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BALANCE

A Bricolage for Legal Augmentation to Navigate Comprehensive Experimentation

Articles

॥वसुधैव कुटुम्बकम्॥

Symbiosis Law school - Hyderabad

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Chief Editor's Desk

I am indeed elated to see BALANCE, the International Multidisciplinary Law Journal, Volume1, and First Issue taking shape and seeing the light of the day. I am also excited and thankful to the contributors from India and abroad, and the members of the editorial board who made this happen.

The modern legal systems are just not products of conceptual and theoretical categories but are extensions of a special ideological structure, which consisted of religious morality, feudal domination, and Roman law. This forms the base to think that legal philosophy is interdisciplinary because this domain is between the territory of law and the field of philosophy. But, the acceptance of inter- and multidisciplinarity proved to be drastically more difficult in jurisprudence (as in the humanities in general) than in the natural sciences. Although this phenomenon can have various causes, the most probable reason for this lies in the nature of the humanities. For instance, natural science is organized on the basis of practicality, whereas ideological momenta have a bigger role in the human disciplines and cultural evolution giving rise to new thoughts and approaches than pragmatic-rational reflections. The subject of Law has thus grown to include normative and critical approaches calling for multidisciplinary involvement to make the field of Law more substantial.

Andrew Button (2009) observed that much has been written about the law in disciplines other than law. For example, Philosophy concerns itself with macro-level legal questions, such as "What is the meaning of justice?" and "What is the role of law in society?" Anthropology concerns itself with the differences and similarities between laws in different countries while, Sociology asks how social norms and power structures influence the law and overlaps frequently with critical legal studies. Ideological, quite idealistic and fundamentally speculative natural law got a chance at renewal from the biological, and an evolutionary viewpoint too.

Thus, Law and legal profession has a lot of responsibility to our society, especially in the wake of complex scientific, social, economic and political changes and developments affecting human relationships. Any legal issue in this fast moving society necessarily embraces the 'peeping and application' of other disciplines. That is why there is all around discussion and deliberation to launch single integrated multidisciplinary studies keeping the man in the center of it

The objective of the journal is to Cohere the multidisciplinary ideas to the field of Law thus forming a unified whole. In a nutshell, the purpose is to create a platform to integrate research ideas of different fields of study into the academic stream of Law to create a synergistic value to field of Law. I hope our objective shall fetch good research contributions from different professionals from different disciplines and help the journal go a long way showing light to the world.

Dr. Mirza Ilyas Baig

Managing Editor's desk

I am very happy to launch the first online edition of BALANCE, the International Multidisciplinary Law Journal from Symbiosis Law School, Hyderabad. We are fortunate to have an interesting blend of research contributions from multiple disciplines from India and abroad. The word BALANCE not only denotes *a situation in which different elements are equal or in correct proportions,* but also projected as an abbreviation which can be expanded as **A Bricolage of Legal Augmentation to Navigate a Comprehensive Experimentation.** The word Bricolage means *construction of creation of things from a diverse range of avialable things*.

The first issue carries 8 papers that are recieved from Universties in Srilanka, Tanzania and India and National Law Schools across India. We have a good blend of papers ranging from protection of geographical indications in developing countries, importance of English Language Skills for Lawyers, Evolution of Euthanasia from different dimensions, Conscience being an ulimate judge with episodes cited from the Epics of India, Free Trade Agreement issues, Data privacy, and controversies associated with capital punishment.

I thank all the contributors and hope we shall receive more contributions to make the journal a success and preach to the world the importance of multidisciplinarity.

Dr. Sukhvinder S Dari

Dr. Prageetha G Raju

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THE PROTECTION ON GEOGRAPHICAL INDICATIONS IN DEVELOPING COUNTRIES: THE CASE OF CEYLON TEA

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Abstract

"Ceylon Tea has its own subculture and a heritage that nurtured over 140 years. It is a way of living and has plethora of attitudes. The rich cultures and secrets of the industry have refined through many generations."[1]

As it is vividly illuminated by commentators, "Sri Lankan Tea" which is well known as "Ceylon Tea" has been not only a geographical indication but also has been pillar of Sri Lankan culture, heritage and identity. Sri Lankan tea industry is, of course, a top contributor of foreign exchange of the economy. With that practical insight, this article attempts to analyse the current protection of geographical indication in Sri Lanka from different perspectives. This article first addresses the economic, cultural and social importance of geographical indications. Secondly, it discusses the international legal instruments relating to Geographical indications. Thirdly, it examines the protection accorded for geographical indications under the current Intellectual Property regimes of Sri Lanka. This article also provides useful insights on Indian experience based on a case study of 'Darjeeling Tea'. Finally, it offers several suggestions to enhance the protection of geographical indications in Sri Lanka.

Key words: *Intellectual Property, Geographical Indications, Ceylon Tea, Derjeeling Tea*

1. Introduction

The protection of intellectual property plays an important role in a globalized economy in the 21st century. In the last two decades, the protection of Geographical Indications (hereinafter "GIs") has gained worldwide recognition as a theme of industrial property protection in the global intellectual property (hereinafter "IP") law agenda, giving both economical and socio-cultural value to them.[2] Generally speaking, a GI serves as the marketing tool, providing consumers the information about special qualities and attributes of a product. It is not easy to establish a reputation as a GI. It requires long time, patient application and sustained commitment. Therefore, the owners of GIs are required to take measures against direct or indirect use of any false indication, unfair competition or any other malpractices in relation to GIs. As

[1] Ajith Alawatte, 'Hubble-bubble over Pure Ceylon Tea' Sunday Times (Colombo, 4 May 2012)

[2] For example, Indian Basmati, French Champagne, Italian Parma ham, Feta Greek Cheese, Colombian Coffee, Ceylon Tea, Mexican Tequila, Portuguese Porto wine etc; GIs link a product to a particular region and such inherent characteristics attribute to geographical and human factors.

some scholars have pointed out GIs are not exclusively commercial or legal instruments, they are multi-national. They exist in a broader context as an integral form of rural development that can powerfully advance commercial and economic interests, while fostering local values such as environmental stewardship, culture and tradition."[3]

Pursuant to Article 22(1) of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement[4], GIs are defined as:

> *"Indications which identify a good as originated in the territory of a member or a region or locality in the territory where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin."*

According to this definition, a GI has inherent qualities which attributed to its origin. The *'other characteristics'* can be colour, texture and fragrance. Reputation can come through the consumer practices and they can also be created by skilful marketing. The above definition pointed out the significance of GIs as an IP right.

2. Methodology

This study is a normative research and thus based on literature review. Moreover, primary and secondary sources are used to carry out the research. The literature research includes legal enactments such as statutes, international legal instruments, published research on GIs. Also, the case studies are used extensively on the subject matter to enrich the research as to find its objectives.

3. Research Objectives

The main objective of this paper is to evaluate, identify and make suggestions on the existing IP protection pertaining to GIs in Sri Lanka. It also attempts to make in-depth analysis on law relating to GIs internationally as well as domestically. Moreover, it discusses the pros and cons of the influence of TRIPS agreement on GIs. Furthermore, it is objected to search the successful story of 'Darjeeling Tea' India for the purpose of evaluating Sri Lankan famous GI, 'Ceylon Tea'. Finally, it offers suggestions to enhance the existing Sri Lankan law on GIs.

4. Results and Discussions

4.1 Importance of Protection of GIs

"GIs pertaining to both agricultural and handicrafts, may contain traditional knowledge which is capable of exploitation in sophisticated consumer market as natural medicinal, culinary, cosmetic

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[3]Daniele Giovannucci - Tim Josling - William Kerr - Bernard O'Connor - May T. Yeung, *"Guide to Geographical Indications: Linking products and their origins"*, Geneva: ITC, 2009. xix, vii

[4]At the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994 TRIPS agreement was implemented to regulate standards of IPR Regulations in World Trade Organization (WTO) members. This considers as the most comprehensive multilateral agreement on Intellectual Property ever.

or lifestyle products."[5] The instrumental importance of GIs is basically derived from development and business aspect of them. In terms of development aspect one can discuss its socio-cultural value and environmental-ecological value. GIs can directly help create rural employment on one hand, and on the other hand, they provide a structure to promote intellectual property rights while promoting the socio-cultural values embedded in indigenous life style of a particular community. Moreover, a GI has a market-oriented business aspect to it. GIs have acquired some inherent qualities through the production and processing methods of particular territory. Therefore, they can have a significant impact on entire supply chain.[6] In terms of the traditional knowledge aspects of GIs, in many parts of the world, producing and processing methods of GIs are based on traditional methods followed for centuries.[7] These methods are generated and transmitted from one generation to another. Therefore, it is not amount to skilled or trained labour. Even if the labourers of rural areas are lack of literacy or other skills, it would not a barrier to contribute their labour to produce GIs because they are possessing necessary skill through traditional knowledge and practices.

For an example, tea is grown in hill country regions of Sri Lanka since the colonial era and it has acquired well known GI name for "Ceylon Tea" for centuries. In this area, the whole rural lifestyle is established based on tea culture. Sri Lanka relies overwhelmingly on its most famous GI, the Ceylon tea, which brings in nearly $700 million in annual export earnings and provides employment to over 1 million people.[8] It provides many job opportunities to countryside residents who are lack of education and who are not skilled labours. If the hill country tea industry is neglected, it would certainly create a major blow to the national economy of the country and to the rural lifestyle of the hill country. [9]

In the view of development characteristics, the GIs are not only providing employment opportunities or greater income, they also promote tourism industry in such areas. In this way promotion of agro-tourism around GIs inter linkage with rural development are well illustrated in case *Boseong* green tea in South Korea. After six years following the introduction of GI, in addition to promoting the product age, doubling production and increasing tea prices by 90

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[5]Evens G.E and Michael Blakeney, "*The Protection of Geographical Indications after Doha; quo vadis?"*,Journal of International Economic Law, Oxford University Press, 2006. at p. 3.

[6]For example 'Tuscony' for Olive oil of Italy and 'Roquefort' for cheese produced in France are famous GIs. Climate system of the area, traditional methods of producing and processing added a special taste and quality to that food stuffs.

[7]*Prosciutto di Parma* or Parma ham is a well-known example of using traditional knowledge in production. For ham to receive the Parma name, it must be produced in the province of Parma – in the Emilia-Romagna region of north-central Italy – using exclusively pigs from that area. Each step in production, from the breeding of the pigs and their diet through processing to the final packaging, is closely monitored and controlled by the *Istituto Parma Qualità*. Only the Istituto can brand the finished ham with the seal of Parma's five-pointed ducal crown, qualifying the ham as true Parma ham.

[8]*Surbhi Jain,* **"Effects of the Extension of Geographical Indications: A South Asian Perspective",** *Asia-Pacific Development Journal, Vol. 16, No. 2, December 2009, at p17.*

[9]In 2009 , Sri Lankan Tea production is contributed to earn 534,140million rupees (value added % is 1.6 of Gross Domestic Products), source; Economic and Social Statistic of Sri Lanka, 2011,at http://www.cbsl.gov.lk

percent, the number of tourists to the Boseong region has been increased by three fold. It leads to the creation of thousands of jobs and development opportunities in the area. There are many case studies on the particular importance of GIs in developing countries and as well as in developed countries[10] throughout the globe.

Arguably, environmental preservation can be discussed as a consequence of GIs. The using of indigenous methods and traditional knowledge in producing goods, automatically contributes to the preservation of the environment. There are pros and cons on environmental protection approach to GIs. Conversely, the cultivation or industry is thinning out in an area it can of course affect the natural environment and its riches. Therefore, from a perspective of environmental protection, GIs contribution can be considered as a narrow one. Moreover, "GIs were perceived as means of changing from quantity based to quality based exports by creating a system that would allow consumers to recognize and pay a premium for high quality products which produce only with traditional raw materials or methods that remain unique within the regions of that the products originally were associated.[11]

GIs have their own socio-cultural relationship which has been developed as a result of their long-standing association with particular region.[12] GIs are market-oriented and, therefore, they value the cultural aspects and traditional methods that are intrinsic to the producing and processing methods. One might still argue that, in commercial transmission of modern era, all GIs is not means of protectors of traditional and cultural values. Therefore, other Intellectual Property instruments such as patents or other forms of legal protection may needed to complement GIs. Some countries of the world expect GIs to be legally connected to traditional aspects. For an instance, in France, Appellation of Origin law reference "local fair and constant practices"[13], and in Tunisia, the Destination of Origin law notes "methods of production must be rooted in local traditions being ancient constant and well known".

