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# Innovations and Refinements for Enhancing Humanism, Vibrancy and Coherence of the Legal System: A Note on Justice V.R. Krishna Iyer's Judgments in Constitutional Law

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## Introduction

Innovations and refinements in the sphere of constitutional law are largely products of judicial review and interpretation, apart from those triggered by constitutional amendments. They usher in social transformation in response to the social aspirations, economic needs and political challenges. They bring to the forefront the moral values underlying the constitutional principles and augment the competence for humanism. As Joseph Schumpeter views, "In order to be able to innovate, there is a need to ensure that the innovation process is informed about the social needs, circumstances, and cultural factors that could affect the effectiveness of the innovation in the field." [1]The judgments rendered by the legendary figure of the Indian Supreme Court, Honourable Justice V R Krishna Iyer in the field of constitutional law have made a big and indelible mark because of their innovative quality. They have evolved new concepts and mechanisms, brought coherence in their working and relations, and made the legal system to act with great vibrancy and humanism. In doing so, the learned judge has acted with great social insight, juristic creativity and political vision.

Starting with constitutionalism and journeying through various key terrains of constitution's precepts and practices, and touching upon fringe areas referred in schedules, his judgments have illumined basic thoughts on the subjects with deeper philosophic reflections. His compassion for the marginalised, concern for rule of law principles, readiness to help the victims with thoughtful remedies, and vision of welfare of all have supported the driving force of innovative approaches. To name a few of his achievements, due to his thoughtful judgments the concept of 'State' under Article 12 got expanded by his pioneer view in *Som Prakash Rekhi;*[2] equalitarian constitutionalism in *N M Thomas*[3] provided independent base for substantive equality clauses; prison reform became a constitutional imperative because of procedural fairness revolution in post *Maneka* and post-*Sunil Batra* period;[4] epistolary jurisdiction became a great innovation in public law remedy; public interests litigation got a proper shape; method of identification of basic

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1 Joseph Schumpeter, *Capitalism, Socialism and Democracy*, (Martino Fine Books 2010); Eric von Hippel, *Democratizing Innovation* (MIT Press, 2006)44 cited in *Indian Medical Association* v. *Union of India*, AIR 2011 SC 2365 at 2434.

2 *Som Prakash Rekhi* v. *Union of India,* AIR 1981 SC 212

3 *State of Kerala* v. *N.M. Thomas*, AIR 1976 SC 490

4 *Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597; *Sunil Batra* v. *Delhi Administration*, AIR 1978 SC 1675; AIR 1980 SC 1579

structure got a new approach; property jurisprudence became socialistic; and welfare constitutionalism became a strong strategy through new perspective about the Directive Principles of State Policy; principles of cabinet form of government got streamlined. This paper attempts to comprehend and analyse the efforts put by the great genius in some of the crucial areas of constitutional jurisprudence. It looks to the methodology used in the reasoning process; the sociological jurisprudence he deciphered or steered through; the moral vision of the Constitution which he had perceived or clarified; and the impact of his judgments upon contemporary and subsequent Benches of the Supreme Court. While the focus is on judgments, we have to bear in mind the scope for change in the precedent by new idea due to changed perception of judiciary, which is speaking about the social dynamism in judicial process.[5]

**Personal Inclination for Social Transformation Agenda**

About the very role of law Justice Krishna Iyer had a clear sociological perception: "Law is meant to serve the living and does not beat its abstract wings in the *jural* void. Its functional fulfilment as social engineering depends on its sensitized response to situation, subject-matter and the complex of realities which require ordered control. A holistic understanding is simple justice to the meaning of all legislations. Fragmentary grasp of rules can misfire or even backfire as in this case."[6] His political career as Member of Legislative Assembly and minister for Law and Home Affairs had filled in him the experience of administration and legislative process, and insight about free legal aid to the poor. When he entered into the Bench as a permanent judge of High Court in 1968, he observed, "The forensic institutions and the legal system itself need a new orientation, a modern grammar and vocabulary and simpler techniques of social engineering, if they are not to be accused of exotic, expensive, obsolescent and tardy features. I shall endeavour, in a humble measure, to be judicial activist...." and committed himself to the cause of equal rights of every individual under the rule of Law.[7] His elevation to the Supreme Court via Law Commission membership paved the way for unfolding his capability for departure from archaic principles and judicial orthodoxy. *George Gadbois*[8] describes his tenure as the Supreme Court judge:

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5 Justice V R Krishna Iyer observed, "A ruling of a superior court is binding law. It is not of scriptural sanctity but is of ratio wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and dehors the milieu it is not possible to impart eternal vernal value to the decision, exalting the doctrine of precedents into a prison-house of bigotry, regardless of varying circumstances and myriad developments. Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting those matters which may lurk in the record." The *Mumbai KamgarSabha, Bombay* v. *M/s. AbdulbhaiFaizullabhai*, AIR 1976 SC 1455

6 *Chairman, Board of Mining Examination* v. *Ramjee*, AIR 1977 SC 965

7 See George H GadboiseJr, infra n 8 p 212; also see P B Sahasranaman, *Speaking for the Bench*, (New Delhi: Oxford University Press, 2012)

8 George H GadboisJr, *Judges of the Supreme Court of India 1950-1989,* (New Delhi: Oxford University Press, 2011) p.213.

> "He came with an agenda which seemed to violate the norms of judicial detachment. He was unabashedly pro-poor, pro-downtrodden, and pro-weaker sections. He was the SCI's first judge to depart emphatically from the hoary inherited common law and seek to adopt it to Indian conditions. He pushed the boundaries of legitimate debate to the left and moved the centre in this process."

## Articulating and Strengthening Constitutionalism

On constitutionalism's role in building egalitarian society, Justice Krishna Iyer had observed in *T N Khosa*, "The dilemma of democracy is as to how to avoid validating the abolition of the difference between the good and the bad in the name of equality and putting to sleep the constitutional command for expanding the areas of equal treatment for the weaker ones with the dope of 'special qualifications' measured by expensive and exotic degrees. These are perhaps meta-judicial matters left to the other branches of Government, but the Court must hold the Executive within the leading strings of egalitarian constitutionalism and correct, by judicial review, episodes or subtle and shady classification grossly violative of equal justice. That is the heart of the matter. That is the note that rings through the first three fundamental rights the people have given to themselves."[9] In the context of regional biases that exclude educational opportunities, he questions its propriety and national consensus, and observes, "If higher education bids farewell to national vision and equal opportunity - the two fundamental criticisms levelled before us in these cases - what hope is there for constitutionalism save surrender to provincialism and lobby power, leaving the fortunes of students of advanced learning to litigative astrology annually?"[10]

Constitutionalism for the poor prisoner had meant opportunity to have liberal bail: "Unremitting insulation in the harsh and hardened company of prisoners leads to many unmentionable vices that humanizing interludes of parole are part of the compassionate constitutionalism of our system."[11] In extending access to justice by exempting the poor from court fee, he uses constitutionalist argument keeping in mind that the provision in Part IV needs such support: "We should expand the jurisprudence of Access to Justice as an integral part of Social Justice and examine the constitutionalism of court-fee levy as a facet of human rights highlighted in our Nation's Constitution. If the State itself should travesty this basic principle, in the teeth of Articles 14 and 39A, where an indigent widow is involved, a second look at its policy is overdue."[12] His acumen in using equality doctrine to structure the discretion of pardoning power uses the medium of constitutionalism as follows: "Article 14 is an expression of the egalitarian spirit of the Constitution and is a clear pointer

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9 *State of J & K* v. *TrilokinathKhosa*, AIR 1974 SC 1

10 *Charles A Skaria* v. *Dr C Mathew*, AIR 1980 SC 1230

11 *Babu Singh* v. *State of UP,* AIR 1978 SC 527; he refers to "humanizing interludes of parole are part of the compassionate constitutionalism of our system" in support of parole in *GudkantiNarasimhulu* v. *Public Prosecutor,* AP, AIR 1978 SC 429

12 *State of Haryana* v. *Darshana Devi,* AIR 1979 SC 855

that arbitrariness is anathema under our system. It necessarily follows that the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism."[13] Reading constitutionalism into the prison law in *Sunil Batra* had a salutary effect.[14]

The very nature of Indian constitution being eclectic, constitutionalism is destined to enhance the efficacy of its each component. He observed in *Samsher Singh*, "We have, in the President and Governor, a replica of constitutional monarch and a Cabinet answerable to Parliament, substantially embodying the conventions of the British Constitution - not a turn-key project imported from Britain, but an edifice made in India with the knowhow of British Constitutionalism."[15] After a thorough discussion by referring to Constituent Assembly Debates, earlier precedents and literature on President's constitutional position, he identifies the area of independent discretion and observes, "The President in India is not at all a glorified cipher. He represents the majesty of the state, is at the apex, though only symbolically, and has rapport with the people and parties, being above politics. His vigilant presence makes for good government if only he uses, what *Bagehot* described as, the right to be consulted, to warn and encourage'." His view that the President can provide protection against the Cabinet's dictatorship adds to the strength of instrumentality of constitutionalism. It is from constitutionalism that Justice Iyer infers the limitation on power of pardoning by holding that the rule non-arbitrariness rules even pardoning power.[16] In both the judgments, the extent of academic research and social science discourse for building a new proposition is of high order.

Constitutionalism had a role of purifying electoral process, according to Justice Krishna Iyer. Holding that free and fair elections are cornerstone of parliamentary culture, in *Vatal Nagaraj* he observed, "The manu mission of the electoral process from money power is the *dharma* of our Republic."[17] The Court reversed the High Court's order of declaring the candidate who lost in the election as victorious only on account of corrupt practice by the elected candidate.

The learned judge expresses the transformative spirit, competence and obligation of constitutionalism in *Dattatreya Govind Mahajan*[18] as follows:

> Our Constitution is a tryst with destiny, preambled with luscent solemnity in words 'Justice - social, economic and political.' The three great branches of Government, as creatures of the Constitution, must remember this promise in their functional role and forget it at their peril, for to do so will be a betrayal of those high values and goals which this nation set for itself in its

13 *Maru Ram v. Union of India,* AIR 1980 SC 2147
14 *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579 at 1596
15 *Samsher Singh , Appellant v. State of Punjab* AIR 1974 SC 2192
16 *Maru ram v. Union of India,* AIR 1980 SC 2147 at 2170
17 *VatalNagaraj v. DayanandSagar*, AIR 1975 SC 349
18 *Dattatraya Govind Mahajan v. The State of Maharashtra,* AIR 1977 SC 915 at 934 paragraph 22

> objectives Resolution and whose elaborate summation is in Part IV of th paramount parchment. The history of our country's struggle for independency was the story of a battle between the force of socio-economic exploitation and the masses of deprived people of varying degrees and the Constitution sets the new sights of the nation. To miss the burning economics and imperative politics of the Fundamental Law and to foucs fatuously on legal logomachy and pettifogging casuistry is to play truant with its messiahnism and to defeat the sweep of its humanism. Once we grasp the dharma of the Constitution, the new orientation for the karma of adjudication becomes clear. Our founding fathers, aware of our social realities and the inner workings of history and human relations, forged our fighting faith, integrating justice in its social, economic and political aspects. While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown Social Justice.

## Methods of Identifying the Basic Structure

By the time Justice Krishna Iyer had assumed charge as a Supreme Court judge *Kesavananda* case[19] had decided by 7:6 majority that the power of amendment of the Constitution cannot be so exercised as to destroy the basic structure of the Constitution. It is a landmark judgment that heralded judicial activism and had great political importance. But the method of identifying basic structure of the Constitution was left to be decided by future Benches on case to case basis. When there was review of *Kesavananda* during emergency by a Full Bench of the Supreme Court, some of the remarks expressed by Justice Iyer along with other factors triggered the closure of that process. The *Indira Gandhi*[20] and *Minerva Mill*[21] cases had established the Basic structure theory on sound pedestal. But the judgments had no coherent approach of holding particular feature of the Constitution as basic feature. In *Waman Rao* case,[22] the Supreme Court Bench consisting of Justice Krishna Iyer gave a clue by drawing analogy from the professional practice of amending the pleadings, and observed,

> you cannot by an amendment transform the original into the opposite of what it is. For that purpose, a comparison is undertaken to match the amendment with the original one. Such a comparison can yield fruitful results even in the rarefied sphere of constitutional law. What were the basic postulates of the Indian Constitution when it was enacted? And does the 1st Amendment do violence to those postulates? Can the Constitution as originally conceived and the amendment introduced by the 1st Amendment Act not endure in harmony or are they so incongruous that to seek to harmonise them will be like trying to fit a square peg into a round aperture? Is the concept underlying Section 4 of the 1st Amendment an alien in the house of democracy? - its invader and destroyer? Does it damage or destroy the republican framework of the Constitution as originally devised and designed?

This approach of comparing the pre-amendment position with the post-amendment position had the potentiality of bringing coherence and providing

19 *Kesavananda v. State of Kerala,* AIR 1973 SC 1461
20 *Indira Nehru Gandhi v. Shri Raj Narain,* AIR 1976 SC 2299
21 *Minerva Mills Ltd. v. Union of India,* AIR 1980SC 1789
22 *WamanRao v. Union of India,* AIR 1981 SC 271 at 280

proper guidance. The width and identity test adopted in later cases had gathered support from this approach. But perversion took place when it was equated in *M Nagaraj* case[23] with the golden triangle test, which is basically relating to the relation amidst equality, freedom, and life/liberty laid down in *Maneka Gandhi* case.[24] Compared to these subsequent developments, what was initiated in Waman Rao appears to be coherent and logical.

**Incorporation of International Human Rights Instruments**

In view of highly inspiring and guiding standards of human rights guaranteed in international human rights instruments, the judicial approach concerning their incorporation into the domestic system matters a lot. The traditional common law approach of waiting for specific adoption into the legal system has a limited impact. An inclination for change from this approach was expressed by Justice Krishna Iyer in *Jolly George Varghese* case.[25] The case involved detention under the Civil Procedure Code for deliberate non-compliance by the judgment debtor with performance of contractual obligation under the decree. It was argued that Article 21 shall be read in the light of Article 11 of the International Covenant on Civil and Political Rights, which reads: "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation." The learned judge proceeded with a reasoning that the march of civilization has been a story of progressive subordination of property rights to personal freedom; and a by-product of this subordination finds noble expression in the Article 11 of ICCPR. He harmonised the positions between section 51 of CPC and the Article 11 by observing that Section 51 also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he incurs the liability to imprisonment under Section 51 of the Code, but this does not violate the mandate of Article 11. After referring to *Maneka*, *Sunil Batra* and other cases that emphasised on right to human dignity under Article 21, in a convincing way he observed, "It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of *Daridra Narayan* (land of poverty) is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Art. 21 unless there is uroof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Art. 11 of the Covenant. But this is precisely the interpretation we have put on the proviso to S. 51, C.P.C. and the lethal blow of Art. 21 cannot strike down the provision, as now interpreted."

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23 *M. Nagaraj* v. *Union of India,* AIR 2007 SC 71; I. R. *Coelho v. State of T.N.,* AIR 2007 SC 861

24 *Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597

25 *Jolly George Varghese* v. *The Bank of Cochin*, AIR 1980 SC 470

The learned judge diluted the traditional approach of specific adoption in areas of human rights, and paved a new path which was formally taken up in the Bangalore Principles. Now the rule is that unless the international human right principle is clearly inconsistent with the domestic law, the courts in the municipal legal system shall give effect to international human rights. This approach has salutary effect in cases like *Vishaka, Neelabati Behera, Chandrima Das* and other cases.[26] The pioneering view of Justice Krishna Iyer has shown the path although it did not reject the long standing common law principle.

**Equality in Language Rights in Public Employment**

In a multilingual country like India the because of unequal development of various languages the approach of formal equality in the matter of facilities or opportunities to various languages has become problematic. The approach of substantive equality taken by Justice Iyer in *Javed Niaz Beg*[27] is a typical social inclusion policy. The case involved constitutionality of civil service examination rule of UPSC which exempted the candidates whose mother tongue is non-Eighth Schedule language from taking any examination in any Indian language. Upholding the concession to the language-have-nots, Justice Iyer put forward substantive equality approach: "This concession is not contravention of equality but conducive to equality. It helps a handicapped group and does not hamper those who are ahead." Approaching from the angle of multiculturalism the learned judge observed, "The realisation that language is at the root of culture, that communities sometimes sacrifice their very existence for survival of their mother tongue and that tolerance and mutual accommodation on the linguistic front are integral to national integration must persuade the court to keep its hands off the delicate strategic policy of the State relating to the people's language. Indeed, rich diversity of India and the indispensable unity of the nation make it a linguistic imperative that a spirit of generosity to territorial communities, especially minorities without political pull is of the quintessence of our constitutional policy."[28]

**Contribution to Criminal Justice System Through Constitutional Interpretation**

Justice Iyer contemplated big changes in matters relating to procedural fairness and proportionality of substantive law in the realm of criminal jurisprudence. Even prior to *Maneka Gandhi*, he emphasised the need for proportionality in punishment. In *Ediga Annamma*[29] the position of accused person that she was a mother of a child and that the murder had been committed in a context of sexual rivalry were responsible for commuting the death penalty

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26 *Vishaka v. State of Rajasthan,* AIR 1997 SC 3011*; Smt. Nilabati Behera* v. *State of Orissa,* AIR 1993 SC 1360; *Chairman, Railway Board* v. *Mrs.Chandrima D*as, AIR 2000 SC 1988

27 *Javed Niaz Beg* v. *Union of India,* AIR 1981 SC 794

28 *Ibid* at 795

*29 EdigaAnamma v. State of A.P.* AIR 1974 SC 799

into life imprisonment. This is in contrast to the holding in Paras Ram that the blind belief inspired human sacrifice deserved stern punishment by death penalty. Justice Iyer had observed, "Secular India, speaking through the Court, must administer shock therapy to such anti-social *'piety',* when the manifestation is in terms of in-human and criminal violence. When the disease is social, deterrence through court sentence must, perforce, operate through the individual culprit coming up before court. Social justice has many facets and Judges have a sensitive, secular and civilsing role in suppressing grievous in-justice to humanist values by inflicting condign punishment on dangerous deviants." It is to be remembered that even after three decades when similar factual situation was to be handled, in *Sushil Murmu*,[30] the Supreme Court approached similarly in spite of elaborate jurisprudence in *Bachan Singh* and other cases. In *Sushil*, Justice Arijit Pasayat refers to the brutality of sacrifice of a helpless child and the shocking set facts, and observes, "Superstition cannot and does not provide justification for any killing, much less a planned and deliberate one. No amount of superstitious colour can wash away the sin and offence of an unprovoked killing, more so in the case of an innocent and defenceless child." The possibility of reform of the criminal, futility of death penalty and the need for educating the communities struck with shocking blind beliefs are taken into consideration by Justice Ravindra Bhat of Delhi High Court when instead of death, life imprisonment was imposed.[31]

In *Rajendra Prasad*,[32] a case after *Maneka* but before *Bachan Singh*,[33] the learned judge extensively dealt with propriety of reformative purpose of punishment and futility of preventive and retributive purposes of punishment by referring to the views of great thinkers. He applied not only the triangle of Article 14, 19 and 21 but also thought how preamble's notions of dignity of individual and social justice have bearing on sentencing policy and process. He observed, "Social justice, projected by Article 38, colours the concept of reasonableness in Article 19 and non-arbitrariness in Article 14. This complex of articles validates death penalty in a limited class of cases...."[34] The line of discussion in Rajendra influenced the majority judgment of the constitutional Bench in *Bachan Singh* case.

The impact of *Maneka* case on the criminal justice system was revolutionary. In effectuating it the efforts put in extension of constitutional interpretation is significant. In *Moti Ram*,[35] the learned judge developed right to bail under the *Criminal Procedure Code* primarily by egalitarian argument. He reasoned that insistence upon an arrestee who was poor mason to produce bail security of Rs 10,000 and to produce two sureties from his district violated

30 *SushilMurmu* v. *State of Jharkhand*, AIR 2004 SC 394
31 *State v. Jitender,* Delhi High Court judgment dated 21/2/2013.
32 *Rajendra Prasad* v. *State of UP*, AIR 1979 SC 916
33 *Bachan Singh* v. *State of Punjab,* AIR 1980 SC 898
34 *Ibid* at 938 at paragraph 82.6
35 *Moti Ram* v. *State of MP,* AIR 1978 SC 1594

right to equality and the concept of social justice. He invoked Preamble, Article 14 and 350 for excluding the elements of discrimination due to penury and regional bias. He viewed in *Gudikanti Naraimhulu*. "Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community."[36]

A break through in interpretation of Article 20 (3) occurred when in *Nandini Satpathy*, the learned judge widened the scope of the term 'accused' to include persons other than formally subject to FIR accusation. He said, "The prohibitive sweep of Art. 20 (3) goes back to the stage of police interrogation - not, as contended, commencing in court only. In our judgment the provisions of Article 20 (3) and Section 161 (1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter."[37] Policing the police was an approach adopted in restraining the power to extern persons from any locality as it would otherwise offend the right under Article 21.[38]

Reasoning with an approach that imprisonment does not mean farewell to fundamental rights, Justice Iyer observed in *Charles Sobhraj*, "Art. 21, read with Art. 19 (1) (d) and (5), is capable of wider application than the imperial mischief which gave it birth and must draw its meaning from the evolving standards of decency and dignity that mark the progress of a mature society. Fair procedure is the soul of Art. 21, reasonableness of the restriction is the essence of Art. 19 (5) and sweeping discretion degenerating into arbitrary discrimination is anathema for Art. 14. Constitutional *karuna* is thus injected into incarceratory strategy to produce prison justice."[39] He regarded that there shall be correlation between deprivation of freedoms and legitimate functioning of correctional system. In *Sunil Batra*, Justice Iyer deduced from Article 19 rights of prisoners to have access to visitors, family members and friends; right against bar fetters from Articles 14 and 21; isolation between under trials and convicts from Article 19 and 21; right against harsh labour and violence from Articles 19 and 21; and right against unreasonable solitary confinement from Article 21 and 32; and right to remedies from Articles 32 and 226.[40] He observed, "Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials 'dressed in a little, brief authority', when Part III is invoked by a convict. For when a prisoner is traumatized, the Constitution suffers a shock."[41] He also viewed that putting a

36 *Gudikanti Narasimhulu* v. *Public Prosecutor, High Court of Andhra Pradesh,* AIR 1978 SC 429
37 *Smt. NandiniSatpathy* v. *P. L. Dani*, AIR 1978 SC 1025 paragraph 53
38 *Prem Chand* v. *Union of India,* AIR 1981 SC 613
39 *Charles Sobraj, Petitioner* v. *Supdt. Central jail, Tihar*, New Delhi, AIR 1978 SC 1514
40 *Sunil Batra* v. *Delhi Administration,* AIR 1980 SC 1579
41 *Ibid* Paragraph 5

death convict into solitary confinement amounted to double jeopardy prohibited under Article 20 (2).[42]

**Women's Empowerment Through Constitutional Interpretation**

A beginning of constitutional feminism in case law occurred in *C B Muthamma*. Nullifying a Service Rule which disqualified married women to hold the position in Indian Foreign Service, Justice Iyer observed, "If a married man has a right, a married woman, other thing being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thraldom. Freedom is indivisible, so is Justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored *vis-a-vis* half of India's humanity, viz., our women, is a sad reflection on the distance between Constitution in the book and Law in action."[43]

A careful construction of right to maintenance on the part of divorced woman in social justice is a pioneering view of Justice Iyer in *Bai Tahira* case. Construing the right under section 125 of Cr P C in the light of Article 15 (3) and without arousing any religious controversy he observed, "Protection against moral and material abandonment manifest in Art. 39 is part of social and economic justice, specificated in Article 38, fulfilment of which is fundamental to the governance of the country (Art. 37). From this coign of vantage we must view the printed text of the particular Code."[44] This approach is unique and significant as it builds up welfare right by linking Part IV provisions with right to dignified life under Article 21 convincingly, and avoids reference to religious texts, an approach which caused controversy in Shah Bano case.[45]

**Combating Poverty and Promotion of Economic Justice Through Constitutional Interpretation**

Anti-poverty jurisprudence and support to economic justice gained great momentum in the hands of Justice Iyer. *Azad Rickshaw Pullers' Union case*[46] is a testament to his great enterprising skill in combining power with justice to bring welfare free from heartless legalism. When the inadequacy of the Punjab law aiming at eradication of exploitation of toilers of rickshaw pulling by the intermediaries was brought to the notice of the Court calling attention about its vires, the Court seized the opportunity to bring reforms by involving banks and insisting on providing loan to the pliers of rickshaws on easy terms and provide effective remedy. Holding that courts are havens of refuge for toilers, he said, "No higher duty or more solemn responsibility rests upon this court than to

42 *Sunil Batra* v. *Delhi Administration,* AIR 1980 SC 1675
43 *C. B. Muthamma* v. *Union of India*, AIR 1979 SC 1868
44 *Bai Tahira* v. *Ali Hussain Fissalli Chothia,* AIR 1979 SC 362
45 *Mohd. Ahmed Khan* v. *Shah Bano Begum,* AIR 1985 SC 945
46 *Azad Rickshaw Pullers Union, Amritsar* v. *State of Punjab,* AIR 1981 SC 14

uphold every State measure that translates into living law the preambular promise of social justice reiterated in Article 38 of the Constitution."

Justice *Iyer* believed in social and humanist dimension of land reform laws meant for re-structuring of village life itself taking in its broad embrace the socio-economic regeneration of the rural population.[47] The Constitution has an economic mission and exceptional historical circumstances calling for correction although justify exclusion of judicial review under Article 31 A, do not black out the beneficent content of articles 14, 19 and 31, he reasoned. But he was not agreeing to bring article 21 elated claims to question the validity of land ceiling law.[48] When there was an attempt to invoke an exception given to widows of landlords who were separated through family partition to claim back the agricultural tenancy, partial partition without metes and bounds was not accepted to dilute the object of the law.[49] In the matter of leasing of houses on rent in urban places, he observed, "The rent control legislation in a country of terrible accommodation shortage is a beneficial measure whose construction must be liberal enough to fulfil the statutory purpose and not frustrate it. So construed, the benefit of interpretative doubt belongs to the potential evictee unless the language is plain and provides for eviction."[50] In another case for eviction of tenant, he ruled for partition of the house between the land lord and the tenant on 'live and let live' basis.[51]

**Reasonable Limits to Protective Discrimination**

Justice Iyer, in spite of his strong sympathy in favour of *Scheduled castes* and *Scheduled tribes,* was not in favour of bending the constitutional provision to accommodate the state policy of special relaxation from promotion rules without compelling justifications. In *N M Thomas* he observed by dissenting, "To expand the frontiers of classification beyond those which have so far been recognised under Clause (1) of Article 16 is bound to result in creation of classes for favoured and preferential treatment for public employment and thus erode the concept of equality of opportunity for all citizens in matters relating to employment under the State.... Inaction on the part of the State under Clause (4) of Article 16 cannot, in my opinion, justify strained construction of Clause (1) of Article 16."[52] In *ABSKS* he ruled that special rules for SC/ST relaxing the requirements for promotion under Article 16 (4) did not violate the Constitution. He observed, "The remedy of 'reservations', to correct inherited imbalances must not be an overkill...Excellence and equality may co-operate fruitfully and need not compete destructively. Ultimately harijan/ girijan militancy must find fulfilment in effective main-streaming and creative contribution."[53] The balanced approach he paved became the mainstream line

47 *State of Kerala* v. *The Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd.* AIR 1978 SC 2734
48 *Ambika Prasad Mishra* v. *State of UP,* AIR 1980 SC 1762
49 *BalkrishnaSomnath* v. *SadaDevramKoli,* AIR 1977 SC 894
50 *Mani Subrat Jain* v. *Raja Ram Vohra,* AIR 1980 SC 299
51 *Jivram Ranchhoddas Thakkar* v. *Tulshiram Ratanchand Mantri,* AIR 1977 SC 1357
52 *State of Kerala* v. *N M Thomas,* AIR 1976 SC 490 Paragraphs 62 and 71
53 *Akhil Bharatiya Soshit Karamchari Sangh (Railway)* v. *Union of India,* AIR 1981 SC 298

of development.

**Access to Justice**

The pioneering works of legal aid activity he undertook as Law Minister in Kerala and later as member of Law Commission had given opportunity to Justice Iyer to shape the path of access to justice on egalitarian footing. His most important contribution to the constitutional jurisprudence is the idea and practice of Public Interest Litigation. Admitting a prisoner's letter addressed to the Supreme Court and converting it into writ petition, for the first time in history of the Court, he observed in *Sunil Batra*, "Where the prison process is de-humanised, forensic help, undeflected by the negative crudities of the adversary system, makes us dare where we might have daunted. The finest hour of justice comes when court and counsel constructively collaborate to fashion a relief in the individual case and fathom deeper to cure the institutional pathology which breeds wrongs and defies rights."[54] He viewed in *Fertilizer Corporation Kamgar Union,*

> A pragmatic approach to social justice compels us to interpret constitutional provisions, including those like Arts. 32 and 226, with a view to see that effective policing of the corridors of power is carried out by the court until other ombudsman arrangements -- a problem with which Parliament has been wrestling for too long - emerges.... Law, as I conceive it, is a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction. We cannot be scared by the fear that all and sundry will be litigation-happy and waste their time and money and the time of the court through false and frivolous cases. In a society where freedoms suffer from atrophy and activism is essential for participative public justice, some risks have to be taken and more opportunities opened for the public minded citizen to rely on the legal process and not be repelled from it by narrow pedantry now surrounding locus standi ."[55]

In *Darshana Devi* case the learned judge applied Article 14 and 39-A to support legal aid and said, "The poor shall not be prised out of the justice market by insistence on court-fee and refusal to apply the exemptive provisions of Order XXXIII, C.P.C." Thus he was instrumental in laying strong foundation of expanded access to justice by the poor and the marginalised.

**Conclusions**

From the above discussion of sample cases that the eminent judge had decided in various areas of constitutional law, it is possible to infer as follows: The judgments largely reflect sense of humanism and determination to redress the grievances by dynamic interpretation of the constitutional provisions in an

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*54 Sunil Batra v. Delhi Administration,* AIR 1980 SC 1579

*55 Fertilizer Corporation Kamagar Union (Regd.) Sindri v. Union of India*, AIR 1981 SC 344

unparalleled manner. His ideas and approaches were innovative, refining the prevalent notions and made great contribution to the legal system. His concern that operation of law shall lead towards promotion of justice had potentiality of yielding valuable result. Wherever the ideas have been already at work, bringing coherence to its contours and make it more stable and efficient is the task he did. In identifying basic structure of the Constitution such a contribution has guided the subsequent benches. The methodology he adopted in his judgments has characteristic combination of historical, comparative, philosophic and sociological research methods. Inter-disciplinary study and wider reference to religious, moral and intellectual discourse relevant to the issue have added to the great weights of his scholarly judgment with choicest and persuasive language. His indulgence in purposive interpretation and structuralism could overarch various provisions and values and could enhance the moral worthiness of constitutional reasoning.

# CSR and the Environment: Two Sides of a Same Coin

*Mrs. Annapoorna Shet*

## Introduction

Concept of environmental protection and its sustainability is an evergreen issue. There is neither any particular season nor some specific area which deals with the concept of environment. Even there is no particular boundary for this concept as environment is a matter of right and duty for each and every individual. Environmental protection is a concern of every creature. It is like, if we have a healthy environment, if we possess a pollution free environment, it is possible to live in the world. Because of this, several international initiatives, national initiatives, declarations, laws have been passed from time to time for the purpose of conserving the environment. In this regard, UN Conference on Environment and Development (UNCD), has stated specially with regard to the concept of sustainable development, which is the key issue in the environmental law in the present day, as 'to treat environment and development in an integrated manner and to co operate in the further development of International Law in the field of sustainable development.[1] The advancement in the science and technology has created lots of benefits to the people and at the same time has affected the environment to the greater extent. And it is now the concept of Corporate Social Responsibility, which has been introduced under the Companies Act, 2013 through its initiatives have taken a task of the protection of environment.

## Corporate Social Responsibility and the Environmental Sustainability

The concept of sustainability first got widespread acceptance through Brundtland Report, which is also known as 'our common future'. In the year 1987, the concept was defined as, 'development that fulfils the needs of the present without compromising the ability of future generations to meet their own needs', and according to which the progress cannot be made by using and consuming irreplaceable natural resources and polluting the earth. The same report was convened by the UN to address governing concerns 'about the accelerating degradation of the human environment and natural resources and the consequences of that deterioration for economic and social development'.[2]

Even the Rio Earth Summit in the year 1992 has further expanded the concept of sustainable development. The goal to ensure environmental sustainability has also been included as the eight goal of the Millennium Development Goals adopted by the UN Millennium Declaration 2000.

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1. Principle 27, Report of the UN Conference on Environment and Development.
2. Philippe Sands, Environmental Protection in the Twenty First Century: Sustainable Development and International Law, Cambridge University Press, 1stedn, 2000, p.374.

Agenda 21 was a comprehensive and far reaching programme which was set up in the year 1992 for sustainable development and constituted the centre piece of international cooperation and co-ordination activities within the United Nations system. This dynamic programme which was a voluntary action plan opened with the preamble with the statement that in order to fulfil the basic needs of the community, to improve the living standards of all and a better managed and protected eco system and for a safer and more prosperous future, greater attention was to be diverted towards the integration of environment and developmental concern. In order to achieve the above purpose, the world should come together in a global partnership for sustainable development. The preamble further stated that, the development and environmental objectives of Agenda 21 would require a substantial flow of new and additional financial resources to the developing countries, and in order to cover the incremental costs for the actions they have undertaken to deal with global environmental problems and to accelerate sustainable development. The main purpose of Agenda 21 was to address the pressing problems of the 20th century and to overcome with the remedy to get rid of those problems in the 21st century and make the world a better environment by following the rules and achieving the goals of Agenda 21. The concept of Agenda 21 was even followed under the concept of Corporate Social Responsibility which is particularly enlisted in the Schedule VII of the new Companies Act, 2013.[3]

Concept of sustainability is moving to the core of the business agenda.[4] Concept of sustainable development is also not a new one. And it is the responsibility of every country, be it a developed or developing, to make their land environmentally sustainable. There are certain issues and things in a world which cannot be purchased from money and it is only with the proper use of certain resources, people can maintain the sustainable environment. From the beginning, the whole world is dominated by the nature, and it is the human beings who have to adapt their activity to the unchanging forces of nature. But now a day the concept is totally changed. Due to the undue intelligence of human folk, they are going against the nature and environment. Instead of using the natural resources and environment in a friendly manner, his activities and habits are too often threatening and destroying the nature. Man is causing the deterioration of the nature through the depletion of natural resources like air, water, soil, etc which has brought the environment to a critical condition. And because of the advancement in science and technology, it has become easy for a man to destroy the natural resources within a shorter period of time which in turn has created havoc in the matter of environmental protection.

No doubt government has taken many initiatives as well as many rules and regulations to take care of the concept of environmental sustainability. But still the situation has reached to such an extent that almost many resources are

3. Dr.Sukanta K. Nanda, *Environmental Law,* Central Law Publications, 2nd edn, 2009, p.337.
4. Bjorn Stigson, President of the World Business Council for Sustainable Development.

getting extinct day by day and there is a situation that, our future generations may not be in a position to experience or use certain resources.

The reason for this is many. People have changed their lifestyle and even their thinking and attitude. People have become so greedy. They are crossing their limits and utilizing the natural resources to the maximum extent without thinking about the future generations. As already stated, now because of the advancement in science and technology, the work could be done in a most efficient and easy manner so that too much of resources can be extracted very easily in short span. This has changed the attitude of the people and they are forced to grab as much as possible and fulfill their greed. This attitude of people must get lowered. Then only the concept of sustainability can be achieved.[5]

It is a fact that the government has brought many strict rules and regulation for the purpose of maintaining sustainability in future. But it's not enough to make rules and punish those who do not abide by the rules. There are certain issues in the world that cannot be compensated by supplementing things in its place. A good and healthy environment comes in such category, where once the environment is polluted, once the natural resources are harmed, it's not possible to bring them to a normal condition. Hence it is required that the people themselves must voluntarily join hands for the purpose of developing a sustainable environment.

The government has taken initiative to solve this problem in a better manner. It has made intelligence in shifting the burden on those companies who pollute or spoil the environment. So it is they who have to take care of the environment for the running of their businesses. There are several examples where the company has taken initiative to protect the environment and also to give the society a sustainable environment. Now it is considered as a social responsibility of businesses and companies to take care of the environment through its CSR initiatives.

But at the same time it should not be forgotten by the companies to maintain stability in their business too. The concept of CSR is possible, only when the companies run in profits and only those companies who are flourishing can contribute to the development of the society in the form of CSR. Hence the company should not forget to maintain its stability in business. There must be a proper balance between environmental sustainability and business sustainability. Then only the purpose of CSR can be met with.

**The Role of CSR in Environment Protection**

The concept of Corporate Social Responsibility plays a very important role in the protection of environment. It is quite evident from the provisions enacted in the new *Companies Act, 2013,* that the companies are forced to take certain measures for the betterment of the environment and even to check environmental pollution and take certain measures to protect the environment.

5. *Supra Note* 3, p.375.

Schedule VII of the Act clearly states the efforts to be taken by the companies for the protection of environment. There are many instances in the society through which the companies played a role in the protection of environment in the name of CSR initiative. No doubt making a sustainable environment and living in a sustainable environment is a difficult task in a present day. The aim of sustainable development is to enable people to satisfy their essential needs and enjoy a better life without compromising the quality of life of future generations.

As already stated, the concept of sustainability is a global phenomenon. It should be accepted worldwide and followed in and around the globe. As an example, in USA, on January 2006, the Citizens Financial Group launched the 'Flex Your Power' energy conservation campaign to reduce energy consumption and improve efficiency. As a part of this project, more than three hundred company signs were converted to photo-cell technology which ensures that the signs are illuminated only when natural light is reduced. This initiative achieved a cost reduction of more than USD 800,000. [6]

Not only in the International sphere, even in the national level many initiatives are taken by the Corporates for the protection of environment. The need for environmental protection was very badly felt and various measures were followed for the environmental protection from time to time. It is the vision and mission of each corporate sector to carry their trade and business eco friendly. Green business is booming in a rapid way. And it is the fact that, those companies who involve in eco friendly business will survive in the present future.

**Balancing Between the Corporate Development and Environment Protection**

Corporate Development and environmental protection are very much essential for the purpose of development of the nation. Without the presence of corporate sector or industries, there is no question of nation's development. No doubt with the establishment of all these corporate sectors, there will arise both the advantages and even the disadvantages. Environment protection and the sustainable development is a big challenge for the government to take care of. No doubt, these companies contribute too much for the countries development, it is not possible for the state to order for its closure and at a same time the state is not in a position to support these companies who cause greatest havoc in terms of environmental pollution. Hence there must be a proper balance between the corporate development and environmental protection. There are certain evidences whereby the state has tried to maintain a balance between these two spheres. It's a fact that there cannot be exact definition to streamline the corporate development and environmental protection. But the judiciary and

6. Ramon Mullerat, International *Corporate Social Responsibility: The Role of Corporations in the Economic Order of the 21st Century,* (2010), Aspen Publishers, 1st edn, at. p.161.

the state from time to time have tried to maintain a balance between corporate development and environment protection.

In *Rural Litigation and Entitlement Kendra* v. *State of U.P.*[7], a voluntary organization wrote a letter to the Supreme Court which was accepted as a writ petition. The main allegation of the RLEK was, there were unauthorized and illegal mining operations carried on in Mussoorie hills and nearby areas which adversely affected the ecology of the area and led to various environmental disturbances. Their allegation was that the erratic, irrational and uncontrolled quarrying of limestone effected the environment and the green cover in the area was reduced from 70% to 10%. Even the reckless mining operations, disturbed the natural water systems, supply of water for drinking, etc. The frequent transportation for the supply of mines and the vibration caused due to this transportation damaged the sensitive environment. On the other hand, the lime deposits of the area were of high grade having up to 99.8% of calcium carbonate, which was used for the purification of iron ore.[8]

The contention of the mining industry was that they satisfied the major portion of the countries demand and it will lead to national income and at the same time these raw materials from the mines were used for the manufacturing of arms and armaments which was used for the purpose of defenses. But it was true that due to these quarrying operations, there was a large destruction in the environment and the environment was effected very badly. Keeping all these considerations in a mind, a special committee was appointed to enquire on these issues known as 'Bhargawa Committee'. And on the recommendation made by the committee and based on their reports, the court gave the decision in favour of RLEK and ordered the mining industry to stop its operation. The court further held that, no doubt mining is important for the economic development of the nation. But at the same time it should carry its operation in such a way that it should make maximum efforts to reduce the pollution. And as this company failed to do so the court gave decision banning mining operation by this industry. In this way court has tried its maximum to balance between the corporate development and environmental protection.

In a famous *Goa Foundation* v. *The Konkan Railway Corporation*[9], which is popularly known as *Konkan Railways* Case, a writ petition was filed in a Bombay High Court by a society asking the court to compel the Railway Corporation to procure environmental clearance from Ministry of Environment and Forests under the *Environment (Protection) Act, 1986* for the part of alignment passing through Goa. Their allegation was that the proposed plan was undertaken without an adequate Environment Impact Assessment and Environment Management Plan and the plan would cause large destruction

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7. AIR 1986 SC 517
8. Prof. Satish C. *Shastri, Environmental Law,* (2012), Eastern Book Company, 4th edn, Lucknow, at pp. 459-461.
9. AIR 1992 Bom 471.

of flora and fauna in turn effecting the environment badly. The court rejected the claims of the petitioners on the ground that the public at large is benefited by this project and the environment pollution and degradation is negligible compared to the benefits derived from the projects.[10] The judges followed the principle of greatest happiness of the greatest number. It was also of the opinion that when the large number of folks are getting benefitted out of this project, its not bad to have a little effect on environment. And further that small effect can be overcome by adopting alternative and remedial measures like planting saplings, etc.

In S. Jagannath v. Union of India,[11] A Public Interest Litigation (PIL) was filed under Article 32 of the Indian Constitution alleging that the large scale commercial aquaculture farming and the Shrimp farming in the coastal areas, caused degradation of mangrove ecosystems, depletion of plantation, pollution of ground water and reduction of fish catch which thereby caused pollution and degrading effect on the environment and coastal ecology. Through this writ petition, the petitioner who is the chairman of the voluntary organization who was working for the upliftment of the weaker sections of the society, even sought the enforcement of Costal Zone Regulation (CRZ) Notification issued by the government of India which dealt with environment protection. In this case Supreme Court gave decision in favour of the petitioner stating that, it would greatly affect the water environment and hence ultimately lead to economic degradation. It even pointed that there are certain other methods of fishing through which the purpose can be met and the natures gift should not be hampered by the undue intervention of man made products.

In M.C. Mehta v. Union of India,[12] which is famously known as *Kanpur Tanneries Case,* one Mr.M.C.Mehta, a famous environmental activist, filed a writ petition under Article 32 of the Indian Constitution, where in his petition, he brought to the notice of the court that, the group of tanneries doing the business in the banks of river Ganga by utilizing the water from the same river, were polluting the river by discharging effluents into the river without following proper primary as well as secondary treatment of water. Even in the same petition he added the flaws made by the respective government in taking action against those industries. The court gave the judgement keeping in mind various factors. It held that no doubt as the tanneries were polluting the environment to the larger extent it would be better to shut down the industries for the purpose of environmental protection. Even it also stated that, its not possible to take at a time a harsh step by ordering to shut down the tanneries as irt is a major source of national income to the country and even the people who are working in these tanneries and earning their bread and butter would be put to great loss if the tanneries are shut. Hence the court was of the opinion that,

10. Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India,* (2005), Oxford University Press, New Delhi, at pp.469-472.
11. AIR 1997 vol 2 SC 87
12. AIR 1988 SC 1037

thoswe companies which will follow the environmental norms and carry the business by establishing proper treatment plant can be allowed to run their business and those who do not follow any treatment plans were asked to shut down. In this way in the above case the court has tried to establish a balance between these two concepts.

There are several instances and several cases that have come in front of the court and concerned authorities with regard to affect caused by corporate sector to the environment in carrying their business. And the court in all the cases have strike the balance between environment protection and societal development. No doubt environment protection is a key concern issue. At the same time it should not be forgotten to have a good financial and developed modern society according to the changing needs of the people. But there must be a balance between these two so that both should go hand in hand and provide a better environment and best future.

**Conclusion**

It is true that the concept of CSR has played a very important role in the development of the society. It is also known fact to each of us that the concept of CSR has taken the maximum burden of the society from the hands of the government. No doubt there may be certain hidden agenda with these companies who invest huge amount of money to the society. But still it has in turn helped the society to a larger extent. That too for a country like India the concept of CSR has provided too much of benefits specially in the matter of environment protection which is the greatest challenge to the Government of India as it is very difficult to the government alone to take care of the environment. But these companies by giving their helping hands to the government have lowered the burden of the government. But still in spite of formulating many rules, regulations, directions, still the problem of environment protection is not reduced to the extent expected. There is a need to formulate some advanced procedures for the purpose of environmental protection by means of CSR so that the problem of environment and its protection can be taken care by the advanced rules and regulations and techniques so that there will be good environment in a future.

# The Relevance of the *Excise Act* in Modern day Perspective: A Sociological Study

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## Abstract

The *Excise Act* was enacted in the year 1944. With this development central excise is said to have taken a firm and important place in the fiscal system of India. The year also witnessed the repeal of the *Tariff Act* of 1894 by the *Indian* tariff Act, 1934. With shrinkage of revenue from customs duty during the Second World War the scope of excise duties was greatly enlarged to cover items like tobacco, cloth, vegetable ghee, artificial silk, cement, footwear, tea and rubber tires.[1] The present paper traces the historical and sociological development of liquor consumption with special reference to India, and how such consumption pattern changed over time. The present legislations were also reviewed for the purpose but inspite of the laws the scenario has not changed much.

## Historical Development of Consumption Culture in Societ

Consumption of alcohol is not a recent event, it has been a part of human life since 8000 B.C. Primitive societies especially the permanent communities in the North east were the first to establish grain farming which prompted the brew of beer a drink- which may have preceded bread as a dietary staple. Other examples from the past include the Hebrews who introduced wine during their captivity in Egypt. Following their exile wine became a common drink for everyone. The Mayan civilization which is the present day Mexico was a "mead drinking society".[2] Such consumption culture grew wherever there was permanent settlement in the past. In ancient China liquor consumption played an important role in religion as well as other walks of life. It symbolized any celebration like victory, ceremonials like birth, marriage, before going to battle, offering sacrifices before God and ancestors and during any festivals. Worshipping wine Goddesses and deities were also practised in ancient age.[3] After the expansion of the Roman Empire there has been growing incidence of heavy drinking coupled with corruption. From the first and second century liquor consumption is no longer taken only during festivals but it has become a regular part of people's life. Intoxication or the habitual drinking is now common among all sections of thesociety.

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1 See https://pvjois.wordpress.com/2015/02/24/evolution-of-customs-and-excise-duties-in-india-volume-iv/

*2 See www.oxfordscholarship.com/view/10.1093/.../acprof-9780199655786-chapter-01*

3 *Supra*, note 2.

Some doctrine belief of Christianity encouraged consumption and production of alcohol especially wine, as it is referred to as a gift of God which should be taken and enjoyed. This is how it is spread to the rest of Europe and rest of the world. Apart from liquor other consumption culture also grew up. With globalisation more such patterns of consumption became popular, different types of addictions for example, types of drugs addiction also became widespread which has harmful health hazards too. The term addiction became widespread during the early 20th century referring to compulsive drug taking. Adrug is any substance which is not food but when consumed, injected, inhaled it causes physiological changes in body. Caffeine, in coffee, is also a drug, which is being widely used all over the world on a daily basis. But all drugs do not have the same effect on the body or psychological well-being. Historically some drugs were used for religious and medical purposes like priests in religious ceremonies (eg, amanita muscaria); (ii) healers for medicinal purposes (eg, opium); or (iii) the general population in a socially approved way (eg, alcohol, nicotine, and caffeine).[4] Drugs are also used for recreational use. Some addictive drugs have been used by a significant proportion of population on a regular basis but they have become staple commodities.[5]

In 1878 the first international alcoholism congress was held in Paris. In 1906 the first international association was set up and located in Lausanne. But alcohol was never aserious candidate for overall international regulation. The closest approximation to international effort was the African based regional control arrangement agreed between the parties to the *General Brussels Act* of 1889–90 and included in the antisla very provisions of the act. The opioids, by contrast, developed an international control system that has dominated and helped to determine systems of domestic regulation. An earlier draft regional system (setup by the Shanghai Opium Commission in the early 1900s) transmuted through American efforts, in their turn prompted both by missionary concerns and strategic imperatives, into an ascent global system before the first war. Germany and Britain resisted but the post-war settlement saw these export controls imported into the peace settlement under the supervision of the League of Nations. The 1925 Geneva Convention, which scheduled cannabis for the first time, was part of this system. This system of control of trade changed after the second world war, again under American influence, into a strongly prohibitory regime whose impact continues to be felt in smuggling the illicit trade, and in domestic drug control legislation. Control, as it changed, helped to exacerbate the problem it had been set up to deal with.[6]

Historically, the liquor policy was guided by two major objectives-collection of revenue and secondly safeguarding people's morality. The state

4 Crocq, M. (2007). Historical and cultural aspects of man's relationship with addictive drugs. *Dialogues in clinical neuroscience*, *9*(4), 355.

5 *Ibid*, p.356.

6 See jech.bmj.com › Volume 58, Issue 9:749.

often came into conflict with the tribals or the *adivasis.* For them drinking comprised material as well as symbolic reality.[7] (1995:2323). Foucault's explanation was notable in this connection. According to him, in spite of heavy execution and torture by the system in order to prevent unnecessary resistance from people, disobedience, constant resistance and oppositional groupings have always been there. From history till date such events are constantly taking place.

The concern for the public health, specially the nutrition and standard of living of the people was the primary duty of any state or country. So there was a need to bring prohibition of the consumption level of such goods except for medical use, which are injurious to heath.

**Alcohol Consumption in India**

The excise duties placed on any commodity, which are mostly locally produced goods was done for two reasons-one for increasing revenue for the state or country and to limit the consumption of such goods. Such resistance can create further deviances in the society, leading to illegal selling and purchase of goods. This results in development of black markets. Black markets are characterised by some form of noncompliant behaviour with an institutional set of rules. If the rule defines the set of goods and services whose production and distribution is prohibited by law, non-compliance with the rule constitutes a black market trade since the transaction itself is illegal.

Two landmark events in history -The *Bombay Akbari Act*, 1878 and the *Mhowra Act*, 1892- these two legislative acts banned the customary drinking practise among adivasis in Thane district, Bombay. These acts blocked the major sources of liquor- toddy, "the fermented/distilled juice of palm tree, and mahua drink made from the flowers of Bassialatifolia"[8] - by taxing the former and banning the latter. The new system further opened up important source of revenue for the government.

Prior to independence, the political and economic scene was different. There was no economic development as well as a plan for making up a welfare state. Apart from cotton and jute industries there was no further development in the industrial sector. Most of country's need was met by imports from abroad.[9] Post independence, the scenario changed in India. The country's goal was to set a program on increased developmental expenditure. The concept of welfare state was one of the objectives. By then a number of manufacture industries grew up in the country. The rise of industries has reduced the need of imports and reduced share of customs as a major and expanding source of revenue yet it

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7 Saldanha, I. M. (1995). On Drinking and 'Drunkenness': History of Liquor in Colonial India. *Economic and Political Weekly*, pp.2323-2331.

8 *Ibid,* p.2323.

9. See https://pvjois.wordpress.com/2015/03/03/evolution-of-customs-and-excise-duties-in-india-volume-v-consti tutional-provisions/.

constituted a major partner with central excises in the tax system.[10]

After 1944, excise duties were imposed on a huge range of manufactured goods in India. In 1975 the government introduced a new tariff system to cover all goods. So by that time all manufactured goods attracted excise duties.[11] Since liberalization of Indian economy and in the field of central excise, excise duties were not mainly applied to commodities of mass consumption nor as tax used for regulatory purposes.

India's response to drugs flows along an extraordinary spectrum – of tradition and modernity; of widespread availability and stringent enforcement; of tolerance and prohibition; of production for medical use to lack of medical access to opiates. Being a country with significant volumes of illicit drug cultivation, a transit route as well as a consumer market, India's drug policy dilemmas span 'demand' and 'supply' control. While India's harsh drug control laws conform strictly to prohibition, its regulated opium cultivation industry provides insights for countries that are experimenting with alternatives to prohibition.[12]

**Historical Period and Alcohol Consumption**

In ancient India soma and sura are the types of popular drinks. Soma was considered as the drink of social elite whereas the sura was consumed by warriors to increase their strength. This is how drinks were classified according to the class of people. Other form of alcoholic drink like sap was mentioned in south Indian literature. Thus alcohol consumption or use is not a recent practice; it has prevailed in ancient era too. The ancient medical texts describe the harmful effects of excessive drinking on mind and body. Despite of its availability, alcohol consumption was not a daily part of Indian diet. Religions posed strict rules and prohibitions to prevent excessive usage of such uses but it tolerates drinking by military classes. Among Hindu castes, Brahmins and other upper caste abstain from drinking and see it as a practise prevailing among lower or unclean castes.[13] Islamic traditions pose strict regulations on drinking but it existed among the Mughals. Soldiers and military classes were encouraged to drink and allowed to join in mass drinking festivals.[14] But the colonial period witnessed a change in pattern of alcohol usage.

**Consumption in Colonial Period**

India was under British rule for 200 years, during this period there has been steady rise in alcohol consumption, nature of alcohol, its pattern and usage and social attitude towards it. Modern transportation increased the easy availability of alcohol everywhere. Since British were more familiar with alcohol other

10 *Ibid.*
11 A drug derived from opium.
12 See http://idhdp.com/media/400258/idpc-briefing-paper_drug-policy-in-india.pdf.
13 Unclean caste here refers to the polluted castes that is not considered within the Hindu caste hierarchy, for eg. Shudras.
14 Benegal, V. (2005). India: alcohol and public health. *Addiction*, *100*(8), 1051-1056.

intoxicants like cannabis and opium were not much promoted and also stringent laws against its uses increased demand for alcohol. It lead to the manufacture of locally made liquor.[15] Various types of alcohol beverages from Indian made foreign liquor to beer, to country liquor were easily available and the alcohol industry grew rapidly.

Illicit trading of alcohol became common. It has a local presence and run with the help of local goons. They operate the industries themselves and sometimes even made regular payments to government authorities. The alcohol industry produced a large source of revenue for government. The number of distilleries and manufacturers are difficult to find as each state's excise departments keep the records.

**Social Problems and Drug Abuse**

India is a country with major rural population and belongs to the low economies of the world. The use of cannibals and alcohol has existed in India for centuries. The pattern of usage and consumption of liquor have changed. The actual data of alcohol consumption and its use are hard to find in vast country like India and very less empirical studies have been done so far. In India alcohol is an ingredient used in many medicines in traditional age but with modernisation and westernisation alcohol usage has become everyday fashion. Among teens alcohol usage has risen. Of late it has become a staple food in India. Alcohol consumption is no more a part of celebration or ritual ceremony now it has shifted from occasional to a part of routine social interaction and entertainment.[16] The main purpose to consume is to get drunk as quickly as possible and such motivations are reflected mainly between the age group of 25-40 years. Such practises lead to the establishment of various pubs and bar in various regions of India.

The increasing production, distribution, and promotion of alcohol have already seen drink-related problems emerging as a major public health concern in India. Alcoholism is a result of multiple causations. A number of factors play a pivotal role in developing this habit. We may divide these factors into two groups-individual factors and situational factors. The former includes personality traits like feeling of insecurity, depression, emotional conflict, lack of self control, while the later may be subdivided into following groups like family environment, peer group relation, neighbourhood, movies and advertisements. Chief among them is that people are beginning to drink at ever-younger ages, mainly below 21 years of age. Many alcohol advertisements now feature spirited groups of young people having a good time and drinking has always been glamorized by film industries. The idea of social belonging

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*15 Ibid.*

16 Demers, A., Room, R., &Bourgault, C. (2000). *Surveys of drinking patterns and problems in seven developing countries*. World Health Organization, Department of Mental Health and Substance Dependence,.

that is drinking is also significant from group identity or recognition. Mostly among teenagers it is a way to show his masculinity and to become the accepted member of his peer group which pushes him to drink.[17]

Apart from alcohol there are other types of drug abuse too. The victims of drug abuse are mainly children and youths. Crimes related to drug are on a rise among which juvenile crimes are most common. Four of every five children and teen arrestees in state juvenile justice systems are under the influence of alcohol or drugs while committing their crimes, test positive for drugs, are arrested for committing an alcohol or drug offense, admit having substance abuse and addiction problems, or share some combination of these characteristics. Other crimes include domestic violence and physical violence among college going youths under the influence of drugs. Though there is no "cause" of abuse and no specific profile of abusers, many factors contribute and make abuse more likely to occur. Pressures on the family, alcohol and drug abuse, and social isolation can all lead to parental stress and increase the chances that a parent will strike out at their child. Most importantly it has adevastating social impact upon community life. The present article focuses on the adverse effect of drug abuse on industry, education and training and the family, as well as on its contribution to violence, crime, financial problems, housing problems, homelessness and vagrancy.

