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NIGERIA /US RELATIONS AND THE WAR ON TERRORISM

O. A. Fatula*

ABSTRACT

This paper examines critical issues in the United States' classification of Nigeria as a country having links with terrorism due to the 2009 December Christmas day botched terror attack attempted on United States of America (USA)'s Delta Airliner by a young Nigerian. It discusses the concept of terrorism with a view to determining whether Nigeria is a terrorist state or has any link with terrorism. It also examines the contending arguments for and against the classification and the implication of such classification. The position of the paper is that it is always a strong argument that religious riots in which people are sometimes maimed and slaughtered amount to terrorism The paper concludes that unless the Nigerian government braces itself up to the challenges of incessant communal and religious clashes and conflicts particularly in the Northern part of the country, the country may soon become a recruitment ground for terrorist organizations.

INTRODUCTION

Since the 2009 December Christmas day botched terror attack attempted on United States of America (USA)'s Delta Airliner, by a twenty three year old Nigerian, Umar Farouk Abdulmutallab, international attention has been focused on Nigeria. The young Nigerian, now being described as underwear Bomber, had packed himself full of deadly explosive, detonated the bomb, which incidentally malfunctioned and did not explode, saving the lives of almost 290 people aboard the airplane. He reportedly boarded the Northwest Airlines with other 278 passengers and 11 crew members in Amsterdam, the Netherlands. The airplane was on a flight to Detroit, Michigan, the United States of America. The young Nigerian, it was alleged, had the plan to bomb the plane shortly before it reached its destination by detonating the explosive

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device which had been sewed to his trouser. But the potential disaster was averted because the detonator malfunctioned, when the explosive devise burn but not with the expected devastating explosion. The al-Qaeda group in Yemen has allegedly claimed responsibility for the failed attack.[1] Not a few Nigerians were miffed and genuinely surprised that one of their compatriots was involved in an act of terrorism with the principal aim of killing himself in order to kill several innocent others. Nigeria, like any other country of the world, especially developing nations, has its own problems, but terrorism of the scope, dimensions and complexity that Farouk attempted to execute is clearly not one of those problems.[2]

The United States' had reacted to this act by its recent listing of Nigeria among 13 other countries branded as terrorist threat states. The other countries include Afghanistan[3], Algeria[4],

1. See Abdulmuttalab and Terrorism, Nigerian Tribune, Monday 11, 2010 at p 17, suicide bombing is just one of the growing methods adopted by terrorists. Other methods include the use of biological and chemical weapons. See Edward Hyams, Terrorists and Terrorism. New York: St martins, 1975. See also Paul Wilkinson, Terrorism versus Liberal Democracy: A problem of Response in Studies in Conflict and Terrorism, Vol 16, 1993 pp 4 - 34 .See also, Ogaba D. Oches ; The Phenomenon of Terrorism, FOG Ventures, 2007 at p 1-35.
2. Ibid
3. Afghanistan's inclusion is not surprising considering the activities of the Taliban. The Taliban, a Muslim fundamentalist group, took control of Afghanistan's government in 1996 and rule until the 2001 when the US-led invasion drove it from power. Despite its ouster, however, remnants of the Taliban have maintained influence in rural regions south and east of Kabul. The group is known for having provided safe haven to Osama bin Laden and al-Qaeda as well as for its rigid interpretation of Islamic Law, under which it publicly executed criminals and outlawed the education of women. Though the group has been out of power for several years, it remains a cultural force in the region that operates parallel governance structures aimed at undermining the US- backed central government.
4. Algeria is on the list based on the activities of the Armed Islamic Group (known by its French acronym, GIA) which waged a violent war against Algeria's secular military regime during the 1990s. The GIA grew out of a 1992 decision by Algeria's military government to cancel an election in which it appeared that a moderate, mainstream Muslim party, the Islamic Salvation Front (FIS), was headed for victory. The backlash took many forms, including formation of the Islamic Salvation Army, a militant group linked with the FIS. But the separate and more radical GIA soon gained a notorious reputation for mayhem and murder, targeting those affiliated - even remotely -with the military and the government, as well as innocents and foreign nationals. The GIA vowed to raze the secular Algerian government and, in its place, establish a Muslim state ruled by sharia, or Islamic Law. The ensuring civil war ranked as one of the most violent in the world during the 1990s. While the GIA is now largely defunct, it remains designated as a foreign terrorist organization by the US State Department. Algerian and Western counter terrorism officials say many of its members may have defected in recent years and joined al- Qaeda its sister organization in the Islamic Maghreb (AQIM).

Iraq[5], Iran[6], Pakistan[7], Syria[8], Yemen[9], Cuba[10], Lebanon[11], Libya[12], Somalia[13],

5. The US claims that former Iraqi President Saddam Hussein provided bases, training camps, and other support to terrorist groups fighting the governments of neighbouring Turkey and Iran, as well as to Palestinian terror groups. The George Bush administration said it believed Saddam could pass weapons of mass destruction to Osama bin Laden's al- Qaeda network or other terrorist. Though after Saddam's fall from power, convincing proof of an Iraq - al Qaeda link remained lacking. Iraq has however sheltered specific terrorists wanted by other countries such as Palestinian Liberation Front Leader Abu Abbas, who was responsible for the 1985 hijacking of the Achille Laurocuise ship in the Mediterranean. Abbas was later captured by U.S forces. Again, two Saudis who hijacked a Saudi Arabian Airline flight to Baghdad in 2000 as well as Abdul Rahman Yasin, who is on the FBI's "most wanted terrorist" list for his alleged role in the 1993 World Trade Centre bombing have also been so sheltered.
6. According to the US, Iran is the most active state sponsoring terrorism. Its Islamic Revolutionary Guard Corps (IRGC) and Ministry of Intelligence and Security (MOIS) were directly involved in the planning and support of terrorist acts and continue to exhort a variety of groups, especially Palestinian groups with leadership cadres in Syria and Lebanese Hezbollah, to use terrorism in pursuit of their goals. Supreme Leader Khamenei and President Ahmadinejad have praised Palestinian terrorist operations, and Iran provided Lebanese Hezbollah and Palestinian terrorist groups- notably Hamas and Palestinian Islamic Jihad- with extensive funding, training, and weapons. The US also blames Iran for playing a destabilizing role in Iraq, which is inconsistent with its stated objective regarding stability in Iraq.
7. After escaping across the border into Pakistan in 2001 and 2002, al Qaeda's leadership established a safe -haven there, "US President Barack Obama once said that the stakes are even higher within a nuclear - armed Pakistan, because al Qaeda and other extremists seeks nuclear weapon. Little wonder Pakistan is also of the 10 countries of interest on the US list.
8. The Syrian government has continued to provide political and material support to Hezbollah and political support to Palestinian terrorist groups. Palestinian Islamic Jihad (PIJ), Hamas, the Popular Front for the Liberation of Palestine (PFLP), and the Popular Front for the Liberation of Palestine- General Command (PFLP- GC) , among others base their external leadership in Damascus.
9. The US describes Yemen as a poor Muslim country with a weak central government, armed tribal groups in outlying area, and porous borders, which makes it fertile ground for terrorists. Its government has tried to help after September 11, 2001 terrorist attack on the U.S and the U.S. State Department calls Yemen "an important partner in the campaign against terrorism providing assistance in the military, diplomatic, and financial support". But experts say that terrorists are believed to live in Yemen, sometimes with government approval; Yemen- based corporations are thought to help fund Osama bin Laden's al-Qaeda terrorist network; and Yemenis affiliated with al- Qaeda have targeted US interest in Yemen, including the October 2000 bombing of the U.S. Navy destroyer U.S. Cole in the Yemeni port of Aden. Hamas and Palestinian Islamic Jihad are recognized legal organization in Yemen and Hamas maintains offices in the country. Neither group has engaged in any known terrorist activities in Yemen, but conduct fundraising efforts through mosques and other charitable organizations.

10. The US says Cuba has a history of supporting revolutionary movements in Latin America and Africa and that Cuba has continued to publicly oppose the US-led Coalition prosecuting the War on Terror. To US Knowledge, Cuba did not attempt to track, block, or seize terrorist assets, although the authority to do so is contained in Cuba's Laws. To date, the Cuban government has not undertaken any counterterrorism efforts in international and regional level nor taken action against any designated Foreign Terrorist Organizations
11. Lebanon is described in US circles as a country where organized terrorist organizations like radical Shiite militia, Hezbollah, several Palestinian group- Hamas, Palestinian Islamic Jihad and many more- as well as the Abu Nidal Organization operate from. Since the end of its devastating fifteen year civil war in 1990, Lebanon, a tiny, mountainous Arab state bordered by Isreal, Syria, and the Mediterranean Sea had, until 2005, been largely controlled by Syria, a "state sponsor of terrorism".
12. Libya is also one of the ten considered as country of interest though in the country's case, it is actually an improvement on its previous designation. Libya has been downgraded from state sponsor to country of interest. In the early 1970s, Libyan leader, Moammar Qaddafi allegedly established terrorist training camps on Libyan soil, provided terrorist groups with arms, and offered a safe haven. Such groups that have been aided by Qaddafi include the Irish Republican Army, Spain's ETA, Italy's Red Brigades, and the Palestine Liberation Organization. Libya was also suspected of attempting to assassinate the leaders of Chad, Egypt , Saudi Arabia, Tunisia, and Zaire (now Democratic Republic of Congo).A Scottish court, convening in the Netherlands for reasons of neutrality, connected Libyans to the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland, that killed 270 people on board. Qaddafi's regime was also implicated in the 1989 bombing of a French passenger jet over Niger in which 171 people died. In 1986, Libya was said to have sponsored the bombing of a Berlin disco popular among US servicemen, killing two US soldiers. However in 1999, after prolonged negotiations with UN and UK representatives, Libya turned over two of its citizens to be tried in The Hague for their role in the Pan Am 103 bombing. At the same time, Qaddafi increasingly moved to cut Libya's ties to terrorism, closed Libya's terrorist training camps, cut ties with Palestinian militants, and extradited suspected terrorists to Egypt , Yemen, and Jordan.
13. The US is worried about Somalia because "it is a chaotic, poor, battle- weary Muslim country with no central government. Moreover, US government officials say that Osama bin Laden's al Qaeda terrorist network supported Somali radical Islamists, organized training camps in Somalia, and threatened American troops in Somalia who were there on a UN humanitarian mission in the early 1990s. According to the State Department, it is Somalia's lack of functioning central government, protracted state of violent instability, long unguarded coastline, porous borders, and proximity to Arabian peninsula which still makes it a potential site for terrorists seeking refuge.

Saudi Arabia[14] and Sudan[15]. Before we examine the implications of this classification and the arguments for and against it as well as other issues connected to it we would like to first of all examine the conceptual framework of terrorism.

THE CONCEPTUAL FRAMEWORK OF TERRORISM

Terrorism is derived from the word "terror" meaning great fear, a condition in which one fears for his/ her life. The person who carries out the aggression or creates a condition of great fear is seen as a terrorist. In this case, the term "terrorist" refers to group of individuals or individual involved in creating that state of great fear.

Though there is at present no internationally agreed definition of terrorism, it is however safe to say that terrorism is the systematic use of terror especially as a means of coercion. In November 2004, a United Nations Security Council Report described terrorism as any act "intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act".[16] Terrorism usually involves

14. Saudi Arabia has been accused of backing the civilian infrastructure of Hamas with extremist textbooks glorifying jihad and martyrdom that are used by schools and Islamic society throughout the West Bank and Gaza Strip. Ideological infiltration of Palestinian society by the Saudis in this way is reminiscent of their involvement in the madrassa system of Pakistan during the 1980s, which gave birth to the Taliban and other pro Bin- Laden groups. They are also accused of providing the ideological backdrop for the September 11 2001 World Trade Centre attacks. Fifteen of the 19 hijackers who carried out the attacks were Saudi citizens. Moreover, Osama bin Laden, was born and raised in Saudi Arabia The release of the September 11 Joint Intelligence Report by the US congress disclosed what the US press called "incontrovertible evidence" linking Saudi to the financing of al- Qaeda operatives in the United States.

15. Sudan, on its part has been under diplomatic sanctions by the United Nations since 1996. It was the same year that the United States evacuated its Khartoum embassy and expelled a Sudanese diplomat suspected of supplying inside information about the United Nations to the group of terrorists convicted of plotting the 1993 bombing of the UN and other New York landmarks. According to the US State Department's Patterns of Global Terrorism, "Sudan has continued to serve as a haven, meeting place, and training hub for a number of international terrorist organizations, primarily of Middle East origin. The Sudanese government also condoned many of the objectionable activities of Iran, such as funneling Assistance to terrorists and radical Islamic groups operating in and transiting though Sudan.".

16. "UN Reform". United Nations. 2005-03-21. Archived from the original on 2007-04-27. http://web.archive.org/web/20070427012107/*http://www.un.org/unifeed/script.asp?scriptId=73*. Retrieved 2008-07-11. "The second part of the report, entitled "Freedom from Fear backs the definition of terrorism - an issue so divisive, agreement on it has long eluded the world community - as any action "intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act.""

unlawful, illegitimate and deliberate targeting of non- combatants through violence intended to induce physchological impact and fear and is normally perpetrated for a political goal particularly when the terrorists believe that no other means will effect the kind of change they desire. Carsten Bockstette's definition of terrorism seems to combine the various elements of a typical act of terrorism. According to the scholar:

> *Terrorism is defined as political violence in an asymmetrical conflict that is designed to induce terror and psychic fear (sometimes indiscriminate) through the violent victimization and destruction of noncombatant targets (sometimes iconic symbols). Such acts are meant to send a message from an illicit clandestine organization. The purpose of terrorism is to exploit the media in order to achieve maximum attainable publicity as an amplifying force multiplier in order to influence the targeted audience(s) in order to reach short- and midterm political goals and/or desired long-term end.*[17]

The terms "terrorism and terrorist" have assumed subjective colouration. Thus some persons or organisations classified as terrorists by certain persons or organisations may not be classified or seen as such by some others. Infact those so classified rarely see themselves as such, and prefer to use other terms specific to their situation, such as separatist, freedom fighter, liberator, revolutionary, vigilante, militant, paramilitary, guerrilla, rebel, patriot, or any similar-meaning word in other languages and cultures. It is common for both parties to a conflict to describe each other as terrorists.[18] Explaning the rationale for this, Bruce Hoffman in his book Inside Terrorism said:

> *On one point, at least, everyone agrees: terrorism is a pejorative term. It is a word with intrinsically negative connotations that is generally applied to one's enemies and opponents, or to those with whom one disagrees and would otherwise prefer to ignore. 'What is called terrorism,' Brian Jenkins has written, 'thus seems to depend on one's point of view. Use of the term implies a moral judgment; and if one party can successfully attach the label terrorist to its opponent, then it has indirectly persuaded others to adopt its moral viewpoint.' Hence the decision to call someone or label some organizations terrorists becomes almost*

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17. Bockstette, Carsten (2008). "Jihadist Terrorist Use of Strategic Communication Management Techniques" (PDF). George C. Marshall Center Occasional Paper Series (20). ISSN 1863-6039. *http://www.marshallcenter.org/mcpublicweb/MCDocs/files/College/F_ResearchProgram/occPapers/occ-paper_20-en.pdf*. Retrieved 2009-01-01.

18. Paul Reynolds, quoting David Hannay, Former UK ambassador (14 September 2005). "UN staggers on road to reform". BBC News. *http://news.bbc.co.uk/2/hi/americas/4244842.stm*. Retrieved 2010-01-11.

> *unavoidably subjective, depending largely on whether one sympathizes with or opposes the person/group/cause concerned. If one identifies with the victim of the violence, for example, then the act is terrorism. If, however, one identifies with the perpetrator, the violent act is regarded in a more sympathetic, if not positive (or, at the worst, an ambivalent) light; and it is not terrorism.*[19]

IS NIGERIA A TERRORIST STATE OR LINKED WITH TERRORISM

Following the aborted plans by Umar Farouk Abdulmuttallab to bring down the Detroit bound Delta Airline on Christmas day December 25, 2009, the United States government classified Nigeria as a country with links to terrorism and therefore a threat to the US. By this act, Nigeria now belongs to an infamous group of countries that include Pakistan, Yemen, Cuba, Saudi Arabia, Somalia, Libya and Algeria. This is even a lower category than another classification of countries that sponsor terrorism. In this category are Cuba, Iran, Sudan and Syria.

Many Nigerians will consider this unfair and will be pained that the act of an individual provides the basis for which the entire country is judged, even as Farouk is the first Nigerian suspect to surface in an Al Qaeda- connected plot.

However, it appears the US has not taken this decision on the basis of the attempted bombing of the Detroit bound Delta plane alone. The decision could have been taken on the basis of what the US considered as the religious conflicts in the Northern part of the country resulting from Islamic fundamentalism. The US must have felt that there is a link between those conflicts and the apparently inept approach of government towards them and the Christmas day incident.

During her last visit to Nigeria, Hillary Clinton, the US Secretary of State, had warned that Nigeria faced the risk of being infiltrated by al Qaeda. She felt this was possible using the ingredients of conflict in the Northern part of the country as an entry point into Nigeria. Although the Christmas day incident has less to do with religious conflicts in the North, the fears of al Qaeda link to Nigeria or Nigerians has been confirmed by this incident.

No doubt Sectarian violence has been on in the country since the colonial days, and continue even after independence. As a matter of fact, sectarian crisis played major role in the country's civil war between 1967 and 1970. After the war, it has also continued with, for instance, the Maitatsine riot of 1980, and also the Kalakato of 1990, which was said to be an offshoot of the Maitatsine. In addition to the Maitaisine riot in Kano the country has also witnessed the Zango-kataff riot in Kaduna and the latest Boko- Haram riot in

19. Bruce Hoffman (1998). Inside Terrorism. Columbia University Press. pp. 32. ISBN 0-231-11468-0.

Borno state. Other states in the North that have experienced one form of the religious riot include Plateau state, Bauchi state, Kwara state etc. Infact on Monday, 28 December 2009, there was another bloody day in Bauchi State, when members of a religious sect known as the Kala -Kato clashed with security operatives in the Zango area of the Bauchi metropolis. Houses, cars and motorcycles were burnt in the event. At the last count about 70 citizens were feared dead and hundreds of people displaced. With the latest round of violence, Bauchi State has gradually established itself as the number one flashpoint for religious conflicts in the country. The state housed the headquarters of the Boko Haram sect that attacked police stations in a conflict that spread to several cities in several northern states in July 2009[20]. A rough estimate of death arising from sectarian conflicts in Nigeria has been part at 20,000 such Maitasine riot of 1980.

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20. In March 1980, skirmishes occur in Zaria between Christians and Muslims mobs. The toll on human life is limited but considerable property was destroyed. Again in December 1980, Maitatsine religious riots broke out in Kano, spreading to Yola, Maiduguri, Bauchi and Gombe. Lasting for 10 days, not less than 6,000 lives were lost during the crisis. Between April 26 to 28, 1985, in the Pantami area of Gombe in the old Bauchi State, 105 Nigerians reportedly lost their lives while many others lost valuables in another religious conflagration traced to the Maitatsine group. In March 1986, barely a year after the last Maitatsine riot, Christians and Muslims adherents engaged each other in a superiority fight, in what was said to have been sparked by a mere Easter procession in Ilorin. Subsequent religious squabbles were recorded in the late and early 1990s, beginning with the March 1987 confrontation in Kafanchan, leading to loss of lives and destruction of property. On the same day, this time in Gusau, Kaduna, Zaria, Katsina and Funtua, reprisal attacks occur when some Muslims took to the streets. The disturbance also led to loss of lives. In April 1991, echoes of the Maitatsine riot and the memories of the havoc they unleashed on society gripped the nation again, when a Shiite sect in Katsina master-minded a bloody protest in the town. No sooner had the Katsina crisis died down when Bauchi erupted. For four days, Bauchi State was engulfed in a fire of religious violence. Thousands of hoodlums, many of them teenagers, under the cover of religion, went on rampage in some towns, including the state capital, Bauchi. Six months later, the train of religious conflagration returns to Kano. What was initially thought to be a peaceful demonstration by the Izela sect to stop the American born Reinhard Bonnke's evangelical crusade in the town soon turned violent, resulting in a clash between Christians and Muslims. In 1994, the once idyllic city of Jos also experienced its first spate of sectarian violence. Kano made headlines again in December 1994 when an Igbo trader, Gideon Akaluka, was beheaded by Muslims fundamentalists and had his head paraded on a spike on the streets of Kano. More religious riots followed in May 1995, July 1999, October 2001 and May 2004 respectively. In 2000, thousands were killed in northern Nigeria as non- Muslims opposed to the introduction of Islamic sharia law foght Muslims, who demanded its implementation in the northern state of Kaduna. More than 2,000 people reportedly lost their live in that conflict In September 2001, Christian-Muslim violence flared after Muslim prayers in Jos, with churches and mosques set on fire. At least 1,000 people were killed, according to a September 2002 report by a panel set up by Plateau State Government. In November 2002, Nigeria had to abandon

the Miss World contest in Abuja. The decision followed the death of at least 216 people in rioting in the northern city of Kaduna following a violent protest against holding the beauty contest. In May 2004, hundreds of people, mostly Muslim Fulanis, were killed by Christian Tarok militia in the central Nigerian town of Yelwa. Survivors say they buried 630 corpses. In February 2006, the tinderbox shifted to Maiduguri and was lit when a group of Muslims converge in the Ramat area of the town to protest a cartoon of the holy prophet Mohammad published by a Danish newspaper. About 157 people died in one week of rioting by Christian and Muslim mobs. Muslim and Christian militants fought street battles later the same months in the northern city of Kano. Christian community leaders alleged 500-600 people were killed in two days of violence. In November 2008, clashes between Muslim and Christian gangs triggered by a disputed local government election killed at least 700 people in the central city of Jos.Again in February 2009, the governor of Bauchi state imposed a night curfew on Bauchi city precisely on February 22, a day after clashes in which at least 11 people died, 28 were seriously wounded and several houses, churches and mosque were burnt. In July 2009, Boko Haram, an organization which opposes Western education and demands the adoption of Sharia in all parts of Nigeria, staged attacks in the northeastern city of Bauchi after the arrest of some of its members. More than 50 people were killed and over 100 arrested, prompting the Bauchi State Governor to impose a night curfew on the state capital. The violence spread to Maiduguri, Borno State and neighbouring Yola State. Red Cross and military officials say more than 7000 people were killed during the five-day Boko Haram uprising. In December 2009, at least 40 people were killed in clashes between security forces and members of an Islamic sect armed with machetes in the northern city of Bauchi. In January 2010, over 200 people were reportedly killed after clashes between Muslim and Christian gangs in Jos, most by gunfire. In this crisis, the state government imposed a 24-hour curfew by the second day of the riot which had spread to neighbouring towns and villages. Between the Maitasine religious riots of 1980 and the latest Jos conflagration, there have been more than 10,000 deaths recorded and the destruction of property worth billions of Naira. In September 2009, Grace Ushang Adie, a youth corper was raped and murdered in Borno State for wearing NYSC trousers. In October 2007, Comrade Shehu Sani's book "The Phantom Crescent" satirizing sharia leaders, lawyers, judges, and Hisbah (their police officers) was banned in Kaduna. Some Muslim pupils at a secondary school in Gandu, Gombe state , beat a teacher to death after accusing her of desecrating the Koran. The teacher, Oluwatoyin Olusesan, a Christian, was invigilating an Islamic Religious Knowledge exam at the Government Day Secondary School, Gandu when the incident occurred. The teacher suspected that a foul play was about to take place when one of the students wanted to come in with his books to the exam hall. The teacher collected the books and threw them outside, unknown to her, there was a copy of the Holy Koran among the books. The principal said before they knew what was happening, the students had started chanting Allahu Akbar (God is Great). All efforts to control the rampaging students proved abortive. Even when the school principal, Mohanmmed Sadiq, tried to protect the teacher in his office, the principal was also terribly beaten and injured while they set the teacher's car, three classes, the school's clinic, administrative block and library on fire. There

From the above analysis, it is clear that victims of Al- Qaeda - related violence are little compared to those that have died from the increasing Islamic violence in northern Nigeria[21].

ARGUMENTS AGAINST US CATEGORIZATION OF NIGERIA AS A COUNTRY OF INTEREST

Opponents of Nigeria's inclusion in the list of countries having links with terrorism based their argument on the premise that there is yet no concrete evidence that Al-Qaeda has any cell in Nigeria and that Abdumutallab was not radicalized in Nigeria. Although he was born by a Nigerian parent, Abudlmutallab was shaped and oriented in the West and then was obviously radicalized by his contact with Yemen- a notorious haven for Islamist extremists. As regards the occasional religious and sectarian crises in the country resulting in the untimely death of innocent citizens, while noting that these crises are unfortunate and regrettable they however argued that the perpetrators and sponsors of these sectarian violence never saw their own death as mathematical certainty as a consequence of the crises unlike suicide bomber, who willfully walk into certain death[22]. The privileged sponsors of religious crises in Nigeria may use the poor as cannon fodder. Though the poor and the less privileged may take risks for pecuniary reasons, by participating in religious and sectarian riots, it is unlikely they would do so if

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were neither arrests nor convictions. Again in January 2001, during the lunar eclipse in Maiduguri, Muslim youths razed down hotels, bars, brothels and churches blaming them for causing the eclipse. In October 2001, in Sokoto State, Safiya Hussaini was sentenced to death by stoning for adultery by Judge Mohammed Bello Sanyinlawal white acquitting the 60-year-old Yahaya Abubakar who impregnated her. After sustained international pressure, Safiya was acquitted a year later and made honorary citizen of Rome. Sokoto State Governor, Attahiru Bafarawa and his Zamfara State counterpart, Ahmad Sani condemned the honour with the latter adding, it was an act of proslytisation. It was Amina Lawal's turn in March 2002. She was sentenced to public stoning for getting pregnant outside wedlock in Katsina. In 1998, Muslim youths in Offa invaded the palace of the traditional ruler of the town and razed down Moremi's shrine. See Timeline- Ethnic and Religious Unrest in Nigeria, Thisday , January 23, 2010 at p 56.

21. See Damola Awoyokun, The Chilling Advertisement for Al-Qaeda, The Guardian, Sunday, January 24, 2010 at p 23

22. Abdulmutalab and Terrorism, Nigerian Tribune, Monday 11, January 2010 at p 17

they were told and/ or know that death is certain[23].

Another argument against the US decision is that even assuming that the suspect in question was influenced and recruited within the Nigerian borders, that should not serve as enough reason to blacklist the country as doing that is tantamount to visiting the sin of one person on about 150 million people.

The apparent "double standards" inherent in the American action has also been pointed out. The question have been asked: Why should Nigerians suffered the fate of enhanced airport screening while Britain or France for instance never suffered a similar fate when their own citizens were caught in similar terror plots.? Again why are the citizens of United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, Egypt and France not on the US enhanced screening at airports.? After all it is a fact that:

(1) Fifteen of the "September 11 2001 New York Terrorists" were from Saudi Arabia
(2) Two of the "September 11, 2001 New York terrorists" were from United Arab Emirates
(3) One of the "September 11, 2001 New York terrorists was from Lebanon.
(4) One of the September 11, 2001 New York terrorists was from Egypt.
(5) One of the suspected hijacker of the September 11, 2001 New York Terrorists attack, "Moussaoui" is from France
(6) The "Shoe-bomber" Richard Reid is from the United Kingdom (UK).
(7) Taliban John Walker Lindh is a citizen of the USA.

Opponents of US blacklisting of Nigeria have also cited Nigeria's anti terrorism efforts to prove that the Farouk phenomenon is an isolated case and that the U.S does not have any concrete proof apart from Farouks's case

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23. To these critics, farouk Mutallab's case was an aberration. His aberrant behaviour, they explained by the fact that the better part of his impressionable years and adult life were spent out of Nigeria. He had, at an early age, allegedly traversed Togo, London, Dubai and Yemen in the course of receiving secondary and university education. Thus, the young man hardly lived in Nigeria and could not be described as a product of Nigerian culture. By all standards, Farouk is of privileged and elite background. Children from such a background raised and brought up in Nigeria could be involved in other social vices but they would not have involved themselves in suicide missions over nebulous causes. This young Nigerian exposure to debased foreign cultures and close interaction with international terrorists have unwittingly and negatively influenced him, thereby dragging his family's name and most unfortunately that of Nigeria through the mud. It also emerged that Abdulmutallab's father, a prominent Nigerian banker, had taken steps to alert the US authorities on the errant behaviour of his son several weeks before the December 25 incident. These cannot be the actions of a conniving nation or parents. See Nigeria on the Terrorism Watch List , Sunday Comment, Thisday , The Sunday Newspaper, January 10, 2010 at p 3

to suggest that Nigeria is a terrorist state or is sponsoring terrorism[24].

In his own view, while arguing against Nigeria's inclusion in the list of countries having links with terrorism, Chidi Amuta wrote as follows:

> *Nigeria definitely does not belong in this new list. Statistically, one Nigerian out of an estimated 150 million cannot be credible ground for this negative categorization of a whole nation. If numbers mean anything, the number*

24. As regards Nigeria's anti- terrorism efforts, a Prevention of Terrorism Bill, which considers any act of terrorism and complicity in it as a crime, and therefore punishable, was sent to the National Assembly in October 2008. What is particularly noteworthy about the bill is that anyone found guilty of engagement in terrorism will have his or her funds confiscated, and cannot enter into or transit through Nigeria. More importantly, funding of terrorist activities and taking of people into hostage are prohibited by the Bill. Again, partly in expectation of the occupation by Nigeria of a non- Permanent Seat on the United Nations Security Council as from January 1, 2010, the United Nations Analytical Support and Sanctions Monitoring Team visited Nigeria in November 2009 in order to assess the extent of compliance by Nigeria with the UN Security Council resolutions. The findings of the Monitoring Team were satisfactory. For instance, of the sixteen United Nations Universal Instruments against Terrorism, Nigeria has already ratified nine. They included the Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963); Convention for the Suppression of Unlawful Seizure of Aircraft (1970); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971) and that against the Safety of Maritime Navigation (1988); and Convention on the Prevention and Combating of Terrorism(1999). Nigeria has also ratified the United Nations Conventions against Transnational Organized Crime (2001) At the level of the OAU/ African Union, Nigeria has adopted the Convention on the Prevention and Combating of Terrorism which was done in July 1999 in Algiers. Nigeria has also adopted the Declaration on Terrorism made in 2001 in Senegal, as well as The Plan of action for the Prevention and Combating of Terrorism by the September 2002 in Algiers, Algeria. Perhaps most importantly, in an effort to deal with the problems of terrorism African leaders decided to create the African Centre for the Study and Research on Terrorism (ACSRT). The Centre required all the 53 Member States of the African Union to establish National Focal Points on Terrorism. It was in compliance with this obligation that Nigeria set up the National Focal Point, the responsibility for which has been assigned to the Department of State Services. Without any shadow of doubt, the National Focal Point has not failed in its mandate: it has been conducting research on terrorism and analyzing the implications for national and international peace and security. It has been implementing all polices on counter - terrorism. It has been monitoring very closely all financial transactions in order to prevent the funding of terrorism in Nigeria, maintaining of data base on the movement and activities of all passengers from terrorism countries and, maintaining a security watch list on individuals and groups of people. Nigeria has also been complying with United Nations Security Council Resolutions 1526 (2004) and 1822 (2008), both of which deal with arms embargo, assets freeze, travel ban, consolidated list, etc.

> *of US citizens that have either carried out pro- Al- Qaeda terrorist operations against the US or enrolled directly in Al- Qaeda and other extremist brotherhoods has not qualified the US to categorise itself as a terrorist subscriber nation. All the four airports from which the 9/ 11 terrorists struck are within US territory. As we write this, five US citizens, Muslims who normally worshipped at a mosque in Virginia, are being tried for allegedly plotting terrorist operations in Pakistan, a US ally in the war against terrorism.*[25]

IMPLICATIONS OF THE CLASSIFICATION

As a result of that suicide bombing attempt, Nigerians abroad have been bearing the brunt, as they go through grave ordeals in the hands of foreign security agents who subjected them to different forms of strenuous searches. This is so because as a result of that classification, the US government gave directives to its security agencies worldwide to make sure that Nigerian nationals traveling to the U.S from anywhere in the world were given extra security screening. Surprisingly, the directive did not stop there; Washington DC also listed former Nigerian governors, senators, businessmen and their relatives, among those to be barred from entering America. As a result, the American government tightened entry requirements into the country, as some suspected terrorists and terror groups sympathizers are barred from flights into the country.

A further implication of this measure is that while other countries, especially in the western world would begin to exercise extra caution in dealing with Nigerians traveling to their countries, foreign investors would be dissuaded as they would not want their reputation smeared in indulging with a country under a terror watch -list[26]

Another area in which Abdulmutallab's terrorist act could have serious negative implication is Nigeria /US business relations. The relationship between the United States of America (USA) and Nigeria can be best described as buoyant and strategic, but that could change following the attempt by the 23

25. See Chidi Amuta, An Unlikely Teror Axis, Thisday, Thursday, January 7 2010, at p 64

26. See Paul Arhewe, Terror Attack: Do Nigerians Deserve To be Demonised?, Sunday Independent January 10, 2010 at p 7

- year-old Nigerian to blow up the Northwest plane over Detroit, Michigan.[27]

The branding of Nigeria as a terrorist nation may dampen economic growth and the much - touted Vision 2020 and the Seven point agenda of the ruling party as foreign direct investment will shrink astronomically. Even humanitarian aid to the country may wind down as foreign aid workers and

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27. Taken an overview of the aftermath of Nigeria's inclusion in the infamous U.S terrorists list and the implication on the hitherto buoyant U.S- Nigeria trade relationship Emeka Umejei reported as follows: Since that epochal but unsavory event, the US- Nigeria trade relations, as it appeared, may have nosedived and the once chummy bilateral relationship appears to be on the tenterhooks. To show for the buoyant relationship that existed between Nigeria and the US, Bureau of African Affairs (BAA) publication of December 2009 estimated that one million Nigerians and Nigeria Americans live, study and work in the US, while over 25,000 Americans live and work in Nigeria. On the bilateral front, the BAA publication noted that since the restoration of democracy in Nigeria (1999), the "bilateral relationship between US and Nigeria has continued to improve and cooperate on many foreign policy goals, such as peace-keeping, has been excellent". Going specific, the BAA publication revealed that Nigeria is the US largest trading partner in sub- Saharan Africa, accounting for eight per cent supply of US oil, nearly half of Nigeria's daily production. It also revealed that Nigeria is the 5th largest exporter of oil to the U.S, 50th largest export market for U.S products and the 14th largest exporter of goods to the U.S. In fact, the publication submitted that in 2008, the trade volume between both countries was valued at more than $42 billion, an 18 per cent increase over 2007 data, including $38 billion imports from Nigeria by the US, consisting predominantly of oil. To buttress the magnitude of trade relationship between Nigeria and the U.S the publication revealed that the U.S is Nigeria's largest trading partner after the United Kingdom(UK). The trade relationship between U.S and Nigeria is not limited to products alone, it also includes huge Foreign Direct Investment (FDI), U.S African Trade profile of 2009 revealed that the U.S is the largest foreign investor in Nigeria. The data appear intimidating as well as attractive. The stock of U.S FDI in Nigeria in 2006 was $339 million, down from $2 billion in 2004.Nigeria was also the largest recipient of global FDI inflows grossing $12.5 billion. To sustain and encourage the bilateral trade relations between both countries, the U.S Congress had in mid 2000 passed into Law the African Growth Opportunities Act (AGOA); a legislation under which specified manufactured goods with predominantly local contents and value added can be exported to the US at concessionary or zero- duty rates. In 2008, US imports under (AGOA) grew to $66.3 billion, representing, 29. 8 per cent more than in 2007. Nigeria is among the top five AGOA beneficiary countries.However, barring any diplomatic truce between both countries, this huge bilateral trade relationship may be jeopardized, as a result of Abdulmutallab's act and the listing of Nigeria as a country of interest, alongside Afghanistan, Algeria, Iraq, Pakistan Yemen, Lebanon, Libya, Somalia and Saudi Arabia. There are growing concerns that the trade relationship between both countries may after all join the growing list of casualties in the ongoing diplomatic debacle against Nigeria in the aftermath of Abdulmutallab's act.

See Emeka Umejei, Abdulmutallab Act and Nigeria/ US Business Relations, Sunday Independent, Jan. 24, 2010 at pp. 23- 24

medical experts may be discouraged by their home governments from coming to Nigeria. There is also a consensus among some Nigerians that if measures are not put in place to stem the tide of tremor in the bilateral relationship between both countries, the White House may be provoked into revoking the plethora of development assistance to Nigeria. Some of the ongoing aids to Nigeria include the African Growth and Competitiveness Initiative, Fighting Avian Flu, the initiative to end hunger in Africa and the Trans-Shael Counter-terrorism Programme. Nigeria is reportedly a premier participant in the Presidents Emergency Plan for AIDS Relief (PEPFAR) to which about $467 million was committed in 2008. Technical assistance, development funds and security cooperation emanating from the U.S may suffer, unless something is done in the immediate to restore the once chummy bilateral relationship[28].

OUR VIEW

All said and done it must be said that it is always a strong argument that religious riots in which people slaughtered, amounts to terrorism. America regards Nigeria almost as a terrorist inclined state on account of this. And the thinking is that terrorism practiced locally has the potential some day, to be practiced internationally. The attitude of the US in this wise must be considered in the light of the fact that more than any other country the US has been the most targeted country for terrorist attacks[29]. These terrorist attacks against the US have to a lot of destruction of lives and property, affected tourism, economy and the welfare of people. For example, inside the US, the Wall Street junction bombing pulled down a multi -story building worth millions of dollars and led to the death of several people. Outside the US, the bombing of US embassies in Nairobi and Dar-es Salaam also destroyed buildings and killed many people.

As a result of unceasing terrorist attacks on the US (particularly that of September 11, 2001 attack in whose breadth and audacity stunned the world leaving about 3000 dead) the US has re- conceptualized terrorism as war. As President Bush (Jnr) declared in 2001, the deliberate and deadly attacks that

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28. Ibid.

29. Some of these attacks include: (a) The killing of 19 US airmen in the bombing of the Khubar housing facility in Saudi Arabia in June 1996. (b) The killing of four US off- duty embassy marine guards in a café in El- Salvador in June 1985, (c) The Killing of four US military officers in LaBelle discotheque bombing in West Berlin in April 1986, (d) The killing of Captain William Nordeen, US Defence Attache in Athens in June 1988, (e) The killing of Col. James Rowe in Manila in April 1999, (f) The World Trade Centre bombing of 1993, (g) The subway train bombing at Wall Street junction (US) in December 1994 which led to the death of several people. (h) The Oklahoma city bombing of 1995, (i) The summer Olympics explosion of 1996. j) The bombing of US embassies in Nairobi (Kenya) and Dar-es- Salam (Tanzania) in August 1998, which led to the death of about 16 Americans and over 200 Africans.

were carried out against our country were more than acts of terror. They were acts of war[30]. The National Commission on Terrorist Attacks Upon the United States, two years later, upheld such reinterpretation of terrorism as war. In its Report, the Commission asserted that:

> *Terrorism is a tactic used by individuals and organizations to kill and destroy. Our efforts should be directed at those individuals and organizations. Calling this struggle a war accurately describes the use of American and allied armed forces to find and destroy terrorist groups and their allies in the field, notably in Afghanistan. The language of war also evokes the mobilization for a national effort.*[31]

With this justification, the US mobilized NATO and launched ground and air attacks against the Taliban, pushing them out of power in Afghanistan and at the same time, sacking al- Qaeda from that country. This marked the beginning of the war against terrorism, which led also to the attack on Iraq and the ouster of President Saddam Hussein from office in 2003, following the September 11, 2001 terrorist attacks on The World Trade Centre's twin towers which were symbols of America's greatness and the Pentagon which was the seat of the US military power.

This American approach must also be considered in the reality of the fact that contemporary International Law and international community seem powerless in the face of some unexpected and unheralded challenges and issues which have emerged since the beginning of the millennium, one of which issues is terrorism[32] Existing international legal documents and

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30. Time Magazine (New York), 24 September 2001.

31. National Commission on Terrorist Attacks Upon the United States , The 9/11 Commission Report (New York, W. Norton and Company), p 363. See further Knight C. & Murphy M., Trends in the Incidence of International Terror Attacks on Americans After the Cold War, Briefing Memo No. 29 (Cambridge , MA; Project on Defence Alternatives, 26 June, 2003); available on the Internet at http:// www.comw.org/pda/0306bm29.html , Iyiola, M.L., Terrorism and the Al- Qaeda, "An Introduction to the Study of Global Terrorism (Datura Nigeria Limited, 2004), p. 48. See also Ogaba D. Oche, The Phenomenon of Terrorism , FOG Ventures, 2007 at pp 46-47.

32. According to Shambhu Chopra , some of the challenges of terrorism under International Law include the following issues: What would be the status of a state that harbours terrorists or terrorist organizations? Would it be liable to be declared a terrorist state and if yes, what does International Law have to try such state? What is the status of non- state actors and what are the remedies available under International Law against such non- state actors or against unlawful combatants?, What is the responsibility of those states harbouring these non-state actors indulging in terrorist related crimes? What are the principles and doctrines which need to be evolved under International Law to address the menace of terrorism and are the terrorist attacks carried out by terrorist in another state liable to be termed as Acts of War against that State? What, if any , are the legal limitations and the permissible limits under International Law of retaliating

conventions have not been able to stop or prevent terrorism from continuing unabated in different parts of the world.[33] Also proving to be inadequate to suppress or prevent terrorism are other legal documents including the United States Anti - Terrorism Act of 1991, the SAARC Regional Convention on Terrorism of 1987 and the 2004 Additional Protocol to the SAARC Regional Convention.[34] Added to this fact is that existing International Humanitarian Law only prohibits any conceivable form of terrorism committed in an armed conflict. The main treaties of international Humanitarian Law which have a bearing on the issue are the four Geneva Conventions of 12 August 1949 for the protection of war victims,[35] supplemented by their two 1977 Additional Protocols.[36] Many other treaties deal with aspects of armed conflict and thereby indirectly with terrorism, such as the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954). It should, of course, not be forgotten that all States (supposedly) prohibit recourse to terrorist acts by domestic legislation, in particular criminal law

To an extent therefore, Nigerian leaders should be ashamed that since 1983 or thereabout when Maitatsine struck and unleashed terror on a high scale on innocent citizens, sectarian strife has grown unfettered. It is a shame to recount the regularity of such strife, which usually starts on a flimsy and silly excuse. After the 1987 incident that started in Kafanchan and spread to

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against such asymmetric warfare?, Can the victims of terrorism attacks have the legal rights to sue terrorists and terrorist organizations for compensation and/or reparations in U.S Courts or in the courts of their own country? What are the rules governing the enforcement of such judgments upon terrorists and terrorist organizations and the consequences arising there from? What is the remedy under International Law against a state using terrorism as an instrument of State Policy. See Shambhu Chopra, Public International Law and Terrorism: Emerging Issues and Challenges, being a paper delivered at the Sixth International Conference on International Law in the Contemporary World , 1-4 February 2009, New Delhi Conference Papers organized by The Indian Society of International Law. See Conference proceedings, at pp 163-166

33. Thus at various times countries like India, Israel, Belguim, France, Germany, Greece, Turkey, Italy and UK have been victims of terror attacks

34. Ibid

35. Convention (i) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field Geneva 12 August 1949; Convention (ii) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (ii) Relating to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (iv) Relating to the Protection of Civilian Persons in Time of War , Geneva, 12 August 1949-190.

36. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol), 8 June 1977, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts (Protocol ii), 8 June 1977 (160 and 153 States parties respectively as at 30 June 2002).

Kaduna, Zaria, Funtua, Malumfashi and Katsina, many thought that enough was enough. And for once, the government, then under Gen. Ibrahim Babangida, tried to cut its roots, perhaps as no other government since then had responded. Apart from setting up the Justice Donli Commission, it set up the Karibi- Whyte Tribunal that tried suspects and sent quite a few to jail, as the existing law permitted. It was generally believed that the action checked religious fanaticism to some extent, so that throughout that regime period only one other similar incident came to mind. And then, it was on a much lower scale involving some skirmishes in Kano and Katsina. But again, people were tried openly and sanctioned. It is most unfortunate that since Babangida, no president has mustered the political will to seriously address religious disturbances. Consequences and incidents of riots have grown in frequency and intensity and rendered Nigeria a failing, if not a failed state.

THE WAY FORWARD

One of the steps to be taken by government towards attaining real development and solving sectarian terrorism in Nigeria is to resuscitate the education sector. Education has grown very slowly in this country, particularly in the North where it is customary to allow children migrate out of the homes to be fully accountable to local Mallams. Obviously, the education impacted in that circumstance, though important for the soul in the world beyond, is inadequate for the rigour of life within. In practical terms, if the nation's educational structure had been functioning well, it is most unlikely that many of our youths would have had cause, like Farouk, to travel out of the country at their infantile age, to attain quality education, not to mention being so easily indoctrinated.

Secondly there is need on the part of the federal government to review the way and manner it has been handling religious crisis in the country. Incidentally, the Nigerian Federal Government has often been criticized, and many still criticize it for poor handling of such killings in the past , blaming the trend to insincerity. A particular example that has been cited for this criticism was the twin turmoil that took place in both Jos and Kano in 2004.

Certain social, political and economic conditions feed fundamentalism and intolerance. These conditions include poverty, typified by widespread deprivation and hunger, lack of access to quality education, unemployment, political manipulation of religion by the political elites and struggle over resources. Indeed, conflicts over religious doctrine within a sect have hardly and usually not been identified with violence. In the particular incident of the Kala- Kato, though various reasons had been advanced as the cause of the violence, the popular argument was that it was an implosion over leadership tussle that cascaded into widespread violence. Within religious sects, therefore, occurrence and/ or eruption of violence has usually had a strong link with leadership tussles.

Since the 1980s, the condition of living of the average Nigerian has fallen to miserable levels. Over 70 per cent of the population lives below poverty

level. This has occurred amidst huge corruption and waste by the ruling elite. The shared feelling of powerlessness has led to the explosion of religious congregations, denominations and sects as people look to the supernatural for succour. Thus, frustration with the failures of service delivery and powerlessness in the midst of the impunity of the elite has translated into a volatile mix of fear, uncertainty and confusion among a deprived population. Nigeria has become a fertile ground for religious entrepreneurs, demagogues and those claiming to exude misguided religious charisma.

What these mean, therefore, is that dealing with the religious conflicts in the country is tied to making governance meaningful for the ordinary citizen. The government must address the issues of poverty by increasing access to the basic necessities of life; improving quality and access to education and dealing with the problem of unemployment. These must be pursued side by side with the initiatives of improving security , mounting public campaigns and enlightenment on the need for tolerance and peaceful existence among the population, irrespective of tribes and/or ethnic configurations and religions.

It is regretful enough to say that economic, electoral, political , educational, social, security structures are non- existent in the country. It is only when these structures flourish the way they should that we can be spared the headache of dealing with the effects of a failed system. Also, if the security structure had been effective, we would have been able to monitor the activities of the different religious sects mushrooming in the country on a daily basis and possibly find a lasting solution to the attendant loss of life and property as a result of the religious crises experienced on a regular basis in the country.

The government of Nigeria must now take serious look into the report that Al-Qaeda's agents now operate in Nigeria. Three events make this to be imperative. In the first place it can be recalled that in 2008 the then Inspector- General of Police, Mike Okiro raised the alarm over threats by Al-Qaeda to launch a terrorist attack in Nigeria. Although Okiro refused to give details then he said his alarm was based on intelligence reports. Secondly, in 2009 a member of the Nigerian Islamist militant group Boko Haram admitted being trained in Afghanistan, given 500 dollars for the training and promised $35000 if he returned for more training. Thirdly is the alarming and shocking report that an Al- Qaeda group has offered to train and arm Nigerian muslim groups to fight perceived enemies in the country[37].

37. Commenting on this report, Thisday editorial of Tuesday February 9, 2010 at p 19 said: the present Al- Qaeda offer of help in a statement by a group called Al-Qaeda in Islamic Maghreb (AQIM) said " We are ready to train your people in weapons and give you whatever support we can in men, arms, and munitions to enable you to defend our people in Nigeria. Coming after the Christmas day Detroit failed bomb attack by 23- year old Nigerian Abdudmutallab which led to the US classifying Nigeria as a terror prone state, the Kalo Kato religious skirmish in Bauchi and the recent sectarian mayhem in Jos, the present Al Qaeda offer to help and equip Nigerians could not have come at a more embarrassing time for those trying to salvage Nigeria's image as a peace- loving nation.

This frightening situation has even been compounded as news came in that the Ministry of external affairs was investigating the alleged involvement of two Nigerians arrested in Malaysia for terrorist activities[38]. Obviously this is another dismal international development that seeks to make the stigma of terrorism stick to our nation's long and hard earned reputation as a peace loving regional power in West Africa amongst ECOWAS states. There is therefore an urgent need for effective communications and information dissemination strategies to stem the current trend of our drift towards terrorism both domestically and globally. The ball is therefore in the court of the Ministries of information and external affairs to act urgently to salvage Nigeria's reputation in this regard.[39]

Nigerian security and intelligence agencies must track down, arrest and arraign before the court, those with proven links to al- Qaeda before they unleash murder and mayhem which are the hallmarks of al- Qaeda. Religious leaders in mosques and churches must warn the youths and their members about dubious and suspicious offers of training for them from strangers or even fellow Nigerians in foreign countries. We implore the religious and political leaders to preach and practice religious tolerance as Nigeria by its constitution is a secular state. Nigerians must not to be carried away by unfounded rumours to foment trouble or attack those they suspect as terrorist. They should rather report such people to the police. More importantly Nigerians must be alert and vigilant for collective security and safety from terrorism[40].

While we are not in support of Nigeria's classification, it is our view that unless the Nigerian government braces itself up to the challenges of incessant communal and religious clashes and conflicts particularly in the Northern part of the country, the country may soon become a recruitment ground for terrorist organizations.[41]

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38. The Ministry's spokesman said it would provide consular support for the two Nigerians who were arrested with seven others for having links with Al- Qaeda. According to Nigeria's High Commissioner to Malaysia, Ambassador Pete Anegbe the Ministry through its mission was in collaboration with the Malaysian Home Office in unraveling the facts of the Nigerians' involvement. See Thisday editorial of Tuesday February 9, 2010 at p 19

39. Ibid.

40. Ibid.

41. See the following reference materials: War on Terror and Nigeria -US Relations, Thisday, The Sunday Newspaper, January 10, 2010, at pp 20- See further, Kingsley Omose, Umar Abdul -Mutallab: Case of Failed Parenting, Businessday, Wednesday 06, 2010, at p 13, Niyi Osundare, Life in the Terror League, Thursday, February 11, 2010 at p 14, Emma Maduabuchi & Nkasiobi Oluikpe, Jos: Another Fire on the Plateau, Sunday Independent January 24, 2010 at p 17, Funmi Falobi, Jos Crises in History, Sunday independent January 24, 2010 at p 16, Damola Awoyokun, The Chilling Advertisement for Al- Qaeda, The Guardian, Sunday, January 24, 2010 at p 23, Sunday Dare, Jos: From Idyllic City to Killing Fields, Thisday , Saturday,

Mutallab Senior (the father of the would be suicide bomber) has been commended for warning relevant security agencies about the waywardness of his son. Only a good person with character will do what he did and in today's world of degraded social values, these are very few. But that does not subtract from the fact that Dr. Mutallab is the father of Nigeria's pioneer international terrorist. Farouk has blighted his family's name forever, his father's laudable efforts notwithstanding. The fact that must however be admitted here is that the whole issue revealed a failure of parenting which failure has become the norm in Nigeria.[42]

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January 23, 2010 at p 64, Vincent Obia , Abdulmutallab: Accused with Nigeria , Thisday, The Sunday Newspaper, January 10, 2010, at p 75, Kunle Sanyaolu, What Next After Mutallab? , The Guardian, Sunday, January 10, 2010 at p 69, Todd Moss, How Nigeria's Power Void Endangers The Nigeria- U.S Relations , Daily Independent, Monday, January 11, 2010 at p 32, Emma Maduabuchi, Is Nigeria a Terrorist Nation? Sunday Independent January 10, 2010 at p 15, Chidi Amuta, An Unlikely Terror Axis , Thisday Thursday, January 7, 2010 at p 64, Joe Adiorho, Mutallab: Fallouts of a Failed Terrorist Attempt, The Guardian , Sunday, January 24, 2010 at p 12, The Offer from Al-Qaeda , Thisday , Thursday, Vol. 15, No. 5406, at p 16

42. Many rich parents in Nigeria put away their minor children in boarding house or abroad , where they become available to human predators and perverts looking for impressionable and undefended sprouting to prey on. Many fathers are too busy to know where their children attend school or how they fare. It may be difficult for the family of Dr. Mutallab to accept failure of proper parenting on their part, having provided Farouk with the best of education that money can give for the young man. But inadequate parenting cannot be ruled out, because provision of money and sending children abroad to study without proper guardianship and/ or guidance cannot possibly replace good and adequate parenting. Children and young persons require regular monitoring in order to remain on course at all times. This is more so for children from privileged homes, where there is a disconnect between them and the ordinary citizens. They should be monitored to see the world beyond the small, controlled and opulent lives that the economic and financial situations of their parents provide. Besides, the expanded worldview expressed in these foreign countries that parents send their children to and their corrupt cultural experience which are far alien to those of Nigeria, often leave negative influences on these children. The lesson of the Mutallab's case is for parents, especially affluent parents who send their children abroad, to pay more attention to the growth of their children. There is no alternative to good parenting. These children need the love, attention and understanding of their parents to develop the right mental and/ or cognitive attributes. See Ochereome Nnanna, Mutallab Snr: Another View Vanguard , Monday, January 18, 2010 at p 19

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ADVERSARIAL AND INQUISITORIAL SYSTEMS OF LAW : PROS AND CONS

Nthenge Paul Musila*

ABSTRACT

The main idea of the study is to elucidate on the two main legal systems that is adversarial and inquisitorial, and their aims. The present study starts by defining the adversarial system of law and then it gives a brief genesis of how the concept began. It then proceeds to give some of the major flaws and gains from this type of justice system, by citing a few Indian Supreme Court decisions. This is followed by defining the inquisitorial legal system, tracing its evolution, features, drawbacks and achievements. The study then proceeds to distinguish both the systems, as well as a few obstacles in the administration of justice. The present study ends by giving a few suggestions that can be incorporated in the Indian legal system.

Keywords: *adversarial, inquisitorial, truth, evidence, judge, investigate*

1.0 INTRODUCTION

The primary goal of the law of criminal procedure is achieving a system that respects the rights of the individual whilst maintaining society's legitimate interest in preserving the peaceful cooperation and co-existence of its citizens and punishing the guilty whilst protecting the innocent. This is true in both civil law as well as common law jurisdictions. Therefore, there should be a balance between the rights of the individual and the right of the State to prosecute those who breach the law. A criminal justice system reflects the society it seeks to protect. It is designed to deal with what are perceived to be "social" evils and as such it is not possible to have universal laws covering all societies.[1] The State discharges the obligation to protect life, liberty and

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1. Martin Blackmore, Deputy Director of Public Prosecutions (NSW), Does the Common law system of criminal justice protect or infringe upon the rights of the defendant? *http://www.odpp.nsw.gov.au/speeches/Final% 20paper% 20Capetown.htm, accessed on 26th Nov. 2010*

property of the citizens by taking suitable preventive and punitive measures which also serve the object of preventing private retribution so essential for maintenance of peace and law and order in the society.[2]

There two major criminal procedures are adversarial and inquisitorial systems. The adversarial system is associated with common law tradition while the inquisitorial system deals with civil law tradition.[3]

1.1 THE ADVERSARIAL SYSTEM

The adversarial system (or adversary system) is the system of law generally adopted in common law countries including India. It is a procedural system involving active and unhindered parties (defendant and prosecution) contesting with each other to put forth a case before an independent decision maker (Judge/jury).[4] In the adversarial dispute resolution system, truth emerges from the respective versions of the facts presented by the prosecution and the defence before a neutral judge/jury, having power to impose penalties.

In adversarial systems a judge(s) control(s) the courtroom and decides various issues of substantive and procedural law. A Judge is supposed to be a neutral and passive fact finder, dispassionately examining evidence presented by parties, with the objective being, whether, the prosecution has been able to prove the case beyond reasonable doubt. He remains uninvolved in the presentation of arguments so as to avoid reaching a premature or biased decision.[5] In this system an accused is presumed innocent until prosecution proves guilt of the accused beyond reasonable doubt by producing evidence showing him guilty of the offence charged. Before reaching a conclusion about the guilt of the accused, the Court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses. It must be noted that ultimately and finally the decision in every case depends upon the facts of each case. Further, if two views are possible on the evidence produced in the case, the view favourable to the accused is to be accepted.[6] The state law enforcement agencies e.g. (police) do investigative work for the state.

The adversarial system prevailing in India allows a counsel to put forward construction of the enactment in question relying on several alternative arguments and the Court may ultimately base its judgment on unglossed literal meaning.[7] Though the trials in India are adversarial, the power vesting in the Court to ask any question to a witness at any time in the interest of justice

2. Malimath committee report, *www.mha.nic.in/pdfs/criminal_justice_system.pdf, accessed on 10th December 2010*
3. www.majon.com, accessed on 25 November 2010
4. Garner A. B., *Blacks law dictionary, 8th edn.*, Thomson west, USA, p58
5. http://law.jrank.org/pages/4120/Adversary-System.html, accessed on 10 November 2010
6. *Chikkarangaiah v. State of Karnataka,* 2009 CRI. L. J. 4667
7. *Swedish Match AB v. Securities and exchange Board, India,* AIR 2004 SC 4219

gives the trial a little touch of its being inquisitorial. To be an effective instrument of dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participating in the trial by evincing intelligent active interest…An alert Judge actively participating in Court proceedings with a firm grip enables the trial Judge to hold the proceedings so as to achieve the dual objective-search for truth and delivering justice.[8] The adversary process is governed by strict rules of evidence and procedure that allow both sides equal opportunity to argue their cases. No party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute.[9] These rules also help to ensure that the decision is based solely on the evidence presented. No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any admission made outside of the trial.

1.1.1 HISTORY OF THE ADVERSARIAL PROCESS

The adversarial process can be traced to the medieval mode of trial by combat, in which litigants, notably women, were allowed a champion to represent them. Trial by combat pitted two armed contestants with conflicting claims against one another, with a neutral party serving as referee. The winner had his claim validated and was exonerated, of a criminal offense.[10]

1.1.2 DISADVANTAGES ADVERSARIAL SYSTEM

The adversarial system has certain drawbacks for example there is no judicial management in the pre-trial phase often leading to long delays[11] between the alleged offence and the trial of the case, the delays, combined with insistence on oral evidence by first hand witnesses, the exclusionary rules of evidence result in selective presentation of evidence by witnesses whose recall long after the events is often adversely affected. Due to the above mentioned factors truth is not necessarily identified. Because of the sometimes conflicting roles, Judges tend to prejudge a case in an effort to organize and dispose it off.[12] The trial is highly confrontational.

The adversarial system is often criticised because it is not sufficiently concerned with finding the truth, as parties, rather than state agencies, control and circumscribe the forensic process, and judges do not participate actively in the search for truth. The result is in injustice, as prosecuting authorities

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8. *Makan Lal Bangal v. Manas Bhunia,* AIR 2001 SC 490
9. *Muhammed Basheer v. State of Kerala* 2009 CRI. L. J. 246, *Kailash v. Nankhu and ors.* (2005) 4 SCC 480
10. *http://wps.pearsoncustom.com/wps/media/objects/2426/2484551/CJ140_Ch02.pdf,* accessed on 2nd December 2010
11. laws delay is not unknown in adversarial litigations, *M.C Mehta v. Union of India* AIR 2001 SC 1544
12. Supra 5

pursue convictions disregarding the truth. There is no neutral forensic process, as in inquisitorial systems. There is also inequality of means, favouring the prosecution in most cases especially where the accused is not in a position to commit sufficient resources to the search for evidence, and the system is open to manipulation by smart, wealthy and determined criminals. There is also manipulation of the forensic process by police in common law systems and the system is accused of being potentially skewed in favour of the accused and the traditional view, that rather ten guilty persons escape punishment than one innocent party being convicted, resulting in many guilty persons being acquitted.[13]

There is no obligation on the part of the accused, either to prove innocence, or to collaborate. Because of the absolute right to silence, and the presumption of innocence, the accused can simply rest his case and let the prosecution prove 'beyond reasonable doubt' his guilt. While vigorous cross-examination allows the accused to undermine the prosecution case, even without adducing his own evidence and it has the unfortunate effect of painting a witness negatively.[14] It is in this sense an essentially negative tool, apparently rendered more effective by the structural characteristics of the system, which encourage delay between facts and trial, than by any inherent usefulness in finding the truth.

There is inadequacy of compensation available to victims of crime, and a sense of powerlessness and a lack of respect and comprehension in the criminal court as well as a perception by victims that nothing is done to deter re-offending and endemic crime in certain areas. The full-blown trial is seen as cost-intensive and rules of procedure and evidence are heavily weighted in favour of the accused.

Perhaps the biggest drawback is mounting arrears and the delay in disposal of cases, the disadvantage to the poorer and weaker section of society due to the adversarial procedure.[15]

1.1.3 ADVANTAGES ADVERSARIAL SYSTEM

The advantages of the adversarial system include; the practitioner's first duty is to the court and to the justice system, rather than to the client. As a responsible officer of the court, the counsel has an overall obligation of

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13. *http://www.lrc.justice.wa.gov.au/2publications/reports/P92-CJS/consults/1-3crimadvers.pdf*, accessed on 2nd December 2010

14. A judge presiding any trial, needs to be effectively control examination, cross examination and re-examination of the witnesses so as to exclude questions being put to witnesses as the law does not permit and to relieve the witnesses from the need of answering such questions which they are not bound to answer. The examination of the witnesses should not be protracted and the witness should not feel harassed. The cross examiner must not be allowed to bully or take unfair advantage of the witness. *Makhan Lal Bangal v. Manas Bhunia* AIR 2001 SC 490

15. *Advocate General, Kerala v. K. Ramkumar* 1986 CRI.L.J. 60

assisting the Courts in a just and proper manner in the just and proper administration of justice. Zeal and enthusiasm are the traits of success in the profession but overzealousness and misguided enthusiasm have no place in the personality of a professional.[16]

There is an intimate relationship between bench and bar in the professional sense. The courts also have an independent law-making power through the mechanism of precedent. In this function too the court is assisted by the independent bar. The accused can present own evidence to counter the prosecution claims. Advocates play a big role in trials as they have a right of audience in the courts. There is presumption of innocence until proved guilty beyond reasonable doubt, and the accused can always appeal to a higher court if not satisfied with the decision rendered. The indigent accused have a right to legal aid and also there is scope for plea bargaining.

1.2 INQUISITORIAL SYSTEM

The inquisitorial system of law is the system of law that is usually found in Europe among civil law systems (i.e. those deriving from the Roman or Napoleonic Codes). It is a system of proof taking used in civil law, whereby the judge conducts the trial, determines what questions to ask, and defines the scope and extent of the inquiry.[17] In the inquisitorial system, a judge investigates the facts, interviews witnesses, and renders a decision while simultaneously representing the interests of the state in a trial. Judges assume multiple roles in a trial, such as fact finder, evidence gatherer, interrogator, and decision maker, the Judge is not a passive recipient of information, but, the Judge is primarily responsible for supervising the gathering of the evidence necessary to resolve the case.