According to the definition adopted by the TRIPS agreement, the protection must be extended for the quality, reputation or other characteristics of the good being linked to the territory. In this sense, this IP right is being capable of using to preserve traditional knowledge (hereinafter TK). GIs have the potential to transform traditional knowledge into intellectual capital.[14] The protection of GIs as collective rights are more appropriate than the protection of GIs under a

[10]European Union Commission on GIs, 1992, discussed about the issue of rural development by GIs, as a result of these considerations in Regulation 2081/92 made express mention of the common agricultural policy in fulfilling its objective of contributing to '…the diversification on agricultural production…so as to achieve a better balance between supply and demand on the markets, … (and benefiting) rural economy in particular …less favored or remote areas, by improving the income of farmers.'

[11]Evens G.E and Michael Blakeney, "*The Protection of Geographical Indications after Doha; quo vadis?,* Journal of International Economic Law, Oxford University Press, 2006. at p. 4.

[12]Specially in Greece, France ,Italy and other sub continental areas of wine making; rich traditional and cultural diversity has engendered. There are rituals,functions, celebrations, traditional folklore created by wine producing history.

[13]Decree No. 91-368 of April 15, 1991 on the Organization and Operation of the National Institute of Appellations of Origin in France.

[14]See *supra* foot note 4; at p.35.

trademarks regime when they involve community held traditional knowledge. Granting GIs based on collective marks or on other effective system it creates a better way to codify traditional practices. Codification of traditional practices provides effective protection against exclusive private use or irregular use of TK. When granting GIs, the protection for products can potentially be held on an unlimited period of time. There is no possibility to become generic the production name or method when GIs are recognized.[15]

From a different perspective, consideration of GIs as instruments of rural justice, the ends of social equity may be achieved through rewarding the local products. In that sense, GIs also facilitate cultural recognition in marketplaces trough cultural communication. Undoubtedly, it is created a very effective platform to rural development. GIs are multi-purpose means which can gain huge amount of benefits in developing scenario. As means of intellectual values, it can easily be utilized to improve economic as well as socio-cultural aspects of a country.[16] In order to make the above mentioned objectives realized in a given country, it is utmost important that the prevailing law must be dynamic, transparent, well-deigned to reflect country's specific characteristics.

4.2 International Regime on GIs

The recognition of GIs in international scenario as an intellectual right goes back as far as the late 19th century, but more regulated and active forms of protection have been implemented in recent decades. The laws relating to GIs are deprived from common system but distinct forms of protection can be seen in different countries and regions. Therefore, we could not identify a consistent legal instruments or international consensus on the protection of GIs at international level. This dilemma has caused difficulties in initiating a globally harmonized system of GIs protection. As commentators have pointed out, there is no universal method of protecting GIs, or a common international commercial law, the granting of legal protection for GIs lies within the jurisdiction of separate domestic laws and the regulations of individual countries. Domestic mechanisms are very considerate, therefore different marks, appellations or designations need to be registered in all relevant countries in order to protect the GIs they represent.[17] Nevertheless, there are three main approaches to protect GIs in different jurisdictions:

- The use GIs specific laws or *sui genaris* systems
- The use trade mark system or other legal or administrative means.
- Some countries do not formally recognize or protect GIs.

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[15] *Cerkia Bramley,* "A Review Of The Socio-Economic Impact Of Geographical Indications: Considerations For The Developing World", Worldwide Symposium On Geographical IndicationsLima, June 22-24, 2011 WIPO Publication, No. 798(E), pp54-73

[16] The EU's perspective on GIs has been described as "a legal and commercial basis for development of rural areas, the preservation of cultural heritage [and] the promotion of small and medium firms in the rural economies context" , Hughes J (2009). "Coffee and chocolate: Can we help developing country farmers through geographical indications?", Report prepared for the International Intellectual Property Institute, Washington DC.

[17] See *supra* foot note 1; at page 40

There are, at least, more than hundred countries where GIs are recognized as a separate type of intellectual property and *sui generis* protection of GIs are in place.[18] Some countries provide protection by registration of GIs under the particular law. Other countries have established registers and have registered Geographical Indications. Jordan, Mauritius, Oman, Qatar, Singapore and Sri Lanka are the only 6 countries with *sui generis* system of protection of GIs do not have a compulsory registration or protect GIs as such without the need for a register.

There are 56 countries that do not have specific laws for the protection of Geographical Indications but protect them as certification trademarks, collective trademarks or just as ordinary trademarks. Among those countries are the United States, Canada, Australia, Japan, a large number of African countries and many Arabian countries. In fact, many countries with *sui generis* system also have the option of some additional protection via trademarks. Although various jurisdictions provide various forms of protection, the basic guidelines for GI are illustrated in several international agreements. These include; Paris Convention of 1883[19], Madrid Agreement of 1891[20], Lisbon Agreement of 1958[21], and TRIPS Agreement. When analysing the provisions of these agreements, it is clear that different legal norms are used to accord protection of GIs and the definitions of GIs vary according to each international instrument.

The Madrid system has 56 contracting parties. It provides a framework for a central international registration of marks. It was introduced as an effective protection method on a multinational basis, so that rather than filling separate registration in individual countries of interest, owners of marks can simply file one application directly with their national trade mark or IP office. The most important equipment for the protection under the Madrid system is that the country requests the protection, must be a member of the system. Although the Madrid system may or may not constitute a direct protection on GIs, a separate Madrid agreement of 1891, concern the repression of false and deceptive indication of source.[22] Moreover, the Lisbon Agreement also provides an effective means of protecting GIs because it directly addresses appellations of origin rather than their country of origin. Specifically, it provides a single registration procedure for an appellation of origin and substantive law such as defining the content of the protection that member states must undertake. According to Article 2(1) of this agreement,

> *'appellation of origin means', the geographical name of a country, region or locality which serves to designate a product originating therein, the quality and*

[18]Argentina, Chile, Colombia, Costa Rica, European Community, India, Iran, Nicaragua, Qatar, Sri Lanka and Thailand are instances for countries using *sui generis* GIs protection.

[19]The Paris Convention for the protection of Industrial Property, 1883.

[20]The Madrid Agreement concerning the International Registration of Marks and the Protocol relating to the Madrid Agreement., 1891.

[21]The Lisbon Agreement for the Protection of Appellation of origin and their International Recognition, 1958.

[22]Article 1(1) of the Madrid Agreement,' All goods baring a false or deceptive indication by which one of the countries to which this agreement applies, or a place situated therein, is directly or indirectly indicated as being a country or place of origin shall be seized on importation into any of the said countries.'

characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.'

This definition is broader than Madrid agreement's definition on GIs. It refers to the geographical environment including human factors and natural factors.[23]Although the Lisbon Agreement provides more effective protection of 'appellation of origin', it has 26 signatories only and has not been accepted widely.[24] The Paris Convention also accords some protection for GIs. Under the Paris Convention, although there are no expressed provisions relating to 'appellation of origin' Article 10*bis* includes the obligation to protect 'indication of source' against unfair competition. It provides that the contracting states are required to make masseurs against direct or indirect use of any false indication of source of goods or the identity of the producer, manufacturer or trader. Even more importantly, the TRIPS Agreement set out a more comprehensive interpretation on GIs than any other international agreements. The essential elements of the standards concerning the availability, scope and use of rights involving GIs include the following:

Article 22(1): *"Geographical Indications are for the purpose of this agreement indications which identify a good as originated in the territory of a member or a region or locality in the territory where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin."*

Geographical origin indicates the 'appellation of origin' as well as 'indication of source' and contains rational and standard interpretation on GIs.[25] It serves not only to define GIs, but also to align the standards of protection as well as providing access to an international dispute settlement mechanism.[26]

Article 22(2)(a): *"Members must provide the legal means for interested parties to prevent the use of indications that misleadingly indicate or suggest that a good originates in a geographical area other than the true place of origin."*

[23]An appellation of origin is a special kind of geographical indication generally consisting of a geographical name or a traditional designation used on products which have a specific quality or characteristics that are essentially due to the geographical environment in which they are produced.

[24]Lisbon members as of 2008, Algeria, Bulgaria, Burkina Faso, Congo, Costa Rica, Cuba, Czech Republic, Democratic People's Republic of Korea, France, Gabon, Georgia, Haiti, Hungary, Iran, Israel, Italy, Mexico, Moldova, Montenegro, Nicaragua, Peru, Portugal, Serbia, Slovakia, Togo, Tunisia,

[25]"…above explanation indicates the broadest term is 'indication of source' which may comprise both geographical indications and appellation of origin. On the contrary, it appears that all appellations of origins are GIs but all GIs are not appellations of origins. There can also exists indication of source which are not covered by the definition of GIs under the TRIPS Agreement, namely, indications of source whose use on products does not imply a specific quality, reputation or characteristic of those products." Karunarathne D.M., *"Elements of the Law of Intellectual Property in Sri Lanka"*, 1st Edition, Nugegoda, Sarasavi Publishers, 2010, at p.297.

[26]See Article 24 (part II, section 3 of the TRIPS Agreement)

Article 22(2)(b): "*Members must provide means to prevent any use which constitute an act of unfair competition within the meaning of Article 10(b) of the Paris Convention."*

Article 22(3): "*Members shall refuse or invalidate the registration of a trade mark which consist a misleading indication."*

Above articles provide obligations to signatories for making appropriate protection with strong commitment for GIs. Article 23 denotes the specific and additional protection for the wine and spirits categories.[27] It can be observed that TRIPS mandates two tiered model of protection on GIs.[28] Basically, it is giving specific and additional protection on 'wine' and 'spirits' but leaving the legal means of protection to national governments for other agricultural products and foods. While TRIPS providing higher level of dilution-type protection mechanism for wine and spirits, it only provides minimum safeguards of protection on non-alcoholic GIs. Therefore, the developing countries those own GIs other than wine and spirits have to bargain for a proper system to protect their GIs in the global arena.[29] But, any such initiatives have been prevented by lack of consensus among different member States of the WTO.

As a solution to this issue of dual protection embodied in the TRIPS Agreement, it can well be argued that the time is ripe for WTO members to initiate new negotiations in order to extend a higher level of protection provided by Article 23 of TRIPS beyond the current scope of wine and spirits to all products. Prior to Seattle Ministerial meeting, in a submission by Turkey on 09th July 1999, proposed the extension of GIs beyond wines and spirits. There had been many arguments for and against such a move. Perhaps more importantly, when it comes to the protection of GIs, one cannot see the traditional divide between developed and developing countries (North-South Dimension of the TRIPS) on the same line of opinion.[30] In other words, both developed and developing countries queue up to argue for and against the harmonization of GI protection. Significantly, countries including Kenya, Nigeria and South Africa, African group of countries endorsed a proposal on requesting that the GIs protection be extended 'to other products recognizable by their geographical origin', specially agricultural, food and handicraft

[27]Article 23(1), "Each member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for not originating in the place indicated by the geographical indications in question, even where the true origin of the good is indicated or the geographical indication is used in translation or accompanied by expression such as "kind", "type", "style", "imitation" or the "like".

[28]84% of GIs are attributable to four product categories, wines (61.4%), sprits (9.5%), agro (6.7%) and cheese (6.5%). International Protection on Geographical Indications and Developing Countries, South Centre, TRADE Working Papers no 10, 2001.

