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A CONSTITUTIONALLY ENTRENCHED APPROACH TO CONFLICT MANAGEMENT: THE NIGERIAN EXPERIMENT

Olaolu S. Opadere*

ABSTRACT

For diverse reasons humanity has become rife with conflict, the resolution of which is often cost-enormous with incredible and virtually indelible scares in its trail. However, as long as there remains interaction, there must be conflict, which in itself is an essential component of a free society in which everyone has the right to compete for advantages. Realising therefore, that there is no monopoly of approach to managing conflict, this discourse is poised to explore the constitutionally entrenched Nigerian approach. This thesis proposes that nations are diverse and peculiar to the extent of their diversities; and in the same manner should be their search for means of conflict control and management. Hence this discourse is structured to consider conflict management; federal character principle-its historical perspective vis-a-vis quota system; legal and institutional bases for the principle; its successes and challenges, among others; and conclusion.

KEY WORDS: *Conflict Management; Federal Character; Nigeria; Experiment..*

I. INTRODUCTION

AS LONG as there is interaction between persons, organisations, communities, states and/or nations, conflict is bound to arise as a natural by-product of such interactions, of course, with varying degrees and dimensions. This is consequent upon divergence of views, opinions, perceptions, reactions,

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" Excerpt from author's Ph.D. thesis, successfully defended in December 2010, at the Obafemi Awolowo University, Ile-Ife, Nigeria.

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as well as other inexplicable salient factors or influences. Therefore, in order to avoid the cost of conflict, which is usually enormous, and the eventual search for means of resolution, the need for conflict management becomes absolutely pertinent. Conflict management ordinarily involves implementing strategies to limit the negative aspects of conflict and to increase its positive aspects at a level equal to or higher than where the conflict is taking place. In other words, conflict management is the principle that all conflicts cannot necessarily be resolved, but learning how to manage conflicts can decrease the odds of non-productive escalation. It is however common knowledge among conflict management scholars that there is no one best approach to lead and/or manage conflict; against which backdrop this study seeks to examine the peculiar Nigerian experiment on the management of conflict, which is a variant of affirmative action. Importantly, every affirmative action structure is more an attempt at conflict management than resolution. It is along this line that Nigeria fashioned her federal character principle, furthered by constitutional entrenchment, in anticipation of empowering it for optimisation. Therefore, this paper shall consider the concept of conflict management; the concept of federal character principle; its historical perspective vis-a-vis the previously existing quota system; federal character vis-a-vis conflict management; legal and institutional basis for federal character; its approach to conflict management via its first and second mandates; assessment of its successes and challenges; what prospect abounds for the experiment; among others.

II. CONFLICT AND CONFLICT MANAGEMENT

Conflict is perceived as an essential component of a free society, in which everyone has the right to compete for advantages. Particularly in a democracy, conflict produces new standards, new institutions, and new patterns of relationships. Conflict is also an integral element in the pursuit of justice.[1] Indisputably, conflict is a natural element of a free society and is sometimes required to bring about needed change. Conflict management is not intended as a means to suppress or avoid confrontation over legitimate differences of interest; rather, it seeks, among others, to increase the range of choices available, which may possibly meet the needs of all the parties concerned. As pointed out by Kozan, in some instances, subcultures may be as far removed from each other in terms of conflict management as are national cultures.[2] As a result, without knowledge of possible sub-cultural differences, there may not be a good grasp of national differences. The sub-cultural differences exist on a massive scale in Nigeria, which underscores the importance of this study as well as the invention of the federal character principle by the Nigerian nation

1. S.L. Carpenter and J.D. Kennedy, (1981) "Environmental Conflict Management: New Ways to Solve Problems". *Mountain Research and Development*, 1(1), pp. 65-70
2. Kozan K.M., (2002) Subcultures and Conflict Management Style. *MIR: Management International Review*, 42(1), pp. 90-93

in the management of its sub-cultural divergences. The Kozan study on Turkey examined the handling of the conflict by adversaries, while discussing the third party intervention and organisational structural methods of reducing conflicts. His study focuses on the peculiarity of the Turkish nation with regards to sub-cultural conflict, and its management style. This buttresses the fact that as much as it is important for nations to learn from one another's positive sides, certain issues are peculiar, and those dimensions require peculiar approaches in order to deal with them. The peculiar approach may however need to still borrow from the common generalised approaches; but without customising it to suit the national peculiarities, it may not yield the required positive results. Such is the case in Turkey, and particularly, Nigeria, which is the focus of this discourse.

It is established that there are two likely physiological responses to conflict: fight or flight. In other words, 'take on anyone who comes your way' or 'get away from the conflict'.[3] From these two parallels derive some key modes of dealing with conflict, viz: competing, avoiding, accommodating, compromising, and collaborating modes.[4] The competing mode describes high assertiveness, and low cooperation; while the avoiding mode represents an attitude of low assertiveness and low cooperation. This is a situation where people usually avoid conflicts out of fear of engaging in a conflict or because they do not have confidence in their conflict management skills. The accommodating mode represents low assertiveness and high cooperation. This is usually employed when the issue concerned or outcome is of low importance to the party employing it. The compromising mode is that of moderate assertiveness and moderate cooperation. This is sometimes perceived as 'giving up more than you want', or as 'both parties winning'; in other words, no winner, no vanquished. Lastly, the collaborating mode is high assertiveness and high cooperation. Collaboration has been described as 'putting an idea on top of an idea on top of an idea... in order to achieve the best solution to a conflict'.[5]

III. FEDERAL CHARACTER

Having observed earlier that the approaches to conflict management are not limited to a particular form or method, Nigeria, in the course of her national life evolved the concept of federal character as her peculiar approach to conflict management, resulting from her hyper-plural configuration. As a

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3. The Foundation Coalition, Understanding Conflict and Conflict Management, available at http://www.foundationcoalition.org/publications/brochures/conflict.pdf [Accessed 16 September 2011]

4. Ibid. See also Deutsch M. (1983) "Conflict resolution: Theory and practice". *Political Psychology*, 4(3), pp. 432-436

5. The Foundation Coalition, op.cit.

   See also Borg M.J. (1992) "Conflict Management in The Modern World-System", *Sociological Forum*, 7(2), p. 265.

fact, the type of conflict situation a nation is confronted with will determine the type of approach to adopt in its resolution. The civil war faced by Nigeria played a major role in informing the introduction of a medium of tackling conflict; consequently arriving at the federal character principle. Therefore, in considering the Nigerian experiment, it is important to observe that Nigeria has, overtly or covertly, once adopted the competing mode, which eventually let to the regrettable civil war of July 1967 to January 1970. Having survived the civil war, the present mode being experimented (federal character) could be qualified as an amalgam of accommodating, compromising and collaborating modes; which implicitly is also predicated on the doctrine of equity, as shall be considered shortly.

The need for the conflict management principle of federal character in Nigeria was first conceived in the wake of the 1914 amalgamation.[6] Thus, federal character principle, in theory and practice, represents an important element in the country's policies and politics.[7] In tracing the historical perspective of the principle, certain imperatives have been identified and encapsulated under three main heads: North-South problem; forms of Nigerian federalism; and ethnic diversities.[8]

North-South Problem

This is otherwise regarded as the historical imperative of federal character. The manner in which the political composition of Nigeria was initiated and grown into nationhood generated many battles, overtly and covertly. Under the colonial administration of Lord Frederick Lugard, the Southern and Northern provinces of Nigeria, which were the two main provinces, were amalgamated in 1914. Accordingly, the amalgamation had

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6. See D. Abubakar (1998) The Federal Character Principle, Consociationalism and Democratic Stability In Nigeria. In: K.Amuwo, R.Suberu, A.Agbaje and G.Herault eds. *Federalism and Political Restructuring in Nigeria*. Spectrum Books Limited, Ibadan. pp. 165-167; and Tekena N. Tamuno T.N. (1998) *Nigerian Federalism in Historical Perspective*, In: Amuwo K. et al., at pp. 14-16

   See also O.Ajayi, KJW. (2009) *Nigeria: Africa's Failed Asset*? Printserve Limited, Nigeria. pp. 1, 125-130, and R.A.Olaniyan and A.Alao (2003) *The Amalgamation, Colonial Politics and Nationalism*, 1914-1960. In: A.Richard, R.A.Olaniyan ed. *The Amalgamation and Its Enemies* (An Interpretive History of Modern Nigeria). Obafemi Awolowo University Press Limited, Ile-Ife. pp. 1-19

7. See S.A.Obiyan and S.T.Akindele, (2002) The Federal Character Principle and Gender Representation in Nigeria, "*Journal of Social Sciences*", India Delhi. pp. 241-246

8. P.P.Ekeh (1989) *The Structure And Meaning of Federal Character in The Nigerian Political System*. In: Ekeh P.P. and Osaghae E.E. eds., *Federal Character and Federalism in Nigeria*, Heinemann Educational Books Nigeria Limited. pp. 22-28

   See also I.A.Ayua and C.J.Dakas Federal republic of Nigeria, available at http://www.federalism.ch/files/categories/IntensivkursII/nigeriag1.pdf [Accessed 22 January 2009]

been a cause for questioning by many over the years.[9] The reasons are not far fetched. As at the time of the amalgamation of the North and South, the North was regarded as a non-self-conscious part of Nigeria.[10] However, it is also interesting to note that at that time, the North was together as one whole political entity. This was made possible by the pre-colonial centralized form of government that existed in the North,[11] like the Sokoto Caliphate being much instrumental under the massive influence of Islamic religion.

Owing to the fact that the North was largely built on the Islamic religion, a sizeable non-Islamic area situated in the modern states of Plateau, Benue and parts of Kwara constituted more of a 'pain in the neck' to the political North, in view of their divergent religion, and ethnic considerations. Nevertheless, the North, with its Hausa-Fulani caliphate dominance under the British, in its separation from the more 'disorderly' South, rapidly became a political entity largely in contradistinction to the Southern province of Nigeria. It is quite interesting to realize that the work which had begun by the British in building up the North as a separate political entity had actually been sustained by the political elites that emerged in its process of consolidation. It has also been realized that the effective challenge to this manifold attempt to consolidate the North as a single political entity set against the South did not, particularly, come from the South, but from within the North itself. For instance, the non-Moslem areas of Benue and Plateau have always been of general disinclination to the uniformitarian claims of a 'North' Nigeria, and where similarities in cultural patterns with areas of the South abound. This may otherwise be dubbed 'middle belt agitation'. Against this negation of a political North has been the rather exaggerated pro-one-North posture of the marginal Kwara Northerners, particularly in Ilorin, who have been the main beneficiaries of the privileges which accrue to the adherence of a one-North policy, especially in the areas of bureaucracy and public administration.

Another fundamental threat to the image of a separate and single North also came from the Hausa-Fulani caliphate authority. This opposition was made up of certain radical elements within the caliphate that question and seek to uproot the feudal foundations of the emirate system and to re-organize it by destroying its key elements. These radicals were constituted in two political parties that existed in succession. First was the Northern Elements Progressive Union (NEPU) which operated in the First Republic before 1966. The People's Redemption Party (PRP) succeeded it in the Second Republic of 1979-1984. These were revolutionary political parties which sought to uproot

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9. Tamuno, op.cit., p. 14, where he quoted elaborately the words of late Atanda Fatayi-Williams, CJN, during an international conference in May 1976. The late Chief Justice of Nigeria spoke very pungently and vehemently against the 1914 amalgamation and the concept of federalism adopted in 1954: referring to it in terms of 'scrambled eggs'.

10. Ekeh P.P., op.cit.

11. Particularly as exemplified in the Sokoto Caliphate and Borno.

two centuries of feudal authority by attacking its legal and law-based authority.

On the other hand, the South, that has indirectly motivated the North-by perceived threat of educational advantage-to evolving into a political entity, does not, on its part, exist as a self-conscious political entity. There was no political South Nigeria in the same sense that the North Nigeria existed. The North and South Nigeria share divergent attributes, to the end that during the colonial period, it was much easier for the South to be influenced directly by British colonization particularly in the areas of education and religion, from which much of the North was shielded.[12] Consequently, this influence left on the South a degree of Westernization.

In another respect, Southern Nigerian elites cling to ethnicity as a primary principle of association and consensus. Whereas, Northern Nigeria has the nearest thing to what qualifies to be called a political elite in black Africa in the sense of a body of elites who share common political commitments differentiated from purely primordial sentiments[13]. It was, and still is, obvious that Southern Nigerian elites are scattered in their allegiance to various ethnic groups, with the most outstanding and most notorious being the two largest groups: Yoruba and Igbo.[14] Furthermore, given the greater intensity of colonization and Western education in the South, there is more of an appearance of democratization development in the South than in the North.

The foregoing is not to imply that there are no ethnic forces at work in the North, or that there are no evident state political forces in the South. But on the whole, it is intended to reveal that it is these differences and the attempts to manipulate them by elites on both sides from time to time that constitute the North-South problem which has dogged the Nigerian nation since about 1950 up to the present time. As well, the North-South problem is, by far, the oldest imperative and foundation of the doctrine of federal character which eventually manifested for the first time ever, in the 1979 Constitution[15]. And as the years advanced in Nigeria's political history, it became very clear that the long despised (by the South) political organization and consolidation of the North far outweighs the primordial divisions in the South; thus resulting in the reordering of the balance in the overwhelming favour of the North. It must also be noted that other imperatives in the making of the concept of

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12. However, as a matter of fact/history, Christianity had actually come to the North before the arrival of Islam; which ended up being more embraced and/or accepted by the Northerners, than Christianity which was first in time.

    See Ajayi O. KJW, op. cit., pp. 18-20

13. Ekeh P.P., op. cit., p. 24

14. It must be noted, however, that at present, ethnic and state cleavages are becoming more pronounced in the North, with the emergence of a new democratic regime in 1999. As a result of this, it has been virtually impossible for a non-indigene of a Northern State to seek election into a political office in another state.

15. Constitution of the Federal Republic of Nigeria, 1979 (CFRN), S. 14(3)&(4) (Federal Ministry of Information, Printing Division, Lagos)

federal character are always argued with reference to the North-South problem.[16]

Nigerian Federalism

Federalism as a system of government in Nigeria is often regarded as the political imperative of federal character. This imperative rests on the history and type of federalism that has evolved in Nigeria.[17] Federalism in Nigeria could be said to have evolved from three conglomerate Regions whose leaders were determined to carve out the region they controlled . As aforementioned, the amalgamation that took place in 1914 consisted of just two provinces: the North and South. This was followed by devolution of the Union into three administrative regions in 1939. The South was broken into two Regions of East and West, while the North remained intact, but with the apparent understanding that the North was co-equal with the East and West.[18]

In 1954, the Nigerian Union acquired a federal format, de-emphasizing the relevance of the provinces, while giving prominence to the regions. The mid-Western region was created in 1964 from the Western region, in a political crisis; thus making up four regions. The first military era, 1966 to 1st October 1979, created, first, twelve;[19] and later, nineteen states from the already existing regions.[20] These devolution exercises resulted in a total of ten Northern States and nine Southern States.[21]

It is also noteworthy that Nigerian federalism has been built up by a

16. See J.A.Yakubu (2003) *Constitutional Law in Nigeria*. Demyaxs Law Books. pp. 428-429;

O. Aguda (2000) *Understanding the Nigerian Constitution of 1999*. MIJ Professional Publishers Ltd., Lagos. pp. 41-45; Eteng I.A. (1996) *Minority Rights under Nigeria's Federal Structure*. In: Friedrich Ebert Foundation, Lagos, *Constitution and Federalism* (Proceedings of the Conference on constitutions and Federalism, held at the University of Lagos, Nigeria 23-25 April 1996). pp. 119-127; and N.O.Yaqub (1996) *State Creation and the Federal Principle*. In: Friedrich Ebert, Ibid. pp. 187-196

17. The North was headed by Sir Ahmadu Bello; the South-East by Dr. Nnamdi Azikiwe; while the South-West by Chief Obafemi Awolowo. (All deceased)

18. Ekeh P.P. (1997) A Case for Dialogue on Nigerian Federalism, A keynote address to the Wilberforce conference on Nigerian federalism, available at http://www.citizensfornigeria.com/index.php?option=com_content&task=view&id=35&Itemid=34 [Accessed 28 March 2007]

See also Nigerian Federalism and Intragovernmental Relations, available http://www.photius.com/countries/nigeria/government/nigeria_government_federalism_and_intra-10025.html [Accessed 12 May 2008]

19. It is important to note that the creation of the first twelve States took place in a period of crisis, that is, shortly before the outbreak of the civil war.

20. Akinyele R.T. (1996) State Creation in Nigeria: The Willink Report in Retrospect. African Studies Review, 39(2), pp. 71-94

21. Ibid.. See also Ekwuruke H., State Creation and Resource Control Politics in Nigeria, African News , available at http://www.africafront.com/news/136/state_creation_and_resource_control_politics_in_nigeria.html [Accessed 12 May 2008]

process of devolution, with new states carved out of existing regions, not by a process of accretion with new units joining existing nuclei as has been the case in the U.S., Australia, Canada and even India. Sadly, an insidious consequence of the Nigerian form of federation is that the association comes to be evaluated in terms of how much the component units gain from the federalism without the reciprocal consideration of how much they put into it. The effect of this portion of the Nigerian history of federalism is that emphasis has been on how much federal wealth the regions or states can acquire, not how much they can generate. Consequently, this state of affairs impinged the construction of the concept of federal character, which is primarily conceived as the distribution of national wealth and privileges, irrespective of contributions.

Although latent, but a very important factor is that, despite the creation of the then nineteen states[22] from what used to be four Regions and later twelve States, the core of each of the old regions remains more or less intact, and active. The Northern states still rally together, while the Yoruba states also associate together in diverse ways; so also the Eastern (Ibo) states hang out together. The relevance of this pattern of association is that the distribution of the privileges and benefits, on which federal character rests, has come to be reckoned not simply in terms of single states, but first in terms of blocks of states.[23] In fact, one of the many hurdles that Nigeria had to overcome in the attempt to return to civilian rule, and then to have such a new system entrenched, was the fact that competitive politics encouraged recourse to sectional identities.[24] This syndication may be qualified as 'plural stratification'; in other words, it goes beyond ethnicity or religious inclination.

Ethnic Diversities

Ethnic diversities in Nigeria is regarded as the sociological imperative of federal character. Taking a cursory look at the jurisprudence of ethnicity, there are basically four broad and apt expressions of the concept, viz: primordial phenomenon; epiphenomenon; situational phenomenon; and subjective phenomenon.[25]

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22. Which presently stands at 36 states and Abuja, the federal capital territory (FCT).

23. This has further been divided into six geo-political zones.

    See Federal Ministry of Women Affairs, (2004) Nigeria's report on the implementation of the Beijing platform for action and commonwealth plan of action. p. 2, available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/911b9951-f8d0-41c5-8b26-0e717c6cd34b_nigeria.pdf [Accessed 12 May 2008]. See also Federal Character Commission (Establishment, Etc.) Act Subsidiary Legislation, Guiding Principles and Formulae for the Distribution of all Cadres of Posts [S. I. 23 of 1997], Part 1, Paragraph 8, for an enumeration of the six geopolitical zones, and the states comprising each.

24. R.A.Joseph (1991) *Democracy and Prebendal Politics in Nigeria*. Spectrum Books Limited, Ibadan. pp. 43-51

25. Isajiw W.W. (1992) Definition and Dimensions of Ethnicity: A Theoretical Framework in Statistics Canada and U.S. Bureau of Census (eds.) Washington, D. C.: U.S. Government Printing Office. pp. 407-427, available at http://tspace.library.utoronto.ca/bitstream/1807/68/2/Def_DimofEtnicity.pdf [Accessed 17 September 2009]

The primordialist approach is considered the oldest in sociological and anthropological literature. Its argument is that ethnicity is something given, ascribed at birth, deriving from the kin-and-clan-structure of human society. Hence, it is something more or less fixed and permanent. The other three definitions/approaches emerged in confutation of the primordialist approach. The epiphenomenon approach to ethnicity seeks to divide the economic structure of the society into two sectors: centre and periphery. It describes the periphery as consisting of marginal jobs where products are not unimportant to society, as for example, agricultural works, but which offer little in the form of compensation as compared to the jobs in the centre. It is on this peripheral labour sector that immigrants concentrate, develop their own solidarity and maintain their culture.[26] By the epiphenomenal approach, ethnicity is something created and maintained by an uneven economy, or a product of economic exploration.

The situational approach is based on what is termed the rational choice theory. This approach views ethnicity as something which may be relevant in some situations but not in others. As a result, individuals may choose to be regarded as members of an ethnic group, if they find it to their advantage. Thus, it is described as a rational choice option of an individual in any circumstance. It is also classified as the political advantage of ethnic membership choice.[27] Ethnicity therefore becomes a group option in which resources are mobilized for the purpose of pressuring the political system to allocate public goods for the benefit of the members of a self-differentiating collectivity. This approach was more popular in the mid-seventies to mid-eighties period; and perhaps, re-introducing itself at present.

The subjective approach is perhaps the most interesting, in that it sees ethnicity as basically a social-psychological reality or a matter of perception of 'us' and 'them' in contradistinction to looking at it as something given, which exists objectively. By this approach, culture is jettisoned from the concept of ethnicity. Thus, ethnic boundaries are described as psychological boundaries, as a result of which ethnic culture and its content are irrelevant. Consequently, ethnic group is a result of group relations in which the boundaries are established through mutual perceptions and not by means of any objectively distinct culture.

However, the meaning of the concept of ethnicity depends on the meaning of several other concepts, particularly, those of ethnic group and ethnic identity. The concept of ethnic group is the most basic, from which the others are derivative; and by which it refers to ethnicity as the collective

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26. Ibid. See also Isajiw W.W., Approaches to Ethnicity. The Encyclopedia of Canada's peoples/definitions and dimensions of ethnicity, available at http://www.multiculturalcanada.ca/Encyclopedia/A-Z/d2/1 [accessed 17 September 2009]

27. Isajiw, ibid. See also APA ONLINE, Guidelines on Multicultural Education, Training, Research, Practice, and Organizational Change for Psychologists (definition of ethnicity), available at http://www.apa.org/pi/multiculturalguidelines/definitions.html [accessed 17 September 2009]

phenomenon. Ethnic identity refers to ethnicity as an individually experienced phenomenon. Ethnicity itself is an abstract concept which includes an implicit reference to both collective and individual aspects of the phenomenon. Consequently, the concept of ethnic group refers to a community-type group of people who share the same culture or to descendants of such people who may not share this culture but who identify themselves with this ancestral group. For the purpose of this discourse, therefore, and particularly in the Nigerian context, a merger of this last view of ethnicity as expressed by Isajiw, and the primordialist approach earlier considered, are most applicable. This is because, in Nigeria, ethnicity is mostly ascribed at birth, thereby deriving from the kin-and-clan-structure.

It is well recognized by now, that Nigeria contains within her borders about three hundred and seventy four (374) identifiable ethnic groups, most of them with clearly distinctive languages;[28] but the Igbos, Hausas, and Yorubas are the dominant groups. Although, there are other factors such as religion, race and others that have impinged the Nigerian politics, it is ethnicity that has counted for the most in terms of the individual's identity in a variety of settings. It has been experienced a lot of times that the fame and appeal of a politician are determined by his ethnic base. Likewise, agreement or disagreement between ethnic groups in the country has led to inter-ethnic consensus, or else, to violent inter-ethnic confrontations in Nigeria. Such confrontations have, unfortunately, dominated Nigeria's political history.[29]

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28. National Population Commission [Nigeria] (2000) Nigeria Demographic and Health Survey 1999, Calverton, Maryland: National Population Commission and ORC/ Macro. p. 1

    See also A.R.Mustapha (2003) Ethnic Minority Groups in Nigeria: Current Situation and Major Problems. Commission on Human Rights, Sub-commission on promotion and protection of human rights working group on minorities, ninth session, May 12-16, available at http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/8711d70208916cc6c1256d250047da37/$FILE/G0314157.pdf [Accessed 21 July 2010]; Otite, O., Nigeria's identifiable ethnic groups, available at http://www.onlinenigeria.com/tribes/tribes.asp [Accessed 21 July 2010]; and Tribes in Nigeria , available at http://www.onlinenigeria.com/tribes/index.asp [Accessed 21 July 2010]- where about 371 tribes were identified and further establishing that some of the tribes are present in more than one state.

29. See Ogunde O. (2002) National Question in Nigeria: Ethnic Cleansing or Socialist Revolution. In: Defence of Marxism, available at http://www.marxist.com/nigeria-ethnic-conflict2002.htm [Accessed 21 July 2010], in which the author chronicled recent episodes of 'inter-ethnic warfare in Nigeria'.

    See also Nigeria: ethnic/religious crisis (2004) IFRC Information Bulletin No. 1, 17 May. , available at http://www.reliefweb.int/rw/fullMaps_Af.nsf/luFullMap/1530635BFD7D644685256E9A006D8F85/$File/rw_nga200504v2.pdf?OpenElement [Accessed 21 July 2010] for a graphic illustration of the various ethnic/religious crisis in Nigeria, particularly in the Northern States.

Attempts to deprive certain ethnic groups of any share of government patronage were not uncommon in Nigeria's past history or even at present. It is evident that the picture of these past problems clearly registered in the minds of the members of the C.D.C., and also influenced their thinking in the formulation of the federal character principle.[30] It has been noted that ethnicity has greater salience in politics in the South than in the North[31]. The two Southern majority ethnic groups, that is, the Igbo and Yoruba, have at various times, acted as independent political units, without regard for the existence of other ethnic groups, in furtherance of their political objectives.[32] However, within each of these Southern majority ethnic groups, sub-ethnic divisions have caused major disruptions in politics. The majority ethnic groups themselves are torn apart in inter-ethnic strife, especially between neighbouring ethnic groups.

Although ethnicity obtains also in the North, it does not command the same magnitude as it does in the South. This is attributable to the centralized caliphate/emirate system of government that has been in the North since the pre-colonial era, as well as the strong influence of Islam. Noted that the Hausa-Fulani majority in the North had some ethnic difficulties with the minorities such as the Tiv, the Kanuri and Nupe, it was not in the style of the inter-ethnic strife in the South.[33] Rather, it was that of confrontation between the emirate organization and dissenting groups. As such, it may be said that the principle of political organization in the North was not that of ethnicity, as it was in the South; more so with the unifying influence of Islam, except for the middle-belt agitation.

Due to historical contingencies, public utilities and social benefits such as access to political power, employment, education, primary social goods, etc., are unevenly distributed between the component ethnic groups and peoples. It

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30. See O.Obasanjo (1989) *Constitution for National Integration and Development*, Friends Foundation Publishers Ltd., Lagos. pp. 114-115

31. Ekeh P. P. op. cit., p. 28. It was observed that in present day Nigeria, this is also becoming the situation in the North.

32. See Mustapha A. R. Ethnic minority groups in Nigeria, op.cit.

33. Although, this seem to have changed in recent times to such as is obtainable in the south, as evidenced by the Tiv versus Jukun inter-ethnic clashes; and the protracted crisis in Plateau State, between the Indigenous people and the Hausa/ Fulani settlers.

    See Asuni J. B. (1999) Nigeria: The Tiv-Jukun conflict in Wukari, Taraba state , available at

    http://www.conflict-prevention.net/page.php?id=40&formid=73&action=show&surveyid=55# ; and

    Osagbae E. E. And Suberu R. T. (2005) A History of Identities, Violence, and Stability In Nigeria. CRISE Working Paper No. 6 , available at http://www.crise.ox.ac.uk/pubs/workingpaper6.pdf [Accessed 26 January 2009]

is essentially for this reason that the federal character principle was adopted as a proposed remedy,[34] seeing that Nigeria is a pluralistic and/or conglomerate society[35] which makes it prone to easy conflict, in the absence of proper management. The colonial Commissioner for Northern Nigeria in 1900, Frederick Lugard, had been faced with the emirates' opposition to alien rule, which although was subsequently conquered between 1900-1903. However, the Emirs could not be pacified until Lugard undertook to preserve the Moslem culture and heritage of the Emirates. Therefore, when Nigeria was amalgamated, Lugard initiated a policy of separate development aimed at the 'organic' growth of the two groups of provinces (North and South), each at its own pace.[36] From that moment on, various shapes and dimensions of threat, fear and distrust loomed on Nigeria vis-à-vis the inter-relationship and co-existence of the various parts, groups and religious sects constituting the Nigerian nation. The fear of the Northern part was as a result of their abysmally low literacy level in Western education,[37] occasioned partly by their Islamic religion and partly by the deliberate effort of the British colonialists. The South, on the other hand, feared the Northern domination by virtue of its being rated larger in size and human population than the South (West and East), put together. There was also the fear of domination on the part of the various minority groups in the middle belt region (comprising the present Plateau, Benue, Nassarawa, Kwara, Niger, Taraba, Kogi states), the Niger Delta, the Mid-Western States, etc. Based on the multiple dialectical dilemmas

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34. Other works that have proffered basis and justification for the introduction of the federal character principle include: Sogolo G. (1989) Justice, equity and the logic of reverse discrimination in Nigerian politics. In: Ekeh & Osaghae, op.cit. p. 277-in which Sogolo copiously relied on John Rawls' theory of man's inalienable rights to primary goods, those things men generally want in order to achieve their ends, whatever they are. This is what federal character seeks to accomplish by effectively managing conflict;

    J.Rawls (1971) *A Theory of Justice*, Cambridge, Mass., Harvard University Press. p. 328; Young C. (1976) The Politics of Cultural Pluralism, University of Wisconsin Press. p. 11; Lijphart A. (1977) Democracy in Plural Societies, A Comparative Exploration, New Haven and London Yale University Press. p. 161- where in his effort to proffer solutions to the democratic failure in Nigeria between 1957-1966, Lijphart expressed that the degeneration of Nigeria's democracy into military rule, the Biafran secession, and civil war, was practically because of its plural ethnic configuration, and failure of its 'consociational democracy'; etc.

35. A.W. Fawole (2006) *Authoritarian mindset, politics and democratic rule in Nigeria*. In: O.Abegunrin and O.Akomolafe eds. (2006) Nigeria in Global Politics, Nova Science Publishers, Inc., New York. p. 20

36. U.Okpu (1989) *Ethnic Minorities and Federal Character*. In: Ekeh & Osaghae, op.cit., p. 350, therein referring to the Statutory Rules and Orders, No. 1446-the Nigerian (Legislative Council) Order in Council 1922

37. This underscores the fact that Northerners were though largely illiterate in Western education, but quite literate in Arabic education, according to the dictates of the Islamic religion.

of Nigeria, it was realized that the most important requirement of a federal instrumentality is the balancing of interests. The uneven development of the Northern and Southern parts which characterized the federal society from inception further reinforced the necessity for accommodating the diversities in the polity through structural and political balancing.[38] The subsisting plurality and the imbalance in the nation at various times led to many outbursts from notable leaders of the respective groups, out of fear of domination by the other. For instance, Obafemi Awolowo once stated that:

"… It was clear from these statements and from the general political and journalistic manoeuvres of Dr. Azikiwe over the years that his great objective was to set himself up as a dictator over Nigeria and to make the Ibo nation the master race."[39]

Such prevalent distrust and apprehension of domination was what eventually culminated in the 15 January 1966, and July 1966 bloody military coups; and eventually the July 1967 memorable thirty-month old civil war.[40] Despite the various efforts made to avert the undesirable and detestable civil war, such as the Aburi accord,[41] nothing could be done to avert the doom because of the claim of distrust and apprehension that had accumulated unchecked over time. Unfortunately, the level of distrust, apprehension, hatred and all the abhorred negative feelings nursed by the various regions and groups, directly or indirectly involved, that broke down into the civil war cannot be sufficiently narrated.[42] These, from another perspective, may be regarded as the cumulative background to the development of the federal character principle.

IV. QUOTA SYSTEM VIS-À-VIS FEDERAL CHARACTER PRINCIPLE

It is also on record[43] that federal character, with regards to the Nigerian armed forces, very much predates the 1979 Constitution, in which the concept was first constitutionally unveiled. The army's experience with ethnic quotas dates back to 1958, under the old three-region political system then operated by Nigeria. It is important to observe that the historical perspective of the federal character principle impinges virtually every aspect of Nigeria's national

38. E.Osaghae (1989) *Federal Character: Past, Present and Future*. In: Ekeh & Osaghae, op. cit., p. 443

39. O.Awolowo (1960) Awo, Cambridge University Press. p. 172

40. Young, op. cit., p. 473

41. Aburi Tape Transcript: What They Said, How They Said it (2007) *The Nation*, 23 and 24 July, pp. 45 & 9, respectively

42. See Obumselu B. (1990) Massacre of Ndiigbo in 1966, Tollbrook Ltd. Ikeja, Lagos. pp. 271-275

43. B.J.Adekanye (1989) *The quota recruitment policy: its sources and impact on the Nigeria military*. In: Ekeh & Osaghae op. cit., p. 232, See also Madunagu E. (2001) General Yakubu Gowon , available at http://soc.culture.nigeria [accessed August 2007].

existence. Actually, prior the advent of federal character, there had been the quota system, which sought to implement a near-intendment of what transmuted into federal character. However, that was without constitutional backing, but it was, presumably, mutually embraced by virtually all the regions and groupings. For want of space, however, much shall not be said on the quota system in this discourse, beyond a cursory comparison and contrast of the two concepts.

Comparison

i) It is evident that both the quota system and its successor, federal character, apply to legislative appointments, federal educational institutions, federal executive cabinet, the military, police, etc.

ii) Both the quota system and federal character have a substantially similar aim; which is to forestall domination of one ethnic or tribal section of the Nigerian society on the other, particularly, as it concerns opportunities at the federal level of the Nigerian state.

iii) Neither the quota system nor the federal character principle is bound by any time frame/tenure, within which to operate and lapse.

iv) The two are political devices adopted by the people of Nigeria to protect and advance the interests of their various ethnic groups and diversities, and to forestall conflict.

Contrast

i) Unlike quota system, the federal character principle has both constitutional and statutory basis, predicating its subsistence. By virtue of the FCC Act, the function in respect of which the Commission was established automatically transcends mere fundamental objectives and Directive Principles of State Policy, as contained in Chapter II of the Constitution.[44] Although the primary provision on which the federal character principle hinges[45] is located under the said Chapter II, by virtue of the enabling Act of the Commission however, the Commission could sue and/or be sued in respect of its functions therein contained, among other things.[46] As a result, the fundamental objects are brought within the realm where, technically, they could be enforced. It is not the same with quota system, rather, it is an improvement on the quota system.

ii) There is a broadening of the scope, beyond that which was covered by quota system, in the federal character principle. The principle beyond quota system which is only applicable at the federal level, covers both its application at the federal level, and then goes further in its application to the

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44. CFRN 1999, op.cit.
45. Ibid., S. 14(3) and (4)
46. FCC Act, op.cit., S. 1(2)(a) and (b)

states,[47] local governments,[48] public companies or corporations, both in the public and/or private sectors.[49]

iii) Pursuant to the constitutional backbone provided for the federal character principle, unlike quota system, there is also an enabling statute[50] particularly for the implementation of the principle.

iv) By virtue of the enabling statute, a Commission was also created and saddled with the responsibility of promoting, monitoring and enforcing compliance with the principles of the proportional sharing of all bureaucratic, economic, media and political posts at all levels of government.[51] This was not the case with the implementation of the quota system.

v) Quota system was only concerned with the allotment of position, at the federal level of its application; whereas, federal character principle has the objectives of quota system as being just part of its "terms of reference" regarded as the first mandate. Federal character principle entails what is regarded as the second mandate.[52] This entails advising the federal, state and local governments to intervene and influence providers of services, goods and socio-economic amenities; to extend such services, goods and socio-economic amenities to deprived areas of the country. The socio-economic services, amenities and facilities mentioned here include those in the sectors of education, electricity, health, commerce and industry, telecommunications, transport and youth development.[53] These are beyond the contemplation of quota system.

vi) To further reinforce the fact that federal character, unlike quota system, is of concern to federal, states and local governments, it is statutorily required that each state of the federation, in addition to the FCC headquarters which is to be located at the Federal Capital Territory Abuja, has an office within its capital.[54]

In the Nigerian context, federal character principle is viewed implicitly as an equitable relief or remedy, quintessential to bonding together a hyper-plural nation like Nigeria. Equity, in relation to the federal character principle, depicts the intrinsic aspect of the Nigerian nation which seeks to attain fairness, do justice and treat all her citizens equally,[55] in order to enable it properly manage any form of conflict that may erupt.

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47. See CFRN 1999, op.cit., SS. 192(2), 197(3), 208(4), etc.
48. Ibid., Third Schedule Part C, Paragraph 8(1)(b)
49. Id., Paragraphs. 8(3) and 9
50. The FCC Act, op.cit.
51. Id., the introductory note
52. Id., SS. 4(1)(f), (g)(ii), and 4(2)(b)
53. Ibid.
54. Id., S. 1(2)(c)and (d)
55. See Utume D. A. (1998) Federal Character as an Equity Principle. In: Amuwo et al., op.cit., pp. 201-202

V. MODUS OPERANDI OF FEDERAL CHARACTER

By the constitutional conference of 1994/1995, recommendation was made for the establishment of the Federal Character Commission, as an institution to oversee the implementation of the federal character principle. This culminated in Decree No. 34 of 1996, Federal Character Commission (Establishment, Etc) Decree.[56] Consequently, the commission is a body corporate with perpetual succession which may sue and/or be sued in its corporate name. The headquarters of the Commission is in Abuja, the Federal Capital Territory (FCT) of Nigeria, while an office is also established in each state of the federation. There is also provision for a representative from each state, who serves both as member of the Commission (representing his/her state) at the FCT, and who also doubles as coordinator of his/her state's office.

Pursuant to the constitutional substratum provided for the federal character principle in S. 14(3) and (4) and S. 158(1)[57], which provides for its independence, as well as the elaborate provisions of the Act, the mandate of the Commission has been classified into two major sub-heads.

First Mandate

The first mandate is to ensure that each state of the federation and the FCT are equitably represented in all national institutions and in the public enterprises and organizations. It is also required that the best and most competent persons shall be recruited from each State of the Federation to fill positions reserved for the indigenes of that State or the Federal Capital Territory.[58] In considering candidates to fill up a vacancy, once a candidate has attained the necessary minimum requirement for appointment to a position, he shall qualify to fill a relevant vacancy reserved for indigenes of his State or the Federal Capital Territory.[59] However, in the event that the number of positions available cannot go round the States of the Federation and the Federal Capital Territory, the distribution shall be on zonal basis. But in the case where two positions are available, the positions shall be shared between the Northern and the Southern zones.[60] In a case where the indigenes of a State or the Federal Capital Territory are not able to take up all the vacancies meant for them, the indigenes of any other State(s) or the Federal Capital Territory within the same zone shall be given preference in filling such vacancies. Provided that where the zone to which the preference is given fails to take up such vacancy, the indigenes from any other zone shall be considered for the appointment.[61] It is further required under the guiding

56. Which is now Federal Character Commission (FCC) (Establishment ,etc.) Act, Cap F7, Laws of the Federation of Nigeria (LFN) 2004

57. CFRN 1999.

58. FCC Act, Subsidiary Legislation: Guiding Principles and Formulae for the Distribution of all Cadres of Posts [S. I. 23 of 1997] of 2nd October 1997, Par. 2

59. Id., Par. 3

60. Id., Par. 4

61. Id., Par. 5

principles and formulae that each State shall produce 2.75% of the total work force in any federal establishment while the Federal Capital Territory shall produce 1% for the indigenes of the Federal Capital Territory. Provided that the Commission may adopt a range so that the indigenes of any State of the Federation shall not constitute less than the lower limit or more than the upper limit of the range.[62] In any case of distribution on zonal basis, however, the Commission shall adopt another range, such that the indigenes of a particular zone shall not constitute less than the lower limit or more than the upper limit of the range set out in paragraph 12(b).[63]

For the application of the principles to career posts at the national level, it is required that the indigenes of a State of the Federation shall constitute not less than 2 per cent (%) and not more than 3% of all officers, including junior staff at the head offices of any national institution, public enterprise or organization. In the case of branches or local offices, however, not less than 75% of these categories of staff shall be indigenes of the catchment area.[64] In the event that the number of vacancies is not sufficient to go round the 35 States of the Federation and the Federal Capital Territory, the vacancies shall be shared among the zones such that the indigenes of a particular zone shall not constitute less than 15% or more than 18%.[65] For career posts within a zone, the indigenes of a particular State shall not constitute less than 12% or more than 15% in the case of North Central and North West; not less than 15% or more than 18% in the case of North East, South-South and South West; and not less than 18% or more than 22% in the case of South East.[66] For appointments into the leadership of all Ministries, departments, full-time commissions, public corporations and tertiary institutions, the armed forces, Police and other security agencies, it shall be done in such a way that each State or Zone shall be represented equitably in accordance with the appropriate formula.[67] This is to eschew any form of marginalisation of any section or predominance of one section above others.

Second Mandate

The second mandate of the Commission appears the most crucial; in view of the fact the first mandate, apparently, would only benefit the elites, who are usually in the minority. In an emerging economy like Nigeria, elites are usually the ones that are educated, and consequently qualified for the various positions envisaged under the first mandate. Illiterates or poorly educated ones are automatically disqualified. Whereas, the second mandate seeks to benefit the larger populace; in that it concerns the equitable

62. Id., Par. 6
63. Ibid.
64. Id., Par. 12(a)
65. Id., Par. 12(b)
66. Id., Par. 12(c)
67. Id., Par. 12(d). Note that the FCC has annual report in which detailed information about the operations of the Commission could be garnered.

distribution of socio-economic services, amenities and facilities in the sectors of education, electricity, health, commerce and industry, telecommunications, transport and youth development.[68] Unfortunately, space would not permit that I address each of these services, amenities and/or facilities one after the other, to assess the extent and/or whether the requirements have been met or not. It suffices to say, however, that since the establishment of the Commission, not much has been recorded with respect to the second mandate, while the first has been over-flogged, if not virtually abused.

VI. SUCCESSES AND CHALLENGES OF FEDERAL CHARACTER

Undoubtedly, the concept of federal character, which is hereby regarded as Nigeria's peculiar approach to conflict management, has attained a measure of success in its over three decades of existence, particularly in respect of the first mandates.[69] It has created occasions for Nigerians to accommodate, compromise and/or collaborate in their divergences, which sometimes could have otherwise degenerated into some disastrous disputations. So much emphasis has been laid on implementing the first mandate, and resources have been invested at various times to ensure attainment of mutual equilibrium. This has also always engendered debates in the political circles, in respect of appointment of political office holder, officials of political parties, government appointments as earlier stated, etc. It has however become clear in recent years that overconcentration on the first mandate is insufficient for the management of the conflict-prone Nigerian nation. It is common knowledge in West African politics that there has been an escalation of conflict in the Nigerian Niger Delta Region, as well as in the Northern Region-with the emergence of the Boko Haram[70] crisis, among other areas of unrest. Thus, the purported successes made in respect of the first mandate is being drastically dwarfed by the emerging conflict in Nigeria, which may be summarised as the challenges-both inherent in and created by the implementation of federal character-which now requires urgent attention.

(i) A foremost challenge faced in the implement of the federal character principle is the trivialisation of the second mandate, which for over a decade of the Commission's existence has not seen the light of day. The Commission reported that it submitted a draft of the guidelines for the distribution of the elements comprising the second mandate to the presidency since 1997, which unfortunately has remained trampled, and never brought to public knowledge. Had this been implemented, it would have become justiciable via or against the Commission, which is a corporate entity. For avoidance of doubt, failure of the second mandate indicates failure of education, health, electricity, and other indispensable social amenities that it stands to protect.

(ii) Another challenge is the presidential domination of the Commission,

68. FCC Act, S. 4(2)(b).

69. Though the success is relative, and has been subject of intense criticism on many counts. Foremost of the criticisms being that it tramples merit; promotes mediocrity; creates more cleavages along the seams of ethnicity, rather than unite the nation; it serves the interest of elites above that of the average Nigerian; among others.

70. Forbidding of western education, by a fundamentalist Islamic sect.

contrary to the spirit and letter of S. 158(1) of the Constitution which grants that the Commission shall not be subject to the direction or control of any other authority or person. The reality however, is that the president dictates the pace and virtually all that the Commission does; which is the same reason why the second mandate has remained unrealisable.

(iii) 'Indigenship'[71] is another major problem of the federal character principle in Nigeria. It is regarded as one of the paradoxes of the principle which aims at unity through balancing, while on the other hand creating further cleavages in the country. The implication of this is that Nigerian citizens have greater allegiance to their local governments of origin, and then states, about the country. By this absurdity of indigenship, a Nigerian could reside and possess landed property in any part of the country, but is only a recognised 'indigene' of his local government of origin-not of residence; regardless of how long he has domiciled therein.

(iv) The elites' domination created by the implementation of the first mandate is a factor that empowers few above the majority. There probably would not have been much agitation against the elites if the second mandate had been put in place and effectively implemented. The manner of implementation of federal character at present, consciously or unconsciously, seeks to make the rich richer, and the poor further impoverished; which of course would eventually lead to escalation of conflict that was intended to checkmate.

(v) The issue of merit is another challenge confronting the implementation of federal character in Nigeria. Even though the original intent of the principle is to ensure that the best is sought from each state and/or region of the federation, it has now been reduced to suit the most primordial of sentiments, with utter disregard for merit, and at the expense of the nation's well being.

VII. CONCLUSION

Though there are still other issues challenging the implementation of the federal character principle, the purpose of this paper is not an out right condemnation of the principle. Despite the barrage of condemnations against the implementation of federal character, it is certain that for the continued existence of a nation with the plural configuration evidenced in Nigeria, there is need for a means of attaining equilibrium and management of the acutely divergent interests. Thus, if it is not federal character, it must be something else; otherwise, the advocacy may then be for a disintegration of the nation. Therefore, the Nigerian experimentation of the federal character principle is an ingenious one, which if sincerely implemented, has a great propensity for success. With a firm confrontation of the above highlighted challenges and others, it is anticipated that this Nigerian model of conflict management could become a classical model indeed.

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71. 'Indigene' has no recognition in the English dictionary. Nevertheless, it is a familiar and accepted word in the Nigerian parlance, particularly in reference to a citizen's place/locality of origin.

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MANDATORY DEATH SENTENCE : A COMPARISON OF JUDICIAL PERCEPTION

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ABSTRACT

The penal statute of several countries in the world had the provision of mandatory death sentence for certain categories of offences but gradually such provisions under the influence of modern penology were found to be out of date either on the ground of inhuman, degrading and cruel treatment or that it violated the principle of separation of power or the power of judicial review. In India, the 'due process' clause was deliberately rejected by the Constituent Assembly. The judiciary gradually brought this clause in India. The provision of mandatory death sentence existed in the Indian Penal Code which was declared unconstitutional as the court found it unjust, unfair and in violation of Article 21 of the Constitution. Despite the fact that the mandatory death sentence did not receive the approval of the Supreme Court of India on earlier occasion, in 1988 the Parliament amended the Arms Act and incorporated mandatory death sentence. An attempt has been made here to analyse the judicial approach on mandatory death sentence in various jurisdictions.

KEY WORDS: *Indian Penal Code, 1860 - Section 303 - Mandatory Death Sentence - Arms Act, 1959 - Section 27(3) Reasonableness - Arbitrariness - Separation of powers - Judicial review.*

I. INTRODUCTION

THE SEVERITY in punishment is related to seriousness of crime. There was a time when most of the crimes were punished severely and the concept of proportionality between crime and punishment was unknown. The object of all laws is to prevent mischief and Jeremy Bentham had identified four objects

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of punishment[1] but also pointed out that four objects of punishment are subservient to the 'rules or canons by which the proportion of punishments to offences is governed.' The Classical School of criminology sought to rationalize punishment on the basis of utility principle and introduced the tariff system of punishment. Various forms of punishment like death sentence, imprisonment for term or life, forfeiture of property fine etc, were introduced under the criminal law. Thus, for serious offences only the provision of death punishment was recognized on the principle 'greater the mischief of the offence, the greater is the expense which it may be worthwhile to be at, in the way of punishment'.[2] In India there are certain offences which are punishable with death and alternatively by life imprisonment. There was a time when serious offences were punishable with death and in exceptional circumstances alternative sentence of life imprisonment was to be imposed but this policy changed in independent India and life imprisonment became rule and death sentence an exception. The shift in policy was motivated by philosophy that human life is supreme and the law is to guard it. Thus, while imposing any sentence, the nature of crime and the criminal both are to be considered by the sentencing court. However, some of the provisions existed in statute book which provided for mandatory death sentence to the convict. The purpose of this paper is to discuss the judicial trend in imposition of mandatory death sentence in various jurisdictions and to highlight issues connected therewith.

II. THE INDIAN POSITION

The trend of Indian judiciary in imposition of mandatory death sentence with reference to the Indian Penal Code, 1860 and the Arms Act, 1959 may be dealt separately.

