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ARTICLES

NOTES AND COMMENTS

BOOK-REVIEW

LAW ENFORCEMENT, MILITARY DISCIPLINE, AND THE NOTION OF MILITARY JUSTICE: BUILDING A CASE FOR THE HUMAN RIGHTS OF SERVICE PERSONNEL IN NIGERIA

OLUSOLA B. ADEGBITE*

ABSTRACT : Law enforcement is the pivot on which every society and institution stands and essentially survives on. An institution where enforcement of the law is in abeyance will surely not endure, as whatever goals are set is condemned to shoulder in total indiscipline. Without doubt, no institution would want to set off on that footing. However, where law enforcement takes place in a special institution like the Military, its deployment is bound to raise deep questions regarding the Constitutional rights of the accused persons. Over the years, the Nigerian Military appear to have been caught in this miasma in which the Constitutional rights of its service men have remained trapped in the notion of upholding Military discipline. It is to this end that this paper appraises the question of law enforcement in the Nigerian Military, querying its attitude towards the safeguards of these rights, and accordingly building a case for a new and better regime, in which Constitutional rights of Service personnel are not only guaranteed, but regarded as pre-eminent.

KEY WORDS : Law enforcement, Military discipline, Justice, Human rights , Constitutional rights.

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I. INTRODUCTION

Within the context of the general society, the responsibility of Law enforcement lies in the hands of the Police[1], and other relevant State Security Agencies[2]. The Police and these other bodies act as agents of the State in the maintenance of law and order, and in extension regulate the conduct of human affairs. However, aside from the Civilian type of law enforcement, there also exists another type more *sui generis* in nature. Servicemen just like other members of the Society are subject to the general laws of the land and bound by the jurisdiction of the conventional courts. Additionally, they are also, more specifically this time, subject to a regime of special laws which strictly regulates their profession, conduct, behaviour, duties, obligations, rights, and other areas of their job as Soldiers. This refers to law enforcement within the province of Military law[3].

The Status of the Soldier/Service personnel within a democratic cum constitutional framework is a complicated one. On the one hand, upon his enlistment into the Armed Forces it is deemed that there now exist a change in his legal status which compels that he is subject to the terms of the 'Military contact' as well as the provisions of relevant Military laws, which serves the dual purpose of regimenting him to military discipline, as well as preparing him as a ready asset for the overall fighting force. On the other hand, given that such soldier still remains a citizen of the State, it is equally deemed that he is not only subject to the same liabilities as other citizens, but more importantly that he is still assured of his constitutionally guaranteed rights that Military service does not attenuate. It is within this complicated web that the punishment of service personnel for Offences comes into scholarly focus.

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1. See generally Section 4 of the Police Act, Laws of the Federation of Nigeria (LFN), 2004.
2. Notable amongst these include specialized institutions such as the Nigerian Customs Service, The Nigerian Prisons Service, Nigeria Security and Civil Defence Corps (NSCDC), Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices and other related Offences Commission (ICPC), National Drug Law Enforcement Agency (NDLEA), National Agency for Food Drug Administration and Control (NAFDAC), Federal Road Safety Commission (FRSC), Standards Organization of Nigeria (SON), e.t.c.
3. Generally, Military Law is defined as "the body of laws, rules, and regulations that have been developed to meet the needs of the military. It encompasses service in the military, the constitutional rights of service members, the military criminal justice system, and the international law of armed conflicts".

We hear of the term "Court Martial" all the time, but not many have a clear insight into what goes into the final determination of matters in this special court. Can we say that the rules in Military books ensure that justice is done at all times, or is it just a question of justice their own way? What about the question of the Serviceman's Constitutional rights? Does the spirit and letters of Military compacts signals the death of the Soldier's rights, or is there a mutually beneficial co-existence of the two? Striking the right balance between these important, but unequal streams of law, requires a deep understanding of where they meet and where they part. These are current issues at the core of the intellectual ferment surrounding the Constitutional rights of service personal in Military law enforcement.

II. THE MILITARY AND THE NOTION OF MILITARY DISCIPLINE

There is no gainsaying that Soldiers are creatures of discipline, with nearly all aspects of their professional lives governed by orders[4]. While on the one hand Military justice and discipline appears to operate independently of each another, on the other hand both are not mutually exclusive, as they interconnect and serve as the legal pedestal on which law enforcement is applied in the Military[5]. The historical premise of Military discipline and the concept of punishing Soldiers for unlawful conducts, as well as illegal acts has its roots in ancient practices of the Roman Military establishment[6]. Under the old Roman Military justice system, soldiers of Rome's legion when accused of violations of extant military laws were made to undergo summary trials with the result that the punishment was always brutal in nature[7]. Appearing to illuminate the

4. See ICRC, 'Military Discipline and the Law', International Committee of the Red Cross (ICRC), available online at https://www.icrc.org/eng/resources/documents/article/editorial/ihl-swirmo-2011-article-2011-09-28.htm, accessed 27/05/2018.
5. See Anthony J. Ghiotto, 'Back to the Future with the Uniform Code of Military Justice: The Need to recalibrate the Relationship between the Military Justice System, Due Process, and Good Order and Discipline', (2014), 90, North Dakota Law Review, 485-544.
6. See C.E. Brand, Roman Military Law, (Texas: University of Texas Press, 1968), 63-82.
7. Ibid.

brutality involved in early forms of military discipline, a leading Military law Scholar Joseph Bishop once opined that the popular legal doctrine which states that it is better that ninety-nine guilty men go scot-free, than for one man to be innocently convicted, has no basis in the notion of Military discipline[8]. In making this assertion, Bishop was of the view that if a soldier who deserts and manages to run away is eventually shot, the heartening effect is greatly reduced if not obliterated where correspondingly ninety-nine out of a hundred deserters also get away[9]. Bishop's postulation appears to sum up the state of mind regarding law enforcement in the Military.

Under the Roman system, offences deemed legally impermissible could be classified as atrocities, even where such were carried out relying on lawful orders[10], a framework that was further developed under canon law, and has since been sustained through the middle ages up to contemporary times[11]. This today forms the crux of what is known as the Doctrine of Obedience to lawful superior orders, a doctrine firmly at the core of law enforcement in the Military[12]. Under the current rule, the leading position is one that excuses only non-atrocious misdeeds by

8. See Joseph W. Bishop, 'Court-Martial Jurisdiction over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners', (1964), 112(3), University of Pennsylvania Law Review, 317-377.

9. Ibid.

10. For example, the Roman Digest is known to have excluded certain acts regarded as "heinous" from the defence of obedience to lawful orders. See IV The Digest of Justinian, Law 157, tit. XVII, Lib. L, Theodore Mommsen & Paul Krueger (eds.) (University of Pennsylvania Press, 1985). This Roman rule appear to have greatly inspired most modern Military laws, which today have provisions excluding from the defence of 'lawful orders', all forms of crime and criminality particularly those that are regarded as clearly "gross, indisputable, outrageous, universal, and without any doubt". See L. C. Green, 'Superior Orders and the Reasonable Man', in Essays on the Modern Law of War (1985), 43.

11. See Doyne Dawson & James D. Dawson, The Origins of Western Warfare: Militarism and Morality in the Ancient World, (New York, London: Taylor & Francis Group, 1996), 129-130.

12. The doctrine of superior orders is a defence a Soldier pleads to a charge for crimes committed in the course of a war, on the ground that the acts so referred to, were carried out based on lawful superior orders. The superior order plea is deemed also deemed as a corollary of the complementary to the command responsibility defence which seeks to help a Soldier escape personal liability for executing superior orders. The superior orders defence is rooted in more than four centuries of pre-modern historical practice, starting with the 1484 trial of Peter Von

soldiers, while criminalising all acts deemed as egregious. This rule is also a subset of the established military doctrine of *respondeat superior*'[13], a rule that holds that the superior officer alone would be held liable for

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Hagenbach who claimed that all the atrocities that were alleged of him where not of his personal decision. It significance in contemporary times however came to the fore during the Nuremberg trials where some of the accused persons tried to raise it in defence, but its applicability for such an Ad hoc prosecutorial process was struck down following the promulgation of the London Charter of the International Military Tribunal which stated clearly that the defence of superior orders was invalid when it comes to allegations of War Crimes. This position appears to be have been inspired by the earlier position under Roman law in which acts considered as very atrocious and impermissible did not come under the superior orders rule. Specifically, Nuremberg Principle IV provided that, "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him". However, the doctrine was to later resurface on the international scene during the trial of the notorious Nazi War Criminal, Adolf Eichmann. Over the years, the doctrine has evolved in a rather chequered manner, such that its application in international criminal prosecution has been greatly narrowed. For instance, the Rome Statute of the International Criminal Court under Article 33 referred to as "Superior orders and prescription of law", provides that; "The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful". The doctrine has remained a most controversial item in most scholarly works. See generally, Matthew. R. Lippman, 'Humanitarian Law: The Development and Scope of the Superior Orders Defence', (2001), 20(1), Penn State International Law Review,153-251; H.T. King, 'The Legacy of Nuremberg', (2002), 34 (3), Case Western Journal of International Law, 335-356; James B. Insco, 'Defense of Superior Orders before Military Commissions', (2003), 13(2), Duke Journal of Comparative & International Law, 389-418; Leora Y. Bilsky, Transformative Justice: Israeli Identity on Trial, (Michigan: University of Michigan Press, 2004), 169-197; K.C. Moghalu, Global Justice: The Politics of War Crime Trials, (Greenwood Publishers, 2006).

13. Shakespeare captures the idea of respondeat superior perfectly, in his dramatic account in one of his works Henry V, where an infantryman had hailed the King's cause as 'just and honourable'. The conversation then went thus – "That's more than we know", replies a second infantryman; then add a third, "Ay, or more than we should seek after, for we know enough if we know we are the King's subjects. If his cause be wrong, our obedience to the King wipes the crime of it out of us". See William Shakespeare, King Henry V, (T.W. Craik ed., 1995) 264-265.

any unlawful conduct commanded of subordinates. The key behind this rule is that it helps institutionalise a system of total obedience to orders, so Military discipline is maintained always. In an obedience to superior orders regime, Military discipline flourishes and respect for Military authority remains at an all time high. This is exemplified in the works of William Westmoreland, who speaking of Military discipline opined as follows;

> Discipline is an attitude of respect for authority which is developed by leadership, precept, and training. It is a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task that is to be performed. Discipline conditions the soldier to perform his military duty even if it requires him to act in a way that is highly in-consistent with his basic instinct for self-preservation[14].

Thus, the military life is one in which the Soldier in a proper understanding of the delicateness of his assignment, is expected to display peculiar virtues of character and general moral principles of an uncommon nature, all within a highly regimented framework that is followed through consistently[15]. For instance, matters such as the Soldier's daily regime of

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14. See W. Westmoreland, 'Military Justice - A Commander's Viewpoint', (1971), 10, American Criminal Law Review, 1-5.

15. This unique life of the Serviceman appears to be the theme of the renowned Military strategy theorist Carl Clausewitz, when he said, "every special calling in life, if it is to be followed with success, requires peculiar qualifications of understanding and soul". See generally Carl Von Clausewitz, On War, Anatol Rapoport (ed.), (Penguin Books, 1968) (1832) 138. Clausewitz was equally of the opinion that "at the heart of any army, there would always be a cadre of professionals who would fight, not out of patriotism but...from sheer professional pride". According to him, the professional army, "is mindful of all these duties and qualities by virtue of the single powerful idea of the honour of its arms-such an army is imbued with the true military spirit". Ibid. at 187. Adding to this understanding, Samuel Huntington on his part postulates on a kind of Military Ethics that speaks of "the permanence, irrationality, weakness and evil in human nature... the supremacy of society over the individual and his rights", including, "the importance of order, hierarchy, and division of functions". See Samuel P. Huntington, The Soldier and the State: The Theory and Politics of Civil-Military Relations, (Belknap Press, 1957), 79. The same idea is further reflected in the works of Richard Miller who in expanding this thought, spoke about the Excellency of character and this finds expression in individual personal identity. See Richard

different strata of rigorous exercises, difficult tasks, and hard labour, as well as a form of seclusion from the society which is signified by the 'barrack life'[16], are things carefully designed to disconnect him from unwarranted behaviours and a corresponding capacity not to contemplate any.

In the Military, discipline is a fundamental hallmark of military service. This tradition evolved from certain historical objectives separating the Soldier from other members of the society. First is the fact that the work of the military which involves defending the nation from external aggression and territorial integrity is a hard one that requires troop's preparedness, and a high level of morale from the rank and file, as well as the Officers corps. Second, the principal job of the military is about fighting wars and most often, particularly when the call out of troops is based on an emergency, the military objective is not always entirely clear both to the Commanding Officer as well as his troops, as such there is a measure of discipline required so as not to lose focus, and to be able to switch strategy at the slightest call. These apparently uncommon characteristics make the service personnel's work a unique one in which control must be activated at all times. Where a Commanding Officer loses control of his troops, or where the Military High Command loses authority of its forces, it is as good as saying that all is lost. It is within this context that Offences are viewed quite seriously in Military circles.

III. OFFENCES IN THE MILITARY

Generally, any act of service personnel which brings disgrace or contempt to the Military as an Institution is subject to the penalties of military law[17]. In the Nigerian context, offences punishable in Military circles range from minor infractions related to military discipline, to very

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B. Miller, Casuistry and Modern Ethics: A Poetics of Personal Reasoning, (Chicago: University of Chicago Press, 1996), 241.

16. For an overview of the importance of such seclusion, see generally B. Boane, 'How Unique Should the Military Be? A Review of Representative Literature & Outline of a Synthetic Formulation, (1990), 31(1), European Journal of Sociology, 3-59.

17. See David G. Monroe, 'When a Soldier Breaks the Law', (1942), 33 (3), Journal of Criminal Law & Criminology, 245-254.

serious offences occasioning death. Under Nigerian Military law, Offences are specifically defined with corresponding sanctions or punishments as the case may be.[18] For military personnel, offences are broadly of two types, viz;

1. Military Offences.
2. Civil Offences.

1. Military Offences

Military Offences are simply contraventions of the rules laid down for the enforcement of military discipline. These regulations are contained in Nigeria's principal military law, the Armed Forces Act[19] (Hereinafter referred to as 'The Act'). Persons to be tried under this Act must be subject to what is known in Military circle as Service Laws. Section 168 and 169 of the Act provides grounds for bringing offenders who have ceased to be subject to Service Laws for trial under the Decree. These offences are peculiar to Service Personnel and Civilians who come under Section 272 of the Act. It will be noted that a few civil offences are reflected in what constitutes Military offences. Under the Act, Military offences includes the following - Aiding the Enemy[20], Communication with the Enemy[21], Cowardly Behaviour[22], Offences against morale[23], Becoming a Prisoner of war through disobedience or wilful neglect and

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18. Emphasis here is laid on the written aspects of the Constitution of the Federal Republic of Nigeria, 1999(as amended) especially in Section 36(12), which provides that, "Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law."
19. CAP A20, Laws of Federation of Nigeria (LFN), 2004 (1993 No.105), which came into force 6th July, 1994, and which is a review of the Nigerian Army Act, 1960, enacted by the legislature of the Federal Republic of Nigeria in 1960.
20. Section 45(1)(2)(3) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN),2004
21. Section 46(1)(2)(3) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN),2004
22. Section 47(1)(2)(3) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN),2004
23. Section 48 of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN),2004

failure to rejoin Armed forces[24], Offences by or in relation to sentries[25], Looting[26], Mutiny[27], Failure to suppress mutiny[28], Insubordinate behaviour[29], Fighting, quarrelling and disorderly behaviour[30], Disobedience to particular orders[31], Disobedience to Standing orders[32], Obstruction of Provost Officers[33], Absence without leave[34], Desertion[35], Assisting and concealing desertion and absence without leave[36], Failure to perform Military duties[37], Malingering[38], Drunkenness[39], Drug: Wrongful use, possession, e.t.c of uncontrolled substance[40], Offences in relation to

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24. Section 49(1)(2)(3) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN),2004
25. Section 50(1)(2)(3)(4)(5)(6) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN),2004
26. Section 51 of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN),2004
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33. Section 58 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
34. Section 59 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
35. Section 60(1)(2)(3)(4) of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
36. Section 61 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
37. Section 62 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
38. Section 63(1)(2)(3) of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
39. Section 64(1)(2) of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
40. Section 65(1)(2) of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004

property[41], Offences in relation to properties of members of the Armed Forces[42], Miscellaneous Offences relating to property[43], Loss or hazarding vehicle, Ship, or Aircraft[44], Dangerous Flying[45], Low flying[46], Annoyance by Navigation or flying[47], Other offences in respect of Ships and Aircrafts[48], Prize Offences[49], Sexual Offences[50], Billeting Offences[51], Offences in relation to requisitioning of vehicles[52], Offences relating to and by persons in custody[53], Miscellaneous Offences[54], Offences in relation to Court Martial[55], Other civil offences.[56]

The above represent what constitute offences under the Act. It should be noted that in the course of investigating an offence that has been

41. Section 66 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
42. Section 67 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
43. Section 68(1)(2) of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
44. Section 69 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
45. Section 70 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
46. Section 71 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
47. Section 72 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
48. Sections 73 & 74 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
49. Sections 75 & 76 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
50. Sections 77 - 81 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004
51. Section 82 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004.
52. Section 83 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004.
53. Sections 84 – 87 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004.
54. Sections 88 - 99 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004.
55. Sections 100 - 113 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004.
56. Section 114 of the Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN),2004.

committed, or to prevent the commission of an offence it might become imperative to apprehend and detain the alleged offender. Where arrest becomes necessary it must be done by a person who has legal powers to do so.

2. Civil Offences

Under the Act, there is another class of offences called civil offences. The position under the general Law is that if an offence is one for which the punishment is either a fine, or term of imprisonment or both, it is referred to as a crime. Distinctively, if it is an infraction in which the tort-feasor makes reparations to the victim or his estate in form of damages for the injury caused, then it is a civil wrong and not a criminal offence. However, in the Military where a crime is provided for by the civil authorities as contained for instance in the Criminal Code, or other criminal legislations, it is referred to as a Civil Offence. Service personnel are subject to both Military and Civil Laws, and in extension Courts Martial have jurisdiction over both Military and Civil Offences. The Act provides for Civil Offences[57]. In a Court-martial or any military trial, it is important that the appropriate section of the law providing for the civil offence be entered on the charge sheet, and must be explained by quoting the section or the civil enactment contravened, and the act constituting the contravention.

IV. PROCEDURE FOR ENFORCEMENT OF OFFENCES IN THE NIGERIAN MILITARY

Arresting the Offender is the first step in the prosecutorial process. A suspected offender may be placed under arrest to prevent him from damaging evidence, escaping, or prevent further illegal acts, or ensure the personal safety of the offender himself. A person subject to service laws under the decree may be arrested if found committing an offence, alleged to have committed an offence, or reasonably suspected of having committed the offence.[58] It is important to note, that an officer may be arrested only by an officer of superior rank, however if he is found

57. Ibid.

58. Section 121 of the Armed Forces Act, 1999, Laws of Federation of Nigeria (LFN), 2004.

engaging in quarrel or disorder of any kind, he may be arrested by an officer of any rank[59].

If for any reason, a service personnel under arrest is to remain in custody for a longer period than eight days without release, a special report should be made on the necessity for his continued detention. This report will be made every eight days until a court martial is assembled or the offence is dealt with summarily or the person is released from arrest. An Offender may be detained in the following circumstances – (a) The seriousness of the allegation or accusation, for example murder or treason; (b) The need to establish the identity of the person under arrest; (c) The need to secure or preserve evidence relating to the allegation or accusation; (d) The need to prevent the continuation or repetition of the offence or any other offence; (e) The necessity to secure the safety of the person, other persons or property; (f) The need to forestall the actual or likelihood of interference with investigation, for example threatening, intimidating, incriminating or suborning of witnesses; (g) The need to prevent escape of the accused; (h) The fact that the accused has not surrendered but has been apprehended as an illegal absentee or has habitually absented himself.

1. Disciplinary powers of Commanding Officers

As earlier observed, a key objective of Military Law is the maintenance of discipline and good order among troops. Under the Act, a variety of channels have been provided through which military discipline is applied and one is the authority of the commanding officer in the command and law enforcement chain. The Commanding Officers at various levels as executors of military discipline are given extended powers

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59. However, a soldier may be arrested by an officer, warrant, or petty officer or a non-commissioned officer subject to service laws. In this case, the person executing the arrest must be of superior rank to the offender. A provost or any officer, warrant, or petty officer, non-commissioned officer, or soldier, rating or air craftsman lawfully exercising authority under a Provost Officer or on his behalf may arrest any person subject to service law.

    A person authorised to effect arrest may use force as is reasonably necessary. Power of arrest may be exercised either personally or by ordering into arrest the person to be arrested or by giving orders for that person's arrest. Generally, arrest consists of actual seizure or touching a person's body with a view to detaining that person. It is imperative that before a person is arrested, he must be told by the person carrying out the arrest that he is being arrested, and the circumstances, or reason for such arrest be clearly stated.

to investigate charges, and deal with offenders summarily, or through the avenue of a court-martial[60].

When an offence has been committed, the allegation shall be reported to the Commanding Officer of the accused in the form of a charge. The Commanding Officer shall investigate the charge in the prescribed manner[61]. The accused may be attached to another unit for the purpose of the investigation[62]. This however applies only in cases where the Commanding Officer is the only material witness. After investigating an offence, its nature and the rank of the accused determines the action to be taken in order to dispose of it. Subject to the provisions of the Act the Commanding Officer shall summarily deal with the charge[63]. Where he is convinced that the charge cannot be summarily dealt with, he has the powers to refer the case to the Appropriate Superior Authority (ASA), or take steps to have the charge tried by a Court-martial. The ASA may deal with a charge referred to him summarily, remand for trial by court-martial, or refer it back to the Commanding officer advising a retrial or dismissal of the charge. Summary dealing with a charge according to the Act refers to the Commanding Officer or Appropriate Superior Authority taking the following actions – (a) Dismissing the charge; (b) Determining whether the accused is guilty; (c) Where the accused is guilty recording a finding of guilty and awarding punishment; (d) Condoning the offence. Note that the Act expressly provides that a Commanding Officer shall not deal summarily with a charge under certain sections of the Act[64].

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60. See Sections 115 – 118, Armed Forces Act, 1999, Laws of the Federation of Nigeria (LFN), 2004. Exercise of these powers especially in the disposal of charges against accused persons vary according to the instruments of powers they possess. There are instances where a Commanding Officer may be appointed mainly for disciplinary purpose only.
61. See Rule of Procedure, No.8
62. This is based on the Doctrine of Natural Justice i.e. the Commanding Officer, cannot be a Judge in his own case, as enshrined in the Latin maxim, nemo judex in causa sua, meaning, "No one hall be a Judge in his own cause".
63. See Section 105, Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN), 2004.
64. These sections include 45, 46, 47, 48, 50, 51, 52, 53, 60, 65, 66, 67, 71, 72, 73, 75, 76, 83, 88, 91, 93, 95 and 98. See Section 124(6)(a) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN)2004.

V. PROCEDURE FOR TRIAL AND TYPES OF COURT MARTIAL

1. Classification of Courts-martial

Senior Military officers play an important role in all aspects of Nigeria's military justice system. They are the ones empowered to adjudicate in the court-martial system and in carrying out their duties, they often function in roles similar to that of judges and other judicial authorities in the Civilian criminal justice system. The Court-martial is the military court-system where the accused person makes his/her case for a judicial determination. Under the Act, there are two (2) types of Courts Martial; a General Court Martial and a Special Court Martial.[65] The main differences between the 2 types of court martial are – (a) The level at which they are convened including ranks of the membership; (b) The rank of the accused; (c) The nature of offence including the nature of punishment prescribed for the offence; (d) Their composition especially the size and rank of the membership.

2. A General Court Martial: A General Court Martial may be convened by - (1) The President (as C-In-C); (2) The Chief of Defence Staff; (3) The Respective Service Chiefs; (4) GOCs of Corresponding Commanders; (5) Brigade of Corresponding Commanders.[66] Also, the Composition of a General Court martial consists of at least 8 persons as follows - (1) A President; (2) Four Members (not loss, may be more); (3) A waiting Member; (4) A Liaison Officer; (5) A Judge Advocate who must be a lawyer.

3. A Special Court Martial: The power to convene a Special court martial is defined as follows - (1) A Special court martial may be convened by any of the person who may convene a General court martial; (2) The Commanding Officer of a Battalion or a corresponding unit.[67] Also a CO or corresponding Commander can convene; (3) Commander of detached sub-unit who would otherwise not qualify under paragraph 1 above.

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65. Section 129 of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN), 2004.
66. Section 131 (2) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN), 2004.
67. Sections 131(3) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN),2004.

A Special Court Martial when eventually convened is usually composed of (1) A President; (2) Two members (not less, may be more); (3) A waiting member; (4) Liaison Officer; (5) Judge Advocate.

4. Jurisdiction of Court-martials:

The Act provides as follows-

(1) A General court-martial shall, subject to the provisions of this Act try a person subject to service law under this Act for an offence which, under this Act is tri-able by a court-martial and award for the offence a punishment authorised by this Act for that offence, except that where the court-martial consists of less than seven members it shall not impose a sentence of death.

(2) A General court-martial shall also have power to try a person subject to service law under this Act, who by law of war is subject to trial by a military tribunal and may adjudge a punishment authorised by law of war or armed conflict.

(3) A Special court-martial shall have the powers of a general court-martial, except that where the court-martial consists of only two members, it shall not impose a sentence that exceeds imprisonment for a term of one year or of death[68].

5. Constitution of a Court martial

A court-martial shall be duly constituted if it consists of the President of the court-martial, not less than two other officers, and a waiting member.[69] The President of a court-martial shall be appointed by order of the convening officer and shall not be under the rank of major or corresponding rank, unless in the opinion of the convening officer, a major or an officer of corresponding rank having suitable qualifications is not, with due regard to the public service, available, so however that - (a) The president of a court-martial shall not be under the rank of a captain or a corresponding rank; and (b) Where an officer is to be tried, the President shall be above or of the same or equivalent rank and seniority of the accused and the members thereof shall be of the same but not below the rank and seniority of the accused.[70] The Act also states that the

68. Sections 130 of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN),2004.

69. Section 133 (1) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN) 2004.

members of a court-martial, other than the President, shall be appointed by order of the convening officer or in such other manner as may be prescribed[71], and that a Judge Advocate shall be a commissioned officer who is qualified as a legal practitioner in Nigeria with at least three years post-call experience, or failing that he shall on request by the convening officer be nominated by the Directorate of Legal Services of the respective services of the Armed Forces[72].

6. Arraignment of the Accused person.

When a court-martial is sworn, an accused is arraigned on the charge contained in the charge sheet. Arraignment consists of – (a) The reading of the commencement of the charge and the person named, "the accused"; (b) The reading of each charge separately to the accused and called upon him to plead to it. The arraignment is conducted by the President and the Judge Advocate. Where two or more accused persons are being tried jointly, one accused may apply to be tried separately on the grounds that unless so tried, he will be prejudiced in his defence. Where there are several charges in a charge sheet the accused may, before pleading to the charge, apply for separate trial on any charge on the ground that unless so tried he will be prejudiced in his defence. It is instructive to state that Courts Martial are required to observe and apply the rule of admissibility of evidence as is observed in the civil courts. Both the investigation by Commanding Officer (taking of Summary and Abstract of Evidence) and the evidence at the trial must be done in accordance with the rule of evidence.[73] In addition, the Council[74] has the power to hold disciplinary proceedings against an Officer, concurrently with Criminal proceedings in Court on the same matter[75], and even punish

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70. Section 133 (3) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN) 2004.
71. Section 133 (4) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN) 2004.
72. Section 133 (6) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN) 2004
73. Section 143 of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN) 2004.
74. The Council in this event would the Army Council, Naval Council, or Air Force Council.
75. See Section 1 of the Armed Forces (Disciplinary Proceedings) (Special Provisions) Act, CAP 22, Laws of the Federation of Nigeria (LFN), 2004. It provides that,

after an acquittal[76].

VI. LAW ENFORCEMENT AND THE HUMAN RIGHTS OF SERVICE PERSONNEL: THE NIGERIAN EXPERIENCE.

Over the course of history, there has remained an ongoing tension between certain aspects of Military law and the Constitution, particularly as it relates to the Constitutional rights of Service personnel. This is significant because the balance between military discipline and the notion of individual rights was not always so carefully calibrated. In Nigeria, Courts-martial as Military courts derive their validity from the authority of the Act and are therefore 'special' in nature and appear separate from the courts listed under the Constitution[77], except that they can be classified under the heading of, "*such other courts as may be authorised by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws*"[78]. As their jurisdiction is primarily statutory, the exercise thereof is expressly circumscribed by the Acts creating the courts, except that where the court in its operation conflict with the Constitution, the

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"Notwithstanding anything contrary in any law, the appropriate Council or Board of each force of the Armed Forces of the Federation(in this Act referred to as the Council), may institute, and where instituted, may continue disciplinary proceedings against any person subject to military law(hereinafter referred to as an "Officer") whether or not (a) Criminal proceedings have been instituted with respect to such a person in any Court of law in Nigeria or elsewhere or are about to be instituted or are contemplated; or The grounds upon which any criminal charge is based or is to be based is substantially the same as that upon which the disciplinary proceedings were or are to be instituted".

76. See Section 2 of the Armed Forces (Disciplinary Proceedings) (Special Provisions) Act, CAP 22, Laws of the Federation of Nigeria (LFN), 2004. Here the law provides that; An Officer acquitted on a criminal charge for an offence or given a discharge, whether amounting to an acquittal or not, in any court of law may be dismissed or otherwise punished in accordance with any disciplinary provisions on any charge arising out of his conduct in the matter if the Council is satisfied" (a) That his conduct in the matter has been in any respect blameworthy; or that it is in the interest of the force where he is deployed and generally in the interest of the Armed Forces as a whole that he be so punished".
77. Section 6, Constitution of the Federal Republic of Nigeria, 1999 (As amended).
78. Section 6(5)(j), Constitution of the Federal Republic of Nigeria, 1999 (As amended).

latter clearly overrides[79].

The current understanding within the framework of Military Courts as gatekeepers of law enforcement, is one that is founded on the notion that the entire Military justice system must from the start of the trial proceedings to the end, safeguard the constitutional rights of the accused service personnel. The Nigerian Constitution as the nation's principal legal document under Chapter IV provides for a long-list of such rights[80]. These rights are not only protected, but are deemed enforceable whenever they are violated, are been violated, or likely to be violated[81]. While all of these rights remain totally inalienable, and are held in permanence by the Service personnel notwithstanding his/her being subject to service laws, two of these rights critically stand out in terms of their application, protection, and safeguard within military law enforcement framework. These are the Right to personal liberty as guaranteed under Section 35 of the Constitution, and the Right to Fair hearing which is also to be found in Section 36 of the same document. Both rights are essentially key in any trial proceeding involving the Service personnel and must be seen to be upheld at all times.

As regards the right to personal liberty it is a cardinal rule that upon

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79. See Section 1(3), Constitution of the Federal Republic of Nigeria, 1999 (as amended), which provides thus, "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of its inconsistency, be void"

80. The rights includes – Right to Life (Section 33); Right to Dignity of the Human person (Section 34); Right to personal liberty (Section 35); Right to Fair Hearing (Section 36); Right to privacy (Section 37); Right to Freedom of Thought, Conscience and Religion (Section 38); Right to Freedom of Expression and the Press (Section 39); Right to Peaceful Assembly & Association (Section 40); Right to Freedom of Movement (Section 41); Right to Freedom from Discrimination (Section 42); Right to Property and family Life (Section 43 &44).

81. Section 46(1) provides that, "Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress". 46(2) then additionally provides that, "Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcement or securing the enforcing within that State of any right to which the person who makes the application may be entitled under this Chapter".

arrest, the accused person may choose not to utter a word or make any statement. In upholding this rule the Constitution clearly provides that, "Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice"[82]. This constitutional guarantee is also further reinforced under the Administration of Criminal Justice Act, 2015[83]. This powerful doctrine has remained a long-standing cornerstone in several forward-thinking decisions of Constitutional courts in leading jurisdictions seeking to re-affirm the fundamental protections a suspect under interrogation is guaranteed within the fullness of his/her rights. The historical origin of this doctrine remains an ongoing contest[84], however its modern application was laid in the groundbreaking decision

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82. See Section 35(2), Constitution of the Federal Republic of Nigeria, 1999 (as amended).

83. Section 6 of the ACJA provides that, "(1) Except when the suspect is in the actual course of the commission of an offence or is pursued immediately after the commission of an offence or has escaped from lawful custody, the police officer or other persons making the arrest shall inform the suspect immediately of the reason for the arrest. (2) The police officer or the person making the arrest or the police officer in charge of a police station shall inform the suspect of his rights to: (a) remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice; (b) consult a legal practitioner of his choice before making, endorsing or writing any statement or answering any question put to him after arrest; and Notification of cause of arrest and rights of suspect. (c) free legal representation by the Legal Aid Council of Nigeria where applicable: Provided the authority having custody of the suspect shall have the responsibility of notifying the next of kin or relative of the suspect of the arrest at no cost to the suspect".

84. Scholars remain divided on the origin of the right to silent doctrine. A leading position however is that which subscribes to the view that the foundations of 21st century privileges as it relates to the right to remain silent is connected to the rivalry between the Common law courts preferred independently gathered evidence as valid, and the ecclesiastical courts which tiled more toward the use of confessional statements. Both courts where of the old English order. See J. H. Langbein, 'The Privilege Against Self Incrimination: Its Origin and Development' in Hemholz et al (eds), The Privilege against Self-Incrimination: It's Origins and Development, (University of Chicago Press, 1997).

85. 384 U.S. 436 (1966). In this case, Ernesto Arturo Miranda was in 1963 arrested by the Phoenix Police Department and charged with the crime of kidnapping and raping an eighteen-year-old lady. In the course of his interrogation, he was made to sign a confession in which he owned up to the rape charge, however at the commencement of trial, when prosecutors tried to tender Miranda's confession

of the US Supreme Court in *Miranda* v. *Arizona*[85], where the court established the right of the accused person to remain silent at all times[86]. Of course, the basis of *Miranda* is to be found under US Constitutional framework, where the privilege against self-incrimination as a product of

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in evidence, his attorney objected saying the confession was in no way voluntary and should be rejected. The court disagreed with the position of Miranda's lawyer and he was subsequently convicted and sentenced to 20years on each of the charges. On appeal to the Arizona Supreme Court, the Court affirmed Miranda's conviction saying it saw no involuntariness in Miranda's confession particularly give hat Miranda did not specifically request an attorney at the time of making his confessional statement. Miranda finally appealed to the US Supreme Court, where the apex court reversed the two courts below.

The Court held that in light of the manner and type of coercion by which Miranda's purported confession to the Phoenix Police department had been procured, it could not be said to be voluntary and was therefore inadmissible under the fifth amendment to the US Constitution which provides for the right against self-incrimination, as well as the sixth amendment which entitles all accused person a right to an attorney. Delivering the opinion of the Court, Chief Justice Earl Warren went ahead to establish the landmark right that is now a major cornerstone of constitutional law i.e. 'The Right to remain silent'. He doing so he powerfully opined as follows; "The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he/she is indigent, an attorney will be provided at no cost to represent him/her". The Warren court further went on to say that: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning".

Following this landmark judgement, Miranda's conviction was accordingly overturned. Miranda is today a fundamental doctrine particularly as it relates to a judicial determination of guilt and has been applied meritoriously in a plethora of cases. See Berkemer v. McCarty, 468 U.S. 420 (1984). See also Berghuis v. Thompkins, 560 U.S. 370 (2010), where a suspect decides not to either invoke or waive his Miranda rights.

86. This rule is today the most important pillar of the interrogation process as a prelude to criminal prosecution. The ratio of the Court's decision is captured in the popular Miranda Rights which is mandated to be read to every person upon arrest, with the words, "You have the right to remain silent, as anything you say can and would be used against you in a Court of law".

87. The Fifth Amendment provides that, "no person shall be compelled in any criminal case to be a witness against himself".

the Fifth Amendment[87], allows a person to refuse to testify against himself in a criminal proceeding, as well as to answer official questions, particularly "where the answers might incriminate him in future criminal proceedings"[88].

In addition to the right to remain silent, the Nigerian Constitution provides for other rights such as the right to be informed promptly in the language that one understands as well as the details/nature of the offence in question, the right to defend oneself in person or by a legal practitioner of one's choice, the right to be given adequate time to prepare one's defence, the right to have an interpreter free of charge, the right to be presumed innocent until one is proven guilty, the right not to be charged for an unwritten offence or a retroactive offence, the right to have record of the proceeding kept, and the right to have copies of this within seven days of the conclusion of the case[89].

It is however a sad commentary that notwithstanding this explicit guarantee of the Nigerian serviceman's constitutional right to remain silent, often times in the interrogation process preceding Court martial proceedings, service personnel alleged to have committed one offence or the other are coerced into making statements, usually with the goal that such can be used as confessional tool forming part of the prosecution's basket of proof of evidence. Such acts are clearly in violation of the Service personnel's constitutional rights and are certain to render the entire proceeding a complete nullity, whether at the trial court or upon appeal. It clearly delegitimizes whatever the entire outcome of the court-martial proceeding may be and reflects more of military illegality as against military justice.

Quite instructively also the *Miranda decision* dealt extensively with the military's practice of providing the accused person with lawyers as free defence counsel[90]. This requirement is firstly a part of the right to personal liberty under Section 35 and the right to fair hearing under Section

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88. A. M. Hapner, 'You Have the Right to Remain Silent, But Anything You Don't Say May Be Used Against You: The Admissibility of Silence as Evidence After Salinas v. Texas', (2015), 66 (4), Florida Law Review, 1763-1778.

89. See Section 35 & 36, Constitution of the Federal Republic of Nigeria, 1999 (As Amended).

90. Ibid. at 489.

36. The clause, "until after consultation with a legal practitioner or any other person of his own choice" clearly lends credence to the accused person's right of have a legal practitioner organise his defence to the charge. Not only is the Service personnel entitled to a Legal Practitioner, it must be free so as to excuse him of the financial burden of a criminal defence and it must be one that he consents to.

The first reasoning behind the rule that the legal practitioner be free of charge rest on the need to manifestly secure the course of justice, which is a course itself rooted in the principle of fair hearing. The Constitution clearly takes the issue of fair hearing very seriously, hence it provides that:

> In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality[91].

The principle that in determining the guilt or otherwise of any individual, such must be accorded fair hearing is as old as the common law. This principle is espoused in the twin maxim "*audi alteram partem*"[92] and "*nemo judex in causa sua*"[93], and clearly underpins the pivotal nature of this right. Therefore, in line with the *audi alpartem rule*, the logic of justice is that both sides in a matter have an opportunity to be heard without any impediment. In this regard the boundaries of this rule is quite elastic, and all matters tilts more towards affording the accused person every opportunity of being heard. Where there is a prevailing financial encumbrance on the accused service personnel depriving him/her of legal representation, this clearly does not paint a picture of both sides been heard.

The second reasoning is based on the fact that it is the State that has instituted criminal proceeding against the accused service personnel, and not the other way round. Again, the Constitution is clear in this regard

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91. Section 36(1), Constitution of the Federal Republic of Nigeria, 1999 (As Amended).

92. This is translated to mean, "Listen to the other side".

93. This also means, "No one should be a Judge in his own cause"

and it provides, "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty"[94]. Part of the demonstration that the accused person is innocent, is founded on the rule that he is not duty bound to prove his commission of the offence. This is a cardinal principle of law expressed in the Latin maxim, "*Affirmati Non Neganti Incumbit Probatio*"[95]. The accused is therefore entitled to simply do nothing all through the trial proceeding, except when called upon to enter his defence after the prosecution may have closed its case. In line with this position, it would therefore be akin to double jeopardy, to impose the twin burden of not only putting in an appearance, but one of financing an expensive defence on the accused, all for a charge which he may eventually be pronounced innocent. Thus, the right of the accused service personnel to have a counsel freely provided for him by the State remains cast in stone. The Nigerian Military justice system must therefore rise to this task. It is important that the provisions of the Act and other military regulations and court martial procedure rules, be made to reflect this all-important right.

VII. THE DEVELOPMENT OF SERVICE PERSONNEL HUMAN RIGHTS UNDER THE AMERICAN MILITARY JUSTICE SYSTEM: ANY LESSONS FOR NIGERIA?

In the United States, the civil and constitutional rights of the serviceman and the civilian in the context of criminal prosecutions are implemented in two distinct legal settings, i.e. a civil system of state and federal courts including the United States Supreme Court, and a military system composed of courts martial, boards of review, and the United States Court of Military Appeals[96]. Under American law, service personnel generally are issued a honourable discharge from Military service upon a satisfaction of acceptable military conduct and performance of duty. Notwithstanding this position, a member of the force cannot be denied a honourable discharge without due process of the law[97]. The former

94. Section 36(5), Constitution of the Federal Republic of Nigeria, 1999 (as amended).
95. This is translated to mean, "The burden of proof is upon him who affirms and not on him who denies".
96. S. Sidney Ulmer, Military Justice and the Right to Counsel, (Kentucky: University of Kentucky Press, 2015).
97. United States ex rel. Roberson v.Keating, 121 F. Supp. 477 (N.D. Ill. 1949). See also the Fourteenth Amendment to the US Constitution, Section 1 which provides

position under US Military law was that Servicemen generally enjoyed a level of constitutional protection that was inferior to that of Civilians[98]. For years, there remained an intense debate among scholars on the full applicability of Constitutional right to the service personnel in the United States Armed Forces[99]. However following developments through statutes and judicial decisions, the constitutional divide on matters of right to due process for civilians and for service personnel has been significantly reduced such that today, any serviceman accused of an offence, enjoys nearly all constitutional due process rights accorded to civilians[100]. A relevant example is the decision in *United States v. Stuckey*[101], where the U.S. Court of Appeals for the Armed Forces held that, "the bill of rights applies with full force to men and women in military service"[102]. This jurisprudence was later significantly advanced by the same court in *United*

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that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

98. For fertile discussions in this area see generally, James M. Hirschhorn, 'The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights', (1984), 62(2), North Carolina Law Review, 177-254.

