Nigerians, including members of a trade union or association engaged in the provision of essential services to hold public meetings or protests peacefully against the government's increase in the prices of petroleum products. [96] Of course, the former president realised that democracy admits of dissent, protest, marches, rallies and demonstrations.[97] True democracy ensures that these are done responsibly and peacefully without violence, destruction or even unduly disturbing any citizen and with the guidance and control of law enforcement agencies.[98] A good example was the mass protest of trade unions and other Nigerians under the aegis of the Nigeria Labour Congress and Trade Union Congress between 9-16 January 2012 over the hike in the pump price of fuel as earlier disclosed.

In view of the foregoing, Nigeria cannot continue to retain in its statute books a law such as the Trade Disputes (Essential Services) Act under whose section 1(1) the president could proscribe a trade union or association whose members are engaged in essential services who have merely organised themselves into a rally or march or demonstration in opposition to unpopular or other anti-workers and people policies or programmes of government.

Perhaps, if the learned justices of the Supreme Court of Nigeria, had adverted their minds to the foregoing points they would have come to a different conclusion in the case above.

VII. OBSERVATIONS

It is clear from the foregoing legal overview of derogation from fundamental rights under the Nigerian constitutional system that the 1999 Constitution in its section 45(1) (a) allows the law-making authorities in Nigeria to make laws which derogate from the fundamental rights guaranteed to all citizens of Nigeria under sections 37, 38, 39, 40 and 41 provided they are reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health. This is in tune with the practice in some other countries such as Zimbabwe, India and South Africa. It is observable that the provisions of section 45(1)(a) above is being misused by the law-making authorities in Nigeria to make laws which provide restrictions on the fundamental rights guaranteed to all citizens of Nigeria under sections 37,38,39,40 and 41 of the 1999 Constitution for the selfish or vested interest of Nigerian leaders instead of the interest of the public or good of all Nigerians as a whole. The resultant effect is that some of the fundamental rights guaranteed to all citizens of Nigeria under the sections above

96. *Ibid.,* 470
97. *Ibid.*
98. *Ibid.*

have been unduly eroded or taken away under the guise that the laws enacted by the law-making authorities were reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health. A good example of such laws is the Public Order Act 1990 which in its sections 1(2),(3),(4),(5) and (6),2,3 and 4 require police permit before rallies are held in Nigeria. The Criminal Code Law of Anambra State is also another note worthy example of such laws. Its section 51(1)(c) makes it an offence for any person to publish any seditious publication against the person of the Governor or Government of Anambra State. This unsatisfactory development is attributable mainly to the fact that the 1999 Constitution is silent on the meaning of the elastic terms-defence, public safety, public order, public morality or public health. It is also observable that some of the laws purportedly enacted pursuant to the provisions of section 45(1) (a) above, namely, the Trade Disputes Act in its first schedule and the Trade Disputes (Essential Services) Act in its section 7 (1) (a) - (c) give a wide definition of essential services which is not in tune with what obtains in some other countries and the International Labour Organisation definition of essential services.

It is regretful that the Nigerian Courts have not been very helpful in dealing decisively with the problem above. The courts in Nigeria, in many of their decisions, have failed to declare void some of the laws made pursuant to section 45 (1) (a) above on ground of inconsistency with the provisions of the 1999 Constitution which guarantee to all citizen of Nigeria the fundamental rights contained in sections 37, 38,39,40 and 41 of the 1999 Constitution. This is attributable, among other things, to the fact that many of the judges in Nigeria are oblivious or unaware of the import and purport of the fundamental rights guaranteed under chapter IV of the 1999 Constitution as well as the fact that many of the judges in Nigeria belong to the ruling capitalist class. No wonder the judiciary has become a veritable organ for class oppression. For socialists, the legal systems of capitalist and neo-colonial capitalist societies, including Nigeria are instruments of class rule.[99] They postulate that the main functions of the courts in these systems are to legitimise and buttress the domination of the capitalist class.[100] It has been observed, in relation to the West-German Federal Constitutional Court, that:

> The Constitutional Courts are not, nor were even intended to be neutral 'non political' instruments of the State in the sense of the positive tradition of German jurisprudence… their judges are supposed to be non-partisan in interpreting the constitutional principles of

99. A Ball, *Modern Politics and Government* (London and Bansingstoke: 3rd edn, Macmillian Publishers Ltd. 1971) 200-201.

100. *Ibid.*

> the prevailing order, but biased in favour of the regime. In other words, the Constitutional Courts and particularly the Federal Constitutional Courts are quite explicitly judicial structures for legitimising and preserving the present political system. [101]

Oni, for one, observes that in the capitalist and neo-colonial capitalist societies, including Nigeria:

> Judges administer justice according to the capitalist jurisprudence. They exist to ensure that everybody conforms to the requirements of bourgeois law which seeks to preserve and defend the prevailing capitalist relation. [102]

No wonder, the legal system in Nigeria, does not protect the fundamental rights of the under - privileged Nigerians. This situation is really very dangerous as it could spur the citizens into violence against the government. Oputa, former Justice of the Supreme Court of Nigeria had this in mind when he warned that unless the Nigerian legal system took care of the fundamental rights of the poor and under-privileged who could not afford to go to the courts to press their claims, they might be compelled to seek redress in street and mob violence.[103] Oputa did not mince words in explaining the bias of the Nigerian legal system. As he puts it:

> Fundamental human rights seemed to be exclusive to the rich and dominant class in our society. The powerful, rich and dominant class in our society seemed to enjoy all the fundamental human rights while the poor and downtrodden suffer in silence.[104]

The problem of Nigerian law-making authorities enacting laws which derogate or take away the fundamental rights guaranteed to all citizens of Nigeria in sections 37,38, 39, 40 and 41 above for the selfish or vested interest of Nigerian leaders under the guise of making laws reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health must be given the highest consideration it deserves by the government so that it may not

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101. *Ibid.*
102. O Oni, *Towards a Socialist Political System for Nigeria* (Ibadan: Progress Books Nigeria Ltd. 1986), quoted in A.E Abuza, 'The Problem of Vandalization Oil Pipelines and Installations in Nigeria: A Sociological Approach' (2006) 2 (2) *Delta State University Law Review- Environmental Law Edition* 276.
103. Nigerian Tribune (Ibadan, 1 December 1986) 8.
104. *Ibid.*

be accused of paying lip service to the issue of promoting respect for the fundamental rights entrenched in the Nigerian Constitution for the benefit of all citizens.

A continuation of the problem above poses a grave danger to the survival of Nigeria's nascent democracy. It has already impacted adversely on the country's system of democracy or democratic governance. Of course, the problem if not quickly arrested or check-mated has capacity to impact negatively on political stability. Instability in Nigerian politics would encourage the military to foray into politics and take over political governance of Nigeria like what happened recently in Burkina Faso, thus bringing an end to democratic governance and constitutionalism and in its stead enthrone a system of totalitarian or despotic rulership in Nigeria devoid of respect for the rule of law and or the fundamental rights of citizens. This would constitute a serious setback on the country's progress and march toward sustaining the democratic culture and ideals and thus not augur well for Nigeria's system of democratic governance.

VIII. RECOMMENDATIONS

The bane of statutes is an inadequate enforcement of these statutes. Fundamental right statutes are no exceptions. A critical recommendation that is worthy of note is that failure to enforce statutory provisions on the fundamental rights guaranteed to all citizens of Nigeria should be seriously and urgently tackled by the government. This is imperative so as not to create the impression that the government itself is not concerned with addressing the problem of law-making authorities in Nigeria making laws which erode or take away the fundamental rights guaranteed to all citizens of Nigeria in sections 37, 38, 39, 40 and 41 of the 1999 Constitution for the selfish or vested interest of Nigerian leaders rather than in the interest of the public or good of all Nigerians as a whole. Among other critical recommendations that are worthy of note are:

(i) There should be clear yardsticks in the Nigerian Constitution to determine whether a law made by the Nigerian law-making authorities pursuant to section 45(1)(a) of the 1999 Constitution is reasonably justifiable in a democratic society in the circumstances mentioned in section 45(1) (a) above. To this end, the 1999 Constitution should be amended by the National Assembly of Nigeria to define the elastic terms-defence, public safety, public order, public morality and public health in relation to the restrictions envisaged by the framers of the Nigerian Constitution so as to guard against unforeseeable and unreasonable interference with the fundamental rights guaranteed to all citizens of Nigeria in sections 37,38,39,40 and 41 of the

1999 Constitution.[105] In the alternative, the National Assembly of Nigeria should amend the 1999 Constitution to expunge these elastic terms as they are being misused by the Nigerian law-making authorities to make laws for the protection of the selfish or vested interest of Nigerian leaders rather than in the interest of the public or good of all Nigerians as a whole.

(ii) The Trade Disputes Act 2004 and Trade Disputes (Essential Services) Act 2004 should be amended to consider essential services as only those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population. This is in tune with what obtains in some other countries like Lesotho and Tanzania.[106] The truth of the matter is that these other countries actually adopted 'hook, line and sinker' the definition of essential services by the International Labour Organisation Committee of Experts on Freedom of Association as disclosed before. The Committee considers to be essential services in the strict sense, where the right to strike may be subject to major restrictions or even prohibitions, to be: the hospital sector; electricity services, water supply services; the telephone services; and air traffic control. [107] In contrast, the Committee considers that, in general, the following do not constitute essential services in the strict sense of the term, and therefore the prohibition to strike does not pertain.: radio and television; construction; the petroleum sector; automobile manufacturing; ports (loading and unloading); aircraft repairs; banking; agricultural activities; computer services for the collection of excise duties and taxes; the supply and distribution of foodstuffs; department stores; the mint; pleasure parks, the government printing service, the metal sector; the state alcohol, salt and tobacco monopolies; the mining sector; the education sector; transport generally; metropolitan transport; refrigeration enterprises; postal services; and hotel services.[108] It can be argued that the

105 AE Abuza, 'Lifting of the Ban on Contracting out of the Check-off System in Nigeria: An Analysis of the Issues Involved' (2013) 42 (1) Banaras Law Journal 66 <http://www.bhu.ac.in/Lawfaculty/blj/BanarasLawJournal.2013. vol. 42. No 1. pdf> accessed 10 October 2015.

106 See, for example, Lesotho Labour Code 1992, section 232 (1) and Tanzanian Employment and Labour Relations Act 2004, section 77 (1), (2) & (3).

107 See *Aero Contractors Company of Nigeria Ltd. v National Association of Aircraft Pilots and Engineers & 2 Ors*., see above note 91, 708. See also AE Abuza (2015): '*A reflection on regulation of strikes in Nigeria', Commomwealth Law Bulletin,* DOI: 10.1080/03050718.2015.1115731 30 - 31. <http://dx.doi.org/10.1080/0305718.2015.1115731> accessed 24 December 2015.

108 *Ibid* ., 709. See also Abuza, *Ibid*.

foregoing principles constitute International Labour Standards which Nigeria is obligated to apply being a member of the International Labour Organisation, moreso when it had already ratified International Labour Organisation Convention 87 as disclosed before. The country must show respect for international law and its treaty obligations as enjoined by section 19(d) of the 1999 Constitution,

(iii) The government of Nigeria should organise public lectures and other public enlightenment programmes to sensitise members of the legal profession, including judges, members of the Legislature and Executive as well as other Nigerians on the import and or purport of the fundamental rights guaranteed under the 1999 Constitution. This could be the missing ingredient necessary to wipe out the problem of the law-making authorities in Nigeria making laws which erode or take away the fundamental rights guaranteed to all citizens of Nigeria in sections 37, 38, 39, 40 and 41 of the 1999 Constitution for the selfish or vested interest of Nigerian leaders rather than in the interest of the public or good of all Nigerians as a whole. The decision of the Nigerian Court of Appeal in *Mallam Abdullah Hassan and Four Others v Economic and Financial Crimes Commission and Three Others* [109] is very instructive here. The Court of Appeal declared that fundamental rights are rights without which neither liberty nor justice would exist. It went further to declare that these fundamental rights stood above the ordinary law of the land and infact constituted a primary condition to civilized existence. The appellate court concluded that it was the duty of the court to protect these fundamental rights.

(iv) Nigeria should emulate the approach in some other countries like Botswana and the United States of America. To be specific, in the American case of *Shetton v Tucker* [110] the United States' Supreme Court observed that:

> Even though the Government purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties.

IX. CONCLUSION

This article has undertaken a legal overview of derogation from fundamental rights under the Nigerian constitutional system. It has identified short-comings in the various

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109 [2014] 1 Nigerian Weekly Law Reports (part 1389) 607, 610.

110 364 US 479, 488 [1960], quoted in *Inspector General of Police v All Nigeria Peoples Party and Ors.*, see above note 98, 498.

laws. It has also discussed the effects of the Nigerian law-making authorities making laws which erode or take away the fundamental rights guaranteed to all citizens of Nigeria in sections 37, 38, 39, 40 and 41 of the 1999 Constitution for the selfish or vested interest of Nigerian leaders instead of the interest of the public or good of all Nigerians as a whole on Nigeria's system of democracy or democratic governance. It has equally highlighted the practice in some other countries and made recommendations, which if implemented would end the problem of Nigerian law-making authorities hiding under section 45(1) (a) of the 1999 Constitution to make laws for the selfish or vested interest of Nigerian leaders instead of the interest of the public or good of all Nigerians as a whole.

Notes on Contributor

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MEDICAL PRACTITIONERS AND HOSPITALS: LIABILITIES AND PROTECTIONS

PRADEEP SINGH*

ABSTRACT : In division of labour medical practitioners are assigned responsibilities relating to life saving, therefore, they are esteemed higher in the society. In last three decades respect of medical practitioners and hospitals, has been much affected, reasons are commercialization of medical services, emphasis on more and more money earning at any cost, devaluation of professional ethics and service of humanity and giving more importance to money instead of life saving. Laws, both criminal and civil, are made to regulate medical profession and impose liabilities on guilty medical practitioners and hospitals. Medical practitioners, hospitals and their services are important and indispensable for society, there is need to protect honest and duty oriented medical persons, therefore, law provides protections to them against misuse of legal provisions. Negligence of medical practitioners and hospitals is a major problem and it is dealt by imposition of criminal and civil liabilities. Female foeticide has become a major challenge and matter of serious concern; furthermore, there is serious problem of commercialization of organ transplant. These problems now have taken form of organized crime and sternly dealt in penal Acts. Whenever, medical practitioner administers treatment to patient, he has responsibility to provide treatment with care and caution. In case of non-observance of standard of treatment, medical practitioner and hospital owe liability under civil law to pay the compensation. In this context the present paper discusses and examines the criminal and civil statues relating to liabilities of medical practitioners as well as the protection available to them.

KEY WORDS: Consent; Consumer; Criminal Negligence; Deficiency; Foeticide; Medical Practitioner; Miscarriage; Organ Transplantation; Professional deviation; Sex Determination; Treatment; Termination of Pregnancy; Pre-natal Diagnostic Techniques.

I. INTRODUCTION

Medical profession is a noble profession and Medical practitioners are much respected members of society. For proper functioning of society and

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maintaining social solidarity, division of labour has been made and every societal member is assigned some role for the wellbeing of society. Every societal member is important but person, who has role relating to life saving, is considered more important, much respected and taken with much affection. In division of labour, medical practitioners are assigned responsibilities relating to life saving, therefore, they esteemed higher in the society. In last three decades respect for medical practitioners and hospitals, has been much affected, reasons are multifarious and complex. Some very important reasons are professional deviations, non-observance of professional ethics and giving more importance to money instead of life saving. Such deviations have affected respect for medical practitioners and it has ultimately caused loss of faith of patient and his family members in medical practitioners and hospitals. Laws are made to regulate medical profession, prevent professional deviations, abuse of medical procedure and know how.

II. LIABILITY AND PROTECTION UNDER CRIMINAL LAW

Criminal law provides measures to tackle problems creating serious challenge before the society. In case of medical profession, crimes may be committed in two references – first, unrelated to the profession; medical professional will be taken as ordinary criminal and case will be dealt under general provisions of criminal law. When a patient comes in hospital, medical practitioner assaults on him, he will be dealt under Indian Penal Code as ordinary accused. Second, when medical practitioner is alleged for commission of crime in course of his profession, his case is dealt under special provisions and special protections are also available. Such protections are afforded to check his unnecessary harassment by vested interests.

LODGING OF FIR

Indian Penal Code is substantive criminal law and Criminal Procedure Code is procedural criminal law. These two codes are general penal laws enacted to tackle crime and criminality in the society. These Codes regulate deviations in medical profession and at the same time provide protections to medical practitioners also. These provisions are applicable even in case of special penal statutes in absence of provisions to contrary.[1] Whenever crime is committed, any person having information about commission of offence may give information to police officer for lodging of

1. The Criminal Procedure Code, 1973 (CrPC), Sections 4 and 5 provide that provisions of Code are applicable even in case of offences under any law other than Indian Penal Code. Sec. 4(2) provides: "All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to same provisions, but subject to any enactment for time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences." When special penal statute makes provisions applicable in reference to offences therein, provisions of

FIR and initiation of investigation in the case. FIR is very important in criminal cases. It provides important clues to police officer for effective investigation in the case. The principal object of First Information Report to set the criminal law in motion so that investigating officer may be able to collect evidences in the case. Section 154 when read with section 39 of CrPC and section 176 of IPC makes clear that the person having information about commission of crime is bound to give information to police officer. Language used in section 154 of CrPC makes clear that the police officer in-charge of police station after receiving information is bound to lodge FIR and further, he is bound to lodge it verbatim as provided by the informant.[2] Constitutional Bench of Supreme Court in case of *Lalita Kumari* v. *Government of UP*[3] completely established that the police officer has mandatory duty to lodge FIR as and when he receives information disclosing commission of cognizable offence. He cannot make preliminary investigation to test genuineness of information before lodging of FIR. In case of medical practitioners if such rule is made applicable, any person may lodge FIR even without any sufficient ground

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Criminal Procedure Code shall not apply but provisions of special penal statute shall apply. Sec. 5 provides: "Nothing contained in this Code shall, in absence of a provisions to contrary, affect any special or local law for time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for time being in force." These two provisions make clear that provisions of CrPC are applicable even in case of special penal statutes when special provisions are not prescribed. Indian Penal Code is general substantive law, therefore provisions and principles of criminal law particularly definitions (ss. 6–52) , provisions relating to punishment (ss. 53 – 75), mental elements (ss.76 – 95) and private defence provisions (ss. 96–106) contained therein are applicable even in case of special penal statutes in absence of contrary provisions.

2. In Sec. 154 CrPC 'shall' word is used repeatedly directing police officer in various references relating to lodging FIR. It clears that police officer is bound to lodge FIR. To give information mandatory duty is cast on informant u/s 39 CrPC r/w 176 IPC, so that duty on police officer to lodge FIR also becomes Mandatory duty. When police officer is not lodging FIR, aggrieved person has remedy to represent his case before superior police officer or/and before the magistrate and on their direction FIR may be lodged. In section 157 CrPC binding duty is imposed on police officer to make investigation in cognizable offences, therefore, as and when information disclosing commission of cognizable offence is received, he must record it and take action thereon. All these clear that the police officer is bound to lodge FIR. 'every information' term is used in section, further, requirement of reducing it in writing, reading to informant and entering in book kept in police station clear that information is recorded as provided by informant. Supreme Court has observed in these references in the cases- *State of Haryana* v. *Bhajan Lal* AIR 1992 SC 604, *Ramesh Kumari* v. *State (NCT of Delhi)* AIR 2006 SC 1322, *Lallan Chaudhary* v. *State of Bihar* AIR 2006 SC 3376, *Prakash Singh Badal* v. *State of Punjab* AIR 2007 SC 1274, *Lalita Kumari* v. *Govt. of UP* AIR 2014 SC 187.

3. AIR 2014 SC 187

particularly due to professional jealousy or to pressurize him for some purposes or to harass or to malign him in his profession. In our society lodging of FIR generally stigmatize a civilized person, such stigmatization causes a serious impact on medical practitioner, his whole profession and reputation may be badly affected. Such impact affects medical practitioner and also society at large. Supreme Court considered the problem and directed in *Lalita Kumari* case that on receipt of information about commission of offence by medical practitioner, police officer shall make preliminary investigation and when information is found *prima facie* genuine, only then police officer shall lodge FIR:

> "Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offence, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in case of allegation relating medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in complaint."[4]

Medical practitioners serve the society and participate in life saving activities, therefore society feels responsibility to provide protection to them from frivolous and unjust prosecutions filed to pressurize or harass. In *Jacob Mathew* v. *State of Punjab*[5] supreme Court directed that a proceeding may be initiated before court in criminal negligence cases against doctor or criminal investigation may be proceeded by investigating officer only when reliable evidences are available, particularly opinion of doctor in Government service, and further, Court directed that police officers shall not arrest the doctor in aforesaid case as matter of course:

> "We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefer recource to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for future which should govern

4. *Id.,* at 225

> the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from doctor in Government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam test to the fact collected in the investigation. A doctor accused of rashness or negligence may not be arrested in a routine manner (simply because a charge has been leveled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."[5]

Prior sanction for initiation of criminal proceeding

Medical practitioner should not be unnecessarily implicated in false cases; otherwise it will not only affect and harass particular medical practitioner but also society at large. Treatment of patients and thereby life saving activities may be affected. Medical practitioner employed in government hospital or autonomous institution is public servant u/s 21 of IPC:

> The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely-
> Twelfth – every person –
> a) In the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the government;
> b) In the service or pay the local authority, or corporation established by or under a Central, Provincial or State Act, or a Government company as defined in section 617 of the Companies Act 1956 (1 of 1956)

To provide protection to public servants in sec 197 of CrPC provision is given that

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5. AIR 2005 SC 3180

court shall not take cognizance in the case without prior sanction of the competent authority:

> when any person who is or was judge or magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction-
>
> a) In the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;
>
> b) In the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the State, of the State Government…[6]

Any offence is alleged to have been committed by medical practitioner, employed in government hospital, in giving treatment to patient, court shall not take cognizance and thereby proceeding shall not be initiated unless competent authority has given prior sanction. Courts have always interpreted the term 'acting or purporting to discharge of his official duty' strictly. The protection given under section 197 of the Code has some limitation and is available only when alleged act done by the public servant is reasonably connected with the discharge of his official duty for example excess of duty or directly incidental to performance of official duty but when alleged offence is unconnected with the duty, no protection may be available.[7] When medical practitioner employed in government hospital has committed crime unconnected with his official duty like he has committed some criminal acts, he will have no protection u/s 197 CrPC.

Consent of patient

Consent of patient or his guardian provides major protection to medical practitioner. Treatments given to patient always involve some harm or risk of harm to him. Consent defence is available to doctor in section 88 and section 89 of IPC. If a Medical practitioner without intention to cause death and in good faith for the benefit of patient makes treatment with his consent knowing that his act is likely to

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6. CrPC, Sec. 197(1)
7. *See, Sankaran Moitra* v. *Sadhana Das* AIR 2006 SC1599; *State of Goa* v. *Babu Thomas* AIR 2005 SC 3060; and *Jaswant Singh* v. *State of Punjab* AIR 1958 SC 124.

cause harm or intending to cause harm, his act shall not amount to crime and he shall not have any criminal liability for any harm caused to the patient: Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.[8]

When patient is under 12 years of age or of unsound mind consent is given by his guardian.[9] For the protection it must be shown that doctor decided treatment in good faith for the benefit of patient. Even when treatment caused death of patient, doctor will not be liable, when such death was not intentionally caused but resulted from treatment given in good faith for benefit of patient. Important requisite is consent of patient (Sec. 88 IPC) or his guardian (sec. 89 IPC). For the protection it is necessary that consent must be informed consent. Informed consent is when true, complete and effective intimation regarding risk involved in treatment, ailment and condition of patient has been intimated. The usual meaning of consent is taken as 'to agree to a thing being done', it is to be given after due deliberation of mind and calculation of harm and benefit, therefore, the patient or his guardian should have effective information to be considered for giving consent. Consent should precede the treatment. Consent may be express or implied. If patient is unconscious and no guardian is available at that time to give consent, and condition is critical requiring giving immediate treatment, it is taken as the consent has been impliedly given. Surgeon A knowing that a particular operation is likely to cause the death of Z, who suffers under the painful complaint, but not intending to cause Z's death, and intending, in good faith Z's benefit, performs the operation, with Z's consent. A has committed no offence.[10] If surgeon pretending to cure, intentionally causes death, he will have no protection but liable for punishment. Medical practitioner is skilled and expert in particular treatment, it is known to medical practitioner himself, when he has expertise only then he should administer treatment. Even when consent is given by patient, it is for expert doctor and further, for careful treatment. 'Good faith' term used in sec. 88 IPC is very meaningful. When doctor is negligent in treatment or he is not expert, no protection shall be available and he will be liable for infliction of punishment. Blackstone observed:

> If a physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder

8. The Indian Penal Code, 1860, Sec 88
9. *Id.,* Sec. 89
10. *Id.,* Sec. 88, Illustration

> nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might for merely have been to a civil action for negligence or ignorance; but it hath been holden, that if it be not a regular physician or surgeon, who administers the medicine or perform operation, it is manslaughter at the least.[11]

A patient who gives consent and undergoes treatment administered by medical practitioner and such medical practitioner is not qualified or careless or treatment given may not be given by any reasonable doctor, the consent given by patient will not afford any protection to doctor as his act is not done in good faith.

Criminal Negligence

Medical practitioner has moral, ethical and legal duty to make treatment of patient with due care and caution. Negligence in treatment is dealt by imposition of civil and criminal liability. When medical practitioner is negligent in treatment and death is caused, he is liable u/s 304 – A of IPC and no protection is available u/ss 88 and 89 of IPC because these provisions provide protection when treatment is given with due care in good faith for benefit of patient. Sec. 304 – A of IPC provides:

> Whoever cause death of any person by doing rash and negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years or fine or with both.

The requirements of this section are that the death of the person must have been caused by the accused doing rash and negligent act. For liability it is to be shown that the medical practitioner administered negligent treatment and it was proximate cause of death. There must be direct nexus between the death of patient and negligent treatment administered by medical practitioner. Simple lack of care may constitute civil liability; for criminal liability degree of negligence is very high:

> To impose criminal liability under section 304 – A, IPC, it is necessary that the death should have been the direct result of a rash or negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *cause causans*; it is not enough that it may have the *causa sine qua non*.[12]

The term negligence is used for the purpose of imposing liability both under civil law (Law of Torts and Consumer Protection Act) and criminal law. Explaining the difference between the two, Lord Atkin in *Andrews* v. *Director Public*

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11. 4 *Black*, 197.
12. *Emperor* v. *Omkar Rampratap* 4 Bomb.L.R. 679.

Prosecution[13] stated:

> "Simple lack of care such as will constitute civil liability is not enough for purposes of the criminal law, there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established."

Thus for negligence to be an offence, the element of *mens rea* (guilty mind) must be shown to exist and the negligence should be gross or of very high degree. In Criminal law, negligence or recklessness must be of such a high degree as to be held "gross". Supreme Court in *Jacob Mathew* v. *State of Punjab*[14] explained that; "the expression "rash and negligent act" occurring in section 304-A of the I.P.C should be qualified by the word "grossly". In case of *Dr. Suresh Gupta* v. *Govt. of N.C.T. of Delhi*[15] Supreme Court explained distinction between civil and criminal liability:

> "For fixing criminal liability on a doctor or surgeon the standard of negligence required to be proved should be so high as can be described as gross negligence or recklessness. …mere inadvertence or some degree of want of adequate care and caution might create a civil liability but would not suffice to hold him criminally liable."

In case of *Juggan Khan* v. *State of MP*[16] a homoeopathic doctor administered dhatura leaves and drops of stramonium without thoroughly studying the effect of giving 24 drops of stramonium and a leaf of dhatura to a patient with the result that the patient died. Court held that did not administered the alleged material with the knowledge that he was likely by such act to cause death, therefore, case would not come u/s 302 but his act amounted to rash and negligent act that he prescribed poisonous medicine without thorough study of effect and thereby, committed an offence under sec. 304 - A of IPC. In criminal cases, the amount and degree of negligence are the determining factors. Negligence does not mean absolute carelessness or indifference but want of such degree of care as is required in particular circumstances. When negligence of doctor causes death of patient, case is covered under sec. 304 – A; when negligence does not cause death, then it may be punishable – (1) no harm is caused but endanger life or personal safety, act of doctor is punishable u/s 336 IPC with imprisonment extending to three months or with fine up to two hundred fifty rupees or both; (2) when negligent act causes hurt, act of doctor is punishable u/s 337 IPC with imprisonment extending to six months or with fine up

13. (1937) 2 All ER 552 (HL) 34.
14. AIR 2005 SC 3180.
15. AIR 2004 SC 4091.
16. AIR 1965 SC 831.

to five hundred rupees or both; and (3) when negligent act causes grievous hurt, act of doctor is punishable u/s 338 IPC with imprisonment extending to two years or with fine up to one thousand rupees or both.

The rules applicable to determine civil and criminal liability are different mainly in two aspects – firstly, in criminal cases, u/s 304 – A and u/ss 336, 337, 338 of IPC, the negligence justifying conviction must be culpable or of gross degree and not the negligence founded on a mere error or judgment or defect of intelligence. Secondly, contributory negligence of injured person is no defence in criminal cases. Furthermore, the nature of onus, the approach to and effect of the evidences in a criminal case is materially different from civil cases. In criminal cases, the prosecution must prove the guilt of accused beyond all reasonable doubts. In civil cases, mere preponderance of probability may be sufficient for imposition of liability.

Termination of Pregnancy

Female foeticide is serious problem before the society which causes serious impact on social structure, social process and every aspect of society, therefore needed to be effectively dealt with. To prevent foeticide, major step is prescribed in Indian Penal Code by declaring foeticide as offence u/ss 312 – 316 of IPC. For foeticide expressions criminal abortion and causing miscarriage are used.[17] Foeticide, abortion or causing miscarriage consists of causing the expulsion of foetus from uterus. Miscarriage or abortion may be natural or violent. Violent or forced abortion or miscarriage is punishable. Generally criminal abortions are conducted by medical practitioners or under his prescription. Such deviant medical practitioner may be inflicted with sever criminal liability under Indian Penal Code. Section 312 prescribes punishment to the person whoever causes miscarriage:

> Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of woman, be punished with imprisonment of either description for a term which may extend to three years or with fine or with both;

17. Medically abortion, miscarriage and premature delivery terms are used to refer various stages of pregnancy but legally these terms are synonyms. Life begins with conception and causing expulsion from uterus will attract criminal provisions for imposition of criminal liability. Generally in criminal law miscarriage or termination of pregnancy terms are used. In Modi's Medical Jurisprudence (Lexis Nexis, 24th edition, 2011, p. 717) observation is given: "Medically, abortion means expulsion of the ovum within the first three months of pregnancy; miscarriage, the expulsion of foetus from 4th to 7th month; and premature delivery, delivery of a baby after 7 month pregnancy and before full term. Legally, miscarriage, abortion and premature labour are now accepted as synonymous terms, indicating any termination of pregnancy at any stage before confinement. Life begins at the moment of conception; after conception."

> if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Explanation – a woman, who causes herself to miscarry, is within the meaning of this section.

Section 312 makes clear that every person participating in causing miscarriage is criminal. Explanation to the section 312 makes it clear that consenting woman for her miscarriage is also equally criminal. Medical practitioner, family members or other relatives arranging measures for miscarriage and consenting woman for her own miscarriage are *particeps criminis*. Differentiation for infliction of punishment is made whether child in womb is child is with or without quickening. When child in womb is without quickening, offence is punishable by imprisonment which may extend to three years or with fine or both. When child in womb is with quickening, offence is punishable by either description of imprisonment which may extend to seven years and also with fine. Miscarriage of quick child is more serious offence, it is punishable by more sever imprisonment in both references i.e. kind and extent; further, fine is mandatory. When woman is consenting, causing miscarriage is dealt under Section 312 of IPC. Causing miscarriage without consent of woman, it may be by use of compulsion – forceful or deceitful, is more serious offence dealt u/s 313 IPC; every person including medical practitioner is liable for severe punishment – life imprisonment or imprisonment of either description extending up to ten year and also with fine. For imposition of punishment u/s 313 IPC it is regardless whether woman is with child or with quick child. In causing miscarriage, if death of woman is caused, when woman is consenting for miscarriage then offender may be inflicted with imprisonment of either description extending up to ten years and also with fine, when woman is not consenting then offender is liable for life imprisonment or either description of imprisonment extending up to ten years and also with fine. Medical practitioner causing miscarriage should have intention to cause miscarriage and it has caused death of woman, intention to cause death is not required. When intention to cause death is present, offence will become punishable as murder or culpable homicide. When foetus is well developed as viable child in womb and any act is committed to cause death of child, offence is punishable u/s 315 IPC and punishable with imprisonment extending up to ten years or with fine or both. Sec. 315 deals with foeticide and different from infanticide.[18]

Medical practitioner has responsibility to save the lives. Sometimes continuance of pregnancy may cause risk to life of woman, medical practitioner should have

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18. Here act is caused before delivery, to cause birth to still born child. When child is born and death is caused, it will be infanticide and is dealt under provisions dealing with murder and culpable homicide.

protection from criminal liability for his life saving acts. Protections to medical practitioners are provided in the same provisions of IPC which has declared causing miscarriage as an offence. Furthermore, one special law –Medical Termination of Pregnancy Act 1971- has been enacted to protect medical practitioners and regulate medical procedure in termination of Pregnancy. Immunity is provided in Indian Penal Code to medical practitioners when he has caused miscarriage 'in good faith for the purpose of saving the life of woman'.[19] In certain cases termination of pregnancy becomes requirement for various reasons. To permit termination of pregnancy and to provide protection to medical practitioners Medical Termination of Pregnancy Act was enacted in 1971. Section 3 (1) of MTP Act 1971 provides protection to medical practitioner from criminal liability:

> Notwithstanding anything contained in the Indian Penal Code (45 of1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

In circumstances permitted by MTP Act, doctor will have no liability but in other circumstances, case will be dealt under relevant provisions of Indian Penal Code and he will be liable for punishment prescribed therein. Section 8 of MTP Act provides protection to medical practitioner from civil liability: No suit for other legal proceedings shall lie against any registered medical practitioner for any damage caused likely to be caused by anything which is in good faith done or intended to be done under this act.

In Modi Medical Jurisprudence observation is given:

> "Medical Termination of Pregnancy (MTP) is the lawful abortion of a foetus and it empowers a woman to decide whether to continue her pregnancy or terminate it. It is a liberal law, which enables registered medical practitioner to terminate pregnancy for social and socio-medical reasons, as well as reasons for danger to the health of the mother. It spared many women from inflicted pregnancy' and 'forced motherhood'."[20]

Section 3 of Medical Termination of Pregnancy Act is main provision contained in the Act. It permits abortion within twenty weeks of pregnancy. When length of pregnancy is not exceeding twelve weeks, decision about termination of pregnancy may be taken by one medical practitioner but when pregnancy period is exceeding twelve weeks but does not exceed twenty weeks, the decision is to be taken by

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19. IPC, Section 312. Section 315 makes provision in the same reference – 'in good faith for the purpose of saving life of the mother'
20. *Modi Medical Jurisprudence* (New Delhi: LexisNexis, 24th ed., 2011) at 718.

two medical practitioners. After twenty weeks of pregnancy, in normal circumstances abortion is not permissible. Always opinion to terminate pregnancy has to be taken by doctor in good faith means there should be proper deliberation, study and analysis and furthermore, it should be objectively clear from the medical prescriptions and medical procedures. Consent of pregnant woman is compulsory, when she is below eighteen year age or lunatic consent is given by guardian. Termination of pregnancy may be caused only in government hospital or any place approved by government for the purpose.[21] Termination of pregnancy may be caused by medical practitioner only; any other person neither has protection under this Act nor under Indian Penal Code.[22] Termination of pregnancy is permissible under the Act in following cases:

a) To save the life of pregnant woman:

Indian Penal Code which declares abortion as crime has permitted it to save the life of woman. In section 3 of Termination of Pregnancy Act the same ground that is to save the life of woman is provided. Single medical practitioner (when length of pregnancy is not exceeding 12 weeks) or two medical practitioners (when pregnancy is exceeding 12 weeks but does not exceed 20 weeks) may take decision in good faith. In case of emergency, where medical practitioner in good faith has opinion that to save the life woman, there is immediate need to terminate the pregnancy; provisions relating pregnancy time period, number of medical practitioner and approved place for termination of pregnancy provisions will not apply.[23] In such situation pregnancy time period will not be considered, even after 20 weeks abortion may be permissible. After 12 weeks and up to 20 weeks pregnancy, decision is taken by two medical practitioners but in case of emergency such decision may be taken by a single medical practitioner. Termination of pregnancy is permitted only at government hospital or approved place by government, but in case of emergency this restriction will not apply.

b) To save woman from grave injury to physical or mental health:

Medical practitioner is permitted to cause termination of pregnancy to save the pregnant woman from injury to her physical or mental health. The anguish caused by pregnancy due to rape is presumed to constitute a grave injury to the mental health of the pregnant woman. In sec. 3(2) of Act medical practitioner is permitted to terminate such pregnancy.

Explanation II of section 3(2) permits termination of pregnancy for family planning in reference to restrict the number of children. Explanation II clears that the anguish caused by unwanted pregnancy constitutes a grave injury to the mental health of the

21. Medical Termination of Pregnancy Act, 1971, Sec. 5
22. *Id.,* Sec. 5(2)
23. *Id.,* Sec. 5(1)

pregnant woman.

c) To save the child from physical or mental health:

Medical practitioner is permitted u/s 3(2) of Act to terminate the pregnancy, when child in womb is detected with physical or mental abnormalities as to cause serious handicap to him after his birth. Such permission is given to save the child from life-long serious problems.

Termination of pregnancy may be natural or forced (human intervention caused). Forced termination is subject to legal regulation. Law permits termination of pregnancy in certain circumstances, for certain purposes, by certain persons, by observance of certain medical procedures; such termination of pregnancy is permissible, legal and does not attract criminal liability. All other forced termination of pregnancy are crime punishable under Indian Penal Code.

Pre-Natal Sex determination

Scientific and technological developments are made for betterment of society but at the same time some vested interests usually misuse and create problem for the society and sometimes even challenge for societal existence. Female foeticide and infanticide are major problems of such nature. Female foeticide is more problematic and has completely disturbed sex ratio throughout India. Some scientific know-how and gadgets are developed by scientists to detect the ailments and treatment but some hospitals and medical practitioners are misusing for monetary benefits. Some techniques like ultra-sonography, foetoscopy and amniocentesis etc are used by delinquent medical practitioners to detect sex of foetus in womb and female foeticide is committed. Causing miscarriage (foeticide) is declared as punishable offence in Indian Penal Code and Termination of Pregnancy Act. Further, there is need to check the use of scientific techniques for sex detection of foetus; for this purpose Indian legislature has enacted Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. (PCPNDT Act) and declared foetus sex determination as an offence and prescribed severe punishments. Objective mentioned in Act clears that it is enacted for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide. PCPNDT Act permits use of pre-natal diagnostic techniques only for chromosomal and metabolic abnormalities detection but makes complete ban on use of such techniques for sex detection of foetus. Section 3 – A of Act gives mandatory direction to medical practitioner against pre- conception and pre- natal sex determination:

No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them.

Section 4 of PCPNDT Act permits use of pre-natal diagnostic techniques only for detection of abnormalities mentioned in sub-section (2) only at registered place and imposes complete prohibition for any other place. For detection of abnormalities conditions and liabilities are imposed on medical practitioner that he be satisfied with existence of those conditions particularly that the age of pregnant woman is above 35 years and there was loss of two or more foetus etc:

On and from the commencement of this Act,—

1. No place including a registered Genetic Counseling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in clause. (2) and after satisfying any of the conditions specified in clause (3);

2. No pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely:—

(i) Chromosomal abnormalities;
(ii) Genetic metabolic diseases;
(iii) Haemoglobinopathies;
(iv) Sex- linked genetic diseases;
(v) Congenital anomalies;
(vi) Any other abnormalities or diseases as may be specified by the Central Supervisory Board;

3. No pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing that any of the following conditions are fulfilled, namely:—

(i) Age of the pregnant woman is above thirty-five years;
(ii) The pregnant woman has undergone of two or more spontaneous abortions or foetal loss;
(iii) The pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;
(iv) The pregnant woman or her spouse has a family history of

mental retardation or physical deformities such as, spasticity or any other genetic disease;

(v) Any other condition as may be specified by the Central Supervisory Board; Provided that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of provisions of section 5 or section 6 unless contrary is proved by the person conducting such ultrasonography.

When medical practitioner has decided to use pre-natal diagnostic techniques for detection of abnormalities, it is necessary that he must have obtained informed consent in writing from the pregnant woman after informing side and after effects of procedure used.[24] During abnormality detection prohibition is imposed on specialist to not inform about sex of child in womb:

> No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner.[25]

Section 6 imposes prohibition on hospitals or any such institutions, medical practitioners or any other specialists and woman or her relatives against sex determination.[26] Female sex determination and related activities are declared as an offence and severe punishments are prescribed. There is immediate need to ban the advertisements which usually indirectly suggest for female sex determination and causing miscarriage. Section 22 of PCPNDT Act declares giving advertisement for pre-natal sex determination as an offence and prescribes punishment of imprisonment extending up to three years and fine up to ten thousands rupees. Advertising company, hospital and medical practitioner giving advertisements for pre-natal sex determination are punishable u/s 22 of the Act. Medical practitioner or any other specialists employed in hospital or any other institution, whoever, detects sex of child in womb and owner of hospitals are punishable under section 23 of

24. The Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, Sec 5(1)
25. *Id.,* Sec 5(2)
26. *Id.,* Sec 6 provides "Determination of sex prohibited.- On and from the commencement of this Act,—(a) no Genetic Counseling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus; (b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus; (c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

PCPNDT Act with imprisonment extending up to three years and also with fine extending up to ten thousands rupees. On subsequent conviction imprisonment extends to five years and fine extends to fifty thousands. Further, name of medical practitioner may be suspended on frame of charge till disposal of case and removed for five years from register of medical council on first conviction and permanently on subsequent conviction. Person who seeks sex determination, it includes pregnant woman, her husband or any relative or middleman, is liable for punishment of imprisonment extending to three years and fine extending to fifty thousand rupees on first conviction and on subsequent conviction imprisonment extending to five years and fine extending to one lakh rupees.[27] Section 23 (4)provides that pregnant woman undergoing sex determination is liable for punishment only when she is consenting, section 24 makes presumption clause that such pregnant woman is not consenting but she is compelled by her husband or other relatives. Contravention of any provision contained in Act is declared as an offence under section 25 of PCPNDT Act, where specifically punishment is not prescribed, contravention of any provision is punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one thousand rupees or with both and in the case of continuing contravention with an additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention.