1.2.1 HISTORY OF THE INQUISITORIAL SYSTEM

The inquisitorial system was first developed by the Catholic Church during the medieval period. The Ecclesiastical Courts in thirteenth-century England adopted the method of adjudication by requiring witnesses and defendants to take an inquisitorial oath administered by the judge, who then questioned the witnesses. Beginning in 1198, an Ecclesiastical Court could summon and interrogate witnesses of its own initiative, and if the (possibly secret) testimony of those witnesses accused a person of a crime, that person could then be summoned and tried.[18] In the inquisitorial oath, the witness swore to truthfully answer all questions asked. The inquisitorial system is now more widely used than the adversarial system.

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16. *D.P. Chadha v. Triyugi Narain Mishra*, AIR 2001 SC 457
17. Garner A. B., Blacks law dictionary, 8th edn., Thomson west, USA, p.809
18. *Inquisitorial System*, accessed on 1st December 2010

1.2.2 BASIC FEATURES OF THE INQUISITORIAL SYSTEM

Some authors state/contend that the inquisitorial system applies to questions of criminal procedure as opposed to questions of substantial law; that is, it determines how criminal enquiries and trials are conducted, not the kind of crimes for which one can be prosecuted, nor the sentences that they carry.[19]

In the inquisitorial system, the power to investigate offenses rests primarily with judicial police officers. They investigate and draw the documents on the basis of their investigation. The Judicial police officer has to notify in writing of every offense which he has taken notice of and submit the dossier prepared after investigation, to the concerned prosecutor. If the prosecutor finds that no case is made out, he can close the case. If, however he feels that further investigation is called for, he can instruct the judicial police to undertake further investigation. The judicial police are required to gather evidence for and against the accused in a neutral and objective manner as it is their duty to assist the investigation and the prosecution in discovering truth. Exclusionary rules of evidence hardly exist. Hearsay rules are unknown. If the prosecutor feels that the case involves serious offenses or offenses of complex nature or politically sensitive matters, he can move the judge of instructions to take over the responsibility of supervising the investigation of such cases. The Judge of instructions is empowered to issue warrants, direct search, arrest the accused and examine witnesses. The accused has the right to be heard and to engage a counsel in the investigation proceedings before the judge of instructions and to make suggestions in regard to proper investigation of the case. It is the duty of the judge of instructions to collect evidence for and against the accused, prepare a dossier and then forward it to the Trial Judge. The accused is presumed to be innocent and it is the responsibility of the Judge to discover the truth. The statements of witnesses recorded during investigation by the Judge of instructions are admissible and form the basis for prosecution case during final trial. Before the Trial Judge the accused and the victim are entitled to participate in the hearing. However the role of parties is restricted to suggesting questions that may be put to witnesses. It is the Judge who puts questions to witnesses and there is no cross-examination as such. Evidence regarding character and antecedents of the accused such as previous conduct or convictions are relevant for proving the guilt or innocence of the accused. The standard of proof required is the inner satisfaction or conviction of the Judge and not proof beyond reasonable doubt.[20] The trial judge will largely base his or her decision upon the contents of the dossier.[21]

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19. *http://www.newworldencyclopedia.org/entry/Court*, accessed on 27th November 2010
20. Supra note 2
21. The investigating magistrate, who, being a judicial officer, will supervise the police and the prosecutor and ensure that an objective balance is struck in all investigative measures, in particular ensuring that no excessive pressure is used to obtain a confession.

The goal of the investigating magistrate is not prosecuting, but, finding the truth, and as such his duty is to look for both incriminating and exculpating evidence.

The advantage of an investigating magistrate is that a judicial figure, closely engaged with the investigation, will be able to exercise effective control over the conduct of the investigation by the police. He will also be well placed to judge the real necessity of measures that affect freedom, rights and integrity of the accused. Hearings and submissions regarding sentence and regarding guilt are not strictly separate as in adversarial law systems. There are no rules excluding evidence of propensity (ie of previous criminal conduct or convictions); all this information is seen as relevant to the trier of fact forming its intime conviction (the relevant standard of proof in inquisitorial jurisdictions) concerning the guilt or innocence of the accused.

1.2.3 DISTINCTION BETWEEN INQUISITORIAL AND ADVERSARIAL

The goal of both the adversarial system and the inquisitorial system is to find the truth. The most striking differences between the two systems can be found in criminal trials. What distinguishes the two systems is the structure and organisation of the forensic process or investigative method, than the adversarial nature of proceedings.[22] In most inquisitorial systems, a criminal defendant does not have to answer questions about the crime itself but may be required to answer all other questions at trial. Many of these other questions concern defendant's history and would be considered irrelevant and inadmissible in an adversarial system. A criminal defendant in an inquisitorial system is first to testify. The defendant is allowed to see the government's case before testifying. In an adversarial system, the defendant is not required to testify and is not entitled to a complete examination of the government's case. A criminal defendant is not presumed guilty in an inquisitorial system. Nevertheless, since a case would not be brought against a defendant unless there is evidence indicating guilt, the system does not require presumption of innocence that is fundamental to the adversarial system.[23] The adversarial system safeguards the individual rights of the accused, whereas the inquisitorial system places the rights of the accused secondary to the search for truth. The decision in an inquisitorial criminal trial is made by the collective vote of a certain number of professional judges and a small group of lay assessors. A two-thirds majority is usually required to convict a criminal defendant, whereas a unanimous verdict is the norm in an adversarial system. In an inquisitorial system, the ultimate responsibility for finding the truth lies with an official body that acts with judicial authority, and gathers evidence both for and against the accused.

Both adversarial and inquisitorial systems monopolise the determination of

22. Supra 13

23. Supra 18

the existence of a criminal offence and sentencing, in the hands of the state and have as their primary and most fundamental purpose prevention of private justice by retribution.

The civil law system is said to be simpler, without the strict rules of evidence unlike adversarial jurisdictions, where the strict rules concerning hearsay evidence result in the loss of much valuable evidence gathered in a form that is not admissible during the early stages of a criminal investigation and prosecution.[24] Jury trials are the exception rather than the rule in civil law jurisdictions. Guilty pleas do not figure in inquisitorial systems because the accused is not a fully-fledged party to the proceedings, and because it is ultimately always the responsibility of the trial judge to ascertain the truth. The judge need not necessarily accept a confession of guilt in the form of a plea.

In adversarial systems much of the law is still found in binding judgments (precedent), even where there is statute law, the emphasis in teaching is still on the cases, and their facts, rather than on a systematic and theoretical analysis of legislation or 'codes'. The apparent uncertainty of certain areas of law, flowing from the sheer multiplicity of judicial opinions, exacerbates this tendency, as well as giving rise to a more inventive or speculative attitude to litigation, it engenders uncertainty, which inflates the expectation of winning a case, i.e if law is uncertain, a good lawyer may be able to get you a win. Law education in civil law systems has its prime emphasis on the systemic study of legislation and codes, i.e a theoretical and analytical examination of the logical organisation and interconnectedness of various provisions, codes and statutes. Cases are not so central to study, merely filling up gaps or resolving points of uncertainty. Legal education in many civil law jurisdictions is presented as part of a wider system of social organisation, rather than a series of disputes.[25]

The emphasis of the common law courts is more on law than on facts; facts are left entirely to the parties to present them as they see fit. Judges are not involved in party prosecution or presentation. Thus, in theory, the courts in common law jurisdictions have inherent powers of adjudication with a law making ability. They have no investigative but only a passive fact determining role (where the parties' versions of the facts do not correspond). In civilian jurisdictions, at least in theory, courts, deriving their powers from the constitution, and made up of officers of the state, play a more direct role in formulating the factual basis of a dispute because of their investigative powers. They apply only the laws of parliament and have no overt law-making power.

The civilian system may be more expensive in terms of costs to the state, but may cost less to the litigant. The adversarial system, not requiring

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24. Supra 13

25. Van Caenegem, William (2003) "Adversarial Systems and Adversarial Mindsets: Do We Need Either?," Bond Law Review: Vol. 15: Iss. 2, Article 9.

Available at: *http://epublications.bond.edu.au/blr/vol15/iss2/9*, last accessed on 5th December 2010

as much state input, should be cheaper for the state, and consequently more expensive and time consuming for the parties. The advocate's role in the civil law systems is more passive: to submit written submissions and supervise the case. The adversarial system with the continuous trial as its great ideal is undoubtedly more confrontational and more oral.[26]

1.2.4 DISADVANTAGES INQUISITORIAL SYSTEM

The Inquisitorial system suffers some setbacks such as the courts are far less sensitive to individual rights than adversarial courts, and inquisitorial judges who are government bureaucrats (rather than part of an independent judicial branch), might identify more with the government than with the parties. The system provides little, if any, check on government excess and that invites corruption, bribery, and abuse of power. The role that the Trial Judge actually plays in practice in any given case is quite limited. Judges in civil law jurisdiction rarely conduct a vigorous examination of the evidence at the trial; they rely on the contents of the dossier without much question, simply checking that there are no formal irregularities. The prosecutor naturally and instinctively assumes a partisan position, in spite of normative statements to the contrary. Very long delays between offense and trial, powerlessness of the accused in the forensic process and at the trial, a lack of emphasis on the innocence of an accused until proven guilty, the use of disposition and character evidence may affect the ability of the system as a whole to find 'the truth'. There is also excess pressure on the accused that goes with evidence gathering, and the lack of genuine opportunity to question such evidence vigorously.

Further, in reality the civilian system struggles from a lack of resources to fully investigate the truth and the prosecutor is naturally inclined, to take a partisan position against an accused, of whose guilt he may have become convinced, and is often in the power of the police, rather than effectively supervising police conduct of the investigation; and the investigating magistrate, because of lack of resources, is only involved with a minimum of cases. There is a great gap between legalistic prescripts and reality in many civilian systems, which may be the inevitable effect of codification and its attempts to formalise and circumscribe discretionary decision making in an unrealistic manner.[27]

Many methods used to obtain evidence in inquisitorial jurisdictions have come under severe criticism, for their deleterious effect on the right of silence and the presumption of innocence of the accused. A suspect is put under excessive pressure after an offense is committed and that confessions are sought in an atmosphere where an accused is powerless. Delay has been a major concern in civil law; excessive terms spent on remand ('preventative detention'). Delays between the commission of an offense and trial are due to the complexity of the system at the pre-trial stage, where there is too much

26. Ibid

27. Supra 13

formality and duplication of tasks. On the other hand, delays are also due to the inability of courts to deal with the workload, and the unavoidable prioritization that flows from it. The problem of delay is universal, in that it always affects the quality of justice and results in great personal and financial costs. In this system jury trials are extremely rare, and attorneys play a more passive role.[28]

1.2.5 ADVANTAGES INQUISITORIAL SYSTEM

Some of the benefits for the inquisitorial system are; victims in civil law jurisdictions can appear as civil claimants (for damages) in criminal cases (party civil') and their claim for compensation can be heard at the same time as the criminal case. Witnesses, including victims, are not subjected to the rigours of cross-examination, their written depositions as they appear in the dossier amounting to the full extent of their involvement in the process in most cases. The state, through the courts, takes greater control of adjudication of private disputes, both from the legal and from the fact-finding or investigative perspective and trials are on the whole less expensive, being less time consuming and involve fewer personnel.

1.3 OBSTACLES IN ADMINISTRATION OF JUSTICE

Difficulties faced by both inquisitorial and adversarial systems of criminal proceedings are similar. Both clearly face increased case loads due to criminalisation of conduct and greater incidences of urban and white-collar crime. Due to decreasing resources available for courts, prosecuting and forensic authorities in general and because of fiscal, budgetary and political constraints two common concerns result: 1) an increased tendency to exercise executive discretion not to prosecute on the part of police and prosecutors; and 2) considerable delays in adjudication of criminal cases, resulting in unfairness and injury to accused persons, as well as to others.[29]

1.4 Conclusion

The two major criminal procedures are the adversarial and the inquisitorial systems. The adversarial system founded on common law tradition while the inquisitorial system is based on civil law tradition.

The adversarial legal system is a dispute resolution system where claims of parties are presented by lawyers or prosecutors, to an impartial Judge or Jury, who has/have power to impose penalties. The state law enforcement agencies i.e police or specialised investigative departments e.g. CID, FBI, CBI etc do investigative work for the state. Court procedures are governed by strict rules of criminal procedure and evidence. Evidence gathered must conform to the rules specified otherwise it is inadmissible as evidence in a court of law. The accused is presumed innocent until proven guilty beyond

28. Ibid

29. Ibid

reasonable doubt.

The inquisitorial system when juxtaposed with the adversarial system, the Judge plays a more active role i.e the Judge has investigative police who work/investigate cases and gather evidence under his supervision. The evidence gathered is put in a dossier, which helps the judge in reaching a final decision. The Judge is not passive but plays an active role by questioning the suspect, witnesses etc. the Judge collects evidence for and against the accused.

Both systems search for the truth in different ways, the adversarial by allowing both parties to a dispute to present their evidence to a neutral third party (Judge) who decides the case as per the evidence produced. While in inquisitorial systems the Judge searches for the truth by using investigative police who collect evidence for and against the accused. If there is a case against the accused the Judge orders a trial if not accused is let free.

Both systems suffer from common maladies such as insufficient funds for proper investigations, lack or enough manpower, corruption from the wealthy, delays, the rise of criminality within the general population etc.

All in all both systems have managed fairly well in prosecuting offenders despite the above mentioned constraints.

1.5 Suggestions

In India there needs to be introduced a system where an accused can choose whether to go for an inquisitorial or adversarial trial, as there are exceptions to adversarial proceedings. For example, proceedings under the ceiling Act, are not adversarial as are proceedings in suit,[30] the disputes of village community particularly relating to access to land having water source and its ownership, are dealt with and handled on the basis of customs of the village communities and through a very informal procedure.[31] There is also scope for Ombudsman who is a non adversarial adjudicator of disputes.[32] The Indian Supreme Court has said that public interest litigation, should not be converted into an adversarial litigation.[33]

Therefore, from the above few exceptions it would be advantageous if the courts would incorporate some aspects of inquisitorial proceedings or let an accused have an option to be tried with either system.

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30. *Escorts Farms Ltd. V. Commr, Kumanon Division, Naintal* AIR 2004 S.C. 2186
31. *Tekaha AO v. Sakumeren AO*, AIR 2004 SC 3674
32. *Durga Hotel Complex, M/s v. Reserve Bank of India* AIR 2007 SC 1467, An Ombudsman is an official appointed to receive, investigate, and report on private citizens complaints about the government. He serves as an alternative to the adversary system for resolving disputes, especially between citizens and government agencies. He is an independent and non-partisan officer who deals with specific complaints from the public against the administrative injustice and maladministration.
33. *M.C. Mehta v. Union of India*, AIR 2008 SC 180

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SOVEREIGNTY AND EXTERNA INTERVENTIONS: FOCUS ON CRISIS IN COTE D'IVOIRE

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ABSTRACT

The article examined the concepts of sovereignty and external interventions against the background of the crisis in Cote d'Ivoire. This was with a view to appraising the nature, extent and possible implications of external interventions already made or being contemplated by some notable international communities. The crisis was wholistically considered in its historico-legal, political, socio-economic and international perspectives.

Reliance was placed on primary and secondary sources of information based on relevant theoretical and practical models propounded by scholars in other interdisciplinary subjects. All data obtained were subjected to content and contextual analyses.

The study found that though, Cote d'Ivoire is an independent nation having the right to exercise her sovereignty in the management of her domestic affairs; such right should be exercised subject to other international legal instruments to which the country was signatory. Also, one serious dimension to the crisis could be noticed in the complacency which had trailed the attitude of Laurent Gbagbo and his supporters to the decisions of some international organizations and States to ease them out of power by force.

It was concluded that an enduring resolution of the crisis should be pursued through protracted dialogue and negotiations founded on workable principles of justice between Laurent Gbagbo and Alassane Ouattara rather

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than the use of force however 'legitimate'.

Key Words: *Sovereignty, External Interventions, Crisis, Cote D'voire.*

INTRODUCTION

There are two groups of writers who view the State in two opposing dimensions. The first group considers the State as an institution employed by political opportunists to intimidate, oppress and exploit the majority of the population.[1] The second group of writers appears to adopt a positive approach by defining the State as an institution of governance recognized by law, to possess certain qualities needed to reconcile conflicting interests and provide the forum for finding solutions to pertinent problems of the society.[2] In Law, a State is a community of persons living within certain limits of territory, under a permanent organization like a government which is established among the people to secure certain objects within a system of order through which, their activities can be carried on.[3] The words 'nation' and 'country' are often used interchangeably with State in modern political parlance.

Over the ages, issues of common interests like security, peace, defence, commerce, trade, transport, politics, mines, power, technology etc; had compelled States to come together under different regional, international and world bodies despite various challenges posed by distance, language and culture. Such bodies like the United Nations Organization (UNO), European Union (EU), African Union (AU), Economic Communities of West African States (ECOWAS) etc; have established legal instruments[4] which bind member States in their relationship with others. Giving the present terrain of globalization in terms of computer technology, modern transportation, trade, politics, diplomatic relations, economic recession and global insecurity climaxed by terrorism and wars; no independent nation or State can survive as an island unto herself. The foregoing considerations are fundamental to the issues of sovereignty and external interventions even as states conduct their separate and collective affairs.

Cote d'Ivoire, as an independent sovereign State, had been a member of some important international bodies like the United Nations Organization, African Union and Economic Communities of West African States.[5] As the

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1. D. Samuel, 'The Process, Prospects and Constraints of Democratization in Africa', African Affairs, Vol. 91 (1992) 735; See also, J. F. Bayart, The State in Africa: The Politics of the Belly, (New York: Longmans, 1993) 29 - 31.
2. C. Patrick, Power in Africa, (New York: St. Martin's Prress, 1992) 62 - 63; G. Hyden, 'Rethinking the Study of African Politics', in D. Olowu, et al, Governance and Democratization in West Africa (Dakar: CODESRIA Publications) 9.
3. J. L. Brierly, The Law of Nations (London: Oxford University Press, 1955) 11.
4. Examples are: The United Nations Charter, 1945; The European Union Charter, 1949, Charter of the African Union, 1963; ECOWAS Charter; 1975 etc.
5. Africa Today, (London: Africa Books Limited, 1996) 617.

leading Producer of Cocoa[6] in Africa, Cote d'Ivoire remains an international trade partner to many countries thereby, playing a prominent role in the development of global economy. Over the years, this enviable economic position of the nation had attracted many nationals of various callings and vocations. For instance, it has been published in some media newspapers that a huge number of Nigerian citizens are resident in that country.[7] Cote d'Ivoire is bounded in the South by the Atlantic Ocean but shares common international boundaries with Liberia, Guinea, Mali, Burkina Faso and Ghana.[8] The country also habours embassies of other nations. It is also important to recall that the country is one of the nations in Africa which had witnessed a devastating civil war between 2002 and 2003, while the UNO and ECOWAS intervened by contributing their armed forces.[9]

The crisis and political stalemate in Cote d'Ivoire arose from the contest between incumbent President, Laurent Gbagbo and his opponent Alassane Quattara, over the presidential election of November, 25, 2010. Even though Alassane Quattara was recognized by the country's Electorate Commission and some International Communities as the winner of the election, Laurent Gbagbo has refused to relinquish power because he and his supporters have claimed that the election was rigged.[10]

Giving this precarious political situation in Cote d'Ivoire and the likelihood of another civil war, world powers and other international bodies have been sending appeals to Laurent Gbagbo to handover power to Alassane Quattara otherwise, they might be forced out by 'legitimate force'.[11] Thus far, Laurent Gbagbo and his allies have ignored appeals and threats from the concerned international communities. In the present circumstance, certain fundamental questions are raised in this article: What constitute the historical, legal, political, socio-economic and international perspectives of the crisis? As an independent nation, can Cote d'Ivoire exercise her sovereignty to deal exclusively with her domestic crisis? What is the limit of the power exercisable in that respect? Do other nations and international bodies have the right to intervene in the internal crisis of Cote d'Ivoire? If so, at what stage and to what extent? Giving the nature of interventions already witnessed and those being contemplated with regard to the use of 'legitimate force' against Laurent Gbagbo; which of these interventions can be described as quantitative or qualitative? In the case of ECOWAS, can Cote d'Ivoire still be dealt with haven been suspended by the organization? Why have Gbagbo and his supporters treated decisions to use force against them with levity? In the light

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6. Id; p. 618.
7. The Moment, 'African Commentary', 2 - 18 January, (2011) 16.
8. Africa Today, Op. Cit. p.617
9. BBC News - Africa - ECOWAS block threatens Ivory Coast: *http://www.bbc-co.uk/news/world - Africa - 12077295* (site visited, 1/12/11).
10. *http://news.the age.com.au/breaking news world/gbagbo warns ivory coast-intervention would provoke chaos - 11 - 01 - 2011* (site visited 12/01/11).
11. BBC News - Africa, n.9 above. 1.

of experience about similar crises in African nations, can the use of force however 'legitimate' be considered a viable option to resolve the crisis in Cote d'Ivoire? If yes, what are the likely implications? If no, what should be the appropriate strategy?

CONCEPTUALIZATION

What is Sovereignty?

The concept of sovereignty is one of the most controversial ideas in Political Science and International Law. It is closely related to the difficult concepts of State and government. The word 'sovereignty' is derived from the Latin term 'superanus' and from the French term 'souverainete,' both terms meaning supreme power.[12] Sovereignty is the ultimate overseer or authority in decision-making process of the State and in the maintenance of order.[13] The theories of John Locke[14] on the Rule of Law towards the end of the 17th century and those of Jean - Jacques Rousseau[15] on the Rights of Man in the 18th century posited that the State is based upon a compact of its citizens. Through this arrangement, they entrust political powers to a government as may be necessary for common protection. This phenomenon led to the development of the doctrine of popular sovereignty which found expression in the United States Declaration of Independence and Rights of Man, 1776. The Declaration states in part that:

> "…we hold these truths to be self evident that all men are created equal and they are endowed with certain inalienable rights among which are: life, liberty and pursuit of happiness. To guarantee these rights, governments are instituted among men deriving their just powers from the consent of the governed…

Affirming the political concept of sovereignty in the same vein, the French Constitution, 1791 States in part that:

> "Sovereignty is one indivisible, unalienable and imprescriptible; it belongs to the nation. No group can attribute sovereignty to itself nor can an individual arrogate it to himself."

In political theory therefore, the idea of popular sovereignty exercised primarily by the people became thus combined with the idea of national sovereignty exercised not by an unorganized people in the State of nature, but by a nation embodied in an organized State. Between 16th and 18th centuries, the concept of sovereignty was seriously related to might or power rather than

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12. The New Encyclopaedia Britannica (Chicago: Enclyclopaedia Britannica Inc, 1997) 56 - 57
13. Ibid.
14. J. Locke's Two Treaties of Government (1960), cited in M. D. Freeman, Lloyd's Introduction to Jurisprudence (London: Garden City Press) 158.
15. Ibid; p.160.

law by philosophers like Bodin[16] and Thomas Hobbes.[17] In their views, the sovereign Authority made laws and could not be bound by them since he was an Uncommanded Commander.[18] Leon Duguit,[19] Hugo Krabbe[20] and Harold Laski[21] etc; began to ventilate the concept of sovereignty by identifying it with law. According to them, sovereignty in each society does not reside in any particular place or individuals but shifts constantly from one group to another. Thus, there can be Parliamentary Sovereignty, Executive Sovereignty, Judicial Sovereignty; within a particular political framework climaxed by a workable Constitution which is supposed to be ultimately supreme and sovereign as the nation's fundamental law.

Sovereignty therefore, refers to the powers exercised by an independent State in relation to other countries and the supreme powers exercised by a State over its own citizens.[22] In the context of International Law, an independent State is a sovereign State which should be free from all external control, enjoys full legal equality with other States; governs its own territory; selects its own political, economic and social systems; and has the power to enter into agreements with other nations to exchange Ambassadors and to decide on war or peace.[23] This contention is further reinforced by the Charter of the United Nations which affirms that the Organization is based on the Principle of the Sovereign equality of member States.[24] Sovereignty also entails the power to make and enforce the law and to control the nation's treasuries, finances and armed forces. It is ideal if the powers to exercise all the above functions are complete rather than being partial or in a state of confusion, instability, animation or uncertainty. Although a sovereign State theoretically enjoys absolute freedom, its freedom is in fact, often abridged by the need to coexist with other countries, and to obey treaties, conventions, declarations and other laws which it has entered into with other nations or organizations. In view of the sorry state of the socio-economic conditions of Cote d'Ivoire, its statehood weakness, immense contributions from foreign powers and allied states to the conduct of the disputed run-off elections; can Gbagbo and Quattara claim absolute sovereignty for their nation?

EXTERNAL INTERVENTIONS

The word intervention is coined from the Latin base, 'intervenire' meaning

16. J. Bodin, Sovereignty and International Law (London: Centenary Press, 1576)39.
17. T. Hobbes, Leviathan, 1651 in M. D. Freeman, Lloyd's Introduction to Jurisprudence, Op. Cit., pp. 156 - 158.
18. J. Austin, The Province of Jurisprudence Determined, ed. H.L. Hart (1954) in M. D. Freeman, Ibid; pp.256 - 258.
19. L. Duguit, 'The Law and the State', Harvard Law Review, Vol. 31 (1917) 1.
20. H. Krabbe, 'Sovereignty and the Law' in The New Encyclopaedia Britannica, Op. Cit.; p. 57.
21. H. Lask; Studies in Law and Politics (London: G.C. Press, 1932) 163 - 180.
22. Academic American Encyclopedia (New York: Grolier Press, 1989) 113.
23. J. Alan, Sovereign Statehood (London: OUP, 1986) 63.
24. Article 2 (1).

to come between. In International Law and ethics, intervention is used to note the assistance given by one or more governments to one belligerent against another or the action taken by governments outside their own territory to bring help to individuals or to aid one or more parties to internal dissension with another State.[25] Historically, the Ambrosian Judgment of the duty of intervention underwent considerable development in the 16th and early 17th centuries.[26] The Dominican Franciso de Vitoria (1483 - 1546), apart from reasserting the accepted teaching on the rightfulness of fighting in defence of allies who were attacked, stressed that intervention within other countries was justified and even a duty, notably in two sets of circumstances. First, it could be undertaken to save innocent people from massacre, human sacrifice, cannibalism or other violations of natural morality. This could be done to depose tyrannical rulers. The second set of circumstances relates to the right of rebellion. According to Vitoria, if the justice of a rebellion is doubtful, other rulers do not have the right to intervene. On the other hand, if it is evident that subjects are suffering injustice from their political rulers, it is lawful for foreign rulers to make war on those rulers.[27]

In International Law, intervention is diplomatic or military interference by one nation in the affairs of another without the nation's consent.[28] It is considered illegal under Customary International Law, as well as in many treaties since States are expected to be absolutely sovereign in their territories. In modern International Law however, intervention is regarded as an obligation of charity that should naturally lead one society to lend others, protection against unjust aggression; just as the duty of national benevolence makes us go to the defence of another person unjustly attacked.[29] Therefore, in international order, the triumph of an oppression may bring with it, greater and more imminent dangers for all the neighbouring peoples. Consequently, the defence of a nation which is the victim of oppression is not only of benevolence for the peoples whose territories adjoin it; it is also for them a question of public safety and national interest. In most cases, intervening countries usually rely on the fact that they are intervening to protect their own nationals or to defend themselves against aggression by the other country. Intervention is legal only when done for humanitarian reasons such as prevention of genocide or under the 'collective intervention' terms of the United Nations Charter to preserve international peace and security,[30] or through the involvement of other nations and regional organizations like the African Union, European Union, Economic Communities of West African States as in the present case of Cote d'Ivoire.

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25. New Catholic Encyclopedia, (London: Mc Graw-Hill Press, 1967) 593.
26. E. C. Stowell, Intervention in International Law (Washington: State Press, 1921)31.
27. Commentary on the Summa Theological of Thomas Aquinas, Chapter 40.1.6; See also, M. D. Freeman, Lloyd's Introduction to Jurisprudence, Op. Cit., pp. 151 - 156.
28. Academic American Encyclopedia, Op. Cit., p.230.
29. Taparelli d'Azeglia, Essay on Natural Law (Italy: Westminster, 1921) 91.
30. Article 42.

TYPES OF EXTERNAL INTERVENTIONS

Contemporary International Law recognizes certain types of interventions by foreign States and other organizations in the domestic affairs of other nations. First, is Protective Intervention which aims at protecting nationals of a State resident in a crisis-ridden nation provided that such intervention is not open to abuse, particularly when it involves a subjective interpretation by a State when its nationals are in danger. Ventilating her opinion on this issue, Rebecca Wallace noted that even if protective intervention is accepted, it must be recognized as an exception rather than the norm, not least because it involves violation of another State's territorial integrity and sovereignty.[31]

Intervention in Civil Wars is the second type of intervention. The fundamental principle here is that civil wars are not prohibited by International Law.[32] Going by the purposes and principles of the United Nations Charter however, the use of force is often prohibited in international relations.[33] On the issue of participation by other States in the internal affairs of a nation, the general rule is one of non-intervention. In fact, the General Assembly Declaration of the United Nations, 1970, affirms the principle of non-intervention in the independence and sovereignty of another state. The danger of intervention by a State in support of one party is that it will attract counter - intervention by another State or other States in support of the other party and consequently, an internal matter can escalate into an international war.

The third type of intervention is Classical Humanitarian Intervention which involves intervention to protect another State's nationals or group of nationals and possibly those of the territorial State. The intervening State is deemed not to be protecting its own right alone. Humanitarian intervention is also open to abuse because the intervening State may ostensibly intervene to promote an altruistic interest but in reality, it may be pursuing some political agenda. Protagonists of Classical Humanitarian Intervention however, support its use for the prevention of serious violations of basic human rights, normally the right to life even if it infringes the sovereignty of a nation.[34]

Contemporary Humanitarian Intervention constitutes the fourth type of External Intervention which relates to various activities of States permitted by the Security Council of the United Nations Organization to intervene in the internal crises of other nations. Instances of this intervention can be traced to counties like Iraq, Uganda, Somalia, Rwanda, Yugoslavia, Sierra Leone, Liberia, Haiti etc; where the use of force was employed to prevent genocide, violation of human rights, and other forms of war crimes. It is salient to point out that without a concrete resolution from the United Nations Organization or any recognized regional body approving a humanitarian intervention, no such

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31. R. M. Wailace, International Law (London: Sweet and Maxwell, 1997) 255.
32. Id; p. 256.
33. Article 2 (4).
34. B. A. Garner, Black's Law Dictionary, (Mimesota: West Publishing Inc., 2004) 840.

intervention is allowed in International Law.[35]

The major types of external interventions enumerated above can also be grouped into two, subject to certain strategies, methods, devices or approaches adopted by the intervening State(s) or organizations. The first is termed Quantitative Intervention which relates to such methods or devices adopted by interventionists to tinker with the affairs of any State without ensuring objective and analytical consideration of various issues involved in the particular crisis. This kind of intervention is premised on mere speculations or volume of information gathered from different sources relating to the seriousness or adverse effects of the crisis in the State concerned. Information on the prolongation of the crisis, huge losses to lives and properties and its devastating effects on economy and socio-political affairs of neighbouring States and the world at large; may weigh heavily on the mind of State Actors to compel them to take far-reaching decisions. Decisions taken through quantitative intervention approach are not often deep, incisive, thorough, scholarly and pragmatically analyzed. Issues connected with the subject matters are rather scratched on the surface by mere consideration of sentiments and emotions tending to favour the interest and position of a party to the crisis or the intervening authorities. In the case of Cote d'Ivoire, a rather quick or sudden arrival at the use of 'legitimate force' by ECOWAS and AU to oust Laurent Gbagbo and his allies if they refuse to surrender positional power to Alassane Quattara despite much persuasions can be described as quantitative intervention approach.

The second type is Qualitative Intervention which bothers on how good an intervention is, rather than with how much of it there is. It relates to making serious and objective analysis of issues involved in a matter by subjecting them to the microscope of empirical philosophy in the context of available precedents and notable experience before arriving at a decision. Qualitative intervention entails a wholistic appraisal of all convoluted material issues concerned with the subject of a dispute rather than on -the-spot assessment or scratching issues on the surface in favour of political and socio-economic considerations. It tends to undertake a deep examination of the history, terrain and features of the matter; its current dimension, effects and future consequences. An important characteristic of qualitative intervention is the ability of the intervening parties to critically and objectively consider their own positions as interventionists-whether or not, they are morally, ethically, diplomatically or legally justified in their actions. This approach should also include a closer look at the foundation of the crisis, its antecedents, remote and ultimate causes, dimension, effects and thereafter; working out favourable and workable strategies based on universally accepted principles of justice, equity and fairplay to provide acceptable solutions to such crisis. Giving the decisions and hurried actions of some notable key-players in the international

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35. M. Resisman, 'Sovereignty and Human Rights in Contemporary International Law, American Journal of International Law, Vol. 84 (1990) 66; See also Article 42 of the United Nations Charter.

community like African Union, ECOWAS and some allied nations, coupled with conflicting responses from Laurent Gbagbo and Alassane Quattara; it may not be credible to assert that members of the international community involved have adopted a qualitative intervention approach thus far, into the crisis in Cote d'Ivoire?

CRISIS IN COTE D'IVOIRE: PAST AND PRESENT

Under the leadership of Houphouet-Boigny, Ivory Coast (Now Cote d'Ivoire), enjoyed a stable Parliamentary Democracy between 1960 and 1993. When Houphouet - Boigny died in 1993, he was succeeded by Henri Bedie as the President. In 1999, Henri Bedie was overthrone by Robert Guei in a military coup. Houphouet - Boigny was known to have gotten the national charisma and wisdom to diffuse regional and religious rivalries notwithstanding his overbearing long tenure.[36] His successors on the other hand, were identified with politics of bitterness, cultural, tribal and social discriminations. All of a sudden, Ivorian Politics become a tussle between Northern Muslims where Alassane Quattara was born and Southern Christians - the home base of Laurent Gbagbo.[37] Alassane Quattara was the Prime Minister under President Houphouet - Boigny (1990 - 1993) and a flag-bearer of the Rally of the Republicans while Bernard Henri Bedie was also a Prime Minister between 1993 and 1999 when his regime was terminated by a military coup. He is the candidate for the Democratic Party of Cote d'Ivoire. Laurent Gbagbo on the other hand, is the candidate of the ruling Ivorian Popular Front.[38] When Alassane Quattara intended to run for the Presidency in 2000, he was disqualified on the ground that his parents were not Ivorians. The disqualification assisted Gbagbo to become the only contestant against the incumbent military leader, Robert Guei. There was a fierce contest over the Presidential Election between Gbago and Robert Guei but popular protest forced Robert Guei to cede power to Laurent Gbagbo. In 2002, the military struck again but Laurent Gbagbo was lucky in suppressing the plot which eventually plunged Cote d'Ivoire into a civil war between 2002 and 2004.[39]

In 2004 when the civil war ended, the Ivorian Presidential Election which was scheduled for 2005 was postponed six times covering a period of five years. This was due to logistic reasons, post-war trauma, difficulties involved in the electoral process, rehabilitation of Armed Forces and dilapidated public utilities.[40] After a long period of procrastinations, Laurent Gbagbo accepted to hold the first round of elections on October 31, 2010, which led him to score 38.4% of the total votes while Quattara scored 32.07%. On the second round of elections which held on November 28, 2010, Quattara was reported to

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36. Sunday Punch (Lagos), Vol. 17 No. 21, December 26 (2010) 8, *www.punchng.com* (site visited 27/12/10).
37. *http://www.biyokulule.com/view-comment*(site visited 09 -01 - 11).
38. Sunday Punch; No. 36 above, 14.
39. Ibid.
40. *http://alafricacom;cote d'Ivoire*: A critical Look at the Crisis (site visited 11/1/11).

have scored 54.1% compared to Gbagbo's score of 45.9% of the votes cast.[41] Gbagbo's thugs were reported to have disrupted the announcement of the results by the Independent Electoral Commission of Cote d'Ivoire so bad that one of them tore the results sheets into shreds in the presence of international press and Gbagbo's security agents.[42]

In order to legitimize Gbagbo's position, the President of the Constitutional Council announced on December 3, 2010, that over 1000 votes in the Northern part of Cote d'Ivoire belonging to Quattara were voided due to fraud.[43] At the National Stadium in Abidjan, Gbagbo was sworn in for another term of five years. Shortly after this exercise, Alassane Quattara was also sworn in as the President at the Golf hotel under the heavily guarded auspices of about 10,000 UN peace keeping force even though, Gbagbo and his supporters have been alleged to have mounted a serious barricade around the hotel.[44] It is sad to not that funding of the unsuccessful Ivorian election was borne solely by the international community to the tune of about 115 billion CFA fracs donated by countries like France, Japan, USA and the World Bank. The United Nations Observers, the African Union, the European Union and the United States of America have testified to the fact that Laurent Gbagbo lost the Presidential Election of 28th November, 2010 to Alassane Quattara.[45]

ALLEGATIONS AGAINST LAURENT GBAGBO

Some international observers and those who believe that they were quite familiar with political crisis in Cote d'Ivoire have levied certain allegations against the incumbent Gbagbo. First, it was said that he has violated one of the salient provisions of the Lome Declaration for an OAU Response to Unconstitutional Changes of Government in the sense that he, as an incumbent authority, refused to relinquish power to the winning party after free, fair and regular elections.[47] The problem with this allegation is whether or not Laurent Gbagbo and his supporters are convinced that the November 28, 2010 Presidential Election in Cote d'Ivoire was free, fair and regular? If that election was not credible, how can this allegation be sustained?

Second, Gbagbo was alleged to have contravened the provisions of the African Charter on Democracy, Elections and Governance, 2007, which forbid an incumbent authority to effect any amendment or revision of the Constitution or legal instruments which constitute an infringement on the principles of democratic change of government.[48] It was revealed that the Ivorian

41. *Mhtml:file://G:VOA* (site visited 12/01/11).
42. *http://allafrica.com*; p.2 (site visited 11/1/11.
43. Sunday Punch (Lagos), No. 36 above.
44. National Mirror (Lagos), January 10, (201) 52, *www.natinal mirrorsonline.net* (site visited 11/01/11).
45. Sunday Punch (Lagos), No. 36 above.
46. Vanguard (Lagos), January 19, (2011) 17, *www.vanguardng.com* (site visited 19/1/11).
47. Article 16 (iv) of the OAU Lome Declaration.
48. Article 23 (5) thereof.

presidential election which was scheduled for 2005 was postponed six times thereby, affording Gbagbo undue opportunity to extend his tenure for over a period of ten years. This allegation must be convincingly established further because other compelling reasons such as logistic problems, funding, rehabilitation of armed forces and basic infrastructure in Cote d'Ivoire; were given by Gbagbo and his supporters for the postponement of the election.

Third, it was also alleged that Laurent Gbagbo has been keeping a group of hooligans and political thugs who have no respect for the rule of law, human rights and democratic values. It was sadly reported that on the day the results were to be announced, one of Gbagbo's political thugs grabbed the results sheet and tore it into shred in the glare of the international community.[49]

Forth, Laurent Gbagbo has also been accused of being vehemently belligerent and with little or no consideration for the rule of law and decent opinions from the international community. If not how could he and his allies go to the extent of erecting defile around his opponent without respect for the United Nations Peace Keeping Force already stationed to protect Alassane Quattara? Also, in view of many pieces of advice and persuasions from various organizations, Heads of States and Prominent individuals; how could he and his supporters continue to be adamount, defiant and obstinate?[50]

The present state of affairs in Cote d'Ivoire presents intermittent clashes between supporters of Laurent Gbagbo and Alassane Quattara especially in cities like Abidjan, Abobo, Yamoussoukro and the Western Regions, leaving about 30,000 people as refugees fleeing to neighbouring countries like Liberia, Guinea and Burkina Fasso.[51] Right from the beginning of the political crisis in November, 2010, between 300 and 400 people have been reported to have been killed.[52] Laurent Gbagbo still retains control of the army, police and civil service.

REACTIONS FROM THE INTERNATIONAL COMMUNITY

Reactions to the unfortunate political crisis in Cote d'Ivoire have been spontaneous. The Economic Community of West Africana States and African Union immediately suspended illegal government of Cote d'Ivoire from the two blocks until Gbagbo cedes power to Alassane Quattara as the nation's President.[53] The European Union threatened to place travel ban and freeze assets of members of Gbagbo's government, ECOWAS has decided to close down the Central Bank of West Africa to starve Gbagbo of funds,[54] the

49. *http://allafrica.com*, n.40 above, 2.
50. *http://www.france24.com/eu/20110103 - gbagbo-defiant-11-01-2011*, (site visited 12/1/11).
51. Saturday Mirror (Lagos), February 26 (2011) 55, *www.nationalmirroronline-net* (site visited 27/1/11); See also, National Mirror (Lagos), February 15 (2011) 52.
52. The Guardian (Lagos), February 23 (2011) 11, *www.ngnguardiannews.com* (site visited 24/1/11).
53. Daily Sun (Lagos), Vol. 6 No. 1987, February 9, (2011) 15; *www.sunnewsonline.com* (site visited 9/2/11).
54. National Mirror (Lagos, Vol. 1 No. 37, 18 February (2011) 44.

United States of America has advised Gbagbo to step down while the UNO has also vowed to defend Alassane Quattara at all costs. In fact, the UN Secretary General, Ban Ki-Moon, has warned Gbagbo and his allies of severe consequences if the UN Peace Keeping Troops were attacked.[55] Threats from ECOWAS have been more direct concerning instructions to their military Chieves of Defence Staff to strategise and get ready for the use of 'legitimate force' in the event that Laurent Gbagbo refuses to cede power to Alassane Quattara.[56] Early February, 2011, Five African Presidents of South Africa, Tanzania, Mauritania, Burkina Fasso and Chad, were given the mandated by the African Union to resolve the crisis in Cote d'Ivoire and report back within a period of one month.[57] Inspite of all these threats and pieces of advice, Gbagbo and his allies have defied the international community. It is also interesting to state that on Monday, February 14, 2011, Laurent Gbagbo filed a law suit against ECOWAS for recognizing his rival, Alassane Quattara as the winner of the country's presidential election of November 28th, 2010. The action, which was filed at the Economic Community of West African States' Court of Justice, Abuja, Nigeria; asked judges to void and annul decisions by the regional block that recognized Quattara as the winner.[58]

CAN THE USE OF FORCE PROVIDE ENDURING SOLUTION?

Up till the first week of February, 2011, when Heads of States of African Union decided to appoint Five prominent African leaders to mediate between the warring political parties in Cote d'Ivoire; the overriding threat from the ECOWAS in the particular, had being the use of 'legitimate force' to oust Gbagbo if he should refuse to cede power to Quattara. The term 'legitimate force' as used by ECOWAS and in the ordinary grammatical meaning, could be deemed as a force recognized as just, fair and acceptable to all members of the international community as the only device capable of resolving political crisis in Cote d'Ivoire. In the light of past and present circumstances, the concern of this article is whether any force, however, legitimate, can bring about a lasting solution to the political logjam in that nation.

A candial issue relates to legitimate use of force in the process of intervening in the crisis of Cote d'Ivoire. The word legitimate has been defined as meaning; complying with the law, something lawful, valid and genuine.[59] The question is whether the use of force by other nations in resolving Cote d'Ivoire's crisis can be considered legitimate in the present circumstance? Article 2(1) of Chapter one of the Charter of the United Nations provides that the Organization is based on the principle of the sovereign equality of all its members. Cote d'Ivoire, as a State Member of the United Nations Organization

55. Sunday Punch, n. 36, 14.
56. BBC News - Africa - ECOWAS bloc threatens Ivory Coast, n. 9, 1.
57. The Punch (Lagos) Vol. 17 No. 20, February 2 (2011) 66, *www.puncontheweb.com* (site visited 2/2/11).
58. National Mirror (Lagos), February 15 (2011) 52.
59. B. A. Garner, Black's Law Dictionary, n. 34 above, 920.

is entitled to her sovereignty equal in principle to other nations. Article 2 (4) of the same Charter also provides that:

> *"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations".*

In the same vein, Article 2 (7) of Chapter one of the same Charter states that:

> *Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter;…"*

In Chapter IV of the Charter, Article 11(2) and (3) provides that:

> *"The General Assembly may discuss any questions relating to the maintenance of International Peace and Security brought before it by any member of the United Nations, or by the Security Council, or by a State which is not a member of the United Nations…"*

> *"The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security".*

In the context of the above cited provisions of the Charter of the United Nations Organization, certain issues are clear in relation to the intervention of other States and Organizations in the Cote d'Ivoire's crisis. First, Cote d'Ivoire, as a Member of the United Nations Organization is expected to exercise her sovereignty in the same manner equal to those of other States. Second, other nations which are Members of the United Nations, Organization like Cote d'Ivoire, are prevented from the use of force or threat, against her territorial integrity or political independence. Third, the crisis in Cote d'Ivoire is strictly speaking, within her domestic jurisdiction. Hence, as a Member of the United Nations Organization, her domestic affairs should not be interfered with anyhow, without a reasonable just cause. Also, Cote d'Ivoire cannot be compelled to submit her domestic affairs or crisis to the United Nations Organization for settlement.

Fourth, if per chance, the crisis deemed as domestic affairs of Cote d'Ivoire, degenerates to a point which attracts questions bothering on international peace and security, nothing will prevent any Member State or the Security Council from bringing the attention of the General Assembly of the UNO to such an issue. Fifth, in case the crisis is of Cote d'Ivoire precipitates further as to endanger international peace and security such as, loss of lives and properties of innocent citizens of other nations resident in that country, or worsening conditions of refugees threatening the security of neighbouring

States; the General Assembly of the UNO can call the attention of the Security Council to wade into the matter notwithstanding the suspension placed in Cote d'Ivoire by ECOWAS.

No individual may predict pointedly, the outcome of any military action in the Cote d'Ivoire's crisis rather than the expectation of sorrow due to huge loss of human lives and property. Less than six months, close to 400 people have been reported killed while about 30,000 people turned refugees. In the case of Nigeria, what will be the fate of her 2.5 million citizens? The use of force will worsen the problems of refugees and population explosion of adjourning nations which will have no alternative than to evacuate their citizens. Unlike the military actions of the UNO, AU and ECOWAS in crises of Sierra Leone, Liberia, Somalia. Cote d'Ivoire is relatively a wealthy nation (notwithstanding the imposition of economic sanctions by some nations), which may still be able to fund a strong army already fortified to some extent, by France. Hence, it has been argued that any force deployed to Cote d'Ivoire may meet a lot of resistance which is likely to prolong the crisis rather than it may be expected.[60]

Neither the regional nor international leaders can demonstrate that they have exhausted diplomatic and non-military options at this point to warrant the use of force. The reactions of ECOWAS in the first instance was rather quick and spontaneous leading to the assemblage of Military Chieves of Staff of ECOWAS with a view to putting strategies in place for the use of force in Cote d'Ivoire. It is rather unfortunate that such a magnitude of threat could turn out to be a long period of diplomatic persuasions.

Facts have also emerged of recent, that there is a division among members of ECOWAS over reservations expressed by countries like Ghana and Burkina Fasso, to contribute troops to the ECOWAS standby force for military operation in the crisis of Cote d'Ivoire.[61] Some other leaders of ECOWAS have also been oscillating between fear and courage over the use of force in Cote d'Ivoire. Situations like these may not guarantee a properly coordinated and articulate position among nations that opt for the use of force and this may work against their intention to rely on military intervention as a viable option. In the face of global economic recession and its devastating effects on African nations especially members of ECOWAS, those nations chanting the use force should be mindful of their limited financial resources before opting for war that will require huge human and material resources to prosecute. For instance, nobody expects a country like Nigeria to be involved in any venture likely to deplete her treasury when she has unresolved problems of political elections, Niger Delta, Bokko Harram, Jos crisis, epileptic power supply, unemployment and insecurity of life and property.

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60. The view of Dr. Kwesi Anning Why Military Action is a bad idea, *http:// www.biyokulule.com* (site visited 6/1/11) 13.
61. Nigerian Tribune (Ibadan), February 8 (2011) 6, *www.tribune.com.ng* (site visited 8/ 2/11).

Recalling the sad and agonizing effects of war in many nations, emphasizes have been placed on the need to exhaust all diplomatic and consular remedies before embarking on the use of force as an alternative means of resolving the crisis in Cote d'Ivoire. Military interventions by the United Nations, African Union and ECOWAS in the crises of some African countries like Liberia, Sierra Leone, Uganda, Somalia, Sudan and even Cote d'Ivoire, have precipitated much calamities to the extent that most of these nations are still gasping for restoration. Working out a qualitative intervention by an Institution like ECOWAS should also take account of the implication of any action designed to tinker with the crisis over which Gbagbo had instituted an action before ECOWAS Court in Abuja. Except there is an amendment to Articles 11 and 56 of the Treaty[62] of ECOWAS 1975, such intervention may be seen as an attempt to tamper with a matter subjudice which is punishable for contempt of the court.

CONCLUSION - OBSERVATIONS AND RECOMMENDATIONS

Perusing the crisis in Cote d'Ivoire and appraising the involvement of different stakeholders, it would appear that the United Nations, African Union and ECOWAS have declared their support openly for Alassane Quattara based on popular contention that he won the Presidential Election of November 28, 2010. There is nothing wrong in taking sides if the above named institutions were seriously convinced of facts and figures upon which their positions have been premised. The issued is whether these institutions should rely wholly on the statements and observations of different electoral observers in Cote d'Ivoire or go further to inquire from other authentic sources before taking side with Alassane Quattara. Even if the institutions appear justified in supporting Quattara, how will they be expected to remain neutral in mediating directly between the rival political parties? These institutions appear to have forfeited their unique status as independent arbiters and that is why they have not been effective in ensuring proper resolution of the crisis. As a sensitive international matter, one would have expected the various mediating authorities to embark on a more objective, constructive and qualitative approach capable of providing an enduring resolution of the crisis.

The African Union and ECOWAS could be said to have done the right thing by sending envoys and emissaries to Cote d'Ivoire with a view to making peace between the warring parties but there appear to be good missions and wrong emissaries in the entire process. For instance, since the Kenyan Prime Minister, Raila Odinga was one of the first proponents of the use of force in Cote d'Ivoire; the confidence likely to be reposed in him by warring parties in ensuring dispassionate resolution has been seriously eroded. Also, the first set of ECOWAS delegation to Cote d'Ivoire included Presidents Bai Koroma of Sierra Leone, Pedro Pires of Cape Verde and Yaya Boni of Benin. It has

62. The Provisions relate to the establishment of a Tribunal of the ECOWAS and it is charged with the responsibility of settling disputes related to the community.

been argued elsewhere, that none of these leaders have gotten any political or economic clout to persuade or compel Laurent Gbagbo in this matter.[63]

Good enough, the African Union took another bold step by sending Five African Presidents of South Africa, Tanzania, Mauritonia, Burkina Fasso and Chad to Cote d'Ivoire for the purpose of resolving the crisis. The present group of leaders appear to be good emissaries if only they could be proactive and more dispassionate in their intervention. Such approach may be adopted by establishing an Independent International Commission made up of reputable individuals within and outside Cote d'Ivoire, and from whom dependable facts and cogent evidence about the presidential election of 28th November 2010 can be gathered. Any recommendation of the emissaries which emanates from such a Commission and if adopted by the international community will be binding on the warring parties and respected by them. In case this approach fails, there is another possibility of a coup d'etat in which Gbagbo, Quattara and their allies (Considered as troublers of Cote d'Ivoire), may be swept away. Such a military regime of sincere and patriotic officers may decide to embark on durable democratic process founded on true reconstruction, rehabilitation and reconciliation. This approach may however be termed as a worst scenario.

In view of the huge investments in terms of money, materials and human resources committed by some notable nations to finance elections in Cote d'Ivoire and the fact that the status of Gbagbo's government is rather de facto and not de jure; can total sovereignty be claimed by Laurent Gbagbo? Even if the regime of Gbagbo could still be recognized by some other nations, certain decisions from United States of America, France, Britain and other members of ECOWAS to invoke economic sanctions against Gbagbo and his allies; are factors which can militate against Gbagbo's absolute claim of sovereignty. Political sovereignty without effective recognition and sound economy may not be workable in both diplomatic and consular relations. Instead of military intervention, imposition of serious economic and diplomatic sanctions against Gbagbo and his allies by intervening authorities is a more pragmatic and democratic device for forcing them to cede power to Quattara. This position is however subject to final convictions that the November 28, 2010, presidential election in Cote d'Ivoire was overwhelmingly won by Alassane Quattara.

Despite the plethora of consultations, mediations and pleadings with Laurent Gbagbo and his allies to cede power to Alassane Quattara, it is observed that a more aggressive, daring resistance and obstinacy still characterize the reactions of Gbagbo and his supporters. It would appear that they have made up their mind to perpetuate their regime or settle for a government of unity. In the light of the unpleasant examples in Kenya and Zimbabwe, except if Gbagbo and Quattara find no useful alternative for peace than a government of Unity; such undemocratic political formula should not be

63. See Francois Soudan, 'In Laurent Gbagbo's Head,' *www.biyokulule.com*, n.37 above, 12.

embraced by the international community. If allowed in the present circumstance, other sit-tight dictators in Africa will continue to toe the same approach and it may become an unruly political phenomenon capable of threatening political destiny of African nations.

Resolving the crisis in Cote d'Ivoire require protracted dialogue and negotiations between the parties concerned. Mediators and interventionists must be patient, loyal and endurant. It may not be possible to end the crisis by dialogue and persuasions. War and the use of force may likely ensure between the two political rivals. It is advisable not to allow the use of force to emanate from the various intervening authorities. If Gbagbo and Quattara feel that war and the use of force are inevitable option and if international peace and security are seriously threatened in the process; international community will then decide on what should be the appropriate action to take in resolving the crisis. Whatever the option, it is hereby reinstated that a qualitative intervention approach should be adopted in resolving the crisis in Cote d'Ivoire.

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CUSTOMS HAVING THE FORCE OF LAW: LOCATING "AGRICULTURAL LAND" IN WOMEN'S RIGHT TO INHERIT PROPERTY

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ABSTRACT:

Article 13 of the Constitution of India includes "custom or usage, having in the territory of India the 'force of law'" within the definition of law. There are many areas where the custom and usages having the force of law have over shadowed what is called the "in force" under the same Article 13. One such poignant area is the issue of agricultural land holding among women. Although formal laws promulgated by the legislature has endeavoured to establish gender justice, there are still certain areas in women's right to property which is, notwithstanding the 2005 amendment to Hindu succession Act,1956, continue to be influenced by customary beliefs. This not only has gender ramifications but also has an adverse economic impact.

Key words: *Custom, Property Rights of women, Agricultural Land.*

I. INTRODUCTION

The Constitution of India under Article 13 of includes "custom or usage, having in the territory of India the 'force of law'" within the definition of law. There are many areas where the custom and usages having the force of law have over shadowed what is called the "in force" under the same Article 13. One such poignant area is the issue of agricultural land holding among women. Although formal laws promulgated by the legislature has endeavoured to establish gender justice, there are still certain areas in women's right to

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property which is, notwithstanding the 2005 amendment to Hindu succession Act,1956, continue to be influenced by customary beliefs. This not only has gender ramifications but also has an adverse economic impact both in terms of eschewed economic growth and economic empowerment of women. The traditional calculation of the GDP fails to take into account of the domestic production made by women and the invisible contribution made to economy from the "domestic sector". Where women are not formally holding agricultural land at the village level, they are relegated into the realm of "invisible contribution" because the subsistence farming done by them for meeting the food needs of the family seldom figures in economic growth calculations and she ends up as unpaid agricultural labour in family holdings. Corporatisation of agriculture, international trade, urban migrations, genetically modified seeds have all taken a toll on Indian agriculture in general but more

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specifically has deprived the Indian woman of her subsistence farming upon a piece of land on which she had no right at all.

Land is a solid, immovable, indestructible portion of the outer layer of the surface of the earth as distinguished from sea and ocean. Its position may be distinguishable by real or imaginary points. The surface may be comprised of varying materials such as water (in the form of ponds, lakes, streams, and rivers), rock and soil. More importantly land is an indispensable factor of production.

Property may be tangible or intangible. It can also be personal, public, or private. It may be owned or possessed. The owner gets a title over the property and may consume, sell, gift, mortgage, gift, lease or destroy. Ownership establishes the relation between the property and other persons, assuring the owner the right to dispose of the property as they see fit. Some philosophers assert that property rights arise from social convention. Others find origins for them in morality or natural law. Land is an integral part of such a debate. Traditional Principles of Property Rights Include:

1. Control and use of the property

2. The right to any benefit from the property (examples: mining, rent etc.)

3. Right to transfer or sell the property, and

4. Right to exclude others from the property.

Traditional Principles of Property Rights do not Include:

a. uses that unreasonably interfere with the property rights of another private party (the right of quiet enjoyment)

b. uses that unreasonably interfere with public property rights, including uses that interfere with public health, safety, peace or convenience

II. WOMEN'S RIGHT TO PROPERTY IN THE ANCIENT AND MEDIEVAL CUSTOMARY LAWS

A. THE HINDU POSITION

The ancient and medieval period can be marked as an era of intense intellectual activities. It would not be amiss to begin a journey into this era from the Sruti-Smriti ages. The Dharmashastra in all its stages of evolution has been overly protective about women and were terrified at the thought of the women taking liberties. The ideally acceptable situation was to keep the women confined to the four walls of their homes with no opportunity or permission to communicate with males other than their husband, father or son. The entire era appears to be paranoid about protecting and preventing women from becoming "corrupted". It is an accepted fact that society should provide protection should provide protection to its members. Apparently the process begins at home and according to the Dharmashastra it is the duty of the grihastha [householder], the father is principally to look after the aged, children etc. This arrangement extended to the joint family where several generations of male descendants of a common male ancestor lived under the same roof with a common economic resource. The senior most male member is the Karta, who was the guardian of the entire household. However partition of property was allowed to those who desired a separate home and hearth. Since the society was and continues to be patriarchal in matters of property right the male got the primacy but maintenance provision existed for mother, daughters in law, widows of the deceased male members, daughters and unwed and illegitimate keeps[1].

The Dharmashastra thus deals with the religious and moral laws. There is a statement in the Code of Manu that the Sruti, Smriti, Customs of virtuous men, and one's own conscience [self approval][2] are the primary source of Hindu law. But the Smriti writers knew the difference between Vyavahara and the law that was understood in the widest sense in the form of Sruti and Smriti. Breach of the former resulted in judicial proceedings.

Manu who is considered to be the primary law givers to the Hindus had formulated some very interesting laws. Be she a girl or a young woman or even an aged one, nothing must be done independently even in her own house[3] in childhood she subject to her father, in youth to her husband, in widowhood to her sons. A woman is never fit for independence[4]. She must not separate herself from father, husband or son and make both families contemptible[5]. Day and night she must be kept dependent upon the males of the family[6] the whole property after the death of parents were to be inherited

1. S. C. Sircar, Hindu Law, Bharat Law House, [1957], see generally pages 10-65; Mayene's Treatise on Hindu Law & Usage [fifth Edition, 2006] Revised by Justice Ranganatha Misra,Bharat Law House, See generally, Pages 5-161
2. Manu II. 6. 12; Yaj. I. 7; Mandlik 159 adds desire produced by a virtuous resolve.
3. Manu .V.147
4. Manu.V.149 and IX .2
5. Manu. V.149
6. Manu.IX.2

by the sons[7] but the separate property of the mother called streedhana was the share of daughter alone. In the absence of an heir the property reverted back to its source.[8] Maternal grandmother may give her stridhana property to her granddaughter[9].

At the same time, the Manu Smriti contradicts itself by declaring that a wife has no property and the wealth earned is for the husband[10]. Daughters and sons equally inherited their mother's property; but insist that a mother's property belongs solely to the daughters[11], in order of preference: unmarried daughters, married but poor daughters, married and rich daughters. When a father died, unmarried daughters had to be given a share in their father's property, equal to one-fourth from every brother's share [since it is assumed that the married daughter had been given her share at marriage][12]. If the family has no sons, the (appointed) daughter is the sole inheritor of the property[13].

So, the question of women inheriting property [let alone land] was a far cry. The concept of absolute ownership of property where women were concerned was not there. Obviously, even if the woman was given land as streedhana it would inevitably be in the hands of her father, brother, husband or son as she would be completely dependent upon them and not sufficiently educated to handle the property (land) by herself.

Manu recognises that a woman has a right over her streedhana. He recognises the following types of Streedhana:

i. Adhyagni- Gifts before nuptial fire[14]

ii. Adhyavahanika- Gifts given during 'vidai' when she leaves her father's house with her husband[15].

iii. Pritidatta- Gifts from parents in law[16]

iv. Padavandanika- Gifts given during 'muh dikhai' and touching the feet of elders[17]

v. Gifts from father, mother, brother[18]

vi. Anwadheyaka-Gifts subsequent made by husband's relatives[19]

vii. Adhivedanika-Gifts by husband to the wife for taking another wife[20]

7. Manu. IX. 104
8. Manu. IX. 131
9. Manu. IX. 93 - 200
10. [Manu VIII.416]
11. Manu IX 131
12. Manu IX. 118
13. Manu IX 127
14. Manu. IX. 194; Yaj. II.143
15. Ibid;
16. Ibid; Nar. XIII.8
17. Ibid; Yaj. II.143
18. Ibid
19. Manu. IX. 195; Yaj. II.144
20. Yaj. II.144; Vishnu. XVII.18

viii. Bandhudatta- friends and relatives of father and mother[21]

ix. Sulka-

a. Bride price[22]

b. Special present ti the bride to go cheerfully to her in laws house[23]

c. Cost for furniture and house hold goods for the new home[24]

x. Adhya- Such other

According to Kautilya, maintenance and ornaments constitute women's property. Maintenance only of two thousand panas and ornaments without limit which she may use as she pleases for giving gifts to her children, grand children etc. or for any household purposes[25]

Thus, even if under the tenets of Manu, one could include the possibility of women inheriting land or agricultural land as streedhana, Kautilya put an effective end to it. An interesting thing to note is that the streedhana is definitely meant for women but the nature of gift is not described thereby setting a convention more towards movable gifts so that the woman can physically hold on to it. So even if women had received land as streedhana during Manu's period, she sure did not receive land during the kautilyan period [Mauryan dynasty]

Eventually two schools of thought emerged regarding property rights of the Hindus. The Mitakshara School of thought owes its existence to Vijnyaneshwara and the Dayabhaga School of thought to Jimutavahana. The Mitakshara is a commentary on only one Smriti called Yajnavalkya Smriti, whereas Dayabhaga is a digest of all the Smritis. The question therefore which arises is as to why Vijnaneshwara chose only the Yajnavalkya Smriti for his commentary. There was Manu Smriti which was held in even greater respect than Yajnavalkya Smriti, but Vijnaneshwara preferred to write his commentary on the Yajnavalkya Smriti rather than on Manu Smriti. For an answer to this question Manu Smriti has to be compared with Yajnavalkya Smriti.