99. For a comprehensive read on the divergence of opinion on this see generally, Gordon D. Henderson, 'Courts-Martial and the Constitution: The Original Understanding', (1957), 71, Harvard Law Review, 293; Frederick B. Wiener,' Courts-Martial and the Constitution: The Original Practice parts.1 & 2', (1958), 72, Harvard Law Review, 266.

100. See Francis T. McCoy, 'Due Process for Servicemen - The Military Justice Act of 1968', (1969), 11(1), William & Mary Law Review, 66-105.

101. 10 M.J. 347 (1981)

102. Ibid; There are however few exceptions. Key amongst them include the right to indictment by US Grand Jury and trial by petty jury, the right to be confronted in certain cases with adverse witnesses and right to bail. A reference to the US Constitution reveals that the Fifth Amendment clearly states that the grand jury provision does not apply to, "cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger." In this respect also, the US Supreme Court has held that the Sixth Amendment's right to trial by jury is similarly inapplicable to courts-martial. The Court has advanced the current jurisprudence by reaffirming the fact that some portions of the Bill of Rights is applicable to the military justice system, except that such application must be viewed differently against that of the Civilians.

103. 71 M.J. 168, 174-75 (C.A.A.F. 2012)

States v. Easton[103], which now recognizes the general application of Constitutional rights to the military justice system[104].

In addition, under the American system the concept of military justice is not foreign to the Constitution. Rather, just like every other aspect of public life that comes within the purview of Congressional powers, the Constitution provides that the US Congress shall have the power, "to make Rules for the Government and Regulation of the land and naval Forces"[105]. One way in which the US Congress has brilliantly deployed its powers above, is as regards its enactment of the Uniform Code of Military Justice (UCMJ) in 1950, which immediately revolutionized the notion of Military Justice in the United States[106]. Following its first draft, the UCMJ has since been amended several times to bring it up to speed with complex matters of American military life. It is however instructive to say that one of the landmark achievements of the UCMJ has been in the area of giving further expression to matters of constitutional rights as it applies to servicemen, such that today the Code amongst other things provides for the right to counsel, right to a speedy trial, the right to a trial of the facts, the right to protection against double jeopardy, and the right against self-incrimination. This is certainly a framework that seeks to ensure that all matters regarding the Military are not conducted outside the supreme authority of the Constitution.

Interestingly, the Nigerian Constitution has a provision very similar

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104. The opinion of the court in re-entrenching this rule is quite instructive. It stated as follows; "Constitutional rights identified by the Supreme Court generally apply to members of the military, unless by text or scope they are plainly inapplicable. In general, the Bill of Rights applies to members of the military absent a specific exemption or certain overriding demands of discipline and duty. Though we have consistently applied the Bill of Rights to members of the Armed Forces, except in cases where the express terms of the Constitution make such application inapposite, these constitutional rights may apply differently to members of the armed forces than they do to civilians. The burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule".

105. See Article 1, Section 8 of the United States Constitution.

106. The UCMJ made up of about 150 statutory sections also provides for a system of court martial and other parts of the adjudicatory process such as pre-trial conferences, trial proceedings and post-trial procedures. The Code also provided for the establishment of the Court of Military Appeals which is now known as the Court of Appeals for the Armed Forces.

to its American counterpart where it says, "The National Assembly shall have power to make laws for the regulation of - (a) the powers exercisable by the President as Commander-in-Chief of the Armed Forces of the Federation; and (b)the appointment, promotion and disciplinary control of members of the armed forces of the Federation"[107]. Sadly, as it has become self evident this constitutional provision has operated as nothing more than a paper tiger, as the proper custodian of this all-important power i.e. the National Assembly has failed abysmally in deploying it to good use, carrying on in total indifference, and preferring to dump the matter on the laps of the Executive branch. It is suggested therefore that now is time to reverse this unsavoury trend. In addition to the provisions of Chapter IV, the National Assembly is called upon to proceed without favour or ill will towards anyone and give the needed teeth to the serviceman's rights and begin a new order of mandating the Military to be constitutionally guided in its law enforcement procedures. With this sort of framework, matters of law enforcement and military discipline necessarily become subject to overriding constitutional provisions, as it is the case under the American Military justice system, which is one that Nigeria can gain a bit of insight from.

VII. CONCLUSION

The Military is one Institution that takes the question of enforcement of its laws very seriously. That accounts for why it is about the most disciplined institution to be found anywhere in the world. The sustenance of this tradition of enforcement is what has made discipline the hallmark of the Military. However, the current understanding is one that leans in one direction only i.e. that every Constitution contains components of a moral imperative demanding that every member of the society be treated as human, having an intrinsic value in themselves, and that the principal duty of a constitutional society is to protect this idea of humanity[108], with courts positioned as the beacon to translate these rights[109]. Under the

107. Section 218 (4), Constitution of the Federal Republic of Nigeria, 1999, (As Amended).

108. See James M. Hirschhorn, supra, n. 97.

109. Ibid. Major pillars of this doctrine is the same that upholds the standards of "compelling interest", and "strict scrutiny" which the US Supreme Court's current approach to is assessing questions surrounding Citizen's Constitutional rights.

prevailing understanding, it is now the norm that servicemen do not abandon their rights when enlisting into the Military[110].

There is no gainsaying that the recognition of Constitutional rights within the framework of Military law enforcement is still a developing area of the law in Nigeria, and it is on this basis that a case is being made to ensure that a similar framework as what obtains in other jurisdictions is not only adopted here, but consistently improved upon. One must commend some stakeholders in this sector such as the Nigerian Army and the National Human Rights Commission, who have already seized the gauntlet and are leading the way[111]. We ask that they do not rest on their oars, even as others are called upon to toe the same line. More than ever before, it is now vitally of utmost necessity that every criminal proceeding under Nigeria's Military's law enforcement mechanism, is not just a satisfactory vehicle of constitutional rights of the accused servicemen, but more manifestly one which is so programmed to resolve constitutional rights grey areas, whenever such arises, in favour of such personnel. Though the desired destination may appear a long way from where we are at the moment, but if we continue with the current measured steps, it is certain that in a few years from now, there would be no trace between our Military justice system and where it used to be.

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110. See Weiss v. United States, 510 U.S. 163 (1994), Where a current Justice of the US Supreme Court, Justice Ruth Bader Ginsburg spoke saying, "Men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service. Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history…". Justice Ginsburg's position is in consonance with an earlier dictum of Justice Douglas who said, "A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander, but as written in the Constitution…" See Winters v. United States, 89 S.Ct. 57, 59-60, 21 L.Ed.2d 80, 84 (1968).

111. In a major move in this regard, there was of recent a special session of the Nigerian Military Human Rights Dialogue held on 27th September 2016, with the support of the Chief of Army Staff and the National Human Rights Commission (NHRC), where far-reaching consensus on safeguarding the Constitutional rights of Nigerian Service personnel consensus was reached. For a full reading of this report see generally Olawale Fapohunda, 'Roundtable on the Administration of Military Justice System in Nigeria', A Special Session of the Nigerian Military Human Rights Dialogue, The Nigerian Voice, (Lagos: October 3, 2016), available online at https://www.thenigerianvoice.com/news/231685/roundtable-on-the-administration-of-military-justice-system.html, accessed 27/05/2018.

DRM AND INDIAN COPYRIGHT LAW: AFTER 2012 AMENDMENT

R. P. RAI*

ABSTRACT : Digitisation was an international phenomenon that impacted India at the end of the twentieth century. The change in economic policy leading to the opening of the economy in the early 90s resulted in the increased availability of Computers, usually to the domestic consumers. The condition received an additional thrust with the availability of the Internet and its extensive use. The ease of digital technology with a range of advantages particularly quality allowed more and more works to be transformed into digital format and creation of newer work in digital arrangement. After the implementation of WCT and WPPT, several nations of the world adopted and integrated the DRM provisions of WCT and WPPT in their respective laws. In India, the Copyright (Amendment) Act 2012 has introduced the digital right management (DRM) provisions in the Indian Copyright Law, before that the Indian Copyright Act has been amended 5 times to meet with the national and international requirements.[1] The 2012 amendments attempt to make Indian Copyright Law amenable with the two Internet Treaties i.e. WIPO Copyright Treaty and WIPO Performances and Phonogram Treaty.[2] The work attempts to find out the impact of information technology on Indian copyright law after the 2012 amendment.

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1. Zakir Thomas, *"Overview of Changes in Copyright Law*", (2012) Vol. 17, *Journal of Intellectual Property Right,* at.324.
2. *Ibid*.

KEY WORDS : Infringement, Digital Piracy, Circumvention, Effective, Digital Rights Management, Right Management Information, WIPO, TRIPs, WCT, WPPT, Right Management

I. INTRODUCTION

Intellectual property and digital technology in the last couple of decades have complemented each other in various ways. Intellectual property rights are incentive-based assets which definitely needs strong protection in terms of digital environment because the paradigm shifts in technology have proved online space as a save heaven for anonymous offenders. The term DRM is generally understood as the management of your rights digitally, but as simple the concept sounds the more complicated it becomes when it comes to the happening of offences, identification of culprits and defining the complex terminology involved within the process of digital platform. Copyright is a set of rights which is given to the author for the protection of his intellectual creation. In the digital environment, these rights are protected in different ways i.e. with the tools like Digital Rights Management. This is nothing but a combination of hardware and software. India in response to the two Internet treaties has brought the amendment under the copyright law. The amendment aims to offer protection to the digital copyright content in the digital environment. In a backdrop, it has to be understood that even before the ratification of the above mentioned two treaties India was following more or less the same approach as provided in the treaties, therefore, this is the high time to define the complexities involved in the whole process either in terms of defining the ambiguous and puzzling terms or tracing the new methods evolved by the sophisticated lawbreakers. Along with it a system of checks and balances has to be created as far as the functioning of copyright societies is concerned in general and the management of rental virtues in particular. The present work is an attempt to highlight the technical details and legal issues involved in the above-mentioned introduction with an aim to provide a balanced and pragmatic approach without evoking any statutory as such.

II. THE PROBLEM OF DIGITAL PIRACY AND INDIA'S APPROACH

According to the International Intellectual Property Alliance (IIPA), India can be the world's principal legitimate market for the creative

industries both foreign and local.[3] Further, the opinion expressed by 'UNCTAD'[4] and 'Motion Picture Association'[5] that increase will continue, unfortunately, content theft negatively impacts the prosperity of creators, as a recent study highlighting the film production and piracy's effects the livelihood of the professionals and workers involved demonstrates.[6] Physical Online and mobile piracy, unlawful camcording of movies from the cinema screen, the unlicensed use of the software by the enterprise, print and photocopy piracy, circumvention of technological protection measure (TPM) have taken place since several years but no action was taken to stop and till 2012 there was no legislation to forbid these kinds of actions. In India, there is a blatant infringement of copyright norms.

III. INDIA AGAINST DIGITAL PIRACY

India is one of the leading consumers of intellectual Property Products (IP) but due to illiteracy, poverty ignorance and insufficient protection to online digital content, piracy of intellectual creation takes place and the Indian legislation is failing to prevent the piracy of intellectual property. In these circumstances, the burden falls upon the copyright holder to defend or manage his work by his certain inherent existing rights. Copyright holders can restrict the use that is made of the copyrighted work in several diverse situations. In reflection of the core nature of these rights, any contravention of these rights is branded as a primary infringement. To restrain the negative impact that illegal acts have upon copyright holder, copyright law recognises that it is not sufficient merely to offer remedies against those who copy or perform the copyrighted work. As an alternative, copyright law recognises that it is also necessary to offer, owners with protection against those who aid and abet the primary infringer. Such subsidiary infringement is known as

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3. International Intellectual Property Alliance is a group of seven trade association representing US companies that produce Copyright protected material.
4. UNCTAD i.e. United Nation Conference on trade and development, It deals with trade investment and development issue.
5. Motion picture association is a group of film producing companies. The name of the association varies with the country like India, America etc.
6. Openion expressed by Motion Picture Association in its annual theme report 2016- 2017 Available at *https://www.motionpictures.org/research-policy/* (accessed on 17 May 2017)

secondary infringement.[7] There are two vital differences between primary and secondary violations. The initial relates to the extent of protection. Primary infringement is concerned with people who are directly concerned in the reproduction, performance, (etc) of the Copyright work. In contrast, the secondary violation is concerned with the people in a marketable context who deal with infringing copies, facilitate such copying or facilitate public performance. The second difference between the two kinds of infringement relates to the mental part that the defendant must show to violate. In the case of secondary infringement, however, the liability is dependent on the defendant knowing or having grounds to believe that the activities in issue are wrongful.[8] In India, the provision involving copyright infringement is given in chapter XI of the Copyright Act. Section 51(a) deals with primary infringement and Section 51(b) deals with Secondary infringement. Primary infringement is a straight encroachment upon the author's right. Section 51 (b) deals with the persons involved in incidental activities of copyright infringement. When any person deals with the 'infringing copies' like makes for sale or hire, or lets for hire or distribute which is detrimental to the interest of the owner or display to public or import into India infringing copies constitute secondary infringement of copyright. In addition to this, Section 52 exempts specific kinds of acts from any liability. Section 52 says that 'Certain act not to be an infringement of copyright-like fair dealing with any work for 'private or personal use including research'[9], 'criticism or review'[10], 'reporting of current review'.[11] Section 52 (1) (c) exempts temporary storage of a work or performance for providing an electronic link, it means Internet Service Providers (ISPs) are as well exempted for 'incidental or transient storage, of a work. Remedies for copyright infringement are specified under chapter XII and XIII. Chapter XII is regarding civil remedies and chapter XIII deals with offences (criminal remedies). Civil Remedies include Interlocutory Injunction, *Mareva*

7. Lionel Bently and Brad Sherman, *Intellectual Property Law* (New York: Oxford University Press, 2011), at155.
8. *Ibid*.
9. Sec. 52(1)(a)(i).
10. Sec. 52(1)(a)(ii).
11. Sec. 52(1)(a)(iii).

Injunction,[12] *Permanent* Injunction, *Anton Piller* Order, etc.[13] Compensatory Civil remedies contain damages, damages for conversion, delivery up, the account of profits, etc. Penalty for copyright infringement is specified in Chapter XIII. Some common prevalent forms of digital piracy are-

(i) Signal Theft and Public Performance Piracy

In recent time Pay TV piracy is one problem which plagues the content industries. There was one issue with the cable operators that they under affirm the figure of the users and even there was no technique to identify the figures of users and sometimes users on one connection uses more than one TV. In the Pay TV system also the cable operators enjoy a monopoly. Sometimes unlicensed movies/titles are broadcasted by local cable operators.[14]

(ii) Software Piracy

Software piracy is also not free from the illness of piracy and infringement. India is the core of software piracy especially of mobile and free software. In India, different types of software piracy are widespread like end-user piracy, software counterfeiting mobile or chip downloading from open software websites like *Google play store, etc*. Software piracy is an unauthorised use, copy and circulation of the software without the owner's authorization or license. Section 63B of the Copyright Act makes the unauthorised use of computer software a penal offence.

(iii) Pirate Printing and Photocopying of Books and Journals

Although does not come within the purview of digital piracy, Piracy of books, textbooks, professional books (scientific, technical, and medical), and academic journals continue to spoil the publishing business in India. Book piracy occurs in a variety of ways in the country. While

12. *Mareva* Injunction is a court order preventing a defendant from transferring assets until outcome of the associated law suit is decided.
13. *Anton Piller* Order is a form of discovery preservation granted on Ex. Parte application. It can comprise of an injunction to restrain infringement, permission to enter defendant's premises to inspect documents and to remove originals or copies of originals, permission to remove infringing goods and an injunction to restrain defendant from disclosing the contents of the injunction to third parties for a specified period.
14. *Supra* note 6.

online piracy of trade books, textbooks, journals, and reference books is beginning to rise, publishers' chief problem in India remains hard goods piracy.[15] Unauthorised photocopying as well as the compilation and sale of "course packs" are usually seen concerning textbooks used in educational institutes. Print piracy (off printing presses or reprints) affects scholarly titles as well as trade titles.[16]Unauthorised and scanned copies of books (chiefly in the scientific, technical and medical sectors) and the hosting of such copies on websites created and maintained by campus students are also on the rise in India. One very general problem that is also seen in the book publishing industry is downloading the 'PDF'[17]

(iv) Internet and Mobile Piracy

With the growth of Internet connectivity and growing mobile penetration, internet and mobile device piracy have grown worse for the copyright industries in India. Illegal downloading websites, P2P file sharing,[18] Bit Torrent trackers and indexes, streaming websites, deep linking sites, blogs, forums, and social network sites directing users to infringing files, cyberlockers used to promote massive amounts of infringing materials, and piracy through auction sites all continue to plague right holders in India.

(v) Camcording Piracy

India is also a core of camcording piracy. In India, the camcording piracy started nearly from the year 2000 when the tiny digital cameras and camcording devices turn out to be easily available in the Indian market. This device takes an extremely sharp and clear picture even in a loud environment. With the aid of small cinema theatre owners the person concerned in camcording piracy records the movie and after that with the aid of any content sharing website distributes it globally.

(vi) Retail Piracy and Circumvention of TPMs

The major form of retail piracy in India consists of burned optical

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15. *Ibid*.
16. *Ibid*.
17. PDF (Portable Document Format) it is a file format used to present documents in the manner independent of application software, hardware and operating systems.
18. P2P File sharing network is governed in India through Sec.52 of Copyright Act. Various kinds of P2P File sharing network like Napster, Kazaa, Gnutella are involved in Copyright Infringement.

discs (CD or DVD), with content including music compilations in MP3 formats, pre-release music (primarily Indian titles and some international repertoire), motion pictures on VCDs, DVDs, and CD-Rs (most of which are available in chief cities well before the local theatrical release of the title), and CD-ROMs and DVDs of software, entertainment software and books/reference materials. The music industry alone reports losses due to hard goods piracy of Rs 300 billion.[19]

IV. DRM AND COPYRIGHT ISSUES UNDER INDIAN COPYRIGHT LAW

India's Copyright Act 1957 was revised in the year, 1983, 1984, 1992, 1994 and 1999. The 1994 and 1999 amendments narrowly addressed the matter of digitisation and also brought the copyright law in observance with the "Trade-Related Aspect of Intellectual Property Rights (TRIPS)". The 2012 copyright amendment introduced the notion of 'Digital Rights Management' and 'Right Management Information' in Indian Copyright Law.[20] This amendment was introduced with a vision to bring copyright law as per the two internet treaties i.e. WCT (1996) and the WPPT (1996), even though India's was a non-signatory to the internet treaties and it was not under compulsion to endorse provisions relating to DRM in India. By way of Sections 65A and 65B provisions on technological protection measures (TPM) and rights management information (RMI), which are chiefly used by the copyright owners to protect copyright over digital content, has been introduced into the Act. Section 65A makes circumvention of the preventive measures a punishable offence besides this the section provides certain exceptions where circumvention of technological protection measures is not an offence. Section 2(xa) of the Act defines Right Management Information (RMI) and section 65B provides a penalty for the circumvention of rights management information (RMI).

The first ingredient of "Digital agenda|" in Indian law is found in S.2 (ff) of the Act which explains the expression 'communication'. The amended definition by providing for making any work or performance

19. *Supra* note 16.

20. Betsy VinoliaRajasingh, BIndia, *India enacts laws to protect copyright over digital content*, *Journal of Intellectual Property Law & Practice*, 2013, Vol. 8, No. 4

accessible to the public directly by any method of display or diffusion at place and time individually chosen rather issuing corporeal copies of such work or performance. Communication to the public introduces a novel right i.e. making an available right. It is significant to recognise the point of disparity between the new provision and the old provision. The right to make the work accessible to the public is introduced by the 2012 amendment. The earlier section 2(ff) did not contain the phrase "*places and times chosen individually"*.

(a) Provision of Right Management Information in Indian Copyright Law

Section 2(xa) of the Copyright Act describes the expression of Right Management Information[21]. As it has discussed in the previous chapter that RMI is information attached to the protected copyright content. Section 2(xa) states certain content which RMI includes. RMI includes the name of the work, name of the author or performer his /her address, etc. Section 65(B) declares the infringement and alteration of RMI an offence. Section 65 (B)[22] makes the removal, alteration, distribution; import for distribution, broadcast or communication to the public of RMI, an offence punishable with the sentence up to two years and fine and the owner may also avail the civil remedies.

It is worth noting that the concept of RMI is not completely novel for India. An inference from the wording of RMI can be drawn from Section 52A (1) of the Copyright Act.[23] Section 52 makes it compulsory

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21. *See* the Copyright Act, 1957: Sec. 2 (xa).
22. *See* the Copyright Act, 1957: Sec. 65B.
23. the Copyright Act, 1957: Sec.52A. Particulars to be included in sound recording and video films.-

    (1) No person shall publish a sound recording in respect of any work unless the following particulars are displayed on the sound recording and on any container thereof , namely:-

    (a) the name and address of the person who has made the sound recording;

    (b) the name and address of the owner of the Copyright in such work; and

    (c) the year of first publication.

    (2) No person shall publish a video film in respect of any work unless the following particulars are displayed in the video film, when exhibited, and on the video cassette or other containers thereof,namely:-

    (a) if such work is Cinematograph film required to be certified for exhibition

to include a description of the content available with sound recording and video film. The description may include the name and address of the maker of the work, name, and address of the owner and the time of first publication of sound recording or video film.

RMI has been defined under section 2(xa) of the Copyright Act contains the detailed and minute description of the protected content. The definition does not, however, consist of any appliance or procedure intended to recognise the user. Such RMI are guaranteed protection under the Act, which reads: Section 65B any person, who knowingly—

(i) removes or alters any RMI without any proper authority, or

(ii) distributes, imports for distribution, broadcasts or communicates to the public, or changed or removed without authors' consent. Sentence up to 2 years and fine.

The RMI provision, which is derived from Article 12 of WCT and Article 19 of WPPT, aims at fighting piracy in entities together with, film, music and publishing industries, etc. The definition, by excluding 'any device or procedure to identify the user' from its ambit, ensures the protection of privacy rights of the end-user. Further, unlike Section 65A, a proviso to Section 65B permits the owner of the copyright to avail himself of civil remedies for tampering the RMI within the copyrighted content. Practical significance, the introduction of anti-circumvention legislation and RMI provisions in the Indian context have given rise to various questions, including the requirement for such laws in a rising economy that would, in the absence of such legislation, benefit from access to a fairly large population. The conventional balance that exists in copyright laws, among the right holder and the public, had been twisted in favour of the copyright owner with the initial introduction of DRM provisions in the developed countries. Even though with the clear absence of access control provisions as well as manufacturer liability, the Indian

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under the provision of the Cinematograph Act ,1952 (37 of 1952), a copy of the certificate granted by the board of films certificate under Section 5A of that Act in respect of such work;

(B) the name and address of the person who has made the video film and a declaration by him that he obtained the necessary license or consent from the owner of the copyright in such work making of such video film; and

(C) the name and the address of the owner for the copyright in such work.

law is comparatively less stringent in comparison with the US and EU laws, its fair use provisions are insufficient as the law compounds the problem of access by assuming that all persons exempted from legal accountability, for example, disabled persons, would have the essential tools to circumvent the technological locks used by copyright owners. There is also a lack of particular intent behind the burdensome record maintenance process that an individual facilitating circumvention, for the benefit of those exempted from the anti-circumvention provision, is obliged to comply with. So it can be an opinion that in a developing nation such as India, which is likely to benefit from access to copyrighted content, the introduction of a concept such as DRM that is already on the path of termination is largely non-imperative. Nevertheless, since it has been enacted and considering the absence of legislative clarity in certain areas, it is vague how the judiciary will interpret these laws without compromising the access for the general public which DRM is likely to choke.

(b) Provision of Digital Rights Management

The provision involving DRM is given in Section 65A of the Copyright Act.[24] This provision is added in the Copyright Act by the 2012 Copyright amendment Act. The section does not define DRM rather simply lays down the punishment for the circumvention of effective technological measures. It provides punishment for the individual engaged in circumvention of technological measures. However, it exempts certain actions for which if any restrictive measure is circumvented then the person will not be liable.

The word *effective* in the section is positioned ahead of 'technological measure' in a way similar to Article 11 of WCT and Article 18 of WPPT. Unlike the European Union Copyright Directive 2001, there is no definition of "effective technological measure" under the Act, besides, no explanation is appended in the Indian copyright law on the plausible mechanism to list a certain TPM as effective or otherwise, Section 65A exclusively prohibits circumvention of TPMs that are applied for the protection of rights conferred under the Act, that is the protection of copyright works, thus leaving access control provisions outside the compass of the Act. Unlike the USA, but similarly to the EUCD, a prerequisite for intention to breach copyright is essential to incur liability under this section. Various

24. *See* the Copyright Act, 1957: Sec. 65A.

concerned parties were against such a prerequisite for intention, which positioned the burden of proof to set up circumvention on the copyright holder. They felt that the mere act of interfering with a TPM should be sufficient to categorise the act as an offence under the section. Many stakeholders also felt that Section 65A was lacking as it had neither access control provisions nor civil remedies for an act of circumvention. Responding to these criticisms, the committee backed Section 65A by highlighting the legislative intention behind the phrasing of the section to be based on India's status of being a developing country.

Further, such status has been the reason for providing partial legislative guidelines and leaving the judiciary to develop the laws based on practical situations, yet not compromising on public interest in access to work. The section also does not refer to preparatory actions (business in trafficking circumventing technologies) as found in the US Digital Millennium Copyright Act 1998 (DMCA) and the EU Directive [25] , as a result, the anti-device provisions of the US and EU laws are absent in the Indian law. Exceptions to anti-circumvention are provided in the latter part of Section 65A, which permits circumvention for any purpose not specifically proscribed by this Act; encryption research using a lawfully acquired encrypted copy; legal investigation; The exceptions permit circumvention for any purpose other than those specifically prohibited by the Act. Therefore the limitations and exceptions to copyright provided under Section 52 (which has also been broadly reviewed and amended by the Copyright (Amendment) Act 2012) cannot be made inoperative by the anti-circumvention provision under s 65A. Section 52 between others includes provisions permitting fair dealing of a content in which copyright exists for: private or personal use including research, criticism or review and news reporting (concerning any work excluding computer programs); the purposes of judicial proceedings, legislative usage, instructional and educational needs; and the benefit of a person with a disability or any organisation working for such persons with disability. Further, Section 65A also requires any person who helps in circumvention of TPM, for the advantage of those exempted from legal responsibility, to keep a complete written record of the name, address and reason for which such circumvention had to take place.

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25. *Ibid*.

Implementation of DRM Provision in Indian Copyright Law: A Critical Approach

After vigilant reading of the 2012 amendment provision in the Indian copyright law, it is found that there are various lacunas in the drafting in this part we shall examine the various shortcomings in the 2012 copyright amendment.

(a) No Distinction between Copy Control and Access Control

The obligation imposed by WCT and WPPT was implemented by the DMCA (1998) and the EU Directive. One of the most distinguishing characteristics of the DMCA is that it attempts to differentiate between the measure that controls access to content and protection for measures that control the use of the content.[26] DMCA manages the real circumvention as well as the preparatory actions. The EU left the member Nations free to draft act as per there convenience but the legislations of the associate states contain the provision for the Copy control and access control.

In India section 65A says that "*any person who circumvents an effective technological measure"* if the measures are not effective then it will not attract any liability.

In DMCA Section 1201(a)(1) contains the exclusion relating to access control technological measure, Section 1201 (a) (2) defines the circumvention tools, further Section 1201 (b) prohibits copy control circumvention tools but DMCA does not forbid copyright control circumvention measures. The Indian copyright act does no differentiate the copy control circumvention measure and access control circumvention measure.[27]

(b) No Definition of circumvention, infringement or alteration of RMI

The Indian Copyright act imposes liability on every person who circumvents an effective technological protection measure. The equivalent

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26. ArunGeorgeScaria, "*Does India Need Digital Right Management Provisions or Better Digital Business Management Strategies?*", Journal of Intellectual Property Rights, Vol. 17, at 463.

27. WIPOGeneva:*Standing committee on Copyright and related rights,*(3-5 Nov 2003), Available at:*http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_7.pdf,* (accessed on 24 Jan. 2017).

provisions in the WCT and WPPT left these definitions on the member nations to define these expressions as they like keeping their domestic need.[28] The Indian Copyright Act states the condition or list that except these all the actions will come under the purview of circumvention of technological protection measure. The same situation is with the RMI and it states that if anyone does these acts intentionally then (circumvent) shall be liable to punishment.[29]

In addition to Indian legislation, the other legislation of the world like DMCA and EU Information Directive defines the term circumvention, technological measure, and 'effective technological measure'.[30] The absence of a definition for expressions like 'technological measure' in the Indian Copyright Law creates a gap since it is not clear as to whether the provision relates to copy control measure or access control measure or both.

(c) No protection to broadcasters

The Indian Copyright Act does not offer protection to the Broadcasters for circumvention of technological measures. At the time of Drafting of WCT and WPPT by fault, no protection was offered to broadcasters but later on realising the mistake in the year 2007 protection from violation was given to broadcasters. The Indian Copyright Amendment Act was passed in the year 2012 but this provision was escaped in the amendment bill. The non-inclusion of broadcasters seems to be irrational. Apart from the above-mentioned shortcomings in the Act, the other one is in Section 65A (e) use of the word "operator". The term operator is very confusing in the respect that it is unable to determine the meaning of the term "operator". The term operator does not give any idea and connection with the rest of the provision of Section 65A (2). The Subsection does not convey any meaning so it can be said that placing the word operator is confusing one and it should be clarified or removed.

(d) Kind of Knowledge not defined

WCT and WPPT require protecting the act of actual circumvention. Article 19 of WPPT and Article 12 of WCT cover both the knowledge of

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28. *Supra note 20.*
29. Copyright Act, 1957: Sec. 65A and 65B.
30. *Ibid*.

the action and the knowledge of the consequence. A close look at the laws of the different countries reveals that the Laws of the most nations have gone beyond this International mandate and have offered comprehensive protection even to preparatory activities like 'manufacture, import, sale .etc, of the devices and services used to circumvent a technological measure.[31] The copyright amendment Act 2012 uses the expression '*who circumvents'* indicating that the activity covered is that of circumvention. Unlike the DMCA provision, since circumvention remains vague, the author shall consider the dictionary meaning of the expression 'circumvention' which means to evade, elude, etc. Thus the action intended to be covered is the 'avoidance or bypassing' of an effective technological measure. Furthermore, the word in the provision implies that there must be an actual circumvention of a technological measure. This means that that liability is imposed on the individual who performs the act of circumvention. Act of circumvention attracts the liability only when there is an 'intention of infringing rights. 'Intention' means a purpose or desire to bring about a completed result or foresight that a certain consequence will result from the conduct of the Individual.[32] This means that the action of an individual is covered only if he does such an act with the wish to does the prohibited act. Section 65B uses the expression "*any person, who "knowingly"* means for doing the act of circumvention, knowledge is required, but the Act does not define that when it can be said that the person knows. A person knowingly does an act will undergo the consequence it means knowledge of the act results. If we take the help of criminal law, for every criminal act there must be a guilty mind that is also known as '*means rea'* means an act does not make a man guilty unless it is accompanied by the guilty mind. So it means for proving the act of intention it is essential to prove the culpable mind of the person by which he does the act of circumvention, and it depends upon the court to examine the requisite '*means rea'* of the person. So it is also a loophole in the 2012 Copyright Amendment Act.

(e) The civil remedy given but, corresponding wrong not defined

The only remedy is provided under the 2012 Copyright Amendment Act is criminal. In case of violation maximum punishment up to two

31. *Supra* Note *27*.
32. *Ibid*.

years and fine. The proviso of Section 65B says that if Right Management Information (RMI) has been tempered the author of the RMI can avail the remedy of Chapter IIX (Civil remedy) but the wrong is not defined in the chapter. Last but not the least punishment for removal or alteration of RMI is two-year imprisonment but the amount of fine is not given.

(f) Preparatory Act is not prohibited

The activity covered under the act is only actual circumvention of the technological protection measure or the Right management Information (RMI) and the preparatory activities are not forbidden. The provision under Section 65A and 65B particularly excludes the actions like manufacture or otherwise dealing with technology that will help circumvention. Thus it can be seen that all preparatory activities are barred and as a result all the people who make such preparation. This is keeping in view the dual nature of the technology in the sense that the technology that would ease circumvention for the reason permitted by the section itself is the one that can be used for infringement. As an effect, if manufacture and otherwise dealing in the technology are prohibited, this will not merely inhibit infringement but also those activities which the copyright regime intends to encourage.

(g) Facilitating Circumvention

An exclusive provision can be seen in the current 'Indian Copyright Act 1957 regarding the liability of an individual who facilitates the creation of technology to circumvent in Section 65A. While most jurisdictions inflict liability on an individual facilitating circumvention, the Indian Copyright provision specifically provides that a third party can aid if record maintained. The insertion of this provision is with the realisation that it is not within the capacity of each individual to have the technical knowledge to circumvent a technological protection measure applied to content to please his legitimate requirements.[33] But there could be a huge difficulty in the implementation of this section. In a country as vast as India, it is not easy to recognise and isolate individuals who have this technical knowledge. A wide variety of people ranging from computer geek, who could be a minor ignorant of the consequence of his action to a professional hacker, might have technical knowledge of this nature. An

33. *Ibid*.

additional point of significance is that the Act requires maintaining a record for the same purpose but it does not inflict any liability or punishment for the same.[34]

(h) Lack of Proper Economic Analysis Regarding the Need/ Potential Impacts of DRM Provisions in India

One of the most significant steps that any legislature has to assume before engaging in a legislative process is to conduct a proper economic analysis of the need as well as the impact of the proposed legislation in society. Economic analysis of law can provide invaluable insights as to how the changes in the law will influence the behaviour of different actors in society.[35] Laws are instruments intended at achieving significant social goals and economic analyses will aid to predict the effects of laws on efficiency also.

While the economic study of law has not in common received its due attention in the Indian law making scenario, subjects like copyright law surely deserve a rigorous analytical analysis, considering their far-reaching implications in the society. If one looks at the legislative backdrop of the new DRM provisions in India, it can be seen that the provisions have not been subject to appropriate economic analysis concerning both the need as well as the impact of those provisions on the country copyright-based industries in India.

V. CONCLUSION

The statement of the objects and the reasons of the Bill introduced in the Parliament primarily focuses on the desire to fulfil the WIPO Internet treaties obligation and also expresses the firm belief that adherence to those two treaties is essential for defending the copyrighted material in India on digital networks like the Internet. The amended provisions as contained in section 2xa Section 65A and Section 65B contains the provision relating to the Right Management Information and Digital Rights Management, the amended provisions lack the basic details as to DRM and RMI. The legal as well as the technical experts are of the view that

34. *Ibid*.

35. Cooter Robert D and Thomas Ulen, *Law and Economics* , Pearson Addison Wisley, Boston, 2004, p. 472-498.

these provisions do not meet the basic requirements of the two internet treaties. The penalty imposed in the contravention of these provisions is very less and insufficient for the habitual offenders. The provisions like, maintenance of record appears very ambiguous and does not talk about the authority concerned with the maintenance of the register. However, a plea that can be taken in support of the amendment is, it is just a beginning to offer legal protection to the measures as well as the content and safeguard the economic rights of the content owner. Because, it is only partial incorporation of the two internet treaties, so it is suggested that a second amendment is required to cure the existing issues in the previous amendment on the lines of DMCA or EU Information Society Directives.

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DEATH SENTENCE AND CRIMINAL JUSTICE IN INDIA

PRADEEP KUMAR SINGH*

ABSTRACT : Society has responsibility to protect itself and members of society against harmful impacts of criminality. Such need is more felt and also societal activism to check problem of criminality becomes vigorous when nature and rate of crime create fear of victimization in common mass. Traditionally crime problem is reacted sternly and also it is believed that by instilling deterrence in criminal elements through infliction of punishment, effectively crime problem may be tackled. It is considered stern punishment has deterrent and reforming qualities. Thereby, as nature of crime becomes more serious and crime rate becomes more alarming, punishment becomes more stern and severe. Death penalty is most stern and severe punishment, now days usually demands are made for frequent prescription and application of this punishment. In this paper legal regime relating to death sentence will be discussed. Further, there will be analysis of penological goal attainment by death sentence prescription.

KEY WORDS : Aggravating and mitigating circumstances, Criminal, Criminal justice system, Death sentence, Penological, Punishment.

I. INTRODUCTION

Criminality, criminal and crime commission are serious challenges before the civilized society which challenge the existence, disturb the peace and affect the development of society itself and members of society. Further, it interferes with life, personal liberty and property of members

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of society. Society has developed criminal justice system for effective dealing with crime, criminals and criminality. By such act on part of criminal justice system, society makes striving for its own and society members' protection against grave danger posed by crime problem. In criminal law prescribed reaction for commission of crime is infliction of punishment and it is distinctive feature of criminal law. Traditionally it is considered that rationalization for infliction of punishment is deterrence creation and retribution taking. Nature and extent of punishment prescription in criminal law and its infliction depend on many factors specially on crime problem in the society concern; whenever crime problem in the society concern becomes graver, punishment becomes more severe; similarly, whenever crime problem is lesser problematic, punishment is lesser. Common citizenry also believe that cure for crime problem is stern punishment prescription, thereby, in case of increase in crime rate usually demands for made for new crime definitions creation and enhancement of punishment, both in nature and extent. Criminal law in India prescribes various punishments and provisions prescribe punishments on the basis of seriousness of offence, because of this reason seriousness of offence is generally calculated on the basis of severity of offence prescribed. Death sentence is most severe punishment prescribed in criminal justice system. Death sentence is also referred as death penalty and capital punishment. Death sentence is mentioned in Section 53 Indian Penal Code (hereinafter referred as IPC) as one of the punishments imposable for commission of crime. Death sentence is most debated punishment; some persons argue for abolition of death penalty while some persons argue that death penalty should be in penal provisions and in appropriate cases it should be readily inflicted. Some persons consider that the death penalty disrespect human life, it is barbaric and have no rational basis except on brute consideration to take life for life taking, thereby, obsolete concept of eye for eye, tooth for tooth and life for life. Other section of people consider that death penalty is effective measure of deterrence for criminal element and teach the lesson to criminals and potential criminals to have not dare to commit crime, thereby, death penalty is effective measure to compel and force the reformation of criminals. Further, the supporters of this view consider that infliction of death penalty satisfies victim's injured self, thereby, lynch law problem is completely tackled; it reduces the criminality; and it reduces fear of victimization. Furthermore, they also consider that infliction of death penalty increases social solidarity,

reaction against crime, and feeling of being protected against crime. Death penalty is completely different from other punishments. On infliction of death punishment life of convicted person comes to an end, therefore, detailed procedural safeguards are provided to completely check every error and mistake indetermination of guilt, death sentence pronouncement and execution of sentence. Thereby, death sentence is completely different from other sentences prescribed in penal law.

In Indian criminal justice system a reasonable view is adopted for death penalty. Death penalty is declared as permissible punishment u/s 53 IPC but this punishment is provided only in reference to very few offences which are considered as most serious one affecting the whole society, for example murder punishable u/s 302 IPC, murder punishable u/s 303 IPC but this provision has now been declared as unconstitutional in the case *Mithu v State of Punjab*[1] on the ground that classification made in provisions between person under going life imprisonment and other person committing murder is not a reasonable classification and further only one punishment death penalty is prescribed which completely takes away judicial discretion of court in sentencing and has made compulsive to impose death penalty in mechanical manner, sedition punishable u/s 121 IPC, giving or fabrication of false evidences which caused execution of innocent person punishable u/s 194 IPC, attempt to murder by life-convict and in this pursuance hurt was caused punishable u/s 307 IPC, kidnapping for ransom punishable u/s 364-A IPC, murder in dacoity punishable u/s 396 IPC. Perusal of offences for which death penalty is inflicted on the offender shows that death penalty is prescribed as punishment mainly for offences causing death of victim, hereby, capital punishment is prescribed as punishment for murder or related offences.