Hospitals or other institutions involved in sex determination are person under section 11 of Indian Penal Code and they may commit crime and liability may be imposed. Hospitals, any other institutions, manufacturing and supply units of machines or materials used in sex determination have severe liability in PCPNDT Act 1994. Incorporated and/ or registered bodies have graver responsibilities. Section 3 – A of Act imposes restriction on manufacturers and dealers not to supply any ultrasound machine or scanner or any equipment unless the hospital or other institution is registered under the Act. It is responsibility of manufacturer and dealer to satisfy that institution is registered. Any clinic or other institution having ultra sound machine or any other testing facility which may be used for purpose of sex determination or sex selection cannot be operated unless registered under PCPNDT Act.[28] Section 4 (1) requires that any registered institution shall not be used by any person for conducting pre-natal diagnostic techniques for sex determination. It is responsibility of institution itself to see that nobody is misusing the facilities. In section 6 there is express prohibition and imposition of responsibility on clinics in reference to foetus sex determination. In case of violation of provisions of Act Appropriate Authority may suspend or cancel registration of clinic or institution by passing reasoned order

27. *Id.,* Sec 23(3)
28. *Id.,* Sec 18

after giving reasonable opportunity of hearing.[29] Section 22 imposes liability and punishment on persons and organizations for giving advertisements for sex selection or sex determination of foetus. Whenever any clinic is indulged or permitted to use it for sex determination, it is liable for punishment under section 23 of the Act. When offence of sex selection and sex determination are committed by clinic or any other institution, section 26 clears the rule relating to imposition of corporate criminal liability that both clinic and person responsible for affairs of clinic shall have criminal liability and therefore penalized. For imposition of punishment on responsible person and clinic deeming provisions are given. Presumption about participation in accomplishment of crime is provided in the section. Directors and managers of company (clinic) are also deemed to have committed crime, when in clinic sex determination or sex selection offence is committed but for them presumption is rebuttable presumption. When director or manager succeeds in proving that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence, he will not be punished. Company term is used in wider reference that it is any corporate body, firm or association of persons means clinic may be registered under any law: Where any offence, punishable under this Act has been committed by a company, every person who, at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

> Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.
>
> Notwithstanding anything contained in sub-section (1), where any offence punishable under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
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> Explanation—for the purposes of this section,—
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> (a) "company" means anybody corporate and includes a firm or other association of individuals, and

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29. *Id.,* Sec 20

(b) "director", in relation to a firm, means a partner in the firm.[30]

Offences are declared as cognizable, non-bailable and non-compoundable. Due to rivalry with medical practitioner or to pressurize him for some purposes, the provisions of PCPNDT Act may be misused. To afford protection to medical practitioners, Act provides that the court may take cognizance when complaint is filed by appropriate authority established under the Act or any officer authorized by government. Private person is permitted to file complaint but restriction is imposed that he must have given at least fifteen days notice to appropriate authority disclosing his intention to file complaint for alleged commission of offence; only then court may take cognizance on complaint filed by private person.

Supreme Court in case of *Centre for Enquiry into Health & Allied Themes (CEHAT)* v. *Union of India*[31] observed:

> "It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that the gentle touch of a daughter and her voice has a soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticide whereby the female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advanced medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing full well that it is immoral and unethical as well as it may amount to an offence, foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance."

One writ petition was filed by a research organization CEHAT, a Non-Governmental organization *Mahila Sarvangin Utkarsh Mandal* (MASUM), and a civil society member Dr. Sabu M. George seeking directions against misuse of diagnostic techniques for determination of sex of foetus. The Court in this case in 2001 passed wider directions to check misuse of modern know – how for committing female foeticide:

a) Directions to Central Government:

1. The Central Government is directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through appropriate releases/programmes in the electronic media. This shall also be done by the Central Supervisory Board ("CSB" for short) as provided under

30. *Id.* Sec 26
31. (2001) 5 SCC 577.

Section 16(iii) of the PNDT Act.

2. The Central Government is directed to implement with all vigour and zeal the PNDT Act and the Rules framed in 1996.

b) Directions to the Central Supervisory Board (CSB):

1. Meetings of CSB will be held at least once in six months [re proviso to Section 9(1)]. The constitution of CSB is provided under Section 7. It empowers the Central Government to appoint ten members under Section 7(2) (e) which includes eminent medical practitioners, including eminent social scientists and representatives of women welfare organizations. We hope that this power will be exercised so as to include those persons who can genuinely spare some time for implementation of the Act.
2. CSB shall review and monitor the implementation of the Act [re Section 16(ii)].
3. CSB shall issue directions to all State/UT appropriate authorities to furnish quarterly returns to CSB giving a report on the implementation and working of the Act.
4. CSB shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendations to the Central Government (re Section 16).
5. CSB will require medical professional bodies/associations to create awareness against the practice of prenatal determination of sex and female foeticide and to ensure implementation of the Act.

c) Directions to State Governments/UT Administrations:

1. All State Governments/UT Administrations are directed to appoint by notification, fully empowered appropriate authorities at district and sub-district levels and also Advisory Committees to aid and advise the appropriate authorities in discharge of their functions [re Section 17(5)].
2. All State Governments/UT Administrations are directed to publish a list of the appropriate authorities in print and electronic media in their respective States/ UTs.
3. All State Governments/UT Administrations are directed to create public awareness against the practice of prenatal determination of sex and female foeticide through advertisement in print and electronic media by hoardings and other appropriate means.
4. All State Governments/UT Administrations are directed to ensure that all State/ UT appropriate authorities furnish quarterly returns to CSB giving a report on the implementation and working of the Act.

d) Directions to Appropriate Authorities:

1. Appropriate authorities are directed to take prompt action against any person or body who issues or causes to be issued any advertisement in violation of Section 22 of the Act.
2. Appropriate authorities are directed to take prompt action against all bodies specified in Section 3 of the Act as also against persons who are operating without a valid certificate of registration under the Act.

Again In the same case *(Centre for Enquiry into Health & Allied Themes (CEHAT)* v. *Union of India)* in 2003 Supreme Court observed:

> "It is an admitted fact that in Indian Society, discrimination against girl child still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mindset or also because of insufficient education and/or tradition of women being confined to household activities. Sex selection/sex determination further adds to this adversity. It is also known that number of persons condemn discrimination against women in all its forms, and agree to pursue, by appropriate means, a policy of eliminating discrimination against women, still however, we are not in a position to change mental set-up which favours a male child against a female. Advance technology is increasingly used for removal of foetus (may or may not be seen as commission of murder) but it certainly affects the sex ratio. The misuse of modern science and technology by preventing the birth of girl child by sex determination before birth and thereafter abortion is evident from the 2001 Census figures which reveal greater decline in sex ratio in the 0-6 age group in States like Haryana, Punjab, Maharashtra and Gujarat, which are economically better off."[32]

Further, Supreme Court directed the Central Government/State Governments/UTs for effective implementation of the Act that the information against misuse of diagnostic techniques should be published by way of advertisements as well as on electronic media. This process should be continued till there is awareness in public that there should not be any discrimination between male and female child.

Organ removal and transplantation

Organ transplantation is modern development in medical science; in case of malfunction or non-function of certain organ of body, to cure the ailment and save the life, organ from other person is removed and transplanted in the body of sick

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32. (2003) 8 SCC 398.

person. Now it is alleged that there is commercialization of removal and transplantation of human organs. Poor person's poverty is used, for some money his body organ is purchased and transplanted in the body of rich sick person. A clandestine market has developed to sell and purchase of human organs. Further, it is alleged that there are kidnappings and abductions particularly of children for removal of organs. Further, when there is surgical operation particularly of abdominal part of body, patients and their relatives are suspicious regarding removal of body organs, thereby, theft of body organs. In organ transplantation organized criminal gangs are operating by creating criminal nexus of organized criminals, medical practitioners and hospitals. Particularly such allegations are made in reference to kidney transplantation. To check the problem and regulate the removal, storage and transplantation of human organs and tissues and for prevention of commercialization of human organ and tissues transplantation, legislature enacted Transplant of Human Organ Act 1994 (THO Act 1994). This Act was enacted by parliament in exercise of its power available in Article 252 of Constitution of India and this Act is applicable for Goa, Himachal Pradesh and Maharashtra And all Union Territories; other states have discretion to adopt the law and enforce in state territory after passing resolution in state legislature.[33]

Human organ is defined as part of human body if wholly removed cannot be replicated by body. Human organ is taken from body of one person, he is called donor; and transplanted in other's body, he is recipient. Donor is defined as a person not less than eighteen years age who voluntary authorizes removal of his human organ for therapeutic use. The definition of donor itself imposes restrictions on organ removal for transplantation – (1) definition requires authorization of donor for organ removal; therefore, removal must be voluntary. Any kind of compulsion, commercialization or kidnapping is not permissible; (2) age of donor be eighteen or above, thereby, it makes clear that there cannot be removal of organ from body of child; (3) purpose of removal of organ must be therapeutic. Section 3 permits removal of organ from body of minor or person of unsound mind only after his death, hereby, it makes exception to definition of donor that child cannot be donor. When definition of donor, section 3 and section 9 (1 B) are read together make clear that a child or his guardians cannot give consent for removal of organ when he is alive, only after his death consent may be given by the person having lawful possession of body. Similar provision is made for person with unsound mind in section 9 (1 C).

Generally, THO Act 1994 permits removal of organ from human body after death. Section 3 provides that any person before his death may donate his body organs

33. The Transplant of Human Organ Act 1994, Sec 1

and thereby authorize removal of organ after his death for therapeutic use and in such case after death person having lawful possession shall facilitate removal of organ unless he has reason to believe that such authorization was revoked by donor before his death. It is responsibility of medical practitioner himself to ascertain that dead person had given consent for removal of body organs.[34] When consent is not given by dead person before his death, person in lawful possession of dead body may authorize removal of organ but in such case any near relative should not have any objection. Near relative is defined as spouse, son, daughter, father, mother, sister, grandfather, grandmother, grandson or granddaughter. Besides dead person there may be removal of organ from body of brain-dead person. Organ removed from dead body may be transplanted in body of any recipient, whether related to donor or not, for therapeutic purpose. Normally Act permits transplantation of organ when donor is dead and recipient is alive.

With many restrictions and in much restricted relations transplantation of organ is permitted, when donor is alive. To check commercialization and criminalization, to take stern steps against unscrupulous business of human organs, to cope with exploitation of poverty of poor persons, to avoid any compulsions and to tackle kidnapping and abductions for organ removal; section 9 provides when donor is not dead, then his organs may be transplanted only in body of recipient who is near relative. In case of removal of organ from the body of living person, donor and recipient must be near relatives means related by spouse, son, daughter, father, mother, sister, grandfather, grandmother, grandson or granddaughter relationship. One exception to this general rule is given that a donor, who is alive, may give his body organ to a person who is not his near relative if he has affection or attachment with recipient.[35] This provision creates wider grey area and there may be misuse of permission. To check commercialization and criminalization of transplantation of human body organs, in such case requirement of prior permission of authorization committee established under Act is made compulsory. In two cases prior approval of authorization committee is necessary –(1) when donor and recipient are not near relatives, (2) when recipient is near relative but foreigner.

Supreme Court in case of *Kuldeep Singh* v. *State of Tamil Nadu* [36]in 2005 observed that the objective of Act is to deal with commercialization of organ transplant. In this case petitioner no. 1 was undergoing treatment in Chennai for renal disorder. Both kidneys were failed to function and doctors advised for kidney transplantation. Petitioner no. 2 was willing to donate his kidney to the petitioner no. 1. Application for prior approval was filed before Authorization Committee,

34. *Id.,* Sec 3
35. *Id.,* Sec 9(3)

Tamil Nadu, which refused to give NOC on the ground that both donor and recipient belonged to Punjab, therefore, Authorization Committee, Punjab was competent to give NOC. Then application was filed before authorization committee, Punjab, it refused to give NOC on ground that transplantation was to take place in Chennai, therefore, authorization committee, Tamil Nadu was empowered to give approval. Aggrieved petitioners filed writ petition before Supreme Court. The Court observed that the purpose of NOC issuance by authorization committee is to check commercialization of organ transplant and the authorization committee of the state to which donor and recipient belong is in better position to ascertain the true intent and purpose of organ donation and to find out whether any commercial element is involved or not. In this case Court directed authorization committee, Punjab to dispose the application for issuance of NOC.

In this case Supreme Court observed:

> "As the purpose of enactment of the statute itself shows, there cannot be any commercial element involved in the donation. The object of the statute is crystal clear that it intends to prevent commercial dealings in human organs. The Authorization Committee is, therefore, required to satisfy that the real purpose of the donor authorizing removal of organ is by reason of affection or attachment towards the recipient or for any other special reason. Such special reasons can by no stretch of imagination encompass commercial elements… The burden is on the applicants to establish the real intent by placing relevant materials for consideration of Authorization Committee. Whether there exists any affection or attachment or special reason is within the special knowledge of the applicant and a heavy burden lies on them to establish it."

Supreme Court in *Kuldeep* case opined that the object of statute is to rule out commercial dealings, therefore donor and recipient should give information regarding financial positions and vocations. Court directed legislature to amend the rules and form – I requiring incomes and vocations disclosure for previous financial years (3 years); until statutory incorporation Authorization Committee was directed to require information in accordance with judgment. Supreme Court directed all the states to adopt, THO Act 1994 enacted by parliament in exercise of power available in Article 252 of Constitution of India, without any delay

In case of *Praveen Begum* v. *Appellate Authority*[37] in 2012 Delhi High Court observed:

> "From the above statutory provisions and the scheme of the Act, it

36. Available at: https://indian kanoon.org>doc
37. *Ibid.*

> becomes clear that the Act and the rules do not seek to prohibit, but only regulate the transplant of organs and tissues from cadavers and living human beings. What is prohibited is the commercial transaction in the giving and taking of organs and tissues. However, donations offered out of love and affection – even amongst those who are not near relatives, is permitted. The aforesaid scheme under the Act recognizes two of the greatest human virtues of love and sacrifice, and also the fact that such intense love and affection need not necessarily be felt only for one's own blood or spouse, but could also extend to those not so closely related or for those not related at all."

In this case a writ petition was filed for issuance of writ of certiorari to quash the order passed by Appellate Authority established u/s 17 of the THO Act 1994. In this case petitioner no. 1 aged 58 years and petitioner no. 2 aged 38 years were distantly related through blood relations. Petitioner no. 1 was having serious kidney ailment and doctors at Sir Ganga Ram Hospital advised for kidney transplant. Petitioner no. 2 applied for kidney donation due to love and affection with recipient and requested for compatibility test. Compatibility test was positive. District level Authorization Committee of Meerut (donor was resident of Meerut) permitted transplant. Authorization Committee at Sir Ganga Ram Hospital refused to permit on grounds that they were not close relatives, husband of petitioner no. 2 was not willing for donation and further, there was income disparity between donor and recipient. Appeal was filed before Appellate Authority but appeal was rejected. Order of appellate authority was challenged before Delhi High Court. Court opined that transplantation is not prohibited in the Act but only regulated to check commercialization of organ transplant. Role of authorization committee is only in case where donor and recipient are not near relative or where recipient is near relative, but foreigner. Role of authorization committee is to see whether donation is out of love and affection or for commercial purpose. Court after going through video recorded by authorization committee decided that kidney donation was out of love and affection and directed the authorization committee to permit.

Section 9 (1 A) of the Act imposes complete prohibition on transplantation of human organs between Indian donor and foreign recipient except when donor and recipient are near relative. This restriction is imposed to protect the citizenry from exploitation of their poverty and to check India from becoming market hub of human organs. Section 11 makes mandatory provision that transplantation of organ can only be for therapeutic use. Transplantation of organ must be with informed consent and for this purpose responsibilities are imposed on medical practitioner to explain effects, complications and hazards connected with removal and transplantation of organ:

> No registered medical practitioner shall undertake the removal or transplantation of any human organ unless he has explained, in such manner as may be prescribed, all possible effects, complications and hazards connected with the removal and transplantation to the donor and the recipient respectively.[38]

For regulation of organ transplant, to check the organized criminals and to cope commercialization THO Act prescribes actions against hospitals, medical practitioners and all the persons who are mediating for supply of human organs. Most effective measure to check serious problems is criminal measure, therefore contravention of provisions are declared as an offence and sever punishments are prescribed. When without authorization human organ is removed, it is offence u/s 18 of Act which prescribes punishment of imprisonment extending up to ten years and fine extending up to twenty lakh rupees. This provision mainly prescribes punishment for medical practitioners. Usually allegations are made against medical practitioners for indulgence in immoral, unethical and criminal act of unauthorized removal of body organs. Furthermore, in first instance registration of medical practitioner may be cancelled for three years and permanently on subsequent offence. Any other person working in hospital or giving services to hospital if involved in unauthorized organ removal, he is liable to punishment of imprisonment extending up to three years and fine extending up to five lakh rupees.[39]

Section 19 of Act provides important measures to check illegal removal of human organs. Whoever commercializes human organ transplantation and for this purpose gives or receives or seeks to find out donor on payment, initiates or negotiates any arrangement for payment for supply or offer to supply any human organ or gives advertisement for aforementioned is committing an offence punishable with imprisonment which may not be less than five years and extend up to ten years and also with fine which shall not be less than twenty lakh but extend up to one crore rupees. Section 19 imposes criminal liability mainly on hospitals, recipient and his relatives, and middle men.

Removal and transplantation of organ are authorized to be performed only at hospitals registered under THO Act.[40] Hospitals are instrumental in unauthorized removal of body organs and further for tackling problem also hospitals may be instrumental. Illegal activities of hospitals may be checked when stern actions are prescribed and taken against them. It will act two pronged – firstly, hospitals will desist from indulgence in criminal activities of illegal removal and sale of organs;

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38. The Transplant of Human Organ Act 1994, Sec 12
39. *Id.,* Sec 18(3)
40. *Id.,* Secs 10 and Sec 14 (1)

and secondly, hospital will actively keep surveillance that hospital premises and amenities are not used for the purpose of illegal transplantation of organs. Hospital has incorporated body, therefore, hospital and persons looking after affairs of hospital have criminal liability and they are liable for punishments under sections 18 and 19 THO Act for criminal acts of removal of organs, commercialization of organ transplantation, giving advertisements and negotiation for supply of human organs. Furthermore, Section 16 provides that in case of default of hospital or commission of wrongful act by hospital, registration of hospital may be suspended or cancelled by appropriate authority after giving reasonable opportunity of hearing. Advertising company, hospital, and or any other person giving advertisement for supply of human organs are liable and have criminal liability under sec 19 of THO Act. Hospital is company u/s 21 of THO Act, this expression is used in wider sense to include incorporated body, firm or association of individuals. Hospital as corporate body shall have criminal liabilities for any crime commission. Whenever hospital is indulged or permitted to use it for unauthorized human organ or tissue removal, it is liable for punishment under section 21 of the Act. Section 21 clears the rule relating to imposition of corporate criminal liability that both hospital and person responsible for affairs of hospital shall have criminal liability and therefore penalized. For imposition of punishment on responsible person and clinic deeming provisions are given. Presumption about participation in accomplishment of crime is provided in the section. Directors and managers of company (hospital) are also deemed to have committed crime, when in hospital offence of unauthorized removal of organ or tissue is committed, but the presumption is rebuttable presumption. When director or manager succeeds in proving that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence, he will not be punished. Section 16 of Act authorizes Appropriate Authority to suspend or cancel registration of hospital by passing reasoned order after giving reasonable opportunity of hearing.

The provisions of Act may be misused by some vested interest and it may affect innocent medical practitioners and hospital, thereby life saving activities may be affected, therefore protection is afforded in the Act that the court can take cognizance only when complaint is filed by appropriate authority established under the Act or any officer authorized by government. Private complaint may also be entertained but restriction is imposed that such complainant has given at least 60 days notice to appropriate authority clearing his intention of filing complaint.

III. LIABILITY AND PROTECTION UNDER CIVIL LAW

Medical practitioner and hospitals have legal, moral and ethical responsibilities to take due care in diagnosis and treatment of patient. When due care is not observed

and patient has suffered injury, medical practitioner and hospital have liability in civil law to compensate the patient and satisfy the loss. Civil law provides important remedies to patient for compensating loss caused to him by carelessness of medical practitioner or hospital. Compensation is available to satisfy monetary loss, physical and mental injury calculated in money terms. Civil law besides compensating patient plays deterrent and preventive role and regulate treatment activities of medical practitioner and hospitals. Once liabilities are imposed and substantial damages is paid, always it reminds medical practitioner and hospital to be careful in treatment of patient. Civil liabilities are imposed mainly under two laws – (1) Law of Tort and (2) Consumer Protection Act 1986.

Law of Torts

Medical practitioner is bound to use reasonable care and skill towards patient in diagnosis and treatment. Medical practitioner is liable for non-observance of reasonable care and skill. Hospital is also liable under vicarious liability when medical practitioner is employed in the hospital through contract of service. Tort of Negligence is committed when ordinary care and skill are not observed towards the person to whom one owes duty of observing ordinary care and skill.[41] Ordinary care and skill are determined on the basis of standard of behaviour of reasonable man.[42] Existence of duty to take ordinary care and skill is decided on the basis of foreseeability of risk and towards whom the person will have duty is decided on the basis of neighbourhood concept.[43] For medical practitioner harm to patient in treatment is foreseeable and further, patient is his neighbour, therefore, medical practitioner and hospitals owe duty to exercise reasonable care towards the patient. Duty of medical practitioner is observance of standard of treatment given by reasonable doctor. Standard of care and precautions always varies according to circumstances. A medical practitioner has duty of observance of standard of care and if he has observed that standard it will be immaterial whether treatment has caused harm to the patient. Doctor has responsibility only to take standard of treatment in circumstances concerned; he has no tortuous liability when standard of

41. *Heaven* v. *Pender* (1883)11 QBD 503.
42. *Blyth* v. *Birmingham Waterworks Co.* (1856) 11 Ex 781.
43. In case of *Donoghue* v. *Stevenson* 1932 AC 562 (HL) House of Lords laid down the rule that a person will owe duty to care when he has reasonable foreseeability of risk to another by his act and this duty will be towards person who is in contemplation of doer of act as being affected, such person is called neighbour. Duty is to take reasonable precautions to avoid injury means doer of act will observe standard of behaviour of reasonable man. Reasonable man, whose standard is applied to determine existence and observance of duty to take care, is a person from the same profession with common prudence and expertise.

care and precautions are observed in administering treatment. Medical practitioner will not have liability for tort of negligence when he has – (1) observed standard of behaviour and (2) obtained consent of patient. For determination of medical practitioner's liability a rule was laid down in case of *Bolam* v. *Friern Hospital Management committee*[44] and now this rule is used as a test called Bolam test, according to which a doctor, who acts in accordance with a practice accepted as proper by a responsible body of medical men, is not negligent merely because there is a body of opinion that takes a contrary view. Mc Nair, J, in this case observed:

> "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if conforms with one of these proper standards, then he is not negligent."

Further, Bolam test was approved by Supreme Court of India in case of *State of Haryana* v. *Santra (Smt)*.[45] Observance of duty and thereby liability of the person is decided on the basis of observance of standard of behaviour. Medical practitioner is liable when in diagnosis, prescription and treatment; he has not behaved like a reasonable medical practitioner. Standard of duty is decided not only on consideration of reasonable medical practitioner but also on circumstances existing at the time of administering the treatment. In medical professions normally treatment is given on the basis of established medical procedure. If that is observed, medical practitioner has observed his duty. In emergency situation standard of care is lesser. A medical practitioner does not owe responsibility to cure the patient but owes responsibility to observe the standard of treatment. Whenever any person makes allegation of carelessness and negligence in treatment, he will have onus to adduce evidences. Medical practitioner's liability arises when he has not observed - a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment is to be given and duty of care in the administration of treatment. Halsbury's Laws of England defines medical negligence:

> A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered

44. (1957) 2 All ER 118.
45. AIR 2000 SC 1888.

> medical practitioner or not, who is consulted by a patient, owes him certain duties, namely, a duty of care in deciding whether to undertake the case; a duty of care in deciding what treatment to give; and a duty of care in his administration of that treatment. A breach of any of these duties will support an action for negligence by the patient.[46]

Consent of patient or his guardian is very potent defence available to medical practitioner. Consent cannot provide protection for willful negligence which amounts to commission of crime. Consent is defence only in case of tort of negligence means where standard of treatment is not observed. Consent to be effective defence must be informed consent that the patient prior to accord his consent had proper and effective information communicated by medical practitioner regarding: (1) necessity of treatment, (2) alternative modalities of treatment, (3) risk in pursuing treatment like drugs, investigation or surgical risk, (4) expences, and (5) true condition of patient and gravity of condition was neither exaggerated or minimised. Consent is given only to suffer risk of harm; it is not given to suffer harm, therefore, consent does not mean that the medical practitioner will not observe standard of treatment; he is always bound to observe standard of treatment. Supreme Court in case of *Achutrao Haribhau Khodwa* v. *State of Maharashtra*[47] observed:

> "The skill of medical practitioners differs from doctor to doctor. The very nature of profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of doctor if he has performed his duties to best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in manner which is acceptable to the medical profession and court finds that he has attended on patient with due care and skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence."

In this case Court cleared that rule of *res ipsa loquitur* may be applied in certain cases. In the instant case a mop was left inside women's peritoneal cavity while she was operated for sterilisation in a government hospital causing peritonitis which resulted in her death. The negligence was decided on the basis of rule of *res ipsa loquitur* and government was held vicariously liable.[48]

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46. *Halsbury's Law of England*, 4 th Edn, Vol. 26, pp.17-18.
47. AIR 1996 SC 2377.
48. When doctor is negligent and he is employed in any hospital, then for tort of negligence doctor is liable and employer (hospital) is liable vicariously for tort committed by doctor and both are considered as joint tortfeasors. Patient has option to file the case and

The Consumer Protection Act, 1986

Consumer Protection Act is important, effective and beneficial legislation enacted to provide proper and appropriate remedies to consumers. Before enactment of Consumer protection Act, consumer grievances were mainly dealt in law of torts, in which disposal of cases is much delayed and expensive. In Consumer Protection Act emphasis is given on speedy justice without incurring expenses. Patient getting medical service after payment is consumer and in case of deficiency in services, he may get remedy under this Act. But section 3 of Act makes clear that remedies under the Act are in addition to and not in derogation of remedy available under any other law, therefore, aggrieved patient has option available to file his complaint under any other law like Law of Torts.

Whenever patient files complaint, it is necessary that he should satisfy all the requisites of being consumer.[49] For consumer payment of consideration is necessary. Following persons are consumers – one who paid consideration and other who avails services with permission of person who paid the consideration. Patient is consumer when he has paid consultation fee or any other charge of medical practitioner. It may have been paid by patient himself or any other person, both are consumers and in case of any grievance any of them may file complaint as consumer, for example a child is ill, his father paid the consultation fee, father and child both are consumers. Medical service comes within meaning of service provided in section 2 (1) (o) of Consumer Protection Act; therefore, in case of any deficiency in services medical practitioners and hospitals are liable under the Act. For application of provisions of Act most important requirement is that the medical service must not be available free of charge. Definitions of consumer and service emphasize on payment for service, Thereby, patients are divisible in two classes one who paid the charges for medical service and another who get medical services in charitable and government hospital without any charge; former is consumer and his case is covered under CP Act and later is not a consumer and he may have remedy under Law of

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realize damages from medical practitioner or employer or both. Generally damages is realized from employer. After paying to injured person (patient), employer may ask contribution (when both were negligent, share paid for negligence of doctor) or indemnity (when only doctor was negligent, the whole amount paid) from medical practitioner.

49. Consumer in reference to service is defined in sec. 2 (1)(d)(ii): "hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised or partly paid or partly promised or under any system of deferred payment, when such services are availed of with approval of first mentioned person but does not include a person who avails of such services of any commercial purpose."

Torts. Medical service should be available to potential users means to patient at large, whoever wants to avail the services. Further, it is also relevant to note that service must not be under contract of personal service. Contract of personal service establishes master servant relationship and any service provided by servant to master will not come under the Act. If medical practitioner is servant and patient is his master, Consumer Protection Act shall not be applicable. In case of *Vasantha P. Nair* v. *Smt. V.P. Nair*[50] the National Commission held that a patient is a "consumer" and the medical assistance was a "service" and, therefore, in the event of any deficiency in the performance of medical service the consumer forum can have the jurisdiction. In case of *Indian Medical Association v. V.P. Shantha*[51] Supreme Court observed that patients aggrieved by any deficiency in treatment, from whether private clinics or Government hospitals, are entitled to seek damages under the Consumer Protection Act, 1986. A few important principles laid down in this case include:

a) Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge or under a contract of personal service) by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of "service" as defined in section 2(1) (o) of the C.P. Act.
b) The fact that medical practitioners belong to medical profession and are subject to disciplinary control of the Medical Council of India and, or the State Medical Councils would not exclude the service rendered by them from the ambit of C.P. Act 1986.
c) A service rendered free of charge would not be service as defined in the Act. Hospitals and doctors cannot claim it to be a free service if the expenses have been borne by an insurance company under medical care or by one's employer under the service conditions.

Complaint may be filed by patient or any complainant when there is any deficiency in medical services provided.[52] Consumer has right to be informed, therefore effective information in every reference of treatment should be given.[53] There should not be unfair trade practices[54] leading to or exaggerating the ailment

50. (1991) C.P.J. 1685.
51. AIR 1996 SC 550.
52. Service is defined in section 2 (1)(g) of Consumer Protection Act.
53. Consumer has right to be informed u/s 6 of CPA. Consumer has right to have the information about quality, quantity, potency, purity, standard and price of goods and services.
54. In section 6 of CPA consumer has right against unfair trade practices and it is defined in section 2 (1) (r) of CPA and it makes clear that false or misleading representation concerning need or usefulness of services, giving misleading advertisements, or false claim about standard, quality or grade of services is unfair trade practices.

and treatment and giving misleading information. There should not be restrictive trade practices[55], leading to rise in effective price. Medical practitioner and hospital cannot compel patient to purchase medicines from any particular shop. Medical services provided must be of standard determined according to circumstances, established medical procedure and law for the time being in force. Any imperfection in this regard will make medical practitioner and hospital liable. For deficiency in medical services medical practitioner and hospital both are liable and consumer forum may order any one of them or both to provide sufficient compensation to patient or his legal heirs in case of death of patient. The remedy under Consumer Protection Act is available to only that patient who availed medical services on payment. When patient is beneficiary of medical services available without any payment then Consumer Protection Act will not apply and such person can only pursue his case under Law of Torts for commission of Tort of Negligence. Further, doctor and patient must not be related through contract of personal service.

IV. CONCLUDING REMARKS

Services provided by medical practitioners are very crucial and important for the wellbeing of societal members and thereby ultimately to the society. Society has provided higher status and societal members have great respect, faith and trust in medical practitioners and hospitals. When such status, respect, faith and trust are ascribed, strict as well as higher liabilities are also imposed; and society seeks standard of behaviour. Medical services are related to life of people, therefore needed to be regulated through legal regime. Commercialization, greed, avarice, rapaciousness and professional deviations have entered in medical profession creating a greater challenge before the society at large. Professional deviations of hospitals and other incorporated bodies create greater problem and becomes more complicated by association and participation of criminals, organized criminal gangs and other middlemen, giving rise to organized criminality. To tackle the problem criminal legal regime is used and onerous liabilities are imposed on guilty medical practitioner, hospital, person responsible for managing affairs of hospitals, middlemen and any other person participating in commission of crime. Medical deviations are mainly committed for money; therefore to strike on causation fine imposed is larger and compulsory component of punishment. In case of incorporated bodies like hospitals, clinics or any other institution, to avoid confusion it is cleared in every enactment that both incorporated body and person responsible for affairs of incorporated body shall be liable and punished. Offences committed by medical

55. Consumer has right against Restrictive Trade Practices u/s 6 of CPA and it is defined in sec 2 (1) (nnn); when there is manipulation of price by affecting delivery or flow of supply of goods or services and thereby impose unjustified cost or restrictions, it amounts to Restrictive Trade Practices.

practitioners particularly by hospitals are of very serious nature and affect the life of societal members ultimately whole society may be affected like offences of female foeticide, female foetus sex determination and illegal and commercial organ transplant. These offences are committed in organized manner by expert persons by using modern gadgets and by use of modern know-how, therefore, evidences are generally not available. To cure the situation and for this purpose to convict and impose punishment on guilty persons presumption clauses are provided in penal statutes. Crime committed by hospitals and other incorporated bodies needed to be dealt more sternly with imposition of more severe punishment; furthermore, there is need to give emphasis on procedural aspects like improvement in investigation agency and investigation techniques, and prosecution agency. Medical practitioners and hospitals are liable under civil law to pay compensation for injury caused to patient. Law of Tort and Consumer Protection Act are important legislation to determine liability to pay compensation. Consumer Protection is effective law as it provides speedy justice without any expenses through simple procedure by easily accessible forums but efficacy of this law is much affected in reference to poor patients who gets treatment from charitable hospitals or government hospitals without payment of charges (consideration). Such poor patients may pursue the case under Law of Tort where there is much delayed disposal of cases and justice may be obtained after incurring much expense through complicated procedure; there is need to amend and expand Consumer Law to cover cases of poor patients availing medical services free of charge. Medical practitioners and hospitals are serving the humanity by providing services relating to life saving, thus effective protections must be provided to honest, innocent and duty oriented medical practitioners and hospitals against misuse of legal proceedings, and for this purpose there is greater need to take action against filing of frivolous, vexatious and false complaints.

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CYBER WARFARE: PREVENTION AND ENFORCEMENT STRATEGIES

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ABSTRACT : Exponential expansion of the Internet as global infrastructure for the growth of electronic commerce and as a new tool for politics, espionage and military activities has become a growing focus at national and international discourse particularly relating to the unprecedented growth of cyber warfare. Gauging the destructive consequences of emerging cyber warfare, many states are secretive about the nature of their planning and capabilities about their law enforcement and domestic security arrangements for cyber warfare. The traditional approach to cyber security that dates back to the 1990-setting up a National Computer Emergency Response Team (CERT), assigning responsibility to science ministries and creating specialized units within the national policy. Being it is a cost effective and asymmetric weapon, it needs international co-operation for extradition and mutual legal assistance.

From the above delineations, this paper examines the following important issues:What is the scope and scale of cyber warfare? Whether and to what extent cyber warfare can be considered a new or novel form of criminal activity against the person, property, society and nation as a whole? What are the criminogenic causes and motivations behind their offending? What are the legal contours of criminalisation, investigation, prosecution and execution of transnational nature of cyber warfare? How are policy makers, legislators, police, courts, business organisations and others responding at global, regional, international and national levels? and what distinctive challenges of cyber warfare present for criminal justice system and for criminological explanation?

KEY WORDS: Cyber warfare, cybercrime, critical information infrastructure, cyber weapons, malware etc.

I. INTRODUCTION

Cyberspace is the infrastructure of the modern world, and cyber security is the infrastructure of cyberspace. The end of the 20th century and the beginning of the 21st century have witnessed the unprecedented growth of myriad of computing

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devices that constitute the Internet[1] which has loudly been acclaimed throughout the world. The growing popularity of the Internet not only promises to revolutionaries the manner in which governance, diplomacy, business, warfare and other areas of activities are carried out but posits new threats to the cyber society. Since 9/11 attack[2], the burgeoning expansion of cyberspace and the issues of cyber security like two wagons of a fast moving trains between business and individual are the hottest and fastest-growing areas in cyber world, but that it lacks a clear epistemic community, yet really needs one. The expansive development of the Internet coupled with escalating threat to both the public and private networking entities has made security and the protection of information and intellectual capital a primary concern for all types of appropriate governments and organisations. An ever increasing demand, therefore, exists for experts with the knowledge and both technical as well as the legal skill to solve the challenges posed by the cyber warfare, a new breed of crime wherein hostile states use cyber world targeting to destroy the Critical Information Infrastructure[3] only to achieve the political objectives. In future, if war breaks out between two or more major world powers, one of the first victims could be the Internet itself. The reason is that classified cyber attack tools and techniques available to military and intelligence agencies are likely far more powerful

1. The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer. According to Oxford English Dictionary, the Internet is a computer network consisting of or connecting a number of smaller networks such as two or more local area-networks connected by a shared communications protocols. The Federal Networking Council (FNC) agrees that the following language reflects the definition of the term the Internet: Is logically linked together by a globally unique address space based on the Internet Protocol(IP) or its subsequent extensions/follow-ons; Is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suit or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.
2. On September 11, 2001, 19 militants associated with the Islamic extremist group *al-Queda* hijacked four airliners and carried out suicide attacks against targets in the United States. Two of the planes were flown into the towers of the World Trade Centre in New York City, a third plane hit the Pentagon just outside Washington, D.C., and the fourth plane crashed in a field in Pennsylvania. Often referred to as 9/11, the attacks resulted in extensive death and destruction, triggering major U.S. initiatives to combat terrorism and defining the presidency of George W. Bush. Over 3,000 people were killed during the attacks in New York City and Washington, D.C., including more than 400 police officers and firefighters.
3. The Information Technology Act, 2000, Section 70 reads as: Critical Information Infrastructure means the computer resource, the incapacitation or destruction of which, shall have debilitating impact on national security, economy, public health or safety.

than those available to the general public. Therefore, it is aptly said that third world countries are moving from weaponized war to informationized war.

II. CONCEPTION AND DEFINITION OF CYBER WARFARE

The term 'cyber warfare' is difficult to define but easy to understand as it has little traditional literature. Cyber warfare is a war in cyberspace[4] which is distinct from information warfare or information operation. Cyber warfare in cyberspace may be information warfare or information operation relating to naval warfare or land warfare. However, cyber warfare and cyber operation have a subtle distinction in which the former attacks or targets on Critical Information Infrastructure[5] such as electric utilities and power grids, water supplies, trains, air traffic, civil administration, hospitals and associated emergency services, financial institutions, weapons etc. in a peacetime are not cyber warfare rather it is information operation. Therefore, cyber warfare is a sub-set of cybercrime[6]. In warfare context, cyber

4. William Gibson, a Canadian mathematician is widely credited with coining the term cyberspace in his books *Neromancer*, *Monalisa and Count Zero* in the 1980. The word is clipped off from the word cybernetics, which comes from the Greek *Kubernetes* meaning is steersman or governor, *Asian School of Cyber Laws*, 2001, at 1. The Supreme Court of the Unites States of America in *ACLU* v. *Reno*, 521 US 844 explains the nature of cyber space as follows: anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficulty to categories precisely. But, as presently constituted, those most relevant to these cases are electronic mail (e-mail), automatic mailing list services, newsgroup, a chat room and the *World Wide Web*. All of these methods can be used to transmit text most can transmit sound, picture, and moving video images. Taken together, these tools constitute a unique medium known to its user as cyberspace located in no particular geographical location but a available to anyone anywhere in the world, with access to the Internet.
5. *Supra* note 3.
6. The term cyber crime being multidimensional concept creates a myriad of iceberg situations as there is no coherent, consistent and concurrently formulated definition. From the generalized point of view, it may be defined as the act of creating, distributing, and altering, stealing, misusing and destroying information through the computer manipulation of cyberspace without the use of the physical force and against the will of the victim. To quote D. Wall, "The term has no specific reference in law, yet it is often used in political, criminal justice, media, public and academic discussion. I have already suggested that instead of trying to grasp cybercrime as a single phenomenon, it might be better to view the term as signifying a range of illicit activities that common denominator is the central role played by the network of information and communication technology in their commission, (D. Wall, *Cybercrime and the Internet* (2001a) in D. Wall (edn.) *Cyber Crime and the Internet*, London, Routledge, p.2. A working definition is offered by Thomas and Loader who conceptualize cyber crime as those computer-

warfare suggests as a narrower term which entails information transmission through cyberspace during crisis or conflict period to achieve political objectives targeting the Critical Information Infrastructure.

In common parlance cyber warfare refers to a massive co-ordinated digital assault on a government by another, or by large groups of citizen. It is the action by a nation-state to penetrate another nation's computers and networks for the purpose of causing damage or disruption[7]. Further, the term may be used to describe attacks between corporation from terrorist organisations, or simple attacks by individuals called hackers, who are perceived as being warlike in their intent.[8] A working definition has been offered by Martin C. Libicki[9] from the RAND Corporation[10] as cyber warfare claims into four basic capabilities *i.e* espionage[11], disruption[12], cause of corruption[13] and distraction[14] in a connected world. Further, it has become clear that cyber warfare does not apply solely to nation *versus* nation battle, but also those that involve terrorist's activities, organised criminals and commercial organisations. Similarly, Shane M. Coughlan describes as cyber warfare is symmetric or asymmetric offensive and defensive digital network activity by states or state-like actors, encompassing danger to critical national infrastructure and military systems. It requires a high degree of interdependence between digital networks

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mediated activities which are either illegal or considered illicit by certain parties, and which can be conducted through global electronic networks, (D. Thomas and B. Loader, *Introduction Cyber Crime: Law enforcement, Security and Surveillance in the Information Age,* (200a), p.3 in D. Thomas and B. Loader (edn) *Cyber Crime: Law Enforcement, Security and Surveillance in the information Age*, London, Rutledge Publication. The Budapest Convention of Cyber Crime of 23rd November, 2001 adopts the term cybercrime as (a) offences against the confidentiality, integrity and availability of computer data and system, (b) computer related offences, (c) content related offences and (d) offences related to infringement of copyright and related rights.

7. Available at:*http://definitions.uslegal.com/c/cyber-warfare/visited on 21.03.2014.*
8. *Ibid*.
9. Libicki,*Conquest in Cyberspace*: *National Security and Information Warfare* (New York: Cambridge University Press, 2007) at 79.
10. RAND is nonprofit, nonpartisan, and committed to the public interest and to making our work accessible to people throughout the world. Each year more than 5 million research products are downloaded from RAND.org by audiences that include policy makers, academics, and the general public.
11. The use of cyber warfare to gather information as part of or in preparation of a cyber attack.
12. The use of cyber warfare to prevent a system from performing its intended purpose.
13. The use of cyber warfare to alter the intended purpose of a system.
14. The use of cyber warfare to use a targeted system to disrupt the decision making cycle of that system's end user.

and infrastructure on the part of the defender, and technological advances on the part of the attackers. It can be understood as a future threat rather than a present one, and fits neatly into the paradigm of Information Warfare[15]. A further definition of cyber warfare is a conflict that uses hostile, illegal transactions or attacks on computers and networks in an effort to disrupt communications and other pieces of infrastructure as mechanism to inflict economic harm or upset defences[16].