Such norms and ideas have increased liquor consumption and related crimes. Government has first levied excise duties on such items mainly because of revenue collection and later to prevent purchase of such harmful substances. There is central excise acts as well as individual state acts. The central excise act levies tax on any good or substances manufactured in the country and state excise act levies tax on intoxicating substances.

**The *Central Excise Act***

The *Central Excise Act,* 1944 (Act 1 of 1944) is a tax legislation that tries to amend and consolidate the law relating to Central Excise duty, which is an indirect tax levied on goods manufactured or produced in India. The goods so manufactured or produced must be movable and marketable for being considered excisable within the meaning of various provisions of the *Central Excise Act.* The Central Government administers Central Excise duty by invoking Entry 84 of the Union List of the Seventh Schedule to the Indian Constitution.

The Act empowers the Central Government to levy excise duty based on the capacity of production with regard to the excisable goods. The Act bestows a corresponding liability on the manufacturer or the producer to pay excise duty on the goods so manufactured or produced. Thus, anyone who produces or manufactures, carries on trade, holds private store-room or warehouse or otherwise uses excisable goods must be registered in accordance with the

17 Prasad, R. (2009). Alcohol use on the rise in India. *The Lancet*, *373*(9657), pp, 17-18.

provisions of the *Central Excise Act* and its Rules thereof. The Act also stipulates penal provisions for those who do not conform to the provisions of the enactment.

The provisions of the *Central Excise Act* must be read in light of the *Central Excise Rules,* 1944 and the *Central Excise Tariff Act,* 1985, which specifies in its Schedules I and II the types of goods that are excisable and the respective duties on the goods to be levied by the Central government. The duties may be charged either as specific duty or as tariff duty or as maximum retail price or on an ad-valorem basis. One conspicuous thing about the legislation is that even though it prescribes the rate at which a particular Excise duty is to be payable, it fails to lay down any criteria for imposing such rate. The amendments in the Act are done through the respective Finance Acts. A major shuffle in the *Central Excise Act* was done in 2015, when section 11(A)(C), which stipulates penal provisions for short-levy or non-levy of duty in certain cases, was substituted.

Among the states Acts, the *Bengal Excise Act* is considered to be the landmark Act and also a parent act from which it appears other states too have borrowed their provisions. The *Bengal Excise Act,* 1909 *(Bengal Act 5 of 1909)* (hereinafter referred to as the *BE Act)* is a special legislation that was passed by the British Administration to consolidate and amend Excise laws related to import, export, transport, manufacture, possession and sale of intoxicants in undivided Bengal. The primary objective behind passing this Act was to collect revenue out of intoxicating products, especially those country-made products whose production or sale could not be formally prohibited by the then British government. Yet another objective was to enforce a regulatory regime by formally penalising unlawful import, export, transport, manufacture, possession and sale of intoxicants.

The Act is put at the intersection of fiscal and penal policies and strives to levy excise duties on certain intoxicant products while at the same time imposing punishment for illegally importing, exporting, transporting, manufacturing, possessing and selling these intoxicant items. These duties vide Entry 51 of the State List read with Article 268 of the Indian Constitution are collected and appropriated by the state of West Bengal. Entry 51 of the State List reads as: "Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics;

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry".

While a fair amount of revenue is collected every year by regulating the aforementioned items through grant of retail licenses and otherwise, prosecutions for violating the provisions of the Act are quite less. Even with the insertion of Sections 15(1)(e) and 46AA and amendments of quite a few other penal sections in 2012 following the Sangrampur Hooch tragedy,[18] the penal provisions of the *BE Act* have remained as dead letters both in terms of procedure and substance. The situation has turned worse in the last couple of years with the public prosecutors/assistant public prosecutors finding it hard to convict persons arrested for violating the excise laws in Bengal. The gaps existent in this system have led to greater menace of illegal manufactures, traders, transporters and sellers, leading to not only pilferage of excise revenue but also an increase in health hazards and liquor-related deaths. In a nutshell, the purpose of the state in the prevention of import, export, transport, manufacture, possession and sale of illegal intoxicants is blatantly defeated.

In this respect, the preventive sections of the *Bengal Excise Act* ought to be looked at thoroughly, both in letter and in spirit. These sections when studied should also be seen in the context of other states and their practices. Many states have fared well with implementing their laws on prohibition or regulation of liquor. A comparative analysis in this respect will render the emulation of best practices much easier. The health hazards related to consumption of such substances and related crimes have increased putting both the system and society at risk.

**Conclusion**

Despite laws and Acts the liquor consumption has increased over the past years and inspite of well written provisions crimes related to excise have also increased. Illicit drug and good trading is harmful for both the government and the society. The production process of such goods to consumptions has a huge impact on the environment as well. This affects the formal economy and the political system as well. The magnitude of funds under criminal control poses special threats to governments, particularly in developing countries, where the domestic security markets and capital markets are far too small to absorb such funds without quickly becoming dependent on them. It is difficult to have a functioning democratic system when drug cartels have the means to buy protection, political support or votes at every level of government and society.

Illicit good trading and escaping from tax duties are quite common in developing countries. The tradition of black markets and illicit trading has a long history as discussed above. Trading of such illicit goods has taken a form

18 Sangrampur, in West Bengal witnesses a tragic incident where a methanol-tainted batch of illegal alcohol killed 143 people in India in December 2011, affecting mainly manual workers in the eastern province of Sangrampur.The deaths enraged villagers of Sangrampur in South 24-Parganas district and thousands of people, from teenagers to 70-year-olds, ransacked one hooch den after another and torched the houses of hooch sellers.

of informal or unorganised sector, creating employment and markets luring others to enter into such trade. Inspite of such stringent laws by the government, offenders are being freed with meagre fines. Corruptions make situation worse. While it is inevitable that the problems relating to illicit drugs that are currently emerging will have an impact on the research agenda in individual countries, it is crucial that research results should be channelled into the process of drug policy development, not only within these countries but at the international level too. The use of drugs can cause tremendous effects on all aspects of life including social, cultural economic. Proper scrutiny and surveillance should be there especially on the youths and teenagers. Laws should be amended with time as the target group, kinds of drugs and pattern of consumption may change. So present excise laws should be made keeping in mind of both the affected group i.e the victims and the accused and can control the rate and intensity of the illicit drug trafficking in future.

# Due Process : Meaning, History, Kinds and Comparative Study

**Dr. S. G. Goudappanavar**
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## Introduction

Law is one of the great civilizing forces in human society, and that growth of civilization has generally been linked with the gradual development of system of legal rules together with machinery for their regular and effective enforcement. The ultimate goal of a legal system is the realization of justice or freedom. State and law are essential conditions to have peaceful and organized society. The law is indispensable even though it may be having imperfections and flaws. Most of the Democratic Constitutions have been drafted on the principles of Rule of Law and respect for human rights. The necessary element of rule of law is that the law must not be arbitrary or irrational and it must satisfy the test of reason.[1] One of the important components of rule of law is the doctrine of due process of common law and fifth and fourteenth Amendment of United States Constitution.

## History of Due Process

Rule of law is the unique characteristic of the English Constitution which suggests that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In other words, the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[2] Dicey's rule of law is nothing but the due process of a law which has emerged from the customary rules of common law. Due process has ancient history which is traceable to the *Magna Carta*. During the 13th century there was struggle between the barons and the King of the England which led to issue of *Magna Carta* of 1215. *Magna Carta* was not a statute but was merely a personal treaty between King John of England and the enraged upper classes.[3] Mott has quoted the Section 39 of *Magna Carta* of 1215 which has laid the foundation for the terminology of Due Process in the following manner:

> "No freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor

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1. *Bachan Sing* v. *State of Punjab*, AIR 1980 SC 898.
2. A. V. Dicey, *Introduction To The Study of The Law Of The Constitution*, 8th edn., (Indianapolis: Liberty Classics 1982), p.110.
3. Rodney Mott, *Due Process of Law*, (New York: DA CAPO PRESS., 1973), p. 4.

send upon him, except by the lawful judgment of his pears and by the law of the land."[4]

The terminology, 'law of the land' used in the Section 39 of *Magna Carta* is replaced by the word "due process of law" in the 1354 Charter re-issued by King Edward III. *Magna Carta* was successively reissued by the Monarchy of British.[5] Henry III who re-issued the Charter 1216 of *Magna Carta* and clause related to *per legem terrae* (due process) shifted from the Section 39 to 29.[6] King Edward III who re-issued *Magna Carta* in 1354 officially used the word "Due Process of law."[7] *Magna Carta* becomes the basic symbol of British Constitutionalism which was originally applied to the free barons against Monarchy but later it was applied to every Englishman.

The United States of America adopted its Constitution on September 17, 1787 which contained no Article guaranteeing the due process of law to its subjects. However, under the leadership of James Madison twelve proposals were passed for Amendments to Constitution in 1789 but only ten Amendments were ratified by States in December 1791 which are known as Bill of Rights. The Fifth Amendment contains the clause of due process of law.[8] However the Supreme Court of USA has held that Bill of Rights historically applicable to newly formed Federal Government but not to state legislatures.[9] Therefore, the Fourteenth Amendment of US Constitution which contained due process clause is made applicable to states legislature.

**Meaning of Due Process of law**

It is very difficult to provide complete definition and meaning of 'due process of law' because it's meaning and scope is far from settled in spite of the great amount of research that has been made by various authors. Moreover, there is no unanimity among the authors on the content, scope, limitation and meaning of due process. Further the word 'due process of law' is ambiguous and has been interpreted and reinterpreted by the courts in different sense under different circumstances at different points of time. Thus, due process can be said to be relative term rather than absolute which is dynamic and flexible. Therefore, the content and meaning of due process is much related to time, territory, the nature of legislation and nature of right to be deprived.[10]

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4. *Magna Carta* Art. XXXIX (1215), quoted in Rodney L. Mott, *Due Process of Law* (New York: DA CAPO PRESS, 1973), p.3.
5. Charles Miller, "The forest of Due Process of law: The American Constitutional Tradition", in NOMOS XVIII, *Due Process*, Roland Pennock and Johan Chapman, (ed.), (New York: New York University Press, 1977), p.5.
6. Ivor Jennings, "Magna Carta and Constitutionalism in the Commonwealth," in, *The Great Charter*, William Dunham, *et al.,* (ed.), (New York: Pantheon Books, 1965), p. 75.
7. Rodney L. Mott, *Due Process of La*w, (New York: DA CAPO PRESS, 1973), p. 4.
8. V Amendment of US Constitution states that "No person shall … be deprived of life, liberty, or property, without due process of law …"
9. *Barron v. The Mayor and City Council of Baltimore*, 32 US (7 Pet) 243 (1833).
10. Durga Das Basu, *Constitution of India*, 8th edn., Vol. 3, (Nagpur: LexisNexis Butterworths Wadhwa, 2009), p. 3084.

The Due Process is a legal principle which has been shaped and developed through the process of applying and interpreting the written Constitution of America. The concept of due process provides criteria for assessing the justice of procedure. Sense of justice requires due process because due process is a means for achieving the purpose of a just legal system. Rodney Mott has viewed the due process as a specific prohibition aimed at a specific abuse.[11] Due Process makes the state subservient to rule of law. It is limitation on the power of state. The Due Process obligates the state to respect the rights of people which are owed to them and any deprivation of such right shall not be arbitrary, unreasonable and capricious. Due Process of law balances the interest of individual rights and power of state to regulate such rights. The right to due process is a principle rather than a right; a principle which is used to generate a number of specific rights, procedure and practice. This principle is grounded in a common and public sense of justice which itself is open to philosophic reflection and analysis.[12] Due Process ideas evolved both in and out of courts and are fused into new ideology of higher law.[13]

It is the judiciary not the legislators who are empowered by due process clause to decide whether law enacted by the State is fundamentally fair, in accordance with the Constitution and the principles of due process. Due process is often equated with the concept of natural rights which has proven controversy. The word "due" in America has been interpreted as 'reasonable', 'just', and 'proper.'[14] The elasticity and potential breadth of the words 'due process of law' have provided the judiciary with countless opportunity for its interpretation and re-interpretation in the light of value of the incumbent society. Supreme Court of America first examined the meaning of due process in *Lessee v. Hoboken Land & Improvement Co*.[15] Benjamin, J., *per curium* stated that the phrase 'due process of law' were undoubtedly intended to convey the same meaning of as the words 'by the law of the land' used in *Magna Carta*. Honorable judge further noted that

> [A]lthough the Constitution did not define 'due process of law,' provided no description of those process which are intended or forbidden and did not declare the principles to be applied: It is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process" by its mere will . . . We must examine the Constitution . . . to see whether this

11. Rodney L. Mott, *op,cit*., p. 32.
12 David Resnic , *"Due Process and Procedural Justice",* in, Nomo's XVIII *Due Process*, Roland Pennock and Johan Chapman, (ed.), (New York: New York University Press, 1977), p.208.
13 Charles Miller, "*The Forest of Due Process of Law*": The American Constitutional Traditions, in, Nomo's XVIII *Due Process*, Roland Pennock and Johan Chapman, (ed.), (New York: New York University Press, 1977), p.14.
14 M.P. Jain *Indian Constitutional Law*, 5th edn., (Nagpur: LexisNexis Butterworths Wadhwa, 2005), p.1080.
15 *Lessee* v. *Hoboken Land & Improvement Co,* 59 U.S. 272 (1856)

process be in conflict with any of its provision.[16]

Further Frankfurter, J., said "Due process" unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance. Due process cannot be imprisoned within the treacherous limits of any formula. It represents a profound attitude of fairness between the individual and government."[17] Contents of due process are not fixed which has led to different interpretations by different judges at different point of time.

**Kinds of Due Process: Substantive and Procedural Due Process**

Substantive due process is developed in America. Substantive due process ensures that government power of law making must be compatible with constitutional spirit. Under due process of law, the Court determines the justness of substance of law. Therefore every form of review other than involving procedural due process is a form of substantive due process. In a democratic country judicial review of legislations is always considered to be fundamental to legal system.[19] Judicial review of the legislation under the specific provision or Amendment of the Constitution is not subject matter of debate because Constitution provides specific indication through specific language that certain subject matter of legislation is beyond the power of the legislator or executive. The court employs due process clause to control the substance of legislation that certain subject matter of legislation is beyond any proper sphere of government activity. In nutshell, it means that certain legislations are incompatible with democratic system of government and individual liberty. Thus, the court opinion is based upon the premises that any deprivation of life, liberty and property without due process of law is never granted by the Constitution

American legal system has divided the due process into 'Substantive due process' and 'Procedural due process. Procedural due process protects the individual that process adopted by the state to deprive the rights of individual should be fair and non-arbitrary. For example, the procedure of law must accommodate the provision in respect of sufficient notice, impartial tribunal, opportunity to produce evidence and cross examine the adversary evidence, etc. Procedural due process is limited in scope. Procedural due process only guarantees that there is a fair decision making process by State. In general procedural due process means that in dealing with individuals, the Government must proceed with 'settled usages and modes of procedure', *e.g*., that there should be no conviction without hearing. This kind of due process clause does not protect against the use of unjust laws on which the decision of state is based.[20]

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16 *Ibid.*

17 *Joint Anti- Fascist Refugee Committee* v. *McGrath,* 341 US 123 (1951).

18 Johan Nowak, *et al., Constitutional Law*, (St Paul Minnesota: St Paul Minn. West Publishing Co. 1978), p.381.

*19* *Keshavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.

20 Johan Nowak, *et al., loc,cit.*

**Due Process in England**

In England the due process of law is mainly referred to the procedural due process rather than substantive. Section 39 of *Magna Carta* of 1215 gave protection to the free barons that they will not be imprisoned by the King except by the law of the land. The King's arbitrary power of imprisonment of his subject was very much restricted by this clause. The Law of the land had assured the barons and free men that their imprisonment shall be subject to the trial by their peers according to the law of the land. The phrase "the law of Land" were not defined in the statute. The nature of Section 39 of 1215 charter was understood in three senses. First, it was aimed at specific prohibition of specific abuse. Second, that specific abuse which Section wanted to curb is that of execution before judgment. Third, the law of the land is quite generally understood in the sense of legality. However the 'law of the land' word was replaced by the 'due process of law' in the charter of 1354 issued by King Edward III which widens the scope of due process.

Moreover the protection of due process which was initially provided to only 'free men' is made available to every man.[21] The 'law of the land' was capable of conveying the meaning of the positive law. It means that procedure prescribed by the King through law. But it was held that the law of the land meant to be customary laws of the Kingdom.[22]

During the medieval period in England due process was very much related to the procedure of imposition of fines, seizing of land, forfeiture or outlawry. The Courts were used to invalidate the decision of the King which is based upon the summary proceedings by observing that those proceedings were not in accordance with the law of the land. Law of the land has been equated with custom of the realm or established procedure under custom of England. By the end of fifteenth century, it was firmly established in England that no one should be deprived of his life and property without regular trial before the impartial tribunal according to the law of the land. This is considered to be greatest contribution of due process of common law to the criminal jurisprudence.[23] The phrase 'law of the land' used in the 39th Section of *Magna Carta* of 1215 had suggested that limitation could be applied to only King. However, the word 'due process of law' used in the Charter 1354 issued by King Edward III constrained even the courts also. Thus, due process of law in England meant to

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21 Edward III made changes to *Magna Carta* that this protection should apply to every 'man of what estate or condition that he be.' Even certain of the American States before the civil war had applied due process protection only to the free man but not to the black slaves. However the Thirteenth and Fourteenth Amendment of US Constitution removed that discrimination. See Mott, *Due Process of La*w, (New York, DA CAPO PRESS, 1973), p. 37.

22. Joseph Story, *Commentaries on the Constitution of the United States*, Ronald & John Nowak, (ed.), (New York: Carolina Academic Press 1987), p.923.

*23* *Supra* note 11 at 41.

be a regular procedure for summoning people to trial and adjudicating their liability. Unlike USA, the due process of law in England has not become subject matter of debate among the judges, academicians and politicians because it is very much related procedural due process rather than substantive due process. Therefore in British's legal system, due process of law does not put restraint on legislative function of Parliament. The *Magna Carta* which becomes basic document of English liberties never intended to limit the authority of the Parliament of England because the Parliament was not in existence at the time of issue of *Magna Carta.*

But great English Commentator Sir Edward Coke opined that the Acts of Parliament too were subject to 'the law of the land.' In *Dr. Bonham's case,*[24] Sir Edward Coke, who was Chief Justice of the Court of Common Pleas declared, "that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void."[25] Sir Edward Coke said that "Statutes to be legitimate, must conform to the fundamental law, and merely because a declaration is an Act of Parliament is no guarantee that it is according to the principles of the English common law and custom."[26] Even Rodney Mott had said that there were a considerable number of acts, awards, etc., which were declared void as being against *Magna Carta* or the Fundamental Law.[27] Nevertheless the British legal system is firmly built upon the theory of omnipotence of Parliament which is propagated by Sir Blackstone that is the major premises why due process does not limit the Parliament in England. The authority of England Parliament is infinity because England does not have written Constitution. Hence the British Parliament is supreme and judiciary does not enjoy the power of *ultra vires* of legislation. Nevertheless, the opinion of Sir Edward Coke was short lived. Captain Johan Streater who had been imprisoned by the order of Parliament, pleaded that his imprisonment was illegal because it is contrary to the Law of the Land. The Court answered that it must bow to legislative supremacy.[28] Even Walter Bagehot, the famous British economist and journalist, has commented that "there is nothing the British Parliament cannot do except transforms a man into a woman and woman into a man."[29] The British courts are revered and esteemed as necessary concomitants of the democratic process, but not the degree of being ultimate guardians of the Constitution as are the American courts.[30] Even the *Human Rights Act, 1998* which promotes Human rights in U.K. has acknowledged the supremacy of the

24 8 Co. Rep. 114a, 77 Eng. Rep. 646 (C.P. 1610).

25 Lowell Howe, *The Meaning of "Due Process of Law"* Prior to the Amendment of the Fourteenth Amendment, 18 *Cal. L. Rev.* (1930). p, 583. Available at:http//scholarship.law.barkeley.edu/californialawreview/vol18/iss6/1. Accessed, on March 17, 2016.

26 Rodney L.Mott, *op,cit*., p. 67.

27 *Ibid.*, at, p. 44.

28 *Ibid.*

29 Henry J. Abraham, *The Judicial Process*, 4th edn., (New York: Oxford University Press,1980), p.311.

30 *Ibid.*

Parliament. The *Human Rights Act, 1998* empowers Court to interpret other legislation with compatibility of human rights. However, if the legislation is incompatibility with Human Rights, it can declare legislation is incompatible but cannot invalidate the legislation.[31] It means supremacy of the Parliament of U.K. kept intact even in 21st Century.

**Due Process in United States of America**

America's independence is considered to be a symbol of victory for civil and political rights of human beings. But irony is that the federal Constitution of United States of America as first adopted did not contain due process clause. Nevertheless that important omission was rectified in the year 1791 by the Fifth Amendment. But eight States of America had already contained the due process clause in their Constitution before the adoption of Fifth Amendment of the federal Constitution.[32] However, the Fifth Amendment did not apply to states. Therefore, the Fourteenth Amendment of USA Constitution obligated the states to adopt due process clause. The American legal system was highly fused by the philosophy of Sir Edward Coke that the concept of due process clause even restrained the Parliament also. Further, American Constitution is highly influenced by the Locke's philosophy of Natural Rights. Mr. Madison who was the father of the American Constitution in drafting and introducing the Bill of Rights had reasoned that restriction in the form of due process is necessary not only on the executive but also on the legislative power of federal government.[33] Rodney Mott concluded that the philosophy is developed in America that Fifth Amendment is expected to limit arbitrary abuses of the powers of government from whatsoever sources abuse might come.[34] Thus the due process provision is intended to serve as a general limitation on tyranny of any kind of government is undisputable.

Two fundamental differences exist between the due process clause of USA and England. Unlike in England, due process in USA puts limitation not only on executive but even on the legislative power of state. The Supreme Court of United State of America held that:

"That the warrant now in question is legal process is not denied. It is issued in conformity with an Act of Congress. But is it 'due process of law'? The Constitution contained no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to

31 Section 4 authorizes the Court to declare any legislation as incompatible if it is inconsistent with *Human Rights Act, 1998*. However, section 3 (2) does not empower the court to declare such incompatible legislation is void.

32 These were: Maryland (1776) Article XXI, Pennsylvania (1776) Article VIII, North Carolina (1776) Article XII, Virginia (1776) Article VIII, New York (1777) Article XIII, South Carolina (1778) Article XLI, Massachusetts (1780) Article XV, and New Hampshire (1784) Article XV.

33 Rodney L. Mott, op, cit., p. 155.

34 Ibid., at 159.

legislative power to enact any process which might be devised. The article is restrain on the legislative as well as on the executive and judicial powers of the government, and cannot be constrained as to leave Congress free to make any process 'due process' by its mere will."[35]

Further due process concept in USA is interpreted in such sense that it puts limitation upon the legislative powers which are not explicitly enumerated in the Constitution. The due process of law in England is intended to provide protection to individual against arbitrary arrest and imprisonment in criminal matters.[36] But the due process concept in United State of America is extended to even civil matters including taxation and domain.

**Due Process before the Civil War**

The elastic scope and potential breadth of 'due process of law' has provided a number of opportunities to the Supreme Court of USA for its interpretation. However, the due process of law of Fifth Amendment was largely irrelevant till the middle of the Nineteenth century. In fact it was in 1850 that the Supreme Court of USA first examined due process clause in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*[37] The Court had no difficulty in holding that the Fifth Amendment Due Process Clause restrained Congress as well as the executive and judicial branches of government. Congress was held to be not "free to make any process 'due process of law,' by its mere will." The Supreme Court adopted twin tests to determine whether process prescribed by the law is due process of law or not. First, it looked to those "settled usages and modes of proceedings" under English Law that were applicable to American society. Second, the Court examined the whether Common Law practice be conflict with Constitution of USA. Thus due process was defined in terms of historically accepted practice of common law.[38] The Courts repeatedly in unambiguous manner have held that determination of what is due process is the function of judiciary and not of legislature. The Court findings are based on the following reasons:

> To Say … that "the law of the land," or "due process of law," may mean the very act of legislation which, deprives citizens of his rights, privileges, or property, leads to a simple absurdity. The Constitution would then mean that no person shall be deprived of his property or rights unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away.[39]

The Due Process clause of the Fourteenth Amendment was the least discussed provision in the Amendments which has failed to specify particular

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35 *Murray's Lessee v. Hoboken Land & Improvement Co.* (1855) 59 US (18 How.) 272 at 276.

36 Mott, Due Process of Law, (New York: DA CAPO PRESS,1973), p. 180.

37 *Murray's Lessee v. Hoboken Land & Improvement Co.* (1855) 59 US (18 How.) 272.

38 Ronald Pennock , "Introduction", in, Nomo's XVIII *Due Process,* Roland Pennock and Johan Chapman, (ed.), (New York: New York University Press, 1977), p. xvii.

procedural safeguard in the Amendment. Thus the Amendment has authorized state to prescribe procedural rules which have to be just and not necessarily confined to the procedure of common law.

**Procedural Due Process in the Post-Civil War Period.**

In *Hurtado* v. *California*,[40] the Court held that due process clause did not require grand juries in state criminal proceedings. Court further elaborated the general meaning of due process; new procedures that were not part of the inherited common law might nevertheless qualify as due process. Court held that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show that sanction of settled usage both in England and in America; but it by no means follows, that nothing else can be due process of law. Citing the common law "flexibility and capacity for growth and adaption", the Court concluded that the due process of law had a "fixed definite and technical" meaning is untenable. Thus, historical precedent is no longer a necessary condition of due process, instead fundamental fairness of a challenged procedure is vital for determination of due process. Stanley Mathew, J., held due process must be determined by a "gradual process of judicial inclusion and exclusion", drawing on "the best ideas of all systems and of every age." Due Process, he said was like the common law, its inspiration coming "from every foundation of justice."[41] Thus the court admitted that there may be procedure outside common law according to the law of the each state which can be recognized as due process. [42]

**Substantive due process in United States of America**

The written Constitution which defines the different branches of government and their duties, postulates limitations upon the legislative body and if such limitations are disregarded in the enactment of a statute it becomes the duty of the judiciary, when adjudicating the rights of litigants, to treat the statute as void.[43] But when judiciary tries to declare a statute as void on the grounds that are not explicitly enumerated in the Constitution under the due process clause, certainly it leads to a controversy and becomes subject matter of hot debate in the legal system.[44] Chase J., in *Calder* v. *Bull*[45] laid the foundation for substantive due process in America through his judgment which deserves to be quoted at length:

> "I cannot subscribe to the omnipotence of a state legislature or that it is absolute and without control: although its authority

39 Wynehamer v. People, 13 N.Y. 378 (N.Y. 1856)
40 *Hurtado* v. *California* 110 U.S., 516 (1884).
41 *Ibid.,* at 531.
42 *Missouri* v. *Lewis* 101 U.S. 22 (1879), see also Walker v, Sauvinet, 92 U.S. 90 ( 1875).
43 *Marbury* v. *Madison* (1808) 5 US (1 Cranch) 137.
44 Thomas M.Cooley, *Constitutional Limitations,* 1st edn. (Boston: Little, Brown, & Co.,1868), p. 174.
45 3 U.S. 386 (1798)

> should not be expressly restrained by the constitution, or fundamental law of the state … There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principle of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law, in government established on express compact, and on republican principles must be determined by the nature of power on which it is founded."[46]

Hence Chase J. went outside the written Constitution for a criterion to test the validity of a legislative act. What he meant was that the scope of the power of the legislature, or any governmental body is determined by the purpose for which it is brought into existence. However, this idea is not new but akin to the idea of Johan Locke which influenced the American society to great extent and that has become source of substantive due process of law in American legal system. The arguments of Chase J. are substantially based upon the foundation of 'social compact' doctrine. Social Compact doctrine means that peoples enter into contract with each other and transfer their power to form the government with a condition that the government should secure liberty and justice of people. The chief principle of this doctrine is that civil rulers hold their powers not absolutely but conditionally, government essentially is a moral trust and that moral trust is to promote liberty and justice,[47] if these conditions are not fulfilled by trustees, they would forfeit their trust. In nutshell, social compact theory limits power of American Government and it cannot take any person's life, liberty and property except when such a taking is necessary to secure life, liberty and property to the individuals generally who compose society. It means that life, liberty and property of people can be taken only for the legitimate end of government or compelling reason which justifies deprivation of life and liberty of American citizen.

The social compact theory has led to formation of Doctrine of Vested Rights and the Doctrine of Police Power under due process clause. Thus, these two doctrines have set up extra-constitutional and unwritten basis for judicial review which is equated with "natural justice" or "law of nature." But conferring discretionary power to the judiciary to determine the validity of law on unwritten specification in the constitution is nothing but conferring veto power to judiciary. The courts on the basis of "liberty of contract" have struck

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*46* *Calder* v. *Bull,* (1798) 3 US (3 Dall.) 386.

47 The people of America have created the United State Government to establish justice, to promote the general welfare, to secure the blessings of liberty, and protect their persons and property from violence. See the object of American Constitution.

down laws which try to regulate industry. This liberty was based on the presumed parity of bargaining power between employer and employee, buyer and seller, guaranteeing both parties substantive due process "liberty" against police power legislation.[48] In *Lochner* v. *New York*, the Court struck down a legislation which regulated working hours of workers in baking industry on the ground that it interfered with their contract of liberty.[49] The Supreme Court of USA has struck down many legislations of New Deal era for violation of due process clause during 1930s.

The general position of the court in respect of due process is that when fundamental interest is at stake involving life, liberty, or property, then the state must have a "compelling' objective and its statute must be narrowly tailored to achieve that objective. In case of non-fundamental interest, the state must have a "legitimate" objective, and a statute must rationally relate to achieving that objective. The Court thus determines what powers of state government are legitimate or compelling, regardless of enumeration of powers in state's constitution. The Court also determines what rights are fundamental, notwithstanding rights that may be enumerated in a state's constitution. However, due process underwent changes since 1937 from protecting individual interest to community interest because of Constitutional Revolution of 1937. The Court started to focus less on substantial due process in social and economical reformative laws and more on procedural aspect of such laws. Further the court relied on the doctrine of enumerated specific prohibitions under the Constitution to decide the validity of legislations rather than on unremunerated prohibitions. Therefore, the scope of substantive due process is narrowed down in US legal system.

**Due Process in India**

The expression 'due process of law' is not used in any provisions of the Indian Constitution. However, the due process can be inferred through the Articles 14, 19, 20, 21 and 22 together. The judiciary has played a creative role in this regard. It has interpreted the 'procedure established by law' in Article 21 to be equivalent of the 'due process of law.' Article 21 in its draft form was Article 15. It provided that "No person shall be deprived of his life or liberty without the due process of law."[50] But the Drafting Committee at a later stage proposed the substitution of the expression *"except according to procedure established by law"* for the words "without due process of law." The Drafting Committee justified the amendment because the word due process gives scope for judicial supremacy to determine the content of law which is likely to create

48 In 1885, the New York Court held that legislation banning manufacture of cigar in tenement house is unconstitutional because it interfered with freedom of worker to trade where they wished. In 1897, Justice Peckham held that Louisiana insurance law violated the due process clause by depriving a local firm of its liberty to purchase insurance which it wished to purchase. See *Allgeyer* v. *Louisiana,* 165 U.S. 578.

49 *Lochner* v. *New York,* 198 U.S. 45 (1905).

50 H.M., Seervai, *Constitutional Law of India,* 4th edn. Vol. 2, (New Delhi: Universal Law Publishing Co. Pvt. Ltd. 2010), p.970.

confusion and hurdles in the social transformation. Their view was based upon the experience of due process in American legal system. Frankfurter, J., of the United States Supreme Court had expressed that due process clause is undemocratic and burdensome to the judiciary, because it empowered judges to invalidate the legislation enacted by democratic majorities,.[51] The Supreme Court of India in *A.K. Goplan* v. *Union of India* held that Article 21 is complete code; procedure established by law need not comply with the principle of natural justice and reasonableness under Article 19.[52] Court decisively rejected the application of due process of law under Article 21 pointing out that as long as a person was detained according procedure established by law, he could not challenge his detention. However the attitude of judiciary gradually shifted from the procedure established by law to procedural due process.

The 11 judges bench of Supreme Court in *Bank Nationalization*[53] overruled the view of *Goplan* and opined that each fundamental right is not complete code but interdependent which laid the foundation for due process clause in the Indian legal system. The 24th and 25th Amendments of the Constitution were adopted by the Parliament with an object to nullify the decision of the Supreme Court given in the *Bank Nationalization*[54] cases respectively. Further the Parliament Amended Articles 13 and 368 gave unlimited power to Parliament to amend, add, vary or repeal any Article of the Constitution which established omnipotent Parliament that is based upon the philosophy of Austin's unlimited sovereign. The worst was insertion of Article 31-C in the Constitution which empowered the Parliament to enact a law with mere declaration that it would give effect to Directive Principles of State Policy, which will insulate that law from judicial scrutiny. Such law would not be challenged on the ground that it would infringe the fundamental rights. The writing was clearly on the wall to the Supreme Court that Parliament was supreme and could do what it wanted. Indeed these amendments destroyed the separation of power and made the judicial review is mere illusory and myth.[55] Even though 13 judges Bench of the Supreme Court in *Kesavananda Bharati* upheld these amendments, it laid down the basic structure theory.[56] Parliament's power to amend the Constitution is permissible to any extent with only limitation of not violating

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51 B.N. Rao had met Justice Felix Frankfurter of the United States Supreme Court for advice in the drafting of the Indian Constitution. Frankfurter told him that he considered the power of judicial review implied in the due process clause both undemocratic – because a few judges could negate legislation enacted by the representatives of a nation and also burdensome to the judiciary. See, Granville Austin, *The Indian Constitution,* (New Delhi: Oxford University Press, 2010), p103.

52 *A.K. Goplan* v. *Union of India,* AIR 1950 SC 27.

53 *Rustom Cavasjee Cooper* v. *Union of India,* (Bank of Nationlisation), (1970), 1 SCC 248, 1970 AIR 1970 SC 564.

54 *Ibid.*

55 Abhinav Chandrachud, *Due Process of Law,* (Lucknow: Eastern Book Company, 2012), p. xxxvii.

56 *Kesavananda Bharati* v. *State of Kerala,* (1973) 4 SCC 225, AIR 1973 SC 1461.

its "basic structure." Thus justness of Constitution is saved by the theory of basic structure which reflected the value of substantive due process of law which is akin to the US substantive due process of law, which is based upon the philosophy of natural law and justice. The concept of natural law and justice provides judiciary to determine the validity of law on the grounds which are not explicitly enumerated in the constitution.

The *Menaka Gandhi*[57] is now accepted as the starting point of the introduction of due process clause in India after incorporating the concept of arbitrariness articulated in *Royappa*[58] under Article 21. The Court held that it was axiomatic that a law prescribing a procedure for deprivation of life and personal liberty under Article 21 could not be any sort of procedure but it has to be one that is neither arbitrary nor unfair or unreasonable.[59] Bhagawati J. observed:

> "A law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has to stand a test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation. *Ex-hypothesi* it must also be likely to be tested with reference to Article 14. On principle, the concept of reasonableness must, therefore, be projected in the procedure contemplated by Article 21 having regard to the impact of Article 14 on Article 21."[60]

Further the Supreme Court observed that, "the procedure contemplated in Article 21 must be right, just, fair, and arbitrary, fanciful or oppressive."[61] Thus, Court interpreted that "procedure established by law" meant to be "due process of law" which is emphatically rejected the theory of original intent and embraced a more generic and contemporaneous value of Indian Constitution.[62] In *Sunil Batra* v. *Delhi Admistration,* Krishna Iyer J. explicitly conceded the presence of due process under Article 21. Thus, in India due process concept can be perceived under the theory of basic structure, doctrine of non-arbitrariness under Article 14 and 'just, fair and reasonable' requirement of Article 21.[63] Even Articles 19 (2) to (6), 20, and 22 also insulate the content of due process in the Indian legal system.

## Conclusion

It is American Constitution which gives the statutory recognition to the due process of law. It is very difficult to provide complete definition and meaning of 'due process of law' because it's meaning and scope is far from settled. The word due process is limitation on the power of legislator because whatever

57 *Maneka Gandhi* v. *Union of India,* AIR 1978 597; (1978) 1 SCC 248.
58 *E.P. Royappa* v. *State of T.N.,* (1974) 4 SCC 3; AIR 1974 SC 555.
59 (1978) 2 SCR 621, at 658 and 671. *Kartar Singh* v. *State of Punjab,* (1994) 2 SCR 375.
60 (1978) 1 SCC 248 at 252.
61 *Ibid.,* att 284.
62 Abhinav Chandrachud, *Due Process of Law,* (Lucknow: Eastern Book Company, 2012), p. xxxix.
63 (1979) 1 SCR 392 at 428.

legislation they enact must confirm with principles of natural law and justice. The word 'due process of law' is ambiguous and has been interpreted and reinterpreted by the courts in different sense under different circumstances at different points of time. Thus, due process can be said to be relative term rather than absolute which is dynamic and flexible. Therefore, the content and meaning of due process is much related to time, territory, the nature of legislation and nature of right to be deprived. The Due Process obligates the state to respect the rights of people which are owed to them and any deprivation of such right shall not be arbitrary, unreasonable and capricious. Unlike USA, the due process of law in England has not become subject matter of debate among the judges, academicians and politicians because it is very much related procedural due process rather than substantive due process. The expression 'due process of law' is not used in any provisions of the Indian Constitution. However, the due process can be inferred through the Articles 14, 19, 20, 21 and 22 together.

# Legalization of Euthanasia: The Conundrum of Principle and Policy

**Dr. Venugopal B.S. ***
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## Introduction

The legalisation of euthanasia, physician assisted suicide (PAS) and withdrawal of medical treatment from terminally ill-patients including those in permanent vegetative state (PVS) has been one of the most controversial legal subjects which has triggereda debate on the conundrum of legal principle, policy, ethical issues and religious overtones surrounding it. The ambiguity in the very meaning of euthanasia is another cog in the hub of never ending diatribe throwing flood light on its pros and cons. These issues have kept the matter burning in the legal and judicial circles. Consequent upon the debate in a few foreign jurisdictions euthanasia or physician assisted suicide has been legalized with a framework encompassing provisions to be complied with before and after performance of euthanasia or completion of assisted suicide. The working of laws in these jurisdictions, manifest that especially the procedural safeguards following the performance of euthanasia or completion of physician assisted suicide are not strictly adhered to. The slippery slope development in one jurisdiction permitting exceptions after exceptions devouring the general rule has permitted euthanasia under almost all circumstances never contemplated initially because of which it has been reduced to the first available opportunity rather the last option as it ought to be. In India the law commission has recommended legalisation of passive euthanasia which has not been translated into law. The decision of the Apex Court in *Aruna Ramachandra Shaunbaugh's* case legalised passive euthanasia subject to the fulfilment of the conditions precedent contemplated therein. As there is no specific legislation in India legalising euthanasia or physician assisted suicide or withdrawal of medical treatment legislative attempts made in a few foreign jurisdictions can be taken recourse to grapple with the issues to deliberate upon the way forward. In this article an attempt is made to critically analyse the complex question of principle, policy, ethical perspective and religious overtones which has pervaded the whole spectrum of euthanasia, physician assisted suicide and withdrawal of medical treatment in case of patients in permanent vegetative state inclusive of those suffering from terminal illness to facilitate formulation of a vibrant and sensitive legislative framework for their legalisation.

## Meaning of Euthanasia

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The word euthanasia is the result of coinage of two Greek words 'eu' and 'thanatos' which literally signifies 'good death' or 'easy death'.[1] It is also styled as 'mercy killing'.[2] It is an act of putting an end to the life of a person who is suffering from terminal illness or excruciating incurable pain grounded on mercy.[3] Accordingly euthanasia is a concept which revolves around those who are terminally ill or in a permanent vegetative state or suffering from intractable pain for whom life has become a hell that a silver line piercing the cloud is found in the solace of a painless death.[4] Such unfortunate lots should have the luxury of dying an easy, painless and happy death enjoining an obligation on a physician to alleviate their bodily suffering.[5] As such a physician deliberately intervenes with the intention of ending the life of such a person on his request either by a positive act or assisting him to end his life on his request either by a positive act or assisting him to end his life or withdrawing the medical treatment and life support systems.[6] The physician may administer a lethal substance[7] or prescribe a lethal substance for self-administration or discontinue the life deferring treatment to facilitate acceleration[8] of natural death.[9]

**Euthanasia may be classified as follows.**

Active Euthanasia:It signifies a deliberate performance of a positive act for ending the life prompted by mercy.[10] In sum and substance it is a deliberate life shortening act consequent upon the request of a person who seeks salvation from constant perpetual agony. It involves the administration of a lethal drug.

Passive Euthanasia**:** It is the converse of active euthanasia signifying deliberate omission of life lengthening act.[11] The distinction between active and passive euthanasia is that in the former a positive act is done towards extinction of life, the latter involves abstaining from doing something which would have preserved life.[12] Accordingly passive euthanasia is characterised by acts of omission like withdrawal of life prolonging medication or removal of artificial respiratory devices or heart lung machine from a patient who has slipped into coma. It is resorted toaccelerate the natural process of death with an intention of emancipating him from constant unbearable pain or agonising condition.

Voluntary Euthanasia:It is taken recourse to on obtaining the consent of a

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1 Dr. Seema Sharma, "Legal Challenges to euthanasia in india," *IJRESS*, Vol.7, Issue 2, p.223.
2 *Ibid.*
3 *Ibid.*
4 *Ibid.*
5 196th Law Commission Report, "Passive Euthanasia A Relook", p.1
6 *Id* at p. 2
7 *Ibid.*
8 *Ibid.*
9 *Ibid.*
10 See *supra* note 1, 224.
11 *Ibid.*
12 *Ibid.*

dying patient intending to opt for mercy killing.[13] The request may also proceed from a legal representative of such a patient.[14] The consent must be free.[15] It should not be the result of any coercion.[16] It must have emanated from the freewill and volition of a consenting patient. Voluntary euthanasia is a reinforcement of the principle of bodily autonomy which confers an exclusive right of self-determination to what shall or shall not be done with one's body. Internationally it has been accepted as the most appropriate form of euthanasia.

Non-voluntary Euthanasia:It occurs when the person to be subjected to it is either unconscious that he is incapable of expressing his desire or conscious but lacks the mental capacity to arrive at a rational conclusion. The recipient either is not in a position to give consent for the reason stated above or by reason of mental incompetency he cannot take any decision at all. In such a situation the consent proceeds from the legal representatives in the best interest of the recipient. It appears if there are no legal representative consent can be dispensed with permitting medical practitioner under the authority of a court to withdraw the life sustaining treatment or procedure in the best interest of the patient as dictated by sound medical ethics or do a positive act to end the life. The premise for this type of euthanasia can be found in the presumption that a person if conscious and otherwise capable of giving a genuine consent would not have objected for extinction of his life.

Involuntary Euthanasia: It is Euthanasia performed against the expressed will of the recipient who is an unwilling participant in the procedure.[17] It amounts to the offence of murder.[18]

Active or passive euthanasia may voluntary or non-voluntary. It may be involuntary.

The question of euthanasia arises on three occasion's viz., at birth, terminal stage and unforeseen mishap.[19] At birth it arises in case of physically and mentally handicapped children grounded on futility of medical treatment, where the decision to perform euthanasia needs to be taken in accordance with the laws of the land by the parents and doctor.[20] At terminal stage the conscious patient can give consent for euthanasia or physician assisted suicide or withdrawal of medical treatment if permitted by the law of the land. It is a situation where the doctor is under no moral obligation to save the life.[21] The third situation is characterised by severe brain damages consequent upon violence, poisoning, accident or natural cases where a person's life can be

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13 *Ibid.*
14 *Ibid.*
15 *Ibid.*
16 *Ibid.*
17 *Ibid.*
18 *Ibid.*
19 P. N. Murkey & Konsam Suken Singh, *Euthanasia* [Mercy Killing], The Indian Academy Forensic Medicine, 30(2) at p. 92.
20 See *infra,* Groningen Protocol
21 See *infra*

sustained only through artificial means but only in a state of suspended animation.[22]

Extinction of life occurs in euthanasia, homicide and suicide. However, euthanasia differs from homicide and suicide.

**Euthanasia v. Homicide**

Homicide means killing of one human being by another human being.[23] It is punishable unless it falls into any one of the exceptions contemplated under law.[24] It may amount to murder under some circumstances.[25] The antagonists of euthanasia consider it as murder. It is not murder for the protagonists of physician assisted patient activated suicide. Even according to them, euthanasia activated by the physician on request amounts to murder as he takes active participation to cause the death. It is an expressed opinion that mercy killing akin to euthanasia amounts to murder if it is performed without consent.

**Euthanasia v. Suicide**

Euthanasia cannot be considered at par with suicide as there is fundamental difference between the two. It is considered as a device to put an end to the life of a person to relieve him from the misery where resuscitation is impossibility.[26] On the other hand, suicide is a diametrically contrasting concept signifying an act of deliberate self-killing.[27] Suicide accordingly implies intentional termination of one's own life by a self-induced means. It is an act where a person kills himself by his own act without any assistance from others for reasons best known to him.

**Legal Status of Euthanasia, Physician Assisted Suicide and Withdrawal of Medical Treatment from Terminally Ill-Patients in a Few Foreign Jurisdictions**

**Netherlands**

*Termination of Life on Request and Assisted Suicide (Review of Procedures) Act,* 2002

Euthanasia and physician assisted suicide were legally formalised as a result of decades of persistent debate culminating in the *Termination of Life on Request and Assisted Suicide (Review of Procedures) Act,* 2002.[28] The Act exempts a physician from criminal liability who in accordance with the requirements of due care as contemplated therein terminates life on request or assists a patient to commit suicide.[29] Due care implies a conviction on the part

22 See *infra*

23 Prof. S.N. Misra, *Indian Penal Code,* 417, Central Law Publications, Allahabad (2016).

24 The Indian Penal Code, Seesecs 84-96.

25 The Indian Penal Code, See secs 299-300

*26* *Maruthi Shripathi Dubal* v. *State of Maharashtra*, 1987 CrLJ 743.

*27* *Ibid.*

28 Netherlands became the first country to decriminalize voluntory euthanasia, Bulletin of World Health Organization, 2001, p. 550/79 (6).

29 See the Statement of Object of '*Termination of Life on Request and Assisted Suicide (Review Procedures) Act,* 2002

of a physician that the request of the patient was voluntary and well considered, patient was suffering from unbearable lasting agony and patient has been informed of his critical condition and prospects.[30] Further the patient should harbour a strong belief that there was no other reasonable solution to alleviate him from the critical condition in which he was.[31] The physician must have consulted at least one other independent physician who has seen the patient and rendered his opinion with respect to the due care requirements contemplated above.[32] The consulted physician must have the experience of terminating a life or assisting a suicide with due care.[33] The crucial question is who can make a request for termination of life. Any minor patient falling between the age of 12 and 16 years may make a request for termination of life or assisted suicide provided he has sufficient mental maturity to have a reasonable understanding of his interests.[34] Further it is necessary that a person exercising parental authority or guardian as the case may be must have been included in the decision-making process.[35] If the above two conditions are fulfilled a physician cannot refute the request of such a patient.[36] Additionally, the requirements of due care would apply mutatis mutandis.[37] In case of a patient falling between 16 and 18 years of age he can make a similar request provided he is deemed to have a reasonable degree of understanding as to his interest.[38] However as contemplated above, the involvement of the parent or parents exercising parental authority in the decision-making process is mandatory.[39] If a patient is of the age of sixteen years or above who does not possess the mental capacity to express his wish but has expressed his wish terminating his life in writing when he was deemed to have reasonable understanding of his interests prior to reaching that condition the physician has no option but to accede to his request subject to the requirements of due care.[40] It is obvious from the above discussion that parental involvement in the decision-making process is dispensed with if a patient has attained the age of 18 years provided the conditions discussed above are fulfilled.

The above Act contemplates the Constitution of Regional Review Committees whose duty it is to ensure that all cases of termination of life and assisted suicide are registered with it for review. The Committee is enjoined with the duty of reviewing notification regarding cases of termination of life and assisted suicideon request.[41] The committee reviews the notification to

30 *Ibid.*
31 *Ibid.*
32 *Ibid.*
33 *Ibid.*
34 *Ibid.*
35 *Ibid.*
36 *Ibid.*
37 *Ibid.*
38 Ibid.
39 *Ibid.*
40 *Ibid.*
41 See for the establishment of the Committee, composition, appointment, dismissal and remuneration *Id* at Arts 3, 4, 5, 6 and 7

ascertain the observance of requirements of due care.[42] On review if the committee opines that the statutory obligation of due care is not complied with, it needs to communicate the matter to the concerned physician and the Authority prescribed under the Act.[43] Further its opinion must be communicated to the public prosecutor at his request to enable him to assess the actions of concerned physician to ascertain the possibility of a criminal investigation.[44]

The termination of life of another person by any other person notwithstanding the express and earnest request of the former is an offence under the Penal Code of Netherlands punishable with imprisonment not exceeding twelve years or a fifth category fine.[45] Likewise any person who assists another to commit suicide invites penal liability.[46] It does not amount to an offence if committed by a physician in compliance with the due care criteria discussed above.[47]

The above Act warranted an amendment to the Burial and Cremation Act. Accordingly, now it contemplates that in case of death resulting from the termination of life or assisted suicideon request the physician conducting the post mortem examination shall not issue a death certificate.[48] The attending physician shall refer the matter to a municipal autopsist with a reasonable report pertaining to observance of requirements of due care.[49] The municipal autopsist, if of the opinion that he cannot issue a death certificate, shall report the matter to the public prosecutor and furnish a reasoned report as to the observance of requirements of due care.[50] If the public prosecutor is of the opinion that he cannot issue a no objection certificate for burial or cremation he shall accordingly report the matter to the municipal autopsist and the Regional Review Committee.[51]

In the pre-legalization era also, termination of life by physicians or assisted suicide was in vogue de-facto.[52] Doctors were not subjected to any criminal liability.[53] In plethora of cases, since 1973 it was established that the Dutch doctors not needed to fear punishment or criminal liability if they killed any patient or assist suicide on his request to emancipate him from the unbearable agony.[54]

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42 *Id* at Art.8
43 *Id* at Art.9
44 *Id* at Art. 10
45 *Penal Code of Netherlands,* Art 293
46 *Id* at Art. 294
47 See *supra* n. 25 and amendment to Arts 293& 294 of the *Penal Code of Netherlands.*
48 The *Burial and Cremation Act*, Art 7.
49 *Ibid*.
50 *Ibid.*
51 *Id* at Art. 12
52 Assisted Suicide and Euthanasia: From Voluntary to Involuntary, Secretariat of Pro Life Activities, www.ussccborg/prolife.
*53* *Ibid.*
*54* *Ibid.*

Consent of the concerned for termination of life or assisted suicide is mandatory. However, the Courts have dispensed with the requirement of consent to accord the stamp or legality to whatever was done by a doctor in good faith.[55] In a recent case an elderly woman was suffering from dementia.[56] The doctor concluding that it was time for her to receive euthanasia slipped a sedative to her coffee. On awake she struggled against what was being done to her. The doctor told her family members to hold her down when lethal injection was administered. The patient died because of administration of lethal injection. The Regional Review Committee holding that the action of the doctor was prompted by good faith relieved him from any wrong doing.

In another instance a nun was suffering from excruciating pain.[57] She would have died naturally after couple of days. She was constrained by her religious conviction not to make a request for euthanasia. Though she was a competent patient, the doctor terminated her life without her request forbidding her to die the way in which she wished to breathe the last. It was acceptable to some euthanasia protagonists who advocated the necessity of doctors making life ending decisions sans consultation with the competent patients.[58] Though it is not acceptable to some advocates of euthanasia they have endorsed the view that the doctors must be given a free hand to terminate the life of competent patients where they are accustomed to play a dominant role in decision making.[59]

It is evident beyond doubt that the new-born children cannot make a voluntary request for termination of life. In 1993 a Dutch doctor administered a lethal injection to a 4 ½ year old child who was suffering from spina bifida,[60] being under an alleged conflict between his duty to preserve life and relieving pain.[61] Subsequently many such cases have been reported where euthanasia was effected in consultation with the parents.[62] However, in all those cases the proposal for euthanasia first emanated from the doctors, barring a few exceptions.[63] The above development culminated in the Dutch Association of Paediatrics approving the "Groningen Protocol".[64]

The working of the Act manifests that the statutory safeguards are not complied with. In all jurisdictions the request for euthanasia or pas shall be voluntary, well considered, informed and persistent over a period of time.[65]

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55 *Ibid.*
56 *Ibid.*
57 *Ibid.*
58 *Ibid.*
59 *Ibid.*
60 Spina bifida means a condition of hernia of spinal cord resulting from malformation of posterior arches of the vertebrae culminating a fissure in the spine filled with some sort of fluid and sometimes nervous tissue. SeeinfraGroningel Protocol, at p.2
61 *Ibid.*
62 *Ibid.*
63 *Ibid.*
64 For a discussion on 'Groningel Protocol', see infra
65 J. Periera, Legalizing Euthanasia or Assisted Suicide: The Illusion of Safeguards and Controls, *Current Oncology,* Vol 18 No 2 p 38-39.

Further the consent must be written, and the patient must be competent at the time when the request was made.[66] Much against these safety valves in every year a substantial number of people are being subjected to involuntary euthanasia in violation of the norms laid down.[67] Mandatory reporting norm is often ignored.[68] The requirement of exclusive involvement of the physicians in performance of euthanasia is violated by involving the nurses exclusively in carrying out the same.[69] Opinion of a second physician before proceeding to euthanasia to ensure that all criteria have been met with is mandatory.[70] But there are instances where this requirement is ignored.[71] It is said that this infraction is the by-product of non-reporting of instances of euthanasia or pas.[72]

The Dutch experience of euthanasia manifests a slippery slope by creating exceptions after exception culminating in the very exceptions devouring the rule itself.[73] Commencing with the euthanasia of terminally ill, gradually all it slipped to the terrain of euthanasia of chronically ill, physically ill, mentally ill, and psychologically distressed or mentally suffering and old age enabling a person who is above 70 years of age tired of living to seek euthanasia or pas.[74] It has created a situation that anyone can request for euthanasia. Further it has encompassed voluntary, non-voluntary and involuntary euthanasia.[75] Denying euthanasia to one who is chronically ill either physically or psychologically is considered as an act of discrimination against them as they are forced to suffer longer than those who are terminally ill.[76] The exceptions discussed above have rendered euthanasia as a means of first available intervention rather a last option.[77]

Euthanasia of New-borns and the Groningen Protocol

The Groningen Protocol emerged as a result of death of new bornbabies consequent upon withholding futile medical care grounded on the premise that treatment does not lead to real improvement in their condition warranting a situation that non-treatment[78] is always better than treatment. The instance contemplated above springs from the fact that the so-called means cannot achieve at all the end of amelioration of child's health.[79] It is a frustrating situation of embracing inaction rather action.

The Protocol classifies the new-born as follows[80]

66 *Ibid.*
67 *Ibid.*
68 *Ibid.*
69 *Ibid.*
70 *Ibid.*
71 *Ibid.*
72 *Ibid.*
73 *Id* at p 40
74 *Id* at p 43
75 *Ibid.*
76 *Ibid.*
77 *Ibid.*
78 'Euthanasia of New-borns and the Groningen Protocol', The Dossiers of the European Institute of Bioethics, p.1
79 *Ibid.*
80 *Ibid.*

a. New-borns who have no chance of survival at all like one suffering from hyperplasia[81] of the lungs or kidneys. Withholding futile medical care in case of new-borns who have no prospects of survival is considered as a good practice in Europe and the USA.

b. New-borns who are in need of intensive care to survive characterised by a very poor prognosis and quality of life, like one suffering from severe cerebral malfunction or damaged organs resulting from extreme hypoxemia.[82] Forgoing intensive care is acceptable provided both the parent and physician are confident that they are acting in the best interest of the infant who it is, predicted to have a poor quality of life. This justification is based on the most problematic theme of quality of life which is a subjective premise lacking in objective parameters to arrive at a precise assessment of the expected quality of life.

c. The infants who fall into the third category who according to their parents and medical practitioners are suffering unbearably. They do not require any intensive care for their survival. They have to suffer intensively due to very poor quality of life. For example, an infant suffering from spina bifida even if he survives after numerous operations there being no prospect of improvement has to lead a life characterised by very poor quality. This is a situation which can be considered for euthanasia provided both the parents and physicians are convinced that there is extremely poor prognosis and death would be more humane than prolonging life.