[29]Most of non-alcoholic GIs are originated in developing countries, for example; 'Ceylon Tea' in Sri Lanka, 'Antigua Coffee'- Guatemala, 'Darjeeling Tea'-India, 'Gobi Desert Camel Wool'- Mongolia, 'Blue Mountain Coffee'-Jamaica, 'Kona Coffee'- Hawaii, 'Pampas beef', 'Tellicherry pepper', 'Basmati rice', 'Rooibos tea' are well-known agricultural GIs originated in developing countries.

[30]"TRIPS Agreement cannot be applicable to developed and developing countries equally without attributing due consideration to such rights with particular reference to the mitigatory provisions in the Agreement." per J. S.N. Silva, *In the Supreme Court Special Determination on 'A Bill Bearing the title intellectual property*' on 6th June, 2003.

products.[31] Their argument of extension is based on making a market differentiation for a verity of common commodities as tea, coffee and rice and as a mean of protecting traditional knowledge which sturdily combined with products of that region. Opponents of the proposal are not only the developed countries, but also developing countries involves as aggrieved party led by United States of America.[32] There is so far no outstanding solution being adopted by WTO members on this regard. This dilemma can adversely affect to non-alcoholic GIs, mostly originated from Asian and African and other low-income economies.[33] Therefore, countries need to take measures to empower regional and domestic legal system as a mean of providing minimum protection to own GIs.

4.3 The Protection of GIs under the current IP regime in Sri Lanka

As we have seen in the above sections, the international regime on the protection of GIs has been modified through last two decades, but countries have not been able to reach a central point of universal commitment. Therefore, countries have individual or collective responsibility to provide proper protection on GIs till an acceptable and a justifiable international commitment is adopted. Most commendably, an identifiable strong regional commitment on protection of GIs has been achieved in the European Union.[34] Registration of a GI is not a prerequisite for the protection of GI. When a country seeks judicial intervention for the protection of a GI, it is important to establish that the product claimed protection has duly registered as a GI. Providing national protection for GIs could be used as a weapon when claiming GI protection in an international infringement scenario.[35]

Sri Lanka is a country with vast ethnical, cultural and bio-diversity. It also has a long historical civilization. Therefore, it has the possession of rich traditional knowledge on producing and processing methods.[36] Through the civilization factor, the geographical orientation will lead to

[31]This proposal also is adopted by Cuba, Chez Republic, Dominican Republic of Honduras, India, Indonesia, Nicaragua, Pakistan, Sri Lanka and Venezuela.

[32]Australia, Chili, Argentina and Guatemala claims that if the extension of protection be granted it will undoubtedly cause to assign exclusive rights on certain producer groups and also they point out that extension of protection with mandatory system of protection will take high amount of cost.

[33]Lack of strong protection on GIs, could cause to original geographic location has been universally lost or GIs could be generic terms. For example Yemen's Mocha coffee has lost its identity and popularity. India ink, Chinaware, Worcestershire sauce, Kiwi fruit, Gouda and Swiss cheeses are some instances that have become generic or common in some markets.

[34]Under European Regulation 510/2006[1], within the European Union (EU), to benefit from a protection designation of origin (PDO) or a protected geographical indication (PGI) a product must be the object of a registration to the European Commission.

[35]According to Article 3 of TRIPS Agreement, the member countries shall provide 'national treatment' for the nationals of other countries also, Article 4, contains the 'most-favoured nations principle',-" …any advantage, favour, privilege or immunity granted by member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of other members…", by initiating these two principles one country can sue against another for the purpose of international infringement of GIs.

[36]In Vietnam, Decree 54/2000/ND-CP concerning GIs, provides a higher level of protection to all product categories. Vietnam protects traditional knowledge by this means, e.g. 'Phu Quoc' fish soya sauce and 'Tuet Moc Chaue' a variety of tea in Vietnam.

add uniqueness, quality and reputation of goods. Climate, soil, humidity, temperature, rainfall and other physical factors contribute to make these specialties. There are several established GIs in Sri Lanka including; '*Ceylon Tea*', '*Ceylon Cinnamon*', '*Ruhunu Buffalo Curd*', '*Dumbara Mats*', '*Malwana Rambutan*', and '*Bibile Oranges*'. As a member of WTO, and country which can identify established GIs, Sri Lanka has a responsibility to provide legal means to protect GIs. The current protection of GIs in Sri Lanka is governed by provision of the IP Act No. 36 of 2003 (hereinafter 'the act') which may be described as a kind of *sui genaris* system.[37]

Under the IP Act, GIs may also be protected by other regimes such as certification mark, collective mark as well as protection against unfair competition. Pursuant to Section 161 of the IP Act

> (1) Any interested party shall be entitled to prevent-
>
> (i) the use of any means in the designation or presentation of goods that indicates or suggests that the goods including an agricultural product, food, wine or spirit in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of goods ; or
>
> (ii) any use of a geographical indication which constitutes an act of unfair competition within the meaning of section 160 ;
>
> (iii) the use of a geographical indication identifying goods including an agricultural product, food, wine or sprit not originating in the place indicated by the geographical indication in question or identifying goods not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expression such as kind, type, style or imitation or the like.

According to the above provision, 'any interested party shall be entitled' to prevention of misleading the public as to the geographical origin of goods, by any means of designation or presentation. It expressly provides protection for agriculture products, foods wine or sprits. This provision also under the sub section (ii) provides protection against unfair competition for GIs. The most importantly, the wordings of section 161 which read as 'any interested party' embrace a broad meaning covering not only who has business interests, but also those such as consumers and public spirited persons.[38] Moreover, section 161 (2) reads:

> the protection accorded to geographical indications under sections 103, 160 and 161 shall be applicable against a geographical indication for which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

[37]See *supra* foot note 16.
[38]See *supra* foot note 23 at page 299.

This section provides a safeguard against false representation as to origin of goods. If the public are misled by false representation of origin the protection, the section 103[39], 160 and 161 of the act, may be applied against such misrepresentation. Arguably, the Act is not granting the trade mark protection for GIs; because trade mark protection is a private/individual right. However GIs are collective rights of people. If individual rights have been granted, it would amount to an infringement of collective rights of people in particular area. The Act also offers special protection to the wine and sprit in accordance with the TRIPS Agreement.[40] Thus, it is clear that the Act not only provides *sui genaris* protection to the GIs, but also keeps other possible option for protection of GIs viz. protection under certification and collective marks regimes. According to Section 142 (3) of the Act:

> "Notwithstanding the provisions of section 103, a certification mark which consists of a sign or indication which may serve in trade to designate the geographical origin of the goods and services may be registered: Provided, however, the owner of such mark is not entitled to prohibit the use of such sign or indication in accordance with honest practices in industrial or commercial matters and in particular by a person who is entitled to use a geographical name."

Certification mark is a mark which indicates goods or services are certified by a 'certification authority', which have specific quality, accuracy or other characteristics. Certification mark represents collective right rather than private right.[41] Also under a registered owner it can be protected goods or services which have special quality or reputation, from providing safeguard against misuse, as collective marks.[42] The act offers certification marks and collective marks protection on GIs as additional means of protection.

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[39]Section **103.**(1) (*f*) of the act offers negative type of protection for GIs."A mark shall not be registered— which is likely to mislead trade circles or the public as to the nature, the source, geographical indication the manufacturing process, the characteristics, or the suitability for their purposes, of the goods or services concerned" , According to Section **103.** (1) (*h*) which is, according to its ordinary signification, a geographical name or surname

[40]161 (3)In the case of homonymous geographical indications for goods including an agricultural product, food, wine orspirit, protection shall be accorded to each indication, subject to the provisions of subsection (2) of this section. The Minister, in case of permitted concurrent use of such indications, shall determine by prescribed practical conditions under which the homonymous indications in question will be differentiated from each other, taking into consideration the need to ensure equitable treatment of the producers concerned and the protection of consumers from false or deceptive indications.

[41]A certificate is a written guarantee by an independent certification agency that the production process or the product complies with certain standards. These standards can be environmental issues (as soil conservation, water protection, pesticide use, or waste management), or social issues (such as producer income, workers' rights, occupational health and safety) or on other aspects of production like food safety.

[42]138 (3) Notwithstanding the provisions of section 103 a collective mark may be registered which consists of a sign or indication which may serve, in trade, to indicate the geographical origin of the goods or services: Provided, however, the owner of such a mark shall not be entitled to prohibit the use of such sign or indication in accordance with honest practices in industrial or commercial matters and in particular, by a person who is entitled to use a geographical name.

Enforcement mechanism for the protection of GI rights is provided under both civil and criminal litigation. Therefore, one could find a reasonably effective procedure under the Act in the event of infringement of GIs. Civil litigation applies to the *sui genaris* protection, as well as to the rights under collective and certificated mark protection. In an infringement action involving a GI, the Act provides the courts[43] with power to grant an injunction to prevent such infringement. Only after paying due consideration on the matter, the court may grant compensation or other civil remedies.[44] In terms Section 191 of The Act, any person who-

(*a*) Makes a false declaration to the Director-General ;

(*b*) Makes a false declaration in respect of geographical indication inclusive of Ceylon Tea and Ceylon Cinnamon, shall be guilty of an offence and shall be liable on conviction by a Magistrate to a fine not exceeding five hundred thousand rupees.

According to this section Magistrate Court is empowered to impose criminal sanctions on infringers of GIs. It is clear that Sri Lankan law on GIs is rather effective, but there is no registration procedure for GIs in place in Sri Lanka. Thus, any violations would happen the without the notice of the right holders.

An effective system of GIs protection must have minimum standards. Such a system must have four essential components as follows.[45]

1. Strong organizational and institutional structure to maintain market and monitor GIs. In this component, it should consider, fairly demarcating GIs, organizing existing practices and standards, establishing a plan to protect and market the GIs.
2. Equitable participation among the producers and enterprises in a GI region. This would helpful to share not only profits or benefits of the GIs, but also in the control and decisions regarding there public assets.
3. Strong market partners committed to promote and commercialized over the long time.
4. Effective legal protection including a strong domestic GI system. Especially a strong domestic protection is very effective to enforce GIs in international regime.

In view of these four features, it is worth considering Indian experience GIs protection. For our purposes, case study of 'Darjeeling Tea' has been selected.

4.4 Indian perspectives on Geographical Indications: Case study on 'Darjeeling Tea'

India is in the early stage of developing and exercising its GI protection regime. As a developing country, with vast verity of culture, population and climate and other factors are contributed to originate GIs; India has to develop an effective mechanism for the protection of GI in order to prevent violation of GI rights. Indian approach of protecting GIs has been designed based on lessons learned domestically as well as from other jurisdictions such as European Union and United State of America.

[43]See section 212 of the Intellectual Property Act, No.36 of 2003. Other than western province this jurisdiction is held with High Court of the province. In western Province this power vested with commercial high court of the Western Province.

[44]See chapter xxxv of the Intellectual Property Act, No.36 of 2003.

[45]See *supra* foot note, at page xvii.

The Indian Geographical Indications of Goods (Registration and Protection) Act, 1999, came into effect in 2003. It expressly provides a registration[46] and protection procedure for the GIs. The goods may registered under the Act are categorized to several classes such as natural goods, agricultural goods, manufactured goods (handicrafts, foodstuffs) so long as production, processing and preparation methods includes in this list.[47] According to section 11 of the Indian GI Act 1999, any applicant who apply for registration of GI must be representing the interest of the producers of the concerned goods; and desirous of registering a GI in relation to such goods. [48] Section 21 of the Indian GI Act of 1999, confers on the proprietor of the GI and the authorized user, exclusive rights to use of a GI in relation to goods which the registration is obtained.[49] Section 67 of the Indian GI Act of 1999, provides for the relief that the court may grant in any suit for infringement of passing off which includes injunctions and damages or account of profits. The registration under the Geographical Indications of Goods Act, 1999 prevents people by instituting proceedings on unregistered GIs, registered owner or authorized users are granted with exclusive right use of GIs, registered owner or authorized users can institute proceedings against infringement of their rights and it also confers public rights.