The Indian Penal Code, 1860

The provision of mandatory death sentence exists in Section 303 of the Indian Penal Code[3] and its constitutional validity was challenged in *Dilip Kumar Sharma* v. *State of M.P.*[4], where it was observed that the Section 303 of the Indian Penal Code is draconian in severity, relentless and inexorable in operation.[5] The question of mandatory death sentence was examined by a constitutional bench of the Supreme Court in *Mithu* v. *State of Punjab*[6] and this substantive law which provided for mandatory death for murder committed

1. Bentham Jeremy, Of Proportion between Punishments and Offences, *On Utilitarianism and Government*, Wordsworth Classics of World Literature Edition, (2001) pp.257-302
2. Id. at 260
3. Section 303, Punishment for murder by life convict: Whoever being under sentence of imprisonment for life, commits murder shall be punished with death.
4. AIR 1976 SC 133 per Sarkaria, J.
5. Id. at 138
6. (1983) 2 SCC 277

by a life convict was invalidated. Referring to the decisions of *Maneka Gandhi* v. *Union of India*[7], *Sunil Batra* v. *Delhi Administration*[8] and *Bachan Singh* v. *State of Punjab*[9], the Court observed:

> These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the courts to follow it; that it is for the legislature to provide the punishment and for the Courts to impose it …the last word on the question of justice and fairness does not rest with the legislature.[10]

The Court raised the issue of reasonableness of section 303 under Article 21 and pointed out that it was difficult to hold the prescription of the mandatory sentence of death answered the test of reasonableness. The Court also opined that a provision of law which deprives the Court of the use of its wise and beneficent discretion in a matter of life and death, without regard to circumstance in which the offence was committed and without regard to the gravity of the offence cannot but be regarded as harsh, unjust and unfair. The apex court for the first time held that not merely the procedural but a substantive law could be held invalid under Article 21. Reddy, J. observed:

> So final, so irrevocable and so irrestible is the sentence of death that no law which provides for it without involvement of judicial mind can be said to be just, fair and reasonable.[11]

The concept of 'due process' was initially rejected by the Constituent Assembly. The members of the Assembly were divided on the issue of 'procedure established by law' and 'save in accordance with law'. However, effort was made to lessen the authority of the court in guise of public peace and order. The nation remained at the mercy of the legislature and the executive[12] for quite long time till the court got an opportunity to bring first the procedural due process and later on substantive due process. In view of the judgment in Mithu Case, the provision of section 303 Indian Penal Code, a pre-constitutional law, was thus eclipsed due to its inconsistency with the fundamental right and became inoperative, dormant but not dead. The doctrine of eclipse which was once supposed to be applicable only to pre - Constitution laws has now been extended to post-constitutional laws also.[13]

The Arms Act, 1959

Section 27 of the pre amended Arms Act punished for possessing arms

7. AIR 1978 SC 597
8. AIR 1978 SC 1675
9. AIR 1980 SC 898
10. Supra note 6, at 284
11. Id. at 294
12. See, Granville Austin, *The Indian Constitution*: *Cornerstone of a Nation*, Oxford University Press, (1966) pp.101-112
13. State of Gujarat v. Shri Ambica Mills Ltd. AIR 1974 SC 1300

with intent to use for unlawful purpose irrespective of whether it was actually used or not.[14] The present section 27 came by amendment in 1988.[15] Section 27 (3) of the Arms Act, 1959 provides that whoever uses any prohibited arms[16] or prohibited ammunition[17] or acts in contravention of Section 7[18] and

14. The pre amended section 27 read as: Punishment for possessing arms, etc with intent to use them for unlawful purpose - Whoever has in his possession any arms or ammunition with intent to use the same for any unlawful purpose or to enable any other person to use the same for any unlawful purpose shall, whether such unlawful purpose has been carried out into effect or not, punishable with imprisonment for a term which may extend to seven years, or with fine or with both.

15. The amended Section 27 reads as: Punishment for using arms etc.

(1) Whoever uses any arms or ammunition in contravention to section 5 shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

(2) Whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of section 7 shall be punishable with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine.

(3) Whoever uses any prohibited arms or prohibited ammunition in contravention of section 7 and such use or act results in the death of any other person shall be punishable with death.

16. The expression "prohibited arms" has been defined under Section 2 (i) of the Act. It reads:

Prohibited arms means-

(i) fire arms so designed or adapted that if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or magazine containing the missile is empty, or

(ii) weapons of any description designed or adapted for the discharge of any noxious liquid, gas or other such thing,

and includes artillery, anticraft and anti tank fire arms and such other arms as the Central Government may, by notification in the Official Gazette, specify to be prohibited arms.

17. Section 2(h) of the Arms Act, 1959 defines the expression "prohibited ammunitions" as under:

Prohibited ammunition means any ammunition containing, or designed or adapted to contain, any noxious liquid, gas or other such things, and includes rockets, bombs, grenades, shells, missiles articles designed for torpedo service and submarine mining and such other articles as the Central Government may, by notification in the Official Gazette, specify to be prohibited ammunition.

18. Section 7 of the Arms Act, 1959 reads as:

7. Prohibition on Acquisition or possession or of manufacture or sale of prohibited arms or ammunition- No person shall-

(a) acquire, have in his possession or carry; or

(b) use, manufacture, sell, transfer, convert, repair, test or prove; or

(c) expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test or proof;

any prohibited arms or prohibited ammunition unless he has been specially authorized by the Central Government in this behalf.

if such use or act results in the death of any person, the person guilty of such use or acting in contravention of Section 7 shall be punishable with death. The pre amended Arms Act did not make any distinction between ordinary and prohibited arms for the purpose of determination of sentence. In other words, the law did not make any distinction between ordinary arms and prohibited category of arms. An amendment in Arms Act was brought to enhance the punishment for offences involving prohibited arms. The Statements of Objects and Reasons of 1988 Amendment Act was stated as:

> The Arms Act, 1959 has been amended to provide for enhanced punishments in respect of offences under that Act in the context of escalating terrorist and anti-national activities. However, it was reported that terrorist and anti-national elements, particularly in Punjab had in recent past acquired automatic fire arms, machine guns of various types, rockets and rocket launchers. Although the definitions of the expressions "arms", "ammunitions", "prohibited arms" and "prohibited ammunitions" included in the Act are adequate to cover the aforesaid lethal weapons in the matter of punishments for offences relating to arms, the Act did not make any distinction between offences involving ordinary arms and ammunitions and prohibited arms and ammunitions. Further, while the Act provided for punishment of persons in possession of arms and ammunitions with intent to use them for any unlawful purpose, it did not provide any penalties for the actual use of illegal arms. To overcome these deficiencies, it was proposed to amend the Act by providing the deterrent punishment for offences relating to prohibited arms and ammunition so as to effectively meet the challenges from the terrorist and anti-national elements.

In view of above stated object, the Arms (Amendment) Ordinance, 1988 was promulgated[19] and the following changes were made in the Arms Act:

(i) The definitions of "ammunition" and "prohibited ammunition' was amended to include missiles so as to put the matter beyond any doubt;

(ii) Deterrent punishment was provided for the offences involving prohibited arms and prohibited ammunitions;

(iii) Punishment was provided for the use of illegal arms and ammunition and death penalty was provided if such use caused death.

The constitutionality of the provision for mandatory death sentence under section 27 of the Arms Act reached to the Apex Court but could not be decided. Once the matter was not argued, and at another occasion, the arms in question could not be brought in the ambit of the definition of 'prohibited arms'. In *Surendra Singh Rautela* v. *State of Bihar*[20], the appellant was initially convicted under Section 27(3) of the Arms Act and was given death

19. On May 27, 1988

20. AIR 2002 SC 260

sentence. The High Court however set aside the sentence on merit.[21] In Supreme Court the counsel appearing for the State stated that it was not possible to challenge the order of acquittal of the appellant under Section 27(3) on merit and thus the question of constitutional validity of Section 27(3) was neither canvassed nor examined by the Supreme Court.

In *Ram Kumar Bind @ Vakil* v. *State of Maharastra*[22], the appellant was charged under Section 27 (3) of the Arms Act besides Section 302/34 of the Indian Penal Code and death sentence was awarded to him by the Sessions Court. The High Court confirmed the conviction and sentence of death. The Supreme Court though reduced the death sentence to life imprisonment but it did not pronounce on the constitutional validity of Section 27(3). The Supreme Court found that the arms in question could not be brought within the definition of 'prohibited arms' as defined under section 2(i) of the Arms Act, 1959. The Court pointed out that in order to bring the arms in question within the prohibited arms, the State was required to issue a formal notification in the Official Gazette and in the case at hand instead of formal notification in the official gazette an administrative order was issued which could not treated be as a Gazette notification and thus conviction of the appellant under Section 27(3) was set aside. However, the Supreme Court did not decide on the constitutional validity of Section 27(3) of the Arms Act, 1959.

The constitutional validity of Section 27(3) of the Arms Act was challenged before the Supreme Court of India in *State of Punjab* v. *Dalbir Singh*[23] and it was declared unreasonable. In this case[24] the Court constructed its argument on three pillars. The first pillar was the concept of 'right and reason' which is an element of fairness. The court found that as the words 'use' and 'results' have not been defined in the Arms Act, it has to be viewed in its common meaning. In view of the wide meaning of the word 'use' even an unintentional or an act of accidental use resulting in death of any other person shall subject the person so using to a death penalty. A law which is not consistent with notions of fairness, while imposing an irreversible death penalty is repugnant to the concept of right and reason. Under the circumstance such a law is not just, reasonable nor fair and fall out of the due process test. The Court referred to *Dr. Bonham Case*[25] where Lord Coke

21. The Chief Justice of Jharkhand High Court acquitted the accused on the ground that it was not permissible in law to try appellant simultaneously for offences under Section 302 of the Indian Penal Code and Section 27 (3) of the Arms Act. But this view did not get the approval of the Supreme Court in light of Section 220 of the Criminal Procedure Code which lays down that if, in one series of the acts so connected together as to from same transaction, more offences than one are committed by the same person, he may be charged with and tried in one trial for every such offence.
22. AIR 2003 SC 269
23. 2012 Cri. L. J. 1579 (SC)
24. *Id.*
25. (1610) 77 ER 646

had observed that in many cases, the common law controls acts of Parliament, and sometimes adjudge them to be utterly void because when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void.

The second pillar was the limitation on the power of Parliament to make law inconsistent with Part III of the Constitution. Section 27(3) being a post - Constitutional law, has to obey the mandate of the Article 13 of the Constitution that the State shall not make any law which takes away or abridges the right conferred by Part III of the Constitution and any law made in contravention of the same is, to the extent of contravention void. Section 27(3) being violative of Articles 14, 21 and it contravened the mandate of Article 13 and was thus held to be void.

The third pillar was judicial review. It is one of the basic structures of the Constitution.[26] Section 27(3) deprived the judiciary from discharging its Constitutional duties of judicial review whereby it has the power of exercising discretion in the sentencing procedure.[27] The sentencing power has to be exercised in accordance with the statutory sentencing structure under Section 235 (2) and also under Section 354 (3) of the Criminal Procedure Code, 1973. The provisions for mandatory death sentence under section 27 (3) was found to run contrary to those statutory safeguards which give discretion to the judiciary in the matter imposing death penalty. Section 27 (3) of the Arms Act was thus held to be *ultra vires* the concept of judicial review.

It may be said that the imposition of national emergency paved the path for the Supreme Court of India to incorporate the 'procedural due process' but could not at that time introduce 'substantive due process.' However, soon after it introduced the 'substantive due process' by declaring Section 303 of the Indian Penal Code unconstitutional. While declaring Section 303 as unconstitutional, the principle of reasonableness was made its basis. The Supreme Court clarified that even the substantive provisions of law have to be reasonable, just and fair. In 1988 the Arms Act was amended and a provision of mandatory death sentence was introduced and it remained in force till it was declared unconstitutional in *State of Punjab* v. *Dalbir Singh*.[28] In this case the Supreme Court not only relied on test of 'reasonableness' but also on power of 'judicial review', which is one of the basic features, and found Section 27(3) of the Arms Act as inconsistent with Article 13 of the Constitution of India. It may be submitted that the argument could have been taken that the doctrine of separation of power, though not expressly provided for in the Constitution of India but through judicial construction it has assumed the status of basic feature,[29] did not support the imposition of mandatory death sentence. It may be inferred that the Supreme Court in holding any

26. *L. Chandra Kumar* v. *Union of India* AIR 1997 SC 1125; See also, *P. Sambamurthy* v. *State of A.P.* AIR 1987 SC 663; *Subhash Chandra* v. *Union of India* AIR 1991 SC 631

27. *Bachan Singh* v. *State of Punjab* AIR 1980 SC 898

28. *Supra* note 23

29. *State of Bihar* v. *Bal Mukund Sah* AIR 2000 SC 1296; See also, *Ram Jawaya Kapur* v. *State of Punjab* AIR 1955 SC 549

substantive law as unconstitutional has gradually moved from 'reason' to 'power', that is, from reasonableness to power of judicial review.

III. AMERICAN POSITION

In United States it has been recognized that in the determination of sentence, justice generally requires consideration of more than the particular acts by which the crime was committed and thus the circumstances of the offence together with the character and propensities of the offender is to be taken into account. The consideration of both the offender and the offence in order to arrive at just and appropriate sentence has been viewed as progressive and humanizing. The opinion of the American Court suggests that in sentencing process the nature of crime and the nature of individual criminal and the attending circumstances in which the offence was committed are relevant factors. Further, any process which runs contrary to it is not treated as reasonable. In America the State of North Carolina, Louisiana and Nevada had provisions of mandatory death sentence and its constitutionality were challenged.

The General Assembly of North Carolina in 1974 codified a statute making death sentence mandatory for persons convicted of first degree murder. In *James, Tyron Woodson and Luby Waxton* v. *State of North Carolina*,[30] the petitioners were convicted of first degree murder in view of their participation in an armed robbery of a food store. In the course of committing crime a cashier was killed and a customer was severely wounded. The petitioners were found guilty of charges and sentenced to death. The Supreme Court of North Carolina affirmed the death sentence. The U.S. Supreme Court granted certiorari to examine the issue whether imposition of death sentence in the instant case was in violation of VIII and XIV Amendment of the U.S. Constitution. It was held that mandatory death sentence was unconstitutional and it violated the VIII Amendment. Stewart, J. observed:

> A process that accords no significance to relevant facets of the character and the record of the individual offender or the circumstances of a particular offence excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating frailties of humankind. It treats all persons convicted of a designated offence not as a uniquely individual human being, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[31]

In *Stanilaus Roberts* v. *State of Louisiana*,[32] the imposition of death sentence mandatorily for a crime of first degree murder under the statute of

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30. (1976) 428 US 280=49 L Ed 2d 944 July 2, 1976

31. Contrary views were expressed by White, J., Burger, CJ. and Rehenquist, J. and upheld the constitutionality of North Carolina statute.

32. (1976) 428 US 325=49 L Ed 2d 947

Louisiana received the similar response.[33] The Court had pointed out that in mandatory death sentence, the circumstances in which the offence was committed and the propensities of the offender are not considered and thus it may be regarded as arbitrary. John Paul Stevens, J. observed that the constitutional vice of mandatory death sentence statutes lies in the fact that it lacks focus on the circumstances of the particular offence and the character and propensities of the offender and which was not resolved by Louisiana's limitation of first degree murder to various degrees of killings. The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute. Even the other more narrowly drawn categories of first degree murder in Louisiana law did not afford any meaningful opportunity for consideration of mitigating factors presented by the circumstances in the particular crime or by the attributes of the individual offender.

The Court found that the history of mandatory death penalty statutes indicated a firm societal view that limiting the scope of capital murder was an inadequate response to the harshness and inflexibility of mandatory death sentence statute. A large group of jurisdictions initially responded favourably to the unacceptable severity of common law rule of automatic death sentence for all murder convictions by narrowing the definition of capital homicide but later on each of these jurisdictions found that approach insufficient and subsequently substituted discretionary sentencing for mandatory death sentences.

Further, crime may be an act prohibited by law but it is also a social phenomenon. The social factors in commission of any crime thus cannot be ignored. The Court found the futility in attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offence stems from our society's rejection of the belief that every offence in a like legal category and called for an identical punishment without regard to the past life and habits of a particular offender.[34]

The constitutionality of Louisiana statute which imposed mandatory death penalty for the 'first degree murder of a police officer] was challenged in *Harry Roberts* v. *State of Louisiana*.[35] The majority setting aside death penalty declared the statute unconstitutional because the statute did not allow for consideration of mitigating factors. The court accepted the fact that as the

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33. Burger, CJ., White, J. and Rehnquist, J. expressed their contrary views and declared Louisiana statute as constitutional.

34. See, *Williams* v. *New York* (1949) 337 US 241; *Pennsylvania* v. *Ashe* (1937) 302 US 51

35. 431 US 633=52 L Ed 2d 637. Contrary view was taken by Burger, CJ., Blackmum, White and Rehnquist, JJ. on the ground that the duty police personnel is such that they put their life at risk for the security and safety of others and thus the nature of duty make them different.

murder victim was a peace officer and he was performing regular duties may be regarded as an aggravating circumstance. There may be special interest in affording protection to these public servants who regularly risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can ever exist when the murder victim is a police officer. The circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drug, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct may be the examples of mitigating factors which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.

Similarly, a statue in Nevada mandated death sentence for murder committed by a person while serving a life sentence without the possibility of parole. In *George Summer* v. *Raymond Wallace Shuman*,[36] the majority opinion held that Nevada statute was in violation of Eighth and Fourteen Amendment and thus it was unconstitutional. Blackmum, J. who had expressed dissent in *Harry Roberts case*[37] delivered the majority opinion and he observed that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime. Just as the level of an offender's involvement in a routine crime varies, so too can the level of involvement of an inmate in a violent prison incident. An inmate's participation may be sufficient to support a murder conviction, but in some cases it may not be sufficient to render death an appropriate sentence, even it holds good for a life term inmate serving a particular number of years.

Blackmum, J. further observed that the circumstances surrounding any past offence may vary widely. Without consideration of nature of the predicate life term offence and the circumstances surrounding the commission of that offence, the label "life term inmate" reveals little about the inmate's record or character. Even if the offence was first degree murder, whether the defendant was the primary force in that incident, or a no triggerman like Shuman, may be relevant to both his criminal record and his character. Yet under the mandatory statute, all predicate life term offence is given the same weight - a weight that is deemed to outweigh any possible combination of mitigating circumstances.

The principle of 'guided discretion' was insisted upon in the instant case. The interest of the State can be satisfied fully through the use of a guided discretion statute that ensures adherence to constitutional mandate of heightened reliability in death penalty determinations through individualized sentencing procedures. The court found it difficult, after having reached unanimity on the constitutional significance of individualized sentencing in capital cases to depart from that mandate.

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36. 483 US 66=97 L Ed 56. However, contrary view was taken by Rehnquist, CJ., White and Scalia, JJ.

37. *Supra* note 35

IV. THE PRIVY COUNCIL

The Privy Council did not find, initially, any unconstitutionality in the provision for a mandatory death sentence for trafficking in significant quantity of heroine and morphine. The constitutionality of mandatory death sentence was challenged before the Privy Council in *Ong Ah Chuan* v. *Public Prosecutor*.[38] The Privy Council heard the appeal from the Court of Criminal Appeal of Singapore, against a conviction for the offence of drug trafficking of heroine in Singapore. The quantity of heroine was more than 15 grams and thus sentence of death was imposed on the defendants. The Board observed that the social object of the Drug Act was to prevent the growth of drug addiction in Singapore by stamping out the illicit drug trade and, in particular, the trade in those most dangerously addictive drugs, heroine and morphine. The social evil caused by trafficking which the Drugs Act sought to prevent was broadly proportional to quantity of addictive drugs brought into the illicit market. The Privy Council found nothing unreasonable in the legislature's holding the view that an illicit dealer on the wholesale scale who operated near the apex of the distributive pyramid required a stronger deterrent to his transaction and deserved more condign punishment than do the dealers on smaller scale who operated near the base of the pyramid. It was for the legislature to determine in the light of information available to it about the structure of the illicit drug trade in Singapore. The Privy Council did not find it arbitrary in fixing 15 grams of drug or more for inviting mandatory sentence of death despite the statute, being silent as to the circumstances and the propensity of the accused. However, the Privy Council drew a distinction between mandatory sentence of death for the offence of murder and the same for the offence of drug trafficking and observed:

> Where a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in heat of passion, the likelihood of this is very real; it is perhaps more theoretical than real in case of large scale trafficking in drugs, a crime of which the motive is cold calculated with equal punitive treatment for similar legal guilt.[39]

In *Reyes* v. *The Queen*,[40] the Privy Council found the provision of mandatory death sentence unreasonable as it excluded any judicial consideration in sentencing. In this case, the appellant committed murder by shooting and consequent upon his conviction, he was sentenced to death under the laws of Belize. The Privy Council granted leave to raise on constitutional points, inter alia, on the ground that mandatory death penalty infringes both the protection against subjection to inhuman or degrading punishment or other treatment in violation of rights under Section 7 of the Constitution of Belize and also in violation of the right to life protected under Sections 3 and 4 of

38. (1981) AC 648

39. Id. at 674

40. (2002) 2 AC 235

the Constitution.[41] The Privy Council holding the imposition of mandatory death sentence as inhuman and degrading observed:

> The Board is however satisfied that the provision requiring sentence of death to be passed on the defendant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under Section 7 of the Constitution in that it required sentence of death to be passed and precluded any judicial consideration of humanity of condemning him to death. The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as death penalty is retained, there may well be murders by shooting which justify the ultimate penalty.[42]

The Privy Council made an attempt to distinguish murder from those murders which are committed during sudden fight and in state of provocation. The Privy Council observed:

> But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of firearms legitimately owned for no criminal or aggressive purpose) in which death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny him basic humanity, the core of the right which section 7 exist to protect…[43]

It has also been argued that the offender in such circumstances invokes the mercy power bestowed upon the executive and the harshness and rigour of the sentence may be mitigated in appropriate cases.[44] The Privy Council in Reyes case making a distinction between mercy and justice opined that the opportunity to seek mercy from a body cannot cure a constitutional defect in the sentencing process. It observed that:

> Mercy in its first meaning given by the Oxford English Dictionary, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature mercy and justice are contrasted.

41. Section 7 of the Belize Constitution reads as: No person shall be subjected to torture or inhuman or degrading punishment or other treatment. Section 4 (1) of the Belize Constitution reads: A person shall not be deprived of his life intentionally save in execution of the sentence of court in respect of a criminal offence under any law of which he has been convicted.

42. *Supra* note 40 at 256

43. *Ibid.*

44. See, *Ong Ah Chuan* v. *Public Prosecutor* (1981) AC 648 at 674

> The administration of justice involves the determination of what punishment a transgressor deserves the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is judicial, the latter an executive responsibility….It has been repeatedly held that not only the determination of guilt but also determination of the appropriate measure of punishment are judicial not executive functions.[45]

In *R.* v. *Huges*,[46] the accused was convicted by the High Court of Saint Lucia for murder. Section 178 of the Criminal Code of Saint Lucia provided death sentence to be imposed on anybody who was convicted of murder and Huges, the accused, was thus sentenced to death. The Board found that imposition of death sentence for murder was mandatory and the Court had no power to impose lesser sentence. Such a provision in the Criminal Code of St. Lucia was held to be inhuman and degrading and thus void. The Privy Council observed that the in the case of murder decision to impose the appropriate penalty is be taken by the judge after hearing submissions and where appropriate, evidence on the matter. In reaching and articulating such decisions, the judge will have to enunciate the relevant factors considered and the weight to be given to them. This burden thus laid on the shoulders of the judiciary might be undoubtedly heavy but it is one that has to be carried by the judges.

The issue again came up before the Privy Council in the case of *Fox* v. *The Queen*.[47] In this case, the accused was convicted on two counts of murder and he was sentenced to death on each count under section 2 of the Offences against the Person Act, 1873 which prescribed mandatory death sentence for murder. His appeal against the conviction and sentence was rejected by the Court of Appeal. The Privy Council granted special leave to appeal against conviction and sentence. While the appeal against the conviction was dismissed but on the question of sentence the Privy Council held, applying the ration of the case in Reyes case, Section 2 of the Offences against the Person Act, 1873 was inconsistent with section 7 of the Constitution and the sentence was quashed and the matter was remitted to the High Court for determination of appropriate sentence having regard to all the circumstances of the case and in the light of the evidence relevant to the choice of sentence.

Section 312 of the Penal Code of The Bahamas was challenged before the Privy Council in *Bowe and another* v. *The Queen*.[48] In this case, both the appellants were convicted for murder and sentenced to death under section 312 of the Bahamas Penal Code. The appeals against conviction did not succeed. Section 312 was challenged to the extent that it provided for persons other than pregnant women charged for murder must be punished by death

45. *Supra* note 40 at 257
46. (2002) 2 AC 259
47. (2002) 2 AC 284
48. (2006)1 WLR 1623

sentence. The Privy Council allowing the appeal formulated following principles relevant for consideration in case of mandatory death sentence:

(a) It is a fundamental principle of just sentencing that the punishment imposed on a convicted defendant should be proportionate to the gravity of the crime of which he has been convicted.

(b) The criminal culpability of those convicted for murder varies widely.

(c) Not all those convicted of murder deserve to die; and

(d) Any discretionary judgment on the measure of punishment which a convicted defendant should suffer must be made by the judiciary and not by the executive.

The Privy Council in this case also took the view that the imposition of appropriate sentence is the judicial function and it cannot be taken by any other functionary of the State. So far as the approach of Privy Council on the issue of mandatory death sentence is concerned despite it being hesitant initially, found the provisions of mandatory death sentence as unjust, cruel and degrading and also held that as the pronouncement of sentence was judicial function, it could not be taken away by any other organ of the State.

V. SUPREME COURT OF UGANDA

In *Attorney General* v. *Susan Kigula*[49], where various issues pertaining to constitutionality of death sentence, manner of execution by hanging and the execution of death sentence after a long delay were involved one of the issues before the Court was to decide the constitutionality of the laws of Uganda which provided for mandatory death sentence. The imposition of mandatory death sentence was held to be unconstitutional. The administration of justice was considered a function of the Judiciary under the constitution. The entire process of trial from the arraignment of an accused up to sentencing constitutes the administration of justice. The provision of mandatory death sentence made by the legislature removes the power to determine sentence which in fact falls in the purview of the power of the court. Thus such a provision which mandates death sentence would be inconsistent with the constitutional scheme. The Attorney General in this case argued that because Parliament has the powers to pass laws for the good governance, so it could pass such laws as those providing for a mandatory death sentence. The Supreme Court of Uganda rejected the argument and observed that the laws passed by the Parliament must be consistent with the Constitution.

The issue of separation of power was also taken up by the Supreme Court of Uganda in *Kigula case*.[50] The Supreme Court of Uganda observed that as the Constitution of Uganda provides for the separation of powers between the Executive, the Legislature and the Judiciary, any law passed by Parliament which has the effect of tying the hands of judiciary in executing

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49. Constitution Appeal No. 03/2006

50. *Ibid*.

its function to administer justice is inconsistent with the Constitution; that any law which fetters that discretion (discretion on appropriate sentence) is inconsistent with the provision of the Constitution.

VI. KENYAN COURT OF APPEAL

The issue of mandatory death sentence came up for consideration before the Kenyan Court of Appeal in *Ngotho Muthiso* v. *Republic*.[51] In this case, the constitutional validity of Section 204 of the Penal Code of Kenya was challenged by the appellant on the ground, first, that the imposition of mandatory death sentence for particular offences was neither authorized nor prohibited in the Constitution. As the Constitution was silent, it was for the Courts to give a valid constitutional interpretation on the mandatory nature of the sentence. Secondly, that mandatory death sentence is antithetical to fundamental human rights and there was no constitutional justification for it. The convicted person should be given an opportunity to show why the death sentence be not passed against him. Thirdly, the imposition of mandatory death sentence was arbitrary and would make an affront on the rights of the accused because the offence of murder covers wide spectrum. The Criminal Court of Appeal declared the section 204 of the Penal Code of Kenya as unconstitutional because it denied a fair hearing by not affording an opportunity to an accused to offer mitigating circumstances before the imposition of sentence. Moreover, sentencing is the part of the trial and mitigation was an element of fair trial. Further, because sentencing is the matter of law and part of administration of justice which is the preserve of the judiciary. The Parliament thus could prescribe the maximum sentence and leave the court to administer justice by sentencing the offender according to the gravity and circumstances of the case. Thus the Court of Appeal based its judgment on the principle of fair hearing in criminal matter and also on the principle of separation of power because sentencing is judicial function thus no other State organ should take this power away.

VII. CONCLUSION

The Constituent Assembly had rejected the 'due process' clause in India on the ground that such a clause might be problematic in growth and development of the country. When the country was writhing under national emergency, this clause silently entered through the judicial process and was initially limited to 'procedural due process' only. It further spread its tentacles and the judiciary introduced 'substantive due process' in India. The provision of mandatory death sentence which existed in Section 303 of the Indian Penal Code, as relics of primitive punishment, was found to be unconstitutional by the Supreme Court of India as it was arbitrary, unreasonable and violative Article 21 of the Constitution. The emphasis of the court was on test of 'reasonableness' and any provision which was not true to this test were

51. Criminal Appeal No. 17/2008

arbitrary. Despite having the disapproval of the Supreme Court on mandatory sentence, the Parliament amended the Arms Act particularly in order to deal with the prohibited arms and ammunitions being used by the terrorists and incorporated Section 27 (3) for providing mandatory death sentence besides other incidental provisions. When the constitutionality of this provision was challenged, the Supreme Court declared it unconstitutional on three counts. First, that it was not based on reason. Secondly, that the provision was inconsistent with Article 13 of the Constitution and, thirdly, that the power of judicial review which is one of the basic features of the Indian Constitution cannot be excluded. In view of the fact that separation of power has also been accepted as one of the basic features, it may be submitted, could have also been one of the arguments. It may be concluded that the provision of mandatory death sentence, on the one hand, has not received the judicial approval and, on the other hand by introducing the concept of 'substantive due process' the court has enhanced its power.

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RULE, PRINCIPLE AND POLICY DEBATE: AN ANALYSIS OF RONALD DWORKIN'S APPROACH

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ABSTRACT

The rule, principle and policy debate has engaged the attention of many philosophers. Ronald Dworkin with his incisive analysis of the distinction between them has contributed immensely for the strengthening of the concept of individual rights, and in his famous saying that "Rights are trumps over utilitarian goals". The conflict between the deontological and teleological methods of reasoning, has led Ronald Dworkin to adopt a reconciliatory path between the two, and assigning each a respective place in its own sphere.

KEY WORDS: *Deontological, Teleological, Utility and rights, Individual rights and social harmony, Rule, principle and policy.*

I. INTRODUCTION

RONALD DWORKIN, by his famous distinction between rules, principles and policies, has endeavoured to establish the primacy of individual rights over utilitarian goals. Dworkin has taken the fundamental argument that rights are more fundamental than rules, thus establishing the deontological conceptions of the rights - thesis, over the teleological conceptions of what it is to have a right. Dworkin's critical argument is that principles offer the best justification of the existing black letter rules, and that judges while giving judgments must be guided by rules and principles, but must not resort to policy matters, as according to him policy matters are the exclusive prerogative of the legislature. Dworkin's concern is that if judges resort to policy matters while giving judgment, then they would be resorting to a teleological interpretation of the

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existing law, which would in his opinion upset the existing rights of the litigants. Dworkin stresses the argument that judges are not elected representatives of the people, and hence they do not have the power to undertake an exercise in policy matters, and their only duty is to interpret and expound the law as it exists. Dworkin vehemently attacks the theory of legal positivism, particularly in the form as expounded by Prof. H.L.A. Hart, and criticises his rule of recognition as based on empirical criteria, and also his theory that law is a system of rules by arguing that law is not only a system of rules, but also includes principles. Dworkin also criticises the theory of utility by exposing its egalitarian pretensions by his famous distinction between external and internal preferences, and his further argument to consolidate the fact that there are rights even against the majority in a democracy. Thus Dworkin in his endeavour attempts to strike a promising reconciliation between the theory of natural rights and the theory of utility.

This article attempts to understand Dworkin's contribution to the concept of individual rights under the following headings:

" Dworkin's criticism of positivism and pragmatism.
" Dworkin's rights thesis.
" Dworkin's theory of entrenched rights.
" The consequentialist theory of rights.
" Judicial decisions and the common law.
" Judicial decisions and statutes.
" Democracy.

II. DWORKIN'S CRITICISM OF POSITIVISM AND PRAGMATISM

Dworkin first of all attacks and criticises the theory of positivism, particularly in the form as propounded by H.L.A. Hart. He says that "I want to make a general attack on positivism, and I shall use H.L.A. Hart's version as a target..... My strategy will be organised around the fact that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies and other sorts of standards positivism, I shall argue is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important roles of these standards that are not rules".[1]

Dworkin examines Hart's theory of judicial function and its analysis.[2] Hart says that in the majority of cases, the rules will be clear. However they will, at some point, become indeterminate and unclear, because they have what Hart calls an "open texture", a defect inherent in any use of language.

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1. R.M. Dworkin, *Taking Rights Seriously*, Lon: Duckworth, 1977, p. 22
2. See, H.L.A. Hart, *The Concept of Law*, Oxford, Clarandon Press, 1961, Ch. 7

Dworkin argues against this approach which allows for the judge or official to make a policy decision not based on law in hard or unclear cases, stating that Hart, by seeing law solely as a system of rules, fails to take account of general principles. Dworkin says that in hard or unclear cases, the judge does not revert to policy and act as a law maker, but applies legal principles to produce an answer based on law.

Dworkin, to substantiate his argument, gives the example of a legal principle in the case of Riggs v. Palmer[3] in which a New York Court had to decide whether a murderer could inherit under the will of his grandfather he had murdered. The Court held that the relevant statutes literally gave the property of the deceased to the murderer. But denying the murderer of his inheritance, then the court reasoned as:

> "..... all laws as well as contracts may be controlled in their operation and effect by general fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own inequity, or to acquire property by his own crime."[4]

Standards such as "no man may profit from his own wrong" have, according to Dworkin, relative weight when considered judicially and so help to determine the case in favour of one of the parties, when the rules run out. Dworkin is suggesting that in unclear cases, the judges do not have complete discretion to make new law, instead they fall back on legal principles to make a decision based on existing law. From this it can be inferred that Dworkin is giving legal principles another role. As well as acting as the cement of the law filling in its gaps and loopholes, they are also used to prevent injustices which would arise out of a simple application of the rules. Hart himself says that rather than relying on the judges using policy to deal with unclear cases, most mature legal systems lean towards certainty and predictability by stretching the rules to deal with unclear cases. However, Hart claims that the more the rules are stretched, the more their application becomes artificial, leading to cases of injustice.[5] The main thrust of Dworkin's argument is that rules whether precedents or statutes, are applicable in "an all or nothing fashion", and so there may be cases, particularly hard ones, which are not covered by rules, or if there are rules they are unclear. In a common law system, it is quite possible for each party to a case to be able to marshall an equally impressive set of precedents in their favour. Dworkin is arguing that in all cases, most particularly in hard cases, Judges are always constrained by the law. Dworkin paints a picture of gapless legal universe, wherein in every adjudication there are legal rules and standards which the Judge is obliged to follow although he does have discretion in the weak sense of weighing the standards set to him by authority.

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3. (1889) 22 NE 188
4. *Id.,* at 190
5. *Supra* note 2, at 127

In his later works[6] Dworkin expands his attack on other theories not only to cover positivism, but also legal realism, and the economic approach to the law[7] which suggests that Judges like legislators should and do make law exclusively by reference to social goals, such as improved economic efficiency. Dworkin's own theory is restated as "Law as integrity" and he argues that it better explains how cases are decided. Dworkin states that legal realism does not fit the judicial process, because of the simple, but undeniable fact that Judges by and large decide cases as if they are upholding existing rights, rather than making new law. Dworkin emphasises that Judges do not look to the future and decide whether their decision will best maximise utility or some other social goal such as economic efficiency. Dworkin further argues that the legal realists say that Judges appear to honour rights without regard to social welfare, because overall welfare in advanced, by acting as if some rights are impervious to such calculations.[8] He further criticises legal realism by arguing that if one accepts their views than we would have law without legal rights. Law for the legal realists is simply a tool to achieve political or economic goals.

III. THE RIGHTS THESIS

Dworkin's theory of judicial process is based on the distinction between principles and policies. He says that:

> "Arguments of policy justify a .....decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favour of a subsidy for aircraft manufacturers that the subsidy will protect national defence is an argument of policy. Arguments of principle justify a .....decision by showing that the decision respects or secures some individual or group rights. The argument in favour of anti-discrimination statutes, that a minority has a right to equal respect and concerns, is an argument of principle."[9]

Dworkin's main contention is that Judges do not have the discretion to decide unclear cases by reference to policy, and that in fact they decide them on the basis of principles. He raises two objections to those legal realists who argue for judicial decision-making on policy grounds:

1. Judges are not elected to make policy decisions.
2. Judges would be applying retroactive law if they made their decisions on policy grounds, whereas a principled decision means that the Judge is upholding rights and duties that already exist.[10]

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6. See generally R.M. Dworkin, *A Matter of Principle*, Oxford, Clarendon Press, 1986; R.M. Dworkin, *Law's Empire*, London, Fontana, 1986.
7. See for example, R. Posner, *Economic Analysis of Law*, 3rd edition, Boston Mass, Little Broun & Co., 1986.
8. *Laws Empire*, pp.154-55
9. *Supra* note 1, at 82
10. *Id.*, at 84

IV. ENTRENCHED RIGHTS

Dworkin describes policies as collective goals which encourage trade-offs of benefits and burdens within a community in order to produce some overall benefit for the community as a whole, for example, the drive for economic efficiency. Principles and individuated rights, such as the very general right to equal concern and respect, the right to freedom of speech or the right to recover damages for emotional loss in negligence claims, may be sacrificed to the collective welfare by the legislature, but not by the judiciary.[11]

However, Dworkin's theory has a wider political import and as a part of this he argues that rights cannot simply be overridden by governments using simple utilitarian calculations of what is best for the community on consequentialist grounds. Dworkin's theory involves more than simply judicial protection of established rights, but also has the wider dimension of entrenching rights, whether they are against the government, such as the right to free speech or between individuals such as the right to recover damages for negligence. His theory is designed to give special place to rights as trumps over utilitarian justifications throughout the legal process not merely in hard cases. He deals with hard cases by saying that they can only be decided on the basis of existing rights not policies, for the simple fact that to allow policy-making by the judiciary in these marginal cases would undermine his theory that Judges are the protectors of rights.

Rights, whether they are derived from legal rules, or from more general legal principles, protect individuals from political decisions, even if those decisions would improve those collective goals. The more concrete or institutional a right is the more dramatic the general collective justification will have to be if it is to be defeated by a more marginal collective justification. The more entrenched or institutionalised a right is the less a government is able to enact legislation which undermines that right. Dworkin provides a general distinction between 'abstract or background rights' and 'institutional or concrete rights'. Dworkin says, any adequate theory will distinguish between background rights which are rights that provide a justification for political decisions by society in the abstract and institutional rights that provide a justification for a decision by some particular and specified political institution.[12] Further, an abstract right is general political aim, the statement of which does not indicate how that general aim is to be weighed or compromised in particular circumstance against other political aims.[13]

V. THE CONSEQUENTIALIST THEORY OF RIGHTS

Dworkin raises argument against the consequentialist theory of rights. Dworkin gives a hypothetical example of a concrete right derived from the

11. *Id*., pp.90-96
12. *Supra* note 1, at 93
13. *Ibid*.

more general right of freedom of expression.[14] A court in deciding whether to uphold the right of a newspaper to publish secret defence plans would weigh the newspaper's right to freedom of expression against the competing rights of the soldiers to security. The newspaper's concrete right to publish weighs more heavily than the rights of the soldiers in this particular instance, because it is supported by the background right of freedom of expression, provided that the publication does not threaten the lives of individual soldiers. In Dworkin's hypothetical example the court upholds the newspaper's rights but it is more common for the courts to uphold the government's claims that defence documents should be kept secret in the public interest. But if the court decides in favour of secrecy, it is surely doing so on the basis of a policy decision.

Dworkin attempts to deflect this argument by advising not to confuse arguments of principle and arguments of policy with a different distinction between consequentialist and non-consequentialist theories of rights.[15] A court may in fact consider the consequences of its decisions in the light of its effect on future litigant's rights. In other words, the court may take account of wider issues only when looking at rights. In the defence cases, Dworkin is arguing that the courts are simply balancing the alleged rights of the litigants before them against the wider rights of the individuals potentially affected by their decisions. This is what Dworkin means by a consequentialist theory of rights. He claims that his theory encompasses such an approach and is not simply concerned with upholding the rights of litigants who appear before courts. This approach means that the court may decide to protect the rights of individuals even though they are not before the court and have not had representations on their behalf heard by the court.

VI. JUDICIAL DECISIONS AND THE COMMON LAW

Dworkin's view of judicial precedent is that Judges agree that earlier decisions have gravitational force or weight. The legislature may make decisions inconsistent with earlier ones, but a Judge rarely has this independence, because he or she will always try to connect his or her decision with past decisions. It is because policy decisions may be inconsistent and are not individuated that a Judge, when deciding the particular gravitational force of a precedent must take into account only the arguments of principle that justify that precedents ignoring arguments of policy.[16] In effect Judges are always looking back to precedents or statutes to justify their decisions whilst the legislatures, in formulating policy and enacting it in the form of legislation, are forward looking. Furthermore in looking back, the Judge only looks for principles, not for instance, at the policy that may have generated a particular piece of legislation.

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14. *Id.*, pp.93-94
15. *Supra* note 1,307
16. *Id.*, pp 110-23

VII. JUDICIAL DECISIONS AND STATUTES

As regards the Common Law Dworkin adheres to the view that Judges decide cases on principle not policy and this is the approach, whether the case is difficult or straight forward. It appears that such an approach is inapplicable to cases involving in whole or in part the interpretation and application of statutes for the simple reason that, unlike the Common Law, statutes are mostly motivated by considerations of policy. Again there are different considerations for settled and hard cases. In settled cases, the enforcement of the clear terms of some plainly valid statute is always justified on grounds of principle even if the statute is generated by policy.[17]

By "principle" here Dworkin means that the statute creates rights and duties which are recognised in individual cases, even though the statute as a whole is directed towards the attainment of a policy goal. In relation to hard cases, Dworkin states that since a Judge accepts the settled practices of the legal system, then he or she must accept some theory that justifies these practices. Consequently, the Judge must develop a theory of the Constitution in the shape of a complex set of principles and policies that justify the scheme of government. In interpreting statutes, the Judge must use a construction, not about the mental state of the particular legislature that adopted the statutes but of a social political theory that justifies that statute.

VIII. DEMOCRACY

Although Dworkin's theory commences as an analysis of the judicial function, it does grow into a legal and political theory. It is already seen, the basic distinction that Dworkin makes between the legislators acting on policy considerations which are usually based on calculations of what is in the best interest of society, while the judiciary acts on principle. Although there is some cross fertilisation for example, parliament may enact legislation that is primarily designed to protect people's rights and Judges may in hard cases concerning Statutes make decisions about competing policies. Dworkin is stating that despite this cross-fertilisation, the two processes, adjudication and legislation are qualitatively distinct. Dworkin views Judges as the preservers of rights against governmental interference and this is particularly evident in the United States where certain fundamental rights are entrenched in the Constitution and are protected by the Judiciary. This explains, why the Judiciary should be free to deal with hard cases.

Following from Dworkin's essentially anti-utilitarian theory of democracy, the principle of equal concern and respect could be said to be the foundation of his democratic theory. This principle signifies that people are treated as individuals by the government rather than simply as part of society as a whole utilitarianism favours simple calculations of what would advance the interests of a society or more usually a section of society. In so doing it fails to treat individuals as distinct and allows majority or more correctly the democratically elected representatives of the majority to force decisions on the minority, not

17. *Supra* note 1, pp.105-110

only concerning issues of policy but also permitting the government of the day to subject individual rights to policy calculations. Dworkin's approach to democracy is that the government of the day is free to take policy decisions on the basis of utilitarian calculations, but is not permitted to do so when such decision overrides or denies individual or minority rights. However, it appears unclear whether the principle of equal concern and respect is a concrete right or an abstract right or whether it is indeed a legal or political right. It appears too general to be institutionalised and there is no real evidence offered that it has crept into Judicial calculations in hard cases. Nevertheless, the principle is so fundamental that Dworkin states that anyone who believes in rights must believe in it, more particularly in a minimum of two ideas: (i) The idea of human dignity - that the government must treat a person as a full member of a human community, and (ii) The idea of political equality - that every member of the community, whether weak or strong, is entitled to the same concern, and respect from their government.[18] Dworkin claims that the protection of rights makes sense if it is necessary to preserve an individual's right to dignity and equal concern and respect. The principle of equal concern and respect is the background principle in a liberal society which justifies the preservation of rights. Dworkin says:

> So if rights make sense at all, then the invasion of a relatively important right must be a very serious matter. It means treating a man as less than a man or as less worthy of concern than other men. The institution of rights rests on the conviction that this is a grave injustice, and that it is worth paying the incremental cost in social policy or efficiency that is necessary to prevent it.[19]

Dworkin points out that utilitarian arguments based on external preferences of the community, which will include the worst prejudices, does not entail treating each individual with equal concern and respect. Therefore, to justify political constraints on rights, care must be taken to ensure that the utilitarian calculations on which the constraint is based focus only on internal and not external preferences.

In this way the underlying principle of equal concern and respect preserves other individual and minority rights, which will be protected against the general Will, and can be overridden in three situations according to Dworkin:

> "I can think of only three sorts of grounds that can consistently be used to limit the definition of a particular right. First, the government might show that the values protected by the original right are not really at stake in the marginal case..... second it might show that if the right is defined to include the marginal cases then some competing right in the strong sense .....would be abridged. Third, it might show that if the right were so defined, than the cost to society would not be simply incremental but would be of a degree

18. *Id.*, pp.198-99

19. *Id.*, at 199

far beyond the cost paid to grant the original right a degree great enough to justify whatever assault on dignity or equality might be involved."[20]

IX. CONCLUSION

In conclusion, it can be said that the rule, principle and policy distinction carved out by Ronald Dworkin, has thrown new light in the direction of establishing the importance and primacy of individual rights over collective goals. Dworkin's endeavour to protect the rights of the minority from the onslaught of the majority swayed by many prejudices, through the procedural device of excluding external preferences is certainly highly laudable. Dworkin's attempt to justify Judicial review of a law enacted by a democratic majority, which too many would appear to be undemocratic on the ground of external preferences of majority extraneous to the principles of utility, is appreciable, more particularly when viewed from the perspective of securing individual rights.

The interpretative technique evolved by Dworkin on deontological lines is neo-Kantian in its approach, in the sense that during difficult times, the rights given to the minority or vulnerable sections of the community must be kept away from utilitarian calculations based on a teleological or a purpose oriented interpretation. In essence, Dworkin's argument is that every aspect of life must not be decided on the basis of utilitarian calculation, as that would virtually amount to depriving the basic human dignity and human worth which human beings are endowed with Dworkin's argument that human dignity and human worth, which cannot be commodified in terms of profit and loss, and that the pain endured in protecting it is worthwhile, as that alone would justify our existence as human beings giving preference to quality over quantity, has definitely elevated the status of human beings reflecting their moral autonomy, instead of reducing them into subject matter of calculation on utilitarian grounds.

At the same time it must also be understood that Dworkin is not recalcitrant or obstinate in his approach, and that his approach also reflects flexibility in the sense that he concedes that in certain exceptional circumstances, the individual's rights may be compromised to accommodate larger utilitarian goals. The empirical sciences, which have reduced man to a bundle of cause and effects, have undermined the importance of morality and ethics in public life. The question that continues to evade a convincing answer is whether society is a natural institution to be nurtured by scientific principles or an artificial institution to be nurtured by ethical and moral principles, is at the centre of debate. Immanual Kant's understanding that as science and technology progresses, people's confidence in ethics and morality would correspondingly get reduced has become a reality, in view of the ascendancy being given to empirical sciences. Dworkin has taken this challenge upon

20. *Id.*, at 200

himself and endeavours to strike a reconciliatory path between the empirical and normative sciences. He admits the importance of empirical sciences in policy matters, but in matters of principles, he gives importance to normative sciences. Even in the case of policy matters, he does not totally subscribe to the path shown by empirical sciences, as evinced in his exclusion of external preferences to establish the rights against the majority on deontological lines.

Dworkin claimed his thesis to be both prescriptive and descriptive. The question whether he is successful in this endeavour is debatable, as there are many who argue that Judges resort to teleological interpretation, when confronted with a hard case. It is precisely at this juncture when the teleological interpretation looks very obvious to many in the sense that the rights of one or two individuals may be sacrificed for the sake of happiness of many. Dworkin becomes more relevant in his attempt to protect individual rights, instead of reducing them to the status of sacrificial scapegoats.

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RESERVATION IN PRIVATE EDUCATIONAL INSTITUTIONS: A JOURNEY FROM T.M. PAI TO INDIAN MEDICAL ASSOCIATION

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ABSTRACT

The 93rd Constitutional Amendment [Article 15 (5)] allows the government to make special provisions for "advancement of any socially and educationally backward classes of citizens", including their admission in aided or unaided private educational institutions. The questions whether reservation could be made for SCs, STs or SEBCs in private unaided educational institutions on the basis of the constitution (Ninety-third Amendment)? or whether reservation could be given in such institutions? or whether any such legislation providing reservation for weaker sections of society would be violative of article 19(1) (g) or Article 14 of the Constitution? or whether the Constitution (Ninety-third Amendment) which enables the State legislatures or Parliament to make such legislation would be violation of basic structure of Constitution? This paper explores the aforesaid issues. It advocates reservation in private educational institutions as a tool for social justice or empowerment of backward and marginalized class.