The Groningen Protocol contemplates the following conditions viz unmistakable diagnosis and prognosis presence of irremediable and unbearable suffering, parental informed consent independent confirmation of medical diagnosis and prognosis by at least one doctor, conformity of procedures to be followed with the medical standards and submission of report to a prescribed authority to check the procedural adherence.[83]

The author of the protocol has rebutted the slippery slope argument put forward by the opponents of euthanasia by citing the instances where euthanasia was the only option.[84] It is said that euthanasia of a new-born can be permitted if his condition would have justified an abortion.[85] In effect it has paved the way for emergence of a new nomenclature of post-natal abortion with which euthanasia of new-born is equated even though there is etymological difference between euthanasia and abortion. It is grounded on the premise that the death of the child whether pre-natal or post-natal should materialise for the reasons contemplated above in the greater interest of the child. Though in form euthanasia and abortion differ in substance there is no

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81 Hyperplasia means arrested or insufficient development of a tissue or organ. See *sup*ra n.78 at p.2
82 Hypoxemia means abnormally low level of oxygen in blood. *Ibid.*
83 *Id* at p.3
84 *Id* at p.8
85 *Id* at p.7

difference as in the former death is post-natal and, in the latter, it is pre-natal.

**Belgium**

The *Belgian Act on Euthanasia*, 2002

Euthanasia was legalized under the *Belgian Act on Euthanasia,* 2002. It is defined as intentional termination of life of one person by another person at the request of the former.[86] It follows that where life is terminated by the person concerned himself it does not amount to euthanasia. Euthanasia can be performed only when a patient is suffering from perpetual unbearable pain resulting from a serious illness or accident signifying a futile medical condition of unalleviated pain. Any physician who terminates the life of such a patient subject to the fulfilment of the following conditions and procedures[87] does not commit any offence. Such a patient must have attained the age of majority or he can be an emancipated minor.[88] He must be legally competent and conscious at the time of making the request.[89] He should be able to understand the consequences of his request. The request must not be the result of any external pressure.[90] It must be voluntary, repeated and well considered.[91] It must be in writing.[92] The document concerning request must be drawn up dated and signed by the patient himself.[93] If the patient is not capable of doing so, the document must be drawn up by a person designated by the patient.[94] The person so designated must be a major having no material interest in the death of the patient.[95] He must indicate in writing the reason why the patient himself is not capable of formulating his request in writing.[96] In such a situation the document is drafted in the presence of a physician whose name should be mentioned therein.[97] This document must be annexed to the medical record.[98] The patient is free to revoke the request at any time consequent upon which the document needs to be removed from the medical record and returned to the patient.[99] The medical record regularly must bear all details of request, actions taken by the attending physician and their results including the report of the consulted physician.[100]

Mere fulfilment of request requirements is notsuffice. There are conditions precedents to be fulfilled before the performance of euthanasia. The

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86 The *Belgium Act on Euthanasia*, 2002, sec 3.
87 *Ibid.*
88 *Ibid*. Emancipated minor means one who has financial independence
89 *Ibid.*
90 *Ibid.*
91 *Ibid.*
92 *Ibid.*
93 *Ibid.*
94 *Ibid.*
95 *Ibid.*
96 *Ibid.*
97 *Ibid.*
98 *Ibid.*
99 *Ibid.*
100 *Ibid.*

performing physician should discuss with the patient his health condition, life expectancy, request for euthanasia, possible therapeutic and palliative courses of action focussing on their consequences.[101] He should together with the patient conclude that there is no reasonable alternative to emancipate the latter from his condition.[102] Such conclusion must be the outcome of several conversations with the patient spread out over a reasonable period of time reckoning the progress in the patient's condition to be certain of the patient's constant physical and mental suffering sans any hope of alleviation.[103] The performing physician must ensure that the request is voluntary.[104] Further he should consult an independent physician to seek his opinion about the incurable nature of patient's condition. The consulted physician should conclude that death is the only alternative to relieve the patient from his unbearable agony.[105] The performing physician should inform the patient the opinion of the physician consulted.[106] He should discuss the request of the patient with a regular nursing team if any attending the patient.[107] If the patient so desires, his request needs to be discussed with the relatives so appointed by him.[108] It should be ensured that the patient has had opportunity to discuss his request with a person whom he wished to meet.[109] If the performing physician believes that the patient is not expected to die in near future, he shall seek a second opinion from a psychiatrist or specialist in the disorder from which the patient is suffering.[110] The legal provisions applicable in case of first consultation *mutatis muthandis* apply to the second one also.[111] Further the physician consulted for the second opinion needs to be independent of the physician initially consulted.[112] Eventually there should be a time gap of atleast one month between the request and performance of euthanasia.[113]

The statute allows any legally competent person of age or emancipated minor to draw up an advance directive instructing a physician to perform euthanasia under conditions contemplated above, provided such a person is no longer conscious.[114] The advance directive may be drafted at any point of time. It must be in writing, signed, dated and drafted by the person wishing performance of euthanasia or occurrence of an eventuality contemplated above.[115] It must be signed in the presence of two attesting witnessing one of whom shall not have any material interest in the death of the person wishing

101 *Ibid.*
102 *Ibid.*
103 *Ibid.*
104 *Ibid.*
105 *Ibid.*
106 *Ibid.*
107 *Ibid.*
108 *Ibid.*
109 *Ibid.*
110 *Ibid.*
111 *Ibid.*
112 *Ibid.*
113 *Ibid.*
114 *Id* at sec. 4
115 *Ibid.*

performance of euthanasia.[116] It must be signed by the attesting witnesses and two persons designated in the directive in the order of priority to inform the attending physician about the patient's directive.[117] The attending physician, the physician consulted and nursing team cannot act as designated persons.[118] An advance directive can be drafted by any other person other than one wishing performance of euthanasia who is not capable of doing so in compliance with the provisions discussed above.[119] A medical certificate must be annexed to the advance directive to the effect that the person in question is permanently incapable of drafting and signing the advance directive.[120] An advance directive to be valid it must have been drafted or confirmed within 5 years of the person's loss of the ability to express his wish.[121] It may be revoked or amended at any time.[122] The additional conditions applicable in case of patients request also inter alia applicable in case of advance directive further including discussion regarding the request with designated person taken in confidence or relatives of the patient designated by the person taken in confidence.[123]

A Federal Control and Evaluation Commission is established under the Act to implement it and review the performance of euthanasia in the light of compliance to the mandatory provisions.[124] A physician who has performed an euthanasia should submit to the Commission a registration document with all the mandatory information evidential of compliance with the provisions of the Act. The Commission based on the information furnished in the second part of the registration document determines whether euthanasia has been carried out in strict compliance with the provisions of the Act.[126] If a decision is taken with 2/3 of the majority that it is not so, a report shall be sent to the public prosecutor to the same effect to enable him to initiate legal proceedings against the attending physician.[127]

It should be noted that in the light of patient's request or advance directive no physician can be either compelled to perform or assist in the performance of euthanasia.[128] A physician who refuses to perform euthanasia needs to communicate his decision to the patient or the designated person taken in confidence.[129] If the refusal is grounded on medical reasons same must be

116 *Ibid.*
117 *Ibid.*
118 *Ibid.*
119 *Ibid.*
120 *Ibid.*
121 *Ibid.*
122 *Ibid.*
123 *Ibid.*
124 *Id* at sec. 6
125 *Id* at sec. 7
126 *Id* at sec. 8. The second part consist certain mandatory information as to the fulfilment of the condition contemplated in the Act. The first part contains particulars relating to the identity of the patient and certain general information.
127 *Ibid.*
128 *Id* at sec. 14
129 *Ibid.*

recorded in the medical record of the patient.[130]

The rate of involuntary and non-voluntary euthanasia is on the higher side compared to Netherlands.[131] It is said that nearly half of the cases of euthanasia are not reported to Federal Control and Evaluation Committee.[132] Nurses are also involved in performance of euthanasia much against the mandatory requirement of exclusive involvement of physicians.[133] In Belgium in addition to second opinion reviewable by a third physician is mandatory, if a person is placed in a non-terminal condition.[134] However, the evidence manifests that this provision is not universally adhered to.[135]

**Luxembourg**

Euthanasia and assisted suicide were legalized that they are being currently regulated by the National Commission for Control and Assessment.Competent adults suffering from incurable and terminal diseases that cause constant and unbearable physical and psychological agony sans any possible relief fall into the gamut of law.[136] Such a patient may make a request for the procedure through a living will or a written document consisting of his end of life provisions.[137] The documents must be registered with Commission for its assessment of the situation.[138] The document permits that patient to record the circumstances which prompted him to submit to the assisted suicide procedure by a trusted physician.[139] The patient can revoke the request at any time.[140] On such revocation the request needs to be removed from the medical record.[141] Before the procedure the physician should consult another independent expert, health team of the patient and a trusted person designated by the patient.[142] On completion of the procedure it must be reported to the Commission within 8 days.[143]

**Switzerland**

The *Swiss Penal Code* prohibits euthanasia. However, it invites relatively diminished criminal responsibility than one contemplated in the case of either murder or homicide.[144] Anyone who instigated or assists to commit suicide for

130 *Ibid.*
131 See *supra* n.61 at p 39
132 *Ibid.*
133 *Ibid.*
134 *Ibid*.
135 *Ibid.*
136 Mariana et all, "Euthanasia and Assisted Suicide in Western Countries: A Systematic Review,"The Law on the Right to Die with Dignity allows euthanasia and assisted suicide. http://www.scielo.br/pdf/bioet/v24n2/en_1983-8034-bioet-24-2-0355.pdf, 355 at 360
137 *Ibid.*
138 *Ibid.*
139 *Ibid.*
140 *Ibid.*
141 *Ibid.*
142 *Ibid.*
143 *Ibid.*
144 The *Swiss Penal Code*, Art. 114.

selfish reasons invites criminal liability.[145] The inference is that assisted suicide is permitted for altruistic purpose. Anyone including a physician can assist suicide unlike other jurisdiction where it is mandatory that only a physician can assist suicide or perform euthanasia.[146] Even though the above said provision originally did not contemplate the regulation of the practice of assisted suicide for with an altruistic motive, since decades ago institutions supporting assisted death have ventured to justify their actions based on that provision.[147] Currently six institutions indulge in assisted suicide. Each of these institutions has different criteria for selection of candidates. Three of these institutions have confined these procedures to terminally ill patients.[148] Four institutions have openedtheir doors for foreigners also.[149] In effect, many foreigners are visiting Switzerland for assisted suicide paving the way for suicide tourism.[150] In the recent years the number of assisted suicide is on the increase that visiting Switzerland has become a euphemism for assisted suicide.[151]

Assisted suicide is also allowed in case of people with mental illness. As required by the Supreme Court psychiatric report is mandatory.[152] The report should state that the patient's desire for seeking assistance for suicide was well considered as well as self-determined and not part of his mental disorder.[153]

The responsibility for the process falls on the doctors who prescribe the drugs and they should always inform the patients about their condition and possible alternatives.[154] A well-established doctor-patient relationship is not the *sine quo non*. Usually doctors are not present when the patient breatheshis last.[155] It should be noted that notification of assisted suicide and release of public reports regarding the same are not required.[156]

**France**

The *Public Health Code* neither addresses euthanasia nor assisted suicide. Therefore, the inference is that they are prohibited. The above Code was amended to incorporate provisions relating to end of life care.[157] The amendment addresses withholding treatment and prescription of pain medication where such a measure would shorten the life of a patient. In effect passive euthanasia was legalised. Subsequently *Deep Sleep Law* was enacted permitting withdrawal of life sustaining treatment in case of terminally ill conscious patient suffering from unbearable pain and permitting such a patient

145 *Ibid.*
146 I*d* at Art. 115
147 See *supra* n. 134 at pp. 357-358
148 *Ibid.*
149 *Ibid.*
150 *Ibid.*
151 *Ibid*.
152 *Ibid.*
153 *Ibid.*
154 *Ibid.*
155 *Ibid.*
156 *Ibid.*
157 *See,* "Euthanasia and Assisted Suicide," Library of Parliament, Publication No 2011-67E

to go for deep perpetual sedation until death. Despite support of majority of people for legalization of euthanasia and assisted suicide, it did not find fruition in passing of a Bill legalizing the same. The avowed object of this law is to facilitate sleep before death to avoid suffering. This law further permits people to make legally binding declaration or living wills stating that they should not be kept under artificial ventilation if they are too ill to decide.

**United Kingdom**

Activate euthanasia amounts to the crime of murder and assisting it invited criminal liability.[158] It is doubtful whether assisted suicide is permissible under all circumstances. The law on this point is silent. The aftermath of Debbie Purdy Caseculminated in the Crown Prosecution introducing new guidelines pertaining to assisted suicide. According to these guidelines assisted suicide can be permitted under some circumstances if assistance is rendered out of compassion, the decision of death is voluntary, conscious; well thought of and has been intimated to the concerned authorities. Notwithstanding these guidelines legal conflicts do recur. In effect, the legality of assisted suicide is not guaranteed. However, the current legal position is that only passive euthanasia is allowed. In *Iredale NHS Trust* v. *Bland,*[159] a patient was in persistent vegetative state due to severe injury. His life was maintained by artificial feeding for more than two years. The attending doctor obtained a court order in favour of him that it was lawful to put an end to feeding through tube. The Official Solicitor preferred an appeal against this order, but unsuccessfully. It was held that a PVS patient neither could give nor withhold his consent to any medical treatment that a doctor in the best interest of the patient could decide whether the treatment needed to be continued. It was further observed that if it was in in the best interest of the patient when there was no prospect of improvement, a doctor could withdraw the treatment that sustained life including feeding consequent upon which the patient would die. The court made it categorical that it was unlawful to cause or exhilarating death through active steps and as such causing death by administering drug was totally different from disconnecting the feeding tube. Taking cognizance of the fact that the provision could be misused by unscrupulous doctors, the court made it mandatoryfor all doctors to get a declaration from the court to withhold any life sustaining treatment or device.

It is evident from the above discussion that neither active euthanasia nor assisted suicide is permitted. Passive euthanasia is allowed in case of a patient who is in a permanent vegetative state but not in the case of a terminally ill patient. Terminally ill signifies an incurable disease which cannot be adequately treated and is reasonably expected to culminate in untimely death of the patient. Permanent vegetative state is characterised by complete absence of self or environmental awareness, such patients cannot voluntarily control

158 The *Suicide Act,* 1961, See sec.2; see for a discussion, *supra* n. 134. at p. 361
159 [1993] 1 All E.R. 821

their urination & stools, they have normal heart beating & breathing and their life is under no threat they can live for many years.[160] The difference between PVS and terminal illness is that in the former the patient is deprived of all mental faculties and in the latter the patient is conscious coupled with mental faculties functioning properly to arrive at a proper conclusion.

**United States**

Euthanasia is prohibited in all states,but assisted suicide is legalised in five of the fifty states.[161] In four states it was statutorily recognised and in one state it was judicially legalized. The statutes of respective states permit anyone who has attained the age of majority capable of expressing his will, suffering from terminal illness having a life expectancy of less than six months to receive lethal medication prescribed by a physician through voluntary administration. Further it is mandatory that the seekers of assisted suicide must be the residents of respective states. Self-administration of lethal medication resulting in death under the circumstances stated above is not considered as suicide. It is deemed as death with dignity. However, many catholic hospitals have not supported this procedure. The obvious reason is the religious prohibition against killing a person irrespective of the motive. Any religion for that matter is against premature death caused by suicide. All religions of this world strongly advocate natural death and condemn termination of life by any other mode.

In one state assisted suicide was legalised by the Supreme Court. According to the Court only mentally competent adult patients suffering from terminally illness can seek lethal medication. The act is secured by the right to privacy and dignity contemplated in the Constitution. The doctors who assist suicide subject to the fulfilment of the conditions laid down by the court enjoy immunity from criminal liability.

**Canada**

After many years of debate in the Supreme Court eventually, Canada lifted the ban on euthanasia and assisted suicide. Quebec became first state to enact the"Act Respecting End of Life Care" on lines similar with the enactments that are in force in a few states of the USA with one exception that it does not contemplate the rule of maximum life expectancy of six months.[162] According to the Act 'medical aid in dying' signifies administration of a lethal substance by a physician in pursuance of request by a patient. The inference is that active euthanasia is permitted even though the term is not specifically spelt in the Act.

**Brazil**

Even though euthanasia has not been regulated yet, it has been a topic among the physicians, legal professionals, philosophers and religious people. Euthanasia is a crime of murder and depending upon the circumstances the

160 See *Aruna Ramachandra Shanbaug's Case, infra* n.172
161 See for a discussion *supra n.* 134 at p. 358
162 See for a discussion *Id* at p. 359

conduct of an agent would amount to the crime of instigation, inducement or assistance to suicide.[163] Further the code of Medical Ethics contemplates that it is not lawful for the physicians to reduce the life of any patient irrespective of his or his legal representative's request. It further enjoins a duty on the physicians in case of incurable and terminal illness to extend all palliative care without taking recourse to any useless or obstinate diagnostic and therapeutic actions. However, the Federal Council of Medicine through its resolution has allowed physicians to circumscribe or withdraw medical treatment that prolong the life a terminally ill-patient honouring his will or his legal representative's. The resolution further contemplates that the patient should receive continuous care to relieve him from the pain, be assured of comfort, comprehensive care and the right to be discharged. It further provides for a living will respecting the principle of patient's autonomy over his body. It is further opined that passive euthanasia is secured under the Constitution as it ensures a dignified death to a terminally ill-patient who is at liberty to refuse inhuman and degrading treatment. The above discussion reveals that except the resolution of Federal Council of Medicine there is nothing to support passive euthanasia legally either by way of a judicial decision or statute to that effect.

**Colombia**

In the whole of Latin America, Colombia is the only country where euthanasia is allowed.[164] The Constitutional Court decriminalized it. Initially it was styled as 'murder by compassion'. Under the Criminal Code guarded because of lack of well-established criteria for its performance, controversial legislation, conflicting interpretations and uncertainties regarding the matter generating ambiguity. Subsequently the Ministry of Health has laid down the criteria and procedures concerning the right to die with dignity. Accordingly, a physician can administer a lethal intravenous drug to a terminally ill adult patient suffering from constant un-relievable pain. There must be a conscious request by the patient for assisted death which must be authorized and supervised by a specialist doctor, lawyer, psychiatrist or psychologist. The current legislation permits the foreign patients also to seek euthanasia.

## Legal Status of Euthanasia in India

There is no express provision under the Indian Constitution either prohibiting or allowing euthanasia. Accordingly, legal status of euthanasia need to be examined in the light of fundamental right to life[165] as to whether it encompasses a right to die. If so whether euthanasia falls within the gamut of right to die needs to be delved into.

In *P. Rathinam* v. *Union of India,*[166] the petitioner was prosecuted for

163 *Id* at p. 361
164 *Id* at p. 357
165 The *Constitution of India*, 1950, Art. 21.
166 (1994) 3 SCC 394

attempting to commit suicide under Sec. 309 of *Indian Penal Code*. He challenged the constitutional validity of the above provision of law as violative of Art. 14 and 21 of the constitution. According to the Court right to life as contemplated in Art.21 encompasses the right not to live enabling one to terminate his life. Right to life includes right to die. Further it was held that the above said provision of law was violative of Art 14 as attempt to commit suicide was undefined and unguided.

The Apex Court upheld the decision in *Maruthi Shripathi Dubal* v. *State of Maharashtra.*[167] It is very pertinent here to be seized of the observation of Bombay High Court in the above case where the court has held that right to die is a fundamental right. It has been observed that the desire to die is not unnatural, but it is abnormal and uncommon. Such desire to end one's life emerges from many lamentable situations like disease, cruel or unbearable condition of life, a sense of shame or disenchantment with life. The judges observed that everyone should have the liberty to put an end to his life as and when he wishes to do so. In effect anyone who attempts to commit suicide should not be punished as it is cruel and irrational to expose him to double jeopardy as he has already suffered and undergoing the trauma of being unsuccessful in his attempt to put an end to his life. It should be noted that only under some extreme situations and for a cogent compelling reason he attempts to commit suicide. The paradox is that if in his attempt he is triumphant the question of punishment does not arise because he is no more. If in his attempt he becomes unsuccessful, he invites punishment. It appears he is punished because he is unsuccessful in his attempt. The underlying reason for making it an offence is to curb the tendency to commit suicide which in the long run does not do any good to the society. Suicide is diametrically opposed to the concept of a healthy and civilized society. However, in many countries taking into consideration the agonising circumstances under which a person makes up his mind to commit suicide it has been decriminalized.[168]

However, the plea for allowance of euthanasia under the right to die could not cut ice with the apex court as it was outside the scope of the petition in hand and there was fundamental difference between suicide and euthanasia. The basic distinction is that in case of suicide a person himself attempts to terminate life, whereas euthanasia is either performed or assisted by a third person. In the light of this basic distinction it can be concluded that right to die does not encompass euthanasia.

The decision in *Rathinam* was overruled in *Smt. GianKaur* v. *State of Punjab*.[169] On overruling the decision, the Supreme Court has held that right to

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167 1988 Cr LJ 549

168 See Law Commission 196th Report. In India the Law Commission has recommended for the decriminalization of attempt to commit suicide and obliterate sec.309 of the Indian Penal Code which contemplates criminal liability for attempt to commit suicide. See Law Commission 42nd, 196th and 210th Report.

169 (1996) 2 SCC 648. The decision in *Chenna Jagadeeshwar* v. *State of A.P,* 1988 Cr LJ, was upheld.

life does not include right to die or right to be killed that right to life is inherently inconsistent with right to die as death is with life. The Court observed:[170]

> "Any aspect of life which makes it dignified may be read into Art. 21 of the Constitution but not that which extinguishes it and is therefore inconsistent with the continued existence of life resulting in effacing the right itself… Right to life is a natural right embodied in Art.21 but suicide is an unnatural termination or extinction of life and incompatible and inconsistent with the concept of right to life"

It is obvious from the above observation that anything which enhances the quality of life or adds dignity to the life falls within the ambit of Art. 21, but not anything which curtails the naturalspan of life. Therefore, euthanasia or assisted suicide which shortens the natural span of life cannot be read into Art. 21. In effect, a premise for justifying euthanasia or assisted suicide cannot be culled out from right to life which has been interpreted not to include any right to die.

The above argument does not hold water in case of a person in permanent vegetative state or who is terminally ill. Neither right to life nor anything which adds dignity to his life makes any sense to him. Dignity in his case implies a dignified death by accelerating the process of natural death rather prolonging it. It is meaningless to prolong life, where in real sense there is no life at all to be prolonged. The greatest honour that could be done to such a person is to allow him to put an end to his life or seek assistance of a third person naturally a physician to put an end to his life to obtain salvation once for all from the perennial pain and suffering. If the focus of law is on life with quality not a mere physical existence, the persons who are in permanent vegetative state or terminally ill virtually being corpses in breathing human bodies must be allowed to seek euthanasia or assistance in suicide respecting their autonomy over their bodies. Therefore, it is submitted that at least in case of such patients a premise may be culled out from Art.21 carving out a right to die by way of euthanasia or assisted suicide.

In western countries the debate on euthanasia which commenced decades ago culminated in legalization of euthanasia and assisted suicide in a few jurisdictions and only passive euthanasia in a few either by way of statutory sanction or judicial decision. But in India the debate started off late except sporadic references to euthanasia in the decisions discussed above and the deliberation of Law Commission.[171] However, it was in a path-breaking judgement, the apex court in *Aruna Ramachandra Shanbaugh* v. *Union of India,*[172] legalized passive euthanasia. ArunaShanbaughwas a junior nurse in a Mumbai based hospital. She was physically as well as sexually assaulted by a ward boy there. Due to the severity of the assault she slipped into a permanent

170 *Ibid.*
171 See *supra*
172 (2011) 4 SCC 454

vegetative state. She was in that state nearly for 37 years when this petition was filed by her journalist friend PinkiVirani seeking the courts permission for euthanasia. Though the petition was dismissed the apex court legalised passive euthanasia by way of withdrawal of life support or medical treatment in case of a patient who is in a permanent vegetative state. According to the court withdrawal of life support by a doctor signifies an omission, not a positive action. The latter amounts to active euthanasia which is an offence and invites criminal liability. Active euthanasia entails use of lethal substance to kill a person and passive euthanasia involves withdrawal of life support or medical treatment to discontinue the life.

The Court further has laid down the following procedural safeguards with respect to withdrawal of life support from a patient in PVS[173]

1. The decision to discontinue life support must be taken by the parents or spouse or other close relatives or in the absence of any of them decision can be taken by any person or body of persons acting as a next friend. The decision can be taken by a doctor also. However, it must have been taken in the best interest of the patient.
2. A petition seeking permission for withdrawal of life support must be filed in the concerned High Court. The approval of the High Court for the same is mandatory.
3. On filing of a petition for withdrawal of life support, the Chief Justice of the High Court should constitute a bench of judges to decide whether to grant approval or not
4. The decision must be based on the opinion of medical experts. To this effect in every city a panel of doctors needs to be prepared.

Commenting on Sec. 309 of the *Indian Penal Code*, the apex court has observed that even though it is constitutionally valid, it should be repealed by the parliament as it is a relic of anachronism. It is only a depressed person who ventures to commit suicide and as such he needs help. Therefore, it needs to be accepted that punishing a person who made an unsuccessful attempt to commit suicide does not serve any meaningful purpose except to aggravate the agony. It is submitted that if a terminally ill patient attempts to commit suicide he should not be punished. The very object of such an attempt is emancipation forever from constant incurable suffering.

**Law Commission Report on Euthanasia, Assisted Suicide and Withdrawal of Life Support Measures**

The Law Commission has made it categorical in unequivocal terms that it is not dealing with euthanasia or assisted suicide which is unlawful.[174] Euthanasia and assisted suicide must be continued as offences under the law of the land.

173 *Ibid.*
174 See 196th Report

Law Commission has advocated passive euthanasia for both competent and incompetent terminally ill patients. Accordingly, the attending physician in case of terminally ill incompetent patient should obtain the opinion of the medical experts from an approved panel. The opinion so obtained must be communicated to the patient if conscious, parents or relatives. Subsequently he must wait for fifteen days prior to withdrawal of medical treatment including discontinuance of life support systems. The object of fifteen days' time gap is to enable the patient (if conscious) or his parents or relatives to file an original petition in the High Court seeking a declaratory relief as to the legality of the proposed withdrawal of medical treatment including withdrawal of life support. The decision of the High Court in this regard is binding on all concerned and shall have the effect of exempting the doctor from any civil or criminal liability.

The procedural safeguards laid down by Supreme Court in *Aruna's Case* as discussed above makes a departure from one contemplated by the Law Commission. Accordingly, in case of incompetent patients, the close relatives or next friend or the hospital staff attending the patient can apply for specific permission of the High Court. The difference lies in the matter of seeking expert opinion. According to Law Commission expert opinion needs to be sought by the attending doctor, but according to the Supreme Court it is for the concerned High Court to seek medical opinion as discussed above. The decision of the High Court must be grounded on the report and wishes of the close relatives or next friend.The Law Commission is inclined to accept the procedural safeguards contemplated by the Supreme Court instead of it's own.

Summary of Recommendations[175]

(a) Passive Euthanasia as permitted in many countries subject to the guidelines laid down by 17th Law Commission and Supreme Court in *Aruna's Case* must be allowed.

(b) A competent adult patient has the right to insist that he should not be subjected to invasive medical procedure by way of life sustaining measures and such decision provided it is informed one, shall be binding on the attending doctor. In case of a minor above the age of 16 years, his decision regarding the same shall be supported by the consent of the major spouse and one of the parents of such minor patient.

(c) In case of an incompetent patient in irreversible coma or permanent vegetative state, the decision of the close relatives or next friend or doctor is not final. Sanction from the concerned High Court is mandatory. This is applicable to a competent patient who cannot arrive at an informed decision.

(d) The High Court as *parens patria* has to take an appropriate decision taking into consideration the opinion of three medical experts selected

175 *Ibid.*

from among an approved panel and the wishes of the close relatives of the patient.

(e) The medical practitioners who act in accordance with the wishes of a competent patient or order of High Court shall not invite any civil or criminal liability.

(f) A competent terminally ill-patient who refuses medical treatment shall not be deemed to be guilty of any offence under any law.

(g) Advance medical directive rendered by a patient before the occurrence of illness shall not be valid.

(h) The procedure for constituting panels of medical experts as recommended by the 17th Law Commission shall be adhered to.

(i) Notwithstanding the withdrawal of medical treatment both in case of competent as well as incompetent patients, palliative care needs to be extended to both.

(j) The Medical Council of India to come up with guidelines with respect to withdrawal of treatment both in case of competent and incompetent patients.

***The Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill***[176]

It confers protection to the terminally ill-patients and medical practitioners by providing immunity from liability in case of withdrawal of medical treatment including life support systems.[177]

It is contemplated that every competent patient including a minor aged above 16 years suffering from terminal illness has autonomy to decide with holding of medical treatment to oneself to see that nature takes its own course.[178] In case of a minor above 16years of age, consent of major spouse and parents is mandatory. Such decision is binding on the medical practitioner provided he is satisfied that the patient is competent, and he has taken an informed decision.[179] The decision on the part of a patient to continue or withdraw the treatment becomes informed one if it is made after a thorough comprehension of the nature of illness, availability of alternative forms of medical treatment, consequences of withdrawal of treatment or remaining

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176 The revised Bill is a blend of earlier recommendations of the Law Commission and the directions of the Supreme Court in *Aruna Ramachandra's case*. The Bill drafted by the Law Commission 2006 has been modified to accommodate the views of Supreme Court in the above case. See for the text of the Bill, para 13.13 of the 196th Law Commission Report

177 See the statement of objects

178 See sec. 3 of the *Medical Treatment of Terminally Ill Patients (Protection of Patients and Medical Practitioners) Bill*

179 *Ibid.*

untreated.[180] Terminal illness means such illness, injury or deterioration of physical or mental condition of a patient exposing him to extreme suffering and pain which according to the reasonable medical opinion culminates in his untimely death.[181] It further includes a persistent and irreversible vegetative condition consequent upon which the concerned patient is deprived of a meaningful existence of life.[182] Medical treatment in the context of terminal illness signifies any life sustaining treatment or use of mechanical or artificial means which would only serve to prolong the process of natural death.[183]

A competent patient is one who is of sound mind and aged above 16 years.[184] He should be capable of comprehending the information based on which an informed decision is made about his medical treatment, retaining that information so as to use or weigh it as a part of decision and communicating such informed decision as to medical treatment by way of speech or any sign or language or through any other mode.[185] Any decision made by a patient suffering from any impairment or disturbance in the functioning of his mind or brain cannot be an informed one. Such a patient, though adult cannot be styled as competent one.

The medical practitioner before giving effect to the decision of a competent patient is under a legal obligation to inform to the spouse, parent or major son or daughter of the patient or in their absence any relative or other person regularly attending the patient at the hospital, the need to withhold the treatment from the patient.[186] He shall not proceed to give effect to the decision until the expiry of three days from the date of communication of information contemplated above.[187] Permission from the respective High Court before withdrawal of treatment is mandatory. Any near relative, next friend, legal guardian of the patient, the medical practitioner or para-medical staff generally attending on the patient receiving treatment or any other person can invoke the jurisdiction of the High Court seeking permission for withholding the treatment.[188] Such petition shall be disposed by a Divisional Bench constituted by the Chief Justice for the purpose within one month as far as practicable.[189] The High Court is empowered either to refuse or accord permission for withdrawal of treatment having regard to the best interest of the patient and opinion of three medical experts selected from a panel of experts constituted as contemplated in the Bill,[190] wishes of close relatives, spouse, parents, major children or any other person whom the High Court deems fit.[191] The medical practitioners or the

180 *Id* at sec. 2 (e)
181 *Id* at sec. 2 (m)
182 *Ibid.*
183 *Id* at sec. 2 (i)
184 *Id* at sec. 2 (d)
185 *Ibid.*
186 *Id* at sec. 3 (B)
187 *Ibid.*
188 *Id* at sec. 9
189 *Ibid.*
190 See for the constitution of panel of experts, sec.9 of the Bill
191 *Id* at sec.9

hospital management or staff who in accordance with the order of the High Court withdraws the treatment is exempted from any civil or criminal liability.[192] The attending medical practitioner shall maintain a register bearing the personal details of the patient, nature of illness, the treatment that is being rendered, names of close relatives, request or decision of the patient communicated and his opinion as to whether it is in his best interest to withdraw the treatment.[193]

Even though the medical treatment is withheld it does not preclude the medical practitioner from administering palliative care.[194] Any competent patient who refuses medical treatment in compliance with the provisions of the Bill does not invite any criminal liability under the *Penal Code* or any other law which is in force for the time being.[195] Likewise, a medical practitioner who takes a decision to withhold the treatment in the best interest of the patient in compliance with the provisions discussed above does not invite any penal liability.[196] Best interest is not defined in the Bill which contemplates that it is not only confined to medical interests of the patient but inclusive of ethical, social, moral, emotional and other welfare considerations.[197] To quote the observation of the Apex Court in *Aruna's Case*,[198]

> "Acting in the patient's best interest means following a course of action that is best for the patient and is not influenced by personal convictions, motives or other considerations"

A doctor should be guided by beneficence which signifies acting in the best interest of the patient. It follows that patient's best interest does not entail personal motives, convictions or considerations of a doctor. The doctor must weigh all the considerations from the perspective of the concerned patient.

An advance medical directive or a living will authorising medical practitioner to withhold medical treatment shall be void.[199] Likewise, a medical power of attorney executed by a person authorising another person to take decision in future as to the nature of treatment to be given or withholding of the treatment should the former become terminally ill and incompetent is also void.[200] A medical practitioner is not bound either by a living will or medical power of attorney.[201]

**Indian Medical Council on Euthanasia**

The Medical Council is empowered to give guidelines from time to time with respect to withdrawal of treatment to competent and incompetent

192 *Ibid.*
193 *Id* at sec. 5
194 *Id* at sec.6
195 *Id* at sec.7
196 *Id* at sec.8
*197* *Id* at sec. 2 (b)
198 See s*upra* note 168
199 *Id* at sec. 11
200 *Ibid.*
201 *Ibid.*

suffering from terminal illness.[202] According to the guidelines it is unethical to practice euthanasia.[203] However, on specific occasion like withdrawing life support service that sustains cardio-pulmonary function even after brain death is permitted.[204] Only a team of doctors consisting of the attending doctor, Chief Medical Officer/ Medical Officer of the hospital and a doctor nominated by the concerned hospital from among the doctors employed therein or in accordance with the provisions of the *Transportation of Human Organs Act, 1994,*[205] shall declare such withdrawal.[206] It is evident from the above regulation that withdrawal of life support system in a situation of brain death for stopping cardio-pulmonary function only allowed. The withdrawal of medical treatment and life support devices in case of terminally ill-patients is not contemplated.

**Arguments For and Against Euthanasia**

**Arguments For**

- Principle of Bodily Autonomy:This principle signifies that a person shall have the liberty to decide what shall be and what shall not be done with his body. Going by this principle a person has the right to die as and when he wishes to put an end his life. The state shall respect his wish. It shall not interfere with his liberty. It shall interfere only with matters affecting public and law and order. It is not that every man under all circumstances wishes to take recourse to euthanasia or assisted suicide or withdrawal of medical treatment. It is only under some extreme circumstances like permanent vegetative state or terminal illness, a person wishes premature death. In case of a terminally ill-patient if otherwise he is competent, he can express his wish as to whether to put an end to his life. If he so desires, respect his autonomy. On the other hand, a person in a permanent vegetative state is incapable of taking any decision. If a question is posed to anyone if in future he meets that calamity whether he would wish to be in that state until he encounters natural death, the answer certainly is negative.
- The Desire for Happy Death: The literal meaning of Euthanasia is happy death. Death is certain, and it is natural process. Every person on this planet wishes a happy death free from all misery and sufferings. Nobody would desire to eventually die after constant and perpetual unbearable suffering. Generally, everyone knows that life is a continuous struggle against all odds and for routine wear and tear of life no one wishes to terminate life much against natural death. It is only under some extreme circumstances contemplated above a person craves for premature death in fulfilment of his long-cherished desire of

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*202* *Id* at sec. 12

203 The *Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations,* 2002, See Chapter 6, sec.67

204 *Ibid.*

205 The *Transplantation of the Human Organs Act,* 1994, See sec. 3 (6).

206 See *supra* note 28*, Ibid.*

happy death. In the situations contemplated above even though death is not a happy ending at least he will be happy to find solace in an early death to find salvation from the unbearable pain once for all. Hence there cannot be a better solution than euthanasia or physician assisted suicide or withdrawal of medical treatment. There is an essential difference between euthanasia a physician assisted suicide and withdrawal of medical treatment. In case of euthanasia, where the physician administers a lethal substance and physician assisted suicide where the patient himself administers the lethal substance, the death is immediate. But withdrawal of medical treatment only accelerates the natural process of death. The time of eventual death is uncertain. To that extent the misery continues eclipsing desire for an early, relatively happy death.

- Lack of Alternate Solution: It should be noted that there is no effective substitute for euthanasia or physician assisted suicide or withdrawal of medical treatment. One alternative is suicide. But if a person fails in his attempt to die, he will be indicted for attempt to commit suicide. It will further aggravate the situation. The only option for a terminally ill-patient is to commit suicide at the risk of inviting criminal liability for unsuccessful attempt. In case of patient in PVS he cannot venture to commit suicide because of physical disability. The other option is a third person killing such a patient. But it invites criminal liability for culpable homicide that a third person would not come forward to do it. The only feasible device is euthanasia or physician assisted suicide where a physician has a role to play in killing. Unless euthanasia or physically assisted suicide is decriminalized, a physician will not come forward to perform it for the fear of inviting criminal liability. In the light of above submission, authority to a physician to perform euthanasia or pas can be thought of under some extreme circumstances as discussed above.

- Flexibility**:**The public policy against euthanasia or pas or withdrawal of medical treatment resulting in death of a person reflects archaic penal laws. Even if at the request of a person, he is killed by another person it invites criminal liability either for murder or manslaughter all over the world. Fearing criminal liability physicians are not inclined to perform euthanasia or assist in suicide or take recourse to withdrawal of medical treatment. The archaic penal law needs to be changed to keep pace with the changing needs of the society that otherwise law slips into anachronism. It is under extreme situations not the entire society, but a few seek euthanasia or pas or withdrawal of medical treatment as a part of alleviation from constant suffering. Hence taking cognizance of this, law needs to accommodate the wish of such persons respecting their autonomy.

- Negative Socio-economic Impact:Prohibition of euthanasiaor assisted suicide has a deep negative socio-economic impact. A terminally ill-patient may feel that he is a burden to himself, his family and society. He knows that his death is untimely. Accordingly, he might wish to put an end to his life to relieve himself from the sense of burden and cause of trouble to others. The family members are also after a sometime tends to be indifferent towards such persons suffering from terminal illness. They may consider such patients as thorn in their flesh. Hence, the wish of a terminally ill-patient must be respected to allow him to seek euthanasia or assistance to commit suicide. Further prolongation of life of a PVS patient or terminally ill-patient has an economic dimension. The health cost incurred on such patients is a waste as untimely death is certain. The cost so incurred can be syphoned off for some other constructive purpose. A minor premise can be culled out from the negative socio-economic impact resulting from criminalization of euthanasia or pas that euthanasia or pas requires to be decriminalised to accommodate the wish of a person seeking it.

**Arguments Against**

The principle of bodily autonomy is not an absolute doctrine. Many inroads have been made to curtail the scope of this principle. In the greater interest of society, state can intervene to circumscribe the autonomy not to confer him the right to die but to wait for the natural death to occur. In a welfare state as the state must discharge multifarious functions in the greater good of the society.In the public interest the state can curtail the scope of bodily autonomy.

It should not be forgotten that inter-alia law is a product of culture and religion. All religions are against killing of a person by himself or others even though it is for a good motive. They condemn suicide also. The religious conviction is that this life which is a boon of god must be lived until the natural death. No one has the right to kill himself or others. The life which is given by god can be taken back only by god. The natural death is the call of the god to leave this world. It is true that God cannot be proved. It is a matter of faith. The religious overtones have swept the law all over the world. For example, abortion is banned because of religious prohibition. So, religion which accords sanction only to natural death or accidental death has no place for euthanasia and allied concepts.

Euthanasia is against public policy. The public policy is in favour of natural death. Accidental death must be accepted because it is a culmination of factors which are beyond one's control. The public policy-based apprehension is that it would open pandora'sbox if euthanasia is allowed. This apprehension is baseless.Everyone in this world for any reason whosoever does not seek euthanasia. The desire to live is always there except in a situation so lamentably pathetic that death is better than life.

The other apprehension is that if decriminalized euthanasia will be misused by unscrupulous persons in the pursuit of inheritance to property. This is a misconceived apprehension that procedural safeguards stand as a safety valve to keep a check on the unscrupulous persons. If it is proved that euthanasia is performed with an ill-motive everyone involved in it invites criminal liability for culpable homicide.

A person suffering from terminal illness may feel that he is a burden to all including himself. The close relatives may not consider so with a few exceptions. They wish to see their dear ones alive as long as possible until the natural death irrespective of the cost involved in rendering medical treatment.

The Code of Medical Ethics is against a physician killing another person or assisting another to kill himself. The Hippocrates Oath enjoins a duty on every person entering the medical profession that at all times to undertake only those acts which alleviate the pain or suffering of a patient. The only counter argument is that when the oath was drafted millenniumago, Hippocrates might not have contemplated the advancement in the sphere of medical treatment which can prolong life.

**Conclusion**

It is evident from the above discussion that the whole dilemma surrounding euthanasia is a culmination of uncertainty associated with the meaning of euthanasia. Literally off course it signifies good death or easy death. Later it acquired the nomenclature of mercy killing. Every normal person wishes that eventually he should have a good death or easy death. It does not mean that everyone can seek performance of euthanasia. Another controversial issue is whose mercy killing it is whether everyone who is fed up of life or who thinks that he had enough of life deserves mercy as per his request to assist him to terminate his life easily to have a good death. The situations contemplated here are not compatible with the term mercy. They are not the circumstances which generate an emotional churning in the minds of people at large to make their hearts bleed for others. The society seriously began to think of the persons in permanent vegetative state and terminally ill patients to enable them to take recourse to easy death as an eternal solace of alleviation from the unbearable pain in a situation where untimely death is certain. Universally the societies have not accepted mercy killing of others for any other reason whatsoever as there is nothing in them to evoke mercy to assist them to put an abrupt end to their life without awaiting the natural death.

There is consensus among the people as to PVS or terminally ill patients that they deserve the mercy that they should die a relatively good or easy or early death before the occurrence of natural death as there is no possibility of survival at all except the perpetuation of the pain until the death ensues on its own. The opinions regarding the mode of achieving the good or easy death are divided. The question is whether euthanasia or pas or withdrawal of medical treatment is the right solution. Consensus is in favour of withdrawal of medical

treatment and life support systems signifying passive euthanasia in case of PVS and terminally ill-patients.

There are a few jurisdictions where euthanasia pas and passive euthanasia are legalized. In a few, only passive euthanasia is allowed as it does not involve any positive act on the part of a physician whereas euthanasia or pas is not allowed as it involves a positive act on the part of the physician. In jurisdictions where euthanasia and pas were legalized they were allowed de-facto before their decriminalization exempting the physicians involved in them from criminal prosecutions. The statutes even though provide procedural safeguards they are put into oblivion that they are not enforced in their letter and spirit. The very object of these procedural safeguards is to avoid misuse of euthanasia by any unscrupulous persons for any other concealed purpose other than the one for which it is allowed. The misuse will result in killing of some persons under the guise of terminal illness generally for inheritance. In one jurisdiction any other person other than physicians also can assist suicide. The danger involved in this provision is that any other person other than physicians may not have the knowledge of terminal illness, alternative methods of treatment, the possibility of survival and futility of medical treatment. Therefore, it is advisable that only a physician shall be allowed to assist suicide, if at all the legal policy is to allow it, to ensure the futility of medical treatment and untimely death. Even a physician also cannot be compelled to assist suicide. He may refuse to do so because of emotional reason or that his religious conviction dictates his conscience not to involve in it. In such a situation if he wishes, he can guide a non-medical person as to how to go about it.

In one jurisdiction even, foreigners are also allowed to seek euthanasia or assisted suicide. It has paved the way for 'suicide tourism' attracting people from other jurisdictions where it is not allowed. That will result in accomplishing something which is prohibited under their law which will be an embarrassing situation for the law and policy makers in those jurisdictions. Therefore, in those jurisdictions there must be strict visa rules prohibiting them from seeking euthanasia or pas elsewhere. The jurisdiction which allows the foreigners to seek euthanasia earns the bad reputation of being called as 'suicide spot'. In addition to that a person who wishes to visit the jurisdiction will be booked with suspicion of being there with the purpose of ending his life. Therefore, it is submitted 'suicide tourism' should not be allowed. One foreign jurisdiction has witnessed a slippery slope development in the sphere of euthanasia and assisted suicide. Many exceptions have been created to the original rule that in effect euthanasia or assisted suicide is not confined only to terminally ill-patients. Consequently, the exceptions have devoured the original law itself. Hence it is submitted that once the legislative intent is clearly laid down as a matter of policy there should not be any room for slippery slope which also paves the way for misuse.

It was *Aruna Ramachandra Shaunbaugh's* case which gave currency to the debate on Euthanasia. Except that in a few cases relating to right to die the Apex

Court has made some obiter observation. In the above case the Apex Court has accorded the stamp of legality on passive euthanasia for the reason discussed above. It has been laid down that Approval of the High Court is mandatory before withdrawing medical treatment in case of patients in PVS and suffering from terminal illness. The High Courthas laid downthe procedural safeguards which are necessary to avoid the misuse of euthanasia or assisted suicide by unscrupulous persons to acceleratethe right of inheritance as pointed above. The Apex Court has made it clear that the procedural safeguards are to be followed until a law is laid down by the Parliament in that regard. As per the judicial decision euthanasia or assisted suicide is not permissible for the reason discussed above.

The Law Commission like the Apex Court is in favour of only passive euthanasia and has recommended prohibition of euthanasia and assisted suicide for the reason stated above. It has accepted the procedural safeguards mandated by the Apex Court. It has laid down certain recommendations. The proposed Bill on the withdrawal of medical treatment and life support systems in case of patients in PVS and suffering from terminal illness is an amalgam of its own recommendation and the directions of the Apex Court in *Aruna's case.* But in that case, there was reference only to patients in PVS. In effect go by that judgement withdrawal of medical treatment in case of terminally ill-patients is not possible. Therefore, it is submitted that any law which is going to be enacted shall encompass both patients in PVS and terminally ill condition.

A review mechanism in line with some foreign jurisdictionsto review the compliance of review provisions prior and after withdrawal of medical treatment must be laid down. The task of review can be entrusted to the Director General of Health Services who shall dispose the matter expeditiously. It is true that a decision to withdraw medical treatment shall be taken expeditiously. But the above safeguards are very much necessary in a country like India where the propensity of misuse by unscrupulous persons is very high to protect the interests of the patients in PVS and terminally ill condition and others who are without cogent reason exposed to withdrawal of medical treatment to attain the ulterior motive of inheriting the property by acceleratingthe natural process of death.

It is laudable that the proposed bill prohibits advance medical directive and medical power of attorney. The very rationale is to prevent misuse of the law by creating fake advance medical directive (living will) or medical power of attorney. It is difficult to prove advance medical directive and medical power of attorney. It will prolong the process of decision making as to withdrawal of medical treatment which will expose the terminally ill and patients in PVS to the hardship of unnecessarily enduring the unbearable pain. However, in a few foreign jurisdictions such advance medical directives are not prohibited. The obvious inference is that integrity and honesty of the people involved there in the decision-making process are unquestionable. Unfortunately, the same is not true of India.

The Apex Court has categorically ruled that the fundamental right to life does not carry with it's the right to die. Hence there is nothing unconstitutional with the culpability of an attempt to commit suicide. This is nothing but an irrational adherence to the archaic law which has derived its force from the dominant religious sanction against suicide under the rubric of a sin. The reality of frustration of life consequent upon certain extreme circumstances of utter despair and dejection where hope of survival is a mirage, a person embraces the drastic step of committing suicide. If unsuccessful the trial for offence of attempt to commit suicide surrounds his neck, a situation worse than death sentence. Realizing the agonizing factors which prompt a person to commit suicide and the aftermath agony of criminal trial, in many foreign jurisdictions attempt to commit suicide has been decriminalised. Such a decriminalisation will go a long way in protecting the interest of a terminally ill-patient who wishes to commit suicide to put an end to his lifewith no inclination to wait at all for the compliance of legal procedure pertaining to withdrawal of medical treatment shedding the fear of criminal trial for an unsuccessful attempt to commit suicide. It is submitted that in the greater interest of all victims of attempt to commit suicide,such attempt must be decriminalised. It is an illusion that decriminalisation will aggravate the tendency to commit suicide. Knowledge of punishment for attempt will not deter a person from trying, as it is a step taken under some extreme circumstances.

Right to life does not include right to die as clarified by the Apex Court consequent upon which a premise for allowance or euthanasia or assisted suicide cannot be culled out from the constitutionally guaranteed right to life. As a matter of policy, it is left to the parliament to provide a legislative space legalising euthanasia or assisted suicide. If at all euthanasia or assisted suicide is allowed, it must be confined only to instances of PVS and terminal illness. To break the ice there must be public awareness to sensitise the people as to the extreme situations where euthanasia or assisted suicide can be permitted as a last resort. Certainly, PVS and terminal illness are the two situations where the thought of euthanasia and assisted suicide loom large in the eyes of all in general and the person who is terminally ill in particular. There is only a difference of form and not of substance between active euthanasia or assisted suicide and passive euthanasia. In both the cases the eventual end is emancipation of a patientfor the purpose contemplated above. The means only differs, as one involves a positive act and the other an act of omission. Active euthanasia is prohibited because it involves a positive act. Going by the proposition 'end satisfies means' there need not be any hindrance to allow active euthanasia. The practical difficulty is that the physicians may become highly sentimental to kill a person even though it is for a good motive of relieving a person from the enduring pain. It requires intensive training of physicians in this regard. However, what if a physician refuses to administer a lethal substance or assist in the administration of the same. The answer is in

negative as contemplated in the concerned legislation in one of the western jurisdictions to the effect if a physician refuses to perform euthanasia or to assist in committing suicide he cannot be subjected to legal action. Palliative care is a strategic area in the whole spectrum of withdrawal of medical treatment and life support system. The withdrawal is taken recourse to cut short the span of natural death that until then the patient must be kept happy through palliative care to reduce the pain and suffering of the patient. The foreign experience shows that it has not received much focus as the need of the hour. The reason is that the physicians and the para-medical staff are not well trained in this area. Therefore, it is submitted those involved in carrying out passive euthanasia must be thoroughly trained in every aspect of it to keep in tune with the underlying notion of easy death, the guiding spirit behind the concept of euthanasia.

The above discussion manifests that euthanasia involves a great conundrum of principle, policy, ethics, pragmatism and religious precepts. The antagonists would argue that an end to life other than natural death is unethical and against laws of nature. Hence it is against ethical principle. In principle, the bodily autonomy allows person to decide whether to go ahead with his life or terminate it before the occurrence of natural death. This is a cogent argument in the armoury of protagonists of euthanasia and assisted suicide. The principle of autonomy as a matter of policy needs to be circumscribed in the greater interest of society to check intentional killing in the guise of euthanasia. On the other hand, it can be argued that with the stringent enforcement of procedural safeguards it can be permitted. Public policy is not an absolute concept. It is relative that it changes with the changing needs of society. What has been blocked in the name of public policy needs to be approved if society demands. The policy matter must undergo a change to formulate a principle worthy of implementation. It is a never-endingprocess in an endeavour to bridge the gap between law and society. The life of law has not been logic, but experience which warrants change in the existing policy. Experience equips a person with wisdom which calls for pragmatism. The element of pragmatism grounded on the negative socio-economic impact of prohibition on euthanasia and assisted suicide dictates the terms to legalize them subject to off course with stringent procedural formalities. The herculean task involved in conferring a legislative space to euthanasia and assisted suicide is the proportion in which principle, policy, logic, ethics and pragmatism should enter the legislative framework. As passive euthanasia has been legalised by the Apex Court in case of PVS patients, to break the ice the parliament needs to legislate a law legalising it inclusive of both patients in PVS and suffering from terminal illness. Based on experience of legalization of passive euthanasia at an appropriate time a thought can be thrown on a legislative framework allowing euthanasia in the light of foreign experiences as discussed above to lay down a vibrant and sensitive law pertaining to euthanasia, active as well as passive and physician assisted suicide.

# Real Estate, Good Governance and Property Right – Interface and Intricacies

Dr. D. Rangaswamy*

## Introduction

The role of the property for the betterment of the human society is remarkable.[1] In the context of its vital importance, right to property has been accorded concrete jurisprudential foundation.[2] According to *Smith* and *Lee* property rights are not simply equally important to other right, but are the most important of all rights. It is a guardian of every other right.[3] It is fundamental in a society based upon private ownership of the means of production.[4] As explored by the *Carol M. Rose, Bentham* regards property not as a right but as a creature of law, and indeed as "nothing but a basis of expectation."[5] According to *Bentham* the security of property is vitally important not because property is a right with a political role, but because a society that safeguards property is wealthy.[6] Being wealthy, that society can satisfy more individual preferences than a society in which property is at risk.[7] The State being protector of the interest of the citizens, has to play a pivotal role in protecting and promoting the property of the society. When ownership is insecure, it may leads to social revolution. Crucial components of economic development such as Investment and effort in trade or business may be dampened when "Mafia" thugs threaten the successful, or when vaguely-authorized officials siphon off the fruits of

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1 *See generally* Joseph William Singer. "Property as the Law of Democracy."*Duke Law Journal* , VOL.63 (2014): 1287 - 1336. (Explores the nexus between property, Democracy, Morality and Social Order); Marvin Bentley J & Tom Oberhofer. "Property Rights and Economic Development."*Review of Social Economy*, VOL.39, NO.1 (April, 1981): 51-65. ( explains the economic perspective of property in the context of tranditional and modern property rights); David A. Leblang. "Property Rights, Democracy and Economic Growth."*Political Science Quarterly,* VOL.49, NO.4 (March, 1996 ): 5-26. (explores the relationship between property rights and economic growth and evaluate the relative significance of democracy and property rights)

2 *See* Sukhninder Panesar. "Theories of Private Property in Modern Property Law ." *The Dennining Law Journal* , VOL.15, NO.1 (2000) 113-138. ( Reflects the right of the property from in the context of occupation theory, Laour theory and Utilitarianism ); Abrham Bell. " A Theory of Property ." *Cornell Law Review* , VOL.90, NO.3( March, 2005): 531-616. ( explains the property from the perspective of natural law theory, positivist theory, Utilitarianism, value theory); George B. Newcomb. "Theories of Property."*Political Science Quarterly*, VOL.1, NO.4 (Dec., 1886): 595 -611. ( explains the right to property In the context of legal philosophy of Hobbes , Locke, Kant, Fichte, Bentham and J. S. Mill)

3 Cited in; Carol M Rose. "Property Right as Key Stone Right." *Notre Dame L. Rev.,* VOL.71, NO.3(1996): 329 – 337 at p.333.

4 Michael E.Tiga. "The Right of Property and the Law of Thelf." *Tex.L.Rev*, VOL.90, NO.8 (1983-1984): 1443-1475 at p.1443.

5 Bentham, Jeremy. "Principles of the Civil Code." In *The Theory of Legislation* , by C.K.Ogden ( edt.,) 1931.Cited in; Carol M Rose, *Supra* note 1, at p.330.

6 Principles of the Civil Code, at 113-14. Cited; Carol M Rose, *Ibid* ., at p.331.

7 *Ibid., at* p.330.

one's efforts.[8]

According to *Adam Smith* "the first and chief design of every system of government is to maintain justice; to prevent the members of a society from incroaching [sic] on one anothers [sic] property, or siezing [sic] what is not their own. The design here is to give each one the secure and peacable [sic] possession of his own property. The end proposed by justice is the maintaining [of] men in what are called their perfect rights."[9] According to Justice *Marshall,* "(I)t is a very important natural right; that the founding fathers and those who came after them profoundly believed that its recognition and just preservation were prime essentials to the pursuit of happiness here..."[10] He further says "...I must make it clear that in plumping for the natural law right to acquire and own private property, I do not put it forward as an absolute and unqualifiable municipal or civil law right. I do, though, insist that just governments are formed not to destroy but to protect and expand this natural right as well as the others..."[11] Remarkable prevalence and unusual development of real estate sector across the globe has proved that real estate is emerging and outstanding property. It is unique commodity that is immovable, relatively durable, costly and that has its own market.[12] Accordingly, home buying touches every corner of the society and has sweeping influences on daily lives of ordinary people.[13]

The role of good governance in ensuring above mentioned property right in appropriate way is considerable. Thus, Good governance is the corner stone of the healthy society. The existence and continuation of the affair of the individual strongly depends upon the level of governance ensured by the government. In fact, public-sector management, accountability, legal framework for development, Transparency and information are the hall mark of good governance.[14] This is the manner in which power is exercised in the management of a country's economic and social resources for development.[15]

On the other hand, the Real Estate Sector is emerging in the public spotlight as prominent societal and economic concern under the context of the right to housing. The recent developments have evinced the appropriate regulation of the sector saying that there is a need of streamlining the legal system covering Real Estate Sector in

8 *Ibid.,* at p.331.