II. DEATH SENTENCE WAS PRESCRIBED PUNISHMENT IN ANCIENT INDIA

Society has responsibility to protect the citizenry against the crime and criminality. For the aforesaid purpose societies has developed some informal instrumentalities and some formal instrumentalities; state is major formal instrumentality established by society to tackle the crime problem. State bear the whole responsibility of society to effectively deal with crime and in this reference in its turn it has developed criminal justice

1. AIR 1983 SC 473

system. From very ancient period emphasis was given on responsibility of state to punish the wrong-doer. In Mahabharat in Shantiparva primary duty of king was mentioned to use Dand (punishment) for maintaining and providing dharma (justice):

स्मयग्दण्डधरो नित्यं राजा धर्ममवाप्नुयात्।
नृपस्य सततं दण्डः सम्यग् धर्मः प्रशस्यते।।[2]

Traditionally, it is considered that criminal can be checked from commission of crime only by instilling fear of punishment. Punishment is considered one crucial measure which effective use can protect society against crime, criminal and criminality. In ancient literature Punishment was considered provided by God and its proper use was considered as *Raj Dharma* (State duty). In Mahabharat it was observed that whole world was functioning properly only due to the punishment:

अयं पितामहेनोक्तो राजधर्मः सनातनः।
ईश्वरश्च महादण्डो दण्डे सर्व प्रतिष्ठतम्।।[3]

In ancient period deterrent concept of punishment was given primacy over other concepts. It was responsibility of state itself to see that criminal elements were not daring to commit crime. In Mahabharat in Shantiparva detailed discussion was made on use of punishment as deterrent measure to check the problem of crime:

न स्याद् यदीह दण्डौ वै प्रमथेयुः परस्परम्।
भयाद् दण्डस्य नान्योन्यंघ्नन्ति चैव युधिष्ठिर।।[4]

Capital punishment is considered as most deterrent punishment. It is believed that when death sentence is inflicted in appropriate cases, it has potential to instill fear in criminals and near criminals and they may desist from crime commission. Death penalty may teach the lesson to criminals that crime commission may badly affect the criminal of crime himself and he may even loss his own life; criminal will get lesson that if he will take life of some innocent person, he can do only at the cost of his own life and in such situation criminal may not dare for such crime commission. In ancient India death penalty was permitted and it was

2. Mah. Shantiparva, LXIX. 30
3. Mah. Shantiparva, CXXI. 1
4. Mah. Shantiparva, CXXI 34

rationalized on the basis that it has greater deterrent effect. Further, king was considered under duty to end the criminal for protection of innocent persons. In Mahabharata in Shantiparva King Dyumatasena justified killing of criminals that if the offenders were leniently let off crimes were bound to multiply. Further, he opined that true ahimsa lays in execution of unworthy persons, and therefore, execution of unwanted criminal is perfectly justified:

अथ चेदवधेधर्मोऽधर्मः को जातु चिद् भवेत्।
दस्यवशचेन्न हन्येरन् सत्यवन् संकरो भवेत्।।[5]

In Manusmriti king was directed and made duty bound to impose effective punishments on criminals and for the purpose of determination of effective punishment king was directed to have proper knowledge about punishments and to consider the societal condition, nature and impact of crime.[6] Manusmriti equated punishment with Dharma and observed that punishment is king, leader and ruler; punishment is ruler of whole citizenry and punishment is protector. Punishment always awake and protect from wicked persons, therefore, rational persons opined that punishment is dharma.[7] Manu expressed opinion that punishment is measure which checks the problem of *Matshya-nyay* (bigger fish devour smaller fish; similarly when properly criminal justice is not dispensed with then stronger person may exploit weaker person; *matshyay nyay* is indication of anarchy.[8] Manu observed that all the persons are under control of Danda (punishment).[9] Manu recommended use of all four kinds of punishments including death sentence:

वधेनापि यदि त्वेताऩ्नि गृहीतुं न शक्नुयात।
तदैषु सर्वमप्येत त्प्रयुन्जीत चतुष्टयम्।।[10]

Yajnavalkya recommended four kinds of punishments – warning, due admonition, monetary punishment and physical punishment; physical punishment was including death penalty:

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5. Mah. Shantiparva CCL XXVI 5
6. Manusmriti 7:16
7. Manusmriti 7:17, 18
8. Manusmriti 7:20
9. Manusmriti 7: 22
10. Manusmriti 8:130

धिगदण्डस्त्यथ वाग्दण्डो धनदण्डो वधस्तथा।
योज्या व्यस्ताः समस्ता वा ह्यपराध वाशादिमे[11]

Kautilya supported deterrent punishment an opined that in absence of punishment imposition there may be *Matsya nyay* in which mighty may devour week:

दण्डः अप्रणीता हि मात्स्यन्न्यायमुद्भावयति।
वलीयानबलं हि ग्रसते दण्डधराभावे।।[12] (कौ. 1.4)

In ancient India concepts of criminal justice was well developed; Smriti authors gave well articulated theories of punishment with a view to attain the goals of criminal justice system. In Shantiparva of Mahabharat penological analysis of punishment was made, and thereby, striving was made to identify the rational basis of punishment. In ancient India main emphasis was to check the problem of crime with objective to protect the citizenry and for this purpose solemn responsibility was imposed on state. Ancient Indian law givers considered that criminal may not commit crime when sufficient and effective punishments were inflicted; such punishment infliction would create deterrence in criminal elements thereby, they and may not dare to commit crime. Deterrent punishment was considered to have teaching the lesson effect over criminal elements. Because of emphasis on deterrent element in criminal justice administration, punishment prescribed became severe and stern. Death sentence had been considered having greater deterrent effect, it was permitted. Further, death sentence may remove the hardened person who cannot be deterred and/or reformed. Punishment (Danda) was equated to Dharma (justice). State (king) was directed to use the punishment but it was not subjective discretion but as the sovereign responsibility (Raj Dharma), and further, determination of nature and extent of punishment was not arbitrary discretion but must be based due consideration of factual matrix of case, social condition, nature and impact of crime, and nature and impact of punishment. Ancient Indian scripture testifies that punishment infliction was purposive, it was not only for deterrence creation but for prevention of crime, teach the lesson to reform the criminals, and ultimately to protect innocent citizenry from crime, criminals and criminality. When compared with modern criminal justice

11. Yaj. 1:36
12. Kautilya 1.4

system in India it is clear that ancient criminal justice system was equally developed and based on same penological substratum. Ancient Indian Criminal Justice system had its own roots and bases of development, those were, Indian social structure and social process. Even today social structure and social process of particular society determines criminal justice system of society concerned. Concept of treatment of offender was also well developed in ancient India, criminal who might be reformed was taken care in ancient Indian criminal justice system. In Mahabharat Satyavan , the Son of King Dyumtasena, says that killing of any human being cannot be rationalized by law:

वधो नाम् भवेद् धर्मेनैतद् भवितुमर्हति।।[13]

Further, Satyavan observes that the criminal should be reformed and only it is measure to tackle the criminality:

तान् न शन्कोषि चेत् साधून् परित्रातुमहिंसया।
कस्यचिद् भूतभव्यस्य लाभेनान्तं तथा कुरु।।[14]

III. DEATH SENTENCE IS AWARDED IN REREST OF RARE CASE

Offences punishable with death penalty are of serious nature but for infliction of death not only offence has to be serious but also the case must be heinous and ghastly. For infliction of death penalty offence has to be serious offence and further, case is brutal, heinous and ghastly case. Section 235 (2) Criminal Procedure Code (hereinafter referred as CrPC) specifies that in the trial of case bifurcated hearing has to be conducted, separate hearing for conviction and sentence; only conviction for offence is not sufficient to determine sentence but for sentence court takes evidences whether person should be released on probation or punished and if punished what punishment and what extent of punishment should be inflicted. Bifurcated hearing for conviction and sentence is necessary. Hereby conviction of a person for offence punishable with death penalty is not sufficient to award it but further evidences must be taken and factual matrix of case has to be considered to determine whether any other punishment should be inflicted or death sentence has to be awarded. When Section 235 (2) CrPC requiring bifurcated hearing is read with Section 354 (3) CrPC requiring to give special reason for award

13. Mah. Shantiparva CCL XXVI. 4
14. Mah. Shantiparva CCL XXVI. 23

of death sentence, it becomes clear that conviction for death penalty punishable case is not sufficient for infliction of death sentence but further case is such in which only death penalty may be appropriate sentence. Offence punishable with death penalty is no doubt serious offences and out of that in serious case death penalty is actually imposed, thereby, death penalty can be awarded in serious of serious case, means, rarest of rare case. Section 354 (3) CrPC requires that when conviction order is passed for any offence for which death penalty is alternative punishment, court has to give reason and when death penalty is awarded, in such case court must give special reason for awarding the punishment. The requirement of recording special reason for award of death penalty emphasizes that death penalty can be awarded only in rarest of rare case. Section 354 (5) CrPC determines mode of awarding death penalty and in this regard sentencing court must give specific direction regarding mode of execution of death penalty punishment. Section 354 (5) CrPC has laid down only one mode for execution of death penalty that is by hanging by the neck; this sub-section compulsorily requires that court awarding death penalty shall give specific direction in sentence order for offender 'be hanged by the neck till he is dead'. Effective punishment infliction is essential requisition for effective tackling of crime problem. Always court gives reasoned decision but for some punishment inflictions specific requirement is made for giving of reasons, it means provisions require special caution on part of court in awarding such punishments. When more severe punishment that is death penalty, is awarded special reason has to be given. Death sentence infliction results in end of life of offender, therefore, requires special care, not in normal case it should be inflicted but case has to be rarest of rare case, a case with depravity, brutality and in-human acts. In *Bachan Singh v. State of Punjab*[15] Supreme Court upheld constitutional validity of death penalty but decided that imprisonment for life is rule and death sentence is exception. Supreme Court decided that case in which death penalty can be imposed should be rarest of rare case. For calculation rarest of rare case situation of crime and criminal both must be seen; for the aforesaid purpose mitigating and aggravating circumstances of crime and criminal should be calculated. When murder is committed in planned manner, public servant on duty is

15. AIR 1980 SC 898

murdered. Further, criminal has no prospect of reformation and rehabilitation. In reference to criminal probability (not the possibility or improbability or impossibility) of reformation and rehabilitation of offender should be considered. If he has prospect of reformation and rehabilitation, life imprisonment may better be awarded; age of the accused, if accused is young or old, he should not be sentenced to death; probability that accused would not be continuing threat for society. Aggravating circumstances relate to crime, mitigating circumstances relate to criminal. In *Machhi Singh v. State of Punjab*[16] Supreme Court analysed *Bachan Singh case decision* and reaffirmed and observed that death penalty should be awarded in gravest case. Not only circumstances of case but also circumstances of offender should be considered. Life imprisonment should be rule and death penalty should be exception. Death penalty should be awarded when other punishment cannot be applied.

In *Bachan Singh case* Constitutional validity of death penalty for murder was upheld on the basis that Section 302 IPC r/w 354 (3) CrPC prescribe death penalty only as an alternative punishment; generally life imprisonment is imposed, only in a case for giving special reason means in situation of rarest of rare case death penalty may be inflicted. Further, judicial discretion is available to court to determine and select appropriate punishment. In *Bachan Singh case* Supreme Court observed that death sentence has to be exception for the judge awarding the punishment and life imprisonment should be rule:

> "…Nonetheless, it cannot be overemphasized that the scope and concepts of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354 (3). Judges should never be bloodthirsty…that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354 (3), viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception…"

16. AIR 1983 SC 957

But when for any offence death penalty is prescribed as only one punishment then judge determining the case will not have opportunity to exercise the judicial discretion in determination of punishment. In such station death penalty becomes mechanical with conviction of accused which causes conflict with well established legislative and judicial policy underlying in Sections 235 (2) and 354 (3) CrPC. Section 235 (2) CrPC requires for bifurcated hearing on sentence and further bifurcated hearing on death penalty infliction. When only one punishment, death penalty is prescribed for any offence then bifurcated hearing will not be available and it will violate provisions contained in Section 235 (2) CrPC. Section 354 (3) CrPC requires on part of court to give special reason for infliction of death sentence. When for any offence only death penalty is provided, it will become compulsive for court to award death penalty in mechanistic manner and in such situation court will not needed to give any reason, there is no question of giving special reason. Thereby, such situation will be in conflict with well established procedure contained in Section 354 CrPC. In Indian penal Code murder is punishable under Sections 302 and 303 IPC. Section 303 IPC covers case when murder is committed by a person during serving the life imprisonment and this Section prescribes only one punishment, death sentence, for the murderer. Section 302 IPC covers murder committed by other persons and this section prescribes alternative punishments, life imprisonment or death sentence, and one compulsory punishment fine. When Section 302 IPC is read with Sections 335 (2) and 354 (3) CrPC, particularly in light of constitutional bench decision in *Bachan Singh case* then punishment of life imprisonment is rule and death sentence is exception. For same offence committed has two different dealing in two separate Section only depending on one fact that in one situation murder was committed by prisoner of life imprisonment during serving of such life imprisonment and in such situation always only one punishment death sentence is inflicted, and in another situation murder was committed by any other person different from coming u/s 303 IPC then case is covered u/s 302 IPC and in this case generally life imprisonment and fine is inflicted, only in exceptional situation when case is proved rarest of rare case then only death sentence and fine may be inflicted. In *Mithu v. State of Punjab*[17] Supreme Court

17. AIR 1983 SC 473

declared Section 303 IPC as unconstitutional. Supreme Court decided that there is no rational basis for making such classification of murder cases one committed by life imprisonment convict during his imprisonment and another committed by any other person. Even when life imprisonment convict after release from jail due to remission or commuting committed murder then his case is covered u/s 302 IPC. Further, any convict who is in imprisonment other than life imprisonment then also his case will be covered u/s 302 IPC. Supreme Court declared Section 303 IPC as violative to Article 14 and 21 of Constitution of India. After judgment of Supreme Court in *Mithu case* all murder cases are dealt u/s 302 IPC. In *Mithu v. State of Punjab* Supreme Court observed:

> "On consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that Section 303 of Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution…The section was originally conceived to discourage assault by the life-convicts on prison staff, but the legislature chose language which far exceeded its intention. The Section also assumes that life-convicts are dangerous breed of humanity as a class. The assumption is not supported by any scientific data…"

Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra[18] Supreme Court observed that for death penalty bifurcated hearing is necessary; on the basis of hearing for trial only, death penalty cannot be imposed. Separate hearing should be for sentencing. Court further observed that what grounds and circumstances are not material for conviction, are material and must be considered for determination of sentence particularly for infliction of death penalty like socio-economic condition, and probability of reformation and rehabilitation. In this case Supreme Court observed that special reason should be given for imposition of death penalty; special reason means exceptional reason. Hereby, Supreme Court directed for bifurcated hearing for death penalty imposition; one hearing for trial to determine issue relating to conviction and acquittal, then separate hearing for sentence and in sentence infliction when it is appearing to Court that there should be infliction of death sentence the again there

18. (2009) 6 SCC 498

should be separate and detailed hearing for determination of death sentence infliction and in this connection court considers whether case is rarest of rare case and factual matrix is such that only capital punishment is suitable punishment for offender.

In *Shankar Kisanrao Khade v. State of Maharashtra*[19] Supreme Court directed that for finding out reasons for application of death sentence courts must calculate aggravating and mitigating circumstances; for this purpose courts should use some tests – crime test, criminal test and R-R test (rarest of rare case test) but courts should not use balancing test. In this court observed that in addition to aggravating and mitigating circumstances courts should consider the opinion of society about crime category whether society consider crime category as rarest of rare. In this case Supreme Court observed:

> "Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstances favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the perception of the society that is "society centric" and not "judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, court has to look into variety of factors like society's abhorrence, extreme indignation

19. (2013) 5 SCC 546

> and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges."

In *Chhannu Lal Verma v. State of Chhattisgarh*[20] Supreme Court upheld decision given in case of *Bachan Singh v. State of Punjab* to upheld constitutional validity of death sentence and observed that that Constitution Bench in *Bachan Singh v. State of Punjab* has upheld capital punishment, there is no need to re-examine the same at this stage. But Court observed that death penalty infliction requires utmost care as this sentence is irreversible. Court has to take care that decision should not be influenced by emotionally charged narratives. Such narratives need not necessarily be legally correct, properly informed or procedurally proper. *Chhannu Lal Verma v. State of Chhattisgarh* case was relating to murder of 3 persons and attempt to murder of 3 persons. Accused in this case was previously charged, tried and acquitted for commission of rape with one woman who was murdered in this case. in present case it was alleged that accused entered in the house of complainant of previous case (rape case in which accused acquitted) and committed assault on three persons and then entered in the house of another assaulted on three persons. Court of Session and then High Court awarded capital punishment. Then after appeal was filed before Supreme Court; during pendency of case accused was in jail; jail Superintendent gave report that accused shown good behaviour in jail, Court considered that accused has shown probability for reformation. Supreme Court observed that trial court and High Court did not considered that accused was falsely implicated in previous case of rape, accused has no criminal antecedent, accused has probability of reformation, and further, there was procedural impropriety as there was separate hearing to find out special reason to award death sentence. Supreme Court changed death penalty to life imprisonment. Supreme Court observed in this case:

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20. AIR 2019 SC 243

> "Till the time death penalty exists in the statute books, the burden to be satisfied by the judge in awarding this punishment must be high. The irrevocable nature of the sentence and the fact that the death row convicts are, for that period, hanging between life and death are to be duly considered. every death penalty case before the court deals with a human life that enjoys certain constitutional protections and if life is to be taken away, then process must adhere to the strictest and highest constitutional standards. Our conscience as judges, which is guided by constitutional principles, cannot allow anything less than that."

Only one or two factors from category mitigating or aggravating circumstances are not considered, and further aggravating and mitigating circumstances are not separately considered but every and all factors of mitigating circumstances and aggravating circumstances are considered together and on that basis decision for infliction of punishment is taken that what punishment and what extent of punishment should be inflicted particularly such consideration is stricter for taking decision regarding death sentence. In *Purushottam Dashrath Barote v. State of Maharashtra*[21] Supreme Court observed that only age cannot be paramount consideration as mitigating circumstance. Similarly family background or person has many dependents or lack of criminal antecedents also cannot be considered alone as mitigating factor but should be considered together with nature of heinous offence and cold and calculated manner in which offence was committed. In this case accused a cab driver deputed the responsibility to pick and drop the deceased from her residence to work-place. Accused picked the deceased from her residence in the night to drop at work-place and with the help of co-accused abducted her and subsequently gang-raped and murdered. Trial court decided that only one punishment can be given to accused persons that is death penalty. High Court Confirmed death penalty and dismissed appeal. Appeal was filed before Supreme Court, which upheld decision given by trial court and High Court. Supreme Court opined that to such brutal commission of crime with apathy for humanity in planned manner, no lesser sentence than death

21. AIR 2015 SC 2170

penalty can be given. In this case after commission of crime accused and co-accused went for second pick of employee of company, they did not have any regret or sorrow or repentance in commission of crime and nor thereafter. Supreme Court observed that judge may have any personal opinion but it is regardless situation when such crime is committed which shocks the collective conscience of society, then death penalty is appropriate punishment and may be inflicted:

> "In addition to the above, it would be necessary for this Court to notice the impact of crime on the community and particularly women working in the night shifts at Pune, which is considered as hub of Information Technology Centre. In recent years, the rising crime rate, particularly violent crimes against women has made the criminal sentencing by the Courts a subject of concern. The sentencing policy adopted by the Courts, in such cases, ought to have a stricter yardstick so as to act as a deterrent. There are a shockingly large number of cases where the sentence of punishment awarded to the accused is not in proportion to the gravity and magnitude of the offence thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. The object of sentencing policy should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In the case of Machhi Singh (AIR 1983 SC 957) (supra), this Court observed that the extreme punishment of death would be justified and necessary in cases where the collective conscience of society is so socked that it will expect the holders of judicial power to inflict death penalty irrespective of their personal opinion."

In *Vasant Sampat Dupare v. State of Maharashtra*[22] Supreme Court observed that punishment inflicted not only affects accused but also society at large, therefore, in sentencing court should consider retributive and deterrent effect of punishment also. In this case accused committed rape and murdered a girl child aged 4 years. After sexual assault, accused

22. AIR 2017 SC 2530

crushed head and lower part of body of victim by using stones weighing 8.5 Kg and 7.5 Kg. Trial court and High Court awarded death penalty; Supreme Court also upheld death penalty. Present case was filed before Supreme Court through review petition. Supreme Court dismissed review petition and affirm the judgment under review. Supreme Court observed in this case:

> "The court then would draw a balance sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The court has to strike a balance between the two and see towards which side the scale/ balance of justice tilts. The principle of proportion between crime and the punishment is the principle of "just deserts" that serves as the foundation of every criminal sentence that is justifiable. In other words, the "doctrine of proportionality" has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large."

Death sentence is inflicted when in the case in such brutal manner crime is committed that any other punishment does not fit the crime and criminal. *Mukesh v State for NCT of Delhi*[23] is one such case; this case is also known as Nirbhaya rape case in which six criminals committed brutal and barbaric rape against a girl in running bus in Delhi on 16th December 2012. The girl victim and her friend after sexual assault and merciless beating were thrown out of bus. They were hospitalized, girl victim died. One accused committed suicide in the jail; one another accused was found minor and dealt as child in conflict with law under Juvenile Justice Act; other four accused were awarded death sentence by all the Courts. Mercy petition was rejected by President of India. All the four criminals were hanged till death. Justice Deepak Mishra in this case observed:

> "…It sounds like a story from different world where humanity has been treated with irreverence. The appetite for sex, hunger for violence, position of empowered and attitude of perversity, to say the least, are bound to shock

23. AIR 2017 SC 2161

> collective conscience which knows not what to do. It is manifest that wanton lust, servility to absolutely unchained carnal desire and slavery to the loathsome beastility of passion ruled the mindset of appellants to commit a crime which can summon with immediacy "tsunami" of shock in mind of collective and destroy civilized marrows of milieu in entirety. When we cautiously, consciously and anxiously weigh aggravating circumstances and mitigating factors, we are compelled to arrive at singular conclusion that aggravating circumstances outweigh mitigating circumstances now brought on record. Therefore, we conclude and hold that High Court has correctly confirmed death penalty and there is no reason to differ the same."

In balancing mitigating and aggravating circumstances, generally mitigating circumstances are given wider and liberal interpretation but when gruesome murder is committed which shocks humanity then Supreme Court is of opinion that mitigating circumstances cannot be given primacy and such criminal deserves only for infliction of death sentence. In *Mukesh v State for NCT of Delhi* Supreme Court observed even though criminals may not have criminal history and may not be hardened criminals but manner of crime commission is such in which only one punishment, death sentence, can be given. Justice J. Bhanumati observed in this case:

> "…The gruesome offences were committed with highest viciousness. Human lust was allowed to take such a demonic form. The accused may not be hardened criminals; but the cruel manner in which gang-rape was committed in the moving bus; iron rods were inserted in the private parts of the victim; and coldness with which both the victims were thrown naked in cold wintery night of December, shocks the collective conscience of the society. The present case clearly comes within the category of 'rarest of rare case' where the question of any other punishment is 'unquestionably foreclosed'. If at all there it is a case warranting award of death sentence, it is the present case. If the dreadfulness displayed by the accused in committing the gang-rape, unnatural sex, insertion of iron rod in the private parts of the victim does not fall in the 'rarest of rare

> category', then one may wonder what else would fall in that category…"

In *Mohd. Arif alias Ashfaq v Registrar, Supreme Court of India*[24] Constitution Bench decision clearly show that case in which death penalty is imposed forms completely separate category of case. Constitution Bench of Supreme Court decided that henceforth in every appeal in Supreme Court in which death sentence has been awarded by the High Court, only a Bench of three judges will hear the appeal. In disposal of review petition limited oral hearing ought to be given in cases in which death sentence is awarded, review petition in case of death penalty should not be decided by circulation.

IV. DEATH SENTENCE CAN BE IMPOSED ONLY ON PROVING CASE BEYOND DOUBTS

Death penalty causes end of life of convict, care and caution is taken that case has completely proved against him without any iota of doubt. Further, procedure of trial will be detailed in comparison to any other offence punishable with other punishments; before the High Court through two procedures case is heard, death reference and appeal, it will be naturally take more time; appeal before Supreme Court is made under Constitutional and statutory provisions, and review procedure before Supreme Court is prescribed for case in which death penalty is imposed; and mercy petition filing before President of India which involve much complicated procedure of moving of case from prison authority to President of India through State Government and Union Government. Thereby, in case punishable with death penalty, conviction rate may be lesser in comparison to offences punishable with other punishments. When conviction rate of any offence is lesser then naturally crime rate may be greater. Death penalty which is considered as having greater deterrent effect may in reality have lesser deterrent effect. Generally death penalty is inflicted when direct evidences are available proving crime commission by accused. Even on the basis of circumstantial evidences also death penalty may be inflicted but the care should be taken that there must not be any kind of doubt and completely beyond any doubt case has been proved. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*

24. (2014) 9 SCC 737

Supreme Court observed that even where sentence of death is to be imposed on the basis of circumstantial evidence, the circumstantial evidence must be such which leads to an exceptional case. In *Rajendra Prahaladrao Wasnik v. State of Maharashtra*[25] Supreme Court observed that there is no hard and fast rule that on the basis of circumstantial evidence death cannot be inflicted but care is required that there should not be any suspicion. Supreme Court observed in this case:

> "The result of the above discussion is that ordinarily, it would not be advisable to award capital punishment in a case of circumstantial evidence. But there is no hard and fast rule that death sentence should not be awarded in a case of circumstantial evidence. The precaution that must be taken by all the courts in cases of circumstantial evidence is this: if the court has some doubt, on the circumstantial evidence on record, that the accused might not have committed the offence, then a case for acquittal would be made out; if the court has no doubt, on the circumstantial evidence, that the accused is guilty, then of course a conviction must follow. If the court is inclined to award death penalty then there must be some exceptional circumstances warranting imposition of the extreme penalty. Even in such cases, the court must follow the dictum laid down in Bachan Singh (AIR 1980 SC 898) that it is not only crime but also the criminal that must be kept in mind and any alternative option of punishment is unquestionably foreclosed. The reason for the second precaution is that the death sentence, upon execution, is irrevocable and irretrievable."

In *Rajendra Prahaladrao Wasnik v. State of Maharashtra* accused was alleged for committing rape on girl child aged 3 years. After rape rapist caused death of child. Session Judge after calculation of mitigating and aggravating circumstances inflicted death penalty. Against the accused two similar cases were pending. Appeal against decision of trial court was filed before High Court, and further, death reference was made to High Court. Both were decided together and High Court confirmed death sentence and dismissed appeal. Appeal was filed before Supreme Court which was dismissed and decision of trial court and High Court was

25. AIR 2019 SC 1

upheld. Then after present review petition was filed. Supreme Court decided that only on the basis of circumstantial evidences death penalty should not be inflicted but it should be exceptional circumstances. Supreme Court further observed that previous conviction may be considered for determination of punishment but pending case in trial or investigation should not be considered. Supreme Court commuted death sentence to life imprisonment till end of natural life.

V. DELAY IN EXECUTION OF DEATH SENTENCE IS CONSIDERED INHUMAN

Death penalty imposed should be executed without any unreasonable delay. Waiting for death penalty and identifying that the death is coming nearer day by day which causes graver mental pressure and affects completely the prisoner waiting for infliction of death penalty. It is considered that waiting for death penalty is barbaric, brutal and inhuman, therefore, offender should not wait for longer for execution of death penalty. Death penalty infliction causes end of life of offender, considering it procedure provided is detailed one. In trial itself when offence is punishable with death penalty, detailed trial procedure is provided and conviction and then death penalty is awarded only when all the evidences prove crime committed by offender and his crime commission comes in rarest of rare offence u/s 354 CrPC. After award of death penalty detailed procedure is provided, death penalty awarded by Session Judge and Additional Session Judge may give death penalty but it becomes final only after confirmation by High Court. In case of death penalty there are two proceedings before High Court, confirmation and Appeal, in these two procedures High Court considers about death penalty imposed, naturally it may be time taking. After decision of High Court, appeal may be filed before the Supreme Court under Constitutional and statutory provisions. After decision of Supreme Court, offender may file review petition and mercy petition, it takes much time and delay may be caused in execution of death sentence. When delay is not due to delaying tactics of offender, inordinate and unreasonable delay in execution of death sentence makes ground for commute of death sentence in life imprisonment. In *V. Sriharan alias Murugan v. Union of India*[26] Supreme

26. AIR 2014 SC 1368

Court observed that undue, inordinate and unreasonable delay in execution of death sentence is well recognized circumstances for commutation of death sentence into life imprisonment. This case was related to Rajiv Gandhi assassination case. In this case there was delay of five years and one month in disposal of mercy petition. Court observed that such delay violates the requirement of a fair, just and reasonable procedure. Regardless and independent of the suffering it causes, delay makes the process of execution of death sentence unfair, unreasonable, arbitrary and capacious, thereby violates due procedure guaranteed under Article 21 of Constitution. In such cases dehumanizing effect is presumed. Supreme Court directed for commuted death sentence to life imprisonment. In *Ajai Kumar Pal v Union of India*[27] there was delay of 3 years and 10 months in dealing with mercy petition and it was also found that offender was kept in solitary confinement for longer period in connection with death sentence. Court decided in this case that combined effect inordinate delay in disposal of mercy petition and solitary confinement for longer period caused dehumanizing effect. Supreme Court converted death sentence into life imprisonment. What is inordinate and unreasonable delay depends on facts and circumstances of the case, therefore, it may vary from case to case. In *Jagdish v. State of Madhya Pradesh*[28] petitioner was convicted for commission of murder of his wife and five children and for crime committed by him death sentence was imposed. Petitioner filed mercy petition through jail authorities on 13. 10. 2009; MP Government took four years in forwarding of mercy petition to the President and it was rejected by President of India on 16.7. 2014. There was delay of five years in deciding mercy petition. Supreme Court decided that delay in disposal of mercy petition was inordinate delay, and further, Petitioner was in prison for more than 14 years; in 2005 incident occurred and after that he was arrested and from then he was remaining in jail. Supreme Court commuted death penalty into life imprisonment but keeping in view the fact that offender took lives of 6 innocent persons, Court directed that life imprisonment shall be till the end of natural life. In this case Supreme Court observed:

> "…The mercy petition is the last hope of a person on death

27. AIR 2015 SC 715
28. AIR 2019 SC 1160

> row. Every dawn will give rise to a new hope that his mercy petition may be accepted. By night fall this hope also dies. Inordinate and unexplained delay in deciding the mercy petition and the consequent delay in execution of death sentence for years on end is another form of punishment which was awarded by the Court. This Court has repeatedly held that in cases where death sentence has to be executed same should be done as early as possible and if mercy petitions are not forwarded for 4 years and no explanation is submitted we cannot but hold that the delay is inordinate and un-explained."

Competency for infliction of capital punishment is conferred on superior courts of original jurisdiction. High Court is empowered u/s 28 CrPC to pass any sentence authorised by law, thereby, empowered to pass death penalty. Session judge and Additional session judge may pass death sentence but it will become final only after confirmation by High Court. Death penalty is not an ordinary punishment, it is itself indicative by the procedure prescribed as aforesaid that only superior courts can impose this punishment and further, the death penalty imposed becomes absolute only after confirmation by High Court. Death penalty once effected cause is completely irreversible, life of person cannot be restored, therefore, procedure for compulsory review is prescribed. Furthermore, when there is sufficiency of evidences and offence committed by offender is not simple but it is rarest of rare, only then death penalty may be inflicted. In this regard Section 354 (3) CrPC provides that when death penalty is alternative punishment for any offence, court passing sentence order shall give reason and when in such case court passed sentence of death penalty, it shall give special reason. Requirement of giving special reason is directive under provisions that when sufficient and direct evidences are available and case is heinous and ghastly, only then death penalty has to be inflicted.

VI. DEATH SENTENCE MAY BE COMMUTED IN LIFE IMPRISONMENT

Death penalty imposed may be commuted u/s 433 CrPC to any punishment prescribed in penal law subject to limitation provided u/s 433-A CrPC. after reading Section 433 and 433-A CrPC together makes clear that death penalty may be commuted to life imprisonment which shall be

of at least fourteen years imprisonment. Similarly, power to remit is also limited under Section 433-A CrPC. State has power to commute the death penalty to life imprisonment and then remit the life imprisonment but such power is subject to statutory provisions and court directions. In case of death sentence limitation is imposed in Section 433-A CrPC that it can be commuted to life imprisonment but which cannot be less than 14 years. Further Court can also put limitations on power of state government in case concerned. Due to provisions contained in Section 433-A CrPC death sentence imposed case or death sentence imposable case forms special class particularly death penalty imposed case. In *Swami Shradhananda (2) Case (Swami Shradhananda v. State of Karnataka)*[29] and *Union of India v. V. Sriharan*[30] Supreme Court laid down rule that death penalty can be commuted into life imprisonment but it forms special category, therefore, court may put limitation that it shall be till end of natural life without remission. Court in this regard may make such pronouncement for case concerned means it may be decided from case to case and limitation may be put in the case concerned that life imprisonment will be till end of life. it is not general rule that every case where death penalty is commuted, the death penalty is for whole life without remission but it has to be specifically declared in case concerned. In *Vijay Kumar v. State of Jammu and Kashmir*[31] Supreme Court reiterated its decision that death sentence commute forms special class and in this situation death penalty may be commuted or remitted into life imprisonment till the end of life. In this case accused-appellant assaulted on his brother, his wife and their four children, thereby, caused death of 3 children and grievous injury to brother, his wife and one child. He was convicted and sentenced by trial court u/ss 307, 326, 324 and 448 IPC with terms of imprisonments and fine, in case of default of payment of fine further term of imprisonment. All substantive imprisonments were directed to run concurrently. Further, accused-appellant was convicted and sentenced u/s 302 IPC with death sentence. Death reference was made to High Court and also accused filed appeal before the High Court. High Court confirmed the death sentence, upheld decision of trial court and dismissed appeal. Against decision of High Court appeal was filed before the Supreme Court. Supreme Court decided that death sentence can only be inflicted

29. AIR 2008 SC 3040
30. (2016) 7 SCC 1
31. AIR 2019 SC 298

after due calculation of aggravating and mitigating circumstances of crime and criminal and on this basis when it is identified that case is rarest of rare case in accordance with *Bachan Singh case (AIR 1980 SC 898) and Machhi Singh Case (AIR 1983 SC 957) directions*. Further, Supreme Court observed that the accused-appellant was upset with his matrimonial dispute. His marriage was arranged by his brother and sister in law. Accused was of opinion that his brother and sister in law were not extending helping hand to bring his wife back. He was feeling affected by matrimonial dispute. He committed offence to eliminate whole family of his brother. Accused had no criminal history. Supreme Court decided that death sentence may not be appropriate sentence, death penalty may be commuted to life imprisonment. But this case forms special category as it was decided in *Swami Shradhananda (2) and V. Sriharan cases* and accordingly death penalty may be commuted to life imprisonment till end of life without application of remission.

In *Raju Jagdish Paswan v. State of Maharashtra*[32] a person aged 22 years committed rape against a girl child aged 9 years. In crime commission criminal committed vaginal and anal sexual assaults and when victim became unconscious, she was dragged and thrown in the well. Victim due to sexual assault and drowning died. Offender was co-worker with father of victim. Trial court and High Court awarded death sentence. Appeal was made to Supreme Court. Supreme Court upheld conviction and changed sentence from death penalty to imprisonment for a period of 30 years without remission.

When death penalty is pronounced for woman offender and she is found pregnant then Section 416 CrPC provides that death penalty shall be commuted to life imprisonment. Before Code of Criminal Procedure (Amendment) Act 2008 in case of pregnant woman death penalty could be commuted to life imprisonment or postponed but by this Amendment Act compulsory provision has been provided that in case of pregnant woman death penalty shall not be executed but compulsorily by provisions itself death penalty is commuted to life imprisonment; for application of provision only it has to be identified that woman offender is pregnant woman. In all other cases appropriate Government has discretion u/s 54 IPC r/w 433 and 433-A CrPC to commute the death penalty to any other punishment. Death penalty is generally commuted to life imprisonment

32. AIR 2019 SC 897

with due observance of restriction given u/s 433-A CrPC. When death penalty is Session Court and confirmed by High Court or passed by High Court, to effect the sentence u/ss 413 and 414 CrPC Session Court issues warrant which commonly called as death warrant. When a person files appeal before Supreme Court against the death penalty imposition, High Court u/s 415 CrPC postpones execution of death penalty.

VII. CONCLUDING REMARKS

Death sentence is much debated and controversial punishment prescribed by penal law. Jurists, legalists, academicians and other knowledgeable persons are divided in retentionist and abolitionist for death penalty; on the same line common mass of the society is also divided. Retentionists believe that death penalty has greater deterrent effect and it should be inflicted in serious case which may prevent commission of crime. Further, they advocate by use of death penalty society may be cleaned from hardened criminals, thereby, also crime may be prevented. Abolitionists consider death penalty as inhuman, age-old, barbaric punishment which is inflicted on fallible evidences, and further once inflicted life of convicted person cannot be restored back. Law Commission in 35th report recommended for retention of death sentence but in 262nd report Law Commission recommended for abolition of death penalty except for cases of terrorism and waging war against State. In *Shankar Kishanrao Khade v. State of Maharashtra*[33] Supreme Court in dealing with case expressed its concern for lack of a coherent and consistent purpose and basis for awarding death and granting clemency and requested Law Commission for report on death penalty. In reference to aforesaid Law Commission submitted its 262nd report. Law Commission in 262nd report observed that death penalty does not serve penological goal of deterrence more than life imprisonment. It is very difficult to decide in which case death sentence should be inflicted and in which case life imprisonment. Retribution is important element in punishment but retribution should not become vengeance; death penalty has become vengeance and constitutionally mediated criminal justice system does not permit vengeance. Law Commission in 262nd report, further, observed that judicial determination and executive clemency exercise differs.

33. (2013) 5 SCC 546

Executive may decide by taking new things into consideration or even without material, thereby, create discrimination and arbitrariness.

Death sentence is mostly related to and inflicted for commission of murder. Whether death sentence, prescribed as a major punishment by penal law in India, fulfills any penological objective may be tested on the basis of its impact on murder crime rate and deterrent impact on murderers. It is fact that murder crime rate is increasing alarmingly. Murders committed during commission of some other crimes particularly sex crimes are considered as ghastly and heinous murders; rate of such murders are also increasing alarmingly. Increase in murder crime rate particularly ghastly and heinous murders are putting suspicion on deterrent effect of death sentence. Murderers may be broadly kept in four major classes – (1) first category of murderers suffer from serious physical, mental or cultural deficiencies because of that they contemplate murder as normal and natural form of conduct. Mass murderers and serial murders are some examples for this category. Generally any punishment may not have any deterrent effect over such murderers. Murders belonging to this category are dreaded murderers. (2) Second category of murderers are relatively normal physically, mentally and culturally but they are subject to emotional trauma which may be long lasting or momentarily. Due to such emotional trauma such murderers commit murder otherwise such murderers under normal circumstances are law abiding persons. Murders committed due to long lasting enmity or murders committed due to sudden and grave provocation are some examples of murders committed by such murderers. (3) Third category is made up by new and modern category of professional murderer called as hit-man or supari killer. Such murderers have expertise in commission of murder and they sell their expertise for money. Such murderer has no personal dispute or enmity with deceased victim but only for money murder is committed for some other person. (4) Fourth category is of those murderers who commit murder in course of commission of some other offence; for example murder committed during commission of dacoity and rape. In these cases murder is not committed as primary offence but some other offence was primary one, during commission of such primary offence murder was also committed. Such murders are committed for inducing fear in victims thereby remaining victim may not oppose the crime commission or victim opposed crime commission and in reaction murder is committed or murder is committed

to destroy the evidences particularly when assailant considers that against him only evidence may be victim or when assailant is mentally abnormal and he commits crime horrible and brutal manner.

When deterrent effect over murderer is considered on every category of murderers, it may be identified that they may not have or may not realize deterrent effect of death sentence. In case of death sentence major problem is that it is prescribed in substantive criminal law but procedure relating to its infliction is so detailed, complicated and time consuming causing delay, result is generally death sentence is not awarded by the criminal court and whenever awarded by the court then generally not executed and due to delay commuted to life imprisonment. When punishment becomes more sever and stern particularly when punishment may cause end of the life of convict, the procedure becomes much detailed based on direct evidences or if it circumstantial evidences that must be without any break, and further, all precautions are taken to identify actual criminal. Furthermore, to find out rarest of rare case to inflict death penalty much detailed procedure of balancing of aggravating and mitigating circumstances is observed and then after again and again case is considered by various courts and ultimately by executive. In such situation conviction rate decreases and acquittal rate increases. Even when death penalty is pronounced by the court, it may ultimately happen that death penalty may be commuted to life imprisonment by executive or court on the basis of mercy or delay in disposal of mercy petition. When acquittal rate is higher for any crime it is but natural that crime rate will be higher for such crime and also it cause increase in over-all criminality in the society. Prescription of punishment never has deterrent effect but actual and speedy infliction create deterrent effect over the criminals. Criminal never reads the substantive criminal law to know the prescribed punishment but considers reality of criminal justice system. Further, death sentence execution within four-walls of prison may not be recognizable and identifiable for criminal elements and also for common mass. In these aforesaid circumstances death sentence may not have sufficient deterrent effect. When death sentence does not evidenced with deterrent effect voice of abolitionists become louder. Grunhunt observed about effective punishment:

> "Three components must be present "If punishment is to act as a reasonable means of checking crime" first " speedy

> and inescapable detection and protection" must convince the offender that crime does not pay. Second after the punishment the offender must have "a fair chance for a fresh start" and third "the state which claims the right of punishment must uphold superior values which the (offender) can reasonably be expected to acknowledge"."[34]

Barness and Teeters observed:

> "The wisdom of capital punishment is still subject for animated debate and has taken on renewed interest as it becomes increasingly apparent that those condemned men who have funds can prolong their cases through the courts for years while those who do not have money go silently and promptly to their death."[35]

Punishment has very important role in protection, continuance and development of society and members of society. Effective and proper punishment prescription, selection, infliction and execution determine outcome of criminal justice system. Whether crime problem is effectively dealt with depends on detection of actual criminal without loss of time, speedy disposal of case, conviction under appropriate Section of penal Act, imposition of effective sentence, and proper execution of sentence. More crucial fact for success of criminal justice system in attaining its goal is speedy disposal of case and speedier infliction of punishment. Death penalty is losing its deterrent, retributive, incapacitation, preventive and teaching lesson effect due to exceptional infliction and even whenever inflicted rare execution. Need is to rectify procedure related to death sentence. prescription of punishment is not material and effective measure in criminal justice system but it is infliction and execution of punishment.

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34. Grunhunt quoted in Walter C. Reckless, *The Crime Problem*, Vakil Feffer and Simons Pvt. Ltd., Bombay (first Indian reprint), 1971, p.487

35. Barness and Teeters, New Horizons in Criminology, Prentice Hall of India Pvt. Ltd., New Delhi, 1966 (3rd ed.), p. 314

ANTI-COMPETITIVE AGREEMENT UNDER COMPETITION LAW IN INDIA

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ABSTRACT : In the pursuit of globalization, India has responded to opening up its economy, removing controls and resorting to liberalization. As a natural consequence of this the Indian market has to be geared to face competition from within the country and outside. Further, in the light of International economic developments relating to competition laws, the need was felt to shift the focus from curbing monopolies to promoting competition. Indian competition Act, 2002 is a modern piece of economic legislation. It imposes reasonable restrictions upon citizens and enterprises to the freedom of trade and commence while operating in India. It has ingredients of prohibition of anticompetitive practices, prohibition of abuse of dominance and regulation of mergers & acquisitions. Anti-competitive agreements are intended to be prohibited by orders of the commission. Anti-competitive agreements are harmful for markets and subvert the interest of consumers. There are certain agreements which are presumed to have an appreciable adverse effect on competition (AAEC).

This paper tries to explain the concept of 'anti-competitive agreements' its various forms and impact on national economy. The object of the study is to discuss whole aspect of anticompetitive agreements.

KEY WORDS : Competition, Regulation, appreciable adverse effect, anti-competitive agreements, competition commission of India, Relevant market, Enterprise, Bid-rigging, Horizontal & Vertical agreements.