Manu Smriti is not a systematic treatise. It does not have a clear-cut division between religion and law, as in Yajnavalkya Smriti. If we read the Manu Smriti, we will find that there is one shloka on religion, the next shloka on law, third on morality, etc. Everything is jumbled up. On the other hand the Yajnavalkya Smriti is divided into three chapters. The first chapter is called Achara which deals with religion, the second chapter is called Vyavahara which deals with law, and the third chapter is called Prayaschit which deals with penance. Thus, there is a clear demarcation between law and religion in Yajnavalkya Smriti, which is not to be found in the Manu Smriti. This demarcation between law and religion itself is a great advance over the Manu

21. Yaj. II.144
22. ibid
23. Vyasa, Dig II. 592
24. Viramit. V..1,3
25. kau.3.2.14-37

Smriti. Thus, the Yajnavalkya Smriti marks a tremendous advance in law over the Manu Smriti. Law is now clearly separated from religion. This is analogous to the Roman law or to the positivist jurisprudence in the 19th century of Bentham and Austin. Also, the Yajnavalkya Smriti is shorter and more liberal, particularly towards women than the Manu Smriti. It was perhaps for this reason that Vijnaneshwara preferred the Yajnavalkya Smriti to the Manu Smriti for writing his commentary. As is well known, the Mitakshara was written by Vijnaneshwara during the reign of Vikramarka, a Chalukya ruler of the 11th century A.D[26].

The bifurcation of the Mitakshara and Dayabhaga was due to two different interpretations given to a single word "sapinda". Manu has written that when a man dies, his property goes to his nearest "sapinda". The meaning of the word "sapinda" depends upon the meaning of the word "pinda". According to Dayabhaga, "pinda" means the rice balls which are offered in the Shraddha ceremony to one's deceased ancestors. On the other hand, according to the Mitakshara the word "pinda" does not mean the rice balls offered at the Shraddha ceremony at all but it means the particles of the body of the deceased. The term "sapinda" as used in the Smritis and by the commentators before Vijnaneshwara meant only those connected with the funeral obligations. Vijnaneshwara's definition of "sapinda" as one connected by the particles of the same body was apparently unknown to any previous commentator. He cites no Smriti in support of his view, but only the Vedic texts on the theory of heredity which do not mention "pinda" or "sapinda" at all[27]. In this connection the Mitakshara may be contrasted to the Dayabhaga system. In the chapter which deals with the subject of succession, Dayabhaga appeals to the doctrine of religious efficacy at every step, testing the claims of rival heirs by their numbers and nature of their respective offerings. On the other hand, the Mitakshara never once alludes to such a test[28], The claims of rival heirs are determined primarily by the test of degrees of propinquity and not religious efficacy. Even persons who confer no religious benefits to the deceased are admitted as heirs for the reason of affinity. Vijnaneshwara states emphatically that "sapinda" relationship does not depend upon the relationship of the deceased through the offering of the "pindas" and his getting it or not, but it depends upon having the same particles of one's body. He rested the rules of law on purely practical and rational considerations. Combating the view that the wealth of a regenerate man is designed for religious uses exclusively, Vijnaneshwara says: "If that were so, other purposes of opulence and gratification, which are to be effected by means of wealth, must remain unaccomplished and if that be the case, there is an inconsistency in the following passages of Yajnavalkya, Gautama and Manu, 'Neglect not religious duty, wealth or pleasure in the proper season.' Vijnaneshwara relies on no

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26. Justice Markandey Katju, The Importance Of Mitakshara In The 21st Century, (2005) 7 SCC (J) 3
27. Ibid
28. *Balasubrahmanya Pandya Thalaivar v. M. Subbayya Tevar* 1, IA (PC) at p. 102.

Smriti authority in support of his contention that the word "sapinda" has a secular and not religious connotation. Instead, Vijnaneshwara displayed his creative brilliance by relying for this purpose on Jaimini's Lipsa Sutras as he calls the 3rd Adhikarana of Chapter I Book IV of Jaimini's Sutras[29].

According to Vijnaneshwara, the origin of property is popular recognition, and hence the basis of inheritance and succession is relationship by blood. While Jimutavahana makes the text of Manu on the subject the foundation of his principle of inheritance, Vijnaneshwara mainly relies on the text of Yajnavalkya, because the latter prefers the matter of factual aspect. Vijnaneshwara utilises the Mimansa Adhikarana as interpreted by Prabhakara who is reputed to be a heterodox propounder of the Mimansa Sutras, while the orthodox interpretation of the Adhikarana as given by Savaraswami and Kumarila Bhatta gives no support to Vijnaneshwara's views[30]. Jimutavahana who wrote the Dayabhaga, did not permit inheritance to a son at birth. This is because Dayabhaga followed the traditional rule that only the person who can perform Shraddha for his ancestor can inherit the property. In the book called Parvana Shraddha the list of persons who can perform Shraddha is mentioned. At Serial No. 1 of the list is the son. At Serial No. 2 is the son's son, etc. The general rule is that if a person at a higher position in the list is available, then one cannot go down the list, and the list terminates there. For instance, if the son is alive, then the son's son (i.e. grandson of the deceased) has no right to perform the Shraddha, because the grandson is at Serial No. 2 in the list given in Parvana Shraddha, whereas the son is at Serial No. 1. Hence, the grandson of the deceased has no right to inherit the property when the son is alive, because the grandson has no right to perform Shraddha when the son is alive[31].

It is for this reason that there is no inheritance at birth in Dayabhaga when the father is alive. This is in sharp contrast to the Mitakshara in which the son inherits a share in the ancestral property at birth. Similarly, in Dayabhaga the unborn son in the mother's womb cannot inherit a share in the property, because an unborn son cannot perform Shraddha. On the other hand, in the Mitakshara an unborn son in the mother's womb gets a share in the ancestral property. Dayabhaga prefers the father to the mother, because he presents two oblations in which the deceased son participates, while the mother presents none. Vijnaneshwara takes exactly the opposite view on the ground that "her propinquity is greatest".

Similarly, the right of a daughter to succeed is rested by Jimutavahana upon the funeral oblations which may be hoped for from her son, and the exclusion of widowed, or barren, or sonless daughters, is the natural result. Vijnaneshwara excludes neither the widowed nor the barren daughter, but prefers one to another, accordingly as she is unmarried or married, poor or

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29. Justice Markandey Katju, The Importance Of Mitakshara In The 21st Century, (2005) 7 SCC (J) 3
30. Ibid
31. Ibid

rich, that is, according as she has the best natural claim to be provided for. The right of a daughter's son when he succeeds on the death of the widow and daughter certainly rests far more upon consanguinity than on religious efficacy. The preference of the daughter's son to agnates, whose claims based upon pinda offerings are stronger, can only be explained by propinquity. According to the Mitakshara, the Shraddha of the maternal grandfather is not obligatory but is only optional, except when the mother's sapindikarana has taken place with the maternal grandfather. The express view laid down in the Mitakshara on the Shraddha rites that sapinda-relationship with the deceased is wholly independent of his being benefited by the pindas or not, is decisive and is consistent only with the conclusion that propinquity must be judged without reference to the grades, number or quality of the funeral offerings.

The conclusion therefore is irresistible that the Mitakshara does not admit religious efficacy either as a basis of heirship or as a measure of propinquity. The rules governing the right to perform Shraddhas or the offering of pindas, though in part determined by propinquity, are also in part influenced by different considerations. Religious efficacy as deduced from these rules can therefore furnish no safe or satisfactory test as regards the order of succession.

The exclusion of women from ownership and the limitation of male ownership to only four degrees arose due to the custom prevailing in ancient times and religious considerations. A subordinate position was given to women due to several reasons and religious practices and beliefs[32].

Another important differences between the two schools is that under the Dayabhaga, the father is regarded as the absolute owner of his property whether it is self-acquired or inherited from his ancestors. Mitakshara law draws a distinction between ancestral property (referred to as joint family property or coparcenary property) and separate (e.g. property inherited from mother) and self-acquired properties. In the case of ancestral properties, a son has a right to that property equal to that of his father by the very fact of his birth. The term son includes paternal grandsons and paternal great-grandsons that are referred to as coparceners. An important category of ancestral property is property inherited from one's father, paternal grandfather and paternal great-grandfather. The other categories are:

i) Share obtained at a partition

ii) Accretions to joint properties and self-acquisitions thrown into common stock.

The point that deserves attention is that under traditional Hindu law, a daughter is not entitled to property rights by birth in such ancestral properties. In the case of separate or self-acquired property, the father is an absolute owner under the Mitakshara law. So except the small area where the

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32. Vijender Kumar, Hindu Law of Coparcenary and Its Composition *http://www.scribd.com/doc/33115992/2-Hindu-Law-of-Coparcenary-and-Its-Composition* visited on 16 March, 2011 at 1755hrs

Dayabhaga law prevailed in the rest of India women did not have any right to property.

B. THE ISLAMIC POSITION

The Islamic conception of the first creation is found in several places in the Quran, for example:

"O Adam dwell with your wife in the Garden and enjoy as you wish but approach not this tree or you run into harm and transgression. Then Satan whispered to them in order to reveal to them their shame that was hidden from them and he said: 'Your Lord only forbade you this tree lest you become angels or such beings as live forever.' And he swore to them both that he was their sincere adviser. So by deceit he brought them to their fall: when they tasted the tree their shame became manifest to them and they began to sew together the leaves of the Garden over their bodies. And their Lord called unto them: 'Did I not forbid you that tree and tell you that Satan was your avowed enemy?' They said: 'Our Lord we have wronged our own souls and if you forgive us not and bestow not upon us Your Mercy, we shall certainly be lost' " [33]

A careful look into the story of the Creation reveals some essential facts. The Quran places equal blame on both Adam and Eve for their mistake. Nowhere in the Quran can one find even the slightest hint that Eve tempted Adam to eat from the tree or even that she had eaten before him. Eve in the Quran is no temptress, no seducer, and no deceiver. Moreover, Eve is not to be blamed for the pains of childbearing. God, according to the Quran, punishes no one for another's faults. Both Adam and Eve committed a sin and then asked God for forgiveness and He forgave them both.

A strict reading of the Quran provides far more liberal rights for women in terms of property than is normally believed. The Qur'an, revealed to Muhammad over the course of 23 years, provides guidance to the Islamic community and modified existing customs in Arab society. The early reforms under Islam, the Qur'an introduced fundamental reforms to customary law and introduced rights for women in marriage, divorce and inheritance. By providing that the wife, not her family, would receive a dower [Mahr] from the husband, which she could administer as her personal property, the Qur'an made women a legal party to the marriage contract. The Qur'an contains specific and detailed guidance regarding the division of inherited wealth[34]. However, many Islamic majority countries have allowed inherently unfair (towards woman) inheritance laws and/or customs to dominate[35].

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33. Qur'an. 7.19.23
34. Surah Baqarah, chapter 2 verse 180, chapter 2 verse 240; Surah Nisa, chapter 4 verse 7-9, chapter 4 verse 19, chapter 4 verse 33; and Surah Maidah, chapter 5 verse 106-108. Three verses in the Qur'an describe the share of close relatives, Surah Nisah chapter 4 verses 11, 12 and 176.
35. For example Tunisia. Tunisia, have legislated against this liberalism, since they hold that it places too high of a burden on men.

In Islam, women are entitled to the right of inheritance[36]. In general circumstances, though not all, Islam allots women half the share of inheritance available to men who have the same degree of relation to the decedent. For example, where the decedent has both male and female children, a son's share is double that of a daughter's.[37] Additionally, the sister of a childless man inherits half of his property upon his death, while a brother of a childless woman inherits all of her property[38]. However, this principle is not universally applicable, and there are other circumstances where women might receive equal shares to men. For example, the share of the mother and father of a childless decedent. Also the share of a uterine brother is equal to the share of a uterine sister, as do the shares of their descendants[39].

Also the Qur'an does not discriminate between men and women in cases of kalalah relation[40]. Kalalah describes a person who leaves behind neither parents nor children; it also means all the relatives of a deceased except his parents and children, and it also denotes the relationships which are not through [the deceased's] parents or children.

Islamic scholars hold that the original reason for these differences are the responsibilities allotted to spouses. A husband in Islam must use his inheritance to support his family while a wife has no support obligations. Also, men had to pay the dower to women in marriage while women did not have to pay anything to men[41].

The dower (the mahr) lies at the basis of all Islamic law related to women and property. When a woman accepts her dower, she has consented to the proposed marriage, and now has her own capital. The woman has all rights to the dower, including any interest it might earn if in cash. If this dower money is invested, all profits are the woman's, and there is no legal

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36. "From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large,-a determinate share." Sura 4:7
37. Qur'an. 4:11
38. Qur'an. 4: 126
39. Schacht, Joseph (1991). "M?r?th", Encylopaedia of Islam. 7 (2nd ed.), Brill Academic Publishers. pp. 106-113. ISBN 90-04-09419-9
40. "If a man or a woman is made an heir on account of his [or her] kalalah relationship [with the deceased] and he [or she] has one brother or sister, then the brother or sister shall receive a sixth, and if they be more than this, then they shall be sharers in one-third, after payment of any legacies bequeathed and any [outstanding] debts - without harming anyone. This is a command from God, and God is Gracious and All-Knowing." Qur'an. 4 : 12. "People ask your pronouncement. Say: God enjoins you about your kalalah heirs that if a man dies childless and he has only a sister, then she shall inherit half of what he leaves and if a sister dies childless, then her brother shall be her heir; and if there are two sisters, then they shall inherit two-thirds of what he [or she] leaves. If there are many brothers and sisters, then the share of each male shall be that of two females. God expounds unto you that you err not and God has knowledge of all things." Qur'an. 4 : 176.
41. Tafsir Nemooneh, Sura Nisa, v.12

obligation to share with the man. The dower, in other words, creates the basis of all female property rights.

Division among the sexes in Islam, if anything, is biased against the male. The husband has all the obligations. Legally, the husband must care for the home and children, and any aged parents if applicable. The woman, the wife, need not do any of these things. Her money is hers and hers alone. The man's money is never really his, but belongs to the extended family. These rights serve to liberate women under Islamic law, but bind the man to family support. In the case of divorce, she receives all her contributed property, including the dower. Since the woman has full control over her dower money and wealth, it follows that Islam cannot legislate negatively against her in any other property matter without falling into contradiction.

Why did Muslim societies deviate from the ideals of Islam? There is no easy answer. A penetrating explanation of the reasons why Muslims have not adhered to the Quranic guidance with respect to women would be beyond the scope of this study. It has to be made clear, however, that Muslim societies have deviated from the Islamic precepts concerning so many aspects of their lives for so long. There is a wide gap between what Muslims are supposed to believe in and what they actually practice. This gap is not a recent phenomenon. It has been there for centuries and has been widening day after day. This ever widening gap has had disastrous consequences on the Muslim world

C. THE JUDEO- CHRISTIAN POSITION

The Judaeo-Christian conception of the creation of Adam and Eve is narrated in detail in Genesis 2:4-3:24. God prohibited both of them from eating the fruits of the forbidden tree. The serpent seduced Eve to eat from it and Eve, in turn, seduced Adam to eat with her. When God rebuked Adam for what he did, he put all the blame on Eve, "The woman you put here with me --she gave me some fruit from the tree and I ate it." Consequently, God said to Eve:

> *"I will greatly increase your pains in childbearing; with pain you will give birth to children. Your desire will be for your husband and he will rule over you."*

TO ADAM HE SAID:

> *"Because you listened to your wife and ate from the tree .... Cursed is the ground because of you; through painful toil you will eat of it all the days of your life..."*[42]

The image of Eve as temptress in the Bible has resulted in an extremely negative impact on women throughout the Judaeo-Christian tradition. All women were believed to have inherited from their mother, the Biblical Eve, both her guilt and her guile. Consequently, they were all untrustworthy, morally inferior, and wicked. Menstruation, pregnancy, and childbearing were considered

42. Genesis 2:4-3:24

the just punishment for the eternal guilt of the cursed female sex.

> *"I find more bitter than death the woman who is a snare, whose heart is a trap and whose hands are chains. The man who pleases God will escape her, but the sinner she will ensnare....while I was still searching but not finding, I found one upright man among a thousand but not one upright woman among them all"*[43]

JEWISH RABBIS LISTED NINE CURSES INFLICTED ON WOMEN AS A RESULT OF THE FALL:

> *"To the woman He gave nine curses and death: the burden of the blood of menstruation and the blood of virginity; the burden of pregnancy; the burden of childbirth; the burden of bringing up the children; her head is covered as one in mourning; she pierces her ear like a permanent slave or slave girl who serves her master; she is not to be believed as a witness; and after everything-death".*[44]

To the present day, orthodox Jewish men in their daily morning prayer recite "Blessed be God King of the universe that Thou has not made me a woman." The women, on the other hand, thank God every morning for "making me according to Thy will."[45] The Biblical Eve has played a far bigger role in Christianity than in Judaism. Her sin has been pivotal to the whole Christian faith because the Christian conception of the reason for the mission of Jesus Christ on Earth stems from Eve's disobedience to God. She had sinned and then seduced Adam to follow her suit. Consequently, God expelled both of them from Heaven to Earth, which had been cursed because of them. They bequeathed their sin, which had not been forgiven by God, to all their descendants and, thus, all humans are born in sin. In order to purify human beings from their 'original sin', God had to sacrifice Jesus, who is considered to be the Son of God, on the cross. Therefore, Eve is responsible for her own mistake, her husband's sin, the original sin of all humanity, and the death of the Son of God. In other words, one woman acting on her own caused the fall of humanity[46]. What about her daughters? They are sinners like her and have to be treated as such."A woman should learn in quietness and full submission. I don't permit a woman to teach or to have authority over a man; she must be silent. For Adam was formed first, then Eve. And Adam was not the one deceived; it was the woman who was deceived and became a

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43. Ecclesiasticus. 25:19, 24.
44. Leonard J. Swidler, Women in Judaism: the Status of Women in Formative Judaism, Metuchen, N.J: Scarecrow Press, (1976) p. 115.
45. Thena Kendath, "Memories of an Orthodox youth" in Susannah Heschel, ed. On being a Jewish Feminist, New York: Schocken Books, (1983), pp. 96-97.
46. Rosemary R. Ruether, "Christianity", in Arvind Sharma, ed., Women in World Religions Albany, State University of New York Press, (1987) p. 209.

sinner"[47] St. Tertullian was even more blunt than St. Paul, while he was talking to his 'best beloved sisters' in the faith, he said[48]:"Do you not know that you are each an Eve? The sentence of God on this sex of yours lives in this age: the guilt must of necessity live too. You are the Devil's gateway: You are the unsealer of the forbidden tree: You are the first deserter of the divine law: You are she who persuaded him whom the devil was not valiant enough to attack. You destroyed so easily God's image, man. On account of your desert even the Son of God had to die." St. Augustine was faithful to the legacy of his predecessors, he wrote to a friend: "What is the difference whether it is in a wife or a mother, it is still Eve the temptress that we must beware of in any woman.....I fail to see what use woman can be to man, if one excludes the function of bearing children."[49] Centuries later, St. Thomas Aquinas still considered women as defective: "As regards the individual nature, woman is defective and misbegotten, for the active force in the male seed tends to the production of a perfect likeness in the masculine sex; while the production of woman comes from a defect in the active force or from some material indisposition, or even from some external influence."[50] Finally, the renowned reformer Martin Luther could not see any benefit from a woman but bringing into the world as many children as possible regardless of any side effects: "If they become tired or even die, that does not matter. Let them die in childbirth, that's why they are there"[51]

Again and again all women are denigrated because of the image of Eve the temptress, thanks to the Genesis account. To sum up, the Judaeo-Christian conception of women has been poisoned by the belief in the sinful nature of Eve and her female offspring. Jewish Rabbis made it an obligation on Jewish men to produce offspring in order to propagate the race. At the same time, they did not hide their clear preference for male children: "It is well for those whose children are male but ill for those whose are female", "At the birth of a boy, all are joyful...at the birth of a girl all are sorrowful", and "When a boy comes into the world, peace comes into the world... When a girl comes, nothing comes."[52]

The Judaeo-Christian tradition virtually extends the leadership of the husband into ownership of his wife. The Jewish tradition regarding the husband's role towards his wife stems from the conception that he owns her as he owns his slave[53]. This conception has been the reason behind the double

47. I Timothy 2:11-14.
48. For all the sayings of the prominent Saints, see Karen Armstrong, The Gospel According to Woman, London: Elm Tree Books, (1986) pp. 52-62. See also Nancy van Vuuren, The Subversion of Women as Practiced by Churches, Witch-Hunters, and Other Sexists Philadelphia: Westminister Press pp. 28-30.
49. Ibid
50. Ibid
51. Ibid
52. Leonard J. Swidler, Women in Judaism: the Status of Women in Formative Judaism, Metuchen, N.J: Scarecrow Press, (1976) p. 115
53. Louis M. Epstein, The Jewish Marriage Contract, New York: Arno Press, (1973) p. 149.

standard in the laws of adultery and behind the husband's ability to annul his wife's vows. This conception has also been responsible for denying the wife any control over her property or her earnings. As soon as a Jewish woman got married, she completely lost any control over her property and earnings to her husband. Jewish Rabbis asserted the husband's right to his wife's property as a corollary of his possession of her: "Since one has come into the possession of the woman does it not follow that he should come into the possession of her property too?", and "Since he has acquired the woman should he not acquire also her property?"[54] Thus, marriage caused the richest woman to become practically penniless. The Talmud describes the financial situation of a wife as follows:

"How can a woman have anything; whatever is hers belongs to her husband? What is his is his and what is hers is also his..... Her earnings and what she may find in the streets is also his. The household articles, even the crumbs of bread on the table, are his. Should she invite a guest to her house and feed him, she would be stealing from her husband..."[55]

The fact of the matter is that the property of a Jewish female was meant to attract suitors. A Jewish family would assign their daughter a share of her father's estate to be used as a dowry in case of marriage. It was this dowry that made Jewish daughters an unwelcome burden to their fathers. The father had to raise his daughter for years and then prepare for her marriage by providing a large dowry. Thus, a girl in a Jewish family was a liability and no asset[56]. This liability explains why the birth of a daughter was not celebrated with joy in the old Jewish society. The dowry was the wedding gift presented to the groom under terms of tenancy. The husband would act as the practical owner of the dowry but he could not sell it. The bride would lose any control over the dowry at the moment of marriage. Moreover, she was expected to work after marriage and all her earnings had to go to her husband in return for her maintenance which was his obligation. She could regain her property only in two cases: divorce or her husband's death. Should she die first, he would inherit her property. In the case of the husband's death, the wife could regain her pre-marital property but she was not entitled to inherit any share in her deceased husband's own property. It has to be added that the groom also had to present a marriage gift to his bride; yet again he was the practical owner of this gift as long as they were married[57].

Christianity, until recently, has followed the same Jewish tradition. Both religious and civil authorities in the Christian Roman Empire (after Constantine) required a property agreement as a condition for recognizing the marriage. Families offered their daughters increasing dowries and, as a result, men

54. Leonard J. Swidler, Women in Judaism: the Status of Women in Formative Judaism, Metuchen, N.J: Scarecrow Press, (1976) p. 115
55. San. 71a; Git. 62a
56. Louis M. Epstein, The Jewish Marriage Contract, New York: Arno Press, (1973) p. 149.
57. Ibid

tended to marry earlier while families postponed their daughters' marriages until later than had been customary[58].

Under Canon law, a wife was entitled to restitution of her dowry if the marriage was annulled unless she was guilty of adultery. In this case, she forfeited her right to the dowry which remained in her husband's hands[59]. Under Canon and civil law a married woman in Christian Europe and America had lost her property rights until late nineteenth and early twentieth centuries. The Old Testament in several places commands kind and considerate treatment of the parents and condemns those who dishonour them. For example, "If anyone curses his father or mother, he must be put to death"[60] and "A wise man brings joy to his father but a foolish man despises his mother"[61]. Although honouring the father alone is mentioned in some places, e.g. "A wise man heeds his father's instruction"[62]. The mother alone is never mentioned. Moreover, there is no special emphasis on treating the mother kindly as a sign of appreciation of her great suffering in childbearing and suckling. Besides, mothers do not inherit at all from their children while fathers do[63]. The Biblical attitude has been succinctly described by Rabbi Epstein: "The continuous and unbroken tradition since the Biblical days gives the female members of the household, wife and daughters, no right of succession to the family estate. In the more primitive scheme of succession, the female members of the family were considered part of the estate and as remote from the legal personality of an heir as the slave. Whereas by Mosaic enactment the daughters were admitted to succession in the event of no male issue remained, the wife was not recognized as heir even in such conditions."[64] Why were the female members of the family considered part of the family estate? Rabbi Epstein has the answer: "They are owned --before marriage, by the father; after marriage, by the husband."[65]

The Biblical rules of inheritance are outlined in Numbers 27:1-11. A wife is given no share in her husband's estate, while he is her first heir, even before her sons. A daughter can inherit only if no male heirs exist. A mother is not an heir at all while the father is. Widows and daughters, in case male children remained, were at the mercy of the male heirs for provision. That is why widows and orphan girls were among the most destitute members of the Jewish society.

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58. James A. Brundage, Law, Sex, and Christian Society in Medieval Europe Chicago: University of Chicago Press, (1987) p. 88.
59. Ibid
60. Lev. 20:9
61. Proverbs 15:20
62. Proverbs 13:1
63. Louis M. Epstein, The Jewish Marriage Contract, New York: Arno Press, (1973) p. 122.
64. Karen Armstrong, The Gospel According to Woman London: Elm Tree Books, (1986) pp. 52-62.
65. Louis M. Epstein, The Jewish Marriage Contract, New York: Arno Press, (1973) p. 121.

Christianity has followed suit for long time. Both the ecclesiastical and civil laws of Christendom barred daughters from sharing with their brothers in the father's patrimony. Besides, wives were deprived of any inheritance rights. These iniquitous laws survived till late in the last century[66]. Because of the fact that the Old Testament recognized no inheritance rights to them, widows were among the most vulnerable of the Jewish population. The male relatives who inherited all of her deceased husband's estate were to provide for her from that estate. However, widows had no way to ensure this provision was carried out and lived on the mercy of others. Therefore, widows were among the lowest classes in ancient Israel and widowhood was considered a symbol of great degradation[67].

But the plight of a widow in the Biblical tradition extended even beyond her exclusion from her husband's property. According to Genesis 38, a childless widow must marry her husband's brother, even if he is already married, so that he can produce offspring for his dead brother, thus ensuring his brother's name will not die out[68]. The widow's consent to this marriage is not required. The widow is treated as part of her deceased husband's property whose main function is to ensure her husband's posterity.

In the Indian context canonically a Christian woman is fully dependent upon her male counterpart to atone for her original sin. Indian Christians were initially governed by their pre-conversion customary law which seldom provided for women's property right. After the British advent they were governed by the Indian Succession Act, 1865.

The position of women in the Judaeo-Christian tradition might seem frightening by our late twentieth century standards. Nevertheless, it has to be viewed within the proper historical context. In other words, any objective assessment of the position of women in the Judaeo-Christian tradition has to take into account the historical circumstances in which this tradition developed. There can be no doubt that the views of the Rabbis and the Church Fathers regarding women were influenced by the prevalent attitudes towards women in their societies.

A. THE PARSI POSITION

Parsis belong to Iran. In the ancient times Iran was divided into two parts- Media & Pers [Persia], the Parsis belong to Pers. In 636 a. D. Caliph Omar an Arab defeated the Parsi king Yezdezind. To escape persecution the Parsis sailed off in boats with their sacred fire in search of new land. One group landed 25 km south of Daman[69]. They entered into an agreement with local king Jadeo Rane to give them refuge with a promise that they would

66. Ibid
67. Isaiah 54:4
68. "Then Judah said to Onan, 'Lie with your brother's wife and fulfill your duty to her as a brother-in-law to produce offspring for your brother' " Genesis 38:8.
69. D. Framji, The Parsees-Their History Manners, Customs and Religion, London,Smith Elder &Co. (1858), P. 10

enrich the land and they kept their promise.

The king had laid down five conditions:

o They would adopt local language

o They would translate their holy text in local language.

o Their women must wear the local dress [saree]

o It was observed that the Parsi women were discriminated by customary laws which had no origin in any religion.

o Their marriage ceremony should include the local ceremony of tying the sacred knot.

o They should surrender their arms[70]

o They consented to the above conditions and the king allotted them a strtch of underdeveloped land in Diu and allowed them to build their Fire Temple[71] They settled down as agricultural community and mingled with the Hindu community thee. After settling down in India, the Parsis adopted the local customs[72]. In 1746 the Parsis divided into two sects-

o Shensoys or shuhursaees

o Kudmis

During the British rule, due to their commerdarie with the British, some British rules were made applicable to them and rule of primogeniture became applicable to them. They took maximum advantages of the economic and political transformations taking place during colonial period and evolved as an important economic and political force. Thus they were able to negotiate a separate set of personal laws for themselves. In 1778 Parsi Panchayat was granted recognition. In 1835 a Parsi son claimed the whole property of the father through the English rule of primogeniture. Alarmed by this the Parsis pressed for separate legislation. The1837 saw the Parsis were no longer bound by the English rule of primogeniture. The Parsis wanted protection from English statute of distribution in case of intestacy, and denial of married woman's independent control over property during coverture. At last in 1855 a committee for draft code of laws appointed.

III. WOMEN'S RIGHT TO PROPERTY UNDER FORMAL LAWS

Much like those of women of any other country, property rights of Indian women have evolved out of a continuing struggle between the status quoist and the progressive forces. And pretty much like the property rights of women elsewhere, property rights of Indian women too are unequal and unfair: while

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70. P. H. Cabinetmaker, "Parsis and Marriage", Pune, International Institute of Population Studies, (Mimeo) (1991) page 2-3

71. This first Fire kindled is even today preserved in the Holiest of Holy shrines of Imamshah at Udwada which they renamed as Navsari in memory of he land they had left behind called 'sari'

72. D. Framji, The Parsees-Their History Manners, Customs and Religion, London,Smith Elder &Co. (1858), P. 84

they have come a long way ahead in the last century, Indian women still continue to get fewer rights in property than the men, both in terms of quality and quantity. What may be slightly different about the property rights of Indian women is that, along with many other personal rights, in the matter of property rights too, the Indian women are highly divided within themselves. Every religious community continues to be governed by its respective personal laws in several matters - property rights are one of them. In fact even within the different religious groups, there are sub-groups and local customs and norms with their respective property rights. Thus Hindus, Sikhs, Buddhists and Jains are governed by one code of property rights codified only as recently as the year 1956 called the Hindu Succession Act, while Christians and Parsis are governed by another code called the Indian Succession Act, 1925 and the Muslims have not codified their property rights, neither the Shias nor the Sunnis. Also, the tribal women of various religions and states continue to be governed for their property rights by the customs and norms of their tribes. To complicate it further, under the Indian Constitution, both the central and the state governments are competent to enact laws on matters of succession and hence the states can, and some have, enacted their own variations of property laws within each personal law.

There is therefore no single body of property rights of Indian women. The property rights of the Indian woman get determined depending on which religion and religious school she follows, if she is married or unmarried, which part of the country she comes from, if she is a tribal or non-tribal and so on.

Ironically, what unifies them is the fact that cutting across all those divisions, the property rights of the Indian women are immune from Constitutional protection; the various property rights could be, as they indeed are in several ways, discriminatory and arbitrary, notwithstanding the Constitutional guarantee of equality and fairness[73].

A. HINDU WOMAN'S RIGHTS

The property rights of the Hindu women are highly fragmented on the basis of several factors apart from those like religion and the geographical region which have been already mentioned. Property rights of Hindu women also vary depending on the status of the woman in the family and her marital status: whether the woman is a daughter, married or unmarried or deserted, wife or widow or mother. It also depends on the kind of property one is looking at. The concept of a birthright fundamental to an understanding of the coparcenery at which a person acquires rights on his birth even if the ancestor is still alive although it is now not recognised in law still continues.

THE MAIN SCHEME OF THE ACT IS:

1. The hitherto limited estate given to women was converted to absolute one.

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73. Articles 14, 15, 16, 21 and Articles 38, 39, 44 et al.

2. Female heirs other than the widow were recognized while the widow's position was strengthened.

3. The principle of simultaneous succession of heirs of a certain class was introduced.

4. A daughter is made the coparcener at birth

5. Remarriage, conversion and unchastity are no longer held as grounds for disability to inherit.

6. Even the unborn child, son or daughter, has a right if s/he was in the womb at the time of death of the intestate, if born subsequently.

B. TRIBAL WOMAN'S RIGHTS

It is also pertinent to mention here that as far as property rights of the tribal women are concerned, they continue to be ruled by even more archaic system of customary law under which they totally lack rights of succession or partition. In fact the tribal women do not even have any right in agricultural lands. What is ironical is that reform to making the property rights gender just are being resisted in the name of preservation of tribal culture!

In *Madhu Kishwar & others* v. *State of Bihar & others*[74] there was a public interest petition filed by a leading women's rights activist challenging the customary law operating in the Bihar State and other parts of the country excluding tribal women from inheritance of land or property belonging to father, husband, mother and conferment of right to inheritance to the male heirs or lineal descendants being founded solely on sex being discriminatory. The contention of the Petitioner was there is no recognition of the fact that the tribal women toil, share with men equally the daily sweat, troubles and tribulations in agricultural operations and family management. It was alleged that even usufructuary rights conferred on a widow or an unmarried daughter become illusory due to diverse pressures brought to bear brunt at the behest of lineal descendants or their extermination. The widow on remarriage is denied inherited property of her former husband. They elaborated further by narrating several incidents in which the women either were forced to give up their life interest or became target of violent attacks or murdered. Therefore the discrimination based on the customary law of inheritance was challenged as being unconstitutional, unjust, unfair and illegal.

In the judgment in this case the Supreme Court of India upheld the rights of inheritance of the tribal women, basing its verdict on the broad philosophy of the Constitution, the Court declined to be persuaded by the argument that giving the women rights in property would lead to fragmentation of lands.

Accordingly it was held that the tribal women would succeed to the estate of their parent, brother, husband, as heirs by intestate succession and inherit the property with equal share with male heir with absolute rights as per the general principles of Hindu Succession Act, 1956, as amended and interpreted by the Court and equally of the Indian Succession Act to tribal

74. (1996) 5 SCC 125

Christian.

In a substantially concurring but separately written judgment another judge of the Bench supplemented another significant principle to strengthen the tribal women's right to property by reading the right to property into the tribal women's right to livelihood. The judge reasoned that since agriculture is not a singular vocation, it is more often than not, a joint venture, mainly, of the tiller's family members; everybody, young or old, male or female, has chores allotted to perform. However in the traditional system the agricultural family is identified by the male head and because of this, on his death, his dependent family females, such as his mother, widow, daughter, daughter-in-law, grand-daughter, and others joint with him have to make way to a male relative within and outside the family of the deceased entitled there under, disconnecting them from the land and their means of livelihood. Their right to livelihood in that instance gets affected, a right constitutionally recognized, a right which the female enjoyed in common with the last male holder of the tenancy. It was thus held:

"It is in protection of that right to livelihood that the immediate female relatives of the last male tenant have the constitutional remedy to stay on holding the land so long as they remain dependent on it for earning their livelihood, for otherwise it would render them destitute. It is on the exhaustion of, or abandonment of land by such female descendants can the males in the line of descent take over the holding exclusively"[75].

This judgment is also noted for its extensive reliance on the mandate of the international Declarations and Conventions, most notably the Convention on Elimination of all Forms of discrimination against Women (CEDAW) and the Universal Declaration, of Human Rights (UDHR) that call for gender just legal systems and equal rights for women.

C. MUSLIM WOMAN'S RIGHT

Till 1937 Muslims in India were governed by customary law. After the Shariat Act of 1937 Muslims in India came to be governed in their personal matters, including property rights, by Muslim personal law as it "restored" personal law in preference to custom. However this did not mean either "reform" or "codification" of Muslim law and till date both these have been resisted by the patriarchal forced in the garb of religion. Broadly the Islamic scheme of inheritance discloses three features, which are markedly different from the Hindu law of inheritance:

(i) the Koran gives specific shares to certain individuals

(ii) the residue goes to the agnatic heirs and failing them to uterine heirs and

(iii) Bequests are limited to one-third of the estate, i.e., maximum one-third share in the property can be willed away by the owner.

The main principles of Islamic inheritance law which mark an advance

75. Ibid

vis-à-vis the pre-Islamic law of inheritance, which have significant bearing on the property rights of women, are:

(i) the husband or wife was made an heir

(ii) females and cognates were made competent to inherit

(iii) parents and ascendants were given the right to inherit even when there were male descendants and

(iv) As a general rule, a female was given one half the share of a male.

The newly created heirs were mostly females; but where a female is equal to the customary heir in proximity to the deceased, the Islamic law gives her half the share of a male. For example, if a daughter co-exists with the son, or a sister with a brother, the female gets one share and the male two shares.

D. CHRISTIAN WOMAN'S RIGHT

The Indian Christian widow's right is not an exclusive right and gets curtailed as the other heirs step in. Only if the intestate has left none who are of kindred to him, the whole of his property would belong to his widow. Where the intestate has left a widow and any lineal descendants, one third of his property devolves to his widow and the remaining two thirds go to his lineal descendants. If he has left no lineal descendents but has left persons who are kindred to him, one half of his property devolves to his widow and the remaining half goes to those who are of kindred to him. Another anomaly is a peculiar feature that the widow of a pre-deceased son gets no share, but the children whether born or in the womb at the time of the death would be entitled to equal shares. Where there are no lineal descendants, after having deducted the widow's share, the remaining property devolves to the father of the intestate in the first instance. Only in case the father of the intestate is dead but mother and brothers and sisters are alive, they all would share equally. If the intestate's father has died, but his mother is living and there are no surviving brothers, sisters, nieces, or nephews, then, the entire property would belong to the mother. A celebrated litigation and judgment around the Christian women's property rights is *Mary Roy v. State of Kerala & others*[76] in which provisions of the Travancore Christian Succession Act, 1092 were challenged as they severely restricted the property rights of women belonging to the Indian Christian community in a part of south India formerly called Travancore. The said law laid down that for succession to the immovable property of the intestate is concerned, a widow or mother shall have only life interest terminable at death or on remarriage and that a daughter will be entitled to one-fourth the value of the share of the son or Rs 5000 whichever is less and even to this amount she will not be entitled on intestacy, if streedhan (woman's property given to her at the time of her marriage) was provided or promised to her by the intestate or in the lifetime of the intestate, either by his wife or husband or after the death of such wife or husband, by

76. 5 (1950) SCR 747

his or her heirs. These provisions were challenged as unconstitutional and void on account of discrimination as being violative of right to equality under Article 14 of the Constitution. The Writ Petition was allowed by the Supreme Court and the curtailment of the property rights of Christian women in former Travancore was held to be invalid on the ground that the said state Act stood repealed by the subsequent Indian Succession Act of 1925 which governs all Indian Christians. However, the provisions were not struck down as unconstitutional since the Court felt that it was unnecessary to go into the constitutionality issue of the provisions as they are in any case inoperable due to the over-riding effect of the ISA.

E. PARSI WOMAN'S RIGHT

Prima facie the property rights of the Parsis are quite gender just. Basically, a Parsi widow and all her children, both sons and daughters, irrespective of their marital status, get equal shares in the property of the intestate while each parent, both father and mother, get half of the share of each child. However, on a closer look there are anomalies: for example, a widow of a predeceased son who died issueless, gets no share at all.

IV. INDIAN WOMAN'S RIGHT TO LAND

Another continuing area of discrimination is that Indian women continue to be deprived of the agricultural land. Section 4(2) of the HSA exempts significant interests in agricultural land from the purview of the Hindu Succession Act 1956. The personal laws of other religious denominations also do not expressly speak of agricultural land and the agricultural lands continue to be covered by the existing laws providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings. Such laws are made part of IX Schedule which takes them out of the purview of judicial review though in I. *R. Coelho v. State of Tamil Nadu*[77], the Supreme Court has ruled that this cannot be done without any justification.

Hence, interests in tenancy land devolve according to the order of devolution specified in the tenurial laws, which vary by state. Broadly, the states fall into three categories:

(i) In the southern and most of the central and eastern states, the tenurial laws are silent on devolution, so inheritance can be assumed to follow the 'personal law', which for Hindus is the HSA.

(ii) In a few states, the tenurial laws explicitly note that the HSA or the 'personal law' will apply. But,

(iii) in the north-western states of Haryana, Punjab, Himachal Pradesh,

Delhi, Uttar Pradesh, and Jammu & Kashmir the tenurial laws do specify the order of devolution, and one that is highly gender-unequal. Here (retaining

77. JT 2007(2) SC 292

vestiges of the old Mitakshara system) primacy is given to male lineal descendents in the male line of descent and women come very low in the order of heirs. Also, a woman gets only a limited estate, and loses the land if she remarries (as a widow) or fails to cultivate it for a year or two. Moreover, in Uttar Pradesh and Delhi, a 'tenant' is defined so broadly that this unequal order of devolution effectively covers all agricultural land. Where there is holding by both spouses as tenants in common, women are almost never asked whose share of the land should be brought under ceiling while assessing family land for declaring surplus.

V. CONCLUSION

Thus it is seen from the foregoing discussions that custom having the force of law is still very strong in the area of property rights at least. Agricultural land is the most important form of rural property in India; and ensuring gender-equal rights in it is important not only for gender justice but also for economic and social advancement. Gender equality in agricultural land can reduce not just a woman's but her whole family's risk of poverty, increase her livelihood options, enhance prospects of child survival, education and health, reduce domestic violence, and empower women.

As more men shift to urban or rural non-farm livelihoods, a growing number of households have become dependent on women managing farms and bearing the major burden of family subsistence. The percentage of *de facto* female-headed households is already large and growing. These include not just widows and deserted and separated women, but also women in households where the men have migrated out and women are effectively farming the land. These women shoulder growing responsibilities in agricultural production but will be constrained seriously by their lack of land titles.

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LODGING OF FIRST INFORMATION REPORT BY POLICE OFFICER IN CHARGE : THE JUDICIAL TREND HANGS BETWEEN ITS DISCRETIONARY OR MANDATORY NATURE

Akhilendra Kumar Pandey *

ABSTRACT

One of the ways of putting criminal law into motion is lodging the First Information Report. The Criminal Procedure Code vests this function in the Officer in Charge of a Police Station. The lodging of the First Information report or registering the case on receipt of information regarding commission of cognizable offence is mandatory or it is discretionary on the part of the police officer in charge has remained unsettled. The court has taken divergent views. There is a need to settle the controversy at rest.

Key words: *Section 154 Criminal Procedure Code - First Information Report - Nature of - Mandatory or discretionary*

INTRODUCTION

Recently a bench comprising three judges of the Supreme Court of India has requested the Chief Justice to refer the matter to a constitutional bench of at least five judges to pronounce authoritatively on an issue of vital importance in the administration of criminal justice. The issue raised was whether under Section 154 of the Criminal Procedure Code, 1973 a police officer - in - charge of a police station is bound to register a first information report or he has been given some latitude in law to conduct preliminary enquiry before registering the first information report.[1] The nature of law has been viewed in various ways. The liberal theory of law - also known as ruling theory of law - has two parts, namely, legal positivism and utilitarianism. While

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1. Lalita Kumari v. State of U.P. AIR 2012 SC 1515 The Bench consisted of Dalveer Bhandari and Dipak Misra, JJ.

the theory of legal positivism holds that the truth of legal propositions consists in the facts about the rules that have been adopted by specific social institutions, utilitarianism holds that the law and its institutions should serve the general welfare.[2] In this backdrop, an attempt has been made to analyse the approach of the judiciary on the aforesaid issue with a view to suggest that both the parts of ruling theory of law are not independent rather they are intertwined for a purpose of creating a better social order.

I. First Information Report: Object and Legislative History

In absence of organized government, every man is wolf to every other man. In an atmosphere of hate, fear and mutual distrust, everybody is at war with everybody. Thus, peace is to be bought wherever it can be found. The men entered into a compact, under the circumstances, the 'Mortal God' was constituted. The sovereign power in State came through the agreement whereby everyone agreed to transfer all his power and strength upon one man for the purpose of promoting the peace, safety and convenience of all.[3] Police is one of the functionaries of the State through which State administers criminal justice. Thus, the police play a very important role in maintaining peace and order on the one hand and investigation of offence on the other.

The principal object of the first information report is to set the criminal law into motion.[4] Investigation usually starts on information relating to the commission of an offence given to an officer - in - charge of a police station and recorded in the manner provided under section 154 of the Criminal Procedure Code, 1973. The Privy Council had observed in *Emperor v. Khawaza Nazim Ahmad*[5] that report was not the condition precedent for setting the criminal law into motion and the Police officer may investigate into the commission of a cognizable offence even without report.[6] The Privy Council had held that in truth the provisions of the first information report was to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten or embellished.

Section 139 of the Criminal Procedure Code, 1861 which was passed by the Legislative Council of India, provided that 'every complaint or information' made to the officer in charge of a police Station should be reduced into writing. This provision was subsequently modified by Section 112 of the

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2. See, Dworkin, Ronald, Taking Rights Seriously, Universal Book Traders, Delhi, First Indian Reprint (1996)
3. See, Bodenheimer, Edgar, Jurisprudence: The Philosophy and Method of the Law, Fourth Indian Reprint, Universal Law Publishing Co. Pvt. Ltd. New Delhi (2004)
4. Hasib v. State of Bihar AIR 1972 SC 283
5. AIR 1945 PC 18. Similar view was taken in State of U.P. v. Bhagwant Kishore Joshi AIR 1964 SC 221 where it was observed that though ordinarily investigation is undertaken on information received by a police officer, the receipt of information is not a condition precedent for investigation.
6. See, for contrary view, Mahindro v, State of Punjab 2001 (9) SCC 581 where it was held that the registration of a case is a sine qua non for starting investigation.

Criminal Procedure Code, 1872 and it read 'every complaint' preferred to an officer in charge of a police station shall be reduced into writing. Subsequently in the Criminal Procedure Code, 1882 the word 'complaint' which earlier existed was deleted and it retained the expression 'information'. It is manifest that the condition which is sine qua non for recording the first information report is that there must be information and that information must disclose a cognizable offence.

All the functions of law may, according to Bentham, be referred to four heads: to provide subsistence, to produce abundance, to favour equality, to maintain security. To him of these four ends of legal regulation of security was the principal and paramount. Security demands that a man's person, his honour, his property and his status be protected and maintained.[7] Securing of the conditions of social life is the aim of law. The element of compulsion is central to it. The police officer in charge on receiving information is expected to reach at the place of occurrence as early as possible. It is the duty of the State to protect the life of an injured person and it is implicit duty and responsibility of the police officer.[8] The conditions of social life cannot be secured unless the Station House Officer lodges the First Information Report disclosing the commission of cognizable offence.

II. LODGING FIR: MANDATORY IN NATURE

There is one line of thought that registering the First Information Report on information of commission of cognizable offence is mandatory and the police officer is duty bound to register the same. In *State of Haryana v. Ch. Bhajan Lal*,[9] the Court dealt with the legal principles governing the registration of a cognizable offence. The legal mandate enshrined in Section 154 (1) is that every information relating to commission of cognizable offence should be entered in a book to be kept by the police officer-in-Charge and this act of entering the information in the said book is known as registration of crime or case. The Police Officer in Charge cannot insist upon any enquiry before the registration of the crime. The Supreme Court observed:

At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandates of Section 154 (1) of the Code, the concerned police officer cannot embark upon an enquiry as to whether the information given by the informant is reliable and genuine or otherwise (emphasis supplied) and refuse to register a case on the ground that the information is not reliable or credible. The officer in charge is statutorily obliged to register a case and then to proceed with the investigation in accordance with law.[10]

In *Bhajan Lal Case*, the Supreme Court referring to Section 41 of the Criminal Procedure Code very categorically suggested that the police officer

7. See, Ogden, C.K. (Ed.) The Theory of Legislation (1931), London.
8. Animireddy . Public Prosecutor, High Court of A.P. AIR 2008 SC 1603
9. AIR 1992 SC 604 bench comprised Ratnavel Pandian and Jayachandra Reddy, JJ.
10. Id. at 613 per Ratnavel Pandian, J.

in charge is bound to lodge the first information and he had no discretion comparable with the expression 'credible' or 'reasonable suspicion' as such expressions did not exist under Section 154 of the Code. Such expressions were purposefully included in Section 154 of the Code. The Supreme Court observed that:

> the legislature in its collective wisdom has carefully and cautiously used the expression 'information' without qualifying the same as in Section 41 (1) (a) or (g) of the Code wherein the expressions "reasonable complaint" and "credible information" are used. Evidently, the non - qualification of the word "information" in Section 154(1) unlike Section 41 (1) (a) and (g) of the Code may for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, "reasonableness" or "credibility" of the said information is not a condition precedent for registration of a case.[11]

The Supreme Court in *Bahajan Lal case* thus held that if any information disclosing a cognizable offence is laid before an officer - in - charge of a police station satisfying the requirements of Section 154 (1) of the Code, the said police officer had no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

In *Superintendant of Police*, CBI v. *Tapan Kumar Singh*[12] the Calcutta High Court while exercising revisional jurisdiction, quashed the General Diary, the first information report and the investigation undertaken by the Superintendant of Police, CBI. The Superintendant of Police, CBI in this case received information on telephone from reliable source which were recorded in the General Diary. The fact stated in the General Diary was that the accused was a corrupt official and was in the habit of accepting illegal gratification; he had demanded and accepted cash to the tune of rupees one lakh approximately and he would be carrying the said amount while going out station by train. The information so recorded made a categorical assertion that the accused had accepted a sum of rupees one lakh by illegal gratification and was carrying the said amount with him while going outstation by train on that day. The assertions in its face value were clearly an offence of criminal misconduct under Section 13 of the Prevention of Corruption Act, 1988. Criminal misconduct is a cognizable offence having regard to second item of the last part of Schedule I of the Criminal Procedure Code. The issue was whether or not the said information could be treated as the first information report. Quashing the order of the High Court, the Supreme Court observed that:

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11. Ibid.
12. AIR 2003 SC 4140

> What is of significance that the information given must disclose the commission of a cognizable offence and the information so lodged must provide the basis for the police officer to suspect the commission of a cognizable offence.[13]

Futher, the Court observed :

> At this stage it is enough if the police officer on the basis of the information given suspects the commission of cognizable offence and not that he must be convinced or satisfied that a cognizable offence has been committed. If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information….[14]

In *Ramesh Kumari* v. *State (NCT of Delhi)*[15] where the grievance of the appellant was that information of cognizable offence was given to the Station House Officer but no case was registered in terms of the mandatory provision contained in Section 154 (1) of the Criminal Procedure Code. The court on the one hand observed that:

> Genuineness or otherwise of the information can only be considered after registration of the case. Genuineness or credibility of the information is not the condition precedent for the registration of the case.[16]

In *Ramesh Kumari case*, the Court concluded that there was no doubt that the provision of Section 154 of the Code is mandatory and the concerned officer is duty bound to register the case on the basis of such information disclosing cognizable offence. The Court in this referred to the following observation made in *State of Haryana* v. *Bhajan Lal*[17]:

> that if any information disclosing a cognizable offence is laid before an officer - in - charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, register a case on the basis of such information.[18]

In *Madhu Bala* v. *Suresh Kumar*,[19] the court observed that in view of Section 156 (1) of the Code and the Rules framed under the Police Act, 1861 the police are duty bound to formally register a case. In *Aleque Padamsee* v. *Union of India*[20] the petitioners approached the Supreme Court under

13. Id. at 4145 per B. P. Singh J.
14. Id. at 4145-46
15. AIR 2006 SC 1322
16. Id.at 1323 per Sema and Lakshmanan, JJ.
17. AIR 1992 SC 604
18. Id. at 614; See also, Parkash Singh Badal v. State of Punjab AIR 2007 SC 1274
19. AIR 1997 SC 3104
20. 2007 Cri LJ 3729 (SC) The Bench comprised three judges, namely, Arijit Pasayat, Balasubramanyan and Jain, JJ.

Article 32 of the Constitution of India because of inaction on the part of the officials who did not act on the report lodged. The grievance was that though commission of offence, making speeches which were likely to disturb communal harmony in the country and to create hatred in the minds of the citizens against the persons belonging to minority community, which is punishable under the Indian Penal Code was disclosed but the police officials did not register the First Information Report. The petitioners prayed the Supreme Court to issue a writ of appropriate nature directing the police officials to register the case. It was contended by the counsel for the petitioners that undoubtedly the commission of cognizable offence was disclosed the police officials were not justified in not registering the First Information Report. The Supreme Court though did not issue the writ and held that if any person is aggrieved by the inaction of the police officials in registering the FIR, the modalities contained in the Criminal Procedure Code are to be observed and adopted. However, the Supreme Court observed:

> Whenever any information is received by the police about the alleged commission of offence which is cognizable one there is a duty to register the FIR. There can be no dispute on that score.[21]

The Supreme Court further observed:

> The correct position in law, therefore, is that the police officials ought to register the FIR whenever facts brought to their notice show that cognizable offence has been made out.[22]

In cases analysed in this part hold the view that the police officer in charge of police station is duty bound to register the case by lodging the FIR.

III. LODGING FIR: DISCRETIONARY IN NATURE

There is however another view that on receipt of information of commission of a cognizable offence the police may also make a preliminary enquiry into the matter as there was no prohibition on such enquiry before lodging the first information report. In *State of U.P.* v. *Bhagwant Kishore Joshi*[23], the Supreme Court observed:

> that in absence of any prohibition in the Code, express or implied, I am of the opinion that it is open to police officer to make preliminary enquiries before registering an offence and making a full scale investigation into it.[24]

The Full Bench of Kerala High Court in *State of Kerala* v. *M.J. Samuel*[25] ruled that it is not necessary that every piece of information however, vague, indefinite and unauthenticated should be recorded as first information for the sole reason that such information was the first, in point of time, to be

21. Id at 3730 per Arijit Pasayat, J.
22. Id. at 3731
23. AIR 1964 SC 221
24. Id at 227 per Mudholkar, J. and Subbarao, J. concurred.
25. AIR 1961 Ker. 99 (FB)

received by the police regarding commission of an offence. Cryptic information is hardly sufficient for discerning the commission of nay cognizable offence. Under Section 154 of the Code the information must unmistakably relate to commission of cognizable offence.[26] In *P. Sirajuddin* v. *State of Madras*[27], it was observed that before a public servant, whatever be his status is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and first information is lodged against him, there must be some suitable preliminary enquiry into the allegation by a responsible officer.

In *Shashikant* v. *Central Bureau of Investigation*[28], the appellant made an anonymous complaint alleging corrupt practice and financial irregularities on the part of some of the members of Special Police Force - Central Bureau of Investigation. On the basis of this information, a preliminary enquiry was conducted it was opined by the investigating officer not to register a first information report and holding a departmental enquiry against the concerned officers was recommended. The question which arose for consideration was whether it was obligatory to lodge a first information report and carry out a full fledged investigation about the truthfulness or otherwise of the allegation made in the anonymous complaint. The Central Government which made CBI Manual providing guidelines for functioning of the CBI and it is imperative that the CBI adheres scrupulously to the provisions of the Manual in relation to its investigative functions. Under the CBI (Crime) Manual, 1991 a distinction has been made between preliminary enquiry and a regular case because it provides clearly for a preliminary inquiry. The preliminary enquiry may be converted into a regular case as soon as sufficient material becomes available to show that prima facie there has been commission of cognizable offence. The preliminary enquiry by the police before lodging the first information report was held to be permissible under the Code as there was no prohibition on it. Moreover, on an anonymous complaint the police officer in this case, under the CBI Manual, was competent to make a preliminary enquiry when an allegation of corruption was made on the part of public servant and the recourse to observance of CBI Manual under the circumstances could not be said to be unfair.

In *Binay Kumar Singh* v. *State of Bihar*[29], the conviction and sentence under Section 302 read with Section 149 of the Indian Penal Code was challenged. In this case, murder took place wherein 13 persons lost their lives and 17 other were badly injured along with burning of several mute cattle alive and dwelling houses. Though the interpretation of Section 154 of the Code was not directly in issue but the Supreme Court observed that:

> Under Section 154 of the Code the information must unmistakably relate to commission of cognizable offence and it shall be reduced into writing (if given orally) and shall be

26. Binay Kumar Singh v. State of Bihar AIR 1997 SC 322
27. AIR 1971 SC 520 per Mitter, J
28. AIR 2007 SC 351
29. Supra note 26.

> signed by its maker. The next requirement is that the substance thereof shall be entered in a book kept in the police station in such form as the state government has prescribed. . . The police officer in charge is not obliged to prepare FIR on any nebulous information received from somebody who does not disclose any authentic knowledge about commission of the cognizable offence. It is open to the officer in charge to collect more information containing details about the occurrence, if available, so that he can consider whether a cognizable offence has been committed warranting investigation thereto.[30] (Emphasis supplied)

In *Rajinder Singh Katoch* v. *Chandigarh Administration*[31], the Supreme Court on the one hand declared that the police officer in charge was bound to lodge the report and register the case but on the other hand suggested that preliminary enquiry before registering the case was permissible in order to ascertain the genuineness of the information. The Court observed:

> Although the police officer in charge of a police station is legally bound to register a first information report in terms of section 154 of the Criminal Procedure Code, if the allegation made by them give rise to an offence which can be investigated without obtaining any permission from the magistrate concerned; the same by itself, however, does not take away the right of the competent officer to make a preliminary enquiry in order to find out as to whether the first information sought to be lodged any substance or not.[32]

The principles of law must be closer to the realities of hard life. In a case where one goes to lodge an FIR and the State machinery responds that there will be a preliminary enquiry first and if truth was found then FIR would be registered, it would simply add to the misery and plight of an already shattered victim. The better course on the part of the state machinery would be to register a case and then investigate the matter according to law. There may be a question whether law is just a means for the exercise of administrative or political power or it has a function as a medium of social integration. When all other mechanisms of social integration are exhausted, law provides some means for keeping together complex and centrifugal societies lest the societies should fall into pieces, says Habermas. In fact, law stands as a substitute of other integrative mechanism. Law requires from its addressee nothing more than norm conformative behaviour. It must meet the expectation of legitimacy so that it is open to the people to follow the norms out of respect for the law.[33] Habermas acknowledged that the legal system

30. Id. at 326 per Thomas, J.
31. AIR 2008 SC 178
32. Id at 179 per Sinha, S.B. and Bedi, H.S. JJ.
33. See, Jurgen Habermas, Between Facts and Norms: An Author's Reflections quoted in Llyod's Introduction to Jurisprudence, Seventh Edition (2001), International Students Edition, Sweet and Maxwell, London.

must be 'socially effective' and 'ethically justified'. It brings tension between facticity (legitimacy) and validity which has been explained by Cotterrel as:

> Law's facticity is its character as a functioning system, ultimately, coercively guaranteed. To understand this facticity is to understand social or political power working through law. Law's validity, however, . . .is a matter of its normative character, its nature as a coherent system of meaning, as prescriptive ideas and values. Validity lies ultimately in law's capacity to make claims supported by reason, in a discourse that aims at and depends on agreement between citizens.[34]

On several occasions, it has been argued that it would not be advisable to lodge the first without making any preliminary enquiries as it may affect the liberty of alleged accused. The grounds may be briefly discussed under the following heads:

(i) Medical Negligence:

Sometimes it is argued that in case of allegations relating to medical negligence on the part of doctors, the Supreme Court clearly held that no medical professional should be prosecuted merely on the basis of the allegations in the complaint.[35] There should be an in depth enquiry into the allegation relating to negligence and this necessarily postulates a preliminary enquiry before registering an FIR before entering on investigation. It is submitted that the direction of the Court in those cases were to the effect that a medical professional should not be prosecuted on flimsy ground instead there should be a detail enquiry into the incident. The purpose of First Information to start investigation will be frustrated where preliminary enquiry is conducted by the police.

(ii) Mis- use of Criminal Process:

In support of the contention that before lodging FIR and registering the case a preliminary enquiry should be done, is argued that provisions like section 498 A of the Indian Penal Code, meant to be a measure of protection may turn out to be an instrument of oppression. In *Preeti Gupta* v. *State of Jharkhand*[36], the Court pointed out the rapid increase in filing of complaints which are not bona fide and are filed with oblique motives. Such false complaints lead to insurmountable harassment, agony and pain to the accused. The allegations of the complainant in such cases should be scrutinized with great care and circumspection. Drawing inference from this observation it is argued that before registering an FIR it is advisable to undertake a preliminary enquiry in order to verify at least the identity of the complainant and his residential address. It may be submitted here that all these verifications may

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34. As quoted by Freeman, M.D.A. in Llyod's Introduction to Jurisprudence, Seventh Edition (2001) at 693, International Students Edition, Sweet and Maxwell, London
35. State of M.P. v. Santosh Kumar AIR 2006 SC 2648; Dr. Suresh Gupta v. Govt. of NCT of Delhi AIR 2004 SC 409
36. AIR 2010 SC 3363

also be done during investigation subsequent to lodging the First Information Report.

(iii) lodging FIR an administrative function:

It is argued that the literal interpretation of Section 154 would mean the registration of FIR to a mechanical act. The registration of FIR results into serious consequences for the alleged accused and it may result in loss of reputation, impairment of his liberty, mental anguish and stigma. It is thus reasonable to assume that the legislature could not have contemplated that lodging of first information report was a mere mechanical act on the part of the police officer in charge. The registration of FIR under Section 154 of the Code is an administrative act and thus it must be based on application of mind, scrutiny and verification of the facts. The rule of law demands that an administrative act should never be a mechanical.[37]

In *Sevi* v. *State of Tamil Nadu*[38], where the police officer in charge of police station received information on telephone that there was rioting and some persons were stabbed. As he was not satisfied whether the information disclosed any cognizable offence, he made an entry in the General Diary and, without registering any FIR, proceeded to the spot to verify the information. Under such a circumstance the action on the police officer in charge was held to be justified. It was however quite strange on the part of the police officer that he took the FIR book with him to the place of occurrence while this book is supposed to be at the police station.

(iv) Impact of Article 21 on Section 154 Cr PC

There is a need to consider the impact of Article 21 of the Constitution of India on Section 154 of the Criminal Procedure Code. The Court has applied Article 21 on several occasions in matter relating to criminal law. The expression "law" contained in Article 21 necessarily postulates law which is reasonable and not merely statutory provision irrespective of its reasonableness or otherwise. The requirements of Article 21 are implicit in Section 154. The provisions of Section 154 Criminal Procedure Code must be read in the light of Article 21 of the Constitution and thus before registering an FIR the Station House Officer must have a prima facie satisfaction that there is commission of cognizable offence.

(v) Interpretation of word "shall": Directory or Mandatory

The use of word "shall" in section 154 is mandatory or directory has been an issue. The Supreme Court on various occasions[39] has observed that

37. State v. Dr. R.C. Anand AIR 2004 SC 3693; Mansukhlal Vithaldas Chauhan v. State of Gujarat AIR 1997 SC 3400. Both the cases were on the issue of sanction by the authority to prosecute and it was held that the grant of sanction requires application of mind by the sanctioning authority.
38. AIR 1981 SC 1230 Chinnappa Reddy and Bahrul Islam, JJ.
39. Sainik Motors, Jodhpur v. State of Rajasthan AIR 1961 SC 1480; State of U.P. v. Babu Ram Upadhyaya AIR 1961 751; Shivjee Singh v. Nagendra Tiwary AIR 2010 SC 2261

though the word 'shall' raises a presumption that the provision is imperative but it may be rebutted by other considerations such as object and scope of enactment. Thus the word "shall" may be construed directory also. In *P.T. Rajan* v. *T.P.M. Sahir*,[40] the issue was the effect of non - publication of electoral roll on the validity of election result and the Supreme Court was to discuss the principles as to whether a statute is mandatory or directory. The court had observed that a statute must be read in its text and context. Whether a statute is directory or mandatory does not refer to the words "shall" or "may" used therein. Such questions must be answered having regard to the purpose and object it seeks to achieve. A provision in a statute which is procedural in nature although employs the word "shall" may not be held to be mandatory if thereby no prejudice is caused, the Court observed.[41] If the police does not register FIR, it is argued, no prejudice is caused to the complainant as effective remedies are available to him under various sections like 154 (3), 156, 190 of the Criminal Procedure Code. Such an argument is tenable where the informant approaches higher authorities without exhausting the remedy available at the lower level. The question may arise where other remedies are available at higher level, should the police officer in charge not lodge an FIR. There is a need to restore faith and confidence among the people that the criminal justice adequately provides some initial satisfaction to the aggrieved party by registering the case where the offence disclosed by such information happens to be cognizable.