In the world of GIs, Darjeeling Tea is a well-known name not only in also throughout the world. Among the teas grown in India for more than a century, Darjeeling tea offers distinctive characteristics of quality, flavour and reputation. Darjeeling district in West Bengal State is the place where Darjeeling tea is grown, cultivated and produced.[50] Above two third of the annual production Darjeeling tea is exported.[51] Most notably, the Indian Tea board has been taken several efforts to ensure the supply of genuine Darjeeling tea.[52] In year 2000, the tea board of India initiated a system of compulsory certification for Darjeeling tea suppliers. Under this system the licensees must provide information relating to the production and manufacture of Darjeeling tea to tea board. This information is useful to maintain aggregate production and sales reports on Darjeeling tea. After the essential parameters are fulfilled by the producers; the tea board issues a certificate of origin authentication. The custom authority of India also instructed

[46]Under section 6 of the Indian GI act, a record called Register of Geographical Indications shall be kept at the head office of the GI Registry, wherein shall be entered all mandatory descriptions regarding to the registered GIs.

[47]After the act of 1999 is enforced in 2003, well regarded GIs of India have registered under the provisions of act, for examples, Darjeeling Tea, Chanderisaree, Kotfad Handloom fabric, Kancheepuram silk, Mysore Agatbathy, Mysore Milk, Kullu Shawl, Kangra Tea, Coorg Orange, Mysore Betel Leaf, Mysore Sandal soap, and Nanjanagud Banana.

[48]According to the meaning of section 11, 'Applicant' indicates; any association of persons or producers or any organization or authority established by or under any law for the time being in force.

[49]In terms of the section 23 of the Indian GI Act of 1999, the fact of registration of the geographical indication shall be *frima facie* evidence of the validity thereof.

[50]Darjeeling is an area near to Mount Himalayan of North East India, above 2000 meters of mean sea level and has suitable climate for tea cultivation.

[51]Japan, Russia, the United States, United Kingdom, France, Germany and the Netherlands are the key buyers of the Darjeeling tea.

[52]See the Tea Act of 1953 in India, and Tea Marketing and Distributing Control Order 2000 in this regard.

to prevent exporting Darjeeling tea without the certificate of tea board of India. By this procedure the originality of Darjeeling tea can be protected without any harm of passing off or unfair trade practices.

Indian regime on GIs can basically divide into two levels of protection against infringement of GIs viz., the protection of domestic level and the steps taken at international level. At domestic level, the tea board of India has registered the 'Darjeeling Logo' and the word 'Darjeeling' as a certification trade mark.[53] This certification trade mark is also registered under the Geographical Indications of Goods Act of 1999. Enacting a legislation to protect GIs, amount to the complementation of India's obligation, as a signatory of TRIPS Agreement and a member of WTO.[54] India has taken rudimentary steps to protect 'Darjeeling tea' in international level also. Indian Tea board has registered the 'Darjeeling logo' and 'Darjeeling' marks in various countries through out of the world such as Canada, Japan, Egypt, the United States and United Kingdom.[55] Also Indian tea board has hired since 1998; the service of 'Compu mark', a Worldwide Watch Agency to prevent the misuse of 'Darjeeling logo' and 'Darjeeling' marks. Moreover, the Indian Tea Board constantly communicates with overseas buyers and tea boards in order to supply genuine 'Darjeeling tea. These initiatives at the international level have been contributed to protect 'Darjeeling logo' and 'Darjeeling' marks worldwide.

With this statutory context, the Indian tea board has been playing an outstanding role in protecting 'Darjeeling logo' and 'Darjeeling' GIs. It tries to reach negotiations with other countries, applies for registration of 'Darjeeling logo' and 'Darjeeling' marks in other countries, institutes proceeding against misuse of 'Darjeeling logo' and 'Darjeeling' marks contributing to enhance the effectiveness of the GI protection on Darjeeling tea.[56] The high cost of enforcement and protection of 'Darjeeling logo' and 'Darjeeling' marks is the another major problem that the Indian tea board is constantly facing. Specially in hiring an international agency, fighting infringements in overseas jurisdictions are expensive matters.[57] In this case study on 'Darjeeling' tea, we could identify the soundness of the legal protection and the effectiveness of the procedural aspects both separately as well as conjunctively have contributed to make a better safeguard on GI 'Darjeeling logo' and 'Darjeeling' marks.

4.5 What Lessons for Sri Lanka?

This part aims to analyse the practical issues relating to protection 'Ceylon Tea' as a GI and what are the legal parameters that Sri Lanka should introduced to strengthen the GIs protection at

[53]This registration is proceeded under the Trade and Merchandise Market Act, 1958

[54]Enacting domestic legislation to protect GI amounts to fulfil of the obligation expressed in article 23 of the TRIPS Agreement.

[55]On 3rd August 2001, the UK trade registry granted the word 'Darjeeling' under the UK Trade Marks Act, 1994.

[56]The Tea Board of India has faced a series of hurdles and difficulties in protecting and enforcing the 'Darjeeling tea in the world. Some of the major challenges faced by the tea board are in Japan, France, Russia and United States.

[57]According to the reports of Indian Tea Board, without including administrative expenses; India has spent approximately US$ 200,000 during last four years for the purpose of protecting Darjeeling tea.

domestic as well as global level. According to the Sri Lanka Tea Board (herein after SLTB), production report in 2010, Sri Lankan total tea production was 331426 (metric tons), and has earned 148.6 billion SL Rupees, by exporting pure "Ceylon Tea". In global scene Kenya, China and Sri Lanka accounted for more than 60% of global export of tea.[58]

World famous "Ceylon Tea" as a GI holder needs to be better protected both national and international markets. At domestic level, Sri Lanka Tea Board is the authorized body entrusted with this daunting task. The Sri Lanka Tea Board was established as a fully government-owned statutory institution by Act of Parliament on 1 January 1976.[59] The Board renders its service under the preview of the Ministry of Plantation Industries. The primary objects of the SLTB under the above Act are development of the tea industry in Sri Lanka, promotion of Ceylon (Sri Lanka) tea globally and the implementation of regulatory requirements to be followed by the industry.

SLTB is the legitimate owner of the 'Ceylon Tea Lion Logo' and has applied to register as a GI, in Intellectual property office in Sri Lanka. 'Ceylon Tea Lion Logo'[60] has registered in 96 countries of the world by the end of the year 2010. Furthermore, the SLTB has planned to register 'Ozone Friendly Free Ceylon Tea Logo' which carrying the idea of that when you reach for the Ceylon Tea flavor you are not only refreshing yourself, but also help to renew and protect the limited resource on the Earth for yourself as well as for the unborn generation.[61] This registration does not amount to a registration of GI but it is registered as certificated trade mark (CTM) in other countries. Sri Lanka Tea Board has just concluded the local registration of the name "Ceylon Tea" and the main seven tea growing regions (NuwaraEliya, Dimbula, Uva, Udapussella, Kandy, Ruhuna & Sabaragamuwa) as certification marks under Geographical Indications. According to the latest information, the relevant steps are currently being taken to register 'Ceylon Tea' as a GI in other countries by SLTB and Ministry of Industry & Commerce.

We can identify the SLTB has initiated some rudimentary steps to protect the quality of Ceylon Tea by initiating Quality Empowerment Activities (hereinafter referred as QEA) as per the provisions of Tea Control Act No. 51 of 1957. These QEA's are as follows;

1. SLSI-SLTB Quality Certificate
2. Randalu Strategy to improve leaf standard
3. Rush Crop Management programme during festival season

[58]World Tea Production Statistics, Annual ICT Bulletin of Statistics, 2010.

[59]By the amendment introduced in Sri Lankan Tea Board Law, No. 14 of 1975, SLTB was amalgamated in to four sections. (Tea Control Department, the Tea Export Commissioner's Department, the Ceylon Tea Propaganda Board and the Tea Research Institute)

[60]The franchise to the lion logo has been granted only for the branded value added tea products which contain 100% pure 'Ceylon Tea' compliance with ISO 3720 stranded and a minimum reference standard to each destination packed in Sri Lanka.

[61] Sri Lanka is the first and foremost country in the world which has registered 'Ceylon Tea Logo' as a Eco-Friendly mark. The Sri Lanka Tea Board plans to register 'Ozone Friendly Free Ceylon Tea Logo' in thirty tea importing countries. This is a prominent step which has been taken by the Sri Lanka Tea Board by initiating sustainable development standards in local tea production sector.

4. Low NSA Strategy
5. Quality Monitoring System (Task Team Operation- TTO)
6. Factory Modernization subsidy scheme
7. Tea Re Planting Subsidy Scheme
8. Working capital loans
9. Factory base tea development programme
10. Establishment of GMPs (Good Manufacturing Practices) in Tea Factories[62]

Basically, by implementing this QEA's the SLTB aims to monitor the quality of productions, maintain fixed price on tea production in domestic level, licence of dealers,
Therefore, as to protect 'Ceylon Tea' as well as other GIs in Sri Lanka, it should be given priority to enact proper legal provisions domestically. Registration of Geographical Indications for a particular product in the home country is a pre-requisite prior to applying for international registration. Domestic registration gains lot of advantages in internationally enforcement of GI rights. If GI is registered in home country, it is useful when,

- application of registration is not accepted in a jurisdiction where protection is sought.
- it creates well recognized status on GI and indicating clear link with geographical origin.[63]

In this regard SLTB is acted wisely and prominently by affording domestic registration. From the Indian perspectives on 'Darjeeling tea', Sri Lanka can learn a lot to improve protection for GIs in Sri Lanka. In fact, India has provided further protection for 'Darjeeling tea' via GI act of 1999. The most important feature of the Indian legislation is that it provides a clear and efficiency registration procedure and registry for GIs. In this regard, Sri Lankan legislation the Intellectual Property Act, No.36 of 2003 lacks of registration mechanism for GIs.

Establishing a new GI registration system is not an easy task. It needs patient application and sustained commitment which would also involve high costs, for registration, monitoring and legal enforcement process. Specially, the establishing of a domestic legal framework, defining exact physical boundaries, establishing criteria and standards, marketing and promoting, assessing and applying in overseas involve high costs. Nevertheless, such a system can create a number of benefits such as improving market access, increasing sale, increasing market value and profitability, elevating land values, complementary effects on other products and increasing employment.[64]

Enacting a domestic legislation on GI may be a more effective way to deal with the situation and it can be considered as a preliminary step on protecting GIs.[65] India is the best example in providing effective domestic legal protection for GIs. Therefore, Indian perspectives on GIs

[62] For further details on QEA's see the 'Sri Lanka Tea Board Annual Report-2010', pp 50-53.
[63] Srivathsava S.C., "Protecting the Geographical Indication for Darjeeling Tea", Managing the Challenges of WTO Participation, case study 16.
[64] Ibid, Srivathsava S.C.
[65] Eg: Georgia- Law on Appellation of Origin and Geographical Indication of Goods 1999, Lebanon- Wine Law of 2000, Switzerland- Federal Law on Trade Marks and Indication of Sources 1994, Vietnam- Intellectual Property Law 2005.

could be used affirmatively in developing a specific Law on GIs in Sri Lanka. Most importantly, providing for a proper system of domestic registration is a fundamental requirement for a successful regime on GIs. Sri Lankan *sui genaris* protection on GIs must at least be extended with registration procedure for facilitating sound legal protection for every goods which have intrinsic qualities inherited by their place of origin.