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I. INTRODUCTION

The term anti-competitive agreements as such has not been defined under the Act, however, Section 3 prescribes certain practices which will be anti competitive. Anti-competitive agreements are agreements among competitors to prevent, restrict or distort competition In simple words, anti-competitive agreements are those agreements which restrict competition.

Section 3 of the Act has five sub-sections. Section 3(1) is very general and broad in scope. It prohibits and declares in respect of production, supply distribution, storage, acquisition, or control of goods or provision of services which causes, or is likely to cause an appreciable adverse effect on competitionin India." Section 3(2) provides that, any agreement between enterprises thatany agreement entered into in contravention of the provisions contained in Section 3(1) shall be void. Section 3(3) deals with "horizontal agreements" and specifies certain anti-competitive agreements that may be entered into, or practices that may be carried on, by enterprises supplying identical or similar goods or services, or cartels. It also enlists the agreements or practices carried on by enterprises, which are presumed to have an appreciable adverse effect on competition (AAEC). They are *per se* void under the Act. Section 3(4) deals with "vertical agreements" and Section 3(5) provides certain exceptions from Section 3. So, in order to understand Section 3 in a better manner, Section 3 can be broadly divided into four parts namely:

i. General prohibition on agreement [Section 3(1&2)]

ii. Horizontal agreement [section 3(3)]

iii. Vertical agreement [Section 3(4)]

iv. Exceptions and proviso [Section3(5)]

i. GENERAL PROHIBITION ON AGREEMENT [SECTION 3(1&2)]

Section 3(1) is a general prohibition of an agreement relating to the production, supply, distribution , storage , acquisition of control of goods or provision of service by enterprises which causes or likely to cause an appreciable adverse effect on competition within India.

On bare reading of section 3 it becomes clear that the section does not define anti competitive agreements but it has only provided that an agreement which causes or likely to cause appreciable adverse effect on

competition within India is prohibited and has declared that such agreement is void.Thus, section 3(1) imposes a duty on enterprises to examine the agreement from its effect on competition in market.

Section 3(1) makes it clear that there are two essential requirements to bring into operation section 3(1): (i) Agreement (ii) That agreement should cause appreciable adverse effect on competition within India

(i)Agreement

The term "agreement" is defined in Sec. 2(b) of the Act as follows: "Agreement" includes any arrangement or understanding or action in concert- (i) whether or not, such arrangement, understanding or action is formal or in writing; or (i) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.

It is clear that the definition includes any 'arrangement' or understanding' or 'action in concert' whether or not formal or in writing or is intended to be enforceable by legal proceedings. Thus, it may be noticed that the definition is inclusive and not exhaustive.

The definition is thus not limited to legaly enforceable contract as defined in Sec. 2(h), Indian Contract Act. It covers both formal and informal agreements whether express or implied. Such agreement may or may not be enforceable by law. Thus, the term 'agreement has been worded in a wide manner and the agreement does not necessarily have to be in the form of a formal document executed by the parties. Thus there is no need for an explicit agreement and the existence of the agreement can be inferred from the intention and objectives of the parties. The agreement' is the factum rather than the form in which such arrangement or understanding is reached; and, in order to ascertain its existence, the whole context must be looked into. In case of oral or informal agreements, the proof will generally be based on circumstantial evidence, and parallelism of action between enterprises can indicate this.

An 'arrangement' or 'understanding' could be in any way or form, but it must result from some communication between the parties or some meeting of their minds. Arrangement is something whereby the parties to it accept mutual rights and obligations. When behaviour of the traders seems consistent with a mutual understanding of some kind, the conspiracy, communication or at least concert could be inferred. A

'concert' means that certain traders combine together to fix the price of a commodity or raise the price at the same or about the same time. The intention is to limit competition among themselves. A feature of concert is that the price of the commodity is fixed not on the basis of the supply and demand in the market but by understanding.

The Competition Commission of India in ***M/S Puja Enterprises &Ors***[1] has held the definition of 'agreement' to be a wide one. The CCI was of the view that understanding may be tacit, and the definition covers situations where the parties act on the basis of a nod or a wink. There is rarely a direct evidence of action in concert and the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In the light of the definition of the term 'agreement', the Commission has to find sufficiency of evidence on the basis of benchmark of 'preponderance of probabilities'.

(ii) Appreciable Adverse Effect On Competition Within India

To bring in the application of Section 3, it is pertinent that the effect on competition must be 'appreciable'. The term 'appreciable adverse effect on competition', used in section 3(1) has not been defined in the Act. The determination of 'appreciable' has proved to be a main problem under the Competition Act. The author T.Ramappa considers that to be considered 'appreciable', the effect has to be substantial[2]. However; this may not be in line with Indian economic interests. Accordingly, a more appropriate meaning has been given in Law Lexicon where 'appreciable' is defined as'capable of being estimated, weighted, judged of or recognized by the mind' which is 'perceptible *but not a synonym of substantial.*' For the most practical purposes 'appreciable' has to be more than just a detectable effect but may not be substantial.

In *Haridas Exports v. All India Float Glass Manufactur Association*,[3] the Supreme Court observe that the words "adverse effect on competition embraces acts, contract agreements or combinations which operate to the prejudice of the public interests by unduly restricting competition or

1. Case No.1 of 2012 by DG (S&D) 06.08.2013
2. T.Ramappa, Competition Law In India- Policy, Issues and Development, Oxford India Paperbacks, 2nd Ed (2009).
3. (2002) 111 Comp. Cas. 617 (SC),

unduly obstructing due course of trade. Public interest is the first consideration. It does not necessarily mean interest of the industry.

Section 19(3) of the Act, specifies what factors are to be taken into consideration by Competition Commission of India (CCI) in determination whether an agreement has an 'appreciable adverse effect' on competition.Section 19(3) reads as follows:

The Commission shall1, while determining whether an agreement has an appreciable adverse effect on competition under Section 3, have due regard to all or any of the following factors, namely

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services

The first three factors i.e. clauses (a) to (c) relates to negative effect on competition i.e. they have anti-competitive features. Enterprises and their acts of indulging in any one or all of these activities, may come within the ambit of anti-competitive conduct and such indulgence would be a strong indicator to establish causation of 'appreciable adverse effect on competition in the market' by such enterprises. However, the remaining three factor i.e. clauses (d) to (1) indicate pro-competitive conduct. As such, depending on facts and circumstances of each case, the enforcers would determine the conduct of the enterprise and ascertain whether such conducts are pro or anti-competitive.

In *Automobiles Dealers Association* v. *Global Automobiles Limited &Anr*.[4] CCI held that it would be prudent to examine an action in the backdrop of all the factors mentioned in Section 19(3). The agreement should be the cause of the adverse effect on the competition. Even if such a consequence is probable, the agreement is anti-competitive. The

4. CCI Case No 33 of 2011, decided on July 3, 2012

probability and not mere possibility of its consequence as appreciably affecting competition is the requirement.

ii. HORIZONTAL AGREEMENT [SECTION 3(3)]

Competition laws usually places anti-competitive agreements in two categories namely-horizontal agreements and vertical agreements. The Act have not used the term horizontal agreements and vertical agreements, however the language used in the Act suggests that agreements referred to in Section 3(3) and Section 3(4) are horizontal and vertical agreements respectively. Section 3(3) and Section 3(4) are the main provisions which are mainly attracted to prove the existence of any anti competitive agreements. Section 3(3) deals with certain specific anti competitive agreements, practices and decisions of those supplying identical or similar goods or services, acting in concert, for example agreement between manufacturer and manufacturer or supplier and supplier, and also includes such action by cartels.

Horizontal agreements are those between competitors, i.e., entities at the same level of distribution. Horizontal agreements are arrangements between enterprises at the same stage of the production chain and that is generally between two rivals for either fixing prices or for limiting production or for sharing markets. In all such agreements, there is a presumption in the Act that such agreements cause AAEC.As per *Merrium-Webster* dictionary it is an agreement among economic competitors on the same level of production or distribution.

Cartel is also a horizontal agreement. This is generally between producers of goods or providers of services for price-fixing or sharing of market, and is generally regarded as the most pernicious form of anti-competitive agreement.

Section 3(3) provides that an agreement would have AAEC if there is a practice that is carried on, or a decision that has been taken, between any of the parties mentioned above, including cartels, engaged in identical or similar trade of goods or provision of services, that can either –

a. Directly or indirectly determine the purchase or sale prices;

b. Limits or controls production, supply, markets, technical development, investment or provision of services;

c. Shares the market or source of production or provision of

services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

d. Directly or indirectly results in bid rigging or collusive bidding

II. TYPES OF HORIZONTAL AGREEMENT

Section 3(3) presumes that there are four types of agreements between enterprises involved in the identical or similar trade of goods or provision of services have an appreciable adverse effect on competition.

Prize Fixing Agreement : Section 3(3)(a) prohibits Prize Fixing Agreement . Agreements through which the companies mutually set the prices that they want to charge in the market are called price fixing agreements. Imagine a market where four firms manufacturing white-cement agree to sell their products at a fixed price. Although, sometimes a slight increase in the price of each product hardly matters to a consumer; such price fixing will ultimately generate huge profits for the colluders. Other types of price-fixing agreements include agreements that jointly predetermine the size of profit margins, the extent of discounts and the level of price increases.

In *Arizona v. Maricopa County Medical Society*[5], court observed that the aim and object of price-fixing agreements, is the elimination of one form of competition. Such agreements are made by way of informal understandings as to prices for preventing competition and keeping the prices up. The power to fix prices, whether reasonably exercised or not, involves the power to control the market and fix arbitrary and unreasonable prices.

In *FICCI-Multiplex Association of India v. United Producers/ Distributors Forum*[6] (CCI), a (UPDF) not to release Hindi films to multiplexes in order to pressurize them collective decision was taken by United Producers and Distributors Forum into accepting new terms of revenue sharing ratio. UDPF issued notices instructing all producers and distributors including those who were the members of UDPF not to release any new Hindi film for the purpose of exhibition at the multiplexes.

5. 457 U.S. 332 (1982),
6. Case No. 01/2009 order dated 25.5.2011

A complaint was registered with CCI. CCI directed Director General for investigation. The report of Director General stated that UDPF was controlling almost 100% of the market for the production and distribution of Hindi Motion Pictures which are exhibited in Multiplexes in India. UPDF were acting in concert to fix sale prices by fixing revenue share ratio in violation of section 3(3)(a) of the Act. Besides this, they were also limiting/ controlling supply by refusing to release Hindi Pictures in multiplexes in violation of section 3(3)(a) of the Act. The Competition Commission held that the agreement entered into by the opposite parties is covered within the contour of clauses (a) and (b) of Section 3(3) of the Act.

Output Limit Agreement : Section 3(3)(b) prohibits agreements regarding limitation or restriction on quantity control. There can be a scenario where competitors agree to restrict and control the production thereby controlling the supply in the market. Output restrictions can take place through various forms including agreements on production volumes and agreements on sales volumes. Agreements which limit or control production, supply, markets, technical development, investment or provision of services are considered to be anti competitive for two reasons. Firstly, by controlling production, the supply is Kept low as compared to demand and thereby creating artificial scarcity. secondly, the agreement in effect restricts competition between the parties selves so that the efficient ones among them could not go ahead with further production and elbow out the less efficient. The objective of controlling and limiting supplies is to create scarcity in the market and subsequently raise prices in the market. Such output restriction agreements lead to dead weight loss in the society.

Market Sharing and Allocation : Another common horizontal agreement amongst competitors is market sharing. These are also called market allocation and market division agreements. It is prohibited under section 3(3)(c). Under such agreements, the competitors agree to divide amongst themselves specific territories, customers, or products. Such market allocating actions are restrictive in nature because they leave no room for competition in the market. For example, an agreement amongst competitors to allot certain customers to particular sellers and toallocate or divide sale territories would be anticompetitive. Geographic market sharing is particularly restrictive from customer's point of view since it diminishes choice.

Bid rigging : Bid rigging or collusive bidding is defined under Explanation to section 3(3) of the Competition Act, 2002 in the following way:

> "Any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding".

Bid-rigging occurs when bidders collude and keep the bid amount at a pre-determined manipulated level. Bidders could be actual or potential, but they collude and act in concert.

Let us see an example. Consider a situation where two firms X and Y bid for supplying products to a government department which has floated a tender for the same. In a competitive scenario, both the firms X and Y will submitcompeting bids. Later on, these firms decide together that Firm Y will submit a bid superior to Firm X's and that if Firm Y is awarded the government tender, it will subcontract part of the work to Firm X. This conduct of determining the winner before the competitive process of bidding will be illegal under competition law because Firm X and Firm Y have agreed not to compete for the tender, thereby hampering competition. Here, both the firms are colluding and if successful will gain extra illegal profits at the expense of the government department.

There can be different forms of bid rigging:

* Complementary bidding: It is also known as cover bidding or courtesy bidding. It involves a situation where some of the bidders bid an amount which is too high or contains unacceptable conditions. Thus, in essence, cover bidding might give the impression of competitive bidding. In reality, suppliers agree to submit symbolic bids that are unreasonably high to succeed.
* Subcontract bid-rigging: Under this type of bid-rigging the conspirators agree not to submit bids, or to submit cover bids that are intended not to be successful, on the condition that some parts of the successful bidder's contract will be subcontracted to them.
* Bid rotation occurs where the bidders take turns being the designated successful bidder, for example, each conspirator is designated to

be the successful bidder on certain contracts, with conspirators designated to win other contracts. This is a form of market allocation, where the conspirators allocate or apportion markets, products, customers or geographic territories among themselves, so that each will get a "fair share" of the total business, without having to truly compete with the others for that business.

* Bid suppression occurs where some of the conspirators agree not to submit a bid so that another conspirator can successfully win the contract.

III. Horizontal agreement and per se illegality

To identify an agreement and then reproving it as an anticompetitive agreement has always been a grey area in anti-trust cases. Due to which the courts have devised apparatus of investigation in order to expeditiously come to a rational conclusion. Of the numerous legal principles that have become the cornerstone of anti-trust common law none have attracted more attention then the rules of "per se" and the "rule of reason". These two rules have been helpful in ascertaining that whether or not a particular agreement is anti-competitive.

as per "per se rule" once the certain act falls under the recognized perview of the criteria of per se rule then in that case there is no need for the further inquiry and also all the defenses and the attempt to prove the reasonableness of the act in question shall be precluded. It can also be explained that when there is sufficient indicator of the unreasonableness and anticompetitive potential then in that case the "per se rule" is applied as there is no need for further inquiry etc. this rule of "per se" not only saves time but also cost where the outcome of the inquiry is not worth the unreasonableness.

The presumption raised under Section 3(3) is that of "AAEC". If there is sufficient proof to establish that the opposite parties are engaged in any of the restricted activities laid down in the sub-section then the commission shall presume that there is "AAEC". The use of the words "shall be presumed" gives rise to a "presumption" against the opposing parties. The principle of 'shall presume', used in section 3(3) has been explained by courts in India in numerous cases. In *Sodhi Transport*

Co. v. *State of Uttar Pradesh* the court observed that[7]:

> 'The words "shall presume" have been used in the Indian judicial lore for over a century to convey that they lay down a rebuttable presumption in respect of matters with reference to which they are used...and not lying down a rule of conclusive proof.'

Therefore, horizontal agreements dealt under section3(3) are presumed to have an appreciable adverse effect on competition, they are per se illegal.

iii. VERTICAL AGREEMENT [SECTION 3(4)]

Vertical agreements are agreements between enterprises that are at various stages or levels of the production chain, and accordingly, in various markets. These agreements are not treated as anti-competitive per se as in the case of horizontal agreement. Section 3(4) deals with vertical agreements.

The term vertical agreement has not been used in the Act as such. Section 3(4) of the Act, however, provides for certain types of anticompetitive agreement between or amongst firms at different stages or levels of the supply chain of any product or services. It states that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including

a) Tie-in-arrangement

b) Exclusive supply agreement

c) Exclusive distribution agreement

d) Refusal to deal

e) Re-sale price maintenance

shall be an agreement in contravention of section 3(1), if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. Section 3(1) and 3(2) read together with Section

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7. *Sodhi Transport Co*. v. *State of Uttar Pradesh,* AIR 1980 SC 1099

3(4) prohibit such agreements and declare them to be void.

Types of Vertical Agreements : The Explanation to Sub-sec. 3(4) provides definition to each such type as follows:

Tie-in arrangements have been defined in explanation (a) to section 3(4). It means imposing a condition on the purchaser of goods, to purchase some other goods and thus selling goods which is not of purchaser choice. For example requiring a person to keep fixed deposit with the bank while allotting him a locker, requiring a stabliser to be bought alongwith the refrigerator,

This practice is often resorted to by enterprises to use the popularity of a product (tying product) to promote the sale of a less popular product (tied product). A tie-in-arrangement reduces or eliminates competition.

In *United States v. Microsoft Corporation*[8], one of the allegations was that Microsoft used its dominance on personal computer operating systems (tying product) to push the sale of its other products, specially its internet browser and media player systems (tied products).

Exclusive Supply Agreements : Exclusive supply agreements includes any agreement restricting in any manner the purchase in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person. In *Jindal Steel v SAIL*[9], an exclusive supply agreement through a memorandum of understanding (MOU), was entered into between Indian Railways and Steel Authority of India (SAIL) to supply rails on a continuous basis. Jindal Steel and Power Limited alleged that the said MOU resulted in foreclosure of the relevant market for it. It was held that the MOU was not hit by Sec. 3(4) and hence, not anti-competitive.

Exclusive distribution agreements : It includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods. The main feature of such agreements is that the manufacturer or supplier agrees to supply certain goods for resale to only one party, the exclusive distributor within a defined territory and no other party will be supplied with the goods

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8. 258 F. 3d (DC Cir, 2001),
9. Case no 11/209 dated 20 December 2011

within that area by the supplier. Exclusive dealing is a way of restraining inter-brand competition.

Refusal To Deal : As per the Explanation provided in the Section, *refusal to deal includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought.* For a refusal to deal violation under Section 3(4)(d) the parties must agree to refuse to deal, not with each other but, with other third parties. For instance, a contract between Manufacturer A and Distributor B may state that Manufacturer A will not sell to Distributor C. Alternatively, it may state that Distributor B will not buy from Manufacturer D. These types of restrictions agreed upon by parties at different levels of the chain amount to a refusal to deal. It is only such an agreement which is specifically contemplated in the Explanation to Section 3(4).

Resale Price Maintenance : resale price maintenance (RPM) is a type of price fixing arrangement also known as vertical price pixing agreement, whereby the manufacturer fixes the price at which the retailer can sell the product to the end customers. The manufacturer may fix the maximum or minimum price at which its product can be sold and may also fix the maximum and minimum limits of discount offered on its product to the end customers. RPM is a vertical restraint as it is imposed by a player operating at a higher level in the market chain on a player operating at a lower level in the market chain. in *Fx Enterprise Solutions Indiav. Hyundai Motor India Limited*[10] observed that an agreement that has as its direct or indirect object the establishment of a fixed or minimum resale price level may restrict competition. In this case, CCI held RPM through discount restrictions imposed by the manufacturer to be anti-competitive because of the potential harm to consumers.

IV. VERTICAL ARRANGEMENTS AND THE RULE OF REASON

Section 3(4) of the Act embodies the rule of reason. In the case of *Chicago Board of Trade V. United State*[11] , the rule of reason was explained

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10. 36/2014 | 12-09-2014 M/s Fx Enterprise Solutions India Pvt. Ltd v. M/s Hyundai Motor India Limited 36/2014 on 12.09.2014
11. *Chicago Board of Trade V. United State* 246 U.S. 231 (1918)

by the court as follows: - "The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court interpret facts and to predict consequences."

In the Indian context the Supreme Court in the case of *Mahindra and Mahindra V. Union of India*[12] , *TELCO V. Registrar of RT*[13], held that the rule of reason is to be applied in the case as here in these the definition of the term "Restricted Trade Practices" is a very exhaustive one and not the inclusive in nature. Supreme Court stated that the vertical agreement under the section 3(4) of competition Act 2002 shall be interpreted in accordance with the rule of reason and not otherwise.

V. EXCEPTIONS AND PROVISO [SECTION3(5)]

The Act provides exemptions to some of the anti-competitive agreements.

(i)Joint Venture Defence

Proviso attached with Section 3(3) exempt any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

(ii) IPR Defence

There are two clear exceptions to the rule of anti-competitive

12. (1979). 2 SCC 529
13. 1977 2(SCC)

agreements whether horizontal or vertical in India which are mentioned under Sec 3(5) of the Act. These are relating to intellectual property rights (IPRs) and export cartels. According to it, the rule contained in Sec 3 , which renders an anti-competitive agreement void , has limited application to any person who has been conferred the various intellectual property rights (IPRs) such as copyrights, trademarks, patents etc. In the aforesaid context, CCI states that any 'reasonable condition' imposed for protection of IPR would not attract Section 3, however, imposition of 'unreasonable condition' to protect IPR would contravene Section 3 of the Act. The CCI provides an illustrative list of practices/agreements which though entered into for protection of IPR may contravene Section 3 of the Act[14]. The Commission observed[15] that in order to determine whether an exemption under Section 3(5) of the Act is available or not, it was necessary to consider:

a) Whether the right which is put forward is correctly characterized as protecting an intellectual property?

b) Whether the requirements of the law granting the IPRs are in fact being satisfied?

The CCI in view of the facts and circumstances prevailing in the case held that the exemption enshrined under Section 3(5) of the Act was not available to those OEMs (original equipment manufacturers) who had failed to submit the relevant documents evidencing grant of the applicable IPRs in India, with respect to the various spare parts.

(iii) Export Cartel

Another exemption under Sec 3 is that given to an export cartel. A cartel generally operates when companies collude amongst themselves to fix prices of goods within the domestic market. Such cartels attract national antitrust law. A number of countries which have competition law in place including India exempts under Sec 3(5) what are known as 'export cartel' agreements from the competition law violation so long as such cartels 'do not lead to injurious effects on the competition within the domestic market.'

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14. Competition Commission of India; Advocacy Booklet on Intellectual Property Rights under the Competition Act, 2002
15. *Shri ShamsherKataria v. Honda Siel Cars India Ltd. &Ors 03/2011*

VI. CONCLUSION

Anti-competitive agreements do harm the competition in the market as it could lead to monopoly or provides unfair advantage to the business enterprise. However, these competitive agreements are not always injurious to business. Agreements which generally cause adverse effect or distort or restrict completion are known as anti-competitive agreements.

Sec 3 of the Act deals with the 2 types of agreements, which can be in contravention of the Act 1- section 3(3) deals with the agreements amongst horizontally, placed firms such as bid rigging, collusive bidding, cartels etc. Such agreements are most pernicious to consumer and hence have to be dealt severally. 2- section 3(4) of the Act deals with the agreements between firms operating at different levels in the production/ distribution chain such as between manufacturer and distributors, manufacturer and retailers, distributors and retailers etc. These agreements ate generally employed to deal with the problems arising in vertical relationship. Under such agreements individual self-interest of the manufacturer and distributor may sometimes conflict with their joint interest. Unlike horizontal agreements, vertical agreements have both positive and negative effects on competition and consumer as well.

Adverse effect on competition refers not to a particular list of agreements but to particular economic consequences which may be produced by quite different sorts of agreements in varying time and circumstances. The role of CCI is of great importance with respect to anti-competitive agreements. CCI has control on competition in market and has to function in accordance with ever changing dynamics of market.

The competition regime is unique and exclusive with civil courts jurisdictions being barred. This further necessitates avoidance of procedural errors more important than a mere wishful thinking. The commission also faces challenges with regard to lack of awareness amongst all important stakeholders about the newer methods of implementing the law. The most discussed challenge is collection of evidence against cartel and bid rigging. Here it is helpful to bear in mind that there is distinction between restriction on competition and a restriction on conduct.

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THE RHETORIC OF TAX-POLICY AND CONSTRUCTION OF TAX-STATUTES

DHARMENDRA KUMAR MISHRA*
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> "The power to tax is, ... the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of people .....To lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon the favoured individuals, to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the form of law and is called taxation. This is not legislation. It is a decree under legislative forms .....We have established, we think, beyond cavil that there can be no lawful tax, which is not laid for a public purpose."
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> -Samuel F. Miller J, US Supreme Court[1].

ABSTRACT : The legal system is a combination of statutes and case laws. The statute usually comprises of Articles or Sections which signify the overall principles. The statute is the will of the Legislature.[2] However, it is the court that interprets and gives the Section or Article its true meaning. The Legislature uses sole power in enacting laws governing all the matters including revenue and collection of taxes for the State. The fundamental aim of tax administration is that

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1. *Citizens' Savings And Loan Ass'n v Topeka*, 87 U.S. (20Wall.) 655 (1874) at 662, 664
2. Maxwell on *The Interpretation of Statute*, 12th edn. p.1 (1969)

the tax should be fair between two taxpayers. It should neither be exclusive nor undermine the State monopoly. While administering tax legislations, the basic principle must always be kept in mind that there has to be equality among all parties for whose benefit it is laid on. Judicature remains aware of the basic philosophy, and not averse to giving suggestions for it. The Judicial approach cannot be formed in isolation from the legislative process. However, the court conversely resists changing the law, especially at the application of the revenue in the form of taxes, when the same effect could be achieved through the taxing statutes. The present paper discusses the enactment policy of tax legislations and judicial attitudes in construing them through different canons applied for interpretation of the taxing statutes.

KEY WORDS : Strict Interpretation, Tax Statute, Double Taxation, Equitable Consideration, Tax-payer (Assessee).

I. INTRODUCTION

A system of law corresponds to a political system. The intensity of implementation of fiscal function is heavily reliant on the political ideology. But the fiscal function of taxation is independent from political views. A political system remarkably should be conformed to the modern principle of good and ideal tax system.[3] Taxation is a term that is used in the legal field to refer an imposition of financial burden upon its citizens or residents by the Government through the authority of law. Paying taxes to the Government has been a mainstay of all civilisations since ancient times.

In ancient India, the State was sustained by the revenue collected from its subjects. It has been presumed that a well-founded and developed tax system makes the nation prosperous and stable. The King without a treasury should collect a treasury, when difficulties concerning money have arisen.[4] The importance of public finance to the successful system of governance can be underscored by its succinct advice to the Government. There is a fundamental principle that a sovereign state has

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3. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations,* Chapter 2, Book 5, (1776)
4. Kautilya, *Arthashastra*, Adhikaran V, Chapter 2, Section 90 :1, कोशमकोशः प्रत्युतपन्नार्थकच्छः संग्रहीयातृ ।

its own law, which might or might not resemble the law of a given sovereign state. More authoritatively, a tax shall be collected only by the order of the law on the one side, and on the other side, people of the State have no inherent obligation to pay tax to the Government. The most important function of the taxes is to serve as the primary means necessary in the functioning of the public welfare schemes. Assuming a certain level of revenue that needs to be raised, which depends on the broader economic and fiscal policies of the country concerned. There are a number of policies of taxation systems.

Tax policy should be impartial between securing the revenues needed for Government to execute the social and economic programmes and the need for a tax system that promotes innovation, productivity and inclusive economic growth. In order to establish a balance between the interest of the taxpayer and the public welfare scheme, the court has to play a cautious role while interpreting the taxing laws.

A person has no inherent liability to pay a tax and any such liability may arise only by an imposition made by a statute.[5] Sometimes the legislative authorities insert specific anti-evasion provisions in a fiscal statute, but the presence or absence of these does not affect the duty of a court to counter any attempt in providing with a remedy for mischief against which the enactment is directed. Accordingly, the court will prefer a construction that advances this object rather than one which attempts to find some way of circumventing it[6]. Blackstone says that the law will not suffer itself to be trifled with by evasions.[7] This basic principle embodies the necessary legal policy of any democratic State.[8] However, the State has a right to impose tax on its subjects, but the fundamental principle of taxation is that no subject is to be excessively or unnecessarily taxed. Taxation is in a sense, an encroachment on the liberty of the subject. This power of State has to be exercised humanely and not arbitrarily.

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5. Article 265, the Constitution of India reads: no tax shall be levied or collected except by authority of law.
6. *Heydon's Case*, (1584) 3 Co Rep 7a , the office of all the Judges is always to make such construction as shall …… suppress subtle inventions and evasions for continuance of the mischief ……*pro private commodo* (for private advantage)
7. Kerr Bl , 4th edn, (1876)
8. Supra note 3, p 867

Chanakya has suggested taxing the subjects in a moderate way.[9] Thus, in the realm of taxation jurisprudence to this liberal legal discourse of legal determinacy is pervasive. The present paper focuses on the canons of constructions generally applied in construing the tax statute and it is confined to the common law system of statutory interpretation applied by the courts in India in searching out the true meaning of legal edifice.

II. INTERPRETATION AND JUDICIAL PROCESS

In the field of legal studies, the interpretation of statutes is a specialised branch. It comprises of a set of basic principles and guiding rules. It is the duty of the judicature to act upon the true intention of the legislature. The main object of interpreting a statute is to ascertain the intention of the Legislature enacting it.[10] A Judge has many ways to decide a case. He may decide the case either on the basis of public policy, legislative history, or community values as the canons of statutory construction. Justifications for applying anyone among the different ways are not equal. But, the policy justification clearly trumps other justifications in any meaningful hierarchy of judicial values. Policy justifications are the public policies that instruct judges to respect legislative preferences and to avoid exalting their own view of the good over that of the legislature or to intrude on the legislature's prerogative to make law. But, it is also true that the canons can be ranked and ordered by judges, which makes legislation more public regarding serving as a check on legislative excess without intruding on the constitutional authority of the legislature to make law.

It is a well-settled rule of law that all charges upon the subject shall be imposed by clear and unambiguous language because to some degree they operate as penalties.[11] For the last two centuries, the interpretation of tax legislation was dominated by the application of strict rules of statutory interpretation. With occasional departures and limited exceptions, the courts construed tax legislation strictly and literally on the basis of

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9. Supra note 4, taxing power is limited , it should not be felt heavy; a *Raja* (king) should collect tax in the same manner as honey bees extract nectar from flowers neither hurting the beauty nor the fragrance.
10. Salmond, *Jurisprudence*, 11th edn. P 152
11. *Rusell v Scott,* (1948) AC 422;Supra note 2

the words used in the legislation and with no assumptions about any legislative purpose or spirit other than the raising of tax.

As statutes imposing liabilities are to be strictly construed, the courts require tax- statutes to be couched in clear and express terms. As in the case of penal statutes, nothing more than a literal reading of the text of the enactments is permitted. The language of the enactment is to be given its plain meaning; it can neither be extended nor restricted with reference to any supposed intent of the legislature. Thus, the general principle of construction of a fiscal (taxing) statute is that the language of the statute is not to be neither stretched in favour of the State, nor narrowed in favour of the tax-payer. This traditional approach is summarised by the Privy Council in the case of *Inland Revenue Commissioner v Duke* of *Westminster*[12] where the Council has observed that taxpayers are free to arrange their affairs so as to minimize tax[13]. This opinion is adopted by the courts to statutory interpretation in the tax context and reflected in the view of Lord Cairns:

> 'I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute'[14].

The emphasis on literal interpretation in the case of tax- statutes is a double edged weapon. On the one hand, it prevents the extension of the

12. [1935] AC 1(HL)
13. *Ibid*
14. *Partington v The Attorney General* (1869) LR 4 HL 100

ambit of the enactment by analogy and on the other, it disables the court from mitigating any hardship or inconvenience that may arise. If something falls within the net of the tax- statute, it is not for the Court to provide relief. The statute is to be taken literally irrespective of considerations of inconvenience, hardship, or injustice.

The rule requiring strict construction of tax-statute is reflected in the following principles of construction used by the Courts in respect of the tax-statutes:

a) A tax statute cannot, on equitable consideration, be extended to cover subjects with not clearly covered by the words of the enactment. Tax legislation is to be construed strictly on the basis of the words chosen by the legislator in drafting the legislation, and with no assumptions about any legislative purpose or spirit other than the raising of tax.

b) If the language of the enactment is susceptible to two meanings, the one favourable to the assessee is to be preferred. If the plain words of a taxing provision are found to be ambiguous, the ambiguity is resolved in favour of the tax-payer.

c) There is presumption against double taxation of a single transaction.

d) Where the language of the enactment is plain and unambiguous the Courts can not restrict its scope with reference to any considerations of injustice, hardship, or inconvenience. If the plain words of an exemption are found to be ambiguous, the ambiguity is resolved in favour of the taxing authority.

e) The principle of strict construction is primarily limited to the charging section of the statute.

III. THE CANONS OF THE CONSTRUCTION OF FISCAL STATUTES

Nevertheless, there are certain rules to construe the fiscal statute, which are given below:

a) No extension by Analogy

A matter, which is not covered by the provisions of tax enactment, may not to be brought within its ambit. It is for the legislature to devise the net of taxation. In fiscal legislation a transaction cannot be taxed on supposed spirit of law. The courts will not extend its purview on the

consideration of equity by analogy. If the language of the statute is plain and clear, there is no option for equitable consideration.[15] The Supreme Court has observed:

> 'The doctrine of "approbate and reprobate" is only a species of estoppel, it implies only to the conduct of parties..... it cannot operate against the provisions of tax-statute.'[16]

In *Higgs v. Olivier*,[17] where an actor had entered into an agreement with a procedure to the effect that the actor would not play role in any film produced by anybody other than that procedure for a period of eighteen months. A sum of £ 15,000 was paid as consideration for this promise to the actor. The question was whether this money constituted '*profits of professio*n' or *'vocation'* within the meaning of *the Income Tax Act,* 1952, the Chancery-division has interpreted that the payment did not constitute 'profits for profession' as the payment made as a matter of professional fees.

In *P. J. P. Thomas v. Commissioner of Income Tax*[18], where the assessee had transferred certain assets to a lady, and later on, he married her. The question was whether income accruing from such assets could be added in the total income of the assessee? Section16 (3) (a) (iii) of *the Income Tax Act*, 1922, permitted the authorities to include the income of the assessee as other income derived by his wife from assets transferred directly or indirectly to the wife[19]; the Supreme Court interpreted the provision and held that the enactment had no application to a situation

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15. *CIT v. V. MR. P. Firm, Muar* AIR 1965 SC 1216; *Commissioner of Income Tax v. Madho Pd. Jatia* (1976) 4 SCC 92
16. Ibid
17. 1952 ch. 311,
18. AIR 1964 587
19. The Section 16 of the Act reads thus:
    (3) In computing the total income of any individual for the purpose of assessment, there shall be included-
    (*a*) so much of the income of a wife or minor child of such individual as arises directly or indirectly-
    (*iii*) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart;

where the assets were transferred before marriage. The enactment used the word a 'wife' and that word could not be construed to include a lady who later became wife.

b) Presumption in favour of the Assessee

Where the terms of an enactment imposing a tax are fairly susceptible to two constructions, the one which favours the subject (assessee) is to be adopted. In *Kirkness v. John Hudson and Co*[20], the plant of the respondent was compulsorily acquired by the State. Section 17 of *the Income Tax Act* provides that a balancing charge could be levied when machinery or plant was sold 'for a sum in excess of its written down value'. The charge was levied on the compensation paid to the company. The court used the presumption to hold that '*sale*' in this enactment should be construed to exclude compulsory sale. It was interpreted that the charge could not be levied on the amount received as compensation.

In *Commissioner of Income Tax v. Karamchand Premchand Ltd*.,[21] question was related to the ambit of the provisos of Section 5 of *the Business Profits Act*, 1947. The proviso excluded income profit or gain of business arising in any part of India to which the Act did not extend[22]. The respondent claimed that his loss arising in Baroda (an area to which the Act did not extend) should be taken into account. While interpreting the provisos, the Supreme Court has held that as the matter was debatable construction favouring the assessee, would be adopted, and therefore as such the loss should be taken into account. There are

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20. (1955) 2 All E R 345
21. AIR 1960 SC 1175
22. The proviso of the Section 5 of the Act reads thus:
    this Act shall apply to every business of which any part of the profits made during the chargeable accounting period is chargeable to income- tax by virtue of the provisions of sub- clause:
    Provided that this Act shall not apply to any business the whole of the profits of which accrue or arise without British India where such business is carried on by or on behalf of a person who is resident but not ordinarily resident in British India, unless the business is controlled in India,
    Provided further that this act shall not apply to any income, profits or gains of business accruing or arising within an Indian State unless such income, profits or gains are received or deemed under the provisions of the aforesaid Act to be received in or are brought into British India in any chargeable accounting period,.

many cases where the court has refused to adopt a construction of a taxing Act which would impose liability where doubt exists. Rowlatt J, has rightly exprtessed:

> 'In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used.'[23]

c) Presumption against Double Taxation

There is a presumption that the legislature does not intend to tax the same transaction more than once[24]. Double taxation means – taxation on the same tax base (income ,property or transaction etc.), in the same hands, by the same authority. Lord Brightman has said that the element of double taxation exists whenever a shareholder sells at a profit his shares in a company that has itself realised a capital asset at a profit[25]. Of course, if the enactment imposes double taxation in clear and express words, the Courts cannot help but enforce it. But, where the language is ambiguous, courts lean against double taxation.

However, there is no constitutional bar against double taxation. The modern attitude of the court is that the revenue from taxation is essential to the running of the State, and the duty of the judiciary is to add its collection while remaining fair to the subject[26]. The fact that the same commodity comes to be taxed twice, is no conclusive objection to the legality of taxation. As a matter of presumption, the court does not intend such double taxation. In the case of *State of Madras v Pothuri Srivasulu Chetty*,[27] the court did not levy tax on the same hands of the principal where an agent had been subjected to tax.

d) Court not to restrict the ambit of the law for considerations of equity

If the language of the enactment is plain, the principle of strict

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23. *Cape Brandy Syndicate v IRC* [1921] 1KB 64
24. Supra note 4, S. 90:30, सकृदेव न द्विः प्रयोज्यः।
25. *Furniss (Inspector of Taxes) v Dawson* [1984] AC 474
26. *IRC v Berrill* [1981] 1 WLR 1449
27. 1954 (2) MLJ 134; *I. R.C. v. F. S. Securities Ltd.* (1964) 2 All E R 691; *Ahmadji Bhai v. State of Madhya Pradesh* AIR 1953 Nagpur 29

construction does not require the court to restrict the ambit of the taxing provisions with reference to possible consequences.

In *Farmers Machinery, Syndicate v. Shaw*,[28] where certain farmers joined together to form a business syndicate to operate a ferry for drying grains and purchased and installed the machinery. A trust was created to manage it and the land on which the plant was also installed vested in the trust. A question arose whether the plant was liable for payment of 'rate' under *the Rating and Valuation (Apportionment) Act*, 1928. Section 2 (2) of the Act exempts from the rate-assessment such buildings were occupied together with farmland and were used for agricultural operations on such land. The Court interpreted that the exemption was not available in respect of the plant because it was occupied by the trust managing committee which had no form of land and as such, it was not occupied together with the farm lands, nor was it used in connection with agricultural operations on such lands.

In *C. A. Abraham v. The Income-Tax Officer, Kottayam And Anr.*[29], the Supreme Court has observed:

> 'In interpreting a fiscal statute, the court cannot proceed to make good deficiencies if there be any; the court must interpret the statute as it stands and in case of doubt in a manner favourable to the tax-payer[30].'

The apex court further held that it was not for the courts to restrict their operation for considerations of hardship and inconvenience. In the instant case, the Court interpreted that the power to make assessment in case of a discontinued business includes the power to impose a penalty on the assessee.

The same principle is used by the court to require that those who claim exemptions under tax-statute must establish them. In *Commissioner of Income Tax v. Ramkrishna Deo*[31], the question was who has the burden to prove that the income being agricultural income is exempted from levy

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28. (1961) 1 All E R 285
29. AIR 1961 SC 609
30. *Ibid*
31. AIR 1959 S C 239

of income-tax. The Supreme Court has held that the burden of proof shall lie upon the assessee and the principle of the law of Income-tax is that where an exemption is conferred by a statute, the State must not get the tax either directly or indirectly[32]. In support of the view of the Supreme Court, the following observations of Lord Somervell, L J, is worth mentioning which was given in *Australian Mutual Provident Society v. Inland Revenue Commissioners*[33]:

'the rule must be construed together with the exempting provisions which, in our opinion, must be regarded as paramount. So far as the rule, if taken in isolation, would have the effect of indirectly depriving the company of any part of the benefit of the exemption, its operation must be cut down, so as to prevent any such result, and to allow the exemption to operate to its full extent[34].'

IV. TAX-STATUTE AND THE RULE OF STRICT INTERPRETATION : LIMITATIONS

Statutes imposing taxes or monetary burdens are to be strictly construed. The logic behind this principle is that imposition of tax is a kind of imposition of penalty upon citizens which can only be imposed by the authority of law. Therefore taxing statutes should be interpreted strictly. However, the principle of strict construction is basically limited to charging sections of the tax-statute. The Courts have made a distinction between the imposition of liability to pay tax and the machinery for collection of tax. The provisions relating to imposition of liability are to be strictly construed, but the provisions creating the machinery for tax collection should be construed *ut res magis valeat quam pareat.* The Court will construe enactments relating to machinery of collection so as not defer the intention of the legislature. Once the liability is incurred, the statute to be construed so as to make it workable.

In *Allen v. Trehearne*[35], Section 45(5) of *the Finance Act,* 1927 provided that in case an assessee ceased to hold office during the

32. *Ibid*
33. (1946) 1 All E R 528
34. *Ibid*
35. 1938 22 Tax case 15

assessment year, he would be liable to pay tax on the amount of emoluments received between the month of that year and the date on which he ceased to be employed. The question was whether this enactment was applicable to a case where the assessee died without receiving the sum due as emoluments? The court has interpreted that the provision should be broadly construed as it only dealt with the machinery of tax collection. It construed the enactment to include not only payment received but also payment due to be received.