(vi) Availability of Alternatives Procedure in the Code:

Sometimes it is argued that where the police officer in charge refuses to lodge the First Information Report, the informant may take other legal recourse provided under Sections 154 (3), 156 (3) 190 and 202 of the Criminal Procedure Code.[42] It may also be argued that the non-registration of an FIR does not result in crime going unnoticed or unpunished. The registration of FIR is only for the purpose of making the information about the cognizable offence available to the police and to the judicial authorities at the earliest possible opportunity. Similarly, the delay in lodging an FIR does not necessarily result in acquittal and delay can be satisfactorily explained. Such argument may affect the credibility of the State. It may be submitted that the police officer in charge of police station must mandatorily lodge the report and register the case and start his investigation according to law. In case, the police officer investigating the case arrives at a conclusion that it was false and concocted information he may submit the investigation report to the competent magistrate and initiate proceeding against the informant whose name and particulars are available with the police.

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40. AIR 2003 SC 4603 V.N. Khare CJ. , Brijesh Kumar and S.B. Sinha, JJ.
41. Id. at 4615
42. Supra note 19

(IV) GUIDELINES FOR REGISTERING AND NON - REGISTERING OF FIR: TOWARDS A BALANCE

In *Lalita Kumari case*[43], the Senior Counsel for the State of Maharastra, submitted that it was not possible to put the provisions of section 154 Criminal Procedure Code, 1973 in any straight jacket formula. However, some guidelines can be framed as regard to registration and non registration of FIR. He suggested following guidelines:

1. Normally in the ordinary course a police officer should record an FIR, if complaint discloses a cognizable offence. In exceptional cases, where the [police officer has reason to suspect that the complaint is motivated on account of personal or political rivalry, he may defer recording of the FIR, and take a decision after preliminary enquiry.
2. In cases of complaints which are result of vendetta like complaints under Section 498 A Penal Code, the police officer should be slow in recording an FIR and he should record an FIR only if finds a prima facie case.
3. Police officer may also defer recording of an FIR, if he feels that the complainant is acting under mistaken belief.
4. The police officer may also defer the recording of an FIR if he finds that the facts stated in the complaint are complex and complicated involving financial contents like criminal breach of trust, cheating etc. Where the police officer in charge of a police station decides to defer the registration of an FIR, the following steps should be followed:

   a. The police officer must record the complaint in the Station/ General Diary. This will ensure that there is no scope for manipulation and if subsequently he decides to register and FIR, the entry in the Station/General Diary should be considered as the FIR.

   b. The police officer in charge should immediately report the matter to the superior police officer and convey him the reason or apprehension and take permission for deferring the registration of FIR. A brief note of this should be recorded in the Station Diary.

   c. The police officer should disclose to the complainant that he is deferring registration of FIR and call upon him to comply with such requisitions the police officer feels necessary to satisfy him about the prima facie credibility of the complaint. The police officer should record this in Station Diary. All this is necessary to avoid any change as regard to delay in recording the FIR.

In view of the above suggested guidelines, it would be pragmatic to submit that the police officer should mandatorily lodge the FIR where the information discloses commission of cognizable offence. If the information was found to be true during the investigation, the police will submits its report to the magistrate according to law otherwise may submit its closure report with recommendation to initiate proceedings against the informant. Such an approach

43. Supra note 1

will be a balance between right and duty on the part of the informant.

V. CONCLUSION

Thus, where law provides for lodging of the First Information Report in cognizable offences and the Police officer refuses do so, it not only affects the safety and peace but also may lead to emotional outburst of the people because the immediate effect of crime agitates the human mind. There is thus a likelihood of people taking the law in their own hand which may lead to law and order problem. In case the Police lodge the First Information Report and investigate into the matter, the emotional rage may subside to a great extent and problem of law and order may not erupt. It may therefore be submitted that where the information discloses the commission of cognizable offence, it should be mandatory for the officer-in-charge of a police station to lodge the First Information Report and then to proceed for investigation.

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CUSTODIAL VIOLENCE AND CRIMINAL JUSTICE SYSTEM

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ABSTRACT:

Custodial violence is utter violation of human rights and human dignity. It is most heinous crime which erodes public faith in criminal justice system and creates criminogenic atmosphere. It is committed by the police officer who has responsibility to protect the public from crime and has duty to check the problem of crime and criminality. Custodial violence is mainly committed for extracting informations and confessions during investigation. Reasons behind custodial violence are faulty training of police officers, excessive work load over police officers; police officers consider themselves above the law and corruption. For prevention of custodial violence International legal regime and Municipal legal regime are making striving but still the problem is unchecked and becoming more and more alarming. Now a days law enforcement agencies and legalists are advocating limited permissibility of custodial violence for tackling problem of terrorism and organized crime. In these situations causes of custodial violence and law relating to it are needed to be analyzed to suggest effective measures for prevention of custodial violence.

***Key words**: Custodial violence, Custody, Criminal justice system, Police officer, Torture, Third degree methods, Human rights, Investigation,*

INTRODUCTION

Custodial violence resultant of torture and atrocities committed by police officers against persons in custody by the use of third degree methods is creating a great challenge before criminal justice system. Criminal Justice system has been evolved to prevent the crime, to identify criminals, to collect evidences, to penalize criminals and ultimately to save the society from crime and criminals. Police is most important constituent of criminal justice system

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and have responsibility to enforce criminal law. Police officers have responsibility to save the society and protect the societal members. Now days cases are continuously coming in media and also before courts alleging abuse of police powers and commission of custodial violence. If police officer, the protector, himself commits crime of custodial violence, it affects whole criminal justice system. People lose faith in police, law and justice. People do not believe in police investigation; therefore also do not have faith in criminal justice system. This situation gives rise in increase of crime rate. Crime of custodial violence is committed by police officer, the protector and main part of state law enforcement machinery, against the helpless person in police custody who should be protected by police officer. Therefore in this era of human rights consciousness custodial violence is considered as most ghastly and heinous offense.

1. CUSTODIAL VIOLENCE DEFINED

Custodial violence is very broad term and it includes deaths, rapes, tortures, illegal arrests and detentions, false implications, disappearances from police custody and other abuses of police powers. In common word custodial violence refers to torture in police custody. It is very heinous offense committed by police officers, who have responsibility to protect the citizens. Supreme Court of India observed that:

> "Custodial violence, including torture and death in the lock-ups, strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society."[1]

Custodial violence is infliction of physical pain and discomfort or psychological and mental pain. Custodial violence is essentially an instrument to impose the will of police officer over the helpless person in custody by suffering. Custodial violence is utter violation of human dignity and it distorts individual personality of sufferer. Supreme Court observed that:

> "No violation of any one of the human rights has been the subject of so many conventions and declaration as "torture" - all aiming at total banning of it in all forms, but in spite of the commitments made to eliminate torture, the fact remains that torture is more widespread now than ever before. "Custodial

1. *D.K. Basu V. State of West Bengal* (1997) SCC 416 at P.424.

> torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilization takes a step backward - flag of humanity must on each such occasion fly half-mast."[2]

Custodial violence is mainly committed by the police officer during interrogation. Convention against Torture and other Cruel, In-human or Degrading Treatment or Punishment 1984 defines torture as:-

> "Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."[3]

2. CAUSES OF CUSTODIAL VIOLENCE

The problem of custodial violence is of universal nature particularly in India police has very bad image for resorting custodial violence in almost every case. This type of police image has badly affected faith of people in police ultimately in criminal justice system. People are only fearing to police but not having any faith. The image of the police was depicted by the Police Commission:

> "The police is far from efficient; it is defective in training and organization; it is inadequately supervised; it is generally regarded as corrupt and oppressive; and it has utterly failed to secure the confidence and cordial cooperation of the people."[4]

The cases of custodial violence are utter violation of human rights and human dignity committed by the person in uniform who has responsibility to check the problem of crime and criminality. Custodial violence erodes the faith of citizenry in criminal enforcement machinery and criminal justice dispension system resulting into problem of lynch law and increase in crime rate. There are many causes of custodial violence:

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2. *Ibid*.
3. Art. 1.1 of Convention Against Torture, 1984.
4. Police Commission Report 1902, P.150.

(I) FAULTY TRAINING OF POLICE OFFICERS

Police Officers are employed for tackling the problem of crime and criminality. It can only accomplished when crime is properly investigated and criminal is identified. Further, it is required that police officer should collect evidences properly by which criminal be sentenced. Crime investigation is a specialized work; investigating officers can perform their duties only when they are properly trained. Even today in scientifically and technologically developed era when offenders are using modern know-how in committing crime, police training institutions are imparting training in old fashion. Therefore, police officers have no proper investigative skill, but at the same time investigation of case is compulsive for his employment that's why police officers usually resort custodial violence. Police officers only know third degree method and always use custodial violence for investigation of criminal cases. Custodial violence is resorted by police officers during investigation for collection of evidences and extracting of confessions. Police Officers are not trained properly for collection of evidences by use of modern scientific investigation methods, they use third degree methods. As the complexity and nature of crime is changing, it is needed that the police officers should be trained in forensic science and information technology.

(II) EXCESSIVE WORKLOAD OVER POLICE OFFICERS

Police officers are always pressurized by government and superior officers to complete investigations speedily. When crime rate is excessive and continuously increasing, it is not possible to investigate the case properly by present police force, therefore police officers use third degree method to extract confessions, even when accused may not have committed crime and by this way to complete investigation. Crime rate is increasing day by day. In India criminal justice system is collapsing due to lack of proper number of well trained investigating officers. Even the present existing number of investigating officers is not in the situation to dedicate their full time for crime investigation as they are indulged in VIP security and maintenance of law and order. Excessive work load, long hours of duty and pressure for speedy completion of investigation create frustration, anguish and anger in police officers, which is manifested custodial violence against helpless detainees. Excessive workload over the police officers is, no doubt, a major cause of custodial violence.

(III) POLICE OFFICERS CONSIDER THEMSELVES ABOVE THE LAW

Police officers have misconception about Criminal Justice System. People obey the law, because they internalize the law which sets a standard and by this standard pattern of prescriptive behaviors is determined that how an individual and others ought to behave.[5] This is principal method and reason for

5. Prof. H.L.A. Hart, The Concept of Law, P.80.

enforcement of criminal law. Police officers have misconception about enforcement of criminal law that the people observe the criminal law because they fear the law enforcement machinery (police) and due to this fear people desist from committing criminal behavior. For instilling this fear police officers usually use third degree methods. Becker observed that:

> "In justifying the existence of his position, the rule enforcer faces a double problem. On the one hand, he must demonstrate to others that the problem still exists : the rules he is supposed to enforce have some point, because infractions occur. On the other hand, he must show that his attempts at enforcement are effective and worthwhile, that the evil he is supposed to deal with is in fact being dealt with adequately.[6]

Further Becker observed that:

> "…… A rule enforcer is likely to believe that it is necessary for the people he deals with to respect him. If they do not, it will be very difficult to do his job; his feeling of security in his work will be lost. Therefore, a good deal of enforcement activity is devoted not to actual enforcement of rules, but to coercing respect from the people the enforcer deals with." :[7]

(IV) CORRUPTION AND POLITICAL RIVALRY

Corruption is much criticized and rampant problem in India in 21st century. Police personnel are part of society and at the same time they have enormous power, therefore they have opportunity to misuse of power also. Due to corruption and bribery police officers make illegal arrest and detention and during detention detainee is meted with third degree methods. Police Commission of 1902-03 observed that:

> "Extortion and oppression flourished unchecked through all gradations of officials responsible for the maintenance of law and order."[8]

Police officers have enormous powers of arrest and detention, it is usually misused. John Beams has given pictorial detail of power of Daroghas in British India and its misuse:

> "They ruled their territories like little kings. Their misdeeds were legion and always went unpunished, for who would have temerity to report him to collector. The darogha's powers of harassment were enormous; he could have a person indicted

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6. Howard S. Becker, Moral Entrepreneurs : the Creation and Enforcement of Deviant category in Deviant Behavior, Delos H. Kelly (ed.), St. Martin's Press, New York, 1979, P.19.
7. *Ibid*.
8. Police Commission Report, *Op.cit.*, P.5.

> for harbouring a bad character or failing to assist an officer in arresting a criminal. Obtaining witnesses presented no problem to the darogha."[9]

Police force is usually used by ruling echelons against their rivals. This situation further aggravates the problem of custodial violence like - illegal arrests, illegal detentions, implication in false cases, fabrication of evidences and third degree measure applications for extracting confessions and informations even when person may not have committed any crime.

(V) LACK OF RESPECT FOR HUMAN RIGHTS AND HUMAN DIGNITY

Human rights are basic rights of all human being and these are needed to be protected in every situation for protecting the human dignity. Police officers are not properly trained and educated about human rights, importance of human rights and human dignity. It is important causation of custodial violence. Human right against custodial violence is also given place in Art. 21 of Constitution of India as a fundamental right: right to life and personal liberty. Police officers particularly dealing with public are not properly educated persons and therefore general awareness of police officers about basic human rights instrument is very poor. It becomes more aggravated due to public expectation about early revealing of crime and arrest of criminals. It pressurizes police officers and because they are completely lacking conscience for human rights and human dignity protection, police officer arrests all the suspected persons and applied third degree measures for collection of evidences and extracting confessions. By torture arrestee confess although he may not have committed the crime. Supreme Court observed that:

> "Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during investigation of an offense but it must be remembered that law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means."[10]

About the causation of custodial violence Supreme Court observed in the case of *Sube Singh* V. *State of Haryana*[11] that:

> "Unfortunately police in the country have given room for an impression in the minds of public that whenever there is a crime, investigation usually means rounding up all persons concerned and subjecting them to third degree interrogation in the hope that someone will spill the beans. This impression may not be correct, but instances are not wanting where

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9. John Beams, Memories of a Bengal Civilian, Chato and Windus, London, 1961, Pp.140-41.
10. *D.K. Basu V. State of West Bengal, Op.cit.,* P.433.
11. (2006) 3 SCC 178 at P.203.

> police have resorted such a practice. Lack of training in scientific investigation methods, lack of modern equipment, lack of adequate personnel and lack of mindset respecting human rights, are generally the reasons for such illegal action. One other main reason is that the public (and men in power) expect results from police in too short a span of time, forgetting methodical and scientific investigation is time consuming and lengthy process. The expectation of quick results in high profile or heinous crimes, builds enormous pressure on the police to somehow "catch" the "offender". The need to have quick results tempts them to resort to third degree methods. They also tend to arrest "someone" in a hurry on the basis of incomplete investigation, just to ease the pressure."

Custodial violence is serious, heinous and ghastly act committed by law enforcement machinery which violates basic human rights of citizenry and undermine human dignity. The main causations of custodial violence are faulty training of police officers - police officer lack training in scientific investigation methods and not have modern equipments of investigation. Excessive workload over the police officers - increasing and excessive workload create frustration in police officers which usually drain off in form of custodial violence. Police officers consider themselves as law themselves - they have misconception that people observe the law because they fear to the police officers, police officers are not properly educated and trained for respecting human rights, human values and human dignity and that's why have no guilty feeling in using third degree measures and now in money oriented capitalist society corruption, bribery. Police-politician-wealthy people nexus aggravate the problem of custodial violence. Now in 21st century crime rate and criminality is continuously increasing and creating fear of victimization to every person in the world particularly to be victim of terrorism. Terrorists always plan and have ability to cause mass destruction needed to be tackled beforehand. Public at large and political leaders are now arguing that limited custodial violence may be permitted for getting information about planning of mass destruction and terrorist measures from the person holding such information and refusing to disclose it. This is one more very potent reason of custodial violence and it legalizes the incidents of custodial violence.

3. INTERNATIONAL CONVENTIONS

Custodial violence causes serious violation of human rights of detainee. Torture not only affects the physical body of the person but causes painful wound to the very soul of the detainee and also of the public at large. Society feels ashamed and scandalized as the protector empowered by the society has abused the power and brutal power has been used against a societal member. Custodial violence has become a serious and grave challenge before the criminal justice system in 21st century. Custodial violence has not only taken menacing situation in India but also before whole world. It has become an

universal challenge before criminal justice system. International community has convened many conventions and given directions for eradication of problem of custodial violence.

(I) GENEVA CONVENTIONS

After the First World War, Geneva Convention was convened to check the problem of atrocities during the wars. Art,5 prohibits use of custodial violence against war prisoners and states that "no pressure shall be exercised on prisoners to obtain information regarding the situation in their armed forces or their country." In World War II again world community seen atrocities committed against war prisoners, therefore again in Geneva Convention directions were given for complete ban on custodial torture:

> "No physical or mental torture, nor any other form of coercion, may be inflicted an prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuses to answer may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind."[12]

In Fourth Geneva Convention the prohibition on torture was broadened and protection was also provided to civilian persons. Article 32 does not distinguish between judicial torture designed to extort confessions and extra judicial torture. Prohibition on torture is complete and covers all forms of torture and any other measures of brutality whether applied by civilian or military agents. Further Art.3 of the convention prohibits murder of all kinds, mutilation, cruel treatment and torture.[13]

(II) UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948

Universal Declaration of Human Rights together with International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights form the Bill of Rights. Bill of Rights lays down general principle regarding human rights of individual and renounces all derogatory practices. Custodial violence is also renounced as being utter violation of human rights of individuals and derogatory practices. Universal Declaration of Human Rights provides that:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[14]

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12. Art.17 Geneva Convention of 1929.
13. Fourth Geneva Convention, 1949.
14. Art.5 Universal Declaration of Human Rights, 1948.

(III) CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 1984:

Custodial violence is universal problem, therefore for tackling this vice United Nations drafted and adopted in 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and directed state parties for effectively dealing the custodial violence. This Convention is the most comprehensive relating to custodial violence. Art.2 of Convention rejects the invocation of exceptional circumstances such as war or threat of war, internal political instability or any other public emergency to justify torture in custody. Torture in custody has been defined in Art.1 of the Convention that torture means any act committed *intentionally by state official which causes severe pain or suffering*, it may be physical or mental but it not include pain or suffering arising only from lawful sanctions. This Convention provides direction to state parties for elimination of custodial violence, but at the same time has ample space to permit limited resort of custodial violence in certain circumstance. Now a days nature of crime, modus operandi of crime and consequences of crime affecting public at large have been completely changed and causing mass destruction. In this situation some states are now arguing for limited permissibility of torture for getting information from detainee particularly in cases related with terrorism. The definition of torture given in CAT seems to have given space for it. CAT has separated torture from Acts less severe. It defines torture that it is act by which severe pain or suffering is intentionally inflicted. Therefore if act is causing simple pain or suffering it may not amount to torture. Further one more exception has also been given when pain or suffering inflicted not amounts to custodial violence when it is arising only from, inherent in or incidental to lawful sanctions. This situation given in CAT enables municipal legal systems to have wider space in determining what may be inherent or incidental. Torture is committed by inflicting severe physical pain or suffering and severe mental pain or suffering. Severe physical pain or suffering requires such a high level of intensity that the pain is difficult for the detainee to endure. Severe mental pain or suffering is considered to be inflicted when the act of torture causes profound disruption of individual personality. Therefore it appears that the mild infliction of pain or suffering is not accepted as torture.

4. CONSTITUTION OF INDIA

Constitution is Supreme Law of India. Constitution particularly Fundamental Rights provisions protects human dignity and human rights of citizens. Arts. 20, 21 and 22 of Constitution protects a person from torture and other dehumanizing act committed during police custody. Article 21 is most pervasive provision protecting person's life and liberty. Life includes life with human dignity. Protection to liberty is also given and a person may be arrested and detained only in accordance with procedure established by law. Art.21 therefore prohibits torture and dehumanizing treatment and further it prohibits illegal arrest and detention. For protecting a person from custodial violence

Art. 22 has prescribed a time period within which arrested person must be produced before magistrate. Therefore the police officer will not have time to torture the person by third degree measures and extract confessions even when person may not have committed the offense. Art.20 enjoins that the no person shall be compelled to be witness against himself. These Constitutional safeguards provide protection to all the persons from custodial violence. Custodial violence is completely prohibited act. Supreme Court of India in case of *D.K. Basu v. State of West Bengal* observed that:

> "Fundamental Rights occupy a place of pride in the Indian Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law." Personal liberty, thus, is a sacred and cherished right under the Constitution. The expression "life or personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the state or its functionaries. Article 22 guarantees protection against arrest and detention in certain cases….. Art.20(3) of the Constitution lays down that a person accused of an offense shall not be compelled to be witness against himself. These are some of the Constitutional safeguards provided to a person with a view to protect his personal liberty against any unjustified assault by the state."[15]

5. INDIAN PENAL CODE 1860

Torture in police custody is prohibited act and it is utter violation of fundamental rights of citizens. No doubt custodial violence is crime committed by law enforcement machinery. But in Indian Penal Code custodial violence is not expressly and directly described as an offense. Constitution of India and Criminal Procedure Code proscribe it and completely ban on infliction of torture in custody. In certain circumstances custodial violence is punishable under Indian Penal Code under special provisions. In other circumstances police officer may become liable for custodial violence under general provisions defining some general offenses like; murder, culpable homicide, wrongful confinement, hurt and grievous hurt etc.

Some provisions contained in Indian Penal Code specifically deal with custodial violence. In custody third degree measures are applied which usually amounts to hurt and grievous hurt. Sec.330 provides severe punishment for causing hurt to detenue in custody:

> "Whoever voluntarily causes hurt for the purpose of extorting from the sufferer or from any person interested in sufferer, any confession or any information which may lead to the

15. Op.cit., at P.426.

> detection of an offense or misconduct or for the purpose of constraining the sufferer or any person interested in sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, shall also be liable to fine."

Causing of grievous hurt is more serious offense. If police officer causes grievous hurt for extracting confession or any other information, it is punishable by imprisonment of either description which may extent to ten years and also by fine.[16] Police officers have very wider powers of arrest without warrant, which is usually misused and detenues are kept in illegal detention amounting to wrongful confinement. Indian Penal Code prescribes punishment for keeping a person in wrongful confinement by police officer:

> "Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined any confession or any information which may led to the detection of an offense or misconduct …. Shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine."[17]

For tackling the problem of custodial violence in Indian Penal Code it has been made punishable offense with an objective that these provisions may have deterrence effect and police officer would not resort third degree measures in investigation of cases. But these provisions seems to be only paper tigers and in reality have no deterrence as no person dares to file complaint for custodial violence, if filed investigating officers do not investigate the case properly because of police brotherhood. Therefore in custodial violence cases police officers are never convicted.

6. CRIMINAL PROCEDURE CODE 1973

Custodial violence is stigma for humanity in which state machinery having legal duty to protect citizens, abuses state power, causes severe pain or suffering to the helpless person in custody. It is utter violation of human rights and human dignity. Criminal procedure is fully laden with human values, in every provision striving has been taken to protect the person arrested and kept in custody, attempt has been made to protect human rights and human dignity, proper provisions have been provided to regulate and restrict the powers of law enforcement machinery to prevent abuse of power resulting into custodial violence. Criminal Procedure Code completely prohibits custodial violence:

> "(1) No police officer or other person in authority shall offer

16. Sec.331, Indian Penal Code1860.
17. Sec.348, Indian Penal Code1860.

> or make or cause to be offered or made, any such inducement, threat or promise as is mentioned in Section 24 of Indian Evidence Act, 1872 (1 of 1872)."[18]

(I) RESTRICTION ON POWER OF ARREST

Police officers have very wider power of arrest without warrant. Arresting power is much criticized that it is most abused power. For investigation of an offense police officer arrests a person and in custody usually third degree methods are applied for extracting information. Sometimes police officer even not shows the arrest in record and without legal arrest person is kept in custody and for extracting confessions and other information custodial violence is inflicted. Then after extracting all the information police officer shows arrest in record and produces him before the magistrate. Power to police officer for arresting is essential for checking the problem of criminality but at the same time restrictions on police power of arrest are much needed to check more serious problem of custodial violence. Balance has been made between these two requirements of criminal justice and wider powers of arrest with wider restrictions have been given to police officers.

Police officers have very wider power of arrest in certain circumstances, those circumstances are expressly enumerated in Sec. 41 and 42. Arresting power without warrant can be exercised only in these circumstances shows police power of arrest is regulated power. Further for exercise of power police officer must have credible information or reasonable complaint or reasonable suspicion or have knowledge about complicity of person in offenses.[19] Knowledge, credible and reasonable situations much restrict the powers of arrest, by this way minimize the chance of infliction of custodial violence. Arresting power to police officer is given mostly in case of cognizable offenses. In these cases circumstances are divided in three categories:

1. When cognizable offense is committed in presence of police officer - police officer may arrest without warrant. In this case police officer has complete knowledge that the person has committed crime.

2. When cognizable offense has not taken place in presence of police officer and it is punishable by more than seven years imprisonment or with death sentence - In this case police officer has received *credible information* and the police officer has *reason to believe* on the basis of that information that such person has committed the crime.

3. When cognizable offense has not taken place in the presence of police officer and it is punishable by seven years imprisonment or less, police officer normally not arrests the person but if his presence for investigation is required notice to appear before police officer may be issued. If the person complies and continues to comply the notice, he shall not be arrested (sec. 41-A). In certain circumstances a person may be arrested in this type of offense also

18. Sec.163, Criminal Procedure Code1973.
19. Sec.41 and Sec.42 of Criminal Procedure Code, 1973.

-when the police officer has received reasonable complaint or credible information or reasonable suspicion exists that he has committed a cognizable offense and following conditions are satisfied:

(A) Police officer has *reason to believe* that the person has committed the offense.

(B) Police officer is satisfied that arrest is necessary:

(a) To prevent such person from repeating the crime.

(b) For proper investigation of crime

(c) To prevent tempering with evidences and terrorizing witnesses.

(d) To ensure presence of person before the court.

(e) When person not observes notice for appearance issued by police officer.

Further in case of *Bir Bhadra Pratap Singh V. D.M., Azamgarh*.[20] Allahabad High Court by interpreting arresting power imposed one more check that even if a police officer has been empowered by sec.41 to arrest without warrant this power is to be exercised in circumstances where the obtaining of a warrant from a magistrate would involve unnecessary delay defeating the arrest itself. This makes clear that the police officer should arrest a person without warrant only in exigency situations. Reasonable, credible and knowledge requirement requires that the person may be arrested only after completion of investigation up to some extent. Supreme Court observed that:

> "No arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing. The justifications for the exercise of it is quiet another ..... No arrest should be made without a reasonable satisfaction reached after some investigation as to genuineness and bonafides of a complaint a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter.[21]

Provisions relating to arrest directs clearly how person be arrested .Criminal Procedure Code prescribes complete measures for prevention of incident of excessive use of force. Sec. 46 requires that at the time of arrest if the person is not submitting himself in the custody police officer may touch the body of the person means least force may be used. If more force is needed for the arrest then it may be used and person may be confined. This step by step prescription for use of force clears that the legislator has prescribed the procedure by which incident of use of excessive force may be minimized at the time of arrest. Sec.46 provides that:

> "In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the

20. AIR 1959 All 384.
21. *Joginder Kumar V. State of U.P.* (1994) 4 SCC 260 at P.267.

custody by word or action."[22]

For prevention of custodial violence express provision is given in S.49 of Criminal Procedure Code and it provides that the person arrested shall not be subjected to more restraint than is necessary to prevent his escape. After arrest it is constitutional and statutory requirement that within 24 hours from the time of arrest person must be produced before magistrate.[23] Therefore the police officer will have much limited time to keep the person in custody without authorization. It minimizes chance of infliction of third degree measures. Sec.54 incorporates directions given by Supreme Court of India in the case of *D. K. Basu* v. *State of W. Bengal* regarding medical examination of arrestee and provides a potent means for protecting the person from custodial violence and provides that:

> "54(1) When any person is arrested, he shall be examined by a medical officer in the service of central or state governments and in case the medical officer is not available by a registered medical practitioner soon after arrest is made:
>
> provided that where the arrested person is female , the examination of the body shall be made only by or under the supervision of a female medical officer , and in case the female medical officer is not available , by a female registered medical practitioner.
>
> (2) The medical officer or a registered medical practitioner so-examining arrested person shall prepare the record of such examination , mentioning therein any injuries or marks of violence upon the person arrested and the approximate time when such injuries or marks may have been inflicted ...."

This provision contained in sec. 54 Cr.P.C. Requires preparation of injury report at the time of arrest or immediately after the arrest and one copy of such report is to be given to arrestee free of cost. This provision may check the problem of custodial violence. Further sec. 55-A imposes duty on police officer to take care of health and safety of the arrestee- "It shall be duty of the person having the custody of an accused to take reasonable care of the health and safety of the accused."Police officer when arrests any person, no proper information is given to the persons interested in his welfare, his arrest is not shown in record and arrested person is conveyed from one place to another. During such custody custodial violence is committed. Now by amendment in 2005 one provision Sec. 50-A has been added which imposes duty on police officer to give information of arrest and place of custody be informed to person's relatives or friends nominated by arrested person. In 2008 some more provisions have been added in criminal Procedure Code for the purpose of complete prevention of incidents of custodial violence by restricting power of police to arrest.

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22. Sec.46(1), Criminal Procedure Code, 1973.
23. Art.22 of Constitution of India; SS.56, 57, 76 and 167 of Cr.P.C. 1973.

(II) DIRECTIONS FOR THE USE OF MODERN METHODS OF INVESTIGATION

Police officers are not properly trained for the collection of evidences by use of modern methods of investigation. This is major cause of custodial violence. Now this situation has been taken into consideration and in Criminal Procedure Code provision has been given providing that in investigation police officer should use biological clues available at the crime scene or body of victim or accused. If it is resorted in reality by trained police officers, police officers will not commit custodial violence .Criminal Procedure Code directs for collection of biological clues and its examination:

> "Examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offenses, sputum and sweat, hair samples and finger nail chippings by the use of modern and scientific techniques including DNA profiling and such other tests, which the registered medical practitioner think necessary in a particular case."[24]

(III) RIGHT TO SILENCE

Police officer has very wider power of investigation and it is mainly carried out by police officer by interrogating persons acquainted with fact and circumstances of the case. Sec.161 of Cr.P.C. authorizes police officer to interrogate person acquainted with fact and circumstances of the case:

> "(1) Any police officer making an investigation under this chapter, or any police officer not below such rank as the state government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the fact and circumstances of the case.
>
> (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answer to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture."

Police officers have power to interrogate all the persons acquainted with fact and circumstances of the case for collection of evidences. Accused is the person who is considered that he is person completely acquainted with fact and circumstances of the case. Therefore, he may be interrogated. During interrogation police officer for extracting information uses third degree measures. It becomes more devastating by one more power available to police officer U/s.160 of Cr.P.C. empowering the police officer to call any person acquainted with fact and circumstances of the case in police station for interrogation, which is much misused, by abuse of this provision police officers

24. Explanation to Sec,53 of Criminal Procedure Code, 1973.

without proper arrest keeps a person in police station and commit custodial violence.[25]

For preventing misuse of these powers some protection are given to accused person. Sec.163 expressly gives direction that during interrogation threat or inducement cannot be given to the accused person. In other words police officer shall not inflict custodial violence. In Sec.161 person interrogated is bound to answer truly but he has liberty to not answer that question which would have tendency to expose him to a criminal charge. It means accused person has two rights - right to refuse to answer incriminating question and right to silence. This provision is given with a view to save the person from custodial violence and implicitly prohibits police officers from using third degree measures for extracting informations from person in custody. Statement given U/s.161 is prohibited to be used against accused person except certain exceptional situations (Sec.162 of Cr.P.C.). Women and children are most vulnerable persons needed to be protected from any type of custodial violence; therefore, police power to call persons in police station is restricted in respect of these two classes of people. If interrogation of these two classes of people is required, should be done at their residence but not in police station.

(IV) SAFEGUARDS FOR RECORDING OF CONFESSIONS

Confessions are statements made by accused accepting his complicity in the crime. Only on the basis of confession accused may be convicted. Police officer by use of third degree measures attempts to extract confessions. Police officer would not commit custodial violence for extracting confession, for this purpose in Section 164 of Cr.P.C. procedure for recording of confession is given according to which only Metropolitan or Judicial magistrate may record any confession. Section 164 provides a special procedure for the recording of confessions by competent magistrates after ensuring that the confessions are being made freely and voluntarily and are not made under any police pressure or influence:

> "(2) The magistrate shall, before recording any confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily."[26]

Section 164 imposes statutory obligation on the magistrate to warn the accused, before recording his confession, that he is not bound to make it and

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25. In case of *Joginder Kumar* V. *State of U.P.* (1994) 4 SCC 260 a person was arrested by police officer. When his whereabouts were not known to relatives, they filed writ of habeaus corpus. Person was produced before court and police officer stated before court that the person was called in police station U/s.160 of Cr.P.C. and he was not arrested at all, but assisting police officers in investigation of a case.
26. Sec.164(2), Criminal Procedure Code 1973.

that if he does so it may be used as evidence against him. In recording confession magistrate must satisfy himself that no pressure or force was used on the accused who makes the confession. Any marks of police torture on the person of the accused vitiate voluntary character of the confession. Voluntariness is the essence of the confession. This is material substance behind confession. The rest part of the requirements under section 164 relates to the form for recording of confession. Where the magistrate failed to ask any question to the accused whether he was under any inducement or threat from police, indicates that the magistrate failed in searching voluntariness before recording the confession. Confession recording should be in letter and spirit, not in mechanical and routine manner. In case of Babubhai Udesinh Parmar V. State of Gujarat[27] case was related with rape and murder. Accused was illiterate, no legal aid was provided to him. According to Sec.164 warning was given, but his two confessions in both the cases recorded in quick succession. Each confession recorded only within 15 minutes. Court observed that:

> "Section 164 of Cr.P.C. is a salutary provision which lays down certain precautionary rules to be followed by the magistrate recording a confession so as to ensure the voluntariness of the confession and the accused being placed in a situation free from threat or influence of the police. ….. Section 164 provides for safeguards for an accused. The provisions contained therein are required to be strictly complied with. But it does not envisage compliance of the statutory provisions in a routine or mechanical manner ……. What is necessary to be complied with, is strict compliance of the provisions of Section 164 of the Code of Criminal Procedure which would mean compliance of the statutory provision in letter and spirit."[28]

Section 164 is salutary provision given in Criminal Procedure Code to prevent custodial violence by police officers for extracting informations and confessions.

(V) INQUIRY BY MAGISTRATE INTO CAUSES OF DEATH OR RAPE IN CUSTODY

Due to custodial violence death and sexual assault in police custody have become common media highlighted phenomenon, needed to be tackled properly by proper investigation and inquiry. In case of custodial death and custodial sexual assault there may be probability that investigating police officer may favor alleged police officer, therefore in Section 176 of Criminal Procedure Code special inquiry is prescribed to be conducted by magistrate in custodial death and custodial sexual assault cases. Inquiry in custodial violence by

27. AIR 2007 SC 420.
28. Id. At Pp.423-424.

magistrate is conducted in addition to or instead of the investigation held by police officer:

> "Where, -
>
> (a) where any person dies or disappears, or
>
> (b) rape is alleged to have been committed on any woman,
>
> while such person or woman is in the custody of the police or in any other custody authorized by the magistrate or the court, under this code in addition to the inquiry or investigation held by the police, an inquiry shall be held by the judicial magistrate or the metropolitan magistrate, as the case may be, within whose local jurisdiction the offense has been committed."[29]

(7) INDIAN EVIDENCE ACT, 1872

Police officer uses third degree measures for extracting informations and confessions. For preventing this malady, these types of statements have been made inadmissible evidences by provisions contained in Indian Evidence Act 1872. Custodial violence causes threat to the person and he is compelled to give particular type of statement. Compelled testimony is completely prohibited by Sec.24 of Indian Evidence Act:

> "A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority……."

Police officer is person in authority and always it is regarded that the confessions made to police officer are obtained due to threat or inducement, therefore expressly confessions to the police officer are made inadmissible by Sec.25 :

> "No confession made to a police officer, shall be proved as against a person of any offense."

If confessions to police officer would allow to be proved in evidence, the police would torture the accused and force him to confess to a crime even which he may not have committed the crime. Confessions made in police custody even made to any person other than police officer unless made to judicial magistrate and recorded by procedure given in Section 164 of Criminal Procedure Code is inadmissible:

> "No confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a magistrate, shall be proved against such person."[30]

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29. Sec.176(1-A), Criminal Procedure Code 1973.
30. Sec.26, Indian Evidence Act, 1872.

This section is based on fear that the police officer may torture the accused and force him to confess, if not to the police officer as prohibited by Sec.25, to some other person for making it admissible, therefore Sec.26 for prevention of custodial violence has made confession made in custody of police officer inadmissible unless made to magistrate.

Under Evidence Act, there are two situations when confessions or statements made to police officer or during police custody become admissible - one when statement is made to magistrate and other when statement leads to discovery of a fact connected with crime then that part of statement leading to discovery of fact or incriminating thing discovered become admissible. In second situation part of statement leading to discovery of fact connected with case and discovered facts are admissible. Sec.27 of Indian Evidence Act 1872 provides that:

> "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offense, in the custody of a police officer, so much of such information, whether it amount to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

The discovery assures the truth of the statement and makes it reliable. Police officer usually inflicts third degree methods to extract some informations and attempts to discover some fact with the help of such statement. By which information given by accused and discovered fact become admissible. In Indian Evidence Act provisions have been carefully provided to minimize incidents of custodial violence.

(8) JUDICIAL DIRECTIONS FOR PREVENTION OF CUSTODIAL VIOLENCE

Courts have always been very kin in protection of individuals, their fundamental rights, human rights and human dignity. Superior court; by interpreting provisions of statutes, have given new shapes to the law. Custodial violence is a serious problem which violates human rights and human dignity and people loss faith in law and law enforcement machinery therefore creates criminogenic atmosphere needed to be tackled properly. Superior Courts - Supreme Court and High Courts have given direction for prevention of custodial violence.

In case of *Nilabati Behra* V. *State of Orissa*[31] Supreme Court observed that prisoners and detainees are not denuded of their fundamental rights, still they are human being. If any state official commits custodial violence, he will be accountable and state will be responsible:

> "It is axiomatic that convicts, prisoners or under trials are not denuded of their fundamental rights under Art.21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such

31. (1993) 2 SCC 746.

> persons. It is an obligation of the state to ensure that there is no infringement of the indefeasible rights of a citizen to life except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. … The duty of care on the part of the state is strict and admits of no exceptions. The wrongdoer is accountable and the state is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law."[32]

In case of custodial violence cases direct evidences particularly eye witnesses are not available, therefore Supreme Court in case of *State of M.P. V. Shyamsunder Trivedi* directed that the trial courts should not adopt technical approach in custodial violence cases:

> "The Trial Court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a "could not care less" attitude in appreciating the evidence on the record and thereby condoning the barbarous third-degree methods which are still being used at some police stations, despite being illegal. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact situations and the peculiar circumstances of a given case, as in the present case often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in lock up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilized society …. the courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach…[33]

32. *Id.* At P.767.
33. (1995) 4 SCC 262 at Pp.273-274.

Custodial violence poses serious threat to society governed by law, it is committed by the person who has responsibility to prevent the crime and protect the society. In *D.K. Basu* V. *State of West Bengal*, Supreme Court observed that:

> "Using any form of torture, for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21. Such a crime-suspect must be interrogated - indeed subjected to sustained and scientific interrogation - determined in accordance with the provisions of law. He cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or derive knowledge about his accomplices, weapons etc…. challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to "terrorism". That would be bad for the state community and above all for the rule of law."[34]

Usually police officer abuses power to arrest without warrant, after arrest it is not shown in record and persons are kept in detention for a number of days without any authorization from the judicial magistrate and in the meantime third degree methods are used. Even it may result in custodial death, custodial sexual, assault grievous hurt and personality disorders. For checking abuse of arresting power Supreme Court in *D.K. Basu* V. *State of West Bengal* given wider guidelines, some of which have now been incorporated in Criminal Procedure Code by making amendments in 2005 and 2008 :

> "(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.
>
> (2) That the police officer carrying out arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.
>
> (3) A person who has been arrested or detained and is being held in custody in a police station or interrogation center or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been

34. Op.cit. at P.435.

arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal Aid Organization in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in who has custody of the arrestee.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "inspection memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

(9) Copies of all documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."[35]

Courts always show serious concern and stern attitude in custodial violence cases, therefore probability of false accusation of custodial violence

is alarming and it may affect whole criminal justice system particularly when crime rate is increasing. In case of *Munshi Singh Gautam* V. *State of M.P.* Supreme Court observed that:

> "But at the same time there seems to be a disturbing trend of increase in cases where false accusation of custodial torture are made, trying to take advantage of the serious concern shown and the stern attitude reflected by the courts while dealing with custodial violence. It needs to be carefully examined whether the allegations of custodial violence are genuine or are sham attempts to gain undeserved benefit masquerading as victims of custodial violence."[36]

Nature of crime, modus operandi of crime, consequences of crime particularly crime affecting public at large and fear of victimization are challenges before criminal justice system in 21st century, which has changed previous stand of judiciary in custodial violence cases. Now courts are emphasizing the need of careful analysis of evidences for deciding custodial violence cases. It has now afforded some space to police officer to disprove allegations of custodial violence against them. In case of *Sube Singh* V. *State of Haryana* Supreme Court observed that:

> "Cases where violation of Article 21 involving custodial death or torture is established or is incontrovertible stand on a different footing when compared to cases where such violation is doubtful or not established. Where there is no independent evidence of custodial torture and where there is neither medical evidence about any injury or disability, resulting from custodial torture, nor any mark/scar, it may not be prudent to accept claims of human rights violation, by persons having criminal records in a routine manner for awarding compensation. That may open the floodgates for false claims, either to mulct money from the state or as to prevent or thwart further investigation. The courts should, therefore, while zealously protecting the fundamental rights of those who are illegally detained or subjected to custodial violence, should also stand guard against false, motivated and frivolous claims in the interests of the society and to enable the police to discharge their duties fearlessly and effectively. While custodial torture is not infrequent, it should be form in mind that every arrest and detention does not lead to custodial torture."[37]

Judiciary always protects zealously human rights and human dignity of citizens. Superior Courts have shown stern attitude in custodial violence cases by penalizing guilty law enforcement personnel, holding state responsible for

35. *Id.* At Pp.435-436.
36. (2005) 9 SCC 631 at P.639,
37. (2006) 3 SCC 178 at P.201.

custodial violence committed by police officer and providing remedies like compensation to victims. Supreme Court has given variously directions for prevention of custodial violence but custodial violence is still rampant creating challenge for Criminal Justice System.

(9) CONCLUDING REMARKS

Custodial violence is worldwide problem. Custodial violence refers to torture in custody and abuse of police powers. Police torture in lock-up creates greater challenge before the criminal justice system. The enforcer of law himself becomes violator of law, the protector becomes abuser. Police torture results in terrible impression in the mind of common citizen that their life and liberty are in peril because of act committed by law enforcers. Torture committed by police officials shows to potential criminals that crime is acceptable and legalized and creates a criminogenic environment. Due to custodial violence people lose faith in law further augment the criminogenic environment. Custodial violence is mainly committed for extracting informations and confessions during investigation, reasons behind it are faulty training of police officers - police officers are not properly trained for use of modern techniques of investigation and only knowing traditional method that is use of third degree methods; excessive work load - crime rate is continuously increasing and at the same time public and superior officers want ready result of crime investigation, then police officer find easy way of third degree measure for investigation; corruption and political rivalry are other very potent reasons for custodial violence. Police officers consider themselves above the law. They consider that the people obey the law because they have fear of police officers and therefore police officer causes custodial violence sometimes even in public places or before the public for instilling fear of police, this is major reason of custodial violence. One very important causation of custodial violence is that the police officers are not properly trained and educated about human rights and importance of protecting human dignity. They do not know importance of internalization of standard of law, mechanism of observance of criminal law and respect for law by common citizen. Therefore, police officers are unable to comprehend consequences and effect of custodial violence.

For prevention of custodial violence International community has made various conventions and treaties, directed state members for enactment for checking this menace. State members have passed law for this purpose but the problem of custodial violence becoming more and more devastating and terrible. Constitution of India in Arts 20, 21 and 22 provided measures against custodial violence. Indian Penal Code explicitly and implicitly penalizes custodial violence. In Criminal Procedure Code attempts have been made by prescribing restrictions, regulations and checks on powers of police officers. Indian Evidence Act makes evidences collected by police officers by custodial violence or in circumstances in which probability of use of violence is there, inadmissible. In spite of legal measures and judicial directions problem is unchecked creating greater challenge before criminal justice system. Some suggestions for tackling custodial violence may be given that :

(1) Police training should be remodeled to change the mindset of police officers by which they should understand importance of human rights and human dignity.

(2) Increasing and excessive workload on the police officers creates frustration and police personnel become annoyed. Attempt should be made for increasing number of investigating officers and to lessen the workload.

(3) Police officers are not properly trained for using modern techniques of investigation. They only known the traditional method of investigation that is torturing the suspected persons during interrogation. Police personnel should be trained properly by which they should adopt scientific investigation methods.

(4) Inability to cope with the rising crime rate and hierarchical pressures from government, superior officers and also from public to produce quick result often force investigating officer to apply third degree methods. For coping custodial violence emphasis should be on qualitative investigation, not on quantitative investigation.

(5) The functioning of subordinate police officers should be continuously monitored and supervised by superior police officer. Superior police officers are more conscious for human rights and human dignity. They are well knowing impact of custodial violence on public faith in law and ultimately on criminal justice system.

(6) Custodial violence cases are not properly investigated by police officers because of police brotherhood. A new investigating agency should be established for investigating only cases of custodial violence.

(7) In Criminal Procedure Code provision should be added defining custodial violence and expressly prohibiting it.

(8) In Indian Evidence Act provision should be added making outcome of scientific investigating methods substantive evidence. It will encourage police officers to use modern scientific investigation methods, not the custodial violence.

(9) Police officers are not educated in forensic science therefore they are not using modern scientific investigation methods and commits custodial violence. Considering this fact police officer should be educated and trained in forensic science. It should also be made compulsory that a forensic science expert shall assist the police officer in investigation.

(10) Public should be made conscious for filing complaint in case of police power abuse and custodial violence.

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THE COMMERCIALIZATION OF HIGHER EDUCATION AND SUSTAINABLE DEVELOPMENT: EMERGING ISSUES

Vinod Shankar Mishra*

"The higher education so much needed today is not given in the school, is not to be bought in the market place, but it has to be wrought out in each one of us for himself; it is the silent influence of character on character"**

ABSTRACT

This paper explains the negative implications of the increasing commercialization of higher education, of viewing education as a commodity, students as consumers, and educators as service providers. It deals with law relating to commercialization of higher education in the context of sustainable development. Several principles of sustainable development are embedded in India's education policy. It analyses the initiative of central government to introduce fundamental reform in higher education in India. India's higher education sector needs an additional 8 million seats over the next 3 years in order to sustain economic growth.

Key words: *Commercialization, Sustainable Development, Privatisation, Professional education.*

INTRODUCTION

The Mahabharta observes: *Janami dharmam na ca me pravrttih janamy adharman na ca me nivrttih,* 'I know the right but I do not adopt it. I know the wrong, but I cannot abstain from it'. These lines of Mahabharata vividly explain the dilemma of our policy makers.

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** William Osler Canadian Physician, (1849-1919)

According to dictionary meaning, the word "Commercialize" means manage in a way designed to make a profit[1]. Thus, the word commercialization shows the profit as the main motive behind any activity. Thus, if there is sale of services or profit motive behind imparting of education or funds come mainly from the receivers of education, we can easily say that there is commercialization of education.

The Parthenon Group, a leading strategic advisory firm with deep experience in global education industries, released key findings from presentations made at the firm's Global Education Seminar held in Mumbai on 27th January 2011. The Mumbai event was the fourth in a series of global education conferences held in New York City, London, and Dubai. Speakers from Parthenon shared analysis on various hot topics in the Indian education sector such as growth and investment opportunities in higher education. Robert Lytle, Partner and Co-Head of Parthenon's Education Centre of Excellence, presented findings on how foreign universities can help solve India's higher education crisis.

Robert Lytle said: "We have hosted four education conferences in the past two weeks - in New York City, London, and Dubai; but, we saved the biggest and best for where the education market, issues, and challenges are the most dynamic - right here in India. Even here, in India, where demand for quality education seems insatiable, choosing the wrong value proposition or wrong business model will condemn you to failure. Conversely, informed choices allow you to build enduring, self sustaining, and expanding [educational] institutions. Increasing higher education enrolment is central to India's ability to compete in a global economy, as economic strength and Gross National Income (GNI) per capita are closely linked to a country's higher education enrolment ratio. In order to increase India's competitiveness, it is necessary to grow the availability of high quality higher education. Research conducted by The Parthenon Group's Education Centre of Excellence projects that India's higher education sector needs an additional 8 million seats over the next 3 years in order to sustain economic growth."[2]

Prof. P. Leelakrishnan says that sustainable development denotes economic growth without destroying the resource base and involves a new approach of integration of production with resource conservation and enhancement providing adequate livelihood and equitable access to resources[3].

The seed for 'Sustainable Development' was sown with the adoption of Stockholm Declaration in 1972. It started growing with the World Conservation Strategy Project prepared in 1980 by the World Conservation Union (IUCN) with advice and assistance from the United Nations Environment Programme (UNEP) and the Worldwide Fund, the World Charter of Nature of 1982,

1. Catherine Soanes (Ed.), Compact Oxford Reference Dictionary, 164, 2003.
2. http://www .pieronline.org/default.aspx?page=newsarticle& NewsId=2777 visited on 24.02.11
3. P. Leelakrishnan, "Law and Sustainable Development in India", 9 Journal of Energy and Natural Resource Law, 193 (1991)

Report of World Commission of Environment and Development (Brundtland Report), Our Common Future of 1987.

The Brundtland Report defines Sustainable Development 'as development that meets the needs of present generation without compromising the ability of the future generations to meet their own needs.[4] The document 'Caring for the Earth' defines Sustainable Development as 'improving the quality of human life while living within the carrying capacity of supporting ecosystem'.[5]

In 1990, a Canadian workshop highlighted three fundamental objectives of Sustainable Development[6]- (I) An Economic Objective - the production of goods and services the overriding criterion in fulfilling this objective is efficiency. (ii) An Environmental Objective - the conservation and prudent management of natural resources, the overriding criteria here are preservation of biodiversity and maintenance of biological integrity. (iii) A social Objective - the maintenance and enhancement of the quality of life based on equity is the main consideration in meeting this objective[7].

One can say that common point highlighted by this definition of sustainable development is the need to integrate environmental concerns into development process.

Indeed, economic growth is significant for development but it is only a means of development than an end in itself. Rio Declaration or Earth Summit in 1992 confirmed the need to integrate environmental protection into developmental process[8]. The Summit was also instrumental in setting up the necessary legal framework for implementing sustainable development on a global plan.[9] Further, the Rio Declaration, unlike the Stockholm Declaration attaches greater importance to social environment over physical environment. It achieves a balance between the substantive requirements of sustainable development and procedural requirements for implementing environment protection. With human rights as the focus of sustainable development, the

4. G.H. Brundtland, "Our Common Future (Report of the World Commission on Environment and Development)", 92-93, (1987).
5. Caring for the Earth: A Strategy for Sustainable Living, Published in partnership by IUCN, UNEP, WWF under Second World Conservation Strategy Project, 10, (1991).
6. Ben Boer, "Implementing Sustainability", Delhi Law Review, 1, 9 (1992).
7. Philippe Sands has summarized various components of the principle of Sustainable Development that are as under. (i) The need to take into consideration the needs of the present and future generation (the principle of inter-generational equity) (ii) The acceptance, on environmental protection grounds, of limits placed upon the use and exploitation of natural resources (the principle of sustainable use). (iii) The role of equitable principles in the allocation of rights and obligation between various states (the principle of equitable use or intergenerational equity). (iv) the need to integrate all aspects of environment and development (the principle of integration).
8. United Nation Conference on Economic and Development held at Rio De Janerio, Brazil. A UNEP report again highlighted the need for striking a balance between economic Development and sustainability as major environment and development challenge; Global Environment Outlook, UNEP, 25 (1997).
9. Economic and Political Weekly, 2322-1325, Sep. 13 (1997).

Declaration attempts to create a harmonious and equilibrated world society. Justice, equity and fair play become key words in the present task of restricting the world community on the basis of Sustainable Development[10].

World Conference on Higher Education in the Twenty-First Century: Vision and Action held at UNESCO Headquarters in Paris from October 5 to 9, 1998 was attended by nearly 5000 participants representing 180 countries. It adopted an Action Plan for reforms in the field of higher education. Its main theme was that higher education must serve the interest of sustainable development and help build a better society.

The rise of global authorities like WTO[11] & GATS and their Dispute Resolution Mechanism has far reaching consequences for globalization. Further, WTO's 'enforceable global commercial code' has made a real impact. Higher education services, now figure in India's offer on liberalisation in trade in services that the Commerce Ministry has submitted to WTO in August 2005[12].

According to the report, a more powerful version of GATS will be at place which will ensure that educational services will be progressively commercialized, privatized, and capitalized. The report further says that globalization is already taking place involving standardization of culture summed up with the concept of 'McDonaldization'[13]. International brands in consumer products are being embraced on a global scale with trans-national institutions taking account of local legal codes, currencies, local tastes, habits, customs and adjusting to a new international order. Communication through Internet and e-commerce has further changed the method of transacting business. As a result, major corporations have now lobbyists settled permanently at WTO headquarters in Geneva and Representatives of Corporations sit on some of the many Committees and Working Groups of WTO. WTO has thus facilitated incremental freedom for trans-national capital 'to do what it wants, where and when it wants'[14].

The United Nations Decade of Education for Sustainable Development (2005-2014), for which UNESCO is the lead agency, seeks to integrate the principles, values, and practices of sustainable development into all aspects of education and learning, in order to address the social, economic, cultural and environmental problems we face in the 21st century.

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10. R.S. Pathak, Presidential Address on "Post - UNCED Seminar on Environment and Development Policy Issues in Asia, held in New Delhi in Prodipto Ghosh and Akshay Jaitly (eds), The Road from Rio: Environment and Development Policy Issues in Asia, 14 (1993).
11. Ajitava Raychauduri, Prabir De, "Barriers to trade in higher education Service in the Era of Globalization", Economic Political Weakly Aug 30, 2008; Primary education services; Secondary education service; Adult education service; Higher education services & others.
12. Sanat Kaul, "Higher Education in India : Seizing the Opportunity", (working Paper No. 179),10 , May 2006, www.icrier.org. visited on 25.02.2011
13. Id at 13
14. Supra note 12 at p. 14.

In India, since ancient time education has been working like a pendulum between Vidya-dana and dana -vidya. The free education or a natural flow of education took education and in particular the educational institutions to the ever rising heights of excellence but this long culture in Indian tradition was polluted in view of population explosion, industrial implosion, liberalization and globalization The changing scenario of education has brought in the education a commercialized approach, an approach to gain more profit out of the educational venture. Thus the educational shops started coming up at first in those parts of the country which were more industrially developed and gradually this disease spread throughout the country.

The first Prime Minister, Jawaharlal Nehru, deeply believed in the importance of education, launching India on to the path of innovations. In subsequent decades, literacy rates climbed, and significant progress was made on access to primary and secondary education. The numbers of institutions of higher learning and of university students grew, but, perhaps as a by-product of the priority devoted to wider access, the quality of teaching and student support did not always follow. In contrast to the Indian Institutes of Management and the Indian Institutes of Technology (IIMs and IITs) and other elite institutions gaining international fame, many universities, colleges and deemed universities barely bumped along, serving their students poorly. The Indian government announced the creation of eight new IITs and also of 14 new world class universities. It may be noted that approved in March 2010, the National Knowledge Network (NKN) will link 1500 Institutes of Higher Learning and Research through an optical fibre backbone. During the current year, 190 Institutes will be connected to NKN. Since the core will be ready by March 2011, the connectivity to all 1500 institutions will be provided by March 2012[15].

Another panel on Nava-ratna Universities - Indian equivalent of Ivy League varsities - has recommended direct funding from the central government, freedom to fix salaries, fee structure, reward for performing teachers, cutting increment to non-performers and flexibility to invite the best faculty from any part of the world.

This paper explains the negative implications of the increasing commercialization of higher education, of viewing education as a commodity, students as consumers, and educators as service providers. It deals with law relating to commercialization of higher education in the context of sustainable development. Several principles of sustainable development are embedded in India's education policy. It analyses the initiative of central government to introduce fundamental reform in higher education in India.

CONSTITUTIONAL AND STATUTORY PROVISIONS
COSNTITUTIONAL PROVISIONS

The centre has exclusive power to make laws in respect of the items in List I (Union list) while the States have the power to make laws for items

15. Tax Mann, the Budget, 17, 2011-12.

covered in List II (State list), for those included in List III (Concurrent list), Centre and States both can legislate. In the Union list, six entries pertaining to education provide for Institutions of National importance[16], Central Universities,[17] institutions of Scientific and technical education,[18] Union agencies and institutions,[19] Co-ordination and determination of standards and ancient historical monuments[21] on which Parliament has exclusive powers to make laws. The State legislatures have power to make laws in respect of institutions not of national importance[22] and agricultural education.[23] Subject to the power of Parliament, the Centre and States both have power to make laws for education, including technical education, medical education and university[24].

The Constitution of India has placed on the Central government the responsibility to meet the need for co-ordination of facilities and the maintenance of standards at the higher levels.

Looking to the distribution of legislative power, one can say that the balance is tilted in favour of Center. The important or core aspects of education are with the Centre and the residue is left to the States.

WHO REGULATES HIGHER EDUCATION IN INDIA?

As the number of educational institutions imparting higher and professional education has increased, the problem of recognition, affiliation, proper planning, co-ordination and determination of standards is attracting the attention of Parliament and State legislatures. Herein after, an attempt is made to study the existing regulatory mechanism and recent legislative attempts.

[I] THE UNIVERSITY GRANTS COMMISSION ACT, 1956

This Act, established a Commission for the co-ordination and determination of standards in Universities. The Commission, in consultation with the Universities and other bodies, is empowered to take all such steps as it may think fit for the promotion and co-ordination of University education[25]. It is also empowered to regulate the fee chargeable in constituent and affiliated colleges, so that admission to such course of study may not be regulated by economic power and thereby preventing a more meritorious candidate from securing admission.[26]

If the University fails to comply with the recommendations of the

16. Entry 62 of List I
17. Entry 63 of List I
18. Entry 64 of List I
19. Entry 65 of List I
20. Entry 66 of List I
21. Entry 67 of List I
22. Entry 12 of list II
23. Entry 14 of List II
24. Entry 25 of List II
25. Section 12 of the U.G.C. Act, 1956
26. Section 12-A (2) (c)

commission funds may be withheld.[27] No educational institution except a University can award degrees.[28] The Commission is empowered to make regulations while rule making power is conferred upon the Central Government.[29]

[II] INDIAN MEDICAL COUNCIL ACT, 1956

This Act was passed to uniformly regulate the medical education in India. The Council deals with all matters connected with "recognized medical qualification"[30] and "approved institutions".[31]

The Council is empowered to withdraw recognition in cases where it finds the lowering of standards of proficiency, knowledge of skill.[32]

The rule making power is conferred upon the Government while regulation making power conferred upon the council.[33]

[III] THE ALL INDIA COUNCIL FOR TECHNICAL EDUCATION ACT, 1987

The Act provides for the establishment of the "All India Council for Technical Education" (AICTE) for the proper planning and coordinated development of the technical education system through out the country, promotion of qualitative improvement of such education and other allied matters.[34] These three bodies have been referred to specially because:

(1) They are already in existence.

(2) They are vested with over-riding powers which, if enforced, can lead to far reaching changes, and

(3) They have been facing the problem of commercialization of education in particular.

UGC Act was amended in 1985 to empower it to prescribe fees at every level. Had the UGC discharged this responsibility, it would not have been necessary for the Supreme Court to intervene[35].

The incorporation, regulation and winding up of Universities are within the competence of the State Legislatures. However, in order to maintain the standards of higher education, the UGC (Establishment of and Maintenance of

27. Section 14
28. Sections 22 and 23.
29. Section 26 and 25.
30. Section 2 (h) defines "recognized qualifications included in the Schedules".
31. Section 2 (9) defines "approved institution" to mean "a hospital health centre or every such institution recognized by a University as an institution in which a person may undergo training, if any required by his course of study before the award of any medical qualification to him."
32. Section 19.
33. Ordinance No. 13 of 1992 issued by the President of India on August 1992, Indian Medical Council (Amendment) ordinance 1992.; See also, the Indian Medical Council (Amendment) Ordinance, 2010 No. 2 of 2010, The Gazette of India, Extraordinary, Part-II. May 15,2010.
34. Section 3.
35. Infra note 66.

Standards in Private Universities) Regulations, 2003 were issued on 27th December, 2003 and are in force. The Central Government has also initiated wider consultations concerning Universities promoted in the Private Sector in the overall context of protection of the interests of students, financing of Higher Education and autonomy for institutions[36].

A Private University Bill was introduced in the Rajya Sabha (Upper House) of the Parliament in August 1995 with a view to providing for the establishment of self-financing universities. The bill has not been passed so far. The bill provides for a private university permanent endowment of Rs.30 crores and full scholarship to 30 per cent of the students. This was kept because in earlier cases many private colleges had to be bailed out by the Government. The Prime Minister's Council on Trade & Industry also constituted a Two Member Committee on Higher Education, of two leading industrialists of India- Mr. Kumarmagalam Birla and Mr. Mukesh Ambani. This Committee in its report strongly suggested that the Government should leave higher education to the private sector largely and confine itself to elementary and secondary education.

It may be noted that wait has begun for the quiet burial of the country's apex higher education regulator. In a clear signal of the winding down of the 54-year-old behemoth, the government plans to avoid appointing a full-fledged chairman to the University Grants Commission (UGC) after economist Sukhdeo Thorat, retires. The proposed National Commission for Higher Education and Research (NCHER) will subsume many of the roles of the UGC and other regulators, including the All India Council for Technical Education (AICTE). "But the end of the UGC is more than just the creation of a new regulator. It epitomizes the end of an era when the government micro-managed higher

36 In order to evaluate performance of an institution and bring about a measure of accountability a mechanism of accreditation has been developed by UGC. This is an autonomous council under UGC called National Accreditation and Assessment Council (NAAC) with a purpose to carry out periodic assessment of universities and colleges. NAAC has evolved a methodology of assessment which involves self-appraisal by each university/college and an assessment of the performance by an expert committee. Similarly, for technical education AICTE has established its own accreditation mechanism for its institutions through the National Board of Accreditation (NBA). NBA has also undertaken a detailed exercise for bench marking the performance of reference for evaluation if performance can be initiated. (ii) Both NAAC and NBA are in the right direction and need to be encouraged and strengthened. However, so far only 47 universities, 75 affiliate college and 20 autonomous colleges have volunteered to be accredited by NAAC. Some more universities and 25 more colleges are in advanced stage of finalizing self-study reports. There is a need to link up grants and loans to NAAC and NBC reports. This can be done when NAAC and NBC is made applicable to all Higher Education Institutions. UGC has already indicated that development support will be related to outcome of NAACs report

education. We now want to act as a facilitator," a senior government official said. While the NCHER will set standards in higher education, the new regulator will relinquish direct control of many other functions of the UGC, including funding universities and testing candidates for teaching jobs[37].