9 *Ibid*., at p.332.

10 An address delivered by J Marshall on *The Natural Law And The Right To Property* on December 8, 1950, at the Fourth Annual Natural Law Institute at the University of Notre Dam. Cited in; 26 Notre Dame Law. 640 ( 1950-1951) at p.641.

11 *Ibid.,* at p.642.

12 Kevin Fox Gotham." The Secondary Circuit of Capital Reconsidered: Globalization and the U.S. Real Estate." *American Journal of Sociology*, VOL.112, NO.1 (June 2006 ): 231-275, at p.233.

13 Tianfu Wang &Bobai Li. " Resources And Strategies: Conflicts And Its Consequences In The Chinese Real estate Market." *Asian Perspective*, VOL.29, NO.4 (2005): 159-181 at p.160

14 International Fund for Agricultural Development. *Good Governance: An Overview.* EB99/67/INF.4, IFAD, August 1999.

15 Asian Development Bank. *Governance: Sound Development Management*. October 1995. Cited; *Ibid*., at p.4.

terms of housing price inflation, property right protection, regulating real estate agents, promoters and builders, environment sustainability and much importantly, to provide more housing to low- and medium income urban families. In fact, the distinguishing feature of real estate, local specificity and heterogeneity, makes it difficult to communicate information about assets, liabilities, and opportunities to a large audience of investors in a clear and credible manner.[16]

The lack of good governance in real sector could negatively affect the prospective property right of the individual. The concept of good governance through institutional frame work can raise the transparency and simplify the complex process of the real estate sector. Thus, Protection of the amateur investor against the risks that may defeat his expectations has been a long-standing aim of governmental regulation.[17]

In the backdrop of the core governances issues attached to Real Estate Sector, the government of India has come out with regulatory mechanism by passing Real Estate (Regulation and Development) Act, 2016 ( RERDA). The purpose of this article is, under the context of unique scheme of the Act, to analyse the ability of basic policy assumption governing the Real Estate Sector and to determine the profitability of the Act in accomplishment of its avowed purpose of protecting and promoting the property right of the individual over plots through good governance.

**Real Estate Sector – An Overview**

The global population is witnessing tremendous growth of urbanization since last couple of decades. [18] The massive growth of urbanization, in line up with global trend, results in incidental stress on ability of the government of India to cope up with emerging challenges. One of such smart byproduct of the urbanization is the unconventional migration from rural to urban area. It is stated "…the stride of migration from rural to urban areas is accelerating numerically. By 2050, about 70 per cent of the population will be living in cities, and India is no exception. It will need about 500 new cities to accommodate the influx."[19] This accelerated growth of the urbanization has severely affected the capacity of the government to ensure right to housing for its citizen in hassle free manner. As high urbanization rate, coupled with high rate of migration from rural areas is stressing, the limited urban infrastructure; sub-optimal usage of urban land has resulted in raising the cost per unit of built-up area. In addition, lack of growth in housing development capacity with respect to construction capability, labour availability, construction material,

16 Kevin Fox Gotham, p.235.

17 Curtis J. Berger. " Real Estate Syndication: Property, Promotion, and the Need for Protection." *The Yale Law Journal,* VOL.69, NO.5 (April, 1960 ): 725-793, at p. 727.

18 According to United Nations Study, Globally, more people live in urban areas than in rural areas, with 54 per cent of the world's population residing in urban areas in 2014. In 1950, 30 per cent of the world's population was urban, and by 2050, 66 per cent of the world's population is projected to be urban. United Nations Organisation. *World Urbanisation Prospects- 2014 Revision.* New York: UNO, 2014, p.2.

19 CREDAI (Confederation of Real Estate Developers' Associations of India). *Smart Cities,* p.3, available at http://www.credai.org/sites/default/files/Conclave-2014-Report-smart-cities.pdf (Retrieved on 8th January 2017)

and housing affordability is likely to pave the way for some major considerations for the government to provide an enabling framework for housing development.[20] Taking advantage of the situation, the private players have taken over the Real Estate Sector (RES) with no concern for the consumers.

The RES being a major economic driver of the country has very interesting history behind it.[21] *Shradhanjali Parida* has quoted two major reasons for the unprecedented development of the RES in India. The first reason is that the expanding industrial sector has created a surge in demand for offices building and dwellings. The significant development of the manufacturing sector at the rate of 10.8 percent in 2006-07 out of which a growth of 11.8 percent is the root cause for this uncommon situation of the country. The second reason is the liberalization policies of government have decreased the need for permission and licenses before taking up mega construction projects. The liberal attitude of the government towards Foreign Direct Investment (FDI) in RES since 2002 has further widened the scope of the real estate industry in the country.[22] Further, according to Competition Commission the growth in the residential real estate market in India has been largely driven by rising disposable income, a rapidly growing middle class, fiscal incentives like tax concessions, conducive and markedly low interest rates for housing loans and growing number of nuclear families. The residential sector is expected to continue to demonstrate robust growth, assisted by rising and easy availability of housing finance.[23]

**Background of the RERDA, 2016**

Under the context of significant growth of the RES since last few decades, the most of the countries have created and adopted their own regulatory authorities to protect the interest of the stakeholders of the sector.[24] The legal

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20 Sujash Bera et al. *Housing for All: Reforms Can Make it Happens Soon.* Confederation of Real Estate Developer's Association of India ( CREDAI) & JIL, November,2014. Available at http://www.credai.org/sites/default/files/Credai-Housing-for-all.pdf ( Retrieved on 8th January 2017)

21 *See,* Robert J. Shiller. "Historic Turning Points in Real Estate."*Eastern Economic Journal*, VOL. 34, NO.1 (winter, 2008): 1-13; Marc A. Weiss. "Researching the History of Real Estate Development."*Journal of Architectural Education*, VOL.41, NO.3 (1984); Marc A. Weiss. "Real Estate History: An Overview and Research Agenda." *The Business History Review*, VOL.63, NO.2 (Summer, 1989): 241-282.

22 Shradhanjali Parida."Real Estate in Indian Context-Opportunities and Challenges."*Abhinav National Monthly Refereed Journal of Research in Commerce and Management,* VOL.2, NO.2( February 2013) at p.83.

23 *Belaire Owners Association v. DLF Limited, HUDA, and Ors*, Case No. 19/2010, 12st August, 2011, para.1.2.

24 For example in *Alberta Real Estate Council of Alberta (RECA),* set up under its *Real Estate Act, 2000*, The *Real Estate Council of Ontario* established under the *Real Estate and Business Brokers Act (REBBA), 2002*; *The Estate Agency Affairs Board* constituted under *The Estate Agency Affairs Act, 1976* , *Washington D.C Real Estate Commission*, in *Queensland Australia, the Property Agents and Motor Dealers Act, 2000*,

regime relating to RES in India is subjected plethora of laws since 19th century.[25] The net effect of these laws has been that a large number of real estate transactions have been accomplished without adequate standard and professionalism. There is was no specific law lays down the general principles for builders, promoters and Real Estate Agents (REA) to follow. The lack of regulatory mechanism is one of the prominent factors that led the Central government to think of revitalization of the RES of the country.

As stated above, the legal framework governing REB in India is a little uncommon. Constitutionally, the acquisition and requisitioning of the property, though, is a State subject,[26] in practice, both Central as well as State governments are acting as appropriate authorities to regulate RES. The incidental activities attached to REB and power of the Central government to exercise its authority over these subjects,[27] though RES governed by State laws, has enabled both State as well Central government to regulate the issue under their respective legislative domain. Accordingly, the different dimensions of the RES are governed by the different level of the government in the States. In urban India, the various facets of REB is regulated by the urban local authorities.

From the regulatory perspective of real estate agencies, town and country planning Acts regulate land use and development of real estate agencies. Whereas, the Consumer Protection Act, 1986 aims at protecting the interest of the customer against deficiency in services provided by the real estate entities. The unhealthy competition of the real estate is regulated by the Competition Act 2005. The crucial question of law and fact adjudicated in the cases such as *Apartments Co-operative Housing Society Limited and Ors v. Municipal Corporation of Mumbai and Ors,*[28] *Priyanka Estates International Pvt. Ltd. v. State of Assam*,[29] Pertaining to relationship between buyer and seller of the REB triggered a need of the revitalization of the law relating to real estate transactions in India.

Similarly, the CCI in *Belaire Owners Association v. DLF Limited, HUDA,*

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25 Such laws are- *Indian Contract Act, 1872, Transfer of Property Act, 1882, Registration Act, 1908, Special Relief Act, 1963, Urban Land (Ceiling And Regulation) Act (ULCRA), 1976, Land Acquisition Act, 1894, The Indian Evidence Act, 1872, Rent Control Act, 1961.*

26 *The Constitution of India, 1950*, Seventh Schedule, List II—State List, Entry 18. This entry empowers State government to makes law related to land, rights in or over land, land tenures including the relation of landlord and tenant, and the collections of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonisation.

27 For example the press release by the Central Government says that Bill is being proposed under Entries 6, 7 and 46 of the concurrent list of the Constitution of India. *See* Press Information Bureau, Ministry of Housing and Poverty Alleviation, August 14, 2013. Entry.6- Transfer of property other than agricultural land; registration of deeds and documents; Entry.7- Contracts, including partnership, agency, contract of carriage and other special forms of contracts, but not including contracts relating to agricultural land. Entry.46 – Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this list. *See* Seventh Schedule, Constitution of India, 1950.

[28 AIR 2013 SC 1861

29 AIR 2010 SC 1030

*and Ors*,[30] strongly emphasized the need of the regulatory authority for REB in the country. Further the Committee on Streamlining Approval Procedures in the RES vehemently advocated for the transparentize of the RES in India.[31] Thus, the inadequacy of laws and regulations are result in domination of the certain social elements and illegal developments in the housing sector. It was pointed out three decades back that "the absence of appropriate laws and regulations for the real estate business and trade strengthened the position of the middlemen. The business operations were underpinned by contacts developed with politicians and bureaucrats at a cost which could easily be passed on to the final purchasers of the property. Through regular pay-offs and offers of prized investments, the long arm of the law could thus be kept at bay, advance information obtained, files cleared promptly, and irregularities condoned".[32]

Under the context of the above cited developments, the Ministry of Housing and Urban Poverty Alleviation (MHUPA) had prepared a model Real Estate Regulation and Development Bill, in 2009 to regulate and promote real estate sector and set appropriate statutory provisions for the real estate business. Finally, with few changes the RERDA was introduced in Rajya Sabha on 20th August, 2013 and was referred to Standing Committee on Urban Development (hereinafter SCUD) on 9th September, 2013 for examination. The SCUD had sought public opinion through a press release. The SCUDanalysed the memoranda and suggestions received from various stakeholders/experts such as Confederation of Indian Industry (CII), Federation of Indian Chambers of Commerce and Industry (FICCI) and Associations working in the field of real estate on various provisions of the RERDA. The Committee had the briefing of the representatives of the MHUPA on the RERDA on 8thOctober, 2013. The SCUD had also heard the views of some of the NGOs working in the field of Real Estate. It took oral evidence of the representatives of the MHUPA, Ministry of Finance (Department of Financial Services, Department of Revenue), Reserve Bank of India, State Bank of India, Bank of India, Punjab National Bank, National Housing Bank, Ministry of Consumer Affairs, Ministry of Law and Justice(Department of Legal Affairs and Legislative Department) and sought clarifications on various issues that were brought to their notice by various stakeholders during their sittings held on 6th November and 6th and 12th December of 2013 respectively.[33] Finally, the Bill was passed

30 Case No. 19/2010, August 12, 2011

31 The Committee suggested that "The Committee reinforces the need to have a Real Estate Regulatory Authority which will ensure regulation and planned development in the real estate sector; ensure sale of immovable properties in an efficient and transparent manner and also protect the interest of consumers in the real estate sector and establish an Appellate Tribunal to adjudicate disputes" *See* GOI. *Report of the Committee of Streamlining Approval Procedures for Real Estate Projects in India - Key Recommendations.* New Delhi: Ministry of Housing and Uran Poverty Alleviation , January 2013, at p. 74.

32 Arun Kumar."Real Estate as Business."*Economic and Political Weekly*, VOL.17, NO.50 (December, 1982) at p.1984.

33 Ministry of Housing and Urban Poverty Alleviation.*The Real Estate ( Regulation and Development) BIll, 2013, Thirtieth Report of Standing Committee on Urban Development.* New Delhi: Lok Sabha Secretariat , Febraury 2014, at p. 7.

by the Rajya Sabha on 10th March and by the Lok Sabha on 15th March 2016.

**Governance Under the RERDA**

According to *Landell-Milles* and *Serageldin* governance denotes how people are ruled and how the affairs of a state are administered and regulated. It refers to a nation s system of politics and how this functions in relation to public administration and law.[34] According to *Reyaz Ahmad* "Good governance (efficient, effective, responsive, corruption free and citizen friendly) is central to the administration for ensuring people's trust in government and promoting social harmony, political stability and economic development."[35] Accountability, participation, legal and judicial reform, rule of Law, effectiveness and efficiency, strategic visions, predictability and transparency are the core principles of the good governance.

As lucidly outlined under the preamble of the RERDA the primary objective of the RERDA is to establish the Real Estate Regulatory Authority (RERA) for regulation and promotion of the RES. The RERDA is also intent to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers of RES. The RERDA is further intended to establish the Appellate Tribunal to adjudicate appeals against the decisions, directions or orders of the Authority.[36] The scheme of the RERDA has been prepared so as to achieve the above mentioned objectives in adequate and appropriate manner. The major characteristics of the RERDA in ensuring adequate governance for the real estate sector of the country are as follows.

**Obligation and Disclosure Clause**

Information disclosure is a central tool of regulatory policy.[37] The real estate transaction is based on contradictory expectations of customer and promoters. To customer, an apartment is used as a necessary shelter. Its use value includes its structure, size, design, location, and other qualities that satisfy home buyers' living requirements and preferences. On the other hand, to promoters, an apartment is a commodity that can potentially bring profits.[38] This kind of

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34 Cited in; Ved P. Nanda. " The "Good Governance" Concept Revisited." *The Annals of the American Academy of Political and Social Science*, VOL.603 (Jan., 2006 ): 269-283, at p.273.

35 Md.Reyaz Ahmad. "Necessity of Administrative Reforms in India - Good Governance Perspective." *International Journal of Multidisciplinary Approach and Studies*, VOL.02, NO.5 Sept-Oct 2015: 219-231, p.219.

36 The Preamble of the Act runs as follows*:An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment orbuilding, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicatingofficer and for matters connected therewith or incidental thereto.*

37 Daniel E. Ho. " Designing Information Disclosure." *Admin. & Reg. L. News*, VO.38, NO.1 (Fall, 2012): 13-14 at p.13.

38 Tianfu Wang &Bobai Li, at p.165.

different expectation may result in exploitation of the customers and result in ethical practices on the part of sellers. Accordingly, protection of the public against fraud, misrepresentation, and unethical practices in real estate transactions is the foundation of the real estate business. The legal system should endeavour to eliminate such practices which could be damaging to the public or bring discredit to the real estate profession. The new legal regime has widely recognised the interest of the nation and its citizens by making provisions for highest and best use of land and transparency in dealings.

The Act has protected customers against exaggeration, misrepresentation, or concealment of pertinent facts which could be practiced by the promoters in their business. The disclosure clause requires that the promoter at the time of the booking and issue of allotment letter should disclose information with respect to following information; (*a*) sanctioned plans, layout plans, along with specifications, approved by thecompetent authority, by display at the site or such other place as may be specified bythe regulations made by the Authority;(*b*) the stage wise time schedule of completion of the project, including theprovisions for civic infrastructure like water, sanitation and electricity.

In justice to customers who relied upon the services of promoter, they should endeavour always to full fill obligations and responsibilities as to obtaining various certificates such as completion certificate, occupancy certificate and lease certificate from the authorities to customers. The obligation clause also requires that the promoter is responsible to provide and maintain the essential services to customers on reasonable charges and to enable the customers to formation of an association or society or co-operative societies. In the best interest of society and public, various obligations such as obligation regarding veracity of the advertisement or prospectus, deposit or advance of customer, adherence to sanctioned plans and project specifications, transfer of a real estate project to a third party, insurance of real estate project, could substantially boost the good governance of the real estate sector.

**Real Estate Regulatory Authorities (RERA)** [39]

The RERDA seeks to establish RERA's at the State level for the regulation and development of the RES. It aims to: (a) ensure consumer protection, and (b) standardize business practices and transactions in the RES. One chairperson and not less than two whole-time members of the authority are to be appointed by the appropriate government on the recommendations of a Selection Committee. The Selection Committee should consist of such persons and in such manner as may be prescribed, from amongst persons having adequate knowledge of and professional experience of at least twenty years in case of the Chairperson and fifteen years in the case of the members in urban development, housing, real estate development, infrastructure, economics, planning, law, commerce, accountancy, industry, management, social service, public affairs or administration.

39 Chapter V Section 20 – 40 of RERA

The mandate has been imposed on authorities to make suitable recommendations to the appropriate government or the Competent Authority in order to facilitate the growth and promotion of a healthy, transparent, efficient and competitive RES.[40] Similarly, the RERDA mandates that certain functions which are vital and incidental to the RES [41] are to be performed by the authorities in addition to power of investigation,[42] issuing of directions[43] and impose and recovery of penalties [44]

Administrative Reform Commission viewed that a single window clearance of all requirements or one-stop service centres is a step which can cut down on corruption as it simplifies procedures and reduces layers.[45] The Commission further says that most of the procedures dealing with permissions, licenses and registration were laid down years ago. These procedures are quite complex and require documentation, which a common citizen finds difficult to complete. It is, therefore, necessary to have a review of all such procedures so that unnecessary procedural requirements are eliminated.[46]

**Central Advisory Council**

Another institutional mechanism ensured under the RERDA is Central Advisory Council (CAC). The RERDA prescribes that the Central government may by notification, establish CAC consisting of representatives of the Ministry of Finance, Ministry of Industry and Commerce, Ministry of Urban Development, Ministry of Consumer Affairs, Ministry of Corporate Affairs, Ministry of Law and Justice, Planning Commission, National Housing Bank, Housing and Urban Development Corporation, five representatives of State governments, five representatives of the RERAs. The function of the CAC is to advise and recommend the Central government on matters concerning implementation of the Act, major questions of policy, protection of consumer interest, foster the growth and development of the RES and on any other matter as may be assigned to it by the Central government.

The Act differs from the previous practice of the real estate governance with regard to the policy framework to be innovated for the country.The Act lists several tasks which the CAC must take up in determining and setting up of new policies which could strategically support real estate sector of the country. In contemplating new goals, polices, regulations and evaluation of existing legal regime, CAC could smarter the real estate sector of the country.The endeavour of the government is not only to bridge the gap between unorganised norms and uniform norms, but also to ensure that the existing Indian system is in line with changed international, regional and standards of other countries. The council

40 *Ibid*., Section 32.
41 *Ibid.,* Section 34.
42 *Ibid* ., Section 35.
43 *Ibid.,* Section 37.
44 *Ibid.,* Section 40.
45 Second Administrative Reforms Commission. *Citizen Centric Administration - The Heart of Goverance, Twelfth Report.* New Delhi: Government of India , February 2009, p.22.
46 *Ibid.*

with a view to ensure effective enforcement of the provisions of the Act, has to make some suggestions and recommendations by taking exhaustive and impressive dimensions of the real estate sector of the country.

**Establishment of Real Estate Appellate Tribunal (REAT)**

The adjudicatory authority ensured under the scheme of the RERDA is constitution of REAT to hear any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under the RERDA. The diversity and expertness of this institution has well maintained under the RERDA by requiring the government to appoint a qualified person as Chairperson and Members of the REAT.

In the case of a judicial member he should be held a judicial office in the territory of India for at least seven years or has been a member of the Indian Legal Service and has held the post in Grade I of that service or any equivalent post for at least three years, or has been an advocate for at least fifteen years with experience in dealing with real estate matters. Similarly, in the case of a technical or administrative member, he should be a person who is well-versed in the field of urban development, housing, real estate development, infrastructure, economics, planning, law, commerce, accountancy, industry, management, public affairs or administration and possesses experience of at least fifteen years in the field. Besides, the independency of the REAT is well ensured under the RERDA by specifying the Term of office, Salary and allowances,Removal ofChairpersonand Memberfrom office.

The REAT is a specialized bodyequipped with necessary expertise to handle real estate disputes involving multiple complexities. The REAT shall not be bound by the procedure laid down under Code of Civil procedure, 1908, but shall be guided by the principle of natural justice. The REAT jurisdiction in real estate matters shall provide speedy and expeditious justice and help to reduce the burden of the litigation in the ordinary courts. The REAT is mandated to make and endeavor of disposal of the real estate matters within 60 days from the date of receipt of the appeal. The RERDA proposes to set up REAT at different places to adjudicate the cases and makes the access to justice more accessible.

**Critical Analysis Of RERDA**

It is pertinent to look at new RERDA from the defective dimensions. Apart from regulatory mechanism, there is another mechanism which may act as major instrument in achieving intended objectives of the RERA. Ethical standards for the Real Estate are such a mechanism. Decline in ethical standards in the real estate business has largely and powerfully affected the governance of the real estate sector in the country. The new legal regime is completely ignorant as to ethical standards of real estate agents. The real estate legal regimes across the globe have paid much attention to the code of conduct for real estate agents.

It is viewed that an ideal arrangement would probably permit an inquiry into the honesty and integrity of every person applying for a real estate license.[47] This kind of power to enquiry may facilitate the real estate committee to inquire into their experience and knowledge of real estate practice, in order to ascertain their ability properly to protect the public with whom they deal.[48] It can also act as judicial authority as to the matter concerning the suspension, recall, or revocation of licenses already issued. Therefore, a real estate committee composed of men who must have been in the business for certain years would e wise step to take care of real estate license issue.

The government can contemplate conditions subjected which license can be issued to the real estate agent.[49] Though the power has been given to State government contemplate conditions for the license, it is evident from the laws passed by the various State governments that there is no such condition clause under the rules. This condition clause is material from the point of view of the revocation of license given to real estate agents. The READ mandates that where any real estate agent who has been granted registration under the READ commits breach of any of the conditions thereof, the license of such agent can be revoked or suspended by the authority.[50] But is illogical to conclude that how authority can exercise this power without any certainty relating to the conditions of license.

Another aspect of the READ is grounds for suspension and revocation of the license given to the real estate agents. According to the READ following are the grounds for revocation and suspension of the licenses- violation of the conditions of license; breech of terms and conditions prescribed under the READ; license through misrepresentation or fraud. It is evident from these grounds that the revocation and suspension clause is very limited and not comprehensive in nature. Following activities might e considered as the grounds for revocation or suspension of the license as all these grounds are recognized under American legal system. They are-paying a commission or valuable consideration to any person for acts or services performed in violation of the READ; Being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interests of the public; failing, within a reasonable time, to account for or to remit any money coming into his possession which belongs to others; acting for more than one party in a transaction without the knowledge of all parties for whom he acts; accepting a commission or valuable consideration as a real estate salesman for the performance of any of the acts specified under the READ, from any person, except his employer, who must be a licensed real estate broker;; Any other conduct, whether of the same or a different character from that hereinbefore

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47 Theobald A.D." Real Estate License Laws in Theory and Practice." *The Journal of Land & Public Utility Economics*, VOL.7, NO.2 ( May, 1931): 138-154 at p.142.

48 *Ibid,* at p.143

49 Section 9 (3) of RERA

50 *Ibid*, Section 9 (7)

specified, which constitutes improper, fraudulent, or dishonest dealing.

**Conclusions and Discussions**

A perennial and fundamental object of the author in this article is to locate the place of good governance in terms of policy statements issued and institutional mechanism set up under new legal regime to govern Real Estate Sector of the country. The past few decades have seen increasing attention given towards constructive urbanization process in the context of rapid transformative process of country. As the nation strives to enhance her capacity to cope up with developmental needs through the urbanization, ensuring adequate roof for people of urban area is viewed as challenging path for the sustainability of the urban India. Housing being a basic determinant of wellbeing of the people of the country is equally prominent to health, family stability and social cohesion.This right was negatively affected because of want of adequate law on real estate sector.

On account of this the property rights of the customers of the real estate projects were under the need of adequate governing authorities. The new law could establish and regulate the sector with fair and consistent fashion. The real estate agents and real estate entities are bound by and answerable to the new balanced and matured system. Given the powerful incentives to various stakeholders of the real estate business, one might expect that the real estate being an emerging property of the contemporary society would bring substantial changes in the real estate business. It is undoubted fact that an attempt to safeguard the property right over real estate property has substantially achieved by the government by enacting the READ and establishing institutional mechanism to take care of registration of the project, licensing real estate agents, regulatory mechanism and adjudication of the cases. While the READ has been accomplished, perfection of the system is still in an experimental stage. To meet the defective part of the new legal regime as explored by the author in this paper, the adequate and reasonable legislative steps must be adopted in order to effectively implement the new legal regime of the country.

> The author would like to conclude doctrine of liquidation[51] of Madison which says, "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." Accordingly, law has been made by the parliamentarian and they have done their job. However, the real execution of the real estate law dependent upon the subsequent discussions and adjudications.

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51 Cited in; Paul G.Ream. " Liquidation Of Constitutional Meaning Through Use," *Duke Law Journal*, VOL.66, NO.7 (April, 2017) 1645 – 1675, at pp.1650-1651.

# Analysis of Environmental Disputes under GATT/WTO

**Mr. Sunil N. Bagade***

## I. Introduction

International trade has gained great significance in the present era. More specifically, it has been regarded as the vehicle of economic development. During the latter half of 19th century the international community realised the importance of free trade and started pursuing the same. At this juncture General Agreement on Trade and Tariffs came into existence prescribing the norms of international trade. The important contribution of GATT was introduction of non-discrimination principle in the international trade.[1] This principle ensured the equal opportunity of trade to all the member countries. Thus, it prohibited the discriminatory practice in the trade. This in a major way helped to promote free trade.

No doubt, the development of free trade helped the countries to attain faster economic development, but at the same time it caused severe harm to the quality of environment. The negative consequences of environmental pollution compelled the nations to adopt environmental measures aimed at the protection of quality of environment. This paved the way for trade and environment conflict.

This article aims to explore the origin of trade and environment conflict. It also aims to understand the compatibility of environmental measures having bearing on trade with the core obligations of GATT/WTO. An effort is made to explore the role of Dispute Settlement Body in the resolution of trade and environment dispute.

## II. Origin of Trade and Environment Conflict

The origin of trade and environment dispute dates back to the period when the countries were rigorously pursuing free trade policy. The economy of the nations was adversely affected by the great depression of 1930s and also by the Second World War. To attain faster rate of economic growth the nations started focusing on free trade policy. It is observed that the increase in the intensity of international trade exerted more pressure on the industries to manufacture goods in large quantity. To meet the increased demand the industries started overexploiting the natural resources which resulted into severe depletion of those resources.The very process of industrial production is pollution causing activity. The increased industries and the production resulted into various kinds of pollution. Water pollution, air pollution, land pollution, etc. are the direct results of trade led growth. In the initial phase the pollution was confined to the territories. But with the industrialization and increased trade environmental pollution became global.[2]

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1 P. K. Rao, *The World Trade Organization and the Environment,* (London, Macmillan PressLtd., 2000), p. 6

2 Se Hark Park and Walter Labys, *Industrial Development and Environmental Degradation – A source book on the origins of Global pollution,* (USA, Edward Elgar Publications,1998), p. 10

The global level degradation of environmental quality posed severe challenges before the nations. More specifically the pollution caused by the trade led development resulted into global warming. The term global warming means, increase in the earth's surface temperature due to accumulation of greenhouse gases that trap heat in the earth's atmosphere.[3] Due to the industrialization the emission of the greenhouse gases has increased considerably. Apart from the same industrialization has drastically reduced the forest cover. The forests had the capacity of absorbing the greenhouse gases and keep the environment safe. But the deforestation has drastically affected the environment's assimilation capacity. This has resulted in the increase in concentration of greenhouse gases in the environment.[4] With the increase in the concentration of greenhouse gases in the environment more radiations is getting trapped and the earth's temperature is gradually increasing. In other words the earth is becoming warmer with the increase in the emission of greenhouse gases.[5]

Apart from the global warming the world witnessed instances of acid rain. The term acid rain refers to a phenomenon where the acidity of rainwater increases beyond that of clean rainwater because of the fact that it gets contaminated with chemicals introduced into the atmosphere through industrial and other emissions.[6] In other words, acid rain refers to the rain which is acidic in nature due to the presence of certain pollutants in the atmosphere emitted from industrial and other process.

Another major environmental problem is the depletion of ozone layer. Ozone layer is a gaseous layer which encircles the earth. This layer exists in the lower part of the stratosphere which exists 15 to 30 km above the earth. The importance of ozone layer lies in the fact that it protects life on earth from ultraviolet radiation which comes from the sun. The ultraviolet radiations have adverse effects on the environment. The excessive ultraviolet radiations hinder the growth process of plants. This may lead to a loss of plant species and may possibly reduce food supply to the living beings.[7] The ozone layer is at peril. The emissions from industries and industrial products have severely damaged the ozone layer. The emissions have reduced the thickness of ozone layer causing depletion of the layer.

Owing to these negative externalities the world is witnessing the climate change phenomenon. The term climate change refers to a change in the climatic conditions that can be identified by changes in the variability of its properties and that persists for an extended period[8] In other words, it refers to any change in climate over time, whether due to natural phenomenon or as a

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3 Gurdip Singh, *Global Environmental Change and International Law,* (New Delhi, Aditya Books Pvt. Ltd.,1991), pp.3 to 4

4 Savita L. Patil, *"Climate Change and Global Warming: A legal Perspective",* published in Dr. Chidananda Reddy S. Patil (ed.), *In Honour of the Common Man (Essays in Law),* (Dharwad, Alumni Association, University College of Law,2013), p. 147

5 Dr. Vijay Chitnis and Dr. Ramesh Tilak, *Changing face of the Planet and Environmental Law,* 1st edn., (Mumbai, Snow White Publication Ltd.,2001), p. 25

6 George Smith (1995), "Acid Rain: Transnational perspective", (1995) *N. Y. L. SCH. J. INT'L and COMP. L.*, p.4

7 *Ibid,* p. 11

8 *Ibid,* p. 18

result of anthropogenic activities.The climate change caused by the human activities is the major concern. The human induced climate change has deleterious effect on the environment and life on earth.[9]

The above discussed consequences are the result of industry led and trade induced economic growth. These adverse consequences were not known to the world till 1970's. When the environmental consequences came to lime light the world started focusing on the measures aimed at curbing these consequences. The laws enabled the nations to adopt environmental measures in the guise of protection of environment. These measures had the impact on trade flow. Various restrictions came to be adopted under the guise of environmental protection. More specifically when the Developed Countries imposed environmental measures on trade, the developing countries raised objection. The Developing Countries contended that the Developed Countries have attained the economic progress by exploiting natural resources.[10] Now when the Developing Countries want to attain the economic development they are coming in the way of the same by way of imposing environmental measures. The Developing Countries view the imposition of environmental measures as anti-development strategy.

These differing views on trade and environment paved the way for trade and environment conflict. Further, when the nations which were affected by these measures approached the Dispute Settlement Body (DSB) of WTO questioning the validity of such measures, it declared the environmental measures as GATT inconsistent. This practice of DSB further increased the debate over the conflict between trade and environment.

The next level of discussion proceeds on the core obligations of WTO and compatibility of the environmental measures with such obligations.

## III. Core obligations GATT/WTO and environmental measures

The General Agreement on Trade and Tariff adopted in the year 1947 provides rules regulating international trade. With the objective of ensuring free trade, the GATT constrains governments from imposing or continuing the measures that restrain or distort international trade. To further its objective GATT has mandated the observance of non-discrimination principle in international trade. The GATT has incorporated two non-discrimination principles, namely, the Most-Favoured-Nation principle and the National Treatment principle.

The Most-Favoured-Nation principle provides equal treatment of "like products" originating or destined for all other contracting parties.[11] The National Treatment principle of provides equal treatment between domestic

9 *Ibid,* p. 20
10 *Supra* Note 5, p. 32
11 Article I of General Agreement on Trade and Tariffs
12 Article III of General Agreement on Trade and Tariffs

and imported products.[12] These two principles are the core obligations of GATT. Through these principles GATT is promoting free trade and also restricted the nations from adopting trade distorting practices.

Any deviation from these core principles of GATT will be treated as GATT inconsistent practice and accordingly DSB of GATT may strike down such practices. This does not mean that a nation cannot adopt a measure which is GATT inconsistent. GATT has recognised certain exceptions. A nation which adopts a measure which is GATT inconsistent has to justify its action based upon any of the exception recognised under the agreement. Article XX of GATT deals with the exceptions which enable the nations to adopt GATT inconsistent measures.

From the perspective of environmental protection when GATT provisions are analysed it has been observed that it does not have any specific provision providing for the same. However, two sub-clauses of GATT, namely Article XX (b) and (g) are frequently invoked by the nations in order to justify their environment protection motivated GATT inconsistent measures. The text of the Article is as under:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: …
(b) necessary to protect human, animal or plant life or health;…
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;…"[13]

As can be observed from the above cited text, nowhere it mentions the term environment. Even then the nations have invoked these provisions for the purpose of legitimizing their GATT deviant measures. This shows that environmental measures are inherently go against the core obligations of GATT. This is the reason for which the nations affected by the imposition of such measures challenged the validity of the same before the DSB.

In these kinds of cases DSB was expected to render judgment having implications on trade and environment issues. The following paragraph tries to trace the approach of DSB towards trade and environment issues.

## IV. Environmental Disputes and Dispute Settlement Mechanism

The *Herring-Salmon* case was the first case wherein Article XX was invoked on the ground of environmental protection.[14] In this case the Canadian regulation which restricted the export of certain fish was challenged before the DSB. The United States contended that the regulation was intended to protect the Canadian fishing industry.

13 Article XX (b) and (g) of General Agreement on Trade and Tariffs
14 Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, Mar. 22,1988, GATT B.I.S.D. L/6268-35 S/98

Canada defended the regulation contending that regulation aims at the protection of native fish stock and thus protected under Article XX (g) of GATT. The DSBobserved thatthe salmon and herring stocks were exhaustible natural resource but the challenged regulation was not directly aimed at protecting the fishery and was, therefore, an illegal trade sanction.

The *Thailand-Cigarette* case is another important case which came before DSB for resolution.[15] In this case also Article XX exception was invoked to justify the measures. Thailand came up with a regulation which required the importers of cigarettes to obtain a permit from the government before importing. The United States challenged this regulation on the ground that it amounts to imposition of ban on imports. Thailand defended the regulation contending that it is necessary to protect human, animal or plant life or health and thus protected under Article XX (b). Thailand claimed that that the purpose of the regulation was to protect its citizens from addiction to cigarettes and more specifically, from the chemical additives in American cigarettes.

In this case the DSB interpreted the term "necessary" to mean "least GATT inconsistent" measure and ruled that Thailand measure is not least GATT inconsistent measure. Thus it struck down Thailand measure as violative of GATT obligation. The Panel observed that any measure invoked under Article XX (b) has to be least GATT inconsistent measure. Thus it promoted the free trade interest than the environmental concerns.

Another landmark case which came before DSB was *Tuna Dolphin-I case.*[16] In this case, Mexico and intermediary importer nations challenged certain provisions of the United States' Marine Mammal Protection Act (MMPA). The Act prohibited the importation of tuna caught using purse-seine nets which caused incidental killing of dolphins in huge quantity. It was observed that the dolphins frequently swim directly above group of tuna, and fishermen, knowing that the tuna sought will be below, surround dolphins with purse-seine nets. In this process dolphin used to be killed or got hurt. To prevent such kind of incidental killing of dolphin United States imposed ban on the use of purse-seine nets by the American fisherman and also the importation of tuna caught with such nets which was effective on foreign fishermen.

Mexico challenged this measure before DSB. The United States defended the said regulation under Article XX (b) and (g) of GATT. The United States argued that the regulation was necessary because there was no other alternative and that the regulation was primarily aimed at protection of the dolphins, an exhaustible natural resource. In connection with the exception provided under Article XX (b), the Panel observed that the United States had not attempted to adopt multilateral agreements to protect the dolphins. According to the Panel, until international negotiations were attempted and had failed, trade restrictions could not be found to be necessary. This is a further extension of the interpretation of 'necessary' that the Panel developed in the *Thailand-*

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15 Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. DSIO/R-37S/200

16 United States-Restrictions on Imports of Tuna, Sept. 3, 1991, GATTB.I.S.D. 39S/155 (39th Supp.)(1993)

*Cigarette* case.

As per the Panel interpretation, in order to be necessary, the regulation must be "least GATT inconsistent." In order to be least GATT inconsistent, the regulating nation must have *exhausted all other options reasonably available to it to pursue its objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements*.[17] This analysis poses considerable hurdle in adopting a measure aimed at the protection of environment, namely, first, such requirement is nowhere suggested in the GATT and secondly, despite the said fact, a nation intending to adopt a measure for the protection of environment has to overcome said requirement in order to survive DSB scrutiny.

Further, while interpreting the exception under Article XX (g), the panel observed that the criteria wherein the allowable incidental killing rate of dolphin by the foreign fishermen was determined based on the incidental killing of dolphin by the American fisherman was considered to be too unpredictable. On the said ground the Panel held that the regulation could not be considered as primarily aimed at the conservation of a natural resource. The Panel observed that using of such criteria wherein incidental killing of dolphins by the American fishermen has been made yardstick to measure the importers amounts to arbitrary imposition of restriction and thus, violates the requirements specified under the chapeau. The Panel also ruled that the regulation was invalid under Article XX (g) as it was not aimed the conservation of natural resources and was not made effective in conjunction with domestic restrictions.

After few years another case came to be filed before DSB. The said case is known as *Tuna-Dolphin case* II.[18] In this case several nations filed case against the United States for imposing import ban on the intermediary nation under the Marine Mammal Protection Act (MMPA). This regulation required the intermediary nations that exported tuna procured from other nations to the United States to certify that the imported tuna was not caught with purse seine nets. While examining the validity of Unites States measure under Article XX (g), the Panel came up with the method for determining the validity of the regulation. As per this method the Panel has to consider the followings:

1. Whether the alleged regulation was aimed to conserve exhaustible natural resources;
2. Whether the effect of the regulation was related to the conservation and implemented in conjunction with similar domestic regulations;
3. Whether the regulation satisfies the requirement laid down under the chapeau of Article XX. In other words, whether the regulation was arbitrary or unjustifiable restriction on trade.

This method is referred to as bottom-up reading. Under this method in the first place the regulation will be scrutinised under the specific clauses of the

17 KazumochiKometani, "Trade and Environment: How Should WTO Panels Review Environmental Regulations under GATT Articles III and XX", 16 Nw. J. Int'l L. & Bus. 441, (1995-1996), p. 415

18 GATT Panel Report, United States – Restrictions on Imports of Tuna, 16 June 1994, DS29/R444

exception and then under the chapeau. The Panel observed that the US regulation fulfilled the first test, whereas it failed to satisfy the second test for the regulation was not primarily aimed at the conservation of dolphins. To reach this conclusion the Panel observed that the regulation under the MMPA was primarily aimed at changing the policies of other countries in regard to the harvest of tuna rather than at protecting the dolphins themselves.

The critics of this judgment observed that the Panel concentrated on the extra-territorial application of the provision rather than on the intention behind imposing such provision. They observed that the Panel has failed to appreciate the fact that when the method adopted for catching tuna is the factor that is resulting into the killing of the dolphins, then how one can protect dolphins without changing the method of catching the tuna.[19]

Considering that the MMPA regulated the processes and not the products, the Panel in above two cases held that process related regulations are not justifiable under the Article XX. The DSB's approach was based of the National Treatment principle. In connection with the same, the United States contended that the national treatment requirement has been fulfilled because foreign dolphin-safe tuna was treated in the same manner as domestic dolphin-safe tuna, and foreign purse seine caught tuna was treated like domestic purse-seine caught tuna. Refusing to accept the said contention, the DSB observed that there exists no difference in the tuna itself irrespective of the fact that whether or not it was caught with a purse-seine net. Therefore, there was no justification for the embargo against purse-seine caught tuna.

It is observed that this ruling makes it impossible for a nation to regulate environmentally detrimental production processes through trade measures. Such a product and process distinction nullifies the purpose of Article XX exceptions aimed at the environmental protection. It is to be noted that the chapeau expressly states that "…nothing in this Agreement should be construed to prevent the adoption or enforcement by any contracting party of measures…" as a guiding proposition with respect to the interpretation of the measures adopted on the basis of the exceptions provided under the sub clauses ofArticle XX. In spite of this stipulation the adoption of a method of interpretation based on the product and process distinction goes against the GATT.[20]

As noted GATT was a temporary arrangement adopted for the purpose of regulating the international trade. In order to have a permanent body to regulate international trade in the year 1995 World Trade Organization (WTO) was established. The Preamble of the WTO expressly provided for the Sustainable Development principle. Thus WTO came up with the noble objective of promoting trade as well as protection of environment. Despite the same, the trade and environment continued to pose problem to the international trade. This is evident from the fact that DSB was asked to adjudicate the

19 J. Patrick Kelly, Judicial Activism at the World Trade Organizational: Development Principles of *Self-RestraintNw. J. Int'l L. & Bus. 353, (2001-2002),* p. 358

20 *Ibid,* p.360

*Reformulated Gasoline* case involving the trade and environment conflict even after the establishment of WTO.

In *Reformulated Gasoline case*[21] Brazil and Venezuela challenged the United States Environmental Protection Agency's Regulation of Fuels and Fuel additives-Standards for Reformulated and Conventional Gasoline (hereinafter referred to as "gasoline rule") promulgated under the 1990 amendments to the Clean Air Act. This regulation stipulated different baseline establishment methods for foreign exporters of gasoline than those used by the domestic refiners. Against this rule it was argued that the gasoline rule discriminated against them in violation of the non-discrimination provisions of the GATT. The United States maintained that the gasoline rule was justifiable under Article XX as it was aimed at promoting lower emissions, maintain cleaner air, and protect public health.

Turning down the argument of United States, the DSBruled against the United States and interpreted exceptions under sub clauses of Article XX based upon the rulings in earlier cases. Holding that the said regulation was not least GATT inconsistent, the Panel rejected the claim of United States under Article XX (b). Further, the Panel rejected the claim of United States under Article XX (g) on the ground that the regulation was not primarily aimed at the conservation of the natural resource. The said judgment of the Panel was challenged before the WTO Appellate Body. While deciding the appeal, the WTO Appellate Body reversed the Panel's finding that the regulation was not a valid exception. The Appellate Body stated that there was nothing in the GATT that indicates that the phrases "related to" and "in conjunction with" should be interpreted to mean "primarily aimed at".[22]

In this case the Appellate body has applied bottom up method devised in *Tuna I* for the interpreting the provisions. After holding that the Gasoline regulation was validunder Article XX (g), the Appellate Body proceeded to examine the validity of the said regulation in pursuance of requirements under the chapeau. The Appellate Body came up with the two-tiered test for interpreting Article XX, namely, first, analysing of the restrictions to check its conformity with the exceptions provided under the sub clauses and secondly, the appraisal of the said measure under introductory clauses of Article XX**.** In thiscase although the regulation was found to be valid under Article XX (g), it did not survive scrutiny under the chapeau of Article XX.

The *Shrimp-Sea Turtle* case is another important case in the matter relating to trade and environment issues.[23] In this case, several Asian nations challenged the regulation of United States which prohibited the imports of shrimp that were caught in a manner that threatened endangered sea turtles. The contention of United States was that the incidental killings of sea turtles could be significantly reduced by the use of Turtle Excluder Devices (TEDs) which provide an escape hatch in the net for turtles without reducing the net's ability to catch shrimp. The said regulation was promulgated in consonance with the Endangered Species Act. This regulations provided that the

21 WTO Dispute Panel Report on United States-Standards for Reformulated and Conventional Gasoline, Jan. 29, 1996,WTO Doc. WT/DS2/R.

22 *Supra* Note 19, p. 367

23 WTO Appellate Body, United States - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (98-3899) (Oct. 12, 1998)

exporting nations, whose fishermen operated in waters where sea turtles and shrimp coexist, have to certify that they are using TEDs or adopted a similarly effective method for catching shrimps before exporting the same into the United States.

This measure was challenged before the DSB. The Panel observed that the claim of United States is not justified under Article XX (b) and (g) of GATT. The Panel while analysing the validity of the said regulation under the chapeau first, observed that unilateral trade measures are inconsistent with the core provisions of GATT and the maintenance of the multilateral trading system. The Panel noted that the object and purpose of the WTO Agreement is to eliminate unilateral trade barriers and the Unites States measure at issue amounts to unilateral trade measure. Thus it held the U.S. measure as invalid. Further, it observed that the said regulation constitutes unjustifiable discrimination between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX.On appeal the decision of the Panel was overruled by Appellate Body. The Appellate Body held that the challenged regulation fell under the Article XX (g) exception.

The appellate panel then took up the second portion of the two-tiered test, which tries to examine whether the regulation violated the chapeau. The Appellate Body found that though the regulation itself was not violative of the chapeau but its implementation by the U.S. Government unfairly discriminated against foreign fishermen.

The above cited decisions aptly demonstrate that the Dispute settlement Body evolved several tests to verify the validity of trade related environmental measures. In all these matters the DSB upheld the trade interest rather the environmental concerns. Initially even the Appellate Body followed the same approach. But the *Shrimp-Turtle* case marks the departure from this traditional approach.

## V. Conclusion

No doubt the industry led and trade induced economic growth has helped the nations to achieve economic prosperity but the increased industrial activities and trade resulted in the over exploitation of natural resources. Further, the emissions from the industrial process have severely damaged the quality of environment. The air pollution, water pollution, global warming, acid rain, etc. are the adverse consequences of the industry led and trade induced economic growth. It is to be noted that these economic gains have been achieved at the cost of environment. In this regard, the views of the Environmentalists and Free trade proponents differ from each other.

Further, the above study reveals that when nations started adopting the trade related environmental measures, their actions were challenged before the Dispute Settlement Body. The GATT agreement did not contain any provisions aimed at the protection of environment. The efforts of the nations to protect their environmental measures under the specific exceptions provided under Article XX of GATT had to face challenge before the DSB. The decisions of

DSB in striking down such measures further aggravated the trade and environment debate.

Now that WTO has come up with Sustainable Development principle the Dispute Settlement Body and also the Appellate Body have to analyse the trade and environment issues in the light of Sustainable Development principle rather than just advancing the trade interests of the nations.

# Privacy Issue in Online Transaction: A Challenge for the Internet Age

Dr. Shashi Nath Mandal*

## 1.Introduction

The right to privacy has been fundamental assumption of free and democratic society since its inception. While not explicitly mentioned in US or Indian constitution, several court cases has established and supported that free citizen are provided right against government intrusion into their living. One finds it difficult to accomplish "Life, Liberty and the pursuit of Happiness without this.[1] Nonetheless, the right to privacy discovers itself in contrary to another inalienable right: right to security. Having decided in *Naz Foundation* v. *Government of NCT,*[2] there originated a feeling that right of privacy of individuals are gaining acknowledgement in Indian legal landscape.[3] The interesting fact about High Court decision reading down Section 377 of *Indian Penal Code* and decriminalizing Homosexuality was the hesitation of Central government to appeal in Apex Court.

Currently India's almost comprehensive legal proviso that addresses privacy on internet can be found in *Information Technology Act*, 2000.[4] A reading of recently amended Section 69 and 69B of the *IT Act*, 2000[5] expresses that this amendment has vested state functionaries with authority to intercept, monitor and decrypt information.[6] This also enables them to block access to website and collect traffic data.[7] Prior to this amendment of *Information Technology Act*, there was vacuum in Indian laws regarding interception and monitoring in internet communication. It was executed by the general provisions of *Indian Telegraph Act*, 1885.[8] Provision that clearly protects privacy of individuals includes: penalizing Child pornography,[9] fraud and cyberpunk, hacking and data protection for corporate body.[10]

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1 'United States Declaration of Independence', available at-<http://www.archives.gov/exhibits/charters/ declaration_transcript.html> (last visited on October 01, 2016)

2 Naz Foundation v. *Government of NCT of Delhi & Ors*., 160 (2009) D.L.T., 277

3 Lawrence Liang,*' Is the Naz Foundation decision the Roe* v. *Wade of India?',* (Kafila Blog, July 6, 2009), available at- <http://kafila.org/2009/07/06/is-the-naz-foundation-decision-the-roe-v-wade-of-india/> (last visited on Dec. 25, 2015); see also *'Leonard Link, Indian Court Rules on Colonial-Era Sodomy Law',* (Leonard Link's Blog, July 2, 2015), available at –<http://newyorklawschool.typepad. com/leonardlink/2009/07/indian-court-rules-on-colonialera-sodomy-law.html> (last visited on Dec. 25, 2009)

4 Popularly known as IT Act 2000

5 *Information Technology (Amendment) Act,* 2008, No. 10 of 2009

6 Section 69, *Information Technology (Amendment) Act*, 2008, No. 10 of 2009

7 Section 69A, *Information Technology (Amendment) Act,* 2008, No. 10 of 2009, Even though this Section does affect the civil liberties of an individual, it is outside the scope of the present article, as the right being analyzed in this article is the right to privacy and not the right to speech and expression.

8 *Indian Telegraph Act*, 1885, No. 13 of 1885 (hereinafter 'telegraph Act').

9 Section 69, *Information Technology (Amendment) Act,* 2008, No. 10 of 2009

10 *Information Technology (Reasonable security practices and procedures and Sensitive personal data or information) Rules*, 2011

## 2. Privacy in Electronic Transaction

### 2.1 Information Assembling

The raising access of internet was lately realized by Indian legislation in 2001. However, regulations regarding privacy were lacking in the statute.[11] The telecommunication interception rules were framed after Supreme Court in *PUCL* v. *Union of India*[12] ruled out. These rules provided the design for intervention with privacy rights for "violation upon individual's solitude or seclusion and information collection." These rules are the reflection of rules which has been amended under Section 69 and 69B[13] (Oct. 27, 2009).

Under Section 5(2) of the *Telegraph Act*, were the rule for interception of telecommunication. These rules stated that when (i) a public emergency or (ii) public safety state of affair exists, then orders can be granted to issue directions for interception. These rules effectively empower high ranking public officials[14] to issue instructions regarding interception of messages.[15] Various safeguards have been added to augment the Section under rule 419-A of *Indian Telegraph Rules* to provide more specific documental formalities i.e. providing the details and particulars of officer directing the maintenance of records. Secondly, review committee has been formed up by limited regulatory oversight.[16]

However, in public cases involving classification of "violation of solitude or informal gathering" the courts apply doctrine developed under Article 14, 19, 21 of the Indian constitution.[17] This doctrine empowers judiciary to strike down statutes which are against the connection of legislation; but courts are unwilling to do the same because according to courts 'right to privacy' is too broad for interpretation and liberal in nature.[18] They have been adhering to procedure rather than limiting the substantive power of state. In *PUCL* v *Union of India*, the Apex court laid down procedural safeguards to check warrantless tapping of telephone as directions.[19] In case challenging constitutional validity of MCOCA proviso regarding telephone tapping the Apex court decided that the provisions contains adequate procedural safeguards.[20] After much of discontents and debate, the *Information Technology Act,* 2000 was amended in 2008. This amendment was sought to ratify the inefficiency with the Rule 419-

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11 Section 72, *Information Technology (Amendment) Act*, 2008, No. 10 of 2009

12 *People's Union for Civil Liberties* v. *Union of India,* (1997) 1 S.C.C. 301 (India) (concerned the legality of telephone tapping).

13 *Information Technology (Procedure and Safeguards for Monitoring and Collecting Traffic Data or Information) Rules*, 2009 (G. S. R. 782(E)

14 Rule 419-A(1), *Indian Telegraph Rules,* 1951

15 Rule 419-A(3), *Indian Telegraph Rules,* 1951

16 Rule 419-A(8), *Indian Telegraph Rules,* 1951

17 T. R. Andhyarujina, 'The Evolution of the Due Process of Law by the Supreme Court, in Supreme but not Infallible: *Essay in honor of the Supreme Court of India', Pg. 203* (B. N. Kirpal et al. eds., 2004).

18 *NeeraAgarwal* v. *Mahender Kumar Agarwal,* 2009 (5) A.L.T. 518 (India).

19 *Supra* Note 12

20 *State of Maharashtra* v. *Bharat Shanti Lal Shah*, (2008) 13 S.C.C. 5

A(1), *Indian Telegraph Rules*, 1951 of enactment. To make this act independent and sufficient with regards to internet behavior,[21] Section 69 was introduced by the law makers.[22]

Section 69 *"Power to issue directions for interception or monitoring or decryption of any information through any computer resource."* This Section reflects the Section 5(2) of *Telegraph Act*, 1885 which also contains the same limitations on the powers to issue directions. It contains *PUCL*[23] alike constitutional limitation. It also includes the requirement of recording reasoning behind issuing the directions and also to remark the 5 classes of event as per Section 5(2). There is no doubt that regulation as per Section 69(2) for providing procedure also follows Rule 419-A in broad manner. They reflect most of the procedural safeguards. Amendment of Section 66E of the act brought forward the penalization for violation of privacy. It seeks to apply exclusively to image private area of person and under the situation where privacy has been violated.[24]

### 2.2 Information Processing

Section 69B of the *Information Technology Act*, 2000, titling itself to be concerned the right way with processing the information, is composition between gathering and processing of information. Section 69B "Power to authorize to monitor or collect traffic data or informing through any computer resource for cyber security." The aim and scope of this Section is better online or internet management by mandating enhance in cyber security. This also prevents and analyzes the violation of computer contaminant. This Section also allows for issuing guidelines for monitoring and collecting information and data produced generated, received, transmitted or stored in any computer or internet source.[25]

A critique of ordinance formed under this Section makes it unambiguous and states that harms or losses which will be incurred are in nature of data processing i.e. aggregation and identification.[26] This Section provides safeguards similar to Section 69 of the Act. As a result, the reasoning that has to be recorded is not threshold as established under Section 69.[27] These are the reasons which were pronounced in the *PUCL* case. Therefore, there lies a debate against constitutional validity of the Section as the rules formed under it

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21 *Information Technology (Amendment) Act*, 2008, No. 10 of 2009 (contains 49 numbered paragraphs which contain insertions, substitutions and deletions to several Sections of the *Information Technology Act,* 2000).

22 *Id*

23 *Supre* Note 12

24 Section 66E (1), *Information Technology Act*, 2000, No. 21 of 2000

25 Section 69B (1), *Information Technology Act*, 2000, No. 21 of 2000

26 Rule 3(4), *Information Technology (Procedure and Safeguards for Monitoring and Collecting Traffic Data or Information) Rules,* 2009

27 Rule 3(2), *Information Technology (Procedure and Safeguards for Monitoring and Collecting Traffic Data or Information) Rules,* 2009

specifically speculate independent direction to supervise data, which inevitably requires interception.

### 2.3 Information Dissemination

What perplexes the mix of privacy damage is the character of information. Information which lies within the source of privacy differs case to case. It varies to scope of human activities and violation of privacy of individual receives a different class of harm. The law regarding whistle blowing or information disclosure has developed mostly with freedom of press. It has been often argued that disclosure of facts harms and violates privacy of individual in society.[28] These claims are usually looped in with the defamation law, when the person disputes the truthfulness of the information searched to be revealed or disclosed.[29] There are lawsuits where probe of information for which violation is complaint against developed through a fiduciary relationship. Regardless of their origin, court presumes the sources and contents of the information. For example fiduciary relationships i.e. bank-customer,[30] doctor-patients[31] and it also look into contents like failures to pay debts.[32] Thus, it is upon the discretion of the court to allow disclosure when it concerns serious infection such as AIDS virus because of which marriage can result in communication of such virus.[33] Issues such as legitimacy of child and maintenance),[34] recovery of debts also includes.[35] *Right to Information Act*, 2005 has been developed regarding this recently.[36]

### 2.4 Protection Against Dissemination

As the 2008 amendment brought several Sections to protect disclosure of information, which was absent prior to this. These include 43A which provides compensation which one will be liable to pay if he fails to protect sensitive or confidential data. The concern here is that these guidelines go beyond the scope of telecommunication regulations providing legal sanction for non-adherence. These are with objective to protect confidentiality with data thus they cannot be counted as proper legislative measurements to protect privacy loss of information because these are not examined for informal components.

28 *R. Sukanya* v. *R. Sridhar,* A.I.R. 2008 Mad. 244

29 *Indu Jain* v. *Forbes Incorporated,* IA 12993/2006 in CS(OS) 2172/2006 (High Court of Delhi, 12th October 2007

30 *Mr. K. J. Doraisamy* v. *The Assistant General Manager, State Bank of India*, (2006) 4 M.L.J. 1877

31 *Mr. 'X'* v. *Hospital 'Z'*, (1998) 8 S.C.C. 296 (India) & (2003) 1 S.C.C. 500

32 *Akila Khosla* v. *Thomas Mathew,* 2002 (62) D.R.J. 851 (India).

33 *Mr. K. J. Doraisamy* v. *The Assistant General Manager, State Bank of India,* (2006) 4 M.L.J. 1877 (India).