In *Gursahai v. Commissioner of Income Tax*[36] the question was whether Section 18 A (8) was applicable to case where an assessee was liable to pay advance tax but had not paid it.[37] Literally construed, the enactment would not have covered the case but the Supreme Court has interpreted that the provisions made under Section 18 A (8) of the *Income-Tax Act*, 1922 are related to the machinery of collection of taxes and not to levy of tax, and such an enactment must be so considered so as to make it workable and not so as to defeat it. Similarly in *Murarilal Mahabir Prasad And Ors. v B. R. Vad And Ors.,*[38] the Supreme Court refused to extend the doctrine of strict construction to assessment of tax on fines after their dissolution. The Court has observed:

> 'The true implication of the principle that a taxing statute must be construed strictly is often misunderstood and the principle is unjustifiably extended beyond the legitimate field of its operation. If the statute contains a lacuna or a loophole, it is not the function of the court to plug it by a strained construction in reference to the supposed intention of the legislature. The legislature must then step in to resolve the ambiguity and so long as it does not do so, the tax-payer will get the benefit of that ambiguity. But, equally, courts ought not to be astute to hunt out

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36. AIR 1963 SC 1062

37. Section 18 A (8) of the Act reads thus:

    Where, on making the regular assessment, the Income-tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section, interest calculated in the manner laid down in sub-section (6) shall be added to the tax as determined on the basis of the regular assessment.

38. AIR 1976 SC 313

> ambiguities by an unnatural construction of a taxing section'[39].

The principle, thus, stated has hardly ever been doubted but it is necessary in the application of that principle to remember that though the benefit of an ambiguity in a taxing provision must go to the subject and the taxing provision must receive a strict construction that is not the same thing as saying that a taxing provision should not receive a reasonable construction.[40] In a few cases it has been held that in construing a tax statute, the courts should take the substance of the transaction into account and should not limit themselves to the form of the transaction. This attitude has been severely criticised by the courts in England and India. In *Inland Revenue Commissioner v. Duke of Westminster*, Lord Russell, J observed:

> 'that the doctrine produced on a misunderstanding of observations made in some earliest. If something did not fall within the letter of the tax enactment, it would not be brought into it by analogy or by a reference to the substance of the transaction.'[41]

The Privy Council accepted with approval these views in *Bank of Chattinad Ltd. v. Commissioner of Income Tax, Madras,*[42] and the Supreme Court of India has also adopted this stand in *A V Fernandez v. State of Kerala*[43].

In the case of *Banarasi Devi v. Income Tax Officer, Calcutta*[44], the Supreme Court refused to apply the doctrine of substance. The court held that it would not go to the substance to say that 'issued' and 'served' were not the something, but where the words of the Act were clear and validated such notices, it will give effect to them. The doctrine of substance has however a limited connotation also. It means that the court will examine the true legal nature and effect of a transaction and will not be deceived by forms.

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39. *Ibid*
40. *Wealth Tax Commissioner v Kripashankar* (1971) 2 SCC 570
41. Supra note 12
42. AIR 1940 PC 183; (1940) 008 ITR 0522; 1940- LL-0602
43. AIR 1957 SC 657
44. AIR 1964 SC 1742

Is taxation penal? Lord Thankerton has said that the Counsel is apt to use the adjective 'penal' in describing the harsh consequences of taxing provision, but if the meaning of the provision is reasonably clear, the courts have no jurisdiction to mitigate such harshness[45]. As aptly observed by Lord Cairns in *Pryce v. Monmouthshire Canal and Railway Companies*[46], that whether the statute, even a taxing statute, contains an ambiguity has to be determined by applying normal rules of construction for interpretation of statutes? The Taxing Acts are to be construed with strictness and no payment is to be extracted from the subject if it is not clearly and unequivocally required by Act of Parliament to be made.

V. CONCLUSION

Thus, it is established principle of construction of taxing statute that it should be strictly construed. But, before taxing any person, it must be shown that assessee should fall within the ambit of charging section by clear words and not by implication used in the section. The charging sections must be construed strictly where as the tax imposing provision which enables the machinery, must be construed as would effectuate the object and purpose of the taxing statute, not to defeat it. It is a settled rule of construction that the court cannot proceed to make good the deficiencies, if there be any, in the statute; it shall interpret the statute as it stands, and in case of doubt, it shall interpret in a manner favourable to the tax-payer. In *W.M. Cory and Sons Ltd v. I.R.C.*, Lord Reid has rightly observed[47]:

> 'The words of a taxing Act must never be stretched against a tax-payer. There is a very good reason for that rule. So long as one adheres to the natural meaning for the charging words, the law is certain, or at least as certain as it is possible to make it, but if courts are to give to charging words what is sometimes called a liberal construction, who can say just how far this will go. It is much better that evasion should be met

45. *Inland Revenue Commissioner v Ross and Coulter* (1963)1 WLR 396
46. (1879) 4 App Cas 197
47. (1965) 1 All E R 865 (HL)

by amending legislation[48].'

If the words of a taxing provision are found to be ambiguous, the ambiguity is resolved in favour of the taxpayer; if an exemption is found to be ambiguous, the ambiguity is resolved in favour of the taxing authority. Academic and judicial criticism of the strict and literal approach was voiced and was widespread throughout the common law world. The rejection of the traditional approach in favour of more purposive guidelines finally occurred in India and other common law countries. To sum up, it may be noted that a statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omissions or clear direction makes that and unattainable. There are three stages in the imposition of a tax; first, there is the declaration of liability that is the part of the statute that determines which person is to be made liable in respect to which property. *Secondly,* there is the assessment; the liability does not depend on assessment; that, ex-hypothesis, has already been fixed. But, the assessment particularities the exact sum which a person liable has to pay. *Thirdly*, come to the methods of recovery, if the person taxed, does not voluntarily pay[49].

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48. *Ibid*

49. *Whitney v. Commissioners of Inland Revenue* (1926) AC 37, as per Lord Dunedin

CRYONIC LIFE EXTENSION : ISSUES AND CHALLENGES

AJAI KUMAR*

ABSTRACT : The article deals with a new subject cryonic life extension related with rights of dead persons. Certain rights are being provided and protected under the legal system of each country. Under Indian legal system constitutional rights in limited sense are being provided to dead persons under Article 21 of the Constitution in form of human dignity under term right to life, which has extended meaning to treat the dead person with respect. The succession laws are being enacted with the objective to enforce the wishes of a person after his death. Considering from both points of view, this technology (cryonic life extension) is important and relevant because if a person express his desire in his life time that his remains after his death to be cry preserved, then it should be honoured. In Indian legal system, the will is enforceable under the succession law but we have no specific law in the area of cryonic life extension. The author has made a comparative study of other legal systems of the world. In United States of America, no separate legislation has been enacted to deal with such technology, inspite of the fact this technology is very popular amongst the citizens of the country. The subject has been partially dealt by the Act known as Uniform Anatomical Gift Act, 1968 which revised in the year 1987 and 2006 and partially under the Contract Act by judiciary. However, the technology of cryonics has been recognized indirectly by the United States judicial system and limited protection is being provided. Similar position has been prevailing in other countries like United Kingdom, Australia,

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France, Russia and China. But the technology has been banned in Canada.

KEY WORDS : Cryonic life extension, cryopreservation, cryoprotectant, cryo-capsule, Conseil d'Etat.

I. INTRODUCTION

The term Cryonics is derived from the Greek word '*kryos*' which means cold or freezing.[1] According to Karl Werner 'cryonics' coined from '*cryo*' meaning cold.[2] The term cryonic Life Extension is wider enough to includes preservation of cells, tissues, organs, body parts and even full human body in tremendously low temperature with the help of cryoprotectant in the hope of being revived in future when science and technology permit. In this article, the author is confining this process only to preservation of the dead bodies which were died due to incurable diseases, for undefined period of time in the hope that one-day medical science would have made remarkable progress to resuscitate them back to life by successfully curing the medical condition which became the cause of their death. According to the Cryonics Institute, a U.S. organization that offers the facility, the central objective is "to give people a second chance at life" and increase lifespans.[3]

Two decisions of the different High Courts in India impressed the author to write this article. The first is Allahabad High Court in *Mujeeb Bhai v. State of U.P.*[4] held that the word and expression 'person' in Art. 21 of the Constitution would include a dead person in a limited sense and that his right to his life which includes his right to live with human dignity, to have extended meaning to treat his dead body with respect, which he would have deserved, had he been alive subject to his tradition, culture and the religion, which he professed.[5] The second decision is of Punjab and Haryana High Court. This is only case which comes closer to cryonic

2. Saul Kent, "The First Cryonicit", 32 CRYONICS9,10(1983). www.alcor.org/cryonics8303txt (visited on 12.01.2017).
3. Meera Senthilingam, "What is cryonic preservation?". CNN, Nov.18,2016. Available at http://edition.cnn.com/2016/11/18/health/how-cryopreservation-and-cryonics-works/index.html (visited on 20 Aug., 2017).
4. Ramji Singh Mujeeb Bhai v. State of U.P. & Ors., Civil Misc. Writ Petition No. 38985of 2004.
5. Ibid.

preservation for life extension in India. This is famous case of *Dalip Kumar Jha & Another v. State of Punjab & others.*[6] The fact of the case was that one Mahesh Kumar Jha, known as Ashutosh Maharaj, headed a religious sect called Divya Jyoti Sansthan in Nurmahal town of Jalandhar district. He was pronounced clinically dead at Apollo Hospital Ludhiana on January 28, 2014. However, his followers declared that he was not dead but merely went in '*samadhi*' and will return to life when he wishes. Therefore, they preserve his body in an ice chamber. What was followed by a highly published legal battle? The event of which were no less than a movie plot. A person named as Mr. Puran Singh filed petition in Punjab and Haryana High Court for issuing a writ of *habeas corpus* seeking the release of the godman's body. The writ petition was rejected by the Court. Another person named as Mr. Dalip Kumar Jha claimed to be the son of Ashutosh Maharaj also appealed to the High Court of Haryana & Punjab, demanding that the body be brought to his home town in Bihar for cremation according to local rituals. The Punjab and Haryana High Court ordered that the last rites of Ashutosh Maharaj be performed within 15 days. But the decision was never execute But the decision was never executed.

Again, Mr. Dalip Kumar Jha, Divya Jyoti Sansthan, State of Punjab and Sadhvi Tapeshwari Bharti filed appeal before Division Bench of the Punjab and Haryana High Court.[7] Hon'ble Mr.Justice Mahesh Grover & Hon'ble MR. Justice Shekhar Dhawan pronounced the judgment on July 05, 2017 and permitted to the followers of Ashutosh Maharaj to preserve his body in a freezer. The court had set aside the judgment of the learned single judge and liberate the Sansthan and the State from the mandate

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6. Dalip Kumar Jha & Others v. State of Punjab & Others, Civil Misc. Writ Petition No. 7345 of 2014 & C.R.M. M-9195 o 2014.

7. Dalip Kumar Jha & others v. State Of Punjab and Haryana , L.P.A. No.2043 of 2014 Decided in 2017 .

   As of December, 2018, the body of the godman is still being preserved at the premise of the 'dera' and disciples still affirm their belief in his return. It is important to note that the disciples have merely frozen his body in an ice chamber and no modern methods of cryonic preservation have been applied to the body. This is understanding of the author of the article that from the point of medical context, since the body was preserved without infusion a cryoprotection, it is likely that ice crystal formation would have damaged most of the cells in his body.

given by him while leaving the alleged son Dalip Kumar Jha to his remedies in law as directed by the learned Single Judge with whom they agreed in this regard. The prayer of Dalip Kumar Jha to conduct a DNA Test would also be left to him to be raised, if he chooses to take recourse to a civil suit and the court made it clear that if such a course is adopted by Dalip Kumar Jha, the Sansthan will not resist the handing over of a DNA sample from the body of Ashutosh Ji Maharaj, as may be determined by any procedure to be determined by the medical professionals. The Division Bench unhesitatingly gave the following directions to ensure that the body of Ashutosh Ji Maharaj does not degenerate or decay :- (1) A medical team would be constituted by the D.M.C., Ludhiana of which C.M.O., Jalandhar would be a part who would visit the place where the body has been kept to examine it and ensure its preservation in good state. (2) The frequency of the inspection and the intervening period between inspections would be left to the wisdom of the medical fraternity. (3) The D.M.C., Ludhiana would also be at liberty to prescribe its charges which the Sansthan will have to pay and if the amount is not paid by the Sansthan to the doctors, they would be at liberty to apprise the C.J.M., Jalandhar who would seek to execute this order and recover the amount from the property of the Sansthan. (4) To obviate a default, it is directed that the Sansthan would create a corpus of Rs.50 lacs to be retained in a Bank in an F.D.R. which will ensure a security for the professional charges of the medical team.

II. POSITION IN OTHER COUNTRIES

i) United States–

Since maximum number of cryonic organizations are based in the United States of America, it is apt to start with analyzing the legislative and judicial response under that jurisdiction. Those who are in favour of cryonic justifying it from the standpoint of right to privacy with due process clause as interpreted in fifth amendment[8] and fourteen amendment[9] of the U.S. Constitution.

Since cryonic life extension is new science which has been in its

8. The Fifth Amendment guarantees right in respect to criminal cases including grand jury, double jeopardy, protection against self incrimination etc.. It also requires 'Due process of law' be part of proceeding.

9. The Fourteenth amendment is equal protection of laws.

infancy, therefore there are not many legislation which addressed it. However, to fulfill legal lacuna, cryonic organizations and people who wish to be cryonically preserved have to rely on subsidiary legislations which impliedly lend legal validity to the practice.

Uniform Anatomical Gift Act (UAGA) 1968 (revised in 1978 & 2006) is a legislation that falls under the category of Uniform Act, drafted by the Uniform Law Commission with intention of harmonizing all State laws on this particular subject. The history and reason behind enactment of this legislation dates back of the year 1967, when Dr. Christian Barnard performed the first heart transplant. The Congress was quick to address this new innovation in the field of medical science and promptly enacted UAGA, which was the first ever legislation to govern all issues related to organ, tissue and cadaver donations for medical use. Section 11 (a) (i) expressly lays down that 'organ procurement organization' may become recipient of anatomical gifts of bodies. Cryonic organizations like Alcor and other cryonic facilities provider heavily depending on this provision to gain legal custody of the deceased upon their death. Similar as people are permitted to give their bodies after death to medical schools or their organs for transplant, they can likewise give their bodies to Alcor for therapeutic research. Section 4 lays down that adult donor himself/ herself, minor donor's parents, an agent of the donor, guardian of donor has authority to make such anatomical gift before the death. Section 5 of the Act describes the manner in which this anatomical gift shall be made. Section 6 provides procedures to amend or revoke this gift before death of donor. Section 9 & 10 enables the donation or revocation of donation of the decedent's body or part thereof by another person. These sections are for assisting and enabling close family member being desirous of preserving the body of a loved one. It is commonly seen that the parents, Children or spouse of deceased have express intention to preserve the bodies of their loved one who have departed early due to an incurable disease. It is peculiar, but in some cases people have also been known to preserve bodies of their pets to whom they have shared a great bond.

Section 14 of the Act, 2006 gives an elaborate account of rights and duties of the procurement organization which when read with section 22 & 23 of the same Act clearly states that all authorities involved in care of the deceased in his/her last days, as well as coroner or medical officer under whose jurisdiction the deceased falls, shall lend complete assistance

and co-operation to the procurement organization so that cryonic preservation of body or organ is carried on in an effective and efficient manner. The section 14 (b) of the Act also laid down that a hospital has to allow reasonable access to information to all medical documents and medical history of the deceased to the procurement organization so that they may be aware of all medical facts in order to prepare for cryonic preservation. Owing to use of this provision, clinic and healthcare personnel are conversant with protocol and paperwork involved in whole body donation and to the requirement for rapid release of the body to the done. Section 16 & 17 are extremely important as they fix criminal liability on any misuse of these anatomical gifts or indulging in any act prohibited by the law and provides for a fine not exceeding fifty thousand US dollars or imprisonment not exceeding five years or both class felony. Section 18 grants immunity to the persons involved in preservation of anatomical gifts for performing their duties which are done in accordance with accepted professional standards. It also states that the donor shall not be liable for any damage if any cause by such donation.

The Uniform Anatomical Gift Act, 2006 covers the issues relating to the process of cryonic preservation, but it fails to address the complications that may arises out of violation of the rights of the deceased or cryonic organizations. It is a legislation which is not directly and effectively targeting the entire procedure itself, but only touches upon the initial stages. It is submitted that a new piece of legislation is required to resolve the problem relating to the process of cryonic preservation.

ii) Judicial response

Dora Kent v. Trasa[10] and ancillary cases of *Kent v. Carillo*[11] & *Henson v. Carillo*[12]

Fact- Dora Kent was mother of a very enthusiastic cryonics activist Saul Kent who had been associated with the cryonic movement ever since its inception. Dora Kent had been long ailing due to ill health and old age. Saul Kent as a son decided to move her to Alcor where she would be given medical care till she passes, with intention to cryonically preserved her head. Eventually she died at the age of eighty – three years in Dec.

10. 20-1022 (Super.Ct. Cal., Dec.15,1989.
11. No. 191277 (Cal. Riverside County Super, Ct. 1988).
12. No. SAC90-021JSL (Cal. Riverside County Super. Ct. 1990).

23, 1987 after which her head was severed from her body and the body was sent to the coroner for relevant formalities before disposition of the body. The deputy coroner signed her death certificate, but when the Riverside County Coroner was made aware of the fact that the doctor who signed death certificate at Alcor was not present at the time of her death, he became suspicious of the circumstances surrounding her death. Following which he reversed the finding of the deputy coroner and stated that the cause of death was homicide and demanded that Cora Kent's head be released to coroner's office for an autopsy. Alcor members refused to do because it would amount to decomposition of the cryopreserved head and would completely defeat the purpose of preservation. On this, cornor's office threatened them with legal action. Two week later, coroner's deputies entered the Alcor office armed with a court order searching Dora's head. Alcor's members refused to disclosed the location of head. Consequent to which they were arrested and detained at Riverside County jail. Later on, the court directed that they be released owing to lack of evidence of foul play in Dora'a death. The attack on Alcor did not stop for thirty hours. The records, drug of five thousands US dollar and eighty private computer of Alcor were seized. The act of Coroner's office gave rise to three simulation litigations, almost all of which were concluded in favour of Alcor for lack of evidence.

Two issues were before the court – a) whether act of preserving Dora Kent's head amount to homicide on part of members of Alcor? b) whether head or body of Dora Kent' s by preservative could be removed?

Prosecution silently dropped the first issue without filing charge sheet stating that there was lack of evidence to support such allegations. On the second issue J. Timlin staed that " Dora Kent, under the Article1, section I of the California Constitution and Fifth and Ninth Amendments of the U.S. Constitution have a privacy right to exercise control over his/her body and to determine whether to submit his/her body, or any portion thereof, including the brain, to pre-mortem cryonic suspension.

Kent v. Carillo[13] the court granted injunction holding that 'the State must show a compelling interest in order to interfere with right to dispose of one's own remains as one desires.'[14]

13. Supra note 11.
14. Ibid.

Henson v. Carillo[15] Alcor members contested the coroner's office's action of seizure of their material and electronic communications as violation of their right to privacy. The case concluded by a tacit admission of wrongdoing by the Coroner's office and an out of court settlement of sum of ninety thousand U.S. dollar which was divided among the six who were detained on Jan. 7, 1988 and their attorneys.

Roe v. Mitchel (Alcor Life Extension Found., Inc. v. Michell.[16]

Richard C. Jones aka Dick Jones (known as Dick Clair) was a famous script writer and a long standing member of Alcor, who was diagnosed with AIDS in 1988 (around the same time conflict was going on Form VS-9). Jones was aware of the legal tussle between cryonic organizations and the office of County Registrar and it was very clear that Alcor would not be allowed to remove his body from the Sherman Oaks Community Hospital, where he was awaiting of his demise. Since Dick Jones was racing against time and the route of a fresh legislation was not feasible in his case, he decided to file a suit in court under the alias "John Roe", as advised by law firm. This was done to protect the real identity of Mr. Jones as he was a television celebrity. On Sept. 01, 1988 a suit was filed with Los Angeles County Superior Court . Considering the circumstances of the case and terminal illness of Mr. Jones, judge Mundoz decided to put the case on fast track program whereby the case would be decided in a span of eighteen months. On Sept.07,1988 the hospital in which Mr. Jones was staying, Sherman Oaks Community Hospital was added as a co-defendant and interim application was moved on behalf of Mr. Jones seeking a temporary restraining order and preliminary injunction against defendant from preventing, restricting or in any manner whatsoever interfering with the application of a portable resuscitator, after pronouncing of his legal death by a licensed physician, to the body of Jonnes at the hospital located at California for such a period not exceeding two hours as shall be necessary thereafter to accomplish the release of body of Jones to a licensed funeral director and the transport of his body after application of portable resuscitator from the hospital.

At the outset court issued an interim restraining order against all the

15. Supra note 12.

16. 9 Cal. Rptr. 2d572(Ct. App.).

defendants restraining them to stop interfering in the process necessary for subjecting body of Mr. Jones to cryonic preservation. The aftermath of the restraining order that Alcor members were allowed the use of heart, lung for resuscitators on Mr. Jones dead body but were again refrained by the hospital to inject and drugs or cryoprotectant into him while they were in the hospital building. The Hon'ble court refused to express any opinion on the validity cryonics and the manner in which it should be regulated.

The Department of Health Services and its office of State Registrar went in appeal against this judgment. Appellate Court affirmed the judgment of trail court. Appellate Court also not stated any opinion on validity of cryonics.

Donaldson v. Van De Kami[17]

Thomas Donaldson was celebrated mathematician and a computer software scientist who was diagnosed with an incurable brain tumor in 1988 which affected his ability to control mental faculties. He lost his control over his body and bed ridden before his death. He decided to enter pre-mortem cryonic suspension i. e. before his legal death. It was suggested to him that his action amounted to suicide on his part and murder or at least assistance to suicide on the part of doctors who helped him in the process. He filed a suit seeking a judicial declaration allowing his pre-mortem cryonic preservation stating that waiting for death will deny him chance to a successful cryonic preservation as all his body would have failed. The trial court rejected the argument of Mr. Donaldson and his lawyer where they relied on earlier decision of right to die. The court drew a contrast with his case to that of earlier case. Earlier decision was on passive euthanasia whereas this case was of active euthanasia because mr. Donaldson was requesting for affirmative action responsible for immediate death. Mr. Donaldson was not happy with the decision and stated in open court that he was going to end his life anyway, as he did not want to experience the misery of becoming an invalid. He filed an appeal and raised the argument that he had a constitutional right to pre-mortem cryonic preservation and he had constitutional right to receive and his doctors had a right to give advice and encouragement regarding cryonic preservation. The appellate court upheld the decision of the trial

17. 4 Cal. Rptr. 2d59, 60-61 (Ct. App.).

court and held that Mr. Donaldson has no constitutional right to go for pre-mortem or assisted suicide. He and his doctor had no constitutional right to take and give advice for assisted suicide.

Alcor Life Extension Foundation v. David Richardson and Darlene Broeker [18]

Orville Richardson was a pharmacist by profession. He firmly believed in the potential of future medicine advancements. Owing under the belief he enrolled himself at Alcor for preservation of his remains after his death in June2004. He chose to be neurosuspension patient (only head was to be preserved). In Dec. 2004, he executed three documents – last will and Testament for Human Remains and Authorisation of Anatomical Donation, consent for cryonic suspension form and cryonic suspension agreement owing to which he made a payment for fifty-three thousand and five hundred US dollar as a lump sum for life membership. The will stipulate condition that such donation takes place after his legal death and after legal death his remains be delivered to Alcor or its agents or representatives. His health was deteriorated due to onset of dementia, his siblings (David Richardson and Darlene Broeker) were appointed as co-conservator and guardians by the court order dated May,2008. Mr. Richardson died without child or wife to succeed him. Two months after death and burial of Mr. Richardson, his brother, David Richardson reached out to Alcor requesting them to refund the money which Mr. Orville paid in his life time. Alcor was shocked to receive the letter as they had never been informed of Mr. Richardson's demise. Mr. David Richardson refused the request made by Alcor and stated that they had no knowledge of any contract between their brother and Alcor. Seeing the stubborn and uncooperative attitude of the deceased's siblings, Alcor approached the court to disinterment of the body of late Mr. Richardson and release the body to them. The trial court denied request made by Alcor stating that they did not find Alcor to qualify as a designee under the Final Disposal Act under Iowa Code chapter 144C nor did Alcor qualified as a done under the Revised Uniform Anatomical Gift Act. The court also stated that the disinterment of the body was beyond the scope of the court and it could neither authorized Alcor to do so, nor could it force the siblings to do the same. The appellate court reversed the finding of trial court.

18. In the court of appeals of lowa, No. 0-098/09-1255 filed May12,2010.

The court highlighted the fact that there is doubt about intention of the deceased to undergo cryonic preservation, which can be asserted from written documents he signed in favour of Alcor when he was in full charge of his mental faculties. The court condemned the act of siblings and noted that the court refused to believe the assertion made by the siblings that they knew nothing about the contract between Alcor and their brother. This, according to court, could be asserted from the fact that they wrote to Alcor demanding a refund of approximately fifty thousand US dollars. The court was of the view that if siblings were not aware of any such contract then how did they guess the amount involved and how they found the address of Alcor. This is the perfect case of hostile attitude of legal heirs towards cryonic preservation. Most of the time, family of the deceased does not abide by the wishes of the deceased to preserve his/her body as they see this as a waste of financial resources. The court held that wishes of the deceased should be carried out.

Alcor Life Extension Foundation v. Darlene Robbins[19]

Marry Robbins, a resident of Colorado Springs, was a nurse by profession and was a determined and independent woman who had a keen interest in science. During her lifetime, Marry had made clear to her friends and family to be nueropatient at Alcor Life Extension Foundation and made her daughters promised they will give her to Alcor upon her death. In year 2006, she signed all documents to the effect with Alcor. In order to secure financial support for her plans, she had executed an annuity naming Alcor as the beneficiary. In Dec.,2009 marry Robbins was diagnosed with cervical cancer and she made all efforts to seek treatment. She was admitted to a hospice on Feb. 07, 2010. It was stated by Darlene Robbins, one of the three daughters of Marry Robbins that she signed a change of beneficiary form right before her death on Feb.10,2010. The contest in this case was now between Alcor and Marry Robbin's three daughter. The trial court found that the last minute change of Marry Robbin's intention did not amount to cancellation of her earlier contract with Alcor. The court based their finding on testimony of various witness as well as circumstances surrounding the case. Through testimony of Darlene Robbins as well as Joan Teslow, attorney, it was established that

19. Order in the matter of estate of Marry D. Robbins by the District Court of El Pasto, Teller County, Colorado, Case no. 2010 PR149. Available at : *http:// www.alcor.org/Library/pdfs/courtorder.pdf_ (last visited on Nov.26,2018).*

Marry had executed last will and testaments for human remains and authorisation of anatomical donation, consent for cryonic suspension form and cryonic suspension agreement in her full mental capacity and was in possession of these documents right up to death. It was testified by Aaron Drake, the transport coordinator for Alcor that Marry Robbins informed him telephonically on Jan.5, 2010 that she had been diagnosed with stage four cervical cancer and express her desire to move to Phoenix, Arizona in order for smooth and hassle free transportation of her body upon death. On this testimony, the court granted Alcor the right to take possession of her remains and held that change of beneficiary form could not taken as revocation as mental and physical capacity of Mary Robbins two days before her death was highly questionable.

iii) Canada

Canada is far away from jurisdiction which has addressed the issue of cryonic life extension with direct legislation. Province of British Columbia has placed a blanket ban on the practice. The reason is that in Canada, the presence of cryonic organizations offering preservation facilities is not as wide spread as it is in the United States.

The Cemetery and Funeral Services Act, 1990 part 5, section 57 provides the provision related to disposal of the human remains and puts blanket ban on cryonic extension. This Act is a result of fourteen years of deliberations and suggestions of Gosse Royal Commission of 1976. The section provides that 'no person shall offer for sale or sell any arrangement for preservation or storage of human remains based on cryonic, irradiation or any other means of preservation or storage, by whatever name called, that is offered or sold on the expectation of the resuscitation of human remains at a future time.'[20] Section 129 provides punishment for contravention of provisions of the above section. The section stipulates that if any corporation is found in violation of section 57 then they shall be liable to fine not exceeding ten thousand Canadian dollar. In addition to this, if directors and officers knew about the offence and permitted or acquiesced, along with company being convicted for a fine of ten thousand Canadian dollars or imprisonment for a period of not more than one year or both.

In addition to above Act, the legislature of British Columbia enacted

20. Section 57 of the Cemetery and Funeral Services Act,1989, Part5.

'Cremation, Interment and Funeral Services Act, 2004 which expressly prohibits any sale or service related to cryonic. Section 14[21] prescribed the ban and section 62[22] lays down the penalty for the same.

Furthermore, penalties provided for in case of contravention of this statute are more stringent than the previous legislation.

Even after this provision was enacted, the officers in bureaucracy, actually in charge of running day to day procedural formalities maintained that the practice of selling cryonic life extension is illegal, but not the act of buying it from outside. So the citizens of British Columbia are free to enter into such contracts with organizations suited outside of the province but, within the province, no cryonics organization can be set up business. It is submitted that language of section is clear and completely prohibit the practice of cryonic life extension.

iv) United Kingdom

No organization is in U.K. which provides the facilities of cryonic life extension. Most of the persons who desire to enroll for cryonic life extension have to make arrangement outside U.K. and their bodies are shipped to United States. That why most of cryonic organizations situated at United States have their subsidiaries or support groups in U.K.. They

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21. Section 14 of Cremation, Interment and Funeral Services Act, 2004:
'Prohibition on sales and offers of sale, of arrangements relating to cryonics and irradiation:
A person must not offer for sale, or sell, an arrangement for the preservation or storage of human remains that is based on
(a) Cryonics,
(b) Irradiation, or
(c) Any other means pf preservation or storage, by whatever name called,
And that is offered, or sold, on the expectation of resuscitation of human remains at a future time.'

22. Section 62 of the Cremation, Interment and Funeral Services Act, 2004.
'Offence Penalties
(i) An individual who commits an offence under this Act is liable to a fine of not more than $10,000 or to imprisonment for not more than 12 months or both.
(ii) A corporation that commits an offence under this Act is liable, to a fine of not more than $ 100 000.
despite subsections (1) and (2), the court may increase a fine imposed under this section by an amount of upto 3 times the court's estimation of the amount of monetary benefit acquired or accrued as a result of the commission of the offence.'

help and prepare everything for transportation of bodies without any delay. Even though cryonic life extension has been gaining popularity over the last few decades, the legislative response aiming at regulating the practice in U.K. has not been acknowledged. There is no legislation in U.K. which is even remotely associated with the practice of cryonic and hence judges are relying in common law in order to dispose of the case of cryonics. In a land mark judgment, wherein a fourteen-year old terminally ill girl successfully won a case against her parents to assert her rights to be cryonically preserved. The case sparked a lot of interest in cryonic life extension, since now it has received a legal sanction of the court. Latter on several more terminally ill patients signed up for cronic extension after this judgment. Institutional organizations are now offering insurance to fund cryonic contracts. [23] Human Tissue Authority is organization of U.K. has express his concern of non regulation of cryonics after the publicity of cryonics in media. The members of academia have express a lot of concern over lack of regulation in field of cryonic life extension.

v) Judicial Response

JS v. Mand F (Re JS (Disposal of body))[24]

JS (her identity has been kept confidential) a fourteen year old girl was diagnose with a rare form of cancer in 2015. She got chemotherapy for that, however, since cancer was rare so medical science and technology did not offer any cure of it. JS was fully in charge of her mental faculties and she was well aware that she was dying. During lost months, she became fascinated with idea and decided to enroll in cryonics upon her death. This might be a chance to give her a chance in future when she has been cured. Parent of JS were living as divorced spouse and she was staying and living with her mother. Her father was not in a mood to permit her for the process of cryonics because of financial burden but when he came to know that he had not to pay for the cryonic process, he became agreed. Maternal grand parent were ready to pay for the same. Justice Jackson allowed the application of minor JS and made order that her body be disposed off as per her desire. It was noted also that minor cannot make a valid will under section 7 of the Will Act, 1873. In present case it was on parent of JS grant letter of administration over her estate

23. Available at :http://w.w.w.cryonicinsurance.co.uk (visited on Nov.26, 2018.

24. J S v. M and F (Re JS (Disposal of Body)), case No. FD16P00526[2016] EWHC 2859 (Fam), Nov.10, 2016.

and makes them duty bound to arrange for disposal of her body as per her wishes. Hon'ble judge made a note of disapproval or unease the members of hospital trust with the entire idea of cryonics. The judge also made remark that this case should not be treated as precedent for future cases.

JS died latter on Nov. 2016 and a team of volunteers from cryonic organization U.K. prepared her body for cryonic preservation and was shipped to U.S. where she was received by cryonic institute, Michigan and stored as Patient No. 143.

vi) Australia

After U.S., U.K. and Canada, Australia is gearing up fast pace to become the third country in the world where cryonic preservation of human bodies have been performing. At present Australia has two active organizations working towards achieving this goal. - a) Cryonic Association in Australia, b) South Cryonics (Stasis Systems Australia). Cryonics is a new science in Australia, it has not been addressed by the legislature or judiciary. However, it has been addressed by the media as well as academia of Australia. Deakin Law School's senior professor, Dr. Neera Bhatia has discussed and highlighted various problems of cryonics in near future. [25] She has advocated that the legislature should not assumed that cryonic will not spread its popularity in Australia. The legislature should armed with a prospective legislation before citizens would opt for cryonic preservation. Katerina Peiros and Christine Smyth in their paper entitled "Cryonics Wreaking Havoc with Estate Planning" have raised several important issues relating to property law on adoption of cryonics by citizens of Australia.[26] it is aptly clear that cryonics may start creating problems in the realm of property law, succession as well as family law. Another article by Parke Lawyers,[27] a leading law firm in Australia, stated

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25. Neera Bhatia, "Cryonics: Hope or Hell : The Ethics of Cryonics" soundcloud. Available at : https//lawnewsroom.deakin.edu.au/articles/cryonics-hype-hope-or-hell. (Visited on Nov.26,2018).
26. Christine Smyth, Katerina Peiros, "Cryonics Wreaking Havoc with Estate Planning". Available at : https://www.robbinewatson.com.au/sites/default/files/2017-08/successful% 20Succession%20 Cryonics%20 Wreaking%20Havaoc%20 With%20Estate %20Planning.pdf. (visited on Nov.26,2018).
27. Parke Lawyers, "Cryonics and its implications in estate planning", May22,2018. Available at :Https://pl.com.au/cryonics-and-its-implications-in-estate-planning. (visited on Nov.26,2018).

that two of the most pressing problems associated with cryonic life extension is burial and preservation of assets. According to them, first, the executor, who is responsible for making all arrangement for burial. He is responsible that he should be aware of wishes of the testator, since cryonic preservation process has to start within minutes of the death or else it will render the entire process invalid. Secondly, to the lawyers who have to deal with matters of succession and division of estate of deceased. It is not clear whether assets of the deceased shall frozen and not open to succession till the time his possibility of revival is ascertained with some certainty. Thirdly it creates problems for a medical surrogate or person with the power of attorney to decide as to what shall be treatment given to remains of the deceased.

vii) France

France is a country which has recognized the jurisdiction over the cryonics and addressed cryonic life extension. The legislation is Canada is directly addressing the issue whereas in France the courts deal this issue indirectly under the jurisdiction of the disposal of dead bodies. In 2006 French senator, Jean-Louis Masson posed the same question to the government which returned an unambiguous answer stating burial and cremation are only way of disposal of dead body in France and hence cryonic preservation was prohibited. This issue was addressed by the French Supreme Court for Administrative Justice on two occasions. The decision was in relation to rights given to deceased under Article 433-21-1 of the French Civil Code[28] which ensures that rights of the deceased shall be respected and any act contrary to wishes of the deceased shall attract penal consequences. Article 16-1-1 obliged everyone to treat and give respect to dead person.[29]

28. Article 433-21-1 of the French Code – " Anyone who gives the funeral a character contrary to the will of the deceased or judicial decision , will or decision of which it is aware, will be punished by six months of imprisonment and fine of 7,500 euros. " translated version available http://www.legifrance.gouv.fr /affichCode Article.do?cidTexte=LEGITEXT000006070719&IdArticle=LEGIARTI000006418594. (visited on Nov.6,2018).

29. Article 16-1-1 of French Civil Code "The respect due to the human body does not stop with death. The remains of deceased persons, including the ashes of those whose bodies have been cremated, must be treated with respect, dignity and decency". Translated version. Available at https://www.legifrance.gouv.fr./ affichCodeArticle.do?cidTexte=LEGITEXT000006070721&idArticle=LEGIARTI0000 19983158. (visited on Nov.26,22018).

Michel And Joelle Leroy (July 29,2002)

A brother and sister fought a long battle in order to win the right over their deceased mother's body to be cryopreserved. They wanted to cryopreserve the body of their mother in a freezer placed in the basement of their villa located in Saint-Denis. The matter was rejected from the lowest to highest court of law in the country. Firstly, it was dismissed *by le perfect de La Reunion* then rejected in appeal by *le tribunal administrative de Saint-Denis de la Reunion and la cour administrative d'appeal de Bordeaux*. Ultimately, the matter went to highest court of the country 'Conseil d'Etat' . A new contention had been raised that their family interests protected by Article 8[30] of the European Convention for the protection of Human Rights and Fundamental Freedoms had been ignored. The highest court had upheld the decision of the lower courts and held that France does not allow cryonic preservation as a method of disposal of dead body. The court observed that a process of freezing of dead body does not constitute a method of burial .

Case of Dr. Raymont Martinot (Jan.06, 2006)

The case is concerned with the preservation of remains of Dr. Raymont Martinot and his wife in a machine which was prepared by their son Remy Martinot. The case went in appeal before the highest court of France against the decision of lower courts and authorities wherein the request was made to freeze the remains of parent of Mr. Remy Martinot . Firstly, the matter was raised in *prefect de Maine-et-Loire* (Perfect of Maine-et-Loire) and *maire de Nueil-sur-Layon* (the mayor of Nueil-sur-Layon). Thereafter, the matter was rejected by the *la cour administrative d'appeal de Nantes* (the administrative court of appeal of Nantes) . Lastly, matter went to highest court Conseil d'Etat (Council of the State) where

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30. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedom : " Right to respect for private and family life:

    1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of the national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Available at : https:www.echr.coe.int/Documents/ Convention_ENG.pdf. (visited on Nov.26,2018).

the matter was discussed in the light of violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The court acknowledged right of deceased to exercise control over his burial which fell within the meaning of Article 9[31] of the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, due to legislative and administrative restrains in France, the court held that burial has been only legal method of disposal of bodies. By virtue of Article 8 and 9 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms, the choice of the method of burial, which is intimately linked to private life and through which a person may bear his or her beliefs, may be restricted, particularly in the interest of public order and public health. Restrictions are provided in the provision of Articles L.2213-7, R.2213-15 and R.2213-32 and R.2213-33 of the General Code of Territorial Communities. These provisions do not violate the stipulations of the European Convention for the Protection of Human Rights and Fundamental Freedom.

vii. Germany

The legislature or judiciary of Germany has not directly faced the challenges relating to cryonic life extension, however general public is well aware of the technology. *Kryonic Deutschland* is a sister concern cryonic U.K.. it is an organization completely devoted to the cause of cryonics and their main agenda is to spread information about cryonics and act as a service provider for a person interested to being cryonically preserved in Germany. It is also dispensing advice on the topic and act as technicians assisting any potential cryonic preservation within the territorial jurisdiction of Germany. An attitudinal survey had been published in the

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31. Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedom: " Freedom of thought, conscience and religion :

    1. Everyone has the right to freedom of thought, conscience and religion; freedom to change one's religion of belief, as well as the freedom to manifest one's religion or belief individually or collectively, publicly or privately, through worship, teaching, practice and the performance of rites.

    2. The freedom to manifest one's religion or beliefs may not be subject to any restrictions other than those provided for by law constituting measures necessary in a democratic society for public security, the protection of public order, health or morality, or the protection of the rights and freedoms of others."

year 2014 in Germany which displayed some very interesting results.[32] The objective of the survey was to explore awareness and the degree of acceptance of the idea of the medical technology of cryonics by German citizens. The data was collected on online survey of one thousand people aged between sixteen to sixty years of resident of the Federal Republic of Germany. Forty seven percent were of the view that they had heard of cryonics, twenty two percent could imagine having their bodies cryonically preserved after their death. Fifty three percent participated in the latest technological developments which correlated with the approval of the conceivability of cryopreservation was important. The author of the survey concluded that cryonics is known and accepted to a certain extent in Germany. Whereas a large portion of respondents did not believe that it was desirable to be used in medical technology to overcome death, and fundamentally rejected a post-mortal continuation of life. Now the current legal position in Germany is that cryonics is neither supported by statutory provisions nor judicial authority. But equally it is also truth that it is not expressly or impliedly declared illegal by statute of judicial decisions.

ix) Russia

It has been historically established that when United States develops any new technology, Russia and China are the first countries to join the race in achieving the same technology in their respective countries. When cryonic life extension activity was started and marketed in United States, the Russia formed its own cryonic organization namely KrioRus in 2005. It is a non- governmental organization, its establishment can be attributed to the Transhumanist Movement in Russia.[33] Kroi Rus was mainly formed

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32. Stephanic Kaiser et al, " Attitudes and Acceptance Toward the Technology of Cryonics in Germany", 30 International Journal of Technology Assessment in Health Care 98-104 (2014).

33. The public organization Russian Transhumanist Movement (RTM) is the largest association of people in Eurasia who share the transhumanist world view. Transhumanism is a rational, based on understanding the achievement and prospects of science, worldview, which recognizes the possibility and desirability of fundamental changes in human condition with the help of advance technologies to eliminate suffering, ageing and death and significantly enhance the physical, mental and psychological capabilities of a person. The RTM supports promising tenders in science, technology and medicine and draws the attention of the state and society to the advantages of the... transhumanist world outlook, to the issues of further human evolution. They are developing projects in futurology,

for patrons and members who were directly involved with the organization. But gradually due to growing interest of the public, services were opened to general public in 2006. Sixty five humans and thirty one animals have been cryopreserved by the company till date. Cryonic life extension is not expressly prohibited, in fact this technology got support from public who can afford to pay for the procedure. KrioRus has moved one step further in cryonics technology. Media reported[34] from the company that they are looking to collaborate with space agencies which will launch bodies in the space in case if sources are destroyed at earth. Some media also reported about a company, named 'Space Technologies' for being assigned the task of sending cryo-capsules to space and developing satellite for taking care and making repairs in these cryo-capsules if need arises. Keeping the view of the high cost of cryonic life extension if it will be practiced in mass then the cost will be more higher. The author of the article is critical of this suggestion and is of the view that outer space is already cluttered with leftovers of previous space missions and every day there are reports of space trash orbiting the earth and it may be a potential risk to future generations. Sending cryo-capsules to space with supposedly dead person in it , will only add to the space garbage.