KEY WORDS: *Reservation, Social Justice, Equality, Private Educational Institutions and Basic Structure.*

I. INTRODUCTION

RESERVATION IS one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the State to promote positive measures to remove barriers of inequality and enable diverse communities to

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enjoy the freedoms and share the benefits guaranteed by the Constitution. To cope with the modern world and its complexities and turbulent problems, education is a must and it cannot remain cloistered for the benefit of a privileged few. Reservations provide that extra advantage to those persons who, without such support, can forever only dream of university, education, without ever being able to realize it[1].

Arjun Sen Gupta's Report[2] has stated that 'Education can be a liberating capability but access to it is made difficult, if not impossible, by such inherited characteristics as lower social status, rural origin, informal work status and gender or a combination of these'.[3]

Equality has two facets- formal equality and proportional equality. Proportional equality is equality "in fact" whereas formal equality is equality" "in law". In the case of proportional equality, the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the frameworks of liberal democracy. Egalitarian equality is proportional equality.[4]

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.

In Prof. Yashpal v. State of Chhattisgarh,[5] the Supreme Court of India has declared[6] the provisions of Sections 5 and 6, of the Chhattisgarh Niji KshetraVishwavidyalaya (Sthapana Aur Viniyaman) Adhiniyam, 2002, to be ultra vires of the Constitution. The UGC was 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.

The courts have a limited role to play in the establishment of new educational institutions since it has been considered as the policy matter of the government[7]. The Madras High Court while observing that prior permission from the Central Government is a sine-qua-non to start a professional college,[8] directed the petitioner to stop conducting the course. In this era of mushrooming of professional colleges, this decision shows the strict attitude of

1. Ashoka Kumar Thakur v.Union of India, 2008 (5) SCALE 1, 52
2. Arjun Sen Gupta Report on "Conditions of Work and Promotion of Livelihood in the Unorganised Sector" (July 2007).
3. Id. at, 172
4. Id. at, 176
5. (2005) 5 SCC 520
6. Vide its order in Writ petition (Civil) No. 19/2004 Prof. Yash Pal &Ors. v. State of Chhattisgarh & Ors., dated 11 February, 2005.
7. See generally, Asif Hammed v. State of Jammu & Kashmir, AIR 1989 SC 1899
8. Madras Presidency Homeopathic Association v.The Registrar, Tamil Nadu Homeopathic Medical Council AIR 2007 Mad 1545. See also S.T. Krishnamoorthy v. Union of India, AIR 2007 Mad 1573.

the court to keep up the standard of education and to retain State control over it.

In State Public Interest Protection Council v. Union of India,[9] the Orissa High Court held that the establishment of educational institutions is the policy matter of Union of India and even the UGC has no power to establish an institution without the approval of the Central Government. The court also added that this unfettered power of the Union of India cannot be judicially reviewed and the court cannot direct the Union of India to establish an institution at a particular place. But, in State of Kerala v. SC/ST Welfare Society[10], Kerala High Court held that educational needs of the society are to be ascertained and determined by the State. It directed the State government to reconsider the application for granting permission to start the school which was denied by the State itself. In this case, the government on the one hand admitted the educational needs in a locality and on the other, took a policy decision to refuse sanction to start a school. The Court observed that the government cannot refuse to give permission under the guise of want of policy decision in that regard as it would amount to defeating the constitutional mandates contained in articles 21-A, 41, 45 and 46.

In Abhishek Kodian v. State of U.P.[11] the stand taken by the private unaided institutions, to fix fee structure on their own was disapproved by the Allahabad High 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. In another case,[12] the Madhya Pradesh High Court held that the fees charged by the private unaided education institutions was rational and there was no charging of capitation fees or profiteering even after decision of the Supreme Court in T.M.A. Pai Foundation case.

The 93rd Constitutional Amendment allows the government to make special provisions for "advancement of any socially and educationally backward classes of citizens", including their admission in aided or unaided private educational institutions. Gradually this reservation policy is to be implemented in private institutions and companies as well.

The questions are whether reservation could be made for SCs, STs or SEBCs in private unaided educational institutions on the basis of the Constitution (Ninety-third Amendment)? or whether reservation could be given in such institutions? or whether any such legislation providing reservation for

9. AIR 2007 Orissa 159
10. AIR 2007 Ker 158
11. AIR 2007 All 204
12. Priyanka v. State of Madhya Pradesh, AIR 2007 MP 182

weaker sections of society would be violative of article 19(1) (g) or Article 14 of the Constitution? or whether the Constitution (Ninety-third Amendment) which enables the State legislatures or Parliament to make such legislation would be violation of basic structure of constitution? This paper explores the aforesaid issues. It advocates reservation in private educational institutions as a tool for social justice or empowerment of backward and marginalized class.

II. JUDICIAL RESPONSE TO RESERVATION IN PRIVATE EDUCATIONAL INSTITUTIONS

The Constitution of India clearly defines 'State'[13] and 'laws'[14] in terms of State actions. The Supreme Court has held in Zee Telefilms v. Union of India[15] that the pre-requisite for invoking the enforcement of a fundamental right under article 32 is that the violator of that right should be State.[16] Rajeev Dhavan had contended that article 15 (5) sub silentio amends article 12 of the Constitution and thereby alters the very basis of the fundamental rights chapter, which is directed against state action and not private persons or institutions.[17] The Delhi High Court in Naz Foundation v. Government of NCT of Delhi[18] has held that article 15 (2) incorporates the notion of horizontal application of rights by prohibiting discrimination of one citizen by another in matters of access to public spaces.

Sudhir Krishnaswamy has stated that the state-private distinction does not stand on the same footing as democracy, equality and secularism as an inviolable constitutional principle and, being and important but malleable principle, it cannot be said to be a part of the basic structure of the Constitution.[19] PratapBhanu Mehta has also opined that no court in India would be radical enough to hold that the private-public distinction is a part of the basic structure of the Constitution.[20]

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13. See Article 12 of the Indian Constitution
14. Id. Article 13
15. (2005) 4 SCC 649
16. Id., at 681; See also, Fali S. Nariman, "Court and the Constitution", The Tribune, April 14, 2006.
17. (2008) 6 SCC 216, Article 17, 23 and 24 of the Constitution expressly impose obligations on private individuals. See also, Ashish Chug, "Fundamental Rights-Vertical or Horizontal?" (2005) 7 SCC (Jour) 9.
18. 2010 Cri LJ 94 Delhi
19. Sudhir Krishanawamy, "In Defence of Larger Intersts", The Telegraph, January 31, 2006. See, generally, M.P. Singh, "Protection of Human Rights against State and Non-State Action" in Dawn Oliver &JorgFedtke (eds).,Human Rights and the Private Sphere: A Comparative Study 180-212 (Routledge-Cavendish, Abingdon, 2007).
20. Pratap Bhanu Mehta, "Is 93rd amendment constitutionally tenable?",The Economic Times, June 6, 2006. See also, Parmanand Singh, "Tension between Equality and Affirmative Action: An Overview", 1 Jindal Global L Rev 109 (2009).

T.M.A. Pai Foundation Case,[21] 11 judges bench of the Supreme Court observed that the right to establish and administer educational institutions is guaranteed to all citizens [19(1)(g) and 26] and to minorities specifically under Art. 30. These rights are not limited to minorities and are available to all persons[22]. In case of aided professional institutions, the State may prescribe that only those persons may be admitted who have passed a common entrance test. The controversy related to State imposed reservation in unaided private educational institution started with the observation of the Supreme Court in the instant case[23] that it would be unfair to apply the same rules & regulations regulating admissions to both aided and unaided professional institutions. However, as a condition of recognition State could allot a certain percentage of seats to fulfill its objective and according to local needs.

In Islamic Education Society Case[24], the Apex Court clarified that unaided professional college should also make provision for students from poor and backward sections of the society where in the government could prescribe the percentage of seats according to local needs and different percentage could be fixed for minority and non-minority institutions.[25]

The Supreme Court in Inamdar Case[26] held that it was constitutionally impermissible to impose any seat sharing, quota or reservation policy by the State on unaided private professional colleges[27]. The court went on to add that any State imposed reservation in unaided private educational institutions would be an unreasonable restriction in the exercise of a fundamental right under Article 19 (1) (g)[28].

In case of unaided institutions the control should be minimal. Conditions of recognition and affiliation by or to a Board or University have to be complied. But the appointment of teaching and non teaching staff and control over them will vest in the management. The State may frame regulations prescribing the minimum qualification of a teacher or principal and also in regard to service conditions. Unaided institution can charge any fees but no institution can charge capitation fee.

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21. T.M.A. Pai Foundation v. State of Karnataka (2002) 8 S.C.C. 712
22. Admission of students to unaided minority institutions cannot be regulated by the State or a University but it can provide the qualifications and minimum conditions of eligibility in the interest of academic standards. An aided minority educational institution has the right to admit students belonging to the minority but it may be required by the State Government to admit a reasonable number of non-minority students. Reasonable number would depend on the type of institution, courses being run and educational needs of the minorities.
23. T.M. Pai foundation v. State of Karnataka (2002) 8 SCC 481, 549
24. Islamic Education Society v. State of Karnataka (2003) 6 SCC 697
25. Id., at 725-26
26. (2005) 6 SCC 537
27. Id., at 597-598
28. Id., at 601

The TMA Pai decision[29], in fact, inaugurated a new constitutional regime in educational matters which consisted of partnership between Government and private institutions including minority institutions.

Even though the TMAPai decision[30], protected all unaided institutions, from the State's reservation programmes, it should be noted that the Islamic decision[31], tried to impose a quota on such private institutions and was specifically overruled by a larger seven-judge Bench in Inamdar case[32]. The Supreme Court held that "neither the policy of reservation can be enforced by the State nor any quota or percentage of admissions can be carved out to be appropriated by the State in a[n] …. Unaided educational institution."[33] Further, it was also held that the private educational institutions[34], including minority institutions, are free to admit students of their own choice and the State by regulatory measures cannot control the admission. The above ruling disabled the State to resort to its enabling power under Article 15 (4) of the Constitution.[35]

In view of the decision of the Supreme Court in T.M.A. Pai Foundation and interpreted in P.A. Inamadar, without legislative support, no reservation can be made in private educational institutions merely by exercise of the executive power.

It has been said that the decisions in TMA Pai Foundation[36] to Inamdar[37] signify that the court in its enthusiasm to set things right in the vital area of higher education created conflicts calling for legislative intervention. It is not known whether these interventions would be looked upon kindly by the court later. So the confusion still exists demanding debates and discussions at all levels[38].

The 93rd Amendment introduces rights against private institutions. The Constitution (Ninety-third Amendment) Act, 2005, had inserted clause (5) in Article 15 enabling the State to make special provisions, by law, for the advancement of any socially and educationally backward classes of citizens or the scheduled castes or the scheduled tribes, insofar as such special provisions related to their admission in educational institutions, including private educational institutions, whether aided or unaided by the State. Minority educational

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29. Supra note 21
30. Ibid
31. Supra note 24
32. P.A. Inamdar v. State of Maharashtra (2005) 6 SCC 537, 589
33. Id., at 603
34. Ibid.
35. Ashoka Kumar Thakur v. Union of India, 2008 (5) SCALE 1, 66
36. Supra note 21
37. Supra note 32
38. K.N. Chandrasekharan Pillai &Jyoti DograSood, 'Supreme Court-in-Retrospect and Prospect', 48 JILI, 3,10 (2006)

institutions referred to in clause (1) of Article 30 were, however, excluded from the purview of this inserted clause. The said amendment became effective from 30.01.2006, along with the newly enacted Central Educational Institutions (Reservation in Admission) Act, 2006.[39] Section 2 (d) of the Act defined 'Central Educational Institution[40]'. Section 3 of the Act provided for 15% reservations for scheduled castes, 7½% for Scheduled Tribes and 27% for Other Backward Classes in 'Central Educational Institutions'.

The object of the Act was to introduce reservation in 'Central Education Institutions' and not in any other private unaided institutions. It thereby restricted the whole objective of the 93rd Amendment Act. The Act, however, did not provide any reservation in any private unaided institution. In spite of these various developments, in effect, the power of the State to regulate the private, un-aided non-minority educational institutions is still governed by the Inamdar judgment.

The constitutional validity of the 93rd Amendment as also the validity of the Act was challenged before the Supreme Court in Ashok Kumar Thakur.[41]

Arijit Pasayat, J, speaking for himself and also for Thakkar, J[42], did not specifically rule on the question whether the constitutional amendment violated the basic structure of the Constitution but held that the challenge relating to private unaided educational institutions could not be examined because no such institution had laid any challenge.[43]

However, Bhandari, J[44], in his dissent opined that "imposing reservation on unaided institutions violates the basic structure by obliterating citizen's right under Article 19 (1) (g) to carry on an occupation. Unaided entities, whether they are educational institutions or private corporations, cannot be regulated

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39. Hereinafter the 'Act'

40. To mean- (i) a university established or incorporated by or under a central Act: (ii) an institution of national importance set up by an Act of Parliament; (iii) an institution, declared as a deemed university under section 3 of the University Grants Commission Act, 1956 (3 of 1956), and maintained by or receiving aid from the central government; (iv) an institution maintained by or receiving aid from the central government, whether directly or indirectly, and affiliated to an institution referred to in clause (i) or clause (ii), or a constituent unit of an institution, referred to in clause (iii), (v) an educational institution, set up by the central government under the Societies Registration Act, 1960 (21 of 1869).

41. Ashok Kumar Thakur v. Union of India, (2007) 4 SCC 397; The petition came before a bench comprising of Arijit Pasayat and Lokeshwar Singh Panta, JJ and on 17.5.2007 the matter was referred to a larger bench after framing the issues.

42. Ashok Kumar Thakur v.Union of India 2008 (5) SCALE, 1

43. Id. at 199. See also Sudhir Krishnaswamy & Madhav Khosla, "Reading AK Thakur v. Union of India: Legal Effect and Significance", 43 Economic & Political Weekly 56 (2008); M.P. Singh, "Ashok Thakur v. Union of India: A Divided Verdict on an Undivided Social Justice Measure", 2 NUJS L Rev 208 (2008).

44. Ashok Kumar Thakur v. Union of India 2008 (5) SCALE, 1, 272

out of existence when they are providing a public service like education. That is what reservation would do. That is an unreasonable restriction. "When you do not take a single paisa of public money, you cannot be subjected to such restriction." Having so observed, Bhandari, J declared that the Ninety-third Amendment's reference to unaided institutions must be 'severed'. Although, no unaided institution had challenged the validity of the said constitutional amendment, the judge held that "the court [had] listened to the parties for months" and received voluminous written submissions from them, yet no objection was made with regard to the fact that no unaided institution had filed a writ petition". According to him, "the best lawyers in the country argued the case for both sides, and a brief from an unaided institution would not have added much if anything to the substance of the arguments. The Government will likely target unaided institutions in the future. At that time, this Court will have to go through this entire exercise de novo to determine if unaided institutions should be subject to reservation. Such an exercise would unnecessarily cause further delay. The fate of lakhs of students and thousands of institutions would remain up in the air"[45]. Looking to the extraordinary facts, the Court led by Justice Bhandari pronounced on the validity of the amendment "in the larger public interest".[46]

The Court in Ashoka Kumar Thakur has clarified that the principles laid down in Indra Sawhney will equally apply to reservations under article 15 (4) and 15 (5).[47]

Rajeev Dhavan has suggested that the imposition of 50 percent reservations in unaided private educational institutions will revive the overruled decision of the court in Unni Krishnan wherein the court had devised the scheme under which 50 per cent of the seats were free and open for the general category while the remaining 50 percent of the seats were paid seats. Rajeev Dhavan has rightly pointed out:[48]

Would the Government pay commercial rates for its quota? Would the institution provide scholarship? Would the fees for this Government quota be subsidized as intended by many States? If there was to be a subsidized quota in aided and unaided colleges, are we not back to the 'half-backed' socialist scheme of Unnikrishnan?

It has been pointed out that Bhandari J has wrongly restricted the scope of the judicial scrutiny of article 15 (5) to the unaided educational institutions. The error becomes particularly glaring because an addition to the equality code could not be termed as unconstitutional without considering its impact on

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45. See generally, Minerva Mills Ltd. & Others v. Union of India and others (1980) 3 SCC 625

46. Ashok Kumar Thakur v. Union of India 2008 (5) SCALE, 1, 237; See also, Upendra Baxi, "The Rule of Law in India", 6 SUR Int'l J of Human Right 19 (2007).

47. Parmanand Singh, "Logical Step", Frontline, May 5, 2006

48. Rajeev Dhavan, "Professional Education and the S.C.", The Hindu, September 5, 2003

the entire code as considered by the court in M. Nagaraj.[49]

Sudhir Krishnaswamy has rightly observed that while article 15 (5) could be shown to neither advance the interests of its beneficiaries nor that of the nation but bad policy is not always bad legally.[50]

Balakrishnan, then Chief Justice of India[51] took the stand that none of the private unaided educational institutions had filed petitions before the court challenging the Ninety-Third Constitutional Amendment. Though the learned counsel appearing for the petitioners challenged the Ninety-Third Constitutional Amendment on various grounds, they were vis-à-vis the challenge to Act 5 of 2007. In the absence of challenge by private unaided educational institutions, it would not be proper to pronounce upon the constitutional validity of that part of the Constitutional Amendment. As the main challenge in these various petitions was only regarding the provisions of Act 5 of 2007, which related to State maintained institutions, the challenge to the Ninety-Third Constitutional Amendment so far as it related to private unaided educational institutions, did not strictly arise in these proceedings. The Court pointed out that the 'in absence of challenge by private unaided institutions, it may not be proper for this Court to decide whether the Ninety-Third Constitutional Amendment is violative of the "basic structure" of the Constitution so far as it relates to private unaided educational institutions merely because we are considering its validity in the context of Act 5 of 2007".[52]

Raveendran, J. agreed with the learned Chief Justice and Pasayat, J. opined that clause (5) of Article 15 was valid with reference to State maintained educational institutions and aided educational institutions; and that the question whether Article 15(5) would be unconstitutional on the ground that it violated the basic structure of the Constitution by imposing reservation

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49. M. Nagarajv. Union of India (2006) 8 SCC 212 at 245.See also, Shivendra Singh, 'Reservations in Private Unaided Educational Institutions: Legal and Theoretical Reflections', 53. JIILI, 72-95, 2011

50. Sudhir Krishnaswamy, "In Defence of Larger Interests", The Telegraph, New Delhi, January 31, 2006. See, generally, M.P. Singh, "Protection of Human Rights against State and Non-State Action" in Dawn Oliver &JorgFedtke (eds.), Human Rights and the Private Sphere: A Comparative Study 180-212 (Routledge-Cavendish, Abingdon, 2007).

51. Ashoka Kumar Thakur v. Union of India 2008 (5) SCALE, 1, 40-43

52. Ashoka Kumar Thakur v. Union of India, 2008 (5) SCALE, 1, 78; See generally, Sudhir Krishnaswamy, Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine 78 (Oxford University Press, New Delhi, 2009); MohsinAlam, Prasand Dhar et al., "Reservation and the Basic Structure: The Evolution of Equality as an essential Feature of the Constitution" in Anirudh Krishnan &HariniSudersan, Law of Reservations and Anti-Discrimination With Special Emphasis on Education and Employment, 661-62 (Lexis Nexis-Butterworths Wadhwa, New Delhi, 2008) ;Soli J Sorabjee, "Evolution of the Basic Structure Doctrine: Its Implications and the Impact on Constitutional Amendments", available at: http://docs.google/com/doc? id=dct39c8s_ 101f3 8gp3cf 2011.

in respect of private unaided educational institutions was left open[53]. However, Justice Bhandari pointed out[54] that reservations weaken the incentive to establish unaided institutions: if the State usurps the right to select students, would one still spend the time and money to establish an unaided institution? When education is effectively nationalized, freedom stands obliterated. The identity of the Constitution is altered when unreasonable restrictions make a fundamental right meaningless. The 93rd Amendment's imposition of reservation in private educational institution has abrogated Article 19 (1) (g), a basic feature of the Constitution, in violation of our Constitution's basic structure'[55].

Devesh Kapur and Pratap Bhanu Mehta took the stand that the percentage of seats in engineering in private universities rose from 15 percent in 1960 to 86.4 percent while in medical colleges, the proportion of private seats rose from 6.8 percent in 1960 to 40.9 per cent in 2003.[56] They have also highlighted that according to estimates, 90 percent of the business schools are private educational institution.[57] In order to grant degrees, all unaided private educational institutions have to get affiliated with a state-operated government university.[58] According to Virendra Kumar, this alone is a valid ground for the imposition of reservations on private unaided institutions.[59]

In an interim order passed by the Supreme Court in Modern Dental College & Research Centre v. State of Madhya Pradesh,[60] it has been reiterated that private unaided institutions have to generate their own resources and consequently they must enjoy a larger degree of autonomy as compared to the aided institutions or the state government institutions. The court, while confronted with the challenge to the constitutionality of a state legislation under article 15 (5), must ensure that the imposition of reservations in unaided private institutions on the line of state education institutions should not lead to

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53. Ashoka Kumar Thakur v.Union of India, 2008 (5) SCALE, 1,200. See generally, Virendra Kumar, "Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance (From Kesavanand Bharti to I.R. Coelho)", 49 JILI 397 (2007).
54. Supra note 44
55. Ashok Kumar Thakur v. Union of India, 2008 (5) SCALE, 1, 248
56. Devesh Kapur & Pratap Bhanu Mehta, "Mortgaging the Future? Indian Higher Edcuation", 4 Brokings-NCAEr Indian Policy Forum 2007-08, 123 (2008)
57. Ibid.
58. Kevin D. Brown &Vinay Sitapati, "Lessons Learned from Comparing the Application of Constitutional Law and Federal Anti-Discrimination Law to African-Americans in the US and Dalits in India in the Context of Higher Education", 24 Harv Black Letter L J 45 (2008).
59. Virendra Kumar, "Dynamics of Reservation Policy: Towards a more Inclusive Social Order", 50 JILI 514-15 (2008).
60. (2009) 7 SCC 751 at 758.Hereinafter cited as Modern Dental College & Research Centre.

a situation wherein they voluntarily opt out of the education sector.[61]

The court's interim order in Modern Dental College & Research Centre[62] has given primacy to the autonomy of private unaided institutions by emphasizing that the state government cannot unilaterally decide to usurp the admission procedure of a private unaided institution on the pretext that it is not complying with the safeguards enunciated in P.A. Inamdar.

In a significant judgment, the Allahabad High Court ruled that reservation to SC/ST and OBC students in admission to private unaided and self-finance educational institutions in Uttar Pradesh will not apply. A division bench comprising Justice Sunil Ambwani and Justice Y C Gupta has held that section 4 of the UP Admission to Educational Institutions (Reservation for SC/ST/ OBC) Act 2006 is invalid and ultra vires to the basic structure of the Constitution of India to the extent it relates to provide reservations in admission of students to private unaided and self-finance educational institutions in the state of UP. The judgment was passed on the writ petition of Sudha Tiwari, challenging section 4 of the said Act, against the decision of Deen Dayal Upadhaya Gorakhpur University providing reservation to SC/ST and OBC candidates in B.P. Ed. course entrance examination 2008.[63]

The Supreme Court got an opportunity to examine the validity of article 15 (5) in the Indian Medical Association Case[64]. The Indian Medical Association Case is related to the Army College of Medical Sciences (ACMS), Delhi Cantonment. Army College of Medical Sciences was a Private Education Institution, started and managed by Army Welfare Education Society and located in National Capital Territory of Delhi. The Army College has devised its own admission procedure for the first year MBBS course in 2008 from a predefined source carved out by itself and its parent society, the Army Welfare Education Society (AWES). The college sought to admit only students who are wards or children of current and former Army personnel and widows of Army personnel.Students who otherwise would have been eligible for admission challenged the policy in a slew of writ petitions. The Indian Medical Association (IMA) also challenged it.[65]

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61. See, Generally, Ananth Padmanabhan, "Privatization of Higher Education in India: Constitutional Perspectives and Challenges", available at: http:// aka.lawstudent.in/ bc_seervai_essay.htm (Visited on Jan. 17, 2011).
62. (2009) 7 SCC 751,757- 758
63. See also, *Sudha Tiwari* v *Union of India* CMWP No. 22511 of 2009 order dated 11-2-2011; available at elegalix.allahabadhighcourt.in
64. Indian Medical Association v. Union of India (2011) 7 SCC 179
65. V Sreenivasa Murthy, The Supreme Court enunciates the virtues of state intervention in ensuring equity in higher education. Frontline, Vol. 28, 16-29 July, 2011 New Delhi. The Hindu available at http://www.thehindu.com/opinion/op-ed/ article381696.ece

The ACMS' admission policy was based on the belief that the wards of Army personnel suffer educational disadvantages compared with the civilian population and that this affects the morale of Army personnel. And it reserved 100 per cent of the seats for the wards of Army personnel. The Delhi government erroneously approved this policy.[66]

The Supreme Court Bench comprising Justices B. Sudershan Reddy and Surinder Singh Nijjar, however, found that the ACMS' admission policy set at naught the legislative intent in the Delhi Act 80 of 2007 to ensure excellence by mandating that all admissions be made on the basis of inter-se merit within each of the categories of students. The Delhi government's permission to the ACMS to admit students who may have scored lower marks than others, both within the general category and in the reserved categories, resulted in the defeat of this legislative intent, the court reasoned in its order of May 12, 2011.[67]

The Bench held that neither the AWES nor the ACMS was protected by any constitutional provision that allowed it to choose to be an educational institution serving only a small class of students from within the general pool. The Bench suggested that if indeed Army personnel now constituted a "Socially and Educationally Backward Class", then under Clause (5) of Article 15, it was for the state to determine the same and provide for reservation to wards of Army personnel.[68]

In the case of minority educational institutions, the state can relax its concern for merit on account of Clause (1) of Article 30, provided minority educational institutions maintain their minority status by admitting mostly minority students except for a sprinkling of non-minorities. With respect to non-minority educational institutions, the state can relax such concern for merit only with respect to reservation of seats for the Scheduled Castes, the Scheduled Tribes and the Socially and Educationally Backward Classes (SEBCs) as enabled by Article 15(5). Consequently, the Bench held that the choice of students by non-minority educational institutions could only be from the general pool with respect to non-reserved seats. They could not make further distinctions of their own accord.[69]

In the IMA case, however, the court had an opportunity to examine this issue because counsel for the ACMS challenged the validity of Article 15(5). The Reddy-Nijjar Bench differed with Justice Bhandari and considered the inclusion of Clause 5 of Article 15 by the 93rd Constitutional Amendment as of great significance. The Bench explained that "It clearly situates itself within the broad egalitarian objectives of the Constitution. In this sense, what it does is that it enlarges as opposed to truncating an essential and indeed a primordial feature of the equality code".[70] The Bench justified reservation as it is social

66. I.M.A. v. Union of India (2011) 7 SCC 179, 200-201

67. Ibid.

68. Id., at 228-29

69. Ibid.

70. Id., at pp.179, 253, 254

circumstances that prevent some individuals from performing to their full potential and thereby competing on a level playing field with those who might satisfy the "desert based" criteria. The Bench disagreed that the principles enunciated in the (Ashok Thakur case) - that egalitarianism was an intrinsic part of our equality code with respect to the field of education - could be limited to public and aided institutions.[71]

Agreeing that the extent of the state's involvement in the field of higher education had dramatically declined on account of its financial position, the Bench linked this fact to the increasing privatisation and liberalisation of the economy. One of the essential elements of privatisation has been the demand of the private sector that the state reduce its deficits, even as tax rates were cut, by reducing its involvement in various social welfare activities. This, according to the Bench, has had an impact on the ability of the state to invest as much as it should have in education, including higher education.[72]

The Bench explained that the burden of the state comprised not merely financial outlays. The burden of the state, it said, also comprised the positive obligations imposed on it on account of the egalitarian component of the equality code, the directive principles of state policy, and the national goals of achievement of an egalitarian order and social justice for individuals and amongst groups that those individuals are located in. "One cannot, and ought not to, deem that the ideologies of LPG have now stained the entire constitutional fabric itself, thereby altering its very identity".[73]

The Bench's reasoning against qualifying examinations or common entrance tests must wake society up. The test of merit, based on some qualifying examinations or a common entrance test, is prone to rewarding an individual who has a better family life, social exposure, and access to better schools and coaching classes, it suggested. The Bench cautioned that complete dependence on such tests would foreclose the possibility of individuals in the disadvantaged groups from gaining access to a vital element of modern life that grants dignity to individuals, and thereby to the group as a whole, both in this generation and in future generations. Therefore, the Bench held, the proper construction of Article 15(2) would in fact be to prohibit complete dependence on such context (social and educational backwardness) insensitive tests.[74]

Reservation based on social and educational backwardness, the Bench said, would promote the selection of those who were truly meritorious in each

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71. Id., at pp.179, 254

72. Id., at pp.179, 257

73. Ibid.

74. I.M.A. v. Union of India (2011) 7 SCC 179, 261, Under Article 15(2), no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public.

group on account of their demonstrated ability to be in the higher rungs of achievement within comparable situations of life's circumstances and disadvantages. Therefore, it held that clause 5 of Article 15 strengthened the social fabric in which the constitutional vision, goals and values could be better achieved and served. The provision, the Bench suggested, could be likened to a necessary replacement and in fact an enhancement in the equality code so that it made the Constitution more robust and stable.[75]

The fact remains that the development of education is integrally linked with the demands of specific societies, and it plays a crucial role in development and nation-building. Moreover, education is a defining factor in moulding a nation's identity. No country can, therefore, entrust the responsibility of educating its citizens, even a part of it, to private agencies that have no stake in the nation except their own self-interest.

III. CONCLUDING OBSERVATIONS

The Journey of the Supreme Court of India from T.M.A. Pai case to Indian Medical Association Case has proved the fact that 'under the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the state has got the role of ensuring that no class prospers at the cost of other class and no person suffers because of draw backs which is not his but social'.

Education is an organic process that cannot be borrowed or super-imposed on a society. Article 15 (5) has been enacted to provide reservation for backward and marginalized sections of the society in private educational institutions to help these sections of the society to develop the scientific temper, humanism and the spirit of inquiry and reform. However, legislative, executive wings have not yet activated dormant provision of the constitution relating to reservation in private educational institutions. To fulfill Constitutional mandate under Article 46 of the Constitution of the India, it is obligation of the Central Government and State Governments to take appropriate measures for reservation in private educational institutions. The said measure would also help these sections of the society to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

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75. I.M.A. v. Union of India (2011) 7 SCC 179, 264-265

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ILC'S DRAFT ARTICLES ON STATE RESPONSIBILITY: CONTRIBUTION OF SPECIAL RAPPORTEUR ROBERTO AGO

Ajendra Srivastava*

ABSTRACT

Roberto Ago has won a great reputation as the special rapporteur for one of the most ambitious projects of the International Law Commission ("the ILC"), namely "Responsibility of States for Internationally Wrongful Acts". His influence on the ILC's work on state responsibility is so great that he has been rightly described as a man "responsible for establishing the basic structure and orientation of the project". In particular, his distinction between 'primary' and 'secondary' rules of responsibility formed the basis for the ILC's work on the subject. Ago's approach in drawing distinction between primary and secondary rules made it possible for the ILC to delineate the scope of the articles and complete the project, albeit considerable controversy surrounds certain draft articles. The present article is aimed to examining theories of Roberto Ago and making an assessment of his contribution to the ILC's work on state responsibility. It shows that theories of Roberto Ago marked a significant departure from traditional theories of state responsibility. It also takes a critical view of certain proposals of Roberto Ago which he submitted to the ILC during his tenure as the special rapporteur for the topic of 'state responsibility'.

KEY WORDS: *State Responsibility, Liability, International Law Commission, Anzilotti, Roberto Ago*

I. INTRODUCTION

Roberto Ago has won a great reputation as the special rapporteur for one of the most ambitious projects of the International Law Commission ("the

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ILC"), namely "Responsibility of States for Internationally Wrongful Acts"[1]. His theories marked a turning point in the history of the law of state responsibility and were so influential in shaping the content of the ILC's work that the commentary to the ILC's Draft Articles praises Ago as a man "responsible for establishing the basic structure and orientation of the project".[2] In particular, his distinction between 'primary' and 'secondary' rules of responsibility formed the basis for the ILC's work on the subject. By focusing on the 'secondary' rules of responsibility, Ago re-conceptualized the whole work of the ILC. He also established the organizational structure of the draft articles, dividing them into two parts: first, the origin of state responsibility; and second, the forms and consequences of state responsibility. Ago's approach in drawing distinction between primary and secondary rules made it possible for the ILC to delineate the scope of the articles and complete the project, albeit considerable controversy surrounds certain draft articles.[3]

The present article intends to review and examine theories of Roberto Ago and to make an assessment of his contribution to the ILC's work on

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1. `The ILC completed its project on state responsibility in 2001. See Draft Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter 2001 Draft Articles on State Responsibility], in Report of the International Law Commission on the Work of Its Fifty-Third Session, UNGAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001). Other related projects of the ILC include Draft Articles on Prevention of Transboundary Harm from Hazardous Activities [Draft Articles on Transboundary Harm], in ILC's Fifty-third Session Report, id., note 1, at 370; Draft Articles on the Responsibility of International Organizations, in Report of the International Law Commission on the Work of Its Sixty-third Session, UNGAOR, 66th Sess., Supp. 10, at 54, UN Doc. A/66/10 (2011) In this paper, the expression 'state responsibility' is used to denote the regime of international responsibility of states as stated in the Draft Articles on State Responsibility.
2. 2001 Draft Articles on State Responsibility, *id*., at 31.
3. It is mainly because of the controversial nature of certain draft articles, the ILC did not request the General Assembly to immediately transform these articles into a convention. The ILC noted that a "suitable period of reflection would be more prudent than a draft convention..." At the ILC's request the General Assembly commended the Draft Articles on State Responsibility to the attention of the Governments "without prejudice to the question of their future adoption or other appropriate action." See GA Res. 56/83, para 3 (Dec. 12, 2001); GA Res. 59/35, para 1 (Dec. 2, 2004); see also David D Caron, "Symposium", "The ILC's Draft Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority" 96 *AJIL* 857,861(2002). Hence, the Draft Articles remain open for review and scrutiny by the international community, scholars, international courts and tribunals.

state responsibility.[4] Part II of this article presents traditional theories of state responsibility. Part III focuses on theories of Ago and his approach in conceptualizing the subject of state responsibility. Part IV is devoted to present a brief overview of the Draft Articles on State Responsibility. Finally, Part V concludes the study.

II. THE CLASSICAL INTERNATIONAL LAW OF STATE RESPONSIBILITY

Tradition theories viewed international responsibility of a state essentially as a duty to make reparation for the injury sustained by the nationals of another state. To put it another way, according to traditional doctrines international responsibility amounted to a consequential obligation incumbent upon the breaching state for not complying with its duty towards nationals of other states.[5]

During the first quarter of the twentieth century, Dionisio Anzilotti, a great Italian jurist, provided a conceptual framework for the law of state responsibility which set the tone for further development of the law. He wrote:

> "When a wrongful act-by which is meant, as a rule, the violation of an international right-is committed, the consequence is that a new relationship comes into existence, in law, between the State to which the act is imputable (that State being under a duty to make (reparation) and the State with respect to which there exists an unperformed obligation (this State having a claim to reparation). This is the only effect that the rules of international law, as laid down in the reciprocal undertakings of States, can attribute to the wrongful act…"[6]

Anzilotti's conception of state responsibility was a bilateral one. For Anzilotti, the violation of a rule of international law gives rise to a claim of reparation as the primary content of state responsibility. Thus, Anzilotti

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4. On the subject of the law of state responsibility, see generally Ian Brownlie, *System of the Law of Nations State Responsibility*, Part 1 (1983); Jimenez de Arechaga, 'International Responsibility' in Max Sorensen (ed.), *Manual of Public international Law* 534-599 (1968); Brian D. Smith, *State Responsibility and the Marine Environment* 5-43 (1988); DJ Harris, *Cases and Materials on International Law*, 484-623 (1998); Georg Schwarzenberger, *International Law*, Vol. I, 562-681 (1957); Georg Nolte, From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations', 13 *EJIL* 1083-98 (2002); the ILC reports on state responsibility, printed in the *YbILC's* Ssuccessive Volumes from 1957 to 2001 and referred to in this article; "Symposium" 96 *AJIL* 773 (2002); and "Symposium" 13 *EJIL* 1053 (2002).

5. For a list of early writings on State responsibility, see Ian Brownlie, id. at 7-8.

6. Dinisio Anzilotti, *Corso di Dirisso Internazionale*, (Rome 1928), Vol.I, p.416: cited in the First Report of Garcia-Amador, *YbILC* [1956], Vol.II, Part Two, p.181, UN Doc. A/CN.4/Ser A./1956/Add.1.

delineated the area of state responsibility separating it from the law of enforcement.[7] Furthermore, he saw the state responsibility as a consequential obligation to make reparation. A major limitation of Anzilotti's approach, however, is that for him international obligation of a state was limited to a 'duty to make reparation'.

Anzilotti's theory of state responsibility is supported by Karl Strupp, a German author. Although he conceded theoretically, at least, it was possible to conceive a model of state responsibility in which international responsibility of a state may be invoked by the international community, he, however, asserted that under the positive international law only the immediately injured state could invoke the responsibility of the injuring state.[8]

Another major figure of the first half of the twentieth century is Clyde Eagleton who asserted that the responsibility of a state is simply the principle which establishes an obligation to make good any violation of international law producing injury committed by the respondent state. Thus, Eagleton like Anzilotti conceived state responsibility as a consequential obligation to make good any loss suffered by another state.[9]

This view that state responsibility denotes a consequential obligation to make reparation is abundant not only in the legal literature but is also reflected in the judicial decisions of that time. In *Chorzow Factory* case, the Permanent Court of International Justice (PCIJ) observed: It is a principle of international law and even a general conception of law that any breach of an engagement involves an obligation to make reparation.[10] Also in *Phosphates in Morocco* case, the PCIJ held that when a state commits an internationally wrongful act against another state international responsibility is established "immediately as between the two States."[11]

Topic of state responsibility was on the agenda of the First Conference for the Codification of International Law which met at Hague from March 13 - April 13, 1930. At the Conference, the topic was entrusted to a preparatory committee.[12] During the course of debate in the preparatory committee on 'responsibility of states for damage caused in their territory to the person or property of foreigners' tentative agreement was reached on some basic principles of state responsibility and several articles were drafted for inclusion in a convention.[13] First of all, the principle was agreed upon that "a state is

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7. See Georg Nolte, *supra* note 4, at 386
8. Karl Strupp, Das vokerrechtliche Delikt 16 (1920): cited in Georg Nolte, id., at 1089
9. Clyde Eagleton, *The Responsibility of States in International Law* 22 (1928)
10. *Factory at Chorzow*, *Jurisdiction*, 1927, *PCIJ*, Series A, No. 9, p. 21.
11. *Phosphates in Morocco, Judgment*, 1938, *PCIJ*, Series A/B, No. 74, p. 10, at 28. See also SS "Wimbledon", 1923, PCIJ, Series A, No.1, p. 15, at 30.
12. See Manley O. Hudson, The First Conference for the Codification of International Law 24 *AJIL* 447-466
13. *Id*., at 458-59

responsible for any failure on the part of its organs to carry out the international obligations of the state which causes damage to the person or property of a foreigner on the territory of the state." This was to be the introductory article. The second principle upon which agreement was reached related to defining the expression 'international obligation'. It was agreed that "the expression means obligations resulting from treaty, custom or the general principles of law, which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations." Regarding the meaning of the term "responsibility" the following agreement was reached: "Responsibility imports for the state concerned the obligation to make reparation for the damage sustained in so far as it results from failure to comply with the state's international obligations". The fourth principle agreed upon was "a state cannot disclaim responsibility by invoking its national law."[14]

However, serious differences arose among the delegations over the issue of international responsibility of a state for the acts or omissions of officials. The proposition advanced by a drafting committee that 'a state is also responsible for damage sustained by a foreigner as the result of acts or omissions of its officials... where the concerned officials did not have authority to perform the acts in question but performed them under cover of their official character', was bitterly opposed by certain delegations. The opposition was so strong that all effort to get a convention was then abandoned.[15]

At about the same time, the Harvard Law School prepared the 1929 Draft Convention on "Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners".[16] The Harvard draft formulated certain basic principles on the subject which may be taken as reflecting the then existing international law. As indicated by introductory comment, "the underlying idea of the draft, therefore, is to combine a restatement of the existing law with proposals for moderate changes which seem necessary to secure the acceptance of the convention by all countries."[17]

A few points may be made about the Harvard Draft. First, it uses the word 'responsibility' to denote the 'obligation' of a state to make reparation to the injured state.[18] In this sense, the term 'responsibility' refers to the secondary obligation of a state which arises following the breach by it of

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14. *Id*., at 459-60

15. *Id*., at 460

16. Hereinafter the Harvard Draft. For the text and introductory comment to the Harvard Draft, see "The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners" in 23 *AJIL* (Supplement: Codification of International Law) pp. 131-239

17. *Id*., at 140.

18. **Article 1**: A state is responsible, as the term is used in this convention, when it has a duty to make reparation to another state for the injury sustained by the latter state as a consequence of an injury to its national. Harvard Draft, *supra* note 16.

some primary obligation (duty) imposed upon it by the rules of international law. The term 'duty' on the other hand, is used to denote some primary duty of a state incumbent upon it being member of the international community.[19] The use of word 'duty' refers to a legal duty giving to the claimant state a correlative right to demand reparation. Thus, the Harvard Draft essentially follows the approach adopted by Anzilotti in formulating the concept of state responsibility as a consequential obligation to make reparation arising out of the breach by a state of its primary duties. Secondly, the Harvard Draft is limited to a particular branch of international law, namely "injury to aliens". Thirdly, the Harvard Draft makes it a primary duty of a state to make available to the alien the municipal remedies and "a measure of redress not substantially less than what it affords to its own nationals." Fourthly, the scope of the Harvard Draft articles is not confined to defining only secondary obligations of a state. The Harvard Draft defines primary duties of a state as well.[20] It is the breach of these primary duties which gives rise to international responsibility of a state to make reparation to another state. While The Hague Conference could reach agreement only on "secondary" rules of state responsibility such as imputation, not on the substantive (primary) rules regarding the treatment of aliens the Harvard Draft was able to formulate substantive obligations of states regarding treatment of aliens in addition to touching on the secondary issues. Finally, the Harvard Draft articles unfold a scheme of state responsibility which is essentially based on the bilateral conception of state responsibility formulated by Anzilotti.

What needs to be emphasized is that both the Harvard Draft as well as the articles adopted in the first reading of the Hague Codification Conference took the view that international responsibility of a state was identifiable with the duty to make reparation following the breach by a state of its primary duty.[21]

However, the bilateral and essentially positivist conception of state responsibility was attacked by Hersch Lauterpacht. He challenged the basic premise of the positivist conception of state responsibility according to which a state, being sovereign could not be punished. In his 1937 Hague lectures, Lauterpacht held that it was contrary to the notion of justice to ignore the idea of international crimes by limiting the international responsibility of a state to making reparations for specific individual wrongs.[22]

19. See Articles 4 &5 of the Harvard Draft, *supra* note 16. **Article 4**: A state has a duty to maintain governmental organization adequate, under normal conditions, for the performance of its obligations under international law and treaties. In the event of emergencies temporarily disarranging its governmental organization, a state has a duty to use the means at its disposal for the performance of these obligations. ***Article 5***: A state has a duty to afford to an alien means of redress for injuries which are not less adequate than the means on redress afforded to its nationals.

20. *Ibid*.

21. See Garcia- Amador's First Report on State Responsibility, *supra* note 6, at 181.

22. Lauterpacht, 'Reglesgenerales du droit de la paix', 62 Recuell des Cours (1937-IV) 99, at 99-422 (cited in Georg Nolte, *supra* note 4, at 1091

III. THE ROBERTO AGO PROPOSALS: A NEW APPROACH TO STATE RESPONSIBILITY

Beginning of the ILC's Project on State Responsibility

At its very first session, in 1949, the ILC selected state responsibility among the fourteen topics considered suitable for codification.[23] In 1953, the General Assembly invited the ILC to undertake the codification of the law of state responsibility. In 1955, F.V. Garcia-Amador of Cuba was appointed the first special rapporteur for the topic. Garcia-Amador attempted to put the focus of attention on traditional approach to the law of state responsibility by limiting the scope of the subject to treatment of aliens. Furthermore, for him the topic of state responsibility should have embraced both substantive as well as secondary rules of responsibility. In this way, Garcia-Amador both narrowed as well as expanded the scope of the topic of state responsibility. Garcia-Amador was also in favour of including international criminal responsibility of states under the topic of state responsibility.[24] But none of his proposals found favour with the ILC. In 1962, the ILC took a fresh start by establishing a Sub-Committee, headed by Roberto Ago of Italy to carry out some preparatory work before a special rapporteur was appointed. At its session held in January 1963, the Sub-Committee decided unanimously to recommend that, with a view to the codification of the topic of state responsibility, priority should be given to the task of defining the general rules governing the international responsibility of the states.[25] The Report prepared by the Sub-Committee proved decisive as it laid the foundation for a new approach to state responsibility. The Commission approved the report of the Sub-Committee in its fifteenth session in 1963 and at the same session appointed Roberto Ago, the special rapporteur for the topic.

Distinction between "Primary" and "Secondary" Rules of Responsibility

The Commission received eight reports from Roberto Ago from 1969-1979. These reports transformed the ILC's project on the subject. Ago's distinction between 'primary' and 'secondary' rules of state responsibility laid the basis for the ILC's work on the subject. He divided the rules of international law into two categories- primary and secondary and alleged that the regime of state responsibility comprises only secondary rules.[26] Primary rules define the content of a primary duty, for example, general prohibition of use of force by states. If a state uses force against another state except in self-defense, it violates its primary duly imposed upon it by primary rules of

23. *YbILC* [1949], p.190, UN Doc. A/CN.4/Ser. 1.
24. For a discussion on Garcia-Amador's approach to the subject, see Garcia-Amador's Report on State Responsibility *supra* note 6, at pp. 180-219.
25. Roberto Ago, Report of the Sub-committee on State Responsibility, *YbILC* [1963], Vol. II, pp.227-28, UN Doc. A/CN.4/Ser.A/1963/Add.1.
26. See Ando Nisuke, "Some Critical Observations on the International Law Commission's Draft Articles on State Responsibility", 5 *Asian YbIL* 125, 126-27 (1995).

international law. However, in the scheme of state responsibility as conceived by Roberto Ago simply the breach of a primary duty is not sufficient to trigger international responsibility of a state. There lie some rules of general character which determine when does a state breach an international obligation, that is to say, rules which provide conditions for determining the breach a primary obligation and the legal consequences of that violation. For example, an act falling within the scope of the articles grouped under 'circumstances precluding the wrongfulness' absolve a state from incurring international responsibility for an act which is otherwise wrongful. A further example includes the rule of attribution. Similarly, the rules pertaining to forms and consequences of international responsibility, such as, the duty to make reparation are of the nature of secondary rules. The following passage well sums up his position:

> The Commission agreed on the need to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility…. i*t is one thing to define a rule and the content of obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation*. Only the second aspect comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate the hope of successful codification.[27]

The underlying idea is that following a breach of primary obligation imposed by international law, a distinct and new regime of responsibility comes into existence, with its own distinct set of rules that apply across the various substantive areas of law. This new regime consists of secondary rules of responsibility which determine when a breach occurs and, in general, the content of the resulting secondary obligations of a state. Roberto Ago concluded:

> In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed 'primary', as opposed to the other rules…which may be termed secondary, inasmuch as they are concerned with determining the consequences of failure to fulfill obligations established by the primary rules.[28]

Ago's distinction between primary and secondary rules of responsibility was endorsed by the ILC. In its report to the General Assembly, it stated:

> In the present draft articles, the Commission is proposing to codify

27. Roberto Ago, Second Report on State Responsibility, *YbILC* [1970], Vol. II, Part Two, p.177, at 178, UN Doc. A/CN4/Ser A/1970/Add.1 [emphasis added].

28. Id., at 179.

> the rules governing the responsibility of States for internationally wrongful acts in general, and not only in regard to certain particular sectors such as responsibility for acts causing injury to the person or property of aliens. The international responsibility of the State is a situation which results not just from the breach of certain specific international obligations, but from the breach of any international obligation, whether established by the rules governing one particular matter or by those governing another matter. The draft articles accordingly deal with the general rules of the international responsibility of the State for internationally wrongful acts, that is to say, the rules which govern all the new legal relationships which may follow from an internationally wrongful act of a State, regardless of the particular sector to which the rule violated by the act may belong.[29]

An important feature of these 'distinct' categories of secondary rules is that they are general in character and as indicated above these rules apply to all areas of international law. This position taken by the ILC is in contrast with the legal systems based on the English common law. In these legal systems, there does not exist any general regime of legal responsibility and the issue of responsibility is decided in the basis of substantive rules of a particular branch of law - contract law, tort law, criminal law, and so forth.