The U.S. Government Security expert Richard A. Clark explains that cyber warfare is action by a nation state to penetrate another nation's computer or networks for the purpose of causing damage or disruption in order to achieve political objectives[17]. In other words, a hostile country being politically motivated while attacking the Critical Information Infrastructure of a nation like financial institutions, corporation, business entities employs cyber warfare.Jeffrey Carr explains any country waging cyber war on any other country, irrespective of resources, because most military forces are network-centric and connected to the Internet, which is not secure during the war period. The perpetrator of the cyber warfare could be foreign government, terrorist groups, unethical hackers, individuals, non-governmental organisations etc.[18] According to a recent UN Security Council Resolution, "Cyber warfare is the use of computers or digital means by a government or with explicit knowledge of or approval of that government against another state, or private property within another state including intentional access, interception of data or damage to digital and digitally controlled infrastructure, and production and distribution of devices which can be used to subvert domestic activity.[19]

It is evident that cyber warfare is species of cybercrime which is distinct from cyber operation. John Arquilla and David Ronfeldt have argued in their important essay, *Cyberwar is Coming* that cyber operation and cyber war are key concepts for understanding information warfare[20]. Cyber warfare is a narrower term which

15. Shane M. Coughlan, "Is There a common understanding of what constitutes cyber warfare?,"*The University of Birmingham School of Politics and International Studies*, 30 September 2003, at 2. In 2001, Congressional Research Service Report notes that Cyberwarfare can be used to describe various aspects of defending and attacking information and computer networks in cyberspace, as well as denying and adversary's ability to do the same.
16. Kevin Coleman, "The Cyber Arms Race Has Begun", *CSO Online*, 28th January 2008.
17. Richard A. Clarke, "Cyber War: The Next Threat to National Security and What to Do About it", April 20, 2010.
18. Carr Jeffrey, *Inside Cyber Warfare, Mapping the Cyber Underworld* (Newton MA O Reilly Media, 2nd ed., 2010) at 318.
19. The United Nations Security Council, Resolution 1113 (2011), 5 March, 2011.
20. George J. Stein, "Information Attack, Information Warfare in 2025", in *New Ideas: New Words*,IASI, August 1996, available at:*http://www.psycom.net/iwarlhtml, visited on 20.02.2014*.

entails information operation during the war or crisis to achieve specific political objectives whereas espionage in peacetime is not cyber warfare: it is information or cyber operation. However, both information warfare and information operation hinges on high-tech attacks on Critical Information Infrastructure such as electric utilities and power grids, water supplies, trains, air traffic, civil administration, hospitals and associated emergency services, financial institutions, weapons etc.[21]. Therefore, cyber warfare is mainly employed to achieve information superiority, which takes two forms. One is Hard Kill where there is physical destruction of mainframe computers and data based servers, uplinking station and telecommunication nodes. The other being Soft Kill comprising pest programs employing a variety of techniques like Trojan Horse, Logic Bomb, Hacking etc., and gaining unauthorised access to destroy block valuable information. To constitute an action as cyber warfare, it depends upon two things: means and vulnerability. The 'means' are the people, tools, and cyber weapons available to the attacker. The 'vulnerability' is the extent to which the enemy, economy and military use the Internet and networks infrastructure in general.

III. INTERNATIONAL EVENTS OF CYBER WARFARE

The beginning of the new millennium has brought a rising wave of cyber warfare attacks. These technological based incidents have destructive impact on information technology facilities. The present section undertakes a study of cyber warfare reviewing the incidents at the national as well international levels.

(a) In Siberia, the explosion of a gas pipeline in 1982 is claimed to have been the first known act of cyber warfare incident[22]. According to Western publications, the event was the result of sabotage where the Supervisory Control and Data Acquisition of the pipeline system were mal-programmed to cause the explosion. This is a computerized system that supervises and controls the industrial process. It is said that *Trozon Bomb*[23]was inserted so as to cause pipe line destruction.

(b) The Morries worm was released in November, 1988. It was launched surreptitiously from Massachusetts Institute of Technology by graduate student *Robert TappenMorries* at Cornell University and spread to the Internet

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21. S. Venkatesh, *Control of Cyber Terrorism* (New Delhi: AuthorsPress, 2003) at 108.
22. George K. Kostopoulos, *Cyberspace and Cyber Security* (London: CRS Press Taylor & Francis Group) at 176.
23. In computer, a Trozen Bomb is a program in which malicious or harmful code is contained inside apparently harmless programming or data in such a way that it can get control and its chosen form of damage.

connected computer running the BSD variant of UNIX. The worm was designed to be indictable but a design flow led it to create far more copies of itself, and resulted in the drastic overtaxing of the entire computer on which it was installed. The Morris worm was not a destructive worm, it only caused computers to slow and buckle under the weight of unnecessary processing[24].

(c) In 1998, the United States hacked into Serbia's Air Defence System to compromise air traffic control and facilitate the bombing at Serbian target[25].

(d) Since 1999, India and Pakistan were engaged in a long-term dispute over Kashmir issue which moved into cyberspace. Historical accounts indicated that each country's hackers have been repeatedly involved in attacking each other's computing database system. The number of attacks has grown yearly i.e. 45 in 1999, 133 in 2000 and 275 by the end of August 2001. In 2010, Indian hackers laid a cyber attack at least 36 government database websites going by the name *Indian Cyber Army*. In 2013, Indian hackers hacked the official website of Election Commission of Pakistan in an attempt to retrieve sensitive database information. In retaliation, Pakistani hackers calling themselves *True Cyber Army* hacked and defaced 1,059 websites of Indian election bodies[26].

(e) Estonia is a small Baltic country, formally a Soviet satellite State that received its independence from the Soviet Union in 1991. Estonia became a member of NATO on 2nd April, 2004, and joined the European Union on 1st May, 2004. Further, in 2007 the government of Estonia decided to relocate a World War II Soviet War Memorial from the capital city of Tallinn to a military cemetery outside of the city. The Russian government as well as many Russian citizens were outraged at the perceived slight. It is generally accepted that this was the catalyst for the cyber attacks that occurred soon after the uproar over the war memorial. The attacks did not occur as part of a concerted effort. The nature of the attack was that malicious virus was inserted not only shutting down Estonian websites but defacing them.[27].

(f) The cyber attacks against Israel in late 2008 and early 2009 were not a coordinated cyber warfare campaign against the Israeli government. Cyber

24. *Supra* note 22.

25. In 1999, the US's Navy's Web site was hacked, reportedly by Russians who support the Serb, Erasing the Navy's information, they left blisteringly obscene insults against the US. In 1999, the war in Yugoslavia has spread to the Net with NATO suffering attacks on it computer systems fromSerbia. In 2001, Chinese hacker groups organized a massive and sustained week-long campaign of cyber attacks against American targets.

26. Available at:*http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA395300, visited on 21.03.2014.*

27. Available at:*http://www.guardian.co.uk/world/2007/may/17/topstories3.russia, visited on 21.03.2014.*

warfare began soon after the Israeli bombing campaign began against Ghana. Within a few days, three hundred Israeli websites were attacked. In response, the Israelis attacked Palestinian media websites such as video from both combatants emerged on *Youtube.* Civilians and journalists began posting accounts of the war on micro blog site Twitter in an effort to shape the information battle[28].

(g) In 2010, Iran reported that as many as 1,000 of its centrifuges at the Natanz nuclear facility, used for enriching weapons-grade uranium, were destroyed by a computer virus. The virus allegedly wrecked the electric motors by accelerating them to damaging speeds and setting back the Iranian nuclear program for at least two years**.** Iran blamed the U.S. and Israeli intelligence agencies for the attack. According to the Washington-based Institute for Science and International Security, the weapon used for the attack was probably a virus called Stuxnet[29]. But unlike other computer viruses, Stuxnet is designed to attack only networks with specific configurations[30].

IV. INTERNATIONAL LEGAL RESPONSE

Cyber warfare is not a territorial crime rather transnational in nature. Therefore, any efforts to combat it, international cooperation, extradition and mutual legal assistance are the read of the houre. These factors need to be appreciated by all the parties because international element in the commission of cyber warfare creates new challenges before the law. The possible involvement of different sovereignties, jurisdictions, divergent laws and rules etc. must be realised by all parties.

European Union

European Union Policy considering the consequence of cyber warfare is directed towards the protection of Critical Information Infrastructure, and

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28. Available at:*http://usacac.leavenworth.army.mil/CAC/milreview/download/English/MarApr03/allen.pdf, visited on 21.03.2014.*
29. Stuxnet is a type of computer program called a worm that can be inserted into a computer or a network of computers, where it replicates itself infecting other machines. Once inside a computer, a worm can corrupt or damage files, causing malfunction of programs. Stuxnet is designed to attack computers with Microsoft Windows operating systems, and it can be most easily inserted through infected removable drives - pocket-size memory banks that connect to standard USB ports. After the damage is done, Stuxnet is designed to self-destruct so it is very hard to trace. According to experts studying Stuxnet, it is a very complex program and only government agencies are capable of designingit.
30. Available at:*https://www.wired.com/2014/11/countdown-to-zero-day-stuxnet, visited on 21.03.2014.*

acknowledges that the strategic level of prevention and enforcement policy is the basic infrastructure of Critical Information Infrastructures. The communication from the Commission of the European Communities at the Conference on Cyber Warfare Tallinn, 2009 to the European Parliament, the Council, the European Economic and Social Committee and the Committees of the Regions on Critical Information Infrastructure Protection Policy, 2009 outlines the strategic nature of the threat and acknowledges cyber attacks as means to destroy or disrupt these strategic systems. Additionally, the European Community Summarised the Conference on Cyber warfare Tallinn, Estonia, June, 2009 with the document, towards a European Union Policy on Critical Information Infrastructure Protection June, 2009.

The United States

The United States has focused on cyber security since 1990. Responsibility is divided between the Department of Homeland Security, the Federal Bureau of Investigation and the Department of Defence including the new U.S. cyber command which has the National Security Agency**.** In 2001, USA PATRIOT Act was proposed and enacted after the horrific event of the 9/11 attack on public and privatesectors in the United States. It being a very controversial law which restricts previously enjoying civil liberties outlines the following important features:

- **National Electronic Crime Task Force:** Recognising theneed for information in combating crime, in general and terrorism, in particular, the law directs for the creation of a national network of electronic crime task forces for the purpose of preventing, detecting, and investigating various forms of electronic crimes, including potential terrorist attacks against criminal infrastructure and financial payment systems.
- **Information interception:** The law grants authority to cognizant US government agencies to intercept wire, oral, and electronic communications relating to terrorism, computer fraud and abuse offences. There can be seizure of voice mail messages pursuant to warrants.
- **Disclosure of records:** An Internet Service Provider may divulge a record or other information pertaining to a subscriber or a customer if the provider reasonably believes that an emergency involving immediate danger of death or serious physical injury to any person requires disclosure of the information without delay.
- **Telemarketing fraud:** The law is concerned with the charitable telemarketing fraud and requires that such activities fully disclose the name and mailing address of the charitable organization on behalf of which the solicitation is made.

Cyber warfare is not a traditional crime which kills humans directly but kills machines[31]. As a means of waging war, however, diplomats of every country may be asked to negotiate international agreements designed to mitigate the risk of cyber warfare, just as they have done for Chemical Weapons Convention[32]. It may be argued that following three principles are clearly transferable in the cyber domain to check the proliferation of cyber warfare:

a. **Political Will:** International treaties require widespread agreement on the nature of a common problem. The threat posed by cyber warfare- based on national capabilities as well as the fear that terrorists will begin to master the art of hacking – could be strong enough to form such a political consensus. In May 2009, President Obama of U.S. made a dramatic announcement; "Cyber attacks have plunged entire cities into darkness". Media reports state that the attacks took place in Brazil, affected millions of civilians in 2005 and 2007, and that the source of the attacks is still unknown. The more recent cyber attack on Google was serious enough to begin discussion in the U.S. on whether to create an ambassador-level post, modelled on the State Department's counterterrorism coordinator, to oversee international cyber security efforts. As with Cyber Weapons Convention, a convention intended to help secure the Internet would need the major world powers behind it to succeed.
b. **Universality**: One of the primary challenges to improve computer security is the fact that the Internet is a worldwide enterprise. The jurisdiction of law enforcement and counterintelligence personnel ends every time a network cable crosses an international border. Even though thousands of miles may separate an attacker and defender in the real world, everyone is a neighbour in cyberspace, and attackers often have direct access to their victims. Smart hackers hide within the maze like architecture of the Internet, and route attacks through countries with which the victim's government has poor diplomatic

31. To be more specific cyber attacks usually target the data resident on or functionality of a machine. It is also important to note that inoperable machines can kill humans: examples medical equipment and national air defence systems. By the same token, chemical warfare can also kill flora, fauna, and human input to machines.
32. In 1997, 95 nations signed Chemical Weapons Convention, an international arms control agreement that has been a success by almost any measure. The treaty's purpose is reflected in its full name: Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Its goal is to eliminate the entire category of weapons of mass destruction that is associated with toxic chemicals and their precursors. The Chemical Weapons Convention Preamble declares that achievements in chemistry should be used exclusively for beneficial purposes and that the prohibition on Chemical Weapons is intended for the sake of all mankind.

relations or no law enforcement cooperation. In 2010, there are plenty of cyber safe havens where criminals, spies and terrorists can operate without fear of reprisal. Although the global nature of cyberspace makes the practical task of securing the Internet inherently more difficult, the universal goals of Cyber Weapons Convention are highly appropriated in the cyber domain. Politicians, international negotiators, and the public will have no trouble understanding this characterization and universality would be a cornerstone of a Cyber Weapons Convention.

c. **Assistance**: Vulnerabilities in computer networks and the advantages they create for an attacker will persist for the foreseeable future. Organizations have no choice but to invest more time and effort into computer security. However, a proper implementation of best practices such as risk management, awareness, training, defence in –depth and incident handling usually requires more expertise and resources than most organizations and even many countries presently have with them. Within Cyber Weapons Convention, developed countries offer practical aid to its members so that it could create an internationally- staffed institution dedicated to helping signatories to improve their cyber defence posture, and respond effectively to cyber attacks when they occur. Experts could provide technical, legal, and policy advice *via* consultation and training. A crisis response team could be available to be deployed worldwide at moment's notice, ready to publish its findings to the world. To actively promote the benefits of peaceful uses of computer technology for economic development and cooperation, the best chance that future Cyber Weapons Convention would have to access to real-time network data from across the whole of the Internet, and the ability to collaborate immediately with treaty-empowered colleagues throughout the world. National sovereignty and data privacy concerns would have to be carefully guarded. The technical and forensic side of the regime should be separated as much as possible from its legal and political ramifications. Further, cyber warfare is unlike chemical warfare in that cyber attacks often demand stealth and anonymity. At a minimum, any prohibition on malware will require substantial progress on solving the cyber attack*attribution* problem. This will take time, and involve technical, legal, and international cooperation on a level far higher than it exists today.

V. INDIAN LEGAL RESPONSE

Owing to expanding horizons and deleterious impact on industry, individuals and society as a whole, the Indian Parliament has enacted the Information Technology Act, 2000 and (Amendment) Act, 2008 incorporating the spirit of the Model Law

on Electronic Commerce adopted in 1997 by the United Nations Commission on International Trade Law. This Act also further amends the Indian Penal Code, 1860[33], the Indian Evidence Act, 1872[34], the Banker's Books Evidence Act, 1891[35] and the Reserve Bank of India Act, 1934[36]. Though, the focus of the Information Technology Act, 2000 is neither on cyber warfare nor cyber crime as such, the Act defines certain offences and penalties that deal with acts and omission falling under the term cyber crimes. Chapter XI of the Act deals with the offences specifically and Chapter IX deals with penalties and adjudication of cyber contraventions generally. A close perusal of the Information Technology Act reveals the following kind of cyber contraventions and cyber offences.

- **Cyber Contravention**: The terminology cyber contravention under the Information Technology Act, 2000 creates civil liability as well as criminal liability. Section 43 which is based upon civil liability outlines that if any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network:

(a) Accesses or secures to access such computer, computer system or computer network:
(b) Downloads, copies or extracts any data, computer database or information from such computer, computer system or computer network including information or data held stored in any removable storage medium:
(c) Introduces or causes to be introduced any computer contaminant or computer virus into any computer, computer system or computer network:
(d) Damages or causes to be damaged any computer, computer system or computer network, data, computer database or any other programmes residing in such computer, computer system or computer network:
(e) Disrupts or causes disruption of any computer, computer system or computer network:
(f) Denies or causes the denial or access to any person authorized to access any computer, computer system or computer network by any means:
(g) Provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulation made there under:
(h) Charges the services availed of by a person to the account of another person

33. The Indian Penal Code, 1860,Sections 29A, 167, 172, 173, 175, 192, 104, 463, 464, 468, 469, 470, 471, 474, 476, 477 and 477A.
34. The Indian Evidence Act, 1872, Sections 3, 17, 22A, 34, 35, 39, 47, 59, 65, 65B, 73A, 81A, 85A, 85B, 85C, 88A, 90 and 131.
35. The Banker's Books Evidence Act, 1891, Sections 2 and 2A.
36. The Reserve Bank of India Act, 1934, Section 58.

by tampering with or manipulating any computer, computer system or computer network:

(i) Destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means:

(j) Steel, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any commuter source code used for a computer resource with an intention to cause damage, he shall be liable to pay damages by way of compensation to the person so affected.

However, under Section 66 of the Act provides that if any person, dishonestly[37] or fraudulently[38], does any act referred to in Section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.

- **Tampering with Computer Source Code**: Whoever, knowingly or intentionally conceals, destroys or alters or intentionally causes, another to conceal, destroy or alter any computer source code, which is required by law to be kept or maintained, shall be punishable with imprisonment up to three or with fine or with both. It is to be noted that when computer source code is not required by law to be kept or maintained than tempering with computer source code is not punishable and that is not proper[39].
- **Cyber Terrorism**: With the help of information technology the potential cyber criminals have created new breed of crime which is known as cyber terrorism[40].

37. *Supra* note 33, Section 24 reads as: whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing dishonestly.
38. *Id.*, Section 25reads as: a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.
39. *Supra* note 3, Section 65.
40. In 1998, a report by the Centre for Strategic and International studies entitled *Cyber Crime, Cyber Terrorism, Cyber Warfare, Averting on Electronic Waterloo* accepted definitions for cyber terrorism as premeditated, politically motivated attacks by sub-national groups or clandestine agents, or individuals against information and computer systems, computer programmes and data that result in violence against non-combatant targets.*See also,* Andrew M. Colarik, *Cyber Terrorism: Political and Economic Implementation*(*Idea Group Publishing 2006*)at 56 "A criminal act perpetrated by the use of computers and telecommunications capabilities, resulting in violence, destruction, and/ or disruption of services, where the intended purpose is to create fear by causing confusion and uncertainty within a given population with the goal of influencing a government or population to conform to a particular political, social or ideological agenda; and The execution of a surprise attack by a sub-national foreign terrorist group or individuals with a domestic political agenda using computer technology and the Internet to cripple or disable a nation's electronic and physical infrastructures." D.

To curb the menace of cyber terrorism, Section 66F of the Information Technology Act, 2000 and its (Amendment) Act, 2008 explains as: whoever (A) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people by-

(i) denying or cause the denial of access to any person authorized to access computer resource: or

(ii) attempting to penetrate or access a computer resource without authorization or exceeding authorized access: or

(iii) introducing or causing to introduce any computer contaminant and by means of such conduct causes or is likely to cause death or injuries to persons or damage to or destruction of property or disrupts or knowing that it is likely to cause damage or disruption of supplies or services essential to the life of the community or adversely affect the Critical Information Infrastructure specified under Section 70; or

(B) or knowingly or intentionally penetrates or accesses a compute resource without authorization or exceeding authorized access, and by means of such conduct obtains access to information, data or computer database that is restricted for reasons for the security of the State or foreign relations: or any restricted information, data or computer database, with reasons to believe that such information, data or computer database so obtained may be used to cause or likely to cause injury to the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to and offence, or to the advantage of any foreign nation, group of individuals or otherwise commits the offence of cyber terrorism.

(2) Whoever commits or conspires to commit cyber terrorism shall be punishable with imprisonment which may extend to imprisonment for life.

- **Access to Critical Information Infrastructure**: An appropriate government by notification in the official gazette declares any computer resource which directly or indirectly affects the facility of Critical Information Infrastructure to be protected system. Any person who secures access or attempts to secure access to a protected system in contravention of the provisions of the Act shall

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Verton Black Ice: *The Invisible Threat of Cyber Terrorism* (Mc Graw-Hill/Osborne 2003)at 20 "Unlawful attacks and threats of attack against computers, networks, and the information stored therein when done to intimidate or coerce a government or its people in furtherance of political or social objective": cited in Majid Yar, *Cyber Crime and Society* (Sage Publication, 2006) at 51 "Cyber terrorism is as the convergence of cybernetic and terrorism."

be liable for punishment which may extend to ten years and shall also be liable to fine[41].

- **Computer Emergency Response Team**: According to Section 70-B, the Central Government shall, by notification in the Official Gazette, appoint an agency of the Government to be called the Indian Computer Emergency Response Team and it has been empowered to discharge the following functions in the area of cyber security:

(a) Collection, analysis and dissemination of information on cyber incidents;
(b) forecast and alerts of cyber security incidents;
(c) emergency measures for handling cyber security incidents;
(d) co-ordination of cyber incidents response activities;
(e) issue guidelines, advisories, vulnerability notes and white-papers relating to information security practices, procedures, preventions, response and reporting of cyber incidents;
(f) such other functions relating to cyber security as may be prescribed.

- **National Cyber Security Policy-2013:** Owing to the numerous benefits brought about by technological advancements, the cyberspace today is a common pool used by citizens, businesses, critical information infrastructure, military and governments in a manner that makes difficult to draw clear boundaries among these different groups. The cyberspace is expected to be more complex in the foreseeable future with many fold increase in networks and devices connected to it. Owing to the dynamic nature of the cyberspace, there is now a need for these actions to be unified under a National Cyber Security Policy- 2013[42] in a following manner with an integrated vision and set of sustained and coordinated strategies for implementation.

(a) To create a secure cyber ecosystem in the country, generate adequate trust and confidence in Information Technology systems and transactions in cyberspace and thereby enhance adoption of Information Technology in all sectors of the economy.
(b) To enhance global cooperation by promoting shared understanding and leveraging relationships for furthering the cause of security of cyberspace.
(c) To designate a National Nodal Agency to coordinate all matters related to cyber security in the country, with clearly defined roles & responsibilities.
(d) To encourage all organizations, private and public to designate a member of

41. *Supra* note 3, Section 70.
42. Ministry of Communication and Information Technology, Department of Electronics and Information Technology, 2nd July, 2013, published in the Gazette of India, Extra., Part 1, Section 1, dated July 2, 2013, No. 143 F.No. 2(35)/2011-CERT-In.

senior management, as Chief Information Security Officer, responsible for cyber security efforts and initiatives.

(e) To encourage all organizations to develop information security policies duly integrated with their business plans and implement such policies as per international best practices. Such policies should include establishing standards and mechanism for secure information flow (while in process, handling, storage and transit), crisis management plans proactive security posture assessment and forensically enabled information infrastructure.

(f) To ensure that all organizations earmark a specific budget for implementing cyber security initiatives and for meeting emergency response arising out of cyber incidents.

(g) To provide fiscal schemes and incentives to encourage entities to install, strengthen and upgrade information infrastructure with respect to cyber security.

(h) To prevent occurrence and recurrence of cyber incidents by way of incentives for technology development, cyber security compliance and proactive actions.

(i) To establish a mechanism for sharing information and for identifying and responding to cyber security incidents and for cooperation in restoration efforts.

(j) To encourage entities to adopt guidelines for procurement of trustworthy ICT products and provide for procurement of indigenously manufactured ICT products that have security implications.

(k) To develop a plan for protection of Critical Information Infrastructure and its integration with business plan at the entity level and implement such plan. The plans shall include establishing mechanisms for secure information flow, guidelines and standards, crisis management plan, proactive security posture assessment and forensically enabled information infrastructure.

(l) To development bilateral and multi-lateral relationships in the area of cyber security with other countries.

(m) To enhance National and global cooperation among security agencies, CERTs, Defence agencies and forces, Law Enforcement Agencies and the judicial systems.

(n) To create mechanisms for dialogue related to technical and operational aspects with industry in order to facilitate efforts in recovery and resilience of systems including critical information infrastructure.

VI. CONCLUSION AND SUGGESTIONS

The world has become so dependent on the Internet that the appropriate governments may seek far reaching prevention and enforcement strategic to ensure its security. Now, more aspect of modern society, business, government and Critical Information Infrastructure are computerized and connected to the Internet. As a

consequence and for the sake of everything from the production of electricity to the integrity of national elections, national networking security is no longer a luxury, but a necessity. In the future, if war breaks out between two and more major world powers, one of the first victims could be the Internet itself. Therefore, world leaders may join their hands to negotiate international agreements on Cyber Weapons Convention which is a possible strategy and strong candidate model.

In Indian context, development and use of information systems follow this generic path where in the process of parameter, balancing vulnerabilities are created leading into risk. Further, there is no activity in life that is absolutely risk free, and where possible insurance is purchased or measures are taken to minimise the risk rather than risk elimination. Although the release of the National Cyber Security Policy 2013 is an important step towards security in the cyberspace of our country, there are certain areas which need further deliberations for actual implementation. The provisions to take care security risks emanating due to use of new technologies e.g. cloud computing has not been addressed. Another area which is left untouched by this Policy is tackling the risks arising due to increase use of social networking sites by the criminals and anti-national elements. There is also need to incorporate cybercrime tracking, cyber forensic capacity building and creation of platform for sharing and analysis of information between public and private sectors on continuous basis.

Everything is subject to change and change is indispensable in nature. The vulnerability of Critical Information Infrastructure could change the cyber world if three things are taken into account as a whole. *Firstly*, vulnerability could increase as societies move to a ubiquitous computing environment when more daily activities have become automated and rely on remote computer networking. *Secondly*, vulnerability could increase as more industrial and infrastructure applications for supervisory control and data acquisition move from relying on dedicated, proprietary networks to using the Internet and then the Internet Protocols for their applications. *Thirdly*, reliance on networks seems to be cost effective, easy to operate and quick responsive. These changes will lead to increase vulnerabilities if countries do not balance the move to become more networked and more dependent on the Internet protocols with effort to improve network security, make law enforcement more effective and ensure that Critical Information Infrastructure are robust and resilient.

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INTELLECTUAL PROPERTY RIGHTS OF FARMERS AND FOOD SECURITY CONCERN

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ABSTRACT: Increasing food production is necessary in light of the projected growth of the world's population. Ensuring an adequate food supply for the booming population is going to be a major challenge in the years to come. At present, international agricultural trade leads to increasing interest in the notion of food security. Significant contributions have been made by indigenous people particularly farming Community to ensure food security. The present paper examines the contribution made by farmers in particular, in the context of intellectual property protection.

KEY WORDS: Agriculture, Farmers Rights, Intellectual Property, Food Security, and International Trade.

I. INTRODUCTION

Recent decades have seen growth in international agricultural trade which led to increasing interest in the notion of food security.[1] However, two facts, when put against each other, startlingly demonstrate the irony of the present global food situation. One is that hunger and malnutrition are verywidespread. The other is that there is enough food produced in the world to satisfy the needs of all. Many figures and estimates exist as to the magnitude and extent of under nutrition and malnutrition, along with information on how these figures have been established.[2]

The world population has topped 7 billion people and it's predicted to double in the next 50 years. Ensuring an adequate food supply for this booming population is going to be a major challenge in the years to come. Increasing food production is necessary in light of the projected growth of the world's population.[3] The Food and Agriculture Organization (FAO) estimates that 1.02 billion people were

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1. Richard Lee, "Food Security and Food Sovereignty", *Centre for Rural Economy Discussion Paper Series No. 11*, 2007, at 2
2. AsbjornEide, Arne Oshaug and Wenche Barth Eide, "Food Security and the Right to Food in International Law and Development", *1 Transnat'l L. & Contemp. Probs.,* 1991, at 416
3. S. Sahai, "India can beat the food crisis", available at: *http://www.genecampaingn.org/India_can_beat _the_food_crisis*

undernourished worldwide in 2009 and hunger was increasing even before the recent food and economic crises.[4]It has been estimated that in order to meet demand, agricultural output would have to increase by 70% between now and 2050 given the limitation on expanding the amount of cultivated land.[5]The FAO World Summit on Food Security, 2009 concluded that increasing agricultural productivity is the main means to meet the growing demand for food and it identified agricultural biotechnology as a way of achieving this goal.[6]

It is argued that significant contributions have been made by indigenous people particularly farmering community in conservation of existing crops and in development of new crops.[7] These groups have been an important agency in the conservation and supply of plant genetic resources to seed companies, plant breeders, and research institutions and are also crucial for ensuring present and future food security. Balancing breeders' rights is one way to ensure that farmers will not be hindered in maintaining their customary practices. However, more direct measures are required to enable farmers to continue to act as custodians of the plant genetic resources and as innovators in agriculture to ensure global food security.These measures are sometimes addressed in the context of rewards and benefit sharing.[8]If their intellectual creations are not protected, agricultural productivity is going todecline and food security will be undermined. Therefore, one of the most important priorities is to protecttheir rights in the seeds and plant variety legislation. It is in this context that the present paper discusses food security concerns and farmer rights under intellectual property protection regime and examines existing international, and national instruments.

II. Farmers And Farming Practices

Agriculture practices started approximately 10,000 years ago in the form of process of domestication of the plants and animals by farmers that feed the world today. In the ancient time people began altering plant and animal communities for their own benefit through other means such as 'fire-stick farming'[9]. However, in the

4. "The State of Food Insecurity in the World: Impacts and Lessons Learned", *Food and Agriculture Organization*, 2009,at 11
5. The FAO World Summit on Food Security, Rome, 16-18 November, 2009, *DOCWSFS/ 2009/2*, at para 4
6. *Id.,* at para 26
7. Elizabeth Verkey, "Shielding Farmers' Rights", 2(12) *Journal of Intellectual Property Law and Practice*, 2007, at 826
8. *Ibid*.
9. 'Fire-Stick Farming' is a term coined by Australian archaeologist Rhys Jones in 1969. It describes the practice of indigenous Australians who regularly used fire to burn vegetation to facilitate hunting and to change the composition of plant and animal species

ancient time farmers were not in good condition. They were farming only for their survivorship though, it was not enough for their survival even because farming practices in ancient time were difficult due to the limited area of good soil and cropland. It is estimated that only 20% of the land was usable for growing crops.[10] Most of the farmings were small with four or five acres of land. With the progress of time farmers were keen to grow enough food to support their families and, at times, they also used to grew a small surplus to sell at the local market.[11]

Agriculture emerged independently in different continents, in what are called "the centers of origin" of crops. When our ancestors started to identify, collect, farm and disseminate those agricultural species, a process was set afoot of mutual adaptation between humans and the plants they grew, and between these plants and their environment. While we depend on cultivation of plants to satisfy the basic human need for food, the crops depend on humanity for their continued existence. Much of their genetic diversity can only survive through continued human use and conservation.[12]Agricultural practices such as irrigation, crop rotation, fertilizers, and pesticides were developed long ago but have made great strides in the past century. The 'Haber-Bosch'[13] method for synthesizing ammonium nitrate represented a major breakthrough and allowed crop yields to overcome previous constraints. In the past century, agriculture in the developed nations, and to a lesser extent in the developing world, has been characterized by enhanced productivity, the replacement of human labour by synthetic fertilizers and pesticides, selective breeding, and mechanization. The recent history of agriculture has been closely tied with a range of political issues including water pollution, bio-fuels, genetically modified organisms, tariffs, and farm subsidies. In recent years, there has been a backlash against the external environmental effects of mechanized agriculture, and increasing support for the organic movement and sustainable agriculture.[14]

Farmers developed many ways to maintain soils, ward off frost and freeze cycles and protect their crops from animals.[15]Identifying an exact origin

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in an area. For further detail see, R. Bliege Bird, D.W. Bird, B.F. Codding, C.H. Parker and J.H. Jones, "The 'Fire-Stick Farming' Hypothesis: Australian Aboriginal Foraging Strategies, Biodiversity, and Anthropogenic Fire Mosaics" (2008) 105(39) *PNAS* pp.14796-14801, available at: *www.pnas.org_cgi_doi_10.1073_pnas.0804757105*

10. Available at: *http://www.historylink101.com/2/greece3/jobs-farming.htm*
11. "Ancient Greece: A Lasting Legacy", Field Test Edition, Unit of Study Gifted/Talented and Enrichment 2009-2010 at 124
12. Available at: *http://www.planttreaty.org/content/farmers-rights*
13. It is a process for producing ammonia from nitrogen and hydrogen, using an iron catalyst at high temperature and pressure.
14. "Agriculture", available at:*http://www.capitalco.com.au/Portals/0/Docs/Fertiliser_Chemical/Agriculture.pdf*
15. Available at: *http://archaeology.about.com/od/neolithic/tp/ancient_farming.htm*

of agriculture remains problematic because the transition from hunter-gatherer societies began thousands of years before the invention of writing. It is not until after 9,500 BC that the eight so-called founder crops of agriculture appeared. These were emmer, einkorn wheat, hulled barley, peas, lentils, bitter vetch, chick peas and flax.[16]Agriculture has undergone significant developments since the time of the earliest cultivation. The Fertile Crescent of Western Asia, Egypt, and India were sites of the earliest planned sowing and harvesting of plants that had previously been gathered in the wild.[17]

Farmers play important role in farming practices. Farmers have made and continue to make contributions for the conservation and development of plant genetic resources. Though regarded by many as a vague, an abstract concept, the available evidence on the important role of traditional farmers in conserving and improving such resources, has provided grounds for its growing recognition.[18]Farmers are good innovators and they always try to evolve or innovate new practices. Due to the nature of agriculture farmers always have to adapt and innovate new practices to ensure a stable and high level of food production. The outcomes of small holder farmer innovation have not always been recognized, however, and it is only in the past thirty years that there has been a move away from the traditional and linear 'top-down' approach to technology transfer to a recognition of the value of farmer knowledge and the importance, as end-users of technologies, of their inclusion in broader innovation systems.[19] Farmers' knowledge and innovation is often 'unrecognized and under-utilized' both within the farming community and between farmers, scientists, extension workers and researchers.

III. Intellectual Property Rights of Farmers

Farmer's rights are traditional rights which farmers have on the seeds or the propagating materials of plant varieties.[20]It is about enabling farmers to continue

16. Bossi Emanuele, Gierlinger Sylvia, KišjuhasAleksej, MorićMilovanovićBojan, OrosSršenAnkica, ŽikovšekDarja, "Implementing Organic Food Production in the DRB" (2013) at 71, available at: *http://www.openstarts.units.it/dspace/bitstream/10077/9339/1/7_DIANET_2013_Working-group-C_FT-.pdf*
17. "Have you ever thought about how Agriculture came to be?" *Agronigeria Online*, 2014, available at: *http://agronigeria.com.ng/2014/02/10/have-you-ever-thought-about-how-agriculture-came-to-be/*
18. Enrico E. Bertacchini, "Coase, Pigou and the Potato: Whither Farmers' Rights?", 68 *Ecological Economics,* 2008, pp.183-193, at 183
19. Available at: *http://canwefeedtheworld.wordpress.com/2012/09/28/farmer-innovation-in-malawi/#more-132*
20. S. Bala Ravi, "Manual on Farmers Rights", *M.S. Swaminathan Research Foundation*, 2004, at 17

their work as stewards and innovators of agricultural biodiversity, and recognizing and rewarding them for their contribution to the global pool of genetic resources. This right arises from the important role farmers have been playing to conserve and enrich varieties and the knowledge they hold on the total genetic variability of the country. The importance of these rights from the conservation point of view became more compelling with the grant of plant breeders rights (PBR) to commercial plant breeders under intellectual property protection regime. The demand for extending intellectual property protection to agriculture has met with counter claims for granting farmers' rights. In this respect the debate over farmers' rights protection has attracted much attention in the recent time all over world.[21]

Origin of Concept of Farmer's Rights

The origin of the concept of farmer's rights can be traced in the debates held within Food and Agricultural Organization (FAO) on the asymmetry in the distribution of benefits between farmers as donors of germplasm and the producers of commercial varieties that ultimately rely on such germplasm. The basic concept was that while a commercial variety could generate returns to the commercial breeder on the basis of plant breeders' rights (PBRs), no system of incentives or compensation for the providers of germplasm had been developed.[22]International Undertaking on Plant Genetic Resources (IUPGR) for Food and Agriculture of Food and Agricultural Organization, 1983 recognized farmer's rights first time in response to the broadening scope of plant variety protection (PVP) afforded to commercial plant breeders under International Union for the Protection of New Variety of Plant, 1961 (UPOV).[23]The UOPV, 1961 provides an international legal framework for plant breeder's rights which is important in encouraging breeders to pursue and enhance their search for the improvement of varieties. However, plant breeder's rights were only for commercial production and marketing and since the use and exchange of saved seeds by farmers was considered non-commercial, the activity was considered outside the scope of PBRs.[24] It thus, allowed farmers to save; use and exchange seed but not sell without penalty under plant breeders' right system.

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[21]AnithaRamanna,"India's Plant Variety and Farmers' Rights Legislation: Potential Impact on Stakeholder Access to Genetic resources", 96 *EPTD Discussion Paper*, Environment and Production Technology Division, International Food Policy Research Institute, Washington, D.C., 2003, at 1

[22]Carlos M. Correa, "Options for the Implementation of Farmers Rights at National Level", 8 *South Centre TRADE Working Papers*, 2000, at 3

[23]"Farmers Rights in the International Treaty on Plant Genetic Resources for Food and Agriculture", available at: *http://www.farmersrights.org/about/fr_in_itpgrfa.html*

[24]S. Bala Ravi, *Manual on Farmers' Rights* (2004) M.S. Swaminathan Research Foundation pp.1-80, at 7

This is known as farmer's exemption and was reduced to an optional clause leaving it to states to decide on the extent of farmers' right to save and exchange seed in the UPOV revision of 1991.[25]

The undertaking recognizes enormous contributions made by farmers worldwide in conserving and developing crop genetic resources, and provides for measures to protect and promote these rights.[26]However, the description of the farmer's right does not seem to be granting any positive right to farmers over their intellectual assets. The contribution of farming communities in conservation and developing of plant genetic resources (PGRs) had been substantial and it has been widely agreed that there should be some form of recognition of their tremendous value, not only to the communities, but also to the nations and to the world as a whole. However, a number of key questions remain unanswered, including how to recognize and attribute a true value to these contributions? At the same time justification for farmers' rights protection is advanced in the text of IUPGR, which recognizes the enormous contribution that the local and indigenous communities and farmers of all region of the world, particularly those in the centers of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources.[27] An assumption of this provision is that the landraces used by traditional farmers are a dynamic genetic reservoir for the development of new varieties and for the transmission of desirable genetic traits. A farmers' rights regime predicates that farmers in the "centers of origin and crop diversity" will continue to use landraces and traditional varieties, in preference to the modern high yielding varieties which are available in the market.

The IUPGR was based on the principle that Plant Genetic Resources should be freely exchanged as a heritage of mankind and should be preserved through international conservation efforts. In subsequent years the principle of free exchange was gradually narrowed. The 25th session of the FAO Conference, 1989 adopted two resolutions providing an agreed interpretation that plant breeder's rights were not incompatible with the IUPGR. The acknowledgement of plant variety rights obviously benefited enterprises which were engaged in commercial seed production. In exchange of this, developing countries wanted endorsement of the concept of "farmer's rights" as parallel to "plant breeder's rights".[28]The IUPGR Resolution 5/

25. JatashreeWatal, *Intellectual Property Rights in the WTO and Developing Countries* (New Delhi: Oxford University Press, 2001) at 137
26. Michael Blakeney, "Protection of Plant Varieties and Farmers' Rights", 24(1) *European Intellectual Property Review*, 2002, pp.9-19, at 9
27. The International Undertaking on Plant Genetic Resources (IUPGR) for Food and Agriculture, 1983, Article 10
28. Michael Blakeney, *supra* note 26

89, defines farmers' rights as rights arising from the past, present and future contribution of farmers in conserving, improving and making available plant genetic resources, particularly those in the centre of origin/diversity.[29] These rights are vested in International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers and supporting the continuation of their contributions. The purpose of these rights is stated to be ensuring full benefit to farmers and supporting the continuation of their contributions. During the 26th Session of the FAO Conference, Resolution 3/91 was unanimously adopted which endorsed that nations have sovereign rights over their plant genetic resources; breeders' lines and farmers' breeding material should only be available at the discretion of their developers; farmers' rights will be implemented through an international fund on PGR which will support PGR conservation and utilization programmes, particularly, but not exclusively, in the developing countries.

Meanwhile, the Convention on Biological Diversity was adopted in 1992, which attempts to establish for the fair and equitable sharing of benefits to indigenous people arising from the utilization of genetic resources. The Agreement on Trade Related Aspects of Intellectual Property Rights, 1994 (TRIPs Agreement) of the World Trade Organization (WTO) obliges members to either provide protection for plant varieties through patent or through an effective *sui generis* law or through any combination of the two.[30]There is no explicit provision for protection of farmers' rights in this agreement; however, it gives an option to member country to legislate on this subject according to their needs. This offers the flexibility to WTO Members to devise PVP systems which suit their interests to the fullest extent. However, the Agreement doesn't define what constitutes an effective *sui generis* system.

The FAO Commission on Genetic Food Resources for Agriculture (CGFRA) in its sixth extraordinary session in June, 2001 agreed on the text of Article 10, which provides for farmer's rights, recognizing the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centre of crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world. The provision puts responsibility for realizing farmer's rights, as they relate to plant genetic resources for food and agriculture, on the national governments. It was accepted that in accordance with the needs and priorities, each contracting party should, subject to its national legislation, take measures to protect and promote farmers' rights. It includes protection of traditional knowledge relevant to plant genetic resources for

[29] The Twenty-fifth Session of the FAO Conference, Rome, November11-29, 1989
[30]The TRIPs Agreement, 1994, Article 27(3)(b)

food and agriculture; the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture. In addition to above, the provision also recognizes the rights of farmers to save, use, exchange and sell farm-saved seed/propagating material, subject to national law.