The NCHER will act against institutions on complaints under a self-disclosure regime that human resource development minister Kapil Sibal is pushing. But the change in philosophy of the Centre isn't the only reason behind the decision to wind down the UGC and AICTE. The recommendations of the National Knowledge Commission[38] (NKC) and the Yash Pal Committee[39] both set up by Prime Minister Manmohan Singh --- to replace these institutions with a single overarching regulator came amid a corruption cloud over Indian higher education.

The minutes of a meeting of the Parliamentary Standing Committee on HRD on a proposed law to punish colleges that cheat or mislead students state that Thorat then UGC, Chairman told the panel the UGC was not consulted by the Centre. Thorat has subsequently changed his stance, and said he had clarified to the panel that the UGC had been consulted. The damage, however, has been done.

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37. Hindustan Times, February 11, 2011
38. It is essential to stimulate private investment in higher education as a means of extending educational opportunities. We must recognise that, even with the best will in the world, government financing cannot be enough to support the massive expansion in opportunities for higher education on a scale that is now essential. It might be possible to leverage public funding, especially in the form of land grants, to attract more (not-for-profit) private investment. The present system of allotment of land, where political patronage is implicit, discourages genuine educational entrepreneurs and encourages real estate developers in disguise. In principle, it should be possible to set up new institutions in higher education, not just more IITs and IIMs but also more universities, as public-private partnerships where the government provides the land and the private sector provides the finances. Such public-private partnerships which promote university- industry interface would also strengthen teaching and research. available at http://www.knowledgecommission.gov.in/downloads/documents/faq_he.pdf visited on 15-06-2011
39. The Yashpal Committee has presented a University Roadmap, which focuses upon two principles, i.e. the principle of autonomy and principle of self-regulation. Recommendations have been made for (1) professional courses like law to be under one category; (2) freedom to the institutions of higher learning in academic, financial and administrative matters; (3) independent decision-making, transparency and accountability in universities; and (4) role of Vice-Chancellors as academic leader in articulating vision of the university. The Roadmap speaks about decentralization and greater autonomy of the universities on the one hand and centralization of regulatory functions without interfering with academic freedom and institutional autonomy of the universities in the hand of the National Council on Higher Education and Research on the other hand.

RECENT LEGISLATIVE ATTEMPTS TO ACCELERATE THE PROCESS OF COMMERSIALIZATION OF HIGHER EDUCATION IN INDIA

(I) THE FOREIGN EDUCATIONAL INSTITUTIONS (REGULATION OF ENTRY AND OPERATION) BILL, 2010

This Bill claims to regulate the functioning of foreign universities who provide education in India. However, as per the provisions of the Bill, the FEIs will be free to charge any fee, will be free to select any student. With no provision for SC/ST/OBC reservations in the Bill; will be free to have their own norms regarding pay of teachers and employees (leading to appointments without necessary qualifications on exploitative terms as is in existence in most private institutions today); will have complete autonomy over course structure and syllabi leading to offering of courses which the market needs and will not be required to submit reports to the UGC or to the central government implying that neither the UGC, nor any other regulatory authority in India will have control over the functioning of these foreign universities making it almost impossible to withdraw the recognition given to a foreign university, even if there are serious problems. International experience indicates that such legislation can neither attract truly 'world-class' institutions, but can only allow unreliable educations shops to sell sub-standard wares (relatively free of regulation) to Indian students.

The parliamentary panel meeting was held to discuss the Foreign Educational Institutions (Regulation of Entry and Operation) Bill, 2010. Members belonging to Left parties and BJP suggested that the government needs to pay attention to strengthening the domestic university system before opening its doors to foreign players. Members stressed on the need to provide a level playing field for Indian universities and colleges. The Left has consistently maintained that foreign universities would subvert the Indian system, skew salaries and win away faculty from domestic universities and increase elitism in education.

MPs are understood to have raised the question of foreign universities not being required to provide reservation for socially and economically backward students. Kirti Azad argued that keeping foreign universities outside the ambit of reservation would result in keeping children from disadvantaged sections out of these universities.[40]

(II) THE UNIVERSITIES FOR INNOVATION BILL, 2010

This Bill proposes to set up 14 "Universities for Innovation" in India, which will enjoy Government funding but be totally free from any kind of regulation of standards or fees! These Universities, in the name of being 'free to innovate", will be free to have foreign VCs; 'merit-based' admission process free from any obligations to reserve seats for SC/STs and OBCs; fix their own fee structures; pay differential fees to faculty; and admit up to 50% foreign students (in contrast to ordinary universities which have a 15% cap on

40. The Economic Times, February 1, 2011

foreign students). These Universities, while enjoying Government funding in the shape of grants of land, fellowships etc, will be free from supervision by regulatory authorities like the UGC. There are no norms for curriculum, teaching quality, students' assessment etc spelled out for the promoters of these universities, and no penalty for making false claims or failing to provide quality education.

(III) THE EDUCATIONAL TRIBUNALS BILL, 2010

In the name of setting up educational tribunals at national and state level to resolve disputes among stakeholders in the education sector and penalise unfair practices, the aim of this Bill seems to be to restrict the recourse of teachers, employees and students to courts. This would facilitate foreign and private players in the education sector who would like to be free from the prospect of being taken to court[41].

The leading lawyers and activists have expressed their concern and apprehension against the risk of tribunalising this country with a plethora of tribunal to decide each controversial sector[42].

(IV) THE NATIONAL ACCREDITATION REGULATORY AUTHORITY FOR HIGHER EDUCATIONAL INSTITUTIONS BILL, 2010

This Bill proposes to make accreditation compulsory. It may be that fund cuts can follow in case an institution fails to achieve sufficient credits. However, the central government will have the power to offer exemptions. Private or otherwise influential players can therefore secure such exemption, which is an open invitation to graft and corruption.

(V) NATIONAL COMMISSION FOR HIGHER EDUCATION AND RESEARCH (INFORMATION ABOUT NCHER) BILL, 2010

Under provisions of this Bill, all existing regulatory like UGC, AICTE, NCTE and the MCI will be replaced by the establishment of a single-window National Council for Higher Education and Research (NCHER). The NCHER will draw its resources directly from Ministry of Finance and thus not be accountable to the MHRD mandated for this purpose. This body has been designed on the lines of World Bank-recommended regulatory bodies for every service sector in every country. It is designed to bypass the political process and to facilitate global corporate trade.

Higher education is thus being thrown open for the private players in the

41. For critical review of tribunal system; See generally, Vinod Shankar Mishra, 'Environment Justice Delivery system: An Alternative Forum', 44 JILI, 62-87, (2002)
42. See for example, National Green Tribunal Act, 2010. See also National Highways Tribunal under the Control of National Highways (Land and Traffic), Act, 2002; Securities Appellate Tribunal (M/o Finance D/o Economic Affairs) SAT Rules, 2003 to adjudicate on the orders passed under Securities and Exchange Board of India Act, 1992; Cyber Regulations Appellate Tribunal under Information Technology Act, 2000.

name of ridding it of problems like corruption and capitation fees and ensuring higher standards. However, the telecom scam is a reminder that privatisation and greed for profit go hand-in-hand with corruption. The agenda for India's higher education dictated by the WTO, FEIs and corporate will not only further exclude the poor and underprivileged, it will increase the scale of chaos and corruption in education manifold.

The ideal of democratizing education and expanding the frontiers of education has naturally led to a sudden increase in the number of colleges and universities. The sudden expansion of higher education led to lowering of the quality of education services provided to the students, quality of the teaching staff and library facilities. The university sets standards but there is no proper mechanism or the will on the part of the authorities to monitor the observance of those standards, with the result that quality has suffered badly in most of the affiliated colleges. Moreover, there is no effective management of the student population or teaching and learning systems in many of those colleges. Added to this is the phenomenon of parallel and tutorial colleges where regular students go during class time at their own colleges.

Many educationists agree that the large influx of students into colleges today is the result of our present socio-economic situation. The boys and girls who are there, not on their own accord in the pursuit of knowledge but by the force of circumstances. What a waste in manpower, money and material to impart costly higher-education to create an army of unemployed and unemployable graduates.

Prof. Amrik Singh has pointed out that ninety five per cent of what gets done in the field of higher and professional education is linked with how the States perform and to what extent they feel involved or committed. The situation varies from State to State. So much depends upon the personal qualities of the politicians who hold the particular portfolio of education. He has noted that the management of education at the State level continues to be what it was, say, in the 19th century[43].

POLICY OF FUNDING

PUBLIC VERSUS PRIVATE FUNDING

India has developed one of the largest systems of Higher Education in the world with over 479 universities including 127 deemed University, 40 central university, 235 state university and 6500 vocational colleges catering to about 10 million students. Most of these are publicly funded although some may be privately run.

World Bank in its report entitled as 'India and the Knowledge Economy; Leveraging Strength and Opportunities' (Report number 31267-IN, April 2005) has concluded that while India has made enormous strides in its economic and social development in the past two decades, it can do much more to leverage its strengths in today's knowledge based global economy. It argues that with

43. Yojana, January, 26, 1994, 24.

the right kind of government policy incentives, the country can increase its economic productivity and the well being of its population by making effective use of its knowledge. However, in India, heavy dependence on only one source of financing, i.e. the State Indian higher education system is heavily state subsidized, and the non-governmental finances from relatively an insignificant component. It is clear that -

(i) The Central and State Governments account for the bulk of the funding of education in India.

(ii) The share of the private sector is quite small and that of local bodies almost negligible.

(iii) The share of the private sector is not only small but also continually decreasing. This happens both in case of fees and also endowments and other sources.

(iv) The share of the University funds is also on decrease.

SOURCES OF INCOME FOR HIGHER EDUCATION

The funds for higher education in India come mainly from three different sources, viz, government, fee income from students and other sources of income from philanthropy, industry, sale of publications, etc. The relative shares of non-government sources such as fees and voluntary contributions have been declining. The needs of the higher education system have been growing rapidly. It is being increasingly felt that public budgets cannot adequately fund higher education, particularly when sectors of mass education are starved of even bare needs. The committees[44] appointed by the government recommended that

44. The Punnayya Committee was set up by the University Grants Commission. It recommended that universities should generate 15% of its annual maintenance expenditure through internally generate resources and this should go up to at least 25% at the end of ten years. The Dr. Swaminathan Panel was set up by the All India Council for Technical Education has recommended that mobilization of additional resources for technical education in India. It has advocated for collection of education Cess from industries and other organization. The Prime Minister's Council on Trade and Industry appointed a Committee headed by Mr. Mukesh Ambani and Kumarmangalam Birla to suggest reforms in the Educational sector. The Committee, which submitted its report in 2001, highlighted the important role of the State in the development of Education. Some of the suggestions were: (i) The Government should confine itself to Primary Education and the higher education should be provided by the private sector. (ii) Passage of the Private University Bill, (iii) Enforcement of the user-pay principle in higher education, (iv) Loans and Grants to the economically and socially weaker sections of society; The Report suggested that the Government must concentrate more on Primary Education and less on Secondary-Higher education. It also recommended the passing of the Private Universities Act. The Birla-Ambani Report further recommended that the Government must encourage business houses to establish Educational Institutions; The Central Board of Education Committee recognized the limitation of non-government funding and emphasized the fact that the higher education plays an important role in promoting growth.

one of the major sources of income is the fee from students. They recommended for an increase in the level of fee and in all kinds of fee and that institutions should raise the fee levels in such a way that at least 15 to 25 per cent of the annual recurring cost per student is recovered from the students in the form of fees and from other sources at the end of ten years. Yet another fact is that the government and UGC are finding it increasingly difficult to even sustain the current level of funding to the institutions of higher education. Managing the present financial liabilities of the universities, especially the state universities, is in utter chaos. In the eighth plan itself, financially self-supporting higher education has been advocated that "expansion of higher education in an equitable and cost-effective manner, in the process, making the higher education system financially self-supporting" (Government of India, 1992). The approach paper to the Ninth Five-year Plan says, "Emphasis will be placed on consolidation and optimal utilisation of the existing infrastructure through institutional networking …. and through open university system. Grants-in-aid will be linked to performance criteria to improve quality and inject accountability. Fees will be restructured on unit cost criteria and paying capacity of the beneficiaries. Additional resources will be generated by involving industry and commerce and through contribution from community" (Government of India, 1997, pp.82).

Distinct signals from the government towards hike in fees and shift of resources from higher to primary education can be noticed from the approach paper to the Tenth Five year Plan, "Since budget resources are limited, and such resources as are available, need to be allocated to expanding primary education, it is important to recognise that the universities must make greater efforts to supplement resources from the government. University fees are unrealistically low and in many universities have not been raised in decades. A substantial hike in university fees is essential (emphasis added)" (Government of India, 2001, pp.37). The Tenth Five-year Plan document as well notes that it is important to recognise that the universities must make greater efforts to supplement resources apart from the government (Government of India, 2002-2007, p.17).The plan expenditures on higher and technical education has been on the decline since Fifth Five-year Plan onwards in the case of general higher education and Fourth Plan onwards in technical education. Elementary education has got the highest priority in first plan, which again seemed to gain momentum in the 9th plan. In the first plan higher education got 9 per cent allocation, which is the case again in the 9th plan. It should be noted that higher education institutions play an important role in setting the academic standard for primary and secondary education. They are responsible for not only providing the specialised human capital in order to corner the gains from globalisation, but also for research and development, training inside the country, provide policy advise, etc. It is to be realized that 'Higher Education is no longer a luxury; it is essential to national, social and economic development' (UNESCO, 2000). In the annual financial statement

(Budget -2011-12), the present finance minister Mr. Pranab Mukherjee emphasized upon the fact that Over 70 percent of Indians will be of working age in 2025. In this context, universalizing access to secondary education, increasing the percentage of our scholars in higher education and providing skill training is necessary. For education, Centre has allocated Rs. 52,057 crore, which is an increase of 24 percent over the current year.[45]

In the context of resource scarcity, privatization of education is being suggested as an important measure. The contribution of private sector to education in India is not significant, at least as far as financing is concerned. Generally, most of the private institutions in India are only privately managed, but publicly funded to the whole of recurrent budgets, and sometimes even non-recurrent budgets, Government spends considerable amount on private aided institutions in the form of aid. Private institutions are also generally found to serve the needs of the well to-do only.

Private institutions in general not only do not necessarily reduce the financial burden of the Government, but also they might even work against financial, education and other social considerations of the welfare State. Policies encouraging privatization in education need to be made with caution. It is therefore, imperative for developing countries like India to give due attention to both the quantities and qualitative expansion of higher education.[46]

IMPACT OF PRIVATISATION

STUDENT AS A CUSTOMER OR CLIENT

A University is no longer a place where students apply to study. Universities are now actively pursuing students, especially foreign ones using a wide variety of strategies to market their courses[47]. The student is now the customer or client. Privatization of higher education has affected the vulnerable sections of Indian society. With globalization, Universities are spreading their reach beyond geographical and political borders. The British, Australian and

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45. Tax Mann, the Budget 2011-12, 16. During 11th five year plan a large number of institutions both in higher and technical education have been established. Apart from setting up of 14 new central universities, three state universities have been converted into central universities. Eight new IITs, seven new IIMs, three new IISERs, two new SPAs, and many new polytechnics have also been setup. In addition, ten new national institute of technology have been approved and 374 colleges in those educationally backward districts, which have low gross enrolment ration as compared to national average, are being considered. The Hindu, March 24, 2010.
46. Ved Prakash, "Trends in Growth and Financing of Higher Education in India" Economic Political Weekly, 3249-3258, 4 August, 2007.
47. Sanat Kaul, "Higher Education in India : Seizing the Opportunity", (working Paper No. 179), 5, May 2006, available at www.icrier.org. visited on 25.02.2011.

American Universities are setting up campuses in Singapore, China and the Gulf. Universities realise that they can examine many more students than they can teach. Hence many of them are collaborating with other institutions or franchisees to teach their courses under their brand name without getting involved in the direct business of imparting the education[48].

There are also different types of these private institutions - Many of the self-financing engineering colleges and management institutions are affiliated to the conventional universities (Examples as found in Tamil Nadu, Karnataka and Andhra Pradesh). In which, the course structure, design, curriculum, and the pattern of examination fall within the purview of the national or state pattern. On the other side, several of these self financing private institutions are also non-affiliating to any universities and cater to the demands of the corporate sector nationally and internationally. Whether the private institutions follow multi-faculty or discipline are decided by the individual institutions. Since the programs and courses are market-driven and each private institution decides on their own the course and subjects it offers. Hence, they also have a free hand to introduce new programs and discard the old.

STUDENT IS THE POWER WHILE FACULTY IS WEAK IN PRIVATE INSTITUTIONS

Indeed, the faculty lacks the position, power and autonomy as they traditionally enjoy at universities. Basically they serve to students and their practical orientations in commercial private institutions. These institutions rely on part-time faculty and may be drawn from full-time faculty at public universities (and hence do not add to further employment opportunities). When employing full-time faculty, they pay meagre salary. Perhaps many of them have neither practical nor academic expertise and lack training. The finances of these private enterprises seem to be free to raise and deploy resources to meet their own norms. Private universities elsewhere, for instance in USA mobilize the resources of about 30 to 40 per cent of the recurring cost of education from students. Remaining 60 to 70 of the recurring cost are generated from endowments, alumni and other sources (Ziderman and Albatch,

48. University of Phoenix, the first University to offer a full time on-line degree is owned by the Apollo Group. Sixteen of the world's better ranking universities have got together and set up a $ 50 million joint venture called Universitas 21 Global, an online MBA business school. These universities include McGill, British Colombia, Virginia, dinburgh, Sweden and Melbourne of Australia. This $ 50 million project has been established in collaboration with a private company called Thomson Learning, an educational and training service division of the Thomson Corporation. Universitas 21 Global aims to tap markets of potential students from UAE, Singapore, Malaysia, India, Korea and China. It has already enrolled 1000 professionals from 45 countries for its graduate programme. It has also offered an M.Sc. in Tourism and Travel Management recently. The online degree of Universities 21 has been well received in the world market and the degree certificate awarded by it bears the crest of all the 16 top ranked participating universities.

1995). On the contrary, fee in these private enterprises in India are exorbitant as they fully depend upon student payments. Indeed, these institutions make huge profits, some times recover more than their recurring costs (full of recurring cost plus part of the capital cost). Such institutions survive as long as there is a demand for their services and the students are willing to pay for such job directed training.

USER PAYS PRINCIPLE

M. Ambani and K. Birla committee appointed by the Government of India, strongly suggested for full cost recovery (user pays principle) from students even in public higher education institutions through hike in fees and introduction of self-financing courses and seats; shifting of resources from higher to primary level of education that government should leave higher education altogether to the private sector and confine itself to elementary and secondary education. Further, the report urged the private university bill to be passed and also suggested that the user-pays principle be strictly enforced in higher education, supplemented by loans and grants to economically and socially backward sections of Society (Ambani-Birla, 2001). In addition, number of foreign universities and franchise of multinational educational (business) centres compete in developing their own centers in India at a full cost recovery basis.

There are instances of a single politician running over 140 educational institutes. All these institutes generate huge amounts of money. There are rampant cases of malpractice in the form of illegal charges to allocate seats from the management quota. These institutes have been subject to income tax raids which have revealed that seats are indeed sold for cash and a seat in the medical institute can fetch a handsome Rs 25 lakh from the candidate.[49]

According to Pratap Bhanu Mehta, the debate over regulation of higher education is highly charged with images of private operators charging exorbitant fees, poor quality, financial barriers to the entry of deserving students, etc. According to him, the executive in India has abdicated its responsibility of providing sensible policies for education and judiciary has stepped into the vacuum without fully understanding the overall objective. On the demand side, we need to have clear objectives[50].

Commercialization of education has not only shadowed ethics and moral values but also generated a "plethora of problems" which will hollow the education system, Union Human Resource Development Minster Kapil Sibal said at the 88th Annual Convocation of Delhi University. He further added that "Ironically, the purpose of education has been reduced to merely acquiring

49. Supra note 47 at p. 35.
50. See Regulating Higher Education published in three parts in the Indian Express, New Delhi Edition on July 14th, 15th and 16th, 2005- also posted online in www. indianexpres.com

a certificate or a degree which can help a person in getting a high-income job. The rush for short-cuts to achieve economic prosperity has pushed moral values into the background," Ruing the discouragement of idealism and welfare intentions of students, the Minister said that education has become "a highly remunerative business, and thrives on raising income expectations of students. Education has become so commercialized that seats in many private institutions and colleges are literally buyable".

He went on to add that "in recent times, we have witnessed the fall of once large and proud international and national corporations, well-known personalities, politicians and sportspersons due to their greed. This gives rise to serious questions about the ethical values and right conduct in controversial situations,"[51].

The State is primarily responsible for ensuring quality education at all levels and in all regions. This would entail strengthening of public institutions as also their quantitative expansion. It is evidently the obligation of the State to find ways and means of raising public resources for higher education as per the recommendations of (a) the Central Advisory Board of Education (CABE) Committee Report on financing of Higher & Technical Education and (b) The Tapas Majumdar Committee Report on National Common Minimum Programme's Commitment of 6% GDP to Education.

JUDICIAL RESPONSE

In D.S. Nakara v. Union of India,[52] a Constitution Bench of the Supreme Court while explaining the significances of the addition of the expression "socialist" in the preamble of our Constitution pointed out, During the formative years. Socialism aims at providing all opportunities for pursuing the educational activity. There will be equitable distribution of national cake.

The present judgment brings a dimensions in the field of education; the transformation from capitalist to the Socialist approach in the education.

In Pradeep Jain v. Union of India,[53] the Supreme Court observed that anyone, anywhere in India was entitled to have equal chance for admission to any educational course for his cultural growth, training facility, specialty or employment. In Bandhua Mukti Morcha v. Union of India,[54] the Supreme Court was confronted with meaning of "human dignity". The court laid down basic constituent of human dignity which included the right to get educational facilities as well. Bhagwati, J. Observed:

The right to live with human dignity enshrined in Article 21 derives its life, breadth from the Directive Principles of State Policy and particularly…. Article 41 therefore, it must include...educational facilities.

51. A News Item published in "The Hindu", Staff reporter dated February 28. 2. 2011, The Hindu, New Delhi, Monday.
52. AIR 1983 SC 130, 139.
53. AIR 1984 SC 1420.
54. AIR 1984 S.C. 802, 812.

In cases like D.S. Nakara,[55] Pradeep Jain[56], Bandhua Mukti Mrocha[57], the court emphasized upon the right to education but in these cases the opinion of the court was merely an obiter dicta, hence they had no binding effect.

As the Court decided that private initiative in providing educational facilities particularly for higher education and become present day a necessity. They should not only be involved but encouraged to augment the much needed resources in the field of education. They could not be compelled to charge the same fee as was charged in the governmental institutions. If they did so, it was perfectly welcome but this was very rare. It led to the concept of 'self financing educational institutions' and 'cost-based educational institutions'. It was clear before the court that intention of Parliament, the State legislatures and the public policy was against commercialization of education. Now the question before the Court was how to encourage private educational institutions without allowing them to commercialise the education.

In 1993, Unni Krishnan's Case[57a], the Supreme Court held that privately unaided colleges were legally bound to provide heavily subsidized professional education to students qualifying under Common Entrance Tests (CET). It further laid out an elaborate scheme under which top ranking students would be admitted at low tuition fee.

The Unni Krishnan judgment recognized that the cost of education may vary, even within the same faculty, from institution to institution. The facilities provided, equipment, infrastructure, standard and quality of education may very from institution to institution. But the scheme was evolved by the court in disregard of this observation and imposed the same fee structure for all colleges irrespective of the variation in operating costs from college to college.

Though the Supreme Court verdict in the case of Unni Krishnan v. State of Andhra Pradesh[58] did not cover the Government and Government aided institutions, the government felt inspired enough to go ahead with the system of payment seats. What the Supreme Court had directed the UGC to do was to frame regulations for determining fees which can be charged by unaided affiliated colleges.

The inefficiency and corruption of state governments exposed and compounded the weaknesses of the scheme laid down by the court.

It is submitted that the fee structure approved by the Supreme Court for professional courses led to the commercialization of education in professional courses. The effect of judicial decision can be better appreciated taking any state where unaided private professional colleges exist.

The Supreme Court on 11th August 1995, directed the centre to subsidies education in private medical and dental colleges, rationalized fee structure,

55. AIR 1983 S C 130.
56. AIR 1984 SC 1420.
57. AIR 1984 SC 802.
57a. A.I.R. 1993 SC. 2178
58. Ibid.

raised NRI's quota and directed the Reserve Bank of India (RBI) to evolve a scheme to provide soft loans to medial students.

The Solicitor General Mr. Dipankar Gupta submitted before the Court that the Union Government did not have any budgetary provision for this and further the direction was against the Government policy of not providing funds to finance private medical education. He further contended that the direction given by the court was not fair as the Central Government was not given opportunity to place its view before the court.

The judges (Singh, Kuldip, Agrawal, S.C. and Reddy, B.P. Jeevan) clarified that the present directions were not a departure from the scheme in Unni Krishnan case but were more in the nature of interim orders. Any Major modification in the scheme could only be for the next academic year and onwards[59].

In TMA Pai Foundation vs. State of Karnataka[60] the Supreme Court ruled against the prevalent practice of State Governments. The common practice is of appropriating more than 60-85per cent of the seats in the 327 medical and 1345 engineering colleges across the country which are privately promoted and unaided. These seats are then allotted to students topping common Entrance Tests.

However this view was reversed by the Supreme Court in Islamic Academy vs. Union of India[61] which directed all State Governments to constitute separate admissions and fees fixation committees headed by retired high court judges.

However, in PA Inamdar case[62] the court upheld and reaffirmed the 11 judge bench judgement in TMA Pai Foundation mentioned above. This turned the political class against the judicial order and united them in bringing for the formulation of a draft 'Private Professional Education' Institutional (Regulation of Admission and Fixation of Fees) Bill of 2005 whose purpose has been to nullify the judgment of the Supreme Court in the T.M.A. Pai case.

In T.M.A. Pai Foundation Case, the Supreme Court overruled the separate fee structure for free and payment seats, in terms of Unnikrishnan[63] but cautioned that there should be no capitation fee or profiteering mechanism. In Islami Academy,[64] the Apex Court directed the respective state governments to constitute committees to supervise the fee - structure proposed by the educational institutions. In Inamdar the case, Constitution Bench of the Supreme Court upheld the freedom of every unaided educational institution 'to devise its own fee structure subject to the limitation that there can be no profiteering and no capitation fee can be charged directly or indirectly, or in

59. T.M.A Pai Foundation v State of Karnataka, (2002), 8 SCC 481, 549.
60. Supra note 59.
61. (2003) 6 SCC 697
62. P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC 537, 598.
63. AIR 1993 SC 2178
64. Islamic Academy of Education v. State of Karnataka , (2003) 6 SCC 697.

any form'.[65] The doubts created by Pai Foundation were clarified in Inamdar. The law, as crystallized in all these cases states that the state government could impose regulatory measures to fix the fee-structure on the basis of materials produce by the colleges before them both for expenses incurred and for future development.

In Prof. Yashpal v. State of Chhattisgarh,[66] the Supreme Court of India has declared[67] the provisions of Sections 5 and 6, of the Chhattisgarh Niji Kshetra Vishwavidyalaya (Sthapana Aur Viniyaman) Adhiniyam, 2002, to be ultra vires of the Constitution. The Supreme Court further directed that in order to protect the interests of the students who may be actually studying in the institutions established by such private Universities, the State Government may take appropriate measures to have such institutions affiliated to the already existing State Universities in Chhattisgarh, in terms of Section 33 and 34 of the impugned Act, where under responsibility has to be assumed by the State Government and, that the affiliation of an institution shall be made only if it fulfills the requisite norms and standards laid down for such purpose.

The UGC was also requested to examine the judgment and its implications, particularly for bonafide students enrolled with these 'universities' so that, should the need arise, the Commission could be requested to take appropriate steps in the matter.

In Abhishek Kodian v. State of U.P.,[68] the stand taken by the private unaided institutions, to fix fee structure on their own was disapproved by the court. The basic issue involved in this writ petition was the competence of the medical college run by a charitable trust to charge higher amount of fees than the fees fixed by the state government. By relying on Inamdar, the Allahabad High Court held that medical college cannot be allowed to fix fees for payment seats and to charge higher fees for meeting its expenses and development activities as charging of fees is regulated by the state government.

The forgoing decisions signify that the Supreme Court in its zeal to set thing right in the vital area of higher education created conflicts/confusion, necessitating legislative interventions. It is not clear weather these interventions would be looked upon kindly by the Court. It may be noted that confusion still exists on many issues which require in-depth discussions and debates at all level. However, the Court's role in generating debates in this important area is appreciable.

CONCLUDING OBSERVATIONS

The whole problem of commercialization of education is complex and complicated. However, it is also related to demand for job oriented degrees.

65. Supra note 62.
66. (2005) 5 SCC 520.
67. Vide its order in Writ petition (Civil) No. 19/2004 Prof. Yash Pal & Ors. Vs. State of Chhattisgarh & Ors., dated 11 February, 2005.
68. AIR 2007 All 204

Course Curriculum should be devised in such a way that education starts with earning. Earning and learning[69] must go together. It will lead to development which can be called as sustainable development. The concept of sustainable development is a technique to reconcile the competing claim of individual liberty and right to development. The need for financing of higher education for students, especially those coming from low income households needs special attention. Like in the United States, we may also evolve a guarantee system, where students coming from low income households are eligible for a student loan without parental security or guarantee so that there is no discrimination due to the financial background of the student. Subsidization of the interest rate for students should be based on his family income. For this innovative financial mechanism needs to be evolved incorporating some of the salient features of the systems existing in UK, USA.

The recent legislative attempts vividly explain the eagerness of our policymakers for privatization and commercialization of higher education in India. Although the constitutional mandate is reflected through preamble of the Constitution of India which enjoins the State to initiate appropriate measures to deliver justice (social & economical) to every section of Indian society.

Coming to judicial response, the Supreme Court of India has stepped in to check commercialization of higher education in India. However, the approach of the Court has not been consistent. It has also accelerated the process of commercialization of higher education.

The philanthropic tradition in Indian higher education has been always active and institutions sponsored by it should be promoted. An incentive system in terms of tax concessions, land grants and transparent rules should be laid down so as to attract private participation in higher education. Industry may be encouraged to provide research grants relevant to appropriate technological change.

Commercialization has expressed itself in a variety of forms such as the full recovery of the cost of higher education in government and government aided institutions; high fees in self-financing private processional colleges, deemed and private universities; high fees charged in unrecognized private institutions offering foreign degrees in collaboration with foreign universities etc. Commercialization, therefore, needs to be unambiguously defined with a view to control, regulate the impact of commercialization.

Commercialization of higher education can have adverse implications, both in terms of access and equity. It may even create internal imbalances and distortions in higher education such as excessive importance to the IT - related sector at the cost of the Social Sciences and the Humanities.

A system to regulate commercialization should be put in place by the Central and State governments in coordination with each other. A suitable framework in respect of specific issues can be imposed by legislation, if

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69. It is interesting to note that Banaras Hindu University has initiated a scheme where earning and learning go together.

necessary, and its implementation may be ensured through various regulatory bodies.

There is an urgent need to evolve a proper coordination mechanism amongst the various regulatory bodies in order to determine issues such as fees, admission, procedures, the quality of education, future directions etc.

We may sum up by saying that knowledge is power. Education serves as a tool for empowerment of backward and marginalized class. It plays a crucial role in development and nation building.

It is high time that the State must fulfill its constitutional and legal obligation to provide education to every section of Indian society to enable them 'to strive towards excellence in all spheres of Individual and collective activity so that nation constantly rises to higher level of endeavour and achievement.

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NARCO-ANALYSIS: A HUMAN RIGHTS PERSPECTIVE

Manoj Kumar Padhy*

ABSTRACT

As society progresses, crime bestows itself in different forms and newer modes of preparation. This correspondingly necessitates the employment of modern scientific methods such as D.N.A finger printing, lie detector test, brain mapping test and narco analysis test etc. These techniques are defended on the ground for extracting information which could help the investigating agencies to prevent criminal activities in the future as well as in circumstances where it is difficult to gather evidences through ordinary means as well as obligations on citizens to fully cooperate with the investigating agencies on the ground of certain provisions of the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872. These tests differ from other traditional modes of investigation on the ground that they seek some kind of cooperation from the accused, which may not always be voluntary. The legal questions relate to the involuntary administration of certain scientific methods for the purpose if improving investigation efforts in criminal cases. This issue has received considerable attention since it involves tension between the desirability of efficient investigation and the preservation of individual liberties and human rights.

Key Words: *Narco-analysis, Human rights & Accused*

I. INTRODUCTION

As society progresses crime bestows itself in different forms and newer modes of preparation. This correspondingly necessitates the employment of modern scientific methods such as D.N.A finger printing[1], lie detector

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1. DNA Fingerprinting is a way of identifying a special individual rather than simply identifying a species or some particular trait. It is currently used both for identifying paternity and maternity and for identifying criminals and victims. It is very attractive because it doesn't require actual finger print, which may or may not be left behind. Because all of the DNA sections are contained in every cell, any piece of person's body, from a strand of hair to a skin follicle to a drop of blood, may be used to identifying them by this test. A drop of blood or skin left at the crime scene may be enough to establish innocence or guilt. Source: *http:/ www.wisegeek.com/what-is-dna-fingr-printing.htm, accessed on 04/13/2010.*

test[2], brain mapping test[3] and narco analysis test[4] etc. Since introduction, these techniques always remain a subject matter of debate and discussion in India and outside. Such measures have been defended by citing the importance of extracting information which could help the investigating agencies to prevent criminal activities in the future as well as in circumstances where it is difficult to gather evidences through ordinary means. These tests have also been defended on the ground of certain provisions of the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 which emphasise on the responsibilities placed on citizens to fully cooperate with the investigating agencies[5]. Attempts were also made to justify these tests for not causing any bodily harm and on the ground that the extracted information would be used only for strengthing investigation efforts and would not be admitted as evidence during the trial stage. The assertion is that improvement in fact finding during the investigation stage would consequently help to increase the rate of

2. It is an examination where the subject who is attached with a polygraph machine is interrogated by an expert. The machine records the blood pressure, pulse rate, respiration and muscle movement. A base line is established by asking question whose answer the investigators know. Lying by the subject is accompanied by specific perceptible, psychological and behavioural changes and the sensors and a wave pattern in the graph expose this. Deviation from the base line is taken as a sign of lie. Source: *http://en.wikipedia.org/wiki/polygraph, accessed on 04/23/2010*.
3. In this test the subject is first interviewed and interrogated to find out whether he is concealing any information. Then sensors are attached to the subject's head and the person is seated before computer monitor. He is then shown certain images and made to hear certain sounds. The sensors monitor electrical activities in the brain and register P300 waves, which are generated only if the subject has some connection with the stimulus i.e. picture or sound. The subject is not asked any questions. Source: *http:/www.rediff.com/news2006/jul/19george.htm, accessed on 04/23/2010*.
4. For books see generally Kaul, Satyendra Kumar, and Zaidi, Mohd. Hasan, *Narco-Analysis, Brain Mapping, Hypnosis and Lie Detector test in interrogation of suspects*, (Allahabad: AliaLaw Agency, 2008) pp.465; Whitney s. Hibbard, Raymond W. Worring,, Daniel L. Falcon and Richard K. King, *Forensic Hypnosis : The Practical Application of Hypnosis in Criminal Investigations*, (Charles C. Thomas Pub. Ltd., 1996); Alan W. Scheflin, , Jerrold Lee and Shapiro, *Trance on Trial*, (Guilford Pubn., 1989); Taylor, Lawrence, *Scientific Interrogation: Hypnosis, Polygraphy, Narco Analysis, Voice Stress and Pupillometrics*,(Lexis Pubn., 1984).
5. *In Smt. Selvi & Ors.* V. *State of Karnataka*, AIR 2010 SC 1974 the Supreme Court of India observed that "... in one of the impugned judgement, it was reasoned that all citizens have an obligation to cooperate with ongoing investigation. For instance reliance has been placed on section 39, CrPC which places a duty on citizens to inform the nearest magistrate or to the police officer if they are aware of the commission of, or of the intention of any other person to commit the crimes enumerated in the section. Attention has also been drawn to the language of section 156(1) CrPC which states that a police officer in charge of a police station is empowered to investigate cognizable offences even without an order from the jurisdictional magistrate. Likewise our attention is drawn to section 161(1), CrPC, which empowers a police officer investing a case to orally examine any person who has been supposed to be acquainted with the facts and circumstances of the case."

prosecution as well as the rate of acquittal[6]. It is also urged that these are softer alternative to the regrettable and allegedly wide spread use of third degree methods by the investigators[7]. Whatever defence may be advanced here, can they override the constitutional protection given to the accused person particularly under Articles 20 and 21.

Until the advent of these new techniques the criminal justice system in India had been relying upon only the traditional modes of investigation and till now the law and procedure of traditional modes of investigation have been almost settled. Our High Courts and Supreme Court from time to time examined these investigation procedures in the light of human rights of the accused and inbuilt human rights requirement in these modes. New techniques differ from other traditional modes of investigation on the ground that they seek some kind of cooperation from the accused which may not always be voluntary. The underlying principle in such tests is revelation of certain pertinent information by using scientific methods. The legal questions relate to the involuntary administration of certain scientific methods for the purpose if improving investigation efforts in criminal cases. An accused receives ample safeguard during judicial proceeding as well as in investigation process[8], but there is a need to examine these safeguard when an accused has been subjected to narco-analysis test. Further, this test needs to be examined in the light of human right of the accused subject. Particularly when, it's evidentiary value is still doubtful. This issue has received considerable attention since it involves tension between the desirability of efficient investigation and the preservation of individual liberties. From the date when the first person[9] had undergone narco-analysis test to till today the Indian courts particularly the

6. For detail see *Smt. Selvi & Ors.* V. *State of Karnataka*, AIR 2010 SC 1974
7. Ibid.
8. Articles 20 and 21 of the Indian Constitution, Sections 161, 162, 163, 164 Of the CrPC and sections 24, 25, 26 and 27 of the Evidence Act. To mention few of them. Article 20(3) of the Indian Constitution says "No person accuse of any offence shall be compelled to be a witness against himself". Section 25 of the Indian Evidence Act says "No confession made to a police officer shall be proved as against a person accused of any offence." Section 26 of the same Act says "No confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a magistrate, shall be proved as against as such person." Section 164(2) Code of Criminal Procedure says "the Magistrate shall, before recording any such confession , explain to the person making it that he is not bound to make a confession and that, if he does so , it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntary" and section 162(1) of the Code of Criminal Procedure says "such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than the questions the answers to which have a tendency to expose him to a criminal charge or to a penalty or forfeiture. "
9. In India narco analysis was first used in 2002 in Godhra carnage case, sonakshi Verma, "the Concept of narco analysis in the view of Constututional Law and Human Rights", Source: http:/*www.rmlnlu.ac.in/content/sonakshi-Verma.pdf. accessed on 04/23/2010*

High Courts faced many challenges regarding the Constitutional validity of the test. Surprisingly, the courts upheld the validity of the narco-analysis test in almost all the cases[10]. Finally, in *Smt. Selvi & Ors.* V. *State of Karnataka*[11], the apex Indian Court set at rest all discussions and developed an indigenous jurisprudence on narco-analysis test.

Almost all civilized countries including USA[12] and Britain already put a ban on narco- analysis test on human right grounds. The human right activists all over the world find this test as a primitive form of investigation, a third degree treatment and an invasive procedure where subjects are lulled into conversational mode by being injected with an anaesthetic. In India however, before 2010 the narco-analysis test had not been examined in the human rights context. However, several persons have been subjected to this test since 2002[13]. At this juncture a question arises whether merely for an investigative purpose can the narco- analysis is allowed at the cost of violation of right against self-incrimation and other human rights of the accused when the fact is that the test result by themselves cannot be admitted as evidence even the subject has given consent to undergo this test because the subject does not exercise conscious control over the responses during the administration of the test[14]. Against this background an attempt has been made in this article to examine the human right issues relating to narco-analysis test.

II. MEANING AND ORIGIN

Narco-analysis[15] is a form of psychotherapy in which light anaesthesia is

10. See *Rojo George v. Deputy Superintendent of Police*, 2006(2) KLT 197; *Dinesh Dalmia v. State by SPE, CBI* 2006 CrLj 2401; *Smt. Selvi and Others v. State by Koramangala Police Station*, (2004) 7 KarLj 501; *Ramchandra Ram Reddy v. State of Maharastra*, 2004 BomCR (Cri) 657; *Chandan Pannalal Jaiswal v. State of Gujrat*, 2004 CrLj 2992; *M.C.Sekhrran and Others v. State of Kerala* 1980 Crlj 31; *Abhya Singh v,. State of U.P.*, 2009 CrLj 2189; *Santokben Sharanbhai Jadeja v. State of Gujrat*, 2008 CriLj 68; *Sh. Sailender Sharma v. State and another*, MANU/ DE/1626/2008; *State of Andhara Pradesh v. Smt. Inapuri Padma and others*, 2008 Cri Lj 3992.
11. AIR 2010 SC 1974
12. During and after war years, US armed forces and intelligence agencies continued to experiment with truth drugs. The CIA has admitted to using as a part of its interrogation tactics. In 1977 US Senate hearings on its secret mind-control project acknowledged that "no such magic brew as the popular notion of truth serum exists." in 1989 the New Jersey Supreme Court in State v. Pitts, 116 N.J 580, 562 A. 2d 1320 (N.J 1989), prohibited the use of Sodium Amytal narco analysis because the results of the interview were not considered scientifically reliable (source: http:www.thehindu.com/fline/fl2409/stories accesses on 04/23/2010). Again when US wanted to conduct narco analysis test on suspect person connected with the terrorist attack on WTC, they took the suspects to remote island fearing objection from the country(source: *http://insidekerala.com., accessed on 04/23/2010).*
13. Supranote 9.
14. See Smt. *Selvi & Ors. V. State of Karnataka*, AIR 2010 SC 1974
15. The term narco analysis is derived from the Greek word narke(meaning "anaesthesia" or "torpor"), Source: http://*www.encyclopedia.com/doc/1G2-3435300958.html*. Accessed on 04/13/2010.

produced by use of Barbiturates[16]. Patients or subjects are encouraged to talk about their experiences and may reveal certain facts what would ordinarily be repressed. The test tries to recall repressed materials. The therapists give post hypnotic suggestions to patients. Repressed materials are recalled during influence of the drug and repressed conflict of the patient is located and cured[17].

Physicians began to employ Scopolamine[18], Barbiturates[19] along with Morphine[20] and Chloroform[21] to induce a state of 'twilight sleep' during child birth early in the 20th century. In 1922, Robert House, a Dellas Texas Obstetrician thought that a similar technique might be used in the interrogation of suspected criminals and he interviewed two prisoners in the Dellas country jail whose guilt seemed clearly confirmed. The Scopolamine was used as the drug to induce the suspects to extract the truth. Both the accused denied the guilt. Surprisingly, both of them on trial were found not guilty. Robert House thus, concluded that a patient under the influence of the Scopolamine could not create lie and also lost the power to think or reason. His experiment and the conclusion attracted wide attention and the idea of truth drugs was thus launched on the public attention. The phrase "truth serum" is believed to have appeared first in the news report of Robert House's experiment 'the Los

16. Barbiturates are a class of drugs that act on the GABA A, a receptor in the brain and spinal cord. The GABA A receptor is an inhibitory channel which decreases neuronal activity and the Barbiturates enhance the inhibitory action of the GABA A receptor. It binds to the GABA A receptor. This explains why overdose of Barbiturates may be lethal. Source: *http://en.wikipedia.org/wiki/barbiturate* .accessed on 04/23/2010.
17. A preliminary report by W.F.Lorenz, Reese and Annette C.washburne on "Psychological Observations during Intravenous Sodium Amytal Medications". As appeared in Kaul, Satyendra Kumar and Zaidi, Mohd. Hasan, *Narco-analysis, Brain Mapping, Hypnosis and Lie Detector test in interrogation of suspects*, (Allahabad: AliaLaw Agency 2008) pp.465.
18. Is also known as Levo-duboisine and Hyoscine, is a tropore alkaloid drug with muscarinic antagonist effects. It has anticholinergic properties and has legitimate medical applications in very minute dose. In rare cases unusual reactions to ordinary doses of Scopolamine have occurred including confusion, agitation, Rambling speeches, Hallucination and Paranoid and Delusions etc(source: *http:/ /en.wikipedia.org/wiki/scopolamine*, accessed on 04/23/2010)
19. Supra note 16.
20. Morphine is an extremely powerful opiate analgesic drug, directly act on the central nervous system to relieve pain. Side effects include impairment of mental performance, euphoria, drowsiness, lethargy and blurred vision etc. (source; *http;/ //wwwmedic8.com/medicines/morphine.html*., accessed on 04/23/2010).
21. It is an organic compound. Chemically it is Trichloro Methane. Once it was used as a popular anaesthesia. Its vapour depresses the central nervous system of a patient, allowing doctor to perform various otherwise painful procedures. Its side effects are dizziness, fatigue and headache etc. a fatal oral dose of Chloroform is about 10 ml.(14.8gm), source: *http://en.wikipedia.org/wiki/chloroform* accessed on 04/23/2010.

Angeles Record' sometime in 1922. Robert House came to be known as the 'father of truth serum'.

III. PRINCIPLE AND PROCEDURE

It is believed that when a drug is administered to a person which suppresses the reasoning power without suppressing the power of speech and memory the person can be compelled to speak the truth. It is the Reasoning power which makes a man to think and to imagine and when a person thinks and imagines he can be able to manipulate his answer and tell lies. Some drugs have been found to create this 'twilight state'[22]. In this semi-conscious state the imagination power of the subject is neutralised and reasoning faculty is affected and the subject talks freely and is purportedly deprived of his power of self control and will power to manipulate his answer. His answer would be spontaneous and restricted to the facts he is already aware. A few such known drugs are Seconal[23], Hyoscine(Scopolamine)[24], Sodium Pentothal[25] and Sodium Amytal[26] etc.

In India the Narco-analysis is conducted by mixing 3 gms. Of Sodium Amytal or Sodium Pentothal dissolved in 3000 ml. of water depending upon the person's sex, age, health and physical condition. This mixture is administered intravenously along with 10% of dextrose over a period of 3 hours with the help of anaesthetist. This puts the subject in a hypnotic trance. The accused is than interrogated. The statement made by the accused is recorded on audio & video cassettes.

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22. A condition of disordered consciousness during which actions may be performed without conscious volition and without any remembrance afterward. Source: *http:/ www.yourdictionary.com/medical/twilight-state*, accessed on 04/23/2010.
23. It is Secobarbital Sodium, which is a barbiturate derivative drug that was first synthesised in 1928. It possesses anaesthetic, anticonvulsant, sedative and hypnotic properties. It is for treatment of epilepsy , insomnia and used as a preparative medication to produce anaesthesia and anxyolysis in short surgical, diagnostic and therapist procedure which are minimally painful. The possible side effects are agitation, confusion, nightmares, anxiety, dizziness, hallucinations, decreased blood pressures and heart rate , nausea and vomiting etc. source: *http://en.wikipedia.org/wiki/Secobarbital*. Accessed on 04/27/2010.
24. Supra note 18.
25. Sodium Pentothal is an ultra short acting drug of class Barbiturates. The proper name of this drug is "thiopental Sodium". It is a sterile powder and after diluting in appropriate diluents injected intravenously. Its molecular weight is 264.32. It has alliaceous, garlic like odour. Source: *http://en.wikipedia.org/wiki/Secobarbital*. Accessed on 04/27/2010.
26. Sodium Amytal is a moderately long- acting or intermediate acting Barbiturates with a moderately rapid induction time. Chemically it is known as "Sodium Barbital" or "Amobarbital". Source: *http://en.wikipedia.org/wiki/Amobarbital*. Accessed on 04/ 27/2010.

IV. HUMAN RIGHTS PERSPECTIVE

The legality of the Narco-analysis test has always remained a matter of debate and discussion amongst legal luminaries. In many occasions the Indian High Courts summoned narco- analysis in the witness box to examine its legality. But in all most all occasions the High Courts remained busy in finding the constitutionality and evidentiary value of these new techniques. As result the human rights perspective of narco- analysis left unexplored. In *Selvi's case* however, the apex court succeeded in touching some of these rights while leaving the other. Therefore, an attempt has been made below to discuss the human right aspect of narco-analysis.

(A) RIGHT AGAINST SELF-INCRIMATION

It is a fundamental principle of criminal law that "No man not even the accused himself can be compelled to answer any question which may tend to prove him guilty of a crime he has been accused of" i.e. *nemo tenetur se ipsum accusare*[27]. This principle has been recognised in most jurisdictions as well as in international human rights instruments. The 5th Amendment of the US Constitution provides "No person … shall be compelled in any criminal case, to be a witness against himself." In *Townsend V. Sain*[28], the US Court held that the petitioners confession was constitutionally inadmissible if it was adduced by the police questioning during a period when the petitioners will was overborne by a drug having the property of the truth serum[29]. In Britain, it is a fundamental principle of the Common law that a person accused of an offence shall not be compelled to discover documents or objects, which incriminate him. Article 3 of the Universal Declaration of Human Rights though not directly but indirectly guarantees the right against self-incrimation by saying 'everyone has the right to life, liberty and security of person'. Article 14(3) (g) of the International Covenant on Civil and Political Rights enumerates the minimum guarantees that are to be accorded during a trial and states that every one has a right not to be compelled to testify against himself for to confess guilt. Similarly Article 6(1) of the European Convention for the Protection of Human Right and Fundamental Freedoms states that every person charged with an offence has a right to a fair trial and article 6(2) provides that everybody charged with a criminal offence shall be presumed innocent until proved guilty according to the law. The guarantee of presumption of innocence bears a direct link to the right to self-incrimation since compelling the accused person to testify would place the burden of proving innocence on the accused instead of requiring the prosecution to prove guilt.

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27. For evolution of Right against self-incrimination see Leonard Levy, 'The Right against Self-incrimation: History and Judicial History', 84(1) *Political Science Quarterly* 1-29, March (1969).
28. 372 US 293 (1963)
29. Warren, CJ observed "numerous decisions of this court have established the standard governing the admissibility of confessions into evidence. If an individual' s 'will was overborne' or if his confession was not the product of rational intellect and free will, his confession is admissible because coerced"

In India Article 20(3)[30] of the Constitution also stipulates this prohibition. The protection under this Article would be available not merely with respect to the court room evidence but also to the previous stages i.e. during investigation[31]. Thus in case of narco- analysis test the bar mentioned in Article 20(3) would be attracted even if the statements in such a test are made before the initiation of the trial[32]. The right against forced self-incrimation widely known as the 'right to silence' is also enshrined in the section 161(2) of the Criminal Procedure Code which states that every person is bound to answer truly all questions put to him by a police officer other than the answer to which would have a tendency to expose that person to a criminal charge penalty or forfeiture. The right to silence is also granted to the accused by the virtue of the pronouncement by the Supreme Court in the case of *Nandini Satapathy vs. P.L.Dani*[33], where the apex court held: "no one can forcibly extracts statement from the accused who has the right to keep silence during the course of investigation." *In Selvi's case*[34] the same Court of held that the compulsory administration of impugned techniques violates the right against self-incrimation. The apex court again clarified that the protective scope of article 20(3) extends to the investigative stage in criminal cases and when read with section 161(2) of the CrPc, 1973 it protects accused persons, suspects as well as witnesses who are examined during the investigation. The test results can not be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual choice between speaking and remaining silent, irrespective whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible conveyance of personal knowledge that is relevant to the fact in issue. The result obtained from narco- analysis test results bear a testimonial character and they can not be categorised as material evidence. It is to be noted that Article 20 of the Indian Constitution has a non-derogable status within pat III of the Constitution because the Constitution 44th Amendment Act, 1978 mandated that the right o move any court for the enforcement of these rights cannot be suspended even during the operation of proclamation of emergency.

(B) RIGHT TO PRIVACY

Right to Privacy has been recognised as a human right guaranteed under Article 12 of the Universal Declaration of Human Rights, which says "no one shall be subject to arbitrary interference with his privacy, family, home or correspondence". Subjecting an individual to compulsory medical tests is closely

30. Article 20(3) of the Indian Constitution says "No person accuse of any offence shall be compelled to be a witness against himself".
31. See *M.P.Sharma v. Satish Chandra*, 1954 SCR 1077 and *Nandini Satapathy* vs. *P.L.Dani* AIR 1978 SC 1025.
32. *State of Bombay vs. Kathi Kalu Oghad*, AIR 1961 SC 1808
33. AIR 1978 SC 1025
34. Supra note 14

related to the interference by the State with individual's privacy. Article 8 of the The European Convention on Human Rights and Fundamental Freedoms deals with the right to respect for private and family life. Article 14 of the same convention laid down the scope of the ' prohibition against discrimination'. Right to Privacy has also been recognised as a fundamental right guaranteed under Article 21 of the Indian Constitution[35]. However, the form and extent of the right are not clear. In *Govind v. State of M.P.*[36], the Supreme Court of India opined that the right to privacy has to be developed on a case to case basis. To our surprise in *Smt. Selvi v. State*[37], the Karnataka High Court declined to declare this test invalid on the ground of violation of right to privacy by holding that right to privacy is not an absolute right. However, the observation of the court relating to right to privacy may be treated as obiter as the case had not been challenged on the ground of violation of right to privacy.

It may be submitted that narco-analysis test violates the right to privacy on the following grounds. Firstly, it requires injection of drugs which has the effect of curbing one's imagination and autonomy of answering and in this way it directly involves a violation of person's bodily autonomy. Prof. Tribes says "exclusion of illegitimate intrusion into privacy depends on the nature of the rights being asserted and the way in which is brought into play; it is at this point that context becomes crucial to inform substantive judgement"[38]. It may again be submitted that where the lie detector test and brain mapping test escapes this test narrowly , narco-analysis fails to qualify this test; Secondly, when video or audio tapes are made public before the judgement it also amounts to breach of privacy; and Thirdly, every human being has two personalities within his subconscious mind . One personality is evil, selfish and craves for all material pleasures and the other is good, humane and sociable one. A perfect human being, a social being is one who controls his mind, contains the evil influences of his selfish self and allows the guidance of his good self and a criminal is one who does not have control over his mind and acts according to the evil guidance of the selfish self. There are chances of misinterpretation during scientific interrogation and which may be exposed through the audio -video tapes.

Notwithstanding the above facts a person can be deprived of his right to privacy guaranteed under Article 21 of the Constitution under due process of law. Examining to this end the Apex court in *Selvi's case*[39] held that forcing an individual to undergo nacrco-analysis test violates the standard of 'substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of investigation or for any other

35. *Peoples Union of Civil Liberties v. Union of India*, AIR 1997 SC 568.
36. AIR 1975 SC 1378
37. 2004(7) Kar Lj 501
38. Lawrence H. tribe, American Constitutional Law 1307 (1988).
39. Supra note 14

purpose since the test results could also expose a person to adverse consequence of non penal nature. The same court added that the narco-analysis test cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases, i.e. the explanations to section 53, 53-A, and 54 of the CrPc, 1973, as in the opinion of the court such an expensive interpretation is not feasible in the light of the rule of 'ejusdem generis' and the considerations which govern the interpretation of statutes relation to the scientific advancements.

The apex court while concluding this aspect held that compulsory subjecting a person to narco-analysis test is an unjustified intrusion into the mental privacy of an individual. It would also amount to 'cruel, inhuman or degrading treatment' with regard to the language of evolving international human right norms. The court further supplemented that placing reliance on the results gathered from narco test comes into conflict with the right to fair trial.

(C) RIGHT TO HEALTH

Article 25 of the Universal Declaration of Human Rights guarantees the right to health as a human right, which says "every one has the right to a standard of living adequate for the health and well being of himself and of his family including…medical care". Right to health has also been held to be a part of right to life under Article 21 of the Indian Constitution[40]. An argument that Barbiturates administered during narco-analysis have detrimental side effects was found to be untenable by Kerala High Court in *Rojo George v. Deputy Inspector of Police*[41], merely on the ground that similar substances are also prescribed by way of medicines to patients despite their having side effects; even X-Rays and City Scans are used for diagnosing diseases, though they might have adverse effects. The Court also relied on a report stating that the substances used in scientific tests are administered in lesser quantities in the test, than in medical treatment[42]. It may be humbly submitted that this reasoning suffers from the flaw that it compares medication which though slightly harmful by itself has been taken to cause a net improvement to sick person's health after his/her consent and these two ingredients are lacking when a person is subjected to narco-analysis test. Even *Selvi's case*[43], where the apex court has evolved an indigenous jurisprudence on narco test, failed to address the 'right to health' of an individual subjected to narco-analysis test.

It is widely accepted that the correct dose of the truth serum depends on the physical condition, mental attitude and will power of the subject on whom narco analysis test is to be conducted. The ordinary effects of truth serums are:

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40. *State of Punjab v. Mahinder Singh Chawla*, AIR 1997 SC 1225
41. 2006 (2) KLT 197.
42. *Santokben Jedeja v. State of Gujarat*, 2008 Crilj 68.
43. Supra note 14

Adverse effects of Sodium Amytal[44]:

Most frequent: Dizziness, Drowsiness and Dyskinesia etc.

Less frequent: Fainting, Headache, Impaired Cognition, Insomnia, Irritability, Nausea, Nightmares and Vomiting etc.

Rare: A Granulocytes, Allergic Dermatitis, Allergic Reactions, Angioderma, Drug induced Hepatitis, Dyspnoea, Exfoliative Dermatitis, Hallucinations, Megaloblastc Anaemia, Osteopenia Rickets, Skin Rash, Stevens-Johnson Syndrome, Thrombocytopenic disorder, Utricaria and Wheezing etc.

Adverse effects of Sodium Pentothal[45]:

Myocardial Depression, Respiratory Depression, Prolonged Somnolence, Hypo Tension, Tachycardia, Sneezing, Coughing, Shivering, and sometimes Immune Haemolytic Anaemia with Renal failure and Radical Nerve Palsy have also been reported.

Again, it may be remembered that the wrong dosage of drug may put the subject in a coma or may even cause death. How can the procedure be called humane, and in such cases another important question which arises, isn't the doctor violating the ethical principles under the Chapter 2, Regulation 6.6 of Code of Medical Ethics, which clearly mentions that the physician shall not aid or abet torture nor shall he /she be a party to either infliction of mental or physical trauma or concealment of torture inflicted by some other person or agency in clear violation of human right. If the doctors argue that they are participating because of courts directive, than why are they still taking the consent of the subject?

(D) RIGHT AGAINST TORTURE

Article 7 of the International Covenant on Civil and Political Rights provides "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…" Similarly, the Universal Declaration of Human Rights clearly stipulates "No one shall be subjected to torture or cruel, inhumane or degrading treatment or punishment."[46] Principle 21 of the Amnesty International states "No detainee while being interrogated subject to violence, threats or methods of interrogation which impair his capacity or decision or his judgement." The United Nations Committee against Torture also condemned the use of drugs to extract information. The Committee observed: "Although the objective is to lay bare the truth, the truth can not be sought by any

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44. Kaul, Satyendra Kumar, Zaidi, and Mohd. Hasan, *Narco-Analysis, Brain Mapping, Hypnosis and Lie Detector Test in Interrogation of Suspects,*(Allahabad: Alia Law Agency 2008), pp.465. See also, Harold I. Kaplan, MD and Benjamin j. Sadock, MD., Comprehensive Text Book of Psychiatry VI Edition., Chapter 32.6.
45. Kaul, Satyendra Kumar, Zaidi, and Mohd. Hasan, *Narco-Analysis, Brain Mapping, Hypnosis and Lie Detector Test in Interrogation of Suspects,*(Allahabad: Alia Law Agency 2008), pp. 475.
46. Article 50

means whatsoever."[47] According to Article 1 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment: Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes or obtaining from him any information or a confession, punishing him for an act he or third persons has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of any kind., when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, . It does not include pain or suffering arising only from inherited in, or incidental to lawful sanction. Article 16 of the same Convention imposes an obligation on the state parties to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishments which do not amount to torture as defined in Art. 1, when such acts are committed by or at the instigation of or with the consent or aquitence of a public official or other person acting in an official capacity. In this way narco-analysis meets all components of the UN definition of 'torture'. Narco-analysis test also fulfils all the requirements of torture under the Inter-American Convention to Prevent and Punish Torture, which expressly defines torture "as including the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish." Apart from this the body of Principles for the protection of all persons under any form of Detention or Imprisonment[48], which have been adopted by the United Nations General Assembly, in its Principles 1, 6, 17 & 21 prohibits cruel, inhuman or degrading treatment or punishment.

Even though the Indian Constitution does not explicitly enumerate a protection against 'Cruel, Inhuman or Degrading Punishment or Treatment' in a manner akin to the Eight Amendment of the US Constitution, the Supreme Court of India read this issue in Article 21 of the Indian Constitution in *Sunil Batra v. Delhi Administration*[49], *Coopers case*[50], *Maneka Gandhi's case*[51] and D.K.Basu v. State of West Bengal[52].

So, Narco-analysis is a way to torturing the subject, a sophisticated method that is carried out without spilling blood. A question arises here that how can an accused be subjected to a torturous method of investigation without being proved guilty according to law; as Article 11(1) of the Universal Declaration of Human Rights says: "Everyone charged with a penal offence

47. Human Rights Features, "The Truth about narco-analysis", dated: 31st-May-2007, source: *http://www.hrdc.net/sahrdc/hrfeatures/HRF166.htm*, accessed on 04/27/2010.
48. GA res.43/173, 76th plenary meeting, 9 december, 1988
49. 1978 4 scc 494
50. AIR 1970 SC 1318
51. AIR 1978 SC 597
52. AIR 1997 SC 610

has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

Looking at the other angle, doctors who are participating in such tests are also party to such inhumane act; as one of the Leading psychiatric and forensic expert Dr. P. Chandrada Sekheren, former director of Forensic Sciences, Department of Tamil Nadu has characterised the practice as an unscientific, third degree method of investigation[53]. Similarly, the World Medical Association of which the Indian Medical Association is a part passed a Declaration against Torture (Tokyo Declaration)[54] in 1975 which defined torture as "the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession, or for any other reason." Needless to say the narco-analysis test meets all the requirements of torture as defined by the World Medical Association. The Declaration explicitly forbade doctors from participating in torture in any circumstances, providing premises or substances or knowledge that would aid torture, or being present during torture or its threat. The Declaration further declares: "the doctor shall not countenance, condone or participate in the practice of torture or other forms of cruel , inhuman or degrading procedure, whatever the offence of which the victim of such procedure is suspected , accused or guilty , and whatever the victim's believe or motive, and in all situations, including armed conflict and civil strife." So, it is humbly submitted that, the doctors should abstain from these practises which is in the interest of their profession as well as nation.

In *Selvi, s case*[55] the apex court held that the compulsory subjecting a person to narco- analysis test is an unjustified intrusion into the mental privacy of an individual. It would also amount to 'cruel, inhuman or degrading treatment' with regard to the language of evolving international human right norms.