The ILC's approach in making distinction between primary and secondary rules of state responsibility has not, however, escaped criticism. It has been suggested that any such distinction is illusory and even unnecessary.[30] For example, it is quite convincing to argue that fault and injury (which have not been addressed by the ILC on the ground that they are determined by the primary rules) relate to the issue whether a particular obligation has been breached and hence are secondary rules and not the primary rules. Similarly, rules of attribution which have been discussed by the ILC in detail may well be termed as primary rules as they address the very actors to whom the primary rule applies.[31] Moreover, no theoretical foundation for drawing a distinction between the 'primary' and 'secondary' rules is found in jurisprudence. Although it is arguable that the idea of primary rules as conceptualized by the ILC is comparable to that of HLA Hart, but Hart's 'secondary rules' are quite different from the ILC's conception of secondary rules.[32] A further point regarding the ILC's secondary rules is that though these are general 'in coverage' they are 'not a repository for all possible secondary rules'. They are only default or residual rules; and are not intended to necessarily apply to cases of self-contained regimes. For example, the 1950

29. Report of the ILC to the General Assembly, *YbILC* [1973] Vol. II, p. 170, UN Doc. A/CN.4/Ser.A/1973/Add.1

30. Daniel Bodansky and John R. Crook "The ILC's State Responsibility Articles: Introduction and Overview" 96 *AJIL* 773, 780 (2002); see also James Crawford, "The *ILC's* Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect", 96 *AJIL* 874, 876 (2002)

31. Daniel Bodansky and John R. Crook, *id.*, at 781

32. H.L.A. Hart's Concept of primary and secondary rules is to be found in his *The Concept of Law* (1961)

European Convention on Human Rights and Fundamental Freedoms (ECHR)[33], establishes its own regime of responsibility to which the Draft Articles on State Responsibility do not apply.[34]

Graded violations of International Law and Notion of State Crimes

Roberto Ago, like his predecessor Garcia Amador[35] and Lauterpacht[36] believed in grading of violations of international law according to their gravity. In fact, he had criticized the bilateral conception of state responsibility advanced by the classical positivists. In his 1939 Hague Lectures he had pleaded for including the notions of international crimes and sanctions in the field of the law of state responsibility and had challenged the basic assumption of the classical positivists that the notion of international crime would violate the basic postulate of international law as a system based on sovereignty of states.[37] In his second report submitted to the ILC he examined the views according to which some relatively less serious violations of law only give rise to the duty to make reparation for the injury sustained, but grave breaches of law justify applying a sanction against the breaching state. He held:

> What can be said is that modern international law has tended progressively to deny the faculty of resorting to measures of coercion as a reaction against less serious wrongful acts, in particular those of a purely economic nature; more generally speaking, it must be recognized that there is also a clear tendency to restrict the injured State's faculty of resorting to sanctions unilaterally. What seems to emerge clearly from the practice of States is the existence of an order of priority between the two possible consequences of an internationally wrongful act, in the sense that the claim for reparation must as a rule precede the application of the sanction, even where recourse to a sanction would be permissible in principle.[38]

In his fifth report, Roberto Ago, clearly came to support the idea of 'international crime'.[39] He, in fact, proposed to include a draft article 18 (later draft article 19) defining international crimes.[40] The draft articles 1-19 adopted

33. For the text, see 213 *UNTS* 221.
34. James Crawford, *supra* note 30 at 878; Daniel Bodansky and John R. Crook, *supra* note 30 at 780. See also Article 56 (Lex Specialis) of the Draft Articles on State Responsibility, *supra* note 1.
35. For the views of Garcia-Amador see *YbILC* [1956] Vol.II, Part Two, *supra* note 6, at 105
36. See supra note 22.
37. Ago, 'Le delit international', 68 *Recuell des Cours* (1939-II) 419-524, at 524
38. Roberto Ago, Second report on State responsibility, *supra* note 27, at 183 (foot notes omitted).
39. See *YbILC* [1976] Vol.II, Part One, pp. 49-55, UN Doc.A/CN.4/Ser.A/1976/Add.1 (Part 1).
40. *Id.*, at 55.

in first reading by the commission at its twenty-eighth session included the notion of international crimes. The text of draft article 19 dealing with international crime is explicitly based on the distinction between international delicts and crimes.[41] Commentary to the draft article 19 indicates that the text is based on a distinction between two types of international obligations-obligations of general kind and obligations fulfillment of which is of fundamental importance. It is the latter which entails criminal responsibility of a state.[42]

The 1976 Report cites[43] the judgment of the International Court of justice in *Barcelona Traction, Light and Power Company Limited*[44] which is often considered as lending support to the view that the concept of state crimes does exist in international law. In the *Barcelona* the Court ruled:

> In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis a vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*…[45]

But a little reflection would show that the above passage from the *Barcelona* case is mainly concerned with obligations erga omnes and not the state crimes. The ICJ sought to incorporate the obligations erga omnes in the general international law and not to create a new type of obligations resulting in criminal responsibility of states. As the ILC has noted in its 1998 report, "[t]he notions of obligations *erga omnes* did not support a distinction between crimes and delicts, particularly since many breaches thereof were not crimes as defined by article 19."[46] In fact, the Commission could not find sufficient

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41. A lengthy discussion of the subject-matter is to be found in YbILC [1976] Vol. II, Part Two, pp.97-122. UN Doc. A/CN.4/Ser.4/1976/Add.1 (Part2).
42. *Id*, at 97. The full text of Article 19 is to be found in the 1976 Report of the ILC, *id*. **Article19** International crimes and international delicts:
    1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
    2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.
    3. xxxxxxxx
43. *Id*., at 99.
44. Second Phase, judgment, ICJ Reports 1970, p.3
45. Id., at 47
46. Report of the ILC on the Work of Its Fiftieth Session, *YbILC* [1998], Vol. II, Part Two, p.66,UN Doc. A/53/10 (1998).

support in the writings of the publicists, state practice and judicial decisions for the view that the concept of state crimes existed in international law. Furthermore, the idea was opposed by a number of governments. Opposition to the idea of state crimes was so strong that that the ILC in its 1998 Report recommended to delete the text of Article 19 from the Draft Articles.[47]

International Liability for Transboundary Harm as Distinguished from International Responsibility for Internationally Wrongful Act

In 1978, at its thirtieth session the ILC started the work on the topic "International liability for Injurious Consequences Arising out of Acts not Prohibited by International Law". Robert Q. Quentin -Baxter was appointed special rapporteur for the topic.[48] In his reports to the ILC he provided conceptual basis and schematic outlines for the topic.[49] In fact, Roberto Ago, special rappoteur for the topic of 'state responsibility' had earlier emphasized that the topic would deal only with the internationally wrongful acts and would in no way prejudge the evolution of a separate regime dealing with international liability for the injurious consequences of acts not prohibited by international law.[50] In his second report to the Commission he stated:

> While recognizing the importance, alongside that of responsibility for internationally wrongful acts, of questions relating to responsibility arising out of the performance of certain lawful activities- such as spatial and nuclear activities-the commission believes that questions in this latter category should not be dealt with simultaneously with those in the former category. Owing to the entirely different basis of the so-called responsibility for risk, the different nature of the rules governing it , its content and forms it may assume, a simultaneous examination of the two subjects could only make both of them more difficult to grasp. The Commission will therefore proceed first to consider separately the topic of responsibility of States for internationally wrongful acts. It intends to consider separately the topic of responsibility arising from the lawful activities….[51]

The work on the first part of the topic ("prevention of transboundary harm") under the sub-title "Prevention of transboundary damage from hazardous activities" completed in 2001 and at its fifty-third session (2001), the Commission adopted the text of a draft preamble and a set of 19 draft articles on prevention of transboundary harm from hazardous activities.[52] The work on the second part of the topic completed in 2006 in the form a set of Draft

47. *Id.*, Para 546.
48. See *YbILC* [1978], Vol.,II, Part Two, pp. 150-52, UN Doc. A/CN. 4/Ser. A/1978/Add.1.
49. See YbILC [1982], Vol. II, Part One, p.51, UN Doc. A/CN.4/Ser.A/1982/aaa.1 (Part 1).
50. YbILC [1973], Vol. II, *Supra* note 29, at 169.
51. Roberto ago, *supra* note 27, at 178.
52. UN GAOR, Fifty-sixth session, Supplement No. 10 (A/56/10) Para. 97.

Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities".[53]

IV. ILC'S DRAFT ARTICLES ON STATE RESPONSIBILITY

Organization of the Work

The first reading of the draft articles had been completed by the Commission by 1996. The draft articles were finalized after their second reading at the fifty third session of the ILC in the year 2001. In the same year, at its fifty-third session the ILC adopted the Draft Articles on State Responsibility.[54] The discussion in this Part will show that general plan and structure of these Draft Articles largely reflects the approach of Roberto Ago. Most of the draft articles prepared during his tenure as the special rapporteur have found place in the Draft Articles as finally adopted.

The ILC's Drat Articles consist of four Parts. Part 1 comprising Articles 1-27 deals with the origin of international responsibility, that is to say, with determination of the question under what circumstances a state may be held to have committed an internationally wrongful act. In other words, this part deals with the elements of internationally wrongful acts. Part 2 of the Draft Articles comprising Articles 28-41 is concerned with determination of the consequences that an internationally wrongful act of a State may have under international law such as various forms of reparation and also the countermeasures. Part 3 comprising Articles 42-54 concerns the implementation of international responsibility by states other than the breaching state and finally Part 4 contains certain general provisions on the subject.

In dividing the Draft Articles on State Responsibility into different parts the ILC essentially adopted the approach of Roberto Ago. For Ago the Commission's study on the subject "comprises two broad separate phases, the first covering the origin of state responsibility and the second the content of that responsibility". The first task is to determine what facts and what circumstances must be established in order to impute to a State the existence of an internationally wrongful act which, as such, is a source of international responsibility. The second task is to determine the consequences attached by international law to an internationally wrongful act in various cases, in order

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53. Report of the ILC on the work of Its Fifty-eighth session, UN GAOR, 61st session., Supp. No.10, at 106 (A/61/10(2006)). Many writers are critical of the Commission's approach in distinguishing the regime of liability for acts not prohibited by international law from that of international responsibility of states for wrongful acts. See Ian Brownlie, *supra* note 4, at 49-50; Michael B. Akehurst, 'International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law', 16 *NYIL* 3 (1985). Philip Allott,'State Responsibility and the Unmaking of International Law', 29 *HILJ* 1 (1988). For an appreciation of the ILC's work on 'liability topic', see D.B. Magraw, "Transhoundary Harm: The International Law Commission's Study of "International Liability" 80 *AJIL* 305 (1986).

54. See *YbILC* [2001], *supra* note 1, at 11.

to arrive on this basis at a definition of the content, forms and degrees of responsibility".[55]

Ago went on to state:

> "[o]nce these two essential tasks have been accomplished, the Commission will be able to decide whether a third should be added in the same context, namely, the consideration of certain problems concerning what has been termed the "implementation" of the international responsibility of States and of questions concerning the settlement of disputes arising out of the application of rules relating to responsibility."[56]

Closely following the line suggested by Roberto Ago, the ILC, during the second reading of the articles, divided the second part into two, one dealing with the legal consequences of an unlawful act, the other with "implementation of state responsibility" by other states.

Definition of Internationally Wrongful Act

As stated earlier, the regime of state responsibility denotes a distinct legal regime consisting of the 'secondary' rules. The purpose of the draft articles is to encompass these secondary rules of responsibility. These rules come into effect upon breach by a state of a primary obligation imposed by the rules of international law. Article 1 states: "every internationally wrongful act of a State entails the international responsibility of that State." Article 2 defines an "internationally wrongful act" as an act attributable to a state that constitutes a breach of an international obligation.[57] Article 12 defines "breach of an international obligation" as "an act of a state which "is not in conformity with what is required of it by that obligation, regardless of its origin or character." Effect of these Articles is that a conduct that is not in conformity with international obligations and is attributable to a state is an internationally wrongful act. Thus, there are two elements of an internationally wrongful act: (a) conduct resulting in the breach of an international obligation, an element usually called objective element; and (b) conduct is imputable to a state, an element usually called subjective element.[58]

It is significant to note that fault and damage are not mentioned as constitutive elements of international responsibility of States. In the view of the ILC, these are addressed by the primary rules in question and not by the secondary rules of the state responsibility. This position taken by the ILC is questionable and points to the elusiveness of the line drawn between "primary"

55. Roberto Ago's Second Report, *supra* note 27, at178.

56. *Ibid*.

57. **Article 2**: There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.

58. See Roberto Ago, 'Second Report on State Responsibility', *supra* note 27, at 187.

and "secondary" rules of state responsibility.[59] If rules of imputability (Articles 4-11) are 'secondary' in nature as they have been dealt with in the draft articles in detail, then fault and damage should also be designated as 'secondary' as they relate to the question whether a particular rule of conduct has been violated.[60]

The issue of imputability of acts in question to the state organs forms the subject-matter of Articles 4-11. These Articles address the issue when an act of state officials and private individuals is considered the act of a state for the purpose of deciding whether the act constitutes internationally wrongful act entailing the international responsibility. Article 4 incorporates an important principle in this regard that a state is responsible for an act in breach of international law committed by any of the legislative, executive or judicial organs. Division of governmental authority within a state is not relevant. A state is responsible for acts of all its organs.[61]

Other Articles which deserve mention are Articles 5, 8 & 9. These Articles relate to the acts of private individuals. Article 5 states that conduct of a person or entity which is not formally an organ of the State but nevertheless exercises elements of the governmental authority shall be considered an act of the state under international law. Under Article 8, conduct by a person or group is attributable to the State if the person or group is acting on the instruction of, or under the direction or control of, that State[62] and Article 9 deals with the rules of attribution in cases where non-State actors are in fact exercising governmental functions in the absence or default of the official authority.[63]

Circumstances precluding wrongfulness

Like municipal law, international law also recognizes certain defenses which preclude the wrongfulness of acts in cases. Articles 20-27 of Part One define these defenses which may be pleaded by the States to deny their international responsibility. There are six such defenses: consent (Article 20), self-defense (Article 21), counter measures in respect of an internationally wrongful act (Article 22), *force majeur*e (Article 23), distress (Article 24), and necessity (Article 25).

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59. See Daniel Bodansky and John R. Cook, *supra* note 30, at 781.

60. Ibid.

61. A state is also responsible for the acts of its judicial organ if a case of denial of justice exists. On denial of justice see, Article 9 of the Harvard Draft and introductory note to it, *supra* note 16, at 173.

62. Article 8 Conduct directed or controlled by a State: The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the construction of, or under the direction or control of, that State in carrying out the conduct.

63. For the text of Articles 5, & 9, see the Draft Articles on State Responsibility, *supra* note 1.

Legal consequences for Breach of an International Obligation

The breach by a state of its international obligations results in a distinct set of rights and duties for states. New obligations that arise for the breaching state are: the duty to cease a continuing wrongful act and provide guarantees of non-repetition (Article 30), and the duty to make full reparation for injury caused (Article 31). Part Two of the Draft Articles titled "Content of the international Responsibility of State" sets forth these obligations. An important point to note is that according to Article 33(1) these obligations are also owed to the other states, the international community as a whole as well as the non-state actors including individuals but non-state actors have not been given the right to invoke these obligations against a breaching state as no corresponding right to invoke is created in Part Three. Article 33 falls in Part Two and not in Part Three (dealing with the invocation of responsibility).Thus, Article 33 is a vague affirmation of the rights of non-state actors in respects the breaching state's obligations. Furthermore, the rights of non-state actors are contained in a saving clause in paragraph 2 of article 33.[64] Weiss comments that "[t]he Commissions's overall approach to individuals and non-state entities was to leave this matter to *lex specialis* rather than to enunciate a general rule."[65]

The breach of an international obligation also creates a set of rights for the injured state and in some cases also for other states, namely the right to invoke responsibility of the state which is in breach of its obligations (Articles 42-48) and the right to take countermeasures (Articles 49-53). These rights are mentioned in the Part Three of the draft articles.

1. Obligations of the Breaching State

i) Cessation and Non-repetition

Article 30 provides that "The State responsible for the internationally wrongful act is under obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require." According to the Commentary to the Draft Articles, "While the obligation to cease wrongful act will arise most commonly in the case of a continuing wrongful act, article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase, "if it is continuing" at the end of paragraph (a) of the article is intended to cover both situations."[66]

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64. **Article 33 (2)** : This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

65. Edith Brown Weiss,"Invoking State Responsibility in the Twenty-first Century" 96 *AJIL* 798,815 (2002).

66. 2001 Draft Articles on State Responsibility, *supra* note 1, at 89. (footnotes omitted).

ii) Duty to make reparation

As indicated above, the obligation to make reparation is the most usual consequence of the international responsibility of a state. The term 'reparation' is a generic term which broadly takes three forms: damages, restitution in *integrum* and satisfaction. The first two forms of reparation are reparation *sricto sensu* and are distinguishable from satisfaction.[67] But satisfaction may also take the form of either restitution or damages. Chapter II of Part Two of the Draft Articles comprising Articles 34 to 39 deal with various forms of reparation. Article 34 states that reparation shall take the form of restitution (Article 35), compensation (Article 36), and satisfaction (Article 37).

The purpose of restitution is the restoration of the state of affairs as it existed at the time of the occurrence of the act which caused the injury. Pecuniary damages, on the other hand, are payable when restitution is no longer possible or when restitution would be insufficient to make adequate reparation for the injury.[68]

The ILC Draft Articles define restitution in Article 35 as re-establishing "the situation which existed before the wrongful act was committed, provided and to the extent that restitution (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[69] In this way, Article 35 reflects the primacy of restitution by way of providing remedy to an injured state based on the judicial decisions including the *Chorzow Factory Case*.[70]

Here a few points may be noted. First, breach of obligation does not absolve the breaching State of its duty to comply (Article 29). Second, internal laws of the breaching State may not be cited as a reason for not complying with the obligations arising under this Part (Article 32). And finally, a breaching State's obligations are not limited to the injured State or States but are owed to the international community as a whole (Article 33).

iii) Other Obligations

Under the ILC's Draft Articles, some serious breaches of international law by a state gives rise to a different kind of obligations mentioned in Article 41. Article 40 defines these breaches by creating a separate category of "serious breaches of obligations under peremptory norms of general international law". Paragraph 2 of Article 40 defines a serious breach of an obligation as an obligation "if it involves a gross or systematic failure by the responsible State to fulfill the obligation". It has been suggested that serious breaches of obligations arising under peremptory norm of international law

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67. Garci-Amador's First Report on State Responsibility, supra note 6, at 209.
68. *Ibid*.
69. ILC's Draft Articles, *supra* note 1, Art 35.
70. See Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", 96 *AJIL* 833,849 (2002).

include the act of aggression, slavery, genocide, apartheid, torture, racial discrimination and violation of " the basic rules of international humanitarian law" and of the right of self-discrimination.[71] According to Article 41, consequences for such breach are: (1) cooperation by the states any such breach, (2) not recognizing situations resulting from them or rendering assistance in maintaining such situations. Paragraph 3 of Article 41 states that the consequences mentioned in this Article are "without prejudice to the other consequences referred to in this Part [Part 2] and to such further consequences that a breach to which this chapter [chapter III] applies may entail under international law."

2. Rights of the Injured or Other States

As duties and rights are correlatives, the ILC's Draft Articles on State Responsibility create a corresponding right of invocation to be invoked by the injured state and in certain cases by a state other than the injured state. Chapter one of Part Three which address the issue who can claim the right of invocation contains seven articles (Articles 42 - 48).[72] Article 42 which contains a key principle states: "A State is entitled as an injured State to invoke the responsibility of another State if the obligation is owed to: (a) That State individually; or (b) a group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 48 contains another key principle which is really an innovation. Under it, a state other than the injured state can claim the responsibility of another state "if (a) the obligation breached is owed to a group of states including that state, and is established for the protection of a collective interest of the group, or (b) The obligation breached is owed to the international community as a whole." Article 48 marks a significant departure from the essentially bilateral approach of the early writers on international law when it states that a non-injured state can invoke the responsibility of the breaching state if the "obligation breached is owed to the international community as a whole." These Articles reflect the Ago's conception of state responsibility under which violation of certain fundamental duties owed to the international community as a whole results in injury to all states.

In addition to the right to invoke responsibility of the breaching state, the

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71. See Daniel Bodansky and John R Crook, *supra* note 30, at 785.

72. Articles 43-47 relate with procedural aspects of the invocation of responsibility: the obligation to produce notice of a claim (Article 43), the admissibility of claims(Article 44), the loss of the right to invoke responsibility(Article 45), the ability of a plurality of states injured by the same "internationally wrongful act" to make claims(Article 46), and the rights of invocation when there are a plurality of responsible states (Article 47).

Draft Articles create a limited right to take counter measures[73] against a breaching state (Articles 49-53). Article 51 incorporates an important principle in this regard that "[c]ountermeasure must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."

Recognition of Lex Specialis Principle

Although the draft articles are of general character, "[t]hese article do not apply where and to what extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed but special rules of international law. Article 55 (Part 4: General Provisions). Article 56 of the Draft articles reinforces the position taken in Article 55 by stating that the Articles are not intended to constitute a code of secondary obligations. "...the applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles."

V. CONCLUSION

Roberto Ago's proposals as the special rapporteur for the topic of state responsibility offer valuable insights into the subject and are forward-looking. Making a drastic departure from traditional theories on state responsibility, Robertop ago concentrated on the general secondary rules capable of applying to all sectors and all violations of international law whether serious or less serious. He adopted a distinctive approach in focusing on secondary rules separating them from primary rules defining particular obligations. But as has been shown drawing a distinction between primary and secondary rules is in many cases is arbitrary and illusory. A further point of tension is that the Draft Articles are not a code of secondary rules but are residual rules and do not apply to all situations, for example to situations involving human rights regime, international environmental law regimes and so forth. In this way, these Articles have only limited scope of application despite their generality. This raises the issue of their usefulness.

No less significant is Roberto Ago's contribution in helping the ILC move away from the essentially bilateral approach to multilateralism. Reflecting his approach the Draft Articles allow a "non injured" state to invoke international responsibility of a breaching state and explicitly recognize the obligations owed to international community as a whole. Ago's proposals regarding state crimes (international crime), however, did not find favour with the ILC and were dropped in the final stage of the work.

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73. On counter-measures, see 2001 Draft Articles on State Responsibility, *supra* note 1, at 128-30.

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POLLUTION OF RIVER GANGA AND REGULATORY MEASURES: WITH SPECIAL REFERENCE TO VARANASI

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ABSTRACT

River Ganga has been the lifeline of the major part of Indian population and the cradle of its civilization. According to the Hindu belief and mythology, to bathe in it is to wash away all the sins. Ganga originates from the Gangotri glacier and joins Bay of Bengal. It has been a source of sustenance for the millions of people who inhabit this area. The river is being polluted by persons in numerous ways. Both the Parliament and the Government have taken number of steps to control the water pollution. The administrative authorities are also empowered under the law to take action. Besides these, the Supreme Court and the Allahabad High Court have issued many directions to the implementing agencies and have applied the principle "polluter must pay" and have extended the principle of 'Strict liability' to the pollution of environment. It has been assessed in this article as to whether these directions have instilled a sense of accountability amongst the implementing agencies and the application of these principles to the case of pollution of Ganga have any deterrent effect on them?

KEY WORDS: *pollution, public nuisance, infection, and noxious atmosphere.*

I. INTRODUCTION

BESIDES the Central Government and State Governments, the district administration is also responsible for maintaining the cleanliness and

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wholesomeness of water of Ganga. The duty of the administrative officers is to take preventive action or launch criminal proceedings against those who pollute the river, ghats by throwing dust, filth, rubbish, excretion, milking and animals etc and pollute the water of Ganga by throwing into it unburnt or half-burnt dead bodies, dead animals, flowers, washing of clothes etc. For the effective performance of these duties, the High Court of Allahabad has directed the State Government in Rakesh Kumar Jaiswal v. State of U.P. and others[1] to constitute a separate cadre of river police. The purpose of creation of such police is that they will have no other responsibility except to prevent the pollution of ghats and the water of Ganga. In compliance of the direction of the Court, the State Government established a Police Out Post at Rajendra Prasad Ghat with jurisdiction over seven km stretch of Ganga.

Both the Parliament and the government have taken number of steps to control the water pollution. The Parliament has enacted the Water (Prevention and Control of Pollution) Act, 1974 and Environment (Protection) Act, 1986. To improve the water quality of the river Ganga, the central government launched the Ganga Action Plan in 1985.

II. CONSTITUTIONAL PROVISION AND STATUTES

By the 42nd Constitutional Amendment provisions were incorporated in the Indian Constitution under Articles 48-A and 51 -A(g). Articles 48-A of the constitution incorporates the Directive Principles of State Policy that the 'State shall endeavour to protect and improve the environment and safeguard the forests and wildlife of the country' and Article 51-A(g) says 'it shall be the duty of every citizens of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures'. Both Articles 48-A and 51-A(g) imposes an obligation not only upon the State, but also on citizens to maintain purity of environment including rivers too.[2]

The duties and powers of the Executive Magistrate and Police officers to take action against the person creating nuisance have been provided in the Indian Penal Code, 1860; the Code of Criminal Procedure, 1973; the Indian Police Act, 1861. These powers can be invoked for preventing nuisance in the Ganga and its ghats.

The Indian Penal Code, 1860

According to Section 268 of the IPC a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause

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1. C.M.W.P. No. 21552 of 1997.
2. Incorporated in the constitution as a result of United Nations Conference on Human Environment, Stockholm (Sweden)

injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage.

The pollution of water of Ganga by throwing unburnt or half-burnt dead bodies, washing of clothes in Ganga, bathing of animals into it etc. are dangerous to the health of people. Therefore, it is a public nuisance. Throwing of refuse, rubbish, dirt and filth on the ghats causes annoyance to the persons who have right to use ghats.

A question arising in this context is whether a cremation ground constitutes a public nuisance? In Indira Nath Banerjee v. State[3], the Calcutta High Court observed that the existence of burning ghat or cremation ground was not in itself a nuisance; if it was one set apart or so used from time immemorial, as if its use was sanctioned by the usage of the community. If it was in an offensive state or the cremation was carried on upon it in such an offensive manner as to be a source of injury, danger or annoyance to the persons living in the vicinity, it is a nuisance.

Polluting of ghats or banks of Ganga is also punishable under section 278 of the I.P.C. If a person voluntarily makes the atmosphere of any place of a public way noxious which is injurious to the health of persons who have a right to pass through that public way shall be punished with a fine of five hundred rupees. Thus, throwing of refuse, dirt or, filth, on the ghats and exerting on the banks of Ganga make the atmosphere of ghats and banks of Ganga noxious to health. All these acts of a person are nuisance covered under this section.

The Criminal Procedure Code, 1973

Whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit may consider under section 133 of the Cr. P.C. that any unlawful obstruction or nuisance should be removed from any public place or from any way, river, or channel or which is or may be lawfully used by the public.

Under Section 133, the power of the Magistrate is discretionary. But the Supreme Court has held in Ratlam Municipility v. Vardhichand[4], that the power of the Magistrate was a public duty to the members of the public who were the victims of the nuisance. It observed that "All power is a trust - that we are accountable for its exercise - that from the people, all springs, and all must exist." The Court further observed that the direction became a duty when the beneficiary brought home the circumstances for its benign exercise.[5]

3. I.L.R. 25 Cal, 425
4. (1980) Cr. L.J. 1075
5. Id., at 1080

The Indian Police Act, 1861

The police officers have been empowered, under section 34 of the Indian Police Act, to take action against the polluter of ghats, banks and water of Ganga. This provision empowers a police officer to impose a fine up to the rupees fifty on any person mentioned in this section who commits any of the offence on any road or in any open place or street or thoroughfare.

It is evident that the powers of police officers in relation to prevention of pollution are more than that of a Magistrate. The police officer can proceed either under section 268, or 269 or 278 of the IPC or under section 34 of the Indian Police Act whereas a Magistrate can take preventive action against the polluter only under section 133 of the Cr.P.C.

III. GANGA ACTION PLAN - PHASE I

The object of Ganga Action Plan is to restore the wholesomeness of water of river Ganga so that it can be used for drinking, bathing, irrigation and could be friendly to acquatic organism. With a view to achieving these objectives the Ganga Action Authority, established under the Ministry of Environment and Forest, asked the Urban Development and Environment Department in 1985, to prepare the schemes for the cities of Uttar Pradesh situated on the bank of Ganga and having population of more than one lac. A wing in the Ministry of Environment,- the Ganga Project Directorate (GPD) was also created to provide fund and monitor the execution of the schemes. The Department of Urban Development assigned the task of preparing and executing the schemes for abating the pollution of Ganga to its instrumentality, the Jal Nigam. A unit in the Jal Nigam, known as Ganga Pollution Prevention Unit, was created.

In Varanasi, the discharge of sewage and domestic waste water into Ganga is the major cause of pollution. To arrest it, 13 big schemes in Core Sector were prepared by the Jal Nigam. Besides, 21 Non-Core Sectors scheme were also prepared. The National River Conservation Directorate, New Delhi, approved the proposals of the Jal Nigam and the GPD released the money. It is worth to mention here that in 1985, the discharge of the sewage from the city was about 147 mld, but, the Jal Nigam made the provision for treating only 101.8 mld sewage. Even the future increase in the discharge of sewage was also not taken into account. The scheme covered only biological treatment of the sewage because the chemical and bacterialogical treatments were beyond the scope of Phase-I.

During the preparation of the schemes, the Nagar Nigam which has the obligation to keep the water of river Ganga free from pollution, was ignored. Further, the NGOs who were devoted to making the Ganga free from pollution, the scientists who have been working on it and the persons who were acquaintant with the topology of Varanasi City were also ignored.

The Phase-I was launched in Varanasi in June, 1986 and all the schemes were completed in 1993. Under the U.P. Municipal Corporation Adhiniyam, 1959 all the assets created thereunder have to be maintained and operated by

the Nagar Nigam. Unfortunately, it was kept aloof during the creation of the assets and execution of the schemes. Irrespective of the quality of assets and execution of the work, it has to discharge this responsibility which appears to be unreasonable. The proper course would have been that the entire work should have been executed under the supervision of the Nagar Nigam.

a) Works completed in core sector

For all the 13 schemes which related to sewerage management and sewage disposal the Ganga Project Directorate (GPD) sanctioned Rs. 4730.32 lakh out of the total budget of Rs. 4730.20 lakhs, but the Jal Nigam exceeded the budget and spent Rs. 4807.26 Lakhs on the completion of the schemes. The work executed by it included interception and diversion of sewer, drains, construction of three sewage treatment plants (STP), renovation and augmentation of the capacity of sewage pumping stations, construction of Mansarovar ghat pumping station, repair of underground drains and rehabilitation of Orderly Bazar sewer. According to the Performance Evaluation Report of STP in Varanasi, the sewage flow of about 25 mld from eight of the nine major underground and surface drains has been diverted to a new trunk sewer. Flow from Assi nala, about 22 mld, has been diverted partly to sewage treatment plant at Bhagawanpur near Banaras Hindu University and the rest has been diverted to the plant at Diesel Locomotive Works.

b)Performance Evaluation

i)Government of India

The Ganga Project Directorate and National River Conservation Directorate, New Delhi got the performance of the STPs evaluated through different agencies.

ii) National Environmental Engineering Research Institute, Nagpur (NEERI)

The NEERI carried the evaluation of the performance of STPs at Varanasi at the instance of GPD in June 1994. It was satisfied with the performance of STPs at BHU and Dinapur but pointed out that these are overloaded, by 66% and 75% respectively.

Again the NEERI conducted the evaluation of performance of Dinapur STP during June 8-10, 1996 on the request of National River Conservation Directorate (NRCD). This exercise was conducted with the cooperation of Jal Nigam and Prof. Veerbhadra Mishra, President, Sankat Mochan Foundation.[6] This time the scope of evaluation was confined to performance of STP at Dinapur and measurement of flow. In this evaluation it was observed that in the treated effluent, the BOD and SS were between 21 to 41 mg/I and 34 to 77 mg/l respectively. It exceeded the standard prescribed for disposal into

6. A NGO working for cleaning the water of the river Ganga.

inland surface. This is due to overloading of the plant.

iii) Team of Professors

The Government entrusted the work of evaluating the performance of GAP-I to a team of Professor of the Universities and Institutes as well. This exercise was, taken up by a team of professors consisting of Prof. R.P. Mathur, University of Roorkee, Prof. J. Nath, Director, All India Institute of Public Health and Hygiene, Calcutta, Prof. R.H. Siddiqui, Aligarh Muslim University, Aligarh and Prof. C. Venkobachar, I.I.T. Kanpur during Feb. 17-21, 1995. The report of this team was similar to that of NEERI.

iv) The Supreme Court

The Supreme Court directed the Central Pollution Control Board to evaluate the performance of STPs at Dinapur and Bhagwanpur and submit its report to it. In compliance of this direction, the CPCB inspected these STPs on May 22-23, 2001 and submitted its report to the Supreme Court in July, 2001. According to this report, the water waste generation from the city is 240 mld. Complete sewage is collected at Main Pumping Stations through a sewage network. Only 50% of the city is served, 30% to 40% of the treated water is used for irrigation and remaining water is disposed of in the river Ganga. The capacity of Dinapur and Bhagwanpur STPs is 80 mld and 8 mld respectively but, during the inspection, these STPs received average flow of 100.18 mld and 10.40 mld. Thus the two STPs were overloaded.

v) Wrangling over transfer of assets

In GAP - 1, the provision was made that the fund for maintaining and operating the assets created under this Plan were to be provided by the Ganga Project Directorate and State Government for three years. Therefore, the Jal Nigam operated and maintained them for three years. Thereafter the Jal Nigam requested the Nagar Nigam, custodian of these assets, to take over the possession of these asset. But through a resolution dated April 26, 1997, the Nagar Nigam raised objections against the scheme and execution of the plan.

c) The Supreme Court on Sewerage and Sewage Disposal

The Supreme Court examined various provisions of the Uttar Pradesh Municipal Corporation Adhiniyam, 1959[7] and The Uttar Pradesh Water Supply and Sewerage Act, 1975[8] in the case of M.C. Mehta v. Union of India[9]. The Court observed:

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7. The Adhiniyam of 1959
8. The Act of 1975
9. AIR 1988 SC 1115

"The perusal of these provisions in the laws governing the local bodies shows that the Nagar Mahapalikas and the Municipal Boards are primarily responsible for the maintenance of cleanliness in the areas under their jurisdiction and protection of the environment.[10]

The Court made it clear that the protection of environment and maintenance of cleanliness were the responsibilities of the Nagar Nigam. The Court referred to the powers and duties of the Central Pollution Control Board and State Pollution Control Board constituted under Water (Prevention and Control of Pollution) Act 1974 and regretted that "on account of their failure to obey the statutory duties for several years, the water in the river Ganga at Kanpur had become so polluted that it could no longer be used by the people either for drinking or for bathing. The Nagar Mahapalika of Kanpur had to bear the major responsibility for the pollution of the river near Kanpur city".[11]

The Nagar Mahapalika informed the Court that under Ganga Action Plan, the U.P. Jal Nigam would set up sewage treatment plant. Even then the Court observed that "it had noticed that the Kanpur Nagar Mahapalika had not yet submitted its proposal for sewage treatment works to the State Board under the Water Act." It directed the Kanpur Nagar Mahapalika to submit its proposals to the State Board with in six months from the date of order".[12]

It is surprising that inspite of informing the Court that the work of constructing sewage treatment plant had been undertaken by the Jal Nigam even then the Court directed the Nagar Mahapalika to submit the proposals for sewage treatment to the State Board within six months. The Court should have issued this direction to the Jal Nigam. It appears that the court issued this direction to Nagar Nigam because it treats it as the obligation of the Nagar Nigam.

The direction of the Court to submit proposals for sewage treatment to the Board was not confined to Kanpur Nagar Nigam only but the Court extended it to other Nagar Nigams by observing that its observations applied mutatis mutandis to all other Mahapalikas and Municipalities which had jurisdiction over the areas through which the river Ganga flows.

The Nagar Nigam could not comply with the direction of the Court because the proposal was prepared and executed by the Jal Nigam without consulting it at any stage.

The Supreme Court obsovled that :

"By the order, dated January 12, 1988, six months time was given to the Nagar Mahapalika/Municipalities for showing as to whether they have set up the Effluent Treatment Plant to the satisfaction of the respective Pollution Control Boards. The Nagar Mahapalika/Municipalities have been seeking adjournments from time to time. Unfortunately, nothing has been done. We

10. Id., at 1126

11. Ibid.

12. Ibid.

take up the matter afresh since we are dealing with Uttar Pradesh matters today. We direct the Pollution Control Board for the State of Uttar Pradesh to issue notices to all such Nagar Mahapalika/Municipalities through their Executive Officers and the Presidents, if there is any elected body, and the District Magistrate/Deputy Commissioner of the area in respect of the other, directing the Nagar Mahapalika/ Municipalities to install Effluent Treatment Plants to the satisfaction of the State Pollution Control Board within a period of three months from the receipt of the notices".[13]

The Central Pollution Control Board issued notices to the Mukhya Nagar Adhikari, Nagar Mahapalikas and the Secretary, Department of Urban Development, Government of U.P. on 03.11.1998. This notice, however, could yield no result.

IV. GANGA ACTION PLAN - PHASE II - LEGAL BATTLE BEGINS

After the execution of all the schemes of phase-I, the Jal Nigam submitted a project comprising twelve schemes for Phase-II to NRCD in 1993.[14]

The project prepared by the Jal Nigam was challenged by two Corporators of Varanasi Nagar Nigam in the High Court of Allahabad in case of Rakesh Jaiswal v. State of U.P. and others.[15]

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13. Ibid.

14. The scheme for Phase II were based on the following ground:

(i) The waste coming to STPs are much more than their designed capacities and augmentation of capacity of these plants is essential; (ii) Due to expansion of the City, the waste water flow from the City has increased to 213 mld; (iii) Some more weeping points on the bank of river Ganga have developed; (iv) Under GAP-I no scheme to check the pollution to river Varuna was sanctioned; (v) The existing trunk sewer of the city is about 80 years old. It is overloaded and giving trouble. Therefore, another relieving sewer parallel to this existing trunk sewer is essential.

Due to these reasons, the Jal Nigarn framed following schemes, again without taking into confidence the Nagar Nigam.

Core Sector Schemes

(i) Prevention of pollution to river, from some Sub-Central City and Trans-Varuna area of Varanasi City; (ii) Prevention of pollution to river Ganga from additional point sources along ghats of Varanasi; (iii) Augmentation of capacity of B.H.U. STP, Varanasi; (iv) Augmentation of capacity of Konia and Dinapur STPs; (v) Construction of Sewage treatment plant at Ramnagar. Estimated amount for these schemes is 4116.28 Lakhs. Revised estimate is Rs. 22611.22 lakhs.

Non-Core-Sector Schemes

(i) Development of Manikarnika ghat; (ii) Development of Khirkiya ghat; (iii) Development of Ramnagar ghat on the right bank of river Ganga; (iv) Development of Aghoreshwar Baba Bhawan, Ranighat on the right bank of river Ganga; (v) Electrification work at Samadhisthal on Aghoreshwar ghat; (vi) Electric crematorium at Rajghat, (vii) Animal Carcass Utilisation Incineration plan.

15. Supra note 1.

The project was challenged on the following grounds

a. The project of GAP-I was prepared by the Jal Nigam and it had failed to abate the pollution of river Ganga.
b. STPs do not have provision for controlling fecal coliform.
c. The Jal Nigam has not sought the approval of the Nagar Nigam. It violated 73rd amendment of the Constitution.
d. Under clauses (iii), (vii) and (viii) of Section 114 of the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959, the Nagar Nigam has the responsibility of disposal and treatment of City waste. It cannot carry out its obligation unless the implementation of schemes and projects are entrusted to the Nigam.
e. The Nagar Nigam has submitted to NRCD and U.P. Govt. a Project Report for GAP-II for Varanasi. Both have not yet considered this report which is a violation of 73rd Amendment of the Constitution.
f. The neglect to construct proper sewage treatment plants is also a direct violation of Art. 21, 48-A and 5lA. (g) of the Indian Constitution, Water (Prevention and Control of Pollution) Act, 1974 and Environment (Protection) Act, 1986.

The High Court stayed the initiation and implementation of the Ganga Action Plan - II till the said Plan was cleared by a Committee of the Experts appointed by the Court.

The National River Conservation Directorate (NRCD) filed Special Leave Petition Civil No. 16935 of 1998 in the Supreme Court against the order dated 16.08.1988. In M.C. Mehta v. Union of India and others,[16] the Court passed following orders:

"We are not inclined to interfere with the order of stay that has been passed by Court. However, we further direct that the Jal Nigam will not carry out any of its plans in respect of Ganga Action Plan without leave of this Court."

This stay has not been vacated by the Supreme Court till June, 2003. In fact, the whole controversy, in the Supreme Court, centred round the acceptance of the proposals for GAP-II submitted by Oswald - Green, USA and Sankat Mochan Foundation and by the Jal Nigam. Pt. Narain Misra insisted that the General Body of the Nagar Nigam vide Resolution No. 339 dated 22.7.1998 has approved SMF Project Feasibility Report. The experts had examined this report and found it suitable for Varanasi.

It may be argued that there will be no check on the Municipalities for the mal-functioning, default or abuse of power. It is not so. There is a

16. Supra note 9.

provision in the Adhiniyam, 1959.[17]

In M.C. Mehta v. Union of India,[18] the Supreme Court issued directions to all Mahapalikas and Municipalities which had jurisdiction over the areas through which the river Ganga flows, although this case related to Kanpur Nagar Mahapalika. The Court observed:

"What we have stated applies mutatis mutandis to all other Mahapalikas and Municipalities which have jurisdiction over the areas through which the river Ganga flows."[19]

In this case, the Court issued following directions:

(a) The Kanpur Nagar Mahapalika may either direct the dairies to be shifted to a place outside the City so that the waste accumulated at the dairies does not ultimately reach the river Ganga or it may arrange for the removal of such waste.

(b) It should increase the size of the sewers in the labour colonies so that the sewage may be carried smoothly through the sewerage system. Wherever sewerage line is not yet constructed, steps should be taken to lay it.

(c) Steps should be taken by the Kanpur Nagar Mahapalika to construct sufficient number of public latrines and urinals for the use of poor people in order to prevent defection by them on open land. The levy of any charge for making use of such latrines and urinals should be dropped so that the poor people can make use of them.

(d) The Kanpur Nagar Mahapalika and the Police authorities should take steps for ensuring that dead bodies or half burnt bodies are not thrown into the river Ganga.

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17. Sec. 538 of the Adhiniyam the State Government to dissolve the Municipality in these cases. Sec. 538 provides: 1. If any time upon representation made it appears to the State Government that the Corporation is not competent to perform or persistently makes default in the performance of the duties imposed upon it by or under this Act or any other law for the time being in force or exceeds or abuses more than once its powers, the State Government may, after having given the Corporation an opportunity to show cause why such order should not be made, by an order published with the reasons therefore in the official Gazette to dissolve the Corporation.

    2. A copy of the order under sub-section (1) of Section 538 shall be laid as soon as may be, before each House of Uttar Pradesh legislature.

    3. When a Corporation is dissolved under sub-section (1) of Section 538 the following consequences shall ensue:

    a. the Nagar Pramukh, the Up Nagar Pramukh and all Sabhasads shall, on a date to be specified in the order, vacate their respective offices but without prejudice to the eligibility for re-election.

    b. till the Consultation of the Corporation under 'Clause (b) of subsection (2) of Section 8, the Mukhya Nagar Adhikari shall carry on the routine work of the corporation and committee.

18. Ibid.

19. Id.

(e) Immediate action should be taken against the existing industries if they are found responsible for pollution of water.

None of these directions are implemented by the Nagar Mahapalikas and Municipalities. After that, the Allahabad High Court issued following direction on 4.4.2000 in Dina Nath v. Union of India[20] to the District Magistrates and Mukhya Nagar Adhikari, Nagar Nigam of Allahabad, Varanasi and Kanpur.

"In the meantime, it was directed that the District Magistrates Allahabad, Varanasi and Kanpur Nagar, respondents nos. 4, 5 and 3 respectively shall make all possible endeavour to ensure that industrial waste, filthy effluents of cities are not discharged in the holy river Ganga. They shall also take all possible steps to ensure feasibility of cleaning Ganga river from burgeoning pollution. They shall file their own affidavits stating therein the action taken by them in the matter on the next date."

Still, these directions are to be implemented. From time to time, the Courts have issued directions to the Nagar Nigams for the discharge of their responsibilities.

V. JUDICIAL RESPONSE

There cannot be two opinion that water is the most precious compound of the nature. In M.C. Mehta v. Union of India[21] it was rightly observed by the Supreme Court that river valleys are cradles of civilization. With a view to mobilize the government and the people to protect the environment Articles 48-A and 51-A(g) were incorporated. Article 21 of the constitution of India provides right to life and personal liberty. In A.K. Gopalan v. State of Madras[22] the Supreme Court interpreted the expression 'right to life and personal liberty' in a very narrow sense. But from Maneka Gandhi Case[23] onward the Supreme Court broadly interpreted the expression 'right to life and personal liberty' as a right to live in pollution free atmosphere.

In M.C. Mehta v. Union of India,[24] Mehta makes a plea that neither government nor industries are serious to stop the pollution of the river Ganga. Petitioner makes a plea that administrative agencies should fulfill their statutory obligation to prevent and control the pollution of river Ganga. The Supreme Court while accepting the plea of the petitioner observed "the petitioner is no doubt not a riparian owner. He is a person interested in protecting the lives of the people who make use of the water flowing in the river Ganga and his right to maintain the petition cannot be disputed. The nuisance caused by the pollution of the river Ganga is a public nuisance."[25] By the Supreme Court

20. Writ no. 16333 of 2000
21. AIR 1988 SC 1037
22. AIR 1950 SC 27
23. Maneka Gandhi v. Union of India 1978 SC 597
24. Supra note 9
25. Id., at 1126

right to life is a fundamental right under Article 21 of the Constitution of India and includes the right of enjoyment of pollution free water. Again, in the case of M.C. Mehta v. Union of India[26] the petitioner argued in the Supreme Court to close down the tanneries which are polluting the river Ganga. The Supreme Court has ordered for relocation of tanneries and held that tanneries which are not willing to shift to a new place should not be permitted to function.

These decision reflect the "polluter Pays Principle" evolved by the Supreme Court in Indian Council for Environment Legal Action v. Union of India.[27] In this case, the Supreme accepted the polluter pays principle by observing that, "Polluter pays principle has gained almost universal recognition. One who pollutes the environment must pay to reverse the damage caused by his act. Remediation of damaged environment is part of process of sustainable development and as such polluter is liable to pay the cost of the individual suffers as well as the reversing the damaged ecology.[28]

In Ganga pollution case,[29] the Supreme Court imposed pollution fine on all the foundries which were polluting the river Ganga.[30] In Subhash Kumar v. State of Bihar, it was observed by the Supreme Court that right to clean water is a fundamental right.

In Mehta case[31] the Apex Court ordered the closure of Tanneries which did not appear before the Court. The Court observed 'we are conscious that the closure of tanneries may bring unemployment, loss of revenue but life, health and ecology have greater importance to the people. The Supreme Court again in Mehta case[32] ordered the relocation of Industries from their present location.[33] The Supreme Court in Vineet Kumar Mathur v. Union of India,[34] and other cases[35] issued order for imposition of fine on the polluter.

VI. CONCLUSION

The river Ganga, considered pious by millions and water of which is largely used for drinking, irrigation and fishing, is being indiscriminately polluted by the people through discharge of domestic and trade effluents, throwing of

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26. AIR (1997) 2 SCC 411, See also Re Bhavani River v. Shakthi Sugar Ltd. (1988) 2 SCC 601
27. AIR 1996 SC 1446
28. M.C. Mehta v. Kamal Nath (1997) 1 SCC 388
29. Ibid.
30. See also Vineet Kumar Mathur v. Union of India, (1996) SCC 714 and Yamuna v. Central Pollution Control Board (2000) 1 SCALE 134
31. AIR 1991 SC 420
32. Supra note 9.
33. See Re Bhavani River v. Shakthi Sugar Ltd. (1988) 2 SCC 601 and Vellore Citizen Welfare Forum v. Union of India, AIR 1996 SC 2175.
34. (1996) SCC 744
35. Yamuna v. Central Pollution Control Board ANR 2000(1) SCALE 134

dead animals, unburnt and half burnt dead bodies. Rapid growth of people, urbanisation and industrialization augmented its pollution load to such an extent that it has reached alarming proportion. Orthodoxy and convenience of the people are two main reasons of pollution of Ganga. It is the conviction of the majority of the people that the Ganga cannot be polluted by throwing any things in it. Therefore, by them, throwing of flowers, leaves, dead body etc. into it do not pollute the water of Ganga. In recent years, the restoration of wholesomeness of water of Ganga has assumed great urgency. Therefore, the Government of India took legal and other measures for abating, preventing and controlling the pollution of Ganga.

The objectives of Ganga Action Plan were to abate pollution of Ganga by interception, diversion and treatment of domestic sewage. With a view to achieving these objectives certain scheme were framed. The Supreme Court and Allahabad High Court have taken a number of steps to prevent and protect the pollution of river Ganga which include remedial measures and directions. The administrative authorities are also empowered to take action and it is necessary that they perform their duties and powers in letter and spirit. The success in preventing pollution of Ganga requires sincere and honest implementation of laws by the implementing authorities but the complete success demands cooperation of the people as well.