This agreed Article was later incorporated in Article 9 of the FAO International Treaty on Plant Genetic Resources (ITPGR) for Food and Agriculture, 2001, which replaced the FAO IUPGR for Food and Agriculture of 1989. According to Article 9, governments are to protect and promote Farmers' Rights, but can choose the measures to do so according to their needs and priorities. Several other Articles in the Treaty are also important for the realization of farmers' rights. However, the understanding of Farmers' Rights and the modalities for their implementation still remained vague. The realization of farmers' rights is a cornerstone in the implementation of the ITPGR, as it is a precondition for the conservation and sustainable use of these vital resources *in situ* as well as on-farm.[31]

IV. Food Security Concern of Farmer's Rights

Hunger is a profound affront to human dignity and human rights. It is a fundamental constraint to development.[32] At the World Food Summit, convened in Rome in 1996, by the Food and Agriculture Organization of the United Nations (FAO) it was reported that more than 800 million people, particularly in developing countries, do not have enough food to meet their basic nutritional needs. It was estimated that some 400,000 people were killed by malnutrition daily. The 185 countries participating at the Rome Summit vowed to achieve universal food security, *i.e.* the access of all peoples at all times to sufficient high quality, safe food to lead active and healthy lives. The Rome Declaration, which was issued by the Summit, pledged to cut the number of hungry people in half by 2015.[33] This goal was also included in the Millennium Declaration of the United Nations in 2000. This objective required the number of undernourished to fall at a rate of 20 million per year. However, data in 2001 indicated that the rate of decline was less than 8 million per year.[34]

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31. "Farmers Rights in the International Treaty on Plant Genetic Resources for Food and Agriculture", available at: *http://www.farmersrights.org/about/fr_in_itpgrfa.html*
32. Michael Blakeney, "Intellectual Property Rights and Global Food Security", 4 *Bio-Science Law Review,* 2001, pp.127-140
33. "The Relationship Between Intellectual Property Rights (TRIPs) and Food Security), Queen Mary Intellectual Property Research Institute, 2004, at 4, available at: *http://www.visbdev.net/visbdev/fe/Docs/tradoc_121618.pdf*
34. *Ibid.*

At the current rate of global population increase, it has been estimated that the global demand for cereals will increase by 20 *per cent* between 1995 and 2020 and that net cereal imports by developing countries will have to double to meet the gap between production and demand.[35] Currently, the developing world is a net importer of 88 million tons of cereals a year at a cost of U.S. $14.5 billion and that the global demand for cereals will increase by 40 per cent between 1995 and 2020.[36] Paradoxically, a 1999 study of the International Food Policy Research Institute (IFPRI) has estimated that world food supply would continue to outpace population growth at least to 2020.[37]

Concept of Food Security

The concept of food security has been explained in various ways. In 1970s, food security was used to refer to the availability of foodstuff in sufficient quantity at a global level. It is argued that the inadequacy of food security is rooted in promoting global production levels and a country's access to world markets for food alone.[38] It is emphasised instead that food security approaches should guarantee livelihoods which would generate sufficient food at the household level.[39]The International Conference on Nutrition (ICN), 1992, defines food security as "access by all people at all times to the food needed for a healthy life."[40] Essentially, in order to achieve food security a country must achieve three basic aims. It mustensure adequacy of food supplies in terms of quantity, quality and variety of food;optimize stability in the flow of supplies; and secure sustainable access to available supplies by all who need them.[41]

The United Nations Food and Agricultural Orginazation defined the term food security in the World Food Summit, 1996 as food security means that food is available at all times, that all persons have means of access to it, that it is nutritionally adequate in terms of quantity, quality and variety and it is acceptable within the given culture.[42] Only when all these conditions are met can a population be considered food secure.[43]

35. Michael Blakenely, *supra* note 26, at 127
36. *Ibid*.
37. Michael Blakeney, *Intellectual Property Rights and Food Security* (Wallingford: CAB International, 2009) at 1
38. FarhanaYamin, "Intellectual Property Rights, Biotechnology and Food Security", *IDS Working Paper 203*, Institute of Development Studies, Brighton, 2003, at 3
39. *Ibid*.
40. FAO/WHO, 1992a
41. "Agriculture, Food Security and Nutrition", available at: *http://www.fao.org/docrep/w0078e/w0078e03.htm#P286_19784*
42. The United Nations World Food Summit, 1996
43. Sharon Astyk, *Depletion and Abundance: Life on the New Home Front* (Canada: New Society Publishers, 2008) at 185

Food security involves ensuring the access of people to nutritious foods at affordable prices. The massive increase in food production in the 30 years between 1960 and 1990, which is described as the Green Revolution, was achieved by increasing the productivity of cereals, expanding the area of arable land and by massive increases in fertiliser and insecticide use.[44] To meet the food security needs of the next 30 years and to create wealth in poor communities, there is a need to increase agricultural productivity on the presently available land, while conserving the natural resource.[45]

Food Security and Role of Farmers

The Economic and Social Council of the United Nations on the Realization of Social and Economic Rights asserted farmer's rights as one of the preconditions for the realization of a right to food.[46] It also asserted that our future food security and its sustainability may depend on such rights being established on a firm footing.[47]The implementation and realization of farmer's rights is critical to ensuring livelihood and food security of rural small-scale farmers. The contribution of measures that protect farmers' rights in ensuring the conservation and sustainable use of plant genetic resources for food and agriculture is also vital, especially in Southeast Asia, where more than 70 percent of the population is involved in traditional small-scale farming.[48] As various international frameworks exist to protect or challenge farmers' rights, continuing pressures and accountability should rest upon the national governments to facilitate the realization and implementation of farmers' rights arising from the past, present and future contributions of farmers in agriculture development and biodiversity conservation.[49]

From the very beginning farmers are considered as food supplier. The world population has topped 7 billion people and it's predicted to double in the next 50 years. Ensuring an adequate food supply for this booming population is going to be a major challenge in the years to come. During the past century world annual agricultural production has more than tripled. This unprecedented achievement in humanity's quest for food security and abundance was largely made possible by

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44. Prabhu L. Pingali, "Green Revolution: Impacts, limits, and the path ahead", 109(31) *Proc Natl AcadSci USA*, 2012 pp.12302–12308
45. D. Vaver, *Intellectual Property Rights: Critical Concepts in Law*(London: Routledge Taylor and Francis Group, 2006) at 316
46. The Economic and Social Council on the Right to Food, June 1999 report submitted to the Commission on Human Rights.
47. *Ibid.*
48. KamaleshAdhikari, "Protection of Farmers' Rights over Plant Varieties in Southeast Asian Countries", *Southeast Asian Council for Food Security & Fair Trade,*2008, at 5
49. *Ibid*.

the development of chemical fertilizers, pesticides, and herbicides; new hybrid crop varieties; the application of irrigation in arid regions; and the introduction of powered farm machinery.[50]

Agricultural policy in developed countries was characterized by high levels of protectionism and by transfer of income from urban consumers and taxpayers to rural farmers and modern agribusiness. These policies promoted agricultural production for both the domestic and the international market, ensured an adequate supply of food and preserved "traditional" agrarian lifestyles. In contrast to the tendency of agricultural policy in developed countries to favour agricultural producers at the expense of urban consumers, agricultural policy in many developing countries was characterized by a transfer of income from rural farmers to urban dwellers. Policies that transferred income from farmers to consumers included taxes on agricultural exports, subsidies on agricultural imports and the payment to farmers of less than world market prices by state purchasing agencies.[51]Farming is fully integrated into the wider economy of rural areas. The vibrancy and diversity of this economy offers positive additional or alternative employment and business opportunities to farmers, their families and employees. Local and regional economies value their unique historical landscapes, rich in flora and fauna. Farmers who succeed in providing these broader environmental goods are prospering.[52]

In the same context a brief discussion of Indian legislative frameworks for protection of farmer's rights shall be relevant.

Farmer's Rights under PPV&FR Act, 2001

India passed the Protection of Plant Varieties and Farmers' Rights Act, 2001, which is a legislation granting rights to both breeders and farmers.[53]The Act recognizes the phenomenal contribution of farming families in conserving biodiversity and developing new plant varieties.[54]The Act defines the privilege of farmers and their right to protect varieties developed or conserved by them.[55]Section 39 of the Act

50. Richard Heinberg, "The Food and Farming Transition: Toward a Post-Carbon Food System" (2009) *Post Carbon Institute* pp.1-39 at 1
51. Bashar H. Malkawi, "Sustainable Agriculture within WTO Law and Arab Countries" (2011) *International Trade Law & Regulation* at 3
52. *Farming & Food: A Sustainable Future* (2002) Report of the Policy Commission on the Future of Farming and Food, at 9
53. MrinaliniKochupillai, "The Indian PPV&FR Act, 2001: Historical and Implementation Perspectives", 16 *Journal of Intellectual Property Rights,* 2011, pp.88-101, at 89
54. Shanti Chandrashekaran and Sujata Vasudev, "The Indian Plant Variety Protection Act Beneficiaries: The Indian Farmer or the Corporate Seed Company?", 7 *Journal of Intellectual Property Rights,*2002, pp.506-515, at 506
55. Pratibha Brahmi, Sanjeev Saxena, & B. S. Dhillon, "The Protection of Plant Varieties and Farmers' Rights Act of India", 86(3) *Current Science*, 2004, at 394

deals with farmers' rights and any farmer who has bred or developed a new variety shall be entitled for registration and other protection in the like manner as a breeder of a variety. Under theActone may easily identify following rights of farmers:[56]

- **Rights to Save, Use, Exchange or SellSeed**: The Actgives farmers the right to save, use, exchange or sell seed in the same manner as entitled before. However, the right to sell seed is restricted in that the farmer cannot sell seed in a packaged form labeled with the registered name.[57]
- **Right to Register Varieties**: Under the Act farmers can apply for registration of their varieties. The criterion for registration of varieties is also similar to breeders but novelty is not required.[58] The Act provides that a farmer who has bred a new variety is entitled for registration and protection as a breeder of a new variety.[59]
- **Right of Reward/Recognition**: A farmer who is engaged in conservation of genetic resources and wild relatives of economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from National Gene Fund (NGF). Provided that material so selected and preserved has been used as donors of genes in varieties registrable under the Act.[60]
- **Right to Benefit Sharing**: The Act provides forbenefit sharing to the farmers/ community who have contributed to the selection and preservation of material used in the registered variety. The authorityunder the Act invites claims of benefit sharing[61] and recognizes the rights of communities because of their role in conserving traditional knowledge in area of farming plant varieties[62].
- **Right to Information and Compensation for Crop Failure**: The Act provides that the breeders must give information about expected performance of the registered variety. If the material fails to perform, the farmers may claim for compensation.[63] This provision attempts to ensure that seed companies do not make exaggerated claims about the performance to the farmers. It enables farmers to apply to the authority for compensation in case they suffer losses

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56. SakshamChaturvedi and Chanchal Agrawal, "Analysis of Farmer Rights: In the Light of Protection of Plant Varieties and Farmers' Rights Act of India", 33(11) *European Intellectual Property Review*, 2011, pp.708-714, at 712
57. The PPV&FR Act, 2001, Sec.39(1)(iv)
58. *Id*., Sec. 39(1)(i)&(ii)
59. *Id*., Sec.39(1)
60. *Id*., Sec.39(1)(iii)
61. *Id.,* Section 26
62. *Id.,* Section 41
63. *Id.,* Sec.39(2)

due to the failure of the variety to meet the targets claimed by the companies.[64]

- **Right to Compensation for Undisclosed Use of Traditional Varieties**: When breeders have not disclosed the source of varieties belonging to a particular community, compensation can be granted. NGO, individual or government institution may file a claim for compensation on behalf of the local community in cases where the breeders has not disclosed traditional knowledge or resources of the community.[65]
- **Right to Adequate Availability of Registered Material**: The breeders are required to provide adequate supply of seeds or material of the variety to the public at a reasonable price. If after three years of registration of the variety, the breeder fails to do so, any person can apply to the authority for a compulsory licence.[66]
- **Right to Free Services**: The Act exempts farmers from paying fees for registration of a variety, for conducting tests on varieties, for renewal of registration, for opposition and for fees on all legal proceedings.[67]
- **Protection from Legal Infringement in Case of Lack of Awareness**: The Act provides safeguards against innocent infringement by farmers. Farmers who unknowingly violate the rights of breeder shall not be punished if they can prove that they were not aware of the existence of breeders' rights.[68]

V. Conclusion

Food security is a major problem, which the entire world is facing today.To over come this problem the reliability is more on science and technology. Biotechnological inventions are considered more effective solution to this problem. However, the fact that farmers have contributed in ensuring food security must not be ignored by the world. Farmers are traditional conservers of variety of food crops in this world and this status of farmers justifies the stringent intellectual property protection for farmers. The rights of farmers will only ensure more and more production which ultimately help in the global fight against hunger.

64 *Supra* note 56, at 713
65 *Supra* note 57, Sec.40
66 *Supra note*57, Sec.47(1)
67 *Id.*, Sec.44
68 *Id*., Sec.42

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INTERNATIONAL CRIMINAL COURT AN INSTRUMENT FOR COMBATING TERRORISM

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ABSTRACT: Terrorism is one of the gravest problems faced by the international community. Once terrorism was treated as a domestic or regional problem has grown like hydra and engulfed the whole world in its clutches. The problem of terrorism aggravated and globalised with the advent and development of Internet Communication Technology (ICT). Efforts are being made at national and international level to curb down this menace. International institutions like United Nations are working day in and day out but the menace of terrorism seems to be invincible. With the establishment of International Criminal Court (ICC) which defines and punishes crimes against humanity it was thought that an acceptable definition of terrorism will find place and appropriate punishment will be laid down. But neither it defines terrorism nor prescribes punishment for the same. The purpose of this paper is to make an attempt to explore whether crime of terrorism can be placed within the jurisdiction of ICC. Further this paper tries to analyze whether definition of terrorism can be fitted under other definition of crimes mentioned in Rome Statute.

KEY WORDS: Terrorism, United Nations, International Criminal Court, War Crimes, Genocide, and War against Humanity.

I. INTRODUCTION

Now days, violence has become the order of the day. Almost every part of the world is currently plagued by endemic violence of terrorism. The world has been witnessing large scale violence with different intensity and causes both at national and international level. Millions of people have lost their homes, lives, properties due to terrorism. The terrorism has spoiled the very nature of human being and society. With the advancement of the society, the phenomenon of terrorism also gained vast popularity. It has engulfed the whole world. The whole world is burning because of the inhumane nature of the terrorism. Terrorism is the cause for killing hundreds of innocents in different incidents ranging from blowing Indian plane 'Kanishka', Lockerbie disaster to September 11 attack on World Trade Centre, 2008 Mumbai attack, Boston Marathon Bomb Blast in the 2013, Paris attack on 13th November 2015 and more recently Bangladesh attack in the 2016.

Our world has become more unified and interconnected. Commerce and

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technology have brought people more close to each other and the world is termed as global village. Mc Donald's sells hamburgers in India and Indian music and videos can be heard and seen in remote corners of the world. Problems and their solutions are no longer isolated geographically.[1] Terrorism too in course of time became international in nature. International terrorism is terrorism that spills over on to the world's stage. Targets are selected because of their value as symbols of international interests, and the impact that attacks against these targets will have on a global audience. International terrorism is a form of psychological warfare intended to create reaction on the parts of its audience, and protracted warfare being carried out for political aims, with or without the sponsorship of state.[2] International terrorism occurs when the target is an international symbol and when the political psychological effects go beyond a purely domestic agenda. International terrorism has two important qualities; one it is a methodology that is specifically selected by violent extremists, and second it is an identifiable brand of terrorism.[3] Terrorists now have a wide range of ever more effective weapons at their disposal, and have developed modern techniques of persuasion.

The crime of terrorism unveils number of difficulties of a legal nature. One of the significant problems lies in the definition of terrorism. Some thinkers are of the view that crime of terrorism is not a domestic problem and international community should interfere. While some argue that labeling terrorism as crime and adopting counter-measures may have unwanted consequences resulting in human rights violations. Furthermore, it is complicated to answer whether terrorism can solely dealt by criminal law and it is justifiable to use armed force against terrorists.[4] The fight against terrorism in now multifaceted and includes standards applied by the UN Security Council, including financial sanctions.[5] But the foremost model to counter terrorism remains criminal law, and the acts of terrorism, in one or the other form, constitute criminal offences. The difficulty in relation to the application of criminal law faced at international and domestic level is to classify and define who is a terrorist and who is not. In the present scenario terrorists can be prosecuted in an international criminal court if their acts amount to war crimes or crimes against

1. Margaret Atwood, "International Terrorism" in Pamala L. Greiset and Sue Mahan (eds) *Terrorism in Perspective*, (2003) at 49
2. Sean K. Anderson and Stephen Sloan, *Historical Dictionary of Terrorism*, (2002) at 481
3. Gus Martin, *Understanding Terrorism: Challenges Perspective and Issues*, (2006) at 272
4. Christine Gray, *International Law and the Use of Force*, (2008); Juttee Brunee and Stephen Toope, "The Use of Force after Iraq", 53 *ICLQ*, 2004, at 537; Sean Murphy, "Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter", 43 *Harvard International Law Journal*, 2002, at 41
5. *See*, John P. Grant, "Beyond the Montreal Convention", 36 *Case Western Reserve Journal of International Law,* 2004, at 472

humanity. It is high time that terrorism should be included within the jurisdiction of International Criminal Court. Terrorism is not a legal concept that can be analyzed in such a manner that it is possible to define it in a straight jacket fashion.

II. DEVELOPMENT OF INTERNATIONAL CO-OPERATION AGAINST TERRORISM

The League of Nations, its successors United Nations along with some international and regional organization realized the gravity of the problem took steps towards the eradication of the problem in one way or the other. In the 20th Century, the assassination of a number of statesmen, during interwar period led negotiations with in the League of Nations. The League of Nation unanimously adopted a resolution in December 1934, appointing a committee of Experts curb down the growing menace of terrorism around the world. In November 1937, two conventions were adopted, The Convention for the Prevention and Punishment of Terrorism and The Convention for the Creation of International Criminal Court. The former convention defined acts of terrorism as 'criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public' and listed acts to be criminalized by States Parties, including those causing death, serious injury or loss of liberty to heads of State and public officials, damage to public property of another State, and risk to the lives of members of the public. But the most surprising fact was that though the world community on one hand was recognizing terrorism as a growing global problem on the other hand they never recognized these conventions, the first convention received only one ratification, that of India in January 1941.[6] Since then terrorism has been addressed issue by issue, in response to particular outrages.

III. UNITED NATIONS AND TERRORISM

Terrorism which once considered being the problem of one or two nations very soon regarded as a global problem. Though much attention had not been paid at initial stage, and the United Nations in the first two decades of the last century has also been painfully slow and adopted piecemeal approach in dealing with the menace of terrorism. The attack on the World Trade Centre changed the entire international strategic equation and the movement for the eradication and combating of the terrorism through the medium of international law gathered momentum. The

6. S.K.Verma, "Terrorism and International law", in B.P. Singh Sehgal (ed.) *Global Terrorism Socio-Politico and Legal Dimensions*, (2002) at 343; Ben Saul, "The Legal Response of the League of Nations to Terrorism", 4 *JICJ*, 2006, at 78; Cryer, Friman, *An Introduction to International Criminal law and Procedure*, (2010)

United Nation, in the course of time, adopted resolutions and declarations to tackle the problem of terrorism. Infact, comprehensive measures to combat individual terrorism have to some extent been victim of the deflection of international attention towards State terrorism and use of force.

The failure of the League of Nations to avert a second world war did not destroy the conviction, shared by many, that only by some form of general organization of states could a system of collective security be achieved which would protect the international community from the scourge of war.[7] And as a result of this positive conviction on October 24, 1945, the United Nations was ultimately established. After the establishment of the United Nations, no specific convention on the terrorism as such has been adopted, nor does the U.N. Charter contain any specific provision on it. It was in the year 1972 when terrorist attacked at the Olympic Games at Munich, the General Assembly of the United Nations put terrorism on its agenda on the initiative of the then secretary General Kurt Waldheim. The agenda was entitled as:

"Measures to prevent terrorism and other forms of violence which endanger or take innocent lives or jeopardize fundamental freedoms and the studying of the underlying causes of those forms of violence which endanger to take innocent lives or jeopardize fundamental freedoms and the study of the underlying causes of those forms of terrorism and act of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes".[8]

The long title of the agenda (resolution) clearly indicates the cautious attitude of the international community, which not only dealt with the methods to curb down terrorism but also with the causes of the terrorism.[9] Although the committee constituted by General Assembly to define terrorism met until 1979 yet it did not reach any agreement. There was dissent as to whether acts committed by national liberation movements for causes such as decolonization should be excluded from any definition of terrorism, and arguments were also made not to impose international ban on terrorist activities unless the causes of the terrorism were acknowledged and resolved. The unfeasibility of achieving international consensus on the universal definition of terrorism led to piece-meal approach to cooperation to prevent and criminalize terrorist acts. International agreements were negotiated on specific areas of terrorist activity. From the 1960s onwards, the international community has

7. D.W. Bowett, *The Law of International Institution*, (1977) at 21
8. Hans Koecher, "The United Nations, The International Rule of Law and Terrorism", 14th Centennial Lecture, SC of the Philippines and Philippine Judicial Academy, available at: *www.i-p-o.org/koechler-un-law-terrorism.pdf*
9. *Ibid.*

adopted thirteen global conventions related to the prevention and suppression of international terrorism, as well as several resolutions pertaining to terrorism has been adopted by the United Nations General Assembly.[10]

These International conventions set out obligations on states: to define acts of terrorism as criminal offence; to prosecute individuals suspected of such offence; investigate such offences and extradite suspects upon request and provide mutual legal assistance on request. Apart from these conventions, Vienna Declaration and Programme of Action 1993 also condemned the acts, methods and practices of terrorism in all its forms and manifestations which are aimed at the destruction of human rights, democracy and threatening the security and integrity of states.[11] The UN sixth (legal) committee and Ad-hoc Committee established in accordance with the 1996 UNGA Resolution 52/21012, are currently continuing their work to that end by negotiating the draft Comprehensive Convention on International Terrorism.[13] This convention has yet not come into existence as on 11 August 2016. These conventions has common objective to prosecute and prevent acts of terrorism by imposing obligations on State parties to give assistance in criminal and extradition proceedings. In their provisions on extradition, the three recent agreements unlike early ones specify that the offence in question may not be regarded as a political offence for the purpose of extradition or mutual legal assistance.[14] As most of the terrorist acts are politically motivated, this removes the loophole by which terrorists

10. The Convention on Offenses and Certain other Acts Committed on Board Aircraft, 1963 (Popularly known as Tokyo convention);Convention for the Suppression of the Unlawful Seizure of Aircraft, 1970;Convention for the Suppression of Unlawful Acts Against the safety of Civil Aviation, 1971 (Popularly known as Montreal Convention, 1971);Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1973;Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention), 1979;International Convention Against the taking of Hostages, 1979; Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, (Supplements the 1971 Montreal Convention), 1988;Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988;Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Supplement the Rome Convention), 1988;Convention on the Marketing of Plastic Explosives for the Purpose of Detection, 1991;International Convention for the Suppression of Terrorist Bombing, 1997;International Convention for the Suppression of Terrorist Financing, 1999;International Convention for the Suppression of Acts of Nuclear Terrorism, 2005.
11. *See,* Tal Becker, *Terrorism and the State,* (2006) pp.84-118
12. The Proposal was made by India in 1996, UNDoc.A/C.6/51/6
13. "Draft Comprehensive Convention on International Terrorism", available at: *cns.miis.edu/pubs/inven/pdfs/intlterr.pdf*
14. The Terrorist Bombing Convention, Article 11; The Terrorist Financing Convention, Article 14; and The Nuclear Terrorism Convention, Article 15

could escape extradition and confirms that terrorism cannot be justified, whatever the objective is.[15]

The United Nations Security Council is also active and playing a key role in eliminating the evil of terrorism, it has defined international terrorism as a threat to international peace and security. Security Council adopted Resolution 731 (1992), criticizing and implementing sanctions against Libya; when Libya was deaf to the request of extradition of suspected bombers of an airplane[16], and in resolution 1070 (1996) which was adopted against Sudan the Security Council reaffirmed that, the suppression of acts of international terrorism, including those in which states are involved, is essential for the maintenance of international pace and security.[17]

It was, however, the 11 September 2001, attack upon the World Trade Centre that moved this process on a higher level. In resolution 1368 (2001), which was adopted the following day to combat by all means threats to international peace and security caused by terrorist attack', unequivocally condemned the attack and declared that it regarded such attacks like any act of international terrorism, as a threat to international peace and security. Resolution 1373 (2001) reaffirmed this proposition and the need to combat threats to international peace and security caused by terrorist acts by all means in accordance with the charter.[18]

The Security Council while acting under Chapter VII of the UN Charter made number of binding decisions demanding states to work for the prevention and suppression of the financing of terrorists act, freezing of the financial assets and economic resources of persons and entities involved in terrorism. States were also called upon to abstain itself from providing any assistance and support to those persons who are involved in terrorist activities and take harsh action against them, and the state should cooperate with other states in preventing and suppressing terrorist acts. Further the Council declared that acts, methods and practices of terrorism were contrary to the purposes and principles of the United Nations and knowingly planning, financing and inciting terrorist acts were also contrary to the purposes and principles of United Nations. More importantly, the Council established a Counter Terrorism Committee (CTC) to monitor implementation of the resolution. States were asked to report to the committee on steps and measures they had

15. See, Cryer, Friman, *supra* note 6

16. *Ibid*; *See also,* Michael Plachta, "The Lockerbie Case: The Role of the Security Council in Enforcing the Principle Aut Dedere Aut Judicare", 12 *EJIL*, 2001, at 125

17. "The Fight against Terrorism: Terrorism and Human Rights", available at: www.una-uk.org/archive/terrorism/terrorismhr.html.

18. *See* Mathew Happold, "Security Council Resolution 1373 and the Constitution of the United Nations", 16 *LJIL,* 2003, at 593; Paul Szasz, "The Security Council Starts Legislating", 96 *AJIL,* 2002, at 901; Stefan Talmon, "The Security Council as World Legislature", 99 *AJIL,* 2005, at 175

taken to implement the resolution.[19] But the weakest point of the Resolution is that it contains no definition of terrorism. Resolution 1373(2001) has been criticized as the Security Council has gone beyond its previously determined Charter powers and has trespassed jurisdiction exercised by the General Assembly and agreement negotiated there. In spite of that, the resolution has been accepted in practice, albeit reluctantly, and is a crucial part of the international counter-terrorism effort.

The Security Council made another resolution 1377 (2001), while affirming the earlier proposition, it declared that acts of international terrorism constitute one of the most serious threats, to international peace and security in the twenty first century', and requested the counter terrorism committee to assist in the promotion of best practice in covered by resolution 1373; including the preparation of model laws, to examine the availability of various technical, financial, legislative, and other programmes to facilitate the implementation of resolution 1373.[20]

Apart from these resolutions, an Ad-hoc Committee was set up by the United Nation's General Assembly, and in the year 1994 a Declaration on Measures to Eliminate International Terrorism was adopted through General Assembly resolution 49/60. This declaration condemned all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever. Committed, nothing that criminal acts intended or calculated to provoke a state of terror in the general public, a group or person or persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them'. States are obliged to refrain from organizing instigating, facilitating, financing or tolerating terrorist activities and to take practical measures to ensure that their territories are not used for terrorist installations, training camps or for the preparations of terrorist acts against other states. States are further obliged to apprehend and prosecute or extradite perpetrators of terrorists act and to co-operate with other states in exchanging information and combating terrorism.[21] In the year 1996 a supplementary declaration was adopted, which emphasized in addition that acts of terrorism and assisting them are contrary to the purposes and principles of the United Nations Charter. The United Nation's General Assembly has also adopted a number of resolutions (e.g. resolution 34/145, 35/168 and 36/133) calling for ratification of the various conventions and for improvement in cooperation between states in this area.[22]

United Nation Office on Drugs and Crime (UNODC) is yet another office

19. Malcom N. Shaw, *International Law*, (2005) at 1051
20. *Ibid.*
21. *Ibid.*
22. *Id.*, at 1052

connected with United Nations which is playing a important part in preventing and combating the menace of terrorism. To strengthen the efforts of United Nations in preventing and suppressing the evil of terrorism, UNDOC has an expanded programme of work for technical assistance to counter terrorism which is based on the principles suggested by the United Nations Commission on Crime Prevention and Criminal Justice and approved by General Assembly. The mandates, carried out by UNDOC's Terrorism Prevention Branch (TPB) with the Division for Treaty Affairs (DTA), include the provision of technical assistance and advisory services to countries in their fight against terrorism. This is done by providing legislative assistance to countries, which makes them to become the parties to, and implement the Universal anti terrorism Conventions and Security Council Resolutions (1373).[23] There are number of organizations including United Nations working for the protection of human beings, but they are helpless in combating this evil. The newly established International Criminal Court (ICC) is next step in this process, which is formed with the objective to punish acts against humanity. The success of ICC is very dim in combating crime of terrorism as it has no jurisdiction on this subject-matter.

IV. INTERNATIONAL CRIMINAL COURT AND TERRORISM

Broadly terrorism can be classified into categories: (1) Terrorism from Above and (2) Terrorism from Below. Terrorism from Above means terrorism practiced by the state directly or sponsored by state indirectly, by quasi- governmental agencies and personnel against perceived enemies. States sponsors terrorism at two levels one at domestic level and the other at international level. The "Terrorism from Below" is committed by non-state movements; groups against governments, ethno-national groups, religious groups and other perceived enemies.[24] The indulgence of states and non states actors in sponsoring terrorism is one of the greatest concerns. However, the Rome Convention focuses only on four categories of core crime and ignored crimes of terrorism which have huge influence on people throughout the world and on global economic development.[25] Like core crimes the crime of terrorism has actual or potential trans-boundary effect or may be intra-State and offend a fundamental value of the international community,[26] but it is excluded from

23. "Implementing International Action Against Terrorism", available at: *www.unodc.org/terrorism.html*
24. Gus Martin, *Understanding Terrorism: Challenges Perspective and Issues*, (2006) p.111-112
25. In Res. 56/120, the UN General Assembly expressed deep concern over 'the impact of transnational organized crime on the political, social and economic stability and development of societies, UN Doc A/RES/56/120(2002); *See also*, Cryer, Friman, *supra* note 6
26. *See,* Neil Boister, "Transnational Criminal Law?", 14 *EJIL,* 2003, at 953

the Rome Statute. Van der Vyver, remarks that terrorism was deliberately omitted from the subject matter jurisdiction of the ICC, partly because the United States approached the very first session of the Ad Hoc Committee on a permanent International Criminal Court with the express object of excluding the crime of terrorism from the proposed subject matter jurisdiction.[27]

The key reason for the United States to request this specific omission was its deep concern that the inclusion of the crime in this international tribunal could undermine its own extensive investigative efforts undertaken in its national prosecutions of international terrorists.[28] Nevertheless, during the Rome Conference many States like Spain, Algeria, Sri Lanka, India, Barbados etc., submitted proposals to indeed include terrorism in the jurisdiction provision of the ICC[29], but ultimately, because of the fact that these supporters for the inclusion of terrorism could not able to convince large enough number of delegates to support the proposal and also because of the fact that there was no consensus definition among the States and required elements of the crime, terrorism was excluded from the Rome Statute. The crime of terrorism may in the future be dealt under international crimes within the jurisdiction of an international court[30] if States are of the view that the values

27. Johan D van der Vyver, "Prosecuting Terrorism in International Tribunals", *24 Emory International Law Review,* 2010, pp.533-535; *See also*, Harmen van der Wilt, Inez Braber, "The Case for Inclusion of terrorism in the Jurisdiction of the Criminal Court", *ACIL*, 2014, available at: *www.acil.uva.nl.*
28. *See,* United States Comments to Ad Hoc Committee Report, UN GAOR, 50th Sess., pp.27-29, UN Doc A/AC.244/1/Add.2 (1995)
29. The Draft Statute of the ICC, Article 5 defines "crimes of terrorism" means: (1) Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups or persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them; (2) An offence under the following Conventions: (a) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (b) Convention for the Suppression of Unlawful Seizure of Aircraft; (c) Convention of the prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; (d) International Convention against the Taking of Hostages; (e) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; (f) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf. (3) An offence involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or group of persons or popularions or serious damage to property.
30. As in past it had been tried by Lebanon Tribunal.

they conflict with are sufficiently significant to the international community and that international prosecution is an effective way of dealing with them.[31]

The records from the Rome Conference reveal six reasons underlying the rejection of the suggested terrorism provision.[32] The first hindrance was the lack of a clear and universally accepted definition of terrorism.[33] The second reason was the notion that the three core crimes represented the crime of greatest concern to the international community, and terrorism does not rise this level of international concern.[34] The third ground for rejecting the inclusion of terrorism under the jurisdiction of ICC was desire not to overburden the ICC and the need for gravity threshold.[35] The fourth reason against the inclusion of terrorism in the Rome Statute was that such an inclusion would create obstacles in the acceptance of the Rome Statute.[36] The fifth argument was that some States questioned the need to include terrorism in the Rome Statute as there was already in place a system of international cooperation to deal with it in form of treaty crime.[37] And the sixth and last objection to the inclusion was that since terrorism is such a politically-sensitive term, and if ICC would deal with cases of terrorism it will be forced into political realm and its legitimacy and credibility will be in question.[38] All reasons but one against the inclusion of terrorism within the jurisdiction of ICC seems not credible. The way in which international community as a whole and states individually addressing the

31. *See*, Mahmoud Hmoud, "Negotiating the Draft Comprehensive Convention on International terrorism", 4 *Journal of International Criminal Justice*, 2006, at 1013
32. Eric Bales, "Torturing the Rome Statute: the Attempt to Brng Guantanamo's Detainees within the Jurisdiction of the International Criminal Court", 16 *TULSA J. COMP & INT'L L.,* 2009, pp.173, 188; Lucy Martinez, "Prosecuting terrorists at the International Criminal Court: Possibilities and Problems", *RUGHTERS L.J. 1,* 2002, at 18; Pouyan Afshar Mazandaran, "An International Legal Response to an International Problem: Prosecuting International Terrorists", 6 *INT'L CRIM. L. Rev.,* 2008, pp.503,528
33. Michael Lawless, "Terrorism: An International Crime", *HARD. HUM. RTS. J.*, 2007, pp.139,159
34. Mark D. Koelsgard, "A Human Rights Approach to Counter-Terrorism", 36 *CAL. W. INT'L L.J.,* 2006, pp.249, 286
35. Christian Much, The International Criminal Court and Terrorism as an International Crime, 14 *MICH. ST. J. INT'L L.,* 2006, pp.121,126
36. Aviv Cohen, "Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism", 20(2) *Michigan State International Law Review,*
37. *Ibid*; *See* Official Records of the Rome Conference, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of International Criminal Court, U.N. Doc. A/CONF.183/13, at 25
38. Luz E. Nagle, "Terrorism and Universal Jurisdiction: Opening a Pandora's Box?", *GA. ST. U. L. REV.,*2001, pp. 339,361
39. Lucy Martinez, "Prosecuting terrorists at the International Criminal Court: Possibilities and Problems", *RUGHTERS L.J. 1*, 2002, at 18

terrorism can lead to the conclusion that presently terrorism is as severe as other international crime described in Rome Statute.[39] Moreover, comparing the status of the Genocide Convention to that of the Terrorism Financing Convention reveals that while the former has forty one signatories and 141 parties; the later has 132 signatories and 173 parties. Adding to this the Security Council has affirmed that acts of terrorism constitute threats to international peace and security.[40]

The claim that ICC will be overload if terrorism will be included is baseless as in Rome Statute there is built-in mechanism[41] which will ensure that the ICC will have the jurisdiction over the most severe terrorist acts just like it has jurisdiction over the most severe crimes against the humanity or any other crimes.[42] The concern that inclusion of terrorism will impede the acceptance of Rome Statute is irrelevant at present time as any amendment to the Rome Statute does not apply automatically to all the states parties but rather applies to only those states that have ratified it specifically.[43] The reason that a system of international cooperation exist to deal with terrorist acts is not at stretch of thought a good reason to exclude from the jurisdiction of ICC. For example, genocide, a core crime, was also under the regime of an international treaty which was already in existence. And most of the war crimes under the Rome Statute were already dealt with the Geneva Conventions.[44] Inclusion of terrorism will force ICC into political realm should not preclude ICC to exercise its jurisdiction over terrorist acts as even with other crimes, the ICC is not sheltered from concerns of politicization. In 2010, the Member States included crime of aggression within the jurisdiction of ICC, a matter that was not resolved in the Rome Conference. In present scenario where the non-state actors are operating from the sovereign territory of certain failed states; where most of the armed conflicts are of non-international character; and a low-intensity armed conflicts in the Middle East, involves the crime of aggression with interference of international politics-a case of violation of state's sovereignty.[45] Moreover all international crimes involve political sensitiveness to certain extent and this argument can be raised with any of the respective core crime. Only one issue is a real impediment that is lack of an

40. S.C. Res. 1373, .U.N. Doc. S/RES/1373
41. The Rome Convention, Article 1 states that the ICC will exercise jurisdiction only for the most serious crimes of international concerns; Article 5 of the Rome Statue specifies crimes within the jurisdiction of the ICC.
42. Roberta Arnold, *The ICC as a New Instrument for Repressing Terrorism* (2004) at 56; See Cryer, Friman, *supra* note 6
43. Aviv Cohen, *supra* note 36
44. *Ibid.*
45. *See*, Keith A. Petty, "Sixty Years in the Making: The Definition of Aggression for the International Criminal Court", 31 *Hasting International and Comparative Law Review,* 2008, pp.531,532

acceptable definition of terrorism. A review conference in 2010 defined aggression, but did not pursue a 2009 Dutch proposal on terrorism.[46] As of 2016, terrorism is yet to be included in the ICC's jurisdiction.

V. DEFINITION OF TERRORISM

The crime of terrorism is indefinable concept.[47] The difficulty in defining terrorism is not new. Bassiouni has persistently stated that the fundamental problem is a failure at the international level to reach a working definition of terrorism.[48] None of the twelve global agreements defines terrorism except the Terrorist Financing Convention, and that is only for a secondary purpose.[49] The impediments of arriving at unanimity on a definition for the cause of a global prohibition of terrorist acts pertains to two related questions: are there causes which justify acts otherwise categorized as terrorism, which should therefore be excluded; and should 'State terrorism' be included?[50]

Cooper, remarks that "there has never been since the topic began to command serious attention, some golden age in which terrorism was easy to define. Writing about terrorism in the middle of the 1970's, the political historian Walter Laquer threw up his hand; he viewed that providing a comprehensive definition was virtually impossible because of the great variety of circumstances in which this type of violence had appeared and the numerous and often competing political causes whose advocates had used it. Martha Crenshaw, another leading observer, wrote that the absence of a consensual definition continued to plague those interested in studying terrorism.[51] The hurdles of having a consensus definition raise the question whether

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46. ICC Assembly of States Parties, Report of the Bureau on the Review Conference, Addendum, 10 November 2009, Doc. ICC-ASP/8/43/Add. 1, Annex IV, 12-13
47. *See*, R.R. Baxter, "A Sceptical Look at the Concept of Terrorism", 7 *Akron Law Review*, 1973, at 380; R. Higgins and M. Flory (eds.) *Terrorism and International Law* (London, 1997) at 28
48. *See,* Bassiouni, "A Policy-Oriented Inquiry into the Different Forms and Manifestations of International Terrorism", in Bassiouni, *Legal Responses to International Terrorism: U.S. Procedural Aspects* (1988) at xvi; *See* also Geoff Gilbert, *Responding to International Crime*, (2006)
49. Article 2 of the Convention refers to the offence of financing acts of terrorism, which are defined as acts covered by the terrorism Convention and 'any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act'.
50. Cryer, Friman, *supra* note 6; Green, "International Crimes and the Legal Process", 29 *INT'L & COMP.LQ* at 582
51. Leonard Weingberg, *Global Terrorism, A Beginner's Guide*, (2006) at 1

effort is worthwhile. It will be more significant not to waste energy and time in defining terrorism and let the world community focus to revert to the range of acts that all States regard as impermissible in all circumstances.[52] But the definition of terrorism is needed if there is to be complete international prohibition on terrorism and a prerequisite for multilateral cooperation including extradition. A definition is also required if terrorism is to be added to the domain of the International Criminal Court. Moreover, prevailing instruments enforcing obligations in relation to counter-terrorism need a definition to ensure a uniform enforcement and effective monitoring.[53] But what follows is a war of words, fought in a mass media, as each side denies that its behaviour constitutes terrorism as struggles to reach the moral high ground. More often, the mass media compound the confusion by applying the term 'terrorist' on a highly selective basis. Newspapers back and forth usually refer particular group as extremists, militants, guerrillas, 'terrorists' depending upon exceptionally hazy criteria.[54] As a consequence thereof, the pervasive and indiscriminate use of often politically convenient label of 'terrorism' continues to mislead this field of inquiry.[55]

The phrase 'one man's terrorist is the other man's freedom fighter' poses a serious problem in defining terrorism. The boundary between legitimate dissidence and freedom-fighters or terrorists and terrorist activity is a difficult one which involves a question of perspective and which is vulnerable to changes in judgment over history. Despite the vast publicity and long history of the phenomenon of terrorism, there is no single comprehensive definition of the term terrorism. More than a hundred definitions of terrorism exists but none of them is universally accepted. Some definitions specifically include religious motivations; others include hate, millenarian and apocalyptic groups. Several definitions refer only to non- state actors where as others include state- sponsored terrorism. Terrorism by groups is an essential part of several definitions, but some definitions include terrorism by individual actors.[56] Diversity is inherent to the international legal system and division between States on a particular issue is unavoidable. But as terrorism is predominantly an international phenomenon consensus is essential to counter this menace.[57]

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52. G. Levit, "Is Terrorism worth defining?", 13 *Ohio Northern University law Review*, 1986, at 97; John Murphy, "Defining International Terrorism: a Way out of the Quagmire", 19 *Israel Yearbook on Human Rights,* 1989), at 13
53. Cryer, Friman, *supra* note 6
54. Leonard Weingberg, *Global Terrorism, A Beginner's Guide*, (2006) at 2
55. *See,* Bassiouni, "A Policy-Oriented Inquiry into the Different Forms and Manifestations of International Terrorism", in Bassiouni, *Legal Responses to International Terrorism: U.S. Procedural Aspects* (1988); See also Geoff Gilbert, *Responding to International Crime*, (2006) at xvi
56. Pamala L. Griset, Sue Mahan (ed.), *Terrorism in Perspective*, (2003) at xii
57. *See,* Alexandra V. Orlova and James W Moore, "Umbrella's or Building Blocks?: Defining International Terrorism and Transnational Organized Crime in International Law", 27

In 1996, India initiated a Draft International Convention on the Suppression of Terrorism (Draft Comprehensive Convention)[58] which created some hope to form an agreed definition and unite the international counter terrorism mechanism under one instrument. But the Draft Comprehensive Convention is still under debate. Article 2 of the Terrorist Financing Convention sets forth the prohibition on the various forms of financing terrorism. The definition is twofold. Article 2(1)(a) refers to acts previously prohibited in prior international conventions related to terrorism, and Article 2(1)(b) refers to any other act of terrorism.[59] Article 2(1)(b) does not deal with the identity of the perpetrator and thus may be applied to both state as well as no-state actors. This definition is wide and broad and is suitable to address cyber terrorism and future manifestations of terrorism.[60] Many of the Convention even do not mention the word terrorism thus illustrating the view that the offence of terrorism can be curbed down without specifying terrorism as an offence.[61]

While drafting a definition of terrorism, human rights considerations have to be taken care of.[62] As these offences are likely to carry higher penalties than other offences, national systems may have more invasive means of investigation for terrorist offences, the political offence exception may not be applied and application for asylum may be refused. If the definition of terrorism is very broad and includes even less serious nature of criminal acts, there is an apprehension that serious consequence of being a terrorist suspect in national law will be applied to criminals who otherwise are not terrorists.[63] While an internationally accepted definition of terrorism is still awaited, human rights concerns have encouraged the 'UN Special

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Houston Journal of International Law; 2005, pp.287-290; *See,* Fiona de Londras, "Terrorism as an International Crime", in William A Schabas & Nadia Bernaz (eds.) *Routledge handbook on International Criminal Law* (Routledge 2010)

58. Letter dated Nov. 1, 1996 from the permanent representative of India to the United Nations of the Secretary-General, U.N. Doc. A/C.6/51/6 (Nov. 11, 1996).
59. Article 2(1)(b) of the Convention states that any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.
60. *Supra* note 36; *See Also,* Aviv Cohen, "Cyber Terrorism: Are we Legally Ready?", *J. INT'L & L.,* 2010, at 1
61. Cryer, Friman, *supra* note 6
62. UNGA Res. 48/122 (1993). See also, Terrorism and Human Rights, Second progress report prepared by Ms. Kalliopi K. Koufa, Special Rapporteur, E/CN.4/Sub.2/2002/35, 17 July 2002; Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism: A Preliminary framework draft of principles and guidelines concerning human rights and terrorism, Expanded working paper by Kalliopi K. Koufa, E/CN.4/Sub.2/2005/39, 22 June 2005; and see Hoffman, *Human Rights and Terrorism*, 26 HRQ 932 (2004)

Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' to convey that a definition of terrorism be restricted to acts causing death or serious bodily injury or taking the hostages, provided that these acts are within the scope of the global agreements and are committed with the intention of provoking a state of terror, intimidating a population, or compelling a government or international organization to action or inaction.[64] Though this approach is appealing in eliminating the problem created by international or national definitions that are too wide in scope but it may not be supported by international community.[65]

After 11 September 2001, there has been more straight-forward criticism of terrorism by the United Nations. UN Security Council Resolution 1373 (2001) declared:

> "…that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations."