34 *Rayala M. Bhuvaneshari* v. *NagaphanenderRayala*, A.I.R. 2008 A.P. 98 (India)

35 *Ibid.* 34. The court held that, "if borrowers could find newer and newer methods to avoid repayment of the loans, the banks are also entitled to invent novel methods to recover their dues."

36 *Union of India* v. *Central Information Commission,* WP(C) 16907/2006, 3607 & 7304/2007, 4788 & 6085/2008 & 7930, 8396 & 9914/2009 (High Court of Delhi, 5th January 2010) (India) (Per Sanjiv Khanna, J.). The case concerned a challenge to the refusal of the Central Information Commission to divulge information under the *Right to Information Act,* 2005

## 3. Limitation of Online Privacy

### 3.1 Lack of Incentive and Procedure

As there are various underlying problems in present legal regime application which is also consider as design defect of surveillance system. An examination of several judicial decisions have established that although due process is followed by judiciary, they have intemperately relied upon framing of strict procedure as well as called for adherence to gauge telephone tapping validity and legality. In all possibilities, the approach towards online surveillance will be same.

The most evident critique which may be pointed towards the privacy through functional or procedural argument, will be that people individual is bound to comply such procedure so people will be not comply with such. Such a counter will be conclude that administration and executive officials i.e. police, put in charge of precautions will barely be stickler for following procedures. Their principle job will be policing rather than securing privacy to individual. Hence, they will be liable for institutional bias[37] to their natural function. The anticipator finds it legitimate and logical end by making a less incentive reasoning. A review of judicial decision shows that judiciary have convicted wrongdoer on evidence collected by unconventional procedure when such is usually held not obligatory.[38] It does not affect the admissibility of evidence in the court of law if there is inadequacy in observing the safeguard in the case of telephone tapping.[39] The court ruled out those two loopholes has been pointed out in orders regarding authorization and confirmation of interception of telephone number. It was not established by the prosecution that Joint Director (IB), who acted as interceptor and authorized the interception, withstands the rank of Joint Secretary to Union of India. Secondly, verified orders which were passed by Home Secretary (Volume VII, Page 446-448) would suggest that confirmation was potential in nature. Nevertheless, these inefficiencies and inadequacies do not rule out the admission of intercepted communication through telephones as evidence. It is also to be looked that Section 5 and Rule 419A does not deal with rule of evidences unlike Section 45 of *POTA*. The non-compliance with provisions of Telegraph Act does not intrinsically affect admissibility.[40]

### 3.2 Ineffective Injury Redressal System

The problem on non-abidingness to procedure is compounded because of

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37 *Romesh Sharma* v. *State of Jammu & Kashmir*, 2007 (1) J.K.J. 84

38 *R. M. Malkani* v. *State of Maharashtra*, A.I.R. 1973 S.C. 157 (India). The court deciding on the admissibility of evidence under Section 7 of the Evidence Act, 1972 held that, *"…there is warrant for the proposition that even if evidence is illegally obtained it is admissible"*

39 *State (N.C.T. of Delhi)* v. *Navjot Sandhu,* A.I.R. 2005 S.C. 3820

40 It is to be noted that even though the *Information Technology Act*, 2000 does not contain a Section analogous to Section 45 of the *Prevention of Terrorism Act*, 2002 which contained language to make evidence admissible even in cases of procedural impropriety for which the decision was given, the general approach of law enforcement is to flout procedural safeguards

inefficient legal measurements to expose or detect the privacy loss, until the data is distributed publicly making the subject known to infringement. This appears essential as a notification may lead to the concealment of information which is looked to be assembled. However this problem is demonstrating. It is predicted that dearth of precedent that challenges unjustified surveillance can be attributed to the confidentiality. There are observational evidence indicates that unwarranted or unjustified surveillance is very large and occurs frequently. The *PUCL case* itself is reflexive as it arose out of a series of study demonstrated by CBI which indicated that high level of non-warranted ear wigging on communication between politicians.[41] In a recent case which was one of iconic headlines of mass communication when the phone was illegally tapped of leader of major politician.[42] Even in an uncertain event where an individual suspects that he is being under espionage or electronic spy, his remedies are enforceable. The courts have their discretion to entertain such through a writ petition under Article 32 or 226 of Indian constitution.[43] Judicial review of actions which are unjustified can be sought and relief may be granted accordingly. The other options includes criminal action police officer or any administrative officer for criminal trespass as per proviso of *Code of Criminal Procedure*, 1973 and damages by filing civil suit can also be claimed. These remedies somehow may look cushy and attractive but it takes substantial efforts and counseling to enforce specially in a judicial system like India. Thus, relying over judicial proceedings to seek remedy of privacy breach will be an ineffectual option.

### 3.3 Limited Protection Against Loss of Privacy of Individual

As absence of data protection standards, the current privacy regime comes into being for the protection of civil liberties of individual against the political body. In a set-up of such nature the protection which is sought against individual or private entity, can only be sought when there in nonperformance of functions which are performed under the state supervision. Thus, these kinds of approaches neglects the fundamental temporal of internet economy, where the state is considered as fringy player, and users' look for habits which are diminished in some of internet service providers. From the basic access of database from desktop, a user generally logs in a search engine or internet service provider. These are operated by the same corporation most of the time, known as conglomeration i.e. Yahoo-mail,[44] Gmail commonly known as Google-mail,[45] Rediff-mail, Hot-mail, Bing. The basic revenue model of such

41 *Supra* Note 12

42 *Amar Singh* v. *Union of India*, 2006 (2) S.C.A.L.E

43 *Sunkara Satyanarayana* v. *State of Andhra Pradesh*, 2000 (1) A.L.D. (Cri.) 117 BBC News, Rory Cellan-Jones, Web Creator Rejects Net Tracking, Mar. 17, 2008, available at <http://news.bbc.co .uk/2/hi/7299875.stm> (last visited on January 5, 2016).

44 'Is your email privacy safe with Google's Gmail and Yahoo! Mail?, July 30, 2006', available at- <http://www.scooq.com/ general/is-your-email-privacy-safe-with-googles-gmail-and-yahoo-mail/34/> (last visited on January 5, 2016)

45 'BBC News, Google's Gmail Sparks Privacy Row, Apr. 5, 2004', available at- <http://news.bbc.co .uk/2/hi/3602745.stm> (last visited on January 5. 2016

conglomeration companies' is prepared upon the basis of providing contextual promotion and publicity to support the kind of service they provide. This is not an anticipated argument but the use of such information can lead individual of privacy loss. For example the creator of the cyberspace itself has conveyed that searching for information regarding cancer or depression may result in increased health insurance policy and indemnity premiums as the companies can data track activities of consumer and sell the same information to the insurance company.[46]

### 3.4 Non Acknowledgment of Loss of Information Processing

The current privacy regime is narrow in scope as does not provide protection and safeguard against several losses which are incurred. These are dazzling regarding the complete non-acknowledgement of crucial harms which are incurred more frequently. A novel amount of personal data and information is accessible online and when amalgamated, life of individual becomes '' over time.[47] Increase in the degree of privacy loss is the concept that data is saved in immense private database by limited conglomerates because of confidential and limited nature of online service provider industry. Nevertheless, when this confidential data is visible non-contextually, it results into wrongful illation being drawn i.e. search logs of a person can possibly for research purpose and not for subjective or private health checkups. The concerning fact here is that person whose information is assembled does not have any kind of acknowledgement or notice causing loss of exclusion.

This kind of exclusion of data processing and not data gathering thus, there ought not to be any reasoning behind such exclusion. Presently, it is not inapposite to paying attention to EU Law on Privacy and refers those guidelines which comprise a basic prohibition backed by sanctions against confidential database. In addition the probable loss of secondary use, where data collected with intention to other than for which it was gathered. For a sturdy and strong privacy regime more procedures and law need to be prescribed to protect against loss of privacy which are unambiguously going on in cyberspace communications.

### 3.5 A Deeper Cut to Privacy

The above mentioned defects are underlying design defects in conceding sanction for surveillance and can also be applied to all mediums of telecommunication or cyber-communication. This Section analyses certain harms that occurs specifically towards internet and cyber communication. The internet as an interactional intermediate renders individual with vast range of application befitted to cater any information required. This may be thru the form of text, audio or video, the application of internet is very broad in nature,

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46 'BBC News, Rory Cellan-Jones, Web Creator Rejects Net Tracking, Mar. 17, 2008', available at-<http://news.bbc.co.uk/2/hi/7299875.stm> (last visited on January 5, 2016).

47 'Omer Tene, What Google Knows: Privacy and Internet Search Engines, 2008', *Utah Law Review.* 1433

which makes harms of interception through cross synergies, much deeper. The harm is much more than of conventional telephonic tapping. When an individual access the internet, he expects privacy to a certain level which he finds reasonable.[48] Unaware due to satisfaction of own desires and curiosities, he may reveal more piece of information to a computer than to another individual.

Thus, communications through internet or cyberspace are confidential in nature and concern the essential privacy of individual. Cyberspace communication is manifestation of individual's motive or intention. Statement of John Battelle to this context makes for reading "Link by link, click by click, search is building possibly the most lasting, ponderous, and significant cultural art effect in history of mankind: the database of intention",[49] Thus, by following the same orthodox and principle which has been established for telephone tapping would be complete simplification and answer of all the question posed by loss of privacy and data alteration in cyberspace and internet communication.

## 4. Global Position of Data Protection:

### 4.1 United Kingdom

In United Kingdom the Parliament in 1984 passed *Data Protection* Act (DPA) which was struck down and replace by *Data Protection Act,* 1998. The objective of the act is protection of personal data of individual and enhancement of privacy regime in states. The act protects all kind of private data i.e. name, Email and address, etc. The Act applies to all kind of data and information which is capable of being held on computer or electronic operating equipment in relevant file system. This act mandates each person or organization which stores data or personal information to register to the same to Information Commissioner.[50] Besides that United Kingdom in August 2011 passed Cybercrime Prevention Act. The objective of this act is to put restrict on collection of personal information or private data other than lawful purpose.

Similar legislation regarding cybercrimes and rules is also adopted by other nations i.e. China, Australia, Canada.

### 4.2 United States of America

Although United States and European Union aims to protect privacy of individual in state, United States has adopted entirely different approach regarding privacy regime. Unites States follows mix legislation and self-regulating sectorial approach. Data and information is classified into several Section based on their value and significance. In 1974, the *Privacy Act* was

48 'Cyber Cafe in Gandhinagar, India', available at- <http://www.worldembassyinformation.com/india-cyber-cafe/cyber-cafe-ingandhinagar.html> (last visited on January 5, 2016).

49 John Battelle, 'The Database of Intentions (Nov. 13, 2003)', available at- <http://battellemedia.com/archives/000063.php> (last visited Jan. 4, 2016).

50 Section 6, *Data Protection Act*, 1998, No. 21 of 2000

passed providing government agency to compare data in different classed based on their nature. United States have the democratic *HIPPA Act,* commonly referred as *Health Insurance Portability and Accountability Act* which governs all the records regarding health and insurance policy. The upkeep regarding issue of privacy and confidentiality covers in this act. In 2002 legislation signed *Sarbanes-Oxley (SOX) Act* to officially mandate and instructs a few reforms for enhancement of corporate liability. This act also contains provisions for financial disclosure to combat accounting fraud and corporate crimes. United States legislation also covers certain policies i.e. *Cable Communication Policy Act, Online Privacy Protection Act, Electronic Communication Privacy Act* for interception of Telecommunication through Electronic means Both federal and states have their respective laws regarding data protection.[51]

### 4.3. Indian Scenario

Looking at the Indian Scenario, with the wrongful use of technology, the strict need to regulate criminal activities arose. *Information Technology Act* amendment in 2008 along with certain provisions of *Indian Penal Code* came into picture for protection of cyber space crimes.

#### 4.3.1 Constitutional Liability

Hacking or stealing into someone's intellectual work is strict violation of Right to Privacy. Although constitution does not explicitly mentions right to privacy but it is protected under Indian Constitution. The Supreme Court in many cases examined right to privacy under Article 14, 19 and 21 of Indian Constitution.[52] Many judicial decisions have affirmed that right to privacy is very much of fundamental right under Article 21 of Indian Constitution.

#### 4.3.2 Criminal Liability

Criminal liability imposes punishment for the wrongs. Under *Indian Penal Code* there are certain provisions regarding Cyber Crimes such as Sending threatening messages through electronic media i.e.[53] E-mails, sending defamatory messages,[54] cyber frauds or bubble website making,[55] forgery,[56] web-jacking,[57] abuse by electronic mediums i.e. e-mails,[58] criminal intimidation by anonymous communication,[59] theft of computer hardware or computer software,[60] sale of obscene objects to youngsters, Printing of

51 Merges R and Nelson R (1999), 'On the Complex Economics of Patent Scope, 90(1)', *Columbia Law Review*, 838- 961 at 855.
52 *Naz Foundation* v. *Government of NCT of New Delhi & others*, Writ Petition no. 7455/2001
53 Section 503, *Indian Penal Code*, 1860, No. 45 of 1860
54 Section 499, *Id*
55 Section 420, *Id*
56 Section 468, *Id*
57 Section 383, *Id*
58 Section 500, *Id*
59 Section 507, *Id*
60 Section 378, *Id*

indecent or scurries matters intended for blackmailing,[61] obscene acts.[62] Other then *Indian Penal Code* provisions, there are other acts under Indian legislation which imposes criminal liability i.e. *Copyrights Act.* This includes Infringement of Copyrights,[63] Abatement for infringement of Copyrights,[64] penalty enhancement on second conviction or subsequent infringements,[65] knowing use of computer program or infringing copy of computer program.[66] The Application of these provisions varies case to case basis and these are subject to investigation and charge-sheet filing depending on the nature of the crime.

### 4.3.3 Tortuous Liability

Basic structure of cybercrime is established through *Donoghue* v. *Stevenson*.[67] In India it developed through *Information Technology Act*, 2000 followed by 2008 amendment. This Act is basic structure of tortuous liability in India. There are provisions regarding penalty and compensation for computer damage,[68] failure to protect data, hacking computer system,[69] dishonestly receiving computer or communication devices,[70] cheating by using electronic means i.e. computer, violation of privacy,[71] Data alteration,[72] Cyber terrorism,[73] Publication of material containing sexually explicit acts,[74] obscene material, misrepresentation,[75] falsify digital signatures,[76] breach of confidentiality and privacy[77] and all offences by companies.[78] This act also applies to acts committed outside Indian Territory.[79]

### 4.4. Analysis

By comparing Indian laws on cyberspace with the laws of developed countries, the requirement of proper law in India can be analyzed. Data are dissimilar in nature based on their value, utility and importance, so all data cannot be considered alike. We require framing the separate and classified category of data having different quality, utility and value as the United States has adopted. Furthermore, the provisions of *Information Technology Act* are

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61 Section 292A, *Id*
62 Section 63, *Indian Copyrights Act*, 1957
63 Section 51, *Id*
64 Section 63, *Id*
65 Section 63A, *Id*
66 Section 63B, *Id*
67 *Donoghue* v. *Stevenson* (1932), AC 532
68 Section 43, *Information Technology Act,* 2000, No. 21 of 2000
69 Section 43A, *Id*
70 Section 66B, *Id*
71 Section 66E, *Id*
72 Section 66, *Id*
73 Section 66F, *Information Technology Act,* 2000, No. 21 of 2000
74 Section 67A, *Id*
75 Section 71, *Id*
76 Section 73, *Id*
77 Section 72, *Id*
78 Section 85, *Id*
79 Section 75, *Id*

narrow in nature as it only deals with the extraction and destruction of data, etc. Companies cannot get complete protection of data which force them to enter into separate privacy contracts to keep their data confidential and secured. These contracts are enforceable under law. Apart from the loopholes of *Information Technology Act*, police system and officials are not familiar with cybercrimes in India. They need proper training to recognize with "Modus Operandi" of Internet and Cyber related crimes.

Despite the fact that efforts have been mode for proper data protection law as independent discipline, Indian legislative body left some lacuna in drafting of 2006 *bill of Personal data Protection.* This bill was drafted by following United Kingdom *Data Protection Act* but requirement is of an effective comprehensive act. Both Bar and Bench need to cognize the extent of internet crimes. They should make themselves conversant with complexness of cyber law and draft law by fulfilling the today's requirement.

**4.5.Conclusion**

Privacy ideologists have to harmonize with the fact that their state and administration has right to intercept and supervise data control in a specified situations. This is more asserted given the current situations where scepter of cyber-war and terrorism is obsessing most of the nations. Once this agreement is achieved; next logical step will be to secure the checks and balance of potential abuse of data while intercepting. Without competent incentive designs, checks and balance are merely curiosity at best. The provisions made under the ordinance recently cannot be called defective, yet imperfect. It would be not wrong to say ratification and refinement is required in current regime of cyberspace laws. Mandating the ex-ante ex-party judicial orders can be an outsmart alternative towards information gathering. Such orders are capable of curing inherent defects as they remove inherent bias of the officials.

This will be more realistic and convenient compromise and will not lead to major shift in current procedure aimed approach. The breach of privacy is higher than traditional encroachment of privacy. The provision of Section 69 should also be applied to Section 69B of *Information Technology Ac*t. Above and beyond this the causation privacy loss is clear, which postulate safeguard developed by *PUCL* Court under *"right to privacy"* to be added in Section 69B. Clearly, privacy under cyberspace is an emerging and essential field in India's cyberspace society. As companies collect huge data and information from online users, and government has been successful in surveillance capabilities, it is crucial that Indian legislation prioritize privacy of individual. The amendments without rectification will certainly create prison with surveillance station only. Confronted by privacy issue on cyber communication, the legislature faces a fragile duty to decide crucial policy matters. Either following totalitarian tendency or adopting a liberal conception can afford a security net to privacy. Last but not the least effective Governmental or non-Governmental mechanisms or centers with equipped

personnel, should immediately be developed at the different places in the country like India, which will work for creating awareness and sensitization regarding non-disclosure of undesired or personal information through electronic transactions and taking precautions at the time of providing personal and important information to any institutions/ bodies or individuals who are working from the place beyond the catch of Indian law *i.e.* falling beyond the lawful jurisdiction of the legal forums in India.

# LGBT's as Special Groups Seeking Asylum Rights

Kajori Bhatnagar*

## 1. Encapsulating LBGTI as Special Groups

### 1.1 Recognition of the Categories

In many parts of the world, individuals experience serious human rights abuses and other forms of persecution due to their actual or perceived sexual orientation and/or gender identity. While persecution of Lesbian, Gay, Bisexual, Transgender and Intersex (hereafter "LGBTI") individuals and those perceived to be LGBTI is not a new phenomenon, there is greater awareness in many countries of asylum that people fleeing persecution for reasons of their sexual orientation and/or gender identity can qualify as refugees under Article 1A (2) of the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol (hereafter the "1951 Convention").[1] Nevertheless, the application of the refugee definition remains inconsistent in this area. It is to be noted that the convention per se does not recognise gender as specific reason of persecution. However, in 2007, a group of 29 human rights experts launched The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. These principles are an attempt to apply existing international human rights law in the area of sexual orientation and gender identity. Although these principles have no legal validation, but these have been supported by several countries. The 23rd principle deals with the right to asylum.[2]

### 1.2 Application of Convention to Gender/Sexual Identification Issues

The definition as per the refugee convention, mentions grounds such as race, religion, nationality, membership of a particular social group and political opinion as ground of seeking asylum.[3] Claims relating to sexual orientation and gender identity are primarily recognized under the 1951 Convention ground of membership of a particular social group, but may also be linked to other grounds, notably political opinion and religion, depending on the circumstances.[4] The Convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause. In many jurisdictions the causal link ("for reasons of") must be explicitly established (e.g. some Common Law States) while in other States causation is not treated as a separate question for analysis, but is subsumed within the holistic analysis

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1 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951; *Protocol Relating to the Status of Refugees*, 31 January 1967

2 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, March 2007, (hereafter "Yogyakarta Principles"), available at http://www.yogya kartaprinciples.org/principles_en.htm., visited on 11th feb,2018

3 As defined in Article 1A(2) of the *Convention relating to the Status of Refugees*, 28 July 1951, available at http://www.unhcr.org/refworld/docid/3be01b964.html, visited on 11th feb,2018

4 *Id.*

of the refugee definition. In many gender-related claims, the difficult issue for a decision-maker may not be deciding upon the applicable ground, so much as the causal link: that the well-founded fear of being persecuted was for reasons of that ground. Attribution of the Convention ground to the claimant by the State or non-State actor of persecution is sufficient to establish the required causal connection.

## 2. Identification of Refugee and Asylum Related Issues

It is observed that some protection risks are unique to sexual minorities, some are shared with other minority groups or individuals at heightened risk, yet other risks are similar to those faced by refugees at large.For instance:

### 2.1 Causes for Displacement and Multiple Discrimination

In many parts of the world, LGBTI persons face discrimination and abuse based on their sexual orientation and gender identity. They may be exposed to physical and sexual violence, including rape, torture, honour crimes and murder at the hands of authorities and private actors. They may be inappropriately treated or denied access to health care and other social services, including housing, education, and employment and, in some instances, arbitrarily detained.[5] Laws criminalizing consensual same sex relations still exist in some 76 countries (including imposition of the death penalty in five countries), and can exacerbate the ill treatment of LGBTI persons and perpetuate negative stereotypes and stigma.[6] Such laws can lead to impunity for crimes committed against LGBTI individuals and prevent them from accessing State protection and asylum systems in many States. LGBTI persons often must hide their true identities, making them invisible and dehumanizing them. They frequently are shunned and abused by their communities and families, leading to social isolation and helplessness. The maltreatment of sexual minorities is closely related to their lack of conformity with traditional gender norms, which is often seen as threatening to the heterosexual majority. The intersection between gender, sexual orientation and gender identity needs to be better addressed and understood as it is often at the heart of harm perpetrated against LGBTI individuals.[7] Although the term "gender-based violence" has mainly been used to describe violence against women and girls, it can also be understood in a broader sense to encompass violence against women and men because of how they experience and express

5 Michael O'Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles" (2008), Human Rights Law Review, Vol. 8, No. 2, 207–48, at 232, available at http://hrlr.oxfordjournals.org/cgi/reprint/8/2/207, last visited on, 11th feb,2018

6 International Lesbian, Gay, Bisexual, Trans and Intersex Association ('ILGA"), State–Sponsored Homophobia: a World Survey of Laws Prohibiting Same-sex Activity Between Consenting Adults, May 2010, available at http://old.ilga.org/ Statehomophobia/ ILGA_State_Sponsored_ Homophobia_2010.pdf., last visited on 11th Feb.

7 Nicole LaViolette "UNHCR Guidance Note on Sexual Orientation and Gender Identity: a Critical Commentary", (2010), 22 Int'l J. Refugee L. 173–208, at 183, available at http://ijrl.oxfordjournals.org/cgi/content/short/22/2/173?rss=1., last visited on 11th Feb.

their gender and sexuality. The violence is triggered where LGBTI individuals are seen as not behaving according to societal norms which dictate what is "proper" to men and to women, and they may be insulted, assaulted or killed for their appearance, manner or dress.

### 3. LGBT Persons as Distinct Groups

LGBTI persons can suffer abuses in similar ways, but they also exist as distinct groups with unique experiences. Their experiences can differ due to age, gender, sexual orientation and the particular region of the world in which they live. Due to the evolving nature of data available on them there is distinctive connotation of experience of each group. For instance, In relation to lesbians, the multiple discrimination borne of being a foreigner, female and lesbian was raised. Women's generally inferior economic and social status makes it harder for them to flee persecution in their country of origin, to access asylum processes, and protect and support themselves in a new country.[8] Single women living alone are particularly vulnerable to suspicion and attack. As other women, lesbians also have been unable to access State protection when they are abused by family members because incidents of domestic violence are not pursued by authorities in the country of origin. Because harm against lesbians is often at the hand of private actors, it sometimes tends to be considered a personal problem or, at best, a common crime, that is not related to a Convention ground.[9]

A lack of reliable country information on lesbians promotes the idea that they are not subject to persecution. Asylum claims made by lesbians tend to have lower recognition rates than those made by gay men. Gay men have difficulty disclosing incidents of sexual violence experienced in their home countries, which inhibits their ability to make a viable claim for asylum. They may be disbelieved by adjudicators if they do not fit the stereotype of what a gay man should look like, or if they were previously married. Masculine gay men may also be disadvantaged if adjudicators believe they would not be recognized as gay if returned to their country of origin. Bisexuals face extremely low asylum claim recognition rates and are largely invisible in jurisprudence. Even where applicants self-identify as bisexual, adjudicators tend to analyse these claims within a hetero- or homosexual context. Some adjudicators do not believe bisexuality really exists as a sexual orientation, and feel that bisexuals can return to their countries of origin and elect to be heterosexual, thereby avoiding persecution. They face major credibility issues in asylum procedures if they have had heterosexual partners.[10]

There is little country of origin information about bisexuals, which makes it difficult for such applicants to corroborate their claims. Transgender asylum-

[8] UNHCR, Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008 (hereafter "UNHCR Guidance Note"), available at http://www.unhcr.org/refworld/docid/48abd5660.html., last visited on 11th Feb.

9 *Id.*

10 The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Ayslum Seekers and Refugees, available at http://www.refworld.org/pdfid/4cff9a8f2.pdf, last visited on 11th feb, 2018

seekers and refugees suffer multiple discrimination based on their gender identity or gender expression. There have been various reports that the transgender persons seem to experience particularly severe marginalization because they are subject to sexual abuse and violence, discrimination, extreme poverty, lack of access to education, health and psychological care, work and housing. It has been reported that this marginalization leads many transgender persons to engage in sex work in order to survive.[11] Transgender persons experience difficulties in transit and at borders when their legal documents do not match their identities. This often leads to searches, detention and incidents of abuse. In asylum procedures, transgender persons are often viewed by adjudicators as opportunistic cross-dressers without serious protection needs. As with other groups, a lack of country information exists regarding human rights abuses perpetrated against them. Transgender persons who are involved in medical treatments related to transition suffer from a lack of access to such treatments in transit countries and upon resettlement. Too often, the abusive conditions they endured in their country of origin are replicated in the country in which they are resettled.[12]

Intersex persons like LGBT persons, can be subject to persecution for failing to conform to gender norms. In some countries, intersex persons are considered evil and have been subjected to ritual ceremonies. Their families can be persecuted for having an intersex child. Intersex persons may have a need for ongoing medical services or surgical/post-surgical assistance that may not be available in transit countries or where they are resettled. They may be forced to endure unwanted surgeries. There appears to be little or no country information available for this group, and a lack of understanding of the dynamics associated with intersex persons and the nature of asylum claims made by them is apparent.[13]

## 4. Issues of Flight, Arrival and Initial Settlement of LGBT Persons

On arrival to the country of asylum, reports indicate that some LGBTI persons have no adequate access to information about how and where they can claim asylum. It has also been reported that LGBTI asylum-seekers and refugees often feel unable to approach or discuss their situation with designated authorities. They frequently perceive that authorities or other actors have no experience or exposure to LGBTI issues, and may, additionally, be unable or unwilling to protect them.

### 4.1 Registration

Registering an asylum claim may sometimes prove difficult for LGBTI persons. Reports of abusive treatment by other asylum-seekers at and near reception centres and insensitive treatment at the hands of employees during

11 *Id.*
12 *Id.*
13 *Id.*

registration and screening have been documented.[14] This can make the asylum process intimidating and less accessible for LGBTI persons who are already hesitant to come forward with their claim. Many LGBTI asylum-seekers have difficulty revealing their true sexual orientation or gender identity when lodging an asylum claim. In some countries where same-sex relations are criminalized, asylum-seekers are forced to deny their real reason for claiming asylum or face arrest or persecution in the country of asylum.[15]

### 4.2 Refugee Status Determination

The majority of industrialized countries recognize that sexual minorities may be eligible for refugee status under the 1951 Convention and its 1967 Protocol. However, lack of systematic and comprehensive data on the number and types of claims makes it difficult to assess the overall recognition rate. The studies have shown that, proportion of gay men seeking asylum is generally higher than lesbian women, while comparatively few claims are made by bisexual and transgender individuals. Intersex applicants account for an even smaller proportion of claims.[16] Further lack of sufficient understanding on behalf of some adjudicators and lawyers as to what sexual identity actually entails, believing that sexual orientation only relates to sexual acts and ignoring the fact that sexual identity is a much broader concept that includes being able to meet a partner, engage in a same-sex relationship, socialize and express one's sexuality without fear of experiencing harm leads to further complications.[17] As reflected in a number of asylumdecisions and education efforts, there is a growing awareness that sexual orientation is something much more than just a sexual act. Similarly, there is often a lack of understanding of the complexities encompassed within the concept of gender identity and the varied experiences of transgender and intersex people. Another related issue is a failure of some adjudicators to understand the link between transgression of gender-related norms and claims of persecution based on sexual orientation and gender identity. [18]

### 4.3 Access to Services

LGBTI asylum-seekers and refugees experience widespread discrimination when accessing housing, employment, education, health and psychological care and other social services in host countries.[19] They may be evicted from their housing and fired from jobs once their sexuality or gender identity is revealed. The frequent lack of any financial support from families or communities' results in double marginalization, where the combined effect of

14 Helsinki Citizens' Assembly-Turkey and Organization for Refuge, Asylum and Migration, Unsafe Haven: the Security Challenges Facing Lesbian, Gay, Bisexual and Transgender Asylum Seekers and Refugees in Turkey, June 2009, 14–15, (hereafter "Unsafe Haven") available at http://oraminternational.org/ sites/default/ files/pdf/Unsafe%20Haven%20Final.pdf., last visited on 11th Feb,2018.

15 *Id.*

16 *Supra* note 11.

17 *Id.*

18 *Id.*

19 *Supra* note 8.

being a refugee and being LGBTI is compounded. Without access to a means to support themselves, some LGBTI persons resort to sex work to survive. LGBTI individuals who are HIV positive can suffer the double stigma of being a sexual minority and living with HIV. This can create barriers to accessing critical HIV prevention and care services. [20]

### 4.4 Staff Attitudes

It has also been reflected that some NGOs and other service providers in host countries may be reluctant to help LGBTI asylum-seekers and refugees in certain country contexts. Some reasons given include the conservative attitudes of NGOs and lack of understanding of issues relating to sexual orientation and gender identity. Sometimes, agencies themselves have a policy on assisting LGBTI persons but their front-line staff (or country staff) was found to be prejudiced and unwelcoming. A lack of assistance from NGOs was reported to be especially problematic in some countries that have laws criminalizing same-sex conduct. In these situations, even where NGOs desire to assist LGBTI asylum-seekers and refugees, they risk antagonizing authorities if they do so.

## 5. Durable Solutions

Durable solutions for refugees include voluntary repatriation, local integration and resettlement to a third country.UNHCR uses its HRIT to assist with determinations regarding which durable solution is appropriate for refugees.

UNHCR has issued the Guidelines pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol. These Guidelines complement the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention (Reissued, Geneva, 2011). Theyin conjunction with UNHCR's Guidelines on International Protection No.1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (May 2002), UNHCR's Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (May 2002) and UNHCR's Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (April 2004) intend to provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out refugee status determination under its mandate.[21]

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20 *Id.*

21 Guidelines on International Protection no. 9, available at http://www.unhcr.org/50ae466f9.pdf, last visited on 12th Feb.

More attention should be placed on protecting LGBTI asylum-seekers and refugees during flight and upon arrival in host countries, including from *refoulement,* physical and sexual violence, and crimes committed in the name of honour. More efforts are also needed to ensure that they receive non-discriminatory and appropriate services from States, UNHCR and NGOs. Protection in the field must include an approach that is sensitive to sexual orientation and gender identity.

Laws criminalizing consensual same-sex relations pose significant problems for LGBTI asylum-seekers and refugees throughout the displacement cycle. Even when these laws are not enforced, their existence often reflects a culture of intolerance toward LGBTI individuals. These laws impede the ability of LGBTI persons to access State protection in their home country and make them reluctant to register for asylum and testify truthfully at asylum hearings. They create severe security issues for sexual minorities in countries of asylum and increase the threat of *refoulement*. It is important to develop specific guidance on how to provide protection in countries where these laws exist.

The procedural aspects of refugee status determination also present many challenges, including a lack of country information, credibility problems for claimants related to a lack of understanding of sexual and gender identity dynamics and insensitive and invasive questioning, and in some cases testing. Long waiting periods for asylum interviews, coupled with inadequate reception conditions, may exacerbate protection risks.

Additional steps need to be taken to rectify protection challenges in both refugee determination procedures and while asylum-seekers await decisions, including providing policy and practical guidance and supporting additional training and education for staff. Such efforts need to take into consideration the diversity of issues involved in sexual orientation and gender identity-related claims and the necessity for tailoring training to different regions. Due to the intolerant environment that permeates many countries, resettlement is often the only viable durable solution for LGBTI refugees. Further development of risk assessment and resettlement procedures that encompass the multiple discrimination to which LGBTI refugees are subjected is therefore vital to their protection.

# An Appraisal of the Role of FSSAI to Regulate Genetically Modified Food

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## Introduction

The man has always an instinct for scientific experimentation. It has resulted in many inventions, basically intended for the betterment of human life. It has the potential to combine the exploration of the natural world with the generation of knowledge. The development in the Biotechnology[1] has revolutionized the entire aspects of human life including the global agricultural system. Genetic engineering[2] has given immense power to man and with the passing years and developing technology, life seems to be in the hands of the biotechnologists and scientists who have acquired and developed the power of creating new life forms by transferring genes from one species to another.

Health is a basic right of the human beings. Food is a concept which doesn't require any introduction in ensuring right to health. It is one of the most essential requirements for all living beings to survive.[3] The application of scientific methods and industrial technologies drastically changed the scale and productivity of farming and food processing. Established practices in rearing animals and cultivating crops, the sourcing, processing, and distribution of agricultural produce, and the purchase, preparation, and consumption of food were all fundamentally transformed. These changes are reflected as a significant impact on the environment, on landscapes, soil, water resources, biological diversity, and the global climate system. As regards

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1 Conventional definition of 'Biotechnology' as follows "any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use". See Art.2 of the *United Nations Convention on Biological Diversity,* 1992, 1760 ***UNTS*** 79; 31 ILM 818 ***(1992)***.

2 It is also called genetic modification or genetic manipulation. It is the direct manipulation of an organism's genes using biotechnology and is used to change the genetic makeup of cells, including the transfer of genes within and across species boundaries to produce improved or novel organisms. *See generally,* Martin, Gunderson. "Genetic Engineering and the Consent of Future Persons." *Journal of Evolution and Technology*, Vol.18, No.1, May 2018: 86-93, available at https://jetpress.org/v18/gunderson2.pdf( last visted 10/09/2018); David Fleming. "Genetic Manipulation - An Unneccessary Technology ." *Feasta Review*, 83-95. Available at http://www.feasta. org/documents/review2/fleming2.pdf ( last visted 10/092018).

3 For discussion relating to nexus between health and nutritious food, *See* World Health Organisation.*Diet, Nutrition and the Prevention of Chronic Diseases* . Report of a Joint WHO/FAO Expert Consultation , WHO Technical Series 916., Geneva: WHO, 2003. Available at http://apps.who.int/iris/bitstream/handl e/10665/42665/ WHO_TRS_916.pdf; jsessionid=1EFD33AE6A332E0617DA3BB185EECC71?sequence=1 ( last visited 10/09/2018).*See also*, Tafadzwanashe Mabhaudhi, Tendai Chibarabada and Albert Modi. "Water-Food-Nutrition-Health Nexus: Linking Water to Improving Food, Nutrition and Health in Sub-Saharan Africa." *Int. J. Environ. Res. Public Health* (1-19), 2016: 1-19. Availabe at https://pdfs.semanticscholar.org/025b/3eeb 51b079d37da3e2a3d6e989a87968627c.pdf ( last visited 10/09/2018).

human health, food is now cheaper in terms of availability, price, and variety.[4]

Theoretically, 'Genetically Modified Organisms' (GMOs) are the next level of agricultural advancement.[5] The production of genetically modified crops[6](GM Crops) and Genetically Modified Food (GM Food) are the latest biotechnological innovation which raises many ethical, social, and ecological questions. Food producers began using these techniques to ensure a stable food supply. It was a matter of controversy since from the inception. The threat posed by the GM Food can be treated as the result of scientific and biotechnological advancement. During the last decades, there was a tremendous increase in the cultivation and production of GM crops across the world.

India, being a developing country has come out with the numbers of legislation to address the issues relating to food security and food safety. Despite the existence of these legislations, the ground realities of the country with respect to food-related issues are shocking and disgraceful. *Food Safety and Standards Act*, 2006 is a laudable legislation enacted by the Parliament of India to revamp and rejuvenate the food sector of the country, which was passed with the objective to 'consolidate the laws relating to food, for laying down science-based standards for articles of food, to regulate their manufacture, storage, distribution, sale and import, and to ensure availability of safe and wholesome food for human consumption'. As per Section 22 of the *FSSAct,* 2006, FSSAI has the responsibility to regulate GM organisms and products. Notwithstanding the in novative scheme of the legislation, the new legal regime is failed to provide proper protection against the hazardous impact of GM food in the country. In this backdrop, the researcher has taken this topic to review the regulatory role of FSSAI in regulating the genetically modified food and trace out the defects associated with it. The paper concludes that the FSSAI has to take a crucial role to protect health and well being of the people of the country, as this is the sole authority to ensure safe and wholesome food in the country.

**Genetically Modified Food – Conceptual Analysis**

According to Codex Alimentarius Commission,"Genetic Modification is the process involving the isolation of gene(s) from the genome of one organism

4 Colin Sage. *Environment and Food. Oxon:* (Routledge, 2012,) p.2.

5 For historical accounts of the Genetically Modified Foods, *See*, B.M.Chassy. "The History and Future of GOMs in Food and Agriculture." *Cereal World Food Perspective*, Vol.52, No.4, July-August 2017: 169-172, available at https://www.aaccnet.org/ publications/plexus/cfw/pastissues/2007/Documents/CFW-52-4-0169.pdf ( last visited on 10/09/2018).

6 For emering trends of the Genetically Modified Foods at Global level, *See*, Hautea, Randy A. "Global Status of Genetically Modified Crops: Current Trends and Prospects." Paper prepared for presentation at the "Food for the Future: Opportunities for a Crowded Planet" conference conducted by the Crawford Fund for InternationaAgricultural Research, Parliament House, Canberra, Australia, August 8, 2002, 2002, available at http://ageconsearch.umn.edu/record/123928/files/Hautea2002.pdf ( last visited on 10/09/2018).

and insertion of the same into the genome of another organism."[7] The term GM foods or GMOs are most commonly used to refer crop plants created for human or animal consumption using the latest molecular biology techniques. These plants have been modified in the laboratory to enhance desired traits such as increased resistance to herbicides or improved nutritional content.[8] What is different is a new gene is inserted into a crop which otherwise wouldn't be there. The conventional plant breeding methods are very time consuming and are often not very accurate. Genetic engineering, on the other hand, can create plants with the exact desired trait with great accuracy. For example, plant genetics can isolate a gene responsible for drought tolerance and insert that gene into a different plant. The new plant will get drought tolerance as well.[9]

**Historical Background of the GM Foods**

GMOs have a very long history of around 1000s of years. It had been done by the farmers over the last decades by cross-breeding most productive hybrids to create the best crops. Since the advent of agriculture 12,000 years ago, farmers have strived to improve their crops durability, resistance to diseases and pests, as much as possible.[10] During 1972 and 1973, the U.S. biochemists developed a technique which allowed them to cut pieces of DNA in certain places, and then attach the pieces to the DNA of other organisms. In 1976, biotechnology became, commercialized allowing companies to experiment with inserting genes from one species into another for medicinal, food and for chemical reasons. In 1983 Monsanto[11] scientists were some of the first to create genetically modified plants, and five years later, they tested their first genetically engineered crops. The GM technologies have increased international attention since its inception by Calgene[12] researchers of the

7 *See*, Codex Alimentarius Commission. *Guidlines for the Production, Processing, Labelling and Marketing of Organically Produced Foods.* Joint FAO/WHO Food Standards Programme, GL 32–1999, Rome, Italy: Codex Alimentarius Commission, 1999. Available at www.fao.org/input/download/standards/360/cxg_032e.pdf( last visited on 05/08/ 2018).

8 Kaumudhi Challa. "Genetically Modified Crops: Challenges of Food Security and Safety." *Cochin University Law Review,* Vol.14, No.1&2, March-June 2011,p.5.

9 One of the best known examples of this is the use of Bt (Bacillus thuringiensis) genes in corn, cotton, soyabean and other crops. Bt is a naturally occurring bacterium that produces crystal proteins or Bt toxin that are lethal to insect larvae, but is not harmful to man and animals. Like human beings and animals plants also have genes. Genes decide the structure of DNA, which gives the organism its specific characteristics. When a scientist genetically modifies a plant, they insert a foreign gene in the plant's own genes. Sometimes it might be a gene from a bacterium resistant or pesticides. Consequently, the genetically modified plants also become able to withstand this pesticides and bacteria. More details see *Ibid.,* at p.3.

10 Lecia Bushak, "a Brief History of Genetically Modified organisms : From Prehistoric Breeding to Modern Biotechnology," available at https://www.medicaldaily.com/brief-history-genetically-modified-organisms-prehistoric-breeding-modern-344076 ( last visited on 2/08/2018).

11 Monsanto Company is an agrochemical and agricultural biotechnology Corporation wholly owned by Bayer .It is a major producer of genetically engineered crops.

12 The first GM tomato was created by this company and they were permitted to commercially produce the tomatoes in the mid 1990s. *See* Ian Murnaghan, Development and history of GM Foods.available at www.genetically modified foods.co.uk/development-history-gm-foods.html ( last visited on 02/08/2018).

United States in the year 1996. Since then there was a tremendous increase in the cultivation and commercialization of GM across the world.[13] In the early days of GMfods, tomatoes were the first crop to be genetically engineered and grown commercially. Later other GM products like soybeans, cotton and many others also conquered the market.

**Gravity of the Problem**

The introduction of genetically modified crops and GM content in food products is a highly controversial debate in several countries for over a decade.[14] States can be distinguished on the basis of their policy governance of GMOs. Firstly, there are States that consider GMOs useful and sometimes it encourages its use actively.[15] The second group of States are neutral and leave GMO regulation essentially up to the market.[16] The third group takes a more reserved approach and restricts or bans the use of GMOs.[17] According to the World Health Organization (WHO) at present, the GM foods available in the International market have passed all safety requirements and are safe for human consumption.[18] It is be lieved that GM Foods can cure world food scarcity to a greater extent. Still, there are many arguments leveled against the manufacture and use of GM Foods. If comparing DNA to a book, GM shall be similar to plucking the pages of a book and to insert with another book with a totally different storyline, scene setting, and characters than the original book.[19] GM food it is believed can cause cancer. It is also said that food is unsafe and the whole ecosystem will get polluted as GM plants either contain or produce toxins.[20] They are of the belief that GM foods have the possibility of

13 S.K.Balashanmugam, Padmavati Manchikanti, S.R.Subramania. "Liability aspects related to Genetically Modified Food under the Food Safety in India." World Academy of Science, Engineering and Technology, *International Journal of Law and Political Sciences,* Vol.9, No.12, 2015:p.4257.

14 C.Preisig, R.Norer and. "Genetic Technology in the Light of Food Security and Food Safety-General Report." In Genetic Technology and Food Safety , by Roland Norer (ed.,) *New York: Springer , 2016,* p.5.

15 The United States does not have any federal legislation that is specific to GMOs. GMOs are regulated pursuant to health, safety, and environmental legislation governing conventional products. The U.S is the world's leading producer of GM crops .*See*https://www.loc.gov/law/help/restrictions-on-gmos/usa.php( last visited on 22.8.2018 )

16 For e.g; Ireland. The FSAI monitors food in Ireland to ensure the only EU-authorised GM foods are on the market and that they are labelled appropriately. See .file:///C:/Users/user/Downloads/GM%20Leaflet%202013%20Final.pdf (last visited on 8/9/2018).

17 Many countries including Switzerland, Australia, Austria, India , Germany etc. have imposed partial or total bans on GMOS. See https://www.foodsafetymagazine.com/magazine-archive1/junejuly2016/international-regulations-on -genetically-modified-organisms-us-europe-china-and -japan ( last visited on 25/8/2018).

18 *Food Safety, Frequently asked Questions on Genetically Modified Foods, See* www.who.int/foodsafety/ areas_work/food-technology/faq-genetically-modified-food/en/ ( last visited on 25/8/2018).

19 Bhuvanyaa Vijay ,"Genetically Modified foods: Venom in our Salvers?-Consumers Right to know", National Law School of India University, Bangalore vol.1,2014 , issue-1 p.144.

20 A.Rajendra Prasad. "Unsafe Foods and Consumer Protection: Recent Legal Trends ." *In 25 years of Consumer Protection Act: Challenges and the Way Forward,* by Ashok R.Patil, ed. pp.267-279. Bangalore: NLSU, 2014, p.75.

introducing allergens that are harmful to human beings. On the other hand, the proponents of GM foods believe that the commercialization of GM food is a boon to the society and it can create positive environmental impacts due to reduced use of pesticides. The corporate giants like Monsanto, Indo-American Seeds, Bayer etc., who works on GM seeds do not have ecological or food safety tests conducted on genetically engineered crops and foods before commercialization.[21] Actually, they are stealing the right to safe and nutritious foods to consumers. The GM crops thus offer both benefits as well as the impact on the environment and human health. Hence there is a need to look into the legal framework for the regulation of GM crops.

**International Legal Regime and GM food**

Since its advent in the International food market, GM Foods have conquered world attention due to its importance. But still, there is no uniformity with regard to the regulation of the GM Foods Internationally. The *Universal Declaration of Human Rights* (UDHR) adopted to affirm and uphold the "dignity and worth of the human person". Article 25(1), of the UDHR, clearly spells out that "Everyone has the right to a standard of living adequate for the health and well being of himself and of his families." This along with a close reading of Articles 3[22] and 19[23] of the Declaration, which mentions the right to life and liberty of a person and the right to freedom to seek and receive information, which shows the importance that has been attached to preserving and maintaining every individual's health. The Preamble of the *Constitution of the Food and Agricultural Organization of the United Nations, 1965*[24] and the *International Covenant on Economic, Social and Cultural Rights*, 1966[25] says about the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions and also directs the State parties to take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.[26] These International instruments uphold the right to health and well being of every human being. Taking into consideration the untested, detrimental nature of GM food, it is absolutely necessary that consumer's right to know about the food that they are consuming be upheld, apart from ensuring

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21 *Ibid*

22 Everyone has the right to life, liberty and security of person. See Article 3 of the Universal Declaration of Human Rights, 1948.

23 Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." *See* Article 19 of Universal Declaration of Human Rights, 1948.

24 Here in after referred as FAO,1965. *See* the Preamble –The nations accepting this Constitution , being determined to promote the common welfare by furthering separate and collective action on their part for the purpose of raising levels of nutrition and standards of living and securing improvements in the efficiency of the production and distribution of all food and agricultural products.

25 herein after referred as ICESCR,1966

26 *See* the Article.11 of the ICESCR

that no such consumable item is left loose on them, which directly affects their health. Apart from this, there are several important International Conventions and Protocols whichdirectly related to the regulation, manufacture, import, and use of GMOs. That includes;

**Convention on Biological Diversity (CBD)** [27]

It is the main International agreement inrelation to GMOs. The provisions of the *Convention on Biological Diversity* states the environmental impacts of GMOs and require the member countries to initiate appropriate regulatory measures to control the risks associated with the use and release of Living Modified Organisms (LMOs)[28] resulting from biotechnology.[29] Moreover, the Convention imposes liability on the Member States to monitor and to regulate the risks associated with the use and release of LMOs and requires them to adopt policy procedures for environmental impact assessment so as to ensure the safety of world biodiversity.[30]

A Protocol to the Convention on Biodiversity called *Cartagena Protocol*[31] provides an intergovernmental forum amongst the parties to the Convention for assessing the impacts of LMOs on biodiversity.[32] This Protocol emphasizes on bio-safety, and creates an enabling environment for the environmentally sound application of biotechnology, making it possible to derive maximum benefit from the potential that biotechnology has to offer while minimizing the possible risks to the environment and human health.[33] It covers the transboundary movement, transit, handling and use of all LMOs (except pharmaceuticals) that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health. It further emphasizes on the need to have a proper risk assessment before the introduction of GMOs into the environment.

Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress

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27 CBD entered in to force on 29th December 1993. The main objectives are the Conservation of Biological Diversity, sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

28 GMOs are called LMOs in Cartagena Protocol, Article.3(g) of the Protocol defines Living Modified Organisms(LMO) as any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology.

29 See Article 8(g) of Convention on Biological Diversity. it states that, "each contracting party shall as far as possible and as appropriate establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking in to account the risks to human health.".

30 Article 19 of Convention on Biological Diversity.1992.

31 It was adopted on 29 January 2000and entered in to force on 11th September 2003.*See* https://bch.int/protocol (last visited on 12/8/2018).

32 *See* Article 1 of the Cartagena Protocol on bio-safety. It was adopted for regulating GMO in 2000 with the objective of contributing to ensure an adequate level of protection in the field of the safe transfer, handling and use of LMOs resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, as well as risks to human health, and specifically focusing on trans boundary movements.

33 Article 10.6 of Cartagena Protocol.

to the Cartagena Protocol on Bio-safety[34]

The objective behind this Protocol is to lay internationally agreed rules and procedures to prevent and remedy damages to the biodiversity for the injury caused by the Transboundary movement of LMOs including GM foods. It is an International framework for the regulation of LMOs. The Supplementary Protocol mainly dealt with the liability aspects in the event of damage resulting from LMOs, or wherein the event of damage if timely measures are not taken.[35] This International instrument is mainly concerned with the defects of GM food and its impact on human health and the environment.

Food safety aspects of GMOs are, at International level, dealt with by the FAO/WHO Codex Alimentarius, which covers all aspects of food safety. These two United Nations agencies (FAO and WHO) provide an intergovernmental forum through the Codex Alimentarius Commission, which seeks to achieve International agreement on standards for food safety, including GM foods. The Codex is currently working on standards of risk assessment for labeling and for several other food safety aspects of GMOs.

The *International Plant Protection Convention***,** 1951[36] has the objective of preventing the spread and introduction of plant and plant product pests, including weeds and other species that have indirect effects on both wild and cultivated plants, and to promote appropriate control measures. The Convention is recognized by the World Trade Organization's[37] (WTO) *Agreement on the application ofSanitary and PhytosanitaryMeasures* (the SPS Agreement)[38] as it deals with the International Standard setting body for the plant health. It states about the socio-economic risks related to the health of plant, animal and humanbeing.

The *International Treaty on Plant Genetic Resourcesfor Food and Agriculture* [39](IT PGRFA) provides evidence that it may be an advantage to cultivate conventional organisms alongside GMOs. According to the treaty, plant genetic resources for food and agriculture are the essential raw materials for adapting to unpredictable environmental changes and future human

34 The supplementary agreement to the Cartagena Protocol on Bio safety, aims to contribute to the conservation and sustainable use of bio diversity by providing International rules and procedures in the field of liability and redress relating to living modified organisms. It was adopted on 15th October 2010 and entered in to force on 5th March 2018.

35 See The Nagoya Kula-Lumpur Supplementary Protocol on Liability and Redress to the Cartagena protocol on Bio Safety.https://bch.cbd.int/protocol/supplementary ( last visited on 12/8/2018).

36 Hereinafter referred as IPPC. It is a multi lateral treaty related to the FAO.

37 The WTO deals with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible. *See*https://www.wto.org( last visited on 17.8.2018).

38 It is entered in to force with the establishment of the WTO on 1stJanuary1995. It concerns the application of food safety animal and plant health regulations. It deals with the measures to protect humans, animals, and plants from diseases, pests, or contaminants.

39 It is known as the International Seed Treaty which is a comprehensive International agreement in harmony with the CBD, which aims at guaranteeing food security through the conservation, exchange and sustainable use of the world'sPlantGeneticResources.*See*International treaty on Plant and Genetic Resources www.fao.org/plant-treaty/en/ ( last visited on 17/8/2018).

needs.[40] Therefore the parties shall develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture. The treaty encourages plant genetic resources for securing food security. On a close appraisal, it is submitted that there is no uniformity with regard to regulation of GM materials in the International arena. There are potential conflicts between the Cartagena Protocol and international instruments. A balance of interest must be formed. It can be pointed out that the regulation exclusively to deal with GM crops is still in its infant stage at international level. Regulations and precautions are mainly concerned with the use, transport, and handling of GMOs.

**GM Food and Indian Legal Framework**

India is a signatory to many of the International human rights conventions[41] and declarations including the Cartagena Protocol.[42] These documents specifically emphasize the obligation to respect, protect and fulfill the right to food for every citizen of India. The Constitution does not expressly recognize the right to safe food. The comparable human right provisions in the Constitution of India are found in the Fundamental Rights as well as Directive Principles of State Policy. Article 21 of the Indian Constitution provides the fundamental right to protection of life and personal liberty. It guarantees the right to live with human dignity.[43] Article 39 (a) of the Directive Principles of State Policy requires the State to direct its policy towards securing that the citizens, men, and women equally, have the right to an adequate means to livelihood. Moreover Art. 47 of the Indian Constitution spell out the duty of the State to raise the level of nutrition and the standard of living of its people as a primary responsibility.[44] So it is clear that the specific right to food is nowhere mentioned in the Constitution. It has to be interpreted from the provisions mentioned above. These provisions specifically emphasize the obligation of the state parties to protect the life of the individuals. The food safety and security can be considered within the ambit of Article 21. Moreover, the wide interpretation given by the Hon'ble Supreme Court of India has made a deep impact on the right to life. The Hon'ble Supreme Court of India has explicitly stated in many cases that the right to life should be interpreted as a right to "live with human dignity," which includes the right to food and other basic

40 Article 6 of the IPPC.

41 India joined the UN on October 30, 1945 and was involved with the UDHR proclaimed on December 12, 1948. The framers of the Indian Constitution were influenced by the concept of human rights and guaranteed most of the human rights contained in the UDHR. The Civil and Political rights have been incorporated in part III of Indian Constitution. India ratified the ICESCR on 10th April 1979.

42 India ratified the protocol on 17th January 2003

43 See Article.21 of the Constitution of India. It says "No person shall be deprived of his life and personal liberty except according to procedure established by law."

44 "the duty of the state to raise the level of nutrition and the standard of living and to improve public health-the state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the state shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health".

necessities. In *State of Maharashtra* v. *Chandrabhan,*[45] the Hon'ble Supreme Court held that the right to food is a component of the right to life[46] guaranteed under Article 21 of the Constitution of India. In *C.E.S.C Ltd* v. *Subhash Chandra Bose,*[47] the Court referred to the UDHR, the ICESCR which recognize certain needs, which include the right to food, clothing, housing, education, the right to work, leisure, fair wages, decent working conditions, social security, and the right to physical or mental health, protection of their families as an integral part of the right to life. Therefore any threat to the consumer 's health and to the environment by the GMFoods can be treated as a violation of the right to life. Apart from these provisions which ensure the right to life of the citizens, there are some other mechanisms which directly dealt with GMOs, GM crops, its cultivation and the production of GM Food.

India ranks 4th place in world's GM crop acreage.[48] At present BT cotton is the only GM crop which is cultivating in India. Private multinational companies like Mahyco-Monsanto, Indo-American Seeds, Bayer etc., have joined their hands in the process of developing genetically modified crops including brinjal, cotton, rice, tobacco etc, to develop genetically modified crops which suit the climatic conditions of India.[49] Among this BT brinjal is ready for large-scale cultivation and seed production amidst the high protest from farmers, activists and the coalition against GM crops across the country. The development of agricultural biotechnology in India paved the way for the establishment of National Biotechnology Board of India (NBTB)[50] to identify priority areas and develop long-term plans for agricultural biotechnology.A separate Department of Biotechnology (DBT) was set up in the year 1986 to promote the large-scale use of Biotechnology and to evolve Bio-safety guidelines.

**Genetic Engineering Appraisal Committee (GEAC)**

Biosafety concerns and its relevance led to the worldwide acceptance of a regulatory regime for research, testing, use and handling of GMOs. In India, the Ministry of Environment, Forest & Climate Change (MoEFCC) constitutes an apex body as GEAC which sets up Rules for the manufacture, use, import

45 (1983) 3 SCC 387.

46 In Maneka Gandhi v. Union of india, AIR 1978 SC 597; Francis Coralie Mullin v. Administrator, Union Territory, Delhi, (1981)1 SCC,608; Olga Tellis & Ors. v.Bombay Muncipal Corporation & Ors, (1985) 3 SCC 545; Santistar Builders v. Narayan Khimlal Totame, (1990)1 SCC 527 and in many other similar cases the Court held that right to life means the right to live with basic human dignity.

47 (1992)1 SCC 695

48 A Comprehensive History of GM crops in India, *See*https://www.civildaily.com /a-comprehensive- history-of-gm-crops-in-india-issues-with-bt-cotton-brinjal-mustard ( last visited on 9/8/2018)

49 Archana, K. "Genetically Modified Crops: Need for Effective Legal Regime." VBLC Law Review, 2016-17:Vol.II, pp.107-119, p107.