5. Conclusion

"*The enduring competitive advantages in a global economy lie increasingly in local things – knowledge, relationships, motivation – that distant rivals cannot match.*"

Michael Porter (1998)

As have seen, Geographical Indications are valuable assets, which have potentials of competing for a great share in the global market. GIs are unique by their origin. Trust and authenticity are implicit in GIs, making them powerful instruments in today's markets. Through market mechanisms, GIs recognize and support the concept of 'local'. There is evidence that the potential long-term value is not only economic (jobs, greater income, tourism) but also social in terms of the recognition of customary and value-adding traditions that convey a very local sense of a people, their history and their relationship to a place. GIs could be used as means of protecting traditional knowledge and customs of a country. Therefore, GIs should be treated as an Intellectual Property Right with higher value.

International commitments on protecting GIs are still in the stage of progression or unconvinced. An accepted multilateral system of notification and registration of all GIs cannot be found in international arena. The TRIPS Agreement, most influential international instrument on IP rights, also does not specify the 'legal means' for protecting GIs. Article 22 of the TRIPS Agreement provides higher level of protection to wine and spirits, but other agricultural, handcrafts, goods including tea, only gets a lower level of protection by this provision. Also the hierarchy in protection within TRIPS has caused proliferate different legal means across jurisdictions of the countries on GI protection.

Therefore, the developing countries such as Sri Lanka face with many difficulties when providing proper legal protection on their GIs domestically as well as internationally. Indian perspectives on GIs, especially on 'Darjeeling Tea', offer effective guidelines on protecting GIs. Therefore, Sri Lanka has to play a major role in providing proper protection on 'Ceylon Tea' and other GIs originated in its territory. Indian examples could well be used to provide more effective protection on GIs. Last, but certainly not the least, Sri Lanka has an obligation to contribute with other countries to constitute an effective legal instrument and multilateral agreement on protecting GIs. If we are eager to reap the benefits of our own GIs, we should cultivate a sound, competitive user-friendly and strong legal background on protecting Geographical Indications.

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LANGUAGE CHALLENGES IN COMMUNICATION SKILLS FOR LAWYERS

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Abstract

Globalization and liberalization have left impact on everyone to learn the language which is international in nature. Without an iota of doubt, one can confidently declare that English has become or going to become world language rather than being the language of only English speaking countries. Language in higher learning Institution means medium of instruction which is English in many countries of the world. English language is the cardinal tool of the lawyer in his/her career/profession. Ability to write, speak fluently, clearly and speak sonorous voice in English language is prerequisite for the successful lawyers in their legal profession. The legal profession unlike other professions is a profession of words includes legal terminologies. Lawyers use English language with due care and they need to be certain that language skills or communication skill will enable them to communicate accurately, understand precisely what they read and listen. Lawyer in some countries are known as a "Barrister" or a "Solicitor, a "Vakil." or "Advocate." Communication is the process of exchanging information. Information is conveyed in the form words (sentences), tone of voice, and demeanour. To be effective in communication one should overcome all the general language challenges. The general language challenges in communication skills for lawyers viz., Grammar, Vocabulary, Accent, Cultural Back Ground, Fluency, Lack of Active Listening, perceptual, emotional, gender, physical challenges etc., including the Plain English and Legal English. The author has ended this paper with conclusion and recommendations.

Keywords: Language – Communication Skills – Lawyers

"The language of law is single grain of sand at the bottom of a great Sea".....Mellinkof, D., *Language of the Law.* Boston, Little Brown and Co., 1963.

1.0 Introduction

Globalisation and increased trade liberalization made everyone must to learn the language which is international in nature. Without an iota of doubt, one can confidently and say publicly that English has become or going to become world language rather than being the language of English speaking countries like UK, USA, Canada, Australia, New Zealand, Republic of Ireland, & others.[66]

[66] Benny George Samuel et al, (2013). Communication Skills in English: A Practical Approach' Confluence(2015, September 5) Retrieved from. Confluence website:

Lawyers use English language with due care. There is need that language skills/communication skills will enable them to communicate accurately.[67] They will understand precisely what they read and listen. As the statement goes ... Soldiers kill the opponents with bullets in the combat or battlefield and the lawyers kill the opponents with the words in the legal battle. In other words, words used in the argument or written statement are like bullets to win the case in the court of law.

Sentences are the combination of words. Words, it is said, is the lawyer's tools of trade. Ever since humans learnt to communicate with each other, the means of communication have evolved over the centuries, refined and honed as time went by.[68] The words used in the title of this paper are explained below in clear cut manner.

Language in higher learning Institutions[69] is nothing but English which is the medium of instruction in many countries of the world. English language is the cardinal tool of the lawyer in his/her career/profession. Ability to write, speak fluently, clearly and that to be sonorous voice in English language is must to a successful lawyers in their practice. The legal profession unlike other professions is a profession of words as well as legal terminologies.

Challenges are faced by the students of law/lawyers are nothing but barriers for effective communication. To be an effective communicator one should overcome all the challenges or barriers.

Communication is essential of human activity or existence. No human can live in solitary and to live in a society, there is a need to interact to lead life smoothly in society. For interaction between two persons, we need to communicate. Communication is the process of exchanging information. Information is conveyed as words, tone of voice, and demeanour. Mehrabian's findings show that 7% of message pertaining to feelings and attitudes is in the words that are spoken. 38% of message pertaining to feelings and attitudes is paralinguistic (the way that the words are said). 55% of message pertaining to feelings and attitudes is in facial expression.[70]

Skill(s) is the ability to do something well; expertise. "Difficult work, taking great skill" and the synonym for the word skills goes a big line which includes the ability, coming from one's knowledge, practice, aptitude, etc., to do something well:- competent excellence in performance;

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http://www.tgpcet.com/E-journal/80%20PAPERS%20PDF/Benny%20George%20Samuel1%20and%20Niraj%20Kendhe2.pdf

[67] One way of increasing accuracy is applying the 3 C's of Nonverbal Communication: First<C> stands for context, second <C> stands for clusters, and third <C> stands for congruence.

[68] Air Infotech: Committed for excellence for legal research.. (2015, September 6). Retrieved from Article: The Importance of Language in Law Website: http://www.airinfotech.in/article5.html

[69] African Terminology is Higher learning Institutions. Indian terminology is Universities

[70] Mehrabian's communication research (2015, September 10) Retrieved from Professor Albert Mehrabian's communications model - http://www.businessballs.com/mehrabiancommunications.htm.

expertness; dexterity:-a craft, trade, or job requiring manual dexterity or special training in which a person has competence and experience. The word skill Antonym is inability.[71]

Lawyer in some countries are known as a "Barrister" or a "Solicitor, a "Vakil." and an "Advocate." A lawyer has two main duties: i) to uphold the law while also protecting a client's rights/cases; ii) To carry out these duties, a lawyer should understand the law and be an effective communicator. Hence, communication skills are vital to the lawyer.

An attempt is made in this paper to throw light on language use and practices in general language challenges in communication skills for lawyers[72] viz., Grammar; Vocabulary; Accent; Cultural Back Ground; Fluency, Lack of Active Listening, Shyness, Perceptual, Gender, Emotional, Physical challenges etc., including the Plain/Common/Regular English verses Legal English and ends with conclusion plus recommendations.

2.0 General Language Challenges in Communication

General English language challenges faced by law students/lawyers are as follows: Grammar; Vocabulary; Accent; Cultural Back Ground; Fluency, Lack of Active Listening, Shyness; Stage Fear, Physical, Emotional, Gender challenges etc., are discussed below in nutshell:

2.1 Grammar

A foreigner visited the hamlet[73] once upon a time. He did not find other means of transport hence he went to Railway Station at the out skirt of the hamlet. Please observe the dialogue between the Foreigner and Station Master.

Foreigner: Who is the Station Master?

Station Master: I is the Station Master.

Foreigner: Are you the Station Master?

Station Master: Yes, I are the Station Master.[74]

Any person glamour is his/her grammar. This proposition is acceptable and it is universal truth in one way or other way. Grammar is the foundation of the sentence where one can express ones thought in proper tense. One will not say "I have reached Symbiosis Law School yesterday at

[71] Dictionary.com. (2015, September 6) Retrieved from: http://dictionary.reference.com/browse/skill?s=t

[72] Author was/is the coordinator of the course "Communication Skills for Lawyers" in University of Dar-Es-Salaam and Adjunct Faculty in other Private Universities in Tanzania respectively.

[73] Hamlet means less huts/area than the village. In other words….. a small village.

[74] Grammar (one of the component is subject agreement rules and the second component is persons, First person, second person and third person). Please see: Your Dictionary. (2015, September 6). Retrieved from 20 Rules of Subject Verb Agreement website http://grammar.yourdictionary.com/sentences/20-Rules-of-subject-verb-agreement.html

5.30pm" but one will say "I reached Symbiosis Law School yesterday at 5.30pm." because of grammar rules.[75] Grammar includes parts of speech, tense, preposition, inflected form of verb, conjunctions, degree of comparison, active voice, passive voice, direct speech, indirect speech, types of sentence viz, simple sentence, complex sentence, compound sentence, compound-complex sentences, syntax, semantics etc.,[76]

2.2 Vocabulary

Bullets are for the soldier to fire and kill in the battle field and words/vocabulary is for the students of law or lawyers to win the legal battle in the court of law. If there are abundant vocabularies, then there is no stammering or pause in communication/arguments. If anyone having abundant vocabulary then one can express using the right word in the right context in the right time. In other words one will be fluent in once speech/talk or in arguments.

Activate your vocabulary by thinking or speaking briefly about the subject you are about to work on. For example, if you are going to study English on topics that focuses on vacations, take a moment to think about your last vacation, what you did, what you enjoyed, etc. This simple exercise will help your brain warm-up to vocabulary that you are likely to encounter as you study English about this particular subject.[77]

The best way to improve the vocabulary is to read anything irrespective of subject or course books, novels, poetry when one is free including the new food preparation columns in news papers or magazines. One will find the new words, and then refer the dictionary. Try to repeat it so that one can remember those new words and meaning. Now and then use them in sentences. Another way to remember is SQ3R technique.[78]

2.3 Accent/Pronunciation

One of the challenges faced by the beginner of the law students and lawyers are accent. One could perceive the sting of mother tongue when one is speaking in English. It depends upon the vocal chords/sound box of a person. It is easy for local teacher to teach to the students in English and the students will grasp easily. Whereas African/expatriate teacher teaching in India in any Law 'school to make the student to understand the class lecture, the students take at least three days three classes (each class is one day) to follow what African/expatriate teacher is teaching

[75] Whenever the present perfect tense is used then there should not be specific time factor. One should use at time only Simple Past tense only where the time factor is must when the action completed. In.Slide Share. (2015, September 5). Tense and its uses. Retrieved from website: http://www.slideshare.net/rajvino/tenses-and-its-uses

[76] It becomes exhaustive and lengthy to deal each aspect of grammar in this paper. Hence few are listed as the part of grammar.

[77] About.com. (2015, April 8). Retrieved from English as 2nd Language. Website: esl.about.com/.../intermediateenglish/.../study_eng.

[78] <S> means or stands for Survey, <Q> stands for Question, First <R> stands for Read, second <R> stands for Recite and third <R> stands for Review.

in the class.Improve one's pronunciation. If there are any problems with pronunciation during the dialog exercise, isolate the word--and then the syllable--that causes difficulty. Pronounce the challenging syllable on its own before pronouncing the entire word. There is on line dictionary which make it clear how the world should be pronounced.[79]

2.4 Cultural Back Ground

All people communicate with others all the time -- in ones homes, in workplaces, in the group's one belong to, and in the community. No matter how well one think one understand each other, communication is hard. Just think, for example, how often a person hears things like, "She/he does not get it," or "She/he did not really hear what One meant to say." "Culture" is often at the root of communication challenges. Culture influences how one approach problems, and how one participate in groups and in communities. When one participates in groups one is often surprised at how differently people approach their work together. Culture is a complex concept, with many different definitions. But, simply put, "culture" refers to a group or community with which share common experiences/usages that shape the way one understand the world. It includes groups that one is born into, such as gender, caste, creed, religion, race, or national origin.