However, UNSC Resolution 1377 (2001) of 12 November 2001 moderately nuanced the wording signifying that it was international terrorism that was in conflict with the purposes and principles of United Nations, not all terrorism. However, subsequent Resolutions have dealt with acts of terrorism in similar ways that were ostensibly domestic.[66] There is no simple answer to the question of how to balance rights, in the same way there is no agreed definition of terrorism. In practice, terrorism is still just a blanket term for any violent acts and there is no agreement, in the first place, as to what constitutes terrorism. Consensus at an international level is still some distance ahead.[67] However, a ray of light occurred when Special Tribunal of Lebanon[68] dared to venture into hitherto judicially avoided legal territory and dived

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63. *See,* Vijay P Singh and Subir k Bhatnagar, "Anti-Terror Laws in India: A Study in Internal Security Mechanism", in Mithilesh N Bhatt (ed) *Terrorism: Its Legal Framework and Beyond*, (2017) pp.23-45
64. Report of December 2005 (E/CN.4/2006/98). *See also*, Cryer, Friman, *supra* note 6; Rodley, "Can armed opposition groups violate human rights?", in Mahoney and Mahoney, *Human Rights in the 21st Century: A Global Challenge*, (1993) at 297
65. *See,* Ben Saul, *Defining Terrorism in International Law* (2006)
66. *See*, Sossai, "The Internal Conflict in Colombia and the Fight against Terrorism: UN Security Council Resolution and Further Developments", 3 *JICJ,* 2005*,* at 253
67. *See*, Geoff Gilbert, *Responding to International Crime*, (2006); See also Cassese, "The International Community's 'Legal' Response to Terrorism", 38 *INT'L & COMP.LQ,* 1989, pp.605-06
68. Established to prosecute bombings in Lebanon in 2005

straight into the exact definition of terrorism as discreet crime.[69] However the definition given by the Special Tribunal of Lebanon was not free from discrepancies as it is both under-and-over inclusive.[70] In fact the new ICC would have had terrorism within its scope, but its terms of reference were redefined and limited, to the exclusion of these offences. Thus no new international criminal remedy will exist in respect of these offences, and the opportunity to redefine and refine was missed due to political impediments.[71]

VI. TERRORISM AS A PART OF CORE CRIMES UNDER JURISDICTION OF ICC

Another problem is whether terrorism is properly or adequately addressed alone by the criminal law or whether it is needed and legitimate to use armed force against terrorists. The attacks in the US on 11 September 2001 were described as 'armed attack' within the of Article 51 of the UN Charter, consequently, US and UK used military force in self-defense against Al-Qaeda and the Taliban, violating all minimum standards of international humanitarian law and human rights.[72] Perhaps such a response to terrorism has made situation more critical and sensitive. The fight against terrorism is now multi-faceted. But the predominant standard to tackle terrorism remains criminal law, and terrorist acts, in one or other forms constitute criminal offences. But application of criminal law at national and international level remains one of the major problems as international community still debating on a consensus definition of terrorism.

Terrorist acts can be prosecuted in an international court if they amount to war crimes or crimes against humanity. Only one internationalized court, the Lebanon Tribunal has jurisdiction over terrorist acts, but these are crimes under Lebanese, not international law. In order that international court or tribunal which has authority to determine cases related to terrorism, a terrorist act may fall within the categories

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69. Manuel J Ventura, "Terrorism According to the Special Tribunal for Lebanon's Interlocutory Decision on the Applicable Law: A Defining Moment or A Moment of Defining?", 9 *Journal of International Criminal Justice,* 2011, at 1022.
70. *See*, Mathew Gillett and Matthias Schuster, "Fast-track Justice: The Special Tribunal of Lebanon Defines Terrorism", 9 *Journal of International Criminal Justice*, 2011, pp.1005-1014; *See also,* B. Saul, "Legislating from A Radical Hague: The UN Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism", 24 *LJIL*, 2011, at 677
71. Claire de Than and Edwin Shorts, *International Criminal law and Human Rights*, (2003) at 237
72. Christine Gray, *International Law and the Use of Force*, (2008); Juttee Brunee and Stephen Toope, "The Use of Force after Iraq", 53 *ICLQ,* 2004, at 785; Sean Murphy, "Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter", 43 *Harvard International Law Journal*, 2002, at 41.

of crimes against humanity or war crimes. The structured use of terror was acknowledged as both a war crime and a crime against humanity by the Nuremberg Tribunal.[73]

The offences considered by the terrorism Conventions were included in the list of treaty crimes in the ILC draft for the new international court and got some support at the time of negotiations for considering terrorism to be under the jurisdiction of ICC. But this was not achieved, because world community was of the view that prevailing treating providing for national prosecutions was adequate and moreover, international community failed to negotiate agreed definition of terrorism. Resolution F of the ICC Final Act recommended that a review conference examine crimes of terrorism 'with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the court'.[74]

Alarming terrorist activities around the globe necessitates the world community to have a definition of terrorism accepted by all without which ambiguities and as a result thereof shortcomings are created that allow terrorists to slip through the chinks in the law, particularly in international law with its underlying principle of nullum crimen sine lege, where clarity and certainty about prohibited conduct is significant. The current scenario leads to grey areas which can be exploited by terrorists. Basically terrorists activity are condemned by the all States and international law prohibits such activities and as international law imposes obligations an all states to follow and respect the rules of international law, it can be said that the States cannot adopt insouciant approach in defining the act of terrorism because such an approach makes international institution weak to punish and prevent terrorist act.[75]

Terrorism as War Crime

It is wrong to argue that terrorism can legally only be considered as a criminal offence in time of peace. International humanitarian law prohibits acts of terrorism and may amount to war crimes. Article 51(2) of Additional Protocol I of 1977 provide: "The civilian population as such, as well as individual civilians, shall not be the object of attack, and prohibits acts of threat of violence the primary purpose of which is to spread terror among the civilian population".[76] This prohibition and

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73. "Nurmenberg IMT: Judgement and Sentence", 41 *AJIL,* 1947, pp.172,229, 231, 289, 319
74. The first review conference will be held at least seven years after the entry of the ICC Statute.
75. Michael Lawless, "Terrorism: An International Crime?", 9 *Canadian Military Journal,* 2008, available at: *http:www.journal.forces.gc.ca/vo9/no2/05-law;ess-eng.as*; *See also*, Anthony d' Amato, "It's a Bird, It's a Plane, It's a Jus Cogens!", 6 *Connecticut Journal of International Law*, 1990, at 1
76. Article 51(2) of AP 1; Article 33(1) of GC IV; Articles 4(2)(d) and 13(2) of AP 2

criminalization are part of customary international law.[77] The same acts are prohibited in non-international conflict by Article 13(2) of Additional Protocol II. Both provisions are part of wider prohibitions on attacks against civilians. Article 4(2)(d) of Additional Protocol II further prohibits 'acts of terrorism' in non-international conflicts. The acts of terrorism find mention in the list of violations of common Article 3 in the Statutes of the ICTR and of the Sierra Leone Special Court[78] while ICTY had no such expression in the Statute. Nevertheless the Tribunal has ruled that it has authority because of general provision of Article 3 of its Statute.[79] Article 8 of the ICC Statute which describes war crime excludes terrorism and therefore ICC does have jurisdiction in relation to terrorism. In the ICC, attacks on civilians carried on with the specified intent to terrorize will be an element in sentencing only.[80]

In the first ever case related to terrorism before an international court, the ICTY convicted General Galic on the war crimes charge of 'acts of violence the primary purpose of which is to spread terror among the civilian population', based upon command responsibility for a prolonged military operation of shelling and sniping in civilian areas of Sarajevo.[81] The Tribunal found that the campaign was intended to terrorize the civilian population.[82] The war crime does not consist in causing terror; it is to be expected that all acts of war will result in terror in the concerned country. The spreading of terror does not have to be the only purpose of the acts, but it does have to be the primary purpose.[83] In the AFRC case, the SCSL ruled that use of child soldiers, abduction and forced labour were committed primarily for military purposes and thus did not constitute the war crime of terrorism, while the brutal amputations of hand or arms of civilian were committed primarily to spread terror.[84] In totality, the international case law illustrates that there are three elements in the war crime of acts of terrorism: (i) acts or threat of violence; (ii) the accused willfully made the civilian population or individual civilians not taking direct part in hostilities the objects of those acts or threats of violence; and (iii) the acts or threats were carried out with the specific intent of spreading terror among the

77. "Galic", *ICTY T,* 2006 paras.87-98
78. Article 4(d) of the ICTR Statute and Article 3(d) of the SCSL Statute; *See,* Harmen van der Wilt, Inez Braber, "The Case for Inclusion of terrorism in the Jurisdiction of the Criminal Court", *ACIL*, 2014, available at: *www.acil.uva.nl*
79. *Supra* note 77
80. *Supra* note 6
81. *Supra* note 77
82. The evidence was submitted that civilians were attacked while attending funerals, while in ambulances and buses, while gardening and while shopping in markets.
83. *See,* Robert Cryer, "Prosecutor v. Galic and the War Crime of Terror Bombing", 2 *Israel Defence Force Law Review*, 2005, at 73
84. *See*, Ben Saul, *Defining Terrorism in International Law* (OUP, Oxford 2006), chapters.3-4

civilian.[85] The Rome Statute of the ICC does not include any crimes of terrorism within jurisdiction. Therefore, acts of terrorism or spreading terror amongst the civilian cannot be prosecuted as such. However, as pointed by the ICTY in Galic, such acts may be regarded as specific instances of the general prohibition of attacks on civilians, breaches of which are within the ICC's jurisdiction.

Terrorism as A Crime Against Humanity

Terrorist acts are even not listed as crimes against humanity in the Statutes of the ad hoc Tribunals or the ICC. Nevertheless, if the acts fall within the list of constituent crimes and if there executions are extensive or structured (and, in case of the ICC, are 'against any civilian population'), they will fall within the ambit of definition of crimes against humanity in all of the Statutes. They cannot be excluded only for the reason that they are executed with the intention of terrorizing people and with a particular political or ideological motive. In ICTY case of Galic, the accused was charged with and convicted of crimes against humanity of murder and inhumane acts on the basis of the same facts as the war of crimes.[86] The perception that terrorism could be included as a crime against humanity has received extensive support in legal literature. But it is controversial and complicated issue to include terrorism under the category of crime against humanity and much depends on the question whether the terrorist assault meets the contextual elements of crime against humanity. Article 7 of the Rome Statue defines a crime against humanity as an act which is part of a widespread or systematic attack, directed against a civilian population, with knowledge of attack. Moreover, for the ICC to have jurisdiction, the attack must be 'pursuant to or in furtherance of a State or organizational policy'. The phrase 'State or organizational policy' is the greatest hurdle in enlarging the ambit of crime against humanity and including in it the act of terrorism. The non-state actors may also carry out the crime against humanity.[87]

After 11 September 2001, terrorism was condemned as crimes against humanity.[88] There were undoubtedly problems with any submission that the crimes

85. *Supra* note 6

86. *Supra* note 75

87. This was substantiated by the International Law Commission which has resolved that 'the article (crimes against humanity, addition HvdW/IB) does not rule out the possibility that private individuals with de facto power or orgainsed in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the Draft Code; Yearbook of the International Law Commission 1991, Volume 2, Part 2, part, A/CN.4/Ser.A/1991/Add.1 at 103

88. *See,* Antonio Cassese, "Terrorism is also Disrupting Some Crucial Legal Categories of International Law", 12 *EJIL*, 2011, at 993; *See also*, Antonio Frederic Megret, "Justice in Times of Violence", 14 *EJIL,* 2003*,* pp.332-4

should therefore be tried by the ICC as the State primarily concerned was opposed to such an idea and the doctrine of complementarily would have stood in a way even if there was otherwise jurisdiction. But the acts may well have been within the subject-matter jurisdiction of the ICC.[89] The germane issue is that what degree of organizational adroitness those non-state actors should attain in order to come within the ambit of Article 7. The organizational requirements for the evaluation of crimes against humanity are responsible command, control over part of territory and proficiency to trigger an armed conflict.[90] A non-state group which lacks these capabilities would fail to qualify as a perpetrator of crimes against humanity.

Terrorism and Genocide

Terrorism and genocide are two forms of violence having increasing attention towards the end of the 20th century. Terrorism and genocide can be differentiated in relation to the sources of violence. Terrorism is carried out by state as well as non-state actors and in recent times Abu Bakr al-Baghdadi's ISIS would be the classic example of terrorism by non-state actors. In case of genocide violence is backed by the state and can be referred to state terrorism. Glaring example of distinction between terrorism as a violence of non-state actors and genocide as the violence of a state is the Israeli-Palestinian conflict which developed originally from the clash of two nationalisms in the 19th century.[91] There is important link between these two kinds of violence. Often a state fighting against terrorism actually proceeded to carry out acts of ethnic cleansing against the section of the population perceived to be producing terrorists. The most interesting example that shows up this link between terrorism and genocide can be found in Kosovo. In Kosovo there was actually a peaceful non-violent Gandhian civil disobedience movement led by the Kosovar Albanian leader Ibrahim Rugova during the decade of the 1980s, campaigning for the restoration of Kosovo's special status in Serbia. This was met with iron-fisted response from the Serbian leader Slobodon Milosevic in the form of repressive police laws designed to end all these activities. The consequent was

89. *See,* Roberta Arnold, "Terrorism as a Crime Against Humanity under the ICC Statute", in Nesi, *International Cooperation in Counter-Terrorism*; *See also,* William Schabas, "Is Terrorism a Crime against Humanity?", 8 *International Peace keeping: The Yearbook of International Peace Operations*, 2002, at 225

90. *See,* Harmen van der Wilt, Inez Braber, "The Case for Inclusion of terrorism in the Jurisdiction of the Criminal Court", *ACIL*, 2014, available at: www.acil.uva.nl; *See also*, Clasuss Kress, "On the Outer Limits of Crimes Against Humanity: The Concept of Organisation within the Policy requirement: Some Reflections on the March 2010 ICC Kenya Decision", *Leiden Journal of International Law,* 2010, pp.855-873

91. Anderson, Perry, "Security Towards Bethlehem", *New Left Review*, 2001; *See also*, Roberta Arnold, *The ICC as a New Instrument for Repressing Terrorism,* (2004) at 54

that subsequently the militant organization, the Kosovo Liberation Army (KLA) actually emerged in 1996. The point is that counter terrorism measures like the one Milosevic and Bush administration used often create more terrorists then they are capable of putting down.[92]

VII. CONCLUSION

Terrorism is one of the most serious present day challenges that the world is facing and the States have tried to response the threat of terrorism by assorting treaties at national, regional and international level. At international level the world is fragmented and suffers from lack of coherence, the diverse perspective of States has created obstructions to arrive upon an adequate definition. The fact that terrorism is an international issue is acknowledged by each and every State and almost all the States around the globe have the definition of terrorism in their domestic laws with little or no difference and regional organizations defines terrorism with slight differences of words here and there but it is unfortunate that a definition of terrorism agreed by States is still not in existence acknowledging the fact that the fight against terrorism cannot be succeeded without a globally accepted definition, even then the States are failing to arrive at any consensus definition. Perhaps it is a fundamental problem which has to be looked upon seriously if the world community truly wants to curb this evil. The fight against terrorism cannot be a wild, unjust war. The proper response to the definition of terrorism should be that the definition of terrorism ought to be outside the political realm. The lack of effective agreed-upon definition simply provides a justification for States not to fulfill their international obligations. If International criminal law is to develop and gain respect amongst the international community, then the focus must be on bringing persons on trial, not on extra-judicial killings that can be justified by extending the scope of the international law of armed conflict that was never intended to cover "sporadic acts of violence". The jurisdictional reach of ICC has to be investigated and jurisdiction of the ICC should be expanded by including terrorism as a separate crime as the law of defense as enshrined in Article 51 of the Charter of the United Nations cannot be invoked against non-state actors in strict sense. Gradually there is a depletion of gap between international core crime and terrorism which gives space to consideration that terrorism could be the fifth category of crime on which ICC can have the jurisdiction. The motivation to include terrorism as a distinct crime under the jurisdiction of the ICC springs from two sources. One, the Special Tribunal for Lebanon has propounded an authoritative definition of terrorism in peace time under customary international

92. Aviv Cohen, "Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism", 20(2) *Michigan State International Law Review*

law and two most terrorist attacks cannot be qualified as core crimes under ICC.[93] The preamble of the Rome Convention states that protection of civilians and other vulnerable groups from heinous crime is the main object and purpose of the ICC and the world community by rectifying various conventions related to terrorism has acknowledged that terrorism is a real threat to the humanity. The definition should not be an impediment in fighting against the evil of terrorism. It would make no sense to acknowledge the sufferings of civilians while denying the ICC the jurisdiction to take action against the perpetrators of terrorism. The world community should be united to include terrorism under the jurisdiction of ICC and add another tool to fight against terrorism.

93. *See* George Fletcher, "The Indefinable Concept of Terrorism", 4 *Journal of International Justice*, 2006, pp. 902 and 903; *See also*, M. Sassoli, "Terrorism and War", 4 *Journal or International Justice,* 2006, at 979

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INTERFACE BETWEEN COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS : AN ANALYSIS

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ABSTRACT : Globalized economy has been looking forward to attract more consumers for profit, sale and market share. Invention of new technologies and enhancing the efficiency of existing products and services is required in order to achieve above-stated objective. Economic assets in the form of intellectual property rights can be used for gaining and retaining competitive advantage in market. Competition law is concerned with the promotion and maintenance of competition for the benefit of society.Intellectual property right and competition law both aims at producing efficiency and consumer welfare in market. Intellectual property right is mainly concerned with the provision of increasing competition by inventing technology in markets on the other hand competition law increases competition in product and service markets. Apart from these similarities, competition law maximizes total welfare by condemning monopolieswhile intellectual property right does the same by granting temporary monopolies. Competition law and Intellectual property right are two side of the same coin because both seek to maximize consumer welfare through economic improvement. In this paper the author through case laws seeks to establish that both laws work for the consumer welfare and this has to be considered as central idea, despite all similarities and dissimilarities. Therefore a comprehensive policy on competition law and Intellectual property right is required for smooth working of market and consumer welfare.

KEY WORDS: Intellectual property right, Competition law, Globalized economy, Market.

I. INTRODUCTION

Competition in market is frequently defined as a process of rivalry with the objective of garnering higher market share or more profit. The outcome of a competitive process is expected to result in lower prices, higher output, better quality and innovation. Competition is at the heart of the market based economy. The goals of competition through economic efficiency, consumer welfare and to check the concentration of economic power have an interactive relationship. Indeed, it is the consumers that are the biggest beneficiaries of competition on the other

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hand; it is the consumers who are the main losers due to anticompetitive activities in a market.[1]

The principal objective of competition law is to protect the competition process.It prohibits activities such as collusive agreement to fix process or outputs, abuse of dominance, or monopolization, and anti-competitive mergers.Competition policy refers generally to a set of government measures that enhance competition, give primacy to market forces, facilitate entry and exit, reduce administrative controls, minimize regulations and create an incentive for innovation being valuable economic assets, these innovations need to be protected by Intellectual Property laws. These economic assets in the form of Intellectual Property can be used for gaining and retaining competitive advantage.[2] The firms/companies can monopolies their technologies for a limited period of time, but they cannot maintain a monopoly over the market. Intellectual property protection per se is not abusive but ironically, if it dominates over the market it is only doing a legitimate job of its purpose, namely to create to incentive for further innovation. However when companies refrain from licensing their intellectual property to competitors, they undermine the basic tenets of competition law as well as the spirit of intellectual property protection.The application of intellectual property right law to competition issues is one of the most complicated disputes in the area of competition law.[3]

II. COMPETETION LAW AND ECONOMIC EFFICENCY

Competition Law has to promote economic efficiency using competition as one of the means and for assisting the creation of a market responsive to the consumer preferences. Economic efficiency is all about maximum utilization and best possible management of scarce resources in a society. Efficient resource allocation is the central idea of any economic market. There are three types of efficiency (a) Allocative efficiency; (b) Productive efficiency; and (c) Dynamic efficiency. Allocative and productive efficiency are together known as static efficiency. Allocative efficiency deals with optimal allocation of resources and productive efficiency deals with optimal production of resources. Thus, static efficiency aims at a better output with same input. Static efficiency can be achieved in the market by enforcement of a competition policy that seeks to promote competitive pricing and prevent abuse of market power. This is based on the premise that monopoly or any other form of imperfect market

1. Allan Fels, "Competition and Regulation", in VinodDhall (ed.) *Competition Law Today* (New Delhi: Oxford University Press,2007) pp.195-197
2. V.K. Ahuja, *Law Relating to Intellectual Property Right* (New Delhi: LexisNexisButtterworths, 2007) at 615
3. K.D. Raju, "The Inevitable Connection between Intellectual Property and Competition Law: Emerging Jurisprudence and Lessons for India",18 *JIPR*, 2013, at 111

structure leads to static inefficiency as the pricing of product is above the marginal cost resulting in monopoly profits.

Market prices are the signals from marginal consumers of the value they receive from the product, showing their willingness to pay. With the increase in supply, demand will decrease and as a result, price will also decrease. An efficient allocation means this price reflects the cost of producing the goods.[4] Allocative efficiency in a free enterprise economy can be achieved only if all firms are of sufficient size to realize all significant economies of scale, and all markets are either competitively structured (that is, they comprise a significant number of producers with no one or few having market dominance) or entry barriers are low. In such cases, all producers are price takers; the market, not the producers, sets the price. The market focuses cause resources to move to the production of goods the consumer want, given the distribution of wealth, Prices move down to marginal cost, and output is optimal to serve consumer wants at that cost.[5]

Competition should aim at achieving static as well as dynamic efficiency. The incentives provided to boost dynamic efficiency should be kept less than the overall social benefit arising from the incentive it provides to innovative activity. At the same time, Posner has argued that, since, in an economic analysis, we value competition because it promotes efficiency *i.e.*, as a means rather than as an end it would seem that whenever monopoly would increase efficiency it should be tolerated, indeed encouraged".[6] In short, the traditional view of competition as an important end in itself is turned on its head: Competition is valued only when it serves wealth maximization. That is, competition is valued only as a means to increase the cumulative market value of private property. Posner's justification for competition, probably, rests on the lines of modern utilitarianism, which states, a rule is good when by its effects society is better well off. However, wealth maximization might be one important social good and need but it is not the only one aspect on which our society values. Moreover, wealth maximization doesn't serve any purpose unless it is efficiently allocated.

III. COMPETITION LAW AND CONSUMER WELFARE

Competition Law is beneficial for the consumers. Many a times, competition has been used to enhance consumer welfare and therein efficiency and consumer welfare has been used synonymously. This has created a situation of redundancy. In strict terms of economics, consumer welfare has been defined as consumer surplus,

4. Abir Roy And Jayant Kumar, *Competition Law in India*(New Delhi: Eastern Law House,2004)
5. *Ibid*.
6. R. Posner, *Antitrust Law: An Economic Perspective*, 1976, at 22

which is that part of total surplus that accrues to consumers. In other words, competition law is not concerned with maximizing of firms; rather it is concerned with defending market competition in order to increase welfare, not defending competitors.

Prof. Joseph Brodley argues that the end result of competition is the enhancement of aggregate social wealth (economic efficiency) subject to the constraint that consumers shall receive an appropriate share of such wealth (consumer welfare). Thus, competition policy enunciates a distinct economic objective, a blending of efficiency and consumer welfare to be achieved by a particular social instrumentality inter-firm rivalry. Because the economic rationale of competition is neither economic efficiency nor consumer welfare standing alone, it is best described by a distinctive term competition welfare.

IV. COMPETITION LAW AND PROMOTION OF SMALL BUSINESS ENTERPRISES

Competition Law provides an opportunity to businesses both as competitors in the market as well as consumers to come forward and point out anticompetitive behavior which can damage the competitive fabric of the market. Competition Law has brought the freedom to the businesses to choose their size and scale. Well-functioning and competitive market will give confidence to investors and help government promote its program of ease of doing business in India. People will come and invest if they are assured that there are no preferences and there interest will be protected and innovations will not be always seen as anti-competitive.Economists still argue that wholesale dissolution of firms that dominate their business industries would reduce concentration and work to achieve the small business equity objective and this will lead to major efficiency loss.[7] Most of the times, due to better financial allocation and inputs available to the conglomerate firms, they result in better efficiency than smaller firms. Therefore, the issue is of promotion of efficiency and balancing the efforts to promote efficiency against other goals of competition.[8]

Maximizing consumer welfare through preserving competition process and optimizing overall economic efficiency, promote, build and sustain a strong competition culture within the country through creating awareness. It shall encourageadherence to competition principles in policies, laws and procedures of

7. Kenneth G. Elzinga. "The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?" 1125 *U PaL.Rev.*1976, at 1196
8. *Ibid*.
9. The National Competition Policy, 2005, available at: *http://www.mca.gov.in/Ministry/pdf/Draft_ National_Competition_Policy.pdf*

the Central Government, State Government and sub-State Authorities, with focus on greater reliance on well-functioning markets,

a. To ensure competition in regulated sectors and to ensure institutional coherence for synergized relationship between and among the sectoral regulators and competition regulators and prevent jurisdictional gridlocks;
b. strive for a single national market as fragmented markets are impediments to competition and growth;[9]
c. ensure that consumers enjoy greatest material progress in terms of wider choices, lowest prices and better quality of goods and services at competitive prices;
d. Effective prevention of anti-competitive conduct like abuse of dominance, merger and amalgamation;
e. Fair market process: Market regulation procedures, whether by public authorities, regulatory bodies or through self-regulatory mechanism, should be rule bound, transparent, fair and non-discriminatory. Public interest tests are to be used to assess the desirability and proportionality of policies and regulations, and these would be subject to regular independent review;[10]
f. "Competitive neutrality", such as adoption of policies which establish a level playing field where government businesses compete with private sector and vice versa, *etc*;
g. Fair pricing and inclusionary behavior, particularly of public utilities, whichcould be imbued with monopolistic characteristics; and
h. Third party access to "essential facilities", *i.e.* requiring dominant infrastructure and intellectual property right owners to grant access to third parties their essential infrastructure and platforms (*e.g.*, electricity, communications, gas pipe lines, railway tracks, ports, IT equipment etc) on agreed reasonable and non-discriminatory terms and conditions aligned with competition principles.[11]

V. BENEFETIS OF INTELLECTUAL PROPERTY RIGHTS

The existence of intellectual property also provides a useful tool for monitoring the activities of Competitors. Published patent applications, registered designs and applications for registration of a trade mark can indicate the technical and commercial direction which a competitor is taking, or thinking of taking. For example, published patent applications contain technical information relating to inventions and can indicate the area of technology currently of interest to the applicant or proprietor. An application for a new trade mark may indicate a new line of business or change

10. *Ibid.*
11. The National Competition Policy,2011, available at: *http://www.mca.gov.in/Ministry/pdf/Draft_ National_Competition_Policy.pdf*

of corporate identity for a company.All of this material is available for public inspection and can be a valuable source of commercial information unavailable elsewhere.

Intellectual Property Rights and Encouragement to Invention

Intellectual Property Law provides incentive to the inventor for his invention. At the same time and inventor will not be able to appropriate the full value of his invention because of 'free riders'[12] problem attached with intellectual property due to its specific nature.[13]

Intellectual Property Rights and Encouraging Disclosure

In the absence of any incentive by the state, the individual will keep the invention with himself. Incentive, in the form of temporary exclusive rights, encourage inventor to disclose his invention to the public. In India, patent is granted only when the inventor gives complete details about his invention to the patent office, which is put in the common pool after 20 years. Thus, this has multifarious advantage. Firstly, it increase 'common knowledge pool'. Secondly, if the information about the intellectual property is useful in the ulterior development of other assets, disclosures increase the pace of economic development by increase the information available to other investors. Thirdly, in case claims of patents, the patent office publishes the specification and claims of the patent in their official journal, which can be used by others for research and development even before the expiry of patent term.

Intellectual Property Rights and Economic Rights

Intellectual Property Law Confers on the owner economic rights because the exploitation of the work may bring monetary befits to him[14]. Intellectual property rights helps in greater commercialization of inventions. Intellectual property helps in further licensing of those property rights to entries that are better able to exploit those rights in an economic efficient manner.

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12. Free rider essentially refers to the person who enjoys the benefits of a commodity without paying anything for that. If a new idea is freely appropriable by all on the condition of existence of communal right to new ideas, incentives for developing such ideas will be lacking. The benefits derivable from these ideas will not be concentrated on their originators. If we extended some degree of private right to the originators, these ideas will come forth at a more rapid pace. This is same as the common law doctrine of unjust enrichment.
13. The specific nature of intellectual property is non-rival and non-excludable . In the absence of any protective legal regime, non-rivalness and non-excludability of intellectual property has caused problems for the production of such goods. "Non-rival in use" means that one individual can consume the good in question

Intellectual Property Rights and Increasing Dynamic Efficiency

Dynamic efficiency refers to the development of new products and processes resulting in socially desirable innovations. Without any fear of restricting the consumption of the same good by another person. "Non-excludability" means that it is difficult or impossible to prevent someone who has not paid for the good fromconsumingit. Grant of temporary monopoly by the state encourages individuals as well as corporations to invent and ripe the fruits of invention in the specified time.

Intellectual Property Rights and Economic Development

Intellectual property has economic value and has the capability ofaffecting the market. Industrial revolution caused the mass production of the goods in short period of time and created a situation where supply exceeded the demand for the goods. As a matter of facts, economic development of any nation is directly related to its industrial development whereas industrial development itself depends upon the inventions invented by the intellect of human brain. Inventions as Intellectual property are protected by the Intellectual Property Law. Protection of Intellectual property rights under the Intellectual property Law encourage the person with the creative mind to create Intellectual property in the form of literary works, inventions, coining of trademarks;industrial designs etc. and disclose it to the public for the benefit of the society.The Intellectual property law confers upon the creator of Intellectual property an exclusive right with respect to his Intellectual property for a specified period. This exclusive right of the creator over his Intellectual property includes his right to assign his Intellectual property, or without assigning his Intellectual property itself, transfer any interest in his Intellectual property in the favor of any other person in consideration of monetary gain.

The remedies in the form of injunctions, damages, and accounts of profits in the favour of the owner of Intellectual propertyprotects the economic interest of the inventors but also the economic interest of the nation to which these owners of intellectual properties belong.By protecting the economic interest of the owner of the intellectual property, intellectual property law encourages theinventors to invent new inventions, createnew designs for industrial products, which are crucial to the economic development of any nation.[15]

a) Intellectual Property Rights and Enabling indirect exploitation

Where a company has protected its products (or processes, etc.) by Intellectual property rights, it can derive revenues not only from their direct exploitation (by

14. S.K. Singh, *Intellectual Property Rights Laws,* (Allahabad: Central Law Agency, 2nd ed., 2013)
15. Meenu Paul, *Intellectual Property Laws*(Faridabad: Allahabad Law Agency,5th ed., 2014)

that company), but also from their indirect exploitation by third parties, under licensing contracts. These additional indirect revenues sometimes exceed the profits resulting from the direct exploitation, especially as they do not require additional internal manufacturing capacities. Such an approach may therefore be particularly relevant for Small and Medium-sized Enterprises (SMEs). It is also important for universities and public research centers, which usually do not have any direct exploitation activities.

b) Intellectual Property Rights andCost-free mechanisms

While certain procedures required for the registration of Intellectual property rights are considered to be expensive, in particular by SMEs, it should be noted that certain Intellectual property rights can beenjoyed without any formal procedure and without paying any official fees. This is in particular the case for copyright and for unregistered designs.

c) Intellectual Property Rights and Collateral to obtain financing

As intangible assets, Intellectual property rights often play an instrument role for SMEs (including start-ups and spin-offs) trying to convince third parties to provide financing to them (equity investment, loan granting etc.).

VI. CONTRADICTION BETWEEN INTELLECTUAL PROPERTY RIGHT AND COMPETETION LAW

Competition Law and Intellectual property right Law are complementary or two sides of the same coin, because both seek to maximize social welfare through economic improvement in one way or the other competition Law enhances consumer welfare by condemning monopolies and various anti-competitive practices on the other hand Intellectual property right Law maximizes social welfare by granting temporary monopolies. Intellectual property right involve grant of exclusive license cross licensing, grants back, patent pooling, Tying Restrictions and Royalty rates may give rise to competition issues, which can affect adversely the price, quantities qualities, or varieties of goods and services.In the case of *VallalPeruman and others* v.*Gudfrey Phillips India Limited*[16]the MRTP Commission observed that IPR owner has the right to use the IPR reasonably. This right is subject to terms and condition at the time of granting license but it does not allow using the IPR in any unreasonable manner. If the IPR owner abuse it by manipulation, distortion, contrivances etc. it will attract the action of anti-competitive practices unreasonable condition under section 3(5) of Indian Competition Act 2002, which prohibits the unreasonable use or explanation of IPR.

16. (1995)16 CLA 201

In The Case of *Gramophone Company of India Ltd.*v. *Super Cassette Industries Ltd.*[17] the Delhi High Court held that :

> At the outset, Section 16 of the Copyright Act may be noticed. Section 16 provides that no copyright can be acquired in respect of any work except in accordance with the provisions of the Act. Therefore, copyright is a statutory right. Only those rights which the copyright Act creates; to the extent it creates, and; subject to the limitations that the Act impose, vest in the owner of the copyright in the work, whether it is primary work such as a literary, dramatic or musical work, or a derivate work such as a sound recording or cinematography film. No right, which the copyright Act does not expressly create can be inferred or claimed under the said Act.

It further held thatthe rights conferred by section 14 are 'subject to the provision of this Act'. Therefore, section 14 has to be read in the light of, and subject to the other provision of the Act. It is seen that the copyright in derivative works viz. cinematography film and sound recording are limited when compared to the rights in primary works viz. literary, dramatic or musical works.

In The Case of *Microfiber Inc.* v.*Girdhar& Co*[18] Delhi High Court held as follows:

> The legislative intent was to grant a higher protection to pure original artistic work such as paintings, sculptures etc and lesser protection to design activity which is commercial in nature. The legislative intent is, thus, clear that the protection accorded to a work which is commercial in nature is lesser than and not to be equated with the protection granted to a work of pure Article."

In the Case of *Entertainment Network (India) Limited*v. *Super Cassette Industries Ltd*[19]Supreme Court held that:

> when the owner of a copyright or the copyright society exercises monopoly, then the bargaining power of an owner of a copyright and the proposed license may not be same. When an offer is made by an owner of a copyright for grant of incense, the same may not have anything to do with any term or condition which is wholly alien or foreign therefore. An unreasonable demand if acceded to, becomes an unconstitutional contract which for all intent and purport may amount to refusal to allow communication to the public recorded in sound recording. The word 'public' must be read to mean public of

17. MANU/DE/1801/2010
18. RFA (OS) No. 25/2006 (DB)
19. (2008)13SCC 30

> all parts of India and not only a particular part thereof. If any other meaning is assigned, the terms 'on terms which the complaints considers reasonable' would lose all significance. It is in that sense the expression 'has refused' cannot be given a meaning of outright rejection or denial by the Copyright owner. What would be reasonable for one may not be held to be reasonable for the other.

Hence, the owner of a copyright has full freedom to enjoy the fruits of his work by earning an agreed fee or royalty through the issue of licenses. But, this right, is not absolute. It is subject to right of others to obtain compulsory license as also the terms on which such license can be granted.In The Case of*United States* v. *Microsoft*[20] the district court held that the copyright does not give its holder immunity from laws of general applicability, including the antitrust laws(competition laws).In The Case of *Otter tail Power Co.* v. *the United States*[21], the US Supreme Court held that a dominant firm that controls an infrastructure or an asset that other Companies need to make use of in order to compete has the obligation to make the facility available on non-discriminatory terms.

In the ECJ in cases of *Magill Radio Telefilms Eireann*[22] and *Independent Television Publications Ltd*[23]established an important precedent in relation to refusal to deal in the context of intellectual property rights. The court held that the appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was apotential consumer demand. Such refusal constitutes an abuse under heading(b) of the second paragraph of Article 82 of the Treaty.

In the case *of Twentieth Century Music Corp.* v. *Aiken*[24]US Supreme Court held that the immediate effect of copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

In the case of *Indian Performing Right Society Ltd.* v.*Eastern Indian Motion Pictures Association*[25]Hon'ble Supreme Court of India held that each feature film is nothing but a bundle of copyrights. It is no doubt true, as held by the Supreme Court that a protectable copyright comes to vest in cinematograph film on its completion which is said to take place when the visual portion and audible portions

20. MANU/UDCC/0152/1998
21. 410 U.S. 366 (1973)
22. 6thApril, 1995
23.
24. 422 U.S. 151, 156 (1975)or 500 F.2d 127, MANU/MANU/0112/1974
25. (1977) 2 SCC 820

are synchronized. It is also not in dispute that the Act in section 3(5) provides that nothing contained in section 3 shall restrict the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him by the Copyright Act, 1957. It may be mentioned that the intellectual property laws do not have any absolute overriding effect on the competition law. The extent of non obstante clause in section 3(5) of the Act is not absolute as is clear from the language used therein and it exempts the right holder from the rigours of Competition law only to protect his rights from infringement, it further enables the right holder to impose reasonable conditions, as may be necessary for protecting such rights.

In the case of *Kingfisher* v. *Competition Commission of India*,[26] considering the importance of matter, the Bombay High Court discussed it at length. The Court ruled that Section 3(5) of the Competition Act 2002 provides that Section 3(1) shall not take away the right to sue for infringement of patent, copyright, trademark, etc. and that the defences which could be raised before the Copyright Board could also be raised before the Competition Commission of India.

In the case of *Mahyco-Monsanto*[27] Mahyco-Monsanto (a 50-50 joint venture between Maharashtra Hybrid Corporation and American Agricultural Company) was found guilty of price gouging above the market price when no alternative retailer is available. In a Bt Cotton case filed by the Andra Pradesh government and some civil society organization before the MRTP Commission of India. Mahyco-Monsanto was charging an excessively high royalty fee for its Bt cotton seeds and Licensing technology in the name of trait value; imposition of unfair & discriminatory conditions in sub-license agreements; leveraging to protect position in the downstream cotton seeds market, where its affiliates operate; and limiting of scientific development in the technology market. Mahyco-Monsanto had a monopoly and had acted arbitrarily. The Competition law applies to IPR in relation to abuse of dominant position and combination. Therefore abuse of dominance due to an IPR is liable for action under the Indian Competition Act just as IPR –related dealings in combination leading to an anti-competitive effect.

The US Supreme Court declared in *Twentieth Century Music Corp* v. *Aiken*[28] that the immediate effect of our copyright law is to secure a fair return for an 'author's' creative labour. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.'[27] The goal of IPR and competition law is to protect the interests of the public and to ensure the freedom of trade and competition in the market. The judicial practice of the European Court of Justice (ECJ) adopted a

26. MANU/MH/1167/2010
27. MANU/CO/0065/2016
28. MANU/USSC/0052/1975

similar approach in cases like United Brands (1978), Hoffmann- La Roche (1979) and Michelin (1983).Section 3(5) is incorporated in the Competition Amendment Act 2007 to deal with IP and anticompetitive practices. This provision generally excluded IPR protection, but this is subject to reasonable condition and the unreasonable condition or abuse of dominant position will attract section 3 of Competition Act 2002.Article 246 of the Constitution which lays down that IPR as patents, inventions and designs, copyright, trade mark and merchandise marks, the farmers of the Indian constitution wanted to afford protection, incentive and encouragement to artists and inventors. Limited monopoly has been provided by the patents Act 1970, Merchandise Act 1958, the Copy Right Act, 1951 and other statutes balancing the interests of the owner of the IP and public interest.

Anti-Competitive Examination of Licensing Provisions

The grant of exclusive license even bars the licensee to practice the invention unless he has specifically reserved the right to do so Exclusive licensing can adversely affect competition in market Examples of exclusive licensing includes:

a) Cross Licensing:It means in change of IPR between two or more persons. If the technology licensed is substitute of subject matter than that can be used to keep prices high through creating scarcity of goods and services and disturb the balance of demand and supply. The competing entities or firms will get market power that would result into monopolization of market.
b) Grant- Backs: Many licensor stipulate under the terms and condition that if any improvement occurs on the licensed subject-matter that should be grant-back to licensor.
c) Patent pooling is a restrictive practice. This happens when the firms in a manufacturing industry decide to pool their patents and agree not to grant licenses to third parties, at the same time fixing quotas and prices. They may keep new entrants out of the market. In particular, if all the technology is locked in a few hands by a pooling agreement, it will be difficult for outsiders to compete.
d) Tie-in arrangement is yet another such restrictive practice. A licensee may be required to acquire particular goods solely from the patentee, thus foreclosing the opportunities of other producers. There could be an arrangement forbidding a licensee to compete, or to handle goods which compete with the patentee's goods.
e) An agreement may provide that royalty should continue to be paid even after the patent has expired or that royalties shall be payable in respect of unpatented know-how as well as the subject-matter of the patent.
f) A licensee may require to grant back to the licensor any know-how or IPR acquired and not to grant licenses to anyone else. This is likely to augment the

market power of the licensor in an unjustified and anti-competitive manner.

g) A licensor may fix the prices at which the licensee should sell.

h) The licensee may be restricted territorially or according to categories ofcustomers.

i) A licensee may be coerced by the licensor to take several licenses in intellectual property even though the former may not need all of them. This is known as coercive package licensing which may be regarded as anticompetitive.

j) A condition imposing quality control on the licensed patented product beyond those necessary for guaranteeing the effectiveness of the licensed patent may be an anti-competitive practice.

VII. CONCLUSION

The essence of promoting competition is to facilitate an easy exit. An entry restriction dissuades people from investing and they may choose a better destination and may invest elsewhere. An easy entry helps in improving the ease of doing business and therefore theentry restrictions must get eliminatedto the extent possible.However being pro-business alone is not enough. Being pro-competition is essential to be pro-business. Being pro-businesswithout, being pro-competition is a very precarious proposition because without being pro-competition, being pro-business can encourage crony capitalism and oligarchs, which may lead to colossus market failures. So any pro-business policy per-se has also to be pro-competition. Competition is at the heart of the market economy. Socialism per-se is anti-competitive as it promotes and encourages state monopolies, which by their very character, can be anti-competitive and against consumer's interests, it is utmost necessary to sustain and promote competition.