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ARTIFICIAL INSEMINATION: EMERGING LEGAL AND MORAL ISSUES

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ABSTRACT

The Assisted Reproductive Technology, a new technology of procreation of human being by way of artificial insemination may raise a lot of legal and moral issues. Before this technology becomes widespread and adopted by a number of people, it is necessary that all these issues should be settled by way of legislation. The proposed Assisted Reproductive Technologies (Regulation) Bill, 2010 (hereinafter referred as ART Bill, 2010) if enacted as law, though will resolve some of the issues yet it has not touched many issues which most probably may arise. An attempt has been made in the present article to discuss the legal and moral issues related to procreation by way of artificial insemination. It also explores the issues which have been attempted to be resolved by the ART Bill, 2010 and the issues which still have been left untouched.

KEY WORDS: *Assisted Reproductive Technology, Artificial Insemination, ART Bill, and Pregnancy.*

I. INTRODUCTION

DEVELOPMENT IN Science and Technology has interfered with the natural process of reproduction in two ways- Negative and Positive. On negative side, means have been developed for suspension or abrogation of reproductive process e.g., contraceptives and sterilization techniques to satisfy or gratify the sexual instincts without risk of producing children. On the positive side, artificial means of reproduction have been devised to help those who are unable to procreate through natural process i.e., means to produce a child without having intercourse.

Artificial insemination technique is generally used in cases where procreation by natural means is not possible. Dr. John Hunter, a Scottish

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Surgeon is quoted as the first person to impregnate a woman by artificial means in 1799[1]. The first case in the United States of artificial insemination was decided by J. Marion Sims in 1866[2]. By 1941 in the United States of America alone one thousand children were conceived by artificial means[3]. The practice is now widely used by the medical community as a method for treatment of infertility. However, practice of pregnancy and delivery of child by artificial means has given rise to a number of legal and moral issues. The purpose of the present paper is to analyse some of these legal and moral issues.

II. LEGAL ISSUES

Artificial insemination may be either Artificial Insemination by Husband (AIH), when semen of husband is used for impregnating the woman, or Artificial Insemination by Donor (AID), when semen of a man other than the husband of the woman desired to be impregnated is used for pregnancy, or Confused Artificial Insemination (CAI) in which the sperm of the husband and a donor are mixed. The advantage of CAI is that it could not be conclusively stated that the husband is not the genetic father of the child. This was important at the time when artificial insemination was being considered as immoral and amounting to adultery and the resulting child could be considered as illegitimate and having no inheritance rights. With the acceptance of artificial insemination in society, the CAI has lost its importance.

Whether procreating child by artificial insemination is an offence

An act is considered as an offence when it is punishable under the law of the country. Offences are generally defined in the statutes and if all the ingredients are fulfilled to constitute the act as an offence then only the person committing that act is said to have committed the offence. Nothing in law renders artificial insemination *per se* illegal in India.

Whether pregnancy by artificial insemination will amount to adultery for matrimonial cases

Adultery in matrimonial cases is usually pleaded as a ground for divorce, to deny payment of alimony and custody of child. In some of the earlier decisions in Canada and in the USA it was held that artificial insemination by donor will amount to adultery for matrimonial cases.

In *Orford* v. *Orford*[4] decided by Canadian Supreme Court the plaintiff

1. See Artificial Insemination and the Law by Brent J. Jensen, [1982] Brigham Young University Law Review p. 935 at p. 938, available at http://lawreview.byu.edu/archives/1982/4/jen.pdf (Last visited on 09.07.2013.)
2. *Ibid*.
3. *Ibid*.
4. (1921) 49 Ontario LR 15

(wife) sought alimony and the husband in defence alleged that wife was guilty of adultery as she gave birth to a child by adulterous intercourse. The wife's plea was that she had undergone artificial insemination (AID) without consent of the husband. The court refused to believe the story of the plaintiff wife and found as a fact that sexual intercourse had taken place with the alleged donor in the normal way. Despite this however, the court observed that even if her story had been accepted, she would have been guilty of adultery. The Court observed:

> "In my judgement, the essence of the offence of adultery consists not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or wife comes within the definition of adultery. Sexual intercourse is adulterous because in the case of the woman, it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would therefore be adulterous."

In *Hoch* v. *Hoch*[5] it was stated that no definition of adultery could be held to include artificial insemination. However, in *Doornbos* v. *Doornbos*[6] a Chicago Trial Court held that mother of a child born as a result of artificial insemination by donor is guilty of adultery. The Court observed:

> "Heterologous Artificial Insemination (When the specimen of semen used is obtained from a third party or donor) with or without the consent of the husband is contrary to public policy and good morals and constitutes adultery on the part of the mother. A child so conceived is not a child born in wedlock and is therefore illegitimate. As such it is the child of the mother, and the father has no right or interest in said child."

The Court went on to add that:

> "Homologous Artificial Insemination (When the specimen of semen used is obtained from the husband of the woman) is not contrary to public policy and good morals and does not present any difficulty from the legal point of view."

In *People* v. *Sorensen*[7] it was held that the child born from AID will be legitimate if the husband consented to artificial insemination. From this an inference may be drawn that neither donor of sperm nor the wife inseminated will be considered as committing adultery.

In the United States, many States now have adopted the Uniform Parentage Act, 2002. Article 7 of the Act deals with parentage when there is assisted conception and incorporates the provisions of earlier Uniform Status

5. Cited in (1958) 21 Mod. L. Rev. at p. 239 quoting (1945) Chicago SUN, February 10,
6. (1956) 139 N.E. 2d. cited in (1956) Can. B.R. at p. 14
7. [1968] 437 p 2d 495 (Cal) cited in Law & Medicine by P.M. Baxi

of Children of Assisted Conception Act, 1989 into the Uniform Parentage Act, 2002 almost without change. If a man and woman consent to any sort of assisted conception and the woman gives birth to the resultant child, they are the legal parents. A donor of either sperm or eggs used in an assisted conception will not be a legal parent of the child.

In England, Lord Dunedin's dictum "*fecundation ab extra* is, I doubt not, adultery" has played much important role in definition of adultery.[8] The issue in this case was whether the wife, who had given birth to a child , could be held to have committed adultery, she being proved to be *vigro intacta*. The jury found that wife had been fecundated *ab extra*[9] (not by artificial means but without penetration of her sexual organ) by a man not her husband. Lord Dunedin observed:

> "The appellant conceived and had a child without penetration having ever been effected by any man; she was fecundated *ab extra*…The jury…came to the conclusion that she had been fecundated *ab extra* by another man unknown, and fecundation *ab extra* is, I doubt not, adultery."

Relying on the observations of Lord Dunedin that penetration is not essential to constitute adultery, the legal members of the Commission appointed in 1945 by the Archbishop of Canterbury "to consider the practice of human artificial insemination with special reference to its theological, moral, social, psychological, and legal implications" opined

> "We entertain no doubt at all that the act both of a married donor, and a married recipient constitutes adultery."

However, Lord Merriman during the debate on the Commission's report in the House of Lords on March 16th, 1949, referring to this conclusion, said, "that seems to me to be absolute non-sense." He then points out that "from the earliest times the courts have required proof of penetration of the woman's sexual organ as an element in adultery….that artificial insemination does not involve an act of sexual intercourse at all, and that sexual intercourse in the ordinary sense of the word is necessary to constitute adultery." The definition of adultery as approved by Lord Merriman is, "voluntary sexual intercourse between a married person and a person of the opposite sex during the subsistence of the marriage." However, in *Spasford* v. *Spasford*[10] the court granted divorce on proof of conduct which did not involve penetration but as the learned judge said, "some lesser act of sexual intercourse." In some other cases the English courts have held that some types of sexual play stopping short of actual penetration might constitute adultery e.g., Rutherford v.

8. *Russel* v. *Russel*, (1924) A.C. 687
9. Conception is possible without penetration of the vagina by the male organ due to deposition of semen on the thighs, or on the vulva which leads to *fecundation ab extra*. The insemination occurs due to passage of spermatozoa from the external genitalia to the uterus.
10. [1954]2 All E.R. 373
11. [1923] A.C.1

Richardson[11].

In Indian context the meaning of sexual intercourse becomes important in the context of section 13 (1)(i) of the Hindu Marriage Act, which is considered as a ground for divorce on the basis of adultery.[12] The question is what is meant by "sexual intercourse". In the most general sense, any activity shared by persons of opposite sexes which would normally take place only if the participants are of opposite sexes might be called sexual intercourse. Passionate kissing and embracing, petting will be included in this sense.

The courts have also held in India that the standard of proof of adultery

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12. Section 13, Hindu Marriage Act, (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(ii) ….

13. In the Indian Penal Code the term Adultery is defined in Section 497 as follow:

"*Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.*"

The term sexual intercourse had also been used in Section 375 of the IPC defining rape prior to its amendment by the Criminal Law (Amendment) Act, 2013 relevant portion of which were as follow:

"*A man is said to commit rape who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling ……..."*

While interpreting the word sexual intercourse under this section the Supreme Court in *Sakshi* v. *Union of India* 2004 Cr.L.J. 2881 (SC) has held that by a process of judicial interpretation the provisions of Section 375 of IPC cannot be altered so as to include all forms of penetration such as penile-vaginal, penile-oral, finger-vaginal or a finger or pencil object penetration within its ambit. Section 375 uses the expression "sexual intercourse" but the said expression has not been defined. The dictionary meaning of the word "sexual intercourse" is heterosexual intercourse involving penetration of the vagina by the penis.

The provisions of Section 375 have been amended by the Criminal Law (Amendment) Act, 2013 and a number of acts have been included in the definition of rape and the present definition of rape under Section 375 does not contain the words 'sexual intercourse'. However, for the purpose of punishing the rape committed under some of the circumstances (such as under Sections 376B and 376C the words 'sexual intercourse' still have been used and explanations attached to those sections lay down that 'sexual intercourse' shall mean any of the acts mentioned in clauses (a) to (d) of Section 375. It is submitted that such extended meaning of sexual intercourse will not be applicable for interpreting the words 'sexual intercourse' used in Section 497 of the Indian Penal Code and the interpretation given to the words 'sexual intercourse' by the Supreme Court in Sakshi v. Union of India will still be applicable for the definition of Adultery under Section 497.

in matrimonial case is same as in a civil case and not as in a criminal case[13] i.e., by preponderance of probabilities and not by proving it beyond reasonable doubt. In *P* v. *P* and *R*[14] it was held that it is difficult to produce evidence of the party being found in actual compromising position.

Since essence of adultery in India is regarded as enjoyment of carnal pleasure, there is remote chance of treating artificial insemination as adultery. However, donation of gamete by either spouse without the consent of the other may be a ground for divorce on the basis of cruelty.

Whether pregnancy by artificial insemination will amount to consummation of marriage

Section 12 (1) (a) of the Hindu Marriage Act, 1955 makes a marriage viodable on the basis of non-consummation of marriage owing to impotence of the respondent.[15]

The question which needs determination is the meaning of consumption. Both the English as well as Indian decisions have established that ordinary and complete intercourse is a necessary condition for consummation. Further, consummation is in no way related to the ability to conceive.

In *Baxter* v. *Baxter*[16] House of Lords held that the use of a sheath as an artificial contraceptive did not prevent consummation of the marriage, i.e., the use of a sheath did not prevent intercourse from being "ordinary and complete."

Thus it is quite clear that the act of insemination cannot be considered to constitute consummation. It is also irrelevant, for this purpose, that the semen used for the insemination is that of the husband. Now the question is whether in those cases where marriage has not been consummated owing to the impotence of the husband or wife but the wife has been impregnated

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14. AIR 1982 Bom 498

15. Section 12, Hindu Marriage Act, 1955, (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:

    (a) *That the marriage has not been consummated owing to the impotence of the respondent., or*

    (b) …..…..

16. [1948] A.C. 274 (HL)

either by AIH or AID with the consent of the husband, such marriage can be annulled on the ground of impotence. If marriages in which the wife has been inseminated are still liable to be annulled on the ground of non-consummation, then the whole purpose and object of the insemination is largely defeated. It is therefore, submitted that this is a matter on which legislation is desirable, However, until a law on the point, the authorities should apply the doctrine of approbation to save the marriage as it is applied in the case of adoption of the child. It is presumed that by adoption of the child the parties to the marriage approve that they are spouses.

Whether the child born by artificial insemination is legitimate

The issue of legitimacy of a child born from artificial insemination arises solely in the case of A.I.D. because there is not the slightest doubt that children conceived by A.I.H. are legitimate. In an editorial of the Journal of the American Medical Association (1939), it was observed:

"The fact that conception is effected not by adultery or fornication but by a method not involving sexual intercourse, does not in principle seem to alter the concept of legitimacy. This concept seems to demand that the child be the actual offspring of the husband of the mother of the child…if the semen of some other male is utilised the resulting child would seem to be illegitimate. The fact that the husband has freely consented to the insemination does not have a bearing on the question of the child's legitimacy. If it did, by similar reasoning it might be urged that the fact that the husband had consented to the commission of adultery by his wife would legitimise the issue resulting from the adulterous connection."

However, we have seen that the later decisions in U.S.A. hold the child born from AID to be legitimate if the husband consented to artificial insemination. In the United States, many States have adopted the Uniform Parentage Act, 2002 to deal with the matter. In Western Australia, the Artificial Conception Act, 1985 deals with the subject and New South Wales has a similar law of 1984. The general thrust of most of these enactments is twofold. Firstly, If the impregnation of the wife by donor is with the husband's consent, then the child born becomes the legitimate child of the woman and her husband. Further, the child shall not be regarded as the donor's child, and secondly, If the impregnation of the wife is without the husband's consent, then the child is not to be regarded as a child of their marriage.

In England Human Fertilisation and Embryology Act, 1990 has been enacted to provide for presumption of paternity. Section 28(2) of the Act lays down that if a child is born as a result of artificial insemination or embryo

transfer to a woman who was at the time of artificial insemination or transfer of embryo, married, then her husband will be treated as the father of the child. Section 28(6) further provides that the donor of the sperm to be used for artificial insemination is not to be treated as the father of the child.

In India we have no legislation in this regard.[17] In absence of any statutory provision in India in this regard the child may be treated as

17. Section 35 of the ART Bill, 2010 deals with the legitimacy of the child which is as follow:

Determination of status of the child -

(1) A child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse.

(2) A child born to an unmarried couple through the use of assisted reproductive technology, with the consent of both the parties, shall be the legitimate child of both parties.

(3) In the case of a single woman the child will be the legitimate child of the woman, and in the case of a single man the child will be the legitimate child of the man.

(4) In case a married or unmarried couple separates or gets divorced, as the case may be, after both parties consented to the assisted reproductive technology treatment but before the child is born, the child shall be the legitimate child of the couple.

(5) A child born to a woman artificially inseminated with the stored sperm of her dead husband shall be considered as the legitimate child of the couple.

(6) If a donated ovum contains ooplasm from another donor ovum, both the donors shall be medically tested for such diseases, sexually transmitted or otherwise, as may be prescribed, and all other communicable diseases which may endanger the health of the child, and the donor of both the ooplasm and the ovum shall relinquish all parental rights in relation to such child.

(7) The birth certificate of a child born through the use of assisted reproductive technology shall contain the name or names of the parent or parents, as the case may be, who sought such use.

(8) If a foreigner or a foreign couple seeks sperm or egg donation, or surrogacy, in India, and a child is born as a consequence, the child, even though born in India, shall not be an Indian citizen.

illegitimate[18], his rights being those enforceable against his genetic father i.e., anonymous donor, and his social father is a legal stranger to him. The state of affairs may create problems for his right of inheritance.[19]

III. MORAL ISSUES

It may be argued that if the practice of artificial insemination becomes widespread, it will destroy family life as the basis of human society. Babies will be sown and grown in laboratories to produce eugenic child and people will have sex solely to gratify desire without intention to procreate just like drinking wine and eating candy. There seems no guarantee that the donor of gamete will always be indeed a donor for altruistic purposes. He or she may turn out to be a vendor of gamete. Should we permit comercialisation of gametes (i.e., sperms and ova). The inseminating physicians may be lured to select and preserve the semen of best bulls like a brave man of war or a handsome tall giant to result best breeds. It is estimated that if a fecund (fertile or fruitful) donor submits two specimens of his semen weekly, it can be used to produce 400 children weekly i.e., 20,000 annually creating apprehension of producing many children of one biological father. Similarly the physician may produce many children of one biological mother by preserving and fertilising several ova of one pretty lady[20]. Now the question to be

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18. Section 112 of the Indian Evidence Act,1872 lays down:

"Birth during marriage, conclusive proof of legitimacy- The fact that any person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

Access means effective access. Access and non-access connote existence or non existence of opportunities for marital intercourse.[*Venkateswara* v. *Venkata Narayan* AIR 1954 SC 156]. If it is established that the husband was physically incapable of procreating, it will mean non access within the meaning of this section. In *Shrimati Kanti* Devi v. *Poshi Ram* AIR 2001 SC 2226, the Supreme Court held that Section 112 of Evidence Act was enacted at the time when modern scientific advancement with Dioxy Nucleic Acid (DNA) as well as Ribo Nuvleic Acid (RNA) was not even in contemplation of the Legislature. The result of genuine DNA test is said to be scientifically accurate but even that is not enough to escape from the conclusiveness of Section 112 of the Act. E.g., if the husband and wife were living together during the time of conception but DNA test reveals that the child was not born to the husband, the conclusiveness in law would remain unrebuttable.

19. See A.H. Ansari, "Artificial Insemination: Indian Perspective", (1995) 1 SCJ (Jn) 11.

20. Clause 26 (7) of the Assisted Reproductive Technologies (Regulation) Bill, 2010 proposes to make provision that an ART bank shall not supply the sperm of a single donor for use more than seventy five times. Similarly Clause 26 (8) proposes to lay down that no woman shall donate oocytes more than 6 times in her life, with not less than a three-months interval between the oocyte pick-ups.

S. 26 (9) lays down that eggs from one donor can be shared between two recipients only, provided that at least seven oocytes are available for each recipient.

considered is as to whether aforesaid acts will not be contrary to public policy and good morals.

Whether unmarried woman or a widow be Artificially Inseminated

What will happen if a single woman wishes to be artificially impregnated? Should the doctor assist her? In England the Royal College of Obstetricians and Gynecologists, in the guidelines laid down for its members, recommend that artificial insemination should be performed only on a married woman and only with her husband's consent. However, The Human Fertilisation and Embryology Act, 1990 of the United Kingdom does not expressly prohibit insemination of an unmarried woman or a widow, though it casts a duty on inseminating physician that he has to take into account the well being of the child including presence of a father. Of course, an unmarried woman or a widow resorting either to natural or to artificial means of reproduction does not commit any offence as such. But society does not approve of such conduct, at least in India. If an unmarried avails the facility of artificial insemination, then the child born will be without any father. Thus, it is important to know whether the law should prohibit an unmarried woman to avail the facility of artificial insemination in the interest of the child or should it allow artificial insemination to those women who want to have a child but do not want marriage.

Whether identity of the donor should be disclosed[21]

Physicians who are engaged in the practice of artificial insemination recommend that the identity of the donor should be unknown to the woman and to her husband. The physician has to assume the responsibility for finding the donor and certifying his suitability. It is argued that if identity of the donor

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21. Section 20 of ART Bill, 2010 which deals with general duties of ART Clinics lays down in sub-section (9) that "Assisted reproductive technology clinics shall ensure that information about clients, donors and surrogate mothers is kept confidential and that information about assisted reproductive technology treatment shall not be disclosed to anyone other than a central database to be maintained by the Department of Health Research, except with the consent of the person or persons to whom the information relates, or in a medical emergency at the request of the person or persons or the closest available relative of such person or persons to whom the information relates, or by an order of a court of competent jurisdiction."

    S. 26 (13) lays down that "no ART bank shall divulge the name, identity or address of any sperm or oocyte donor to any person or assisted reproductive technology clinic except in pursuance of an order or decree of a court of competent jurisdiction."

    S. 32 (3) lays down that "the parents of a minor child have the right to access information about the donor, other than the name, identity or address of the donor, or the surrogate mother, when and to the extent necessary for the welfare of the child."

will not be revealed, there is less likelihood of disputes arising between the woman and her husband. The affection of the woman will not be diverted to her child's genetic father nor will she later be able to put forward any claim based on the paternity of the child. Her husband will also not be jealous of a man unknown to him. Further the donor himself may be willing that his identity should not be revealed to avoid any legal proceeding against him in future. Similarly the identity of the woman to be inseminated must not be known to the donor. This is to prevent him from later laying any claim to the custody of the child, or to a right of inheritance from the child, or attempting to blackmail the child, its mother or the mother's husband by threats to reveal the truth concerning the child's origin. Moreover, some of the sperm banks provide donors with the option to be contacted once their offspring reaches the age of 18. However, many a times the AID couple may have the desire to know whether the donor was a tall man, short man or a dwarf, of fair or dark skin, intelligent or fool, his immediate, paternal and maternal history, colour of eye, colour of hair and so on.[22]

Another important question is whether a child has a right to know about his origin. In artificial insemination the name of the donor of the sperm is kept secret for the reasons mentioned above. Same reasoning will apply for not revealing the identity of the woman who donates her ovum to any couple for

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S. 33 (1) lays down that "Subject to the other provisions of this Act, all information about the donors shall be kept confidential and information about gamete donation shall not be disclosed to anyone other than the central database of the Department of Health Research, except with the consent of the person or persons to whom the information relates, or by an order of a court of competent jurisdiction."

S. 33 (2) lays down that "Subject to the other provisions of this Act, the donor shall have the right to decide what information may be passed on and to whom, except in the case of an order of a court of competent jurisdiction."

S. 33 (3) lays down that "A donor shall relinquish all parental rights over the child which may be conceived from his or her gamete."

S. 36 (1) lays down that "A child may, upon reaching the age of 18, ask for any information, excluding personal identification, relating to the donor or surrogate mother."

S. 36 (3) lays down that "Personal identification of the genetic parent or parents or surrogate mother may be released only in cases of life threatening medical conditions which require physical testing or samples of the genetic parent or parents or surrogate mother."

Provided that such personal identification will not be released without the prior informed consent of the genetic parent or parents or surrogate mother.

22. Some sperm banks provide these details without disclosing the names and addresses of the donor by maintaining a chart as follow:

Donor ID	Race Ethnic Origin	Hair colour Texture	Eye colour	Religion	Blood Group	Height/ weight	Imme-diate Medical History	Parental Medical History	Maternal Medical History

having a child by artificial insemination. If donor's identity will be revealed to the child, will it amount to violation of the secrecy of the donor promised to him/her by the physician? And if the same is not disclosed whether it will affect the right of the child to know his biological father and/or mother. Non disclosure of his or her genetic parentage to a child may result other unfortunate consequences. For example it may result in the child unwittingly marrying its own half-sister or half-brother and thus incurring the risk of evils which may result from inbreeding and which are sought to be avoided by the laws prohibiting incest. Probability of this result may be more, if a single man's sperms inseminate many women. Again if the person who unwittingly marries his or her own half-brother or sister and later anyhow comes to know this fact, this may be shocking to him and will prove disaster to his/her marital life.

The disclosure of the identity of the donor of the gamete to the resulting child may also be required for suing the donor if genetic disease was not disclosed by the donor with which the child suffers later on.

Problems of Donor's duties and rights

The main duty of the donor of the gamete should be to assist the inseminating physician in assessing whether he is a suitable donor or not. He should also disclose the details known to him particularly any genetic disease and to go for medical examination if asked by the physician. In absence of any legislation on this point in India, there is no method to enforce these duties and these remain only the moral obligation of the donor. The ART Bill, 2010 also does not impose a duty on donor to disclose genetic diseases. S. 23 (8) prohibits ART clinics to use semen for ART unless it is medically analysed in such manner as may be prescribed.

Negligence of Medical Professionals

Artificial insemination may give rise to some new kinds of cases of medical negligence as there is likelihood of mixing semen of husband or donor with someone else; transplant of gamete or embryo intended for someone else i.e. in wrong patient; use of embryo or gametes which are discarded for implant in the woman; disposal of embryo by mistake, etc.

In absence of legislation to control these, there is possibility of different opinions of courts on these issues. As of today, in absence of any law on the point anyone can open infertility or assisted reproductive technology (ART) clinic; no permission is required to do so. There has been, consequently a mushrooming of such clinics around the country. In view of the above, in public interest, it has become important to regulate the functioning of such clinics to ensure that the services provided are ethical and that the medical, social and legal rights of all those concerned are protected.[23]

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23. See the Preamble of the Draft ART Bill, 2010.

IV. CONCLUSION

The new technology of procreation by means of artificial insemination has given rise to a lot of legal and moral issues and it is necessary that these issues should be taken into consideration before enactment of any law in this field. The proposed Assisted Reproductive Technologies (Regulation) Bill, 2010 has taken into consideration only some of the issues raised above whereas many of the issues as observed in this paper still will remain unresolved if the Bill is passed in its present form. It is submitted that the Bill needs to add provisions to resolve the remaining issues so as to be called as a complete law on the subject. The issues of legitimacy of child, a widow getting artificially inseminated, disclosure of identity of donor and duties and responsibilities of people involved in the process need to be addressed on priority basis.

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E-CONTRACT : LEGAL ISSUES

Chandra Pal Upadhyay*

ABSTRACT

Technological developments have changed the way the businesses are managed worldwide. The paper based contract is being converted into paperless e-contracts. In this regard the paper highlights the legal issues relating to paradigm shift from paper based to paperless contracts. Starting the discussion from historical development of e-contracts, there has been an attempt to discuss the meaning, definition and kinds of e-contracts. Thereafter validity and enforcement of such contracts have been discussed in the light of existing legal framework at national and international levels. With the help of judicial decisions and legal enactments an effort has been made to discuss the dichotomy and inconsistency of the provisions of the law. Study in this field reveals that legislation relating to e-contracts in India is still lagging behind and more clear provisions are required for e-contracts.

KEY WORDS: *contract, e-contract, information technology, and UNCITRAL*

I. INTRODUCTION

THE AGE of information has introduced technological development. Technological innovations have expanded distribution channels through the creation of transportation and communication improvements. Today computers and internet have expanded the horizon by permitting communications access to the world at large. A major beneficiary of improved technology is business sector. The internet provides rapid communication capabilities at reduced costs and expands access to a global market. An important outcome of this technological development is increasing phenomenon of electronic commerce or E-Commerce. E-Commerce encompasses a broad category of economic activity conducted online, including email contracts and online sales of both tangible goods and information delivered over internet.

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E-contract is a kind of contract formed in the course of e-commerce by interaction of two or more individuals using electronic means, such as email. This is also known as electronic contract or paperless contract. The evolution of e-contract has raised a number of governance issues and compelled the society to advance a legal regime to address these issues. United Nations adopted the UNCITRAL Model Law on Electronic Commerce in the year 1996, which serves as a guide line for national legislations to regulate e-contract. Till now most of the countries has adopted the Model Law and enacted their specific legislation to mentioned a few of them: the Commerce Act, 1998 of Singapore; the Uniform Computer Information technology Act, 1999 and the Uniform Electronic Transaction Act, 1999 of USA; and the Electronic Transaction Act, 1999 of Australia.

In India we have the Indian Contract Act, 1872, which is insufficient and ineffective to regulate e-contract. To plug this, the Information Technology Act, 2000 was passed to provide a legal recognition to e-contract. The Information Technology Act amended and attuned to cater the need of the changed scenario, but unfortunately many issues still remains unexplored. A question as to whether the IT Act, 2000 alone regulate the e-contract or the IT Act, 2000 and the Indian Contract Act, 1872, still remains a mystery.

The present study is a humble attempt in two directions. Its aim is to present a coherent picture of law on e-contract in India and to discuss and examine their adequacy in meeting the challenges posed by the e-contract.

II. HISTORICAL BACKGROUND

According to a theory of political science, state and society came into existence on the basis of contract amongst people. In ancient India there was no specific law of contract. The law of contract was based on natural principles of contract. All religious groups had their own law of contract. In British period, English law of contract under the garb of doctrine of equity, Justice & good conscience was incorporated as a law of contract for Indians. In 1872 Indian Contract Act was passed to avoid the conflicting law of contract for different communities in India.

Technology has radically changed the way businesses are managed across the world. It has affected every walk of life. Present law of contract proved insufficient and inefficient due to use of new technologies in formation of contracts. The Supreme Court tried its best to include every kind of technology in present law with the help of flexible language of contract Act. In the context of Technology and Law, J. Hidayatulla observed that "though the law was framed when telephone, wireless, telestar and Early Bird were not contemplated, the language of sec 4 is flexible enough to cover telephonic communication also."[1]

The rapid development of information and communication technologies

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1. *Bhagwandas Goverdhan Das Kedia* v. *Girdharilal Purushottamdas & Co*. AIR 1966 SC 543

over the past decade has revolutionised business practices. Transactions accomplished through electronic means-collectively 'electronic commerce' have created new legal issues. The shift from paper based to paper less (electronic) transactions raised questions relating to recognition authenticity and enforceability of electronic documents and signatures. Indian Contract Act has no provision to regulate Contracts based on electronic devices like computer & internet. Although technology has progressed, the legal structure is far from adopting to the demands of such progress. To overcome the uncertainty regarding e-contracts, UNCITRAL adopted convention on E-commerce in 1996. A committee headed by justice Fazal Ali in India strongly recommended for a separate law regulating contracts based on electronic devices and refused to modify the present law of contract so as to include electronic contracts.[2] In 1998 UN proposed a draft for the law of e-contracts to India. The legislature decided to pass a new law in this regard which was called the Electronic Commerce Act, 1998. The Act aimed to facilitate the development of a secure regulatory environment for electronic commerce by providing a legal infrastructure governing electronic contracting, security and integrity of electronic transactions, the use of digital signatures and other issues related to electronic commerce.

However later on this Act was overridden by information technology Act 2000 and at present this Act governs the law relating to e-contracts substantially. The Information Technology Act 2000[3] is the legal frame work governing e-commerce activities in India. The Act was modeled on UNCITRAL'S model law, though it departs in many respects from the spirit of the model law. The scope of the Act has been constricted to formulate regulations for authentication of only such electronic document whose physical form is required to be attested by signature of the parties.[4] The Act stipulates various administrative and procedural guidelines for all electronic or computer data related transactions by way of electronic signatures, data protection or deterring heinous crimes like child pornography. The IT Act was amended in 2008[5] with four objectives- first, to enable the services such as e-governance, e-commerce, and e-transactions second, to add new penal provisions in the IT Act, third, to provide alternative of electronic signature, and last to authorise service providers to maintain and upgrade the computerised facility.

III. MEANING, DEFINITION AND CONCEPT OF E-CONTRACT

Due to the advancement of science and technology E-commerce has become a part of human daily life. E-commerce is selling and purchasing of

2. Vakul Sharma, Information Technology: Law & Practice, Universal Law Publishing Company Pvt. Ltd., Delhi, 2nd Ed., 2007, at p.26
3. Here in after referred to as the IT Act. This Act came into force on October 17, 2000
4. Section 5, the IT Act, 2000
5. This came into effect on 29.10.2009

goods and services using technology. E-contracts are basically the contracts analysed with e-commerce and other transaction taking place in the digital environment. According to sir william Anson a contract is a legally binding agreement between two or more persons by which rights are acquired by one or more acts or forbearance on the part of the other or others.[6] E-contract is any kind of contract formed in the course of e-commerce by the interaction of two or more individuals using electronic means, such as email, the interaction of an individual with an electronic agent, such as computer program, the interaction of at least two electronic agents that are programmed to recognise the existence of a contract. This is also known as electronic contract.[7] Electronic contracts are borne out of the need for speed, convenience and efficiency. E-contracts are conceptually very similar to traditional (paper based) commercial contracts. Traditional contract principles and remedies also apply to e-contracts.

E-contract is a contract modeled, specified, executed and deployed by a software system. Computer programs are used to automate business process that govern e-contracts. An electronic or digital contract is an agreement drafted and signed in an electronic form. An electronic agreement can be drafted in the similar manner in which a normal hard copy agreement is drafted. For example an agreement is draft on computer and sent to a business associate via email. The business associate in turn, emails it back with an electronic signature indicating acceptance. Since a traditional ink signature is not possible on an electronic contract, people use several different ways to indicate their electronic signatures, like typing the signers name into the signature area, pasting in a scanned version of the signers signature or clicking an 'I accept' button and many more.[8]

IV. TYPES OF E-CONTRACTS

The basic forms of 'E-Contracts' are: The click wrap or web wrap agreements, the shrink wrap agreements, and the Electronic Data interchange (EDI). The first and foremost are the click wrap[9] agreements. These agreements are those where a party after going through the terms and conditions provided in the website or program has to typically indicate his assent to the same by way of clicking, "I agree" or decline the same by clicking "I disagree". These types of contracts are extensively used on the internet, whether it be granting of a permission to access a site or downloading of software or selling something by way of website.

The question of the validity of click-wrap agreements came for consideration for the first time in 1998 in famous case Hotmail Corporation v.

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6. http:/legal serviceindia.com/article/1127-E-contracts.html. [accessed on 20.08.2013]
7. http:/definitionsuslegal.com/e/e-contract/ [accessed on 23.08.2013]
8. P.M. Bakshi and R.K. Suri , Cyber and E-commerce Laws, 1st Ed.(2002), at p.4
9. Sec Click Wrap Agreements Held Enforceable, available at http//www.philipniser.com [accessed on 16.07.2013]

Van & Money Pie Ine et al,[10] where court indirectly upheld the validity of such licenses and said that defendant is bound by the terms of the licence as he clicked on the box containing "I agree" thereby indicating his assent to be bound. This judgment was followed in catena of judgments.[11] As for as statutory recognition of click wrap agreement is concerned sec. 209 & 112 of UCITA[12] provides that in a click wrap licence if a person reads the terms and clicks 'I agree' he assents to the same.

The shrink wrap agreements "generally contains the CD Rom of software. The terms and conditions are printed on the cover of CD Rom. Sometimes additional terms are shown on the screen when CD is loaded to the computer. The user has option of returning the software if new terms are not to his liking.

The validity of shrink wrap agreements first came up for consideration in the famous case of Pro. CD Inc v. Zeidentrerg,[13] the court held when purchaser after reading the terms of licence featured outside the wrap, opens the cover, coupled with the fact that he accepts the whole terms of licence by a key stroke, constitutes an acceptance of terms by conduct. This judgment was followed in other cases.[14] It is clear from sec 112 and sec 209 of UCITA that conduct of purchaser to tear the wrap after reading the terms, manifests his assent to the terms.

EDI is the electronic communication between trading partners of structured business massage from computer application to computer application.[15] In these contracts, there is transfer of data from one computer to another in such way that each transaction in the trading cycle can be processed with virtually no paper work.[16] In contrast, from other two kinds of contracts, in EDI there is exchange of information and completion of contracts between two computer and not between an individual and a computer. There are no reported cases no enforceability of EDI.[17] Legislations have also recognized the fact that contract can be formed by the interaction of two electronic agents.[18] Art. 11 of UNCITRAL also recognizes the validity of EDI

10. C-98- 20064 (N.D. ca, April 20, 1998)
11. *Groff* v. *America online Ine*-1998 WL 307001, and *steven J. Caspi, et al* v. the *Microsoft Network LLC, et al*. 1999 WL 462175, 323NJ super.
12. Uniform Computer Information Transaction Act, 1999
13. 86f-3d 1447 (7th Cir. 1996)
14. *Compuserve Inc* v. *Paterson* 89F. 3d 1257 and *Hill* v. *Goteway* 2000 Ine-105 F. 3d 1147.
15. Simon Edwards, EDI- Electronic Trading in the Book World: A Series of Six Case studies.
16. Overview of EDI Services, available at http://www.tid.gov.hk. [accessed on 30.07.2013]
17. Erics, Friebrun, Es, EDI and the Law, available at http://www.freibrunlaw.com. [accessed on 30.07.2013]
18. Section 206 of UCITA

and expressly laws down that offer and acceptance by electronic agents especially EDI's are valid and binding contracts.

V. ESSENTIALS AND SUBJECT MATTER OF E-CONTRACT

A valid e-contract must satisfy following requirements-

- " Complete reliable electronic record.
- " Highly secure electronic record.
- " Complete reliable electronic signature.
- " Interaction of electronic agents.
- " Attribution between originator and addressee.
- " Acknowledgement of receipt.
- " Fairness of transaction.
- " Original record admissible in the evidence.

Subject matter of e-contract

Activities through e-contract generally include exchange of goods, services and most importantly information, it may also include selling of goods or delivery of services. The types of electronic contracts can be based either on the kinds of parties involved viz. businesses, consumers, governments or administrators etc. or on the basis of commercial activities on the other hand for example, web advertisement, electronic delivery of goods, physical delivery of goods, and information services etc.

On the basis of kinds of parties involved a contract may be of following types[19]:

1. Business to consumer (B2C)

In B2C contract businesses sell directly to consumers. It has major applicability on online contracts. The major advantages of such contracts are the availability of physical space, availability of returns and customer service is physical matter. Generally B2C contract involves following activities-

a. Information Sharing
b. Order
c. Payment channels
d. Performance of Order
e. Support and Service

2. Business to Business (B2B)

It involves electronic transactions among the businesses. This is in

19. Vakul Sharma, "E-Commerce: A New Business Paradigm, Legal Dimension in Cyberspace", ILI, 2005, at pp.53-54

practice in the form of EDI or electronic transfer of funds. It is fastest growing and most successful segment of e-contract.

3. Consumer to Business (C2B)

This generally involves individuals selling to business concerned and may be in the nature of selling of particular service or product that the consumer intends to sell.

4. Consumer to Consumer (C2C)

This category involves contracts among individuals using the internet and web technologies such as, bids registered with websites for sale of products or possessions of individuals wanting to sell through the net.

A further classification of e- contracts may be made on the basis of modes:

a. Contract through email: A contract can be entered into and concluded following the exchange of a number of emails between the parties. Here the emails serve the same purpose as normal letters do.

b. On line contracts: In such contracts order is placed for goods or services on a website, here relationship may be a onetime act and supplier wishes that his standard terms of conducting business will apply to the customer or the person placing the order. The terms and conditions have to be bought to the notice of the customer, only then terms and conditions will apply to the contract. If terms and conditions are displayed on the websites, many of the problems are unlikely to arise.[20]

c. Web advertising: The web advertising is invitation to enter into online contracts. The web and internet is a good medium of internet advertising.[21] Quick reaction and greater creativity sets the web apart from traditional platforms of advertising.[22]

d. Web-marketing: Marketing is one of the major business functions of the web where large and small business utilise their power alike. Irrespective of the size of business the web provides a platform for organisations to sell goods and services. The consumers also have balance of power to choose and to respond to marketing gimmick positively.

VI. LEGAL REQUIREMENTS OF E-CONTRACTS

For business world to embrace e-contracts the exchange and storage of electronic records must satisfy certain legal requirements. In e-contracts no

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20. Ticket master corp, et al v. tickets, com, inc CD. Cal, March 27, 2000

21. Web advertising is treated as an offer given by supplies of goods or services on the web.

22. Available at www.iab.net/news/content, [accessed on 30.07.2013]IABs Internet and Revenue Report.

physical document is created nor any original document is exchanged between the parties. Even parties sometimes do not see each other. There is a genuine desire of the each party[23] that other party may not repudiate that party's action. The authenticity, integrity and non repudiation of messages are essentials of a record to form legal basis of a claim. These are the following essentials: authenticity, integrity, and Non- repudiation.

Authenticity: Authenticity is concerned with the source or origin of a communication. Every party to an e-contract must have confidence in the authenticity of the messages it receives. A party who fails to verify the other parties identity, may have no recourse, if a fraud is perpetrated. Communication that cannot be authenticated, may not be used as evidence in a court room.

The amendment to the Act[24] introduced the concept of 'electronic signature' which may be used to authenticate an electronic document. Such signatures would authenticate the transaction regarding its genuiness etc. Currently the Indian government has only recognised and notified digital signatures using crypto programming and hash function[25], as the approved form of authorization technique[26]. Therefore parties to the contract must apply to a certifying authority to avail digital signature to be able to electronically execute the contracts.

Integrity: Integrity is concerned with the accuracy and completeness of the communication. Messages sent over the internet pass through many routing stations and packet switching nodes. There are many opportunities for messages to be altered. Sender and receiver must be able to tell as to whether the message send is identical to the message received whether the message is complete or something got lost intransit. Did it arrive in the same form in which it was sent? Has it remained confidential?

Non-repudiation: It is concerned with holding the sender liable for his or her communication. The sender should not be able to deny having sent the communication. It is also concerned with the content of communication i.e. whether the communication received is same as that the one sent the sender.

The authenticity, integrity and non repudiation can be achieved by different methods of encryption or decryption. Sec 15 of the Act provides for secure digital signature.[27] Digital signature is a safety measure, and it provides

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23. Each party includes originator and addressee. Originator means any person who sends generates stores or transmits any electronic message but does not include an intermediary, Section 2(za) of the IT Act, 2000. Addressee means a person who is intended by originator to receive the electronic record, Section 2(b) of the IT Act 2000.
24. Section 3, of the IT (Amendment) Act 2008.
25. Id.
26. By the amendment of 2008, the forms of authentication of technique must be approved by the Indian government.
27. Supra note 4, Section 15

security of data integrity, data authentication and no change of disowning the message signed and sent.[28]

VII. EXISTING LEGAL FRAME WORK FOR E-CONTRACTS

Internet as a decentralised global medium of communication has raised several issues regarding e-contracts. The need for the community to have clear understanding of differences between a paper environment and an electronic environment provides impetus to highlight the increased use of internet. The purpose is to evaluate the recent legislative developments and their possible impact in facilitating e-contracts.

International legislative framework for e-contracts

In 1966, a resolution of UN's General Assembly desired world wide support for harmonisation of international trade law. Thus UNCITRAL[29] was evolved holding its first session in 1968. UNCITRAL has created a convention[30] whose main purpose is to promote the development of international trade, removing the obstacles and uncertainties caused by use of electronic media information of international contracts. The main purpose of this convention was to provide solution for matters related to use of electronic means in international trade. The UNCITRAL convention "CUECIC"[31] contains Provisions relating to formation of contracts. Another resembling UNCITRAL convention "CISG"[32] based on e-contracts came into effect in 1988.

UNCITRAL adopted a model law on e-contracts (MLEC) in 1996[33] MLEC provides facility for offer and acceptance expressing by means of data messages. It validates the contracts formed through electronic means. Thus MLEC attempts to accommodate alternatives to paper based communication.[34] The goal of UN initiatives has been to provide national legislatures with a set of internationally recognised rules to remove legal obstacles and create a more certain legal environment for electronic commerce.

On the basis of Model Law on electronic commerce as adopted by United Nations and directives of the European Union on Electronic Commerce, many countries enacted legislation to regulate e-contract. Singapore was the first country to adopt the above Model in enacting the Electronic Transactions

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28. S.C. Mitra, Law of Contract, Orient Publishing Comp. Ed. 2nd, Vol-2 (2005) , p.2407
29. United Nations Commission on International Trade Law.
30. The convention on e-contracts in International contracts adopted in 2005
31. UNCITRAL Convention on the Use of Electronic Communications in International Contracts 1968.
32. United Nations Convention on the International Sale of Goods, 1988
33. Model law is a legislative text that is recommended to states for enactment as part of their national law.
34. MLEC with guide to Enactment (1996) with additional article 5 adopted in 1998

Act, 1998. This is followed by the Uniform Computer Information Transaction Act, 1999; the Uniform Electronic Transaction Act, the Paperwork Elimination Act, 2001 and the Electronic Signatures In Global and National Act, 2000 of USA; the Electronic Transaction Act, 1999 of Australia and the Electronic Communications Act, 2000 of England etc.

Indian Legislative frame Work for e-contracts

The Indian Contract Act 1872 is still the basic law governing formation of contracts including contracts formed electronically. The substantive principles of contract formation are codified in the Indian Contract Act. The Indian Contract Act governs the manner in which contracts are made and executed in India. But it is not a complete code on law of Contract. Presently law of contract is covered by the Indian Partnership Act 1932, the Sale of Goods Act 1930, the Specific Relief Act, 1963, the Securities Contract Regulation Act, 1956, the Recovery of Debt Due to Bank and Financial Institutions Act, 1993, and the Consumer Protection Act, 1986 etc.

Due to advancement of science and technology, the traditional law of contract does not seem to be sufficient to address all the issues arising out of electronic contracts. The modern day contracts are based on new technologies such as e-mail and other electronic media and devices. Keeping in view the above, Indian Parliament passed Information Technology Act, 2000. The purpose of this legislation is to lay foundation for creation of national legislative framework for facilitating e-commerce. The Act provides a significant platform for interaction of law and technology.

The Act solves some of the peculiar issues that arise in the formation and authentication of electronic contracts. The Act not only provides solution to the issues generated by introduction of e-contracts but in certain cases modifies the principles laid down in the Contract Act, 1872. The relevant IT Act provision are sections 11, 12 and 13 titled as attribution, acknowledgement and dispatch of electronic records.[35] Sec 11 provides for the attribution of electronic records to the originator. This provision is significant because it prohibits a person from disowning electronic communications that originated from him. It is important to note that a mandate for non repudiation is crucial for a contract to come into being.

Sec 12 of the IT Act makes provision for acknowledgement of receipt of communication and the time at which such communication is received. This provision is helpful in resolving some of the complications that arise out of communication over the internet. Where mode of acknowledgement of receipt is not prescribed, the receipt of communication may be given by addressee by any automatic or other communication. The parties are also at liberty to specify the time limit within which such acknowledgement of communication has to be made.

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35. Nagpal Rohtas, "E-Commerce: Legal Issues", Asian School of Cyber Laws, (2008), at p.75

Sec 13 of the Act contains significant provisions which solve the problems of communication over computer network. This section operates only in the absence of contrary contract between the parties. This section provides for the time and place of dispatch and receipt of electronic records.[36] The dispatch of electronic record occurs when it enters a computer resource outside the control of originator.[37] Further it contains the provision with regard to time of receipt of an electronic record.[38] Further this section provides for determining the place of conclusion of a contract. The application of this rule solves many of the problems that arise out of the location of computer and computer systems over different places. The communication is deemed to have been received at the place of business of addressee. If there are more than one place of business, the principal place of business will be treated as place of business. If addressee has no place of business the usual place of residence shall be deemed as place of business. In case of corporations usual place of residence means the place where it is registered.[39]

The IT Act accepts the use of electronic records and signatures.[40] The Act provides that digital signature is a safety measure and it secures the integrity, authenticity and non repudiation of electronic records.[41] For the said purposes central government is authorised to prescribe for security procedures.[42] As far as evidentiary value of e-contracts is concerned, the provisions of Indian Evidence Act, 1872, deal with the presumptions as to e-records.[43] Over and above implications of the consumer protection legislation in India towards online contract have been felt strongly.[44]

The Conventional Law relating to contracts is not sufficient to address all the issues that arise in electronic contracts. The IT Act solves some of the peculiar issues that arise in the formation and authentication of electronic contracts. It is very clear that Law of e-contract is governed by the IT Act for the purposes mentioned in the Act. Other purposes which have not been mentioned in the Act are being covered by other ancillary enactments regarding law of contract, sale of the Goods Act, 1930, the Partnership Act, 1932, the Specific Relief Act, 1963 Forward contract Regulation Act 1952, the Multi Modal Transportation of Goods Act 1993, the Securities Contract Regulation Act 1956, the Consumer Protection Act, 1986, the Recovery of

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36. Supra note 28 at p. 2393.
37. Supra note 4, Section 13(1)
38. Id. Section 13(2)
39. Id. Sections 13(3), 13(4) & 13(5)
40. Id. Sec. 6
41. Id. Sec. 15
42. Id. Sec. 16
43. Sections - 85-A, 85-B, 85-C, 88-A and 65 B of Indian Evidence Act, 1872
44. See Preamble of Consumer Protection Act, 1986

Debt due to Bank and Financial Institutions Act, 1993 etc. It is important to note that the Act does not enable the creation of a trust, execution of a will and execution of any contract of sale or conveyance of immovable property or any interest in such property electronically. The Act clearly excludes transactions through negotiable instruments or power of attorney from the scope of its applicability.[45]

VIII. E-CONTRACTS: THE LEGAL ISSUES

a) Exclusive application of IT Act and E-contract: An important question in the context of e- contracts is whether all the electronic contracts are governed exclusively by the IT Act, 2000 inserted by the amendment of 2008, validates e-contracts. It, however, does not mean that such contracts are now exclusively dealt with under the IT Act. A reading of Sec. 10-A[46] and Sec 81[47] together make it is clear that all the principles of Contract Act are still applicable provided they are not inconsistent with provisions of IT Act. The Contract Act is a fundamental law governing contracts and the IT Act covers only those aspects of contracts that are not covered under the Contract Act. The IT Act is not a complete code for e-contracts. Contract Act is still the basic law governing contract formation including contracts. However, these two Acts are supplementary to each other. IT Act is not only a gap filler but in certain cases it has modified the basic principles of Contracts Act.

b) Communication of offer and acceptance: There are four Theories[48] with regard to time and place of conclusion of contracts.

Declaration Theory- Under declaration theory the contract is concluded when acceptor writes his acceptance because without communication addressed to specific addressee, it is mere internal will.

Information Theory- It is strictest of the contract formation theories, and requires the knowledge of acceptance for formation of contract. The Viena Convention adopted the information theory for oral contracts.

Dispatch theory or mail box rule/Post box rule- Under this theory the contract is formed when acceptor sends his acceptance to the proposer. The consequence of this theory is that risk of transmission is borne by proposer. In postal rule a complete contract comes into existence when

45. Schedule I and Section 1(4) of the Information Technology Act, 2000

46. Supra note 4, Section 10-A provides, "validity of contracts formed through electronic means- Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose."