50 *See*www.dbtindia.nic.in/creation-of-dbt/(last visited on 17.8.2018). In 1982 a National Biotechnology Board was constituted by the Government of India for strengthening bio technological developments in India.

and export of hazardous Microorganisms or cells, under the Environmental Protection Act, 1986.[51] The Rules,1989 are very broad in scope and essentially capture all activities, products and processes related to or derived from biotechnology including foods derived from biotechnology, thereby making GEAC as the competent authority to approve or disapprove the release of GM foods in the market place in India.

Apart from these regulatory Mechanisms, there are certain legislations which implicitly and explicitly says about GMOs. *The Seed Act,* 1966,[52] *The Environmental Protection Act*,1986,[53] The *Biological DiversityAct*, 2002, [54] *Protection of Plant Varieties and Farmers Rights Act*, 2001,[55] *Plant Quarantine Order,* 2003, [56] *Environmental Policy*, 2006[57] and *Food Safety and Standards Act*, 2006 are the main legislations which dealt with GMOs in India.

***Food Safety and Standards ( FSS) Act,* 2006**

Food safety is a scientific discipline describing handling, preparation and storage of food in ways that prevent foodborne illness. The chemicals used in the growing or processing of food are frequently alleged to cause adverse

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51 These Rules commonly referred as 'Rules 1989'. It covers areas of research as well as large scale applications of GMOs and their products including experimental field trials and seed protection.

52 This is an Act to provide for regulating the quality of certain seeds for sale, and for matters connected therewith. Section 5 of the Act deals with power of Central government to notify kinds or varieties of seeds to be sold for the purpose of agriculture. Section 17 deals with restriction on export and import of seeds of notified kinds or varieties.

53 The Preamble of the Act says as follows- "for the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property. Apart from that Section 6 and 25 of the Act empowers the Central Government to make rules and procedures and safeguards for the handling of hazardous substances. Section 8prohibts a person from handling such things without proper procedures and safeguards."

54 Section 36(4)(ii)of the Act empowers the Central Government to regulate , manage, or control the risks associated with the use and release of LMOs resulting from biotechnology likely to have adverse impact on the conservation and sustainable use of biological diversity and human health.

55 Section 29 (1) of the Act prohibits registration of a variety, where prevent ion of commercial exploitation of or human, animal and plant life and health or to avoid serious prejudice to the environment. Section 29(3) no variety of any genera or species which involves any technology which is injurious to the life or health of human beings, animals or plants shall be registered under this Act. Any technology here includes genetic use restriction technology and terminator technology.

56 Plant Quarantine (Regulation of import in to India) Order 2003 regulates import and prohibition of import of plants and plant products in to India. Section 3 of the Order says that no plants, plant products and other regulated articles shall be imported into India without complying the phytosanitary conditions stipulated under this order that includes bio-control agents, transgenic plants and GMOs. Section 6 deals with permits required for import of germplasm, Transgenic or GMOs.

57 Section 5. 1.3 (III) of the Environmental Policy says that "Biotechnology has immense potential to enhance livelihoods and contribute to the economic development of the country. On the other hand , LMOs may pose significant risks to ecological resources, and perhaps human and animal health for that review the regulatory processes for LMOs, periodical review of National Bio-safety Guidelines and to ensure the conservation of bio-diversity and human health when dealing with LMOs."

effects in humans and animals. The *FSS Act*[58] is the primary law for the regulation of food products. This Act also sets up the formulation and enforcement of food safety standards in India. The Act was established to bring uniformity and a single reference point for all matters relating to food safety and standards. It was a move from multi-departmental and multi-level control to a single line of command.[59]

**Food Safety and Standards Authority of India (FSSAI)**

The Central Government shall by notification establish a body to be known as the Food Safety and Standards Authority of India to perform the functions assigned to it under the Act. This Act is enforced by two statutory authorities Food Safety and Standards Authority of India[60] and State Food Safety Authority. The State Food Safety Authority is managed by the Food Safety Commissioner.[61] The Food Authority shall be a body corporate having perpetual succession and a seal with power to acquire, hold and dispose of the property, both movable and immovable and to contract and shall sue or be sued.[62] The *FSS Act* vests wide powers on the FSSAI to regulate and monitor the manufacture, distribution, processing, sale,and import of food so as to ensure safe and wholesome food[63] Apart from that, the FSSAI may specify the standards and guidelines in relation to articles of food, the limits for use of food additives, crop contaminants, pesticide residues etc,.[64] FSSAI shall also provide scientific advice and technical support to the Central Government and the State Governments in matters of framing the policy and rules in areas which

58 The legislation which first dealt with food safety in India was the *Prevention of Food Adulteration Act,* 1954. It regulated the laws of the food industry along with six other laws- *The Fruit Product Order,* 1955, the *Meat Food Products Order of 1973,* The *Vegetable Oil Products (Control) Order of 1947,* the *Edible Oil Packaging (Regulation) Order* of 1998, The *Solvent Extracted Oil, De Oiled Meal and Edible Flour (control) Order* of 1967 and the *Milk and Milk Products Order* of 1992. However due to the changing requirement of the food industry, the *Food Safety and Standards Act* was enacted in 2006. This law overrides and repealed all prior laws.

59 The State Government shall appoint the Commissioner of Food Safety for the State for efficient implementation of food safety and standards and other requirements laid down under this Act. The Commissioner of Food Safety shall, by order, appoint the Designated Officer, who shall not be below the rank of a Sub-Divisional Officer, to be in-charge of food safety administration in such area as may be specified by regulations. The Commissioner of Food Safety shall, by notification also appoint Food Safety Officers for local areas for the purpose of performing functions under this Act. The Act also prescribes provisions for licensing and registration and Offences and Penalties. The Adjudicating Officer shall have the powers of a Civil Court. For the trial of offences relating to grievous injury or death of the consumer for which punishment of imprisonment for more than 3 years has been prescribed – Special Court has to be constituted.

60 *See* Section 16 of the *FSS Act, 2006*

61 The powers and functions of Food Safety Commissioner .is to prohibit in the interest of public health, the manufacture, storage, distribution or sale of any article of food, carry out survey of the industrial units engaged in the manufacture or processing of food, conduct or organize training programmes for generating awareness, ensure an efficient and uniform implementation of the standards and other requirements as specified in the Act and also to sanction prosecution for offences punishable with imprisonment under the Act.

62 Section 4, *FSSAct, 2006*

63 Section 16(1) of *FSS Act, 2006*

64 Section 16(1)(b) *FSS Act, 2006*

have a direct or indirect bearing on food safety and nutrition.[65] It shall also search, collect, analyze and summarise relevant scientific and technical data relating to the risks associated with the consumption of food, incidence and prevalence of biological risk, contaminants in food and identification of emerging risks etc.[66] These provisions ensure that the consumers are getting only safe and standard food. It also insists that the food is to be safe from any biological or emerging risks associated with it.

**The definition of Food as per the *FSS Act,* 2006**

Food is defined as per the *FSS* Act as any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food, genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink , chewing gum, and any substance, including water used in to the food during its manufacture, preparation , or treatment but does not include any animal feed , live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances.[67]The definition gives a wide meaning to the term Food. The second part of the definition enlarges the scope of the definition by adding the word 'includes'. Thus the term food includes primary food, genetically modified food or engineered food in its purview.

Moreover Section 22[68] of the *FSS Act*, 2006, clearly prohibits the "manufacture, distribution, selling or importing of any genetically modified articles of food."[69] except in accordance with the provisions contained in the *FSS Act* and Rules and Regulations. The provision is very clear which prohibits the GM food in India but is subject to the provisions of the *FSS Act*, 2006. Recently a study conducted by the researchers of Centre for Science and Environment (CSE), Delhi found out ingredients of GM even in infant foods.[70] It is a difficult situation in which our country is passing through. In India, we have so far restricted the GM foods but it is easily available in the Indian market.

65 Section 16(3)(a)FSS Act, 2006

66 Section 16(3)(b)FSS Act, 2006

67 Sec. 3(j) of FSS Act, 2006

68 Section 22 of the *FSS Act,* 2006 deals with Genetically modified foods, organic foods, functional foods, proprietary foods etc.- No person shall manufacture, distribute, sell or import any novel food, genetically modified articles of food, irradiated food, organic foods, foods for special dietary uses, functional foods, neutral ceuticals, health supplements, proprietary foods and such other articles of food which the Central Government may notify in this behalf.

69 Section.22(2) defines genetically modified food means "food and food ingredients composed of or containing genetically modified or engineered organisms obtained through modern biotechnology ,or food and food ingredients produced from but not containing genetically modified or engineered organisms obtained through modern biotechnology."

70 As per the report of CSE, overall 32% of the food product samples tested were GM positive. 46% of imported food products were also proved positive. These were made of soya, corn and rapeseed and were imported from Canada, United States , Thailand etc. About 17% of the samples manufactured in India tested positive which were made up of Cotton seed oil. In some of the samples they did not mention the use of GM ingredients on their labels. Some brands claimed that they had not used GM ingredients but were found to be GM positive. *See*, https://www.cseindia.org/genetically-modified-processed-food-in -india-8877 ( last visited on 25/8/2018)

Since 1989, the GEAC has been responsible for approving cultivation of GM crops and the manufacture, import, and selling of processed foods made from GM ingredients. After the establishment of FSSAI, the GEAC issued a notification shifting the task of giving approval to LMOs to FSSAI.[71] But that time FSSAI was not in a position to take up such a task in its infant stage and the Environment Ministry continued the regulation until FSSAI was ready to do so in a scientific manner. The notification was kept in abeyance until 2016 and now it is withdrawn making FSSAI the sole authority to regulate GM Foods. During the period between 2007 and 2015, GEAC gave approval to three GM food products.[72] In the year 2011 *The Legal Metrology (Packaged Commodities)* Rules, were amended to insert labeling of packages containing GM foods with the term "GM" on top of the principal display panel.[73] It has given a false conclusion that India allows GM foods. On the basis of that, using the convenience of the legislation the importers started importing the food products which bears GM ingredients.

The GM Foods and Food Safety Assessment Unit (GMFSAU) of FSSAI are responsible for assessing the food and in its report, it has to mention whether the GM product or its conventional counterpart is safe to be used as food. That report has to be submitted to FSSAI. Apart from that FSSAI will provide administrative and technical training to establish the office of GM foods, GM food safety assessment for the GMFSAU member scientists, and to diagnostic laboratories for detection of unapproved GM events.[74]

Even though the *FSS Act,* 2006 has come up with unique and well-defined ideas to ensure safe and standard food in India including the regulation of GM food, now FSSAI admits that there is a Regulatory Vacuum governing GM food.[75] According to them, there is no verifiable health impact of GM food on humans. Even the US Food Administration (FDA)[76] says the same. They use the term "Food derived from genetically –engineered plants" because actually, it is the plant that is genetically engineered and not the food.[77] The imports of GM foods need approval under laws, i.e. clearance from the Ministry of Environment, Forest and Climate change, Government of India, under the *Environment Protection Act,* 1986, which assess the impact of GM products on biodiversity and the Ministry of Health and Family Welfare, Government of India, which endorses that GM products are safe for human consumption under

71 MoEF Notification No.S.O. 1519(E) dated 23-8-2007.

72 On 29thDecember 2017, the Union Health minister J.P.Nanda admitted in the Parliament that sine2007,GM soybean and canola oils are being imported in India without the approval of FSSAI.

73 *See* www.indiaenvironmentportal.org.in/content/358299/legal-metrology-packaged-commodities- amendment-rules - 2011. ( last visited on 26/8/2018)

74 *Ibid* at p.75.

75 Vivian Fernandes, There is a Regulatory Vaccum in GM Food, says CEO of FSSAI ,See https://www.financial express.com/opinion/there-is-a-regulatory-vaccum-in-gm-food-says-ceo-of-fssai/1274487// ( last visited on 17/8/2017).

76 US Food and Drug Administration.

77 The existing FDA safety requirements impose a duty on everyone to market safe food to the people irrespective of Gm foods or non GM foods.

the *FSS Act,* 2006. FSSAI which was under pressure from several quarters for its alleged failure to restrict the import of food with GMOs has initiated the work on framing Regulations for genetically modified food.[78] The proposed Regulation would lay down the procedures for the safety assessment and approval of foods, including imported foods, derived from genetic modification processes based on the internationally well established and accepted scientific principles, procedures and best practices, before they are approved for food purposes. Recently, the FSSAI draft on labeling regulations made mandatory for the Food Business Operators (FBOs) to declare the labeling of genetically engineered or modified foods.

**Concluding Remarks**

It is to be noted that every technology has two sides. If it is utilized properly it can bring immense benefits to the mankind but if used in a careless manner it may cause irreparable loss to the environment and human health. India's population is expected to reach 1.5 billion by 2025. Food security will be one of the crucial social issues in the days to come. The food production has to be improved in this context to meet the needs of that emerging population. Scientists have the responsibility to provide accurate information regarding the threats and benefits of GM foods. Due regard to the safety process is needed before enforcing such food on consumers. The consumers have to be aware and awaken with regard to the nature and safety of the food they are consuming.

The indiscriminate use of GM crops has to be regulated and at the same time, being an agricultural country care should be taken also to protect the traditional varieties in India. There should be a proper mechanism to identify and prosecute the importers and manufacturers of these domestic and foreign GM Food items. The regulatory vacuum in this area has to be filled. The proposed labeling of Gm foods in India is a step to be welcomed. It is already initiated in many developing countries which helps the consumers to find out GM ingredients in food products. The GM ingredients are different in different food products. So that the safety assessment will also be different. It depends upon case to case basis. The FSSAI has to set up a proper and efficient safety assessment mechanism. Every product which uses GM ingredients has to disclose and for testing the same adequate laboratories has to be ensured. At the same time, the liability framework for GM foods is very much essential for India in order to fulfill International commitments.

Even after many decades of the introduction of GM crops and foods, it is unfortunate to say that there is no proper regulatory mechanism at the National or International level. The safety of every GM product has to be proven beyond doubt and the products must be proven to be safe for human consumption like non-GM products. In India, that is the Herculean task to be undertaken by the FSSAI.

78 Ashwani Maindola , FSSAI commences framing of Regulations for genetically modified foods, See www.fnbnews.com/topnews/fssai-commences-framing -of-regulations-for-geneticallymodified -foods-43543 ( last visited on 2/8/2018).

# Marital Rape Myth Exploded: Desideratum for Legislative Space

Dr. Venugopal B.S.*

"Marriage is for woman the commonest mode of livelihood and the total amount of undesired sex endured by women is probably greater in marriage than in prostitution."

-Bertrand Russell

The expression marital rape has no more remained oxymoron for which the nullification of marital rape exemption through criminalization of marital rape in many foreign jurisdictions bears testimony. The metamorphosis from marital rape exemption to marital rape criminalization in those jurisdictions has not been smooth sailing that the radical feminists there left no stone unturned for centuries together for such a paradigm shift. The feminist struggle for their sexual rights eventually resulted in dawning of a new wisdom on the policy and law makers to realize that rape is rape whether committed within or outside matrimony discarding the anachronistic dubious dichotomy of rape within and outside matrimony enabling a legislative space for criminalization of marital rape. Marital rape myth has been exploded. The civilized societies have realized that it is a reality. However in many jurisdictions including India marital rape exemption continues as it is believed that it is culturally accepted astonishingly perpetuating the patriarchal legacy of male chauvinism in an era of global enlightenment. It is disheartening to note that globally rape in matrimony, acquaintance and intimate partner rape constitute the bulk of the very negligible no of reported rape cases which itself is only a tip of the iceberg. Marriage should not be a license to commit rape. Nor the right to marital intercourse should remain an exclusive prerogative of the husband to have sexual intercourse with his wife anyhow, somehow, anytime and anywhere. The right to marital intercourse should stand on the edifice of mutuality reckoning the interests of both the spouses to do away with the risks associated with marital rape. On the contrary the marital rape exemption for which India is not an exception renders a free license for the husband to have sexual intercourse with his wife against her will and consent. Legislative space for criminalization of marital rape barring an exception is lacking in India. Hence in this article an attempt is made to trace the evolution of dispensation of marital rape exemption and analyze the marital rape myth, reality, legal and ethical issues surrounding criminalization of marital rape in the light of laws obtaining in that sphere in a few foreign jurisdictions in order to grapple with the issues to lay down a vibrant and sensitive legal control regime to regulate marital rape.

As this article revolves around marriage and rape it is necessary to have conceptual clarity regarding marriage, rape and marital rape.

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## Meaning of Marriage, Rape, Marital Rape

Diverse views are expressed regarding the meaning of marriage. It has sociological and religious overtones. It is not legally defined.[1] It is said that marriage is a contract the object of which is procreation and maintenance of children.[2] According to Muslim personal law a marriage (*nikha*) is a civil contract, its purpose being legalization of sexual intercourse and procreation of children.[3] The sociological definition views marriage as an institution that sanctions the relationship of a man and a woman and binds them in a system of mutual obligations as husband and wife and rights essential to the functioning of family life.[4] The sociologists perceive marriage as a system of roles resulting from the union of a man and woman whom the social sanction characterizes as husband and wife.[5] The equilibrium of this system fundamentally revolves around the mutual adjustment finding an outlet in enactment of role by one in correspondence with the expectations of the other.[6] It follows that the triumph of the system warrants enactment of role by each partner of the union to be compatible with the expectation of the other. It is through marriage that relation between man and woman is socially recognized. The Biblical connotation on marriage states that the wife's body does not belong to her alone but also to her husband. In the same way, the husband's body does not belong to him alone but also to his wife. Do not deprive each other except by mutual consent and for a time, so that you may devote yourselves to prayer and then come together again so that Satan will not tempt you because of lack of self-control.[7]

Indologists view Hindu marriage as a *sanskara* performed for the realization of dharma,[8] rati,[9] an d praja.[10] Hindu marriage is a sacrament,[11] reflected in the belief that marriages are made in heaven but solemnized in earth to perceive the union of husband and wife as an eternal one. It is a special bond emanating from the physical, mental and spiritual unison of two souls shared by them who tie the nuptial knot after a mutual promise of companionship for a lifetime.[12] The imperfect human relationships receives perfection through the stability and substance conferred by the institution of

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1 The *Hindu Marriage Act,* the *Special Marriage Act, Muslim Personal Law* do not define marriage, but lays down only the essentials of a valid marriage.

2 According to Malinowski (1956) as quoted in Dr.OlaTolulope Monisola, Dr. AjayiJhonson Olusegum," Values Clarifications in Marital Rape: A Nigerian Situation", *European Scientific Journal,* Vol.9, 2013,p.291at 293

3 See Aqil Ahmad ( Rd. by I.A. Khan), " Mohamadan Law," 23rd Ed. p.107 (2009)

4 See *supra* n.2 at p.293

5 whttp:www.yourarticlelbrary.com/Indian-soceity/famlily-Indian society\Marriage in Indian society-concept-types-and-mate selection\39183\hile. Visited on 4th June, 2016

6 *Ibid.*

7 See 1 Corinthians 7:5, New International Version

8 Fulfillment of religious duties. See *supra* n.5

9 Sexual gratification. *Ibid.*

10 Procreation. *Ibid.*

11 http://weddings.ilveindia.com\features\what is marriage, html. Visited on 4th June,2016

12 *Ibid*

marriage which acts as a vehicle of transmission of culture and civilization from one generation to the other, in the pursuit of prosperity of human race.[13] The broader edifice of any society stands on the institution of marriage which is the very foundation of a family that its benefit to any society does not require any overemphasis.[14] According to K.M. Kapadia, "Hindu marriage is a socially approved union of man and a woman aiming at dharma, procreation, sexual pleasure and observance of certain social obligations.'' R N Sharma defines Hindu marriage as, "a religious sacrament in which a man and a woman are bound in permanent relationship for spiritual, social and physical purposes of dharma, procreation and sexual pleasure."[15] In spite of its religious and social overtones globally marriage is acknowledged as a human relationship.

The term rape is derived from a Latin term *rapio* which signifies to seize.[16] Rape means forceful seizure and ravishment of a woman against her will and consent.[17] It is Sexual intercourse with a woman by fear, force or fraud. It is coercive nonconsensual sexual intercourse with a woman, an act of violence against her private person an outrage by all means**.**[18] It is an inhuman act resulting in unlawful interference with the sanctity of a woman and annihilates the personality of a woman in its entirety.[19] It is a diabolic blow to her supreme honour offending her self-esteem.[20] It destroys very the social fabric and ruins the public tranquility.[21] Taking into consideration its monstrous consequences the apex court in *Bodhisattwa Gautham* v. *Subra Chakraborthy,*[22] has observed that it is a deathless shame and the gravest crime against the human dignity. It further said "rape is a crime against basic human rights and violation of the victim's the most cherished of fundamental rights namely the right to life enshrined in Article 21 of the constitution."[23]

Marital rape otherwise called as spousal rape signifies non-consensual sexual intercourse with the wife the perpetrator being the husband and the victim being the wife.[24] It is committed by the husband on his wife. It is a form of partner rape or sexual abuse.[25] It is a type of domestic violence.[26] There is a controversy as to whether it should be considered as part of domestic violence or an independent crime.[27] It is unwanted sexual intercourse from the point of view of wife committed by the husband by force, threat of force or when the

13 *Ibid*
14 http://www.yourarticlelibrary.com/society/indian-society/family-indian-society/marriage-in-indian-society-concept-t ypes-and-mate-selection/39183/hile.visited on 4th June, 2016
15 *Ibid*
16 Dipa Dube, Rape Laws in India, Lexis Nexis Butterworths, New Delhi,p.1(2008)
17 *Ibid.*
18 *Ibid.*
19 *Ibid.*
20 *Ibid.*
21 *Ibid.*
22 AIR 1996 SC 922
23 *Ibid.*
24 See *supra* n.2 at p.294
25 *Ibid.*
26 *Ibid.*
27 For a discussion see infra

wife is unable to consent.[28] Accordingly it also can be committed when the wife is unconscious or asleep. It is forceful seizure and ravishment of a wife by her husband against her will and consent[29] It implies husband having sexual intercourse with his wife by fear, force or fraud.[30] It is non- consensual sexual intercourse with one's own wife, a dehumanizing act interfering with her sanctity and offending her self- esteem culminating in annihilation of her personality in its entirety.[31] To simplify it is wife's rape or rape in matrimony.[32] Rape is a form of sexual assault[33] of which the other forms are coitus per os (oral sex) and coitus per annus (sodomy).[34] In addition to rape, a husband may compel the wife to involve in oral sex or sodomy against her will and consent which does not fit into the definition of rape as sexual intercourse in common parlance implies coitus per vaginum i.e. vaginal penetration.[35] Marital rape assumes the following forms.

**Types of Marital Rape**

The legal scholars have identified the following three types of marital rapes which are generally encountered in any society.[36]

**Battering rape:** The spousal relationship in this type of marital rape is characterized by physical and sexual violence, needless to say, the wife being the victim experiences the violence in various ways. The focal point here is battering during sexual violence or it may precede sexual violence to force the wife to indulge in sexual intercourse much against her will and consent who is otherwise reluctant to participate in sexual intercourse with her husband or it may follow the sexual violence. This is the usual type found universally. Battering even though not the sine qua non of marital rape, the surveys show that generally battered wives are the ones who are raped by their husbands or sexually assaulted otherwise.[37]

**Force-only rape:** Battering is not characteristic of this type of spousal rape. The husband who perpetrates this applies only that much force which is required to coerce the wife to submit to the wish of the former. Application of force is the aftermath of refusal by the wife to involve in sexual intercourse.

**Obsessive rape:** It is otherwise styled as sadistic rape. It involves torture or sexual perversion or both. Quiet often it is physically violent too.

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28 Ibid.
29 See *supra* n.17
30 See *supra* n.18
31 See *supra* n.19
32 See *supra* n.2 at p.294
33 See sec.375 of the *Indian Penal Code*
34 *Id* at sec. 377
35 For a discussion on rape see S.N.Misra, "Indian Penal Code," Central Law Publication, Allahabad, p.719 (2013).
36 Gosselin, D.K., "Heavy Hands-An Introduction to the Crimes of Domestic Violence,1stEdn., Prentice-Hall Inc.,New Jersey, 2000 as quoted in Saurabh Mishra & Sarvesh Singh, "Marital Rape-Myth, Reality and Need for Criminalization,(2003) *PL WebJour 12*
37 *Ibid.* See also, Udisha Ghosh," Marital Rape: The Need for Criminalization in India," February 4,2015 by Kudrat

It is inevitable to trace the historical evolution of criminalization of marital rape as many intricate issues associated with it can only be addressed through it to lay down effective legal measures to check it.

**Historical Evolution of Criminalization of Marital Rape**

Like any other atrocity against humanity perhaps marital rape is also as ancient as the human civilization itself even though the degree in which it occurs now might not be the case in ancient times. Even though it is prevalent from the time immemorial until recently it has failed to loom into the eyes of sociologists, legal practitioners, criminal justice system and society as whole.[38] The society as a whole began to perceive its severity only in the late 1970s that it paved the way for a societal thinking that rape can occur even in marriages also.[39] The reason for such belated wisdom could be traced to the common law regime of marital rape exemption which became deep rooted not only in common law jurisdictions but also globally stretching its tentacles to all most all jurisdictions. The conceptual basis for marital rape exemption could be traced to the celebrated dicta of Justice Mathew Hale which reads as follows,[40]

> "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto the husband which she cannot retract."
>
> The above observation was further fortified by Blackstone who wrote in his treatise as follows.[41]
>
> **"**By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage or at least is incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performs everything ....Upon this principle, of an union of person in husband and wife, depends almost all the legal rights, duties, and disabilities that either of them acquire by the marriage."

The above two observations have concretized the proposition that the expression marital rape is oxymoron that there is nothing like rape in marriage as on marriage the personality of wife merges with that of the husband and by mutual matrimonial consent and contract the wife submits herself to the will of the husband which she cannot retract to hold the husband guilty of rape in marriage. To add to the misery the common law prerogative of the husband to chastise his wife without causing permanent injury to her aggravated the

38 Jill Elaine Hasday," Contest and Consent: A Legal History of Marital Rape," *California Law Review,* Vol.88, Issue5, p.1375(2000)

39 *Id* at p.1376

40 1 Mathew Hale, The History of the Pleas of the Crown, (1736)

41 *See supra* n.38 at p.1389

situation. The common law doctrines influenced the American legal circles to such an extent that the feminist struggle for claiming their right to marital intercourse protracted nearly for two centuries before the criminalization of marital rape.[42] They condemned marriage as legalized prostitution by reason of insubordination of wives to the husbands due to economic dependency and lack of socio-economic alternatives, above all the exclusive prerogative of the husband to control the right to marital intercourse which totally eclipsed the sexual rights of the wives.[43] The feminist movement though found fruition in fetching married women their right to property and suffrage, the feminine claim pertaining to their exclusive right to their person including the right to marital intercourse which they argued sans which the cycle would be incomplete, remained a cry in wilderness.[44] In the middle of the 19th century and early part of 20th century the states willing to enhance the property rights of the married women and ratify women suffrage respectively were decisively against prosecuting the husbands for spousal rape.[45] Marriage is a sphere where sexual and reproductive relations are so directly implicated. But surprisingly the authoritative legal sources of the past miserably failed to envision marriage as potentially abusive, disharmonious and the most dangerous site of human interaction warranting the desideratum of certain deserving legal rights of the wives against their husbands as safeguards against the possible potential abuse.[46] The legal authorities continuing the callous attitude dealt wife beating soft hands than the other instances of battery and assault with extreme reluctance to enforce civil and criminal sanctions against any one raping his wife.[47] In the thick of things it was not at all a surprise that only one prosecution happened in the beginning of 20th century in *Frazier* v. *State*,[48] where the husband was prosecuted for assaulting and attempting to rape his wife. The trial court convicted the husband. The appellate court set aside the conviction. The enigma was that how first of all the matter came before the jury and trial court on consideration of the prevailing state of affairs then.

The marital rape exemption was restricted only to the husbands. Any husband who abetted rape of his wife by a third person invited criminal liability at par with the real offender as principal of first degree. In this context it is worth quoting the celebrated quote of Justice Mathew Hale to the following effect. "For, though in marriage she hath given up her body to her husband, she is not to be by him prostituted to another."[49] In *People* v. *Chapman,*[50] Mr. Jeremiah Chapman had entered into an arrangement with one James Reagan to

42 *See supra* n.38
43 *Ibid*
44 *Ibid.*
45 *Ibid.*
46 *Ibid.*
47 *Ibid.*
48 86 S.W.754(Tex.Crim.App.1905
49 See *Supra* n.38 at p.1406
50 28 N.W.896( Mich.1886)

the effect that the latter should seduce Mrs. Chapman for a consideration of 25$. The object of the arrangement was that Mr. Chapman could catch the couple in bed red handedly and use that as an evidence to indict his wife on the ground of adultery in his bid to obtain divorce from her. On Mrs. Chapman's resistance of the sexual advances of Mr. Reagan, the latter raped her. The whole incident was watched by Mr. Chapman who was in the adjacent room through the hole which he bore in the intervening wall. He did not make any attempt to avoid the incident from his end. Instead he rushed into the room uttering the words" now I have caught you. He contended that his actions were too tangential that he should not be held liable as an accomplice for rape as he was a passive spectator throughout the incident. The court rejecting the contention held him liable for rape along with the main accused in the case as principal offender of the first degree. It was further observed that if the man on the bed were to be her husband the question of she being subjected to legal injury would not arise. It follows that the marital rape by the husband during the subsistence of marriage only qualified for exemption that it was not permitted to be claimed by him where he abetted commission of rape on his wife by a third person.

*State v. Dowell,*[51] was another case in which the court enforced the third party caveat. In this case a white husband of a white wife keeping both his wife and a colored person under the menace of death with a loaded gun in his hand forced the latter to rape his wife. The offender took the defense of marital relation that he was the husband of the prosecutrix, which was rejected by the court. In this case also the husband was held liable for rape as the principal offender of the first degree. The court with respect to the third party caveat to marital rape exemption reasoned that the divide between the licit and illicit intercourse depended not on the consent of the woman as such but on whether she was married to her sexual partner. It was further held that marital rape exemption was personal in nature that it could be claimed only when the husband had ravished his wife in the exercise of his marital rights, otherwise his position was no better than a stranger.

The above discussion is an explanation of the evolution of marital rape law in the USA which manifests that nothing seriously happened in the direction of criminalization of marital rape in the nineteenth and greater part of twentieth century.[52] The feminine rights in addition to the rights of married women to their property and suffrage became incremental to the extent of recognition of marital rape under the rubric of cruelty as a ground of divorce with its subjective overtones varying with the status of a married woman.[53] In effect divorce on the ground of marital rape was not a guaranteed solution. The authoritative legal sources continued their rigid stance with respect to the regulation of marital relation and sexuality to embrace the view that there was

51 11 S.E. 525(N.C.) 1890
52 *See supra* n.38
53 *Ibid.*

nothing like spousal rape culminating in the prosecution of the husband grounded on the deep rooted principles and presumptions of the era explicitly supported legal subordination of wives to their husbands.[54] However one welcome note was that they were inclined to oversee any modification of other aspects of women's legal status at common law remaining emphatically reluctant to tamper with marital rape exemption.[55] Eventually it was in 1993 in all the 50 states of the USA the process of criminalization of marital rape was complete.[56]

The historical evolution of criminalization of marital rape in England had to pass through much more stickiest path crossing many hurdles as it being the home land of common law which stymied the very thinking of criminalization of marital rape. This statement can be substantiated beyond doubt from the above discussion as to how in the USA the common law in its tight fist captured the American legal circles to emphatically deny prosecution for marital rape.[57] Although in the 19th century the feministsrigoursely pitched for abolition of marital rape exemption with staunch support of thinkers such as John Stuart Mill and Bertrand Russell it was only after 1970s at a political level this issue was deliberated.[58] The Criminal Law Revision Committee in their 1984 Report on Sexual Offences rejected the idea of marital rape in the following words.[59]

> "The majority of us ... believe that rape cannot be considered in the abstract as merely 'sexual intercourse without consent'. The circumstances of rape may be peculiarly grave. This feature is not present in the case of a husband and wife cohabiting with each other when an act of sexual intercourse occurs without the wife's consent. They may well have had sexual intercourse regularly before the act in question and, because a sexual relationship may involve a degree of compromise, she may sometimes have agreed only with some reluctance to such intercourse. Should he go further and force her to have sexual intercourse without her consent, this may evidence a failure of the marital relationship. But it is far from being the 'unique' and 'grave' offence described earlier. Where the husband goes so far as to cause injury, there are available a number of offences against the person with which he may be charged, but the gravamen of the husband's conduct is the injury he has caused not the sexual intercourse he has forced."

The Committee has further observed that domestic violence occurs in some

54 *Ibid.*
55 *Ibid.*
56 Samantha Allen, " Marital Rape is Semi-Legal in 8 states," www.thedailybeast.com\articles 2015\06\09, visited on 6th Jan.2017
57 *See Supra* n.38
58 *Ibid.*
59 *See* the 15th Report

marriages but the wives always are not inclined to snap the marital tie.[60] It further endorsed the view that domestic incidents sans physical injury would generally be outside gamut of the law that especially criminal law should not be stretched to encompass to things which form part of marriage bed in the marital relationships between cohabiting partners except where injury arises culminating in other offences which could be charged.[61] The feminist movement which commenced in the United States had its deep impact on the western world for which England was not an exception. As such at the end of the tunnel the victims of marital rape could witness light when the House of Lords abolished the marital rape exemption in its entirety in 1991. In Scotland the marital rape exemption was abolished in 1989.Soon after this in Australia also marital rape was criminalized.

By 1986 in Europe, international pressure was mounting to criminalize spousal rape.[62] The *European Parliament's Resolution on Violence against Women,* 1986 called for its criminalization.[63] The *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* was the first legally binding instrument in Europe in the field of violence against women came into force in August 2014.[64] It enjoins an obligation on the states which choose to ratify it to ensure that non-consensual sexual acts committed against a spouse or partner are illegal.[65]

In many more countries eventually marital rape exemption was abolished,[66] a few countries are in the process of abolishing it and still in many countries including India it is continuing. The historical evolution of marital rape law throws light on a few causes which has hindered the process of criminalization for a very long time.

**Causes for Overlooking Marital Rape**

The prominent cause for considering marital rape as oxymoron could be identified with the theory of patriarchy which characterizes the father or any senior male member of a family as its head placing other members in subordination to him.[67] It is a political-social system which advocates that males are inherently superior and all others especially female's fall under the shadow of their superior authority.[68] It is based on the vital notion that it is only males can have predominant roles in political leadership, moral authority,

60 *Ibid.*
61 *Ibid.*
62 https://en.wikipedia.org/wiki/Marital Rape#History, visited on 17th Jan. 2017
63 www.europart.europa.eu\EPRS|PE2_AP_PP! Fem.1984_A2-0041\86000\EN.Pdf. Visited on 6th Jan.2017
64 https://www.coe.int\en\web conventions full list \conventions\rms\090000168008482e
65 *Ibid* at Art. 36 and 45
66 *See* for a discussion infra
67 Webster's New World College Dictionary, New Millennium( Michael Agnes, *Edited)*, p.1056(2004)
68 *Ibid.*

social privilege and control of property but not females.[69] On marriage the authority of father is transmitted to the husband who becomes all in all of a wife. The central notion of patriarchy is dominance of female by the male for the benefit of the former.[70] It has culminated in subordination and oppression of women in all spheres for which their marital rights are not an exception. The patriarchal attitudes towards women are found generally in violent males. Rape is an outcome of male aggression whether it is within marriage or otherwise. Both are not an individual problem but a social problem arising from a "distorted masculine philosophy of aggression,"[71] the root of which lies in patriarchy. The same distorted philosophy has made the men to wrongly harbour a notion that wives are their properties. Hence they can be used as the husbands want them to be used. In effect women *vis-a-vis* wives are looked as mere objects of sexual pleasure. Sexual violence and threat of it are taken recourse to terrorize women. It is nothing but re-enforcement of patriarchal perception of women's place in society.[72]

The common law principle of coverture which is an offspring of the rule of patriarchy is another cause for perpetuation of marital rape exemption. Coverture literally signifies a protective or concealing cover.[73] Under Roman - Dutch law it was known as the theory of marital power which laid down a fiction that a married woman was a minor under the guardianship of her husband.[74] Accordingly on marriage a wife comes under the protective cover or concealing of her husband that all her rights and obligations are subsumed by those of the latter as a feme covert rather feme sole (unmarried woman).[75] The principle of coverture paved the way for fiction of unity where the wife and husband deemed as one entity.[76] This fiction caused a disaster in arriving at a conclusion that there was nothing like marital rape as otherwise it would lead to the concept of self- rape landing in a contradiction. So the inevitable conclusion is that husband cannot rape himself even though the reality is that there is a victim of unwanted sex which is none other than his own wife.

The intractable consent theory advocated by Justice Hale which contemplates that on solemnization of marriage by mutual consent the wife surrenders her body to the husband.[77] Accordingly marriage signifies consent on the part of the wife for sexual intercourse which she cannot retract.[78] The question is whether her consent is absolute one without any exceptions that she

69 *Ibid.*
70 *Ibid.*
71 *See supra* n.2 at p.299
72 Christine Ferro, Jill Cermele, & Ann Saltzman, Current Perceptions of Marital Rape: Some good and Some not so good News," *Journal of Interpersonal Skill,* Vol. 23,No 6, 2008,764 at p.765
73 *Black's Law Dictionary* (Joseph R.Nolan & JacqulineM.Nolan Edited),West Publishing House, St.Paul Minn,6th Ed., p.365.
74 https: // en.wikipedia.org/wiki/ coverture, visited on 17th Jan.2017
75 *See supra* n.74 at p.366.
76 *See supra* n.41.
77 *See supra* n.40.
78 *Ibid.*

licenses her husband to have sexual intercourse with her anyhow, somehow, anytime and anywhere at the cost of her interests. Whether she considers marriage as a license on her part to her husband to use her body as he wants? The answer is certainly no. The mindset of the society influenced by the deep rooted historical causes to consider marital rape as paradoxical paved the way for marital rape myth which needs to be exploded to ascertain the hard realities in the backdrop of advanced civilized society.

**Marital Rape Myth**

The general attitude towards rape though has changed as a result of success of feminine movement and rape awareness program with a perception of rape as violent rather as sexual; the marital rape myth still is conspicuous.[79] The consequence is that yet marital rape is less likely to be labeled as rape compared to stranger or acquaintance rape.[80] There is greater endorsement of rape myths in spousal rape than acquaintance or stranger rape.[81] It is the young males who strongly endorse the marital rape myth than the females who strongly endorse the view that marital rape is no different from rapes occurring in other victim-offender relationship.[82] It is believed that older men who are generally married are less likely to show hostility towards females and endorse rape myths.[83] The myth is that rape is viewed as less serious offense and less damaging physically and emotionally compared to other violent crimes. Logically the conclusion is that marital rape is least serious of all other types of rape or there is nothing like marital rape. The attitude towards rape depends on characteristics of persons whose opinion is solicited and certain situational factors, by and large rape is reflective of male stereotypes and patriarchal view of sex.[84] Rape incidents are not generally reported. It depends upon the victim- offender relationship. It is the intimate partner rape which accounts for substantial number of rapes than stranger rape.[85] It is said that "contrary to popular belief, rapists are not strangers lurking in dark alleys or hiding behind bushes looking for their next victims rather, the majority of rapes involve a victim and an offender who had a prior relationship before the rape occurred."[86] The prior relationship with the perpetrator makes a victim not to take the matter to the court. The degree of intimacy being high in case of a husband the possibility of reporting of rape is very bleak as it will lead to disastrous consequences within the family. Even where rape cases are reported conviction rates are too meager. In case of spousal rape convictions might take place hardly because of the belief that rape is not a concept which can be inserted into marriage matrix. Whatever might be

79 *See supra* n.73.
80 *Id* at 766
81 *Ibid.*
82 *Id* at 767.
83 *Ibid.*
84 *Ibid*
85 *Ibid*
86 *Ibid*

the causes behind non –reporting the people are made to believe that rape in any form including marital is not a reality. But the naked truth is otherwise speaks in a different tone. It is accepted by all civilized nations that rape is the most heinous crime. Who is raped does not make any difference. The victim may be wife or any other woman. The monstrous consequences are the same. It results in certain physical and psychological impact.

**Physical and Psychological Impact of Marital Rape**

The impact of marital rape on the wife can be summed up in the proposition that "when a woman is raped by a stranger she has to live with a frightening memory. When she is raped by her husband she has to live with the rapist." [87] It speaks the agony of marital rape in volumes**.** The researches by proving that the women who are the victims of marital rape suffer from enduring physical, emotional and mental consequences enabled exploding of the historical myth that marital rape is less traumatic, injurious and agonizing.[88] The physical consequences of marital rape on a woman may include injuries to the vaginal and anal areas, lacerations, soreness, bruising, torn muscles, fatigue, and vomiting.[89] The battered and raped wives may suffer from broken bones, black eyes, bloody noses, and knife wounds that occur during the sexual violence.[90] Some wives are kicked, hit or burnt during sexual intercourse.[91] Specific gynecological consequences of marital rape include vaginal stretching, anal tearing, pelvic pain, urinary tract infections, miscarriages, stillbirths, bladder infections, infertility, and the potential contraction of sexually transmitted diseases including HIV/AIDS.[92] The wives' constraint in taking recourse to contraceptives resulting from the threats and refusal to use condoms may culminate in unwanted pregnancy causing physical barriers and mental agony.[93] The marital rape survivors suffer from long term psychological consequences as they are raped by their most beloved and trusted partners compared to the victims of other forms of rape.[94] They are likely to experience multiple assaults and sexual attacks.[95] Like the victims of other forms of rape they also experience short term effects which include anxiety, shock, intense fear, depression, suicidal ideation, disordered sleeping, and post-traumatic stress disorder.[96] Long-term consequences include disordered eating, sleep problems, depression, and sexual distress, problems establishing trusting relationships, distorted body image, and increased negative feelings about

87 research.omicsgroup.org\index\php\marital rape, visited on 21st , June, 2016.
88 Raquel Kennedy Bergen, " Marital Rape: New Research and Directions"VAWnet.org, visited on 21st , June 2016
89 *Ibid.*
90 *Ibid.* It is found that there is a nexus between increased HIV risk and forced sex. *Ibid*
91 *Ibid.*
92 *Ibid.*
93 *Ibid.*
94 *Ibid.*
95 *Ibid.*
96 *Ibid.*

themselves.[97] Research has also shown that some spousal rape victims have reported flash-backs, sexual dysfunction and emotional pain for years after the incident.[98] In addition marital rape affects badly the children who have witnessed the sexual violence on their mothers.[99] The agony of the marital rape victim is further aggravated by reason of, as indicated by researches in some western jurisdictions,[100] indifferent attitude of certain assistance providers associated with the marital rape victims which has perpetuated the marital rape myth unabatedly in spite of criminalization of marital rape.

**Callous Attitude of Service Providers towards the Marital Rape Victims**

The marriage rape victims need to look for the assistance of certain authorities and persons comprising of police officers, health care providers, religious advisers, advocates and counselors after the incident. But the frustrating fact is that the assistance rendered by these concerned authorities and persons are far from adequate.[101]

The limited amount of research pertaining to the police response to the problem of marital rape indicates that they are not so much responsive to the survivors of marital rape than the battered women.[102] Instances of positive response though substantially meager, are not wanting.[103] Generally when it comes to the knowledge of the police officers that the perpetrator of rape is woman's husband they may not respond to a call or dissuade her from filing a complaint against her husband or refuse to accompany her to the health care providers for collection of evidence and medical assistance which enables an early initiation of the healing process.[104] The physical and mental trauma of marital rape makes it inevitable for a victim to seek health care from family practitioners, emergency room personnel, obstetricians and gynecologists. In this context also the response is no different with a few sporadic positive responses.[105] The victim like in any other form of rape needs to be tested for venereal diseases or HIV or pregnancy (unwanted). Further the examination is very much essential for collection of forensic evidence. Any lapse in this regard certainly would expose the victim to hardship. It should be noted that the health care providers lack proper training in counselling the victims and eliciting from them the relevant information, furnishing them relevant information including one regarding community resources when they narrate their experience of sexual violence.[106] The researches have manifested that the religious advisers

97 *Ibid*
98 *Ibid.*
99 *Ibid.* More research is required in this field.
100 *Ibid.*
101 *Ibid.*
102 *Ibid.*
103 *Ibid.*
104 *Ibid.*
105 *Ibid.*
106 *Ibid.*

are the least preferred ones for whom the victims look at for assistance.[107] The pronounced reason is that they with their religious bent of mind are not prepared to accept rape within marriage. They shift the blame to the wife grounding it on the age old unreasonable conviction of obedience of wife to her husband and sinfulness of denying sexual pleasure to him.[108] In some western countries two major service centers viz. the Battered Women and Rape Crisis Centers have failed to address the problem of marital rape**.**[109] Like others their focus is more on stranger rape rather than marital rape. Further they too lack the expertise and training to deal with issues associated with rape in general and marital rape in particular.[110]

Even though marital rape is criminalized in many countries yet the mythof marital rape is deeply percolating in the minds of society at large for which marital rape victims and the women with radical feminist bent of mind are exceptions. The above discussion bears testimonyto this proposition. In many countries the ongoing debate on the criminalization of marital rape for which India is also a party triggered a discussion on arguments for and against the criminalization.

**Arguments for and Against Criminalization of Marital Rape**

> A cogent case for criminalization of marital rape can be made from the following premises rebutting the arguments against it which make it categorical that the pros outweigh the cons.[111]

**Arguments for**

**a. A Claim for Criminalization from the Prism of Human Rights**:

It is said that a woman is essentially a human being, but incidentally a woman.[112] By virtue of being born as a human being she is entitled for certain basic and inalienable rights which are known as human rights**.**[113] These rights are not grants or concession from the state. Human beings inter-alia cannot be bifurcated as males and females for its entitlement. The UDHR 1948 contemplates certain rights for which all are entitled without any distinctions whatsoever.[114] Men and women are equal in dignity and rights.[115] Marital rape lowers her dignity. A woman too has right to life and personal liberty.[116] Right to life signifies a right to qualitative and dignified life.[117] A woman cannot be

107 *Ibid.*
108 *Ibid.*
109 *Ibid.*
110 *Ibid.*
111 *See* for a general discussion on arguments for and against criminalization of marital rape, Saurabh Misra and Sarvesh Sing, op.cit.
112 *See supra* n.38
113 Dr. S.K.Kapoor," Human Rights, Under International Law and Indian Law," Central Law Agency, Allahabad, 6th Edn. p.1(2014)
114 *See* Art. 2 of UDHR,1948
115 *Id* at Art.1
116 *Id* at Art.3
117 *Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597; Francis Coralie v. Union Territory of Delhi, AIR 1981 SC 746

subjected to torture or cruel, inhuman or degrading treatment.[118] Needless to say that any sexual intercourse against her will and consent results in torture. It is a cruel, inhuman and degrading treatment to her. However this proposition needs to be examined in the light of the objective of institution of marriage and certain other factors.[119] A woman like a man is equal before law and entitled for equal protection of law.[120] In the absence of a law to criminalize marital rape the equal protection of law becomes a myth to her.[121] She is entitled for equal rights during marriage.[122] It signifies that the husband should not exercise his sexual rights according to his whim and fancy culminating in the annihilation of her sexual liberty. At this juncture it should be noted that sexual rights constitute a part of human rights pertaining to sexuality which need to be constituted reckoning the right to freedom, equality, privacy, autonomy, integrity and dignity of both the spouses.[123] But unfortunately it is not so. The marital rape exemption reduced the sexual rights as an exclusive domain of the husband. The working definition contemplated by the World Health Organization with respect to sexual rights inter alia include the right of all persons, free of coercion, discrimination and violence, to the highest attainable standard of sexual health, respect for bodily integrity, decide to be sexually active or not, consensual sexual relations, decide whether or not, and when, to have children and pursue a satisfying, safe and pleasurable sexual life.[124] The responsible exercise of human rights lies in respecting the rights of others. In that sense human rights signifies what we wish others to do with us. If a husband expects from his wife to respect his rights, naturally the same will be the pronounced wish of the wife. But marital rape exemption obliges the wife to respect the rights of her husband at the cost of her own rights. The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) inter-alia prohibits any discrimination by reason of which one is deprived of enjoying ones social rights on the basis of equality between man and woman.[125] Condemning discrimination against women in all its forms the state parties have undertaken to implement policies and measures to eliminate discrimination against women.[126] It is the obligation of the state to take appropriate measures to modify the social and cultural conduct of men and women in order to wipe out the prejudice and customary & other derogatory practices grounded on either the inferiority or superiority of male or female or stereotyped roles of men or women.[127] The male stereotypes the legacy of

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118 *See Supra* n.101 at Art.5 See also Art.7 of International Covenant on Civil and Political Rights
119 *See* infra
120 *See supra* n. 101at Art.7
121 *See* for a discussion Robin West," Equality Theory, Marital Rape and the Promise of the Fourteenth Amendment", *42 Fla. L. Rev.*45(1990)
122 *See supra* n.at Art.23. See also Art.23 of International Covenant on Civil and Political Rights
123 *See Supra* n.2 at p.295
124 www.who.int\reproductive health\topics\sexual health\sh. definitions\en
125 *See* Art.1
126 *Id* at Art.2
127 *Id* at Art.5

patriarchal rule must yield to the human rights of women. All those pernicious practices based on male superiority the dominating cause of misery of women must be eradicated. Marital rape also is a result of these derogatory practices.

**b. Marriage as an Institution of Equal Partnership:** The institution of marriage whether it is considered as contract or sacrament or a social union of male and female, it stands on the bedrock of human relationship. Both the spouses are equal partners in materialization of the very objective of the institution of marriage which perpetuates the society in eternity. Law must keep pace with the changing needs of the society. The common law fiction of unity of souls and coverture are impotent weapons which no more can feed the content to criminal law which in the modern days is struggling to come to grip with new crimes committed in most sophisticated ways. Equality principle demands that both the spouses should respect each other's rights. But in reality the male chauvinistic belief of total dominance belittled the role of a woman in the institution of marriage subjecting her to various types of atrocities including marital rape. The absolute marital rape exemption does not fit into the philosophy of equal partnership. Hence it is submitted that marital rape exemption barring a few justifying circumstances should be scrapped from the legal regulations.

**c. Women's Empowerment:** It is a buzzword commonly heard in the modern days. Empowerment is a process of infusing confidence in persons who belong to vulnerable sections to enable them to hold their head high with self-respect and self-esteem.[128] A woman is subjected to atrocities and violence from womb to grave. Most of these happen in her matrimonial home which every woman expects to be a home away from home where she is born blessing her with a blissful life. Marital rape takes place in the matrimonial home. Off course a husband may rape his wife anywhere if he wishes. The empowerment of a woman must begin right at her home. Otherwise there is no point in pondering with the word empowerment and speaking about her empowerment in the wider society of which she is a part to reduce it to mere lip service. Marital rape exemption disempowers a woman at her home itself. Hence it is submitted that criminalization of marital rape is the need of the hour to enable her to re-inforce her faith in the institution of marriage.

**d. Deterrence:** The object of criminalization of any act is to generate deterrence in the minds of people to make them to keep themselves away from the path of perpetration of crime. It cannot be generalized that all husbands globally rape their wives. But it is true that there are husbands who have committed rape on their wives in the past. It is equally true that it has contemporary relevance also. It is foolish to think that in future a silver line would appear in the midst of cloud that wives can expect a marital life without marital rape. Therefore it is submitted that criminalization of marital rape is

128 P. Ishwar Bhat, "Law & Social Transformation," Eastern Book Company, Lucknow, p.523(2009)

necessary to create fear in the minds of such husbands who have tendency to rape their wives.

**Arguments Against**

**a. A Myth:** The general belief is that marital rape is a myth.[129] It is oxymoron. It is uncommon. The myth is exploded by the fact of its physical and mental impact on the victim. It has no more remained oxymoron. The opinion of society towards it has changed which could be witnessed from the fact of its criminalization in many countries.[130] It is proved beyond doubt that rape can occur within marriage. The husband has every opportunity to rape his wife because of their cohabitation. It is not so in case of stranger rape which depends upon a variety of circumstances. Marital rape is not uncommon for which the studies conducted to that effect bears testimony. People are made to believe that it is uncommon because in most of the cases marital rape is not reported. If it is not reported it is because of the fear in the wife regarding its consequences on the marital life. She fears that if reported the husband would take revenge by breaking the marital tie. The occurrence is one thing and the reporting the other. Hence the belief that it is uncommon has no justification.

**b**. **Difficulty in Burden of Proof:** It is said that it is difficult to prove rape. As such criminalization of marital rape will not serve any purpose except overburdening the legal system with cases. There is no core in this argument. If the above argument is adhered to all the criminal statutes are to be scrapped as it is a known fact it is hardly in a few cases the accused are convicted and in most of the cases the proceedings culminate in the acquittal of the accused. The reason for it can be located in the golden rule of criminal jurisprudence which contemplates that it is the obligation of the prosecution to prove the guilt of the accused beyond reasonable doubt grounded on the rationale that even if ninety nine culprits go scot free one innocent person should not be victimized. Burden of proof is one thing and the commission of an offence the other that from the difficulty in burden of proof a premise cannot be carved out to deny a legislative space to marital rape. It should be kept in mind that the very object of administration of criminal justice is the punishment of an offender which may be either a means by itself or a means to an end. As a means by itself it aims at deterrence which is a valid ground for criminalization of marital rape as discussed above. Hence it is submitted that the difficulty of burden of proof cannot be used as a stumbling block against criminalization of marital rape .It should be noted that the fact of its criminalization in many jurisdictions has put the above argument into oblivion.

**c. Misuse of Law:** It is said that a dissatisfied, angry, vengeful wife may use the law to take revenge against her innocent husband. It may be true of a few wives who may misuse the law. It cannot be generalized. If such instances take place they are exceptions which are uncommon. The exceptional situations cannot

129 *See supra* n.73
130 *See* infra

be considered as a justification for not giving a legislative space for criminalization of marital rape. If marital rape is criminalized there must be a provision in law to take care of the interests of innocent husbands. The interests of the victims of marital rape need to be rendered preference. The uncommon instances of victimization of innocent husbands should not be a bottle neck for criminalization of marital rape. Further it should be kept in mind that no woman especially in a conservative society would volunteer to undergo the ordeal of trial of rape which is more agonizing than real rape.

**d. Implied Consent for Sexual Intercourse:** Mathew Hales intractable consent theory,[131] which contemplates consent for sexual intercourse on the part of wife from which she cannot retreat has no place in the scheme of things in the modern times. Undoubtedly there is implied consent for sexual intercourse on the part of the wife. But it cannot be stretched to illogical limits to infer consent for sexual intercourse under all circumstances at the cost of her physical and mental health. A husband cannot demand sexual pleasure from his wife wherever and whenever he wishes to have it. In the meantime it should be noted that the wife should not refuse to have sexual intercourse with her husband unless there are justifying circumstances for the same. It is suggested that if a wife refuses sexual intercourse for demands or negotiation she deserves to be raped. Hence it is submitted that the premise of implied consent as a justification for a claim of marital rape exemption should be read subject to the above riders.

**e. Destruction of Marriage:** It is said that waiver of marital rape exemption destroys marriage. This proposition is far from true. The marriage is already broke for the wife beyond reconciliation. Any whiff of reconciliation would certainly detain the wife from knocking the doors of the court for indictment of her husband for raping her. She is clear as to the consequences of lodging a complaint against her husband and the options in front of her. Destruction of marriage as a premise for non-criminalization of marital rape cannot be accepted for the reasons discussed above. Criminalization from a positive perspective can be viewed as a device to strengthen the marital bond by making the husband to respect the human rights of his wife. It should be kept in mind that criminalization will frighten only a few cruel husbands, but not all husbands who are true human beings having genuine concerns for their wives.

The above discussion reveals that arguments for criminalization outweigh the arguments against it. Once condoned by the society or failed to draw legal attention, marital rape now is increasingly criminalized due to condemnation under international conventions and the feminine struggle for their sexual rights. In many jurisdictions it is criminalized. Yet in many the marital rape exemption continues. The following discussion throws a flood light on the legal position in a few jurisdictions.

131 *See supra* n.40

**Criminalization of Marital Rape – Legal Position in a Few Foreign Jurisdictions**

**United States of America**: The process of criminalization which began in 1970 culminated in 1993 witnessing marital rape being criminalized in all 50 states making its way to at least one section of a code contemplating sexual offences or by way of abolishing marital rape exemption or courts declaring it as unconstitutional or declaring it as a distinct offence.[132] However it should be noted that only in a few states marital rape exemption has been abolished in its entirety.[133] In other states it is still being perpetuated in one form or the other. As such when wife is most vulnerable as a result of physical or mental impairment or unconscious or asleep or unable to give consent the husband is exempted from rape prosecution.[134] In some states the condition precedent for prosecution is excessive violence or use of force or threat of force.[135] It is said that in those states a wife can still be raped when she is unconscious, asleep or intentionally drugged by the husband to facilitate sexual intercourse with her.[136] In most of the states resistance requirements are still insisted.[137] Where rape is proved it invites lesser punishment. It follows that though marital rape is criminalized, it is not considered as a serious offence at par with stranger rape as the age old conviction of it being oxymoron.