Competition promotes innovation, ensure efficiency, price competitiveness and increased choices to the consumers over a variety of quality products and service. In India, competition has done wonders in many sectors.The basic role and function of competition law is to prevent anti-competitive practices that harm economic efficiency and increase transaction cost. Dynamic efficiency, economic efficiency and welfare of consumer should be the prime importance in both cases. Competition in the market has to consider the IPR rights of innovators which always boost the market. The analysis of legislations and cases reveal that competition law is not sufficiently equipped with the analytical tools necessary to find out the IPR protection implications.Both the set of laws (Competition and IPR protection) share the same basis objective i.e. promotion of innovations and welfare of society. A comprehensive competition policy for IPR is required in the field of licensing agreements, controls of market dominance and mergers in all jurisdictions.Long term efficiency should be promoted rather justified from a short-term point of view. The IP and competition law objectives are consistent and compatible. The competition law intervention is required only when there is an abuse of monopoly rights.

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EXPANDING HORIZONES OF HUMAN RIGHTS AND NEED OF HUMAN RIGHTS EDUCATION IN INDIA

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ABSTRACT: Human rights are continuously expanding in its scope from individual's rights to group rights and then rights of mankind and finally rights of future generations. However, these expanding human rights are useful only when people are aware of them. Knowledge of human rights is best weapon for its defence and protection from its violation and encroachment. Our apex court is trying to protect our human rights by interpreting right to life and liberty under Art. 21 in light of Directive Principals of State Policy and thus enlarging the scope of Art. 21. At international level, UN and its allied agencies are promoting human rights education by conventions, declarations and conferences. In India, NHRC and other governmental and nongovernmental agencies including UGC, NCERT and CBSE are actively involved in promoting human rights education. However, for countries like ours, who are full of differences on basis of religion, region, language and culture, it is difficult to inculcate human rights in our way of life in a uniform way. Therefore we need few more serious steps like making human rights education compulsory at all stages of our education and also to make it integral part of training at Panchayat level for aged people.

KEY WORDS: Human rights; Expansion of human rights; Human rights education; Human rights protection; Human rights promotion.

I. INTRODUCTION

Human rights are rights that are basic in nature and entitled to every human being, irrespective of his nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. Such rights would include right to life, equality before law, freedom of expression, right to work, right to social security, right to education, collective rights, such as the rights to development and self-determination, etc. Since the UDHR human rights scope and ambit is expanding day by day and new rights are securing its place as human rights. In India, Supreme Court has interpreted 'right to life' under Article 21 of the Constitution as a human rights code. In the light of Directive Principals of State Policy its scope is also expanding with the time.

Almost every legal system has presumption that everyone knows the law.

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However, in reality this is not true in every case and for every individual. Still common man is not aware of basics of law andbasic human rights. Unfortunately, this is true not only among illiterate people but also among highly educated classes around the world. People are not able to defend their human rights from corrupt systems due to social as well as natural forces around the world. Knowledge of human rights is a fundamental tool to guarantee the respect of all rights for every individual. Therefore a complete and fulfilling education system must part knowledge of human rights to make people aware of their human rights and to make them able to defend it whenever required.

Every education system should not only be aimed at producing trained professional workers but they must also inculcate in them a sense of higher purpose creating difference between trained and educated. Education is widely acknowledged and seen as a way to empower people to improve their quality of life and increase their capacity to participate in the decision making process, leading to desired transformation in the social, cultural and economic policies. Human rights education is an indispensable part of right to education; however, it gained larger recognition as a human right of late. It completes objectives of education and strengthens people and students' abilities to accomplish and produce societal changes.

The UN High Commission for Human Rights has called human rights education as one of four pillars for promotion of human rights. Human rights education involves a combination of looking within and looking without. It has to be necessarily focused on the individual, the knowledge, values and skills that pertain to the application of the human rights value system in interpersonal relationships with family and community members. It must also take into account the social, cultural, political and economic contexts, and the potential such education will have for social transformation.As human rights and education have shared goals such as poverty eradication, development, peace andgender equalityetc., need of human rights education necessitates it's integrating throughout education policy-making and implementation at all levels. This necessitatesestablishing links between the sectors of human rights, education and development,in working towards the shared goals of education for all, and as a result there is a need for cross-sectoral analysis.

The twentieth century saw the rise of a global system of organizations, social movements, rules, and discourse promoting the rights of individual human beings.Many modern rights are set forth as citizenship rights but justified on general human grounds that transcend national historical legacies or current national structures.Many human rights we had not thought of earlier are now part of human rights documents at International level. Now we are facing fifth generation of human rights. Over more the right to education itself, earlier justified on national political or

economic terms, is now cast in human right terms in worldwide conferences celebrating the need for "education for all". Such expansion of human rights is meaningless unless we infuse them into our education system and make students and people realise its value. This paper deals with expanding scope of human rights and need of human rights education to strengthen the rule of law. It discusses meaning of human rights, human rights expanding scope, human rights under the Constitution of India, human rights education and International law and human rights education in India.

II. WHAT ARE HUMAN RIGHTS?

Every human being possesses certain basic and inalienable rights which are regarded as possessed by human being prior to their recognition by legal system, or despite their denial by system can conveniently be described as human right or natural right[1]. Human rights are neither created by legislation nor can be amendment by the legislation; it is created by the nature. Therefore, they are also known as natural rights. Such right when recognised in a constitution and guaranteed protection against curtailment (except by legislation passed by special procedure) can be distinguished as "fundamental rights".[2]It is a modern name for what we have traditionally known as natural rights.[3]

Human right is a generic term and it holds civil rights, civil liberties and social, economic and cultural rights etc. Hence it is difficult to give a universal definition of the term human rights. However, it can be said that the rights which people have by virtue of being human being are called human rights. These are the rights which no one can be deprived without a grave affront to justice. The idea of human right is bound up with the idea of human dignity. All those rights which are essential for the protection and maintenance of dignity of individuals and create conditions in which every human being can develop his personality to the fullest extent may be termed human rights.[4] As fundamental or basic right they are the rights which cannot, rather must not, be taken away by any legislation or any Act of the Government and which are often set out in a constitution. As natural rights they are seen as belonging to man and women by their very nature. they may also be described as 'common rights' for they are rights which all man and women in the world would share, just as the common law in England, for example, was the body of rules and custom which unlike local customs, governed the whole country.[5] Human rights cannot be limited

1. O. Hood Philips and Jackson, *Constitutional and Administrative Law* (Sweet & Maxwell, 8th Edition, 2001) at 13
2. *Ibid*.
3. *Golaknath* v. *State of Punjab* AIR 1967 SC 1643 (1656)
4. *Meneka Gandhi* v. *Union of India* AIR 1978 SC 597 (619)
5. J.E.S. Fawett, *The Law of Nations* (Alien Lanne, The penguin Press, London 1968) at 151

to the relation between state and individual, or the area of institutionalised politics, or even solely to phenomena of power in the broadest sense.

Human rights in Indian legal parlance means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution embodies in the international covenants and enforceable by courts in India. According to Justice V.R. Krishna Iyer:

"Human rights are those irreducible minima, which belong to every member of the human race when pitted against the State or other public authorities or group or gangs and other oppressive communities. Being member of the human family, he has the right to be treated as human, once he takes birth or is alive in the womb with a potential title to personhood."[6]

III. EXPANSION OF HUMAN RIGHTS

In ancient legal systems and religions notions of righteousness was present, which are sometimes retrospectively included under the term "human rights". In Hinduism such notions were present from the very ancient times. Similarly in Buddhism and Jews religion such notions are also found. Elements of human rights are also traced at the time of the 6th century BC in Persian Empire of Iran. Cyrus Cylinder of 539 BC of Persian Empire is considered as the first human rights document. Human rights concept can also be traced in ancient Greece and Rome, where it was closely tied to the doctrines of the Stoics, who held that human conduct should be judged according to, and brought into harmony with, the law of nature.[7] However, the modern concept of human rights is regardedessentially the product of 17th and 18th century European thought. At the time of philosophers such as Grotius, Hobbes and Locke,these rights were called 'natural' rights, or 'the rights of man'. Thus graduallynatural law became associated with natural rights and natural rights were replaced by human rights.The Magna Carta (1215), the Petition of Right of 1628, and the English Bill of Rights (1689) played important role in development of human rights law. The Magna Cartacan be regarded as the first written and significant document relating modern concept of human rights.

Human rights are the foremost consideration in any political condition. Their promotion, protection and fulfilment are essential pillars of human dignity and social development. Although, it is the duty of every man and woman to safeguard universally recognised human rights and fundamental freedom from any violation. It is the obligation of the state to take a prompt action whenever human rights are encroached or the enjoyment of those rights are threatened from any angle by any state or party of state. After two world wars humanity has realised that certain

6. V.R. Krishna Iyer, *The Dialectics and Dynamics of Human Rights in India- Yesterday, Today and Tommorrow*, Tagore Law Lectures, (Calcutta: Eastern Law House, 1999) at 54

rights of human beings require transnational protection irrespective of nationality and religion. Therefore, keeping it in the eyes, the United Nations Organization has in 1948, adopted the Universal Declaration of Human Rights as a common standard of human beings.

In early history of human rights emphasis was on basic rights but in latter period it was focused on civil and political rights and from there it was to a broader one that adds social and economic rights. The core civic and political rights limit state action, such as freedom from torture and arbitrary imprisonment, due process, the suffrage, and the right of association. National constitutions increasingly emphasise these rights as well as a number of standard social rights. The division of human rights into three generations was proposed in 1979 by the Czechjurist KarelVasak at the International Institute of Human Rights in Strasbourg. He used the term at least as early as November 1977. His divisions follow the three watchwords of the French Revolution: *Liberty, Equality, and Fraternity*. The three generations are reflected in some of the rubrics of the Charter of Fundamental Rights of the European Union. Modern history of human rights in systematic way in international law begins withSecond World War and formation of United Nation. So begins the Journey of first generation human rights. The *first generation* corresponds to freedom and entails civil andpolitical rights that protect individuals from state power. These rights are primarilyindividualistic; however a few are collectively expressed, such as freedom of association,and the right to assembly. Civil and political rights include protection from discrimination, freedom of thought and conscience, freedom of speech, freedom of religion, the right to participate in civil society and politics. *Second generation* human rights are those rights which are relating to equality, encompass economic, social and cultural rights. They ensure the right to be employed, the right to equal working conditions, the right to social security, the right to education, the right to cultural participation and the right to unemployment benefits. *Third generation* rights, also known as solidarity rights, are collective rightsdealing with the principles of brotherhood. In this regard JanuszSymonides suggests that"solidarity between countries and solidarity within every country in favour of the mostdisadvantaged" must be implemented as a legal principle in the new international order.[8] This is especially evident in the preamble of *UNESCO's Declaration on the Responsibilities of the Present Generations towards Future Generations*, which professes a need for establishing new, equitable and global links of partnership and intragenerational solidarity for the perpetuation of

7. 'Human Rights' available at: *http://www.britannica.com/EBchecked/topic/275840/human-rights*
8. "Generation of Rights" available at: *http://www.s-j-c.net/main/english/images/humanrightsfinal.pdf*

humankind.[9] In addition, the *Universal Declaration on the HumanGenome and Human Rights 1997* encourages states to respect the practices of solidarity towards individuals and population groups who are especially vulnerable or affected by disabilities of a genetic character or by disease.[10]Generally speaking, third generation rights are loosely binding laws found inthe Stockholm and Rio declarations. They cover environmental rights, rights tointergenerational equity and sustainability, the right to self-determination, the right tonatural resources and collective rights.

Although the existence of *fourth generation* rights is disputed, scholars haveshifted some rights of the third generation into a fourth category. Environmental or ecological rights, focus on theresponsibility of humans to protect the environment are fourth generation human rights. Those in favour of such adistinction claim that the rights of the first three generations apply to human beings, while, fourth generation rights correspond to the well-being of mankind. *Fifth generation* human rights include the rights of unborn orfuture generations to inherit a sustainably managed earth.[11]

The universalised character of the human rights regime is evident when we consider the growing number of types of individual persons that can claim human rights. Human rights literature strongly emphasises the rights of women, children, ethnic minorities, indigenous peoples, gays and lesbians, the elderly, the disabled, and the imprisoned. The rationale underlying many of these rights claims is an appeal to a common humanity or personhood status. The content of the rights varies, from rights held in common with others to rights that are more specific to a collective or group. Women, for example, acquire franchise rights and other rights earlier extended to men but also seek reproductive rights and other distinctive protections (e.g., freedom from abuse and violence) and opportunities (e.g., childcare). Childcare rights are increasingly transformed into parental or even caregiver rights, given the individuating character of the human rights discourse. Older more paternalistic or communal regimes focusing on motherhood, for instance, erode and give way to an emphasis on generalised human rights centred on individual personhood.

The twentieth century saw the rise of a global system of organizations, social movements, rules, and discourse promoting the rights of individual human

9. Records of the General Conference, available at: *http://unesdoc.unesco.org/images/0011/001102/110220e.pdf*
10. The Universal Declaration on the Human Genome and Human Rights, available at: *http://portal.unesco.org/en/ev.php-URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201*.html
11. Helen Greatrex, "The Human Right to Water", available at: *www.victoria.ac.nz/law/centres/nzcpl/.../human-rights...2/Greatrex.pdfý*

beings.Expanding world human rights regime has greatly affected both policy and practice in nation-states, especially in those nation-states most tightly linked to world society. Now there are several groups all over the world demanding inclusion of such rights as human right which we would have not even imagined few years back. The number of groups whose human rights are to be protected, such as women, children, gays and lesbians, ethnic minorities, indigenous people, and people with various disabilities.[12] Their movements would result in expansion of human rights. The basis of their demands is human rights which we have recognised earlier. Such demands include demand of recognising same sex marriages and such couples right to procreate using assisted reproductive technologies.

List of recently asserted rights includes the right to expanded education, to basic health, and to non-discrimination across a broad range of spheres (e.g., housing, employment). Added now would be the right to be free from sexual harassment (particularly for women), rights of access to buildings and spaces (forthe disabled), the right to one's culture and cultural resources (for ethnic minorities and indigenous peoples), and the right to be free from cruel punishment (for the imprisoned).[13]

In countries like ours many of such demanded human rights are beyond imagination of common man and for this we may blame to our poverty and illiteracy. However, when such demanded human rights are also beyond imagination of comparatively rich and highly educated class we can conclude that this is because of our lack of human rights education. Situation of human rights education in India is such that not only common man but even highly educated are not aware of their basic human rights like life and liberty, right to health, right to information, rights related to arrest and detention etc.

IV. HUMAN RIGHTS AND INDIAN CONSTITUTION

The basic principles of the Universal Declaration of Human Rights are restated in national constitution and are incorporated into national law of states. Acceptance of human rights is like the acceptance of rule of law. The principle of rule of law is generally respected in most countries of the world as a fair level of commitment to the respect for human rights and human dignity. Human rights are incorporated under the Indian constitution as fundamental rights and it is the function of the State to protect and preserves such rights. The Fundamental Rights in the Indian

12. Francisco O. Ramirez, David Suarez, and John W. Meyer, "The Worldwide Rise of Human Rights Education" available at: *http://servidormanes.uned.es/mciud/eventos/articulos_rodr/Ramirez-Suarez-Meyer_5_15_05_final%202.pdf*
13. Francisco O. Ramirez, et al., "Expansion and Impact of the World Human Rights Regime: Longitudinal and Cross-National Analyses Over the Twentieth Century", available at: *www.stanford.edu/group/csw/hr_proposal2002*

Constitution is enshrined in Part III, which is grouped under seven heads as:

1. Arts. 14 to 18 comprises of Right to Equality which is of most important right
2. Arts. 19 to 22 guarantees Right to Freedom which consist of several freedoms, the most important is the Freedom of Speech
3. Arts. 23 and 24 consist of Right against Exploitation
4. Arts. 25 to 28 guarantees Right to Freedom of Religion
5. Arts. 29 and 30 guarantees Cultural and Educational Rights
6. Arts. 30-A, 31-A, 31-B and 31-C is very much diluted and is secured to some extent alone
7. Arts. 32 to 35 secures Right to Constitutional Remedies of which Art.32 is important and provides remedy to enforce the fundamental rights.

In incorporating Fundamental Rights in Part III and Directive Principles of State Policy in Part IV, our constitution makers were not only influenced by the UDHR just adopted by the UN General Assembly on December l0, l948, but also by the history of human freedom as unfolded by Bill of Rights of Great Britain, the Constitution of USA and the French Revolution. "Liberty, Equality and Fraternity" the watchwords of the French Revolution have been verbally incorporated in the Preamble to our Constitution. At the same time the genesis of the adoption of Fundamental Rights and Directive Principles is the experience our people gathered in our fight for independence from the British Imperialists.

Our constitution makers adopted Fundamental Rights in Part III of the Constitution and made it enforceable by the High Courts and the Supreme Court. In Part IV, they adopted Directive Principles of State Policy many of which were also in the nature of Human Rights. They were not made enforceable in courts of law due to socio-economic restrains. However, after the end of the traumatic experience of the Emergency declared by Mrs. Indira Gandhi in June l975, our Supreme Court played an activist role in liberally and broadly interpreting the Fundamental Rights by even reading some of the Directive Principles in some of the Fundamental Rights and overruling some of the previous judgments of the Court. In 1978 the judgment of the Supreme Court in Maneka Gandhi's case overruled Gopalan's case (1950) and interpreted Article 21 liberally to protect life and personal liberty. It held that the embargo of "procedure established by law" under this Article means a procedure which is "reasonable, fair and just". It was a major departure from the literal interpretation of the clause adopted in Gopalan's case. The ruling in Maneka Gandhi's case opened a vista of new judicial era of enlargement of the scope of the fundamental rights in our Constitution.

Hon'ble Supreme Court in its activist role inferred several rights from Article 21 and other Articles in the Part on Fundamental Rights. It took aid of Directive Principles of State Policy to widen the scope of Art. 21 and now this article is

called a Human Rights code which is expanding with the time. Now many of these non-justifiable Directive Principles are being resuscitated as Fundamental Rights thanks to the expanding horizon of Art.21[14]. The right to free water and air[15] , the right to food, clothing, decent environment and protection of cultural heritage[16], right to reasonable residence[17], and right to education[18] are all examples of Directive Principles which have become enforceable by virtue of Art.21. Thus the Courts have creatively accumulated the power to implement Directive Principles under Art.21 and thus make them enforceable. The scope of the article is increasing with the time.

V. THE NEED OF HUMAN RIGHTS EDUCATION

Someone has rightly said that knowledge is power. In absence of knowledge human life cannot flourish the way it should. In case of human rights and its protection same is equally true. Human rights cannot be protected unless we know our rights. To protect humanity from lawlessness and establish rule of law all over the world concept of human rights was evolved. Through UDHR we have reiterate our belief in fundamental human rights, in the dignity and value of the human being, and in the equality of men and women. These human values in form of human rights are meaningless unless we know it. People who know their rights stand the best chance of realising them. Knowledge of human rights is the best defence against their violation. Learning about one's rights builds respect for the rights of others and points the way to more tolerant and peaceful societies.[19] Human rights education has a crucial role in preventing human rights violations from occurring.

The United Nations proclaimed that human rights education "training, dissemination and information efforts aimed at the building of a universal culture of human rights through imparting knowledge and skills and the moulding of attitudes". These efforts are designed to strengthen respect for human rights and fundamental freedoms, facilitate the full development of human personality, sense of dignity,

14. Rajeev Dhavan, "The Right to Die" *The Hindu* (April 12, 1996)
15. Sheeraz Latif Ali Khan, "Right to Die or not to Die: A Note on the Supreme Court Judgement", 1 *SCJ* (JS), 1993
16. B.B. Pande, "Right to Life or Death ? For Bharat both cannot be Right", *SCC* (J) 1, 1994
17. Vijayabalan, "New Dimensions of Human Rights", 24 *Cochin University Law Review*, 2000, at 11
18. Dilip Ukey, "Expanding Scope of Human Rights", 21 *Cochin University Law Review*, 1997, at 440
19. Balkrishna Kurvey, "Human Rights Education in India: Needs and Future Actions" available at: *http://www.hurights.or.jp/archives/human_rights_education_in_asian_schools/section2/1999/03/human-rights-education-in-india-needs-and-future-actions.html*

promote understanding, respect, gender equality and friendship to enable all persons to participate effectively in a free society, and further activities for maintenance of peace.[20]

For developing countries like ours who have multi religious and multi-cultural population human rights education, training and public information are, therefore, necessary and essential for the promotion and achievement of stable and harmonious relations among the communities and for fostering mutual understanding, tolerance and peace. Through the learning of human rights as a way of life, fundamental change could be brought about to eradicate poverty, ignorance, prejudices, and discrimination based on sex, caste, religion, and disability and other status amongst the people.[21]

VI. HUMAN RIGHTS EDUCATION AND INTERNATIONAL LAW

Human rights education is increasingly emphasised at national and international level. United Nations policy on human rights education now treats individuals as member of global society not of a Nation. In the Cairo Declaration on Human Rights Education andDissemination it was declared that 'human rights education and dissemination is a fundamental human right. This imposes on governments in particular great responsibilities to explicate, propagate and disseminate human rights principles and their protection mechanisms'.The United Nations Decade for Human Rights Education was proclaimed in December 1994 by theGeneral Assembly, spanning the period 1 January 1995 to 31 December 2004. In accordance with the relevantprovisions of international human rights instruments, and for the purposes of the Decade, human rightseducation has been defined as training, dissemination and information efforts aimed at the building of auniversal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes,which are directed towards:

(a) The strengthening of respect for human rights and fundamental freedoms;
(b) The full development of the human personality and the sense of its dignity;
(c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;
(d) The enabling of all persons to participate effectively in a free society;
(e) The furtherance of the activities of the United Nations for the maintenance of peace.

Several human rights treaties contain specific provisions relative to human rights

20. "Human Rights Education in India" available at: *http://www.legalindia.in/human-rights-education-in-india*
21. *Ibid*.

education; in addition,some treaty bodies have elaborated reporting guidelines, general comments or recommendations concerninghuman rights education, training and information. A compilation of those provisions and documents follows:

1. International Covenant on Economic, Social and Cultural Rights (Preamble and Article 2, 13).
2. International Covenant on Civil and Political Rights (Preamble and Article 2).
3. International Convention on the Elimination of All Forms of Racial Discrimination (Articles 2, 7 and reports of different committees formed under the convention).
4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 2, 10).
5. Convention on the Elimination of All Forms of Discrimination against Women (Articles 2, 10 and reports of different committees formed under the convention).
6. Convention on the Rights of the Child(Articles 4, 17, 19, 29).

The expert meeting on National Human Rights Action Plans and Human Rights Education in the Asia-Pacific Region held in Bangkok In October 2004 recommends that a national strategy concerning Human Rights education in the school system should include:

- The infusion of Human Rights within all curriculum subjects (social studies, literature, geography, foreign languages, sciences, etc.) and revision of related textbooks;
- The development of culturally specific and acceptable human rights education materials;
- The training of teachers and other educational personnel; and
- The establishment of a mechanism to ensure a school environmentconducive to human rights, which ensure respect among all actors and promote participatory approach and methodologies.[22]

It also recommended that all relevant actors should be involved such as ministries (ministry of education as well as, ministry of foreign affairs, ministry of culture, ministry of justice, etc.) national Human Rights Institutions, teachers and other educational personnel, students, parents/families, academics and researchers, cultural workers (artists), specific groups (such as organisation of disabled people), religious institutions and media. These actors should work together in a spirit of mutual respect and active participation.[23]

Parting education does not necessarily mean creating acceptance of human

22. Sujata Manohar, "Human Rights Education for Women Empowerment", 4 *Journal of the National Human Rights Commission*, 2005, pp.20-26, at 23
23. *Ibid*.

values. This requires education oriented towards protection and promotion of human rights and human rights education integrated with formal education. Apart from these treaties and conventions there are several other treaties and conventions which require state parties to spread human rights awareness through education. At international level steps are also taken to realise this goal but the real execution can only be achieved with the steps from the side of member states. So it is on the National Governments to execute the program with utmost seriousness and make their citizens aware of their human rights.

VII. HUMAN RIGHTS EDUCATION IN INDIA

India is one of the oldest civilizations in the world having a kaleidoscopic rich cultural heritage and is spread over very large area. It is the world's most linguistically diverse nations, with 22 official languages and English as an associate language, recognized by the Constitution. Added to this, there are many other spoken languages and thousands of dialects. Each State/UT has a unique history, culture, tradition, festivals, attire, language, etc. It is a secular country but home to all major religions. In such a country human rights education may play vital role in strengthening the bond between different communities and of our multi-cultural fabric.Art. 1 of the Universal Declaration of Human Rights says that "All human beings are born free and equal in dignity and rights". In India we have inculcated this in our culture and have been preaching it to the world since times immemorial in form of "VasudhaiwaKutumbakam".However, our schools are not teaching modern concept of human rights and our textbooks barely mention human rights. Indirect references to human rights are included in the Directive Principles of the Constitution of India and in civics and history textbooks. In Maharashtra, supposedly among the most socially aware states in India, the 9th standard (high school) civics book reproduces the Universal Declaration of Human Rights.[24] CBSE and many state school boards have also taken the initiative but that is not sufficient to spread Human Rights education in country like ours. Most universities do not offer human rights education, although some have three-month to one-year postgraduate courses on human rights. Courses offered by the universities are optional and confined to particular class of students. Open universities like IGNOU and RTOU offer diploma courses in human rights but that is not sufficient. It is submitted that human rights education must be made compulsory in all levels of our education system.

Section 12(h) of the Protection of Human Rights Act, 1993, requires the Commission to spread human rights literacy among various sections of society and promote awareness .The National Human Rights Commission (NHRC) of India and many NGOs have launched a countrywide public information campaign for

24. *Supra* note 19

human rights. It aims to make everyone more conscious of human rights and fundamental freedoms and better equipped to stand up for them. NHRC has time to time reviewed existing text books, with a view to deleting from them portions that were prejudicial to human rights. It has published a "Source Book on Human Rights" prepared in collaboration with NCERT and alsoprepared modules for teacher-training, relevant to teaching human rights at various levels. NHRCis also organizing workshops for non-governmental organizations/civil society, bureaucrats, police and students. On its recommendation 10 December each year is observed as Human Rights Day in all schools across the country. NHRChas urged all the Vice-Chancellors and Deans of Law Faculties to examine how best the subject of 'human rights' could be introduced at various stages of study at the university level. It has set-up a Working Group to coordinate, oversee and monitor matters relating to human rights education at the university level.

University Grants Commission (UGC) has constituted a Standing Committee on Human Rights.This Committee has prepared an Approach Paper to deal with several options including the need for basic courses for students of all disciplines.The Approach Paper suggested introduction of Diploma and Certificate Courses aimed at various target groups and emphasized the need for research, extension education and field action projects.Accordingly, the UGC formulated a scheme for providing financial assistance for organizing seminars, workshops and symposia in colleges and universities as well as conducting various Certificate, Diploma and Degree Courses in Human Rights.This Standing Committee was later reconstituted at the request of NHRC to carry forward the tasks undertaken.On NHRC's request, the UGC constituted a Curriculum Development Committee under the chairmanship of a Member of NHRC to frame a module curriculum for courses on Human Rights at Certificate/Diploma/Degree and Post-Graduate levels. Many universities in the country have introduced certificate, diploma, under-graduate and post-graduate courses in 'Human Rights'.

The NHRC pursued with the Government to develop a National Action Plan focussing on:-

- strategies for raising mass awareness on human rights;
- sensitization of specific target groups — law enforcement machinery like the judiciary, police, security forces and others;
- focus on secondary and higher education, including the establishment of a curriculum revision committee for revision of textbooks;
- development of training modules for teachers in English, Hindi and local languages;
- the provision of financial assistance to universities and colleges for development of specific courses in Human Rights; and
- establish a national resource centre that would develop human rights materials

and focus on educational tools.

The National Human Rights Commission of India; the Indian Institute for Peace, Disarmament and Environmental Protection (IIPDEP); and many NGOs have launched a countrywide public information campaign for human rights. It aims to make everyone more conscious of human rights and fundamental freedoms and better equipped to stand up for them. At the same time, the campaign spreads knowledge of the means which exist at the international and national levels to promote and protect human rights and fundamental freedoms. They make school authorities and the general public aware of civic education. They focus on developing knowledge, skills and attitudes needed to apply fundamental human rights and freedom and, consequently, the nonviolent resolution of conflict. However, the number of human rights violations suggests that the steps taken by NHRC and other governmental and nongovernmental bodies and its different wings are not able to spread awareness among common man in rural areas where rate of human right violation is high. The Asian Centre for Human Rights estimated that from 2002 to 2008, over four people per day died while in police custody, with "hundreds" of those deaths being due to police use of torture.[25] There is also rise in reports of sexual assault against women and children, honour killing, acid attacks.[26] Though government and legislature have taken several steps including passing of the Criminal Law Amendment Act, 2013 but such efforts alone cannot curb human rights violations. Seventy per cent of our population lives in villages which is still not aware of its human rights particularly rights of women and children. In rural areas women and children are prone to human rights violation due to our social and cultural setup. Human rights of minorities and differently able people are also not given due respect. Therefore, governmental and nongovernmental bodies must reach to them and make them not only aware of their human rights but also make them to inculcate it in their way of life. Different types of workshops and essay competitions organised by subsidiary bodies are confined only to towns and they do not reach in rural areas. So it is required that they must be included in our schools and colleges curriculum as compulsory subject at all stages of our education system. It is also required that such education must be uniform all over the country.

VIII. CONCLUSION

Rule of Law is the foundation of human rights and therefore, human rights mainstreaming entails the need to understand and apply universal human rights norms.

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25. "Hundreds die of torture in India every year report" available at: *http://in.reuters.com/article/2008/06/25/idINIndia*
26. "World Report- India" available at: *http://www.hrw.org/world-report/2013/country-chapters/india*

As stated in the Universal Declaration of Human Rights, human rights education de-velops the human personality and strengthens respect for human rights and fundamental free-doms. It promotes understanding, tolerance and friendship among all nations, racial or religious groups, and furthers the activities of the UN for the maintenance of peace. Human rights education builds on solidari-ties and social networking among people. Since the beginning of modern human rights concept its scope is continuously increasing. However, increased number of human rights recognised by International community and National Governments are fruitful only if we have knowledge about our rights and thus able to defend them otherwise these rights are meaningless. Human rights protection and its continuous monitoring help nation-states in maintaining high standard. Thishigh standard of human rights is a resource for human rights advocates and organizations within particular nation-states as well as for other nation-states. Such high standard of human rights can only be maintained by making them aware of their human rights. It also helps group of people demanding recognition of new human rights. Thus if more aware would be the people towards their human rights wider would become the scope of human rights. Human rights which started with first generation human rights of civil and political rights now have reached to demands of fifth generation of human rights. Different groups around the world are demanding several new rights to protect their interest as member of our society. Although due to socio-economic and cultural reasons many of such demands are not recognised at international level.

As discussed above the importance of human rights education does not require any over emphasis. It is best way to prevent human rights violations. Same has been recognised by the United Nations when it recognised thatthe human rights education should be aimed towards making it a universal culture. Efforts of human rights education and training are designed to strengthen respect for human rights and fundamental freedoms, facilitate the full development of human personality, sense of dignity, promote understanding, respect, gender equality and friendship to enable all persons to participate effectively in a free society, and further activities for maintenance of peace.

The long-term aim of human rights education programs is to establish a culture where human rights are understood, defended and respected. Thus, anyone who works with other people may be said to engage in human rights education if they have this end in mind and take steps to achieve it – no matter how or where they do it. Therefore, human rights education programs should provide a forum for sharing individual experi-ences in the field of human rights training and education, provide an international understand-ing of human rights and related issues, pro-mote equality in human dignity, and promote intercultural learning and participation.

It may be said that in India that the content of human rights education is not

different to what was taught by way of religion, be it Hinduism, Buddhism, Christianity or Islam. There is lot of truth in that statement. The quintessence of human rights is also the basic essence of all religions; love, compassion, and kindness are the same elements in every religion. However, while teaching religions we confined the obligations arising from these doctrines only to their followers. Our textbooks lack modern concept of human rights. Curriculum of school and colleges do not have human rights as a compulsory subject.

Human rights could bring in a universal aspect to moral and ethical education. And we in our divided societies are in great need of this. On the other hand in the context of rapid secularisation we could still retain a basic common ground for respect for each other. We could still be our brothers' keepers and withstand value systems described in our religions.

NHRC and other governmental and non governmental bodies have done much for promotion of human rights education. However for such a country with tonnes of diversity such efforts are not enough to educate us about human rights and make us conscious about human rights protection irrespective of religious beliefs, linguistic, regionaland cultural differences. For achieving this purpose our human rights education system must target to make human rights protection and promotion part and parcel of our way of life. This can be achieved only by making human rights part of every class curriculum. It may also be introduced as necessary activity at gram Panchayat level for aged people. Uniform human rights education is the only way by which we may strengthen our unity in diversity.

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ANTI-CIRCUMVENTION PROVISIONS IN COPYRIGHT: INDIAN RESPONSE TO THE ISSUE OF DIGITAL COPYING

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ABSTRACT: Copyright law has emerged and evolved to resolve issues arising out of new technologies. The journey of this branch of law started with the intention of the technology of printing press and today the law is confronting problems due to digital technology. The WIPO initiative in the form of internet treaties of 1996 presented some solutions which have been incorporated in legislations of many countries. In the same context the Copyright (Amendment) Act, 2012 includes the digital agenda of the above treaties in Indian law. The present paper examines the Indian response to the problems arising out of use of digital technology and particularly those which are associated with the digital rights management of works etc. For the above purpose the laws of USA and UK have been compared. The paper argues that the anti-circumvention provision of Indian law is wider than the Internet treaties and the paper also highlights the problems and issues associated with the relevant provisions of Indian law.

KEY WORDS: Digital copying, Anti-circumvention, Digital Rights Management, Rights Management Information, Communication Right, Copyright Act, 1957, fair use, WIPO Internet Treaties.

I. INTRODUCTION

Copyright law has grown against the pressure of technology. Since the days when printing press was invented the evolution of this branch of law has been mainly in response to the changes in technology. In the same context the recent changes done in the copyright law of India is a response to address the problems posed by the digital technology and internet.Digital technology enhances communication of works but at the same time it also creates problems. The easier and cheaper reproducibility of digital content, perfect substitutability of the digitized copies, enhanced compression and storage capacities for the content, easier extraction of digital content from storage media, and equally inexpensive dissemination of digitized products have all made copying, authorized or unauthorized, a more frequent activity.[1] The digital technology can deny the efforts of content creators a commercial return on their labour and the ability to manage and exploit their own

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property. The use of digital technology to pirate copyrighted content directly undermines basic building blocks of modern society, such as respect for the rights of others, and a proper return for one's creative output and labour. It also directly threatens the stable economic basis necessary for further development of creative art.[2]

As a result of the increased availability of computers, and the ease of reproduction of information generated thereof, the main challenge has been furthering copyright protection in this environment. In turn, the immediate reaction of copyright industries was to incorporate technological protection measures into digital works to ensure that the average user could not make unauthorized use of these works. Their reasoning was based on the assumption that in order to disable technological protection measures and get access to protected works, users would have to ask content providers for the "unlocking key", thereby ensuring that users would first pay and fulfill any requirement for usage of the content.[3]

Digital rights management (DRM) technologies are aimed to control copyrightable works. In essence, copyright owners now have the ability to write their own intellectual property regime.[4] Such technologies offer no where near the degree of flexibility and coverage necessary to support eithertraditional or new business offerings.[5] It can be viewed as an attempt to provide "remote control" of digital content.The required level of protection goes beyond simply delivering the digital content - restrictions on the use of the content must be maintained after it has been delivered. In other words, DRM requires "persistent protection", i.e.protection that stays with the content. If we consider a digital book, such a book can be delivered over the Internet using standardcryptographic techniques. But if the recipient can save the book in an unrestricted form, he or she can then freel yredistribute a perfect digital copy to a large percentage of the population of the world. This fear has led publishers to largely forego the potentially lucrative sale of digital books and has had a similar chilling effect on the legitimate distribution of other types of digital

1. Ayan Roy Chowdhury, "The future of copyright in India", 3(2) *Journal of Intellectual Property Law & Practice*, 2008, pp.102–114.
2. Nic Garnett, "Digital Rights Management, Copyright, and Napster",pp.1-2, available at: *http://www.sigecom.org/exchanges/volume_2/2.2-Garnett.pdf.*
3. NicoloZingales, "Digital Copyright, Fair Access and the Problem of DRM Misuse", *Boston College Intellectual Property & Technology Forum,* 2012, at 1, available at: *http://www.bciptf.org.*
4. Fred von Lohmann, "Fair Use and Digital Rights Management: Preliminary Thoughts on the (Irreconcilable?) Tension between Them",*Electronic Frontier Foundation,* available at: *https://w2.eff.org/IP/DRM/cfp_fair_use_and_drm.pdf.*
5. Nic Garnett, *supra*note 2, at 3.

content. Without robust DRM, owners of digital content have little choice other than to rely on the honor system.[6]

In the Indian context the topic becomes important in the context of the recent amendment of the Copyright law. The World Intellectual Property Organization ("WIPO") adopted treaties that mandated stronger statutory protections for DRM in signatory nations. The Indian response was in the form of The Copyright (Amendment) Act, 2012 which introduced changes in the definition of communication in section 2 (ff) and introduced sections 65A and 65B in the Act the combined effect of these changes is inclusion of digital agenda of WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty of 1996.

II. DIGITAL RIGHTS MANAGEMENT

Meaning and Purpose

Although technical controls on the reproduction and use of software have been intermittently used since the 1970s, the term 'DRM' has come to primarily mean the use of these measures to control artistic or literary content. DRM is a general term for a set of technologies, software and hardware, that seek to identify, protect, and manage digital content in terms of access, distribution, consumer usage, and payment.[7] The issue of whether DRM is an appropriate method for regulating digital copyright is open to debate. Indeed, when the idea that 'the answer to the machine is the machine' was proposed in 1995, it is questionable whether such prevention of access and use was envisaged.[8]

DRM technologies have enabled publishers to enforce access policies that not only disallow copyright infringements, but also prevent lawful fair use of copyrighted works, or even implement use constraints on non-copyrighted works that they distribute; examples include the placement of DRM on certain public-domain or open-licensed e-books, or DRM included in consumer electronic devices that time-shift both copyrighted and non-copyrighted works. DRM can be viewed as a separate mechanism, or a latent technology, that can be effectively 'switched-on' by right holders following the sale of content to users. As a result, there has been a key shift from protecting content itself to an application of DRM on distribution networks.[9] On the positive side an example of use of DRM has been its use by

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6. Mark Stamp, "Digital Rights Management: The Technology Behind the Hype", 4(3) *Journal of Electronic Commerce Research,* 2003, at 102.
7. Ayan, *supra* note 1.
8. N. Scharf, "Digital Rights Management and Fair Use", 1(2) *European Journal of Lawand Technology*, 2010,at 1.
9. *Id.*, at 2.

organizations such as the BritishLibrary in its secure electronic delivery service to permit worldwide access to substantial numbers of rare documents which, for legal reasons, were previously only available to authorized individuals actually visiting the Library's document center at Boston Spa in England.[10]

Nilanjana Sensarkar observes that "creation, marketing and distribution of entertainment products involves a lot of financial risks.These risks are enhanced in the digital world as it facilitates the near perfect reproduction of the original product and its rapid distribution throughout the globe. In a digital age such as ours, music and films are being increasingly consumed over the internet. This is where the role of Digital Rights Management (DRM) becomes vital as it is perceived to provide a safe environment for transaction of copyrighted content in the networked world by preventing access to it without the content owner's authorization, making consumer's usage rights explicit and thereby establishing new channels for revenue generation. DRM has been a highly controversial topic since itsinception in the developed world in the 1990s. It has potential economic/legal implications for both entertainers and the entertained, not only in the mature deconomies of the west but also in the maturing economies of the east, like India."[11]

It is relevant to note that there is a difference between DRM and Technical Protection Measures (TPMs) which is more confined to the purely technological tools designed to serve the same purpose. Operating as TPMs, it will mainly come into play at the last stage of the value chain i.e. before delivery to the commercial user or consumer. It can also involve Rights Management Information (RMI); forms of digital identification and description that vary in complexity. DRM is not necessarily synonymous with technical protection as it can also involve usage contracts, technology license agreements and anti-circumvention legislation.[12]

Anti-circumvention Provision in WCT and WPPT

Content providers lobbied in the mid-1990s for the passage of international measures dealing with DRM circumvention, and were rewarded in 1996 with the adoption of two new treaties byWIPO.[13] Article 11 of the WIPO Copyright

10.Mir Mohammad Azad, Abu HasnatShohel Ahmed, and AsadulAlam, "Digital Rights Management", 10(11) *International Journal of Computer Science and Network Security*, 2010, at 24.

11.NilanjanaSensarkar, "The Potential Impact of Digital Rights Management on the Indian Entertainment Industry", *British and Irish Law Education and Technology Association,* 2007,at 2,available at: *http://www.bileta.ac.uk/content/files/conference%20papers/2007/The%20Potential%20impact%20of%20Digital%20Rights%20Management%20on%20the%20Indian%20Entertainment%20Industry.pdf.*

12. N. Scharf, *supra* note 8, at 4.

13. Timothy K. Armstrong,"Digital Rights Management and the Process of Fair Use", 20(1) *Harvard Journal of Law & Technology,* 2006, at 65.

Treaty (WCT) require dsignatory nations to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors inconnection with the exercise of their rights under thisTreaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

A similar provision is contained in Art. 18 of the WIPO Performance and Phonograms Treaty (WPPT) in relation to protection of effective technological measures employed by performers and producers of Phonogram in relation to their performance and phonogram. Thus the combined effect of these two provisions is that except for broadcast reproduction right all other subject matter of copyright and neighbouring rights are covered under these two internet treaties of 1996. Apart from the above the other two ingredients of the digital agenda of Internet Treaties are: expansion of communication right to include internet as a mode of communication; and provision on rights management information (RMI).

The WCT provides that "authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."[14] The last phrase may be called as making available right which means communication using internet as a mode. Further as for RMI the treaty provides that "(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority." (2) As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.[15]

The agreed statement provides that "Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the

14. The WIPO Copyright Treaty, 1996, Article 8 on Right of Communication to the Public.
15. *Id.*, Article 12 on Obligations Concerning Rights Management Information.

effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty".[16]

The corresponding provision in WPPT for communication right is contained in Articles 10 in relation to performer's rights. It provides that "Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them." Article 14 provides the same in relation to Producers of phonograms. The law of RMI is contained in Article 19 of the WPPT.