2.5 Lack of Active Listening

The good listener is the good learner. Listening seems like a simple process and yet so many of us are more eager to talk than to listen. Someone once said we were given two ears and one mouth for a reason.[80] What better gift could anyone give to their family, friends, peers and bosses than to listen to them so that they feel really heard? Here are some tips. Stay present; Make eye contact; Ask questions for clarification; Acknowledge feelings; Restate or paraphrase; Seek first to understand and then to be understood; Give nonverbal feedback; Silence; Take in all the information both verbal and nonverbal; and Get permission.[81] Sometimes people just want to be heard. At other times they are seeking advice. Give advice only when requested and only after the person has had a chance to give you the whole story. If one is not sure, ask if the person is looking for input.

2.6 Fluency

Being fluent does not mean speaking swiftly. It is better to speak slowly and clearly than quickly and incoherently. The ability to speak smoothly and fluently

[79] One of the online dictionaries where one can find meaning, pronunciation, Synonyms and antonyms of a word in English language. Please see: http://dictionary.reference.com
[80] Silence is gold and speech is silver.
[81] Parker Associates(2015, April 4). Retrieved from Top Ten Listening Techniques website: http://www.asparker.com/ppts1206.html

is the result of three elements Listen, Read and Talk. Simple tips to improve fluency are stated in the web source.[82]

2.6.1 Listen

Listen to the common phrases, words and diction carefully. Listening to news telecasts such as Indian News channels including BBC, Aljazeera, and CNN will be of great help. Repeat newly learnt phrases with peers or family members. Speak aloud, In other words follow the SQ3R Techniques. Murmuring in one's mind/head will not help because ones mouth is not used to moving that fast or used to certain set of words. These are the tips for effective listening.

2.6.1.1 Focus fully on the speaker, his or her body language (demeanour), and other nonverbal cues are good grounds for effective listening.

2.6.1.2 Avoid interrupting or trying to redirect the conversation to your concerns, by saying something like, "If you think that's bad, let me tell you what happened to me."

2.6.1.3 Avoid seeming judgmental. In order to communicate effectively with anyone, One[83] does not has to like them or agree with their ideas, values, or opinions.

2.6.1.4 Show your interest in what is being said. Nod occasionally, smile at the person, and make sure your posture is open and inviting. Encourage the speaker to continue with small verbal comments like "yes" or "uh huh, indeed, certainly, no doubt at all."

2.6.1.5 Provide feedback. If there seems to be disconnecting, reflecting what has been said by paraphrasing. "What I am hearing is," or "Sounds like you are saying," are great ways to reflect back.[84]

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[82] Urban Pro: Hire Smartly. (2015, May 5). Retrieved from How to speak English fluently – Importance and Tips website: https://www.urbanpro.com/a/how-to-speak-english-fluently-importance-tips#sthash

[83] One as an indefinite pronoun meaning "any person indefinitely, anyone" is more formal than you, which is also used as an indefinite pronoun with the same sense: One(or you) should avoid misconceptions.

[84] HelpGuide.Org: A trusted non-profit guide to mental health and well. (2015, September 6). Retrieved from the Effective Communication website:http://www.helpguide.org/articles/relationships/effective-communication.htm

2.6.2 Read

Read good quality books written by famous authors, even famous novels and good English newspapers viz., The Hindu, Times of India, Indian Express, Deccan Chronicle, The Guardian etc.,. You will find many new words by reading books and other reading materials. This will improve your vocabulary. Understand the context in which the new words are used. Use them in sentences while speaking to friends and family or peers. Do not make it sound too artificial.

2.6.3 Talk

Communicate in English as much as possible even when one makes you up in mid night then only one has to speak in English language. It is all right to be wrong in the beginning. One may learn from own mistakes and move on. Your mental thinking could also be a hindrance for fluency. That means that the thought 'I am poor in verbal expression' can make you stammer or even more poor too. So do not just talk. Talk confidently even though it is wrong. Talk to convince would come later stages when one practice time to time. Talk to take people by storm. That is how you improve fluency in English. Once this mental block/thinking clears, then one would become fluent and will improve on its own.

Follow these simple tips to improve fluency. Believe in yourself and never shy away from mistakes. Take them seriously and vow not to repeat the mistake ever again. In addition, do not forget to listen, read and talk your way to fluency.

2.7 Shyness

Shyness means the quality or state of being shy. Any person worries and anxieties are maintained by negative and limiting thoughts about one. Start with placing more emphasis on the positive side of personality.[85] Think of pleasant experiences and keep them in mind whenever you feel overwhelmed by shyness. Try to visualize the kind of person one would like to become and make it a powerful image to stay with them every moment. The Urdu speaking people say like this: "*Duster pe aur bister pe shurmana nahi*." [86]The English translation is "One should not feel shy on any platform either it is on dining place or on bed. One should not feel shy when one is speaking or writing. Then only such challenges one could overcome. Failure is first step to success should be keep in the mind. One should be optimistic in that manner then only one would proceed in life and become successful in any career or profession.

2.8 Stage Fear/Phobia

Communication apprehension is far more than the first stage fright frequently found in speech classrooms, school assemblies, and drama productions. It is a pattern of anxiety, established often

[85] Be Optimistic in approach or thinking.
[86] One should be not feel shy on the dining cloth/place or dining table or on the bed.

in the elementary grades, which can profoundly affect much or all of a student's oral communication, social skills, and self-esteem. This digest examines some causes and consequences of communication apprehension and ways in which it can be diminished.[87]

2.8.1 Communication Apprehension (CA)

Communication Apprehension (CA) has been defined as an "individual level of fear or anxiety associated with either real or anticipated communication with another person or persons."[88] This anxiety is a significant problem at the elementary school level. Research reveals that at least 11% of the elementary students experience severe CA, and an additional 20 percent may experience enough anxiety to warrant some sort of intervention.[89]

There are four methods overcome the phobia by way of i) Identify your fear; ii) Write down your goals; and iii) Make a copying strategy; and iv) Tell other about your phobia.[90]

There are other challenges like Physical Communication environment, distance, ignorance of medium etc. [91]

2.9 Perceptual Challenges

Perceptual Challenges of communication are nothing but internal challenges that occur within a person's mind when the person believes or perceives that the other person that they are going to speak with will not understand or be interested in what they have to say. Perpetual challenges often cause communication problems because the language used by the person with the perceptual challenges is often cynical, dismissive or obtuse so the conversational partner is not going to understand what the person is saying to them completely and the person is not going to communicate anything of substance with the other partner.[92]

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[87] ERIC Clearinghouse on Reading and Communication Skills Urbana IL(2015, April 8). Retrieved from the Communication Apprehension: The Quiet Student in Your Classroom website: arapaho.nsuok.edu/.../OSTCA.CommApp.Resource

[88] (Mc Croskey, 1977)

[89](Harris, 1980; Garrison and Garrison, 1979; Wheeless, 1971).

[90] Wiki: How to do anything? (2015, September 5). Retrieved from How to Overcome Phobia website http://www.wikihow.com/Overcome-Phobia

[91] Author did not gone into details each of them. Further reading the readers may obtain from (2015, September 16), Retrieved from Educational Technology: The Barriers in Communication website: http://www.slideshare.net/erwinmarlonsario/barriers-in-communication-50762088

[92] What are the Perpetual Barriers of Communication?(2015, September 10). Retried from Ask website: www.sourceamerica.org/.../316-overcoming-perpetual-barriers-to-job

2.10 Emotional Challenges

Emotional challenges are mental hurdles that keep one from openly communicating ones thoughts and feelings or emotion to others. They prevent one from being oneself and living ones life to the fullest. Individuals with emotional barriers or challenges tend to be extremely reserved, cautious, and insecure. As a result, they may find it challenging to effectively express themselves – whether it's through their work, conduct, behaviour or through interpersonal communication.[93]

2.11 Gender Challenges

Even in schools/colleges/universities where women students and men students share equal stature, knowledge and experience, differing communication styles may prevent them from speaking/working together effectively. These gender challenges can be inherent or may be related to gender stereotypes and the ways in which boys and girls are taught to behave as children. Although not all men/boys or all women/girls communicate the same way as the rest of their gender, the study or research have identified several traits that tend to be more common in one gender or the other. Understanding these tendencies is the key in creating a work and learn environment that fosters open communication among all women and men in higher learning institution.[94]

2.12 Physical Disability

Physical disabilities are such as hearing problems or speech difficulties. When one say hearing problem then there would be defect in ear or ear parts defectiveness. As far as speech is concerned it depends on vocal chords, cleft lips, gap tooth, blocking of nostrils, stammering to name them few.

All those challenges which are discussed above may make hindrance/barrier to the effective communication to the students of law as well as lawyers.

3.0 Plain/Common/Regular English Language v. Legal English Language

The following classic example makes clear between Plain/Common English Language and Legal English Language. I give you that orange is the Plain/Common/Regular English Language. The same sentence when written out by a lawyer would become something like the following:

"I give you all and singular, my estate and interest, right, title, claim and advantage of and in that orange, with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck, and otherwise eat the same, or give the same away as fully and effectually as I said AB. I am now entitled to bite, cut, suck, or otherwise eat the same orange,

[93] Let's live coaching (2015, September 5).. Retrieved from what are Emotional Barriers? Website: letslive.info/emotional-barriers

[94] Business Insurance (2015, September 9).Retrieved from the Gender Barriers to Communication website: work.chron.com › Careers ›

or give the same away, with or without its rind, skin, juice, pulp, and pips, anything hereinbefore, or hereinafter, or in any other deed, or deeds, instrument or instruments of what nature or kind so ever, to the contrary in any wise, notwithstanding."[95]

"Legal language in dominant mono-lingual situations and in multilingual situations pose different sorts of problems. If a mono model is sought to be imposed on a pluricultural situation when even the major regional language speakers could have problems with the one language which is sought to be the language of administration and the language of law. As in a plurilingual country so in a plurilingual region, one language chosen for legal purposes would have comparable problems."[96]

3.1 The Difference between Legal Language and Regular/Plain Language

English is being spoken in two different regions. One can analyze that there is a lot of difference between the two. For instance, there are certain terminologies in British English and the US English that slightly differ in spelling too. This can lead to confusion if a British lawyer is practicing law in the US. However, English of law can set language standards that align well with the law of that particular state.

For Example:

The British say Trouser and American says Pant in plain English language. British term Lorry and American term Truck.[97]

In legal terminology: The British lawyers say/write Public Interest Litigation and the US Lawyers say/write Class Representative Suit. British lawyers write Plaintiff and American Lawyers write Claimant.[98]

When come to the matter of spelling either in plain/legal English: The British Lawyer writes the spelling: <Colour>, whereas US Lawyer writes the spelling: <Color>.[99]

Plain/Regular English language is also known as Common English language. The writing and setting out of essential information in a way that gives a cooperative, motivated person a good chance of understanding it at first reading to a common man, and in the same sense that the writer meant it to be understood. In other words writer and reader both are on the same

[95] Niles' Weekly Register (2015, September 6). Retrieved from the Legal Matters Volume 49 website https://books.google.co.in

[96] Language Law and National Integration (2015, May 4). Retrieved from the Nature of legal language: Written and spoken website: http://www.ciil-ebooks.net/html/langLaw/six.html

[97] Oxford Dictionaries: Language matters (2015, September 12). Retrieved from British and American terms website: http://www.oxforddictionaries.com/words/british-and-american-terms

[98] There are many words which differ in British and American region. Author mentioned two examples.

[99] The author used only one example of each but there are many words, in regular language, legal language and in spelling too. In all common law countries British English is written.

plane/platform to understand each other. That means; there would not be any jargons, phrases or even Latin or foreign language terminology.

Legal English is often refereed as "Legalese." In the other words it is Legal language. The Lawyers and other who work in judiciary use the Legalese or legal language. It is mostly used in written form to write plaint, return statements, affidavit and other legal documents in the court proceeding. The use of Legalese (Legal English) is time immemorial.