The policy of Russia having dominance of secrecy and most of the information relating to cryonics is kept secret. Sufficient information relating to this technology is not in public domain. The company, krioRus does not reveal any information about cryo-preserved and they are creating a cloud of suspense by releasing information that they cryo-preserving brains of people who are of high intellectual in their life time. They are of opinion that a human brains holds all the information about a person's personality and they could used the brain if it is replanted upon revival

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in gerontology, medicine and cryonics, in the field of enhancing intelligence, we are exploring the possibility of transferring consciousness to non-biological carriers. They welcome nanotechnology and nanomedicine, the creation of brain-computers interfaces and artificial organs and bodies, genome research, the study of ageing markers, and regenerative cell medicine. Available at: http:// www.transhuman.ru. (visited on Nov.26,2018)

34. Arsen Kalashnikoff, "Blast off into eternity : Russian company to send the dead into space" Science & Technology, Russia Beyond, August28, 2017. Available at : https://www.rbth.com/science_and_tech/2017/08/28/blast-off-into-eternity-Russian-company-to-send-the-dead-into-space_829996. (visited on Nov.26,2018).

and having access to more information and use it to develop new technologies which a person could not do his limited lifespan. Russians are culturally more likely to support cryonic life extension technology than other European countries. The curiosity is progressively escalating which was reflected in the research published in January by Russian Venture Company (RVC)[35], a government supported development institute.

It is a fact that Russians are very enthusiastic about cryonic life extension and they are taking their business to Switzerland. It is widely known that no company is allowed to cryonically freeze a person till he/she has been declared legally dead. This is a thumb rule for exercise of jurisdiction for cryonic life extension that the person to be cryonically preserved should be legally dead. This hypothesis has been improved in Russia with chances of revival by help of cryonic preservation. It has been suggested that Russian cryonic companies are now planning to setup cryonic preservation facilities in countries where euthanasia is allowed. The contention is that it may be argued in local courts that cryonic preservation is equivalent to euthanasia and the anticipation is that such courts may allow the company to freeze a person while he is still alive. The front runner is of this hypothesis is Switzerland. Numerous media reports[36] from reputed newspapers reported that KrioRus is planning to open subsidies in Switzerland and in near future may attempt to freeze a person in his/her life time (when he is still alive). However, this hypothesis has not been materialized till date because there is no evidence of any subsidiaries being established in Switzerland.

x) China

China is a competitive country. When developing countries are in race to develop any new technology, China leads the way in Asia. When

35. "Socio-Cultural Factors of the Innovation Development of Russia", Jan.23,2017. STI and Technological Development, State Fund of Funds, Development Institute, Russian Federation,PBK. Available at: http://www.rvc.ru/press-service/news/company/98017. Visited on Nov.26,2018.

36. "Strange Legal Loophole Might Allow You to Be Cryogenically Frozen While Alive". Availableat:http://www.iflscience.com/health-and-medicine/strange-legal-loophole-might-allow- cryogenenically-frozen-while-alive/ (visited on Nov.26,2018).

See also, Alec Luhn, "Insurance against Death: Russian cryonics firm plans Swiss lab for people in pursuit of eternal life", the Telegraph, Nov.11,2017. Available at: https://www.telegraph.co.uk/news/2017/11/11/insurance-against-death-Russian-cryonics-ferm-plans-swiss/#comments. (visited on Nov.26,2018).

cryonics movement started growing across the world, some people from China also expressed keen interest in pursuing this technology. 'Cryonics in China' is one of the organization having headquarter located in United States and three offices in the city of Shanghai, Beijing and Yangzhou in China. Zhan Wenlian (women) died due to lung cancer at the age of 49 became the first person cryonically preserved in China in 2017 at Yinfeng Biological Group in Jinan, capital of East China's Shandong Province.[37] Yinfeng Biological Group Ltd. is main organization in China doing cryonic life extension and is actively involved in the research in this area. Yinfeng Biological Group Ltd. by its subsidiary co., Shandong Qilu Stem Cell Engineering Co. Ltd., invited the director of KrioRus to teach them on the technology of cryonics in 2013. The scientist of the company also visited the site of KrioRus in order to get training and learning about the equipment used in the process of cryonic preservation.[38] China has established cultural norm to bury the dead bodies. It is also part of the culture in China that aged person prepare for their death and choose the coffin in which he may be buried upon his demise. Few people in china stores the coffin in their home which may be used for burial. Due to this culture, China is currently facing a huge problem of space constraint. China is running short of developed land for house due to huge population and culture of burial in grounds adding to scarcity of land. In order to resolve this problem, the governmental authorities of South China introduced a reform which is known as 'funeral reform' in July,2018.[39] By this reform, residents of South China province are forbidden to bury the dead bodies and cremation has been made mandatory for them. The reform has not been welcomed by general public. They do not want to changed old age tradition and adopt this reform. However, due to this reform, cryonics market has been boom up considerably. Some of the residents choose to be cryonically preserved rather than to be cremated.

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37. Scott Feng, "Women cryonically frozen after dying of lung cancer as husband hopes she can be resurrected by future technologu", Mirror, U. K. , August 14, 2017. Available at: https:www.mirror.co.uk/news/world-news/woman-cryonically-frozen- After-dying-10985205. (visited on Nov. 26, 2017).
38. The first cryopreservation in China. Available at : http://kriorus.ru/en/news/first-Cryopreservation-China. (visited on Nov.26,2018).
39. Against tradition: why in the Chinese province launched a campaign to seize coffins and forced cremation." August 02,2018. Available at: https:// hybridtechcar.com/2018/08/02/against-tradition-wht-in-the-chinese-Province-launched-a-compaign-to-seize-coffin-and-forced-cremation/(visited Nov. 26,2018.

Xu Shaozhou, a sociology professor at Wuhan University[40] who devoted his life in research of tradition relating to burial practices in China advocated that if the government did not relax the force cremation policy more rich Chinese might go for cryonics. According to statistics, China ranks first in the mortality rate with an estimated number of ten million death per year.[41] This is the reason for a good business of cryonics in China. Since the banned over burial is recently imposed and has not been properly followed and implemented therefore, it is necessary to wait and see the impact of ban.

III. CONCLUSION

The problem prevailing in the society cannot be resolved only by help of enacting laws because law and society are intimately connected and entangled with each other. Law cannot be passed without weighing its impact on the society or without taking opinion of the persons who are going to be governed by that law. So, it is suggested that before making the laws governing cryonic lie extension, the society should also be taken in confidence. Firstly, need is to collect public opinion on the point that whether society has progressed to the stage where cryonic preservation may adopt as an alternative to cremation or burial. Would it be fair to give some people a second chance at life at the cost of resources of future generations which are not in existence? Conversely, would it be fair to deny cryonic enthusiasts to second chance of life? Will a blanket ban on cryonic life extension give rise to litigation related to curtailment of right to seek medical treatment and right to body anatomy as happened in Canada? All these questions need to be addressed by the countries which have trend of fast growing cryonic preservation. If the right to cryonic preservation is granted, it may lead to serious violation of the right of the people which will miss out on it due to lack of regulation. The countries of world make it clear one thing that whether they are for or against cryonic preservation, which would practically solve half their problems.

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40. Stephen Chen, "Enduring appeal of immorality: cryonics shows signs of life in China". Available at : https://www.scmp.com/news/china/article/1602630/enduring-appeal-immorality-cryonics-shows-signs-life-china. (visited on Nov.26,2018).

41. Supra note 37.

THE SCHEDULED TRIBES AND OTHER TRADITIONAL FOREST DWELLERS (RECOGNITION OF FOREST RIGHTS) ACT, 2006 AND ITS IMPLEMENTATION : A CRITICAL APPRAISAL

RAJU MAJHI*

ABSTRACT : Historically, the relationship between tribal communities in India and forests was characterized by co-existence and these communities were considered integral to the survival and sustainability of the ecological system. This symbiotic relationship was acknowledge and crystallized as customary rights over forest produce. But these rights were not recognised and recorded by the government while consolidating State forests during the colonial period as well as in independent India.The resulting insecurity of tenure and the threat of eviction led to the alienation of tribal communities from the ancestral forest lands. *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act,* 2006 is the remedy by the legislation to the historical injustice to the forest dwellers. The Act made possible to create a balance between the needs of the lively forest dependent tribal and the developmental programs by the government and the democracy in the area of forest management. It is the main light of the Act that they respect the freedom and rights of the forest dwellers who always been dependent on the vegetation found in the forests. In this background this paper aims toexamine the historical context for the Act and proceeds to discuss the key provisions of the Act and concludes with some observations in relation to the Act and suggesting some recommendations for its proper implementation.

KEY WORDS : Forest Rights Act, Forest Dwellers, Scheduled Tribes, Environment, Conservation.

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I. INTRODUCTION

Historically, the relationship between tribal communities in India and forests was characterized by co-existence and these communities were considered integral to the survival and sustainability of the ecological system. This symbiotic relationship was acknowledge and crystallized as customary rights over forest produce. But these rights were not recognised and recorded by the government while consolidating State forests during the colonial period as well as in independent India. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 is the remedy by the legislation to the historical injustice to the forest dwellers. The Act made possible to create a balance between the needs of the lively forest dependent tribal and the developmental programs by the government and the democracy in the area of forest management. It is the main light of the Act that they respect the freedom and rights of the forest dwellers who always been dependent on the vegetation found in the forests.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, also called the "Forest Rights Act", the "Tribal Rights Act", the "Tribal Bill", and the "Tribal Land Act" saw hardly any opposition in parliament in the course of its passage. The legislation concerns the rights of forest dwelling communities to land and other resources, denied to them over decades as a result of the continuance of colonial forest laws in India. The government is attacking tribal people by various methods including the following:

1. Seizing Resources through Law

Laws such as the Land Acquisition Act are used against tribal communities, taking their resources while throwing them on the streets. Lands are forcibly taken away from them and handed over to private corporations for their benefit. In Orissa, more than 40 memoranda of understanding have been signed with various big mining companies. This is resulting into huge displacement of people, in all in the name of "public interest".

2. Privatizing the Community's Lands and Resources

Where lands or resources are officially owned by the government, they now being handed over to private companies directly- even where it actually belongs to tribal people. Moves are afoot to hand over forests

and other communities lands, declared government land by fiat, to private companies in the name of "afforestation"- resulting in destruction of the forests and denial of people's rights in those lands. In many States, promotion of "biodiesel" plants like *jatrophas* has involved handing over lakhs of hectares of such 'government' land, which people are cultivating or using for pasture, to companies for plantations for biodiesel.

3. Special Economic Zones

A new form of super-land grab has also begun recently: creation of what are called Special Economic Zones, which are basically areas of company raj where private companies will take over not only the land but all functions of the government (including public services and even, indirectly, criminal law). in many areas these are coming up on adivasi community and forest lands, denying them their basic rights are Indian citizens.

4. Denial of Constitutional Protections for Adivasi Rights

After a series of *adivasi* rebellions, the British had provided some protection for adivasi lands, customary law and traditions. These protections were included in the Fifth and Sixth Schedules to Article 244 of the Constitution of India. All adivasi areas in the mainland of India were to be scheduled under the Fifth Schedule and governed as per its provisions. But nearly half of adivasi areas were never scheduled and the Fifth Schedule has been completely ignored by the government, which treats scheduled areas like colonies for exploitation of resources.

5. Ignoring Community Control as Granted through the Panchayat Act[1]

This Act is one of the most powerful laws in the country, essentially an extension of the Constitution- for *adivasis*, guaranteeing that in Fifth Schedule areas, the *gram sabha* will have power to manage community resources and must be consulted on land acquisition, resettlement, etc. This law has been violated by all the States.

6. Using Military and Police Force to Crush People's Resistance

Where all other measures fail, the government has been using police

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1. Panchayat (Extension to Scheduled Areas Act), 1996; No. 40 of 1996 (24 December, 1996).

and the military forces, often illegally, to destroy adivasi organisations and evict them by force. In Chhattisgarh, the government has organized armed militia in the name of the *SalwaJudum* campaign, who burn villages, kills people, rape women and engage in extreme brutality in the name of fighting the Maoists. People are being driven from their homes and lands to make it easier to hand them over to mining corporations. More than one lakh people have been displaced in the last two years because of this inhuman violence, thousands of women have been raped, and hundreds of people killed ruthlessly.

7. Illegal guidelines issued by the Ministry of Environment and Forests

which were meant to relocate thousands of people from national parks and sanctuaries: The guidelines were meant to relocate *tribals* and forest dwellers from more than 600 protected areas across the country. These guidelines violated the rights of people living in these areas and contravened the provisions of the Forest Rights Act in an attempt to hastily declare the parks and sanctuaries free of people as Critical Wildlife Habitat (CWH).[2]

Forest laws passed and instituted by the British have been used to seize lands, homes and resources of *adivasis* and other forest dwellers, first for British timber needs, then for "national industry" and government revenue, and now in the name of conservation. In the nineteenth century, the British wanted to undertake unhindered exploitation of timber, which required that the government assert its ownership over forests and suppress the traditional systems of community forest management that existed in the country. This had nothing to do with conservation; it was an effort to take control over trees, timber and vast areas of community land that was not and never had been forest. "Scientific Forest Management" introduced by the British was designed for 'sustained yield of timber' and little else. The result was that the Indian Forest Act, a series of which were passed from 1876 through 1927. The Indian Forest Act, 1927, India's central forest legislation, had nothing to do with conservation. It was enacted to serve the British need for timber. It sought to override customary rights and forest management systems by declaring forest as State property and exploiting their timber. The law

2. These guidelines have since been scrapped.

says that at the time a "forest" is declared, a single official (the forest settlement officer) is to enquire into and "settle" the land and forest rights people had in that area. These all-powerful officials unsurprisingly either did nothing or recorded only the rights of powerful communities. The same model was subsequently built into the Wild Life (Protection) Act, 1972, with similar consequences. These Act empowered the government to declare its intention to notify any area as a reserved or protected forest, following which a forest settlement officer supposedly would enquire into claims of rights (to land, forest produce, pasture, etc.) and decide whether to record people's rights or not. Since the primary intention of these laws was precisely to take over lands and deny the rights of communities, this "settlement" process was in a sense destined to fail-which is exactly what has happened.

The Forest Rights Act is a key part of their struggle. The movements and groups who fought this battle had tried to bring about an Act that would give legal recognition and recording of the rights of forest dwellers and *adivasis* as the first step in bringing control over the forests back to the people. But the Act that was finally passed was not the Act that had been fought for. The government is now trying further to damage it by including changes in the rules to the Act that will undermined it more.

This legislation, aimed at giving ownership rights over forest land to traditional forest dwellers, was vehemently opposed by the wildlife conservation lobby and the Ministry of Environment and Forest which termed it as the ideal recipe to ensure the destruction of India's forests and wildlife by "legalizing encroachments". The forest department, together with the timber mafia, too had been blocking it since it would severely erode their stranglehold over forest products. Corporates are also against it since the illegal status of *tribals* and other forest dwellers makes a process of eviction and land acquisition for industrial projects easier. Therefore, the fact that the Act has finally been passed is at least a significant admission of the historic injustice done to forest dwellers. The Forest Rights Act, which was passed in December, 2006, is one of the first steps towards fighting for these people.

What are called *"forests*" in Indian law often have nothing to do with actual forests.[3] Under the Indian Forest Act, areas were often

3. http://c:forestrightsact.htm.

declared to be "government forests" without recording who live in these areas, what land they were using, what uses they made to the forest and so on. Eighty-two per cent of Madhya Pradesh forest blocks and forty per cent of Orissa's reserved forests were never surveyed; similarly sixty per cent of India's national parks have till today not completed their process of enquiry and settlement rights. As the tiger task force of the Government of India put it, "In the name of conservation, what has been carried out is a completely illegal and unconstitutional land acquisition programme".

From the above discussions it is crystal clear that the objectives of the Act were to give the proper rights to Scheduled tribes and other forest dwellers and protect their rights. This Act was not gifted by the Government, it is the result of the long struggles of the tribal people to protect their rights over the forest land, because the forest was there sole survival means and they are protector and preservers of the forests itself. In the following sections a highlight has been drawn the background of the Act.

II. BACKGROUND OF THE SCHEDULE TRIBES AND OTHER TRADITIONAL FOREST DWELLERS (RECOGNITION OF FOREST RIGHTS) ACT, 2006

During the years 2002-03, systematic "eviction drives" have been conducted all over the country by the forest department to remove the so-called "encroachers" from forest land. Making matters worse, judicial pronouncements under the ongoing Godavarman PIL[4] have extended the Forest Conservation Act's ambit even to lands yet to be finally notified under the Indian Forest Act (IFA)[5] and to all lands conforming to the 'dictionary definition 'forest' irrespective of ownership. Besides staying regularization of even eligible pre-1980 encroachments and de-reservation of forest land or protected areas (irrespective of whether these have been finally notified after due settlement of rights), the Supreme Court has also banned the "removal of dead, diseased, dying or wind fallen trees, drift wood and grasses, etc." from all National Park (NP) and Wildlife Sanctuaries (WLS): Ministry of Environment and Forests (MoEF) and the Central Empowered Committee (CEC) set up by the Supreme Court

4. Writ Petition (Civil) No. 202/95.
5. The Indian Forest Act, 1927.

interpreted this to mean that 'no rights can be exercised' in Protected areas (Pas) and have banned the collection and sale of all Non-Timber Forest Produce(NTFP) from them. This is when preliminary notifications declaring only the government's intention of constituting them as National Park or Wildlife Sanctuaries have been issued in most cases and people have legally admitted rights in many. In one stroke, between three to four million of the poorest people living inside protected areas have been deprived accesses to a critical source of survival income without any scientific study indicating that such collection is indeed harmful to wildlife habitat. In Orissa's forest belts, already infamous for its starvation deaths, people are being driven to giving up their children in bondage and resorting to large-scale distress migration. The Supreme Court has shown scant regard to the consequences of its sweeping orders, effectively rewriting the law, for the survival or livelihoods of forest dwelling communities.

The last straw came with Ministry of Environment and Forests circular of May 3, 2002 asking all States and Union Territories to evict all forest '*encroachers'* within five months based in misinterpretation of another court order. These eviction drives were triggered by an order date May 3, 2002, whereby the inspector general of forests instructed State governments "to evict the ineligible encroachers and all post-1980 encroachers from forest lands in a time bound manner." Diverse coercive means were employed, from setting fire to houses or destroying standing crops to molesting women, trampling people's dwellings with elephants, and even firing. These atrocities are a grim reminder of similar agonies that have been the lot of *adivasis* faced in India for the last 200 years. History, ruthless and unrepentant, seems to be only repeating itself.[6] The following spate of brutal evictions across the country, in Assam and Maharashtra, with the use of elephants to destroy huts and crops of impoverished *tribals* during a drought year, led to an uproar of protests. Ministry of Environment and Forests was compelled to issue a clarification order in October, 2002 that the 1990 circulars[7] remained valid and that not all forest-dwellers were encroachers. Despite this, as the Ministry of Environment and Forests admitted in Parliament on August 16, 2004 that between May, 2002 and August, 2004 alone evictions were carried out

6. Bela Bhatia, "*Competing Concerns*", EPW, November, 19, 2005 p.4891.
7. Circular No. 13; 1/90-FP of the Government of India.

from 1.52 lakh hectares.[8]

In February, 2004, before Parliamentary elections were held, Ministry of Environment and Forests issued two new circulars: one titled "Regularization of the rights of the *tribals*on the forest lands" which extended the date for regularization of encroachments by *tribals* to December, 1993 (instead October 1980 under the FCA) and the other was titled' Stepping up of process for conversion of forest villages into revenue villages'. These were promptly stayed by the Supreme Court. In an affidavit filed in the court to get the stay vacated, Ministry of Environment and Forests finally admitted that during the consolidation of forest, "the rural people, especially *tribals* who have been living in the forests since time immemorial, were deprived of their traditional rights and livelihood and consequently, these *tribals* have become encroachers in the eyes of law" and that "it should be understood clearly that the lands occupied by the *tribals* in forest areas do not have any forest vegetation". It further asserted that its February circulars "do not relate to encroachers, but to remedy a serious historical injustice. It will also significantly lead to better forest conservation". In now opposing the Bill as a threat to the country/s forest over, Ministry of Environment and Forests is clearly contradicting itself.[9]

The court has refused to vacate the stay and Ministry of Environment and Forests has backtracked and informed the court that October, 1980 would remain the cut-off date for regularization of pre-1980 occupations. In the tussle over the cut-off date for regularization, the State's own culpability in failing to settle forest-dwellers' rights for a quarter of a century (in fact since independence) and the injustice done to those who have been evicted and displaced during this long period, is seldom discussed.

With the United Progressive Alliance Government's (UPA) Common Minimum Programme stating that evictions would be stopped, on December 21, 2004, Ministry of Environment and Forests issued a letter to all States/Union Territories to stop evictions of forest-dwellers till their rights had been settled. Even this has had no effect. In April, 2005 itself,

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8. MadhuSarin, "*Scheduled Tribes Bill 2005: A comment*", EPW, May 21, 2005, p.2132.
9. *Ibid*.

180 huts were burned in Madhya Pradesh, in one case after pulling out a pregnant woman in labour who delivered her child in the open. Several cases filed in the Jabalpur High Court list horrendous forest department's atrocities during such operations.[10]

In this background, a high level meeting held on January 19, 2005, the Prime Minister decided that the Scheduled Tribes and Forest-Dwellers (Recognition of Forest Rights) Bill should be drafter and table in the budget session of Parliament. The task of drafting the Bill was assigned to the Ministry of Tribal Affair (MoTA) instead of Ministry of Environment and Forests (MoEF) as senior officials argued that *tribals* could not expected to get justice within the framework of forestry laws. Contrary to MoEF's claims of being sidelined in the Bill's drafting, the Director General of Forests was a member of the Technical Support Group (TSG) constituted by MoTA, along with representatives of other ministries to help it draft the Bill. Unfortunately, under instructions from higher levels, non-tribal forest-dwellers were subsequently excluded from the Bill's purview. Now it is very relevant to give a little highlight over the Forest Rights Bill, 2006.

III. THE SCHEDULE TRIBES AND OTHER TRADITIONAL FOREST DWELLERS (RECOGNITION OF FOREST RIGHTS) BILL, 2006

Mass eviction of *tribals* led to a promise made in the Common Minimum Programmed of the United Progressive Alliance (UPA) Government, "Eviction of tribal communities and other forest-dwelling communities from forest areas will be discontinued". In pursuance of this commitment, the MoTA prepared a legislation to "protect" the *adivasis* from forced evictions.

The aim of the Bill was to give legal entitlements to forest land that the *adivasis* might have been cultivating for long, as well as over forests rights such as grazing rights and access to minor forest produce. For instance, the Bill gave *adivasis* titles to forest land they had been cultivating since before 1980, up to 2.5 hectares per nuclear family. Similarly, the Bill gave *adivasis* secure entitlements to minor forest produce such as *fuelwood, bamboo, honey, gum, mahua, tendu leaves, roots and tubers*.

10. *Ibid*.

Other forest rights covered the bull included right to *nistar* (collection of forest products for subsistence needs), the right to conversion of "forest villages" into revenue village, and the right to settlement of old habitations and community rights. The initial draft of the Act, tabled in 2005, while broadly providing for land rights or forest dwellers, was extremely problematic. It set the cut-off date for recognizing land ownership as 1980, the year when the Forest (Conservation) Act, was passed. This meant that people who occupied forest land post-1980 would not come under the purview of the legislation- a significant number, considering the victims of the large-scale land acquisition and evictions since 1980 often took refuge in forests. Also, the original legislation was applicable only to *tribals* and not to non-tribal forest dwellers, which too did not have rights over land they had lived on for years. The land ceiling was set at 2.5 hectares (ha) for each settler family.

IV. JOINT PARLIAMENT COMMITTEE'S RECOMMENDATIONS

A Joint Parliamentary Committee (JPC) was constituted to look into the issue in a comprehensive manner and to come up with recommendations for the government to consider. The JPC suggested five major-changes in it, some of which was included in the Act. These changes were: (a) The cut-off date for claiming rights to land was changed from 1980 to December 13, 2005; (b) The provisions was changed to include non-tribal traditional forest dwellers instead of only Scheduled Tribes; (c) The ceiling of landownership was changed from 2.5 hectares to 4 hectares per nuclear family (though the JPC did not recommend any limit); and (d) The penal provisions for forest dwellers were removed.

The JPC also saw to it that the role of *Gram Sabhas* and the *Panchayati Raj* institutions were strengthened. Significantly, the JPC came up with some important recommendations on the procedure of settling land rights. According to JPC, the *Gram Sabha* was to have a central role in all decisions relating to forest dwellers- a recommendation that was aimed at countering the almost infinite power that the forest department has over forest dwellers. The *Gram Sabha* was to be vested with the responsibility and authority for settling land rights of forest dwellers. The *gram sabha* could veto the decision of first tier appeal- the sub-divisional committee. However, the decision of second tier of appeal-

the district committee- would be final.[11]

The *Gram Sabha* was also empowered to make decisions regarding whether or not settlers were adversely affecting forest, wildlife and biodiversity. The JPC also suggested that in the case of land that had been allotted to forest dwellers, provisions similar to the Panchayat Extension to the Scheduled Areas Act (PESA) be applicable. In other words, *gram sabha's* approval for any diversion of forest land for non-forest activity, and for any form of land acquisition, would be mandatory. In addition, the JPC also recommended that the Tribal Bill should define core forest areas unambiguously, from where people could be evicted and resettled. Overall, the recommendations were a step towards loosening the vice-like grip forest departments and corporates aided by State governments had cover forest dwellers.[12] After the JPC report was tabled, a Group of Ministers (GoM) headed by Sri. Pranab Mukherjee looked into the recommendations and the final draft was prepared.

The Schedule Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, according to JPC recommendation, accepted the cut-off date for consideration of land rights as December, 2005, rather than 1980. Also, non-tribal forest dwellers have for three generations prior to 2005 will be eligible to claim land and the ceiling has been set as 4 hectares for each settler family. However, the Act has defined forest dwelling scheduled tribes or other traditional forest dwellers as those who "primarily reside in the forest". The fact of the matter is that the most "forest dwellers" do not strictly well inside the forest, living on forest land- they live on the fringes of forest, but are heavily dependent on the forest land and resources for their livelihood. The Act, therefore, excludes them and an estimated 90 per cent of forest dwellers are likely to be kept out of the Act.

The Act has also excluded large number of non-tribal forest dwellers from its ambit through constrictive definition. The JPC had recommended various categories of people to be included under this category- communities living on, or adjacent to, forestland for at least three generations, communities forced through government policy to live on,

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11. *Supra note 2.*
12. *Ibid.*

or depend on forest land (for instance communities living in forest villages), communities displaced by development projects, communities evicted from wildlife sanctuaries, reserved forests and national parks, and communities forced to live on, or depend on, forest land due to failure of governments to provide sources of livelihood promised to them. The Act shrinks the scope of this broad definition and states that non-tribal forest dwellers were only those who had been continuously residing on forest land for 75 years.

The attempts of the JPC empower *Gram Sabhas* have been thwarted-instead of *Gram Sabhas* being in charge of settling land rights, with the forest department being nowhere in the picture, the Act now mandates the *Panchayati Raj* officials (*Sarpanchs* etc.,) would be part of the process along with officials of the forest department. This is a significant dilution of community control originally envisage.

Also, *gram sabha* approval for forest land diversion and land acquisition is not mandatory. The Act in its current form does not give paramount control over forest resources to forest dwelling communities. In other words, the Act has provided loopholes for continued mafia and corporate control over forest land resources. Forest dwellers do have a right to use and sell forest produce. The definition of forest produce, however, does not include crucial products like fish, leaves, fuel wood and stone.

V. SALIENT FEATURES OF THE SCHEDULE TRIBES AND OTHER TRADITIONAL FOREST DWELLERS (RECOGNITION OF FOREST RIGHTS) ACT, 2006

1. Eligibility for Rights under the Act

To provide that a person is "forest dwelling" and, therefore, eligible for forest rights, he must prove the following:

Firstly, he or she "primarily resides in forests".[13] The easiest way to prove this requirement is if one has a *jhopdi* or other residence on one's plot inside the forest land (or one resides in forest village). In other cases, it should be remembered that "reside" also means to occupy a place, where the occupation not only includes residence but also other

13. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

forms of occupation for livelihood such as land for cultivation, grazing, collection of MFP, etc. Moreover, in the RajyaSabha, the Minister for Tribal Affairs gave an assurance that people who live outside forests will be able to claim rights inside them.

Secondly, he or she is "dependent on forest land or forests for bona fide livelihood needs".[14] The second requirement is that the person should be "dependent" on forest land for "bona fide" livelihood needs. Bona fide livelihood needs would mean not mainly for commercial profit or for making money, but for survival. The rules provide that livelihood needs include sale of the crops cultivated on the land, sale of minor forest produce collected in the forest and income from water bodies and grazing.

Thirdly, if the claimants are Scheduled Tribes, they should be "in the area where they are scheduled".[15] The list of Scheduled Tribes includes the area in which each community was living at the time when they were scheduled. This area is sometimes an entire State and sometimes part of a State. For instance, the *Bhils* are scheduled in parts of Madhya Pradesh, Maharashtra, Andhra Pradesh, Gujarat, Karnataka, Rajasthan and Tripura. In those parts of these States where they are scheduled, *Bhils* can claim rights. Outside these States or outside the parts of these States where they are scheduled, *Bhils* cannot claim rights under the Act as Scheduled Tribes, but can do so 'other traditional forest dwellers'. If the claimant is not a Scheduled Tribe in the area where he or she is scheduled, he or she must have "resided in" forest land or forests for 75 years, whereupon he or she will be considered "other traditional dweller".

Fourthly, non-Scheduled Tribes are also eligible as long as they satisfy this requirement.[16] The section states that the person must have resided in forest or forest land for three generations before 2005, where "generation" is defined as twenty five years. This means a total period of seventy-five years, i.e., since 1930. There is no requirement in law that the person must have resided on the same piece of forest land since 1930, only that he or she must have resided in forest land from that time. Similarly, people can still claims eligibility if his or her community resided in the forest from 1930. Since any claim for a right has to be accompanied

14. *Ibid*.
15. *Ibid*. Section 2 (c) and Section 4(1).
16. *Ibid*., Section 2(o).

by two type of evidence, such evidence should include proof of three generations of residence. If the claimant is a Scheduled Tribe, he or she need attach a Scheduled Tribes certificate to claim rights as Scheduled Tribes.[17] In order to claim rights as a forest dwelling Scheduled Tribe, the claimant needs to attach the Scheduled Tribes certification.

2. Declaring *Gram Sabhas* and Forming Forest Rights Committees

The very first step in the Act is declaring *gram sabhas* and forming forest rights committees. The Forest Rights Rules require the gram Panchayat to convene meetings of *gram sabhas* without specifying what kind of *Gram Sabha* should be called, even though the Act provides for four different types of *gram sabhas*. This will most likely lead to the *Panchayats* calling a meeting of the *Gram Sabha* of the entire Panchayat. These are not the real *g Gram Sabha* of communities but a fiction created by the administration. In most States, they are very large, containing multiple revenue villages and thousands of people. The government's effort is to make it impossible to get rights or to gain control over resources by forcing to work through these *gram sabhas* which would be unmanageable.

Hence, the *tribals* have to claim their rights and use the real *gram sabhas* in villages. In scheduled areas, a legal right to do this has been provided under the *Panchayats (Extension to Scheduled Areas) Act, 1996*. This right is also recognised by Section 2(p) and 13 of the Forest Rights Act. In States that have no *Panchayats*, such as some of the Northeastern States, the traditional village institution itself is the *Gram Sabha* for the purpose of this Act.[18]

3. Constituting the Forest Rights Committee

At its first meeting, the *Gram Sabha* is to elect a smaller body of between ten and fifteen people and pass a resolution listing their names. This body is called the forest rights committee. The members of this committee should be Scheduled Tribes and non-Scheduled Tribes in proportion to their populations, with at least one-third Scheduled members, except where there are no Scheduled Tribes and one-third women members. At the first meeting of the committee, it should choose a

17. *Ibid*., Section 2(c) and Form in Rules.
18. *Ibid*., Section 2(p) (iv).

chairperson and a secretary (who will record the proceedings and decisions of the committee) and send this information to the SDM. For any meeting of the *gram sabha*, at least two-thirds of the members must be present for passing a valid resolution.

4. Claiming Rights

After formation of *gram sabhas*, the *gram sabhas* should invite claims for rights, keeping in mind the time when seasonal users can also participate. Once the *Gram Sabha* passes a resolution inviting claims for rights, applications for these rights have to be filed within three months of the resolution (however, the *Gram Sabha* can extend this time through another resolution, but only if it records reasons for doing so). Each of these rights has to be claimed through an application (many rights can be claimed through on application) to the forest rights committee.

According to rules 11(a) and 13, each application has to be accompanied with two types of evidence. Under each right below, the types of evidence that can be used to accompany the claim are listed, in addition, every claim should include:

1. Scheduled Tribes certificate, if claimant is Scheduled Tribes, living in the area where he or she is scheduled;

2. If the claimant is not a Scheduled Tribes living in the area where he or she is scheduled, some proof of 75 year residence in forest areas, which can include:

a. documents/list (a genealogy) showing ancestry from a person listed in the land records or other records in the area from that time;

b. any other records referring to family ancestors or the community living in forest areas/that village from 75 years before;

c. statements of elders in the village-preferably as an affidavit- regarding 75 years of residence.

5. How to make a claim to land?

The main points to be proven regarding a claim to land are:

1. that the claimant is in direct possession of the land (not through someone else) and that the claimant is cultivating/using the land himself/ herself; and

2. that the land has been under occupation preceding December 13, 2005. The forest rights committee is then supposed to visit the site to physically verify that the person is in occupation of the land.

6. Forest Rights Committee Verifies Claims

Each *Gram Sabha* is to elect a ten to fifteen member forest rights committee. The committee's duties included:

1. Receiving claims from people. The committee has to give a written acknowledgement for any claims it receives.
2. The committee should also on its own consider the claims of the community as a whole over its community resources- such as minor forest produce, access to grazing land, community forest resources, etc. For these, the forest rights committee is responsible for making out the application, which has to be passed by the *Gram Sabha* as a resolution after modification, of necessary.
3. Along with each claim, the person claiming the right attaches the evidence he or she is submitting. There is a wide variety of evidence that can be given, as described above.
4. The forest rights committee will visit the site of the claim (for instance, the plot of land being claimed). Before visiting, the committee has to inform both the claimant and the forest department.
5. The committee can receive additional evidence from the claimant or other witnesses.
6. The forest rights committee can also ask for additional help/ assistance from government officials, who are required to provide that help. On any written request from the committee, the government must provide documents and explain them to the committee members. Also, whether the committee asks for it or not, the sub-divisional level committee has to provide forest and revenue maps as well as voter lists of the area.
7. The committee can then decide whether the claim is correct or not. The committee should not and cannot, accept any claim as correct if it violates any of the conditions given in the previous section (for instance, if a person is claiming land that was encroached after December 13, 2005, or if the claiming person does not cultivate/use the land himself/herself).

8. For each claim that it decides is correct, the forest rights committee will have to make a map with landmarks.

9. The forest rights committee should decide on rights in the presence of representatives of seasonal and pastoralist communities who would be affected by those rights.

10. The committee will make a list of people who have submitted claims before it and stat what its conclusion is on each of those claims.

11. Finally, this list and the maps will be presented before the full *Gram Sabha*. If the *Gram Sabha* agrees, it will pass a resolution endorsing the list and the maps made by the forest rights committee. If it does not agree, it can make changes it feels appropriate and pass a resolution recommending the modified list and maps.

During these proceedings, the secretary of the Panchayat serves as the secretary of the *Gram Sabha*. In case of smaller *gram sabha*s, the secretary should be summoned to the meetings of these *gram sabhas*.[19] This procedure can be done repeatedly- there is no need for the committee to hear all the claims before reaching a decision on some. If rights are being claimed that lie inside another village's boundaries or that lie in an area shared between multiple villages, the forest rights committees of all the villages concerned should meet and together decide on what is to be done. This agreement is placed before both the concerned *gram sabhas* for their approval. If no agreement can be reached, the matter should be referred to the sub-divisional level committee. If any claimant is not satisfied with the *gram sabha's* decision, he or she can appeal to the sub-divisional level committee.[20]

7. Appeals and Higher Committees

a. Sub-Divisional Level Committee

The next step is a committee that will consist of the following people:[21]

1. Sub-divisional officer, who is the chairperson;
2. Forest officer in charge of a sub-division;
3. Tribal Welfare Official at the sub-divisional level, or the official who

19. *Ibid.*, r. 11(6).
20. *Ibid.*, Section 6(2).
21. *Ibid.*, Section 6(8), r. 5.

looks after that subject;

4. Representative of *block/taluka Panchayat* nominated by the *zillaparishad*;
5. Representative of *block/taluka Panchayat* nominated by the *zillaparishad*;
6. Representative of *block/taluka Panchayat* nominated by the *zillaparishad*.

Of the last three, two should be Scheduled Tribes (or, where there are no Scheduled Tribes, other traditional forest dwellers) and at least one should be a woman. This committee is supposed to:

* Put together the resolutions of the different *gram sabhas* in its jurisdiction and 'reconcile' them with government records.
* Hear appeals made to it against *gram sabha* decisions. The forest department and other government agencies can also appeal to the committee if they oppose the *gram sabha's* position.
* "Examine" the resolution of the *gram sabha* and also hear any appeals by people aggrieved by the *gram sabha's* decision. The Act provides only this, but the rules add a provision by which the sub-divisional level committee is also required to check the "veracity" or genuineness of claims. This means that the sub-divisional level committee can, and will, reexamine and reject decisions of the *gram sabha*on its own, which means that this committee will have to be watched very closely. Copies of the record of rights as prepared by the sub-divisional level committee should be made available in each village, along with the reasons for any change.
* Settle disputes between two *gram sabhas*. In case there is such a dispute, either *gram sabha* can pass a resolution applying to the sub-divisional level committee to settle the dispute, or the committee can act on its own. In this case, the committee shouldcall a joint meeting of both *gram sabhas* to try to resolve the dispute. If such a resolution is not reached, the committee should resolve the matter.
* Where a claim concerns an area outside the sub-division, the committee should approach the sub-divisional level committee of the concerned sub-division for settling the matter.

After this work is complete, the committee "prepares" the record

of forest rights for each *block/taluk* and passes that on to the district level committee.[22]

If a claimant is not satisfied with the sub-divisional level committee's decision on the appeal, he or she can appeal to the district level committee. However, he or she cannot appeal directly to the district level committee after the *gram sabha's* decision; he or she must appeal to the sub-divisional level committee first. The committee is also responsible for providing publicity and logistics, including providing copies of forms and information to*gram sabhas*.

b. District Level Committee

The final step is a committee that consists of the following people:[23]

1. District Collector or Deputy Commissioner, who is the chairperson;
2. Divisional Forest Officer or Deputy Conservator of forests;
3. Official in charge of Tribal Welfare at the District level;
4. Representative chosen by *zillaparishad*;
5. Representative chosen by *zillaparishad*;
6. Representative chosen by *zillaparishad*.

Of the last three, two should be Scheduled Tribes and at least one should be a woman. The above committee takes decisions made by the sub-divisional level committees and:

1. "Considers and finally approves" them.[24] This committee may change decisions of the *gram sabhas* (or the sub-divisional level committees) on its own. This too is dangerous and needs to be watched.
2. Hear appeals against orders of the sub-divisional level committee.
3. Settle disputes between sub-divisional level committees in the manner the disputes between *gram sabhas* are settled.
4. Contacts other districts in case claims are cross district boundaries.

Once this is complete, the district level committee issues directions

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22. *Ibid*., Section 6(3).
23. *Ibid*., Section 6(8).
24. *Ibid*., Section 6(6).

to the government officials to make necessary changes in the revenue and forest records. The committee does not need to wait until all appeals or claims are decided before making these changes in the records for any right that is undisputed.

The district level committee then has to publicize the record of rights and provide certified copies of accepted rights to the *gram sabha* and to the person concerned. It is very important to check the final results of the committee's work. The district level committee is also responsible for providing documents to *gram sabhas*, making sure that publicity takes place and ensuring that *gram sabhas* take place without coercion and with free participation of women.[25]

8. Types of Rights

There are thirteen rights listed but they can basically be categorized into four types of rights:

a. Forest Management Rights

One of the most important rights in the Act is the right to protect traditional forest.[26] According to section 3(i), under this right, whatever the forest department might say, the community can "protect, regenerate or conserve or manage" any "community forest resource" and is also empowered to protect trees, biodiversity, wildlife, water sources, etc., in any forest.

As soon as the Act came into force on January 1, 2008, this right became a power of communities under Section 5 of the Act. For this purpose of official recognition, though, the community should also demarcate its boundaries and file a claim for this right. Even if this is rejected, the community has the power to protect its forests. This is the most powerful right under the Act.

According to Sections 3(1) and 5, the community has the following rights over community forest resources:

* To protect and/or conserve them;
* To manage them;
* To regenerate them (e.g. through planting of native trees/shrubs/

25. *Ibid.*, r. 8.
26. *Ibid*., Section 3(i) and Section 5.

grasses or through natural regeneration);

* To sustainable use of these resources.