In relation to the above provisions it is relevant to note that technological protection to prevent unauthorized access to or use of protected work, performances and phonograms takes many forms, and is constantly developing as a result of technological advancements and the need for new adaptations in response to the repeated attempts by 'hackers' and 'crackers' to break the protection and develop means to circumvent it.[17] The meaning of the condition that a technological measure, in order to be protected, must be 'effective'[18] needs to be interpreted. It does not mean that if it is possible to be circumvented, it may not be regarded as effective. Such an interpretation would be absurd since the objective of the provision is to guarantee protection against the acts of circumvention which by definition is also presumed to be possible in case of an effective technological measure. The word circumvention also needs to be interpreted. There are many examples of the acts of circumvention- destroying. Breaking, neutralizing, etc. of technological protection measures, for example 'hacking' through encryption, 'cracking' software envelopes, tampering with digital watermarks, etc. There are few countries which have defined

16. *Id.*, Agreed Statement Concerning Article 12.
17. MihalyFicsor, *The Law of Copyright and the Internet The 1996 WIPO Treaties, their Interpretation and Implementation*(London: Oxford University Press, 2016) pp.545&644
18. An appropriate meaning of the term effective can be seen in the U.S. Act. The Digital Millennium Copyright Act contains two sets of provisions on technological measures-controlling access to protected performance and phonogram, and controlling carrying out of acts covered by copyright. Two definitions are provided which may be used.Section 1201(a)(3)(B): a technological measure effectively controls access to a work if the measure in ordinary course its operation, requires the application of information, or a process, or a treatment, with the authority of the copyright owner, to gain access to the work.Section 1201(b)(2)(B): a technological measure effectively protects the rights of the copyright owner under this title if the measure in ordinary course of its operation prevents, restricts or otherwise limits the exercise of right of the copyright owner under this title.

the term in their national legislations mostly in terms of 'access control' and 'right control'.[19] What is very important is that, if definitions are laid down concerning 'technological measures' and 'circumvention', they must be of a functional nature (rather than 'technology specific') in order to avoid (probably very early) obsolescence.

III. ANTI - CIRCUMVENTION PROVISION: INDIAN RESPONSE

The Indian Copyright Law has now been amended in 2012 to implement the anti-circumvention provisions under the World Copyright Treaty, 1996 and the WIPO Performers and Phonograms Treaty, 1996.[20] It now incorporates the provision of Digital Rights Management in line with that of European Union and the Digital Millennium Copyright Law of United States. Though Indian provisions of Digital Rights Management are not harsh, but still in spite of not being a signatory to a treaty, and not having any obligation there is still a question that what compelled the Indian legal regime to incorporate these provisions in the Indian legal system. It is argued that these new provisions of Indian copyright law is also detrimental to Indian copyright law in three manners, First, it affects the well settled doctrine of Fair Use of copyright law, Secondly these provisions will be creating a Para copyright regime and provides relatively higher protection to the works, and also thirdly, these provisions are against the very notion of collective administration of rights which is prevalent in the Indian legal system of copyright.One of the justifications as provided by the government for introducing Digital Rights Management provisions into Indian copyright law is to bring Indian copyright law in line with these WCT and WPPT, but the fact of not signing or ratifying these treaties have not been noticed by the Authorities. However, the WTO Agreements or TRIPS Agreement

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19. The U.S. Copyright Act, defines the concept of 'circumvention, as follows:Section 1201(a)(3)(A) concerning 'access control': to 'circumvent a technological measure' means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.Section 1201(b)(2)(A) concerning 'right control': to 'circumvent protection afforded by a technological measure' means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure.
20. The WIPO Copyright Treaty, 1996, Article 11; and the WIPO Performers and Phonograms Treaty, 1996, Article 18 oblige parties to have adequate and effective legal remedies to prevent the circumvention against applied effective technological protection measures. Similarly, the WIPO Copyright Treaty, 1996, Article 12 and the WIPO Performers and Phonograms Treaty, 1996, Article 19 provides for contracting parties to have adequate and effective legal remedies against the unauthorised tampering of rights management information which is provided by the owner and also dealing knowingly with the copies of tampered rights management information.

does not make any obligation on India to incorporate Digital Rights Management provisions into its Legal system.[21] Section 65A and 65B of Indian Copyright Act 1957, facilitate the entry of WIPO internet treaties into copyright system.[22] It is also apprehended that the deployment of DRM technology, added to the legal protection, shall virtually destroyed the fair use provisions of the copyright law. Copyright and the fair use doctrine serve to provide authors with incentives to create whilst also allowing users to engage with creative content and inspiring the creation of new works, thus benefitting society overall.[23] As mentioned before the digital agenda of internet treaties is included in Indian law by way of three changes done in the Copyright Act, 1957. The new definition of "communication to public" in section 2 (ff), protection of technological measures in section 65A and provision of rights management information in section 65B.

Communication to Public

Article 8 of the WIPO Copyright Treaty provides: Without prejudice to the provisions of Articles 11(1) (ii),11bis (1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(i) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. The WIPO Performances and Phonograms Treaty contains two similar provisions that accord performers and phonogram producers with the right of making available to the public of fixed performances and phonograms respectively.

In India the 2012 Amendment amends the definition by adding "or performance" after "work" and extending communication to the public simultaneously or at places and times chosen individually, which has significance for performers. The rights hitherto limited to authors have been extended to performers by the amendment. Thus, on demand services (video on demand, music on demand), will clearly be considered as "communication to public".[24] The definition of 'communication to public' after its modification includes in it communication through internet. In order to bring the provision in line with the WPPT the phrase also

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21. Available at: *http://lexpress.in/law-development/digital-rights-management-provisions-and-indian-copyright-law*
22. The Indian Copyright Act, 1957, Section 65A deals with the protection of technological measures and 65B deals with tempering of rights management information.
23. Available at: *http://lexpress.in/law-development/digital-rights-management-provisions-and-indian-copyright-law*
24. IftikharHussian Bhat, "Right of Communication to the Public in Digital Environment", 2(4) *International Journal of Engineering Science Invention,* 2013, at 13.

includes performers within its ambit.[25]

Anti-Circumvention Provision

Section 65A of the Act makes circumvention of an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights, a punishable offence. It is important to note that the Indian provision is not limited to the requirements of WIPO treaties, it also extends the scope of the provision to Broadcast Reproduction Rights.

Agreed statement concerning Article 10 of WCT provides that "it is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment." Further Agreed statement concerning Article 16 of WPPT provides "the agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable mutatis mutandis also to Article 16 (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty."

Similarly the Indian provision contains a list of exemptions including doing anything referred to therein for a purpose not expressly prohibited by this Act; doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy; conducting any lawful investigation; doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner; doing anything necessary to circumvent technological measures intended for identification or surveillance of a user; or taking measures necessary in the interest of national security. It is important to note that the exemption contained in section 65A (2)(e) which provides that nothing contained in sub-section (1) shall prevent any person from operator does not seem to convey any meaning and thus requires an authoritative interpretation. Apart from the above the list of exemptions appear to be a welcome inclusion. On the basis of foregoing one may conclude that we have not borrowed the rigid meaning of DRM in India.

In relation to exemptions in copyright law it is pertinent to note that the blocking of contents to users in particular raises important tensions between the application of DRM and the fair use defense under copyright law which enables users to make

25. The Indian Copyright Act, 1957, Section 2(ff) "communication to the public" means making any work or performance available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by issuing physical copies of it, whether simultaneously or at places and times chosen individually, regardless of whether any member of the public actually sees, hears or otherwise enjoys the work or performance so made available.

use of copyrighted content for certain purposes. Fair use is dependent on access to content and serves to facilitate the dissemination of information and ideas that arise from interacting with copyrighted works.[26] The provisions of the Digital Millennium Copyright Act, 1998 (DMCA)[27] govern the circumvention of technological measures that control access and this can now be seen as a separate issue to use, for which access is a pre-condition.[28] Indeed, when the idea that the answer to the machine is the machine was proposed in 1995, it is questionable whether such prevention of access and use was envisaged. It was the case that DRM technologies primarily operated to restrict uses of copyrighted content, whereas now they have shifted to controlling access to such content.[29] Timothy K. Armstrong argues that DRM technology and the DMCA have been controversial in academic and technological circles. On one hand copyright holders may deploy DRM mechanisms that do not allow fair uses of the copyrighted work and on the other hand DMCA may protect such mechanisms against circumvention, resulting in a curtailment of consumers' ability to engage in lawful fair uses of digital copyrighted works.[30] Derek J. Schaffnert is of the opinion that the DMCA has evolved into a serious threat to important public policy priorities including free speech, scientific research, fair use, and the promotion of competition and innovation.[31] It is argue that the DMCA has today developed into a threat to fair use, free expression, scientific research, competition and innovation. The right of a person to make fair use of the copyrighted content has been provided with an aim to provide free access to public in legitimate cases like comment, news reports, teaching, scholarship, etc. The enactment of the anti-circumvention provisions through DMCA deprives access to the copyrighted works by making circumvention of any technologies designed to protect the copyrighted works illegal. DMCA disturbs free speech by

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26. N. Scharf, *supra* note 8, at 2.
27. The Digital Millennium Copyright Act, 1998 (United States) implements the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes.
28. *Id.,* Section 103 adds a new Chapter 12 to Title 17 of the U.S. Code. The new section 1201 imposes obligation to provide adequate and effective protection against circumvention of technological measures used by copyright owners to protect their works in the context of its fair use.
29. N. Scharf, *supra* note 8 at 2.
30. Timothy K. Armstrong, *Supra* note 13, at 51.
31. Derek J. Schaffnert, "The Digital Millennium Copyright Act: Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation", 14(1) *Cornell Journal of Law and Public Policy,* 2004, at 145

preventing access to information protected by DRM technologies.[32]

The above observation needs to be examined in the context of Indian DRM provision. As mentioned before India has not incorporated rigid meaning of digital agenda. It is evident from the effect of section 65A(2) on rest of the provisions of the Act. An example of the same may be the working of section 52(1)(zb) (the disability provision) included by 2012 Amendment of the Act. The new sub-section provides that a work may be converted into a format which is accessible to people with disability and no license or permission of the copyright holder is required for it, provided it is done without profit motive. A DRM protected work may not be available for anyone to be translated in accessible format and thus the provision in the light of the new restriction technology seems of no use as circumvention would mean commission of offence. Section 65A(2) provides the solution. As mentioned before in clause (a) it provides that nothing contained in sub-section (1) shall prevent any person from doing anything referred to therein for a purpose not expressly prohibited by this Act. It means that for the purpose of doing anything not prohibited under this Act if one needs to circumvent it shall not amount to offence under the provision. As the acts mentioned in section 52(1) are permitted acts, technology protection may be circumvented for performing these acts including for example converting a work into an accessible format for people suffering from disability. Zakir Thomas rightly observes that "In the absence of the owner of the work providing the key to enjoy fair use, the only option was to circumvent the technology to enjoy fair use of work. The major problem of use of law in preventing circumvention was the impact on public interest on access to work facilitated by the copyright laws. This is the logic of sub-section (2) permitting circumvention for specified uses. The standing committee of the Parliament which examined the legislation in its report stated that many terms in this section have been consciously left undefined, given the complexities faced in defining these terms in the laws of developed countries." [33] It is believed that lack of clear guidelines and definitions may create more problems than solving them. Thus, the provision awaits an authoritative interpretation.

Rights Management Information

The Rights Management Information (RMI) of a work is simply data that

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32. Kalyan C. Kankanala, "Anti-Circumvention laws to protect Digital Rights: An Indian Perspective", *Brain League IP Services*, 2003, at 7, available at: *http:// www.nalsarpro.org/CL/Articles/digitalrights.pdf*
33. Zakir Thomas, "Overview of Changes to the Indian Copyright Law", 17 *Journal of Intellectual Property Rights,* 2012, at 332.

provides identification of rights related to that work, either directly or indirectly.[34] RMI is one of the cornerstones of systems that regulate the rights held in digital works. From a technical perspective, it has much in common with watermarking and steganography, both of which provide information over and above that contained in the primary work.[35] Users ("exploiters") can use electronic rights management information to learn how they can lawfully exploit a work. Economic rights owners can use electronic rights management information to inform others of the status of their rights and to provide legal channels for licensing.[36] Under Indian definition 'Rights Management Information' includes those information which are required for effective management of rights in digital medium viz. the title or other information identifying the work or performance; the name of the author or performer; the name and address of the owner of rights; terms and conditions regarding the use of the rights; and any number or code that represents the information referred to in sub-clauses (a) to (d), but does not include any device or procedure intended to identify the user.[37]

Section 65B of the Act defines offence related to tampering with rights management information. It provides that "Any person, who knowingly,- (i) removes or alters any rights management information without authority, or (ii) distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority, shall be punishable with imprisonment which may extend to two years and shall also be liable to fine." The proviso of the section allows the owner of copyright in such work to avail of civil remedies under Chapter XII against the persons indulging in such acts. The omission of broadcast in the body of the provision and omission of performer and broadcaster in the proviso is noteworthy. In the context of these omissions section 39A of the Act assumes importance which provides for "Other provisions applying to broadcast reproduction right and performer's right".[38] It provides that sections 65A and 65B

34. Mark Perry, "Rights Management Information", in *The Public Interest: The Future of Canadian Copyright Law*, at 251,available at:*https://www.irwinlaw.com/sites/default/files/attached/Two_05_Perry.pdf.*
35. *Id*., at 252.
36. Available at *https://www.tipo.gov.tw/ct.asp?xItem=183457&ctNode=6826&mp=2.*
37. The Copyright Act, 1957, Section 2(xa).
38. *Id.,* Section 39A: Other provisions applying to broadcast reproduction right and performer's right. Sections 18, 19, 30, 53, 55, 58, 64, 65 and 66 shall, with any necessary adaptations and modifications, apply in relation to the broadcast reproduction right in any broadcast and the performer's right in any performance as they apply in relation to copyright in a work: Provided that where copyright or performer's right subsists in

shall, with any necessary adaptations and modifications, apply in relation to the broadcast reproduction right in any broadcast and the performers' right in any performance as they apply in relation to copyright in a work. Thus the defect identified above seems corrected, however, the doubt still remains that if the above provisions are applied to broadcasters and performers by virtue of section 39A, the two beneficiaries should not have been mentioned at some places in the body of the provisions. Thus, consistency seems to be missing in the provisions.

As mentioned above the proviso to the section allows the owner of copyright in such work to avail of civil remedies under Chapter XII against the persons indulging in such acts, it is important here to mention that no corresponding civil wrong has been defined. Chapter XII provides for civil wrong for infringement of copyright. The instances where copyright is said to have been infringed have been mentioned in section 51 in the chapter. The section on rights management information is also unclear on the aspect of degree of knowledge required to constitute the offence. It is not clear as to whether the knowledge in the phrase "whoever knowingly" is knowledge of act or knowledge of consequences. The WIPO treaties provide the solution for both of the issues identified above. The WCT provides that Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention.[39] The DMCA has two levels of knowledge requirements in this regard. Section 1203 makes it illegal (criminally actionable) to knowingly remove or distribute works that are known to have had their CMI removed, "knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.[40] In the same way the Indian provision may be redrafted into two provisions where the higher degree of knowledge i.e. knowledge of consequences may make the act an offence and if the act is done with a lesser degree of knowledge i.e. knowledge of act only it amounts to a civil wrong for which civil remedies may be provided.

Before concluding the paper it is relevant to make a brief reference of one of

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respect of any work or performance that has been broadcast, on licence to reproduce such broadcast shall take effect without the consent of the owner of rights or performer, as the case may be, or both of them.

39. The WCT, Article 12(1) on Obligations concerning Rights Management Information.
40. The Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, § 1202 (c), 112 Stat. 2860 (1998).

the other issues which is likely to be affected by the concept of DRM. The collective administration of copyright and neighbouring rights through Copyright Societies in India is the method by which rights of various content creators is collectively administered by societies. The method is considered to be of advantage to both the creators as well as users of work etc. It is a better method of administration because of the fact that an individual owner may not be able to do the policing effectively thus loosing much of the royalty. However, it is now argued that with the advent of DRM the content creator becomes very powerful in administration of his rights in digital environment. This may raise doubt on the utility of collective administration as an efficient method of administration. Without going in detail of the issue, it may be submitted that DRM may reduce the utility of the societies from the point of view of the creators but the societies still remain useful from the point of view of the users of the work etc. Collecting societies provide a one stop shop for the users. Further, it is also relevant to note that societies strengthen the bargaining position of the content creators because of the concept of collective bargaining which may not be available to creators in case of individual administration by using DRM. The detail analysis of the issue is beyond the scope of the present paper.

IV. CONCLUSION

The foregoing suggests that the anti-circumvention provision in Indian law is not as rigid as it is in some of the developed countries. Further, it is also noted that the scope of Indian law is wider than WIPO treaties as it includes broadcast also. The changes done in the Act shall have implications and thus clarity in the provisions is required. As identified some of the provisions require authoritative interpretations. The requirement of knowledge in section 65B is one such provision. It is also relevant to note that the inclusion of anti-circumvention provision may affect the way we understand the aspects of exemptions and collective administration. The paper also identified areas in the relevant section where reconsideration is required. After having said that it may be mentioned that the provisions in Indian law allow circumvention for any purpose which is not prohibited under the Act. This appears to be a useful exception in relation to exemptions and limitations, however, the question remains as to how many people who may require to circumvent the effective technological measure have the resources and technical expertise and thus the future of implementation of Section 52 of the Act which contains provisions on exemptions (including the exemption in favour of disabled people discussed in the paper as example) remains unclear.

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DIRECTIVE PRINCIPLES OF INDIAN CONSTITUTION AND INCLUSIVE GROWTH

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ABSTRACT : Directive Principles of State Policy in the Constitution of India which reflects the distributive aspect of justice is the framework for the socio-economic development of the country and the welfare of the people. It gives the direction to the State for the future course of action. Though the Fundamental Rights are the pride, the Directive Principle of State Policy occupy central and permanent place to be strived for. The fulfilment of the constitutional aspirations through inclusive growth may address the problems of the masses living in abject poverty. In this backdrop, the relevant provisions of the Constitution of India for better development have been analysed.

KEYWORDS : Directive Principles of State Policy - Fundamental Rights - Inclusive Growth Distributive justice.

I. INTRODUCTION

"Poverty is the worst form of violence."

....Mahatama Gandhi

The dream of our founding father is to see India free from all discrimination that is succinctly exhibited in the Preamble that provides for equality of status and opportunity and socialistic State. The inclusion of Chapter IV in the Constitution is the mode to convert dream into a reality in a systematic manner according to the need and desire of the society.Directive principles of State Policy adorn a very important place in the administration of the nation. Proper implementation of these principles is *sine qua non* for the social and economic progress of the nation. Moreover, proper implementation of the directive principles would ensure the proper realization of the fundamental rights also.

II. DIRECTIVE PRINCIPLES AND GROWTH

Directive Principle as reflect the distributive aspect of justice constitutes the mirror of public opinion. It is also a yardstick for measuring Government performance.

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Philosophy behind these principles is conglomeration of Gandhian, socialist, scientific and internationalist philosophy. Purpose of these principles is to establish the utopian society in the country. Ambedkar compared the Directive Principles with the instruments of Instructions.[1] Like Instruments of Instructions they are directions to the future legislatures and executives to show in what manner they should exercise their powers. Ambedkar therefore observed that directive principles were the ready index for the legislatures of the future.[2]

It is apposite here to have a peep into the directive principles that speaks to create a society where everyone can live a dignified life. Article 38 of Indian Constitution directs the State to secure a social order for the promotion of welfare of the people. The clause (1) directs that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Clause (2) of this Article directs that the State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Article 38 is a general article which stresses the obligation of the State to establish a social order in which justice-social, economic and political shall inform all the institutions of national life. It no doubt talks of the duty of the State to promote the welfare of the people and there can be no doubt that standing by itself this might cover a fairly wide area but it may be noted that the objective set out in the Article is not merely promotion of the welfare of the people, but there is a further requirement that the welfare of the people is to be promoted by the State, not in any manner it likes, not according to its whim and fancy, but for securing and protecting a particular type of social order and that social order should be such as would ensure social, economic and political justice for all. Social, economic and political justice is the objective set out in the Directive Principle in Article 38 and it is this objective which

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1. *Constituent Assembly Debate*, Vol. VII,at 474. "The Instrument of Instruction "is the executive instruction by the Crown. It cannot been forced by judicial process."
2. *Id.,* at 476. He said, "In enacting this part of the Constitution, theAssembly is giving certain directions to the future legislature and the future executive toshow in what manner they are to exercise the legislative and the executive power they willhave. Surely it is not the intention to introduce in this part these principles as mere piousdeclarations. It is the intention Q/'the Assembly that in future both the legislature and theexecutive should not merely pay lip service to these principles but that they should bemade the basis of all legislative and executive action that they may be taking hereafter inthe matter of the governance of the country"

is made fundamental in the governance of the country and which the State is laid under an obligation to realise.

This Directive Principle forms the base on which the entire structure of the Directive Principles is reared and social, economic and political justice is the signature tune of the other Directive Principles. The Directive Principles set out in the subsequent Articles following upon Article 38 merely particularise and set out facets and aspects of the ideal of social, economic and political justice articulated in Article 38.

III. JUDICIAL APPROACH TOWARDS DIRECTIVE PRINCIPLES AND GROWTH

In *Minerva Mills* v. *Union of India*[3] while examining Amendment to Article 31C, it was laid down that the concept of social and economic Justice may not be very easy of definition but its broad contours are to be found in some of the provisions of the Fundamental Rights and in the Directive Principles and whenever a question arises whether a legislation is for giving effect to social and economic justice, it is with reference to these provisions that the question would have to be determined. Moreover, where a claim for protection is made in respect of a legislation on the ground that it is enacted for giving effect to a Directive Principle, the Directive Principle to which it is claimed to be related would not ordinarily be the general Directive Principle set out in Article 38, but would be one of the specific Directive Principles set out in the succeeding Articles.

Article 39 directs the State shall, in particular, direct its policy towards securing:

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 39A provides that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular,

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[3] AIR 1980 SC 1789

provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

In *KeshavanandaBharati*v. *State of Kerala*[4]it was laid down that the Constitution accords a place of pride to Fundamental Rights and a place of permanence to the Directive Principles. The Preamble of our Constitution recites that the aim of the Constitution is to constitute India into a Sovereign Democratic Republic and to secure to "all its citizens", Justice-social, economic and political-liberty and equality. Fundamental Rights which are conferred and guaranteed by Part III of the Constitution undoubtedly constitute the ark of the Constitution and without them a man's reach will not exceed his grasp. But it cannot be overstressed that, the Directive Principles of State Policy are fundamental in the governance of the country. What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an individual. That one is justiciable and the other not may show the intrinsic difficulties in making the latter enforceable through legal processes but that distinction does not bear on their relative importance. An equal right of men and women to an adequate means of livelihood; the right to obtain humane conditions of work ensuring a decent standard of life and full enjoyment of leisure; and raising the level of health and nutrition are not matters for compliance with the Writ of a Court. A circumspect use of the freedoms guaranteed by Part III is bound to subserve the common good but voluntary submission to restraints is a philosopher's dream. Therefore, Article 37 enjoins the State to apply the Directive Principles in making laws. The freedom of a few has then to be abridged in order to ensure the freedom of all. The Nation stands at the cross-roads of history and exchanging the time-honoured place of the phrase. In these circumstances the Directive Principles of State Policy should not be permitted to become "a mere rope of sand". If the State fails to create conditions in which the Fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it.

Article 43 enjoins to provide living wage, etc., for worker. It directs the State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

In *State of Kerala and anr.* v. *N.M. Thomas* seven-Judge Bench opined: *"*In

[4] AIR 1973 SC 1461

view of the principles adumbrated by this Court it is clear that the directive principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles. The directives thus provide the policy, the guidelines and the end of socio-economic freedom and Articles 14 and 16 are the means to implement the policy to achieve the ends sought to be promoted by the directive principles. So far as the courts are concerned where there is no apparent inconsistency between the directives principles contained in Part IV and the fundamental rights mentioned in Part III, which in fact supplement each other, there is no difficulty in putting a harmonious construction which advances the object of the Constitution. Once this basic fact is kept in mind, the interpretation of Articles 14 and 16 and their scope and ambit become as clear as day."

Article 46 enjoins the promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. It directs that the State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular of the Scheduled Castes and Tribes and shall protect them from social injustice and all forms of exploitation. In*LingappaPochanna*v. *State of Maharashtra*[5]While dealing with Maharashtra Restoration of Lands to Scheduled Tribes Act, the Apex Court held that the said Act is an illustration of distributive Justice and observed that the Courts should as far as possible uphold the Legislation enacted by the State to ensure "distributive Justice" i.e., laws which seek to remove inequalities and also attempt to achieve a fair division of wealth amongst members of the society.

In *Mohini Jain* v. *State of Karnataka*[6]the Supreme Court was called upon to deal with the question of right to education under Article 41 and once again the Court emphasized the importance of Directive Principles by holding that the right to education is concomitant to the Fundamental Rights and made the following observation: "The directive principles which are fundamental in the governance of the country cannot be isolated from the Fundamental Rights guaranteed under Part III. These principles have to be sent into the Fundamental Rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the Fundamental Rights guaranteed to the individuals under Part III could be enjoyed by all. Without making "Right to education" under Article 41 of the Constitution a reality, the Fundamental Rights under Chapter III shall remain beyond the reach of large majority which is illiterate. The Fundamental Rights guaranteed under Part III of the Constitution of India including the right to freedom

[5] AIR 1985 SC 389
[6] AIR 1992 SC 1858

of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed unless a citizen is education and is conscious of his individualistic dignity."

In *BandhuaMuktiMorcha*v. *Union of India.*[7]court held that "This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State - neither the Central Government nor any State Government - has the right to take any action which will deprive a person of the enjoyment of these basic essential."

IV. EFFORTS OF THE GOVERNMENT TO IMPLEMENT DIRECTIVE PRINCIPLES

The sincere effort has been made many a times by the government in the form of Amendments First, fourth, seventeenth, twenty-fourth, twenty- fifth, 42nd and 44th. TheseAmendments have been made to modify those fundamental rights that were hurdles in implementing these principles and bringing agrarian, economic and social reforms. With these changes the government successfully enacted the legislations to fix land ceilings, remove intermediaries such as Zarnindar, abolish hereditary proprietors, etc, and made the tiller of the soil real owners of the land. The other notable steps taken by Indian government to follow the directives are as under;Land Reforms Acts, Abolition of Zamindari System, The Minimum Wages Act, 1948, Trade Unions Acts, The Maternity Benefit Act, 1961, The Equal Remuneration Act,1976, The Consumer Protection Act 1986, etc. enacted by the government to uplift the standard of people. Many policies and programmmes e.g. IRDP, MGNREGA, PDS, NEGP, NRHM etc. have been launched to create job avenues and protect directive principles. Many Boards e.g. Handloom Board, Silkboard, Handicraft Board under Article 43 etc. have been created to help poor.

The other steps taken by the government to implement directive principles are as under;Green revolution, white revolution programs related to animal husbandry; Land distribution among poor and weaker section of society; Various community development programme; Jan dhanyojna; Different types of insurances; and Different types of subsidies etc.

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[7][1984] 2 SCR 67

NITI Aayog

While inaugurating NITI Aayog it was tweeted by Narendra Modi, Prime Minister of India that "Poverty elimination remains one of the most important metrics by which alone we should measure our success as a nation. The essence of effective governance is defined to include pro-people agenda, citizens' participation, all-round women empowerment, equality of opportunity to the youth and transparency. Inclusiveness with special attention to the socially and economically disadvantaged sections and minorities is also included in the scheme of effective governance."While putting an emphasis on pro-people, pro-active and participative inclusive development agenda he further said that "through the NITI Aayog we wish to ensure that every individual can enjoy the fruits of development and aspire to lead a better life."

V. CRITICAL ANALYSIS OF CONSTITUTIONAL ASPIRATIONS

Non- implementation of the directive principles is mainly due to the lack of political will or foresight. Poverty eradication, education and betterment of the backward classes are a few areas where the directive principles have practically failed to show results. Despite the concerted efforts of the government[8] to eradicate poverty and hunger, to attain greater equity in income distribution, yet this multi-pronged problem still gnawing humanity. It perseveres on the scale that is not acceptable. The percentage of the population below the official poverty line has come down from 36% in 1993–94 to 32% in 2009–10. However, not only is this still high, the rate of decline in poverty has not accelerated along with the growth in GDP, and the incidence of poverty among certain marginalized groups, for example the STs, has hardly declined at all. Because population has also grown, the absolute number of poor people has declined only marginally. This performance is all the more disappointing since the poverty line on which the estimate of the poor is based is the same as it was in 1973–74 when per capita incomes were much lower. Other indicators of deprivation suggest that the proportion of the population deprived of a minimum level of living is much higher. For example, National Family Health Survey-3 (NFHS-3) shows that almost 46% of the children in the 0 to 3 years' age group suffered from malnutrition in 2005–06, and what is even more disturbing is that the estimate shows almost no decline from the level of 47% reported in 1998 by NFHS-2.

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8. The National Rural Employment Guarantee Act, 2005; the National Rural Health Missionincluding the Janani Suraksha Yojana; the expanded SarvaShikshaAbhiyan and National Cooked Mid-Day Meal Programme.These include programs to provide elementary education, basic health care, health insurance; rural roads and rural connectivity, and other services to the poor.

The famous Kuznet[9] curve against, which posits that inequality first increases and then decreases with growth of income, is not supported by the evidence. It has increased in various parts of the world. Failure of this curve is succinctly explained by the UNDP Multidimensional Poverty Index (MPI) 2014[10]. At this juncture when we are moving ahead on the path of development the issue that is bedevilling all of us is that why despite all the technological advancements, we remain fail to eradicate poverty? Why still the humanity is suffering with malnutrition? What is the solution?No doubt rapid pace of growth is the only answer to lift the teeming millions out of poverty, unemployment, illiteracy and disease but if benefits of growth are limited to fortunate few and the benefits of the scheme reach to the poor in the leaky buckets then the failure of the end number of scheme is predestined.

Inclusive green growth is the pathway to sustainable development. This is the growth which yields broad-based benefits and ensures equality of opportunity for all. It is a process, in which, economic growth, measured by a sustained expansion in GDP, contributes to an enlargement of the scale and scope of opportunity, access, capability, securityand the mode to achieve all the four dimensions of inclusive growth. Sustained and rapid growth is a central component of any poverty reduction strategy. But the fact that the responsiveness of poverty reduction to economic growth has been uneven over time and across regions leads us to analyse potential pathways to make growth more inclusive. The aim should be to achieve commercial success in such a way that benefits should be percolated to the poorest of the poor. Other indicators of deprivation suggest that the proportion of the population deprived of a minimum level of living is much higher. For example, National Family Health Survey-3 (NFHS-3)[11] shows that almost 46% of the children in the 0 to 3 years' age group suffered from malnutrition in 2005–06, and what is even more disturbing is that the estimate shows almost no decline from the level of 47% reported in 1998 by NFHS-2. Still people does not have basic amenities according to NFHS-32% households are devoid from electricity and only 18% rural household have improved toilet facility. In a recent report of expert committee[12] in 2014, the total number of

9. Simon Smith Kuznets was a Jewish-American economist, statistician, demographer, and economic historian who won the 1971 Nobel Memorial Prize in Economic Sciences.
10. Available at: www.*hdr.undp.org/en/content/multidimensional-poverty-index-mpi*
11. NFHS were conducted under the stewardship of the Ministry of Health and Family Welfare (MoHFW), Government of India, with the International Institute for Population Sciences (IIPS) as the nodal agency, and technical assistance provided by United States Agency for International Development (USAID) through ICF Macro (presently known as ICF International).In 2014-2015, India will implement the fourth round of National Family Health Survey (NFHS).
12. *Report of the Expert Group to Review the Methodology for Measurement of Poverty,* Planning Commission, June, 2014, available at:*www.planningcommission.nic.in*

poor has reached 363 million from 269 million in 2011-12.[13]According to World Bank number of poor in India is 400 million.[14]

S.No.	Name of Committee	No of Rural poor	No. of urban poor	Total	Percent of poor
1.	Rangarajan Committee (2014)[15]	260.5 million	102.5 million	263 million	29.5%
2.	Tendulkar committee[16]	216.5 million	52.8 million	269 million	21.9%
3.	Dirrerence	44 million	49.7 million	93.7 million	

This data speaks volume about the failure of government policies to tackle the issue of poverty.

VI. CONCLUSION AND SUGGESTIONS

Although India's integration into the global economy has been accompanied by impressive economic growth that has brought significant economic and social benefits to the country yet disparities in income and human development are on the rise. The failure of all five years plans[17] succinctly can be seen through the lens of the conditions of poor. Still more than half of the population is compelled to live in slums and urinates in open as they do not have the resources to live the dignified healthy life.

Inclusive growth implies participation and benefit-sharing. Participation without benefit sharing will make growth unjust and sharing benefits without participation will make it a welfare outcome (IPC-IG).It would seem that at least two conditions are to be satisfied for growth to be considered inclusive: 'Growth does not leave behind large numbers.' Rawl's*maximum* principle is a justice criterion for the design

13. Earlier Rs. 27 per day for rural India and Rs. 33 for urban India was the criterion to decide poverty line and that has been raised by this committee to Rs. 32 per day for rural India and Rs. 47 for urban India.
14. *Report of World Bank,* 2014, available at www.worldbank.org
15. The Planning Commission in June 2012 constituted an Expert Group under the Chairmanship of Dr. C. Rangarajan.
16. The Planning Commission constituted the Expert Group under the chairmanship of Professor Suresh D. Tendulkar in 2005. The Expert Group (Tendulkar) submitted its report in November 2009 and the Planning Commission accepted its recommendations in January 2011.
17. Planning Comission has already been replaced with a pro-people, pro-active & participative development agenda stressing on empowerment & equality is the guiding principle behind NITI Aayog. Through the NITI Aayog we wish to ensure that every individual can enjoy the fruits of development & aspire to lead a better life.

of social systems. According to this principle the system should be designed to maximize the position of those who will be worst off in it.Growth is characterized by evenness across the economy, such that the widest range of our material needs are satisfied.

Following are few more suggestions both for the companies and the State, if followed can go a long way to grips with the environmental challenges posed by the 21st century.

1. The balance between inclusion and growth can be maintained by shifting labour out of agriculture, where it is currently engaged in low productivity employment, into a non-agricultural activity that can provide higher real incomes per head. This must be accompanied by rapidly creating jobs in the industrial and services sectors and by ensuring the improvement in the income-earning opportunities of those who remain in agriculture by raising land productivity. This process would also lead to higher farm incomes and a rise in real wages of agricultural labour whose bargaining power will improve as surplus labour is shifted out of this sector.
2. There is a need to increase the effectiveness of service delivery as the most public programs suffer from varying degrees of ineffectiveness, poor targeting, and wastage of resources. There should be decentralization of responsibilities, promoting effective systems of transparency and accountability, effective monitoring of service delivery, and expanding the role of non-state service providers.
3. Education should be given to everyone to make them capable to earn the livelihood in a dignified manner.
4. The benefits should be dissipated to the entire human family by reducing the difference between rich and poor that is growing and not narrowing.
5. Government should make strategic investment and farsighted policy changes that acknowledge natural resource constraints and enable the poor and downtrodden to benefit from efficient clean and resilient growth.
6. Proper warehousing facilities should be provided. As in the year of 2012 there is a record rice and wheat harvest due to the cold waves but still we are unable to provide food security to our peoples at the bottom as 10% of the crop is lost to the pests or rots in inadequate warehouse. It is disheartening that about 20mt of wheat, rice and lentils, the equivalent of Canada's annual wheat crop, is eaten by rats and birds or spoilt for one reason or another. This is because of poor storage facility. 30% of the farm produce is stored in open, leading to the wastage and distress sales. As there is lack of silos and warehouses, the farmers have to store grains in rooms, bamboo structures, and the underground structure.

7. People should pay all the taxes as this public money can be used for the welfare of the humanity and especially for those who are at the bottom of economic pyramid.
8. Strict implementation of Minimum Wages Act.
9. Social Security should be provided by the state with the help of NGOs and Corporate houses (Food, Health)
10. Begging should be prohibited and all the children found begging should be sent to protection homes and old should be sent to old homes.
11. Loan facility should be made simple with very low interest rate.
12. If we are to meet the poverty and environmental challenge, mere add-on measures will not be enough, innovation regarding both production and market is required. Government as well as corporate sector has to realize that sustained growth cannot be achieved through maximizing short term gain. At this juncture strict implementation of all the popular schemes like SansadGraminYojna, MGNREGA and Pradhanmantri Jan Dan Yojna should be ensured.
13. Every entity must understand that collective and coordinated actions are needed to deal with this problem as poverty is the parent of revolution and crime.[18]"The world is getting better, but it is not getting better fast enough, and it is not getting better for everyone," argued Bill Gates at the World Economic Forum, Davos 2008.

Directive principles operate well in the planning process, but still have not been fully translated into action. These principles are the true reflection of the metaphor of the leaky bucket. Okun[19] suggested imagining that "the money must be carried from the rich to the poor in a leaky bucket. Some of it will simply disappear in transit, so the poor will not receive all the money that is taken from the rich." Money does not literally disappear, of course, but inefficiencies and failure of the policies initiated by the government produce results that can often be accurately characterized in this way.

18. Aristotle, *Politics*, Book II, Section VI
19. Arthur M. Okun, *Equality and Efficiency, the Big Tradeoff*(Washington, D.C.: Brookings Institution, 1975)

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GREEN CONSTITUTIONAL JURISPRUDENCE IN INDIA: AN OVERVIEW

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ABSTRACT : Green Constitutional jurisprudence is gradually expanding in India due to judicial activity. Directive Principles of State Policy, Fundamental Duties and Fundamental Rights are three important arms which have given strength to the Indian judiciary in this respect. An attempt has been made in this paper to analyse the relationship between these arms in making the right to life meaningful.

Keywords : Environment - Green Constitutional Jurisprudence - Directive Principles of State Policy - Fundamental Duties- Fundamental Rights.

I. INTRODUCTION

Green constitutional jurisprudence in our country is always marching on and on and is in the making and remaking. It is swelling like never before. The main environment related provisions of our constitution are Art.48-A and Art.51-(g) read with Art.21.The green jurisprudence has grown vast and fast overtime and is further growing from strength to strength. Due to burst of Judicial activity it is making dramatic advances in environment related area like the one covered by Art.21. This article which gives voice to the feeling and sentiments of the victims of pollution who are suffering in silence will be discussed hereinafter under the heading 'The Third Angle'.

II. BACKDROP

Ever since human beings came into being they started more misusing than using natural resources. This amounted to looting and plundering the assets of earth and gifts of nature by the children of the Mother Nature itself and thus making natural assets and resources scarce.The roofless and rootless people sitting on the edge of subsistence exploited the natural wealth out of need. The rich and affluent having the problem of plenty, in the name of progress, development and modernization misused the natural resources out of greed. The people belonging to both top and bottom of socioeconomic structure of the society took unethical advantage of natural wealth to meet their selfish ends. The money-spinner rich

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became richer but the earth became poorer. Thus the savage and civilized, masses and classes alike, recklessly exploited the earth's assets and natural wealth in a most unplanned manner. It led to degradation, damage or destruction of environment and disturbance in the eco-system on which depends total survival of mankind to an extent that the problem of pollution has become life threatening not only for human race but other life forms as well. They are playing with the very environment which sustains them and thus affects the existence of human being on earth and universe at large

Modernization may be blessing us with many gifts but it is looting and snatching away the greatest gift of all that is treasure of natural gifts. Things are reaching such a crisis point that terrible tragedy of ecological disaster is awaiting us. Delay in the matter will not only be serious but too alarming to be ignored any Longer as earth will not be left with much for human race to Live on. Therefore environmental issues need urgent attention as never before and must be held over everything else.

III. BASIC ENVIRONMENTAL LAWS

Let us enter the world of green environmental jurisprudence. This branch of law is basically founded on the realization of mankind to preserve natural resources, wealth and gifts of nature for man and his progeny. Among the countries across the world, the problem of environmental pollution got for the first time protective cover of Constitution in India. The prudent framers of the environment related provisions were persons of vision and had foreseen this problem ensuing from modernization. Through a constitutional amendment in the year 1976 they set two gems by adding two Articles Art.48-A and Art.51-A(g) simultaneously in pursuance to the trans boundary Stockholm declaration of 1972 to which India was a party. They imposed twofold responsibilities under Art.48-A on the State on one hand and under Art.51-A(g) on the citizens to protect and improve the natural environment and resources. Interestingly due to judicial activism the already existing Art.21 turned out to be the most potential provision for preserving and improving the environmental quality. Though the word 'environment' was not mentioned in the aforesaid article but it was taken as mentioned by the creative judiciary.

The 'Green Triangle'

The aforesaid three provisions account for making the following Green Triangle. The angles of which are being recounted below:

a) The First Angle (Article 48-A: Directive Principle of State Policy)

Art.48-A inserted by the Constitution (42nd Amendment) Act, 1976 provides: The state shall endeavor to protect and improve the environment and to safeguard the forest and wildlife.The word 'endeavor' refers to something which the State

should try hard to do it. Thus Art.48-A is directed to the State and imposes a duty upon it to make serious effort not only to protect, preserve, care, guard and ensure proper, clean and healthy environment against damage, it also expects the State to make exertion for improving the environment. The word 'improve' provides dynamic connotation to the aforesaid provision to enable the State to take positive steps of imposing restrictions on the misuse of natural wealth of mankind which adversely affect the environment e.g. encroachment upon parks and green areas, soil erosion, deforestation and desertification.

Art.48-A not only casts national duty upon the State to protect and improve the natural surroundings but goes beyond and imposes a duty on it to safeguard and protect natural resources namely forest and wildlife of the country. Depending upon this article the Supreme Court has done great service by issuing adequate directions to the State towards reducing pollution and eco-imbalance. The word 'environment' occurring in the article has wide spectrum and takes within its fold hygienic atmosphere and ecological balance and also the basic elements of water, air and soil.

b) The Second Angle (Art.51-A(g): Fundamental duty of citizens)

Art.51-A(g) added by the Constitution (42nd Amendment) Act, 1976 states: It shall be the duty of every citizen of India to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures.While Art.48-A referred to above is addressed to the State, Art.51A(g) is addressed to the citizens as everything relating to environmental matters cannot be left to be taken care of only by the State. While the word 'endeavour' mentioned in Art.48-A is something which one should try hard and make serious efforts by exerting power to do it, the word 'duty' mentioned in Art.51-A(g) is something which one is bound to do as a constitutional obligation.

The architects of these two provisions wanted that protection and improvement of the environment should go side by side. Art.51-A(g) imposes a constitutional duty and imperative on every citizen to protect as also to promote and improve natural environment including natural resources which are gifts of mother nature namely forest, wildlife, lakes and rivers expressly mentioned therein. As in Art.48-A, the word 'improve' imparts positive content to Art.51-A(g) also. It is a constitutional mandate to the citizens to deliberately take positive and constructive steps for the betterment of the environment in pursuance to its positive perception. It infuses sense of positive constitutional commitment in them and gives impetus to take urgent correctional measures for keeping the environment healthy and hygienic and for preventing damage to flora, fauna and environment. Art.51-A(g) does not

stop here but goes much further than Art.48-A and casts a duty on every citizen to have compassion for living creatures. The framers of this provision were visionaries and could foresee the problem of ecological and environmental degradation and deliberately used the expression 'compassion for living creatures' which is in line with our culture and has a ring of the philosophy of Lord Buddha, Ashoka the Great and Lord Mahavir and also vegetarianism which is part of our cultural heritage. It expects citizens to be kind and give ethical treatment to animal kingdom and other life forms.

c) The Third Angle(Art.21: Fundamental right for the protection of life etc. of persons)

Art.21 guarantees a fundamental right to life etc. to all persons whether citizens or non-citizens. Its scope is more sweeping as compared to Art.51-A(g) which is limited to citizens only. In starting phase the judiciary only scratched the surface of Art.21. As the time rolled by the active judges peeled out its surface and found the 'protection of environment' hidden in 'protection of life' mentioned therein. The Apex Court has time and again ruled in unbroken chain of cases handed down by it that right to 'life' means right to 'quality of life', right to live with 'human dignity' or right to 'enjoy life fully'. Environmental pollution is detrimental to the 'quality of life' and compromises 'human dignity'. Right to 'enjoy life fully' is possible only with the pollution free natural atmosphere. Thus the right to decent, healthy, wholesome and unpolluted environment has been read by enterprising judiciary in Art.21. Any interference in the elementary environmental elements namely air, water and soil impairs 'quality of life' within the meaning of Art.21. Due to judicial craftsmanship 'protection of environment' has found its way into 'right to life' guaranteed under Art.21 which was found revealing less and concealing more.