**United Kingdom:** UK is not an exception for belated criminalization which can be attributed inter –alia to common law impediments. There are clear cases[138] where the accused could defend themselves under the defense of marital rape exemption prior to the decision in *R* v. *R*.[139] which necessitated amendment to the Criminal Justice and Public Order Act, 1994 resulting in criminalization of marital rape. In *R* v. *R*,[140] the wife left her husband's house along with her son to her mother's house due to matrimonial difficulties. When she was there her husband forced his way and attempted to rape her in the process of which he assaulted her. Lower court convicted him. On appeal his conviction was upheld. His contention that his intercourse with his wife was necessarily lawful being outside the ambit of the statutory definition of rape did not cut ice with the court. It was held that the husband could be prosecuted for raping his wife. It was observed that if Justice Hale meant in spite of her ill-health and genuine objections the wife could not retreat from her consent for sexual intercourse that could not be accepted. The court without mincing words condemned the common law fiction of marital rape exemption as anachronistic and offensive that it could be no longer applied to the contemporary society. It

132 *See Supra* n.36
133 *Ibid.*
134 *Ibid.*
135 *See supra* n.56
136 *Ibid.*
137 *Ibid.*
138 *R* v. *Miller,* (1954) 2 Q.B.282; *R* v. *Kowalski,*(1988)86 Crim.App.R.339; *R.* v. *Sharples,* (1990) Cri. L.R. 198
139 (1991) 4 All ER 481(HL)
140 *Ibid.*

has been observed that for all practical purposes husband and wife are equal partners and in modern times the marital rape exemption has no place in the law of England. In this regard Lord Keith observed,[141]

> "It may be taken that the proposition was generally regarded as an accurate statement of the common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable."

The position taken in *R* v. *R*[142] was upheld in *SW* v. *UK,*[143] and *CR* v. *UK*,[144] by the European Court of Human Rights. The applicants in these cases were convicted for rape and attempted rape of their wives. They appealed to the European Court of Human Rights contending that their conviction was unlawful as it was the result of a retrospective application of the law in violation of Art.7 of the *European Convention on Human Rights*. They further contended that at the time of rape the common law marital rape exemption was in force that their conviction was *ex-post facto*. Their contention was rejected. It was held that examined in the backdrop of evolution of social norms the criminalization of marital rape had become a reasonably foreseeable development of the criminal law. It has been observed that Art.7 does not prohibit the gradual judicial evolution of the interpretation of an offense. However it should be noted that the result must be compatible with the essence of the offense which could be reasonably foreseen.

**Australia:** The abolition of marital rape exemption occurred in all states and territories by way of statutory and case law in between late 1970s and 1990.[145] Initially in Australia the basis of the offence of rape was found in the English common law offense of rape generally meaning carnal knowledge external to

141 *Ibid*
142 *See supra* n.140
143 (1996)21 EHRR 363
144 (1995) ECHR 52
145 *See supra* n.63

marriage of a female against her will and consent.[146] Some states adhered to the common law concept of rape and some to the statutory definition but however subject to marital rape exemptions.[147] Subsequently marital rape has been criminalized but marital rape exemption was not done away with absolutely. The *Criminal Law Consolidation (Amendment) Act,* 1976 contemplates that a person shall not be presumed to have consented for sexual intercourse with the person with whom his marriage is solemnized.[148] It follows that a husband by virtue of the marriage cannot presume implied consent on the part of the wife for sexual intercourse and *vice versa*. Every instance of sexual intercourse requires the consent of his wife and same is applicable to wife also. The rape law accordingly has become gender neutral. Initially marital rape was not equated with non- marital rape as in the former case law required violence or some aggravating circumstances to turn marital sexual intercourse into marital rape. Eventually all the fetters were removed to do away with marital rape exemption absolutely without any exception whatsoever. In *R* v. *L,*[149] the High Court of Australia held that common law exemption of marital rape had never been a part of Australian law and a legal space could not be conferred to it.

**Austria:** Marital rape was criminalized in 1989.[150] It became a state offence in 2004.[151] It means that the state can set in motion the machinery of criminal justice by taking cognizance of marital rape in the absence of any complaint from the victim wife the procedure of prosecution remaining one which is observed in stranger rape. So the spousal complaint was dispensed with.

**Spain:** The Supreme Court confirming the conviction of the accused for marital rape ruled that sexuality within the marriage must be consensual and interpreted in the light of one's freedom to make decisions with respect to sexual activity.[152] It is needless to say that consensual sexuality within marriage strengthens the spousal bonding culminating in a permanent marital relationship.

**Namibia:** Marriage or any other relationship shall not constitute a defense to a charge of rape.[153] In effect marital rape exemption has been abolished. Hence it fallows that non-consensual sexual intercourse cannot be committed under the shelter of marriage or cohabitation or live- in-relationship or any other intimate relationship.

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146 *Ibid.*

147 The definition of rape in Queensland, for instance, was: "Any person who has carnal knowledge of a woman or girl, not his wife, without her consent, or with her consent, if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape." *Ibid.*

148 *See* sec.12 of the Act. Sec.73 of the *Principal Act* has been repealed and amended to that effect

149 (1991) 174 CLR 379

150 *See supra* n.63

151 *Ibid.*

152 Judgement of 24th April 1992, Actual Jund Aranzadi 54:1,7th May 1992.PMID 12293730

153 See sec.2(3) of the *Combating of Rape Act,* 2000

**Bhutan:** Marital rape is criminalized which is obvious from the words of the *Law Code* which lays down that a defendant shall be guilty of marital rape, if the defendant has sexual intercourse with one's own spouse without consent or against the will of the other spouse.[154] It is obvious from these words that the offence of marital rape has been made gender neutral. The offence of marital rape is considered as a petty demeanor.[155]

**Belgium:** Marital rape was criminalized as early as in 1979.[156] The Brussels Court of Appeal recognizing marital rape has ruled that a husband who has intercourse with his wife by taking recourse to serious violence without her consent and against her wishes commits the offense of rape.[157] The reasoning of the court was that even though the husband had right to sex with his wife, he was not allowed to exercise it through violence as Belgian laws prohibited people from exercising their rights by coercive methods.[158] In the beginning marital rape was not treated at par with other forms of rape.[159] Subsequently by amending the laws the definition of rape was widened to consider marital rape as serious as other forms of rape.[160]

**Italy:** The law on rape styled as violen zacarnale (carnal violence) did not contemplate any statutory exemption in favour of marital rape but it was an accepted proposition elsewhere that it could not be extended to marriage.[161] Even though Italy has a reputation of being a male dominated traditional society quite early forced sexual intercourse in marriages was brought under the umbrella of carnal violence.[162] The Supreme Court as early as in 1976 has ruled that a spouse commits the offence of carnal violence if the other spouse is compelled to carnal knowledge by way of violence or threat.[163] It follows that spousal rape is made gender neutral.

**France:** Ina case a man subjecting his wife to torture raped her and the Court of Cassation authorized prosecution of spouse for rape or sexual assault.[164] Subsequently the Court has convicted a man for committing rape on his wife holding that the presumption of spousal consent to sexual acts within marriage holds good in the absence of any contrary evidence.[165] There after marital rape was criminalized statutorily.[166] Continuing the sequence another law was passed to consider rape by a partner whether it is in unmarried relationships,

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154 *See* sec.199 of *Penal Code of Bhutan,* 2004
155 *Id* at sec.200
156 *Ibid.*
157 *Ibid.*
158 *Ibid.*
159 *Ibid.*
160 *Ibid.*
161 *Ibid.*
162 *Ibid.*
163 *Ibid.*
164 *Ibid.*
165 *Ibid.*
166 *Ibid.*

marriages or civil unions or an aggravating circumstance rape prosecution case.[167]

**Germany:** There was a belated criminalization of spousal rape which was eventually carried out only in 1997 as result of strong lobbying from female ministers and women's rights activists.[168] The definition of rape before outlawing of spousal rape read "whoever compels a woman to have extramarital intercourse with him, or with a third person, by force or the threat of present danger to life or limb, shall be punished by not less than two years' imprisonment."[169] The inference is that marital rape was exempted. Before a husband could be prosecuted only for 'causing bodily harm', insult and using threats or forcing wife to do, suffer or omit an act which contemplated diminished criminal responsibility.[170] It is evident that a husband could rape his wife without violence and use of threat. Even where it was so husbands were rarely prosecuted.[171] So the law had taken a very lenient view of marital rape prior to its criminalization. But with its criminalization rape law was radically changed making it gender neutral and abolishing marital rape exemption.[172]

**Thailand:** Marital rape was outlawed in 2007. Rape was made a gender neutral offence. The reforms were put on track in spite of pungent controversy and criticism.[173] It has been vehemently criticized by a legal scholar to the effect that a husband alleging a rape charge against his wife is abnormal logic and the wives are neither willing to divorce nor to witness their husbands languishing in jail as they are dependent on their husbands.[174]

**Finland:** It is interesting to note that a country like Finland where women enjoy very advanced public rights and many privileges in the public sphere compared to other advanced European countries outlawed spousal rape only in 1994, after a fierce debate which spanned for decades.[175] As a result of the position of women regarding their advanced public rights and privileges in public sphere domestic violence against women has become a hot topic for discussion and debate in the international circles culminating in teething criticisms. A study has revealed that victim blaming attitude is much more in Finland that the provocative behavior of women is pinpointed as the primary cause of violence against women. This assertion is significantly less likely to go down well with the most patriarchal of European countries like Spain, Ireland or Ireland.

**New Zealand**: The marital rape exemption was abolished in 1985. One can be convicted for sexual violence committed on another person notwithstanding

167 *Ibid.*
168 *Ibid.*
169 *Ibid.*
170 *Ibid.*
171 *Ibid.*
172 *Ibid.*
173 *Ibid.*
174 *Ibid.*
175 Ibid

the fact that they are married when it occurred.[176] Further, the fact of marriage or a continuing relationship is not a measure of criminal liability warranting reduction in sentence.[177] In effect the dichotomy between sexual violence within and beyond marriage got erased.

The above discussion reveals that the process of criminalization of marital rape has begun in the late 1970s, yet there are countries where it has occurred at an early stage. For example in the Soviet Union in 1922/1960, Poland 1932,Czechoslovakia1950, and some other members of the Communist Bloc followed the suite to confer an early legislative space to spousal rape.[178] Nearly in two third of the countries spousal rape has been outlawed. But the countries in the commonwealth Caribbean Region, Singapore, India, Bangladesh, Lanka, Burma which inherited the Penal Code around 1860 have explicitly exempted the spouses from marital rape prosecution and in Ethiopia, South Sudan, the rape law contemplates that sexual intercourse by a man with his own wife is not rape.[179]

**Criminalization of Marital Rape- The Indian Position**

Under Indian Penal Code: Marital rape is not yet criminalized in India except where a husband has sexual intercourse with his wife who is below 15 years of age.[180] It is immaterial whether such intercourse is with or without consent of the wife. A husband who rapes his wife who is judicially separated under a decree or who lives separately under any custom or usage invites criminal liability. Once if the couples are separated by a decree of divorce, any rape thereafter amounts to rape outside the marriage as good as stranger rape. The marital relation what they shared earlier before obtaining a decree of divorce is not a license to have sexual intercourse with the former wife without her consent and against her will.

A husband or any relative of husband invites criminal liability for subjecting a married woman to cruelty which signifies any willful conduct which makes a woman to commit suicide or causing grave injury or danger to life, limb or health whether it be physical or mental.[181] Cruelty encompasses harassment of a married woman with an unlawful demand for any property or valuable security or forcing her to bring more property or money. It is doubtful whether marital rape falls within the ambit of this provision. The crucial question is whether non-consensual sexual intercourse drives a woman to commit suicide unless there is a justifying circumstance like husband suffering from HIV or any dreadful contagious disease or any pressing reason. If it so drives her to end her life, it is an exceptional situation. Hence the bygone conclusion is that a victim of marital rape can expect the least from this

176 *See* sec. 128(4) of *Crimes Act,*1961
177 *Ibid*
178 *See* supra n.63
179 *Ibid*
180 *See* sec. 375 of the Indian Penal Code, 1860.
181 Id at sec.498A

provision as marital rape squarely fits into this provision. Marital rape may result in cruelty. But the fundamental object of the above provision is to control harassment for dowry.

**Marital Rape as Part of Domestic Violence:** The *Protection of Woman from Domestic Violence Act*, 2005 contemplates remedy of a civil nature to a woman subjected to domestic violence by someone with whom she shares a domestic relationship.[182] Domestic violence inter alia includes sexual abuse which signifies a conduct of sexual nature that abuses, humiliates or otherwise violates the dignity of a woman.[183] Undoubtedly marital rape is an instance of sexual abuse of the wife by her husband which by all means lowers her dignity. But it cannot be said categorically that the legislature while enacting the above said Act had adverted its mind to the expression sexual abuse to signify marital rape. Even if it is so she can claim certain remedies under the Act by way of protection orders or compensatory relief. On the contrary the primary object of criminalization of any act is deterrence which is lacking in the above Act.

**Law Commission** – 42nd Report: The Law Commission in its 42nd Report recommended for bringing sexual intercourse with a minor wife within the ambit of the definition of rape.[184] It has fallen into deaf ears. The recommendation could not cut ice with the Joint committee which refuted the idea of prosecuting a husband for raping his wife whatever might be her age. It opined that sex was a part of marriage package. There is an element of truth in this contention. But it does not mean sex however, whenever and wherever at the sweet will of a husband.

**Law Commission- 172nd Report& J .S. Varma Committee Recommendation:** The Law Commission in its 172nd report submitted in 2000 though made certain recommendations regarding criminal law amendment, was silent on criminalization of marital rape.[185] But J. S. Varma Committee in 2013 recommended for the deletion of exception to section 375 of *Indian Penal Code* to outlaw spousal rape.[186] The Department-related Parliamentary Standing Committee on Home Affairs presenting its 167th Report on the *Criminal Amendment Bill*, 2012 in the light of the 172nd Report on Review of Rape Laws given by the Law Commission of India and the Report of Justice J.S. Varma committee it observed,[187] "if a woman is aggrieved by the acts of harassment, there are other means of approaching the court. In India, for ages the family system has evolved and it is moving forward."

The idea of criminalization of marital rape did not cut ice with the standing

182 *See* the statement of object of the *Protection of Woman from Domestic Violence Act,* 2005 and *id* at secs.17-23.
183 *Id* at sec. 3(ii)
184 lawcommissionofindia.nic.in\1-50\report 42.pdf.visited on 18th Jan.2017
185 www.lawcommissionofindia.nic.in\rapelaws.htm,visited on 18th Jan.2017
186 www.prsiindia.org\parliamenttrack\report-summaries\Justice Verma committee Report summaries, visited on 18th Jan.2017
187 www.prsindia.org/uploads/.../Criminal%20Law/SCR%20Criminal%20Law%20Bill.pdf

committee which felt that if marital rape were to be criminalized it would destroy the institution of marriage and the entire family system would be under great stress. It is submitted that it would not destroy the institution of marriage if proper care is taken to avoid the misuse of law by unscrupulous wives to expose the innocent husbands to hardship. Rather it would strengthen the marital bond as the wife is ensured that her husband respects her as an individual. There are no legal provisions to check marital rape. Family system has to go on and it will. But the spot of bother is how it should go on tested on the anvil of the parameters of a civilized society. If so tested the obvious answer is criminalization of marital rape is the need of the hour.

**Pam Rajput Committee Report:** The Pam Rajput Committee submitting its report to the Women & Child Development Ministry as a part of women's empowerment has recommended for the criminalization of marital rape irrespective of the age of the wife and the relationship between the offender and the victim.[188] Personally the minister for WCD Ms.Maneka Gandhi is in favour of criminalization of marital rape. To quote her,[189] "My opinion is that violence against women shouldn't be limited to violence by strangers. Very often a marital rape is not always about a man's need for sex; it is about his need for power and subjugation."

Undoubtedly violence against women should not be confined to violence perpetrated against her by strangers. If husband is responsible for that he needs to be indicted for such unlawful behavior. The observation that marital rape is the outcome of man's need for power and subjugation can be accepted to the extent to which patriarchy can be cited as one of the causes for marital rape and it is not the cause for marital rape as there are other causes also. It needs to be examined inter- alia from the prism of sexual instinct.

Later she has made a departure from her personal stance. Answering a question in Rajya Sabha,she said,[190] "it is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors like level of education/illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament etc."

The above volte face invited the wrath of women's rights activists. It should be noted that the above factors cannot be justifications for a husband to rape his wife when she has justifying circumstances to deny sexual pleasure to her husband.

**Constitutional Space:** The preamble of the Constitution contemplates inter-alia liberty and equality. Liberty implies absence of restraints.[191] She should be

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188 http://wcd.nic.in/sites/default/files/Vol%20I.compressed.pdf

189 https://thewirein/24649/ activists angered by Maneka Gandhi's altered stance in marital rape

190 Ibid

191 V. D. Mahajan, *"Jurisprudence & Legal Theory,"* Eastern Book Company, Lucknow, 5th Ed., p.259(2014)

allowed to exercise her right to marital intercourse without any unjustified interference on the part of her husband. On the other hand a wife should also respect the justified liberty of her husband. The spousal liberties must be examined from the prism of the institution of marriage and its objective. The right to life contemplated under the constitution signifies quality of life and not an animal existence.[192] Right to privacy, dignity, marital & sexual rights are concomitants of right to life for which the wife is also entitled that the marital rape exemption must be examined in the light of these rights especially with special reference to equality.[193] The Constitution of India contemplates equality and equal protection to all.[194] Inter-alia there shall not be any discrimination on the basis of sex.[195] The state is empowered to make special laws to promote the welfare of women and children.[196] It is obvious from the current legal position that the wife cannot question any non-consensual sexual intercourse by her husband against her will except where her age is below 15 years. She is denied protection of law even in situations where there is a valid legal justification for her refusal to have sexual intercourse. It is a blatant violation of fundamental right to equality and equal protection contemplated under the constitution. There is a fundamental duty to strive for excellence in all spheres of activities whether it is collective or individual so that the nation is perched on higher levels of achievements.[197] It follows that women cannot be discriminated and their lawful rights cannot be put into oblivion in nation building. There is a fundamental duty to abandon practices which are derogatory to the dignity of women.[198] Needless to say that non-consensual sexual intercourse with a wife when she is not in a position to participate in sexual intercourse due to some genuine reason is certainly something which is derogatory to her dignity.

## Conclusion

The above discussion suggests that it took centuries together for emancipation of marital rape from its oxymoron mist. Thanks to the feminist movement and long fought bitter struggle that recognition of rape within marriage no more remained a surprise culminating in its criminalization in many of the jurisdictions. However even though the criminalization of spousal rape has silenced the voice of the protagonists the aftermath has unfolded the truth that the law is either not properly formulated or where it is so, not implemented in its letter and spirit as still the historical causes responsible for perpetuation of marital rape exemption invisibly pulling the string in the opposite direction. This precarious position can be discerned from the critical analysis of criminalization of marital rape in other jurisdictions going to be discussed below.

192 *See supra* n.117 and 121
193 Right to life signifies a qualitative and dignified life.
194 *See* Art.14 of the Constitution of India.
195 *Id* at Art. 15
196 *Id* at Art. 15(3)
197 *Id* at Art.51A(j)
198 *Id* at Art.51A (e)

The patriarchal theory which gave currency to the principles of coverture, unity of souls and intractable consent doctrine thwarted all feminist struggles to recognize rape within marriage. All such efforts were looked at with great deal of cynicism and skepticism by the male dominated chauvinistic society. The principle of coverture which advocates the idea of placing a woman under the protective cover of male gave currency to the idea of male superiority culminating in subjugation and subordination of females. The above principle lacks a sound conceptual substratum. It can be justified to a certain extent only on the premise of biological differences between male and female where the latter may require the protection of the former to heave a sigh of relief from the onslaughts of this external world on many counts. This justification however is not palatable to the modern feminine world which at this juncture is not a spot of bother. But the naked truth is that the idea of female insubordination got distorted to such an extent that females came to be recognized as properties of men that they could use them as they want. Generally they are looked as objects of sexual pleasure. The general tendency being so, the same notion when transmitted into the matrix of marriage naturally paves the way for a perverted thinking that be all and end all of the very existence of wife is the sexual pleasure of her husband. Sexual pleasure is one component of marital life. It does not mean she should be there at the beck and call of her husband for his sexual gratification at all times under all circumstances at a very high price placing her health physical and mental at the altar of unjustified sexual wish of her husband. Another doctrine which perpetuated the marital rape exemption is unity of souls signifying the merger of personality of wife with that of her husband leading to the conclusion that there is nothing like rape within marriage and any such stance would give rise to a grotesque idea of one raping himself. The unity of souls argument cannot be accepted as a justification for opposing criminalization of marriage. Legally every individual has an independent existence and is a unit of society which the civil law takes into cognizance. A wife is entitled for certain legal and human rights. She cannot be sexually exploited against her will and wish unless the blame cannot be shifted to her unjustified conduct which has goaded the husband to prevail over her against her wish to have his lust satisfied. Hence it is submitted that the unity of souls theory which is grounded on religious philosophy cannot be stretched to its illogical limits to deny the wife her right to control marital intercourse. Intractable consent theory is also a legacy of patriarchal society. Marriage though can be accepted as giving rise to an implied consent for sexual intercourse it cannot be interpreted as irrevocable consent compelling the wife to submit herself to the unjustified sexual desire of her husband. Consent for perverted sexual acts, sex anywhere, anyhow, somehow or anytime cannot be presumed.

The whole concept of criminalization of marital rape needs to be examined through the prism of marriage. Marriage irrespective of its religious overtones worldwide is recognized as social institution a valid means to perpetuate the

institution of family, community and society. It is the result of an equal partnership between the husband and wife. The success of marriage rests on mutual cooperation and reciprocity of respect for mutual rights. Exclusive dominance of any one spouse has no place here. If so it will annihilate the marital tie. A primary object of marriage is legalization of sexual intercourse. It goes without saying that for sexual gratification each spouse has to look for the other which without any justification cannot be denied. No doubt the wife must have her share of the right to marital intercourse. If there are justifying circumstances a wife should be entitled to refuse to have sexual intercourse with her husband. As such if the husband is suffering from venereal disease, HIV positive or any other dreadful contagious disease or any health problem which makes him unfit for sexual intercourse or husband is in intoxication, the wife can refuse to have sexual intercourse. Still the husband has sexual intercourse against her will and consent it should be recognized as rape with in marriage. The forced sex in those situations will expose the wife to the peril of contracting dreadful diseases or a wife may not like the proximity of an intoxicated husband or conception as a result of intercourse with intoxicated husband will have an impact on the health of the child to be born. The other justification for the wife is her own state of mental and physical health which precludes sexual intercourse or pregnancy which does not permit intercourse or wife herself suffering from contagious diseases are other justifications to refuse sexual intercourse. In those situations if the husband forcibly has sexual intercourse with the wife an instance of rape is certainly made out. The balance in marital life as discussed above can be maintained only when each one enacts his or her role in tune with the corresponding expectation of the other. Therefore in the circumstances contemplated above the wife expects sexual seclusion from her husband. A husband who respects human values will abstain from forced sex. Otherwise the result is rape of one's own wife. Law's task is cut out here to balance the interests of both the spouses on the anvil of the institution of marriage. A wife should respect the genuine interests of her husband and reciprocity demands the same from the husband. If she refuses to have sexual intercourse with her husband as a part of negotiation or for demands without any valid justification as discussed above where a husband is expected to show a great amount of self- denial and self –control. Such a wife deserves to be raped. The frequency of intercourse, time and place whether to have children or not, the gap between two child deliveries are not matters which can be regulated by law. They are all matters which are to be decided by the spouses themselves with mutual consultation and consent. Law can intervene to safeguard the genuine interests of the spouses where a husband has sexual intercourse with the wife against her will and consent where there are genuine reasons for the latter to refuse sexual pleasure to the former to punish it or when there is no justification for the wife to refuse sexual pleasure to the husband and the latter has sexual intercourse with the former against her will and consent to exempt him from punishment.

There are arguments for and against the criminalization of marital rape. The arguments for outweigh the arguments against it. A premise for criminalization can be culled out from *United Nations Universal Declaration of Human Rights, International Covenant on Civil and Political Rights* and *Convention on Discrimination against Women* which provide a conceptual basis for criminalization of marital rape from the perspective of human rights. A woman essentially is human but incidentally a woman. She must have a genuine voice over her sexual rights. If genuine it must be heard without compromising the genuine sexual rights of her husband. Examined from the prism of equality total exemption of marital rape is out of place. It violates the equality provision of the constitution. A rape which occurs outside the marriage is actionable but within the marriage is not. In effect rape law is discriminatory of a married woman. A rape is rape whether it occurs within marriage or outside marriage.

Spousal rape is no less serious than stranger rape that there is no justifiable reason to exempt marital rape. It results in grave impact on the physical and mental health of the wife. It is nothing less than the impact of stranger rape on the victim. Sometimes a wife may consider it more agonizing than stranger rape as it is committed by the most trusted one who is under a legal as well as moral obligation to protect his spouse. She has to live with the perpetrator forever unlike the stranger rape where the nostalgia of the agony haunts perennially. It does not mean that the nostalgic agony of being a victim of stranger rape disappears. But in case of marital rape the agonizing experience keeps renewing every moment by reason of cohabitation unless the wife takes it in a lighter vein. But all wives need not take it in a lighter vein.

The opinion whether marital rape should be considered as a part of domestic violence or not is divided. According to a few scholars it is suffice if it is considered as part of domestic violence. The other opinion is in favour of considering it as a distinct offence. Domestic violence is a generic term which inter alia includes sexual abuse of a female by male members at domestic level. It is hard to imagine that sexual abuse encompasses marital rape and legal control of domestic violence can be stretched to marital rape. Rape itself is a distinct offence. Marital rape myth is exploded as it is as serious as rape outside marriage which is obvious from its mental and physical impact on the victim wife. Therefore it is submitted that marital rape should be treated as an independent offence instead of bringing it under the rubric of domestic violence.

Marital rape in many of the foreign jurisdictions has been criminalized consequent upon either by virtue of judicial decision or amendment to the existing penal code. Though legal space is provided the provisions are not satisfactory. In some jurisdictions mere rape is not sufficient to initiate the legal proceedings unless it is accompanied by violence. In effect it has created a dichotomy of marital rape with and without violence the former being actionable and latter exempted. It strikes at the root of the very definition of rape. Violence is not the sine qua non of the concept of rape. On the other hand

without violence a husband can rape his wife with immunity when she is asleep or administering her any stupefying substance. Hence it is submitted that the insistence of violence as a condition for prosecution should be dispensed with. No wife will ever like to be involved in sexual intercourse while asleep or on administration of intoxicating substances by the husband for the purpose of having sexual intercourse with her. These are issues which require serious thought and should not chip in the criminalization of marital rape. Therefore there is a need to strictly adhere to the definition of rape. However it is laudable that the resistance proof is dispensed with. Marks of resistance, if there are any, will help to corroborate the allegation of rape. But absence of marks of resistance cannot negate the fact of rape as in many situations a woman is not in a position to offer resistance because of male aggression a fact which judiciary in many jurisdictions has taken cognizance of. The criminalization of marital rape though made an inroad into common law marital rape exemption the implementation of the law in this sphere manifests that substantially the common law marital exemption has been retained which is evident from the fact of contemplating lesser punishments and placing procedural hurdles for prosecution. Hence the legal regime pertaining to criminalization of marital rape has created a mixed feeling of satisfaction and dissatisfaction for the feminist critics. The feeling of satisfaction could be inferred from the fact of criminalization which itself is a result of bitter struggle for centuries and dissatisfaction for the reason of the marital rape myth still looming large in the eyes of the administrators of law to consider marital rape as a less serious offence reflected in prescription of lesser punishment and procedural hurdles in prosecution of marital rape offenders. Hence it is submitted that marital rape should not be considered as a less serious offence that discretionary power should be given to the courts to vary the punishment taking into consideration the gravity of situation and procedural shackles should be relaxed to apply the procedure adopted in case of other offences to comply with the requirement of equality provision of the constitution. In some foreign jurisdictions marital rape is made a state offence where the state itself taking cognizance of the offence to set in motion the wheels of administration of criminal justice without any recourse to the victim wife and substantially in many jurisdictions it is not a state offence leaving the option of prosecution to the victim wife. It is submitted that the option of prosecution should be given to the wife and state should not intervene in the interest of the wife willing to opt for non-prosecution to protect her marital life. Another focal point is whether marital rape should be made gender specific or gender neutral. In some jurisdictions it is made gender specific and in some gender neutral. Rape can be committed only by a man on a woman and not vice versa subject to exception of a rarest of rare circumstance. On the other hand sexual assault is a wider concept of which rape is a part. A woman can commit an act of sexual assault with an exception of rape on a man. Hence it is submitted that marital rape should not be made gender neutral.

The common law heritage of marital rape exemption is still perpetuated in India in spite of her obligation under the international conventions to which she is a signatory. Marital rape is criminalized only to a limited extent of having sexual intercourse with wife who is below the age of 15 years whether with consent or not. The constitutional space from which a premise for criminalization of marital rape can be culled out is put into oblivion. Pam Rajput Committee, J.S Varma & Law Commission report recommending criminalization of marital rape has fallen into deaf ears. The view of the government expressed by the minister for the welfare of women and children to the effect that a catena of factors like illiteracy and social customs were the factors which stood in the way of criminalization of marital rape invited the wrath of women's' rights activists all over the country. It should be noted marital rape has been criminalized even in many developing countries and underdeveloped countries too. India's stance regarding criminalization of marital rape is not acceptable to the international community. Hence it is submitted that it is high time that the government to break the ice to take a step towards criminalization of marital rape after a public debate to find out the road ahead on the basis of the elicited public opinion. Implementation and actual working of the law will unearth the deficiencies that legislative efforts can be taken recourse to plug out the loopholes. Law is not a panacea for all maladies. The change must come from within. Public awareness must be created to educate men and women regarding the sanctity of marriage, mutual expectations of the spouses, respect for each other's bodily autonomy and conjugal rights. Especially women must be educated not to misuse the law to take revenge against the innocent husbands as instances of misuse of laws aiming at women's empowerment is not lacking. At times these laws are more misused than used, for example, the legal provision relating to dowry harassment. Hence care must be taken to see that sufficient precautions must be taken to avoid such misuse.

Marital rape should be criminalized. The refusal of wife to extend sexual pleasure to a husband only with an ulterior motive of negotiation or for fulfillment of any demand culminating in her rape by the latter should be an exception to the offence of marital rape as otherwise he has to knock the doors of a brothel or commit rape outside marriage or take recourse to extra marital sexual relation for the satisfaction of his sexual desire. Let it not happen in the name of criminalization of marital rape. Do not pave the way for substitution of stranger rape for marital rape or show the way to a brothel by a strict regime of criminalization of marital rape without any exception whatsoever. A wicked wife of the type explained above deserves to be raped without any mercy.

Love is the bedrock on which all human relationship evolves. Marital bond is not an exception to this. If one loves whom he marries, he can certainly live up to the expectations of his spouse that there will be no room for marital rape *via-a-vis* rape outside marriage. Every husband should know that a wife

essentially is human and her womanhood is accidental. Love should percolate the marital tie perennially to strengthen it to keep the couples happy going forever which certainly can prove that marital rape is oxymoron. At this juncture it is apt to quote Tom Mullen who says "Happy marriages begin when we marry the ones we love and they blossom when we love the ones we marry" Sexual rights are not the exclusive privileges of a husband. The wife also should have a say and should be able to raise her voice against any infraction .If a husband respects the sexual rights of a wife an occasion for voicing objection against infraction does not arise. But unfortunately it is not so. In effect lack of voice rendered women weak and vulnerable. It is more appropriate to quote here Melinda Gates, who opines, "A woman with a voice is by definition is a strong woman. But the search to find that voice can be remarkably difficult." Law is not a panacea for all maladies of the society. The change must come from within. If it does not happen law needs to intervene to find that voice to make the women stronger. Criminalization of marital rape would certainly make the wives stronger. However in the process of making themselves stronger they should not misuse the law to torture innocent husbands. Such misuse must be dealt with iron fist that the pendulum does not unjustifiably swings in favour of wives to provide a safety valve to safeguard the interests of innocent husbands.

To conclude any legislative effort to criminalize marital rape if made in the light of the suggestions and experience of foreign jurisdictions as discussed above will go a long way in laying down a vibrant and sensitive legal regime pertaining to marital rape.

# A Rights Based Approach To Incorporation

Sharath Mathew and Prashanth Shukla *

## Introduction

The aim of this article is to re-conceptualise the debate over relationship between national law and international law, which has been divided between dualism on one hand, and monism, on the other. We argues that scholars should start seeing the incorporation doctrine through a model different from the conventional ones of monism or dualism.It is admitted that the constructs of monism and dualism may have been adequate at one point in time to see how legal systems function. However, countries all over the world have evolved from this position. Mostly, these have been through judicial intervention. The result of this change is that the legal systems in these countries cannot be fit into either a monist or a dualist framework.

Once the inadequacy of monism or dualism as the applicable incorporation doctrine is shown, the corollary is to identify what is the applicable doctrine that exists. For this, the essay looks at how international law is applied to municipal spheres in different doctrines to identify common traits in the application. The traits so identified will be the constructing parameters of the model that this paper advocates as the correct incorporation doctrine.

The paper firsts looks at the existing literature on monism and dualism. The major objective of this section is to identify the scope and extent of the terms monism and dualism. Since the model that is proposed is a hybrid of monism and dualism, the contour of these doctrines will give the shape of our doctrine also. The literature review section also looks at certain theories within the incorporation doctrine like the principle of *harmonization*, and *specific adoption* and shows how these constructs are different from the hybrid model we propose.

The next sections look at the how incorporation is done in actual governments in the world. For this purpose, the essay considers the nations of India, United Kingdoms and United State of America as case studies.Thereafter, the common results drawn from these nationsdiscussed is used to formulate the parameters of the 'Rights based Doctrine' that this essay proposes.

## Understanding Monism and Dualism

For considering the applicability and validity of a hybrid model of incorporation, first the scope of the terms, 'monism' and 'dualism' has to be clarified. This is important if the essay is to have any form of meaning in contemporary International Law. Neither a very wide, nor a very narrow definition of scope is desirable in this context.

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If the terms are defined too wide in the sense that they refer to the tendency of the incorporation model, then the construction of any hybrid model will be pointless as in that paradigm, any model would only be seen as either tending towards a monist framework, or a dualist framework. Therefore, monism and dualism should be seen as incorporation theories with certain rules that define them. A hybrid model would be one which does not confirm to either of these rules.

A narrow conception of dualism or monism makes the analysis in this essay equally redundant. In this paradigm, all the rules for both the theories will be strictly defined. Obviously, the application of these rules in the real world will entail variations from the strict paradigm. Visualizing such obvious variations as a separate hybrid model is an intellectually redundant exercise. Consequently, only those rules of the model should be defined which are central to the theories so as to make them the definitional aspects of these theories.

Monism has been defined by many scholars in different terms. Lauterpaht necessarily imputes a system of hierarchy in conceiving monism. He regards monism as the superiority of international law over domestic laws so that they subsume them.[1] Other scholars like Kelsen reject the imputation of superiority and regard the defining feature of monism the existence of a common theoretical *grund norm* for both international law and municipal law.[2] Natural law scholars argue that monism should be seen as international law and municipal law deriving from the same natural law principles.[3]

Monism sees international and municipal law as a unified and single system.[4] In this regard, monism views the authority and validity form common source. Theoretically speaking this source can be either municipal law or international law or to some extent international law in conjugation with international law. In the event of any conflict contemporary monist argue that priority should be given to international law. Therefore, international law can invalidate municipal law. However, both conform to same legal normative framework. This supremacy of international law requires that domestic courts should apply international law regardless of whether it has been formally adopted in the municipal law. The hierarchical supremacy of international law ensures that the mechanisms of 'transformation' and 'incorporation' lose much of their import because domestic courts are required to applyauthoritative law regardless of whether it has been formally adopted at the municipal level,

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1 HerschLauterpacht, *International Law and Human Rights* (1950).

2 Hans Kelsen, *General Theory of Law and the State* (1945), p. 363-80; Hans Kelsen, *Principles of International Law* (1952), pp.401-47.

3 Joseph Gabriel Starke, *Law, State, and International Legal Order: Essays in Honor of Hans Kelsen* (1964), pp.308-16; Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), p.58.

4 Thomas Finegan, Neither Dualism nor Monism: Holism and the Relationship between Municipal and International Human Rights Law, *2 Transnat'l Legal Theory* 477 (2011).

which is seen as one sphere of international law. Therefore, monism does not take into account notion of sovereignty.

The base factor that we distil from the writings of all these scholars is that generally norms of international law applicable to the state will be rules of the municipal field as well in a monist state. In this sense, the municipal law and international law is a single system. This is the definitional conception for monism that we take in this essay for clarity. Notice that the use of the term 'generally' is to expand the scope of the definition. The incorporation system should be in the nature of having a single system. If there are few exceptions which are not diverse enough to divest this nature, such exceptions can be incorporated within the monist framework.

Triepel, and Strupp hold the exact reverse opinion in comparison to Lauterpacht. These scholars regard the premise of dualism to be the state's internal sovereignty and its superiority.[5] Consequently, they regard that international obligations can have no impact on the municipal law of a state. However, the validity of the claim that state law is superior to international law need not be considered in this essay. Even without this claim, the meaning of dualism can still be captures as a system wherein municipal law and international law exists as two separate doctrines. John Austin argued that as international law cannot be enforced by sovereign coercion, it amounted to 'positive international morality'.[6] Therefore, for dualist authors for a treaty to be enforceable – it has to be legislated by the Parliament.

Before concluding this section, attention is drawn towards two theories made by scholars which are closely related with incorporation. The reason these theories are mentioned in the essay is because they have a tendency of being mis characterized as hybrid models of incorporation of the kind this essay seeks to address. These are the *harmonization* theory, and the *specific adoption theory.*

Harmonization does not refer to a form of incorporation. It is merely a response to the dichotomy in superiority of international law and state law advanced by scholars like Lauterpacht,[7] and Anzilotti[8]. Proponents of the harmonization doctrine like Sir Gerald Fitzmauriceargue that there is no question of superiority between state law and international law. They are each supreme in their respective fields.[9]According to Fitzmaurice:

A radical view of the whole subject may be propounded to the effect that the entire monist- dualist controversy is unreal, artificial and strictly beside the point, because it assumes something that has to exist for there to be any

5 Heinrich Triepel, Volkerrecht und Landersrecht (1899); Karl Strupp, *General Rules of the Law of Peace,* (Collected Courses of the Hague Academy of International Law, Vol. 47, 1934).

6 John Austin, *The Province of Jurisprudence* Determined 112 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995)

7 HerschLauterpacht, *International Law and Human Rights* (1950).

8 DionisioAnzilotti, *Corso di Diritto Internazionale* (1928), p.43.

9 Daniel Patrick O'Connell, *International Law* (1970), pp. 50-54.

controversy at all-and which in fact does not exist-namely a coinmon field in which the two legal orders tinder discussion both simultaneously have their spheres of activity.[10]

Since Fitzmaurice talks about 'respective fields', it is evident he is implicitly following a dualist model. The harmonization theory is thus just one feature under a dualist model.

Specific adoption theory simply states that in some countries, international law becomes a part of municipal law when some municipal institution, usually the legislature, does a specific act. This is also referred to as the transformation doctrine by certain scholars.[11] While this seems to suggest a hybrid model falling between monism and dualism, this is actually just showing the basic method by which dualism operates. Legislatures in dualist frameworks that intent to apply international law specifically adopt the same. This process does not have any monist elements in them.

**The Position in India**

The Constitution of India provides that the State shall endeavour to honour treaty obligations and respect international law.[12] On a plain reading of this provision in isolation, the parliament is forced to legislate on any international obligation that is entered into by India. Practically this would mean that international obligations of India are de-facto municipal law also. This suggests a strong monistic framework.

However, Article 51(c) which is the relevant Constitutional provision is given as a Directive Principle of State Policy ('DPSP'). DPSPs are not enforceable against the state. They are meant to be only guiding instruments for conducting governance.[13] Hence, this provision of law cannot be used to assert that the Constitutional setup in India provides for a monistic framework.

The absence of any hints at monism is a very strong, if not a decisive, factor to suggest that the initial constitutional setup in India visualized a dualist setup. This is because we see that the India Constitution has meticulously set down sources of law that govern the people. There are specific provisions which state that the state legislatures,[14] the parliament,[15] and the Supreme Court[16] can formulate laws. Such an enumeration shows the intention of the Constitution makers to limit the source of laws to these institutions. As detailed above, international law is conspicuous by its absence in this list.

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10 Gerald Fitzmaurice, The General Principles of International Law Considered from the Standpoint of the Rule of Law (1957-11) 92 Recueil des Cours1, 71; David Feldman, Monism, Dualism and Constitutional Legitimacy, 20 Aust. YBIL 105 (1999)

11 Joseph Gabriel *Starke, Starke's International Law* (1994), p.66.

12 Article 51(c), Constitution of India.

13 *State of Madras* v *Champakam Dorairajan AIR* 1951 SC 226.

14 Article 246 (1), Constitution of India.

15 Article 246 (2), Constitution of India.

16 Article 141, 142, Constitution of India.

This initial position of strict dualism has however evolved with the passage of time. The watershed event in this direction was the decision of the Supreme Court of India in the case, *Vishakha* v. *State of Rajasthan*.[17] In this case, the apex court was considering Sexual Harassment of Women at Workplace. The court agreed that such sexual harassment was violative of a woman's numerous Fundamental Rights guaranteed under the Indian Constitution such as the right to freely practice any trade or occupation,[18] the Right against Discrimination on grounds of gender,[19] and the Right to Life and Liberty.[20]

However, there was no legislation passed by either the Parliament or any state legislature that could effectively tackle the issue of harassment at work place. Faced with this quagmire, the court turned to international law for a solution. Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') provided that all signatories to the treaty will take necessary measures to ensure equality of men and women at the workplace and also to ensure that the health, especially reproductive health of women are not hampered at the workplace.[21]

India ratified CEDAW on 25th June, 1993.[22] The Court looked at Article 51 (c), and also Entry 14 of the Union List[23] which gave parliament the power to pass laws to enforce international obligations. Then the court, arrived at a conclusion which cannot stand on a strict application of principles of statutory interpretation. The court held that taking into account the entire structure of the Constitution, *an international obligation undertaken by the state of India would be a part of the municipal law would be part of the municipal law as long as there is*

1) *There is no municipal law that applies to the subject matter of the relevant international obligation.*
2) *The impugned international obligation preserves the Fundamental Rights guaranteed under Part III of the Constitution.*

This is the position of incorporation that exists in India today as the *Vishkha* case, regardless of the criticisms that could be taken against it, has not been overruled. The incorporation model in India can no longer be termed dualist as in the limited circumstances laid above, international law is municipal law. The model is neither monist as outside this narrow scope, international law and municipal law exist as two separate entities. This is evidently a hybrid position of law of the nature which this essay analyses.

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17 *Vishakha* v *State of Rajasthan* (1997) 6 SCC 241.
18 Article 19(1)(g), Constitution of India.
19 Article 15, Constitution of India.
20 Article 21, Constitution of India.
21 Article 11, Convention on the Elimination of All Forms of Discrimination Against Women 1249 U.N.T.S. 13 (1979).
22 *Vishakha* v *State of Rajasthan* (1997) 6 SCC 241.
23 Schedule 7, Constitution of India.

## The Position in the United Kingdoms

With United Kingdoms, the analysis is much more difficult than with India as there is no written down Constitution for UK. This means that there is no starting point on which analysis can be built upon. If as an arbitrary point, we fix the 18th century as our starting point, then we see that customary international law was directly applicable in UK as common law then.[24] Treaties on the other hand would become part of municipal law only with specific parliamentary ratification.[25]This means that with respect to treaties, UK was purely dualistic and with respect to customary international law, they werepurely monistic initially.

We see a marked deviation from this predominantly monistic position in the application of customary international law from the case of *R* v. *Keyn*.[26] Here the court was considering whether it had jurisdiction to try a case of manslaughter in a vessel within 3 miles of the British Coast. Principles of customary international law undoubtedly granted jurisdiction to the British Courts. However, the judges deciding this case held that the general rule of monism cannot be applied in the case of vesting jurisdiction to courts as it is a matter which it considered so integral that it ought to be decided by the parliament. With the passage of time, the ambit of these exceptions spread. It was held that the offence of aggression defined in customary international law cannot apply to municipal law without parliamentary ratification.[27]

In the UK, the customary international law is considered to be direct source of law in municipal courts.[28] But law takes 'dualist' approach with respect to treaties including human rights treaties i. e. these treaties have no role to play until they have been legislated by the Parliament.[29] However, this is qualified by the fact that courts will use these treaties as aid to interpretation or deciding questions of municipal law but not as source of it.[30] Moreover, human rights can be directly enforceable in so far as they give rise to principle of EU law that ought to be given effect in cases before national courts.[31] However, this can change with UK is set to leave European Union.

The relatively recent case, R v. Jones[32] evolved the position further from this case and practically dealt a death blow to the monist framework of customary international law in England. In this case, the court held any kind of customary

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24 *Buvot* v *Barbuit* (1737) Cases t. Tallot 281; *Triquet* v *Bath* (1764) 3 Burr. 1478; See also *R* v *Jones* [2006] UKHL 16.

25 *Parlement Belge* (1879) 4 PD 129; *Maclain Watson* v. *Department of Trade and Industry* [1989] 3 All ER 523; *A (FC) and Others (FC)* v *Secretary of State for the Home Department.*

26 *R* v *Keyn* (1876) 2 Ex.D. 63.

27 *Knuller (Publishing, Printing and Promotions) Ltd* v *Director of Public Prosecutions* [1973] AC 435.

28 *Trendtex Trading Corporation* v Central Bank of Nigeria[ 1977] QB 529.

29 *R* v. *Secretary of State for the Home Department; Ex parte Brind*[1991 ] AC 696.

30 House of Lords official Report, 3 July 1996, vol 574, col 1466.

31 L Betten and N Grief, *EU Law and Human Rights* (1998) espch 4.

32 *R* v *Jones* [2006] UKHL 16.

international law that enforces criminal liability on UK citizens incapable of incorporation without specific adoption.

The dualist framework in the Treaty regime has also weakened equally. Any kind of treaty that relates to war, cessation of territory, or imposition of a charge on the public purse does not require any form of specific adoption to be applicable in the municipal sphere.[33] The position wherein specific parts of international law were applied separately but each strictly within the confines of monism and dualism, is capable of being viewed without the conception of any form of hybrid model. However, as international law is incorporated in Britain today, neither monistic nor dualistic principles can completely explain either treaty obligations or customary international law.

**Position in USA**

USA does not follow strict dualist incorporation approach, it has gone for hybrid form of incorporation. In this regard, some treaties are self-executing, while others are not self-executing. The President has power to make treaties, which is done by the advice and consent of the Senate that requires two-third concurrence of Senator.[34] Article VI of the Constitution states that treaties made 'under the Authority of the United States' form, 'the supreme law of the land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding' along with the Constitution and federal legislation. However, treaties are subject to substantive provisions of the Constitution and treaties cannot extent or limit the powers of any branch of Government.[35]

Moreover, only self-executing treaties i.e. those that does not require any intervention by the legislature so as to determine the effect or obligation that arise out of the treaty, have the force of law and they can be made into law without the approval of the Congress.[36] Meaning that is ascribed to self-executing treaties is that "they are treaties that apply in the municipal realm on their own force, discoverable from the intent of the makers as expressed in the language of the treaty."[37] In this regard, if it can be inferred from the language of the treaty that it was the intention of the parties that it should operate as law within the municipal sphere without any enabling law by the legislature, then treaty would pass as self-executing treaty[38] otherwise it will require legislature to give effect to the treaty[39]

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33 *Attorney General of Canada* v *Attorney General of Ontario [1937]* AC 326; *Republic of Italy* v *Hambro's Bank* [1950] 1 All ER 430.
34 US Constitution, art II § 2.
35 *Reid* v *Covert* 354 US 1, 16-17 (1957) (Black J).
36 *Foster* and *Elam* v *Neilson* 27 US 253 (1829).
37 Amos Enabulele; Eric Okojie, Myths and Realities in Self-Executing Treaties, 10 *Mizan L. Rev. 1* (2016)
38 *United States* v. *Percheman,* 32 U.S. (7 Pet) 51, 89 (1833).
39 *Foster and Elam* v *Neilson* 27 US 253 (1829).

We see change in approach adopted by the US Supreme Court in *Roper* v. *Simmons*[40], which arose out of execution of Simmons, who was seventeen at the time of execution. At the trial court he was convicted of first degree murder and was sentenced to death. Simmons approached the Supreme Court of Missouri to get the conviction overturned on account of ineffective assistance of counsel and various other claims but his motion was denied.[41] However, with change in interpretation of 8th amendment, Simmons filed a habeas Corpus in the US Supreme Court. The Court observed that juvenile cannot be sentenced to death. In order to reach that conclusion the Court, *inter alia*, relied on international practice, which "has turned its face against the juvenile death penalty."[42] Justice Kennedy observed that only United States and Somalia had failed to ratify Article 37 of the United Nations Convention on the Rights of the Child that prohibits execution of children. Furthermore, the Court relied upon Article 6(5) of the ICCPR which prohibits juvenile death punishment but the same was reserved by the United States while ratifying. In this regard, the Court observed – "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime."[43]

This development points towards larger normative framework where it is possible to postulate alternate theory of incorporation. Therefore, the dualist approach, in recent times, has come increasingly into tension with the human rights incorporation theory.[44]

**Right Based Approach: Developing an Alternate Model of Incorporation**

The case studies shown necessarily entails deviations from strictly monistic or dualist frameworks. Dualism and Monism must be understood against the historical background. Current challenges demand that there should be alternate theory to justify various anomalies or tipping point that exist.

However, merely showing that monism or dualism does not apply anymore is a half meted exercise. The worthwhile question is if not these, then what? Weargues that incorporation in the modern paradigm should be looked through the lens of a libertarian. This Rights based model develops when we consider the commonalities in these case studies discussed above.

Prima facie, these case studies presented above do not seem to show common features regarding the incorporation doctrines that they respectfully vouch. The watershed events in these countries were relatively recent judicial decisions. In India, this was the *Vishakha*case, and in England, the case of *R* v *Jones* and in USA it was *Roper v. Simmons*.The *Vishakha* case held that

40 *Roper* v. Simmons, 125 S. Ct. 1183, 1199 (2005).
41 *See id.* at 170, 191.
42 *Id.* at I199.
43 *Id.* At 1200.
44 Thomas Buergenthal, Modern Constitutions and Human Rights Treaties, 36 *Colum. J. Transnat'l L.* 211, 213.

Fundamental Rights must be protected and if not for legislations passed by the government, reference will be made to international law. *R* v. *Jones* held that any criminal punishment meted out by the local court necessarily requires the sanction of the parliament. In *Roper* case, the US Supreme Court relied upon international development and practice to hold that juvenile death sentence should be abolished.

In *Slaight Communications* v. *Davidson,* the Supreme Court of Canada, invoked the International Covenant on Economic, Social, and Cultural Rights to hold that the Court can refer to international law to determine 'substance of constitutional right'.[45] Similar position is in Bangladesh where treaty can be used to "interpret fundamental rights in the constitution".[46] On comparative study of both monist (South Africa, Poland, and Germany) and dualist (India) shows that there is great reliance on International Human Rights to interpret the Constitution.[47] This analysis shows that courts will rely upon International Human Rights treaty to interpret new right in their Constitution. Therefore, there is inter-connectedness between Constitution and International Human Rights Treaty. In regard to this, Stephen Gardbaumhas argued that "the rights contained in the major international human rights treaties are very broadly similar in substance to the rights contained in most modem constitutions."[48] This also has institutional *de jure* support in a sense that with increase in human rights there is heightened degree by the Judiciary in form of judicial review.

The common feature in these judgments is the effort made to preserv the rights of the citizens. In *Vishakha*, this is evident as it is through a positive application of rights granted by international law. In *R* v. *Jones*, the advancement of libertarian thought is by allowing the curtailment of the most fundamental liberty in the form of imprisonment only on the authority of those who the people themselves had a role in appointing. This agency given to the people in deciding the curtailment of liberty is essentially a positive granting of liberty itself.

The primary objection regarding rights as the premise of incorporation is the existence of a wide variety of rights which might often contradict each other. This would make the doctrine very ad hoc. To resolve these problems, it is submitted that only certain core rights should be considered to diverge away from the initial position (monism or dualism) taken by the state. For most countries these are often provided in their Constitution itself.[49]

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45 *Slaight Communications Inc.* v. *Davidson,* [1989] 1 S.C.R. 1038 (Can.).

46 David Sloss, Treaty Enforeement in Domestic Courts: A Comparative Analysis,The Role of Domestic Curts in Treaty Enforcement: a Comparative Study 1-60 (David Sloss ed., 2009).

47 Michael P. Van Alstine, The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions, The Role of Domestic Courts in Treaty Enforcement: a Comparative Study 1-60 (David Sloss ed., 2009). at 555

48 Stephen Gardbaum, Human Rights and International Constitutionalism, Ruling the World?Constititutionalism, International law, and Global Governance 233, 235 (Jeffrey L. Dunoff& Joel P. Trachtman eds., 2009).

The Rights based doctrine discussed above also resolves the Supremacy debate between Lauterpacht, Anzilotti, and Fitzmaurice. Supremacy is neither fixed nor non-existent. International law and municipal law assume their supremacy depending on which at that point in time can advance the core Rights of individuals.This is essentially the Rights doctrine advanced in this paper and it also conforms to the post World War II trend of recognizing the rights of individuals in both the international sphere[50].

**Conclusion**

In conclusion, given the problem with monism and dualism. We have argued that Courts should rely upon rights based model, which is meant to incorporate international human rights to domestic courts. Even though this approach has limited scope in a sense that it deals with only human rights cases, it has utility in democratic set-up. Moreover, courts across jurisdiction rely upon international human rights while interpreting their Constitution and these cases have been tipping point in their jurisdiction.This approach focuses on protecting their rights and widen the same in light of changing needs internationally.

49 *See* Part III, Constitution of India; United States Bill of Rights; Charter of Rights and Freedoms, Canada.

50 *See* International Covenant on Civil and Political Rights (1966), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights (1966), 993 UNTS 3.

# Maintenance of Muslim Divorced Women and the Role of Judiciary

Ms. Dipa H. Gautalair

## Introduction

The very essence of the marriage is companionship and gratification due to which obligation is imposed on wife by Holy Quran to contribute to the success and blissfulness of the marriage as much as possible.[1] Due to this unique status of woman, the contract of marriage not only gives a wife right to *'mahr',* an Arabic word which means a nuptial gift but also the most important right to *'nafaka'* an Arabic word which means maintenance where husband is bound by Holy Quran to contribute a portion of his income to his wife as part of her maintenance.[2] In the eyes of law *nafaka* signifies all those things which are necessary to the support of life such as food,clothes and lodging.[3] Wife's right to maintenance is established by authority of Quran, the *Sunna or Hadid,*[4] the*ijma,*[5] and *Aql.*[6] She is entitled to this right irrespective of being Muslim or non-Muslim, rich or poor, healthy or sick.[7]

There may be situation in a marital relationship where husband or wife may release themselves from marital obligations by way of *Talak* i.e. divorce. The question arises whether wife is still entitled to claim maintenance from her divorced husband? Does divorce ceases her maintenance right along with the marital status? These questions need to be answered in the light of Muslim personal law, The *Criminal Procedure Code,* 1974 and the *Muslim Women (Protection of Rights on Divorce) Act*, 1986 along with the role played by judiciary in upholding maintenance right of Muslim divorced wife. Thus effort has been made to highlight religious and legislative provision on maintenance of Muslim divorce wife and the progressive judgment given by judiciary using the tool of judicial activism towards legal reforms pertaining to personal law of maintenance particularly of divorce muslim wife.

## Maintenance of Divorced Woman under Muslim Personal Law

Since Muslim law is based on its religion, it is evident to discuss provisions relating to maintenance of divorced Muslim wife mentioned in the Holy Quran. Provisions are enumerated in following verses:

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1. Syed Iqbal Zaheer, *An Educational Encyclopaedia of Islam*, First edition, (Canada: Al- Attiwque Publishers Inc., 2010), p. 396.
2. Bhala Raja, *Understanding Islamic law (Shariat)*, (San Frrancisco: LexisNexis Law Publishing Advisory board, 2011), p.919.
3. Charles Hamilton, *The Hedaya Commentary On The Islamic Laws*, Second edition., Vol. II, (New Delhi: Kitab Bhavan,1994), p.140.
4. The traditions of Prophet. Precepts, actions and saying of Prophet Mohamed, preserved by transition and handed down by authorized persons.
5. Unanimous agreement of jurists.
6. Reason or common sense.
7. *Supra* note 1, p.393.

i. "Lodge them (the divorced women) where you dwell. According to your means, and do not harm them so as to straiten them (that they be obliged to leave your house). And if they are pregnant, then spend on them till they lay down their burden. Then if they give suck to the children for you, give them their due payment, and let each of you acceptthe advice of the other in a just way. But if you make difficulties for one another, then some other woman may give suck for him". (*Surat At-Talaq* LXV: *Ayat* 6);

ii. "Let the rich man spend according to his mean; and the man whose resources are restricted, let him spend according to what Allah has given him."(*SuratAt-Talaq* LXV:*Ayat* 7); and

iii. "And for the divorced woman, maintenance (should be provided) on reasonable (scale). This is a duty on the pious". (*Sura*II: *Ayat* 241).