Legal language has been known as an argot, a dialect, a register, a style, and even a separate language. It is best described with the relatively new term sublanguage. A sublanguage has its own specialized grammar, a limited subject matter, contains lexical, syntactic, and semantic restrictions, and allows "deviant" rules of grammar that are not acceptable in the standard language.[100]

Examples are given below to understand easily difference between Legal English Language (LEL) and Regular/Plain English Language (PEL):[101]

LEL: The defense council has to exculpate then only the Judge would acquit the accused.

PEL: The defense council to prove the guiltless then only judge would acquit the accused.

LEL: How many issues are involved in this civil case?

PEL: How many issues (offspring) you have in your matrimonial bond.

LEL: Have you recorded the senate meeting minutes?

PEL: How many minutes your LW108 class?

LEL: The plaintiff appealed to the Court Appeal

PEL: The Plaintiff approached the Court of Appeal

LEL: The defendant is exonerated from liability

PEL: The defendant is free from liability

LEL: No marriage would be celebrated in consanguinity

PEL: No marriage would be conducted in close blood relations

LEL: These children are extra-marital

[100] Welcome to LANGUAGEandLAW.org (2015, September 5). Retrieved from An online institute devoted to the study of language and the law website: http://www.languageandlaw.org

[101] Hussain, M.S., & Magee, M.A. (2014), Understanding law: Question and answer, Book-I. Dar-Es-Salaam: Matokeo Publishers and Printers.

PEL: The children's are bastards

LEL: In trust, the beneficiary may enjoy the usufruct only

PEL: In trust, the beneficiary may enjoy the outcome only

LEL: The Court of Appeal never delivers judgment which is fructuous

PEL: The Court of Appeal never delivers judgment which is in effective

LEL: The session is adjourned *sine die*

PEL: The session is adjourned to further orders (without fixing a day of future action)

LEL: You may get your LL.B. degree *in absentia*

PEL: You may get your LL.B. degree in your absence

LEL: My sick grandmother was my *alibi* for missing school.

PEL: My sick grandmother to give an excuse for missing school

LEL: Law of Evidence one of the section says that if husband is not known for seven year consecutively then the presumption is that he is dead.

PEL: Law of Evidence one of the section says if husband is not known for seven year consecutively then it is clear fact that he is dead.[102]

4.0 Conclusion

The author finally concluded among the challenges the cultural barrier is the big challenge. All other challenges are specified above in communication skills for lawyers both in speaking or writing Plain English Language and Legal English Language. Any one overcome them then he or she becomes excellent in communication skills.

English Language gives a huge advantage to those who have learned English as their first language or who have studied English as a medium of instructions in Schools or International Schools from the basic education viz., primary education as well secondary education. In any case most higher learning institutions the medium of instructions and study are in English language in India and rest of the world too. "If English language is replaced by any other language, then there are no Universities and there are only diversities" is said one of the author.[103]

In addition to the English Language, the legal terminologies are more important in drafting the legal documents. Those terminologies mixture of Latin, French, English languages etc, however, legal language is a complex collection of linguistic habits that have developed over many

[102] Hussain, M.S., & Hakeem, A(2012) Legal English v. Plain English, *Supreme Court Journal Weekly Report*, 2012 (8), 19-20.
[103] Author of such statement are not known to this paper author.

centuries and that lawyers have learned to use quite strategically. One will think one can do anything and certainly one can do anything. Hence, be optimistic in view or approach. Many of the scholars/authors say "The best way to learn language is to speak it."

Without any doubt, it is said that no lawyer in this world is having hearing defect, speech defect and visual defect. In other words, all senses of a lawyer should function in normal way.

5.0 Recommendation

One must not only teach, but also inspire and empower. The goal is to excite the students about learning, speaking, reading, writing, and comprehending. The only way to reach the whole population of our planet is to read, write and speak in English as well as legal language and particular to the law students/lawyers.

The Law students/Lawyer should develop communication and language skills by practicing the following:

- Do not be pre-occupied with grammatical accuracy in the beginning;
- One become be fluent in talk or speak, when one is perfect in grammar;
- Read books, novels, newspapers, read stories, articles, news-items to improve the vocabulary,
- The lawyer's greatest skill/wealth is clarity and succinctness. A successful lawyer is a good researcher; a good researcher should possess computer savvy;
- A lawyer should be voracious reader (not blind), good listener (not deaf) and good orator/speaker (not dumb). In other words, his/her all senses functions normal in communication skills.

A lawyer becomes perfect when he/she would achieve the above recommendations then he/she is excellent in communication skills then all the language challenges would disappear without any doubt. Let the author ends this paper with the following quotation:

"*One's own culture provides the "lens" through which one view the world; the "logic"... by which one order it; the "grammar" ... by which it makes sense.*"[104]

[104] Avruch, Kevin & Peter Black, (1993) Conflict resolution in intercultural settings: Problems and prospects in the book Dennis Sandole and Hugo van der Merwe (Ed.). C*onflict resolution theory and practice: Integration and application*, New York: St. Martin's Press.

CONSCIENCE- THE ULTIMATE JUDGE: EVIDENCES FROM INDIAN EPICS

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ABSTRACT:

Man is a social animal. In the society he tries to compete with others and sees many ups and downs in the process. He aims for luxury and tries to achieve it at any cost.

Once the quality of striving to attain luxury "at any cost" gets imbibed in his mind, he cultivates inside him a "Pashu Pravruthi". To control this attitude in a human being, establishment of judicial system became a necessity. Rushis, Puranas and Kavyas have tried to guide the individual in the righteous path.

In today's technologically advanced world, judicial system demands documental evidence and witnesses without which no legal decision making is possible. However, there are great examples in the pearls of Indian cultural wisdom - Mahabharata - Ramayana wherein people used to stand on their words despite no documental evidence or witnesses, when people used to listen to their inner conscience instead of a judgment given in a courtyard.

Bhishma Pratignya was one such instance which was an undocumented promise made to Sathyavathi about Bhishma giving away his chances of becoming King to his father's kingdom. Shakunthala's daringness in the courtyard to speak about the King Dushyantha's relationship with her and the greatness of the people in the kingdom who believed her word as guided by their conscience, speaks a lot about the ancient judicial system. The righteous path followed by Rama to mitigate the ill-effects of "Yatha Raja Tatha Praja" by sending Sita to the woods reminds us of the great legends and their spotless character. Many such characters can come alive for us once again to teach us the righteous path if we are willing to recall them.

In this modern society, we are slowly moving from 'Arya Samskara' to 'Unarya Samskara' and in a situation when animals in the forest indicate to their group when they sense a danger, we humans in the name of competitive spirit have been behaving like animals in this renovated, technologically advanced, culturally improvised self-made jungle.

Yes, there is a need for evolution of the judicial system for which there should be change in the society, which in turn demands a change in every human being's thinking and character, only after which "Sachilatha" (Good character) will lead to "Samardha Nyayam" (rightful justice).

Keywords: Sachilatha (Good Character) - Satyata (Truthfulness) - Dharmikatha (Following Dharma) - Paradarshikatha (Transparency) - Conscience - The Ultimate Judge

1. Introduction

The Early man who was afraid of the geographic constituents – air, water and fire has invaded his fears and has converted them into utilities for his living, thus helping him to make his life comfortable. As long as he lives a comfortable life, he has not even been bothering to think about the meaning of satisfaction and happiness in life. Without getting satisfied with his present comfortable life, he started striving and converting his life from 'comfortable' to 'luxury' status for his temporary pleasure.

As described by the Maslow's Hierarchy theory, after attaining a luxurious status, he strives to gain recognition in the society. In this direction, he strives to win over others in this competitive world and desires to become the best among his peers. Competing in this modern world he pressurizes himself to an extent that he picks up a wrong path. He keeps aside the path of 'Dharma and Nyaya'. With his thirst for earning he has smashed the basic values of humanity and adopted 'Pashu pravruthi'. He started cheating the innocent and in the same direction has been colliding head on head with other people of same mentality. In such a society, need of judicial system becomes mandatory. But the man with the help of his financial strength has been feeding the ugly animal called corruption. He diverted the rules of justice to dance to his tunes, his whims and fancies and has felt proud for his achievement in blinding the 'Nyaya Devatha' (The Goddess of Justice). With his unscrupulous mind, in meaningless debates and contaminated proficiency, he has deserted the 'Sanathana Sampradaya' and has diluted the system. Questions trouble one's mind, as to what type of a system are we living in and how judicious is our judicial system?

1.1 Sachilatha (Good Character)

Once we have to recollect where we are from and how rich is our ancient culture and wisdom. Let us discuss in this paper further how "Sachilatha" (Good character) can be the basis for proper judicial system by way of examples. Our valuable scriptures Bharata-Ramayana have cultivated cultural values in every individual. Rushis, Puranas, Kavyas have enlightened the individual about the righteous path which the individual has to follow in his / her life. In Mahabharatha, Bhishma's father King Shanthana wished to marry fisherman's daughter Sathyavathi. Sathyavathi demanded that instead of Bhishma, her son should be crowned as the King of the Kaurava kingdom, to which Bhishma obliged without a selfish motive. Despite Bhishma's judiciousness, Sathyavathi asked what assurance Bhishma can give that his children will not demand back the throne, to which Bhishma replied that he will remain a Brahmachari forever through oath – "Bhishma Pratignya". This oath is not supported by documents but just a word given by Bhishma. Despite no documental evidence, Bhishma has kept his word and has crowned Sathyavathi's son as the King. In this story, the way in which Bhishma stood on his word is the self-created law which he self-imposed sincerely and obediently.

1.2 Satyata (Truthfulness)

One more apt and excellent example from Mahabharatha is that of Shakunthala. Dushyantha married Shakunthala in "Gandharva vidi" and promised her that he will take her back to the Kingdom. But out of fear towards society, Dushyantha could not stand on his word. Shakunthala who waited for a long time for her husband was of the opinion that the King might have been

engulfed in the administration and ruling of his Kingdom and hence she along with her son visited the King's court. In the presence of all the subjects, Shakunthala requested the Kind to recollect his relationship with her, to which the King responded as if he doesn't know her. After trying to remind the King of their relationship, she had given up her hopes. In here, there is no place for divorce and there is no way that a cheat will escape from his sins. In such a Kingdom, when a woman declares openly that the King is her husband and when she declares that her son who came along with her, should adorn the throne, made his subjects understand that no person other than the one who implements truth in every aspect of life can be so courageous and open. With this, based on their "manassakshi" (consciousness), all his subjects in the courtyard strongly believed and accepted that all her argument is true. With this incident Dushyantha accepted that he lied because he was afraid of the fear which gripped him about how the society might treat him and accepted her as his better half, on conformance of his subjects, leading to a prudent judicial decision made based on the "manasakshi" (self – conscience). In this story, there are no documental evidences, no witnesses, no cross examinations. Justice could prevail in those times because the entire Kingdom believed "Sathyameva Jayathe". The pure character of Shakunthala made her to win justice for herself.

1.3 **Dharmikatha (Following Dharma)**

Even today we wish to bring back the "Rama rajyam" for which Rama's Sacheelatha (righteous character) and Dharma Niyathi (following of Dharma) are the main reasons. "Ramo vigrahavan Dharmaha" – defines Dharma as Rama himself. Just to abide by the word given by Dasharatha to Kaikeyi, Rama renounced the Ayodhya Kingdom and walked into the woods. There are no promissory notes in here. There is no third witness except the promisor - Dasharatha and the promisee - Kaikeyi. To stand on his word, Dasharatha, an ideal follower of Dharma, had to give up his Rama, his ultimate equivalent of life. There is no surprise that Rama had left his kingdom as he is the son of the great Dashratha.