Earlier Art.21 which on plain reading was found colourless, hollow and like a dry bone has been clothed with flesh provided with the case law involving environmental issues. To start with its depth was merely like a coat of paint. Now it has become so deep that its depth cannot be measured and so is its spread. Lots of things for conservation and promotion of environment have been read in Art.21 by the activist judges and loaded it with great meaning. Therefore it has turned out to be having tremendous potential and has made more contribution to the improvement of environment and ecology as compared to the two preceding Articles 48-A and 51-A(g). Thus Art.21 marks the high point of the green triangle.

The effect of the aforesaid green triangle can be summed up as follows:

a) The problem of environment gets triple constitutional protection in our country.
b) Though the Arts. 48-A and 51-A(g) are not judicially enforceable by themselves they are becoming enforceable through the root of Art.21 by judicial

creativity which is pushing its boundaries.

c) Not only the Supreme court under Art.32 for the enforcement of fundamental rights but also the High Courts under Art.226 for the enforcement offundamental or other rights would entertain a petition including environment related Public Interest Litigation brought by environmental organization, public spirited individual/institution or any social action group or *suo motu* to take the relief to the doorsteps of all, persons not only to a select few. The windfall of PILs have given a go-by to the by gone age strict rules of *locus-standi* as also the technical niceties and send ripples in the environmental circles. The courts have gone to the extent of invoking epistolary jurisdiction by accepting a letter relating to environmental issue as writ petition. In *Rural Litigation and Entitlement Kendra* v. *State of UP*[1] (popularly known as Dehradun stone quarrying case) Apex Court invoked its epistolary jurisdiction and pronounced it as the first case of its kind in the country involving environmental and ecological issues, This case later became the basis of string of powerful pronouncements regarding the said issues. According to the top court even the disposal of toxic and hazardous material in and around the factory of Union Carbide Corporation, Bhopal should be done in strictly scientific manner which may not further cause damage to the environment within the meaning of the Green Triangle (*Bhopal Gas PeeditMahilaUdyogSangathan* v.*Union of India*[2].)

Interrelationship of the three angles

Far reaching changes have taken place in the mutual relationship of the three angles. As the time is rolling by, one is making the other two more meaningful. The beauty of case by case development in the area is that three angles of the triangle nourish, sustain and strengthen each other to an extent undreamt of by the framers of these three provisions. They enjoy highest place in the constitutional scheme in evolving green jurisprudence. The set of three articles has been read and interpreted together by the superior courts in the light of each other and to advance the object of each other. Thus change of tripartite relationship changed all in favour of the protection of environment and eco-system. New stand taken by the judiciary had a sudden and dramatic turnaround in the 'environmental scenario of India, which was far from being rosy in the past before insertion of these twin green articles, This triangle which comprises Art.48-A, Art.51-A(g) and Art.21 with its extended meaning has now become a hub of all judicial activity around environmental issues.

1. AIR 1988 SC 2187
2. AIR 2012 SC 3081

IV. CONCLUSION

The aforesaid trio of Articles (along with judicial craftsmanship) not taken alone but taken together have highest environmental and ecological importance and in regular course of things can be said to be Green Triangle under our Constitution. It has great purpose to serve and holds out promise for remarkable results in the environmental panorama of our country. The triangle covers under its wide umbrella almost all matters of environmental pollution and has developed great charm for environment and eco-friendly people and has also become powerhouse to transmit all kinds of power to the people and the government to curb pollution. It is a great reservoir of judicial power in handling all kinds of pollution related litigations. While exercising the power of judicial review in the matter, the enterprising courts are taken to be responsible for the emergence of new and dynamic green environmental jurisprudence in our country conceptualizing new jural postulates, values, principles and doctrines. For example, to name a few, 'Doctrine of Public Trust' which makes the State as trustee (duty bound to protect natural resources) and the general public beneficiary of the natural resources which are meant for general use and not for private ownership.

Another example is 'Precautionary principle' which requires anticipatory action to be taken to prevent harm to environment in advance even on a reasonable suspicion. Direct evidence of the harm to environment is not necessary. Still another example is 'Polluter Pays principle' which means absolute Liability for harm to environment that extends not only to compensate the victims of pollution but also to pay cost of restoring the environmental degradation. The court also slaps 'exemplary fine' to polluters so as to deter others from causing pollution. Recently a private company in Greater Noida was fined for raising pollution level by burning waste in the open. To minimize pollution level very recently the National Green Tribunal has made headlines by imposing a ban on the plying of old vehicles in the National Capital Region which has been upheld by the highest court of the land. Nothing else could have done what this Green Triangle has done for the cause of environment. It is this green constitutional jurisprudence emerging out of this triangle that has brought many victories to the millions of crying victims of pollution by not only wiping out tears from their eyes but also spreading smiles on their faces.

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PUBLIC INTEREST LITIGATION AS A MEANS OF SOCIAL TRANSFORMATION IN INDIA

AJAY KUMAR SINGH*

ABSTRACT : Social change is the necessity of every civilized society. It occurs through legislation, revolution and cultural exchange. PIL is also a key factor in bringing social change through dynamic judicial activism. In India social transformation is ensured through Public Interest Litigation (PIL) and it has emerged as an effective tool for social change in India. Through PIL the Rights of Marginal class of Indian Society whether it is the welfare of women or elderly people are taken care of. It is pious duty of the State to protect the rights of the children and provide adequate environment so that they may develop their personality. The PIL has played an important role compelling the state to perform its pious obligation. The present paper makes an attempt to evaluate the role played by PIL in bringing about social transformation in India. Case laws relating to welfare of children and other child related issues have been examined to substantiate the point.

KEY WORDS : Public Interest litigation, Human Rights, Social Action Litigation

I. INTRODUCTION

In technical sense the term Public Interest Litigation (PIL) consist two words: "Public Interest" and "Litigation". The word "Public Interest" refers an expression which indicates something in which the community at large has some pecuniary interest or some other interest by which their legal rights or liabilities are affected. The second word litigation on the other hand means a legal action, including all legal proceedings initiated in a court of law for the purpose of enforcing a right, Therefore the word PIL indicates a legal action initiated in a court of Law for the enforcement of Public interest where the rights of an individual or a group have been violated. In India it derives its authority from Article 32 of the Constitution of India. Article 32 provides forthe right to move the Supreme Court by appropriate proceedings for the enforcement of the rights guaranteed by Part-III, only the aggrieved Party has rights to seek remedy under Article 32.

Butduring late 1970s, Justice P.N. Bhagwati, articulated the concept of PIL in following words "where the legal injury is caused to a person or group of Persons by reasons of violation of any fundamental right or legal rights and such person or class of Persons on account of poverty or social constraints are unable to reach the

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court for relief, any member of Public who has concern for Public Justice can send an application for an appropriate direction, order or writin the supreme court under Article 32 and in case of breach of any fundamental rights or legal rights Public spirited person can come before the High Court under Article 226". In this way the rules of *locus standi* has been relaxed and (PIL) got constitutional recognition and became a tool for social change.

II. PIL AS TOOL FOR SOCIAL TRANSFORMATION

The dilution of the traditional doctrine of standing and creation of space for PIL in Constitutional cases has made tremendous impact on the way administration works. It is relevant to mention that it has caused meaningful social transformation in India. The present paper takes the example of welfare of children and relevant cases to substantiate the observation.

III. WELFARE OF CHILDREN

A nation which is not concerned with the welfare of its children cannot look forward to a bright future. Children are the other section of society who are also suffering from maladies of an oppressive proportion. Everybody would agree that childhood and youth should be protected against exploitation and against moral and material abandonment. The state has a duty to see the tender age of children is not abused, and that the children are given opportunities and facilities to developing in conditions of freedom and dignity.The constitution has taken special care and provide that no child below the age of 14 Years can be employed to work in any factory or mine or engaged in any hazardous employment. In addition the Directive Principles of State Policy cast a solemn duty on the State "to provide free and compulsory education for all children until they complete the age of 14 years"[1]. On the other hand, the economic and social conditions are such that they are forced to labour long and for longer hours than their wages could possibly sustain.Quite often they suffer different types of diseases.

Child Labour

Child labour has been a serious issue particularly after the commencement of Indian Constitutiondue to lack of effective enforcementmachinery Indian Judiciary took this pious obligation in its own hand to abolishchild labour by establishing judicial legislation.

In *M.C. Mehta* v.*State of Tamil Nadu*[2]PIL had been filed to release those children who were working in match stick industry in Tamil Nadu, the supreme

1. Constitution of India, Art. 45
2. 1996 SCC 756

court took an effective imitative and directed to the state government to ensure that employer who had engaged those children below the age of 14 years should pay a fine of Rs. 20,000/- for each child employed by them for violating the provisions of Child Labour (Prohibition and Regulation) Act, 1986. State was also directed to provide an alternative employment to an adult of family in lieu of the child. If the State cannot do this, it should pay Rs. 5000/- for each child towardschild labour rehabilitation cumwelfare fund. Where alternative employment would not be provided, the parent or guardian shall bepaid fix income every month. In case of non-hazardous work where child labour is permitted, the Supreme Court directed that Inspector should ensure that workings hours of children are not more than 4 to 6 hours a day and child should be provided education for at least 2 hours and cost of which shall be paid by the employer, the Supreme Court through PIL had done praiseworthy work but the amount (Corpus) of State's contribution should be raised to Rs. 20,000/- to make the scheme feasible.

In*BachpanBachaoAndolan*v.*Union of India*[3]the Hon'ble Supreme Court of India delivered its landmark judgment for the protection of missing childrenand child victims of crimes in the country. In this case BBA had filed a PIL on issue of missing children and trafficking. The Hon'ble Supreme Court issued the directions including cases of all missing children in India to be registered as a cognizable offence (as FIR) and investigated. In cases where FIR have not beenlodged at all and the child is still missing. As FIR should be lodged within a month this figure is 75,808 for the period 2009-2011 alone.

In all missing children cases, there will be a presumption of the crime of kidnapping or trafficking unless proven otherwise from investigation. This is an important precedent as for the first timePresumption of Crime for vulnerable section of society wasrecognised. All Complaints regarding children (for non-cognizable cases) to be investigated after referring them to a magistrate.

Juvenile Offenders

The decision in the case of *Munna*v. *State of U.P.*[4], popularly known as Kanpur Children case is of cardinal importance with regard to the welfare of children. Under the U.P. Children Act, 1951, no juvenile offender under the age of 16 years could be kept in jail except under special circumstances provided under the Act. Such a juvenile offender was to be detained in children home or other place of safety. This Act was meant to throw a cloak of protection round juvenile offenders and to protect them from coming into contact with hardened criminals. In violation of this

3 AIR 2013 S.C. The constitution of India by Prof. V.N. Shukla:-EBC Publication, Lucknow
4 AIR 1982 S.C.806

Act a number of juvenile offenders were detained in Kanpur Central Jail. Sri-Madhu Mehta of Hindustani Andolan visited the Central Jail, interviewed certain helpless children and found that they were being sexually exploited.

In *Vishal Jeet* v. *Union of India*[5] the Supreme Court expressed its anguish over negligence of executing agencies. Apex Court observed that it is highly deplorable and heart breaking to note that many poverty stricken children and girls are in the " Flesh Market" and Forcibly pushed into " Flesh Trade" which is being carried on in utter violation of all canons of morality, decency and dignity of mankind.

In *Gaurav Jain* v. *Union of India*[6], the Supreme Court held that the children of the prostitutes have the right to equality of opportunity, dignity, care, protection and rehabilitation so as to be part of the mainstreame of social life without any Pre-Stigma attached on them. The Court directed for the constitution of a Committee to formulate a Scheme for the rehabilitation of such children and child prostitutes.

Observation Homes for Children

Sheela Barse v. *Secretary, Children's Aid Society*[7], was a typical public interest litigation case, A journalist invoked epistolary jurisdiction of Bombay High Court (through a letter). The petition made several allegations against the working of the New Observation Home run by the Children's Aid Society, Bombay. In her letter she had alleged that there was inordinate delay in repatriation or restoration of children to their parents in respect of those orders for repatriation which were made by the juvenile court. It was alleged that there was non-application of mind in the matter of taking children into custody and directing production before the juvenile court. Then, there was almost complete absence of follow up action after the admission of the children in observation homes. She also alleged that the children welfare officers were not performing their duties and such failure had let to continued illegal detention of children without any justification.

The High Court of Bombay did not accept all these allegations as true although some of them were accepted and directions were issued to the observation homes. The Court treated the Children's Aid Society as Voluntary organisation.

Aggrieved by directions issued by the High Court of Bombay, the petitioner challenged the judgement alleging that several of her contentions were not considered by the High Court including the contention that the society should be treated as "State within Article 12. She complained before the Supreme Court that the High Court overlooked the fact that the chileren while staying in the observation homes were forced to work without remuneration and were engaged in hazardous

5 AIR 1990 S.C.1412:- http://Judis. nic.in
6 1997 (8) SCC 114
7 AIR 1987 SC 50

employment. In giving directions the High Court lost sight of the mandatory provisions of the Children's Act and also the provisions of the Articles 21 and 24 and the directive principles. The Supreme Court through Hon'bleBhagwati, C.J. and R.S. Pathak, J. (as he then was) agreed that the society was 'State' under the article 12 and, therefore, subject to the discipline of Articles 21 and 14 as it was an instrumentality or an agency of the State. The court, however, did not agree with the petitioner that the children employed in the homes should be paid remuneration. Hon'ble Bhagwati, C.J. observed that the children in homes should not be made to stay long but as long as they were there, they should be kept busy about the adaptability in life aimed at bringing about self-confidence and picking of human values.

The court made several suggestions for the improvement in the working system of observation homes and juvenile courts. It was suggested, for example, the juvenile courts should be managed by judicial officers having a special training to deal with cases of children. The State of Maharashtra was directed by the Apex court to strictly enforce the Act and the constitutional obligations and proceed to implement the directions issued by the High Court.

Again in *Sheela Barse*v. *Union of India*[8], Bhagwati, C.J. and R.N. Misra, J. emphasized the significance of the dignity of youth and childhood in a civilized society, it was stated that Article 39(f) mandated that children be given opportunities and facilitiesto develop in a healthy manner and in conditions of freedom and dignity. In earlier cases, the prettioner had moved the Supreme Court seeking the release of all the children below 16 yearsdetained in jails in different states. Directions were given by the Supreme Court on April 15, 1986 and on August 5,1986 to the District judges in the country to visit the jails under their jurisdiction to ensure that the children were properly looked after when in custody. In the instant case, the court again expressed its shock and anguish over the attitude of indifference of the lower courts towards the children. Due to this intervention parliament had to enact the Juvenile Justice Act, 1986 considering the gravity of issues relating to juvenile justice.

Illegal Sale of Babies in Foreign Countries

Laxmi Kant Pandey v. *Union of India*[9], case constitutes a valuable piece of judicial legislation making special provision for children. This case came through PIL under Articles 15(3) and 39(f) of the Constitution. For evolving procedure to prevent illegal sale of babies the court issued detailed directions regarding the adoption of Indian children by foreign parents. Some of the important directions are as follows:

8. AIR 1987 SCC 50
9. 1987 SCC 67

1. When the court makes an order appointing foreigner as guardian of a child with a view to its eventual adoption in the foreign country, the court will provide that such amount shall be paid to the scrutinizing agency for the service as the court thinks reasonable., The same principle will apply *mutatis mutandis* in cases when an Indian parent make an application for appointing himself as guardian of a child or Hindu parent applies for permission to adopt a child under the Hindu Adoption and Maintenance Act, 1956.
2. All nursing homes and hospitals coming across abandoned or destitute children will immediately inform with regard to the discovery of such children to social welfare department of the concerned government or to the Collector of the District and copies of such intimation would also be sent to the foster care home. The concerned department and collector will take care to ensure that the directions given by the Supreme Court are followed by the nursing homes and hospitals within their jurisdiction.
3. No recognized placement agency shall make and process an application for appointment of a foreigner as guardian of a child with a view to its eventual adoption unless the child has been in the custody of the recognized placement agency for a period of at least one month before the making of the application and it shall not be permitted to act merely as a post office or conduct pipe for the benefit of the unrecognized agency.
4. Whenever a child is produced before a juvenile court by a recognised placement agency for a release order declaring that the child is court must in all such cases complete the inquiry within one month from the date of the application and proper vigilance should be exercised by the High court for the purpose of ensuring that the directions given by the Supreme Court are complied by the juvenile courts stating as to how many applications for release order were pending before each juvenile court when they were filed and if they have not been disposed of within one month, what was the reason for the delay.
5. Where a child is relinquished by its biological parents or by mother under a deed of relinquishment executed by other, it should not be necessary to go through the juvenile court or social welfare department or Collector to obtain a release order declaring the child free from adoption but it would be enough to produce the deed of relinquishment before the court which considers the application for appointment of a foreigner as guardian of the child. It is only when a child is found abandoned or is picked up as a destitute that the procedure of going through the juvenile court or social welfare department or Collector would have to be adopted.

VI. PIL MUST NOT BE MISUSED

The foregoing highlighted only some of the cases in which the highest court has allowed standing to public spirited individuals and organisations to become champion of the matters relating to welfare of children. The changes brought about by these observations and the decisions of the highest court are significant. The long list of many such decisions firmly establish the conclusion that PIL is a useful to bring about social change. It is, however, also relevant to note that the same tool must not be misused or become a weapon in the hands of unscrupulous people to harass others.

The Supreme Court, while coming down heavily on frivolous public interest litigation petitions for personal or extraneous reasons, has laid down guidelines to be followed by courts in entertaining PIL. The filing of indiscriminate petitions "creates unnecessary strain on the judicial system and consequently leads to inordinate delay in disposal of genuine and *bona fide* cases," said a Bench consisting of Justices Dalveer Bhandari and Mukundakam Sharma. Tracing the origin and development of PIL in various countries, Justice Bhandari, writing the judgment, said: "The courts' contribution in helping the poorer sections by giving a new definition to life and liberty and in protecting ecology, environment and forests is extremely significant." However, the Bench said, "unfortunately, of late, such an important jurisdiction, which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives."

The Court in *State of Uttranchal* v.*Balwant Singh Chaufal*[10] ordered the following:

In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:-

1. The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.
2. Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.

10. (2010) 3 SCC 402

3. The courts should prima facie verify the credentials of the petitioner before entertaining a PIL.
4. The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.
5. The court should be fully satisfied that substantial public interest is involved before entertaining the petition.
6. The court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.
7. The courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.
8. The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations.

VII. CONCLUDING OBSERVATIONS

The whole Problem of implementation of welfare schemes depends upon the effectiveness of executive machinery. Experience suggests that where one organ of the government is not performing its duty effectively, Judiciary has come forward to provide relief to the under privileged class. The role of courts is aptly described by Justice Krishna Iyer in his remark: "The judicial activism gets its highest bonus when its orders wipe some tears form some eyes."

There is an urgent need to evolve proper co-ordination mechanism amongst the various governmental bodies in order to ensure effective implementation of welfare schemes made for vulnerable section of the society in general and for children in particular. And as long as that does not happen, it is only hoped that courts will fill the gap and provide remedies.

In this way it may be concluded that PIL has played a very vital role in bringing about social transformation in India.

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GENDER SENSITIVITY AND ISSUES OF EQUITY AGAINST WOMEN: THE CHANGING DIMENSIONS

KSHEMENDRA MANI TRIPATHI*

ABSTRACT : Even today women are vulnerable. Despite having the same constitutional rights, they are discriminated in every walk of life. The Indian courts have contributed towards making the life of woman dignified. In this paper an attempt has been made to discuss some of the cases which may be regarded a milestone in providing a dignified life to women in India.

KEYWORDS : Gender - Right to Equality - Right to Dignity - Presumption of marriage in live-in-relationship.

I. A GENERAL PERSPECTIVE

There is a general view that women and children are perceived to be the vulnerable section of society. The issues which revolve around against these vulnerable groups is lack of gender sensitivity, within the society[1], which has been raised and admitted by the academia, the NGOs and above all the legislature. Unfortunately, the biological appearance acts as a ground for gender discrimination rather on other grounds of liberty, equity and secular credentials.The changing perception towards the theology of hate crimes, male chauvinism, impact of material aspects and alike factors have found the place in the media regarding crimes against women, a dimension which needs a specific observation. The print and the electronic media have been sensitive towards such social change. The marked change has been witnessed and it becomes all the more relevant in the present circumstance. As perceived, by the sociologists and the psychologists, that a society[2],which cannot adhere to the dignity and honour of the women in general, cannot be in the framework of progressive society. The society must be hitherto in the movement from status to contract. Much has said and written in the media, about the deteriorating condition of women,[3]but lot has to be done in the improvisation of their status. The intelligentsia

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1. Due to usages, customs and ignorance of personal laws.
2. In addition, the term 'gender-based violence' generally refers to such kind of threat, which may intend to hurt or acts as a threat to make the women suffer either physically, psychologically.

has to own up the burden of reciprocating the concerns and the problems posed. The paramount issue being the respect towards the *Stri,* and its surroundings, in which she lives. Sustainability in thought and theory must be aptly adapted.

II. INTERNATIONAL PERSPECTIVE

Much has happened in the era of nineties whereby attention has been done for the prevention of violence against women, which otherwise has been the problem, rather than the perception. Workable solutions must and have been framed in the international law documents. Women rights having been recognised the Nations face the conflicting interests as the world is circumvented by a pluralistic society, multi-religious, multi-lingual, cultural and ethnic dimensions. Such laws, being private in nature, remain at an obligatory status. No hard laws can be either made but a consensus can be reached.

Many international laws now find a place by adhering to the norms which been enunciated in the International Bill of Rights[4] and later in personam incorporated in the United Nations Resolutions and the subsequent documents. Various Conventions of the United Nations have been convened in order to minimise the discriminatory persona against the women[5] namely; Convention on Political Rights of Women,1952, Declaration on the Protection of Women and Children in Emergency and Armed Conflict,1974, The 1979 Convention on Elimination of all forms of Discrimination (CEDAW), The 1993 World Conference on Human Rights, the 1993 UN Declaration on the Elimination of Violence against Women, the 1994 International Conference on Population and Development, In 1996, Universal Declaration on Emergency,1997, Optional Protocol to the Convention on the Elimination of Discrimination Against Women,1999,The World Health Assembly (WHA), In 1999,the UN designated November 25 as the International Day[6]for the Elimination of Violence Against Women.

III. JUDICIAL RESPONSE TOWARDS GENDER SENSITIVITY

The international documents[7] articulate the need of gender equality and try to

3. It's a comprehensive issue of understanding the basic problem of women. It is precisely equity based rights which women must be entrusted, *vis-à-vis* men, and any attempt of discrimination by the State or agencies of a State will result in violation of their rights.
4. The Universal Declaration of Human Rights, 1948, ICCPR and ICESCR, 1966
5. There has been a dichotomy between women rights and the issues pertaining to their development.
6. February 13 is designated as National Women Day to mark the birth anniversary of Sarojini Naidu (First Woman Governor of India).
7. Furthermore, Article 1 of the UN Charter, 1945 enunciates that it is one of the purposes of the United Nations is to promote respect for human beings and fundamental freedoms, laying emphasis on no discrimination as race, sex, language or religion.

eliminate the mental physical discrimination, which subjugates the rights of women, in order to provide rights of equality, i.e. opportunity and status throughout their lives this has also been in enunciated in various forms such as nationality, religion, health status, education, marital status, disability and socio-economic status. Various municipal laws and regional charters, with special reference the human rights perspective, advocate for preservation and sanctity of rights of women.

The Constitution of India also makes an effort to protect the rights of Women especially in the decade of 80's and 90's. The Supreme Court in *Vishakha*v. *State of Rajasthan*[8]a bench comprising of Justice J.S. Verma, Justice Sujata Manohar and Justice BN Kripal issued guidelines to protect sexual harassment at work place. All complaints of sexual harassment by any woman employee would be directed to this committee. This is significant because an immediate supervisor may also be the perpetrator. The committee advises the victim on further course of action and recommends to the management about the harassment caused by the man, accused of the offence. The judgment subsequently witnessed the passing of the Sexual harassment of women at work places (Prevention, Prohibition and Redressal) Act, 2013) by the Parliament.

In another case,*BudhadevKarmaskar v. State of West Bengal*[9], a sex worker was brutally murdered by appellant Buddhadev. The Apex Court in its division bench, headed by Justice MarkandeyKatju and Justice Gyan Sudha Mishra stated we strongly feel that the Central and the State Governments through Social Welfare Boards should prepare schemes for rehabilitation all over the country for physically and sexually abused women commonly known as prostitutes as we are of the view that the prostitutes also have a right to live with dignity under Article 21 of the Constitution of India since they are also human beings and their problems also need to be addressed. The bench acted quite actively and gave the directions to Central and State government to prepare schemes for giving technical/vocational training to sex workers and sexually abused women in all cities in India.[10]

8. (1997) 6SCC 241
9. LC-2011-SC-CRL-Feb 14
10. We direct the Central and the State Governments to prepare schemes for giving technical/ vocational training to sex workers and sexually abused women in all cities in India. The schemes should mention in detail who will give the technical/vocational training and in what manner they can be rehabilitated and settled by offering them employment. For instance, if a technical training is for some craft like sewing garments, etc. then some arrangements should also be made for providing a market for such garments, otherwise they will remain unsold and unused, and consequently the women will not be able to feed herself. We propose to have the response of the Centre and the States in this regard and hence the case shall be listed before us again on 04.05.2011 to be taken up as first case on which date the first compliance report indicating therein the first steps taken by the Central and the State Governments in this regard shall be submitted.

In *Lillu Rajesh v. State of Haryana,* the judgement pronounced on 11 April, 2013, Justice B.S. Chauhan and Fakkir Mohamed Kalifull, realized the agony and trauma of a rape victim who had to go through two finger test give her character certification and after analyzing through various precedents, held that it is violation of victim's right to privacy and dignity.

It held that "*In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy. Thus, in view of the above, undoubtedly, the two finger test and its interpretation violate the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent."*

The Supreme Court very objectively and scientifically determined if it was helpful or not and even if it could be helpful, there can be nothing that can be kept on a pedestal higher than a woman's dignity, that too an already traumatized woman. In my opinion, it was the repetition of the same crime against women behind the veil of legal medical procedures.

In *ABCv. The State (NCT of Delhi)*[11] Justice D.B.Vikramajit Sen and Justice Abhay Manohar Sapre stated in its judgment declared that now, an unwed mother is not bound to disclose the name of child's father and also, she would have all the rights as a guardian to child under guardianships rights. She need not take father's consent for guardianship rights. Not only it was necessary to protect the child from social stigma but, also to protect mother's fundamental right. It was certainly an avant-garde verdict on gender quality.

The Court emphasized that Section 6(b) of the Hindu Minority and Guardianship Act, 1956 makes specific provisions with respect to natural guardians of illegitimate children, and in this regard gives primacy to the mother over the father. Mohammedan law too accords the custody of illegitimate children to the mother and her relations. Name of father is always a myth while it is only

11. SLP (Civil) No. 28367 of 2011

mother whose name the person can always be sure of because she gave birth to him/her. This is one of the reasons why a mother should be given primacy or at least equality to exercise guardianship rights over the child. This judgment is evident of the fact that the highest court of land is deeply indulged in empowering women because it is the key to Nation's development.

In a recent case, *Dhannulal and Ors. v. Ganeshram and Ors,* it was held by the division bench, headed by Justice M.Y. Eqbal and Justice Amitava Roy, that continuous cohabitation of a couple together that is, 'live-in relationship' would raise the presumption of marriage unless otherwise proven. This was a case regarding the dispute for the property that their grandfather possessed would also be inherited by the woman with whom he lived for 20 years or not as she was not his legally wedded wife. The appellants referred to her as his 'mistress' but, not wife. The woman clearly failed to prove that she was the legally wedded wife of deceased but, the bench still held that she was eligible to inherit the property.Generally, our society views the woman who lives with a man without getting married as his 'keep' or 'mistress' and looks down upon her which clearly means that she is deprived of her right to choose whether to marry or not. While it is also the societal fact that man doing this will never be condemned, the woman is seen as characterless and does not gets the rights of legally-wedded wife whereas she does all her duties of a wife. Supreme Court in this case decided to take a step to change such orthodox notions and gave women their right to choose whether to marry or not.

The Supreme Court has understood the very fact that women empowerment is the most indispensable route to Country's development and cannot be ignored except at the stake of country's deterioration. If almost half of the population of country is suppressed and inactive, then, it is obviously foolish on the part of us to think that the country will ever develop in the next few centuries also. Therefore, the court is trying its best to break and do away with all such traditional norms that look down upon women, has given judgments to prevent violence against women and to put them equally as men in the society.There have been certain key areas which entrusts the State for its active role in adhering that to ensure the equal right of men and women to the enjoyment of all Economic, Social And Cultural Rights[12], emphasis must be given for the full development and growth of family as an institution, (the protection and assistance[13]) a natural and fundamental group unit of society,. 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

In 2002, as a follow-up of the WHA declaration in 1996 of violence as a

12. The ICESCR, 1966, Article 3
13. *Id*., Article 10

major public health issue, the World Health Organisation (WHO) released some of the prevalent problems posing gender sensitivity.The other international agencies like UNESCO, has recommended its commitment to gender equality and women's empowerment which is pursued through gender-specific programming and gender mainstreaming with action in all of its fields of competence. UNESCO's Communication[14]and Information Sector has engaged globally in a wide range of gender-specific initiatives. The two perspectives, equality between women and men working in the media, and equality in news reporting on women and men, are of equal importance and are being stridently pursued.

Specific instances of gender indiscrimination have found a marked response from the people at large. There has been sharp criticism in the electronic and the print media about the atrocities against the women.

IV. ROLE OF MEDIA

The aim of the Gender-Sensitive Indicators for Media (GSIM) is to contribute to gender equality and women's empowerment in and through media of all forms, irrespective of the technology used. The main focus of the publication is on the equality and gender dimensions of social diversity in the media. UNESCO's commitment to gender equality and women's empowerment is pursued through gender-specific programming and gender mainstreaming with action in all of its fields of competence. UNESCO's Communication and Information Sector has engaged globally in a wide range of gender-specific initiatives. The United Nations, *vide Resolution No. 54/134*, has declared *25th* November *as the International Day for the Elimination of Violence Against Women*to raise awareness of the fact that women around the world are subject to rape, domestic violence and other forms of violence; furthermore, one of the aims of the day is to highlight that the scale and true nature of the issue. *The Declaration on the Elimination of Violence Against Women* was adopted without vote by the United Nations General Assembly in its resolution 48/104 of 20 December 1993, the urgent need for the universal application to women of the rights and principles with regard to equality, security, liberty, integrity and dignity of all human beings (a paradigm based on CEDAW).

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V. CONCLUSIVE OBSERVATIONS

The issues pertaining to gender sensitivity, with some necessary modifications, will have to be adhered with providing financial support to women, promoting education at all levels, their health related issues, placing and settling them in agriculture sector, in the small scale industries, service sector and promoting religion and customary practices in order to understand their problems and solutions. Some feminist and other academic scholars find such a definition provided by the UN as well as other definitions along the same line to be unsatisfactory and problematic. They argue that these definitions of 'violence against women' appear to be in a very patriarchal understanding that signifies unequal relations between men and women. Some historians believe that the history of violence against women is tied to the history of women being viewed as property and a gender role assigned to be subservient to men and also other women. However, all of the research seems to provide convincing evidence that violence against women is a severe and pervasive problem the world over, with devastating effects on the health and well-being of women and children.Respect and honour for women at large as to have a better future and culturally rich society is the essence of these problems. At least this much can be agreed and male chauvinism has to be checked by men only, a non-transferable obligation on the society.

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BOOK REVIEW:

Law Relating to Electronic Contracts by RK Singh

Lexis Nexis (A Division of Reed Elsevier India Pvt. Ltd) 2014, pp. i-xii + 1-384, Rs 550/

Information and communication technology are increasingly becoming powerful force in the modern world. Their influence can be seen in all sphere of public life and has made a profound impact on human life. The information technology provided a number of commercial opportunities for entrepreneurs and has introduced certain statutory conditions pertaining to methodology of contracts formed electronically using computers and internet. It highlights the significant aspects of paperless communication leading to formation of contract in real time. All the facets of the business transaction with which we are accustomed in physical environment can now be executed over the internet including, online advertising, online ordering, banking, investment, auction and professional service. The book under review is an important and relevant book for our contemporary time in many aspects. The primary aim of this book as unfolded from the reading of its various chapters seems to provide the reader with a clear and concise understanding on electronic contract and related issues as well as a ready reference for further study and research on the topic.

An electronic contract is computerized facilitation or mechanization of a contract in a cross-organizational business progression. In simple words, an electronic contract means a contract made electronically. Theoretically, an electronic contract is very similar to traditional paper based contract but the rules applied to paper based contract cannot be applied on electronic contract because of its own peculiarity. The book answers various questions such as how far is the Indian Contract Act flexible enough to bring within its fold the issues raised by development of electronic contract and to what extent has Information Technology Act 2000 covered the issues uncovered in the Indian Contract Act.

The theme of the book is unfolded in seven chapters and five appendices. The first chapter of the book introduces the subject contents in a very lucid manner. The second chapter, with sufficient reference to common law jurisdictions, defines and explains the basic terms and concepts that arise in formation of contracts traditionally. The issue of contract formation across electronic networks is dealt under chapter

three. The flexibility of communicating across electronic networks allows users to enter into agreements with each other without any difficulty. This leads to the questions of where that contract was formed and when. The fundamental principles of contract law can be applied readily to most traditional contracting circumstances as was observed in the case of *Entores* v.*Miles Far East Corp.* and *Bhagwan Das GoverdhanKedia* v.*M/S GirdhariParshottamdas& Co.* The rules of contract formation, choice of law, choice of jurisdiction, terms and conditions, enforceability of the agreement are well discussed by the author. In fact this chapter can be said to be the backbone of the book.Chapter four and fivediscusses about 'recognition and validity of electronic records'.

The author in this chapter has dealt with laws, rules and regulations, along with relevant amendments made by Indian Legislature. A good compliment to this chapter is that it examines the laws of US, EU and other common law countries along with UNCITRAL Model Laws. Chapter five discusses the approach of judiciary across the world towards legalizing electronic contracts. Some cases which provided legal recognition to Shrink-Wrap Contracts, Click-Wrap Contracts and Web-Browse Contracts are discussed in detail. The unique structure of the internet has raised several jurisdictional concerns. The traditional principles for determining jurisdiction cannot apply to contracts concluded in electronic medium. Chapter six discusses an important issue relating to jurisdiction in case agreements are executed electronically and where the parties are located at different countries in the world. The author has discussed various tests laid down by the US courts to determine the issue of jurisdiction. This chapter also discusses the position in India relating to jurisdictional issue and the author finds that position in India in theoretically close to US. And the issues such as what law should be applied to govern the law of contract in case where the parties belong to different countries or where the contract has an international element are also analyzed in an exhaustive manner. Chapter seven of the book discusses some relatively new issues and it analysis what substantive rules will govern the issues relating to assent in electronic contracts, how far consumers rights are protected in an electronic environment and how does the law accommodate negotiable transfer documents that are paperless.

The uniqueness of this book lies in its presentation. The systematic and thematic arrangement of the chapters unfolds the law relating to electronic contracts from detailed discussion on the basic concepts to an in-depth theoretical understanding of the topic well discussed with references to various case laws and legal framework on the topic in various countries and their implications for the future. Perhaps another notable feat about the book is that it concludes with five appendices which provide the bare legal framework on the topic including a sample of Click-Wrap Contract.

The author deserves appreciation for the herculean task of gathering in-depth source and research material on the law relating to electronic contracts. This book is a precious outcome of his Ph.D. thesis with certain refinements. Not surprisingly there is dearth of books that deals exclusively on electronic contract. This book is an attempt of the author to fill the vacuum in this specific area. The cover is attractive and printing is good. The book would prove to be an asset not only to lawyers but also to academician and student.

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BOOK REVIEW:

Contemporary Issues in International Law: Environment, International Trade, Information Technology and Legal Education

by B.C. Nirmal and RajnishKumar Singh

Satyam Law International, New Delhi, 2014, pp. i-xvi + 1-672, Rs. 1295/

The book "Contemporary Issues in International Laws: Environment, International Trade, Information Technology and Legal Education" is an outcome of two-day International Conference "International Environmental Law, Trade Law, Information Technology Law and Legal education" organized by Faculty of Law, Banaras Hindu University on March 2-3, 2013.The Book is edited by Prof. B.C. Nirmal and Dr. RajnishKumar Singh. The present volume contains 44 chapters divided in five parts. The book brings together the ideas deliberated by the cross-sections of scholars from Asia, Africa, and Europe during the conference. The book attempts to explore the changing nature of international law and its ability to respond to the rapid changes brought about by the contemporary issues related to international environment, trade and information technology.Apart from the contributions by the academic scholars the book contains scholarly papers by Justice Ranjan Prakash Desai on "legal Education", Justice S.P. Mehrotra on "International Environmental Law, Trade Law, Information Technology Law and Legal Education" and Justice R.S.R. Maurya on "Environmental Pollution and its Control".

Part II of the book contains nine academic articles. These papers discuss the various aspects of international environmental law including agrobiodiversity, the discussions related to Rio Conference, international environmental law in Bangladesh, climate change, current perspective on environmental law, a suitable authority in India for environmental protection, human rights to water, need for co-operative action, and sustainable development. SudhirKochhar deals with the issue of conservation and sustainable utilization of plant genetic resources for food and agriculture. He emphasizes onthe implementation aspect of the Indian Biodiversity law. Ali Mehdi observes that the Supreme Court has shown its serious concern and remarkable contribution to activate the executives for execution of laws. Vinod Shankar Mishra proffers some reflections on human rights to water. He notes that the water policy changes in the country reflect changes at the global level.

Part III of the book brings forth the discussion on the contemporary issues in International trade law. The chapter deals with various issues including the relationship between globalization and international Human Rights law, Intellectual Property rights, impact of liberation, WTO and the regulation of International Trade Law. The first essay written by Prof Nirmalon "Globalization, International Human Rights Law and Current Economic Crisis" notes that Globalization movements have become a powerful force in international relations after establishment of WTO. Tham Siew Yean, Nik Ahmad Kamal Nik Mahmod, and RokiahAlavifocus on the main aspects of the impact of liberalization of higher education services within the context of private providers. S.K. Verma presents an overview of WTO and the regulation of international trade law in the context of Doha negotiations.A. Laxmikanth and K. SitaManikyam in their essay present an overview of intellectual property rights. Authors reflect on the issue of use of IP as a tool to advance development strategies and concerns surrounding the issue of IPR for developing countries.Rajnish Kumar Singh deals with Alternate Dispute Resolution and Intellectual Property right in his essay. His discussion indicates that the use of arbitration for IP dispute resolution is facing obstacles. V.K. Pathak presents the issue involving the doctrine of "Exhaustion of Rights". He argues that the different approaches adopted by different countries create confusion in relation to regulation of parallel trade.

Part IV of the book contains chapters on the emerging issues of information technology law. This part too contains nine articles dealing with the issues such as information asset as property, data protection and policy factor impact on public trust in E-government system, law relating to information and technology in Nepal, laws relating to cybercrime in Nepal, globalization, communication and obscenity, taxation of e-commerce, legislation for domain name registration,and legal framework for information technology in India.Tek Bahadur Ghimire writing on "Data Protection Law and Policy Factor Impact on Public Trust in e-Government System in Developing Countries" notices that information communication technology application in public service sector has become inevitable at this digital age. Akhilendra Kumar Pandey presents views on the relationship between globalization, communication and obscenity from feminist perspective. Writing on the issue of taxation of e-commerce Dinesh Kumar Srivastava notes that there are no separate provisions in the income tax laws that deal exclusively with e-commerce. He suggests that the concept of Permanent Establishment cannot be applied in E-commerce. RavindraWakade in his chapter "Legislation for Domain Name Registration: A Requirement in Globalization" makes the observation that with globalization and E-commerce, the disputes relating to the domain name registration are on rise. Golak Prasad Sahoo attempts to answer a range of pressing questions in the special context

of cyber obscenity. He also presents a brief account of the history of Information Technology Law in India.

The last part of the book contains 11 scholarly writing on the various aspects of legal education and law teaching including research excellence in legal education, institutional perspective of legal education, problems to law teachers, legal education in Indian perspective and Nepalese perspective, issues and challenges in legal education. Robert P. Barnidge, Jr. in his essay presents the British approach on research excellence in legal education. He raises a very relevant question as to how one assesses research excellence in legal education. Bhawani Prasad Panda and Minati Panda in their essay "Legal Education and Research in India: The Changes and the Challenges" write that the evolution of the legal profession in the context of globalization presents a very exciting research frontier and opens newer opportunities for legal education and research institutions. JayedevPati brings to discussion a different but a very important dimension of legal education. He argues that though the traditional legal education was confined to class room teaching only with the aid of text book, and other textual matters, time has now come to groom the students keeping in view the need of legal profession. The law students need to be imparted knowledge and training on clinical legal education in this era of science and technology.Prashant Kumar Swain and Shaikh Shanwaz Islam asses the status of legal education with the help of a specific example of Odisha. They argue for establishment of a single regulatory body having experience in legal education and profession. Arun Kumar Singh makes an attempt to compare the traditional law schools with the National law schools. He suggests that a system should be developed so as to make quality legal education available and affordable to common people.

The book indeed is very informative. It covers various aspects of the Contemporary issues in International law and by doing this it justifies its title. The issues have in them some sort of relationship with each other and the same has been very successfully shown in the book. At some places it offers a very innovative approach in the field of international law, for example the issue of agrobiodiversity dealt with by SudhirKochhar, and that water as a human right. Thus, the book carries freshness and innovation in it and provides great intellectual stimulation to the reader.However, so far as countries are concerned, the book hardly brings an article dealing with an issue specific to Europe or America. Because, International Law and its aspects can be fully depicted when problems of various regions are dealt with. In this regard, the book restricts itself to the problems of Asia and the general problem of international law which appears to be a demerit of the book.Nonetheless, the book is very informative, novel and didactic.

The book deals with various facets of contemporary issues in International Law by

covering the perceptions of various Asian, African and European countries. The main urge of the book is towards the protection of environment, and human rights of individuals and the optimization of trade law and information technology law. Harmonization of laws, cooperation between the developed and developing countries and development of technology neutral liability principles are bases on which we may device solutions for the issues identified in this book.

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