In Particular, the *gram sabha* (or any other village institution, or even individual forest rights holders) can:

* Protect wildlife, forest and biodiversity[27]

* Protect adjoining water sources and "catchment areas"[28];

* Protect the habitat and "cultural and natural heritage"(e.g. sacred groves, religious sites, mountains, water bodies, etc.) of their community from destruction;[29]

Finally, the *gram sabha* can make rules for regulating access and protecting wildlife, forest or biodiversity of community forest resources, and it (or any forest rights holder) has the power to ensure that these decisions are followed.[30] This means that, for the first time, whatever the forest department or government or forest mafia may decide, a community can enforce its decisions and protect its forest.

b. Land Rights to Land Being Occupied or Cultivated or Under Customary Use

There are different ways in which the land, that is being occupied, can be claimed under the Act. It should be noted that the word "occupied" should not be limited to cultivation alone and it also includes private land used for grazing or parts of the plot that are left fallow to be used in the next agricultural cycle. Rights to forest land, which can be claimed under the Act, come under the following categories and sections.

c. Directly as land under occupation:[31]

If the claimant, either individually or in common with other, has been occupying land prior to December 13, 2005 and continuously since then, he/she can claim it up to a maximum of 4 hectares (10 acres). The upper limit of 4 hectares applies only to this right. Communities can also claim common title to land for cultivation or occupation. People who

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27. *Ibid*., Section 5(a).
28. *Ibid*., Section 5(b).
29. *Ibid*., Section 5(c).
30. *Ibid*., Section 5(d).
31. *Ibid*., Section 3(a).

successfully prove their claim will receive an individual or common patta to this land. Lands under this section can only be claimed for "self-cultivation"-by the claimant- or for residence.

d. Conversion of Titles/Leases/Grants[32]

If the claimant already has *patta* or lease or grant issued or grant issued by any local authority or State government to the land which the forest department does not recognize, then he/she has the right to get the existing document converted into an undisputed legal title. The area over which rights under this section are claimed shall be based on the area for which the existing *patta* or lease or grant is held, with no upper or lower limit. Some types of lands that could be claimed under this section include:

* *pattas* or titles that were given for lands that both the revenue and forest departments claim;
* *pattas* granted in the "orange areas" of Madhya Pradesh and "Chattisgarh;
* *ek Sali* and *dali* leases in Maharashtra;
* leases given for agro-forestry, agro-silvi culture, or fire line plots;
* government leases that were granted and have since expired but the person is still in occupation of the land;
* *pattas* where the *patta* was cancelled earlier without a "due process of law" (meaning without issuing notice, allowing the person a chance to appeal the decision, etc.), such as in the case of the Private Forests Act of Maharashtra;
* other*pattas,* titles and leases given by *zamindars* or princely States.

As "Disputed Lands":[33]Under the Indian Forest Act, 1927, whenever any land is to be declared as a reserved or protected forest, it has first to undergo a "settlement process". This requires that a settlement officer has to issue notices to all the people who live in, or are dependent on that land; these people have to be given a period of time to file objections or claim their rights, and these claims have to be enquired into by the settlement officer. If this does not occur, the forest settlement is faulty,

32. *Ibid*., Section 3(g).
33. *Ibid*., Section 3(f).

resulting in disputed claims over the land between people and the forest department. In such cases, a person can claim his/her customary rights over such disputed land. This is also includes:

* lands that come under so-called "deemed" reserved or protected forest in Orissa, Madhya Pradesh, Chhattisgarh and elsewhere;
* forest lands where the final notification declaring the area a a reserved forest was never issued. Under the Indian Forest Act, two notifications have to be given before an area can be notified as a reserved forest: one under Section 4, which is the announcement of the government's intention; and the other under section 20, which states that the settlement of rights is complete and the reserved forest is actually being finally notified. If the second notification was never issued, the settlement is faulty. Any land claimed by an individual or a community under any part of the Act should have been under his/her occupation since before December 13, 2005,[34] and should still be in his/her possession at the time of making the claim. Any patta received under the Act cannot be sold or transferred to any other person, but the owner's children or heir can inherit these lands.

9. Use Rights

a. Minor Forest Produce[35]

The forest dwellers can claim rights over minor forest produce under the Act. Minor forest produce includes *"bamboo, brush wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leave, medicinal plants and herbs, roots, tubers*" and so on.[36] The right to minor forest produce includes those minor forest produce that have been "traditionally collected" from within or outside village boundaries.[37] Fish and other produce of water bodies are covered under a separate right.[38]

These rights should normally be claimed by the community as a whole or by a sub-group within the community. In case the community

34. *Ibid*., Section 4(3).
35. *Ibid*., Section 3(b)/3(c).
36. *Ibid*., Section 2(i).
37. *Ibid*., Section 3(1)(c).
38. *Ibid*., Section 3(1)(d).

as a whole is claiming, rule 11(4) requires that the forest rights committee itself make the application for the right, which is then passed by a resolution to the *gram sabha*. The resolution should list the types of MFP collected and the areas from which they are collected.

The right to minor forest produce includes the following:[39]

a. Ownership of minor forest produce;

b. Collect minor forest produce;

c. Use minor forest produce;

d. "Dispose" (i.e. barter or sell) minor forest produce (with some restrictions on transport).

Finally, minor forest produce can be collected from any forest area from where it has been traditionally collected falling both within the outside village boundaries.[40] Where collection of minor forest produce was a part of traditional *nistari* rights, the community can also claim that traditional right and have it recorded.[41] This includes rights that were once recorded under princely States or *Zaminadars,* but in many areas have been treated as 'extinguished' or 'vested' in the State since government take-over. The rules have been framed regarding transportation of the minor forest produce. The rules say that minor forest produce can be transported in forest areas by head loads, handcarts or bicycles. Motorized transport is not allowed in forest areas.

b. Grazing, Water and Other Community Rights[42]

Forest dwellers and forest dwelling *tribals* have a right to graze livestock.[43] Pastoralist communities (both settled and nomadic) have a right to access forest land on a seasonal basis for similar uses. Claims can be filed for this right by individuals or by the traditional institution of the concerned communities, and should be verified by the *gram sabha* at a time when representatives of that community are present.

The right to access forest land on a seasonal basis will be a right of

39. *Supra note 36.*

40. *Ibid*.

41. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, Section 3(1)(b)

42. *Ibid*., Section 3(1)(d).

43. *Ibid*.

the community and its members. Where the village itself is making the claim, the forest rights committee should prepare the application, preferably making the application before a meeting of the *gram sabha*; where pastoralist/nomadic communities, or sections of a village, are making the claim, the application should be signed by all their members or by a representative body. ***"Habitat"***[44] (applies only to pre-agricultural and primitive tribal groups).

Under the Act, "primitive tribal groups" (such as the *Jaungs*, the *Chenchus*, the *Baigas*, etc.) and "pre-agricultural communities" (such as shifting cultivators and hunter/gatherers) have the right to "habitat and habitation." This is a community right; the application for it should either be prepared by the forest rights committee (in case the village itself is claiming the right) or by a representative body of the PTG/pre-agricultural community concerned. The application would include a map of the area being claimed as the habitat of the community. *"Habitat"* here is defined to mean the traditional area in which these communities have live, even if that should be inside reserved/protected forests.[45] A right, including community tenure, to a habitat and habitation, though not defined in the Act or the rules can mean:

* The community right to reside inside these forest areas in accordance with their traditions and customs;
* The right to prevent these forests from being destroyed (since that would deprive these communities of their habitat):
* The right to continue socio-cultural, religious and livelihood social activities in these forest areas that made them into a "habitat".

c. Conversion of Unrecorded Settlements and Forest Village to Revenue Villages*[46]*

Any unrecorded settlement or forest village on forest land has the right to be converted into a revenue village. This is a community right, so the forest rights committee should prepare the application for this right, preferably during a meeting of the *gram sabha*; the *gram sabha* of the village must pass a resolution stating that this village must be converted

44. *Ibid.*, Section 3(1)(e).
45. *Ibid.*, Section 2(h).
46. *Ibid.*, Section 3(1)(h).

into a revenue village.

10. Relief and Development Rights

There is a right to rehabilitation in case of illegal eviction or forcible displacement.[47] The Forest Rights Act also provides for rights to in situ rehabilitation and alternative land in case of illegal eviction or forced displacement.

Eviction is illegal if no notice is served prior to eviction, or if the forest settlement in an area is not complete, or if the settlement is faulty. Secondly, the claim must show that no compensation or rehabilitation is provided. This is to be stated in the claim and then it is the responsibility of the forest department to prove that compensation is being provided. Displaced persons have a right land for rehabilitation, but only if the land that was taken was not used for its purpose within five years of being acquired, and they were not provided any land at the time of being displaced.

As the forest rights rules do not provide any method by which this rehabilitation/compensation should be provided, the kind of rehabilitation that will be provided is not clear. At the very least, however, these rights should be taken to mean that once they have been evicted/displaced once and occupied forest land for livelihood after that, they cannot be evicted from the land they have occupied as they have a right to on site rehabilitation under section 3(1)(m) and to land compensation under section 4(8).

11. Any Other Traditional Right

Section 3(1)(l) of the Act provides that "any other traditional right" of forest dwelling communities can be claimed as a right under the Act excluding hunting. This section can be used to claim rights such as:

* shifting cultivation, both individual and collective;
* customary individual or community claims over territory;
* right to use religious sites/burial sites;
* right to collect timber for housing or types of produce not covered under minor forest produce, etc.

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47. *Ibid.*, Section 3(1)(m) and Section 4(8).

12. Sanctuaries and National Parks: Special rights against being moved out by force

The Act contains special provisions for protected areas. Until now, it was the practice of the forest department to resettle people out of national parks and sanctuaries- especially from tiger reserves- by claiming that they were hurting wildlife. Even where the actual resettlement did not take place, the forest department would use it to threaten people and to prevent the construction of roads, schools, etc. inside these villages. This is what happened in places like *Sariska* tiger reserve. With the Act, this has now changed. The Act provides protection against forcible relocation of people living in protected areas. Notwithstanding the claims by the government and the press, forest dwellers cannot be forced to move out of even tiger reserves in the name of wildlife conservation except with the free, informed consent of the *gram sabha*.[48] The following other conditions apply:

a. No one can be shifted until the process of recognizing forest rights in that area is complete.[49] For that reason, it is important to keep the government from declaring the process complete until all persons have had their right recognized.

b. The areas from which people are to be moved out have to be notified as "critical wildlife habitats." The Central Government has to do this through the Ministry of Environment and Forests. However, the Ministry also cannot take this step on its own- it has to convene an expert committee, which should include local experts, and hold public consultations about whether or not the area should be called a critical wildlife habitat.[50] The State Government then has to prove (through this committee or otherwise) that unless people are moved out, there will be irreversible damage to wildlife, and there is no other way that this problem can be addressed. This has to be proven for each protected area through scientific and objective investigations. The forest department cannot make that decision on its own any more.[51]

c. The Government (it is not clear whether the Central or State

48. *Ibid.*, Section 4(2)(e).
49. *Ibid.*, Section 4(2)(a).
50. *Ibid.*, Section 2(b).
51. *Ibid.*, Section 4(2)(b).

Government will be responsible) has to prepare a package for rehabilitation of the people who agree to go out. This package has to "provide a secure livelihood" acceptable to them and conform with the national rehabilitation policy, the policy of that State and any other applicable laws and policies.[52] The national policy requires that land should be offered "if available." Since a secure livelihood has to be provided, cash compensation is not enough. The have to provide land, other resources or at least employment.

d. After this package is ready, the *Gram Sabhas* of the area have to give their consent in writing, after they have been informed of all of its provisions. If the government lies to the *Gram Sabhas*, or tries to pressure them, that makes the resettlement illegal as per the Act.

e. Finally, nobody should be moved until the land and other facilities at the place they are to be moved to is fully ready.

But what is the scientific basis for reaching the conclusion that coexistence between people and wildlife is not possible, and that relocation is necessary. Forest rights are not about getting *pattas* or rights alone. The fundamental question is who will control forest, and how that control will be exercised. The law is but one tool. The Act is like a bargain- the government will give *pattas* and, in exchange, the forest will remain de facto under government control. A *patta* is just a piece of paper, and the government will be happy to take it away whenever it wishes. *Tribals* have to fight for control of the jungle itself. The Act is not for one *patta*or one plot alone- it is for democracy, freedom and justice for India's forests and forest people.

The Act apparently seeks to rectify a "historical injustice to the forest dwelling STS and other traditional forest dwellers that are integral to the very survival and sustainability of the forest ecosystems." It would seem that the State is finally taking the language of "participatory forest management", in vogue among some conservationists over the last decade, interlaced with the language ofthe tribal rights activists. The Act, along with the Rules, 2007, is an excellent attempt at trying to appease two warring parties.

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52. *Ibid.*, Section 4(2)(d).

VI. DRAWBACKS IN IMPLEMENTATION OF THE SCHEDULE TRIBES AND OTHER TRADITIONAL FOREST DWELLERS (RECOGNITION OF FOREST RIGHTS) ACT, 2006

Quite a few social activists and conservationists have pointed out that there may be some danger if the Act excludes certain groups of people within a region on the grounds that they do not satisfy shall the conditions necessary. The Act would then, unfortunately, become an instrument of eviction and unrest among the very people whom it seeks to help legitimize.

There are cases when the same tribal community is granted a Schedule Tribes status in one State and a Scheduled Caste status in another. Most of the tribal people of Central India belt- Gonda, Durwas, Khonda Reddys, Dorlas, etc., are non-literate, especially in legal affairs and do not easily speak the State language imposed upon them. They would all need competent and sensitive translators who can listen and interpret their claims with sympathy and understanding; considering that we cannot even find enough primary school teachers who perform this much needed role, it is doubtful whether the State is able to perform this challenging task.

The Act needs several safeguards for effective implementation. Some of these measures have been taken into consideration such as keeping "critical wildlife habitats" inviolate. Moreover, it later goes on to add that such critical habitats from which people may be relocated "shall not be subsequently diverted by the State Government or the Central Government or any other entity for other uses". However, despite the FCA, forest lands may be diverted by the Government for several other purposes such as schools, community census, minor irrigation canals, roads, electric and communication lines, non-conventional source of energy, etc., the only condition for such diversions being that felling of trees should be within 75 per hectares (in each case) and should be recommended by the *Gram Sabha*.

In most cases, the rules (June, 2007) clarifies and often strengthens the clauses in the Act. The *Gram Sabha* is on the whole given the authority to initiate processes determining the "individual or community forest rights or both… within the local jurisdiction of this Act by receiving claims, consolidating and verifying them and preparing a map delineating the area

of each recommended claim… and the *Gram Sabha* shall, then, pass a resolution to that effect and thereafter forward a copy of the same to the sub-divisional level committee, to whom they may appeal within 60 days; that failing, there is the district level committee, whose decision "on the record of forest rights shall be final and binding". There is also a "State level monitoring committee to monitor the process of recognition and vesting of forest rights". Various committees "consists of officers from the departments of revenue, forest and tribal affairs of the State Government and three members of the Panchayat Institutions, of whom two shall be members of the Scheduled Tribe members at least one shall be women…."

The *Gram Sabha* that has been given such a huge responsibility in initiating the process of claims, etc., is not as trustworthy an institution as it needs to be. Studies in Madhya Pradesh have shown that "accountability is by and large poor in the Panchayat systems in all the districts studies". It has been remarked that the *Sarpanch* is all powerful in the present system and no other person has any say in Panchayat matters. The present system is termed not *Panchayat Raj* but *Sarpanch Raj*. In some districts of Chhattisgarh, where the *Sarpanch* seat was reserved for tribal women, many non-literate women friends of the earlier *Sarpanch* have been elected; the men are conveniently elected conveniently elected *Upsanpanch* (deputy *Sarpanch*) and nothing has changed in the power structure.[53] The study goes on to add that "on the basic questions dealing with the awareness of the villages regarding the existence, functions and the rights of the *Gram Sabha*, a very high majority of the people seemed completely ignorant". If such a body is vested with powers of settling land claims and diverting lands for development projects, it is anybody's guess what the possibilities of misappropriation are.

The Government's intention with this Act, to settle the land claims up to December, 2005, does have some other dangers. In the earlier instance, when the Ministry of Environment and Forests (MOEF) set the cut-off date for settlements as the FCA, tribal people were forced to prove occupancy of their land before that date. In Chhattisgarh, there are examples of villages springing up within the core area of a NP well after 1980 but claiming, with political support, that they have been there

53. M. Ramnath, "The Role in Tropical Deforestation", NC-IUCN, Amsterdam, 2001.

from long before the cut-off date. The clause demanding residency for at least three generations might be able to save some such spaces from instances of encroachment, but local political clout cannot be dismissed. The cut-off dates have been extended from 1980 to 1993's to 2005 and is known not to be sacrosanct; this might tempt power-hungry leaders to instigate more forest encroachments, with the promise or hope that settlement dates can be extended' this trend has already begun in parts of Central India.

With these differing roles between the people and the forests they inhabit, come also the variations in their willingness and ability to protect the natural resources that they collectively inherit. The argument that *tenurial* security may lead to resource conservation may not necessarily hold true for all groups of people: have we do not been through forest areas where no bird calls are heard? For India,[54] Singh describes 461 Scheduled Tribes, occupying the most varied of forest and mountain tracts, some sharing the same resources, and some at (implicit) war with one another. These differences translate into how aggressive or passive different tribal groups are, and how willingly they merge with the (dominant) non-tribal community.

Another issue that strikes one at the ground level is the fact that tribal people, like the rest of us, are different from one another. Despite the obvious danger of generalizing, reference can be made about the tribal groups' affinity and relationship to forest environments as such.

VII. CONCLUSION

It is clearly reveals from the above discussions that it has been stated in the Act that the traditional forest dwellers are "integral to the very survival and sustainability of the forest ecosystem". This is quite a volte face to the previously held views of the Government, which decried the destructive tribal cultivation practices, suggesting that it was necessary to "wean the *tribals* away from shifting cultivation" and a forest dependent way of life. It is curious that along with India's rise as an economic power today, the Government feels need to show that it is conscious of plight of its marginalized people. This is apparently important for India'

54. K. S. Singh, The Schedule Tribe of India (new Delhi: Oxford University Press, 1994).

image broad, especially in its relations with other countries, it must be convinced that they are dealing with a modern country that also values human rights. Combining the tribal rights and an environmental agenda, the Government has even recognised that the Scheduled Tribes and other traditional forest dwellers have a primary role in sustainability of our ecosystem. Our Government also wants "to address the long standing insecurity of tenure and access rights of forest dwelling Scheduled Tribes and other traditional dwellers including those who were forced to relocate heir dwelling due to State development interventions".

The Forest Rights Act has started a transformation of the forest landscape in India. It is set to redraw not only forest boundaries, but also alter the State- people relations in the context of resource management. Currently, the implementation process is marred by several institutional and efficiency issues, due to which rights have been recognized only over a limited forest area. Also mostly individual rights have been recognized so far. But, the implementation process is expected to improve with clarifications and amendments in the policy guidelines under the constant vigil of civil society. Once community forest rights are recognized over a large area, local people will have control over the management and conservation of resources. With the recognition of rights, they will have some control over the management of protected areas, which have been exclusionary so far. Communities would have access to the commercially important NTFPs like *tendu leaves, sal and mahua seeds,* which are at present controlled by the State. It will redistribute power and control of the forest resources. Forest dependent communities and civil society groups are constantly pushing for rapid and transparent implementation of the Forest Rights Act. For the better implementation the following recommendations are suggesting:

(a) Expedite implementation of the Forest Rights Act through awareness creation, robust monitoring and better support system.
(b) Improve the record of recognizing Community Forest Resource rights and provide support to post-claims management and conservation process for strengthening forest-based livelihoods.
(c) Allocate financial resources and full-time staff at the sub-divisional and district levels for the implementation of the Forests Rights Act.
(d) Align all legislations and policies governing forest land with the Forest Rights Act.

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NOTES AND COMMENTS

ORGAN TRANSPLANTATION AND ITS LEGAL PARAPHRENIA IN INDIA

*SOUGATA TALUKDAR**

ABSTRACT : : Organ transplantation as a curative method for organ failure is the most modern concept of human disease fighting mechanism. As artificial organ is not popular till now, so the demand of human organs for replacement is always high and it brought with it a complexion about commercial exploitation. This exploitation is more prone among the people struggling with poverty. To deal with this and to secure safe organ transplantation, the Transplantation of Human Organ Act, 1994 was enacted in India. Recently the legislation crossed its 25 years. However, till now it fails to provide fullest protection against the commercial exploitation and ill-treatment. In this background, it is important to revisit the legislation again. This paper primarily focused on the same. In addition to this, this paper tries to elaborate the importance of informed consent in organ transplantation and the efficiency of the regulatory authorities in controlling the malpractices.

KEY WORDS : Human Organ, Transplantation, Consent, Commercial Transaction, Authorisation Committee.

I. INTRODUCTION

Organ failure is the leading cause of mortality all over the world despite advances in interventional, pharmacological, and surgical therapies.[1] Under the modern therapy organ transplants are relatively safe procedures and it is no longer considered as experiments. Nowadays it is considered as treatment options for thousands of patients with health

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problems such as heart disease, respiratory disease, cirrhosis of liver, renal problems etc.[2] Thus, Organ transplantation has improved patients' quality of life and their hope to the future.[3] Under the modern Indian medico-legal system, Human OrgansTransplantation is primarily controlled by Transplantation of Human Organ Act, 1994. Though transplantation is a medical issue, it is connected with legal and ethical issues also as the resources of the organ are the living or deceased donors. However the consequences of rising burden of noncommunicable diseases, living geriatric population, other risk exposures and behavior are propelling the graph of end-stage organ failure across the globe including India[4] and thus, it has assumed public health significance due to ever-increasing gap of need and supply of human organs. In this background, this manuscript highlights the current status of Transplantation of Human Organ Act in the country, legislative pre-requisites and procedural limitations transplantation of human organ, the importance of informed consent and efficiency of regulating authorities.

II. HUMAN ORGAN: THE CONCEPT AND THE LAW

The advancements in the field science, technology and medicine have made it possible to remove organs from living as well as deceased persons and to transplant such organs into the body of others to save lives of suffering human beings.[5] Therefore, transplantation of human organs both by natural and man-made substitutes[6] is a landmark

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1. See L. LIU & X. WANG, ORGAN MANUFACTURING HAUPPAUGE 1-28 (X. H. Wang (ed.), Nova Science Publishers Inc., 2015); X. Wang, Y. Yan et al., *Rapid Prototyping as Tool for Manufacturing Bioartificial Livers*, 25(11) TRENDS BIOTECHN. 505 (2007).
2. See K. Ota, *Current Status of Organ Transplants in Asian Countries*, 36(9) TRANSPLANTATION PROCEEDINGS 2535 (2004).
3. See J. Schirmer & A. RozaBde, *Family Patients and Tissue Donation: Who Decides?*, 40 TRANSPLANTATION PROCEEDINGS 1037 (2008).
4. Sandeep Sachdeva, *Organ Donation in India: Scarcity in Abundance*, 61(4) INDIAN J. PUBLIC HEALTH 299, 299 (2017).
5. See Balbir Singh v. Authorisation Committee, A.I.R. 2004 Delhi 413 (India): (2004) I.L.R. 2 Delhi 242 (India).
6. Bioartificial organ or man-made organ manufacturing technologies are a series of enabling techniques that can be used to produce human organs based on bionic rinciples. According to the degree of automation, organ manufacturing technologies

achievement in the aspects of curative techniques in the field of healthcare.[7]Though in the case of, organ transplantation is a personal issue, the process has medical, legal, ethical, organisational and social implications.[8] In India, the legislation to deal with human organs has evolved through a prolonged struggle. Finally, the legislation got its final shape in 1994 with the name 'Transplantation of Human Organ Act (THOA).[9]This Act provides regulations for removal, storage and transplantation of human organs for therapeutic purposes and to prevent commercial dealings in human organs.[10] It came into force in the Union Territories and the State of Goa, Himachal Pradesh and Maharashtra on February 4, 1995. After that other States have adopted this central legislation under Article 252 of the Constitution.[11] The THOA was further amended through the Transplantation of Human Organs (Amendment) Act 2011 and came to its present form.[12] Before the enactment of this

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can be divided into three main groups: (i) fully automated, (ii) semi-automated, (iii) hand-worked, each has the advantages and disadvantages for bioartificial organ manufacturing. See Xiaohong Wang, *Bioartificial Organ Manufacturing Technologies*, 28(1) CELL TRANSPLANT.5, 5 (2019).

7. See C. Manickam, *Organ Transplantation and the Law*, 19 COCHIN UNIVERSITY L. REV. 176, 176 (1995). For discussion on man-made human organs see MITCHEL E. DE BAKERY, BIOLOGY IN HUMAN AFFAIRS107 (Hardy Boardman & Stuart A. Ross (eds.), Estados Unidos, 1974).
8. See A. J. Ghods, *Ethical Issues and Living Unrelated Donor Kidney Transplantation*, 3 IRAN J. KIDNEY DIS. 183 (2009); Sanjay Nagral, *Ethics of Organ Transplantation*, 3(2) J. MED. ETHICS 19 (1995).
9. For general discussion see Ashok K. Sharma, Sudhir K. Bhagotra, et al., *The Transplantation of Human Organs Act*, 3(1) JK SCIENCE 51 (2001).
10. Transplantation of Human Organ Act 1994, Preamble.
11. Article 252 of the Constitution makes it clear that where parliament has no power to make laws for the States except as provided to Articles 249 and 250 and houses of legislature of two or more States passes a resolution then it shall be lawful for the parliament to pass an Act for regulating the matter enumerated in the State List but such Act will be applicable to the States which had passed the resolution and so far as other States are concerned, they can adopt it afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.
12. It is important to note that this Act of 1994 is not applicable in the States of Jammu and Kashmir and Andhra Pradesh, which have their own legislation to regulate transplantation of human organs. The Act of the States of Jammu and Kashmir and Andhra Pradesh are the Jammu and Kashmir Transplantation of Human Organs Act, 1997 and Andhra Pradesh Transplantation of Human Organs Act, 1995 respectively. For *applicability of Andhra Pradesh Transplantation of*

Act, a doctor who removed an organ without the informed consent of his patient could be charged for criminal liability under Indian Penal Code for the offences against the human body like assault and battery and could also face civil liability for professional negligence under the law of torts.[13] To save the doctors from this liability and to ensure proper organ transplantation without monetary exploitation, the THOA played an exotic role in the healthcare scenario in India. The THOA defines "human organ" as any part of a human body consisting of a structured arrangement of tissues which, if wholly removed, cannot be replicated by the body[14] and "transplantation" means the grafting of any human organ from any deceased person or living person to some other living person for therapeutic purposes.[15]

The Act also sets up a regulatory mechanism to achieve the objects and prescribes as to who has the "authority" for the removal of human organs or tissues. When and how can it be done, etc. A detail and stringent mechanism have been set up to monitor, regulate and guide hospitals for the purposes. Anyone who removes a human organ or tissue or both, in violation of the above process, is liable to be punished under the penal provision contained in Chapter VI of the Act. It is pertinent to mention that, the THOA being a special Act and the matter relating to dealing with offences thereunder having been regulated because of the provisions thereof, the THOA will prevail over the provisions of the Code of Criminal Procedure, 1973.[16]

III. HUMAN ORGAN TRANSPLANTATION TO NEAR RELATIVES

The human organ may be removed as per the will of the donor when he is alive or after his death with the consent of his relatives. The

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Human Organs Act, 1995 see D. Desai Madhav v. State, 2019 (3) A.L.T. (Crl.) 20 (A.P.) (India).

13. See Seema Rathi, *Organ Transplantation Law in India: It's Legal and Ethical Issues*, 47(1) CIV & MIL L J.52, 53 (2011).
14. Transplantation of Human Organ Act 1994, Section 2(h).
15. Ibid., Section 2(p).
16. See Jeewan Kumar Raut v. Central Bureau of Investigation, A.I.R. 2009 S.C. 2763(India): (2009) 7 S.C.C. 526(India). See also Sharat Babu Digumarti v. Govt. of NCT of Delhi, A.I.R. 2017 S.C. 150(India): (2017) 2 S.C.C. 18(India).

THOA provides that the donor may authorise the removal of any human organ or tissue or both of his body, before his death, for therapeutic purposes to transplant the same in the body of near relatives of the donor.[17] Whereas, for the donation of the human organ after death, the donor has to unequivocally authorise in writing the removal of any organ of his body for therapeutic purposes in the presence of two or more witnesses. At least one of those witnesses should be near relative of the donor.[18] In that case, the person who is in possession of the body after the death of that wilful donor shall grant all reasonable facilities for the removal of that organ or tissue or both from the dead body of the donor through a registered medical practitioner unless he has any reason to believe that the donor had subsequently revoked the aforesaid authority. It is interesting to note that the Act not only allows the personal donation of the human organ but also the donation for therapeutic purposes may be made by the near relative who is in lawful possession of the dead body. The relatives who are allowed to donate include mother, father, brothers, sisters, son, daughter, grandparents and spouse. These relatives are known as first relatives. The first relatives are required to provide proof of their relationship by genetic testing or by legal documents.[19]But this can be done only if the other relatives have no objection to that and the person from whose body donation will be made did not give objection before his death.[20] The authority to remove the organ for therapeutic purposes can only be given to a registered medical practitioner or a technician possessing such qualifications and experience.[21]

Moreover, in the case of brain death,[22] the registered medical practitioner has a responsibility to make sure by personal examination that such event has truly happened.[23] When a dead body lying in a prison

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17. Transplantation of Human Organ Act 1994, Section 3(1).
18. Ibid., Section 3(2).
19. See Sunil Shroff, *Legal and Ethical Aspects of Organ Donation and Transplantation*, 25(3) INDIAN J. UROLOGY 348, 350 (2009).
20. Transplantation of Human Organ Act 1994, Section 3(3).
21. Ibid., Section 3(4).
22. See Ibid., Section 2(d). It defines brain-stem death as the stage at which all functions of the brain-stem have permanently and irreversibly ceased and is so certified under sub-section (6) of Section 3.
23. Ibid., Sections 3(5)-3(7).

or hospital and not claimed by near relatives of the deceased person within forty-eight hours from the time of the death of the concerned person, the authority to remove human organ or tissue may be given by the person in charge of the management or control of the prison or hospital or by an employee of such prison or hospital authorised in this behalf.[24] All these prior conditions are provided to secure the donor's right to the body and to assure the right to have the best possible healthcare of the donee.

IV. HUMAN ORGAN TRANSPLANTATION TO NON RELATIVES

The exception to the near relatives rules is laid down in Section 9(3) which states that any donor can authorise the removal of any of his organs or tissues or both before his death for transplantation into the body of a recipient who is not a near relative by the reason of affection or attachment towards the recipient or for any special reasons, but this can only be done with the prior approval of the Authorisation Committee. The Authorisation Committee can pass any order after giving an opportunity of being heard to the donor, recipient and any other related person.[25]Thus, Section 9 of the Act is impairing the right to health as an integral part of the right to life of the class of patients who do not have near relative, willing relative or no altruistic donor to some extent.[26] In *S. Samson* v. *Authorization Committee for Implementation of Human Organ Transplantation*,[27]the respondent rejected the application of the petitioner to get kidney from a non-relative person on the ground that the donor is very young and he is not a relative to the petitioner and both of them know each other only for the last two years and suspected financial bonding was involved. The Supreme Court overruled the decision of the respondent due to lack of evidence of financial transaction between the petitioner and donor and held that impugned minutes of the respondent is vitiated by non-compliance of Section 9(6) of the THOA and observed that the action of the respondent in rejecting the petitioner's case is the result of sheer non-application of mind and arbitrary exercise of power.

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24. Ibid., Section 5.
25. See Mehul Kishorsinh Jadeja v. Amarjit Singh,(2007) 2 G.L.R. 1780(India).
26. Anju Vali Tikoo, *Transplantation of Human Organs: The Indian Scenario*, 1ILI LAW REV. 147, 160 (2017).
27. AIR 2008 Mad 227 (India).

The power of the Authorisation Committee is specifically mentioned in the Transplantation of Human Organs and Tissues Rules, 2014.[28]The Authorisation Committee has to evaluate that there is no commercial transaction between the recipient and the donor and that no payment has been made to the donor or promised to be made to the donor or any other person. Further, the Authorisation Committee has to prepare an explanation of the link between them and the circumstances which led to the offer being made. The documentary evidence of the link has to be examined andthe financial status of the donor and the recipient has also to be examined.[29] Moreover,in such case, whether there exists any affection or attachment or special reason, that would be within the special knowledge of the applicants, and a heavy burden lies on them to establish it. Relevant factors like relationship if any, period of acquaintance, degree of association, reciprocity of feelings, gratitude and similar human factors and bonds would throw light on the issues dealing with the transplantation of organ to the non-relatives.[30]

V. INFORMED CONSENT FOR HUMAN ORGAN TRANSPLANTATION

Further, the THOA emphasises on the free and informed consent in a written formfor Human Organ Transplantation.[31]Ethically justifiable organ transplantation presupposes the voluntary decision of consent from a confirmed competentdonor based on adequate information.[32] In case of the dead one, his relatives' consent is important. From this, three essential components of all types of informed consent can be derived: prerequisites,

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28. Transplantation of Human Organs and Tissues Rules, 2014, Rule 7.
29. See Mohammad Sulaiman (Pakistani National) v. Union of India, A.I.R. 2017 Delhi 9(India): 2017 (1) J.C.C. 343(India).
30. See Kuldeep Singh v. State of Tamil Nadu, A.I.R. 2005 SC 2106(India): (2005) 11 S.C.C. 122(India).
31. For detail discussion see Reeta Dar, *Presumed Consent for Organ Donation: Illusion of a Choice*, 3(10) INT J. COMMUNITY MED. PUBLIC HEALTH2691 (2016).
32. For discussion on Informed Consent, see Sougata Talukdar, *Informed Consent in Medical Practices: A Prospective Discussion*, 3(2) INT. J. SOCIO-LEGAL RESEARCH 75 (2017); B. S. Venugopal, *Informed Consent to Medical Treatment*, 46(3) J. THE INDIAN LAW INSTITUTE 393 (2004).

information, and decision.[33]On the same line, Section 12 of the THOA specifically states that no registered medical practitioner shall undertake the removal or transplantation of any human organ or tissue or both unless he has explained, in such manner as may be prescribed, all possible effects, complications and hazards connected with the removal and transplantation to the donor and the recipient respectively. Thus, until the medical procedure has begun for the organ removal operation, the donor should have the right to withdraw consent at any point and for any reason.[34]However, if any person, during his lifetime, had given in writing that his organ should not be removed after his death, then, no organ or tissue will be removed even if consent is given by the near relative or person in lawful possession of the body.[35] Henceforth, the doctor has no right to do anything to a patient without his consent.[36] The emphasis here is on the duty of the doctor, rather than on the patient's right to self-determination.[37]

VI. PREVENTION OF COMMERCIAL TRANSACTION

It is really an ambitious journey to regulate organ transplantation by promoting cadaver donation and prohibiting commercial dealings in organs.[38]Except the aforementioned preventive measures for the removal of human organs and tissues, the THOA has addressed the major issue of commercial transaction. The Act specified that only for therapeutic purposes organ can be transplanted.[39] The shocking exploitation of abject poverty of many donors for even small sums of money provides the foundation for enacting this Act.[40]From a reading of the statement of

33. T. BEAUCHAMP & J. F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS80 (5th ed. 2001).
34. C. Petrini, *Ethical Issues with Informed Consent from Potential Living Kidney Donors*, 42 TRANSPLANTATION PROCEEDINGS 1040, 1040 (2010).
35. Aneesh Srivastava, Anil Mani, *Deceased Organ Donation and Transplantation in India: Promises and Challenges*, 66(2) NEUROL. INDIA316, 317 (2018).
36. Gerald Robertson, *Informed Consent to Medical Treatment*, 97 LAW QUARTERLY REV. 102, 109 (1981).
37. Ibid., at p. 118.
38. Id. 26, at p. 160.
39. Transplantation of Human Organ Act 1994, Section 11.
40. See Kuldeep Singh v. State of Tamil Nadu, A.I.R. 2005 S.C. 2106(India): (2005) 11 S.C.C. 122(India).

objects and reasons of the enactment and the provisions of the Act, it is clear that the object of the legislation is not to prohibit, but to regulate the removal and transplantation of human organs and to prevent commercial dealings in allowing transplantation of organs.[41]On the similar terms, Section 19 declares commercial trading of human organs as offence and punishable with imprisonment for a term not less than five years but which may extend to ten years and may also be liable to fine which shall not be less than twenty lakh rupees but may extend to one crore rupees. Thus, the Delhi High Court in *Parveen Begum* v. *Appellate Authority*,[42] rightly observed that "What is prohibited is the commercial transaction in the giving and taking of organs and tissues. However, donations offered out of love and affection - even amongst those who are not near relatives, is permitted. The aforesaid scheme under the Act recognizes two of the greatest human virtues of love and sacrifice, and also the fact that such intense love and affection need not necessarily be felt only for one's own blood or spouse, but could also extend to those not so closely related, or for those not related at all".

Even for any other illegal use like offers to supply any human tissue for payment, seeks to find a person willing to supply for payment can also be punished with imprisonment for a term not less than one year but which may extend to three years and is also liable to fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees.[43] Therefore, the Authorisation Committee has to be satisfied that the authorization for removal of organ or tissue is not for commercial consideration. Moreover, by upholding the evil aspect of commercial transaction in organ transplantation, the Apex Court in *Kuldeep Singh* v. *State of Tamil Nadu*,[44] observed that the burden is on the applicant to satisfy that such donation of human organ, is not for commercial consideration, but for reasons of affection or attachment towards recipient or for any other special reasons. In addition to this, in *D. Desai Madhav* v. *State*,[45] the High Court of Andhra Pradesh concludes that whether organ

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41. See Ratnakar Peddada v. State of Telangana, 2018 (5) A.L.T. 298: 2018 (5) A.L.D 617(India); C. Seshadri v. State of Telangana, 2018 (5) A.L.T. 637(India).
42. 189 (2012) D.L.T. 427(India).
43. Transplantation of Human Organ Act 1994, Section 19A. See also *Bachpan Bachao Andolan v. Union of India*, A.I.R. 2011 S.C. 3361(India): (2011) 5 S.C.C. 1(India).
44. A.I.R. 2005 S.C. 2106(India): (2005) 11 S.C.C. 122(India).
45. 2019 (3) A.L.T. (Crl.) 20 (A.P.)(India): 2019 (2) A.L.D. (Crl.) 931 (A.P.)(India).

transplantation was done for a commercial purpose or not and whether it is in contravention of the State or Central Government are matters which have to be decided during the course of the trial.

VII. PUNISHMENT FOR COMMERCIAL TRANSACTION

The Act makes it mandatory for the institutions conducting transplantation to register with an authority appointed by the State Government.[46] The 1994 Act also empowers this authority to scrutinise donations to ensure that there is no monetary transaction involved. This authority has to enforce standards, investigate complaints and inspect the hospitals regularly to monitor quality.[47] Persons associated with hospitals conducting transplantation without proper registration are punishable with imprisonment for a term which may extend to ten years and with fine which may extend to twenty lakh rupees.[48] This would be followed by removal of the name from the register of the State Medical Council for a period of three years for the first offence and permanently for the subsequent offence.[49] Thus, it is probably for the first time in the Indian legislation that an external body has been given legal power to scrutinise and monitor the activities of medical institutions and doctors.[50] Thus, the close examination of the definition of the terms "human organ", "transplantation" and also the requirement of registration of hospitals for transplantation of human organs, it becomes abundantly clear that the registration has to be in respect of specified human organ.

The Act further enables the Central Government to take steps for storage[51] and to prescribe standards[52] for hospitals to conduct transplantation. After all these efforts, yet the legislation fails to achieve its purpose in the long run and it is important to note that till date the commercial dealings with human organs are visible in India. The lacunas

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46. Transplantation of Human Organ Act 1994, Section 10(1) read with Section 14.
47. Ibid., Section 13(3).
48. Ibid., Section 18(1).
49. Ibid., Section 18(2).
50. See K. P. Singh and Chitrangada Singh, *Human Organ Transplant: Legal and Ethical Contours*, 45(4) INDIAN POLICE JOURNAL 16, 21 (2008).
51. Transplantation of Human Organ Act 1994, Section 24(2)(h).
52. Ibid., Section 24 (2)(k).

in the law and the lack of implementation of the law are the main reasons for that.[53] Ignorance of law among donors, considerable monetary gains and feeling among offenders that they can easily get away from the law may be the reasons behind the growing menace of offences concerning human organs.[54]

VIII. REGULATORY AUTHORITIES IN CASE OF ORGAN TRANSPLANTATION AND THEIR ROLE

The "Authorisation Committee" is the primary regulating authority under the THOA, 1994. Section 2(c) defines the Authorisation Committee as any committee constituted Section 9(4)(a) and 9(4)(b). The Act requires permission from the Authorisation Committee in cases of transplantation of human organs before the death of the donor to a person who is not a near relative of the donor.[55] Under this Act Central Government and State Government have the power to constitute the Authorisation Committee.[56] It is important to note that the Authorisation Committee is a quasi-judicial authority and thus the Committee has to follow such procedures which are reasonable and in accordance with the principles of natural justice. On an application jointly made by the donor and the recipient, the Authorisation Committee shall approve the removal and transplantation of human organs.[57] Moreover, it has to inquire whether the donor is offering his organ or tissue by reason of affection or attachment towards the recipient or for any other special reasons. The 1994 Act also mandates that the approach of the Authorisation Committee in matters of transplantations has to be pragmatic and its discretion has to be used judiciously, particularly in cases which require immediate transplantation.[58]

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53. SmrithiSurendranatharya and V. Aswini Anjana, *Organ Donation and Transplant Tourism - A Legal Perspective*, 2(2) INT. J. LEGAL DEV. & ALLIED ISSUES 159, 162 (2016).
54. Prateek Rastogi, Manoj K. Mohanty and Tanuj Kanchan, *Human Organ Trade: Is Enough being Done?* 29(4) J. INDIAN ACADEMY OF FORENSIC MED. 52, 52 (2007).
55. Transplantation of Human Organ Act 1994, Section 9(3). See also P. V. Balakrishnan, *Commercialisation of Organ Transplantation: Impact on Human Rights*, 24 COCHIN UNIVERSITY L. REV. 285 (2000).
56. Ibid., Section 9(4).
57. Ibid., Section 9(5).
58. See Parveen Begum v. Appellate Authority, 189 (2012) D.L.T. 427 (India).