47. Supra note 4, section 81 provides that provisions of IT Act shall have effect notwithstanding anything inconsistent contained in any other law.

48. Faseiano Paul, "Internet Electronic Mail: A Lat Bastion for the Mailbox Rule" 25, Hofstra L. Rev. at p.971

properly stamped and addressed letter is put in the course of transmission so as to be out of power of the acceptor and it is immaterial whether that letter reaches to the offerer or not.[49] In *House Hold Insurance Comp.* v. *Grant*,[50] it was held that even if an acceptance was lost and never arrived at the destination, the contract will be concluded.

The Postal rule was first laid down in *Adams* v. *Lindsel*.[51] In this case it was held that acceptance must be taken to be complete as soon as the letter of acceptance is posted and not when it is delivered. For if defendant were not bound by offer till the answer was received then the plaintiff ought not to be bound till they answer and so it might go on ad infinitum and no contract would be ever concluded by post. This rule has an obvious advantage for the offerer as he will not be responsible for delay, instead the burden of uncertainty lies on the offeror.[52] The postal rule was adopted in the early industrial period[53], and represents the fairest method of allocating the risk.[54] Postal Rule is used in common law countries and provides a solution where party is interested in revoking his offer. Opposite to this in civil law countries, the rule is that offeror must actually receive the acceptance is normally used as offers are not generally revocable.[55] The postal rule has been incorporated in sec. 4 of Indian Contract Act with a modification to the principle of communication of acceptance. The acceptance is complete against proposer when put in the course of transmission by acceptor and against acceptor when comes to the knowledge of proposer.[56] However, the contract is completed at the place where the letter of acceptance is posted, and there is no disagreement on this point between Indian Law and common law.

Receipt Theory- As a general rule acceptance must be actually received by the offerer. In Common law system, it is well established that postal rule is not applicable when means of communication is other than mail or post. The Vienna Convention adopted the receipt rule as the general rule to all written declarations. This rule is used where parties use the instantaneous communication. Although initially it was thought that postal rule is applied in instantaneous communications also.[57] This rule was for the first

49. *Brogden* v. *Metropolitan Rly Co*. (1877) 2 App. Las 666
50. (1879) 4 E&D 216
51. (1818) 4 E & D 216
52. RIR Abeyratne "Auctions on the Internet of Air Tickets" Communication Law Vol. 4, No. I, 1999
53. Susannah Downing and Justion Harrington "The Postal Rule in E-Contract: A Reconsideration" Communication Law, Vol. 5, No.-2, 2000, at p.43.
54. Sigfried Eiselen, "Electronic Commerce and UN Convention for Contracts" The EDI Law Review, 6, 21-24, 1999, at p.26
55. Section 4, the Indian Contract Act, 1872
56. *Ramdas Chakrabarti* v. *Cotton Gimmg Co. Ld.* (1887) 9 All series 366
57. *Carow Touring Comp* v. *The Ed. Meurilliams* (1919)46 DLR 50 6 (Ex ct) The Canadian Court held that telephone can be equated with a letter and therefore postal rule applies

time applied in the case of *Entores Ltd.* v. *Miles for East Corporation Ltd*.[58] In this case Lord Denning held that telex is an instantneous form of communication in which postal rule is inapplicable. It was further held that in such communication receipt rule' is applied and contract comes into existence where acceptance is received. The rationale behind this rule is that offeree will always know whether his acceptance has been received and can react immediately any fault or misunderstanding.

This rule was confirmed by House of Lords in *Brinkibon Ltd*. v. *Stahag Stahl and Stahl Waren Handelgesells Chaftmbh.*[59] The Court observed that although it is a sound rule it is not necessarily a universal rule. In many situations this rule may not apply and while making decision regard shall be had to the intention of parties, sound business practice and in some cases by Judgment where the risk should lie. This rule was followed by Supreme Court of India is *Bhagwandas Goverdhandas Kedia v. Girdharilal Purushottam Das and Comp*.[60] The Court confirmed the operation of Sec. 4 of the Indian Contract Act, to postal communication and laid down that in cases of instantaneous communication the contract is concluded at the place where acceptance is received.

A mechanical application of either postal rule or receipt rule without taking into consideration the facts and circumstances would be fallacious. As Supreme Court of India observed that law relating to offer and acceptance is not simple. The Court quoted G. Gilmore[61] "One should not assume that one has mastered the law of Contracts simply because one is conversant with rules of offer and acceptance. Indeed the writings of Modern scholars tend to depreciate the importance of the rules of offer and acceptance."

It is interesting to notice that e-contracts do not fit perfectly in any of the above two broad categories of communications. All electronic communications may not be as instantaneous as popularly believed. Thus they occupy a functional position somewhere between the traditional letter and telephonic communications.[62] The possible situations are discussed below.

EDI transmission may be simultaneous when trading partners are linked directly. A Direct link is rare and expensive.[63] EDI communication is generally established through value added Network (VAN)[64] indirectly. Thus in EDI message where parties are linked directly, the receipt rule' should apply when they are connected by intermediaries then 'postal rule' has to be applied.[65]

58. (1955)2 QB 327

59. (1982)1 All E R 293

60. AIR 1966 SC 543

61. *Bank of India* v. *O.P. Swarnkar* (2003) 2 SCC 721

62. Vakul Sharma, IT Law & Practice - Cyber Law and E-commerce, Universal Law Publishing Co. Pvt. Ltd., Delhi (2006), at p.50

63. Supra note 56 at p. 23

64. Rosa Julia-Barcelo, "EDI e-Contracting: Contract Formation and Evidentiary Issues Under Spanish Law" The EDI Law Review, 6, 155-172 (1999)

65. VAN is usual acronym to indicate third party service providers.

Electronic communications by e-mail are not directly sent. Parties are not directly connected as there is strong element of 'store and forward'.[66] The messages sent by e-mail take different routes and do not pass as a single unit but broken into digital chunks, resulting in delayed messages.[67] These attributes of email communication bring it closer to non intendance means of communication. Therefore e-mails are more suitable for application of 'Postal Rule'.

The communication via website represents a reverse scenario of email. The parties are connected directly as no mail server or intermediary is involved. Due to the instantaneous nature of web communications, 'receipt rule' may be applied.[68]

Thus it is clear that rules of IT Act[69] have modified the substantive law relating to communication of offer and acceptance in case of electronic means of communication. These rules are half way house between the postal rule and receipt rule. However these rules will not govern electronic communications in all situations, instead the parties are free to agree on different timings of receipt of electronic record.[70]

c) Revocation of offer and acceptance: Although IT Act does not expressly provide rules for modification of provisions of Contract Act but by reading the sections 4 and 5 of the contract Act and sections 12 and 13 of the IT Act it is clear that IT Act has modified the provisions of Contract Act upto some extent creating thereby confusion.

Sec 4 of the Contract Act provides that communication of offer is complete when it comes to the knowledge of offeree. In the case of electronic communication, Sections 12 and 13 of IT Act provide that receipt of electronic record occurs at the time when it enters the computer resource of the addressee. Thus test of knowledge as provided under section 4 of Contract Act cannot be applied in electronic communications. The offer is complete when acknowledgement is received by the offeror.

Similarly the rules provided under section 4 of Contract Act for communication of acceptance have been rendered inapplicable in cases of electronic communications of acceptance. In electronic communication the communication of acceptance is complete against the acceptor as well as offeror at the time when acknowledgement enters into designated computer resources of addressee. Thus there will be no scope for revocation of acceptance in this situation.

Recently, an attempt has been made to solve a question regarding the

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66. Chris Reed, Computer Law, 3rd ed. (1996), at pp.304-305
67. Jan-Malte Niemann, "Cyber Contracts: A Comparative View on the Actual Time of Contract Formation", Communication Law, Vol. 5, No. 2
68. Supra note 54.
69. Supra note 4, Section 13
70. Supra note 4, Section 13, starts with words- 'Save as otherwise agreed between originator and addressee'

place of completion of e-contract. Allahabad High Court in *P.R. Transport Agency* v. *Union of India*[71], observed that in case of e-mail the data can be transmitted from anywhere by the e-mail account holder. There is no fixed place either of transmission or of receipt. Section 13(3) of the IT Act, 2000 has covered the difficulty which says that "….an electronic record is deemed to be received at the place where the addressee has his place of business."

IX. CONCLUSION

Globalization highlights the importance of e-contracts. E-contracts hold relevance for legal luminaries in the view of worldwide developments. It is clear that law of e-contract is at nascent stage in India. At present e-contract is governed by the IT Act 2000. It is not a complete code on e-contracts and it has to be interpreted with the help of other laws. In the field of e-contract, India lags behind the contemporary western world in formulating its e-contract jurisprudence. To the best of our knowledge no cases have been decided so far relating to shrink-wrap and click-wrap contracts and violation of e-contract. The absence of confluence of laws and Acts has resulted in lack of legal infrastructure to facilitate paperless contracts. There is also a challenge for law makers to balance conflicting goals of safe-guarding e-contract and encouraging technological development. There are a number of common law principles evolved by courts over a period of time; their applicability to e-contracts has to be determined. Considering that India has a huge business potential in coming years, initiatives towards improving technological infrastructure and legal framework regulating the same will be appreciated.

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71. AIR 2006 All 23

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REVOLUTIONARY SPIRIT OF ARTICLE-21: PROMOTING HUMAN RIGHTS IN INDIA - A CONCEPTUAL ANALYSIS

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ABSTRACT

For human life, values are essential. Isolate these values, living becomes meaningless. The most important is one's fundamental human rights which he enjoys by virtue of being a man. Some rights are basic and primary just like bread & butter and air & water, without which man cannot survive. In the recorded history of mankind man has fought for these rights whenever they have been challenged and exploited. Quite obvious man is born free. He usually feels suffocated when he is deprived of his liberty that has been the craving of all men in all ages of history. The importance of human rights cannot be ignored in any frame work of civilized society. Right from the evolution of mankind, it has been playing a very significant role as an inalienable right. If it is tempered at the caprice of Government in power, it may lead into revolution, agitation or war at worse.

KEYWORDS: *Liberty, Equality, Fraternity, Dignity and Property.*

I. INTRODUCTION

HUMAN RIGHTS are those minimal rights, which every individual must have against the state or other public authority by virtue of his being a member of the human family.[1] Section 2(1)(d) of the Protection of Human Rights Act, 1993 defines 'human rights' means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the international covenants and enforceable by courts in India.

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1. D.D. Basu, Human Rights in Constitutional Law, 2nd ed., Wadhwa, 2003

In addition to the above definition of human rights, what is understood today to be basic and fundamental human rights must also be understood to mean moral rights which are universally accepted as being rights with, which a human being is born, which by their very nature are inalienable. Neither they can be bought nor sold. They are inherent in a human being because he is a human and include the right to live with human dignity, the right to food, clothing and shelter, the right to decent environment and reasonable accommodation. What sets human right apart from rights of other living being is the basic fact that while for an animal its main concern is protection of its body, for a human it is much more Human rights include the right to grow physically, mentally and intellectually.

Human Rights are embedded in the nature. It is spontaneous, outcome of the nature. It is something, a right which is not the gift of a king, a framework, a society, or a man but the gift of nature. Human beings are entitled to certain basic natural rights that define a meaningful existence. Equal dignity of all persons is the central tenet of human rights. These rights have been designated to be universal in application, inalienable in exercise and inherent to all persons.

II. HISTORICAL BACKGROUND

The notion of human rights is as old as nature. It originated since the concept of civilization germinated in human being. This concept follows from time immemorial and covers thousands of years. It draws upon religious, cultural, philosophical and legal developments throughout the recorded history of mankind. Several ancient documents and later religions, and philosophies, included a variety of concepts that they may be considered to be human rights. The spirit of human rights was present in almost all civilizations of the world. Eminent jurist V.R. Krishna Iyer said, Human rights date back to the very dawn of human civilization and often appear very clearly in great religions of the world for an example one's duty towards neighbor, the concept of "Vasudhaiva Kutumbakam" (one family concept) of Hinduism, the universal spirit of brotherhood (Bhaichara concept of Muslim) salvation of men of Buddhism and Jainism, fatherhood of God of Christianity.

The modern concept of human right as we reveal today, is the direct outcome of 'Magnacarta' of 1215 signed by king John was first of its kind, which declares that, "No feudal Lords of England shall be deprived his land without a process of law". It was one of the turning points in the evolution of human rights in the universe. Subsequently it was further reaffirmed by king Edward III in 1354, whereby a further undertaking was given on behalf of the sovereign that, "No person shall be prejudiced by any state action except by due process of law". It was further developed in England in the name of petition of right of 1628 and English Bill of Rights of 1688-89. The Virginia Declaration of 1776 marks the beginning of human rights in America. It was further supported by American Bill of Right of 1791. French Declaration of 1789 was a step for the development of human rights in the

world. The provisions passed so far were stepping stones for the development of human rights. The ball was set rolling with the establishment of United Nations in 1945. The United Nations in 1948 proclaimed and adopted the Universal Declaration of Human Rights, containing 30 Articles having clear and positive objectives for promotion of human rights.[2]

It followed with the bringing of two important conventions in 1966 by the UN General Assembly- one on International Covenant on Civil and Political Rights (1966) and the other on International Covenant on Economic, Social and Cultural Rights (1966), and inviting all the member states to ensure human rights in incorporating the same in their respective constitution. It has influenced the fram in making the Indian Constitution.

The Constitution of India makes several provisions for respect and protection of human rights. At the outset, the Fundamental Rights covered in Part-III of the Constitution (from Art. 12 to 35), are primarily individual oriented rights. The Directive Principle of State Policy covered in Part-IV of the Indian Constitution (from Art. 36 to 51) enjoins the state to secure a social order for the promotion of welfare of the people. The rights in the directive principles are collectively oriented. Fundamental Duties[3] covered by Part IV-A of the Indian Constitution as stipulated in Article 51-A of the constitution spell out the duty of every citizen of India. Besides, there is a plethora of legislations[4] including the present Protection of Human Rights Act, 1993 which have a bearing on the promotion/protection of Human Rights in India.

III. SPIRIT OF ARTICLE-21

Fundamental Rights are deemed essential to protect the rights and liberties of the people against the encroachment of power delegated to them by their government. They are limitations upon the powers of the government, legislative as well as executive and they are essential for the preservation of human rights. In Nagraj v. Union of India[5] the Supreme Court 'speaking about the importance of Fundamental Rights and speaking about the meaning of Fundamental Rights said that the fundamental rights are not gift from the state nor citizens, only a minimal right that man enjoys by virtue of being member of human race. In the historic judgment of Maneka Gandhi v. Union of India[6] Bhagwati J. observed, "Fundamental Rights represent the values cherished by the people of this country since Vedic times, and they are calculated to

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2. See UNO Resolution 217A (GAOR dated. 10.10.1948)
3. Inserted by the Constitution (42nd Amendment) Act, 1976
4. The Protection of Civil Rights Act, 1955; the National Commission for Women Act, 1990; the National Commission for Minorities Act, 1992; the Scheduled Castes and Schedule Tribe (Prevention of Atrocities) Act 1989; the Juvenile Justice Act, 1986; the Child Labour (Prohibition & Regulation Act, 1986, etc.
5. AIR 2009 SC p. 329
6. AIR 2007 SC (71)

protect the dignity of individual and create condition in which every human being can develop his personality to the fullest extent. They weave pattern of guarantee on the basic structure of Human Rights and impose negative obligation on the state not to encroach individual liberty in its various dimensions."

While the chapter of Fundamental Rights is the heart of Constitution, Article 21 is very life of the Constitution of India. Hence Art. 21 is the fundamental of Fundamental Rights under the Constitution of India to the people in the country. Denial of this basic right means denial of all other rights because none of the other rights would have any utility and existence without Right to Life. Right to Protection of life and personal liberty is the main object of Article 21, which negatively coined, "No person shall be deprived of his life or personal liberty except according to the procedure established by law."[7] It is a right guaranteed against state action. Being one of the Fundamental Rights guaranteed by the Constitution the same cannot be taken away by statutes.

Post Maneka period marks a beginning of a new era of Neo-legalism in the Constitution of India. It would not be travesty of truth to say, it produced so many constitutional jurisprudences, particularly liberty jurisprudence, compensatory jurisprudence, accused jurisprudence and most vitally women's and environmental jurisprudence in the annals of Indian legal and constitutional history of India. The judgment of the case of Maneka Gandhi is a case of immense constitutional importance. It was the first of its kind so far as human rights jurisprudence is concerned, that was the starting point of judicial innovation and galvanisation concerning human rights in India. Maneka Gandhi's case vibrates with humanism and single minded judicial dedication to the cause of human rights in India. It proved that the reality of human rights cannot to be drowned in the hysteria of hour and the hubris of power. It confidently ruled, "Government come and go, but the fundamental human rights of the people cannot be subjected to the wishful value, set by a political superior of the passing day." This case gave the court a good opportunity to show its partisanship for developing human rights in India. Therefore a journey from A.K. Gopalan to Maneka and to Vishaka, the Supreme Court of India just magnified the concept of Article 21 in giving vigour of Natural Justice. Some of the new flavour of Article 21 which is rightly called judicially created mini magnacarta of the Constitution of India discussed below.

IV. LIBERTY JURISPRUDENCE AND ARTICLE 21

The right to liberty is popular all over the political spectrum. In every type of modern society a body politics or any form of government in its manifesto which does not give a minimum guarantee or a promise for the honour of liberty is not acceptable. The constitutions of modern states, now, as a principle, protect the liberty of people and in fact the way in which the

7. Article 21 of the Indian Constitution

liberties of the people are protected determines the form of government. The sacred slogan of liberty has created magical effect upon the mankind in every society. It stirred people not only to throw away the domination of the cultures and the rules alien to them under this sway of nationalism, but also to reject to strive against and to replace the tyrannical reign of a minority, though national, thereby stating forth the basic concepts which form basis of the rule of law and democracy.

The Indian Supreme Court has been struggling hard to innovate new jurisprudence. At last, it succeeded in involving new jurisprudence i.e., liberty jurisprudence. Using Constitution pragmatically and creatively, the court liberalized the concept of liberty through its judicial dictum, that heralded an era, the era of liberty jurisprudence. A review of judicial writings may be useful in putting forward the above observation in proper manner.

In Olga Tellis v. Bombay Municipal Corporation[8], it was observed by Supreme Court that "the question which we have to consider is whether the right to life includes right to livelihood." The court with all unanimity held right to life includes right to livelihood. The court further said deprivation of livelihood would not only denude the life of its effective content and meaningfulness but it would make the life impossible to live. The Right to livelihood is borne out of the Right to Life, as no person can live without means of living i.e. the means of livelihood.

In PUCL v. Union of India[9], it has been held that, Right to life under Art. 21 include Right to food. In another case of Kishan Patnaik v. State of Orissa[10] Supreme Court made it clear that no one should die of starvation due to poverty, expressing concern over starvation death in the KBK district of Orissa and other part of country, Supreme Court observed that it is the utmost duty of the government to prevent starvation death. The state should reconstitute national committees for avoiding starvation death.

Right to water became part of right to life under Art. 21 of the Indian Constitution by the decision of Supreme Court in Susetha v. State of Tamilnadu[11], it was held that water resources are to be well maintained and restored if in disuse. The court further directed that it is one of the most solemn fundamental duties under Art. 51-A(9) that every citizen must protect and improve natural environment including forest, lakes, river and wildlife.

Right to shelter has also been held to be fundamental right which derives its basis from right to residence in Art. 19(1)(e) and the right to life under Art. 21. To make the right meaningful for the poor, downtrodden and the persons not coming to the mainstream of the society, the state has to provide facilities and opportunities to build houses. Further in Chameli Singh v. State of U.P.[12] the Supreme Court emphasised on the importance of right to

8. AIR 1986 SC 180
9. (2003) 9 SCALE 835
10. AIR 1989 SC 677
11. AIR 2006 SC 2893
12. AIR 1996 SC 1051

shelter as one of the basic human rights, shelter for human being is not a mere protection of his life and limb but opportunity to grow physically, mentally, intellectually and spiritually.

The court has expanded the scope of Article 21 to include Right to Health & Medical Care including right to lead a healthy life so as to enjoy all facilities of human body within its ambit. The Supreme Court has time and again emphasised that the Government must give priority to health of its citizen, which not only makes one's life meaningful, improves one's efficiency, but in turn gives optimum output. The Supreme Court of India in its two famous judicial decisions, Paramananda Katara v. Union of India[13] and Consumer Education and Research Centre v. Union of India[14] held that right to life includes right to health and medical care.

Education enables a person to lead a meaningful and dignified life. Stating about education, once Nepolian said, "If you win the world ruin the educational system to which you are intended to conquer. No military force is required. The Supreme Court of India for a long time tried its to make right to education as a fundamental right. In several judgments starting from Mohini[15] to UnniKrishan[16] to T.M.A. Pai Foundation[17] the Supreme Court succeeded in making it fundamental right. By the Constitution (86th amendment) Act, 2002 a new Article 21-A was inserted in chapter of fundamental rights according to which the state shall provide free and compulsory education to all children of the age of 6 to 14 years in such a manner as the state may by law determine.

Further recognizing that reputation is an important part of one's life and it is one of the finer graces of human civilization which make life worth living, the Supreme Court after referring to American decision of Marion v. Devis[18], held in Smt. Kiran Bedi v. Committee of Inquiry[19] that a good reputation is an element of personal security and is protected by the Constitution.

In Francis Coralie v. Union Territory of Delhi[20], the Court said that the right to live is not restricted to mere animal existence, it means something more than just physical survival. The right to life is not confined to the protection of any faculty or limb that goes along with bare necessities of life such as adequate nutrition clothing and shelter and facilities for reading, writing and expressing ourselves in diverse forms. Freely moving about and mixing and coming with fellow human being.

The decisions of Supreme Court indicate that it is conscious of the

13. AIR 1989 SC 2039
14. (1995) 3 SCC 42
15. (1992) 3 SCC 666
16. (1993) 1 SCC 645
17. AIR (2003) SC 355
18. American L.R. 171
19. AIR 1989 SC 714
20. AIR 1981 SC 746

requirements of public interest like clean air, and drinking water. Information pertaining to the above belongs not to the state, the government or civil servants but to the public. Officials do not create information for their own benefit, but for the benefit of the public, they serve as a part of the legitimate and routine discharge of Government's duty. Information is generated with public money and as such it cannot be unreasonably kept away from the citizens. Again, freedom of information has been recognised not only as crucial to participatory democracy, accountability, and good governance but also as fundamental human rights guaranteed by the International regime. The broaden horizon of the Right to Life includes Right to Information and it has been held to be a basic right of mankind. In Indian Express Newspaper[21] case it was observed that if the democracy has to function effectively, people must have a right to know and obtain information about the conduct of affairs of state. With the sincere effort of the SC of India, Right to Information Act has become a living reality in India.

The SC has done a large amount of exercise to develop the law relating to privacy in India. Right to Privacy is another new facet of Article 21 of the Indian Constitution. Without privacy living becomes meaningless. Therefore Right to Privacy or Right to let alone is guaranteed by Article 21 of the Constitution. In Raj Gopal v. State of Tamil Nadu[22] and Mr. X v. Hospital Z[23], the Court held that Right to privacy is in built in Art. 21 of the Indian Constitution. In this regard the SC expanding the meaning of privacy declared that, virginity test violates right to privacy under Article 21. In Rayala M. Bhubaneswari v. N. Rayala[24] the Court held that husband's tapping conversation of his wife with others seeking to produce in court violates her right to privacy under Art. 21. In a landmark judgment of Suchitra Srivastava v. Chandigarh Administration[25] it was held that personal liberty includes rights of women to refuse to participate in sexual act.

The foregoing clearly highlights the great role played by the Supreme Court of India in shaping and defining the liberty jurisprudence in India. The Court has responded in the most constructive manner to include the sensitivity of masses within the scope of Article 21.

V. ACCUSED JURISPRUDENCE

The protection of Article 21 is not only available to the common people but also the accused under trial prisoner and convicts. The convicts are not by mere reason of their conviction deprived of all fundamental rights which they otherwise possess. The SC in this manner has developed an extensive prison jurisprudence under Article 21 of the Constitution.

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21. AIR 1989 SC 190
22. (1994) 6 SCC 632
23. AIR 1995 SC 495
24. AIR (2008) A.P. 98
25. AIR 2010 SC 235

In M.H. Hoskot v. State of Maharastra[26] and in Sukh Das v. Union Territory of Arunanchal Pradesh[27], the SC said that right to free legal aid at the cost of the state is a fundamental right within the Art. 21 of the Indian Constitution. Free legal aid to the indigent has been declared to be a State's duty and not government charity. Similarly the Right to speedy trial has been interpreted to be a part of the Fundamental Rights to life and personal liberty as held in case of Pratap Singh v. State of Jharkhand[28]. In this regard the SC of India is quite inspired by European Convention of Human Rights which provides that, "Every one arrested or detained shall be entitled to trial within a reasonable time or a release pending trial." It is said that justice should not be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, the judicial fairness and the criminal justice system would be at stake, shaking the confidence of the public in the system and it would be the violation of rule of law as held in the case of K. Arbazagan v. Supt. of Police[29].

In Babu Singh v. State of U.P.[30], SC held that "refusal to grant bail" to an accused person without reasonable grounds would amount to deprivation of his personal liberty under Art. 21. It is relevant to note that section 438 of the Criminal Procedure Code, 1973 empowers a Court of Session and High Court to grant bail in cases of anticipated accusation of non-bailable offences. Sec. 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, excludes the application of Section 438 of the Cr.P.C. to offences committed under this Act. In State of M.P. v. Ram Kishna Balothia[31], the SC upheld the impugned section and held that it did not violate Art. 21. The court held that anticipatory bail was not an essential part of right to life enshrined in Art. 21.

The SC has expanded the horizon of Article 21 to include right against hand-cuffing, bar fetters and solitary confinement within its ambit. Hand-cuffing has been held to be prima facie in human and therefore unreasonable, over-harsh and arbitrary. It has been held to be unwarranted and violative of Article 21.[32] The court further said that hand-cuffing should be resorted only when there was "clear and present danger of escape". Further, in Sunil Batra v. Delhi Admn.[33] the SC laid down that the treatment to a human being which offended human dignity, imposed avoidable torture and reduced the man to the level of beast would certainly be arbitrary and could be questioned under Articles 21 and 14. Therefore, putting Bar-fetters for an unusually long period

26. AIR 1978 SC 1548
27. AIR 1986 SC 991
28. (2005) 3 SCC 551
29. AIR 2004 SC 1616
30. AIR 1978 SC 527
31. AIR 1995 SC 1198
32. Prem Shankar v. Delhi Admn. AIR 1980 SC 1535
33. AIR 1978 SC 1675

without due regard to the safety of the prisoner is definitely violation to Art. 21.[34] As regards solitary confinement it has been held that a convict is not wholly denuded of his fundamental right and his conviction does not reduce him into a non-person whose rights are subject to the whims of the prison administration. It is a flagant violation of human rights. Therefore the imposition of major punishment within the prison system is conditional upon the observance of procedural safeguard and therefore solitary confinement is violation of Art. 21.[35]

The SC in several cases has taken a serious note of the inhuman treatment meted to the prisoners and has issued appropriate direction to prison and police authorities for safeguarding the rights of the prisoners and in police lock-up particularly of woman and children.[36] In Kishor Singh v. State of Rajasthan[37], the SC held that use of third degree method by the Police is violative of Article 21. Custodial death is perhaps one of the worst crime in a civilised society governed by Rule of Law. The court held that any form of torture or cruel, inhuman or degrading treatment would fall within the inhabitation of Art. 21 of the Constitution. The court further said that precious right guaranteed under Art. 21 of the Constitution could not be denied to convicts, under trails, detenues and other person in custody except according to the procedure established by law.[38] In securing the rights of the arrestee, the SC also formulated a guideline to be followed by the Central Government & and State.

VI. COMPENSATORY JURISPRUDENCE AND ARTICLE 21

The judicial dynamism of SC was not confined to prison jurisprudence only. It also dispensed justice towards compensatory jurisprudence. In its various judicial decisions it recognised the rights of aggrieved person to claim monetary compensation for the violation of Art. 21. Starting from Rudal Shah[39] to Bhim Singh[40] and to State of Maharastra v. C.C.W. Council of India[41], the SC has provided compensation to the aggrieved persons on numerous occasions for violation of Art. 21 of the India Constitution.

In Nilabati Behera v. State of Orissa[42] the SC granted Rs.150,000 to the petitioner for death of his son in police custody. This is an eye opening case so far as the compensatory jurisprudence is concerned. In Shakila Abdul Gafar

34. Ibid.
35. State of Maharastra v. PrabhakarPandu Rang AIR 1966 SC 424
36. Ram Murti v. State of Karnataka AIR 1997 SC 1739
37. AIR 1991 SC
38. D.K. Basu v. State of West Bengal AIR 1997 SC 610
39. AIR 1983 SC 1086
40. AIR 1986 SC 494
41. AIR 2004 SC 7
42. AIR 1993 SC 1960

v. Vasant Raghunath Dhokle[43], the court directed the government to pay 1 lac rupees to the mother and children of the victim of custodial death. The compensatory jurisprudence of the SC is not only confined to custodial death. It is also given for fake encounter death committed by the Police. In PUCL v. Union of India[44], the SC awarded Rs.100,000 to the family of the deceased who died of police fake encounter.

The SC extended its hands and has protected rights of the rape victims. In Delhi Domestic Working Women Forum v. Union of India[45] which is popularly called Mary Express Rape Case, the Supreme Court granted compensation to the victims of the case. Similarly Chairman Railway Board v. Chandrima Das[46], the S.C. also granted monitory compensation to the victim. In the case of Bodhi Sathwa Gautam v. Subhra Chakravarti[47] the SC granted interim compensation to rape victim.

VII. ENVIRONMENTAL JURISPRUDENCE

Right from the mother's womb one needs unpolluted air to breath, uncontaminated water to drink, nutritious food to eat and hygienic conditions to live in. These elements are sine qua non for development of human personality. Though there is no express fundamental right to decent environment under Part-III of the Constitution of India, the judiciary has done a pioneering job in finding out pervasive protection of Article 21 to reach out to the areas of ecology and environment. The SC has made it clear that Right to Life under Art. 21 include Right to Pollution Free Air & Water. The SC has held that Right to live includes the right to enjoyment of pollution free water and air for full enjoyment of life. A citizen has right to have recourse to Art. 32 for removing the pollution of water or air which may be determine as to the quality of life. In this manner the S.C. developed the Principle of Precautionary device and the theory of Polluter Pays Principle.[48] In a catena of cases, the apex court has reiterated that right to clean environment is guaranteed as fundamental right. However, it has been ruled that balance has to be maintained between environmental protection and development activities, which can be maintained by strictly following the principle of sustainable development.[49] The extent to which the court is inclined to evolve the guidelines for the executive for the protection and conservation of environment may be seen from the fact that even relatively minor aspects of environmental concern do not go un attended and example may be seen in the decision of SC in Murli S. Deoro v. Union of India[50] where it held that till the enactment is brought into force no person is allowed to smoke in public zones.

43. AIR 2003 SC 4567
44. AIR 1997 SC 1203
45. (1995) SCC 14
46. AIR 2000 SC 988
47. AIR 1996 SC 922
48. Vellore Citizen Welfare Forum v. Union of India AIR 1996 SC 2715
49. M.C. Mehta v. Union of India AIR 1987 SC 965
50. (2003) 5 SCALE 349(1)

VIII. WOMEN'S JURISPRUDENCE AND ARTICLE- 21

Status of women in different human societies of the world is different. Almost in all the present and contemporary societies, it is discriminatory and prejudicial. Nearly all human societies in different parts of the world are male dominated. India is no exception. The women are everywhere exploited, since time immemorial, due to number of reasons more particularly due to the prevalence of patriarchal society. The SC of India under Article 21 of the Indian Constitution protected the rights of women in general and rights of working women in particular. In a landmark decision in Vishakha v. State of Rajasthan[51], the SC has laid down exhaustive guidelines to prevent sexual harassment of working women in workplace. It was further affirmed by the SC in Apparel Export Promotion Council v. A.K. Chopra[52].

IX. OTHER RIGHTS UNDER ARTICLE 21

The newer dimensions of Article 21 and the influence of Supreme Court on law making is evident from some recent legislations. The concerns of the advanced society as well as that of the people in need are getting more and more reflected in the decisions of the courts. In Maruti Shripati Dubal v. State of Maharastra[53], the Bombay H.C. held that Section 309 of IPC which provides punishment for attempt to commit suicide was in violation of Article 14 and 21. In P. Ratninam v. Union of India[54], the two judge bench of SC held that, Right to life under Article 21 included Right not to live of forced life. Therefore Sec. 309 IPC has held to be unconstitutional. But a bench of 5 judges overruled the above cases and in Gian Kour v. State of Punjab[55] and held that Right to life is natural right embodied in Art. 21 but suicide is an unnatural termination or extinction of life, Article 21 which guaranteed protection of life cannot be constituted so as to read therein extinction of life or right to die.

The decision of Aruna Ramachandran v. Union of India[56], adds to the already expanded list of rights in Art. 21. A writ petition was filed by Ms. Pinki Virani of Mumbai claiming to be the next friend of Aruna Ramachandra with a prayer for direction to the respondent to stop feeding and let Aruna die peacefully. Regarding the withdrawal of life support to a person in PVS, or who was otherwise incompetent to take a decision in this connection, the Supreme Court laid down the law of passive euthanasia to continue till the law made by parliament on the subject, Following points were laid down:

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51. AIR 1997 SC 3011
52. AIR 1999 SC 625
53. AIR 1999 SC 625
54. 1987 Cr.L.J. 743
55. (1994) 3 SCC 394
56. AIR 2012 SC p. 1290
57. AIR 2010 SC 235

1. A decision has to be taken to discontinue life support either by parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by the doctors attending the patient. However, the decision should be taken bonafide in the best interest of the patient.
2. It was hospital staff taking care of Aruna for a long, they were really her friends who could take such a decision but they clearly expressed their wish of Aruna to be allowed to live. If the hospital staff at some future time changes its mind, it would have to apply to the Bombay High Court for approval of decision to withdraw life support.

The aspect of neo-personal rights was analysed in the case of Suchitra Srivastav v. Chandigarh Administration[57], a women of Chandigarh became pregnant due to rape. She became mentally retarded. The Chandigarh Administration filed a petition for abortion before HC. The HC under the principle of parent patriae passed an order of abortion. The applicant, a private party, filed an application in SC challenging the order of abortion of HC. The SC interpreting the MRTP Act, 1971 said that there is a distinction between mental illness and mental retardation. Here the lady can give consent; the doctrine of parent patria is not applicable.

The case of Naz Foundation v. Govt. of NCT, Delhi[58], occupies a special place in relation to legalizing homo-sexuality. The Delhi HC said Sec. 377 of I.P.C. is unconstitutional. It is violation of Art. 14, 19, & 21 of the constitution. But, it will continue to govern non-consensual penile, non-vaginal sex. This classification will be good till law is made by the parliament.

The Supreme Court addressed the problem of honour killing in its 2009 decision of Surjeet Singh v. State of U.P.[59] the court said in pre-fixing the term honour before the term killing is misnomer and unhappy term. It is most heinous crime against mankind and be treated as murder U/S 300 I.P.C. It is a social malady which needs to be urgently curbed.

X. CONCLUSION

The Supreme Court has by its interpretation expanded the dimensions of Article 21, so as to breathe and infuse life into its provisions, and to make it a socially meaningful exercise. The vast number of cases discussed in this paper reflect the attitude of the judiciary in entrenching some of the most basic requirement of the people as human rights and thus enriching the human rights jurisprudence, to make it need based and also quality based. Thus the future of human rights in this country appears to be stable and secure as evinced by the judicial approach, and that definitely is a very healthy and powerful signal to millions of people in requirement of social and economic justice.

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58. 2010 Cr.L.J. 94 Delhi
59. AIR 2009 SC p. 279

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SUICIDE *vis-a-vis* PASSIVE EUTHANASIA IN INDIA: A NEED FOR LAW REFORM

Dharmendra Kumar Mishra*

ABSTRACT

The suicidal tendency is inherent in the very nature of mankind. With the dawn of civilization, the protean face of this tendency has been a subject of understanding to the philosophers in the society. The right to life, right to suicide or right to die that prominently includes euthanasia with consent, has emerged as one of the core issues of intense discourse over the years at the global level. The ancient laws based on religious beliefs proscribe suicide, but, gradual societal change considerably widened the scope of modern legislations throughout the world and certain countries legalized suicide and euthanasia. The question 'To be or not to be' raised an acrimonious debate on its moral, ethical, social and legal aspects while legalising suicide or passive euthanasia in India. Legislators and judges constantly assess its significant impact on society, but it remains a subject matter of academic discourse and discussion. Decriminalising suicide and legalisation of passive euthanasia need a close examination. In this backdrop, the present paper examines the pros and cons of 'Right to Die versus Right to Live' debate which emerged during the end of 20th century in India and compares different perspectives of legal systems existed in the world community.

KEY WORDS: *Suicide, Attempted Suicide, Passive Euthanasia, Active Euthanasia, Right to Life, Right to Die.*

'Every day man sees countless living entities dying, yet the living wishes to live forever. O Lord! What can be a

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greater wonder'?

(Yudhisthira)[1]

I. INTRODUCTION: NATURE AND THE PROBLEM

Suicide

SUICIDE IS a complex,[2] emotional and ethical[3] issue rather than social[4] and legal[5]. The emerging concept of suicide, from primitive society to post-modern, in its various forms- from attempted suicide, abetted suicide, right to die, right to die with dignity, assisted or physician assisted suicide to passive euthanasia raises several jurisprudential issues; identifies the predominant causes of the practice of suicide; and to consider legal and judicial response to assess its effectiveness and efficacy in prevention, control and treatment of the suicidal human tendency by different ways, and finally looks its impacts on the society at large. While discussing these issues in the context of society like India, it is important to note that the legislation of the country expressly proscribes suicide attempted[6], abetted[7] and suffers death and takes the risk of death with his own consent[8] (suicide with consent) but positively silent on the issue of euthanasia[9].

Suicide and euthanasia is not a mixed question.[10] Suicide, an unique phenomenon of mankind, may be termed as 'the expression of death instinct directed against the self; it is extreme manifestation of the said instinct'.[11]

1. Yudhisthira answer to Yaksha, '*Dharma- Baka Upakhyan*', the *Vana Parva* of *Mahabharat*, Khand-III.
2. Suicide is an incident in human life which, however, much disputed and discussed, demands the sympathy of every man, and in every age must be dealt with anew [Goethe, (1811-13)1908,Vol. II, p 125]
3. The question put by Hamlet, "*To be or not to be*" poses before most minds a purely ethical problem; Shakespeare also referred to "*A sea of troubles*".
4. Suicide is a sociological phenomenon which could be explained only in terms of the structure and functioning of social systems (E. Durkheim, 1951: 452)
5. So long as suicide does not become so frequent as to threaten seriously the well being of the community, State has no motive to intervene by legislation against it
6. Section 309 of *the Indian Penal code*
7. Sections 305 and 306 of *the Indian Penal code*
8. Exception 5 of Section 300 of *the Indian Penal code*
9. Euthanasia is one of the modern movement in India, Euthanasia is one of the most perplexing issues which the courts and legislatures all over the world are facing today, see *Aruna Ramchamndra Shanbaug* v *Union of India* (2011) 4 SCC 454
10. Suicide differs from euthanasia, in that latter is either an assisted suicide or a killing by another for humanitarian reasons and by merciful means, generally with consent of the person killed (*The Encyclopedia of Philosophy*, Paul Edwards, Vol.-VIII, p.43)
11. Suicide or self murder is intentional taking of one's life see Stiles v. Clifton Springs Sanitarium Co., DCNY,74,F. Supp. 907; in a more precise and scientific sense the phenomenon of suicide is the occasional final symptomatic act of mental illness triggered often time by a passing event (Spellman, 1969)

When the term 'suicide' is employed in its unusual or colloquial and popular, as distinguished from its technical and legal sense; it includes all the cases of self destruction irrespective of the mental condition of the person committing the act.[12] In its technical and legal sense, it may be defined as self destruction by a sane person;[13] or the voluntary and intentional destruction of his own life by a person of sound mind;[14] the further qualification being added by some definitions that he must have attained years of discretion. The term 'suicide' is not defined in legal instruments. It is derived from the Latin, but the compound word 'suicidium' from which the English word is said to be derived, is not to be found in Latin dictionaries and glossaries. In all English books, suicide is almost invariably used to denote a criminal act i.e. 'felo de se'[15]. The Indian texts clearly define and describe it as an act of self-killing.[16]

On account of its very nature, the subject of suicide does not ordinarily, provoke sustained curiosity. The heart-ache, and the thousand natural shocks, the flesh is heir to as factors responsible for suicide. However, it is not difficult to perceive, after a little reflection, that the methods of ending life and the circumstances leading to that cruel decision are probably as varied as these of procuring means for supporting it. Yet, the scientific study of suicide is one of the problems of consciousness vis-a-vis the thousand natural shocks it receives, and has brought forth considerable scope for arriving at several general conclusions.

Euthanasia

Over the last few years, the global debate and discussion relating to the new emerging right- euthanasia and assisted suicide has subsequently transformed with new discourse based on human right approach and attracted the attention of practitioners of Sociology, Medicine and Law as well of Academics, Human Right activists and Media persons for a great deal. Public attitudes concerning right to life and right to die have, considerably, been changed. Several societies and NGOs have come forward in favour of this movement, and in India, it has generated a fresh round of debate on the desirability and legality of these issues.

One has to begin by defining the term 'euthanasia', though, it is difficult to define. The Classical Greece interpreted 'life' and 'death' in a significant manner using the term 'Eudaemonia' for 'good life' and Euthanasia for 'good death'. 'Good life' is referred to as primarily the mode of living and expressed a genuine concern for safeguarding the 'goodness and sanctity of life'. As

12. *Jones* v. *Traders & General Insurance Co.*, Civ. App.144, SW 2d 68960 CJ p.995 note 1
13. *supra* note 11
14. *Southern Life* & *Health Insurance Co.* v. *Wynn*, 194 So. 421 23 Ala. App. 207-25 C L p.1011
15. *Corpus Juris Secondum*, 83, p.781
16. 'आत्मनो देहस्य हननम्', आत्मन्+हन्+क्यप्।

'good death', referred to the mode of dying in terms of euthanasia has become associated with 'self willed painless death'[17]. Thus, the Greek word 'Euthanasia' is simply used for good death. The key word in the theme is freedom of choice, voluntarism and the dignity of the human being either in living or dying.

Euthanasia does not mean the irresponsible ending of anyone's life;[18] it does mean gentle or easy death. Over the recent decades, this term is used to mean deliberately terminating life to prevent unavoidable suffering. It refers to the death when a man becomes seriously ill and has no chance of survival, in that persistent vegetative state *(PVS)*, the doctor and relatives must jointly treat the man to keep him comfortable.

The concept of 'gentle death' is not new to India, it has been in existence for centuries. India had always humane doctor *(Vaidya)* who used to say that if a man had lived his life to the fullest, he needs peaceful exit. In the Vedas prayer chanted to God- '*Oh Lord! Please give me an instant - painless exit'*.[19] But, recently, the meaning of euthanasia has been changed. The Health Council of the Neatherlands has defined Euthanasia as "a deliberate life shortening act or deliberate omission of a life lengthening act, in respect of an incurable patient and in his interest"[20]. A 'deliberate life' shortening act is called as 'active euthanasia' and 'deliberate omission' of a life lengthening act is called as 'passive euthanasia'. Thus, the meaning of euthanasia has been radically transformed from gentle and easy death in natural circumstances to 'mercy killing' in artificial circumstances.[21] Thus, Active Euthanasia is putting to death a person who, because of disease or extreme old age, can't have a meaningful life and Passive Euthanasia is discontinuing life- sustaining treatment of the ill or stopping so-called extraordinary treatment.[22]

17. Cited by Archana Barua, *A Note on Euthanasia and Contemporary Debate*, Indian Philosophical Quarterly, vol. XXIII, No 3 & 4, (July and October, 1996) p 467; *Assisted suicide in US and Europe*, New York: Oxford University Press, Inc; 2011; *the Concise Oxford Dictionary of Current English*, (2004), Ed. By R. E. Allen 403

18. Euthanasia is referred to inducement of death, especially putting to death of incurable or terminally ill patients painlessly and at their request. (*Encyclopedia Britannica*, Vol. III)

19. अनायासेन मरणं विनादैन्येन जीवनं, देहि में क्रिपय शम्भो त्वयि भक्तिं अचन्चलम्।

20. M.R. Masant, "*The Definition of Life and Death, and Voluntarily Euthanasia*", paper presented at the World Congress of Law and Medicine in New Delhi on 23 Feb., 1985, p.6 cited in IJIL, vol. 28 (1985) p.544

21. *Ibid*

22. See Mustafa, D. Sayid, "*Note, Euthanasia: A Comparison of the Criminal Law of Germany, Switzerland and US*", 6 B.C. Int'l & Comp. L Rev. 533.556(1983), defining active euthanasia as the affirmative act of life-terminating agent. In addition to the distinction between active and passive euthanasia, a distinction is also made between voluntary and involuntary euthanasia, *Id* at 536-3. Voluntary euthanasia involves consent by the patient or by the patient's family speaking on behalf of the patient, involuntary euthanasia occurs when the patient is unable to consent, *Id* at 537

II. THE ANCIENT LAWS: A HISTORICAL OVERVIEW

For better understanding of conflicting concept relating to various forms of suicide *vis-a-vis* euthanasia, the definitions, its various causes and the arguments to favour or disfavour the concepts, let us peep into the historical evolution globally, especially of those countries which are pioneers in the contemporary world in legalising these issues. The origin dates back to the very dawn of human civilization and quite often appears clearly enshrined in the great religions of the world. Suicide has been a part of man's history since recorded time. It has been in existence in pre-modern societies and remains to post-modern too.

There would seem to be no societies in which suicides do not occur. Statements to the contrary were based on travelers' tales rather than on systematic observations. Recent Anthropological studies carried out among African tribes have revealed that their frequency of suicide was about the same as a that of European countries with rather low suicides rates.[23] It has always been existed in India.

Western Approach

In ancient Greece and Rome, attitude toward suicide varied among tolerance, condemnation, and admiration. Some philosophers saw in suicide the ideal way of gaining freedom from suffering. Other among who were Pythagoras and Plato, disapproved it.

The *Bible* contains neither an explicit word nor an explicit prohibition of the suicidal act[24]. But, *Old* as well as *New Testament* both condemn it explicitly[25]. In the middle age, similar views were adopted and suicide was condemned as form of murder and this attitude has remained one of condemnation, but the sanctions are not equally severe in all denomination[26]. The funeral rites accorded to the suicide differ more or less from those who have died a natural death. The Orthodox Jewish law too, condemns suicide[27]. *Quaran*, also declares it a crime worse than homicide.[28] *Hadiya* reinforces the telling of Prophet's refusal to bury who had committed suicide, and this prohibition is included in *Sunna*.

Unlike suicide, euthanasia was almost practiced in the western and eastern parts of the world. History reveales that euthanasia has been

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23. *The New Encyclopedia Britannica*, Vol. XVII, p.778
24. Warren T Reich, *The Encyclopedia of Bioethics*, Vol. IV, p.1622
25. *supra* note 18; Saul and his armer bearer fall on their swords (1 *Sam*. 31: 3-5); Ahitophel hangs himself after the failure of his politicalintrigue (2 *Sam*. 17:23); and Zimri burns himself to death after the failure of his attempt to take the throne of Israel (1Kings. 16:18 f) etc.(*The Hebrew Bible*)
26. *supra* note 22
27. *Ibid*
28. *supra* note 23

accepted, in some other forms, by various groups or societies for centuries back. According to the writing of some western Philosophers, it has been concluded that painful suffering was presumed a good reason for not clinging to life.[29] Emile Durkheim has explained the contemporary societal condition which would be worthwhile to mention here:

> "whoever no longer wishes to live shall state his reasons to the Senate, and after having received permission shall abandon life, if your existence is hateful to you, die; if you are overwhelmed by fate, drink the hemlock, if you are bowed grief, abandoned life. Let the unhappy man recount his misfortune, let the Magistrate supply him with the remedy, and his wretchedness will come to an end."[30]

The movement for the recognition of euthanasia as a legal right to die with dignity started in 1975 in State of New Jersey, US with a tragic story of an American girl[31] and as a result of which, it gave momentum to the movement for the recognition of euthanasia as a legal right to die with dignity and subsequently 14 States in United States recognized 'passive euthanasia'. Euthanasia like any other practice, developed over times from a stage of explicit prohibition to the recent stage of acceptability in some places, while some other countries are giving it some little consideration by amending their laws of the land that generally used to prohibit it.[32] Australia's remote Northern Territory (Darwin, 1998), Albania (1999), Netherlands (2001,) Belgium (2002), Germany (2010) are the countries which permitted and legalized euthanasia.