The above verses of Holy Quran clearly indicate that Muslim divorced wife entitled for maintenance. But the same has been interpreted to mean in India that, Muslim woman is entitled for maintenance only during the period of *iddat*. The Holy Quran in its *Surat At-Talaq* LXV i.e. chapter on *Talaq,* has guided with the procedure to Muslim men the manner by which he can abstain from his wife by way of *Talaq*, where a period called *iddat*[8] have to be observed by wife after dissolution of marriage by *Talak* i.e. divorce. In *Talak Ahasan* the *iddat* period starts after single pronouncement of word *Talak* during a*tuhr* (period between menstruation which is considered to be period of purity)[9] and in *Talak-ul-Bidaatiddat* starts after pronouncement of the word *talak* thrice during a *tuhr,*[10] also Known as Triple *Talak.* In *Talak Hasan, iddat* is observed after every single pronouncement of the word *Talak* for three successive *Tuhrs* i.e. the first pronouncement is made during *tuhr*, the second during the next *tuhr,* and the third during the succeeding *tuhr*.[11] The period of *iddat* in case of dissolution of marriage by divorce is three menstruation periods or, if she is pregnant at the time of divorce *iddat* period extends up to the birth of the child or abortion.[12]

Hence, under Muslim personal law a husband is under obligation to provide maintenance to his divorced wife only up to *iddat* period. It was latter in 1974 Muslim Divorced wife brought under purview of *Criminal Procedure Code,* 1974 (herein after referred as "*Code*") and ensured their right of maintenance.

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*8.* *Iddat* is period during which a woman is prohibited from remarrying after dissolution of marriage.*Iddat* is an Arabic which means counting. Counting the possible days of conception to ascertain whether woman is pregnant and object is to ascertain the paternity of the child.

9. Dinshaw Fardunji Mulla, *Mulla on Mahomedan Law,* Twenty first edition, (Haryana: Lexis Nexis,2017), p.404.

10. *Ibid,* p.405.

11. *Ibid.*

12. Asafa A. A. Fyzee, *Outlines of Muhammadan law,* Fifth edition, (New Delhi: Oxford University press, 2013), p.81.

**Maintenance under Criminal Procedure Code**

Section 125 of the *Code* makes provision for divorce wife[13] to claim maintenance from her ex-husband if she is unable to maintain herself and her husband has neglected to maintain her, by filling maintenance petition before Magistrate. However, a divorced wife's claim is subjected to section 127(3) of the *Code*, which provides that the order for the maintenance in favour of wife shall be cancelled and such woman is not entitled to claim maintenance, under following circumstances:

i. The woman has remarried[14]

ii. The divorced woman has received whole of the sum under any customary or personal law, either before or after the date of maintenance order passed by magistrate[15]; and

iii. Where a woman, has voluntarily surrendered her right to maintenance after the order of divorce[16].

Whenever divorced Muslim wife knocked the doors of court to invoke her maintenance right, several contentions were raised by the respondent husband to defeat the same. However there is a plethora of judicial decisions where judiciary rejected the contentions and protected the said maintenance right of Muslim women. Hence, it's worth discussing some of the landmark judgements in which the Court has interpreted legal and religious provisions of maintenance, upholding the Muslim divorced women's maintenance right and dignity using its tool of Judicial Activism.

In *Bai Tahira* v. *Ali Hussan Fidaalli Chothia,*[17] Supreme court brought amount of *mahr* as a customary discharge within the cognisance of section 127(3)(b) of the *Code*. However, observed that, *"*Welfare laws must be so read as to be effective delivery systems of the salutary objects sought to be served by the Legislature and when the beneficiaries are the weaker sections, like destitute women, this spirit of Article 15(3) of the Constitution must belight the meaning of the Section. The Constitution is a pervasive omnipresence brooding over the meaning and transforming the values of every measure. So, section 125 and sister clauses must receive a compassionate expansion of sense that the words used permit".

With above observation the court was of the opinion that, purpose of the payment of *mahr* (read as payment 'under any customary or personal law' under section 127(3)(b)) is to obviate destitution of the divorce and provide her with where withal of maintenance. Therefore, inadequate *mahr* amount (Rs.5000/-) given to wife at the time divorce cannot be a substitute to maintenance and husband cannot claim under section 127(3)(b) absolution

13. Explanation (b) to section 125 of *Cr.P.C.,* "wife" includes divorced wife and has not remarried.
14. Section 127(3)(a) of *Cr.P.C.*
15. Section 127(3)(b) of *Cr.P.C.*
16. Section 127(3)(c) of *Cr.P.C.*
17. AIR 1979 SC 362

from obligation under section 125 towards divorced wife unless the quantum of sum stipulated by customary or personal law is sufficient to do duty for maintenance allowance. Hence the court held that, irrespective of *mahr* (amount Rs.5000/- which is not reasonable) and maintenance during *iddat,* wife is entitled for maintenance under section 125 of C*riminal Procedure Code*, 1973 until she remarries.

In *Fazlunbi* v. *K. KhaderVali*[18], the Supreme Court reiterated the observation made in *Bai Tahira's*[19] case and stepping ahead, differentiated *mahr* from "the whole of the sum which is payable under any customary or personal law" stipulated in section 127(3)(b). *Mahr* was held to be given as token of love and a mark of respect towards woman fixed at the time of marriage. It may be either prompt or deferred dower i.e. can be recovered either at time of marriage or at any point of time after marriage. So far as "the whole of the sum which is payable under any customary or personal law" is the amount which is ought to be given only for the reason ofdissolution of marriage. Hence even if *mahr* amount is paid at time of marriage or at the time of divorce cannot be construed as "the whole of the sum payable under any customary or personal law" and Muslim husband is not bailed from liability to pay maintenance to his divorce wife.

*Mohd. Ahmad Khan* V. *Shah Bano,*[20] a leading case on the issue of maintenance right of divorced Muslim wife, arose out of petition for maintenance filled by destitute wife under section 125 of *Criminal Procedure Code*, 1973. It was contended that section 125 of *Criminal Procedure Code*, 1973 does not apply to Muslims as the divorce was governed by Muslim personal law and hence maintenance law too would be governed by Muslim personal law. The court clarified that, chapter IX of the code consisting of sections 125 to 128 contains general law of the land and applies to all in India irrespective of the religion professed by the party. Therefore, the right could not be defeated by the husband by divorce against his wife under any other systems of law.The court further clarified that, Muslim divorced wife is within meaning of 'wife', as "wife" under explanation to section125 includes a woman who has been divorced by or has obtained divorce from her husband, irrespective of the religion professed by her or by husband. Therefore, a divorced Muslim woman so long as she has not re-married, is a wife for the purpose of section 125".

An issue pertaining to *Mahr* as "a whole sum payable under customary or personal law" was once again raised in *Shah Bano's* case. The court reiterated findings made in *Fazlunbi's*[21] case and held that, the payment of amount by way of *mahr* is not "occasioned by divorce", but by the marriage. *Mahr* is payable on or because of the marriage and as consideration for the marriage and therefore cannot be branded as an amount payable on or for or

18. AIR 1980 SC 1730
19. *Bai Tahira* v. *Ali Hussan Fidaalli Chothia,* AIR 1979 S.C. 362.
20. A.I.R. 1985 SC 945
*21.* *Fazlunbi* v. *K. Khader Vali,* AIR 1980 SC 1730

because of the divorce which is death of the marriage. Hence, divorce dissolve the marriage and the amount which is payable in consideration of marriage cannot be described as an amount payable in consideration of divorce.[22]

The most important and crucial point for consideration before the court was, whether the liability of Muslim husband to provide maintenance to his divorced wife extends even after expiry of*iddat* period. It was the contention of the husband that, provisions of *Criminal Procedure Code* in respect of maintenance to divorced wife was un-Islamic. The Supreme Court quoted and interpreted *Ayats* 241 and 242 of *Sura* II of Holy Quran and observed that, Quran imposes an obligation on Muslim husband to make provision of maintenance for divorced wife.[23]

This judgement elicited a protest from many sections of Muslims as it was felt that this decision was an attack on their religion and their right of right to religious personal law. This judgement was not the first one to grant maintenance to Muslim divorced wife, but was voluble orthodoxy deemed the verdict an attack on Islam as maintenance to divorce woman beyond *iddat* was alleged to be is un-Islamic and against *shariat*. Huge number of Muslims protested on street and Muslim fundamentalists pressurised the Government in power to enact a law to negate the law laid down in *Shah Bano's* case.[24] Therefore, Parliament enacted *Muslim Women (Protection of Rights on Divorce) Act,* 1986 (Hereinafter referred as the Act).

**Maintenace under *Muslim Women (Protection of Right on Divorce) Act,* 1986**

The *Muslim Women Protection Act*, 1986 has been enacted with an object to protect the rights of Muslim women who have been divorced by or obtained divorce from their husband. The scheme of the Act is a complete in seven sections. Since this Act was enacted to defeat *shah Banho's*[25] judgment, the maintenance right was restricted to certain extent. Hence, it is significant to consider some of the provisions of the Act relevant for the discussion.

Section 3 of the Act contains obstante clause[26] and has four sub-sections. Sub-section is substantive clause prescribes entitlement of maintenance for divorced Muslim wife in following words:

A reasonable and fair provision and maintenance to be made and paid within the *iddat* period.

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*22.* *Ibid,*p.952.

*23.* *Ibid.*

24. Subhashini Ali, "Shah Bano judgement was a landmark in our history", available at <https://www.indiatoday.in/magazine/cover-story/story/20051226-shah-bano-judgement-was-a-landmark-in-our-social-and-political-history-786361-2005-12-26> Last visited, 11/06/2018.

*25.* *Mohd. Ahmad Khan* v. *Shah Bano,* AIR 1985 SC 945

26. Vijay Malik, *Muslim Law of Marriage, Divorce & Maintenance,* Second edition, (Lucknow: Eastern Book Company, 1988), p.92.

i. If she herself maintains the children, reasonable and fair provision and maintenance have to be made and paid by her former husband for a period of two years from the respective dates of birth of such children.

i. Muslim divorced woman is entitled for the *Mahr* or dower which agreed to be paid at the time of marriage or thereafter.

ii. She is entitled for all the properties given for her before or at the time of her marriage by her friends or relative or husband or any relatives of her husband or friends.

Thus Muslim divorced wife is entitled to get maintenance from her husband within *iddat* period, if she is maintaining children by herself then she entitled for maintenance only up to two years of birth of children and she is entitled for her *mahr* and any other property received by her at the time of marriage. The word "within the *iddat*" used in above section is interpreted to mean that, Muslim husband obliged to pay maintenance to his divorced wife only up to and during *iddat* period and not beyond.

Now obvious question arises as to who is supposed to pay maintenance to divorced Muslim wife beyond *iddat* period if she is unable to maintain herself. The Act has shifted the responsibility of providing maintenance beyond *iddat* period on other persons and authorities in its section 4. Section 4 of the Act is both substantive and procedural.[27] Sub-section (1) entitles divorced woman who has not remarried and not able to maintain herself after the *iddat* period, to claim maintenance from her relatives who would be entitled to inherit her properties according to Muslim law after her death. The section empowers the Magistrate to issue an order against such relatives to make fair and reasonable provision and maintenance in favour of such woman. The magistrate while passing order of maintenance will have regard to the needs of the divorce woman, the standard of life enjoyed by her during marriage and other relatives. However, according to first proviso to section 4(1), if children of divorced wife are alive, magistrate is empowered to issue order to such children to pay her maintenance and if her children are unable to pay such maintenance Magistrate is empowered to order her parents to pay the maintenance. Further, second proviso to section 4(1) provides that, in case if any of the parents is unable to pay his or her share of the maintenance for not having sufficient means to pay, then magistrate is empowered to order such other relatives who appears to have means of paying the same.

Finally section 4(2) imposes obligation upon the Wakf Board established under section 9 of the *Wakf Act*, 1954, to pay maintenance to divorce wife by an order of Magistrate if divorced wife is unable to maintain herself, has no relatives mentioned under sub-section (1) or relatives mentioned under second proviso to section 4(1) does not have means to pay.

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*27. Ibid.*

One more evident question arises as to applicability of section 125 to 128 of *Criminal Procedure Code* after enactment of the new Act in matters relating to maintenance. This has been clarified by the Act in its section 5, where it has been provided that, the parties may opt to be governed by the provision of sections 125 to 128 of the Code and also provides that the procedure to be followed for such option i.e. both the parties must make declaration by an affidavit or any other declaration in writing, that they prefer to be governed by sections 125 to 128 of the Code.

Above mentioned provisions appeared to be controversial giving rise to number of ligation throughout India questioning the restriction imposed on maintenance right, restricting it upto *iddat* periodand restriction imposed on invoking sections 125 to 127 of the Code for claiming maintenance. Due to absence of verdict from the Apex Court different High Courts have given their different and conflicting opinion on this issue.

In *Md. Yunus* v. *Bibi Phenkani alias Tasrun Nisa,*[28] the Patna High Court has held that, the divorced woman is no longer entitled to claim maintenance under section 125 of the code and her claim for maintenance is to be determined in terms of the provisions of the Act. Accordingly divorced women's right of maintenance is limited to *iddat* period and right to get maintenance from husband under section 125 of the code has been impliedly repealed. In *Abdul Gofoor* v. *A. U. Pathumma,*[29] the Kerala High Court held that, the orders for enhancement of maintenance of a divorced cannot be passed under section 127 of the Code.

On other hand some High Courts have given contrary view in cases discussed below. In *A. A. Abdulla* v. *A. B. Mohamuna Saiyad Bhai,*[30] the Gujarat High Court held that, the phrase used in section 3 (1)(a) of the Act, "reasonable and fair provision and maintenance to be made and paid to her" indicates that legislature intended to see that the Muslim divorced woman gets sufficient means to livelihood after the divorce and that she does not become destitute or is not thrown on the street without a roof over her head and without any means of sustaining herself and her children.[31] Thus she is entitled to maintenance even after *iddat* period. The court further held that, the word "within" under section 3(1)(a) cannot be read as "for" or "during". Therefore husband is under obligation for making reasonable and fair provision and maintenance to the wife for a period after *iddat.*[32]

Similarly, in Chandigarh High Court in *Hazran* v. *Abdul Rehman*[33] observed that, there is no provision in the Act to the effect that "notwithstanding anything contained in sections 125 to 128 of the Code,

28. (1987) 2 Crimes 241
29. (1989) Cr. L. J. 1224 (ker)
30. A.I.R. 1988 Guj. 141
31. *Ibid.*
32. *Ibid.*
33. 1989 Cr. L. J. 1519

maintenance of a Muslim woman shall be governed by the provision of the Act 1986" and held that, the order of maintenance under section 125 of the Code is not affected by coming into force of the Act of 1986. In *Syed Kareem v. Zarina Bee.*[34] the Karnataka High Court held that, Act of 1986 has not taken away divorced Muslim wife's right to claim maintenance under section 125 of the Code as option has been given to wife and former husband under section 5 of the Act to opt as to which provision of law they wish to be governed.

The Kerala High Court in *M. Alavi* v. *T. V. Safia*[35] interpreted section 3 of the Act in the interest of divorced Muslim wife and held, woman living in adultery is entitled to claim maintenance. In this case an application under section 3 of the Act for maintenance during *iddat* period and also for reasonable and fair provision for her future by divorced wife was rejected on the ground that she was leading an adulterous life.

The Court observed that, section 3 begins with notwithstanding clause and a plain reading of this section would clearly show that a divorced Muslim woman can file an application for maintenance under section 3 and provisions of the Act do not say that she would not be entitled to get relief if she had been living in adultery, it is not possible to read something into which is not there. The contention of the husband that the general principle that govern the provisions for maintenance under section 125(4) of the Code are applicable to proceedings under section 3 of the Act i.e. the wife living in adultery is not entitled to get maintenance was rejected and held that the term 'wife' used under section 125(4) living adulterous life would only mean a woman whose marriage relationship is in existence and divorce woman living adulterous life will not come within the amplitude of section 125(4) of the Code.

The Kerala High court has given its remarkable verdict in *Kunhammed Haji* v. *Amira*[36] by giving an outstanding interpretation to "reasonable and fair provision and maintenance" provided under section 3 of the Act. The court discussed and distinguished "reasonable and fair provision" with maintenance and held that, Muslim husband have to pay maintenance to his divorced wife during the period of *iddat* and also have to "make reasonable and fair provision" for future livelihood after the *iddat* period. By making provision of "reasonable and fair provision" Parliament has protected maintenance right of Muslim divorced wife. The words used in section 3(1)(a) "within" indicates, the time within which provision and maintenance have to be made and paid and not to mean that to be paid during and up to *iddat* period and put an end to husband's liabilities.

The Bombay High Court madesame observation in *Karim Abdul Rehman Shailhk v. Shehnazkarim Shaik*[37] and held that, husband has to pay maintenance

34. LNIND 1991 Kant. 502.
35. A. I. R. 1993 Ker. 21.
36. (1995) 1 M. L. J. (Cri.) 617
37. 2000 Cr. L. J. 3560

to his divorced wife within *iddat* period and for the *iddat* period and his liability to pay maintenance ceases the moment *iddat* period gets over. But he has to make reasonable and fair provisions for her within *iddat* period which should take care of her till the rest of her life keeping in view her needs, standard of her life during her marriage etc,.

Upto 2001 the right of divorced Muslim wife was uncertain and there was no uniform ruling on the said right. Finally uniformity was achieved in *Danial Latifi and others* v. *Union of india,*[38] awrit petition filed by Danial Latifi and others against the Union of India, under Article 32 of the Constitution, where all the writ petitions challenging the validity of the Act asviolative of Article 21, 14 and 15 of the Constitution were clubbed together and converted all writ petitions into one Public Interest Litigation.

The Supreme Court was of the opinion that, in interpreting the provisions where matrimonial relationship is involved, the social conditions prevalent in society have to be considered. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated both economically and socially and women are assigned, invariably, a dependant role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints.[39]

The court observed that, a careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair

38. A. I. R. 2001 3958
39. *Ibid,* p.3967.

provision for maintenance. Parliament seems to intend that the divorced woman gets sufficient means of livelihood, after the divorceand, therefore, the word "provision"in section 3(1) indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles.[40]

The court further observed that, the expression "within" in section 3(1) (a) would mean"on" or "before" the expiration of the *iddat* period, the husband is bound to make and pay reasonable and fair provision and maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate. Apart from maintenance, husband is bound to make and pay reasonable and fair provisions for life within *iddat* period, as the Parliament has no whereprovided that reasonable and fair provision and maintenance is limited only for the *iddat* period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.[41]

The court further observed that, According to the rule of construction the Act would be unconstitutional because depriving a divorced Muslim woman her right of maintenance which is otherwise available to women of other community appears to be voilative of Article 14 of the constitution. With other rule of construction which is permissible through which statute remains effective and operative, the court preferred the latter on the ground that legislature does not intend to enact unconstitutional laws i.e. interpreting "reasonable and fair provision and maintenance to be made and paid to his wife 'within' the *iddat* period" as "apart from maintenance during *iddat*, husband is bound to make and pay reasonable and fair provisions for life 'on' or 'before' the expiration of the *iddat* period". Therefore, letter interpretation was accepted and upheld the validity of the Act.[42] Dismissing the writ petition court held that:

1. A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife including maintenance. Such a reasonable and fair provision extending beyond the *iddat* period must be made by the husband within the *iddat* period in terms of Section 3(1)(a) of the Act
2. Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to *iddat* period.
3. A divorced Muslim woman who has not remarried and who is not able to maintain herself after *iddat* period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death

40. *Ibid,* p.3969.
41. *Ibid.*
42. *Ibid,* p.3972.

according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

1. The provisions of the Act do not offend Articles 14, 15 and 21 of the *Constitution of India.*

In spite of elaborate discussion made in *DanialLatifi's*[43] case, still question arises as to whether maintenance application can be still filed under section 125 of the Code in spite of enactment of specific law. The supreme court in *Shabana Bano* v. *Imran Khan*[44] made it crystal clear that divorced Muslim woman would be entitled to claim maintenance from her husband under section 125 of the Code even after the expiry of iddat period as long as she does not remarry. It was further held that, even Family Court established under Family courts Act, have exclusive jurisdiction to adjudicate upon the application filed under section 125 of Code.

## Conclusion

A careful perusal of the judicial judgements in realm of personal law it is apparent that, Indian judiciary has played tremendous role in empowerment of Muslim divorced women in the area of Muslim personal law by infusing life and blood into the dry skeleton provided by the legislature and giving reformative judgement in every cases placed before it. Apart from this, judiciary has also looked into and interpreted the Muslim Personal law on maintenance where it discovered that, the Holy Quran imposes a clear obligation on the Muslim husband to make provisions for or to provide maintenance to divorced wife even after divorce and not confined to the period of *iddat.*[45]

Since Muslim law is based on religion and the Holy Quran being the main source, first and foremost reference has to be made to such source. So far as maintenance of divorced woman is concerned, according to *Surat At-Talaq* LXV: *Ayat* 6 and 7 ofthe Holy Quran, a Muslim is bound to provide maintenance his wife during *iddat* period. Apart from that, *Sura* II *Ayat* 241 of the Holy Quran provides that, "And for the divorced woman, maintenance should be provided on reasonable scale.This is a duty on the pious." This can be interpreted to mean that, maintenance obligation of a husband does not confine only to *iddat* period. Since it is considered to be pious duty every Muslim must see to it that they provide maintenance to the divorced wife even after *iddat* period.

If above interpretation is accepted, no divorced women would be deprived of basic necessities of life and her human rights would certainly be ensuredat the time of divorce itself and she need not have to approach the court.

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*43. Danial Latifi and others* v. *Union of india,* A. I. R. 2001, p. 3958.
44. A. I. R. 2010 SC 305.
*45. Mohd. Ahmad Khan* v. *Shah Bano,* AIR 1985 SC 945.

# Statutory Protection of Farmers Rights as to Plant Genetic Resources for Food and Agriculture in India

-Gloria D'souza*

## Introduction

In developing countries such as India, Farmers' Rights, as it pertains to plant genetic resources for food and agriculture in traditional plant varieties, is an issue of prime importance as a large segment of population. Earns their livelihood through agriculture, whereas, in developed countries, only a smaller segment of population earns their livelihood though agriculture relying mostly on commercial plant varieties. However, even in developed countries, saving and re-sowing seedsis still practiced to a limited extent. It is especially popular amongst many organic farmers who breed plants based on traditional varieties in traditional way. Thus, Farmers' Rights related to diverse plant genetic resources is of importance to developed as well as developing countries. International Treaty on Plant Genetic Resources for Food and Agriculture addresses measures to be taken as to safeguarding Farmers' Rights. Activities such as protecting traditional knowledge related to crop genetic resources, documentation and maintenance of that knowledge, and protecting and storing of germ plasm in gene vaults, would protect traditional knowledge and resources from extinction. Non-monetary benefit sharing such as access to seed and propagating material, participatory plant breeding and innovation and conservation activities which takes place among farmers who contribute to the maintenance and development of plant genetic resources would protect such traditional knowledge. Due to participation of big corporations in agriculture, farmers influence on decision making and legislations is decreasing and also, policy making in their respective countries also depends on international treaty obligations. Thus, Farmers' Rights to save, use, exchange and sell seeds saved by them is increasingly negatively affected by laws, rules and regulations on plant breeders' rights, and regulations related to selling of seeds. Several stains of plant genetic resources are in the grave situation of extinction and by conserving and cultivating those seeds ultimately food security can be achieved. Prior to advent of government's role in conservation, these genetic resources were conserved by local communities. Some developing countries have been making remarkable progress in this direction and India being one of them, and India's unique contributions in this direction in fact, is a model for other similarly situated developing countries to follow.

## What constitutes Farmers' Rights?

This concept of Farmers' Rights arose to reaffirm traditional agricultural practices in the face of increasing international intellectual property protection

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for plant varieties.[1] Farmers' rights emerged in recognition of the role of traditional farmers play in conserving, creating and promoting genetic diversity in the food supply and of the importance of maintaining traditional agricultural practices.[2] The term 'Farmers' Rights' has been coined to recognize the rights of farmers over their contribution to conservation and crop development, and the sharing of their knowledge on adaptive traits.[3] The concept of Farmers' Right was developed in the forum of the United Nations Food and Agriculture Organization (FAO) International Commission on plant genetic resources in 1989 in its International Undertaking on Plant Genetic Resources, which was later transformed into a legally binding amendment to the Convention of Biological Diversity (CBD).[4] The Biodiversity Convention which was entered into force in December 1993, is a legally binding International Agreement signed by over 150 countries at the close of the United Nations Conference on Environment and Development that established basic terms of trade in 'genetic resources.'[5] Genetic resources are the genetic information "of actual or potential value" contained in diverse species of plants, animals, and microorganisms.[6] Farmers have since the earliest stages of agriculture, used diverse 'plant genetic resources' to breed improved varieties and the current plant breeders continue on this traditional knowledge and heritage. The commercial payoffs for seed, pharmaceutical and other industries have been and will continue to be enormous, and the benefits to humanity, through improved quality and quantity of medicine, crops, foods and other goods have been and will be incalculable.[7] In the past, genetic resources and traditional knowledge of plants, which sometimes was referred as the 'common heritage of humanity' reflects the informal process of exchange, extending over thousands of years, by which the main food crops have diffused throughout the world.[8] The concept of Farmer's Rights is defined by the FAO commission on Plant Genetic Resources for Food and Agriculture as "rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources, particularly those in the context of origin and diversity."[9]

**Background of Farmers' Right**

The General Agreement on Trade and Tariffs (GATT) 1947, which was

1 Lauren Winter, 'Cultivating Farmers' Rights: Reconciling Food Security, Indigenous Agriculture, and TRIPS,' 43 Vand. J. Transnat'l L. 2010, p.223.
2 *Ibid*
3 M. Geetha Rani, Community Gene Banks Sustain Food Security and Farmers' Rights, avilable at http://biotech-monitor.nl/4106.htm, visited on 10-09-2018.
4 *Ibid.*
5 David R. Downers, '*The convention on biological diversity; seeds of green* trade,' 8 Tul. Envtl. L.J. 1994-1995, p.163.
6 *Id*
7 *Id.*
8 *Id.*
9 *Id.*

established to strengthen the relations of member countries in the field of trade and economy after the end of the second world war eventually lead to the founding of World Trade Organization (WTO) after the Uruguay Round negotiations of 1986 (Uruguay Round)[10] which brought in new elements into the trade discussion, specifically relating to the granting of Intellectual Property Rights on biological materials embodied in the Trade Related Intellectual Property Rights. India participated in this Uruguay Round negotiations and signed GATT,1994 on April 15, 1995. GATT 1994, established World Trade Organization (WTO), and India as a GATT signatory, has become a member of WTO and is bound by the Agreementon Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement). TRIPS Agreement specifically requires member nations to grant patents on microorganisms, biological and microbiological processes as well as to provide effective IPR protection for plant varieties.[11] Article 27.3(b) of the TRIPS Agreement defines which inventions governments are obligated to make eligible for patenting and what they can exclude from patenting. Inventions that can be patented include both products and processes and should generally cover all fields of technology. Part - b of paragraph 3 allows governments to exclude some kinds of inventions from patenting (for example, plants, animals, and other essential processes, but microorganisms and non-biological and microbiological processes have to be eligible for patents).[12]

The International Union for the Protection of New Varieties of Plants (UPOV Convention) is an intergovernmental organization with headquarters in Geneva (Switzerland). Mission of UPOV Conventionis to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society.[13] The UPOV Convention system of plant variety protection came into being with the adoption of the International Convention for the Protection of New Varieties of Plants by a Diplomatic Conference in Paris on December 2, 1961. The UPOV Convention provides the basis for members to encourage plant breeding by granting breeders of new plant varieties an intellectual property right: the breeder's right.The UPOV Convention provides a sui generis form of intellectual property protection which has been specifically adapted for the process of plant breeding and has been developed with the aim of encouraging breeders to develop new varieties of plants.[14] The UPOV

10 Uruguay Round Negotiations of GATT 1986

11 Suman Sahai, 'India's plant variety protection and Farmers' Rights Act, 2001,' available at http://www .iisc.ernet.in/~currsci/feb102003/407.pdf, visited on 10-09-2018.

12 Jayashree Watal and Roger Kampf, 'The TRIPS Agreement and Intellectual Property in Health and Agriculture,' available at, http://www.iphandbook.org/ handbook/ chPDFs/ch03/ipHandbook-Ch%2003%2008%20Watal-Kampf %20TRIPS.pdf, visited on 10-09-2018.

13 Available at http://www.upov.int/about/en/mission.html, visited on 10-09-2018.

14 Available at http://www.upov.int/about/en/overview.html, visited on 10-09-2018.

convention came into force in 1968, with revisions in the year 1972, 1978 and 1991. The 1991 Act requires members to grant and protect breeders' rights with the option of restricting farmers "Plant Back" rights. Thus, the Act strengthens breeder's rights privileges and weakens farmers' rights and options. It also imposed restrictions on 'seed savers' rights.

TRIPS Agreement provides a choice for protecting plant varieties. Members may choose from patents, a sui generis system or a combination of the two. Most developing countries including India have decided not to have patents for plant varieties and have chosen the sui generis option instead. The sui generis system (translating roughly into self-generating) means any system a country decides on provided it grants effective plant breeders' rights. TRIPS Agreement does not specify what kind of breeders' rights is meant and it does not say what else a member state can include in its law, apart from breeders' rights. In short, TRIPS Agreementis a flexible system, which leaves a lot to the discretion of members.[15]

Between developing and developed member nations, however, the flexibility of Article 27.3 has been a source of confusion, developed nations being construing a model codified as the International Union for the Protection of New Varieties of plants (UPOV) as the minimum standard for establishing a sui generis system, while developing nations, including India, refuse to treat it as the only option or as setting minimum standards for TRIPS compliance on the grounds that it fails to adequately protect farmers' rights. Developing nations believe that UPOV is more suited to developed nations who practice large scale agriculture and dominated by commercial breeders and industries. Hence developing nations construe the term sui generis as allowing them the discretion to determine the system for plant protection of their choice and have promoted innovating plant breeding while conserving biodiversity and promoting food security. India became a member of the World Trade Organization on January 1, 1995.[16] As a member, India was then required to comply with the TRIPS Agreement.[17] Specifically, according to article 27.2 (b) of the TRIPS agreement, "plants and animals other than micro-organisms" may be excluded from patentability. However, member countries are required to provide for the protection of plant varieties by patents or by an effective sui generis system or by any combination thereof. Article 27.3 (b) of TRIPS requires member countries to protect plant varieties either by patents, or by an effective Sui generis system of protection. The existing Indian Patent Act, 1970 excluded agricultural and horticultural methods of production from

15 *Id.*

16 World Trade Organization, Understanding the WTO: The Organization, at http://www.wto.org/english/ thewto_e/whatis_e/tif_e/org6_e.htm (Apr. 4, 2003). visited on 10-09-2018.

17 Stephen Barnes, 'Pharmaceutical Patents and TRIPS: A Comparison of India and South Africa,' 91 *KY. L.J.* 911, 917 (2002-2003).

patentability.[18] As a party to the TRIPS Agreement, to implement the commitments it has made, India electedsui generis option. Indian Parliament passed the Protection of Plant Varieties and Farmers' Rights Act (PPVFR), in August 2001, which is the Indian Sui generis legislation

Protection of Plant Varieties and Farmer's Rights Act (PPVFR), 2001

India, with a view to fulfill its TRIPS Agreement obligations, passed the Protection of Plant Varieties and Farmers' Rights Act of 2011 (PPVFR). The Act represents a sui generis attempt to balance the rights of farmers and breeders. The term Sui Generis refers to systems envisaged to meet the unique needs of a country or nations. The TRIPS Agreement accommodates sue generis protection for plant varieties by deviating from the normal IP rights. Thus, Article 27.3 of TRIPS Agreement embodies flexibility to protect plant varieties via "patents or by an effective sui generis system or by any combination thereof".[19] PPVFR is a very unique Act which made India the only country in the world to grant "clear and explicit rights to farmers."

The purpose of PPVFR is "to provide for the establishment of an effective system for protection of plant varieties, to provide for the rights of farmers and plant breeders, and to encourage the development of new varieties of plants, to recognize and protect the rights of the farmers in respect to their contribution made at any time in conserving , improving and making available plant genetic resources for the development of new plant varieties; to protect plant breeders rights to stimulate investment for research and development both in the public and private sector , for the development of new plant variety and to facilitate growth of the seed industry, in the country which will ensure availability of high quality seeds and planting materials of improved varieties to the farmers and to give effect to the aforesaid objectives for the protection of the rights of farmers and breeders, [20] having ratified the Agreement on Trade Related Aspects of Intellectual Property Rights, by enacting the PPVFR, made provisions to give effect to Article 27.3(b) in Part II of the agreement relating to protection of plants by adopting a sui generis regime. India's PPVFR was noticed by the rest of the world for two reasons. Firstly, it highlighted the complexity of farming in the developing world, which requires balancing the interests of the variety of actors involved in agricultural trade. Secondly, the PPVFR presented an alternative model to UPOV for poorer nations. With a view to compliment the PPVFR, the Parliament of India passed the Seed Act in 2005 to encourage seed trade, to promote the seed industry, boost exports and protect seed quality. While, TRIPS Agreement does not require governments to regulate seed trade, the passing of the PPVFR perhaps necessitated a review of

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18 Pratibha Brahmi, Sanjeev Saxena and BS Dhillon, 'The protection of plant varieties and farmers' rights act in India," Current Science, Vol.86, No. 3, Feb. 2004, p.10.

19 *Id.*

20 PPVFR Act, 2001

the existing framework governing seed trade.[21]

**Breeders' Rights**

PPVFR defines "breeder" as a person or group of persons or a farmer or group of farmers or any institution which has bred, evolved or developed any variety.[22] Thus, farmers' rights also includes breeders' rights under PPVFR. The breeders' rights are protected by providing exclusive rights to breeder or his successor, his agent or licensee to produce, sell, market, distribute, or to export. The statute alsoprovides penalties providing breeder an incentive to innovate without fear of infringement. Breeders are also required to deposit seeds or propagating material in the National Gene Bank for reproduction purpose atthe breeders expense. The central tenet of the PPVFR is to address India's national concerns about protecting the rights of traditional farming communities, while at the same time promoting plant breeding by vesting IP protection. [23]

**Farmers Right as to Plant Varieties**

The PPVFR allows an application for registration to be made only in respect of three kinds of varieties[24] based on community property concepts:

(i) a variety of such genera and species as specified under section 29 (2);

(ii) An extant Variety- which refer to the existing varieties discovered for the first time

(iii) A farmers Variety[25]

A new variety is registrable only if it is novel, distinct, uniform and stable.[26] Varieties not sold or otherwise disposed of in India more than one year prior to filing, or outside India for more than four or six years, for trees or vines, are considered as novel.[27] It is considered distinct if it is clearly distinguishable by at least one essential characteristic from any other variety whose existence is a matter of common knowledge in any country at the time of filing of the application.[28]

The PPVFR enables protection for new varieties through registration as well as recognizes the role of local farmers at the same time. Unlike UPOV, the PPVFR bears a set of public interest exceptions to registration of a new variety. A new variety, if it is likely to deceive the public, hurt the religious sentiments of any class or section of Indians, or cause confusion regarding the variety's identity,

21 Srividhya Ragavan and Jamie Mayer O'Shields, 'Has India Addressed Its Farmers' Woes? A Story of Plant Protection Issues,' 20 Geo. Int'l Envtl. L. Rev. 2007-2008, p.97.
22 PPVFR Section 2(c).
23 *Supra* note 21.
24 Section. 14.
25 PPVFR Act, s.14.
26 PPVFR Act, s.15.
27 *Ibid.*
28 PPVFR Act, s.15(3)b.

or is not different from every denomination which designates a variety of the same botanical species or of a closely related species registered under the act will be non-registrable.[29]

Extant Variety: With the objective of balancing breeder's right with the farmer's right, in the field of agriculture, farmer's variety and extant variety were introduced. Main purpose behind this is to protect traditional knowledge and indigenous rights.

**The PPVFR has defined an extant variety as**

(i) A variety which is available in India and includes a variety notified under section 5 of the Seeds Act;

(ii A farmer's variety;

(iii) A variety about which there is common knowledge, or any other variety in the public domain[30]

According to PPVFR Rules, Rule 24' The registrar shall register every extant variety within three years from the date of its notification under the Act subject to the criteria of distinctiveness, uniformity and stability.[31] The Authority publishes the list of varieties registered during intervals, that in fact, serves as apublic domain log of varieties known and existing.[32] Extant varieties need not be novel, however, requirements of distinctiveness, uniformity and stability applicable. By including farmers variety, the PPVFR allows farmers to register varieties they have cultivated for years. Thus, by introducing this mechanism to maintain uniqueness of protected varieties through registration breeders are not allowed to register miniscule innovations and are not given exclusive rights over the extant variety, thus protecting uniqueness of the varieties.[33] An extant variety may be registered by a breeder, farmer, and a community of farmers, a university, or a public sector. Section 28 of the Act provides that the certificate of registration confers exclusive right on the breeder or his successor agent or licensee to produce, sell, market , distribute, import or export the variety, provided that in cases where an extant variety is notified for a state under section 5 of the Seeds Act, 1966, the Central Government as the owner of the extant verities enjoys the rights to produce, sell, market, distribute, import or export. Since any person can make an application for registration of an extant variety under section 16, it allows the government to grant rights to the applicant for exploiting the variety for a specified period of up to 15 years from the date of publication, thus preventing private ownership in the public domain. The disadvantage with the extant registration is twofold. First imposing a term of protection for extant varies

29 PPVFR Act, s.15.
30 PPVFR Act, s.2 (j)
31 PPVFR Rules, s.24.
32 PPVFR Act, s.25.
33 *Supra* note 21.

crease the impression that matters in the public domain are not available in perpetuity. Second allowing any third party to register an extant variety, could presumably leave some species in the public domain unregistered. Plants that are not commercially usable or being used may never be registered, leaving registry incomplete. [34]

A farmer's variety is one which has been traditionally cultivated and evolved by the farmers in their fields or is a wild relative or land race of a variety about which the farmers possess the common knowledge.[35] The PPVFR defines farmer as a person-

(i) Who cultivates the land himself; or

(ii) Cultivates crops by directly supervising the cultivation of land through any other person; or

(iii) Conserves and preserves severally or jointly, with any person and wild species or traditional varieties or adds value to such wild species or traditional varieties though selection and identification of their useful properties.[36]

Thus, being able to register the above varieties, farmers enjoy all rights flowing from such registration.

Farmers' Right to Save, Use, Sow, Resow, Exchange, Share or Sell Their Farm Produces Including Seeds

PPVFR gives farmers the right to "save, use, sow, resow, exchange, share or sell [their] farm produce including seed of a variety protected under this Act . . . provided that the farmer[s] shall not be entitled to sell branded seed of a variety protected under this Act."[37] As a result, farmers are entitled to sell locally any variety of seed that they grow, even if the variety has been granted a breeders' right. The farmers are prohibited, however, from selling branded seed ("branded seed" means any seed put in a package or any other container and labelled in a manner indicating that such seed is of a variety protected under this Act being packaged and labeled in a way indicating that the seed is protected under PPVFR.[38] As a result, farmers are allowed to sell the breeders' seed under another denomination.[39]

Consideration for community rights and Gene Fund: PPFVR deviates from UPOV and introduces a right to community compensation for contribution of traditional knowledge related to farming. Section 43 reflects community property philosophy by providing that where an essentially derived variety is

34 *Id.*
35 PPVFR Act, s. 2(l).
36 PPVFR Act, s. 2(1).
37 PPVFR Act, s.39(1) (iv).
38 PPVFR Act, s.39(1) (iv).
39 OKLA. J. J. & TECH. 14 (2004), Available at www.okjolt.org, visited on 18-09-2018.

derived from a farmers variety, the authorization under section 28 (2) shall not be given by the breeder of such farmers variety except with the consent of the farmers or group of farmers or community of farmers who have made contribution in the preservation or development of such variety.[40] Thus, communities need to be compensated by the breeders if new varieties derived from the contribution made by the local community by depositing the compensation in the Gene Fund.[41] Section 45 of the Act provides for National Gene Fund to reward farmers whose existing variety or material is used as a source to create a new variety. The gene fund is a common fund created by the central government for the benefit of farmers. Money collected as royalties, funds collected towards benefit sharing and other sums that become due to farmers will be credited into the gene fund. The central government will use the fund towards expenditure for supporting conservation and sustainable use of genetic resources including in situ and ex sit collections and for strengthening the capability of the village panchayat for carrying out such projects.[42] The PPVFR emphasizes traditional farming practices to protect biodiversity. The underlying assumption is that any efforts that result in benefit sharing should be used to encourage genetic diversity. Thus, the statute promotes innovation while at the same time rewarding the farmers and protecting biodiversity.[43]

The rights of the communities as outlined in Section 41, provides for compensation for the contribution of communities in the evolution of new varieties to be determined by the PPVFR Authority.[44] There are provisions for acknowledging the role of rural communities as contributors of landraces[45] and farmers' varieties in the breeding of new plant varieties. Any person or group of persons, governmental or non-governmentalorganizations are allowed to register a community's claim and have it duly filed at a notified center with the previous approval of the Central Government or Authority. Thus, when farmers themselves cannot register farmer varieties due to lack of awareness or illiteracy, the community can step up for them. If the claim on behalf of the community is found to be genuine, a procedure is initiated for benefit sharing so that a share of profits made from the use of a farmer variety in a new variety goes into a National Gene Fund. [46]

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40 PPVFR Act, s.43.
41 *Supra* note 21.
42 PPVFR Act, s.45.
43 *Supra* note 21.
44 PPVFR Act, s.41(1).
45 Land races are verities that are developed over many plant generations sometimes encompassing thousands of years, by farmers selecting plants with desired characteristics. Land races are usually genetically diverse and will be adapted to local environments. Dr. Elizabeth Verkey, Law of Plant Varieties Protection, (Lucknow: Easter book Company, 2007), p.123.
46 *Supra* note 11.

**The right to Resow**

The PPVFR provides that a farmer may save, use, sow, re sow, exchange, share or sell his produce including un branded seed, even if it is a protected variety.[47] Section 18 further specifies that every application for a new variety be submitted along with an affidavit swearing the protected variety does not contain any gene sequence involving terminator technology.[48] Though farmers can resell in order to maintain their livelihood, they cannot use the breeder's brand name when reselling second generation produce. Since, in India, farmers account for a very large percentage of Indian seed production, denying the right to resow would only enable private seed producers profit at the cost of the livelihood of the farmers. By introducing the right to brown bag, the PPVFR represents a balance between fully allowing re sowing on the one hand, and the UPOV position tending towards preventing brown bagging altogether.[49]

**Benefit Sharing**

PPVFR defines 'Benefit Sharing' in relation to a variety, as such proportion of the benefit accruing to a breeder of such variety or such proportion of the benefit accruing to the breeder from an agent or a licensee of such variety, as the case may be, for which a claimant shall be entitled as determined by the Authority under section 26.[50] The concept of benefit sharing, which is close to the community rights concept gives rights and rewards to farmers for contributing to the creation of new varieties of plants for agriculture. Benefit sharing refers to the concept of sharing a proportion of the benefits accruing to a breeder of a new variety with qualifying claimants who could be indigenous groups, individuals, or communities.[51] Before registering any new variety, the statutory authority should invite claims for benefit sharing. Persons or group can respond based on two criteria. A- Extent and or nature of use of genetic material in the development of the new variety, and B- the commercial utility and demand in the market of the new variety. Only citizens of India or firms or organizational formed or established in India are eligible to claim benefits.[52]

**Compensation for Non-Disclosure of Expected Performance**

To protect farmers from breeders, the Act requires breeders to disclose the expected performance. Should the propagating material fail to provide disclosed performance under such given conditions, the farmer may claim compensation in the prescribed manner before the statutory authority which determines whether the farmer is entitled to compensation.[53] The objective is to

47 PPVFR Act, s. 39(1)(iv).
48 PPVFR Act, s.18.
49 *Supra* note 21.
50 PPVFR Act, s.2(b).
51 *Supra* note 39.
52 *Ibid.*
53 *Ibid.*

ensure that quality is not compromised. The advantage of the provision is that it forces breeders to conform to minimum quality specifications and not to make false disclosures in order induce sales.

**Protection against Innocent Infringement**

As outlined in Sec 42 of the Act, innocent infringement on any PPVFR right of protected varieties by a farmer is protected when the farmers at the time of the infringement, did not know of the existence of such right. If a farmer can prove before the court that he was not aware of the existence of the right so infringed, he will be exempted from reliefs the court can grant for infringement under section 65.[54] Such proof can also include matters such as illiteracy or non-availability of registration license in his local language. Because of economic backwardness and lack of education, those farmers in developing countries who were not aware of their rights are likely to be victims of breeders who pursue prosecution for infringements. Under the PPVFR's system of dual rights, "the breeders [are] rewarded for [their] innovation by having control of the commercial market place but without being able to threaten the farmers' ability to independently engage in [their] livelihood and supporting the livelihood of other farmers."[55] This exemption from innocent infringement provides protection for farmer's way of life.

**Research Exemptions and Essentially Derived Variety**

The PPVFR promotes research on protected varieties by allowing anyone to use a registered variety for conducting experiment or research or use of a variety as an initial source of variety for the purpose of creating other varieties provided authorization from the owner of the initial variety is received for commercial production of newly created variety as a parental line.[56] The provision promotes research while preventing the premature exploitation of protected verities in the name of research.[57]

Again, this PPVFR approach deviates from that of UPOV, which vests rights for up to two generations of essentially derived varieties on the breeder. Though, the PPVFR defines essentially derived, similar to UPOV, it additionally grants rights over the essentially derived verities to the farmer or breeder (second generation breeder) who derived it, and not to the breeder of the initial variety unless the EDV was also developed by the breeder of the new variety. EDVs can be registered provided they are accompanied by the required documentation.[58]

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54 PPVFR Act, s.65.
55 *Supra* note 39.
56 PPVFR Act, s.30.
57 *Supra* note 39.
58 *Supra* note 39.

**Public Interest Exceptions and Compulsory Licensing**

The PPVFR's public interest exception is wider than UPOV's and covers protection of "public order or public morality or human, animal and plant life and health or to avoid serious prejudice to the environment. Similarly, embodying technology (including genetic and terminator technology) which may be harmful to the public or animals, are rendered un-registrable under the statute. Tied closely with the public interest exception is the extensive compulsory license provision. The provision is styled similar to section 84 of the Patent Act of 1970. At the end of 3 years, any protected variety can be subject to compulsory licensing if the reasonable requirements of the public for seed or other propagating material of the variety is not available to the public at a reasonable price. Price shall also be a consideration in determining whether the reasonable requirements of the public are satisfied. The objective is to use compulsory licensing as deterrence to keep market prices of protected materials low.

**Farmers Right to seed- a positive right?**

The farmer's movement in India has been resisting the introduction of IPRs in seeds and plant genetic resources because of their far reaching implications. On October 2, 1992 the farmers of Karnataka started the seed satyagrah at a 5,00,000 strong rally in Hospet.[59] In March 1993 farmers from across the country gathered in Delhi to reject the Dunkel Draft and burn it. The farmers were not satisfied with weak government statements that India will negotiate GATT to allow farmers the right to save and exchange seeds non-commercially.[60] For farmers, the right to seed is a positive right, not a negative one. It is a fundamental right, not a concession. [61]

The PPVFR Act recognizes the farmer not just as a cultivator but also as a conserver of the agricultural gene pool and a Breeder who has bred several successful varieties. . Farmers' rights are defined in the following way:

**(1) Notwithstanding anything contained in this Act,—**

(i) a farmer who has bred or developed a new variety shall be entitled for registration and other protection in like manner as a breeder of a variety under this Act;

(ii) the farmers' variety shall be entitled for registration if the application contains declarations as specified in clause (h) of sub-section (1) of section 18;

(iii) a farmer who is engaged in the conservation of genetic resources of land races and wild relatives of economic plants and their improvement

59 Vandana Shiva, 'Agricultural Biodiversity, Intellectually property Rights, and farmers rights,' EPW, June 22 1996

60 *Id.*

61 *Id.*

through selection and preservation shall be entitled in the prescribed manner for recognition and reward from the Gene Fund:

Provided that material so selected and preserved has been used as donors of genes in varieties registrable under this Act;

(iv) a farmer shall be deemed to be entitled to save, use, sow resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act:

Provided that the farmer shall not be entitled to sell branded seed of a variety protected under this Act.

Explanation.—For the purpose of clause (iv), "branded seed" means any seed put in a package or any other container and labelled in a manner indicating that such seed is of a variety protected under this Act.[62]

Thus, both farmers' and breeders' rights are protected by allowing farmers to sell seed the way it was done in generations but with the restriction that this Seed cannot be branded with the breeder's registered name and the breeder is rewarded for his innovation by exercising control of the commercial market place but without threatening the farmers' ability to independently engage in his livelihood, and supporting the livelihood of other farmers. [63]

**Importance of Farmers' Right to Sell Seed**

Farmers' right to sell seed (not save nor exchange, but sell) has to be seen in the context of seed production in India. In India, the Farming community is the largest seed producer, providing about 87% of the country's annual requirement. If the farmer is denied the right to sell seed, he will face substantial loss of income and the farmer's community will be displaced as country's major seed provider. When farmers are denied the right to sell seed and are not allowed to function as seed providers, commercial seed corporations will dominate the seed market. Strong Farmers' Rights, allowing the farmer to continue to be a significant supplier of seed, makes the farming community a viable competitor and ineffective deterrent to the takeover of the seed market byte corporate sector.[64] Control over seed production is Central to food security which is in the forefront of national security.[65]

**Other Kinds of Farmers' Rights**

Disclosure: Other details supportive of the rights of farmers are the explicit and detailed disclosure requirements in the passport data required at the time of applying for a Breeders' certify cite. Concealment in the passport data will

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62 PPVRF Act, s.39.
63 Supra note 11.
64 *Id.*
65 *Id.*

result in the Breeders' certificate being cancelled. [66]

GURT (terminator) forbidden: Through Terminator Technology, plant gene expression can be controlled by introducing a technique for crop to kill its own seed in the next generation by inserting a DNA in between the seed specific promoter and the toxin coding sequence so that the toxin will not develop until the end of next round of seed development. This stops farmers from saving and re sowing plants.

Farmers are also protected from terminator technology, meaning breeders are forbidden from marketing a variety that prohibits a plant from germinating a second time. In addition, breeders are required to disclose to farmers the expected performance of the variety under given conditions. If the propagating material fails to perform as specified under the given conditions, farmers may claim compensation from the breeders.[67]

Breeders will have to submit an affidavit that the variety does not contain a gene Use Restricting Technology[68] the' Terminator Technology" will further reduce the rights of farmer-cultivators (those are farmers cultivating crops, but are not engaged in conservation. In their case, rights refer to freedom to save seeds for raising crops and for entering into a limited exchange or sale in their neighborhood).[69] The spread of F1 population in both cross pollinated and self-pollinated crops will result in farms, who are traditionally seed savers, becoming seed buyers. They will have no option except to buy seeds form the seed companies for every planting. In addition, as crops incorporating the 'Terminator Technology" are most likely to be genetically homogenous, genetic homogeneity in crops could become more widespread, enhancing genetic vulnerability to pests and diseases. Hence, this aspect of farmer's rights needs careful consideration not only from the point of view of ethics and equity, but even more importantly for the maintenance of genetic diversity at the field level. Moreover, ongoing efforts directed towards the revitalization of the on farm conservation traditions of farm families and the breeding of location specific varieties through participator breeding methods will suffer.

Though protections are being envisaged, multinationals are trying to make inbuilt protection by terminator and verminator technologies. It takes millions of dollars and years of research to develop and superior quality of varieties. When growers save and replant patented seed there is less incentive for companies to invest in developing the variety. Farmers often save the seeds from the crops and may not go back to the seed company for years. The multinationals through terminator, Verminator and other like technologies

66 *Supra* note 11.
67 *Supra* note 39.
68 *Supra* note 11.
69 M.S. Swaminathan, 'Farmers' Rights and Plant Genetic Resources,' Available at http://www.biotech-monitor.nl/3603.htm, visited on 18-09-2018.
70 *Supra* note 45, p.144.

build plant variety protection biologically into the plants.[70]

Protection against innocent infringement: The draft legislation has also attempted to address a concern voiced by several quarters, that when the new system of Plant Breeders' rights is imposed for the first time, there will probably are many cases of unknowing infringement of breeders' rights. Section 43 specifies that the farmer cannot be prosecuted for infringement of rights specified in the Act if he can prove in court that he was unaware of the existence of such a right.[71]

**Shortcomings as to the Effective Implementation of PPVFR Act**

India needs a system where there will be a database with the listing of plant varieties for registration, where governmentcan notify the crops for the purpose of registration based on certain criteria. The criteria for selecting the crops should be the crops that we are dependent for food and nutrition, which would include major cereals, pulses, oil seeds, vegetables and fruits crops, crop that is of importance for India as to export, foreign investment and world trade, species of Indian origin and crops where India could benefit from introduction of new germplasm could be the other priorities for consideration.[72] There is also need for assimilation of information related to plant variety protection and bring awareness of the same to different actors of agriculture such as legislators, researchers, breeders, farmers, seed industry and communities by using different media. There is need to establish resources centers for farmers and breeders to get the resources provided under the act. The Authority is to provide measures for the registration, documentations, indexing and cataloguing ofplant varieties and ensure that seeds of the varieties registered under this Act are available to the farmers and provide for compulsory licensing of such variety of plants, if the breeder of such variety or any other person entitled to produce such variety under this Act does not arrange for production and sale of seed in the manner as may be prescribed. The authority can appoint an independent organization directly under its control to devise assessment procedures and institutional mechanism for effective implementation of the objectives of the Act. There should be effective DUS testing[73] and seed storage facilities and evaluation procedures. In order to test the novelty, a database of the existing verities may have to be developed with effective linkages with other such databases available internationally.[74] The Authority may also have to decide about the minimum passport data required to be submitted with the application. Information regarding parental lines as required under section 18 (c) needs to be restricted to immediate parents.[75] The

71 *Supra* note 11.
72 *Supra* note 18.
73 DUS (Distinctness, Uniformity and Stability) Testing.
74 *Supra* note 18.
75 *Id.*

authority should provide for appropriate storage facilities of genetic material. The fees should be reasonable keeping in view the possible commercial value of the crop, farmers' interest, the national interests, and generation of required resources and financial autonomy of the Authority. There is a need for the effective and integrated implementation of various new acts/bills concerning biodiversity, environment, farmer's rights and seed Acts, which have some interphases because of the common commodity that is the seed. The Biodiversity Act (2002) dealing with conservation and access to biodiversity and the protection of plant varieties and farmers act along with seed act must be simultaneously and effectively integrated for smooth implementation of the objectives of the Act.

**Conclusion**

As discussed above, India has opted for a sui generis system of protection of plant varieties and has provided for rights of different actors in agriculture such as breeder, farmer, community, researchers, commercial seed producer, conserver, all this in the same legislation, in that sense it is a very unique legislation. The Act contains provisions that show sense of community and traditional rights by including provisions for benefit sharing, community compensation, immunity from prosecution for innocent infringement, and a creation of a gene fund. Striking a balance between different rights of different actors is very important as the Act poses different challenges through its all-inclusive measures. In order to implement this Acteffectively, striking a balance between breeder's rights and farmer's right and national interest and food security should be a priority. India should also have a seed policy that should encourage seed producer's interest as well as the interest of farmers whose livelihood depends on traditional farming activities including saving and reusing seeds. Hence, an effective seed policy is complementing the provisions of PPVFR and international laws relating to protection of plant variety without compromising the importance of traditional forms of agriculture and seed conversation by farmers who depend totally on agriculture for their survival. The Indian PVPFR Act is an effective sui generis system which provides for the protection of plant breeder's rights and farmer's rights by striking a balance between the two.

Though the statute PPVFR, seems to be striking balance between farmers' and breeders' rights In a country like India, ensuring food security of the population should be the ultimate goal of any legislation dealing with genetic resources of plant varieties . To be very effective, the act should promote innovation to promote needs of the nation by promoting innovation without threatening farmers' self-sufficiency and livelihood. The PPVFR is exemplary in its ability to capitalize noted flexibilities in TRIPS. India should now work on eliminating the loopholes in the PPVFR. Strengthening the conceptual framework of the PPVFR can result in an efficient sui generis model for plant protection tailored towards national objectives.

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