In this regard the Authorisation Committee of the State within whose jurisdiction the donor and the recipient belong has to ascertain the true intent and the purpose for removing the organ and whether any commercial element is involved or not. To ascertain this, the Authorisation Committees also have the power to require the applicants to furnish their income particulars for the previous three financial years and their vocations.[59] However, in such cases, the question of tissue matching and acceptability of the organ being transplanted is left to be determined by scientific and medical tests.[60]

Therefore, only in cases of transmission of the organ to the person who is not a near relative of the donor, permission from the Authorisation Committee is required. Sub-rule (3) of Rule 7 contemplates that the Authorization Committee before approving the transplantation, shall evaluate that there is no commercial transaction between the recipient and the donor and that no payment is either made or promised to be made; prepare an explanation of the link between them and the circumstances leading to such donation of human organ; reasons for such donation of organ; examine the documentary evidence of their link with proof viz., photographs; to evaluate that there is no middleman or tout involved; evaluate the financial status of the donor to ensure that there is no commercial transaction and; to interview near relative, or if no near relative is available to interview one adult person related to the donor by blood or marriage of the proposed unrelated donor.[61] However generally any transplantation of organ from the donor to its near relative does not require permission from the Authorisation Committee. But the Orissa High Court in *N. Ratnakumari* v. *State of Orissa*,[62] by considering the graveness of the transplantation issue observed that:

[N]ot only in cases of persons who are not relatives but also in case of near relatives, a joint application has to be made by the donor and the recipient before the Authorization Committee of the State to which they

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59. See Kuldeep Singh v. State of Tamil Nadu, A.I.R. 2005 S.C. 2106 (India): (2005) 11 S.C.C. 122 (India).

60. See Balbir Singh v. Authorisation Committee, A.I.R. 2004 Delhi 413 (India): (2004) I.L.R. 2 Delhi 242 (India).

61. See Ratnakar Peddada v. State of Telangana, 2018 (5) A.L.T. 298(India): 2018 (5) A.L.D. 617(India).

62. 2015 (1) Crimes 31 (Ori.) (India): 2014 (4) R.C.R. (Criminal) 955 (India).

belong to and the Authorization Committee after holding necessary inquiry can grant approval for removal and transplantation of the human organ after being satisfied that the applicants have complied with all the requirements of the Act and the rules made thereunder and after such approval is accorded, the removal and transplantation of human organ may take place in the Authorized Transplantation Centre duly registered for this purpose under the Act either in the State to which both the donor and the recipient belong to or in any other State.

In this regard, it is pertinent to mention that after the amendment to Section 9 in 2011, not only the cases of persons who are not near relative but also the cases of persons who are near relatives are also covered under Section 9. In view of Section 9(5), a joint application of the donor and the recipient is mandatory and it is only after approval of the Authorization Committee, the removal and transplantation of the human organ can be done. The Act only cast this consideration duty upon the Authorisation Committee of the State to which the donor and the recipient belong to, as they shall be in a better position to ascertain the true intent and the purpose for the authorization to remove the organ and whether any commercial element is involved or not. Therefore, the Authorization Committee after holding necessary inquiry can grant approval for removal and transplantation of the human organ after being satisfied that the applicants have complied with all the requirements of the Act and the rules made thereunder and after such approval is accorded, the removal and transplantation of human organ may take place in the Authorized Transplantation Centre duly registered for this purpose under the Act as required under Section 10 of 1994 Act either in the State to which both the donor and the recipient belong to or in any other State. Thus, in *Smt. Vandana Dixit* v. *Visitor S.G.P.G.I.*,[63] the High Court of Allahabad held that after authorization having been given by committee constituted by State Government permitting the donor to donate organ, there is no necessity for having any other authorization, from any other authorization committee including hospital-based authorization committee.

Further, after making the inquiry and giving an opportunity to the applicants of being heard, if the Authorisation Committee is satisfied that the applicants have not complied with the requirements of the Act, it

63. (2010) I.L.R. 3 All 1058 (India).

would reject the application by recording reasons in writing.[64] Moreover, the order of the Authorisation Committee is appealable under Section 17 of the Act. Thus, the donor and the recipient has the opportunity to question the correctness of the decision of the Authorisation Committee and the appellate authority also have the power to convert the rejection of the application into approval, if it finds that the applicants have complied with all the requirements of the Act. In all these events, all such orders are subject to judicial review.[65] Thus, this quasi-judicial Authorisation Committee regulates the organ transplantation mechanism in the State level as well as in the Central level.Although the primary aim was to curb the commercial transaction relating to organ donation, the functions of Authorisation Committee can characterize as a mobilizing factor of securing the right to live with better health for an extended period for the patients suffering from organ failure difficulties. Moreover, the transplantation of the human organ endangers the life of the donor and, therefore, the Authorisation Committee has to be more vigilant for preventing the trafficking of the organs which is the main thrust of the Act.

Apart from this Authorisation Committee, another implementing authority under the Act is the Appropriate Authority. Similar to the Authorisation Committee, the Central Government and State Governments have the authority to appoint Appropriate Authority to grant registration to the hospitals, to suspend or cancel such registration, to enforce the requisite standards in those hospitals, to inspect hospitals periodically.[66] Thus, where the Authorisation Committee controls the organ transplantation from the ends of the donor and recipients, the Appropriate Authority controls the standard of organisation or hospitals which has the capacity to secure the medication part of transplantation. The appropriate authority has the capacity to decide any the complaint after giving an opportunity of being heard to the petitioner and also has to consider and decide the complaint as expeditiously as possible.[67] After

64. See Transplantation of Human Organ Act 1994, Section 9(6). See V. Jha, *Towards Achieving National Self-sufficiency in Organ Donation in India - A Call to Action*, 24(5) INDIAN J. NEPHROLOGY271 (2014).

65. See Nagendra Mohan Patnaik v. Government of A. P., 1997 (1) A.L.T. 504 (India): 1997 (2) A.L.D. 83 (India).

66. Transplantation of Human Organ Act 1994, Section 13.

67. See Major Pankaj Rai v. State of Karnataka, A.I.R. 2013 Kant 73 (India): 2013 (2) A.K.R. 8 (India).

the enquiry and after satisfying itself, the Appropriate Authority has a duty to grant a certificate of registration which will be valid for a period of five years from the date of its issue. One of the conditions for grant of such certificate is that experts of relevant and associated specialities including but not limited to and depending upon the requirement, the experts in internal medicine, diabetology, gastroenterology, nephrology, neurology, paediatrics, gynaecology, immunology and cardiology, etc., should be available in the transplantation centre.[68] Thus, it is very clear that no hospital can get a certificate of registration under the Act unless it fulfils the said requirement of specialized services.

Under the THOA, the Appropriate Authority is authorized to investigate cases of breach of any of the provisions thereof, whether penal or otherwise.[69] Therefore, only the Appropriate Authority can file complaint before a concerned Court as per Section 22 of theAct to take cognizance of an offence and if a private person wants to file any complaint directly, he can do so only after giving notice to the Appropriate Authority of not less than 60 days describing his intention to make the complaint directly to the Court. In case the Appropriate Authority feels that it is not a fit case to make a complaint in spite of receipt of notice of the private person or in case it sleeps over the matter then after expiry of 60 days of notice, the private person can make the complaint directly to the Court.[70] Thus, both the Authorisation Committee and Appropriate Authority are regulating the implementation of the law relating to the human organ in India.

IX. CONCLUSION

However, in India, after making all these efforts the number of transplantations is still very low. It is an admitted fact thatbefore the enforcement of the THOAthere was no effective law in India for regulating transplantation of organs in human beings, as a result of which many scams were detected, where human organs were purchased and sold for a price and at times even without making it known to the patient or persons

68. See Transplantation of Human Organs Rules 1995, Rule 9A (7).

69. See Jeewan Kumar Raut v. Central Bureau of Investigation, A.I.R. 2009 S.C. 2763 (India): (2009) 7 S.C.C. 526 (India).

70. See N. Ratnakumari v. State of Odisha, 2015 (1) Crimes 31 (Ori.) (India): 2014 Cri L.J. 4433 (India).

for whom such organ was extracted with the assistance of doctors without their consent therefore with a view to check, control and protect the innocent persons, for becoming the victims of unscrupulous people, including the Doctors and their staff, the THOA is playing a pivotal role in Indian medio-legal scenario.

However, it must be remembered that everyone is free to protect his life under Article 21 of the Constitution of India. Similarly everyone has the right to receive medical treatment and medical aid. This may include transplantation for therapeutic purposes of an organ of a living person or deceased person for systematic treatment of any disease or the measures to improve health according to any particular method or modality. This cannot, however, by any stretch of imagination be extended to taking someone else's life to save one's own life. Therefore the THOA, 1994 has made an effort to choose a middle path. There is a great mismatch between the number of potential donors and actual cadaveric donors. Even in the case of individuals who have given consent for donation after death, the influences of the familial members might change the actual decision. Lack of awareness, superstitions, delay in funeral, lack of agreement between family members, fear of social criticism and dissatisfaction with the hospital staff might all influence their decision. It is here that the involvement of other stakeholders, non-governmental organizations and religious leaders would help in imparting awareness and knowledge and in changing the attitude of the general public towards deceased organ donation. Moreover, the definition of Organ transplantation is incomplete in nature. It should include organs which could re-grow over a period of time and not immediately like- skin within its purview. It is relevant to mention that organ donation to a non-relative without any commercial transaction is a myth which the legal fraternity accepts as a truth. This issue of commercial exploitation can be addressed by specifying amount of monetary consideration for specific organ. In regards to the efficiency of the Authorisation Committee, more time specific action is required and administrative requirements should ease out on factual basis. Thus, though the THOA already travelled along way from its inception, but it has the potential to serve and popularised the organ transplantation in the Indian socio-legal scenario.

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TRADE SUBSIDIES AND HUMAN RIGHTS: A CRITIQUE ON WTO FROM DEVELOPING NATION'S PERSPECTIVE

BONGURALA GANGADHAR*

ABSTRACT : According to the UN Human Rights Office (OHCHR) and United Nations Development Programme (UNDP) joint report statement, trade agreements invariably effects the human rights of the people from developing countries and the inability of these countries to regulate and protect the human rights of their own people where the trade agreements are negotiated without reference to their impact on the basic rights to food, health, education, work and water.The main purpose of this paper is to explore the issues of human rights analysis where the trade agreements between different nations directly or indirectly effects the enjoyment of human rights and these nations while adopting trade agreements need to focus on protection and promotion of human rights.The violation of human rights arises when one government believes that another government who is the party to such trade agreements under WTO rules favours developed countries on issues related to taxes, tariffs and customs. In this scenario a trade policy of one country may have a negative impact of the enjoyment of human rights of another country, such as the impact of farming subsidies in developed countrieseffects the right to food, the concept of trade related intellectual property rights effects the right to health of the people from developing countries. The paper also focuses on the failure of the WTO to include human rights in their Dispute settlement mechanism and points about the processes and methods that needed to make a balance between the trade subsidies and human rights for the development of humanity as a whole.

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KEY WORDS : International Trade, Human Rights Violation, Dispute Settlement Mechanism, Trade Balance, Trade Disputes, Agreement on Agriculture.

I. INTRODUCTION

The World Trade Organization (WTO) is an organization for liberalizing the trade through trade facilitation for its member countries. Trade liberalization is one of theaspects that the WTO has adopted to help its Member countries to achieve economic growth and raise the standard of living of the people living in the world. In contradiction to the above statement, the WTO recognizes the rights of the member countries on issues related to the right to maintain trade barriers for trade facilitation on the basis of the subject to the conditions provided in the provisions of the WTO Agreements. The main objective of such trade barriers is to serve the legitimate objectives for the protection of plant, animal and human rights, right to health or protection of consumer rights. For trade barriers versus human rights, the WTO needs to strike a balance between the trade liberalization and flexible opportunities for its member countries to meet the policy guidelines.

The agreement which binds for the establishment of the WTO recognizes the importance and need for the purpose of developing countries through positive efforts and it also specifies special need to focus on the least developed countries (LDCs) from amongst the developing countries for its considerable share in the trade development as a whole for the world community. The concept of focus on LDCs is firmly affirmed at the Doha Declaration of 2001 popularly known as the Doha Development Agenda (DDA), where it recognised for the holistic development of member countries where it states as follows:[1]

> "There is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".

The reform policies in developing nations after the agreement of WTO in 1995 significantly weakened the institutional support for

1. WTO Secretariat, The WTO and the Millennium Development Goals - Trade and Development, WTO, (Sept, 2019).

agriculture. The protection offered to agriculture from developed nation's imports was removed and in return it resulted in falling of market prices for such agricultural produce. The developing nation's agricultural exports face certain constraints that arise from conflicting domestic policies relating to production, storage, distribution, food security and pricing concerns. The implementation of AoA and TRIPS had a direct impact on lives of poor and vulnerable farming community around the world. The policies which are protecting the developed nation's farming sector are critically affecting lives of billions of people who depend on agriculture in developing countries. This study shows the impact of AoA and TRIPS on violation of human rights in developing countries with evidences from the various parts of the world. The study provides a framework under which the developed nations adopting to pursue their demands in a legitimate manner through illegitimate route of aggressive patenting process and destroying the traditional knowledge in the vulnerable areas of the world. There is a need for the members from developing nations to pursue their demands in larger public ineptest to protect and preserve the plant varieties and communities.

The study provides a scope to understand the impact of WTO on developing nations with special emphasis on the trade subsidies and human right violations with the trade liberalization. It gives an overall knowledge on various provisions of AoA and TRIPS being used by developed nations to appropriate the traditional knowledge and markets for their economic development rather than benefiting the poor and vulnerable communities. The study has some limitations as the research conducted with the special focus on the provisions of AoA and TRIPS by looking into the secondary sources of data rather than employing empirical research due to lack of time.Here there exists a fundamental question from the developed countries to focus on trade policies that balance the economic development with the social and human rights perspective to make the policies more sustainable and inclusive in nature.

II. TRADE SUBSIDIES AND HUMAN RIGHTS

Subsidies are part of main agenda for the party in power to please the voters and at the same time helps for providing a boost to the people below poverty line to come out of it, so, subsidies are moreover becoming a tool for the countries throughout the world to frame government policies and programmes. The various forms of subsidies may be in the forms of

grants, export credit, low interest capital, tax deductions, tax exceptions etc. As per the WTO's document on Subsidies and Countervailing duties specified in Part II, Chapter 6 specifies six kind of subsidies, are as follows, 1).Export subsidies, 2).Subsidies contingent upon the use of domestic over imported goods, 3).Industrial promotion subsidies, 4).Structural adjustment subsidies, 5).Regional development subsidies and 6).Research and development subsidies.[2]

The terminology of WTO uses the word "Boxes" in place of the word "Subsidies", these boxes specified by the WTO usually works like a traffic signal system in our daily life. There are three boxes specified for the purpose of subsidies, they are namely, Amber box, Blue Box and Green Box. The subsidies which are permitted by WTO without any restriction comes under green box, amber box to keep caution for need for the reduction of subsidies with a cap of 5% for developed countries and 10% of total agricultural output for developing countries, blue box are of a kind of subsidies that are tied to the policies and programmes of the country to limit production with some exceptions to the developing countries where it directly controls farming community.

India is a country on one side with a potential powerhouse in agriculture and on the other hand a country with a struggling need in feeding its rapidly growing own population and faces a dilemma in balancing the both in right direction due to its financial problems.[3]This structural problem of agricultural labour and dependent countries such as India, Brazil are likely to exceed the benchmark subsidy percentage so specified in blue box of the WTO and these countries are near to the problem of exceeding 10% threshold in coming years.[4]The right to food programs adopted by developing countries along with other likeminded nations through the G-33 Group under the leadership of India submitted a proposal to the WTO to allow the 10% threshold limit for their nations permanently to balance the rural economies.[5]After the G-33 proposal was

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2. WTO Secretariat, Part II Chapter 6 Subsidies and Countervailing Measures, WTO, (Sept, 2019).
3. Islam Siddiqui, The Politics of Food Security and the World Trade Organization, Centre for Strategic International Studies, (Dec 18, 2014).
4. Kym Anderson & Anna Strutt, Food security policy options for China: Lessons from other countries, 49 FOOD POLICY 50–58 (2014).
5. WTO Secretariat, Understanding the WTO - Agriculture: Fairer Markets for Farmers, World Trade Organisation, (Sept, 2019).

being put by these nations there was a big debate in the Geneva deliberations for its preparation for the ministerial conference of Bali which was being held in the end of year 2013. At the time of framing the food security policy for the nation, many of the intellectuals around the world debated the dictating power of the developed countries through WTO as an atrocious move.[6]

The Parliament of India in the month of September, 2013 has passed the food security law to provide a basic right to the individuals of the country for access to the staple food items at the subsidized rates to almost two-third of the population of the country.[7]This bold decision of the country before the general elections meant to double the expenditure on food subsidy and needs a massive food stocking and acquisition at a cost of about $20 billion potentially violating the WTO commitments that are adopted through the Uruguay Round. At the same time the Indian Delegation to the WTO at the instance of developed nations claimed that there is no need for the WTO's permission to rollout their food security law in the country and tried to push back in a way either to pushing back the WTO to relax rules or at the same time to provide relaxation on WTOs Agreement of Agriculture through a permanent waiver of 10% subsidy threshold limit.[8]India at the Bali Summit in 2013 negotiated with the WTO through a temporary arrangement of the "peace clause". The "peace clause" specify that there should not be any provision to legally bar the nations to implement its food security programs which is fundamental to the survival of the people even if such subsidies exceeds the threshold limit of 10% as mentioned in the WTO's AoA. The Bali Summit provided for the provision of peace clause for a period of four years till 2017, so that it becoming easy for the WTO and its member nations to come to a permanent solution to the issue.[9]

The ministerial decisions at the Nairobi Meet of the WTO have given importance on agriculture with coverage of Special Safeguard Mechanisms for the members of developing countries for the purpose of food security. The decisions of the Nairobi meet included the issues to abolish the export

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6. See Supra note 3.
7. The National Food Security Act, 2013.
8. Mint, India notifies farm subsidies to WTO, claims no breach of limits, Livemint, (Sept 11, 2014).
9. ArvindJayaram, All you wanted to know about: Peace Clause, Business Line, (Aug 4, 2014).

subsidies for farm exports and provisions related to issues of Cotton.[10]India along with the other developing countries wants a clear and permanent solution on the pending Doha Round's issue like the commitment of the developed countries to cut down the farm subsidies in their policies but the developed countries such as US and European Union were not arriving at a consensus aver issues of agriculture but at the same time they want the WTO to discuss on the issues such as e-commerce, government procurement and investments.[11]

The theory of comparative advantage put forwarded by the David Ricardo argues that the country which has sector or industrial expertise boots its economic growth by focusing more on the same sector/industry rather than diversifying to other sectors. This forms the basis for the trade liberalisation and subsidisation around the world. The theory of comparative advantage provides a basis for explaining how the trade protectionism of some countries does not work for the growth in long run.[12] The political leaders of the country are more involved in protecting their seats and bring trade protectionism local problems of unemployment, growth problems and others which are only a temporary method to solve the problems. In long run in effects the performance of a nation and allows the countries to waste resources on unsuccessful industries. It also forces the consumers to pay higher prices for the domestic goods.

Through absolute advantage countries perform more efficiently in their sectors of specialisation which may include advantages of having large farm lands, irrigation facilities and cheap labour. The countries having absolute advantage doesn't mean that they are in comparative advantage to those particular products over other countries. When it comes to strict implementation of trade subsidies related provisions in developed and developing nations, the fruits of the economic growth are seen in both sides.[13] The agreements of AoA, TRIPS and SPS helping developed nations

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10. The outcomes of the WTO's Nairobi meet include ministerial decisions on agriculture covering a Special Safeguard Mechanism for developing countriesand public stockholding.
11. Bureau, India to soon ratify WTO trade pact: Commerce Secretary, Business Standard , (Feb 9, 2016).
12. TejvanPettinger, Definition of comparative advantage, Economics Help, (Nov 5, 2019).
13. Ahana, David Ricardo's Theory of Comparative Cost Advantage, ECONOMICS DISCUSSION, (Sept 20, 2018).

to have more comparative advantage than the developing nations with their control over trade. For example the soybean crop in India in year 1996 constituted 20% to the total oilseeds and making India the fifth largest country of oilseed producers but the reduction of trade subsidies from 1996 to 1998 made the soybean production to come down to 10% pushing out the Indian farmers out of the race to cultivate soybeans.

The international human rights law lays down certain obligations on part of the Governments to act and proceed in certain ways and to act to refrain from certain ways to promote and protect the fundamental freedoms and human rights of the individuals, groups, communities, societies or nations as a whole. The main achievement of the United Nations in protecting the human rights of the member countries through the creation of comprehensive body of human rights law to protect the interests of the international community, the United Nations over a period of time defined a broad range of internationally accepted and appreciated rights such as civil, economic, political, cultural, social and trade related rights.[14] The contrasting and conflicting relation between the fundamental concepts of trade and human rights cause differences to the view point, as human rights law is seen as neutral with respect to the trade liberalisation, due to its focus on outcomes and processes, the free trade in international trade law conflicts between the trade liberalisation on one side and protectionism on the other.

The approach of trade community towards the human rights has the same approach towards the liberalization; both human rights and free trade are taken as tools that provide desired outcomes in same or the other manner. In international trade, trade related rights are provided for attainment of comparative advantage over the other through efficient trade practices. This process of importance to human rights turns human beings into pawns in to the pursuit of great wealth rather than protecting the individual rights of a human. In other words, human rights are about value system and accountability, trade is all about the notion of efficiency and profit. The conviction of liberalisation of trade is a kind of means to achieve the desired ends of human rights is a misleading concept. The designation of the policies which limits the trade to preserve the dignity for right to survival of the individual looks as a trade liberalisation to the

14. Human Rights, (2016), https://www.un.org/en/sections/issues-depth/human-rights/ (last visited Sep 22, 2019).

trade barriers. Reducing the human beings as tools of liberalization and claiming that the fundamental concept of the trade increases the human rights may undermines the value system of human rights, which detaches them from the foundation of human beings from the human dignity.

III. AGREEMENT ON AGRICULTURE

The fundamental trinity of the Agreement on Agriculture which came into force in 1995 focuses on market access which deals with the commitment on protection against imports at the borders of the nation, domestic support which provides for binding rules for self-disciplines by the member countries on subsidizing governments to reduce the trade-distorting policies and export promotion through reduction of existing export subsidies to play a level fielding role. The developed nations on one hand providing high domestic support and subsidies to the native agriculture sector and at the same time forcing the developing nations to reduce tariff based and non-tariff based barriers to the trade in agriculture. This in return providing a implication for lower prices for agriculture products directly affecting small and marginal farmers in developing nations forming a violation of their basic fundamental and human rights in a legitimate manner.

There are about 1.1 billion people in the world living in extreme poverty subsisting on less than a dollar per day beginning from the twenty first century facing problems of food security for their survival.[15]The AoA of the WTO affects the food security of the developing nations in two ways. Firstly it increases the food insecurity by exacerbating the iequality and rural poverty.[16]Secondly it hampers the developing nations to adopt the food security measures in their countries.Empirical evidences of various Non-Governmental Organizations and UN Agencies has shown the impact of trade liberalization of agriculture directly affecting the food security in developing countries.[17] The UN Food and Agriculture Organization's study in 1999 in 16 developing nations expressed its concerns over the Agreement on Agriculture showing market liberalization

15. The World Bank, Nearly Half the World Lives on Less than $5.50 a Day, WORLD BANK , (Nov 1, 2019).

16. World Trade Oorganisation, Food Security, (Nov 1, 2019).

17. Carmen G. Gonzalez, Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries, 27 Colum. J. Envtl. L. 433 (2002).

and structural adjustment programmes had adverse effects on the food security.[18]

The studies shows that trade liberalisation has given rise to the raise in the prices of farm inputs directly affecting the small and marginal farmers making agriculture unproductive, they are forced to pay more for agricultural inputs and receiving less from the produce sale at the markets.[19]Trade liberalisation in the economic terms has worsened the balance between output and input costs of the agriculture.[20]With the Trade liberalisation Trans-National Companies in India, Cambodia, Philippines and Uruguay shows that liberalisation helped them to grow them many folds at the expense of the poor. Women who become part of 60-75 per cent in Asian and African countries has been affected adversely with the reduction of subsidies with problems of credit and raise in the imports directly affecting their food security.[21]In most of the developing countries women has the responsibility in bringing food to the family table but raise in the farm inputs under trade liberalization is under serious pressure for food self-sufficiency, food sovergnity shown by many such studies.[22] In the year 1994, India was the fifth largest producer of soybeans only after the US, Brazil, Argentina and China accounting to 20% of the total oilseeds production but the sudden cut downin import tariffs on the edible oils from 65 to 15 per cent in between 1995 and 1998 tremendously reduced the Indian oilseed farmers shifting towards other crops making oilseed production ineffective.[23]

IV. TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

This agreement is one of the most comprehensive international

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18. Ramesh Sharma, Developing country experience with the WTO Agreement on Agriculture and Negotiating and Policy issues, in IATRC Summer Symposium, Vancouver, Canada (2002).
19. EPHRAIM CHIRWA& ANDREW DORWARD, AGRICULTURAL INPUT SUBSIDIES: CHANGING THEORY AND PRACTICE (2013).
20. John Madeley, Trade and Hunger, Grain, (Nov 5, 2019).
21. International Monetary Fund, Global Trade Liberalization and the Developing Countries — An IMF Issues Brief, (Nov 1, 2019).
22. Food and Agriculture Organisation, Chapter 3. Trade liberalization and food security: conceptual links[42], (Nov 2, 2019).
23. John Madeley, Trade and Hunger: An Overview of Case Studies on the Impact of Trade Liberalization on Food Security, (Oct. 2019)

agreements on intellectual property rights protection and enforcement for the member countries. It covers most forms of copyright, patents, trademarks, trade secrets, industrial designs, geographical indications, and exclusionary rights over new plant varieties for their judicious use.After 1995, most of the member nations adopted progressive legislations in their respective countries started making or amending the laws surrounding around TRIPS. Article 27 of the TRIPS Agreement provides a scope for the member nations for patentability and non-patentability of various trade related aspects which include both products and processes generally covering all the fields of technology. But at the same time the Article 27.3(b) allows governments to exclude some kinds of inventions from patenting such as plants, animals and "essentially" biological processes and also the plant varieties need to be eligible for protection either through patent protection or *sui generis* or a combination of both.

Article 27 of the TRIPS has controversies over the patenting provisions of plants, animals and biological process.[24] The patent registration regime changed from product to processing patenting directly affecting the traditional and indigenous knowledge from the developing nations to be misappropriated by the TNCs from developed nations for capital gains. With the process patenting these TNCs started introducing termination technology in seeds making them sterile and mostly benefiting the Bio-Tech companies rather than helping poor and marginal farmers from the developing nations. The research studies at Nature Journal shows that aggressive patenting in developed nations after 1985 helped to patent 3/4th of the existing gene pool in the hands of private companies of which half of them are existing with the 14 large TNCs of the world.[25] The World Bank's Seed Policy Program as part of LPG reforms provided a scope for the patenting of seed varieties but at the same time it failed to regulate and hold the private companies responsible for seed failure due to genetic contamination. The exploitation of Traditional Knowledge from the developing nations with the aggressive patenting regime under TRIPS in developed nations gave rise to a number of trade disputes with the help of Civil Society Organizations and Human rights activists around the world.

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24. WTO, Trade Related Aspects of Intellectual Property Rights, Article 27.
25. Lucas Laursen, Monsanto to face biopiracy charges in India, 30 NATURE BIOTECHNOLOGY 11–11 (2012).

V. DISPUTES CONCERNING THE TRIPS AGREEMENT

Basmati Rice is aromatic rice grown in Indian and Pakistan for centuries as the farming community in these regions developed, nurtured and conserved the variety with their traditional knowledge. But the US Patents Office granted a patent to a company named Rice Tecfor a strain of Basmati Rice naming it as Texmati.[26]In a patent application to the USPO in 1997 Rice Tec, acknowledged that the good quality Basmati rice traditionally comes from the parts of Northern India and Pakistan. But the Indian Government had pursued only 3 claims out of 20 claims of the Rice Tecoriginal patent application. The Indian Government challenged claims regarding starch index, aroma, and grain dimensional characteristics rather than arguing the traditional knowledge.[27]The TRIPS Agreement does not provide member countries to provide patent to the plant varieties, they need to be protected under Article 27 of TRIPS but United State made an aggressive legislation to grant patent to the plant variety, violating the human rights of the farming community in Indian and Pakistan.

Indian community uses turmeric in medicine, food ingredient and other traditional uses. It has properties of anti-biotic, anti-parasitic and anti-inflammatory properties making it a widely used ingredient in Ayurveda. United States Patent office granted patent on turmeric to University of Mississippi Medical Centre (UMMC) in the year 1995 for its wound healing properties. The Indian Council for Scientific and Industrial Research (CSIR) has objected the USPO for granting patent to UMMC and submitted 32 references from various sources from Sanskrit, Hindi and Urdu literature to authenticate the exclusive use of turmeric by the Indians from since Vedic period.[28] With the evidence submitted by the CSIR to USPO helped to protect and preserve the use of turmeric through traditional knowledge attached to it. The process patenting helping the TNCs from developed nations to exploit the basic rights of the vulnerable communities living in developing countries.

The debate for the neem started when W. R. Grace and Department of Agriculture, USA filed an application in the European Patent Office (EPO). The patent seeks to protect the anti-fungal characteristics of the

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26. Cheshta Sharma, Traditional knowledge and Patent Issues, IIPTA (2017),
27. R.K Dewan& Co, Basmati Wars - Intellectual Property – India, Mondaq (2016).
28. Krishna Tulasi & SubbaRao, A detailed study of patent system for protection of inventions, 70(5) Indian J Pharm Sci., (Sept-Oct, 2008).

neem oil formulation in agriculture. New Delhi based Research Foundation for Science, Technology and Ecology (FSTE), International Federation of Organic Agriculture Movements (IFOAM) filed a complaint against the said party arguing before the EPO that the use of neem and its various parts as a traditional knowledge for curing variety of diseases such as leprosy, diabetes, ulcers and skin disorders. The also showed the EPO that the hydrophobic extracts of neem seeds used for curing skin diseases and also protecting agricultural plants form fungus. With the lack of novelty, the EPO revoked the patent.[29] The decision of EPO made possible for the USPO to take back its patents on neem based products from various TNCs.

The indigenous people of the African using Madagascar periwinkle for its medicinal properties to cure leukemia and indigestion, the components of the said plant are patented and sold by TNCs and earning a huge profits by appropriating their use. Many NGOs, environmental and human rights activists around the world arguing that big transnational pharmaceutical companies are engaging in bio-piracy with use of Madagascar periwinkle. Pharmaceutical manufacturers aren't the only ones accused of product piracy.[30] Due to colonisation, the transfer of plant varieties from African continent taken place and at present it is witnessing the misappropriation of such plant varieties by the developed nations for monetary gains. The aggressive patenting of developed nations to TNCs is a mere violation of rights of indigenous people.

The indigenous communities around the Amazon basin using bark of *Banisteriops is caapi*to produce ceremonial drink called as *Ayahuasca*. The Shamans of the Amazon basin use this use *Ayahuasca* (Wine of the soul) in their daily use to diagnose and treat illness, meet spirits, and divine the future. In USA, Loren Miller obtained patent rights over an alleged variety of *Banisteriopsiscaapi* which he had collected from Amazon basinpotential medicinal properties. About 400 indigenous communities from Amazon basin along with the Body of Indigenous Organisations of the Amazon Basin (COICA) protested for the patenting of such traditional knowledge and filed a complaint with the USPO and on re-examination

29. Keith Aoki, Neocolonialism, Anti Commons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection, 6 IND. J. GLOBAL LEGAL STUD., (1998).

30. Deutsche Welle, Biopiracy rips off native medical , Deutsche Welle, (Nov 5, 2019).

revoked the patent to the Amazon tribes as their traditional knowledge but in 2001 again the USPO granted original claims to Loren Miller.[31] This kind of incidences by the developed nations on process patenting making the indigenous communities around the world has vulnerable.

VI. INDIA'S STAND

India which is the second most populous nation of the world at presently facing the problem of food security for its citizens, one-fourth of the undernourished population of the world resides in India. India wants a protective measure from the WTO for its log holding demand for the exemption for public stockholding programs focussing on basic amenities. India demands to move such subsidies to the green box of the WTO agreements so that countries like India and others may benefit from the initiative.[32]India claims that the protective measure from the "peace clause" lasts till end of 2017 but the developing countries along with India wants an exception from the legal challenges till the permanent solution to the issues comes as the 2017 ministerial conference failed to arrive at consensus and all the decisions of Nairobi meet holds on food subsidies.[33]

Indian government at the WTO agreed to phase out all its export subsidies in agriculture including flexibilities in marketing and transport facilities by the year 2023.[34]The countries like India, China and Brazil which has large market base can negotiate for the Special and Differential Treatment in market access with their potential demands but these nations are not demanding at present for such provisions as it hampers the trade of LDCs in very badly as at present such provisions are enjoyed by the LDCs.[35]India at present also not agreeing to the removal of Doha Development Agenda and does not want the issues of demand put forwarded by the demands of the US and EU which are pressing for the

31. Michael F. Brown, Who Owns Native Culture?,6 Economic Law Review, 136 (2003).
32. Kimberly Ann Elliott, Food Security in Developing Countries: Is There a Role for the WTO?,Center For Global Development.
33. The Politics of Food Security and the World Trade Organization, Centre for Strategic International Studies, Washington.
34. Our Bureau, India needs road-map to phase out farm export subsidies: Teaotia, Business Line, (Feb 9, 2016).
35. Our Bureau, India needs to phase out farm export subsidies: Commerce Secy, Business Line, (Feb 9, 2016).

change in policy from the WTO.[36] India at present stands on the deliberations of the Doha Development Agenda as it addresses the legitimate and immediate interest of the poor farmers from the developing countries for their survival.

VII. RESPONSE OF THE INTERNATIONAL COMMUNITY

India at the WTO was not in a line of consensus for the implementation of agreement on trade facilitation because it did not that it is going to solve any one of its pertaining issues with a permanent solution to the concern of food security. US along with EU and other negotiators agreed to shift the deadline for a permanent solution by the year 2019 from its 2017 ministerial conference.[37]The WTO's protocol of the purpose of ratifying the trade facilitation agreement began from the year 2014 after the India has started negotiating for its food security laws as India refused to support the move as it wants other members of the WTO especially the developed nations to agree to grant a permanent waiver against the legal challenges involved to the developing countries for their food stockholding programmes.[38]India at the WTO's deliberations is agreeing to ratify the trade facilitation agreement on goods which are aimed at relaxing the custom rules for a smooth trade flow but at the same time India along with similar developing nation wants such provision to services also because Indian economy is driven by service sector and it is the main area for most developing countries.[39]

The US may not be in a position to mind on the procurement and stocking policy for food security until unless it's going to distort the international trade. In the last two to three years India is exporting over 12 million tonnes of wheat largely from its public stock.[40]The US at the upcoming WTO negotiations may insist for the refrain from the exporting of grains such as rice and wheat which are procured exclusively for the

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36. Supra note at 15.
37. AsitRanjan Mishra, WTO deal: India refuses to back down on Trade Facilitation Agreement, Livemint, (Jul 26, 2014).
38. NirmalaSitharaman, India's Stand in the WTO, Press Information Bureau, (Aug 5, 2014).
39. FE Bureau, India to ratify TFA on goods soon ,The Financial Express, (Mar 21, 2017).
40. Harish Damodaran, Understanding the permanent solution at WTO, The Indian Express, (Nov 17, 2014).

domestic food security purposes. Developed countries such as US, Canada and EU are pressing developing countries mainly India to make concessions under Doha round to be withdrawn for the international trade but at the same time they are failing comment on the trade distortion and concessions they are providing to the domestic sector of the such nations whereby they are deflecting their attention from their own failures to perform for the progress of the trade facilitation.[41]The US from the year 2005, has successfully diverted the attention of the world from its inability to cut the subsidies on cotton which is a crucial element for the negotiation.Now the WTO's agreements are shifting the own blame on other countries such as India for the failure to negotiate for trade subsidies.

VIII. CONCLUSION

The establishment of World Trade Organisation helped a lot to facilitate the trade liberalisation among the member nations to remove trade and non-trade barriers very effectively. It made entire world into a global market with reduction of subsidies and protectionist economic practices but at the same time the domination of developed countries for their lobby with the TNCs making the some of the provisions of the WTO such as Agreement on Agriculture and TRIPS Agreements making vulnerable to the small and marginal farmers across the world. The implementation of AoA is not taken properly by the developed nations for cutting their subsidies in their countries, they also facilitating for the trade subsidies to benefit the domestic markets in their countries. The implementation TRIPS negatively impacting the farmers and indigenous communities around the world to face problems of gene pool appropriation of plant varieties through exploitation of their traditional knowledge. It is the duty of the developed nations to protect the interests of such communities and transfer the technological and skills to the developing nations to facilitate for the Sanitary and Phytosanitary measures to boost the economies of developing nations through trade liberalisation and reducing the violation of human rights.

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41. Abhijit Das, Showing spine at the WTO negotiations, The Hindu, (Jul 16, 2015).

BOOK-REVIEW

Book on *E-Governance Regulatory Measures in India (A Case Study of Uttarakhand State)* (First ed., 2018), by Laxman Singh Rawat, University Book House, Jaipur, Pp. XV + 278, Price 1995/-

The Information and Communication Technology (ICT) revolution provides basis to the core concept of e-governance. The concept of e-governance is the use of ICT with the aim of improving information and service delivery, encouraging citizen's participation in the decision-making process and making government more accountable, transparent and effective. Thus, e-governance embodies qualities like good governance such as accountability, responsiveness, transparency and efficiency. It is generally understood as a use of ICTs for some fields of service areas, such as e-health, e-social service, e-education, e-enabled public utility services, e-courts, etc. Since e-governance is contemporary and recent development in India, in this present book, Dr. Laxman Singh Rawat, analyzed e-governance and its regulatory measures in India and articulated key issues, approaches and future challenges relevant to the e-governance, addressing technology-based approaches in its wider contextual focus. This book primarily examined how far the e-governance has contributed to achieve the objectives of good governance in India through the case study of Uttarakhand State.

This present work is divided into three parts, consists of ten chapters. The first part of this book brings focus on preliminary aspects of e-governance which introduces the subject matter with conceptual discussion on e-governance, governance and good governance. This part primarily examines theoretical foundation of e-governance, phases and interactions of e-governance and highlights advantages and disadvantages of e-governance. This part also identifies the problem of various regulatory aspects of e-governance. Further, the second part of this book focuses on e-governance regulatory measures in India. This part presents analysis on Policy and Law relating to e-governance in India viz. discusses the shift of policy intent from 'National e-Governance Plan' to 'Digital India' programme, and analyses various provisions of 'Information Technology

Act, 2000', 'Right to Information Act, 2005' and 'Aadhaar Act, 2016' relating to e-governance have been examined. Furthermore, the third part of the book brings focus on industrialisation in State of Uttarakhand in the light of State Industry Policy 2003 and 2008. It also throws lights primarily upon the Uttarakhand Information Communication Technology Policy, 2006. It also presents the status of e-governance initiatives in State of Uttarakhand. Finally, this book sum up with relevant suggestions on the basis of interpretation of regulatory measures of e-governance discussed in various chapters.

In this book, the author shared his understanding in e-governance and regulatory measures in India in general and Uttarakhand in particular. It explores a new insight for and between law and science & technology inter-relations. It addresses technology-based approaches in its wider contextual focus, means that the subject-matter of the book will be of great relevance to those interested in the broader topics of regulatory mechanism of e-governance. While the detailed study of e-governance initiatives is drawn exclusively from State of Uttarakhand, many of the concepts, arguments and messages of the book are relevant to e-governance understanding for other States of India too.

The author explained how the rapid pace of technology at which this e-governance is developing, poses a wide range of specific problems for law and it raises a immediate question of legal regulation and legal liability. Although law too, is trying its best to address squarely these problems, still there is a gap between technological development and law because the slow pace of law-making resulting from the very nature of itself which depends for its success on the existence of a necessary political will, enlightened public opinion and conducive social environment. But if law has to remain relevant and effective in a society, it will have to continuously evolve itself in response to challenges and problems created by technology. Technology, however, presents particular challenges to law-makers, primarily due to the pace of change that occurs in the subject matter itself, e.g. software, computers and networks, and the manner in which such technology is utilized. However, translating policy objectives into workable laws and regulations can obviously be a difficult task in any area of human endeavour.

It may be noted that the author selected Uttarakhand State as a case study for this book to explore how far e-governance has contributed to achieve the objectives of good governance. The Government of

Uttarakhand promises to leverage benefits of information technology for the growth of the State. The author highlighted the geographical inequality in State of Uttarakhand, the hill region districts are less developed than plain region in terms of infrastructure i.e. electricity, roads, irrigation etc, which leads to economic disparity in the State which faces the challenge of promoting livelihoods to retain citizen through local employment and income generation and to enhance their quality of life. However, the formation of the new State created high expectations related to development and better living standards of people of State of Uttarakhand. The vision of the government aspires to reduce various divisions such as the digital divide, economic divide, literacy divide and the social divide. With knowledge playing the leveller, information and communication technology infusion could gradually remove these divides.

The author, endorsed the suggestions of *National Knowledge Commission's Recommendation on e-Governance* to re-engineer government processes with strong committed leadership, autonomy, flexibility, clarity of purpose, redefined deliverables, measurable milestones and periodic monitoring in order to implement national e-governance programme in the State. Author sums up in the words of A. P. J. Abdul Kalam that today, technologies in computers and communications have led to the death of time and distance. Computers and networks work extremely fast and technologies can improve anything and everything. Challenges have inspired some very creative responses in our country. Let every forum of Information Technology professionals discuss and bring out a comprehensive set of recommendations continuously for the effective implementation of anytime-anywhere citizen-centric e-governance systems across State and Central governments in our country. To conclude, this book is written in a simple, coherent and lucid manner which is easy to read and comprehend. The utility of the book is greater among those interested in e-governance and its regulatory measures including law and management students as well as policy-makers, managers, and researchers. I believe that this academic undertaking will aware, inspire and awaken interest of academic and common man in this developing area, and I, hope that the book will find a wider potential reader.

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