(E) RIGHT TO INFORMED CONSENT

Every individual has the right to do what he likes with his body to protect and preserve his health and personal privacy. Justice Cardozo of USA said in 1914: "every human being of adult age and sound mind has a right to determine what shall be done with his body; and a surgeon who performs the operation without his consent commits an assault for which he is liable in damages."[56] Similarly, Article 5 of Convention on Human Rights and Biomedicines (1997) provides that an intervention in the health only after the patient has given free and informed consent to it. Sections 96 to 106 of the

53. Front Line, vol. 24 issue 9,May 5-18, 2007
54. Source: *http://terrorism.about.com/od/humanrights/ss/Torture_7.htm*, accessed on 04/27/2010.
55. Supra note 14
56. *Schloendroff v. Society of Newyork Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914).

Indian Penal Code also provides for the protection of bodily integrity against invasion by the other.

In *Bhondar v. Emperor*[57], Lord Willim J. held that " if it were permitted forcibly to take hold of a prisoner and examine his body medically for the purpose of qualifying some medical witness to give medical evidence in the case against the accused there is no knowing where such procedure would stop… any such examination without the consent of the accused would amount an assault and I am quite satisfied that the police are not entitled without statutory authority to commit assault upon prisoners for the purpose of procuring evidence against them" . In *Deomam Shamji Patel v. State of Maharastra*[58] it was held that if police officer use force for the purpose of medical examination, then a person can exercise lawfully the right of private defence to offer resistance. Subsequently the 37th and the 41st Report of the Law Commission of India became instrumental for insertion of Sections 53 and 54 in the Criminal Procedure Code 1973 to enable medical examination without the consent of an accused.

Now a question arises whether narco-analysis test can be read into these statutory provisions which enable medical examinations during investigation of criminal cases. The Apex Court in *Selvi's case*[59] observed: " the impugned techniques cannot be read into the statutory provisions which enables medical examinations during criminal cases i.e. the explanations to section 53, 53-A and 54 of the CrPC . Such an expansive interpretation is not feasible in the light of rule of "eujsdem generis' and the considerations which govern the interpretation of statues in relation to scientific advancements." The court ultimately concluded that no individual can be forcibly subjected to narco-analysis test. The court however, left room for the test with consent. With all respect it can be submitted that the apex court could have allowed these tests on the ground of 'informed consent' which is different from mere 'consent'.

In narco-analysis test there is lack of informed consent. Because, firstly, the FSL, anaesthetist and interrogator all act under the influence of interrogating agency so there is lack of free consent; Secondly, before putting the subject to the narco-analysis test only a formal consent is obtained on a paper and that can not be equated with informed consent as the subject is not informed about the consequence of such consent; for example, the publication of video and audio tapes etc.[60]; Thirdly, informed consent also involves giving the subject an information about the side effects of the drugs administered and

57. AIR 1931 Cal 601
58. AIR 1959 BOM 284.
59. Supra note 14
60. In *Samira Kohli v. Prabha Manchanda and Anr.*, AIR 2008 SC 1385, it was held tht before subjecting a patient for medical treatment he/she must be informed about the nature and procedure of the treatment and its purposes , benefits and effects; alternative treatment if available ; out line of the substantial risk and adverse consequences etc.

the choice to undergo any alternate test[61]. This issue unfortunately, remained untouched by the apex court in Selvi's case[62].

V. CONCLUSION

If it is permissible in law to obtain evidence from the accused person by compulsion, why tread hard path of laborious investigation and prolonged examination of other man, materials and documents?[63] It has been well said that an abolition of this privilege would be an incentive for those in charge of enforcement of law 'to sit comfortably in the shade rubbing red pepper into a poor devils eyes rather than to go about in the sun hunting of evidence'[64]. Narco-analysis is a dubious practice. There are many lacunae in this technique such as quality of information and non admissibility characteristics etc. Moreover, the human right of a person who is subjected to such test are at a stake. Snatching away the right to control one's mind is worse than a third degree torture and is just a mode of switching on from 'physical third degree torture to mental third degree torture'. In the opinion of the former Supreme Court judge Justice K.T.Thomas the narco-analysis method is crude technique in criminal investigation[65]. This method has been stopped by the developed countries having found improper. New Jersey Supreme Court in the case of State v. Pitts[66] prohibited the use of Sodium Amytal narco-analysis test. Again, when US wanted to conduct narco analysis test on suspect persons connected with the terrorist attack on WTC, they took the suspects to Remote Island fearing objection from the country.

In India, whereas the High Courts have upheld the validity of such test, the human rights issues were not addressed in those cases. However, the Supreme Court in *Selvi's case*[67] has evolved an indigenous human rights jurisprudence on narco-analysis test by concluding that no individual should be forcibly subjected to narco-analysis test whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. The apex court however, left room for the voluntary administration of the narco-analysis techniques in the context of criminal justice, provided that certain safeguards are in place. The court further added that even when the subject has given consent to undergo narco-analysis test, the test results by themselves can not be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. The court however, clarified that any information or material that is subsequently discovered with the help of voluntary administered

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61. Ibid.
62. Supra note 14
63. See *State of Bombay vs. kathi Kalu Oghad*, AIR 1961 SC 1808
64. Sir James Fitzjames Stephen, History of Criminal Law, p. 442
65. *http://insidekerala.com/n/index.php?mod=article&cat=MainNews&article=28378*. Accessed on 04/13/2010
66. 116 N.J 580, 562 A. 2d 1320 (N.J 1989)
67. Supra note 14

test results can be admitted in accordance with section 27 of the Evidence Act, 1872. It was made clear that the guidelines published by the National Human Rights Commission [Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused, 2000] should be strictly adhered to and similar safeguards should be adopted for conducting the narco-analysis test. To conclude, it can be submitted that the Central Government should make a clear policy stand on narco-analysis test, particularly taking its human rights issues into consideration. It is pertinent to note here that the Law commission of India is likely to recommend a ban on narco-analysis test as it violates the basic human rights[68]. We endorse the effort of the Law Commission of India.

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68. *http://timesofindia.indiatimes.com/Law-commission-may-recommend-ban-on-narco-test/articleshow/4585287*.cms. Accessed on 04/13/2010

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LEGAL CONTROL OF CYBER TERRORISM: AN OVERVIEW

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ABSTRACT

This article outlines concerns about the expanding horizons and deleterious impacts of cyber terrorism on critical information infrastructure, individual and society as a whole. It briefly summarises definition, characterisation and classification of cyber terrorism and also what are the criminogenic insights behind their offending? Furthermore, it considers the reasons what extend cyber terrorism can be considered novel from terrestrial crime and how are policy makers, police, court and others responding at the international, global and national levels? Unless appropriate steps are taken to protect ourselves against cyber terrorist attack now, India will suffer tragic cyber terrorism that will have devastating impacts on our economy and will include loss of life. For this end, this article is an attempt to contribute how to devise new legal pedagogy to curb the trans-national spectre of cyber terrorism which has adverse impact across the world.

KEYWORDS: *Cyber terrorism, Critical information infrastructure, Electronic services delivery, Electronic governance, Electronic court,*

"We need courage to throw away old garments which have had their day and no longer fit the requirements of the new generation."

Fridtjof Nansen[1]

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1. Available at http://www.dtic.mil/cgi-bin/Get TRDOC?Location=U2&doc=Get TRDOC.pdf &AD=ADA395338. Accessed on 10/21/2010.

I. INTRODUCTION

In the new millennium the invention of the information communication revolution after the agricultural[2] and industrial revolutions[3] is the geatest contribution to the human civilization. The democratic vision of free and unfettered access to information and communication technology in the fields of social, economic and political has resulted social revolution because it never creates any discrimination on the grounds of caste, colour and creed. More pragmatically, the democratisation of e- services delivery[4], e-governance[5] and

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2. Agricultural Revolution can refer to the (a) Neolithic Revolution: the First Agricultural Revolution (about 10, 000 years age) which formed the basis for human civilization to develop, (b) Green Revolution (post 1945) in which the use of industrial fertilizers and new crops greatly increased the world's agricultural output, (c) Muslim Agricultural Revolution (10th Century) which led to increase urbanisation and major changes in agricultural and economy during the Islaming Golden Age i.e. Islamic Renaissance, (d) British Agricultural Revolution (18th Century) spurred urbanization and consequently helped launching the Industrial Revolution and (e) Scottish Agricultural Revolution (18th Century) which led to the lowland clearances in Scotland were one of the results of the British Revolution. Available at http://en,wikipedia.org.//wiki//howlandcelarances. Accessed on 05/12/ 2011.
3. The Industrial Revolution was a period in the late 18th and early 19th Centuries when major changes in the agriculture, manufacturing, production and transportation had a profound effect on the socio- economic and cultural condition in Britain. Available at http://en.wikipeida.org.//wiki//industrial Revolution. Accessed on 05/12/2011.
4. Section 2(g) of Electronic Delivery Services Bill 2011, electronic service delivery means the delivery of services through electronic mode including, *inter alia* the receipt of forms and applications, issue or grant of any licence, permit, certificate, sanction or approval and the receipt or payment of money.
5. E-Governance (or Digital Governance) is defined as the utilization of the Internet and the wide-web for delivering government information and services to the citizens. Available at http://en.wikipedia.or/wiki/E-governance. Accessed on 06/02/ 2011.
   (a) Project Saukaryam (facility) of Visakhapatnam Municipal Corporation is a public private partnership model of e-governance. Through the website:www.saukarya.org facilities like online payment of municipal dues, filing and settlement of complaints & grievances, tracking of building plans status, registration of deaths and birth, tracking of garbage lifting etc. (b) Gyandoot model in the Dhar district of Madhya Pradesh, a low cost, self sustainable and community owned rural Intranet Project provides soochanalyas (information Kiosks) to rural population like agriculture produce auction centres, copies of land record, online registration of applications and public grievance redressal , (c) The State Kerala has initiated a Smart Ration Card project to streamline the ration card purchasing. (d) The State of Haryana is implementing Haryana Registration Information system to provide registration of documents, right at the Tehsil/sub level. It includes security checks, online capturing and storing of photos of buyers, sells and witnesses and information about registration fee, printing of registration certificate and various statistical reports. (e) Bhoomi Project of the State of Karnataka involves the computerization

e-court,[6] the union government as well as more State governments has treated the Internet[7] as a tool for mobilization of political ideologies, and in the same vein, the citizens are drawn into a consultative process whereby their voice and opinion needs for revitalizing community cohesion by industrialization, urbanisation and the individualization.

The rapid expansion vistas of information revolution present new challenges to the legal system across the globe because it is the law of nature that each and every new invention and innovation has been characterized by constructive and destructive phenomena. Considering the destructive features of the burgeoning world of the information communication technology, it has been tempered by negative sides. The proliferation and integration of computers into all walks of lives has opened the doors to anti-social and criminal behaviour in ways that would never have previously been possible. Computer[8], computer-system[9] and the Internet offer some new sophisticated opportunities for lawbreaking, and they create the potential countervailing and

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of 225 treasuries all across the State. The Bhoomi project is about computerization of land record system and is already operational in 176 taluksas (f) e-choupal is Information Technology Communication's based rural project. It enables farmers to readily access crop specific real time information and customized knowledge in their native language. It has bagged the United Nations' Development Programme's first global business award to recognize the role of the corporate community in implementation of UN targets of reducing poverty etc. Vakul Sharma, *Information Technology, Law and Practice*, Universal Law Publishing Co. (2000), p. 40.

6. Electronic court filing is the automated transmission of legal documents from an attorney, party or self represented litigant to a court, from a court to an attorney, and from an attorney or other user of legal documents. Available at http://en.wikipedia.org/wiki/Electronic_court_filling, Accessed on 05/27/2011.
7. Section 2(h) of the Quality of Service of Broadband Service Regulation Act, 2006, the Internet is a global information system that is logically linked together by a globally unique address based on Internet Protocol or its subsequent enhancement up gradation using the Transmission Control Protocol/Internet Protocol suite or its subsequent enhancement/up gradations, and all other IP compatible protocol.
8. Section 2(i) of the Information Technology Act, 2000 any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network.
9. *Ibid*, Section 2(l), a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files which contain computer programmes, electronic instructions input data and output data that performs logic, arithmetic, data storage and retrieval, communication control and other functions.

exploitative entities such as hackers[10], hacking[11], malware coders[12], and most importantly cyber terrorists who commit traditional types of terrorism in non-traditional ways. It is evident from the terrorist attacks on the World Trade Centre in New York[13], the Internet Black Tiger's attacks in Srilanka[14], Mexican Zapatista movement groups attack on the computer system[15], Estonia's e-

10. The term 'hacker' originated in the world of computer programming in the 1960, where it was a positive label used to describe someone who was highly skilled in developing creative, elegant and effective solutions to computing problems. In course of time, while such hackers would engage in 'exploration of other's computer systems, they purported do so out of curiosity, a desire to learn and discover, and damaging those systems while exploring, intentionally or otherwise. These actions and inactions are said as hacking. The contest over characterizing hacker and hacking is a product of levelling process. But the terms hackers and hacking are used in the sense to denote those illegal activities associated with computer intrusion and manipulation. Majid Yar, *Cyber Crime and Society*, Sage Publication, Indian Pvt. Ltd., (2006), p. 23.
11. *Ibid*.
12. Malware takes a number of distinct forms such as Viruses, Worms, Trozen Horses and Logic Bombs. Computer viruses, like their biological counter-parts, need hosts to reproduce and transmit themselves. However, worms are independent pieces of software capable of self replication and self transmission by e-mail to others in a computer addressed book. A trozen horse as the name suggests is a programme that appears to perform a benign or useful function but in fact has some hidden destructive capabilities that only become apparent after a user had downloaded and installed the software. A logic bomb is a code surreptitiously inserted into an application or operating system that causes it specified conditions are met. Steven Furnell, *Vandalizing the Information Society*, Pearson Education Limited, 2002, p. 143.
13. On September 11th 2001, in the morning, terrorists hijacked four planes in different parts of the Unites States America. Two of the Planes were used as bombing resulting in thousands of causalities. Billions of Dollars worth of buildings offices, networks, databases and information were destroyed. The third plane crashed into Pentagon building causing immense loss of human life and property, while the fourth aircraft landed crashed at a deserted place. The cumulative effect of the World Trade Centre attacks (wired City) was such as to shake the conscience of the entire world which witnessed, in great shock and horror, the extensive television coverage of the September 11th 2001 attacks. Available at http:faculty.news.edu/ toceonnor/410/cyberspace htm. Accessed on 03/12/2010.
14. In 1998 the Internet Black Tiger in Srilanka attacked against the computer system only to establish a separate Independent State in the North East of Srilanka for the Tamil Community. Jarkko Moilanen, "*Extreme activities in cyber space*." Available at http://extreme.ajatuksani.net/tag/internet-black-tigers/.Accessed on 02/28/2011.
15. In 1988 the Zapatista movement group being imbibed with Marxist ideology in Mexico attacked againsyt zsthe computer system under the leadership of Marcus, a Communist leader. LTC Carlos A: Rodrigues, "*Cyberterrorism-A Rising Treath in the Western Hemisphere*", Fort Lesley J. Mc Nair, Washington, DC, May, 2006, p. 13.

governance system attack[16], Taj Hotel at Mumbai attack[17] Purulia Arms Dropping case[18], Red Fort attack[19], Taj Mahal threat[20], e-mail threat to Supreme Court of India,[21] etc. at the international and national levels, the discipline of criminology has quickly been jumped into the conclusions that a new breed of cyber terrorism is on the rise, and jurists and lawyers as well as laymen seem to assume that law will somehow find out some answers to the current problems faced by the human civilization.

II. MEANING AND DEFINITIONS OF CYBERTERRORISM

While it is not very difficult to understand and identify the acts of cyber

16. On April 27, 2007, Estonia was attacked and the effects of this assault were potentially just as disastrous as a conventional offensive on this the most wired country in Europe, popularly known as e-Stonia. By 2007, Estonia had instituted an e-government in which ninety percent of all bank services, and system parliamentary electronics were carried out via the internet. This was not all accomplished through by a traditional nuclear, chemical or biological weapon of mass destruction rather of a classical terrorist attack by computer net work. Available at http://www.timesonline.co.uk/tol/news /world/europe/article1805636. ece. Accessed on 02/30/2011.
17. December 11, 2008, Hotel Taj at Mumbai was attacked by the Cyber Terrorist Groups. Available at http:www.reuters.com/articles/vbs techMediaTelecom News iduBom3394470008. Accessed on 06/12/2010.
18. On 18th December, 1995 the Purulia Arms Dropping Case that caused a widespread concern for the Indian Police Authorities. The main culprit based in New Zealand and England used the Internet for international communication, planning and logistics to create an imbalance the national security. Available at http://cbi.nic.in/dop/judgment/padc.pdf. Accessed on 02/30/2010.
19. On February 20, 2001, the investigation of the crime revealed that the terrorists were using stegnography to communicating the terrorist designs online. Stegnography is the art and science of communicating in a way that hides the existence of the communication. The case at the hand speaks that they transmitted some pornographic matter in which they communicated to the perpetrators. "Red Fort Case: Death for one, life for two", Express News Service, New Delhi, October 31. Available at http:// www.indiaexpress.com/oldastory/81165/ . Accessed on 25/02/2010.
20. On 2nd January 2002, as reported, the Chief Minister of Uttar Pradesh allegedly received an e-mail from the Laskar e-Toiba, which threatened to blow up the 17th Century marble wonder of the world, the Taj Mahal. Expressindia, Lash kar threatens to blow up Tajmahal. Available at http://www.expressindia.com/news fullstory.pht?newside=6127. Accessed on 11/25/2010.
21. In the second week of January, 2002, the supreme court of India received an e-mail threatening: "We will blow up you court and your chief Minister". This e-mail was received as per media reports, by the computer section in charge in the Apex court. Mr. Monoj Jule on receipt of this e-mail, the registrar of the Court, immediately alerted the Chief Justice of India, who reported the matter to the police. Email threat to blow up Supreme Court, high court, Judges. Available at http://www.India-forums.com/news/national/65254-email-threat-to-blow-up-supreme-court-high-court-judges htm. Accessed on 05/20/2010.

terrorism, it is certainly a difficult task to offer a satisfactory definition of this new phenomenon because no such legislatively defined meaning exists and this domain is open to debate and dispute. Before one can defend against cyber terrorism, the quintessential question remains here what is meant by traditional terrorism? At the cost of oversimplification conventional terrorism may be defined as premeditated, politically motivated violence perpetrated against persons or property or government to intimidate or coerce government, the civilian population or any segment, thereof, furtherance of political or social objectives[22]. Simply put cyber terrorism is the convergence of cybernetics[23] and terrorism[24]. In 1998 a report by the Centre for Strategic and International studies entitled "Cyber Crime, Cyber Terrorism, Cyber Warfare, Averting on Electronic Waterloo", one of the first commonly accepted definitions for cyber terrorism has been defined 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[25]". Furthermore, the Deputy Assistant Director

22. Walter Laqueur, Terrorism-A Balance Sheet harper's Magazine, March and November 1976 observes, the term has been used as a synonymous for rebellion, street battles, civil strife, insurrection, rural guerrilla war, coups detat and a dozen other things. Moreover, he explained the concept referring two basic grounds: "Individual" terrorism and "State" terrorism. Individual terrorism has many manifestations, and is used by groups' large and small, nationalists, separatist, liberation fighters etc. In contrast to individual terrorism, State terrorism refers to acts of terror, such as torture, killing mass arrest etc, which are conducted by the organs of the State against its own population, whether the entire population, a certain segment thereof (such as a minority community or political opposition), or the population of an occupied country. While individual terrorism is usually anti-State and subversive, the purpose of the State terrorism is to enforce the authority and power of the State. For example, State terrorism are the activities of the Nazis, the Stalinist repression in the USSR, the rule of Pole Pot in Kampuchea in the 1970s and the treatment of the desapiracidos of Latin America. The State terrorism and Individual terrorism are similar phenomenon but they are fundamentally different concepts and should be studied separately. But it is the fact that both types of terrorism attempt to induce a state of fear, fulfil different functions and manifestations in different ways.
23. According to Microsoft Computer Dictionary, (5th Edn. 2002, Microsoft Press, and U.S.A): The study of control systems, such as the nervous system, in living organisms & the development of equivalent systems in electronic & mechanical devices. Cybernetics compares similarities & differences between living & non living systems (whether those system comprise individuals, groups or societies) and is based on theories of communication and control that can be applied to either living or non living systems or both.
24. The term cyber terrorism was first coined in 1996 by Barry Collin, a senior researcher at the Institute for Security and Intelligence in California. Jarkko Moilanen, "Extreme activities in cyberspace". Available at http://extreme.Ajatukseni.net/?=&sbut=find. Accessed on 05/31/2011.
25. Andrew M. Colarik, *Cyber Terrorism: Political and Economic Implementation*, Idea Group Publishing, 2006, p.56.

of Cyber Division of Federal Bureau of Investigation, Keith Lourdeau defined as: "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"[26]. Another working definition has been offered by Verton[27], "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". In a similar vein, Dorthy Denning[28] takes the term to denote as: "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 objectives. Further, to qualify as cyber terrorism, an attack should result in violence against persons or property. Attacks that lead to death or bodily injury, explosions, or severe economic loss would be examples. Serious attacks against critical infrastructures could be acts of cyber terrorism, depending on their impact. Attacks that disrupt nonessential services or that are mainly a costly nuisance would not."

As evident from the above delineations that cyber terrorism has five major distinct features. *First*, it is unlawful attack by terrorist groups or individuals with a domestic political agenda. *Secondly*, the attack should premeditate and politically motivate against computer and information system. *Thirdly*, the execution of such attacks should be accompanied by the agenda of crippling or disabling a nation's electronic and physical infrastructure. *Fourthly*, such attacks should aim to intimidate or coerce a government or its people in furtherance of political or social objectives of the terrorist groups or individuals and *fifthly*, causing of violence, destruction, bodily injury, death and disruption with a view to create fear within a given population is yet another crucial element of cyber terrorism.

III. CRIMINOGENIC INSIGHTS FOR CYBER TERRORISM

The vertical growth of the Internet system plays an increasing role in the industrialized nations i.e. e-commerce, e-banking, e-transfers, e-governance, power and water supply, air traffic, national security etc. because it enables greater speed and efficiency. Conversely, at the same time, networked technologies also provide opportunities to cyber terrorist organisations to hijack the information system, contaminant the information infrastructure by installing

26. *Ibid.*
27. D. Verton *Black Ice: The Invisible Threat of Cyber Terrorism*, Mc Graw-Hill/ Osborne (2003), p 20.
28. Cited in Majid Yar, *Cyber Crime and Society*, Sage Publication, 2006, p. 51.

viruses, worms, logic bombs or denial of services attack[29]. Assessments by officials and academic commentators that cyber terrorism presents a substantial growth are based on the following factors:

a. The Internet enables action at a distance: Today's terrorists no longer need to gain physical access to a particular location because the global information infrastructure provides the ability to the terrorists or terrorist organisations to cripple the critical information infrastructure commutations from anywhere in the world. With more and more of our lives falling dependent on computerised networked systems, a cyber terrorist also has the ability to attack the same defying the geographical jurisdiction of a particular nation. The use of the Internet for staging terrorist attacks by-passes such security measures along with the risks of apprehension at airports, posts and border check points. It is crystal clear from the fact that what would be consequences in a city hospital having open heart surgery if this official blood type was remotely changed and this change went on unnoticed?

b. The Internet is a force multiplier: A force multiplier is the power that can increase the striking potential of a unit without increasing its personnel. For instance, a small piece of malicious viruses' code can spread rapidly across the global network of the web reproducing exponentially and corrupting systems. In 2000 "Love Bug[30]" and in 2004, "the Mydoom[31]' virus managed to cause an estimated $20 billion of damage within 15 days. The

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29. Denial of Service attack results when legitimate user access to a computer or network resource is intentionally blocked or degraded as a result of malicious action taken by another user. These attacks do not necessarily cause direct or permanent damage to data, but they intentionally compromise the availability of the resources. Steven Furnel, *Vandalizing the Information Society*, Pearson Education Limited, 2002, p. 30.
30. In May of 2000, a computer virus known as the Love Bug Virus was designed to destroy the files of victims' computer and it forced to shutdown of computers at large corporation such as Ford Motor Company, Dow Chemical Company and the Computer system of the House of Lords. After security experts determined that the virus had disseminated from the Philippines, investigators from the Philippines and from the United States tried to obtain a warrant to search the home of their primary suspect. But the investigating agencies were frustrated to conduct the investigation, arrest the culprits and register the case by the Philippines lack of Mutual Legal Assistance and Extradition Treaty on cyber crime. S.V. Joga Rao, *Law of Cyber Crimes and Information Technology*, Wadha & Company Nagpur, India (2004), p. 5.
31. Mydoom is a computer worm affecting Microsoft windows. It was first sighted on 26th Jan 2004. It is transmitted primarily via-email appearing as a transmission error, with subject lines including "Error", "Mail delivery system", "Test" or "Mail transaction failed" in different languages including French and English. The mail contains an attachment that, if executed, resends the worms to e-mail addresses found in local files such as a user's address book. Majid Yar, *Cyber Crime and Society*, Sage Publication Ltd. 2006, p. 54.

cost benefit ratio of electronic disruption has a cascading effect than that small investment.

c. Anonymity in nature: It has already been noted that one of the greatest challenges presented by cyber terrorism to law enforcement agencies is the extent to which the Internet environment affords to perpetrators a degree of anonymity or disguise. Such hiding personality and location can be achieved by staging cyber attacks through use of proxies in which it is difficult to trace the point of origin of the attack. In other words, it can also be achieved through what is known as identity theft, where the perpetrator uses an identity stolen from an innocent third party in order to stage an attack in his/her name.

d. Technical Nature of Crime: Cyber terrorists generally use encryption and decryption methods that cannot be read by law enforcement agencies to investigate them. Therefore, the investigation and prosecution of cyber terrorism require a new legal and technical approach as opposed to investigation and prosecution of conventional crime.

e. Inadequacy of Law and Procedure: One of the greatest problems in securing the Internet against potential cyber terrorism is the absence of any centralized and harmonised regulations at the global, regional and national levels. In case of terrestrial world, if a delinquent illegally or for the criminal purpose entered the room with electronic computers, the law could be applied in traditional way but a potential cyber terrorist tries to obtain an illegal access to computer memory and downloads[32], copies[33] or extracts[34] the information without modifying and removing it remotely. Therefore, the traditional laws, procedures and the systems are unable to appreciate the nature of crime investigation in virtual world. Although some statutes including the Information Technology Act, 2000[35] make provisions for extraterritorial application, they still do not address the modus operandi of such a jurisdiction.

f. Issue of Jurisdiction: The chief focie of information technology not only defeats the geographical and legal boundary but even the jurisdictional boundary of particular sovereign nations. Thus, moot question crops up in the minds of the legal community *i.e.* which court would have jurisdiction to adjudicate the disputed matters between the parties transacting on the Internet. Regrettably, the laws relating to jurisdictional jurisprudence characterised in the terms of subject matter, territorial aspects, pecuniary and prescriptive matters

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32. Retrieving a file from a remote computer, computer system or computer network. Vakul Sharma, *Information Technology, Law and Practice*, Universal Publishing Co, p. 103.
33. *Ibid*, Retrieving a file from a remote computer, computer system or computer network and then saving it on either computer's hard disk or any removable storage medium.
34. *Ibid*, Retrieving a file from a remote computer, computer system, or computer network and then selecting extract part of the digital content.
35. Section 75 of the Information Technology Act, 2000.

are far from satisfactory: and do not answer to the emerging issues posed by the cyberspace referring to the standard test laid down in the past nineteenth Century. Since jurisdiction is the *sine qua non* of administration of justice, a judgement, or order or decree is passed by the court without having the jurisdiction, such judgment or order or decree can be said as *Coram non judice*.

IV. LEGAL REGIME OF CYBER TERRORISM

Cyber terrorism is not a national problem but an international one. The perceived menace of cyber terrorism in cyber space stifles the growth of international trade and commerce, onslaughts the right to privacy, demolition of e-governance, denial of service attacks and serious threat to national security. Additionally, the international element of cyber terrorism creates new problems and challenges for law enforcement agencies as computer system may be accessed in one country, the data may be manipulated in another country and the consequences felt in a third country so that the consequence of the said crime directly attack the sovereignties, jurisdiction, laws and the rules of several entities. Therefore, any national legal response will have limited role in curbing the menace of cyber terrorism. These issues have to be addressed by all countries whether they are producer, users or consumers of the digital renaissance[36] that combines the excellence of age of discovery[37] and renaissance of mediaeval period[38].

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36. The Renaissance (French meaning rebirth, Italian renascbento from re again, and nascere-re born) was a cultural movement that spanned roughly the 14th to the 15th Century beginning in Italy in the late middle age and later spreading to the rest of Europe. Available at http://en.wikipedia.org/wiki/Renaissance. Accessed on 05/23/2010.
37. Age of discovery in the annals of the history of mankind refers to the period between 15th and 16th Centuries when explorers set in search of new continents in the high seas defying the geographical boundaries. The parallels between the age of discovery and digital era are strikingly similar because just as the age of discovery saw the breaking down of the geographical barriers by the exploration of the high seas, Digital revolution which gave birth to the Internet has sounded the death knell of the distance by rendering geographical boundaries meaningless. T.K. Viswanahan, "*Law and Technology*", Indraprstha Technology Law Journal, Volume 1, (Summer) 2006, p.161.
38. The Digital technology also shares may of the achievements of Age of Renaissance. The historical movement described as Renaissance was triggered by the invention of printing technology. Just as Guterber's Printing Press which was invented in 1455, forever changed the world and gave birth to Renaissance to Europe. As Guterberg's printing Press could produce books quickly and facilitate wide dissemination of knowledge in respect of artistic, social, scientific and political thought turned into new directions. The dawn of the third millennium being characterized as digital library with universal access to one and all 24 hours a day, 7days a week, 365 days a year appears to be within its group.

V. INTERNATIONAL LEGAL RESPONSE

a. Organisation for Economic Cooperation Development: In 1983 in Paris with 30 member countries, the first international initiatives in harmonizing the legal responses towards computer crimes phenomena and criminal law reform, an expert committee was appointed by the Organisation for Economic Cooperation and Development[39]. In 1985, OECD document included offences against unauthorised access, damage to computer data, or computer programmers, computer sabotage, unauthorised interception and computer espionage. The OECD adopted guidelines for the security of information systems and networks to secure the following objectives:

(i) Promote cooperation between the public and private sectors in the development and implementation of such measures, practices and procedures.

(ii) Foster confidence in information systems and the manner in which they are produced and used.

(iii) Facilitate development and use of information systems, nationally and internationally.

(iv) promote international cooperation in achieving security of information systems.[40]

b. G 7 & G 8 Groups: In 1996 an expert Group comprising legal and technical expert of the member states in the field of information communication networks on Misuse of International Data was created by G 7 countries and that group presented its report in December 1997. In order to check these misuses the report urged the states to increase the level of criminalization, prosecution, investigation, international cooperation and human rights protection emphasising on the following points:

(i) Strengthen International mechanism for addressing illegal actions i.e. by creating a well defined set of international minimum rules against illegal actions such as hacking, computer espionage, computer sabotage, computer fraud and copyright infringements.

(ii) Encourage countries to establish national laws the effective prosecution of computer crimes especially to search and seizure of computer systems.

(iii) Foster cooperation amongst law enforcement agencies with special respect in international search and seizure procedures.

(iv) Clarification of jurisdiction in cyber world[41].

On the same vein, in 1997 a group of experts on Trans-national Organized Crime was appointed by the G 8 nations and developed Ten Principles and a plan of action ensuring that no criminal receives safe heaven anywhere in the world. The Group of Eight Meeting of the Justice and Interior

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39. Hereinafter, it is referred OECD.
40. S.V. Joga Rao, *Law of Cyber Crimes and Information Technology Law*, Wadhwa & and Company Nagpur, 2004, P. 223.
41. *Ibid*, p.225.

Ministers responded to the increase international movement of criminals, organised crime and terrorist and their use of the information communication technology[42].

e. Budapest Convention on Cyber Crime: Though the Budapest Convention on Cyber Crime 2001[43] does not contain any direct specific provision on cyber terrorism, several of its provisions may be of immense help in combating this crime. The most relevant provisions in this regard are those which are related to international co-operation in the fields of investigation[44], extradition[45] and trial etc. of course the most powerful ways of ensuring consistent international initiatives to curb the exponential emergence of cyber crime problems ultimately result to check the spectre of cyber terrorism.

VI. GLOBAL LEGAL RESPONSE

In the wake of the September 11, 2001 attacks in New York and Washington, the Security Council of United Nations has expressed deep concern describing that like any act of international terrorism, it considers a threat to the peace and security of the international community. Therefore, the role that can be played by the International judicial body with universal jurisdiction and a specialized area of action has much significance.

(i) The U.N. Commission on Crime Prevention and Criminal Justice[46] has initiated several measures as to how to prevent and control high technology and computer related crimes. The Commission has recommended that international co-operation between nations to suppress the trans-national component of cyber crime is indispensable.

(ii) The UN Convention against Transnational Organised Crime has adopted specific measures by General Assembly on 25th November 2000. Though not directly applicable to computer crimes organised gangs like cyber terrorism cyber terrorist use telecommunication and computer network for their inter relations.

(iii) To create global conscientious, the United Nations has brought out a comprehensive Manual on the Prevention and Control of Computer related crimes which analyses all the facets of the Legal response to this new genus of crime and sets out the need, problems and prospects of international

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42. December, 1997, the G8 Meeting of Justice and Interior Ministers.
43. Ministers or their representatives from the following 26 Member States signed the treaty: Albania, Armenia, Austria, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, the Former "Yugoslav Republic of Macedonia" Ukraine and the United Kingdom. Other 4 members, Canada, Japan, South Africa and the Unites States, that took part in the drafting, also singed the treaty.
44. Article 23 of Budapest Convention on Cyber Crime, 2001.
45. *Ibid*, Article 24.
46. General Assembly Resolution, 56/121 (2000).

cooperation in fighting cyber crimes.

VII. NATIONAL LEGAL RESPONSE

a. U.S.A. After the terrorist attack on 11 September, 2001 the USA has introduced the U.S.A Patriot Act, 2001 in which the term 'cyber terrorism' stands for various forms of hacking and causing damage to protect computer networks of citizens, legal entities, or governmental authorities, including damage to computer system used by a governmental agency to manage national defence or to assure national security[47], and it considerably strengthens penalties under the Computer Fraud and Abuse Act of 1984 including provision for the life imprisonment of convicted 'cyber terrorists'.

b. U.K. The United Kingdom lagged behind many of the other major States in introducing specific cyber terrorism legislation. Moreover, Section 1 of the Computer Misuse Act, 1990 postulates that unauthorised access, as an offence which is the basic of hacking or cracking. Furthermore, Article 7 of Data Protection Act, 1998 requires organizations to implement adequate technical measures to protect against unauthorised access to confidential data. Thus, hacking when done by organised terrorist groups would be regarded as an offence and would be dealt with under the relevant provisions.

c. China In China, the Computer Information Network and Internet Security Protection & Management Regulation 1997 clearly underlines that 'No unit or individual may use the Internet to harm the national security, disclose the State secrets, harm the interests of the state of society or of the group, the legal rights of the citizens or to take part in criminal activities[48]. And also no unit or individual may use the Internet to create, replicate, retrieve, or transmit the following kind of information:

a. Inciting to resist or breaking the constitutional or laws or the implementation of administration regulations;

b. Inciting to overthrow the government or the socialist system:

c. Inciting division of the country, harming national unification:

d. Inciting hatred or discrimination among nationalities or harming the unity of the nationalities.

e. Making falsehoods or distorting the truth, spreading rumours, destroying the order of society:

f. Promoting feudal superstitions, sexually suggestive materials, gambling, violence and murder:

g. Terrorism or inciting others to criminal activity, openly insulting other people or distorting the truth to slander people:

h. Injuring the reputation of the State organs:

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47. Vladimir Goluber, *Cyber Terrorism; Concept, terms, counteraction*, Computer Crime Research Centre. Visited on 20-06-2009

48. Article 4 of the Computer Information Network and Internet Security, Protection & Management Regulations 1999.

i. Other activities against the constitution, laws or administrative regulations[49].

d. Singapore The Singapore Parliament has approved tough new legislation aimed at stopping cyber terrorism on the following grounds:

(i) the security, defence or international relations of Singapore,

(ii) the existence or identity of a confidential source of information relating to the enforcement of criminal law,

(iii) the provision of services directly related to communications infrastructure, banking and financial services, public utilities, public transportation or public key infrastructure,

(iv) the protection of public safety including systems related to essential emergency, services, such as policy, civil defence and medical services.[50]

e. Malaysia The Computer Crimes Act, 1997 provides, a person shall be guilty of an offence if: (a) he causes a computer to perform any programme or data held in any computer; (b) the access he intends to secure is unauthorised, and (c) he knows at the time when he causes the computer to perform the functions[51]. Additionally, Malaysia is to establish an international computer response centre to fight against high tech cyber terrorism.

f. Pakistan Section 17 of the Prevention of Electronic Crime Ordinance 2007 provides whoever commits the offence of cyber terrorism and causes death of any person shall be punishable with death or imprisonment for life. The Prevention of Electronic Crimes laws will be applicable to anyone who commits a crime detrimental to national security through the use of a computer or any other electronic device. It listed several definitions of a terrorist act including stealing or copying, or attempting to steal or copy, classified information necessary to manufacture any form of chemical, biological or nuclear weapon.

g. India In India the first official recognition was given to cyber crime when the Indian Parliament being the 12th country of the world passed the Information Technology Act, 2000 and it's (Amendment) Act, 2008 which is similar to Singapore Model of Computer Misuse Act, 1998. With the introduction of the Information Technology Act, 2000, it further amends the Indian Penal Code, 1860[52], the Indian Evidence Act, 1872[53], the Banker's Book Evidence Act, 1891[54] and the Reserve Bank of India Act, 1934[55]. The

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49. *Ibid*, Article 5.
50. Section 9 of the Computer Misuse Act, 1998, and also refer section 8 and 10 of the Computer Misuse Act, 1998.
51. Section 3(i) of the Computer Crime Act, 1997.
52. Sections 29A, 167, 172, 173, 175, 192, 104, 463, 464, 466, 468, 469, 470, 471, 474, 476, and 477A.
53. Sections, 3, 17, 22A, 34, 35, 39, 47A, 59, 65A, 65B, 67A, 73A, 81A, 85A, 85B, 85C, 88A, 90 and 131.
54. Sections 2 and 2A.
55. Section 58.

scope and scale of the Act is to weed out the obstacles arising in the traditional paper based document and to create a more congenial environment on e-commerce and e-governance[56]. Furthermore, to maintain confidentiality, integrity and availability of computer, computer system and computer networks to the legitimate users and prevent the unethical, unauthorised and illegal conduct perpetuated in the virtual world, the said Act provides civil[57] and criminal liability[58].

When the principal Information Technology Act, 2000 was enacted, the focus of legislatures was not on cyber terrorism but on specific cyber offences[59]. Subsequently, Section-65F[60] was inserted by the Information Technology Amendment Act, 2008. This precision runs as follows:

"(1) 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 authorisation 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

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56. Preamble of the Information Technology Act, 2000.
57. The Scheme of the Act provides that cyber contravention in Chapter IX from Sections 43 to 45.
58. *Ibid*, Chapter XI from sections 65 to 75.
59. (a) Section 65, Tampering with computer source document.
    (b) Section 66, Computer related offences.
    (c) Section 67, Punishment for publishing or transmitting obscene materials.
    (d) Section 68, Power of Controller to give direction.
    (e) Section 69, Power to issue directions for inception or monitoring or decryption of any Information through any computer resource.
    (f) Section 70, Protected system.
    (g) Section 71, Penalty for misrepresentation.
    (h) Section 72, Penalty for breach of confidentiality and privacy.
    (i) Section 73, Penalty for publishing (Electronic Signature) Certificate false in certain Particulars.
    (j) Section 74, Publication for fraudulent purpose.
60. Inserted *vide* IT (Amendment) Act, 2008.

specified under section 70[61] or

(b) knowingly or intentionally penetrates or accesses a computer resource without authorisation 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 use injury to the interests 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 an offence or to the advantage of any foreign nation, group of individuals or otherwise commits the offence of cyber terrorism.

Paragraph 2 of Section 65F prescribes punishment for the offence of cyber terrorism. It provides that whoever commits or conspires to commit cyber terrorism shall be punishable with imprisonment which may extent of imprisonment for life."

In order to make a person criminally liable under this section the following essentials of the offence must be established:

1. There should be a criminal intention of cyber terrorist

It is important to note that the intention to constitute an act of cyber terrorism under this section includes not only an act that threatens the unity, integrity, security or sovereignty of the country but also strikes terror in the people or any section of the people. To establish the criminal liability, the concept of '*Actus non facit reum nisimens sit rea*'-the fundamental Maxim of the whole criminal law takes into account when the person charged with that particular offence. It is of the utmost importance for the protection of liberty that a court should always bear in mind that unless a state either clearly or by way of necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence. Conversely, if the mental element of any conduct alleged to be a crime is proved to have been absent in this case the offence so defined is not committed.

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61. (1) The appropriate Government may, by notification in the Official Gazette, declare any computer resource which directly or indirectly affects the facility of Critical Information Infrastructure, to be a protected system.
Explanation- For the purposes of this section, "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.
(2) The appropriate Government may by order in writing, authorize the persons who are authorized to access protected systems notified under sub-section (1).
(3) Any person who secures access or attempts to secure access to a protected system in contravention of the provisions of this section shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.
(4) The Central Government shall prescribe the information security practices and procedures for such protected system.

2. The cyber terrorist must deny or cause to deny any authorised person to access computer resource

This section 65F by virtue of Amendment 2008, underlines that cyber terrorist or cyber terrorist organisation must have made unauthorised access to and control over other computer systems. Once such access and control have been made without the permission of the owner or person in charge and regardless of any loss which may or many not have occurred to the owner or person in charge of the computer a numerous range of prohibited activities are possible i.e. theft of computer resource, proprietary or confidential information system, system sabotage, alteration and destruction of stored information, denial of service attack, introducing viruses etc. by which it causes the denial of access to any authorised person.

3. Such conduct causes death or injury to person or property

Another important ingredient of this section is that whoever knowingly or intentionally causes or is likely to cause death or injuries to persons or damage to destruction of property or disruption of supplies or services essential to the life of the community or adversely affect the critical information infrastructure falls in the real of cyber terrorism.

(4). Access to restricted information, data or computer data base for the security of the State or foreign relations

Computers today, control power delivery, communications, aviation, medical, defence and financial services. They are used to store vital information from medical records to criminal records. With all the advantages of using computers for storing and processing data, they have one major disadvantage *i.e.* they are attacked by outside potential cyber criminals. Hacktivists aiming to target specific organisations, agencies and State Govt. as well as central Govt. get access to such restricted areas unauthorised by introducing malware programmes comprising viruses, worms and other forms of malicious software are limited use to hacktivists, since they tend to be indiscriminate by nature spreading across the web in an uncontrolled manner[62].

VIII. CONCLUDING OBSERVATIONS

In the dawn of the 21st Century, old crimes disappear and new crimes appear. The creation of cyber terrorism considering the new age crime is the result of social, political, economic, technological and cultural change which threatens the well being of society. The role of law as a regulator of human

62. There have been a number of notable instances in which hacktivists have used viruses and worms. The earliest such attack was staged by anti-nuclear activist against NASA the US National Aeronautic and space Administration in 1989, NASA computers were targeted with the so called WANK worms against nuclear killers. During the first Gulf, Israeli hackers launched virus attacks at Iraqu Government system in an effort to disrupt their communication capacity during the U.S. led invasion. Cited in Vakul Sharma, *Information Technology: Law and Practice*, Universal Law publishing Co. 2004, p. 256.

conduct has made an entry into the cyberspace and is trying to cope with its manifolds challenges. But the inherent features of the novel social interaction of information communication technology primarily being characterized no specific permanent population, definite territory, consistent sovereign authorities, anonymity and changeability of the online environment that make a new form and fantasy of illegal behaviour which is the difference from the original one. Therefore, to curb the menace of cyber terrorism, centralized laws, procedure, extradition and mutual legal assistance governing proliferation of cyber terrorism are the need of the hour. Gauging the importance of transnational nature of cyber terrorism, section 1(2) read with section 75 of the Information Technology Act, 2000 confers the extraterritorial jurisdiction like Long Arm Statute in United States of America to deal with cyber terrorism. However, such power is circumvented due to non existence extradition treaty or adequate mutual legal assistance between two or more states or countries.

Computers cannot kill but men operating them can. The only possible step is to maximize the social, political, economic and technological benefits of the information industry by strengthening specific domestic legislations complemented by international cooperation.

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INHERITANCE RIGHTS OF DAUGHTERS IN INDIA

Viney Kapoor *

ABSTRACT

Proprietary rights which accord economic independence and sense of security to an individual play a vital role in determining one's social status thereby assuring prosperous as well as dignified life. In the absence of proprietary rights all the noble sentiments become meaningless. Indian sages have understood this hard reality and provided 'stridhan' to the women-folk long ago. But so far as right to inheritance is concerned, like other areas of various personal laws, the provisions relating to inheritance are also not free from discrimination against women. The daughter is most deprived as regards succession to ancestral property. At the international level too, in most of the legal systems, women were treated like chattels and they were considered unfit to manage the property. Therefore, they were deprived of the right of inheritance. In India, various personal laws do not provide equal treatment to the women, despite of the constitutional guarantee of equality. This research paper highlights the inheritance rights of the daughters under various personal laws.

KEY : *Words Proprietary rights, Mitakshara, Coparcenary, Sagatra, Indian Sucession Act, Christian Law of Interitance, Muslim Personal Law.*

I. ANCIENT HINDU LAW

Traditional Law of Hindus has been unfavorable to the daughter as compared to the son. Originally, she was entitled to maintenance only. There had been no uniformity in view of ancient law givers regarding share of daughter. In the Rig-Veda, the early hymns refer to a brother less daughter

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getting her share of patrimony, but must be unmarried.[1] Mr. Kapadia has also referred to Yajnavalkya and Narada who recognized the daughter's claim to the patrimony provided she had no brother.[2] Kautilya was the first and only authority to recognize daughter as a co-sharer with her brother in patrimony.[3] Manu holds that she is entitled to one fourth of the share of patrimony received by brothers[4] He says,

> *"But to maiden sister the brother shall severally give portions out of their shares, each out of his share one fourth; those who refuse to give it will become outcaste."*

while on the other, Aparkara recognized birth right to the daughter in the father's wealth like sons.[5] Still, it can be concluded that right from Vedic age, daughters were discriminated against in matter of succession. Ancient Hindu Law of inheritance had its origin in the Vedic philosophy about religious competence and out of the male descendants to liberate the souls of their ancestors.[6] It conferred rights on male descendants preferably and not on females.

II. GROUNDS FOR EXCLUSION OF DAUGHTER

Under traditional Hindu Law, the women were considered, generally, incompetent to inherit. Since Vedic times, women were debarred from inheriting the property only on the basis of sex.[7] The Patna High Court in *Nalini Raja Singh* v. *State of Bihar*[8], has stated some of the grounds justifying the exclusion of daughter by sons as under:

> *"Some of such factors are the offering of oblations after the death of the father, the pious obligations attaching to a son to discharge his father's debts, the changing of gotra of a daughter when she is married, from one of her father to that of her husband and well - high severing in many vital respects her connections with the father's family and joining that of her husband, so that, a daughter on marriage ceases to be a member of her father's family; these, interalia, do afford sufficient rationale to sanction the discrimination between a son and daughter"*

1. Rigveda, II, 17, 7.
2. Kapadia, K.K. (ed.), Marriage and Family Law in India, 1966, p.261.
3. Kapadia, ibid; also see Shastri, Sham, Translation of Kauitilya's Arthashastra, 2nd ed., 1923, p.197.
4. Manusmriti, IX, 118. Also see, R>M>Das, 'Manu & Proprietary Rights of Daughters' pub. In Pratibimb: Images of Indian Womenhood, at p.283
5. Aparkara translated in 21 Madras Law Journal, p.317.
6. Joshi, Vaijanti, "Mitakshara Family and Reincarnation of Limited Interest" in Dimensions of Law, Upendera Baxi (ed.), 1992, p.163.
7. Baudhayana, II 23-46 quoted in Jolly, J., Tagore Law Lectures on Hindu Law, 1883, p.271.
8. AIR 1977 Pat. 171

The grounds of justifying discrimination between a son and daughter put forward by Patna High Court do not appear to be logical. An analysis of these grounds may not be out of place:

(a) OFFERING OF OBLATIONS

The daughters and widows also offer some sort of oblations, though the oblation offered by them may not have equal efficacy as those offered by the sons. It is pointed out that after Hindu Women's Right to Property Act, 1937, if widows have been allowed to inherit at the first instance in spite of their inability to offer fully efficacious oblations, there could not be any further rationale or justification for excluding the daughters in favor of the sons.[9]

(b) PAYMENT OF FATHER'S DEBT

Secondly, the law is well settled about the obligations of the sons for the debts of their father[10], that is, any heir of Hindu is liable to pay the debts of the deceased only to the assets inherited by him from the deceased, but he is not personally liable even if he is the son or grandson.[11] The position, therefore, is that son is not personally liable for the debt of his father, even if debt was not incurred for an immoral purpose. This proposition is well established by the Supreme Court in later decisions in S.M. Jakati v. S.M. Borkar[12] and in Virdhachalam Pillai v. Chaldean Bank[13]. Thus, when under traditional Hindu Law, son was bound to pay the ancestral debt irrespective of any asset that he might have received and liability extended to his personal property also, and then there could be some justification behind the exclusion of the daughter by the son.[14-15] But now that as settled by the judicial decisions, during the British period, viz., the liability of the son is co-extensive with the assets he receives, there could not be any justification for excluding the daughter from inheritance in favor of the sons, for as co-sharer with the sons, they also would have been liable for the debts of the father as the sons would have been liable to the extent of the share received by them.

(c) CHANGE OF GOTRA ON MARRIAGE

Other justification to exclude daughter from the list of heirs for ancestral property has been that on marriage gotra of the daughter is changed from that

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9. Bhattacharjee, A.M. (ed.), *Hindu Law and the Constitution*, 1994, p.114.
10. See *Panna Lal* v. *Naraini*, AIR 1952 SC 170; *Sidheswar* v. *Bhubneshwar*, AIR 1956 SC 487
11. Diwan, P., *Modern Hindu Law*, supra p.7.
12. AIR 1959 SC 282 (287)
13. AIR 1964 SC 1425 (1429)
14. For details, see, Bhattacharjee, A.M., supra, p.115.
15. Ibid.

of her father to that of her husband. Mr. Bhattacharjee has raised doubt regarding change of daughter's gotra. He opines that 'Gotra' means the name of the rishi from whom a person is supposed to have descended and, therefore, if a woman has, thus, descended from the Rishi to whose gotra belongs; she cannot and does not cease to be so on her marriage to a person who has descended from another Rishi.[16] Ishwar Chandra Vidyasagar[17] has also confirmed this fact by relying to a text of katyayana that women, even after marriage, retains the gotra of her father until her 'Sapindikaran ceremony' after death and that, by that, or rather for that, 'Spindikaran ceremony' she is deemed to be a 'Sagotra' of her husband.

The provisions of *Hindu Widows Remarriage Act*, 1856[18] also imply that under law as it now stands, a widow is to be given in marriage as if she still belongs to her father's gotra and with all the "Words spoken, ceremonies performed" as if "she had not been previously married". It is well known that in the mantras of a Hindu marriage, bride is to be described as belonging to her father's gotra.[19] From the decision in *Lalubhai* v. *Cassibai*[20] it appears that according to the Privy Council, the wife on remarriage becomes "constructively" a sagotra with her husband and, therefore, if sagotraship with the husband was "constructive" only, it was then not so in actually or in reality. It is submitted that exclusion of daughter on ground of gotra could not be justified. Again, the Sudras do not have any gotra, there is no occasion for the change of gotra in case of sudras, the ground for excluding Sudra female from inheritance on the ground of change of gotra could not arise.

Even if we assume that a girl is severed from her father's family on marriage, it is no ground to exclude her from ancestral property; because a person married under *Special Marriage Act*, 1954 is severed from his family, yet he does not lose his right of succession. Thus, exclusion on the basis of severance which is, in fact, imposed on her by our patriarchal society, is not justified and infringes equality clause of the Constitution.

III. DAUGHTER'S SHARE IN COPARCENARY

The Mitakshra School, which governs majority of Hindus in India, has been unfavorable to women. Under Mitakshara joint family, only males could be coparceners. It recognized the existence of a right by birth in favor of a son, a son's son and son's son's son in the ancestral or coparcenary properties. It implied that a female could not be a coparcener and she did not have a birth right in coparcenary property. Thus, the very concept of right by birth to the males involved a discrimination against women. Again, on the death of a

16. Supra note 8.
17. Vidhaba Vivah - Vidya Sagar Rachana Sangraha, p. 147-92.
18. Section 6 and 7 of the *Hindu Widow's Remarriage Act*, 1856
19. Bhattacharjee, supra, p.166.
20. ILR 5 Bom 110 (121)

coparcener the other coparceners inherited his share by survivorship, thus, excluding the female from joint family property totally. Rao Committee made the first move to recommend the abolition of right by birth which was not accepted at that time. The decision of the government was a major setback caused to the property rights of women. The Law Minister explained that if the government suddenly changed Mitakshara joint family laws by accepting the recommendation, it would affect the status of all existing joint families and suddenly upset the existing state of things.[21]

IV. INTEREST OF THE FEMALE HEIRS UNDER HINDU SUCCESSION ACT, 1956

Laws like *the Hindu Women's Right to Property Act*, 1937 and *the Hindu Succession Act 1956* had made inroads in the concept of the coparcenary[22]. No doubt, daughter had been made heir of a male member and she inherited equally with son[23], yet she was discriminated due to the coparcenary system. Consequently, son not only enjoyed his coparcenary share in joint family property, but also received an additional share equivalent to that of the daughter from his father's share.[24]

The Hindu Succession Act, 1956, undoubtedly, supplied a long felt need and tried to do away with the distinction between Hindu male and female in matter of intestate succession.[25] The Supreme Court has rightly observed in *Kalawati Baisls* case[26] that section 14 was a step forward towards the amelioration of the woman who had been subjected to gross discrimination in matter of inheritance.

V. ANOMALIES IN THE ACT OF 1956

Though *the Hindu Succession Act*, 1956 purported to lay down a uniform law of succession for both males and females, yet there were few anomalies in the Act which are discussed as under:

(a) RETENTION OF COPARCENARY

First of all, it did not consider daughter as a coparcener. The result, however, was unequal distribution among the brothers and sisters. For example, if a coparcenary consisted of father and the son, the father died and heirs survived by his son and daughter. Now share of the father in the coparcenary property will be half while other half will be taken by the son. From the half

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21. See, Prashar, Archana, *Women and Family Law Reforms*, 1992 (ed.) p.127.
22. See, *Status of Women in India*, Report 1991-74, p.53-54.
23. Section 6 of *the Hindu Succession Act*, 1956
24. Jayashree, "*Personal Laws and Women*", S.C.J., January 1994, Vol. I, p.8.
25. *V. Tulsamma* v. *V. Sesha Reddi*, AIR 1977 SC 1944
26. AIR 1991 SC 1581

share of the father, the son and daughter will share equally. As a result, the son will take three fourth, while the daughter will take one fourth of the total property. Therefore, the son by virtue of being coparcener was entitled to have double share, one as coparcener with father and other class I heir, whereas daughter is given only one share in the separated share of the deceased father or a fraction of father's share in joint family property. The retention of Mitakshara coparcenary under section 6 of the said Act was the major factor responsible for continuing inequality between sons and daughters.

(b) EXEMPTION OF AGRICULTURAL HOLDING

Other lacunae in Hindu Succession Act, 1956 had been exclusion of devolution of tenancy rights in agricultural holding under state laws from the scope of the Act.[27] The dominant conservative groups in some states had, however, successfully excluded widows and daughters without giving any particular economic justification for such laws.[28] The glaring example is *the Utter Pradesh Zamindari Abolition and Land Reforms Act*, 1950. *The U.P. Zamindari Abolition* Act shows a strong preference for succession among agnates with a priority in favor of males in that group.[29] Similar, discriminatory features are seen in some of the land ceiling laws adopted in different states, e.g. Karnataka, Punjab and Madhya Pradesh.

(c) NO CLAIM OF PARTITION OF DWELLING HOUSE

Moreover, section 23 of the said Act patently discriminated against female heirs as it provided that right to claim partition to male heirs exclusively, and denied the same right to the female heirs, if they wished to ask for partition but any of the male heirs was not willing. In *Ponnuswamy* v. *Meenakashi Ammal*[39], it has been observed by Madras High Court that the right of female heir to have a division of the dwelling house is postponed until the male heirs choose to divide the same. The reason behind the said provision at the time of enactment of the Act was to avoid fragmentation of the house and, thus, breaking the joint family system at the instance of female heir to prejudice of male heirs.[31]

Again, there had been controversy among various High Courts in India about the scope and applicability of section 23 in cases where there was only one male and one female heir in a Hindu joint family. While interpreting the

27. Section 4(2), *the Hindu Succession* Act, 1956.
28. *Status of Women in India*, Report of National Commission 1971-74, p.54.
29. Dr. Derrett, in *A Critique of Modern Hindu Law*, 1975 ed., p.230. has similarly concluded.
30. (1990) 2 H.L.R. Mad. 1.
31. See *Urmila Pyne* v. *A.K. Phyne* (1985) 2 HLR Cal. 16; *Anant Gopal Rao* v. *Jankibai* 1984 HLR Bom. 273; *Janabai Amal* v. *T.A.S. Panali* AIR 1981 Mad. 62; *Arun Kumar* v. *Jnanendra* AIR 1975 Cal. 232.

provisions of section 23 Orissa High Court in *Hemlata Devi* v. *Umashankar*[32] observed:

> *"When a Hindu dies intestate, a female heir is not entitled to enforce her right of partition of dwelling house under section 23 unless the male heirs exercise their right. If there is more than one male heir, then there is a possibility of any one of such heirs asking for a partition of the dwelling house and female heir in such a case can claim her legitimate share. But where there is a single male heir, there is not possibility of that male heir claiming partition against another male heir. Thus, where there is a single male heir and others are female heirs, then those females heirs are entitled to claim partition. Their right to claim partition of the dwelling house is not excluded by section 23."*

Similar observations have been made by Bombay[33] and Karnataka[34] High Courts. However, the High Court of Calcutta[35], Gujrat[36] and Madras[37] have expressed contrary opinion and held that the restriction under section 23 of the Hindu Succession Act applies in a case where there is only one male heir of an intestate.

Thus, due to narrow interpretation made by Gujrat, Calcutta and Madras High Courts, the right to demand partition vested in female heir had been permanently postponed and ultimately frustrated, since there is no possibility of the single heir, choosing to divide the share in the property of intestate. Recently, full bench of Orissa High Court[38] disagreed with contrary view taken by Calcutta, Gujarat and Madras High Courts and clarified the provision. The Full Bench said:

> *"the legislature by using the expression 'male heirs' which is in plural and again using the expression their respective shares have expressed their intention not to apply the restriction in the case of single male, heir inheriting along with one or more female heirs."*[39]

It is submitted that the Orissa High Court has rightly interpreted section 23 of the Hindu Succession Act, 1956.

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32. AIR 1975 Ori. 208.
33. *A.G. Shende* v. *Jankibai*, 1984 HLR (Bom) 293
34. *Basettappa Bangerappa* v. *Irawwakam Totappa*, 1988(1) HLR Karn. 79
35. *Urmila Pyne* v. *A.K. Pyne*, (1985) 2 HLR Cal. 16
36. *Vidyaben* v. *J.N. Bhatt*, AIR 1974 Guj. 23.
37. *Janbai Ammal* v. *T.A.S. Panali Mudaliar* AIR 1981 Mad. 62
38. *Mahante Natyalu* v. *Oluru Appanama*, AIR 1993 Ori. 36
39. ibid.

(d) DISCRIMINATION BASED ON MARITAL STATUS

Again, proviso to section 23 of *the Hindu Succession Act* 1956 had also resulted in some discrimination between unmarried, widowed and married daughters. Since section provided that "if such female heir is a daughter, she shall be entitled to a right of residence only if she is unmarried, or has been deserted by or has separated from her husband or is a widow".[40] In other words, the right of residence was restricted only to those daughters who are either unmarried or widowed or are deserted by or separated from their husband. Thus, the married daughters had no right to reside in their parental house. But if the heir was male, he had this right, irrespective of the fact that he is married or not.

One of the objections against the female succeeding equally and unqualifiedly as full co-heirs with the males is that allotment of shares to them, particularly, when they are married, would bring in serious complications to the disadvantage of the male heir. As also pointed out by Dr. Bhattacharjee, it is said that since married female heirs are expected to reside elsewhere with the members of their respective families, she would be tempted to reside in the same house[41], and thus, strangers would be inducted into the house, if she is given right to reside in parental house. It further added that in case of a single male inheriting along with one or more female heirs, it could not be a postponement of a right to claim partition at the instance of female heir, but it would a complete denial of such right, as there would be occasion for the male heir to claim share against any other male heir (as there are none). The legislature having given the female heirs absolute right by inheritance on one hand could not have taken away the same by other.

Full Bench also pointed out that : "complication may arise if the single male heir transfers the dwelling house to a stranger in which event the restrictions for joint possession on the part of transferee may not apply, thus depriving the female heir of exercising her right of residence in such circumstance."[42]

It is submitted that these objections raised against married female heir's right to residence do not seem to be convincing. If a married male heir has the right to reside in the dwelling house with the members of his family along with his wife, who is undoubtedly, stranger to that family and at the same time can transfer his share, the denial of such rights to female heirs cannot be justified, particularly when section 22 is there to take care of such transfers.[43] The decision of Calcutta High Court in *Usha Majumdar* v. *Smriti Basu*[44] is welcome step in this matter, where it has rightly observed that the restriction on the right of female heirs to claim partition in respect of the entire dwelling house of her predecessor in interest will not operate and she is entitled to partition in respect of her share, where the dwelling house is

40. Proviso, section 23, *the Hindu Succession Act*, 1956
41. See, Bhattacharjee, supra p.151.
42. Ibid.
43. Ibid.
44. AIR 1988 Cal. 115

partly rented by the other male members of the family. The Court said:

> *"In enacting the section the Parliament must have thought that the dwelling house of a Hindu Joint Family should be regarded as an impartible asset as ordained by the ancient Hindu doctrines and precepts and should be allowed to be preserved by the family, until the male heirs opted for dividing the same..."*[45]

Section 23 of the Hindu Succession Act and its proviso not only discriminated on ground of sex giving certain rights to male heirs and denying the same to female heirs. Then again, the section itself, would not apply when a dwelling house of the deceased would devolve on brothers and the sister would get her share without any limitation and freed from all restrictions to which a daughter is subjected.