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29. see, the Greek Sophist and rhetorician, who serve as a major source of historian information for the period

30. Emile Durkheim, *Suicide: A Study in Sociology*, p330 (John A Spaulding & George Simpson trans., 1997)

31. An American girl, named Karen Ann Quinlan, of 20 years old, an addict of drugs, on April 14, 1975 consumed a lot of liquor, fallen unconscious and stopped breathing. She was taken to hospital, given respirators, but she never regained consciousness and remained in coma for three months with no prospects of recovery and her parents asked the Doctors to take her off the respirators and to let her die with grace and dignity, but the Doctors refused. The matter was taken to the Lower Court of New Jersey, and rejected. They appealed the case to the Supreme Court of New Jersey, as a result, the Court ordered to take off the life sustainer respirators, but Quinlan remained alive for 10 years, though she never regained consciousness and finally died in 1985; In 1920, the book "*Permitting the destruction of life not worthy of life*" was published. In this book, authors, Alfred Hoche, M.P, a Professor of Psychiatry at the University of Freiburg, and Karl Binding, a Professor of law from the University of Leipzig, argued that patients who asked for death sentence should under very controlled condition, be supported to obtain it from a physician (Lawal, 2008). This book helped support involuntary euthanasia by Nazi in Germany. This indeed marks the starting point in the agitation for Euthanasia(Abdul Haseeb Ansari, A.O. Sambo and A.B. Abdulkadir, *the Right to Die Via Euthanasia: An Expository Study of the Shari'ah and Laws in Selected Jurisdictions*, Advances in Natural and Applied Sciences, 6(5): 673-681, 2012)

32. *People* v. *Kevorkian* 447 Mich. 479

Eastern Approach

In ancient India, the question whether ending one's life or by falling from a precipice is sinful, exercised the minds of many writers on *Dharmsasrta*.[33] The *Dharmsasrta* writers, generally, condemn suicide or an attempt to commit suicide as a great sin.[34] Most of the Oriental sacred writings - the *Smrits*, the *Epics* and *Puranas* make it clear that suicide or attempt to commit suicide were not permitted. Parasara says that such persons fall into hell for sixty thousand years[35] and Manu prohibits suicide and says that no water is to be offered for the benefit of the soul.[36] Some put forward a Vedic passage- *one who desires heaven should not (seek to) die before the appointed span of life, is at an end (of self).* In spite of general attitude, exceptions were made in the ancient Indian codifications of law.[37] There are historical examples, too, of this practice supplied by Epigraphy.[38] Moreover, self-destruction from devotion to a deity has been commended in theistic Hinduism. This is the most vivid in Jainism, in which the taking of any life is viewed with revulsion. Indian Buddhism began with an opposition to suicide.[39] In India, more or less, suicide has been acclaimed with reverence.[40]

The euthanasia, in India, has also been known for centuries ago. By enlightening with the reality of Adi Shankara's Philosophy of human life that '*Brahma satyam, jagat mithya*' and accomplishing the four folds of the life i.e. *Dharma* (religious and/or moral virtues), *Artha* (wealth), *Kama* (love or desire), and *Moksha* (sensual),-the earthly objectives of human life, we should not cling on to physical body, we should proceed to peaceful death by terminating the life. Human body has no more importance, in the cycle of birth and death, man simply changes the old worn body into a new by the process

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33. P V Kane, *History of Dharmsastra*, vol. II, part II, (chapt .- XXVII),p924
34. Ibid
35. Parasara, *Parasar Smriti*, IV. 1-2 (अतिमनादतिकोधात्स्नेहाद्वा यदि वा भयाात्। उद्बध्नीयात्स्त्री पुमान्वा गतिरेषा विधीयते।। पूयशोणितसंम्पूर्ण अन्धे तमसि मज्जति। षष्ठि वर्षसहस्त्राणि नरकं प्रतिपद्यते।।
36. Manu, *Manu Smriti*, IV:89
37. *supra* note 22; *Manu Smriti*, XI. 73, 90-91; *Yajnavalkya Smriti*. III. 248, 253; *Vashishta Dharma Sutra* 13-14
38. see also Khairha plates of Yasahkarnadeva (dated Kalacuri Savmvat 823 i.e.1073 AD) narrate that King Gangeya obtained release along with his one hundred wives at the famous banyan tree of Prayaga (*E I* vol. XII. P. 205at 211); King Dhangadeva of the Chandella dynasty is said to have lived for more than 100 years and to have abandoned his body at Prayaga while contemplating on Rudra (*E I* vol. I p 140); Chalukya King Someswara after performing yoga rites drowned himself in the Thungbhadra in 1068 A D (*E C* vol. II Sk 136)
39. supra note 19, at 1621
40. *Sati* (self- immolation by the widow on the burning pyre of her deceased husband; as Dr V P Kane has remarked that it was a custom of elite family in India.); *Johars* (mass suicide or immolation of ladies from the royal houses to avoid being dishonoured by the enemies); *Sahmarana* and *Anumarana*; and *Prayopavesham* (starving unto death)

of which is known as death. In the holy book *Srimad Bhagavad Gita*, Lord Krishna says to Arjuna about eternal reality of the soul's immortality. He says that:

> "just a man giving up old worn out garments accepts other new apparel, in the same way the embodied soul giving up old and worn out bodies verily accepts new bodies".[41]

The *Upanishads* admit that the sannyasin, that has already attained insight into reality, may fittingly choose to die (peaceful and dignified death) through drowning, starvation, fire or some other act[42]. Recently, late Sri Acharya Vinoba Bhave, the Indian Freedom Fighter and Spiritual teacher exemplified this tradition in India.

The matter relating to euthanasia was dramatized in an Indian states in 1985 to legalize it, when a Bill on the subject- euthanasia was moved in the Maharastra Legislative Council and passed the motion to circulate the bill among the members for the purpose of eliciting opinion thereon, within a period of one year[43]. A similar Bill was, again, introduced in the House of People of India in July 1985.[44] Some private organizations have initiated to establish the society for right to die with dignity. All these organizational moves and legislative initiatives made a plateform for healthy deliberation and thread bare academic discussion on its pros and cons in legalizing euthanasia in Indian perspective. The Law Commission of India in its 42nd report had recommended that euthanasia should not be legalized. The Commission suggested that:

> "on the consideration of various aspects of the matter and in particular the state of public opinion on the subject, we have come to the conclusion that it would not be advisable to insert a provision totally exempting euthanasia from criminal liability."[45]

Though, the Commission has reconsidered the issue and in its 241st report, again, emphasized upon and submitted that:

> "Passive euthanasia, which is allowed in many countries, shall have legal recognition in our country too, subject to certain safeguards, as suggested by the 17th Law Commission of India and as held by the Supreme Court in *Aruna Ramachandra's* case [(2011) 4 SCC 454)]. It is not objectionable from legal and constitutional point of view".[46]

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41. Srimad Bhagavad Gita 2:22 (वासांसि जीर्णानि यथा विहाय, नवानि गृहणाति नरोऽपराणि। तथा शरीराणि विहाय जीर्णान्य, अन्यानि संयाति नवानि देहि।।
42. *supra* note 19, at 1621
43. see Maharastra Administrative Gazette, Extraordinary, Authorized Publication, 11 July, 1985, pp.255-9
44. The Times of India (Bombay)27 July, 1985 p.9
45. Law Commission of India, 42nd Report, para16.16, pp.238-9
46. *Id*, at 241st Report, August 2012, *Passive Euthanasia: A Freshlook*

III. JUDICIAL TRANSMUTATION: THE INDIAN EXPERIMENT

In India, the issue of attempted suicide, abetted suicide and passive euthanasia were taken into account by the Indian Courts while deciding the cases according to the existing penal provisions and either expressed them insufficient, cruel and harsh or construed liberally to humanize the Indian Penal law. The judicial response to the offence of attempt to commit suicide has been far from consistent. In majority of cases,[47] the courts (particularly the lower courts) felt constrained to create the liability for the offence that still continues in the statute book.

However, there are some judicial decisions whose findings on the subject match with the progressive legislative opinions[48]. The right to suicide and euthanasia debate in India was enriched further by the judicial pronouncement of the other municipal courts of different countries[49]. The impact of judicial pronouncements is reflected in the important legislations relating to suicide and euthanasia in modern societies.[50] But, in India, still it is only in judicial process, not legislative.[51]

Judicial Detour: *Dubal* to *Aruna Shanbaug*

The two decades of post- Independence era of Indian judiciary was full with conservative British-approach. A British administrator remarked that '*in England, justice goes to people*; *in India people had to come to justice*.' After Independence, Indian common men have several urges; expectations and bare needs inherited from their forefathers for about two centuries on the one hand while on the other, the coercive colonial law, having no moral, ethical and political obligations upon legal fraternity, emanated for Indians from

47. 1960 MPLJ Short Note 104, also See AIR 1967 Goa Cri LJ Bom. (DB) 1519; *Chenna J Reddy* v. *State of Andhra Pradesh*, (1988) Cri LJ, 549 (AP); (1992) Cri LJ, 2074(Mad); (1994) Cri LJ, (NOC) 365 (Mad); *Gain Kaur* v. *State Of Punjab*, AIR 1996 SC 946

48. *King Emperor* v. *Appulaswami*, (1904) 1 Cri LJ, 477; *Musammat Barakat* v. *Emperor*, (1934) 36 Cri LJ, 682; *State* v. *Sanjay Kumar Bhatia*, (1985) Cri L J Delhi 93 (recording acquittal on grounds of procedural injustice) ; *Court on its Own Motion* v. *Yogesh Sharma*, Criminal Revision no. 230 of 1985 an unreported High Court (Delhi High Court) decision delivered by Chief Justice Rajindra Sachar on 13-12-1985; *Maruti Sripati Dubal* v. *State of Maharastra* (1987) Cri LJ, 743 (Bom); *P. Rathinam/Nagbhushan Patnaik* v. *Union of India* (1994) Cri LJ, 1605 (SC);

49. *Roe* v. *Wade*, 410 US 113, 153 (1973); *Hendyside* v. *UK*, (1976) 1EHRR 737; *X* & *Y* v. *Netherlands*, (1985) 8 EHRR 235; *Norris* v. *Ireland* (1988) 13EHRR 186; *Airdale NHS Trust* v. *Bland*, (1993) 1All ER 821; *Washington* v. *Glukeburg*, 521 US 702 (1997); *Vacco* v. *Quil*, 521 US 793 (1997) and *Gonzales* v. *Oregon*, 546 US 243 (2006)

50. *The Suicide Act 1961*(Britain); *the Death with Dignity Act*, 1994 (Oregon, US); *the Right of Terminally Ill Act*, 1995 (Australia Northern Territory); *the Termination of Life on Request and Assisted Suicide (Review of Procedure) Act*, 2002 (Netherlands)

51. *The Euthanasia (Permission and Regulation) Bill*, 2007

Westminster to ensure social justice, was poor instument in hand. The legal fraternity did not symbolize a clear break from that traditional approach in interpreting such law but, the sensitive judges have always expressed their progressive and optimistic views in dissenting opinions. Since 1980s, the traditional view of administration of justice has given way to the concept of social justice. The judicial pronouncement of *Dubal*[52] case caused considerable sensation in India and gave the subject of debate to philosophers, sociologists, moralists, educationists, legislators, and jurists to set the legal and ethical tone for Indian multicultural society.

It is praiseworthy to note here that in the process of expanding the horizon of positive right to life enshrined under Article 21 of the Constitution of India, the Bombay High Court for the first time painstakingly laboured to create a new right namely- the right to suicide or right to die. The main plank of the judgment by Sawant and Patil, JJ, was that the right to life, in its positive and negative aspects, is guaranteed under Article 21 of the Constitution of India. The court observed that:

> "Article 21 spell out not only a protection against an arbitrary deprivation of life or personal liberty, but also positive right to enable an individual to live with human dignity."[53]

The Court, further, held that Section 309, IPC is ultra vires being in violation of Articles 14 and 21 of the Constitution of India and must be struck down from statute book. It was pointed out that the language of Section 309, IPC is sweeping in its nature, and the provision of Section 309 IPC is unreasonable and arbitrary on this account. The blanket prohibition on the right to die on pain of penalty is not reasonable. There is nothing unnatural about the desire to die and hence the right to die[54]. The means adopted for ending one's life may be unnatural varying from starvation to strangulation. But, the desire which leads one to resort to the means is not unnatural. Suicide or an attempt to commit suicide is not a feature of a normal life. It is an incident of abnormality or of an extraordinary situation or of an uncommon trait of personality.[55]

Thus, it was judicial transmutation of right to life into right to die. But, just after one year of the decision, the Andhra Pradesh High Court in *Chenna Jagdeeswar case*[56] rejected the plea that right to life impliedly guarantees the right to die and Section 309 IPC is unconstitutional. Court held that Section 309 IPC is in consonance with notion of the Constitution and hence is valid[57]. It is further observed that if Section 309 IPC is to be held illegal, the people

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52. *Marruti Sripati Dubal* v *State of Maharastra*, (1987) Cri LJ, 743; *Aruna Ramchamndra Shanbaug* v *Union of India* (2011) 4 SCC 454
53. *supra* note 47, at 748
54. *Ibid*.
55. *Ibid*.
56. *Chenna Jagdeeswar Reddy* v *State of Andhra Pradesh* (1988) Cri LJ, 549 (AP)
57. *Id*. at 551

who actively abet, assist and induce persons in committing suicide, may not be clutched.[58]

While examining the constitutional validity of Section 309, IPC, in 1994 the Supreme Court, in *P. Rathinam / Nagbhushan Patnaik* v. *Union of India*[59] with reference to Articles 14 and 21 of the Constitution of India, has given a landmark and historic decision and taken into consideration the decisions of the Delhi, Bombay and Andhra Pradesh High Courts and disagreed with the view taken by Andhra Pradesh High Court on the question of violation of Article 21. Agreeing with views of the Bombay High Court, the Supreme Court observed:

> "On the basis of what has been held and noted above, we state that section 309 of the Indian Penal Code deserves to be effaced from the statute book to humanize our penal laws. It is a cruel and irrational provision, and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide".[60]

Court further observed that:

> "an act of suicide cannot be said to be against religion, morality or public policy and an act of attempted suicide has no baneful effect on society. Further, suicide or attempt to commit it causes no harm to others, because of which State's interference with the personal liberty of the persons concerned is not called for. We, therefore, hold that section 309 violates Article 21, and so, it is void. May it be said that the view taken by us would advance not only the cause of humanization, which is a need of the day, but of globalization also, as by effacing section 309, we would be attuning this part of criminal law to the global wavelength".[61]

But this view of Supreme Court was overruled by a larger Bench in *Smt. Gian Kaur* v. *State of Punjab*[62] wherein Verma J., speaking for the Court, held that *P. Rathinam's* case was wrongly decided. The Court observed:

> "When a man commits suicide he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to, or be included within the protection of the right to life under Article 21. The significant aspect of sanctity of life is also not to be overlooked. Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can extinction of life be read to be included in protection of life".[63]

The Court further observed that, whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, it is difficult

58. *Ibid*.
59. AIR 1994 SC 1844
60. *Ibid*.
61. *Ibid*.
62. AIR 1996 SC 946
63. *Ibid.*

to construe Article 21 to include within it the 'right to die' as a part of the fundamental right guaranteed therein. Right to life is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of 'right to life'. The court did not find any similarity in the nature of the other rights, such as the right to 'freedom of speech' etc. to provide a comparable basis to hold that the 'right to life' also includes the 'right to die'. The word 'life' in Article 21, has been construed as life with human dignity. Any aspect of life which makes it dignified may be read into it but not that which extinguishes it and is, therefore, inconsistent with the continued existence of life resulting in effacing the right itself. The right to die is inherently inconsistent with the right to life as is death with life, if any.

On the question of violation of Article 14, the Court agreed with the view taken by Hansaria J. in *P. Rathinam's* case, Verma J. further observed that the argument on the desirability of retaining such a penal provision of punishing attempted suicide, including the recommendation for its deletion by the Law Commission are not sufficient to indicate that the provision is unconstitutional being in violation of Article 14 of the Indian Constitution. Even if those facts are to weigh, the severity of the provision is mitigated by the wide discretion in the matter of sentencing since there is no requirement of awarding any minimum sentence and the sentence of imprisonment is not even compulsory. There is also no minimum fine prescribed as sentence, which alone may be awarded on conviction under section 309, IPC. This aspect is noticed in *P. Rathinam* for holding that Article 14 is not violated.

The bench harped on the inequity of making attempt to commit suicide an offence but sought to give relief by resorting to a very technical simplistic reasoning[64]. On the analogy of Article 19 rights, in *P. Rathinam*, the Court held that right to live under Article 21 includes the right not to live. It was forgotten that Article 19 rights are liberty rights and give the freedom to a citizen to do a certain thing or to refrain from doing that thing, whereas Article 21 confers immunity rights and not the right to do or to abstain from doing certain things.[65]

The Supreme Court's decision in *Smt. Gian Kaur* has, thus, categorically affirmed that right to life in Article 21 does not include the right to die. Consequently, section 309 which penalises attempt to commit suicide is not unconstitutional. The Court did not go into the wisdom of retaining or continuing the said provision in the statute.

The *Aruna Shanbaug*[66] case is the first case in India which deliberated at length on 'euthanasia'. A two-judge bench of the Supreme Court consisting of Markandey Katju and Gyan Sudha Mishra, JJ., gave a deep consideration to the whole issue of permitting euthanasia, made it clear that passive

64. Uday Raj Rai, *Fundamental Rights and their Enforcement*, (2011) p271

65. *Ibid*

66. *Aruna Ramachandra Shanbaug* v. *Union of India*, JT 2011(3) SC 300

euthanasia is permissible in our country as in other countries, and proceeded to lay down the safeguards and guidelines to be observed in the case of a terminally ill patient who is not in a position to signify consent on account of physical or mental predicaments such as irreversible coma and unsound mind. It was held that a close relation or a 'surrogate' cannot take a decision to discontinue or withdraw artificial life sustaining measures and that the High Court's approval has to be sought to adopt such a course. The High Court in its turn will have to obtain the opinion of three medical experts. The Court started the discussion by pointing out the distinction between active and passive euthanasia and observed that:

> "the general legal position all over the world seems to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained".[67]

It was pointed out that brain stem remains active and functioning while the cortex has lost its function and activity. The Supreme Court addressed the question as to when a person can be said to be dead? It was answered by saying that "one is dead when one's brain is dead."[68] Reference was made to American Uniform Definition of Death, 1980. The court concluded:

> "Hence, a present day understanding of death as the irreversible end of life must imply total brain failure such that neither breathing nor circulation is possible any more."[69]

In *Aruna Shanbaug* case, it was noticed that in *Gian Kaur's case*, the apex court approvingly referred to the view taken by House of Lords in *Airedale case*[70] on the point that euthanasia can be made lawful only by legislation. It may be noted that in *Gian Kaur case*, it has not clarified that who will decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or *PVS*. This vexed question has been arising often in India because there are a large number of cases where persons go into coma (due to an accident or some other reason) or for some other reason are unable to give consent, and then the question arises as to who should give consent for withdrawal of life support".[71]

The Court further observed that:

> "In our opinion, if we leave it solely to the patient's relatives or to the doctors or next friend to decide whether to withdraw the life support of an incompetent person, there is always a risk in our country that this may be misused by some unscrupulous persons who wish to inherit or otherwise grab property of the patient".[72]

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67. *Ibid*
68. *Id.,* at 307
69. *Id.,* at 308
70. *Airedale NHS Trust* v *Bland*, 1993 1 All E R 821
71. *Id.,* at 352
72. *Ibid*

IV. CONCLUSION

As a normal rule of nature, every human being has to live and continue to enjoy the span of life till the nature intervenes to end it. Death is certain and is a fact of life is. Suicide is not a feature of normal life. It is an abnormal situation. But if person has right to enjoy his life, he cannot also be forced to live that life to his detriment, disadvantage or disliking. If a person is living a miserable life or is seriously sick or having incurable disease, it is improper as well as immoral to ask him to live a painful life and to suffer agony.

There is a school of thought which advocates the decriminalization of the offence of attempt to commit suicide. They plead a compassionate and sympathetic treatment for those who fail in their attempt to put an end to their lives. They argue that deletion of section 309 is not an invitation or encouragement to attempt to commit suicide. A person indulges in the act of attempt to commit suicide for various reasons some of which at times are beyond his control. On the other hand, certain developments such as rise in narcotic drug-trafficking offences, terrorism in different parts of the country, the phenomenon of human bombs etc. have led to a rethinking on the need to keep attempt to commit suicide an offence. These groups of offenders under section 309 stand under a different category than those, who due to psychological and religious reasons, attempt to commit suicide.

One can appreciate the theory that an individual may not be permitted to die with a view to avoiding his social obligations. He should perform all duties towards fellow citizens. At the same time, however, if he is unable to take normal care of his body or has lost all the senses and if his real desire is to quit the world, he may not be compelled to continue with torture and painful life. In such cases, it may be argued that - it may be better to permit him to die; however, in the present context it seems impossible until the law on the point is changed. It should be noted that in *Aruna Shanbaug case* the apex court has ruled that the procedure suggested by the court be followed until Parliament legislates on the matter.

In view of above discussions, it requires to have keen observation of implementation of any suggested law. There is need for law reform to legalise suicide and passive euthanasia in India.

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FARMER'S RIGHT AS OWNERSHIP RIGHT UNDER PLANT VARIETY PROTECTION LAW : NATIONAL AND INTERNATIONAL PERSPECTIVES

Rajnish Kumar Singh *
Digvijay Singh**

ABSTRACT

International instruments such as the and UPOV ITPGR recognize the rights of farmers narrowly. Their description of the farmer's right does not include any positive right to farmers over their intellectual assets. It is important to note that the International Treaty allows member states to develop their own mechanism of farmer's protection. India's legislation adds an additional layer of protection for farmers, in the form of a full chapter on farmer's right. One of the most important characteristic of PPV&FR Act, 2001 is that it contains farmer's rights that go beyond the usual characterization of farmer's rights in the international treaties. Farmer's rights as ownership over their varieties represent the extension of the ideology of intellectual property rights to farmer's varieties. This paper examines the success of Indian legislation in terms of conferring ownership right to farmers.

KEY WORDS: *Plant Variety Protection, Farmers' Rights, Collective Ownership, Privilege and Benefit Sharing.*

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I. INTRODUCTION

THE CONCEPT of Farmers' Rights emerged from the Food and Agricultural Organization (hereinafter FAO) in the 1980s in response to the broadening scope of plant variety protection (PVP) afforded to commercial plant breeders under International Union for the Protection of New Variety of Plant, 1961 (hereinafter UPOV).[1] Farmers' rights are basically about enabling farmers to continue their work as stewards and innovators of agricultural biodiversity, and recognizing and rewarding them for their contribution to the global pool of genetic resources.[2] Farmers' rights are first addressed in the International Treaty on Plant Genetic Resources for Food and Agriculture in 1989.[3] The Treaty recognizes the enormous contributions made by farmers worldwide in conserving and developing crop genetic resources, and it provides for measures to protect and promote these rights. But, the description of the farmer's right does not seem to be granting any positive right to farmers over their intellectual assets.[4] Proponents of farmers' rights feared that the property rights bestowed upon plant breeders could restrict the abilities of farmers to exchange, use and store seeds, and degrade traditional knowledge.[5]

Proprietary claims to plant genetic resources (PGRs) have assumed significance, particularly during the past two decades, at the global, national, and local levels. Globally, these are articulated in multilateral trade negotiations most notably through Article 27.3(b) of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), through the concept of plant variety protection (PVP). The same have also been articulated within global environmental and agricultural arenas, through the International Undertaking on Plant Genetic Resources, 1989 (hereinafter IUPGR) and the Convention on Biological Diversity, 1992 (hereinafter CBD).[6] Countries have, independently and in response to international obligations, introduced legislative initiatives to formalize proprietary claims to PGRs by instituting systems of intellectual property rights (IPRs).[7] The exiting ownership approach refers to the right of farmers to be rewarded for genetic material obtained from their fields and

1. Simon West, "Institutionalised Exclusion: The Political Economy of Benefit Sharing and Intellectual Property", *Law, Environment* and *Development Journal*, 2012, p.25 available at *http://www.lead-journal.org/* [accessed on 28/08/2013]
2. *http://www.farmersrights.org/faq/* [accessed on 27/08/2013]
3. Michael Blakeney, "Protection of Plant Varieties and Farmers' Rights", European *Intellectual Property Review*, 2002, 24(1), 9-19 at p.9
4. The FAO International Treaty on Plant Genetic Resources for Food and Agriculture, 2001, Aticle-9.3, "Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate."
5. *Supra* note 1, at 26
6. Shaila Seshia, "Plant Variety Protection and Farmers' Rights Law-Making and Cultivation of Varietal Control", *Economic and Political Weekly*, July 6, 2002 at p.2741
7. *Ibid*.

used in commercial varieties and protected through intellectual property rights.[8] The idea is that such a reward system is necessary to enable equitable sharing of the benefits arising from the use of agro-biodiversity and to establish an incentive structure for continued maintenance of this diversity.[9] The realization of farmers' rights means enabling farmers to maintain and develop crop genetic resources as they have done since the dawn of agriculture, and recognizing and rewarding them for this indispensable contribution to the global pool of genetic resources.[10] It may be argued that this realization of farmers' rights may only be achieved by positive protection which grants positive rights in the form of ownership rights to farmers and enables them to enforce their rights. The knowledge and rights of local community has to be strengthened in order to conserve biodiversity and in this respect community rights over biodiversity seems an important concept.[11]

It is in this background that the present paper examines the law for farmer's rights at international and national levels to examine the working of these rights particularly the ownership right. The paper in part II introduces the concept of farmer's rights. Its various aspects have been examined in part III. Part IV contains Indian law on the subject, and the last part concludes the work.

II. FARMERS' RIGHTS

The concept of Farmers' Rights provides a measure of counterbalance to formal Intellectual Property Right (IPR) and patents that compensate for the latest innovations with little consideration of the fact that, in many cases, these innovations are only the most recent step of accumulative knowledge and inventions that have been carried out over millennia by generations of men and women in different parts of the world.[12] Significant contributions have been made by the knowledge of indigenous people and traditional farmers in the development of new crop types and biodiversity conservation.[13] These groups have been an important agency in the conservation and supply of plant genetic resources to seed companies, plant breeders, and research institutions.[14]

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8. Regine Andersen, "Realising Farmers' Rights under International Treaty on Plant Genetic Resources for Food And Agriculture", Summary of the Findings from the farmers' Rights Project, Phase 1, *FNI Report* 11/2006 at 4
9. *Ibid*.
10. S.K. Verma, "Right to Food and Intellectual Property Rights: Farmers' rights", at 2 available at *http://www.unamur.be/droit/crid/propriete/SKVERMA_Farmers RightsinIndia*
11. Elizabeth Verkey, L*aw of Plant Varieties Protection*, Eastern Book Publication, Lucknow, 2007, at 145
12. *http://www.fao.org/docrep/x0225e/x0225e03.htm*
13. Elizabeth Verkey, "Shielding Farmers' Rights", *Journal of Intellectual Property Law* and Practice, 2007, Vol. 2, No. 12, at 826
14. *Ibid*.

Farmers' Rights is a retrospective reward of unlimited duration for the conservation of plant genetic resources.[15]

It was first formulated in 1989 in the context of FAO International Undertaking on Plant Genetic Resources (IUPGR).[16] Originally, the IUPGR was based on the principle that Plant Genetic resources should be freely exchanged as a heritage of mankind and should be preserved through international conservation efforts.[17] In subsequent years the principle of free exchange was gradually narrowed. In November, 1989 the 25th session of the FAO Conference adopted two resolutions providing an agreed interpretation that plant breeder's rights were not incompatible with the IUPGR. The acknowledgement of plant variety rights obviously benefited enterprises in those countries, which were engaged in commercial seed production. In exchange of this, developing countries wanted endorsement of the concept of "farmer's rights" as parallel to "breeder's rights".[18] Having this in view the annex to the International Undertaking on Plant Genetic Resources (unanimously adopted through Conference Resolution 8/83[19]) in the Conference Resolution 5/89[20], defines Farmers' Rights as "rights arising from the past, present and future contribution of farmers in conserving, improving and making available plant genetic resources, particularly those in the centre of origin/diversity. These rights are vested in International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers and supporting the continuation of their contributions."[21] The purpose of these rights is stated to be "ensuring full benefit to farmers and supporting the continuation of their contributions."[22] These rights are not assigned to specific varieties, types of plant, or to specific farmers.

The 25th Session of the FAO Conference endorsed the concept of Farmers Rights with a view to ensuring global recognition of the need for conservation and the availability of sufficient funds for these purposes; assisting farmers and farming communities throughout the world, especially those in areas of original diversity of plant genetic resources, in the protection and conservation of their PGR and of the natural biosphere; and, allowing the full participation of farmers, their communities and countries in the benefits derived, at present and in the future, from the improved use of PGR.[23]

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15. *Supra* note 11
16. *Supra* note 3
17. *Id*. at 10
18. *Ibid*.
19. The Twenty-Second Session of the FAO Conference, Rome, November 5-23, 1983
20. The Twenty-fifth Session of the FAO Conference, Rome, November11-29, 1989
21. *Ibid*.
22. *Supra* note 1, at 1
23. *Ibid*.

During the 26th Session of the FAO Conference, Resolution 3/91[24] was unanimously adopted which endorsed that nations have sovereign rights over their plant genetic resources; breeders' lines and farmers' breeding material should only be available at the discretion of their developers; farmers' rights will be implemented through an international fund on PGR which will support PGR conservation and utilization programmes, particularly, but not exclusively, in the developing countries; the resources for the international fund and other funding mechanisms should be substantial, sustainable and based on principles of equity and transparency for effective conservation and sustainable use of PGR; and, through the Commission on Genetic Resources for Food and Agriculture, the donors of genetic resources, funds, and technology will determine and oversee the policies, programmes, and priorities of the fund and other funding mechanisms, with the advice of the appropriate bodies.[25]

The FAO Commission on Genetic Food Resources for Agriculture (CGFRA) considered a number of negotiating text of IUPGR between 1994 and 2001, with a view to its adoption as a binding legal obligation by members of the FAO. At its sixth extraordinary session[26] in June, 2001 the members of CGRFA agreed on the text of Article 10, which provides for farmers' rights, recognizing the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centre of crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world. The provision puts the responsibility for realizing farmers' rights, as they relate to plant genetic resources for food and agriculture, on the national governments. It was accepted that in accordance with the needs and priorities, each contracting party should, subject to its national legislation, take measures to protect and promote farmers' rights.[27] It includes protection of traditional knowledge relevant to plant genetic resources for food and agriculture; the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture. In addition to above, the provision also recognizes the rights of farmers to save, use, exchange and sell farm-saved seed/propagating material, subject to national law."[28]

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24. The Twenty-Sixth Session of the FAO Conference, Rome, November 9-27, 1991
25. *Supra* note 1
26. The FAO, Report of the Commission on Genetic Resources for Food and Agriculture, Sixth Extraordinary Session Rome, 25-30 June, 2001
27. The FAO Report of the Commission on Genetic Resources for Food and Agriculture, 2001, Article 10
28. *Ibid*.

This agreed Article was later incorporated in Article 9[29] of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture, 2001 at the 31st Session of the FAO Conference in November, 2001, which replaced the FAO International Undertaking on Plant Genetic Resources for Food and Agriculture of 1989.

The International Treaty also recognizes the importance of supporting the efforts of farmers and local and indigenous communities in the conservation and sustainable use of plant genetic resources for food and agriculture, including through a funding strategy. In this strategy, priority will be given to the implementation of agreed plans and programmes for farmers in developing countries, especially in least developed countries, and in countries with economies in transition, who conserve and sustainably utilize plant genetic resources for food and agriculture.[30] Farmers' rights are important to ensuring the conservation and sustainable use of genetic resources for food and agriculture and consequently for food security today and in the future. Farmers' Rights are also a central means in the fight against rural poverty in developing countries. Farmers' Rights are a precondition for the maintenance of crop genetic diversity, which is the basis of all food and agriculture production in the world.[31]

One reason why the law makers have not been able to agree on a precise definition on Farmers' Rights was that the situation of farmers differs

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29. Article 9 - Farmers' Rights, 9.1 The Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centers of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.

    9.2 The Contracting Parties agree that the responsibility for realizing Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including:

    a) Protection of traditional knowledge relevant to plant genetic resources for food and agriculture;

    b) The right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and

    c) The right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

    9.3 Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate

30. *Ibid*.

31. *http://www.farmersrights.org/about/why_fr_matters.html*

so greatly from country to country, as do the perceptions of farmers' rights.[32] Thus, it is important to establish a common ground of understanding in order to develop a fruitful dialogue among stakeholders on necessary measures to be taken.[33] Farmers' Rights consist of the customary rights of farmers to save, use, exchange and sell farm-saved seed and propagating material, their rights to be recognized, rewarded and supported for their contribution to the global pool of genetic resources as well as to the development of commercial varieties of plants, and to participate in decision making on issues related to crop genetic resources. The realization of farmers' rights is a cornerstone in the implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture, as it is a precondition for the conservation and sustainable use of these vital resources in situ as well as on-farm. The Treaty recognizes the enormous contributions made by farmers worldwide in conserving and developing crop genetic resources.[34] This constitutes the basis of Farmers' Rights. According to Article 9, governments are to protect and promote Farmers' Rights, but can choose the measures to do so according to their needs and priorities. Several other Articles in the Treaty are also important for the realization of farmers' rights. However, the understanding of Farmers' Rights and the modalities for their implementation is still vague.

Presently, farmers' Rights generally fall within one of two main aspects, or somewhere in-between: first, the ownership approach refers to the right of farmers to be rewarded for genetic material obtained from their fields and used in commercial varieties and/or protected through intellectual property rights. The idea is that such a reward system is necessary to enable equitable sharing of the benefits arising from the use of agro-biodiversity and to establish an incentive structure for continued maintenance of this diversity. Access and benefit-sharing legislation and farmers' intellectual property rights are the central instruments.[35] Second, the stewardship approach refers to the rights that farmers must be granted in order to enable them to continue as stewards and as innovators of agro-biodiversity.[36] The idea is that the 'legal space' required for farmers to continue this role must be upheld and that farmers involved in maintaining agro-biodiversity on behalf of our generation, for the benefit of all mankind should be recognized and rewarded for their contributions.[37] There are various approaches to farmers' rights. The extent to which these approaches can be different is evident when they are applied to the measures suggested for the realization of farmers' rights in Article 9 of the International Treaty on Plant Genetic resources for Food and Agriculture.[38]

32. *http://www.farmersrights.org/about/fr_contents.html*
33. *Ibid*.
34. *http://www.farmersrights.org/about/index.html*
35. *Supra* note 32
36. *Ibid*.
37. *Ibid*.
38. *Ibid*.

Plant genetic diversity is probably more important for farming than any other environmental factor, simply because it is the factor that enables adaptation to changing environmental conditions such as plant diseases and climate change. Thus, as a precondition for the maintenance of this diversity, farmers' Rights are crucial for ensuring present and future food security in general, and in the fight against rural poverty in particular.

III. ASPECTS OF FARMERS' RIGHTS

There are different aspects of farmers' rights.[39] A perusal of various multilateral documents reveals the following aspects of farmers' rights

Farmers' Rights as Privilege

It is referred as to the farmers' exemption under International Union for the Protection of New Varieties of Plant (UPOV), 1978. It provides an exemption for farm saved seed by farmers under plant breeders' rights. Originally, plant breeders' rights under UPOV were only for commercial production and marketing and since the use and exchange of saved seeds was considered non-commercial, the activity was considered outside the scope of PBRs. It thus allowed farmers to save, use and exchange seed but not sell without penalty under plant breeders' right system.[40] It refers to the privilege of farmers to save seed or reproductive material of the protected variety from their harvest for sowing on their land to produce a further crop.[41] This saving of seed from their harvest out of the protected variety is not an infringement under the 1978 version of UOPV.[42] In the UPOV, 1978 two important exceptions to breeders' rights were created for the protection of farmers' interest. Firstly, the freedom of other breeders to use the protected variety as starting material for breeding further variety without any requirement for an authorization and any payment of royalty (known as the breeder' exemption) and Secondly, the freedom of farmers to re-use saved seed of the protected variety (known as farmers' privilege). The first was explicitly provided while the second was an implicit consequence of the minimalist scope of protection.[43]

In the 1991 UPOV revision, the farmers' exemption was reduced to an

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39. Saksham Chaturvedi and Chanchal Agrawal, "Analysis of Farmer Rights: In the Light of Protection of Plant Varieties and Farmers' Rights Act of India", *European Intellectual Property Review*, 2011, 33(11), 708-714 at 710

40. Anitha Ramanna, India's Plant Variety and Farmers' Rights Legislation: Potential Impact on Stakeholder Access to Genetic Resources, *EPTD DISCUSSION PAPER* NO. 96, Environment and Production Technology Division, International Food Policy Research Institute, Washington, January 2003 at 5

41. S.K. Verma, "TRIPs and Plant Variety Protection in Developing Countries", *European Intellectual Property Review*, 1995, 17(6), 281-289, at 285

42. *Ibid.*

43. Jatashree Watal, *Intellectual Property Rights in the WTO and Developing Countries*, Oxford University Press, New Delhi, 2001, at 137

optional clause leaving it to states to decide on the extent of farmers' right to save and exchange seed. Article 15(1)(i)[44] indicates that acts which are both of a private nature and for non-commercial purposes are covered by the exception. Thus, non-private acts, even where done for non-commercial purposes, may be outside the scope of the exception. Furthermore, the wording indicates that private acts which are undertaken for commercial purposes do not fall within the exception. Thus, a farmer saving his own seed of a variety on his own holding might be considered to be engaged in a private act, but could be considered not to be covered by the exception if the said saving of seed is for commercial purposes.[45] It suggests that it could allow, for example, the propagation of a variety by an amateur gardener for exclusive use in his own garden, since this may constitute an act which was both private and for non-commercial purposes. Equally, for example, the propagation of a variety by a farmer exclusively for the production of a food crop to be consumed entirely by that farmer and the dependents of the farmer living on that holding, may be considered to fall within the meaning of acts done privately and for non-commercial purposes. Therefore, activities, including for example "subsistence farming", where these constitute acts done privately and for non-commercial purposes, may be considered to be excluded from the scope of the breeder's right, and farmers who conduct these kinds of activities freely benefit from the availability of protected new varieties.[46] So, unlicensed multiplication of propagating material or seed irrespective of the purpose in an infringement, but Article 15(2) allows contracting parties, if they so wish, to provide an exception in favour of farmers, subject to the legitimate interest of the breeders.[47] Article 15 (2) is an "optional" provision as clarified by the

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44. The International Union for the Protection of New Varieties of Plants, 1991, Article 15 Exceptions to the Breeder's Right:(1) [Compulsory Exceptions] The breeder's right shall not extend to

    (i) acts done privately and for non-commercial purposes,

    (ii) acts done for experimental purposes and

    (iii) acts done for the purpose of breeding other varieties, and, except where the provisions of

    Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.

45. Explanatory Notes on Exceptions to the Breeder's Right Under the 1991 Act of the UPOV Convention, adopted by the Council at its forty-third ordinary session on October 22, 2009, at 5

46. *Ibid*.

47. The International Union for the Protection of New Varieties of Plants, 1991, Article 15 According to Article 15(2)- Optional exception: Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii).

wording "…each contracting party may … ". Thus, it is a matter for each member to decide whether it would be appropriate to incorporate the option provided in Article 15 (2). The purpose of the provision is to provide guidance to those members of the Union which decide to incorporate the optional exception into their legislation.[48] It strengthens the protection offered to the breeder and dilutes the exemption granted to the farmers for planting back. Virtually all countries which have adhered to the 1991 version of UPOV adopted such a "farmer's privilege" in one form or another. The conditions of 1991 version of UPOV do not allow the farmers to save seed unless individual government with the consent of the breeders, allow limited exemptions.[49]

The optional exception may be introduced for selected crops. In respect of such crops, the UPOV Convention, Article 15(2) states: "Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right….". In relation to the introduction of reasonable limits and the safeguarding of the legitimate interests of the breeder within plant breeders' rights legislation, the factors such as type of variety, size of holding/crop area/ crop value, proportion or amount of harvested crop, changing situations, and remuneration or a combination of such factors, amongst others, might be considered.[50] The wording of the Convention clarifies that the optional exception relates to the use of the product of the harvest by the farmer on his own holding. Thus, for example, the optional exception does not extend to propagating material which was produced on the holding of another farmer.[51]

The concept of farmer's right as privilege has its own limitations. It does not include the aspect of proprietary right and allows the farmer to only do limited activities having no commercial aspect. Further, the 1991 UPOV leaves it to the wisdom of the member countries to enact for the privileges, making it possible that different countries have different law. Thus harmonization of laws cannot be ensured.

Farmers' Rights as Part of Benefit Sharing

As the concept of farmers' rights evolved throughout the early to mid nineties, several trends, including increased recognition of the value of genetic resources, expansion of PVP protection, liberalisation of agricultural policy and North-South political discord led to the replacement of 'common heritage of mankind' with 'state sovereignty' as the overarching legal principle guiding

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48. Explanatory Notes on Exceptions to the Breeder's Right Under the 1991 Act of the UPOV Convention, adopted by the Council at its forty-third ordinary session on October 22, 2009, at 8
49. *Supra* note 3
50. *Supra* note 48, at 10
51. *Id.*, at 11

treatment of traditional knowledge and genetic resources.[52] The entry into force of the Convention of Biological Diversity, 1992 (CBD), in affirming state sovereignty over natural resources, meant that rights vested in the international community by the FAO Undertaking were now entrusted to state discretion.[53] The CBD led to a shift in viewing genetic resources not as common heritage but rather as the sovereign rights of nations and 'benefit sharing'[54] was formulated as a means to assert this sovereign right.[55] Article 8(j) calls for national protection of traditional knowledge that is associated with bio-diversity, provided that such protection is deemed by each contracting party to be possible and appropriate.[56] With the conclusion of the CBD, the concept of benefit sharing was applied to farmers' fights.[57] The equitable sharing of benefits is the heart of farmers' rights regime for their contribution to innovation in plant breeding.[58] World leaders meeting at the 2002 World Summit on Sustainable Development in Johannesburg, South Africa, agreed that the destruction of biological diversity would continue unabated unless the custodians of this natural wealth benefit from its conservation.[59] The suit of actions suggested by the FAO Undertaking's successor, the ITPGRFA, to fulfill farmers' rights corresponded closely with those provided for in the CBD, such as the protection of traditional knowledge, the right to equitably participate in sharing benefits, and the right to participate in decision-making relevant to traditional knowledge and genetic resources, reflecting a move towards an

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52. *Supra* note 1
53. *Ibid.*
54. Benefit sharing refers to the compensation to farmers/communities who contribute to the creation of a new variety or the development and conservation of existing varieties. It essentially refers to the rights and reward that farmers deserve for contributing to agricultural innovation and growth.
55. Article 8(j) of the Convention on Biological Diversity, 1992 provides: "Each contracting parties shall, as far as possible as appropriate….(j) Subject to its national legislation respect, preserve and maintain knowledge, innovation and practices of indigenous and local communities embodying traditional life style relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holder of such knowledge, innovation and practices and encourage the equitable sharing of benefits from the utilization of such knowledge, innovation, and practices."
56. R.K. Singh, "Protection of Farmers Rights under Plant Variety Protection Regime: National and International Regime", *National Capital Law Journal*, 2001, at 141
57. Suman Sahai, "Farmers Rights and Food Security", *Economic and Political Weekly*, Commentary, March 11-17, 2000
58. *Supra* note 3, at 11
59. D. Schroeder, "Benefit Sharing: It's Time for a Definition", *Journal of Medical Ethics*, 2007, 205-209 at 206

ownership approach.[60] So, farmers as the custodian of plant genetic resources should be given benefit from the conservation of plant genetic resources. It is important to note that the role of individuals in conserving plant genetic resources may not be of much value because it a collective work and the conservation is the result of collective or communities efforts. CBD shares benefits but it does not have any mechanism to identify those who will be given that benefits. In case of individuals it is difficult to identify those who have played any role in conserving plant genetic resources. However, communities may be identified for their role in conservation of plant genetic resources. This community based approach leads to collective rights. Although a plant belongs to its owner, its genetic information, inherited over generations and responsible for the plant's characteristics, belongs to the collective. Collective rights are inalienable, and exist for "the good of present and future generations".[61] Farmers' varieties are common heritage and its access must be negotiated by society. If other farmers, or any other party, want access to this material, they must negotiate with the collective. Responsibility for the management of collective rights belongs to local communities where these exist.[62] Collective or communities work has not been recognized under the convention and farmers' rights or compensation to local farming communities for collective improvements to plant varieties is not specifically addressed under this convention; however, countries are free to frame their legislation on this subject.[63]

The emphasis on sovereign ownership of genetic resources and associated knowledge presaged greater regulation of access to natural resources and prompted the development of 'Access Benefit Sharing systems' (ABS)[64] as a means of facilitating 'transactions' between industry and agricultural communities (a process which has come to be known as 'bioprospecting'[65]). In order to ensure legal certainty on both sides of these transactions, ABS structures have introduced concepts of 'property, exclusivity and exclusion' to traditional agricultural communities which may work to erode the spirit and nature of Farmers' Rights as a whole. Indeed, ABS structures fail to address

60. *Ibid*.

61. Robert Ali Brac de la Perrière and Guy Kastler, "Seeds and Farmers' Rights: How International Regulations Affects Farmers Seeds"- *BEDE/RSP* 2011 at 52, available at *http://www.bede-asso.org/*

62. *Ibid*.

63. *Supra* note 3

64. *Supra* note 1, at 21

65. Bio-prospecting is the systematic search for, and the development of, new sources of chemical compounds, genes, micro and macro-organisms and other valuable biological products. Bio-prospecting often draws on indigenous knowledge about uses and characteristics of plants and animals.

the fundamental conceptual differences between traditional agricultural practices based on free exchange and communal knowledge and IPR structures based on individual property. This, rather than leading to a realisation of Farmers' Rights in the sense of maintaining systems of free exchange, incorporates traditional farmers into the IPR system.

In relation to benefit sharing and particularly for locating the gene contributors, article 29[66] of the TRIPs may be useful. It provides for disclosure requirements on the part of applicant of a patent. Developing countries have been demanding amendment in Article 29 of TRIPs Agreement so as to incorporate adequate disclosure of country of origin of the bio-resource or traditional knowledge, and also for obtaining prior informed consent from the concerned country of origin before patent applications are filed. They argue that without an amendment to TRIPs, there is no legal basis for benefit sharing.[67] The Indian PPV & FR Act and the Patent Act provide for the disclosure of geographical location of genetic material in the application, but the same is not found in the laws of developed countries. Thus until TRIPs is amended, we may not be assured of a meaningful regime of benefit sharing at global level. The foregoing clearly suggests the inherent inconsistencies in the concept of benefit sharing.

Farmers' Rights as Ownership

One of the approaches to Farmers' Rights is the ownership approach. It represents the extension of the ideology of intellectual property rights to farmers' variety. Farmers' rights here refer not to exemption or to benefit but to the rights of farmers to claim ownership over their variety in a similar manner as breeder.[68] The demand for extending intellectual property protection

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66. Article 29 of the TRIPs, 1994, Conditions on Patent Applicants:

    1. Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.

    2. Members may require an applicant for a patent to provide information concerning the applicant's corresponding foreign applications and grants.

67. India, WT/CTE/C/W/198, Committee on Trade and Environment, TRIPs Council, WTO, *www.wto.org*, cited from Rahul Goel, "Protection and Conservation-TRIPs and CBD: A Way Forward", *Journal of Intellectual Law and Practice*, 2008, Vol. 3, No. 5 at 175

68. *Supra* note 39, at 710

to agriculture in developing countries has met with counterclaims for granting farmers' rights. Developing countries are currently attempting to fulfill these demands by evolving new IPR regimes that simultaneously protect the rights of breeders and farmers.[69]

It is important to know the possible implications of establishing such a system of multiple rights on the utilization and exchange of genetic resources among various actors. There may be an apprehension that the attempt to distribute ownership rights to various stakeholders may pose the threat of 'anti commons', where resources are underutilized due to multiple ownerships. The answers to these questions have important implications for the future of agricultural growth in developing countries.

An attempt to balance farmers' intellectual property right with breeders' right can be seen in the several provisions of ITPGRFA which provides for the realization of Farmers' Rights as ownership rights.[70]

As it has been discussed in the context of benefit sharing, individual ownership is a difficult proposition as far as locating the individual owner is concerned. The effort to conserve plant genetic resources is a collective effort, so collective rights of the community need to be recognized, and in this context collective ownership is to be promoted rather than individual ownership. Farmers' collective rights concern not property but biodiversity. There is generally a distinction made between material good and information, which is intangible. Collective rights cover this intangible part. This information's material support is controlled by collective rights, and its owner can only use, sell or pass it on with respect to these rights.[71] These are permanent, inalienable, and exist for "the good of present and future generations". Once a sovereign government has recognized them, it cannot withdraw this recognition, because it cannot invalidate the rights of persons not yet in existence. These rights are managed by a community because farmer seeds are a common heritage, their rules of access must be negotiated by society. This is not free access. This heritage belongs not to humanity, but to a collective.[72] If other farmers, or any other party, want access to this material, they must negotiate with the collective. Responsibility for the management of collective rights belongs to organised local communities where these exist. In cases without such organisations a territorial collective can be partly invested with a responsibility. Italian legislation, for example provides for trusts town halls with certain collective rights dating from the middle ages;

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69. *Supra* note 40, at ii
70. The ITPGRFA, 2001, Articles 9.2 (a), 9.2 (b), 9.2 (c) and 9.3
71. *Supra* note 1, at p.51
72. *Ibid*.

French legislation on common land does the same.[73] Collective rights operate in a negotiated framework. Collective ownership neither prohibits nor exclude, but instead offer rules of access. They do not offer the free and automatic access of "humanity's common heritage" where anyone can simply come and take what they please, nor that of the free market where refusal to sell is an offense. Neither is there any automatic right to demand specific licences for access, in the manner of monopolistic systems. It depends on negotiation. Collective rights have been sacrificed on the altar of industrial property. Communities controlling usage rights are generally deprived of legal status granting them particular ownership. Collective rights have not achieved the level of acceptance accorded to individual rights.[74] The utility of granting ownership right shall lead to desired results if it is granted to a community and not only to the individuals.

IV. FARMERS RIGHTS UNDER PPV&FR ACT, 2001

India is one of the first countries in the world to have passed a legislation granting rights to both breeders and farmers under the Protection of Plant Varieties and Farmers' Rights Act, 2001.[75] This is the first piece of legislation anywhere in the world that recognizes the phenomenal contribution of farm families in conserving biodiversity and developing new plant varieties.[76] The law emerged from a process that attempted to incorporate the interests of various stakeholders, including private sector breeders, public sector institutions, non- governmental organizations and farmers, within the property rights framework.[77] The difficulty however arises with regard to the criteria for registering farmers' varieties. India's Act allows four types of varieties to be registered reflecting the interests of actors: New Variety, Extant Variety, Essentially Derived Variety and Farmers' Variety. Although this multiple rights system aims to equitably distribute rights, it could pose problems of overlapping claims and result in complicated bargaining requirements for utilization of varieties.[78] A potential implication is an "anti commons tragedy" where too many parties independently posses the right to exclude giving rise to

73. *Id*., at 52

74. Douglas Sanders, "Collective Rights", *Human Rights Quarterly*, Vol. 13, No. 3 (Aug., 1991), pp. 368-386 at 368

75. Mrinalini Kochupillai, "The Indian PPV&FR Act, 2001: Historical and Implementation Perspectives", *Journal of Intellectual Property Rights*, Vol. 16, March 2011, pp 88-101 at 89

76. Shanti Chandrashekaran and Sujata Vasudev, "The Indian Plant Variety Protection Act Beneficiaries: The Indian Farmer or the Corporate Seed Company?", Journal of *Intellectual Property Rights*, Vol. 7, November 2002, pp 506-515 at 506

77. *Ibid.*

78. *Supra* note 17

underutilization of resources.[79] A possible solution in this situation may be the collective rights. And to facilitate this, community ownership rights over resources need to be recognized. The role of Biodiversity Management Committees (BMC) established under the Biological Diversity Act, 2002 is important in promoting conservation, sustainable use and documentation of land races and biological diversity at local level. At the local level BMC has the responsibility of chronicling of knowledge relating to biodiversity.[80] The main function of the BMC is to prepare the Peoples Biodiversity Register in consultation with the local people. The register is to contain comprehensive information on the availability and knowledge of local biological resources, their medicinal or any other use or any other traditional knowledge associated with them.[81] It is important to note that the existing institutional framework in the form of BMCs may be used for collective ownership of farmer's varieties. One may argue that, if these BMC's coordinate with each other, the attribution of varieties to various local communities can be done with fair amount of precision.

Section 39 of the Act deals with farmers' rights and any farmer who has bred or developed a new variety shall be entitled for registration and other protection in the like manner as a breeder of a variety. The farmers' variety shall be entitled for registration. Any farmer who is engaged in the conservation of genetic resources of landraces and wild relatives of economic plants and their improvement through selection and preservation shall be entitled to recognition and reward. He shall be deemed to be entitled to save, use, sow, re-sow, exchange, share or sell his farm produce including seed of a variety protected under this Act. The farmers' rights of the Act define the privilege of farmers and their right to protect varieties developed or conserved by them.[82]

One may identify nine rights accorded to farmers under this Act.[83]

1. **Rights to Seed:** The PPV&FR Act, 2001 aims to give farmers the right to save, use, exchange or sell seed in the same manner as entitled before the enactment of Act. However, the right to sell seed is restricted in that the farmer cannot sell seed in a packaged form labeled with the registered name.[84]

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79. *Supra* note 8
80. The Biological Diversity Act, 2002, Section 41 (1)
81. The Biological Diversity Rules 2004, Rule 22(6)
82. Pratibha Brahmi, Sanjeev Saxena, & B. S. Dhillon, "The Protection of Plant Varieties and Farmers' Rights Act of India", *CURRENT SCIENCE*, VOL. 86, NO. 3, 10 FEBRUARY 2004 at 394
83. *Supra* note 39 at 712
84. The PPV&FR Act, 2001, Sec.39(1)(iv)

2. **Right to Register Varieties:** Farmers like commercial breeders can apply for IPR over their varieties. The criterion for registration of varieties is also similar to breeders but novelty is not a requirement.[85] The ability to gain IPRs type rights over "farmer's varieties"[86] is a unique aspect of India's law.[87] The Act provides that a farmer who has bred a new variety is entitled for registration and protection as a breeder of a new variety.[88] The definition of breeder also clarifies this position by including within the fold of breeder, farmer or group of farmers.[89] Apart from the right of registration of a new variety, the farmer has the right to register a farmers' variety. This allows ownership rights to the farmers apart from privileges. Initially the Plant Variety Registry started receiving application from notified genera of 12 food crops as eligible for registration of their varieties under the Act. This opened a new era of protection of intellectual property right on varietal products used in Indian agriculture.[90] The initial post-implementation experience has indicated that the farmers in India had little interest in IPR in plant varieties as is evident from a negligible number (18) of applications filed for protection of farmers' varieties in the country in two and half year till September 30 2009. Nevertheless, by June 10, 2010 the number rose to 51.[91] Now the awareness has increased among Indian farmers and the application for registration of farmers' variety is increasing steadily. A total of 5840 application were received and recorded at the plant variety registry as on August 26, 2013, which include 1873 applications for extant variety, 1348 applications for new variety, 63 applications for essentially derived variety and 1462 application for farmers variety.[92] Despite the above, it is felt that with the amount of knowledge at the disposal of the farmers, the number is still very low.
3. **Right to Reward and Recognition:** A farmer who is engaged in conservation of genetic resources of landrace and wild relatives of

85. *Id.*, Sec. 39(1)(i)&(ii)
86. Farmers varieties is defined as "A varieties which has been traditionally cultivated and evolved by farmers in their fields; or is a wild relative or landrace of a variety about which the farmers possess common knowledge".
87. *Supra* note 39, at 712
88. *Supra* note 84, Sec.39(1)
89. *Id.*, Sec. 2(c)
90. Sudhir Kochhar, "How Effective is *Sui Generis* Plant variety Protection in India: Some Initial Feedback", *Journal of Intellectual Property Rights*, Vol. 15, 2010, pp.273-284 at 273
91. *Id.*, at 277
92. *http://www.plantauthority.gov.in/pdf/Status Crop wise Application.pdf*

economic plants and their improvement through selection and preservation shall be entitled in the prescribed manner for recognition and reward from National Gene Fund (NGF). Provided that material so selected and preserved has been used as donors of genes in varieties registrable under the Act.[93]

4. **Right to Benefit Sharing:** Benefit sharing would be facilitated through NGF to the farmers/community who can prove that they have contributed to the selection and preservation of material used in the registered variety. The authority under section 26[94] of the PPV&FR Act, invites claims of

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93. *Supra* note 84, Sec.39(1)(iii)

94. Section 26, the PPV&FR Act, 2001, Determination of Benefit Sharing by Authority: (1) On receipt of copy of the certificate of registration under sub-section (8) of section 23 or sub-section (2) of section 24, the Authority shall publish such contents of the certificate and invite claims of benefit sharing to the variety registered under such certificate in the manner as may be prescribed.

(2) On invitation of the claims under sub-section (1), any person or group of persons or firm or governmental or nongovernmental organization shall submit its claim of benefit sharing too such variety in the prescribed form within such period, and accompanies with such fees, as may be prescribed :

Provided that such claim shall only be submitted by any -

(i) Person or group of persons, if such person or every person constituting such group is a citizen of India; or

(ii) Firm or governmental or non-governmental organization, if such firm or organization is formed or established in India.

(3) On receiving a claim under sub-section (2), the Authority shall send a copy of such claim to the breeder of the variety registered under such certificate and the breeder may, on receipt of such copy, submit his opposition to such claim within such period and in such manner as may be prescribed.

(4) The Authority shall, after giving an opportunity of being heard to the parties, dispose of the claim received under sub-section (2).

(5) While disposing of the claim under sub-section (4), the

Authority shall explicitly indicate in its order the amount of the benefit sharing, if any, for which the claimant shall be entitled and shall take into consideration the following matters, namely :-

(a) The extent and nature of the use of genetic material of the claimant in the development of the variety relating to which the benefit sharing has been claimed.

(b) The commercial utility and demand in the market of the variety relating to which the benefit sharing has been claimed.

(6) The amount of benefit sharing to a variety determined under this section shall be deposited by the breeder of such variety in the manner referred to in clause (a) of sub-section 45 in the National Gene Fund.

benefit sharing and Section 41[95] of the Act recognizes the rights of communities because of their role in conserving traditional knowledge in area of farming plant varieties. It provides that any person, group of persons (irrespective of whether actively engaged in farming) or any governmental or non-governmental organization may file claim on behalf of any village or local community which is attributable to the contribution of that village or local community in the evolution of any variety for the purpose of staking a claim on behalf of such village or local community. It is important to note that the Indian law allows claims of benefit sharing only once the breeder's variety is registered. It may be argued that the settlement of benefit sharing aspect must be a precondition for registration of a variety.

5. **Right to Information and Compensation for Crop Failure:** The Act provides that the breeders must give information about expected performance of the registered variety. If the material fails to perform, the farmers may claim for compensation.[96] This provision attempts to ensure that seed companies do not make exaggerated claims about the

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95. Id., Section 41 Rights of Communities: (1) Any person or group of persons (whether actively engaged in farming or not) or any governmental or nongovernmental organization may, on behalf of any village or local community in India, file in any centre notified, with the previous approval of the Central Government, by the Authority, in the Official Gazette, any claim attributable to the contribution of the people of that village or local community, as the case may be, in the evolution or any variety for the purpose of staking a claim on behalf of such village or local community.

(2) Where any claim is made under sub-section (1), the centre notified under that sub-section may verify the claim made by such person or group of persons or such governmental or nongovernmental organization in such manner as it deems fit, and if it is satisfied that such village or local community has contributed significantly to the evolution of the variety which has been registered under this Act, it shall report its findings to the Authority.

(3) When the authority, on a report under sub-section (2) is satisfied, after such inquiry as it may deem fit, that the variety with which the report is related has been registered under the provisions of this Act, it may issue notice in the prescribed manner to the breeder of that variety and after providing opportunity to such breeder to file objection in the prescribed manner and of being heard, it may subject to any limit notified by the Central Government, by order, grant such sum of compensation to be paid to a person or group of persons or governmental or nongovernmental organization which has made claim under sub-section (1), as it may deem fit.

(4) Any compensation granted under sub-section (3) shall be deposited by the breeder of the variety in the Gene Fund.

(5) The compensation granted under sub-section (3) shall be deemed to be an arrear of land revenue and shall be recoverable by the Authority accordingly.

96. *Id*., Sec.39(2)

performance to the farmers. It enables farmers to apply to the authority for compensation in case they suffer losses due to the failure of the variety to meet the targets claimed by the companies.[97] The provision, however, does not sound practical in the context of India. Indian farmer, particularly a large number of small farmers may not be able to provide the input required/prescribed by the breeder (which will lead to the promised performance) and thus the farmer's claim for compensation may never be allowed. A more practical approach in this context is desired. It may be ensured at the time of registration that breeder must not make out of proportion claims and promises about the performance of the variety. Indian farmers are not sufficiently equipped to bring the matter to light.

6. **Right to Compensation for Undisclosed Use of Traditional Varieties:** When breeders have not disclosed the source of varieties belonging to a particular community, compensation can be granted. NGO, individual or government institution may file a claim for compensation on behalf of the local community in cases where the breeders has not disclosed traditional knowledge or resources of the community.[98]
7. **Right to Adequate Availability of Registered Material:** Breeders are required to provide adequate supply of seeds or material of the variety to the public at a reasonable price. If after three years of registration of the variety, the breeder fails to do so, any person can apply to the authority for a 'compulsory licence'[99].[100] It is not out of context to mention that the corresponding provision in the Patent Act uses the words "reasonably affordable price" rather than "reasonable price" as used in the plant variety legislation. It is the affordability of the price which makes it a useful public interest provision.
8. **Right to Free Services:** The PPV&FR Act exempts farmers from paying fees for registration of a variety, for conducting tests on varieties, for renewal of registration, for opposition and for fees on all legal proceedings under the PPV&FR Act.[101]
9. **Protection from Legal Infringement in Case of Lack of Awareness:** Taking into account that the low literacy levels in the country, the Act provides safeguards against innocent infringement by farmers. Farmers who unknowingly violate the rights of breeder shall not be punished if they can prove that they were not aware of the existence of breeders' rights.[102]

The above list of farmer's rights indicates that the initiative taken by

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97. *Supra* note 39, at 713
98. *Supra* note 84, Sec.40
99. Compulsory licence revoke the exclusive right given to the breeder and enable third parties to produce, distribute or sell the registered variety.
100. *Supra* note 84, Sec.47(1)
101. *Id.*, Sec.44
102. *Id.*, sec.42

India has definitely yielded results but the true impact of the law will unfold in years to come. The ownership right aspect has not been dealt with keeping in view the idea of community ownership. It is important to note that the Indian law has to be consistent with TRIPs Agreement. Despite the shortcomings, drafting of a full chapter on farmer's right is a big step forward and we need to propose strong arguments to prove that Indian law is consistent with the TRIPs. Out of three choices available in Article 27.3(b) for the protection of plant varieties, India has opted for an effective *sui generis* system. The *sui generis* plant varieties protection system in India has been developed in such a manner that farmers have been given different positive rights. It takes into consideration IPR on plant varieties as well as equitable prior rights on genetic resources. The TRIPs Agreement clearly mentions the need for balancing IP rights with the obligations of the rights holder as per its objective.[103] It also recognizes acts concerning protected subject matter, which were commenced prior to TRIPs Agreement or which become infringing under the term of member country's legislation conforming with TRIPs provisions, or in respect of which a significant investment was made before the date of acceptance of the WTO Agreement[104], and it creates space for providing limitation of the remedies available to the rights holder as to the continued performance of such acts. Nevertheless, it also advocates in favour of an equitable remuneration under the national law. In the light of foregoing observation, the various provisions in respect of farmers' rights in the Indian PVP system appear to be in conformity with the TRIPs Agreement.[105] Further a key requirement as per the TRIPs Agreement is that the *sui generis* system must be an effective system. In order to ascertain its effectiveness, it would be important that there is an effective implementation mechanism for the realization of rights and obligations provided for in the system. The trend of registration partly proves it and the rest will unfold in years to come.

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103. The TRIPs Agreement, 1994 Article 7 requires that "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

104. The TRIPs Agreement, 1994 Article 70.4 states that "In respect of any acts in respect of specific objects embodying protected subject matter which become infringing under the terms of legislation in conformity with this Agreement, and which were commenced, or in respect of which a significant investment was made, before the date of acceptance of the WTO Agreement by that Member, any Member may provide for a limitation of the remedies available to the right holder as to the continued performance of such acts after the date of application of this Agreement for that Member. In such cases the Member shall, however, at least provide for the payment of equitable remuneration."

105. Sudhir Kochhar, "Rights and Obligations in Context of the Indian *Sui Generis* Plant Variety Protection System", *National Capital Law Journal*, 2001, at 7

V. CONCLUSION

The journey of realization of farmers' rights has started since last three decades. But, at the international level, farmers' rights are vaguely defined. The vague definition of farmers' rights, together with a realisation that the developed world would not recognise farmers' rights as a kind of intellectual property right have led to the belief that plant breeding takes place in the sophisticated labs of west and there is nothing like ownership rights of farmers. International as well as national initiatives have been taking place but these do not seem very effective. However, India's Plant Variety and Farmers' Right Act, 2001 is significant both in the domestic and international context as several other countries are trying to enact similar legislations. It provides positive protection to the farmers in the sense that it promotes ownership rights of the farmers. Farmers in India are now able to register their variety as breeders do, and the trend is in upward direction. But, the knowledge and rights of local community has to be strengthened in order to conserve biodiversity because it is difficult to give ownership to individual farmers and in this respect the recognition of community rights over biodiversity seems to be the most workable model. The role of BMC under the Biological Diversity Act, 2002 in identifying the contributions of local communities is important. Developed and developing countries must make a concerted effort to ensure that emerging IPR regime do not restrict stakeholder access to genetic resources and at the same time must not undermine the value of gene conservers and gene contributors.

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SHORTER ARTICLE

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FEMALE FOETICIDE AND THE LAW: AN ANALYSIS IN INDIAN PERSPECTIVE

Arun Kumar Singh*

I. INTRODUCTION

GENDER BIAS has become a common problem in the society. Although the United Nations since its creation has focussed on the advancement of women but they are still discriminated and their rights have been frequently violated by the dominant section of the society. India is a country which stipulates equality regardless of gender. We claim to be the member of civilized and cultured society but it is found that even in many well educated societies the female child is hardly welcomed. The phenomenon of female foeticide has emerged as a social problem in Indian. The girl child has often been a victim to the worst forms of discrimination. Gender bias, deep-rooted prejudices, and discrimination against the girl child have led to many cases of female foeticide in the country. The development of science and technology is also facilitating it. The pre-natal diagnostic centres are mushrooming even in remote areas. They are working as 'mobile killer clinic'. These clinics perform the abortion if after ultrasonography it is found that the foetus is a female. Although, the law[1] allows abortion when continuance of the pregnancy endangers the life or physical/mental health of the woman but abuse of the law is widespread. The killing of female foetus has assumed the form of a social evil which cannot be cured merely by legislation, especially in a country like India where the governmental machinery is weak and corruption is rampant. This paper aims to discuss the problems of female foeticide accentuated by the role of science and technology in India. For this the statutory provisions as well as the judicial pronouncements are also highlighted. In last some of the suggestions are also mentioned which can be incorporated to make the result more effective.

II. FEMALE FOETICIDE AND THE ROLE OF SCIENCE AND TECHNOLOGY

Female foeticide is aborting the female baby in the mother's womb. It is

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1. See The Medical Termination of Pregnancy Act, 1971 [The MTP Act, 1971]

a practice that involves the detection of the sex of the unborn baby in the mother womb and the decision to abort it if the sex of the child is detected as a girl. The female foetus falls to prey to violence before they are born. The expectant parents abort their unborn daughters hoping for sons.[2] Son preference affects women in many countries particularly in Asia. In China and India, some women choose to terminate their pregnancies when expecting daughters but carry their pregnancies to term when expecting sons. In ancient period this was not very common but female infanticide was prevalent. With the development of technology, the sex of foetus may be determined in the mother womb and thus, female foeticide has commonly taken the place of female infanticide. If it is female then those who are needy of male child abort that child.

Sometimes the science and technology may have negative effects. It can be said that the female foeticide is the legacy and contribution of the progress made by the medical science. Before the development of medical science and technology the incidence of female foeticide was unknown. Even if some cases of termination of unwanted pregnancy were found, these were not based on discrimination of sex. After the development of technology the nature of sex can be easily determined and that is why the female foeticide has become prevalent in the society.

There are various modes to determine the status of foetus. There are three pre-natal diagnostic tests that are being used to determine the sex of a foetus, namely, amniocentesis, chronic villi biopsy (CVB) and ultrasonography. Amniocentesis is meant to be used in high-risk pregnancies, in women over 35 years. CVB is meant to diagnose inherited diseases like thalassemia, cystic fibrosis and muscular dystrophy. Ultrasonography is the most commonly used technique. It is non-invasive and can identify up to 50 per cent of abnormalities related to the central nervous system of the foetus. But sex determination has become preferred application of these tests. The amniocentesis is consisting of two words, amnio which means 'membrane' and centesis which means 'pricking'. This process Amniocentesis refers to the removal of about 15 cc of amniotic fluid from inside the amniotic sack covering the foetus, through a long needle inserted into the abdomen. Chromosomal analysis for sex determination involves checking, for the presence of a stainable dot in the nucleus of the cells. The spot which is known as the Barr body is usually present in females and absent in males. Another test, using a dye called quinacrine, looks for fluorescent bodies in the nucleus. The presence of these bodies indicates a male foetus.[3] Amniocentesis was introduced in 1975 to detect foetal abnormalities but now days it is being used to determine the sex of foetus. Another technique, the ultrasonography is

2. Fredrick Egonda Ntende, "The Role of Information Technology in Modernising the Courts", Presented to a Conference of the Southern African Judges Commission, Imperial Resort Beach Hotel, Entebbe, Uganda, 3&6 February, 2005

3. Krushna Chandra Jena, "Female Foeticide in India: A Serious Challenge for the Society", *Orissa Review*, December, 2008, at 9

also very helpful to check the baby's sex in mother womb. It has facilitated doctors to go from house to house in towns and villages to perform such action and abortion. By this method sex of foetus can be determined within 14 to 16 weeks of the pregnancy. The trans- vaginal ultrasonography is an advanced technique through which the sex of foetus can be determined within 13 to 14 weeks of pregnancy. Presence of low-cost technologies like ultrasound, have led to sex-based abortion of female foetuses, and an increasingly smaller percentage of girls born each year. Actually the intention of the development of science and technology was to detect genetic abnormalities of the foetus but it has taken reverse effect in society.

Now a day, these techniques are prevalent in remote rural areas also. Due to privatization and commercialization, the use of pre-natal diagnostic technologies is growing into a thriving business in India. The misuse of technology simply reinforces the secondary status given to girl children in such a way that they are called out even before they are born. The social pressure in India is an important factor in the increased cases of female foeticide. The Government of India realized this problem and due to which in 1994 the Parliament enacted the law known as Pre-Natal Diagnostic Techniques (Regulation & Prevention of Misuse) Act, 1994. This Act was further amended in 2003 and renamed as Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.[4] This Act was enacted to ban the government hospitals and clinics at the centre and in the states from sex determination for the purpose of abortion making use of pre-natal techniques and made it an offence which is punishable.[5] But it says nothing about private clinic and they are rampantly providing the sex determination facility even in rural areas.

III. FEMALE FOETICIDE AND LEGAL LACUNAE

The female foeticide is prohibited and punishable under the Indian Penal Code, 1860.[6] However, two laws the MTP Act, 1971 and the Pre-Natal Diagnostic Techniques (PNDT) Act, 1994, softens the strict provisions of the Indian Penal Code, 1860 regarding abortion. Abortion was legalized in India in 1971 through MTP Act, to strengthen the humanitarian values. The MTP Act was a resultant outcome of social pressure of rejecting the total prohibition of the provision of Indian Penal Code, 1860. The MTP Act, 1971 permits abortion in certain circumstances such as pregnancy can be aborted if it is a

4. This amendment came into effect from 14th February, 2003
5. Section 23 of the PNDT Act,1994
6. Section 312 of the Indian Penal Code,1860 provides, "Whoever voluntary causes a woman with child miscarry, shall , if such miscarriage be not caused in good faith for the purpose of the saving the life of the women be punished with the imprisonment of either description for a term which may extend three years or with fine, or both and if the women be quick with , shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine."

result of sexual assault, contraceptive failure, if the baby would be severely handicapped, or if the mother is incapable of bearing a healthy child.[7]

The MTP Act, 1971 was intended to eliminate the high incidence of illegal pregnancy and confer right to privacy to women which will include right to space and to limit pregnancies. However, it is often seen that the decision to abort it is taken after the detection that the unborn child is female, especially if it is the second or third female child. Similarly, the PNDT Act, 1994 was enacted for regulating the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide.[8] The Act prohibits Genetic Counselling Centres, Genetic laboratories or clinic to conduct or cause to be conducted any prenatal diagnostic technique including ultrasonography to determine the sex of a foetus.[9] The Act also prohibits individuals from associating themselves in assisting such activities.[10] Section 6(c) mentions that no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception, and the act has been made punishable. The Act provides that anyone who contravenes the provision mentioned in section6 of the Act would be liable to be prosecuted and punished with imprisonment which may extend to three years and with fine.[11] The Act also provides

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7. Section 3 of the MTP Act,1971 envisage that the termination of pregnancy by a registered medical practitioner is not an offence if pregnancy involves:
   (a) A risk of the life of the pregnant woman, or
   (b) A risk of injury to her physical or mental health, or
   (c) If the pregnancy is caused by rape or
   (d) There exists substantial risk that, if the child were it would suffer from some physical or mental abnormalities so as to seriously handicap. or
   (e) Failure of any device or method used by the married couple for the purpose of limiting the number of children. or
   (f) Risk of health of pregnant woman by reason of her actual or reasonable forcible environment
8. K.D. Gaur, *A Text Book on the Indian Penal Code*, Universal Law Publishing Co. Pvt. Limited, New Delhi, 2004, at 516
9. Section6 (a) of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 provides; On and from the commencement of this Act no Genetic Counseling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a fetus.
10. Section 6(b) of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, provides that On and from the commencement of this Act no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus.
11. Section 23(1) of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994

punishment for the persons including woman who seeks the aid of such clinics for sex determination.[12] Actually the objectives of this legislation is to prohibit the misuse of pre-natal diagnostic techniques for determination of sex of foetus, prohibition of advertisement of the techniques for detection or determination, regulation of the use of techniques only for the specific purpose of detecting only the chromosomal abnormalities, genetic metabolic disorders and congenital abnormalities. But, still this practice is rampant in the society. The Act is also having a major problem that the abnormalities of foetus is decided by doctors or radiologists, and to run their business sometimes it is found that they misuse the Act by giving wrong opinion towards female foetus.[13] Women are also allowed the right to abortion if they wish to do so in the interest of keeping the family small. This also indirectly opens the door of abortion of female foetus. Similarly, the PNDT Act only focuses on regulation.

V. JUDICIAL APPROACH

A child in the mother's womb is considered to be in existence. Section 99(1) of the Indian Succession Act, 1925 provides that "all words expressive of relationship apply to a child in the womb who is afterwards born alive". The American Supreme Court in case of *William L. Webster* v. *Reproductive Health Services*[14] upheld a Missouri statute which declared that the life of each human being begins at conception and that 'unborn children have protectable interest in life, health and well-being. The Supreme Court of India in case of *State of Tamil Nadu* v. *Ananthi Ammal*[15] said that it is well settled that when a law is challenged as offending against the guarantee enshrined in Article 14 of the Constitution of India, the first duty of the Court is to examine the purpose and the policy of the Act and then to discover whether the classification made by the law has a reasonable relation to the object which the legislature seeks to obtain. The purpose or object of the Act is to be ascertained from an examination of its title, preamble and provisions. In case of *Vinod Soni* v. *Union of India*[16] a writ petition was filed by the married couple challenging the validity of the PNDT Act on the grounds that it violated right to equality as well as right to life and personal liberty in as much as it prohibited sex selection at preconception stage. The petitioner centred only on right to liberty violated by PNDT Act, and therefore, it is unconstitutional and ultra vires. The Court dismissed the petition and held that

12. Section 23(3) of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 provides; that any person (including women) who seeks the aid of such clinic etc. for the purpose of determining sex of the child is liable to imprisonment which may extend to three years and fine.
13. Swati Mehta & Jayna Kothari, "It's A Girl ! Pre-Natal Sex Selection and the Law", *Lawyers Collective*, November, 2001.
14. (1989) 492 US 490
15. MANU/SC/0416/1995
16. 2005 Cr.L.J. 3408 (Bom.)

right to liberty as mentioned in the Article 21 of the Constitution cannot be said to be violated by the PNDT Act, 1994. The Court also stated that the meaning of right to life and personal liberty would be frustrated if the unborn child is excluded from the purview of such liberty. The Court further observed that the right to life or personal liberty cannot be expanded to such an extent as to include the personal liberty to determine the sex of a child which may come into existence. To claim a right to determine the existence of a foetus is never valid. The right to bring into existence a life in future with a choice to determine the sex of that life cannot itself be a right.[17]

In Case of *Vinay Sharma* v. *Union of India*[18], the petitioner challenged the constitutional validity of some of the provisions of PNDT Act. It was argued that there is contradiction between the PNDT Act and MTP Act because one (MTP Act) provide liberty to terminate unwanted pregnancy whereas other (PNDT Act) puts absolute restriction upon liberty to sex selection. The Court stated that two Acts addressing two different aims and objects and they could not be compared. If they are compared, the PNDT Act in matter of ban on sex selection at preconception stage or thereafter could not be called discriminatory and violative of the Constitution of India. The Court said that foeticide of girl child is a sin; such tendency offended dignity of women. It undermines their importance. It violates woman's right to life. The architects of the MTP Act, 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.

The Bombay High Court in case of *Dr. Nikhil D. Dattar* v. *Union of India*[19], commonly known as *Niketa Mehta* case, held that the woman has no right to terminate the pregnancy even if the child was suffering from heart disease. The court refused the permission to abort a six weeks foetus with serious heart defect. The Court also stated that even if the couple had approached before 20 weeks. It was not possible to allow abortion as the medical opinion was contrary. The petitioner had prayed for amendment in the Medical Termination of Pregnancy Act, 1971 so that the pregnancy could be terminated even after 20 weeks if the opinion of the doctor the child in mother womb was suffering from serious disease and delivery would cause serious problem. But, the Division bench said that they could not alter the provision of legislation.

V. CONCLUDING OBSERVATIONS

Gender bias and deep rooted prejudice and discrimination against girl child and preference for male child have led to large scale of female foeticide. The gender ratios in India are terribly skewed about 940 girls per 1,000 boys.

17. *Id.*, at 3410
18. AIR 2008 Bom. 29
19. Writ Petition (L) No. 1816 of 2008

The situation is further worsened by lack of awareness of women's rights and by the indifferent attitude of governments and medical professionals. The attitude that the girls are burdensome and sons are as a type of insurance is required to be changed. In India, the available legislation for prevention of sex determination needs strict implementation, alongside the launching of programmes aimed at altering attitudes, including those prevalent in the medical profession. There is the legally binding Code of Medical Ethics, constituted by the Indian Parliament in the Medical Council Act, 1956 that doctors are legally bound to report medical malpractices but many doctors ignore. It is also the mandate of the PNDT Act 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 it is a daunting task for the government to detect violations of the PNDT Act, since it is a crime of collusion and by consensus. Science and technology is now a tool essential for modernisation of legal system. But it is only a tool, and if not handled with skill and commitment, it may instead frustrate the efforts of modernisation.

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BOOK REVIEW

LEGAL REGULATION OF HAZARDOUS SUBSTANCES (2009) by Furqan Ahmad Foreword by Dr. Upendra Baxi, Daya Publishing House, Delhi-110035, Pp. I-XLII & 403, Price Rs. 1300

While section 2 (b) of Environment (Protection) Act, 1986 defines an 'environmental pollutant' as any solid or gaseous substance injurious or tending to be so, to environment, section 2 (e) defines 'hazardous substance' as any substance or preparation which by its reason of its chemical or physio-chemical properties is liable to cause harm to human beings, other living creatures, plants, micro-organisms, property or the environment. Both the sections indicate that 'pollutant' and 'hazardous substance' are two different concepts for the environmental law. It is not necessary that all pollutants are necessarily 'hazardous' substances' but all hazardous substances are pollutants. The key idea underlying and also to some extent explicit, in both these definition is probability of harm or injury to the environment as defined under the Act.[1]

A substance, a process or a preparation can be an environmental pollutant or hazardous substance. The reference to 'chemical or physio-chemical properties' for 'hazardous substance' creates potential for legal and scientific (expert evidence) quibbling in judicial fora[2]. In view of the above distinct approach, it is suggested that in handling of the above substances, a different approach is necessary.[3]

The term 'hazardous substance' has been defined in section 2(d) of the Public Liability Insurance Act, 1991, to mean "any substance or preparation which is defined as hazardous substance under the Environmental Protection Act and exceeding such quantity as may be specified by notification, by Central Government". The definition under the Environment Protection Act, 1986 will not apply to Public Liability Insurance Act, 1991, unless the

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1. Upendra Baxi, Environment Protection Act: An Agenda for Implementation,(1987), at 6
2. Ibid.
3. Vinod Shankar Mishra, Environmental Disaster and the Law,(1994), at 101

substance in question exceeds in such quantity as specified by the Central Government. When a substance is considered hazardous for the purpose of one legislation dealing with environment, it does not appeal to reason why that substance should not be treated hazardous for another legislation on the same subject, more particularly since the Public Liability Insurance Act, 1991 is a beneficial legislation to protect the members of general public who are killed or injured because of handling of hazardous substance by another who is exploiting it for personal benefit.[4]

The book under review is an earnest effort to assimilate the law governing Hazardous Substances. The introductory Chapter broadly outlines the importance of environment and the need for its protection. The measures adopted at international level have been analyzed. An emphasis on India's concern towards the protection of environment has been considered. The Control of Hazardous Substance at international level describes the evolution of law and management of hazardous substances and processes. It proceeds through the various conventions, declarations, resolutions and the programme of action taken by United Nations. The legal control of hazardous substance at national level attempts to bring together legal provisions relating to hazardous substances and processes in India. The rules made under the Environmental (Protection) Act, 1986 constitute the major regulatory regime relating to hazardous substances. These rules, along with their guidelines, have been appropriately dealt with. The Model Rules pertaining to hazardous substances prepared by the Ministry of Labour have also been discussed at length.[5] The legal aspects of liability including compensation in cases of accidents involving Hazardous Substances and process and issues of criminal liability of corporations and various managing functionaries have been discussed appropriately.

The enforcement mechanisms, along with powers and functions of various authorities, have been narrated in the book under the title 'Administrative Machinery'. Adjudicatory Mechanism is confined to a discussion of different fora[6] for delivery of environmental justice. The work ends with conclusions

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4. S.N. Singh, "Public Liability Insurance Act, 1991: Scope for Making Provisions Effective", Corporate Law Advisor, 5, May 1991, at 234
5. Furqan Ahmand, Legal Regulation of Hazardous Substances, Daya Publishing House, Delhi, 2009, pp.165-187
6. It may be noted that National Environment Tribunal Act, 1995 and National Environment Appellate Authority Act, 1997 have been replaced by National Green Tribunal Act, 2010. See generally, Ritwick Dutta, "EIA-In A Precarious State: A System in Need of Repair", The Hindu Survey of Environment, 139-142, 2009; Vinod Shankar Mishra, "National Green Tribunal: Alternative Environment Dispute Resolution Mechanism", 52 JILI, 522-552, 2010 (Special Issue on Climate Change & Environmental Law).

and suggestions to make the law more effective in preventing and controlling pollution caused by hazardous substances and processes.[7]

The book highlights the multifarious practical issues of Hazardous Substances. The theoretical basis as mandated by the different environmental legislations is efficiently backed up with the practical situations as envisaged in different judicial decisions and other conventions or treaties. The author could touch all relevant areas of Hazardous Substances, which makes the book a comprehensive package of knowledge on the subject. The book gives a comprehensive outlook of the remedies against pollution caused by hazardous substances and processes.

The author is to be duly appreciated for his endeavour of intermingling Hazardous Substances and related aspects in the international as well as Indian standards. This variety of analysis is facilitating the convergence of different facets of Hazardous Substances and protection of environment under the same canopy. They are to be encouraged at the wake of the modern era where demarcating lines of national and international jurisdiction are diminishing due to the establishment of new international tribunals and organizations. The usefulness of this work stands enhanced by a scrupulous recourse to comparative and global standpoints[8].

The Foreword to the book by Dr. Upendra Baxi[9], gives a decision in favour of the present work when he says, "the learned author brings together a wealth of information, analysis, and critical perspectives concerning the Indian regulatory effort at legal regulation of hazardous substances".[10]

One is tempted to quote Prof. Baxi for emphasizing the relevance of the present work. Prof. Baxi says 'the globalizing state and law forms as well as public intellectuals, now articulate some passionate contestations over the issue of collective political responsibility to negotiate the runaway GNR (genetics, nano-technology, and robotics) technologies. Yet, this work invites attention to readily tasks that we all need to perform, especially given the political fantasises about India emerging as a global economic player and as a future leader of the global economy.[11]

One may find that hardly any law is left out which has direct or indirect relation with environment or its components. However, it may be pointed out that the author has not incorporated some recent amendments related to

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7. Supra note 5, at xx
8. Ibid.
9. Former Vice-Chancellor, Delhi University and Professor of Law, University of Warwick, United Kingdom
10. Supra note 5, at x
11. Id., at xiv

prevention and control of Hazardous substances and processes.[12]

The appendix of the book comprising thirty one pages shows that the author has incorporated other relevant data for facilitating further research work. The book offers a good understanding of the fundamentals of Hazardous Substances, related issues, and will be an amicable to law students as well as professionals. It will also provide valuable guidance to those who look forward to having a thorough idea about hazardous substances and processes. It is replete with valuable ideas presented in simple and lucid language. The references provided reveal that the author has carried out an extensive research. The book is strongly recommended for all those who are interested in going deep into the topic.

Vinod Shankar Mishra*

12. See for example, Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008; Hazardous Wastes (Management, Handling and Transboundary Movement) Second Amendment Rules, 2009 (Note: The principal rules were published in the Gazette of India, Extraordinary vide notification number S.O. 2265 (E), dated the 24th September, 2008 and subsequently amended vide number S.O. 1799(E), dated the 21th July, 2009). See also The E-Waste (Management and Handling) Rules, 2011; The Plastic Waste (Management and Handling) Rules, 2011 (They shall come into effect from 1st May, 2012).

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BOOK REVIEW

INTELLECTUAL PROPERTY RIGHTS (2008) by Dr. J.K. Das, Kamal Law House Kolkata, Pp. 1-63, & 1071, Price: Rs. 700

The term 'intellectual property' has been used for almost one hundred and fifty years to refer to the general area of law that encompasses copyright, patents, designs and trade marks, as well as a host of related rights.[1] IP laws regulate creation, use and exploitation of intellectual creations which are *sine qua non* for the economic and technological development of a nation and the prosperity achieved by any nation is the result of exploitation of their intellectual property.[2] In this era of globalization, especially after the establishment of WTO, intellectual property laws have assumed great importance.

India is a fast developing economy and there is growing concern as to how the stronger IP protection, demanded by the TRIPs Agreement, is going to affect such an economy. After India became party to the TRIPs agreement all the existing intellectual property laws in India were subjected to considerable changes. New laws were also introduced to satisfy its obligations under the TRIPs. There is considerable increase in the litigation in India in the last decade. This made learning of intellectual property laws a difficult and complex task.[3] In this background it is heartening to learn that the author has taken pain to come out with a book containing all the aspects of IPR and contributes his bit towards the cause of learning of the subject.

The book under review cover almost all the aspects of intellectual property rights namely copyright, patents, trade marks, designs, geographical indications and plant varieties and farmer's rights. Each area has been discussed in separate part. The book contains seven parts divided into twenty

1. Bently Lionel and Sherman Brad, *Intellectual Property Law*, Oxford University Press, 2003, at 1
2. Ahuja V.K., *Law Relating to Intellectual Property Rights*, LexisNexis Butterworths Wadhwa, 2007, at vii
3. Gopalakrishnan N.S. & Agitha T.G., *Principles of Intellectual Property*, Eastern Book Company, 2009, at11

five chapters apart from 09 appendices and subject index which make it a complete package on the subject. Chapter 1 of part I introduces intellectual property rights which have been detailed in the remaining parts. It explains the significance, nature, and kinds of IP and related rights and also discusses the international character of intellectual property. It also explains one of the most important aspects of intellectual property *i.e.* its commercial exploitation. Chapter 2 of part I explains the origin and development of IPRs at national and international levels. Chapter 3 presents the jurisprudential justifications of IPR protection and chapter 4 presents the details on enforcement of IPRs under the common law and TRIPs framework. Separate part on enforcement of IPR in India makes Part I a useful reading.

Part II is devoted to Copyright, it contains 4 chapters. It explains copyright starting from foundations of copyright protection, origin and development of copyright at national and international levels, special characteristics of copyright, philosophical justifications for copyrights to authors and idea-expression dichotomy. The detailed discussion of foundational concepts of copyright which includes the concept of originality and its comparative study is beneficial for readers. This chapter also deals with the protection of computer programme, database and internet under copyright regime which are the outcome of technological development and *sine qua non* for the development of any nation. The practical implications of copyright regime in the case of indigenous peoples have also been dealt as a way of protecting the unrecorded cultural expression of many developing countries, which is part of their folklore. Above two aspects in this chapter make it very useful for teacher, researcher, and student alike. Chapter 6 is about meaning, subject matter and scope of copyright. It discusses the rights, ownership, assignment, licensing, term and registration of copyright and international copyright. Chapter 7 brings to fore the discussion on infringement, defenses and remedies etc. the last chapter in this part is on copyright societies, office and board.

Part III is devoted to Patents. Chapter 8 starts with foundation of patent protection, and the meaning and significance of patent protection. It deals with origin and development of the law at international as well as at national level and theories of patent protection and essential requirements for patentability. Chapter 10 and 11 are on patent practice including topics on patent prosecution, patent specifications, patent of addition, revocation of patent, patent agent, grant of patent and rights conferred on patentees. It also includes compulsory licensing and exclusive marketing rights. Chapter 12 discusses infringement, remedies and defenses etc.

Part IV containing 4 chapters discusses at length the law of trade marks. Like other parts of the book this section also starts with foundations of trade mark protection and discusses the origin, development and definitions in the beginning. The discussion on domain names and protection of trade marks

make it a useful chapter. Chapter 14 is about registration and chapter 15 discusses the use of trade marks and rectification and correction of register etc. The explanation of collective mark and certification marks add value to the chapter. Chapter 16 is on infringement, defenses and remedies. The detailed discussion on passing off shall be of great use to the readers.

Parts V is devoted to Designs. Chapter 17 starts with foundation of design protection and deals with origin, development and significance. Chapter 18 talks about registration of design and copyright in registered designs, and chapter 19 deals with infringement, remedies and defenses. Part VI is devoted to geographical indications and starts with the foundation of protection of geographical indications. Chapter 20 includes definition, concept, origin and development of protection. This chapter also distinguishes geographical indications from trade marks which may be useful for readers. Chapter 21 describes registration process and rectification and correction of the register and chapter 22 talks about infringement and its remedies.

Part VII presents an overview on Plant Varieties and Farmer's Rights. Chapter 23 starts with foundation of plant variety and farmers' rights and chapter 24 talks about plant varieties authority, registration, effects of registration and tribunal. Chapter 25 describes rights, infringement, offences and penalties. Last three parts of the book deal with the less known areas of intellectual property. Author has followed the same scheme of chapterisation as done in the starting parts of the book.

Appendices provided in the book make it a ready reference for many purposes. There are 9 appendices which contain all the relevant documents having bearing on the subject of intellectual property laws and practice. It contains TRIPs Agreement, related provisions of the Paris Convention, the Berne Convention, Copyright Act 1957, Patent Act 1970, Trade Marks Act 1999, Designs Act 2000, Geographical Indications of Goods (Registration and Protection) Act 1999 and Protection of Plant Varieties and Farmer's Rights Act, 2001.

Subject Index at the end of the book is useful. Apart from the above, the illustrations, examples and case law discussion are useful contributions of the author. After having said that, it is felt that certain problem areas need to be identified for the benefit of the author to work on for further improvement of the book. Many topics in copyright law need to be updated keeping in view the Copyright (Amendment) Act, 2012. The discussion on patent practice part needs to be a bit more detailed as the book summarily addresses many aspects. Tables and flow charts do make it easy to understand the patent practice part. Keeping in view the fact that the subject of IPR is new to many readers, a glossary at the end of the book could have been useful. One also gets the feeling that in bringing such huge content in one book one may

not do justice with all the parts.

Despite the minor shortcomings identified above the present book on Intellectual Property Rights is a good contribution in the area of IP laws. It is equally useful for professionals and students. Finally, considering the quality of subject matter, paper quality and binding etc. one comes to the conclusion that the present book has been appropriately valued and priced but at the same time it is felt that soft bound copies may be published at a lower price for the benefit of students and researchers.

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BOOK REVIEW

***INFORMATION TECHNOLOGY LAW AND PRACTICE*, Third Edition (2011) by Vakul Sharma, Universal Law Publishing Co. Pvt. Ltd., New Delhi, Price Rs. 395.00**

In In the dawn of the third new millennium the major coups of the techno-scientific culture have invented a new pad for digital technology and new electronic communication systems which have touched socio-economic organizations and political governance of human beings. The unprecedented growth of information technology revolution has excelled tremendous opportunities and advantages in the fields of social, economic, political and administration of justice. Furthermore, such technological marvels being symbol of social revolution do not differentiate between caste, creed, race or gender and provide equal opportunities to all irrespective of the status of the individuals. Therefore, 21st century drafts the history of digital renaissance combining the excellence of age of discovery in modern age and of Gutenberg's printing press during the mediaeval period. It is the unique formula of almighty nature that each new invention and innovation has been characterized by constructive and destructive phenomena. Considering the destructive perspective of the information technology, it offers some new and highly sophisticated opportunities for law breakers and the potential cyber criminals to commit traditional types crimes in a non-traditional ways and also creates new age crimes- stalking, hacking, cyber obscenity, cyber prostitution, cyber murder, cyber rape, cyber theft, cyber terrorism, violation of privacy etc.

To maintain correct balance between the technological advancement and integrity of electronic data which are the raw materials of cyber world and to prevent the abuse of computer, computer system and computer resource, the Indian Parliament capturing the sprit of United Nations Commission on International Trade Law enacted the Information Technology Act, 2000 and (Amendment) Act, 2008. Furthermore, the introduction of the Information Technology Law also amends the Indian Penal Code, 1860, the Indian Evidence Act, 1872, the Banker's Book Evidence Act, 1891 and the Reserve Bank of India Act, 1934.

The book *under review* is more than a mere section wise commentary of the Information Technology Act, 2000 comprising numerous illustrations, concept notes and examples attempting to interpret the true legislative intent behind the Act by referring to the Supreme Court judgments for better understanding of its various provisions. It is evident that for the first time it contains the critical appraisal of powers and functions of the Cyber Regulatory Appellate Tribunal, Controller of Certifying Authorities and Police Officers under the Information Technology Act which are commonly said as Cyber Trial.

The Book is divided into two parts and forty chapters comprising five hundred sixty six pages. Part one is a commentary on the each and every section of the Act with all relevant notifications issued from time to time by the Ministry of Communications and Information Technology Department, Government of India. Beginning with introduction and interpretation in Chapters I and II, it proceeds with electronic commerce, distinction between Digital Signature and Electronic Signature with suitable illustrations in Chapter III. Having explained the importance of e-governance and e-contract in the era of liberalization, privatization and globalization in the place of paper based governance, Chapters IV and V discus the conceptual frame work of functional equivalence theory of administration carried out by silicion chips. To assess the probative value of electronic records and electronic signature in the administration of justice, Chapter VI delineates the adoption of security procedure and the information technology law as adopted by the appropriate Government. Internet is an open system of communication where information is the raw materials. Therefore, problems relating to integrity, confidentiality and authenticity of information stored in the computer, computer system and computer resource need to be addressed, Chapters VII, VIII and IX deal with regulatory aspect of Certifying Authorities and duties of the subscriber of the Electronic Signature. Significantly, Chapters X and XI apart from dealing with Cyber Contravention, also provides the details on procedural approach of adjudication. The most valuable aspect of this book is Chapters XII to XXIII which have dealt with various computer related cyber crime and computer focused crime, such as tampering with computer source documents, grounds of cyber obscenity, combating child obscenity, acts and omissions against the controller of certifying authorities, cyber terrorism, breach of privacy and offence against e-signatures. The real novelty incorporated in this book is the discussion on extraterritorial jurisdiction in Chapter XXIV, the power of police officers in Chapters XXV and XXVI to start an investigation in case of cyber crime committed by the potential cyber criminals and also Chapter XXVII which explains the role of intermediaries as information carrier or information publisher. It outlines the liability of the intermediaries.

The fallouts of information communication revolution is not a national problem and therefore, it needs international diagnosis to resolve the international menace of cyber contraventions and cyber crimes. Gauging the broad and universalistic character of cyber law the second part entitled 'Global issue' deals with the issues of jurisdiction, defamation, freedom of expression, electronic taxation and intellectual property rights referring international law particularly Territorial, Nationality, Protective, Passive Personality, Effective Doctrine, Universality Principle, Cyber Crime Convention at Budapest on 23rd November 2001, Mutual Legal Assistance Treaty, Brussels and Rome Conventions and Organization for Economic Co-operation and Development including European's directives. Furthermore, the book discusses many celebrated cases like Pinochet, Yahoo, Napster, DeCSS, and Sex.com etc. to bring out the nuances of emerging legal principles in information technology.

By and large the book is highly informative, thought provoking and full of new insights. Therefore, it is needless to say that it is a useful book for the Legislatures, Judges, Adjudicating Officers, Lawyers, E-commercial portals, Information Technology Professionals, Software developers, Certifying Authorities, Auditors, Network Service Providers, Call Centers, Bankers, Stock investors, Online Publishers, Journalists, Satellite/TV channels, Multimedia houses, Entertainment companies, IPR Cells of Chambers, Cable Operators, Law enforcement and security Agencies, Government bodies, Cyber consultant, Management and Information Technology students.

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