VI. STATE AMENDMENTS IN THE HINDU SUCCESSION ACT REGARDING COPARCENARY RIGHTS

First attempt to amend Mitakshara coparcenary law was made by the state of Andhra Pradesh in 1985 by passing *Hindu Succession (Andhra Pradesh Amendment) Act* 1985 and conferred on daughter the right in coparcenary properties. Karnataka and Tamilnadu legislature have also made similar amendment. Now with the enactment of *the Hindu Succession (Maharashtra Amendment) Act* 1994, one may say that roughly in the territories south of Vindyas the rejection of traditional Mitakshara *coparcenary* as an exclusive male club is complete. One note worthy feature of these legislations is that preamble declares in no uncertain terms these provisions as unconstitutional, but the courts have not as yet thought fit to declare that continuation of Mitakshara coparcenary is unconstitutional and invalid.[46]

In a joint Hindu Family governed by the Mitakshara law, the daughter of coparcener shall be birth become a coparcener in her own right in the same manner as a son and have the same rights in coparcenary property as she would have had if she had been a son inclusive of the rights to claim by survivorship, and shall be subject to the same liabilities and disability in respect thereto as the son.[47]

VII FATHER'S UNFETTERED TESTAMENTARY RIGHT

Though *Hindu Succession Act* provides equal rights to sons and daughters, the daughters get only a fraction of father's share in joint family property due to coparcenary system. Even this unequal share is seldom secured since the Act has conferred unrestrained testamentary power to the

45. AIR 1988 Cal. 115
46. Sivaramaya, B., "Women and the Law", Annuary Survey of Indian Law, I.L.I (ed.), p.157.
47. Keral has been the first State to abolish coparcenary by passing Kerala Joint Hindu Family Abolition Act 1976

father to disinherit the female heir.[48] A father by execution of will can write off the right of daughter in his properties.

During the debates on the Hindu Succession Bill, the fear was voiced that the rights of female heirs will be defeated by executing wills. But brushing aside these fears Mr. Pataskar, Union Law Minister said:

> *"I believe that a normal father will never do any such thing and if at all he has to do it for any reason he will surely make a provision for his daughter when she is going too deprived of her share by will."*[49]

It is submitted that statement of Mr. Pataskar is not well balanced. Dr. Sivaramayya has also objected this statement on various grounds.[50] Firstly, almost all the advanced legal systems have, so far, enacted legislation to put restrain on testamentary freedom.[51]

Secondly, in a country, where the practice of Sati prevailed until 1829, wherein certain parts female infanticide used to be common , it is illogical to say that person nurtured in traditional attitudes would not hesitate to disinherit the daughters.

Again, there are limited opportunities for women to engage in professions, so it becomes incumbent upon individual to arm the female heirs with social security.

The remarks of Smt. Renuka Ray during the debates on the Hindu Code Bill are worth quoting:

> *"Those women or men who are social workers know that an analysis of inmates of rescue homes in this country will go to prove how many of these women are those who have been turned out of the joint family. Without having the training to earn their own living; turned out of their homes these women have been forced to live a life of shame."*[52]

Lastly, an indefeasible share will elevate the status of women and it will check the feeling the women are burden to the family.[53]

VIII. RECENT AMENDMENTS

The National Committee on Status of Women has recommended the abolition of section 4(2) of *the Hindu Succession Act* long back in its report published in 1971-74, but action has been taken by the Government very recently. The amendment of 2005 has introduced major changes in the Hindu law of Mitakshra caparcenary, joint family property and succession. Without

48. Section 30, the Hindu Succession Act 1956
49. (1955) 5 Lok Sabha Debates, Cal. 8379.
50. Dr. Sivaramayya, B., supra, p.65.
51. The Intestate's Estates Act, 1952 England.
52. Constituent Assembly Debates 1928, dated 25th February, 1949
53. Supra note 50

abolishing the joint family system in one go as done by Kerela state in 1975, it has set a process which would gradually erode the concept of joint family. It has come into force on 9.9.2005.

On the recommendation of Law Commission of India (174th report) the amendment of 2005 has introduced changes in the Act of 1956 applicable in whole of India. It has followed Andra Model. Salient features of the amended Act are as follows:-

One, the pious obligation of the same has been abolished.

Two, sections 23 &24 of the Act which discriminated on ground of the sex are also omitted.

Third, daughter has been made coparcener along with son in joint family property. Now, three daughters namely, father's daughter ,son's daughter and grandson's daughters are also coparceners along with son, grandson and greatgrandson.

IX. MUSLIM LAW

Muslim Law, while recognizing the rights of women to inherit, discriminates between male and female heirs of the same degree. The daughter, first female descendent, is being discriminated against son. She occupies the inferior position as compared with her male counterpart, i.e., her brother. Islamic law of succession gives a son twice the share of a daughter. Under Hanafi Law, the daughter is a residuary with a son, so that in the residue her share will be half of his share.[54] Even among the Shias the distribution, as between sons and daughters, gives a double share to the male. Again, if the deceased has left a son and no other Quranic sharer, he inherits the whole property. On the contrary, if deceased has left a daughter she takes half the property and the other half may be taken by a distant male agnate[55] or the descendants of a true grandfather; how high so ever as a residuary, whom the deceased has never met or whom the heavily disliked. Such provision for agnates may sound good in a tribal society, but, frequently, gives rise to considerable suffering today, where the nuclear family represents the basic unit of society and where an uncle can not necessarily be trusted to treat his niece equal with his own children.[56] Under such circumstances, it is desirable to provide more adequately for a daughter.

It is true that when the right to inherit passes beyond the 'inner' family (i.e. parents, grandparents, children, grandchildren, brother, sister and spouse) the Sunni system gives a right of inheritance to the agnates alone, to the complete exclusion of any relative female or even male who is not related to the deceased through the male line. To put if differently, a niece (sister's daughter) of a Hanafi can succeed only in default of all male agnates.[57] On

54. Mulla, supra p.69-70.
55. Mcnaughten, supra, p.108
56. Anderson, "Muslim Personal Law in India", ed. Islamic Law in Modern India, 1972, p.43.
57. Dr. Sivarammaya, B., supra p.149

the contrary, Shias don't follow this principle. They treat cognates on a complete equality with agnates, and when they grant inheritance to male relative, however distant; they invariably allow a female in the same degree of relationship to take her share as well.[58] A female who's closer in degree to the deceased will, indeed, completely exclude a more remote male. Yet more important aspect of system is that the daughter will first receive her prescribed half of the estate of the deceased parent like Sunni's and then the remainder by the 'doctrine of return'[59] to the complete exclusion of the distant agnate. It is to be pointed out that in this respect; Shia system is favorable to daughter. In Iraq, in 1963[60] country has passed the legislation to apply this provision of Shia system to all Iraqis.[61] In Tunisia, too, an amendment to the Law of Personal Status, 1959[62] provides that a daughter or son's daughter will in absence of son; take the rest of estate by 'return' even at the expense of a brother or sister. It is submitted that same principle be incorporated in all schools of Islam in India.

Moreover, son's daughter has been recognized as an heir by virtue of her position as an agnate. But she, again, is being discriminated as her claim would be defeated, if there is a son or son's son or son of a daughter. Thus, if a woman has two sons and one of them dies in the lifetime of a mother leaving a daughter, on the death of the woman, the son's daughter is not in a position to claim any property of the deceased ancestor.

The provision of double share for son as compared to daughter has been bitterly criticized. Besides, unequal shares for male and females under Muslim Law of succession have been characterized as repugnant to constitutional provisions.[63] It is submitted that at the first sight the principle of double share to the male does in fact, constitutes a discrimination against daughters, sisters, etc., on grounds only of sex. It should rightly, be termed as unconstitutional as it is against right to equality enshrined in the Constitution. It is, further, submitted that both daughter and son should be placed on equal footing.

No doubt, there are few jurists who do not want any change or amendment in law of inheritance of Muslims. It would not be out of context to quote the views of Anderson, who says, "To change all this would be to upset the whole structure of the Islamic Law of Inheritance, which is complex, finely balanced and mathematically precise as any system in the world, and which rests more directly on the explicit injunctions of the Quran than any other part of the Sharia"[64] It is submitted that the views of Anderson do not

58. Ibid., p.42
59. Anderson, '*Islamic Law of Testate and Intestate Succession and Administration*', supra, p. 205
60. The Law Personal Status, 1959 (as amended by Law of 1963) Arts. 86-91
61. Although, within these broad outlines, difference of details are still allowed to Sunnis and Shias respectively.
62. Art. 143A
63. Minathur, Joseph, '*on the Magic of Monogamy and Similar Illusions*, published in Islamic Law in Modern India, supra, p.165.
64. Anderson, supra, p.42.

sound good in the present context and keeping in view the changes introduced by various Muslim countries, it would not be wrong to amend Islamic law of inheritance to remove discriminatory provisions against women.

X. CHRISTIAN LAW

Christian women have been discriminated in matter of succession due to great diversity in the laws applicable to the Christians in India. In state of Kerala alone, three Acts have been applicable to Christians in respect of inheritance. The Christians, in territories, which formerly comprised the Malabar District of Madras Province, are governed by *the Indian Succession Act*, 1925 as lexloci. *The Travancore Act*, 1916 governs the properties of Christians in Travancore, subject to the exceptions provided under it. *The Cochin Christian Succession* Act, 1921 generally governs the succession to the properties of Christians in the territory of Cochin State and this Act exempts members belonging to the European, Anglo Indian and Parangi communities and the Tamil Christians of Chattur Taluk who follow the Hindu Law.[65]

A characteristic feature of the Travancore and Cochin Acts is that they are based on the former notions of Hindu Law of inheritance which discriminated against women.[66] Both the Acts discriminate between son and daughter of the intestate. Whereas, under the *Travancore Christian Succession Act* (TSA), 1916, the daughter took only one quarter of the share of the son or Rupees 5000 whichever is less.[67] Nevertheless, she is entitled to a Streedhanam[68] only; which is fixed at one fourth of the value of share of son or Rupees 5000 whichever is less, alongwith a practice of a portion of stridhanam being paid to the Church. This implies that even though a Christian daughter has been mentioned as a heir alongwith a son in Group one of section 25 of the *TSA Act*, 1916, she would get nothing if she is paid streedhanam which is very meager amount generally. Thus, where the father has left a vast estate, the daughter is entitled to main amount of Rupees 5000 which is nothing but cruel joke to the daughter. The brother can defeat her right to claim share in father's property on the ground that she has already had streedhanam. Eventually, the said provision is discriminatory against daughters and thus violative of equality clause of the Indian Constitution.

It is to be noted that after passing of *Indian Succession Act*, 1925 the *TSA*, 1916 should have stood repealed, but unfortunately, the former Travancore Cochin High Court in *Kurian Augusty* v. *Devassey Aley*[69] and Division Bench

65. See Anthonyswamy v. M.R. Chinaswamy, AIR 1970 SC 223
66. Dr. Sivaramayya, supra p.191; Also see Kant, Anjani, "Legal Status of Christian Women in India", AIR 1996 Journal, p.38.
67. Section 28, TSA, 1916
68. Section 5 of the TSA defines, 'Streedhanam as any money or ornaments or in lieu of money or ornaments any property movable or immovable given or promised to be given to a female or on her behalf to her husband or to his parents or guardian by her father or mother.
69. AIR 1957 TCI

of Madras High Court in D. Chellaian Nadar v. G. Lalitha Bai[70] had held that the Travancore and Cochin Acts survived despite the passing of Part B State (Laws) Act, 1951. Since *Travancore and Cochin Act* could not be replaced by Indian Succession Act 1925.[71] The Christian women could not claim to be governed by the fare more liberal and equitable *Indian Succession Act*.

In 1983, Mary Roy of Kottayam, moved the Supreme Court of India filing a Public Interest litigation challenging the various provisions of *TCS Act*, 1916 on ground of being violative of the Fundamental Rights to sexual equality. The verdict of Supreme Court in *Mary Roy's* case[72] has been described as a land mark judgment in which the Apex Court held that sections 24, 28, 29 of the TCS Act are unconstitutional and void and secondly, this act stood repealed by Part B State (Laws) Act, 1951.[73]

This landmark decision has received mixed reaction like Shahbano's case. On one hand, all progressive sections of the society have hailed it as a boost for gender justice, as it rightly places the women of Travancore Cochin area of Kerala at par with males in the community.[74] On the other hand, the churches have been demanding more aggressively in the past years, the negation of Supreme Court ruling or at least part of it.[75]

The Kerala Government filed a review petition seeking the elimination of the retrospective effect of the judgment, but it was rejected.[76] Meanwhile, a private member's bill[77] was introduced into Parliament by P.J. Kurnian, a Syrian Christian Congress (I) Member of Parliament from Kerala. This bill sought to modify the Supreme Court Judgment, so that it is not given retrospective effect. Churchmen from all, except the Marthoma Church, distributed pamphlets and organized meetings to mobilize Christian male opinion against the judgment.[78] Bishop Abraham Mar Claims of Kananga Church demanded a new personal law for Christians.[79] He claimed that the economic impasse created for Christian community, where no property could be transferred without the consent of the females, was likely to destroy the community. It is submitted that this is a baseless argument. Similar apprehensions were raised when Hindu society recognized equal rights of women. Surprisingly, no destruction took place in Hindu society for the last four decades.

It was apprehended that there would be flood of litigation by female

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70. AIR 1978 Mad. 66
71. Section 29(2) of the Indian Succession Act, 1925 exempted the existing laws.
72. Mrs. Mary Roy v. State of Keral and Others, AIR 1986 SC 1011; 1986 KLT, p.508
73. Ibid.
74. See, Jacob Thankachan, "Law of Inheritance of Christians in Kerala and Supreme Court Judgment in Mrs. Roy's Case", Indian Bar Review, Vol. XIV (1) 1987, p.89.
75. See, Indian Express, 20, vi 86
76. Prashar, Archana, supra p.791.
77. Bill No. 129 of 1986
78. Supra nore 2.
79. Jacob, supra p. 102.

heirs asking for share in their intestate father's property. The reference made in this regard by the State Minister for Revenue and Law, K.M. Mani, in the legislative assembly caused serious concern. He said that the Supreme Court judgment with retrospect effect would cause a series of legal battles in the families.[80] Forum of Christian Women for Women's rights, conducted a survey which shows that the number of women challenging the old transactions and filling up their equal property claims in the courts is really small.[81] This may be partly due to low level of female consciousness and partly due to exempla nary tolerance of Christian women to continue the cordial relationship with their brothers.[82]

Surprisingly, the Kerala Government succumbed to the pressures of male recipients of inheritance, whose interests stood threatened by the judgment in Mary Roy and initiated moves to nullify its retrospective effect. A Bill titled 'Travancore and Cochin Succession (Revival and Validation) Bill 1994' was introduced in the Kerala legislative assembly to overturn the retrospectives of the Supreme Court's judgment. Kerala Catholic Bishops Conference, Kerala Council of Churches and Bishops of all denominations supported the moves to undo the retrospective effect of Mary Roy.[83] Luckily, the Bill could not be taken up in the session. Thereafter, Kerala Government sent a draft ordinance on the same lines as the Bill, for the instructions of the President under the proviso to clause (1) of Article 213 of the Constitution. However, National Commission for Women stated its opposition to the Bill and the draft ordinance was sent back.[84]

No doubt, the Supreme Court judgment in *Mary Roy* is definitely a step forward in the direction of equality between the sexes in matter of intestate succession. It has ignited a new consciousness among the Christian women of Kerala[85] who can successfully challenge the unholy nexus between the clergy, the state and the government. The Forum concluded that the Church and the Government would not be allowed to put the clock back or take away the equal rights denied for too long to Christian women of Kerala.[86] *Mary Roy's* Case was again referred into *Zacharias* v. *Joseph*[87]. The logic of *Mary Roy's*

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80. Mukul, "*The question of Right*", Front Line, March 11, 1994
81. Only 29 cases were filed between 1986 to 1993, quoted in Mukul "*Keral Christian Women's Fight*", Mainstream, April 16, 1994.
82. See, Jacob, "*Inheritance of Christians in Kerala*", S.C.J., supra, p.103.
83. For details, See, Sivaramayya, B., "*Women and the Law*", Annual Survey of Indian Law, 1994, p.522.
84. Ibid.
85. The members of women's organisations of all denominations from the Syrian Christian Community i.e. the Syrian Catholic Church, the Orthodox Church, the Jacobite Church, the Marthoma Church and a small section of the Church of South India assembled in large number in Thirvananthapuran on November 24-29, 1993 under the banner of newly formed, 'Forum of Christian Church for Women's Rights Kerala'.
86. Supra note 145.
87. 1991 (2) HLR 197 (Kerala)

case is equally applicable to the Cochin Christian Succession Act, 1921 which too is discriminatory against women. The Cochin Act provides that were an interstate has left sons and daughters each daughter shall take on third share of a son.[88] But like the Travancore Act an important limitation in respect of daughter's share is laid down in section 22. This, in effect, makes the right of a daughter to receive 'Streedhanam' only. It implies that a daughter who has received dowry is not eligible for any share. The attitude of parents to their married daughters, in general, is depreciable as they don't consider her as family member but stranger once her marriage takes place.

It is to be pointed out that the Christian testator enjoys unrestricted testamentary freedom like Hindu testator. Consequently, in some cases even the limited right of a daughter for streedhanam can be defeated by the exercise of testamentary power. Thus, if a Christian father does not promise any streedhanam or fixes any streedhanam to his daughter during his life and if he executes a will leaving nothing to his daughters, it is not a case of intestate succession and there is no law which the daughters can claim streedhanam by way of right from the property of father.[89]

It is, further, suggested that uniformity be brought in law of inheritance governing Christians. Indian Succession Act, 1925 is made applicable to all Christians and the Cochin Act and Travancore Act which discriminate between male and female be struck down. Secondly, suitable amendments are made in Indian Christian Law, 1925 to bring equality between male and female in matter of succession. It is worth mentioning that Christians have presented a draft bill of India Succession Bill, 1994 to the government.

It is submitted that this are of Christian Law needs amendment at the earliest. Indian Christians have taken the initiative by presenting a draft of Succession Bill. All the provisions of the Bill are laudable doing justice to women folk. So, it is the high time for legislative authority to make a move in this direction.

XI. PARSI LAW OF INHERITANCE

Parsi law of inheritance influenced by Hindu and Muslim law has been discriminatory against women. There were separate rules for the devolution of the property of male and female during intestate.[90] The rules relating to the intestate succession Parsi males had the characteristics of Muslim Law, namely, the share of male heir was double than that of a female heir of the same degree. For instance, if a male Parsi died leaving a widow and children, the property would be so divided that the share of each son will be double the share of each daughter.[91] Under the old law, the share of the son was

88. Section 20 (b), Cochin Act, 1921
89. For details see, Mootheden, "*Dowry Prohibition Act and the Payment of Streedhanam*", 1962, K.L.J., p.29-32.
90. Supra note 56, p.188.
91. Section 51(i), *Indian Succession Act*, 1925.

four times the share of the daughter.[92] There was no justification for such discrimination between a son and a daughter and such discrimination is based on sex alone.

Whereas, the son was entitled to an equal share in the mother's property alongwith a daughter, the daughter was not entitled to same right to the father's property.[93] Thus, if a female Parsi died intestate leaving a widower and children, the property would be equally divided amongst them and if she dies leaving children only, among the children equally. In other words, son had at better footing under Parsi Law. On one hand, he inherits equal share in mother's property alongwith the sister and double share in father's property. This provision violated the equality clause of the Constitution. It is to be pointed out that house and the total estate belongs to the son while the daughter is entitled to her marriage expenses only and after that she is the liability of her husband. The discriminatory attitude against the daughter is followed with such rigor that even if she has been given a share, practically, she gets nothing.[94] Her property rights, have, therefore, been reduced to paper rights. The predominant reason for it remains the absolute testamentary powers. Conferment of unfettered testamentary power is used as a very convenient tool to disinherit those heirs of an individual whose presence threatens to interfere or disturb the rights of the son to take the whole of the property of his parents.[95] It is submitted that curbs be put on unfettered testamentary power which are, generally, used arbitrary to defeat the statutory inheritance rights of a person, not on any other consideration, but solely on sex.

It is a matter of great satisfaction that the amendment Act of 1991 had done away the long standing discrimination against women under Parsi Law of succession. Now daughter has equal right with son.[96]

To sum up, in India, we have different laws of inheritance governing people of different religions. But there is uniformity among them at one point, that is, all these, laws of inheritance discriminate against women uniformly.[97] For instance, the daughter is discriminated in all personal laws; Though Hindu Succession Act 1956 has tried to place the Hindu daughters at par with sons by introducing the provision of equal succession to both male and female heirs in the property of intestate. But that equality is simply on statute book and has no real impact, since no daughter wants to strain her relation with the brother by asking for her share in father's property.

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92. The *Parsi Intestate Succession Act*, 1865
93. Section 52(a), Indian Succession Act 1925
94. For instance, in Gujarat, there have been recorded cases of Parsi woman being deprived of their legitimate share in the estate of their fathers and husbands. Quoted in Srivastava, T.N., *Woman and Law*, 1985, ed., p.38.
95. Dr. Saxena, Poonam Pradhan, "Property Rights of Women under the Indian Succession Act 1925", in *Women, Law and Social Change*, ed., Shamsuddin, Shams, p.112.
96. Section 54 (d), *India Succession Act*, 1925
97. Jaya Sagada, "*Women and Law*", supra p.177

Similarly, under Muslim Law the share of son is double as compared to the daughter, which is sheer discrimination against women folk. Under Christian Law daughter's share in father's property is much less than that of the son. It is, therefore, suggested that all these personal laws be amended to remove this discrimination between son and daughter.

The common objections regarding reforms in Muslim Personal Law, generally raised are: First, the identity of the Muslim community will be affected; Secondly, public opinion among Muslims does not favor reforms which provide for equality of sex.[98]

It is absurd to suggest that the identity of the community will be lost, if they give an equal share to women in inheritance and that it will be preserved in an equal share is denied to them. Prof. Fyzee has rightly remarked that in the case of Muslims their identi9ty has not to my knowledge been lost in spite of reforms in the Arab world, Turkey, Iran, Morocco and elsewhere.[99]

It is submitted that it is ironical that despite India having second largest population of Muslims throughout the World, it is still, lagging, behind in matter of reforms in Personal Law. It is, therefore, suggested to amend the Muslim Law to bring equality between the sexes. Similarly, *Christian law of inheritance* requires amendment to provide equal share to male and female heirs. It is suggested that Indian Succession Act, 1925 which governs these communities, be amended keep in view constitutional mandate of equality and present socio-economic circumstances and the changes brought by other countries where these communities are residing.

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98. Supra note 56
99. Quoted in Kahkashan, "*Daughter's Right of Inheritance under Islamic Law*", in Women March towards Dignity, ed., Kusum, 1993, p.159.

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THE FIVE -YEAR NASCENT JOURNEY OF *RTI ACT* : A ROADMAP FOR THE FUTURE

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"Knowledge will for ever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of obtaining it is but a prologue to a farce or tragedy or perhaps both." The citizens' right, to know the facts, the true facts, about, the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the government is increasingly growing in different parts of the world."

(James Madison[1])

ABSTRACT

The Right to Information Act, 2005 passed by the Indian Parliament to access the information of the government by the people of India. Access the information is a key mechanism for ensuring transparency and accountability and to prove as anti-corruption tool. The Government enhanced the policy of openness and encouraged among the people the ability to scrutinize government's decision making process. 'We the People of India' are the ultimate master and have right to watch the performance of our elected representatives. The veil of secrecy obstructs the vision of the masses. The RTI Act is a right way to strengthen the democratic republic and governance. In this paper an attempt is made to review and to re-state in what manner and to what extent the RTI Act, 2005 modulated with specific legislative intent whether achieving its goal?

KEY WORDS- *The Right to Information; Democratic Republic; Right to Freedom of Speech and Expression; Transparency and Accountability; Culture of Openness.*

I. THE RIGHT TO INFORMATION ACT 2005: A BACKDROP

In liberal democratic system, openness in governance is considered an important and imperative attribute. As a practice, for good governance, it has potential to make all government, decision making transparent accountable and

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1. Quoted in *S P Gupta* v *Union of India*, AIR 1982 SC 149

responsive. Participation of people is inextricably linked with democracy, decertralization, self-administration at conceptual level. Over the recent years, it has been an almost indomitable global trend for democratic countries to recognize the right to information. It has also been realized through experience at global level that greater access of the citizens to the information, enhances the responsiveness of government towards community needs. In the post-modern era, 'Information' is a buzz word. *The Right to Information Act,* 2005 (hereinafter referred to as the *RTI Act* or the Act) resulted in independent India through the constraint struggle. This Act is not mere lawyer's centric, it is citizen's centric too. The main purpose behind passing the Act is '*to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority.*[2]' In case of Maneka Gandhi, it was noted that a government which reveal in secrecy not only acts against democratic decency but busies itself with its own burial.[3] In JudgesTransfer case, Bhagwati, J. opined that:

> *'------ in every democracy a certain amount of public suspicion and distrust of government varying of course from time to time according to its performance, which prompts people to insist upon maximum exposure of its functioning. It is axiomatic that every action of the government must be actuated by public interest but ---------- where governmental action is taken not for public good but for personal gain or other extraneous considerations. Sometimes governmental action is influenced by political and other motivations and pressures arid at tunes, there are also instances of misuse or abuse of authority on the part of the executive, NOW, if secrecy were to be observed in the functioning of government and the processes of government were to be kept hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it would all be shrouded in the veil of secrecy without any public accountability. But if there is an open government with means, of information available to the public there would be greater exposure of the functioning of government and it would help to assure the people a better and more efficient administration. There can be little doubt that' exposure to public gaze and scrutiny is one of the surest means of achieving a clean and healthy administration. It has been truly said that an open government is dean government and a powerful safeguard against political and administrative aberration and inefficiency.*[4]'"

Our Constitution- makers have adopted democratic republic but 'we the people' of post -independent India may not be able to give themselves democratic environment. The feudalistic atmosphere of *British- Raj* was continued by the Indian bureaucrats in the name of official secrecy. After

2. Preamble of *RTI Act,* 2005
3. *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597at 661
4. *S P Gupta* v *Union of India,* AIR 1982 SC 149

more than six decades of our Independence, the common people are in queue for the blessing of democracy and face a bitter side of the democratic system. The people have never been provided an opportunity of active participation in the governance except to cast their vote once in a five- year or in mid- term election and Indian democracy became only a paper tiger than reality.

In the present age, especially after evolution of new concept of globalization, there is an important international society that cuts across national boundaries. The Multinational Corporations, International Banks, UN agencies, other International and regional organizations, Professional and Trade Unions, Citizens groups even NGOs etc. have become more responsive to the demands and needs of the global society and more participatory. We hear a lot of greater participation of the people in public actions. With the advent of globalization, huge increase in the governmental expenses and spectre of corruption looming large to regulate the right to information, it was a long felt need in India.

Noticing the above need, the Parliament of India, realized in the first decade of 21st century to strengthen the democratic system by ensuring active participation of the people and informed citizenry and to make transparent and accountable government that is *sine qua non* for the good governance, passed the *Right to Information Act*, 2005 that has come a long way since 15th June of 2005, the President signed it.

II. RIGHT TO INFORMATION: WORLDWIDE PERSPECTIVE

After Second World War, an era of transparency and accountability in governance is on anvil at worldwide. The right to public participation appears in all important international instruments. In this context, reference may be made to the *Universal Declaration of Human Rights, 1948*[5]*; the European Convention on Human Rights, 1953*[6] and *the International Covenant on Civil and Political Rights*1966[7]. In the year 1776, Sweden was the first Sacandinavian country, enacted the RTI law and guaranteed the right to information, but the 20th century is the hallmark of the right to information at global level. In various countries, where large-scale administrative reforms have been carried out, emphasis has been laid on liberalising the extent to which details of policy, performance and other information about government activities are made available to the general public. These countries are Finland (1951);

5. Article 19 reads "everyone has the right to freedom of opinion and expression and this right includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".
6. Article 10 provides that everyone has a right to freedom of expression and this right shall include freedom to hold opinions and to receive information and ideas without interference by the public authorities and regardless of the frontiers.
7. Article 19(1) and 19(2) declare that everyone shall have the right to hold opinions without interference, and everyone shall have the right to freedom of expression, and this right shall include freedom to seek, receive and impart information of ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.(India is signatory of this Covenant.)

United States (1966); Denmark and Narway (1970); France and Netherlands (1978) and Canada (1980). In England, the Judiciary has approved openness in Government. In 1968 in the case of *Conway* v *Rimmer*[8], the House of Lords had established its jurisdiction to order the disclosure of any document and to hold a balance between conflicting interests of secrecy and publicity. Later on in 1988, certain changes were effected in *the Official Secret Act*, 1911 to narrow the scope of the Act.

III. RIGHT TO INFORMATION: INDIAN PERSPECTIVE

At the outset, it may be noted that right to information in India is not a gift conferred to its citizen by enacting the *RTI Act*, 2005. The right to information is pre-existing and implicit fundamental right enshrined under Part III of the Constitution of India, which established a representative democracy. The Act has provided 'Procedural-Avenue' to the exercise of existing fundamental right and has facilitated a person by obligating the State machinery to provide information on being asked, even on some situations voluntarily. Indian Judiciary has liberally interpreted and reinforced the mandates of the Constitution- makers time to time and established the *right to information* as part of fundamental rights.

Though, the movement for *RTI* can be traced back, but the *Right to Information* is not new to Indian setup. In the *Panchatantra* (5th century A D), it is mentioned that '*knowledge is the true organ of the sight not the eyes*'[9]. In the holy book '*Srimad Bhagavad Gita*', Lord Krishna says to Arjuna :

> *'the truth about action must be known and the truth of inaction also must be known; even so, the truth about prohibited action must be known. For, mysterious are the ways of action'*[10].

The pre- independence era was fully governed by the *Official Secrets Act* 1923 and the official tendency was inherited in the public offices in post-independence era through this draconian and colonial law. But democracy and secrecy can't go together. Secrecy always increases corruption in governmental actions and transparency in democracy certainly reduces the corruption and increases fairness and accountability. In India in 1970, the movement initiated by a people's organization- Mazdoor Kisan Shakti Sangathan (MKSS) that literally means an organization for the empowerment of workers and peasants. The movement led to a nationwide demand for a law to guarantee the Right to Information to every citizen, with widespread support from social activities, professionals, lawyers and media who are committed to transparent and accountable governance and people's empowerment. While delivering an invited

8. (1968) A. C. 910
9. Justice Mane, *Vehicle for Development & Human rights Protection*-speech delivered on August 26, 2005 at Indian Merchant's Chamber, Mumbai on Right To Information organized by Centre for National Development.
10. *Srimad Bhagavad Gita* (कर्मणो ह्यपि बोद्धव्यं बोद्धव्यं च विकर्मणः। अकर्मणश्च बोद्धव्यं गहना कर्मणेा गतिः।।), 4/17

lecture, Ansari has beautifully narrated responsible circumstances for passes of the Act in India-

'not surprisingly, the culture of secrecy beginning from the colonial rule till the five to six decades of Independence fuelled rampant corruption, in which large amount of public money was diverted from development projects and welfare schemes to private use through mis-use of power by the authorities. Lack of openness in the functioning of Government, provided a fertile ground for breeding inefficacy and lack of accountability in the working of the public authorities, which, in tune, has perpetuated all forms of poverty, including nutritional, health and educational. In order to rectify the deficiencies in the mechanisms for ensuring the reach of entitlements, particularly the basic human needs, the people in general and NGOs, in particular, demanded for a greater access to the information held by the public bodies, which was acceded to the Government in 2005'[11].

IV. LEGISLATIVE EFFORTS

The Government of India based on the recommendations of the Chief Secretaries Conference on "Responsiveness in Government" appointed the 'Shourie Committee' to suggest a draft RTI Bill. The Shourie Committee considered the issue of classification of information and noted that:

> *"a major contributor to the lack of transparency is the tendency to classify information even where such classification is clearly unjustified. There is also the tendency to accord higher classification than is warranted. The Manual of Departmental Security Instructions, issued by the Ministry of Home Affairs, and the Manual of Office Procedure, which incorporates some of these instructions, do lay down the criteria and guidelines for classification and specify the authorities competent to authorise classification gradings viz. Top Secret, Secret and confidential While the criteria for classification have perhaps necessarily to be broad, it is desirable, in the interest of a proper approach to classification that they should be backed up by a suitable illustrative list for guidance of officers. While drawing up such a list, the principle to be adhered to is that ordinarily only such information, as would qualify for exemption under the proposed Freedom of Information Act, should be classified.*[12]*"*

The draft called the Freedom of Information Bill 2000 and was introduced

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11. An invited lecture delivered at UNESCO Headquarters, Paris, France, on May, 15, 2008 by M. M. Ansari, Information Commissioner, CIC, New Delhi on '*Impact of Right to Information on Development: A perspective on India's Recent Experiences*'
12. Cited in Government of India (2006), *Right to Information*: *Master Key to good Governance*, First Report ,in Preface by M. Veerappa Moily, Chairman

in the Parliament and passed in January 2003. But the law was not notified and finally repealed. In the mean time, several State Governments had already passed their own versions of *RTI Acts*. In 1997, the RTI was passed in two states- Tamil Nadu and Goa. Soon after, other states have followed and by 2005, nine states had passed RTI law but with the passing of RTI by the Union Legislature, the state- level RTI Acts became redundant.

V. JUDICIAL EFFORTS

In the light of Western, European and Continental progressive laws, Indian Judicature has widely and liberally construed the command of constitutional provisions relating to Right to Freedom of Speech and Expression guaranteed under Article 19(1) (a) subject to certain limitations. While interpreting the Right to Freedom of Speech and Expression, the Supreme Court of India has taken into account the observations made in foreign decisions[13] from time to time. In 1961, the apex court sowed the seed of RTI in its judgment[14]. Though the decision of *Sodhi Sukhdev Singh* case[15] was in favour of the Government and the State was allowed to withhold the document but Subba Rao J., in his dissenting opinion observed that while drafting the Indian Evidence Act 1872, India could not get the status of welfare state and therefore word '*affairs of the State*' used under different Sections of *the Indian Evidence Act* could not have comprehended the welfare activities of the State. He further said that if non disclosure of particular state- document is in public interest, the impartial and uneven dispensation of justice is also in public interest. Therefore, the final authority to allow or disallow the disclosure of document lies with the court after the inspection of the document. In case of *Bennett Coleman and Co* v. *Union of India*[16], the Supreme Court has decided by the majority of opinion that the freedom of speech and expression includes within its compass the right of all citizens to read and be informed. In *State of UP* v. *Raj Narian*[17] Mathew J, also remarked that the citizens of India are entitled to know the particulars of every public transaction and all its bearing. It was further observed by the Court[18]-

13. In *New York Times* v. *United Sates*,(48 US 403) wherein Douglas, J. stated that :"Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open discussion based on full information and debate on public issues are vital to our national health; in *R.* v. *Secretary of State for Home Deptt*. Exp. Sims(2002) 2 LR 115 (AC) where in Lord Steyn observed that : 'Freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve; people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country'.
14. *State of Punjab* V *Sodhi Sukhdev Singh* A I R 1961 SC 493
15. *Ibid*
16. 1973 SCR (2) 757; AIR 1973 SC 600
17. A I R 1975 SC 865 at 884
18. *Ibid*

> *'that in a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries,-- it is not in the interest of the public to cover with a veil of secrecy the common routine business ----------, the responsibility of officials to explain and to justify their acts---- the chief safeguard against oppression and corruption' Their right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one worry when secrecy is claimed for transactions which can at any rate have no repercussion on public security.*

In a series of the cases[19], Indian Judiciary has favoured the disclosure of government's information to bring transparency and accountability in public offices.

VI. FIVE YEARS JOURNEY OF THE RIGHT TO INFORMATION ACT: A ROADMAP FOR FUTURE

Five years of implementation of *the RTI Act* has set the road to success and also brought forth many issues, challenges and opportunities. Citizens of all economic strata (from high level to the lower), from officers to farmers and from teachers to students also have applied for and obtained information under the Act. By enacting the Act, master (officers) has become servant and servant (we the people) has become master. The Central Information Commission has decided many cases[20] which were referred to seek information from the public offices but failed. Now, every governmental department and state-owned firm, including banks are obliged to have PIOs to handle RTI requests. More ever 'Culture of openness' in public offices and awareness among the masses has to be developed bring to fairness, accountability and transparency in the public functioning and to curb the corruption rate. Now, people realize active participation in assessing the day to day functioning of the Government. No doubt, *the RTI Act* has definitely resulted in greater transparency in governance at all the levels. The Centre, states and local bodies, including village -panchyats also have put their records

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19. *Reliance Petro Chemicals Ltd.* V *Praprietors of Indian Newspapers Bombay Pvt.Ltd.*, AIR 1989 SC190, 202; *Secretary, Ministry of Information and Broadcasting* V *Cricket Association, Bengal*, (1995)2SCC,161; *People's Union for Civil Liberties* V *Union of India*, AIR 2003,SC 2363

20. CIC asked UPSC to show marks to Civil Services aspirants; in *Paramveer Singh* v *Punjab University*, it was asked to show the merit list of selection of candidates; property statements filed by the civil servants are not confidential; in *Ram Bhaj* v *Delhi Government*, CIC directed the government to inform the common man about the timeframe required to redress their grievances.

in public domain, either through publications or on internet in the regional or national languages. RTI applications have annually increased by 8 to 10 times. However, new challenges emerged in due course which obstruct the effective implementation of the Act.

Time has come to assess the implementation process of *the RTI Act*. It conveys mixed messages- welcome part as well as sad both. The first half of the five- year of the Act, has been disappointing, but, the second half of the period has fared far better. In fact, the role of the Central Information Commission in particular has been impressive and even enthused pessimists. Some State Information Commissions have performed better in terms of invoking the powers of the Act. The disappointment has been particularly on three fronts, firstly, the political leadership and the political parties have done nothing so far as to give a push to the Act and it has not been included in the political agenda of the parties; secondly, the Governments, at the Centre and States level, have done little to create much needed awareness among large sections of the society and to help in opening an important window for effectiveness the Act, no *suo motu* obligations maintained in keeping of records, and their management and thirdly, the CIC and ICs have not yet demonstrated a proactive initiative.

In India, the Act has provided a better prospect not only to common man who are well aware with the functioning of offices but to the marginalized classes of the society who are ignorant with the concept of good governance. There is a major challenge to develop capacities to access the information. The capacity of both- the public authorities (i.e. the duty bearers) and the citizens (i.e. the claim holders) may have to be enhanced. There is need to make a balance in demand and supply of information and harmonious approach must be adopted in providing information sought by the people. It should be made crystal clear that which information relating to public welfare may be disclosed and which may not be disclosed in the interest of sovereignty and integrity of the Nation. In view of diversity, the unique physical condition of India, where people live in different region and different atmosphere, a common approach should be adopted and developed to promote information literacy and to democratize knowledge for people's empowerment by equalizing the opportunities to all.

VII. CONCLUSION

Though, the journey of Indian democracy is in transition phase, it suffers various challenges. Of course, *the RTI Act* is a mile stone in path of Indian democratic journey which would achieve its goal in its real sense. It would be worthwhile to quote the speech given by the Prime Minister of India, which high lights the roadmap, while introducing the Bill for its passage in the Parliament, he stated that-

> *'I believe that the passage of this Bill will see the dawn of a new era in our processes of governance, an era of performance and efficiency, an era which will ensure that benefits of growth would flow to all section of*

> *our people, an era which will eliminate the scourge of corruption, an era which will bring the common man's concern to the heart of all processes of governance, an era which will truly fulfill the hopes of the founding fathers of our Republic.*[21]'

Thus, it may be submitted that we should develop the new office-culture and maximum efforts should be citizen centric to access the public information. Being the largest democracy in the world, India must take a lead to promote fairness, transparency and accountability in strengthening good governance and to expand the horizons of *the RTI Act* to a deserving limit.

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21. The Hindu,12 May, 2005,p1

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CONCEPT OF NO STRIKE: A GLOBAL OVERVIEW

Rajneesh Kumar Patel *

ABSTRACT

Harmony and peace are the essential requirement of industrial relation; and strike is the instrument of economic coercion. This is an acceptable fact that strike affect the production of the institution but it is also true that it raises voice against the evils of the low wages, long hours of works, insecurity of employment, insanitary working and living conditions and social and economic injustice. Work stoppage may also cause the whole community to suffer a larger economic loss, while an accompanying boycott may result in economic injury to persons of firms not directly involved in the dispute. However we cannot forget that time, when human labour had no recognition except that, it was the means of production. There was no law, regulating the hours of work or the working condition or wages etc. and the state did not intervene in any matter regarding the employment of labour. However, with gradual change in time, court and several statutes has recognized right to strike and forms association as one of the basic rights. It has been recognise by the judiciary as well as the Constitution and the special statutes of the various countries.

The right to strike in the Constitutional set up is not absolute right but it flows from the fundamental right to form union. Though under the Constitution of India, the right to strike is not a fundamental right as such, it is open to a citizen to go on strike or withhold his labour. We should always remember that every strike is not illegal and the workers in any democratic state have the right, resort to strike whenever they are so passed in order to express their grievances or to make certain demands. A strike in the circumstance is a necessary safety valve in

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industrial relation when properly resorted. It is a legitimate and sometime, unavoidable weapon in the matter of Industrial relation.

It is undoubtedly true that strike affects the economy of the employment as well as the economy of the country as a whole but on the other hand we cannot deny the role and importance of strike. Judicial approach in relation to the recognition of the rights of workers lacks consistency and thus the issue remains unsettled. Thus in the above context the paper attempts to examine the question as to whether the concept of no strike is acceptable in context of expectation of working people?

Keyword: *laissez-faire, cessation of work, refusal to continue to work, justifiability of strike, collective bargaining.*

I. Strike: meaning and scope.
   (A) Statutory definition of strike.
   (B) Strike as a right.
II. Strike and global outlook.
III. Position in India.
   (A) Legality and justifiability of strike.
   (B) Can an illegal strike be justified?
   (C) Impact of legality and justifiability of strike.
   Concluding observations

INTRODUCTION

Controversy is a normal feature of the Industrial World, subsequently harmonious relation between capital and labour is a distant dream. As Bernard Gurney has said that, in the whole world there is only one place free from conflicts and, it is the graveyard. The industries are not the exception of Gurney's view because conflict between labour and capital is normal feature of any industry. Hence on one hand it is unanimously accepted that, co-operation between labour and capital is quite essential for its smooth functioning and success, but on other hand, it is also true that employers and workmen, always boast contrary interests to each other. They have different strategies and weapons to ventilate their grievances and safeguard their interests. This conflicting status of interest between labour and capital gives dawn to the industrial conflicts.

Therefore, to avoid industrial conflict, to maintain smooth relationship, to ensure industrial peace and for higher productivity, it is require that, workmen and employers should settle their dispute, as early as possible, otherwise no can stop the stumbling block in labour management relation.

There was a time when strike was treated as obstruction in the business of employer and also conspiracy[1] against them, but after the introduction of

Trade Unions Act, 1926 in India strike was recognize as democratic bludgeon and sometimes unavoidable weapon in the hands of workers.[2] It was recognized by the judiciary also, as a legal right of workers, however, after 1991, when Government of India, started its new economic policy, the judiciary radically changed his prior view in regards to strike. Today with the rapid industrialization of the country the problem of labour management relations concerning strikes have become more important. In developing country like India, the emphasis on the planned economic development has focused attention only on work stoppages, by saying that strike adversely affects national economy in various manners. It was thought that, in the development process any factor which retards growth or upsets the plans for development should be view as socially non functional.

Thus, according to this view, strike not only impedes the continuous flow of goods and service but also dislocate the entire industrial process. How can this apparently conflicting interest be harmonized? Industrial law seeks to strike a harmonious and judicious balance between the conflicting interests, as industrial legislations never create total ban on strike, but merely regulate it. Judiciary has also tried to setup a harmonious balance between conflicting interest by dividing the strike into legal and illegal strike as well as justifiable and unjustifiable strike.

However, in T.K. Rangarajan case[3], in spite of recognising this right as a weapon; in the hand of labourers, it was held by the honourable Supreme Court that strike is neither a fundamental right, nor legal and not even a moral right, which raises a number of issues in this panorama.

Actually one can and should accept that, economic progress is bound up with industrial harmony and so no industry can flourish unless there is industrial peace and co-operation between labour and capital, but, strike may be treated as weapon available to the workmen for enforcing the industrial demand and it is an element, which is of the very essence of the principle of collective bargaining. Strike is a legitimate and sometimes unavoidable weapon in hands of labour. It has been regarded an important silhouette for collective bargaining. The strike is itself the part of the bargaining process. As Ludwig Teller says that, collective bargaining regulates the terms and conditions of the employment therefore collective bargaining is more democratic, harmonious and effective way to let parties resolve their own disputes.[4]

These issues have been considered in a series of judicial pronouncement of the Apex Court and High Courts of India and Judicial Institutions of other countries too, as a result of which on impressive body of jurisprudence has evolved over the years. Yet partially because of conflicting positions taken by various courts on the contentions issues and partially because of the lack of

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1. *See, Qween* V. *Leathem*, All.E.R. 21
2. Section 17/18, Trade Unions Act, 1926.
3. (2003) 6 Scale 84 S.C.
4. As quoted by , Malhotra, O.P. in his book, Industrial Disputes Act.

uniformity and consistency in the application of, even well established principles of law, in the cases decided by the courts, there is a need for an objective and dispassionate re-examination of law for increasing our understanding of law relating to strike and its impact on industrial relations and suggesting appropriate measures for improving the existing law and ensuring its better implementation enforcement.

With these objectives in mind a modest attempt is made in the present research paper to discuss and examine the law relating to strike and the present position of the said no right to strike in the backdrop of the reported judicial decisions at global level.

I. STRIKE: MEANING AND SCOPE

In its general sense, strike is a simultaneous cessation of work on the part of employed persons engaged by the employer in any factory, mine, mill or industries. It is obstructive refused to act normally as a means of putting pressure on their employer to coerce them to concede their demands.

The word strike owes its origin to old English word Stricken to go. According to English law the word strike is of an artificial character and does not represent any legal definition or description. It is an agreement between persons who are working for a particular employer, not to continue working for him[5]. That's why it would be worthwhile to first look into the definition of strike given in various Dictionaries:

According to Encyclopedia Britannica, strike is a stoppage of work by common agreement on the part of a body of work people for the purpose of obtaining or resisting a change in the conditions of employment. Similarly Chambers Dictionary[6] said that strike is a cessation of work as a means of putting pressure upon employers.

Webster's Dictionary defined the term strike as "the act of quitting work done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer; a stopping of work by workmen in order to obtain or resist a change in conditions of employment."

On the other hand, the Industrial Relation Glossary focus on the collective nature of strike by saying that, strike is concerted action by an organized group of employees". Likewise the Oxford dictionary defines "strike" as a "concerted cessation of work on the part of a body of workers for the purpose of obtaining some concession from the employer or employers though in defining the verb it omits any reference to the purpose." The Encyclopedia of Social Sciences defines strike as "concerted suspension of work by a body of employees, usually for the purpose of adjusting on existing dispute over the term of the labour contract." According to Anderson's law dictionary strike to be a combination among laborers or those employed by others, to compel an increase of wages, a change in the hours of labour a change in the manner

5. Batra, V.K. *Illegal strike in india* at 19
6. *See*, 20th Century Dictionary.

of conducting the business of principal or to enforce some particular policy in the character or number of the men employed or the like".

It depicts from the above dictionary's definition that strike is a collective action of employed persons and it have in common the notion of quitting, cessation or discontinuance of work in combination and further the idea that such a cessation must be for the employer while is some quarters there is the insistence that the demands must related to conditions of employment and it is early agreed on all sides that the cessation of work must be used as a weapon for the furtherance of some demands.

(A) STATUTORY DEFINITION OF STRIKE

The term strike has been defined by the various statutes of other countries as well as in India. In United Kingdom, according to the section 167 (1) of the Industrial Relations Act, 1971 the term strike defined as a concerted stoppage of work by a group of workers in contemplation or furtherance of an industrial dispute, whether they are parties to the dispute or not, whether (in the case of all or any of those workers) the stoppage is or is not in breach of their terms and conditions of employment and whether it is carried out during, or on the termination of, their employment".

It is important to note that the Industrial Relations Act, 1971 now repealed and in Trade Union and Labour Relations Act, 1974, the term strike is not defined. However, British Columbia Law defines 'Strike' to include "A cessation of work or refusal to continue to work by employees in combination or in concert or in accordance with a common understanding for the purpose of compelling their employer to agree to terms or conditions of employment or of compelling another employer to agree to terms or conditions of employment of his employees".

In the United States of America, Section 501(2)10 of the Labour Management Relation Act, 1947 provides that, the expression strike includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and, say concerted slow-down or other interruption of operations by employees.

In Australia, all State Parliaments have passed legislation which is at least to some extent restrictive of strike activity but not all of them have defined the word 'strike'.[7]

In Canada, The war time Labour Relations Regulations had defined strike to include, the cessation of work by a body of employees acting in combination or a concerted refusal or a refusal under a common understanding of a number of employees to continue to work for an employer, done to compel their employer or aid other employees to compel their employer, to accept terms of employment".

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7. Edward, Sykes, *Strike in Australia* Ed. 1960 At 42

In Philippines, Section 2 (1) of the Act no. 875 of 1953 defines strike to mean; "any temporary stoppage of work by concerted action of employees as a result of an Industrial dispute".

In Mexico, Section 259 of the Act provides that strike (huelga) shall mean the temporary suspension of work as the result of a combination of employees". In Dominion Republic section 368 of the Dominion Labour Code, 1951 defines strikes (huelga) to mean "any voluntary suspension of work concerted and carried out collectively by the employees in defense of their common interests".

In Norway, Section 5 of the Norway Labour Disputes Act, 1927 defines "strike" to mean "a total or partial stoppage of work brought about by the employees acting in combination or in collusion for the purpose of forcing a settlement of a dispute between a trade union and an employer or an employer".

Thus, the definitions of strike provided by the different countries' statutes said that it is a cessation of work intended as a weapon of pressure to be used as a means of securing the granting of demand. In contradiction, the term strike is usually applied to the situation where the withholding of labour services is done pursuant a combination or agreement designed to secure some form of Industrial benefit.

In India the expression 'strike' was defined first time by section 2 (1) of the Trade Disputes Act, 1929, as "Strike means a cessation of work by a body of persons employed in any trade or Industry acting in combination or a common understanding, of any number of persons who are or have so employed to continue to work or to accept employment".[8]

The Industrial Disputes Act, 1947 adopted the same definition under section 2 (q) except a trivial change. Under this Act in place of the word "Trade or Industry" only the term "Industry" has been substituted under section 2 (q).The Act defines strike to mean "A cessation of work by a body of persons employed in any industry acting in combination or a concerted refusal, or a refusal under a common understanding of any number of persons who are or have been so employed to continue to work or to accept employment".

It is to be noted that the above definition of strike is exhaustive and make it clear that the refusal to work or to continue to work to accept employment when such refusal takes place in combination may be a strike provided that the workman is employed in that Industry. The same definition has been followed in the U.P. Industrial Disputes Act, 1947. The definition in the Bombay Industrial Relation Act, 1946 is however, slightly different, which says strike means a total or partial cessation of work by the employees in an Industry acting in combination or a concerted refusal or refusal under a common understanding of employees to continue to work or to accept work, where such cessation or refusal is in consequences of an industrial dispute.

The analysis of the definition given under Industrial Disputes Act shows

8. This Act was repealed by the I.D. Act, 1947.

that there are the following essential requirements for the existence of a strike:

(1) There must be cessation of work.

(2) The cessation of work must be by a body of persons employed in any industry.

(3) The strikers must have been acting in combination.

(4) The strikers must be working in any establishment which can be called industry within the meaning of Section 2 (j).

(5) There must be a concerted refusal; or

(6) Refusal under a common understanding of any number of persons who are or have been so employed to continue to work or to accept employment;

(7) They must stop work for some demands relating to employment, non-employment or the terms of employment or the conditions of labour of the workmen.

(B) STRIKE AS A RIGHT

The 'right to strike' refers to the cluster of rights, immunities and protections, that allow a group of workers to cease work without terminating their employment relationship with their employer and without exposing themselves to civil liability for their actions. Most countries distinguish between legal and illegal strikes. The right to strike thus refers to protected industrial action within the legal framework of a particular country. It goes without saying that the right to strike is internationally accepted as a legitimate means for the redressal of grievances of workers. While it is not clearly articulated as a fundamental right, it is recognized as an implied right that can be inferred from other rights such as the right to collective bargaining, right to form trade unions, right to fair return and right to decent working conditions. Additionally, right to strike is intrinsically linked to the freedoms of association and of expression and the right to peaceful assembly, thereby making it an unassailable and fundamental part of any democratic machinery.

Right to strike also consists of the associated rights to free association, to take supporting and sympathy action, and to receive support against hardship while doing so. This right also includes the basic concept that the contract of employment is suspended for the duration of the strike, that a striker has not broken his contract of employment by striking, that those on strike may not be penalised for striking, which includes workplace, national and multinational collective action too. Beside all these things the right to strike is a basic human right which enables the working class freely to associate with each other without hindrance to balance the influence and power of owners and employers, of their associations and of multinationals. It also includes the right for the workforce to decide who represents them in the workplace, without any kind of input, interference or compulsion from or by owners or employers. By securing this right the aim is to balance out the opinion-forming influence of owners and their establishment so as to further

the economic and social interests of the working population.

Therefore, right to strike needs to be protected by a written, secure and enforceable statute. Let us see, what the position of this right in various countries is.

II. STRIKE AND GLOBAL OUTLOOK

Right to freedom of discussion and liberty, was the ultimate result of French Constitution though it has acquired an implied authorization from the Universal Declaration of Human Rights in 1948. The declarations assert every one's right to work, right to just and favorable remuneration and right to form and join trade unions and also the right to rest, leisure, leave etc. and the right for fair living conditions with necessary social benefits.[9]

In this background, judicial decisions in almost all the countries has recognized right to strike and forms association as one of the basic rights. It has been recognise by the judiciary as well as the Constitution and the special statutes of the various countries. A very clear approach was adopted by the U.S. Supreme Court in the case of National Labour V. Jones & Laughin Steel Corporation[10] by upholding the Constitutional validity of strikes and also saying that strike is a right which is recognized in international treaties, including the European Union's Social Charter the United Nation's Covenant on Economic, Social and Cultural Rights also enshrines the right to strike.

In most European Countries the right to strike is enshrined in, and protected by a written Constitution; however exceptions are the U.K. and Ireland. The U.K. has no written Constitution and the right to strike is not protected constitutionally. Though, in England, the courts have already recognized this right as a justifiable right. As Lord Denning in Morgan V. Fry[11] stated that, strike is labour's ultimate weapon and in the course of hundred years it has emerged as the inherent right of every worker. It is an element which is of the very essence of the principle of collective bargaining. Not only this, but in England, the Trade Dispute Act, 1956 has settled and affirm the view of judiciary by declaring right to strike as justifiable and legal with some qualifications.

The Constitutions of France, Germany, Italy and Spain, mentioned a few provisions, which protect the right to strike of the working population.[12]

In United States, the Taft-Hartley Act limits the right to strike, seemingly shifting responsibility for declaring a strike from the factory floor to the union head office. But an employer may not dismiss a striking employee during a lawful strike and, if he does so, must reinstate him. It would seem that Canadians also may not be dismissed while striking and that an employer may not employ others to do the work normally done by those who are on strike.

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9. See, Articles 23, 24 and 25 *Universal Declarations of Human Rights*, 1948.
10. 1980, All. E.R. 126
11. (1946) All.E.R.111
12. See, the Respective Constitutional provisions of these Countries.

In Rwanda Article 32 of the Constitution lay down that the right to strike shall be exercised within the laws by which it is regulated. It may not infringe upon the freedom to work. Likewise, Article 42 of the Constitution of Ethiopia provides the right to strike to the workers and also enjoins the state to provide such right, subject to any restrictions, even to the government employees. Again, Constitution of Angola under Article 34 guaranteed also the right to strike but prohibit the lockouts.

Brazil, which is the developing Latin American country, also guaranteed the right to strike under Article 9 of the Constitution. Not only this, even the capitalist countries like Japan under Article 28 and South Korea under Article 33 of their respective Constitutions provide the right to strike.

It is also interesting to note that the rights of the workers to negotiate and collective bargain are won after a struggle for three centuries right from the beginning of the industrial revolution in 1765. International Labour Organization guarantees these rights and many other labour rights with the help of international conventions. There are two important conventions in relation to right to strike which are Freedom of Association and Protection of the Right to Organize Convention[13] and Right to Organize and Collective Bargaining Convention[14]. Both Conventions have been ratified by 142 and 153 nations respectively including Australia, France, Germany, Italy, Japan, Pakistan, Sri Lanka, Pakistan and the United Kingdom. Both the conventions, along with eight other conventions, have also been identified by the ILO's Governing Council to be its core conventions.

It emerge from the above discussion that strike as a right has been seriously considered and recognized by the various countries by their respective constitutional provisions as well as by statutes.

III. POSITION IN INDIA

Prior to 1926 in India any types of cessation of work or stoppage of work was treated as breach of contract of service and criminal and civil conspiracy against employers as it was under the common law.[15] The trade union movement, which was the antithesis of doctrine of laissez-faire, comes in actual form since the First World War. The war opened the scope for large production in the factory which in turn opened a new landscape for the legislation move towards the enactment of various labour legislations as Trade Disputes Act 1929, Trade Unions Act, 1926, Workmen's compensation Act 1923, Factories Act 1934, Payment of wages Act 1936 etc. which introduced the concept of collecting bargaining in India.

On the other hand, the fourth 5th year plan in India recognises that "greater emphasis should be placed on collective bargaining and on strengthening the trade union movement for securing better labour management relations supported by recourse in large measure to voluntary arbitration.

13. convention no. 87 of 1948
14. convention no. 98 of 1949
15. See, Workmen's Breach of Contract (Repealing) Act 1925.

While the right to strike is not explicitly included in the list of fundamental rights specified in the Constitution of India, Article 19 enumerates the right to freedom of speech and expression, to assemble peaceably without arms, and to form associations or unions. However this right is not absolute. Article 19(2) and 19(4) of Indian Constitution provides few reasonable restrictions on this right.[16]

Hence, the Article 19(1) (c) of the Constitution poses the issue whether the right to form union also includes the right to resort to strike by the unions? This issue was first time arisen in the case of All India Bank Employees Association V. National Industrial Tribunal[17]. In this case Supreme Court considered the aforesaid provision of the Indian Constitution and ruled that: "Even a very liberal interpretation of sub- clause (c) of clause (1) of Article 19 cannot lead to the conclusion that the trade union have a guaranteed right to strike, either as part of collective bargaining or otherwise."

However the Apex Court accepts that although right to strike is not a fundamental right within the meaning of Article 19(1) (c), but it is a statutory or legal right. In the instant case it was also contended that the right to form an association also carried with it the concomitant right to strike for otherwise the right to form association would be rendered illusory. The Supreme Court rejected this contention and said that "to read each guaranteed right as involving the concomitant right necessary to achieve the object which might be supposed to underlie the grant of each of such rights, for such a construction would, by ever expanding circles in the shape of rights concomitant to concomitant right and so on, lead to an almost grotesque result.

A quite different approach adopted by the learned single Judge of the Kerala High Court in the case of Gwalior Rayons Silk Manufacturing (Weaving) Company Limited V. District Collector[18], wherein he has observed that though under the Constitution of India the right to strike is not a fundamental right as such, it is open to a citizen to go on strike or withhold his labour, workers in any democratic state have right to resort to strike when they are so pleased in order to express their grievances or to make certain demands. A strike in the circumstances is a necessary safety valve in industrial relations as it is a legitimate weapon in the matter of industrial relationship.

On the same line, in the case of Engineering & Metal Workers Union V. M/s. Shah & Sanghi,[19] the learned Judge has observed that the strike simpliciter cannot be regarded per se as coercive activity on the part of the unions or workmen qua the employer. Considering the observation of the Apex

16. Article 19(4) provides 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 any law imposing in the interests of the sovereignty and integrity of India or public order or morality reasonable restriction on the exercise of the right conferred by the said sub clause."
17. (1961) 1 L.L.J. 586 (S.C.)
18. (1982) 1 L.L.J. 356 Ker. 460
19. A.I.R. 1960 S.C.334.

Court in Rohtas Industries Limited V. Staff Union[20], the learned Judge held that the concept of illegal strike is a creation of statute and the observations would seem to suggest that apart from illegality which is created by the statutory provision, a strike cannot be regarded as obnoxious, perverse or coercive.

Again referring to the above judgment, the learned Judge held that the restriction on the right of strike or circumstances which would render it illegal strike must be found in the statute and therefore would not seem to exist de hors the enactment.[21]

Kameshwar Prasad V. State of Bihar[22], is another interesting case on this point, in which though the Patna High Court viewed that strike is recognized right as a fundamental right under the Constitution but on appeal this view was not accepted by the Supreme Court and observed to the extent that "Government employees are entitled to demonstration peacefully within the meaning of Article 19 (a) and 19 (1) (c) but they have no fundamental right to go on strike.[23]

Again in the case of B.R. Singh V. Union of India and other[24] it has been observed by the same court that right to strike is not a fundamental right. Likewise, the Madras High Court in the case of Audio India Limited V. Audio India Employees Union and Others[25] held that although the industrial jurisprudence recognize the right of the workmen to go on strike but it is not a fundamental right. The court observed:

"After a lexical analysis to the term strike we have to refer to article 19 (1) (c) which confers a right on the citizens to form association. Formation of association is no doubt a fundamental right but this does not mean that the individuals farming an association have got fundamental right to go on strike." The court also added that a generally statement the preposition is not wrong for workers have the right to strike but technically it is not correct for the right to strike is one of a fundamental right guaranteed under the Constitution.

The above views of the Indian judiciary make it clear that the right to strike is not recognized as a fundamental right in India. From the above views one thing is also clear that in India strike is not totally banned by the statute

20. A.I.R. 1963 Pat. 170
21. In that case the learned Judge was considering whether an interim injunction could be given under Section 30(2) of the M. R. T. U. & P. U. L. P. Act to restrain employee from participating in a strike which is apparently an illegal strike prior to the stage of making a declaration about the alleged illegal strike under Section 25 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. The Court declined to grant an injunction before a declaration was given.
22. A.I.R. 1962 S.C. 1166
23. In that case, the constitutional validity of Rule 4A which was introduced into the Bihar Government Servants Conduct Rules, 1956 by a notification of the Governor of Bihar dated August 17, 1956 came for consideration.
24. 1989(2) LLJ 591
25. (1990) F.L.R. 29 (Mad.)

as well as judiciary. Thus, in Management of Kairbeta Estate, Kotagiri V. Rajamanickan[26], the full bench observed that:

"Just as a strike is a weapon available to the employees for enforcing their individual demands, a lockout is a weapon available to the employer to persuade by a coercive process the employees to see his point of view and to accept his demands. In the struggle between the capital and the labour, the weapon of strike is available with the labour. It is a weapon to force the employer to accede to employee's demand and to give them the legitimate dues, which is recognized under the Industrial Disputes Act as defined in Sec 2 (q)."

Dealing with the question of right to strike, in the case of Gujarat Steel Tubes Limited V. Mazdoor Sabha[27], the Supreme Court has held as under:

"The rights to union, the right to strike are the part of collective bargaining and, subject to the legality and humanity of the situation, the right of the weaker group, viz., labour, to pressure the stronger party viz., capital, to negotiate and render justice, are processes recognised by industrial jurisprudence and supported by Social Justice".

Again, the Division Bench of the Apex Court in the case of *Medha Patkar* V. *State of Madhya Pradesh*[28] speaking through Chief Justice has opined thus:

"Under Article 19(1) (a) of the Constitution, all citizens shall have the fundamental right of freedom of speech and expression and under Article 19(1) (b) of the Constitution they have the fundamental right to freedom to assemble peaceably and without arms. When a group of citizens, therefore, assemble and shout slogans making some demands they exercise their fundamental rights guaranteed under Articles 19(1) (a) and 19(1) (b) of the Constitution".

It depict from the foregoing discussion in the struggle between capital and labour, the weapon of strike is available to labour and is often used, as is the weapon of lock-out available to the employers and can be used by them. The bargaining strength of trade unions would be considerably reduced if it is not permitted to demonstrate by adopting agitational method such as strike. Therefore, right to strike is an important democratic weapon in the armory of workers, recognized by almost all democratic countries as a mode of redress.

(A) LEGALITY AND JUSTIFIABILITY OF STRIKE

In India for determining the payment of wages for the strike period as well as administrative actions, the tribunals and courts have taken into account the concept of legality and justifiability of strike. Generally the adjudicatory authorities have consistently refused to grant wages for the period of strike

26. (1960) 2 L.L.J. 275 (S.C.)
27. 1980(1) LLJ 137
28. 2007 (4) MPHT 219

when strike was illegal and unjustified. On the other hand according to various judicial dictums if the strike is legal and justified, full wages for the period of strike should be awarded to the workers. Therefore the first issue arise that when a strike become illegal?

Section 24(1) enumerates these circumstances. According to this section a strike shall be illegal if:

(i) It is commencement or declared in contravention of section 22 or 23.

(ii) It is continued or declared in contravention of a prohibitory order issued under section 10(3) or section 10-A (4A).

Clause (i) of the section 24(1) applied to persons employed in public utility service and prohibits the strike if it is contravention of section 22 and it also prohibits strikes if it is contravention of section 23.

Similarly if the strike is continued in contravention of the order made under section 10(3) and section l0A (4) it shall be illegal.[29]

The aforesaid provisions make it clear that every strike is not illegal under the Act. In fact, workers have a right to go on strike whenever they like in order to demonstrate their grievances or to make certain demands in the process of collective bargaining. This right of the workmen cannot be impaired. It makes the strikes illegal, only when they contrivance the provision of Section 10(3), 10-A (4-A), 22 and 23 of the Act.

Now the **second issue** arises that when a strike may be regarded as justifiable strike? Actually the concept of justifiability of strike is totally foreign to the Industrial Disputes Act, because neither the Act nor any rules frame under it, mentions this test. This concept was brought by the Judicial Institutions for the purpose of philanthropic relief to the workmen in hard cases. The Industrial Adjudication System brought this concept first time in Ramkrishna Iron Foundry V. Their Workers[30], wherein the full bench of Labour Appellate Tribunal observed:

"Strike has been recognized by the necessary implication in the industrial legislation in India and express statutory provisions have been made for the purpose. Strike is normally a weapon to lodge a protest and as such it is unobjectionable unless it is used for a purpose other than of giving an expression of the grievances of the worker. Like legal and illegal strike it may

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29. Section 10(3) provides that where an Industrial dispute has been referred to a Board, Labour Court, Tribunal or National Tribunal under the section 10, the Appropriate Government may by order prohibit the continuance of any strike in connection with such disputes which may be in existence on the date of the reference. Similarly section l0A (4-A) provides that where an industrial dispute has been referred to arbitration and a notification has been issued under sub section (3-A), the appropriate Government may by ordered, prohibit the continuance of any strike or lockout in connection with such dispute which may be inexistence on the date of the reference.

30. (1954) 2 L.L.J. 372 (L.A.T.)

be justified and unjustified too. A strike would normally be deemed to be unjustified unless the reasons for it are absolutely perverse and unsustainable".

The verdict of the Labour Appellate Tribunal, in the above case opens a new concept in the field of labour management relationship. According to this concept a strike may be justified if the demands of the workers are fair and strike was peaceful. In this context it is important to note that justifiability of a strike should be reviewed from the standpoint of their existing all other legitimate means open to them for getting the demands fulfilled.

A close scrutiny of judicial dictum on this point make it clear that if the object or means of the strike is illegal the strike under the Indian law will be certainly unjustified but it may or may not be illegal. Similarly, a strike shall be legal if it is commenced without contravening the statutory provisions and it may be justified if it is resorted to for the betterment of the conditions of service of workmen.

By constant Judicial Pronouncement, the courts have laid down the well established rule that a strike has been held to be justified when it was resorted to:

(i) After exhausting the remedies provided in the Industrial Disputes Act and there being proved futile.

(ii) Ordinarily the workers should resort to negotiations and conciliation before indulging in strike.

(iii) Against an unfair labour practice or victimization on the party of management.

(iv) As a measure of protest against retrenchment of workmen.

(v) Strike to be justified should be launched for reasonable economic demands.

(vi) If negotiations fail the workers should resort to conciliation.

(vii) After conciliation the workers should wait for reference of the dispute to adjudication.

(viii) As a measure to protest against suspension of fellow workmen.

(ix) The demands of the workers should be raised in accordance with law.

(x) Discharge of union officials.

Thus, the first and foremost requirement of a justified strike is that it should be launched either for economic demands or in general interest of the workmen, like basic pay, dearness allowances, bonus provident fund, gratuity, leave and holidays, working conditions etc. which are the primary objects of trade union.

In the case of, Swadeshi Industries Limited V. Their Workmen[31] Justice Das Gupta observed that "collective bargaining for the purpose of securing improvement on matters like these viz. basic pay, dearness allowance, bonus, provident fund and gratuity leave and holiday in the primary object of a trade

31. A.I.R. 1960 S.C. 1258

union and when demand like these are put forward and thereafter a strike is resorted to in an attempt to induce the company to agree to the demands or at least to open negotiations the strike must, prime facie be considered justified. It is also held that whether the strike was justified or not is a question of fact and when on a consideration of all the facts and circumstances the Appellate Tribunal has come to the conclusion that strike was justified".

A justified strike is that in which the demands are reasonable and legitimate. In the case of, Crompton Greaves Limited V. Their workmen[32] certain workmen went on a strike in protest of management's order of retrenchment of workmen. On reference of the dispute relating to wages for the period of strike the Tribunal upheld the claim of workmen for wages of the period. The management the filed an appeal by special leaves before the Supreme Court.

The Supreme Court held that the strike could also not be said to be unjustified as before the conclusion of the talks for conciliation which were going on through the instrumentally of the Assistant Labour Commissioner, the company had retrenched as many as 93 of its workmen without even intimating the Labour Commissioner that it was carrying out its proposal plan of effecting retrenchment of the workmen. Hence the court held that the strike was neither illegal nor unjustified.

In Chandramalai Estate V. Workmen,[33] the Supreme Court made the following pertinent observations in this respect:

"Although the strike is legitimate and sometimes, an unavoidable weapon in the hands of labour, it is equally important to remember that indiscriminate and hasty use of this weapon, should not be encouraged without exhausting the avenues for peaceful achievements of their objects. The strike, except in case of demands of an urgent and serious nature, in which it would not be reasonable to expect the labour to wait till after asking the government to make a reference, is not otherwise justified. The industrial tribunal cannot come to the conclusion that the strike was half justified and half unjustified. The award of payment of 50 percent of the total emolument for the strike period is set aside."

In, Sadul Textile Mills V. Their Workmen[34] certain workmen struck work as a protest against the lay-off and the transfer of some workmen from one shift to another without giving four days notice as required by standing order 23. On these grounds a question arose whether the strike was justified. The industrial tribunal answered in affirmative. Against this a writ petition was preferred in the High Court of Rajasthan. Reversing the decision of the Tribunal Mr. Justice Wanchoo observed:

"We are of opinion that what is generally known as a lightning strike, take place without notice and each worker striking is guilty of misconduct

32. A.I.R. 1978 S.C. 1489.
33. (1960) 3 SCR 451
34. (1958) 2 L.L.J. 628(Raj.)

under the standing orders and liable to be summarily dismissed as the strike cannot be justified at all."

It is submitted with due regard, that the above approach of the Rajasthan High Court seems to be itself contradictory. Actually illegality and justifiability of strike is two different phenomena and lightning strike may be said to be illegal but it should not be termed itself unjustified.

In case of L. I. C of India & Others V. Amalendu Gupta & Others[35] the permanent Class II and Class IV employees of life Insurance Corporation of India went on strike for 14 days after serving a notice in accordance with the provisions of the Industrial Disputes Act, when the life insurance corporation of India did not pay bonus in spite of various ordered of the Supreme Court of India. Calcutta High Court held that the strike was peaceful and the employers did not resort to acts of violence or intimidation or violated the civilized norms during the period of strike or earlier. The strike was immediately recalled when the issue of the payment of bonus was finally settled therefore was wholly justified.

Above discussion reveals that, the strikes may be treated as justified strike, when it is launched against unfair labour practice or victimization of management or for any reasonable economic demands. However, the position on this regard is not very clear and judiciary has adopted a different view in different situations and even some times in the same situation.

(B) CAN AN ILLEGAL STRIKE BE JUSTIFIED

In this context two conflicting views have been advanced. According to the first view an illegal strike cannot be justified while the second view supported this idea that an illegal strike may be justified. Even though the legislature has not provided for any classification of illegal strike into justified and unjustified strike put the judiciary has examined this question. The question comes up for interpretation before the Supreme Court for the first time in India General Navigation of Railway Company Limited V. Their Workmen[36] case, wherein the Supreme Court adopts a very rigid approach and said that:

"we are unable to understand that how a strike in the respect of a public utility service, which is clearly illegal, could at the same time be characterized as perfectly justified. An illegal strike never been justified at all." The court also added that "the law has made a distinction between a strike which is illegal and one which is not, but it has not made any distinction between illegal strikes which may be said to be justified and one which is not justified. This distinction is not warranted by the Act, and is wholly misconceived, especially in the case of employees in the public utility services. Actually, the two conclusions that, strike is illegal and at the same time justified cannot in law co-exist."

However the majority decision in Gujarat Steel tubes V. Gujarat Steel

35. (1988) 2 L.L.J. 152 (cal.)
36. (1960) 1 L.L.J. 13 (S.C.)

Tubes Mazdoor Sabha[37] reveres the foundation laid in above case and ruled that "mere illegality of strike does not per se spell unjustifiably". It visualized that between perfectly justified and unjustified the neighborhood is distinct.

The above view of the Apex Court also found strong support in the case of Crompton Greaves Limited V. The Workmen,[38] wherein, the court had observed that "even if a strike is illegal, it cannot be unjustified unless the reason for it is entirely perverse and unreasonable."

Hence, whether a particular strike is justified or not is a question of fact which has to be judge in the light of facts and circumstances of each case. Although it is wel1 settled that the use of force violence or acts of sabotage resorted to by the workmen during a strike disentitles them to wages for the strike period due to unjustifiability of strike. It is also settled that in order to entitle to wages for the period of strike the strike should be legal as well as justified.

(C) IMPACT OF LEGALITY AND JUSTIFIABILITY OF STRIKE

In the process of collective bargaining the question of employment of striking employees and wages for the strike period has been subject matter of negotiation in the settlement of a dispute. In United Kingdom a strike may have one of three consequences in relation to the contract of employment, viz.

(1) It may cause a termination of the contract as soon as the strike begins, thus leaving the employer and the employee with no legal relationship thereafter.

(2) It may suspend all or some of the mutual contractual obligation for the duration of the strike or

(3) It may be a breach of contract by the employee, thus giving the employer a right of action for damages.

In the United States as per the rule, the story is quite different. There has been incorporating a no strike clause in labour contracts. If a strike takes place in violation of this no strike clause then it will be treated as breach of contract. The consequences are similar as to England. In India there are mainly two consequence of strike i.e., dismissal of service of workmen's and deduction of wages of the period of strike. However, when workmen will be dismissed? and when wages for period of strike may be deducted? on these issue judiciary has adopted quite different view in various cases. Thus in the case of Crompton Greaves Limited V. Workmen[39] the Apex Court said that if the strike is legal and justified, the wages of the period of strike should be allowed. The division bench of the Apex Court held that a strike said to be legal if it does not violate any provision of the statute and a strike cannot be said to be unjustified unless the reasons for it are entirely perverse and unreasonable.

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37. (1980) 1 L.L.J. 137 (S.C.)
38. Lab I.C. 1978 (S.C,) 1379
39. Ibid.

But, again in case of Kirkee Cantonment Board V. Kirkee Cantonment Kamgar Union,[40] certain workmen went on strike within seven days after the conclusion of conciliation proceedings before a conciliation officer. During the period of strike, the places of certain strikers were filled by other persons. Upon the termination of strike, the management allowed the return of old workers, but was unable to provide for fifty two of them whose places were filled by other persons during strike. The Labour Appellate Tribunal held that the strike was illegal under section 22 (1) (d) of the Industrial Disputes Act; It is accordingly held that the replaced strikers were not entitled to reinstatement or wages.

The above view was further elaborate and approved in the case of Howrah Foundry Works Limited V. Howrah Foundry Workers Mazdoor Union[41] by the Industrial Tribunal of Madras. It was held in this case that strike was illegal and therefore the management had the right to dismiss the workmen. The court observed: "from evidence it is clear that all the workmen commenced stay in strike and many come out at the close of the working hours of that date and still a large number continued to remain in occupation of the plant and building of the company for several days together. The circumstances show that all the workmen were aiding and abetting the said stay in strike. Therefore, my conclusion is that dismissal to workmen was justified".

The aforesaid view was further elaborate by the Apex Court in India General Navigation Railway Company Limited and another V. Their Workmen[42]. In the instant case the Supreme Court observed that while deciding the question of punishment a clear distinction has to be made between the violent strikers and peaceful strikers. The Apex Court ruled that a strike which is illegal cannot be characterized as perfectly justified these conclusion cannot in law co-exist.

Hence, the Supreme Court has adopted a pragmatic approach in dealing with the question of management's power to dismiss peaceful striker even though they happen to participate in an illegal strike. It has distinguished between peaceful and violent strikers. It ruled that the punishment of dismissal may be imposed upon violent strikers. But where the strikers remained peaceful such extreme punishment of dismissal would not be justified. Thus the peaceful strikers should not be subjected to extreme penalty of dismissal as it would lead to mass dismissal of worker.[43]

A liberal view was taken by the Supreme Court in the case of Burn & Company Limited V. Their Workmen.[44] In the instant case a large number of workmen had gone on an illegal strike. The management dismissed only the

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40. (1951) 2 L.L.J. 621 (L.A.T.)
41. (1955) 2 L.L.J. 97 (I.T.)
42. (1960) 1 L.L.J. 13 S.C.
43. See also, Lakshmi Devi Sugar Mills Limited V. Ram Swarup & Others(1957) 1 L.L.J. 17 S.C.
44. (1959) 1 L.L.J. 450 S.C.

seven strikers on the charge of participating in an illegal strike and inciting others to strike. There was no evidence that strikers incited to other workmen resort to strike and they taken part in any violent activity. Industrial Tribunal held in these circumstances that the order of dismissal was not justified and directed the reinstatement of the seven workmen. It was laid down that mere participation in the strike would not justify suspension or dismissal of workmen. Where the strike was illegal the only question of practical importance would be the quantum or kind of punishment. To decide the quantum of punishment a clear distinction has to be made between violent strikers and peaceful strikers. These finding was upheld by the Supreme Court and held that the dismissal of such workmen was not justified.

Again in the case of Management of Chandramalai Estate, Ernakulam V. Its workmen[45] the division bench affirms the above judgments when it said that strike may be justified or unjustified. In the instant case there was a dispute between the management and the workers and the labour minister decided to arbitrate the matter. It was held that the strike in protest of the recalcitrant attitude of the management in boycotting the conference, by the labour minister of the state was not unjustified. The court also emphasize on the point of right to strike and said that strike is legitimate and sometimes an unavoidable weapon in the hands of the workers. There may be cases where the demand is of such an urgent and serious nature that it would not be reasonable to expect labour to wait till after the government takes notice. In such cases, strike even before such a request has been made may will be justified. The same approach was adopted in Gujrat Steel Tubes V. Mazdoor Sabha case.[46]

However, in the case of Bank of India V. T.S. Kelawala[47] the Supreme Court deviate from the above view by propounding the concept of No work No pay. The court in the instant case clearly declares that if workers resort strike their wages will be deducted accordingly and legality or illegality of strike shall be immaterial as for as wages is concern.

Even in Syndicate Bank V. Umesh Nayak[48] in which concept of no work no pay was reaffirm, Mr. Justice Sawant opined that "the strike, as a weapon, was evolved by the workers as a form of direct action during their long struggle with the employer, it is essentially a weapon of last resort being an abnormal aspect of employer-employee relationship and involves withdrawal of labor disrupting production, services and the running of enterprise. It is a use by the labour of their economic power to bring the employer to meet their viewpoint over the dispute between them. The cessation or stoppage of works whether by the employees or by the employer is detrimental to the production and economy and to the well being of the society as a whole. It is for this reason that the industrial legislation, while not denying for the rights of

45. (1960) 2 L.L.J. 243
46. Supra note 12.
47. (1990) 2 L.L.J. 1
48. (1994) 5 J.T. 648

workmen to strike, has tried to regulate it along with the rights of the employers to lockout and has also provided machinery for peaceful investigation, settlement arbitration and adjudication of dispute between them. The strike is not be resorted to because the concerned party has a superior bargaining power or the requisite economic muscle to compel the other party to accept its demands.

Thus, initially, employees must resort to dispute settlement by alternative mechanisms. Only under extreme situations when the alternative mechanisms have totally failed to provide any amicable settlement, can they resort to a strike as a last resort. It is submitted that the principal objects of the Industrial Disputes Act, 1947, are promotion of measures for securing amity and good relations between the employer and the workmen, to grant relief to workmen in the matter of lay off, retrenchment and closure of an undertaking and also to provide collective bargaining security to all the workmen. This beneficial piece of legislation never denied giving this right to the workmen; therefore this right should be acceptable as legal or statutory right. The provision thereby implies that all strikes are not illegal and strikes in conformity with the procedure laid down, are legally recognized.

In this regard Mr. Justice Krishna Iyer had rightly opined that "a strike could be legal or illegal and even an illegal strike could be a just."[49]

It is submitted with due regard to the honorable Supreme Court that the above views are against the policy of collective bargaining and also the respective provisions of the Act. If we adopt the concept of total ban upon the right to strike then the provision of I.D. Act will be no meaning. However this unhappy situation is continued with the case of T. K. Rangarajan V. Government of Tamil Nadu[50], in which the Apex Court totally wash out the right to strike by saying that there is no right to strike either fundamental, legal, constitutional or even based upon the morality.

A survey of the aforesaid decision, leads us to the conclusion that the legal observation of majority has left the issue whether illegal strike per se is unjustified wide open and introduces uncertainty. Not only is this, the recent approach toward this right need to be review. The study concluded that justifiability of strike depends upon the circumstances of the each case.

It is undoubtedly true that loss of production not only reduced the profit making capacity of the employers but also affects their delivery schedule and other business commitments however we cannot and should not forget that workers should get fair return for their sawed and cooperation.

Thus, the tribunals and courts have ruled that workers participating in a legal and justified strike cannot be dismissed because if this is permitted the statutory right of strike would become ineffective even in a reasonable and bona fide situation. It also reveals that the by constant judicial pronouncement that workers participating in a legal and justified strike cannot be denied

49. Supra note 21.
50. (2003) 6 Scale 84 S.C.

reinstatement simply on the ground that places were filed by other person. The legal and unjustified strike raises more complex issue. These types of strikes have been recognizing by the courts that merely because the strike has been held to be legal it does not foreclose the possibility of dismissal of strikers. Dealing with these types of strikes courts has evolved a clear rule that, a workman cannot be dismissed for joining strike which is not illegal but simply unjustified. It means employer will have the right to dismiss a workman where the strike is illegal as well as unjustified. However, an employer can not dismiss or discharge his employee from service for an illegal strike, unless the employers hold an enquiry in accordance with standing order or natural justice. The employer is therefore required to exercise a great degree to caution in the exercise his disciplinary power to dismiss or discharge his employee.

To sum up, in industry needs a drastic change of attitude and minds of both and more especially of employer because if the worker have not absolute right of strike, then in absence of cogent ground the employer should not have blanket power to declare lockout in consequences of strike, because both instrument of economic coercion, is injurious to smooth running of industry and good industrial relations. So it should be last action of both parties, if all the ways have been closed.

CONCLUDING OBSERVATIONS

Since the year 1991, when new economic reforms are introduced in India, in the form of a new economic policy, there is a constant demand from the employer's side, that there should be a new labour policy to enable them, to function efficiently in the new economic environment. The Government of India has appointed many commissions and constituted many committees to look into the question of labour reforms and the second National Labour Commission headed by Ravindra Verma has also submitted into recommendations to the Government. Economic Development and efficiency are the keywords that one often comes across in the era of a global economic order but it must be supplemented from the perspectives of equity & economic justice.

Right to Strike is an effective weapon given to the workmen by the law to achieve social justice, and it is the submission for that this weapon must not be whittled down for the cause of uninterrupted production & economic development. This is the only weapon through which the working class improves their economic conditions and consequently a life of human dignity. This right to strike was won by the working class after a lot of historic struggle and sacrifice and the regions which led to the recognition of this right in the law must not be lost sight of.

Though as a matter of policy, in India adjudication is given more importance of than strike, but it must be remembered that it has been the vision of policy makers to promote bipartite solutions to the labour problems as it was felt that they would better promote Industrial Peace and Harmony.

Adjudication and legislation, which is the normal feature of industrial jurisprudence to minimize, regulate and control strikes, have in a larger sense catered to the requirements of society, sometimes at the expense of ignoring the interests of the toiling masses who play a predominant role in the profits earned by the industry.

The study in this paper, has revealed many if and buts, drawbacks, thought provoking, unresolved issues necessitating redressal at earliest. With a view to ensure the smooth relation between labour and capital the following suggestions are preffered:

1. An object clause should be added in the definition of strike by declaring that no act of quitting work will be treated as strike if it has no relation with industrial dispute.
2. There should be two categories of illegal strike viz. (i) illegal strike due to non compliance of mandatory provision of the Act (ii) illegal strike where the object or purpose of strike is unlawful. A clear provision should be added in this regard.
3. There should be representation of effective trade unions. Recognition of trade union has to be determined through verification of fee membership method. The union having more membership should be recognized as the effective bargaining agent.
4. The State should enact suitable legislation providing for compulsory recognition of trade union by employers which will be helpful in the process of collective bargaining.
5. State has to play a progressive role in removing the pitfalls which stand in the way of mutual, amicable and voluntary settlement of labour disputes. In this regard a high powered committee should be made to deal with industrial disputes through the negotiation.
6. The judiciary should also be changed their strict and rigid approach toward right to strike. A right to strike should always be granted to the workers for protection of their basic requirements and needs.
7. It is undisputed that strike result in work-stoppage, which in its turn adversely affects production. So strike must be always a last resort when all the means of negotiation are failed.
8. For this purpose the concept of justified and unjustified strike should be authorized by law of parliament by necessary amendment in the Industrial Disputes Act, 1947
9. In the last but not least it is requested that all the disputes should be resolve by the negotiation process bearing in mind that industrial peace will be the beneficial for both workmen as well as for employers.

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FEMALE FOETICIDE IN INDIA: A SHOCKING REALITY

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ABSTRACT

Female Foeticide has indeed become one of the most gravest issues in contemporary world. It is a chilling reality that day by day we are inching closer to a land without women. The uneven sex ratio rates all over the world and specially in the Indian scenario has raised serious doubts on social development as no development can be conceived without the development of half of the human population. As females drop in number in a society, the society is bound to get destabilized. In fact, female foeticide will not only give rise to serious social consequences such as increase numbers of rapes, molestations, growth of polyandry, homosexuality, prostitution etc but also jeopardise human existence at large.

Hence checking of female foeticide is the need of the hour, if society is to prosper. Just as a bird cannot fly on one wing, society cannot move forward without the development of the fairer sex.

Key Words: *Female Foeticide, Foetus, Pre- natal, Sex determination, Legislation.*

INTRODUCTION:

India is a country of incredible ironies. It is a land where people worship myriad forms of female Shakti in quest of wealth, wisdom and power. In this country it is a common sight to see thousands of couples making arduous journeys every year to shrines of goddesses in order to be blessed with a child. But strangely enough, in this country, a couple is said to be 'blessed' only when it has a male child; for a girl is never considered a blessing in our society. Her birth seems to cast a pall of gloom over the entire family. Her birth is not rejoiced, instead the entire family moans.

Gender biasness had been the typical attitude of the patriarchal Indian society since time immemorial. The Vedas contained passages which

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emphasized the necessity of son. '**May you be the mother of a hundred sons**' have always been a popular blessing by elders to young brides. It is indeed an undeniable fact that despite differences in social and intellectual status, almost all the sections of the society do stand on the same platform so far as their craving for male child is concerned. On the other hand, daughters are unwanted, they are considered burdensome and people who do not dare to carry this 'burden' for long dispose them off as quickly as possible, for in Incredible India, 'killing of the girl child is no sin.'

Initially the girl child was put to death brutally, being throttled, poisoned or drowned in a bucket of water right after her birth. These had been the common practices followed particularly in the rural areas. However the evil of killing the girl child no longer remained confined to the rural people but equally attracted the urban population too who, despite being educated, seem to show a strong preference for the male child and the subsequent avoidance of the female child. The rapid advancement of science and technology proved a boon for these people as this had made the diabolic slaughter of the female child much easier and more sophisticated than before. The benefits of science, as usual, has again been misused by mankind and today by dint of the pre-natal sex determination tests, the female fetuses are selectively aborted. Hence we can say that in the modern era another shameful chapter has been added to the saga of oppression and exploitation meted out to women, in the form of 'Female Foeticide'. It is indeed heartening that in recent times when India boasts of its scientific achievements and discoveries, when the pages of textbooks are flooded with slogans of 'Shining India', women in India are not only facing inequality and inequity in every sphere but they are denied even the right to be born.

WHAT IS FEMALE FOETICIDE?

As a medical term, foeticide is destruction of a fetus[1]. The term 'Female Foeticide' may be defined as the elimination of a female foetus at any stage of pregnancy, after determining its sex. It is also defined as killing of female foetus through induced abortion.[2] Hence 'Female Foeticide' refers to the process of aborting a foetus if, after undergoing sex determination tests or pre-natal diagnostics tests, it is revealed that the foetus is female. In other words, it implies the barbarous act of killing the girl child in the womb itself, unseen and unheard, only for the fact that she is female.

The misuse of medical science has facilitated the rapid growth of this heinous crime in the society today. A number of medical procedures are carried out to determine the sex of the unborn child such as: Amniocentesis, Ultrasonography, Foetoscopy, Chorionic villi biopsy; Placental tissue sampling etc.

Out of these the most commonly used sex-determination test is

1. Definition of Foeticide from Dorland's Medical Dictionary
2. Modi's Medical Jurisprudence

amniocentesis. It was meant to be used as an aid to detect any abnormality in the unborn child. But over the years, especially since 1978, amniocentesis has become a widely used test by doctors to determine the sex of the foetus between 14-18 weeks of pregnancy.

The ultrasound technique has also gained huge popularity. The trans-vaginal sonography has enabled to determine the sex of a foetus within 13-14 weeks of pregnancy and through abdominal ultrasound, sex determination is possible within 14-16 weeks.

Whatever be the method employed, the reality is that these methods have made sex determination quite easier and cheaper, thereby encouraging the growth of Female Foeticide at a high rate.

REASONS FOR HIGH RATE OF FEMALE FOETICIDE IN INDIA:

It has been widely accepted nowadays that girls are emotionally more attached to parents, more responsible in society and by no means less competent than boys. However withstanding all this, the typical orthodox Indian attitude accompanied with several socio-economic-cultural factors pervading in the society has always upheld the need of male child and disfavored the birth of girl child in the family. This has immensely contributed to the rampant growth of female foeticide in the country, thus making India one of the worst nations in the world plagued with skewed sex ratio. The most prominent factors encouraging Female Foeticide in India are listed below:

i) Religious factors: The Hindu religion lays great stress on the birth of a son. In a Hindu patriarchal society it is the son who continues the family lineage or 'Vansh'. According to Manu, a man cannot attain moksha unless he has a son to light his funeral pyre. Also, it says a woman who gives birth to only daughters may be left in the eleventh year of marriage.[3] Such gender biased customs and practices in the traditional Hindu society has over-emphasized the birth of sons and discouraged the birth of girl child in the family, thus paving the way for Female Foeticide.

ii) Evil of Dowry: Dowry is essentially one of the factors which has encouraged the practice of Female Foeticide to a great extent. Parents find it a better option to avoid the female fetuses itself than to pay exorbitant rates in the form of 'dowry' while marrying off their daughters. Hence in order to escape from dowry people desperately go for sex selection tests and eliminate the female foetus. To most of the couples, especially the middle-class ones, it appears that 'paying Rs. 500 at present is better than to pay Rs.5,00,000 in future'. Conversely, the boy is viewed an asset to fetch fabulous dowry for the parents. Hence boys are naturally preferred to girls.

iii) Financial Dependence of Females on Husband or In laws: In India, the socio-economic background has also been the villain behind the tragic female foeticide. Certain communities want to get rid of female child

3. Pande Rohini and Malhotra Anju, "Son Preference and daughter Neglect in India.What happens to living"

compelled by the circumstances of dehumanizing poverty, unemployment, superstition and illiteracy.

iv) Secondary status of women in society: It is generally expected that sons would carry the family lineage forward, provide security and care to parents especially in old age, enhance family wealth and property and perform the last rites and rituals. Whereas daughters would go to another's house draining out all the family wealth. Moreover they always need to be protected, defended and taken care of , thus imposing an extra burden over the family. Such conservative attitude of the Indian society which essentially regards women a 'burden' is one of the most potent factors which has induced strong son preference and hence encouraged Female Foeticide.

All this factors clearly point out that the ever existing gender biasness in our country favoring the male and the stereotype notion of women as 'burden' is the primary cause acting behind the shocking statistics of Female Foeticide in India.

GENESIS AND GROWTH OF FEMALE FOETICIDE IN INDIA : THE CHILLING REALITY

The devil of Female Foeticide first crept into the Indian society through the corridors of the northern states which engaged in gross misuse of amniocentesis. Amniocentesis first started in India in 1974 as a part of a sample survey conducted at the All India Institute of Medial Sciences (AIIMS), New Delhi, to detect foetal abnormalities. These tests were later stopped by the Indian Council of Medical Research (ICMR), but their value had leaked out by then and 1979 saw the first sex determination clinic opening in Amritsar, Punjab. Even though women organizations across the country tried their best to put a stop to this new menace, but were helpless because of the Medical Termination of Pregnancy Act 1971 which permitted the amniocentesis test as it claimed to be used for detection of foetal abnormalities,. According to the MTP Act, if any abnormality is detected between 12 to 18 weeks of gestational period in the foetus, an abortion can be legally carried out up to 20 weeks of pregnancy.[4] Owing to this provision, amniocentesis could not be banned and its gross misuse continued. Although responding to the situation certain legal steps had been initiated by the government, however, the evil of Female Foeticide could not be curbed out but rather with the passage of time it has become all the more sdangerous. Today the issue of Female Foeticide in India is no longer only an issue of violation of women's rights only but rather it has become a chronic disease. It has become so widespread all over the country today that day by day we are actually inching closer to a nation without women. Weird it may sound, but the shocking statistics revealing the distorted sex ratio in our country compel us to accept this truth.

According to the United Nations an estimated 2,000 unborn girls are illegally aborted every day in India. Another glaring example is the

4. Section 3, Medical Termination of Pregnancy Act 1971

demographic profile of India which clearly indicates the profoundness and wide spread prevalence of female foeticide. India is a country of 102.7 crore population, out of which 53.1 crores is of males and 49.6 crores is of females, clearly indicating a deficit of 3.5 crore women. The sex ratio is 933 women /1000 men and child sex ratio is 927 girls for 1000 boys[5]. The intensity of this heinous crime in our country is revealed by the following figures:

Sex Ratio (females per thousand males), India: 1901-2001

Year	Sex-Ratio
1901	972
1911	964
1921	955
1931	950
1941	945
1951	946
1961	941
1971	930
1981	934
1991	929
2001	933

Thus as per these statistics reveal, the overall sex ratio in India is 933 females for every 1000 males, showing a marginal increase of 4 points from the 1991 census of 929. However, this is a very sorry state indeed and we are doing much worse than over a hundred years ago when the sex ratio was 972 in 1901, 946 in 1951 till the 933 today.

The Trend of sex ratios in the age group of 0-6 years all over India[6]

Years	Sex Ratio
1961	976
1971	964
1981	962
1991	945
2001	933

The above table clarifies that more and more baby girls have either been aborted or killed as infants since 1961 and that this trend continues strong even today.

The intensity of sex ratio imbalance in the 0-6 age group in some states

5. Census of India, 2001
6. Census, 2001.

of India is indeed horrifying. In Punjab the sex ratio is (793 F: 1000 M), in Haryana it is (820 F: 1000 M), in Himachal Pradesh it is (897 F: 1000 M), in Gujarat it is (878 F: 1000 M). Recent government figures show that in South Delhi, the sex ratio is 762 females per 1000 males, while in Mumbai's Borivalli it's 728 females per 1000 males. In Jaipur itself, an average of 3500 instances of female foeticide is supposed to be carried per year. These figures undoubtedly point out that the country, is witnessing today the systematic extermination of the female child on a large scale. All most the whole of the country is under the grip of this menace. The following table estimates the intensity of Female Foeticide in the various states of India:

States Showing High Foeticide Percentage

State	**Female Foeticide (percent to All India)**
Maharashtra	45.1
Madhya Pradesh	15.4
Haryana	14.3
Rajasthan	9.9
Andhra Pradesh	8.8

From the above table we find that ironically the developed and the richest states of India are the toppers in the list where female foeticide is extensive. According to UNICEF study done over 3 years (1994-1996), there are only five states in India where no case of foeticide or infanticide have been reported which are Sikkim, Nagaland, Meghalaya, Mizoram and Jammu & Kashmir. An improvement in the child sex ratio whatsoever has only been marked in one state, Kerala, and two Union Territories, Lakshwadeep and Pondicherry.

The reports published by various agencies also throw considerable light on this grim reality. The UN reports reveal that between 35 to 40 million girls missing from the Indian population.

According to a study conducted recently in India, the first systematic study on female foeticide by an Indo-Canadian team, 10 million female foetuses have been aborted in India, What all the more shocking is according to its report every year, about 50,000 unborn girls-one in every 25-are aborted in India[7].

The UNPFA report on "India Towards Population and Development Goals" published in 1997 also expressed its concern over the issue. It is estimated that 48 million women were 'missing' from India's population. The report states "If the sex ratio of 1036 females per 1000 males observed in some states of Kerala in 1991 had prevailed in the whole country, the number of would be 455 million instead of the 407 million (in the 1991 census). Thus,

7. www.indianexpress.com/res/web/pIe/full_story.php?content_id=8559 visited on

there is a case of between 32 to 48 million missing females in the Indian society as of 1991 that needs to be explained." It further stated that, "The 1991 census is only indicative of this disturbing trend when elsewhere in the world women outnumber men by 3 to 5 percent. There are 95 to 97 males to 100 females in Europe; the ratio is even less, 88 males to 100 females, in Russia, mainly due to causalities of World War 2".[8]

According to the UNICEF report, 40 to 50 million girls have gone missing from Indian population since 1901 as a result of systematic gender discrimination in India.[9]

Thus in consideration of all these facts it is quite evident that Female Foeticide has taken a disastrous shape in India. It is the distressing reality of Shining India that the mass depletion of the fairer sex is being carried on boldly without any hesitation, without any fear.

LAWS IN INDIA TO CHECK FEMALE FOETICIDE :

In India in order to stop the indiscriminate abortion of female fetuses several laws have been enacted. The essential provisions relating to the prevention of Female Foeticide are laid down in:

a) Indian Penal Code 1860

b) The Medical Termination of Pregnancy Act,1971

c) The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

a) Indian Penal Code 1860: Under the IPC adequate provisions have been made for the protection of mother and unborn child. Under Section 312[10], 313[11] and 314[12], the IPC provides to save the women from miscarriage.

8. www.hsph.harvard.edu/Organizations/healthnet/SAsia/forums/foeticide/articles/foeticide.html visited on
9. www.indianchild.com/abortion_infanticide_foeticide_india.htm visited on
10. Whoever voluntarily causes a women with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the women, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with the 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.
11. Whoever commits the offence defined in the last preceding section without the consent of the women whether the woman is quick with child, or not, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.
12. Whoever with intend to cause the miscarriage of a woman with child, does any act which causes the death of such woman shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine and the act is without the consent of the woman, shall be punished either with imprisonment for life, or with the punishment abovementioned. Explanation- It is not essential to this offence the offender should know that the act is likely to cause death.

Miscarriage means the expulsion of the child or foetus from the mother's womb at any period of pregnancy before the term of gestation is completed. Though the term "miscarriage" is not defined in the I.P.C in its popular sense, it is synonymous with abortion, and consists in the explosion of the embryo or foetus, i.e. the immature product of conception. The stage at which pregnancy has advanced and the form which the ovum or embryo may have assumed are immaterial.[13] Any act intended, not in good faith to cause miscarriage is punishable under IPC. The punishment for this offence is further enhanced if the woman is 'quick with child'. The term 'Quickening' refers to the peculiar sensations experienced by a woman about the fourth or fifth month of pregnancy. The symptoms are popularly ascribed to the first perception of the movement of the foetus.

According to Section **312** if any person causes a miscarriage of woman, he shall be punished with the imprisonment up to three years or fine or with both, and if the woman be quick with child, he shall be punished with imprisonment up to seven years and fine also. Under this section a woman who causes her miscarriage or gives consent to miscarry is also liable for punishment.

Section **313** provides the punishment for life or ten years and fine, who causes the miscarriages of a woman without her consent. In the case of Tulsi Devi v. State of U.P[14], the accused women kicked a pregnant woman in her abdomen resulting in miscarriage. She was held to be convicted under Section 313.

Section **314** further provides that if the act directed to cause miscarriage results in death of the pregnant woman, the offender is punishable with imprisonment of ten years as well as with fine.

However the IPC permits abortion[15] for saving the life of the pregnant women. Section 312 allows the termination of pregnancy in good faith for saving the life of the pregnant woman. The term good faith, however, is not a constant term but it is varied from case to case. The General Clauses Act 1897[16] defines good faith as, "A thing shall be deemed to be done in good faith where it is, in fact done honestly." IPC[17] defines good faith as "Nothing is said to be done or believed in good faith which is done or believed without due care and attention".

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13. A.N. Basu, Indian Penal Code (1998) at 1122-1123
14. 1996 Cri LJ 940 (All)
15. Expulsion of the ovum within first three months of pregnancy, before the placenta is formed.
16. Act 10 of 1897 Sec. 3(22)
17. Section 52 of At XLV of 1860

In addition to these, Section **315**[18] and **316**[19] provides for protection against injuries to the unborn child. Section **315** lays down that any person doing an act without good faith with the intention of preventing a child to be born or to cause it die after birth is punishable with imprisonment of ten tears or fine or both. Section **316** provides if a person causes the death of a quick unborn child by an act amounting to culpable homicide he shall be punishable with imprisonment for ten years as well as be fined.

Like the Indian law, protection to the unborn child has also been recognized and guaranteed in other countries too. Such as in the United States thirty-five states currently recognize the "unborn child" or fetus as a homicide victim. 25 of those states apply this principle throughout the period of pre-natal development[20] while 10 establish protection at some later stage, which varies from state to state. For example, the Supreme Court of California treats the killing of a fetus as homicide, but does not treat the killing of an embryo (prior to approximately eight weeks) as homicide[21]. The Unborn Victims of Violence Act enacted in 2004 recognizes the 'child in utero' as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." This 'child in utero' is recognized as a legal victim if he or she is injured or killed during the commission of any of 68 existing federal crimes of violence and offered legal remedy as per the state laws. However, the federal and state courts have consistently held that these laws do not apply to apply to legal induced abortions and do not contradict the U.S. Supreme Court's rulings on abortion.[22] But unlawful abortion however may be considered "foeticide", even if the pregnant woman consents to the abortion.[23] Similarly the English law also gives protection to the unborn child. It recognizes 'Child Destruction' as a crime. 'Child destruction' refers to the crime of killing a child "capable of being born alive", before it has "a separate existence"[24]. The Crimes Act 1958 defined "capable of being born alive" as 28 weeks' gestation, later reduced to 24 weeks.

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18. Whoever before the birth of any child does any act with the intention of thereby preventing the child from being born alive or causing it to die after its birth, and does by such act prevent the child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
19. Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
20. NRLC. State Homicide Laws That Recognize Unborn Victims (Fetal Homicide)
21. People v. Davis, 7 Cal.4th 797, 30 Cal.Rptr.2d 50, 872 P.2d 591 (Calif. 1994).
22. Constitutional Challenges to State Unborn Victims (Fetal Homicide) Laws
23. Women's Medical Professional Corporation v. Taft (6th Cir. 2003).
24. Knight, Bernard (1998). Lawyers guide to forensic medicine (2nd ed.). Routledge. pp. 70.

b) The Medical Termination Of Pregnancy Act, 1971: The MTP Act is another attempt to prevent high rate of female foeticide in India. This Act aims in preventing large number of unsafe abortions. The Act clearly states that an abortion can be termed legal only when: Termination is done by a medical practitioner approved by the Act, Termination is done at a place approved under the Act, Termination is done for conditions and within the gestation prescribed by the Act; Other requirements of the rules & regulations are complied with.

It permits termination of pregnancy only when Continuation of pregnancy constitutes risk to the life or grave injury to the physical or mental health of woman or there is a substantial risk of physical or mental abnormalities in the fetus as to render it seriously handicapped or if pregnancy caused by rape (presumed grave injury to mental health) or due to contraceptive failure in married couple (presumed grave injury to mental health).However termination of pregnancy is possible : Upto 20 weeks of gestation period only, With the consent of the woman. If the woman is below 18 years or is mentally ill, then with consent of a guardian, With the opinion of a registered medical practitioner, formed in good faith, under certain circumstances; With the opinion of two RMPs[25] required for termination of pregnancy between 12 and 20 weeks.

Also such abortion is to be conducted either at a hospital established or maintained by Government or at a place approved for the purpose of this Act by a District-level Committee constituted by the government with the CMHO as Chairperson.

Thus this Act on one hand positively aims to improve the maternal health scenario by upholding the validity of legally induced abortions and negatively, on the other hand, seeks to reduce illegal abortions. Also it is to be noted that such strict principles laid down by the Act for the regulation of abortion is a bold attempt by the Indian Legislature to check Female Foeticide. The Act seeks to put an end to the menace of illegal abortions carried out primarily for the elimination of female fetuses. See generally, Mikela case - decided by the Bombay Hight Court - cetation.

c) The Pre-Natal Diagnostic Techniques (Regulations and Prevention of Misuse) Act 1994: The PNDT Act is the outcome of the realization of the Parliament that a central piece of legislation had become mandatory for stopping the abuse of pre natal diagnostic techniques. When it was quite evident from the mushroom growth of clinics all over that the pre-natal diagnostic techniques were not restricted for the purpose of detection of genetic disorders or chromosomal abnormalities or congenital abnormalities or

25. A medical practitioner (RMP) is
- who has a recognized medical qualification as defined in clause (h) of section 2 of Indian Medical Council Act, 1956
- Whose name has been entered in a State Medical Register and
- Who has such experience or training in Gynecology and Obstetrics as prescribed by Rules made under the Act

sex-linked diseases only but was actually leading to female foeticide, for the first time in India, in 1986, a social action group in Mumbai namely the Forum Against Sex Determination and Sex Pre-selection (FASDSP), initiated a campaign. On its pressure the Maharashtra government enacted the Maharashtra Regulation of Pre-Natal Diagnostic Techniques Act 1988, which was the first anti sex determination drive in the country. This was followed by a similar Act being introduced in Punjab in May 1994.

However both these Acts were repealed by the enactment of a central legislation, i.e. the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994, which came into effect from 01.01.1996, banning sex determination tests all over the country. This Act was renamed in 2002 as the Pre- Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT Act) which came to effect from 14.02.2003.

The PCPNDT Act chiefly provides for: a) Prohibition of sex selection, before and after conception; b) Regulation of prenatal diagnostic techniques (e.g. aminocentesis and ultrasonography) for detection of genetic abnormalities, by restricting their use to registered institutions. The Act allows the use of these techniques only at a registered institutions. The Act allows the use of these techniques only at a registered place for a specified purpose and by a qualified person, registered for this purpose.; c) Prevention of misuse of such techniques for sex selection before or after conception.; d) Prohibition of advertisement of any technique for sex selection as well as sex determination.; e) Prohibition on sale of ultrasound machines to persons not registered under this Act.; f) Punishment for violations of the Act.

This Act requires that all diagnostic centres must be registered with the authorities. They are required to maintain detailed records of all pregnant women undergoing scans there. These records must include the referring doctor, medical and other details of the woman, reason for doing the scan, and signatures of the doctors. These records must be submitted to the authorities periodically. For implementing the Act, "appropriate authorities" are appointed at the state level and work with the director of health services, a member of a women's organization and an officer of the law. At the district level, the appropriate authority is the medical officer or civil surgeon. Advisory committees consisting of doctors, social workers and people with legal training assist appropriate authorities. Supervisory boards at the state and central levels look at the implementation of the Act. The appropriate authority may cancel the diagnostic centre's registration, make independent investigations, take complaints to court, and take appropriate legal action. It may demand documentation, search premises, and seal and seize material. Courts may respond only to complaints from the appropriate authority. Under the Act the following people can be charged-everyone running the diagnostic unit for sex selection, mediators who refer pregnant women to the test, and relatives of the pregnant woman. The pregnant woman is considered innocent under the Act, "unless proved guilty". So far as penalties under the Act are concerned, it consists of imprisonment for up to three years and a fine of up to Rs. 10,000. This is increased to five years and Rs. 100,000 for subsequent offences. Doctors charged with the offence will be reported to the State Medical Council, which can take the further necessary action including

suspension.

These are the three chief legislative measures initiated in India for combating the evil of Female Foeticide.

JUDICIAL RESPONSE TO FEMALE FOETICIDE IN INDIA:

The Indian Judiciary has from time to time come up with ingenious ways to provide protection to the fairer sex and this essentially includes the group of unborn girls too. The Supreme Court in the case of **"Centre for Enquiry into Health and Allied Themes (CEHAT) and others v. Union of India"**[26] which was filed under section 32 of the Constitution of India under PIL issued directions to Central Supervisory Board, all State Governments and Union Territories for proper and effective implementation of the PCPNDT Act- which mandates that sex selection by any person, by any means, before or after conception, is prohibited. Since 2001, the judiciary has been closely monitoring the implementation of its various orders passed regarding the ban on the use of ultrasound scanners for conducting such tests. Subsequently, it had sought status reports from all states and Union Territories. The Supreme Court also directed 9 companies to supply the information of the machines sold to various clinics in the last 5 years.. Addresses received from the manufacturers were also sent to concerned states and to launch prosecution against those bodies using ultrasound machines that had filed to get themselves registered under the Act. The court directed that the ultrasound machines/ scanners be sealed and seized if they were being used without registration. The Supreme Court also asked three associations' viz., The Indian Medical Association [IMA], Indian Radiologist Association [IRA], and the Federation of Obstetricians and Gynecologists Societies of India [FOGSI] to furnish details of members using these machines.[27] It is to be noted that since the Supreme Court had issued such directives, 99 cases were registered and in 232 cases ultrasound machines, other equipment and records were seized Today there is an estimated 25000 ultrasound machines in the country, of these 15000 have been registered, owing to the efforts of the Judiciary. The Supreme Court in the case of **Mr. Vijay Sharma and Mrs. Kirti Sharma vs. Union of India**[28] the Supreme Court has quoted that " foeticide of girl child is a sin; such tendency offends dignity of women. It undermines their importance. It violates woman's right to life. It violates Article 39(e) of the Constitution which states the principle of state policy that the health and strength of women is not to be abused. It ignores Article 51A (e) of the Constitution which states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. The architects of the MTPA, 1971, have not taken into consideration the fundamental rights of the foetus to be born. It is submitted that 'life' exists in the foetus while in the womb of the mother and in this context Article 21 of the constitution of India is applicable to unborn person as well."

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26. 2001 5 SCC 577
27. Pamela Philipose,"Women versus Girls", Indian Express, April 5,2006
28. AIR 2005 Bom 26

CURRENT SCENARIO OF THE EXTENT OF FEMALE FOETICIDE IN INDIA SUBSEQUENT TO THE LEGISLATIVE INITIATIVES AND JUDICIAL ATTEMPTS:

It is quite unfortunate that in India despite enactment of effective laws there has been a little change in the psychology and behavior in the people who still have a damn care attitude in causing the death of that most vulnerable being in India -- the female foetus. The PCPNDT Act has not been successful to curb out this menace completely but has somewhere or the other contributed to the mushroom growth of private clinics all over the country where people desperately visit for conducting sex selective abortions. Another shameful picture which has come out is that of the doctor community, more often labeled as Gods in our country, are seen to commit a blatant violation of law as well as medical ethics. The zeal with which Female Foeticide has been pursued in the last few decades is indeed a matter of grave concern. The 2001 census registered a decline in the child sex ratio in 80% of the districts in India. The juvenile sex ratio, which stood at 976 in 1961, fell to 927 in 2001, for the country as a whole. According to a popular survey, there are 2,379 registered scan centres in Tamil Nadu alone. In Chennai itself, 147 private nursing homes are allowed to carry out medical termination of pregnancy and sterilisation. What actually happens in our country is that laws remain as mere paper legislations only. For example, the PCPNDT Act mandates the seizure of all equipment/machines for non-registration. But what usually takes place in our country is release of machines after payment of a fine. Considering another situation, the Act also mandates that any person conducting ultrasonography or any other pre-natal diagnostic technique must maintain proper records. The Act requires the filling up of a written form, duly signed by the expectant mother, as to why she has sought diagnosis. But in reality there is hardly any forms filled by the patient, perhaps one in every thirty, in 80% of the clinics. Hence it can be said that mere legislation is not sufficient; it is high time that we need to change the typical biased attitude for the female child and adopt proper social, administrative and judicial steps to put an end to this gradually growing danger in our country.

MEASURES SUGGESTED TO COMPLEMENT LEGISLATION FOR ERADICATION OF THIS SOCIAL EVIL:

Some steps which are to be initiated in order to give a positive impetus to the curbing out of this social handicap are as follows:

- The empowerment of women and strengthening of women's rights through campaigning against practices such as dowry, and ensuring strict implementation of existing legislation.

- Ensuring the development of and access to good health care services, educational facilities and the like to women.

- Wide publicity of the scale and seriousness of the practice of Female Foeticide and related issues by the media.

- Simple methods of complaint registration, accessible to the poorest and most vulnerable women.

- Regular assessment of indicators of status of women in society, such

as sex ratio, and female mortality, literacy, and economic participation etc.

-Inculcating a strong ethical code of conduct among medical professionals, beginning with their training as undergraduates.

All such steps are expected to be carried out sincerely and effectively. It is only by a combination of monitoring, education campaigns, and effective legal implementation and by advocating of a scientific, rational, and humanist approach the deep-seated attitudes and practices against women can be eroded.

CONCLUSION:

It can thus be concluded that Female Foeticide is one of the gravest issues of the 21st century which needs to be addressed and tackled effectively by the human fraternity. Unless paid attention, Female Foeticide, if being carried on at the existing rate, is bound to bring forth several social problems in the near future. Owing to shortage of the female sex, there will be a sharp increase in the instances of rape, molestations and growth of homosexuality in the society. Polyandry will become the order of the day and we will surely have plenty of 'modern day Draupadis.' Prostitution might become a legally accepted profession. And in addition to all such social problems, there will be a biological disturbance affecting one and all. After all, it cannot be forgotten that just like a bird cannot fly on one wing, nature cannot survive on the shoulders of men folk alone. For the growth and development of mankind and the progress of humanity, men and women cannot be in conflict with one another; rather they are sought to be in coordination and cooperation with one another, for they are incomplete alone. Saving the girl child hence becomes absolutely important as in the long run man cannot strive alone. He definitely needs with him always his all time inspiration, 'the lovely woman.

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BOOK REVIEW

LAW & MEDICINE (2010), By Dr. Lily Srivastava. Universal Law Publishing Company, New Delhi. Price Rs. 295/-

The Bar Council of India in its revised curriculum for three-year and five-year law courses for implementation from the Academic Year 1998-1999 had included "Law and Medicine' as one of the optional papers. Thereafter many universities included 'Law and Medicine' as one of the papers for the LL.B. students. However, this being a new interdisciplinary subject quite distinct from traditional law papers wherein mostly statutes are taught like Indian Penal Code, Evidence Act, Civil Procedure Code, Criminal Procedure Code, Companies Act, Tax laws etc. it concerns with all laws which are applicable to medical professionals. Teachers entrusted with the task of teaching this subject, myself also one of them in the Banaras Hindu University were facing difficulties in teaching the subject because of lack of books on the subject and depended upon the materials available on the internet and in articles and case laws reported in journals.

The book under review may be said as late arrival on this subject as the new Rules of Legal Education - 2008 of the Bar Council of India has not included the paper 'Law and Medicine' in the courses prescribed for studies, rather 'Health Law' has been prescribed as one of the papers under Constitutional Law Group in Schedule II of the Rules of 2008. Hence, there is little scope of remaining 'Law and Medicine' as one of the papers in the courses prescribed for legal education by the universities. Nonetheless the value of book under review is not diminished because this book provides a lot of useful materials and guidance for legal and medical practitioners. Laws which are applicable to medical practitioners have grown in number and size. The progress in the field of medical sciences, genetic technology, diagnosis and treatment has opened new fields of duties and responsibilities of the persons involved in these fields because of a number of new national and international laws.

The book 'Law and Medicine' authored by Dr. Lily Srivastava includes thorough deliberations of almost every law which has an impact on the medical practitioners and hence the book may be used as a handbook by the legal and medical practitioners as well as by the teachers and students of the institutions where 'Law and Medicine' is included as a paper in its curriculum of studies. The author has rightly claimed in the preface of the book that the book may also be useful for the administrators who are responsible for planning and delivery of health care.

Though the chapters in the book are not numbered, there are thirty odd chapters in the book. The first chapter 'Introduction' deals with the meaning of medical profession, code of ethics for medical practitioners, Indian legislations which regulate the nature and conduct of medical profession and the duties of doctors in general, towards the patients and towards another doctor. A brief note on the Indian Medical Council Act, 1956 and the Mental Health Act, 1987 has also been included in this chapter. The author has also discussed some recent medical dilemmas relating to abortion, euthanasia, use of stem cells and designer babies by quoting factual illustrations. In the end of this chapter in a few lines the author has given in brief some of the important topics which have been included in this book such as concept of informed consent, human rights, negligence, right to privacy and confidentiality and medical health.

The next chapter is titled as 'Health - The Policy'. In this chapter the author has discussed the National Health Policy of 1983. Public expenditure on Health in India has been compared with some other important countries by giving a chart from which it is evident that in India public expenditure on health is the least i.e. 0.6 per cent of GDP whereas it is highest in Germany i.e. 8.3 per cent of the GDP. Various plans of the Central Government relating to health like National Rural Health Mission, National Common Minimum Programme, Rashtriya Swasthya Bima Yojana have been discussed. In the end of this chapter the author has discussed the emergency duty of doctors whether in a government hospital or a private nursing home quoting a number of decisions of the apex court and relevant rules framed by the Medical Council of India.

Third Chapter running only in two and half pages, deals with 'Health as a Fundamental Right'. In this chapter some of the High Courts and Supreme Court decisions have been given by which health has now been given the shape of Fundamental Right under Article 21 of the Constitution.

Fourth Chapter is titled as 'Public Health'. In this chapter the author has analysed the concept of Public Health and measures to be taken for maintenance of health care. Judicial directions relating to health care has also been discussed by quoting a few cases of the honorable Supreme Court.

In the Fifth Chapter entitled 'Health Care in India' the author has dealt with the present scenario of health care in India and has suggested some of the measures to improve it. A brief note on the Clinical Establishments (Registration and Regulation) Bill, 2007 has also been given in this chapter.

Sixth Chapter is devoted on 'Medical Negligence' which analyses the meaning and essentials of negligence, test for medical negligence and view of the Supreme Court on Medical Negligence.

Seventh Chapter deals with 'Professional Accountability' wherein the author has discussed the primary liability, vicarious liability, criminal liability and contractual liability of medical professionals. Moral obligations of medical professionals as laid down in Code of Medical Ethics, Doctor - Patient confidentiality and duty of doctors to disclose information relating to patient to third party have been dealt with in Eighth Chapter which is titled as Ethics.

Next Chapter is 'Informed Consent'. In this chapter the author after dealing with express and implied consents has analyzed the essentials of and case laws on informed consent. Mostly American case laws find place in this chapter as doctrine of informed consent is prevalent in the United States of America. Doctrine of 'Real Consent' which is applied in Britain and in India and the most important case of the Indian Supreme Court on this point ***Samira Kohli*** **vs.** ***Prabha Manchanda***[1] has not been noticed by the author in this book.

Further two chapters are named as 'unborn person' and 'abortion' respectively. In these chapters the author has dealt with the legal status of unborn child and right of abortion. References of the relevant provisions of Medical Termination of Pregnancy Act and Pre-Conception and Pre-Natal Diagnostics Technique (Prohibition of Sex Selection) Act have been made while dealing with these topics.

The next further two chapters deal with very important aspect of the modern technology i.e. Artificial Reproductive Techniques and Surrogacy. However, only six pages have been devoted to these important topics and hence the author could not have done full justice regarding the contents of these topics. Various legal and moral issues involved with respect to this modern technology have not been discussed. Provisions of the Human Fertilisation and Embryology Act, 1990 in England and the draft Assisted Reproductive Technology (Regulation) Bill, 2008 in India which try to resolve a number of issues relating to these technologies do not find mention in the book under review.

Further chapters in the book deal with Law in Relation to Population, HIV and AIDS, Brain Death and Transplantation of Organs, Clinical Trials,

1. AIR 2008 SC 1385.

DNA Tests in Criminal Investigation and Human Genome Project, Euthanasia, Law in relation to Premenstrual Syndrome, Law in relation to Transsexual (Eunuchs), Autopsy and Inquest, Bio-Medical Waste, Various forms of Medical Professions i.e. Allopathy, Homoeopathy, Ayurveda and further Naturopathy, Siddha, Reiki and Yoga. It is not possible in this review to comment on all these chapters, however, some of the important chapters need to be focused upon. For example, in the Chapter 'Clinical Trials' after dealing with the Clinical Trial Ethics, The Nuremberg Code (known as the First International Code of Ethics), The Declaration of Helsinke, the author has in detail dealt with the procedure adopted for clinical trial of new drugs and the mechanism for monitoring adverse effects of it. A number of American decisions have also been given in this chapters relating to clinical trials.

The chapter 'DNA Tests in Criminal Investigation and Human Genome Project' tests the possibility of DNA testing in the light of right to privacy, provisions in the Constitution and those in the Criminal Procedure Code. Provisions of the DNA Profiling Bill of 2007 have also been discussed in brief. The Human Genome Project part of this chapter deals with the utilities of genetic informations and genetic testing and the legal issues involved therein, patentability of human genetic materials and researches on stem cells.

The chapter 'Law in Relation to Transsexual' deals with the plights of the eunuchs in the Indian society, legality of their marriage and then the author has highlighted their rights and some of the recent cases which have given a ray of hope for Indian transsexuals.

Law applicable to Drug Industries and Pharmacists have been dealt with under chapters titled as 'Pharmaceutical Drugs and the Law', and 'Drug law in Relation to India'. Some of the Indian cases relating to manufacture and sale of drugs find place in a separate chapter titled as 'Indian Case Law'. A comparative study of laws relating to drugs in various countries has been made under chapter 'Prevailing System in Other Countries, Comparative Study of Foreign Law and Cases Decided by the Courts in Other Countries.' Next Chapter 'Product Liability' deals with the liability of producers of drugs and other medical products under the law of torts, contract law and the Consumer Protection Act. 1986. Provisions of Competition Act, 2002 , Trade Marks Act, 1999 as applicable to drug industries have also been discussed in brief in this chapter. Last chapter, 'The Product Patent Regime' after giving in brief the provisions of the Patent Act relevant to the pharmaceutical industry, evaluates the positive and negative implications of new Patent law on Indian pharmaceutical industries.

The value of the book is further enriched with the names of the books and articles given in bibliography, appending of the summary of recommendations of the 'Report of The Expert Committee on a Comprehensive Examination of Drug Regulatory Issues, Including the Problem

of Spurious Drugs' of the Ministry of Health and Family Welfare, Government of India of November, 2003, The Drugs and Cosmetics Act, 1940 , The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 and a subject index given in the last. The book may be termed as having pithy substance in laconic space.

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BOOK REVIEW

Dr. Y.S. Sharma, *Law of Contract II* (Ist edition 2010) University Book House Pvt. Ltd, Jaipur p.p.347.price 195.

With the growth of civilization peoples social and economic behavior has assumed a multidimensional character, it is therefore neither desirable nor feasible to contract all kind of people's activities through a uniform set of rules and principles. Most civilized societies therefore provide a legal mechanism to enforce different sets of rules and guiding principle for different kind of social behavior of man, hence there are several branches of law and law of contract is one of them.

This book is all about law of contract II. Contracts are made and performed in every moment of every day in every aspect of life, whether you are purchasing goods in a supermarket, taking bus or train journey, booking a tickets for the theatre or leasing a flat, to indemnify another, to remain guarantee, to act for another, to bail goods to another or even works for a firm or sale commodities, you are directly or indirectly knowingly or unknowingly involved with a contract. In our market economy ,business makes contracts to raise finance ,employ staff ,acquire premises and raw materials and trade their services or good and consumer make contracts to purchase those services or goods .The law of contract provides the ground rules to make it clear what is needed for a contract to exist and be enforceable and indeed what it means to be enforceable ,to resolve dispute about what the contract means and to prescribe the consequences if one party does not do what has contracted to do.

Contract II definitely a growing subject of law with the pace of liberalization, privatization, and globalization, the improvement of their subject is enormously increased. It comprises law of practical importance in the modern business world. Hence this study of contract II has been given a high priority in legal education .even though there is no dearth literature on this subject, however there steel seems to be a need for a work which unfolds in a easily Comprehensible manner .This book explains fundamental principle of the subject and presents a comprehensive, coordinated, cohesive and accurate exposition of its statutory provisions and case law in a lucid manner .besides

the presentation is easy to grasp since each complicated provisions has been explained with the help of illustration and analogies.

The language of this book is very simple and within the reach of the students in particular and the teachers in general. This book adequately covers the whole part of special contract including Indian sale of good act-1930 and Indian partnership act of 1932. It gives a pleasure reading to law relating to special contract .by providing easy and brief material to understand the subject .The author has given much emphasis on the old as well as the new case laws relating to special contract that helps a lot to the readers in understanding the provision in simple and easy way and makes them up to date about the various provisions of the subjects. Good effort has also been taken by the author to compile such a vast subject in a small book without leaving any important aspect of the subject with a view to maintaining the manageable size of the book .This book will provide immense utility to the law teachers law students and the legal practitioners in particular and the layman in general.

The above stated book under review, has discussed the subject neatly and thoroughly under three different parts each part deals with the subject very minutely .The first part of the work visualizes law relating to indemnity, guarantee, bailment and agency. The first part of this book which contains, indemnity guarantee, bailment and agency is remarkable for giving a separate chapter of pledge .The second part of this book deals with law relating to Sale of Goods with up to date case laws. The third part of this book deals with law relating to partnership in India followed with a comparative study of Indian law with its English counterparts whenever it is required.

Error is human but not the divine; barring a few typological errors the author deserves appreciation for the aforesaid work.

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