Politicians, who play vote bank politics and work for their vote banks, but never feel accountable to fulfill their promises must go through Ramayanam for once. Based on the words of a drunkard Dhobi, if all the subjects in Kingdom might have the same thinking about the return of kidnapped Sita to the kingdom, opining that "Yatha Raja Tatha Praja" (if he continues like this Dharma might not be followed in the kingdom), "Dampadhya Dharmam" (marital discipline) may be damaged in the society, Rama has to send away his wife to woods but not because he was doubtful about the fact. Who might be a better follower of law and righteous path than Rama as per this example?

1.4 Paradarshikatha (Transparency)

For such great personalities, kingdoms, people, necessities, luxuries are nothing valuable than a sand particle. Law today opines that even if 99 out of 100 convicts escape from law might be acceptable but even one ignorant should not be punished. But in today's legal system, a generation in where truth cannot prevail in the presence of the judicial decision makers, a system in where only proof / evidence can only prove the truth, the shouts of an accused are becoming meaningless.

When Rama killed Vali from behind the tree, Vali questioned Rama on the path which he followed in confronting with him. Rama replied that only a person who follows the righteous path of Dharma can question on my implementation of Dharma and as he felt that he has a responsibility to explain it to Vali, has explained Vali about the unrighteous path chosen by Vali. Vali accepted his mistake and agreed for his punishment bestowed upon by Rama.

1.5 Paropakara (Helping others)

When the Rushis (husbands) were away for their religious rituals, Mytraih, Arundathi, who were living on the banks of Ganga along with other "Rushi patnis" (wife's of Saints), who sensed the flooding of Ganga in their habitats, used to shift their livelihood to safe places on the hills. Once the natural calamity is away, they used to rebuild their habitats. They weaved clothes from coir and facilitated them to Sita who was to stay with them in their habitat. In this way, they used to utilize their knowledge for the welfare of others in the society but not in an immoral way. There is no corruption here, no cheating, no unscrupulous deeds, no grief and no competitive spirit wherein you may have to supersede others. As the inheritors of this great "Arya Samskruthi", who call ourselves as City dwellers, use the most advanced technology and our wisdom mostly to cover up the truth, help injustice to prevail and dilute judicial system. We are cutting the branch of a tree on which we are sitting, a dangerous act leading to self-destruction. We are slowly moving from 'Arya Samskara' to 'Unarya Samskara'. Even animals who do not have a natural advanced audio visual communication channel like human beings, do pass on their warning signals about the coming of some grave problematic situation through their own communication channels to their fellow beings to support them survive. It is surprising to say that when judicious character prevails in the animals living in forests (through the helpful nature to their fellow living beings), in today's modern world, human is acting against his value system.

2. **Conclusion:** Yes, there is a need for evolution of the judicial system for which there should be change in the society, which inturn demands a change in every human being's thinking and character, only after which "Sachilatha" (Good character) will lead to "Samardha Nyayam" (rightful justice).

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LEGAL ISSUES ON DATA PRIVACY AND SECURITY IN CYBERSPACE WITH SPECIAL REFERENCE TO INDIA

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Abstract:

Data and information are debated to be synonyms; the dominant approach to solve this debate is to view personal information as a commodity that interested parties should contact for, during the course of negotiating a cyberspace transaction. Thus, data or personal information is considered to be a modern form of money or property. Simultaneously, cyberspace is a new frontier for gathering personal information and thus Internet has become hub of personal information market. In the cyberspace, people are not aware of who collected and used their personal data; the purpose of use and whether anyone still holds a copy of their information is also obscure. Absolute privacy is therefore, just a hypothesis in cyberspace.

In India, data standard compliances are uncertain. Globally, (including India), it is observed that companies and other formal institutions are not following due diligences for data security, thus, opening the gates to many legal challenges. To face these new challenges, many countries have enacted laws for data privacy and security in cyberspace. In India, there is no special legislation dealing with data privacy and security in cyberspace, even though privacy is recognized in the Indian Constitution as a fundamental right under Article 21. Rules under Information Technology Act, 2000, are insufficient.

Therefore, the present paper is an attempt to study the data security challenges and data privacy measures in India and compare it with EU, and USA.

Keywords: Cyberspace, Data security, Information, Privacy, and Property

1. Introduction:

Privacy is internationally recognized as a human right[105]. The term Privacy is not defined in the constitution of India or in any other law in the country, but it is an abstract term[106] it varies from time to time, place to place, according to culture, beliefs, traditions and practices

[105]Ian J. Lloyd. (2004). *Information Technology Law*, 4th Edition, New York: Oxford University Press, p.47.

[106]Bhairav Acharya, Advocate, made a statement in the debate on Lok Sabha TV Channel, available Youtube:
Accessed on 02-09-2015

of particular place. Privacy is a state of being alone and not watched by another, starting from intimacy, sexual choice, personal identity, moral and physical well-being, reputation, formation of human relationships, health and environmental protection, collection access to personal information[107]. Information Privacy and thus, Information Privacy is defined as Acquisition, Disclosure, and Usage of personal information which is claimed as controlled by the Individual who owns it[108].

Daniel Solove, in *The Secrecy Paradigm*[109], refers to secrecy paradigm to understand privacy as being invaded into one's hidden world either through surveillance or by publicizing hidden information. He said that *inhibition, self-censorship, embarrassment,* and *damage to one's reputation* are the consequences of such raids into privacy. The law is heavily influenced by this paradigm and as a result, if the information is not secret, courts often conclude that the information cannot be private. It is however, essential at this point to gain clarity about some related terms such as personal data, sensitive personal data cyber space.

1. Personal Data:

Personal data, which is collected and used for various purposes almost on a day to day basis for example, an individual gives personal data when he/she, registers for a library card, signs up for gym membership, opens a bank account, fills in a job application, applies for Permanent Account Number (PAN) card, etc. Personal data can be collected directly from the individual or from an existing data base. These data may subsequently be used for other purposes and/or shared with other parties. Therefore, personal data can be any data that identifies an individual, through a name, a telephone number, or a photo or e-mail Id.

Article 2(a) of the general directive defined the term personal data as follows: *personal data shall mean any information relating to an identified or identifiable natural person (data subject); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one more factors specific to his physical, physiological, mental, economic, cultural or social identity*[110]. In India, the Information Technology Rules 2011, framed under Section 2 (1) (i) of the Information Technology Act, 2000, recognized personal data as one which covers photograph of a person, name, age, email, mobile number, pan card number so on which identify a person[111].

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[107] David Wright, Paul De Hert. (2012) *Privacy Impact Assessment,* Vol-6, New York: Springer Dordrecht Heidelberg, p.39

[108] Jerry Kang. (1998). *Information Privacy in Cyberspace Transactions*, Stanford: Stanford Law Review. p.4

[109] Daniel J. Solove. (2004) *The digital person, technology and privacy in the information age*. London: New York University Press p. 9& 46.

[110] Peter Carey. (2004). *Data Protection A practical Guide to UK and EU Law*, 2nd Edition, New York: Oxford University Press, p.86

[111] Prashant Mali. (2012) Delivered lecture on Legal aspects of IT Security and IT Act 2000 compliance,

2. Sensitive Personal Data:

Sensitive personal data can be details about racial or ethnic origin, political opinions, religious beliefs or other beliefs of a similar nature, trade union membership, physical or mental health or condition, sexual life, the commission or alleged commission of any offence, any proceedings, and the disposal of such proceedings or the sentence of any court in such proceedings[112].

In India, IT Rules protect sensitive personal data such as password of a person, financial information, debit card, credit card, physical, psychological, mental conditions, sexual orientation, medical records, bio-metric information, finger print, and retina scan. An exception to this sensitive data is information available under the Right to Information Act, 2005[113]. There is an ongoing debate about right to information and right to privacy; while the former asserts that a right to receive information causes transparency in public life, the latter right could intrude on the right to privacy of some individuals. Acknowledged tension between the right to privacy and the right to information is calling for a framework formulation towards, balancing two rights across jurisdictions. In India, this conflict is not witnessed much and every attempt to balance it is more evident under the Right to Information Act, 2005.

Thus, it may be concluded that data is a modern form of money or property[114] this may be scattered, or unimportant, or in small bits, but has the potential, to be used or misused by companies or by antisocial elements[115]. It cannot be transferred without consent of the owner/author; one who wants the data has to follow the procedure like transfer procedure of traditional property for obtain data and this is where data protection becomes significant[116]. But data protection is also more specific than privacy, since it only applies when "personal data" are "processed". By default, and contrary to privacy, data protection rules are not prohibitive, but they organize and control the way personal data is processed.

3. Cyberspace:

Cyberspace does not have a standard, objective definition. The word "Cyberspace" is credited to William Gibson, who used it in his book, Neuromancer, written in 1984. It is "*a notional environment in which communication over computer networks occurs*." The word became popular in the 1990s when the use of the internet, networking, and digital communication and the term "cyberspace" representing the many new emerging ideas and phenomena.

November, 1 of 2012 at Mumbai. India, Available at You Tube; accessed on dt.22-01-2015.

[112] *Ibid.6*

[113] *Ibid.*7

[114] Paul M. Schwartz. (2013), *Property, Privacy, and Personal Data*, Jstor.org. 9-01-2013

[115] Rodney D. Ryder. (2007). Guide to Cyber Laws (Information Technology Act, 2000, E-Commerce, Data Protection & The Internet), 3rd Edition, Nagpur: Wadhwa and Company, pp.477-506.

[116] Serge Gutwirth, Yves Poullet& Paul De Hert (2010). *Data Protection in a Profiled World*, New York: Springer Dordrecht Heidelberg, p.28.

Cyberspace is a concept that is associated with a mature electronic culture that allows one to both process and interacts with information in an electronic form[117]. [118]*Cyberspace is a globally networked, computer-sustained, computer accessed, and computer-generated, multi-dimensional, artificial, or "virtual" reality*. In this reality, each computer is a window wherein every object, physical, real, action is nothing but purely made up of information and data. This information is derived in part from the operation of the natural, physical world, but is derived primarily from the immense traffic of symbolic information, images, sounds, and people, that constitute human enterprise in science, art, business, and culture[119].

Cyberspace is the new frontier for gathering personal information, and its power has only begun to be exploited[120]. The Internet is rapidly becoming the hub of the personal information market, for it has made the peddling and purchasing of data much easier. Currently, there are two basic ways that websites collect personal information.

Firstly, many websites directly solicit data from their users, for instance, requiring users to register and log in, and registration often involves answering a questionnaire. Online merchants amass data from their business transactions with consumers.

Secondly, Government organizations, particularly those engaged in fighting crime and terrorism, have a particular need for personal information. Personal data of others, may help to find out the identity of the person, - information whether he poses a risk to society and with what kind of people he is in contact and so on.

Advantages and facilities of cyberspace, there is a flop side to it. People are not aware as to who has collected and used their personal data, for what purposes, and who still holds a copy of the data[121]. In fact, the advances in the Internet and information technologies have enabled efficiency handling of personal data, cyberspace is gradually turning into a breeding ground for data abuse, such as, e-mail spamming, and credit card fraud, hacking into private data, hacking into organizational data etc.

To face these new challenges, many countries have enacted laws to regulate abuse of personal data in cyberspace, for example, the Australian Privacy Act (Australian Government, 1988), the British Data Protection Act (British Government, 1998), the Personal Information Protection and Electronic Document Act of Canada (Canada Government, 2000), the German Federal Data

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[117] Katsh, M. Ethan. (1995). Law in a Digital World, New York: Oxford University Press, Inc. pp. 28 - 29.

[118] Benedikt, Michael. (1991) "Cyberspace: some proposals," in M. Benedikt (ed.) Cyberspace: First steps.
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Digital Age," *Wired,* March, p. 85.

[120] *Ibid*. 5

[121]Hideyasu Sasaki. (2007), Intellectual property protection for multimedia information technology, New York:
Information Science Reference (an imprint of IGI Global), p.162.

Protection Act (German Government, 2001), and so forth. Moreover, the European Parliament and Council passed the European Union's Directive 95/46/EC, on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in 1995 (European Union, 1995).

Regarding privacy, there are significantly three areas:

1) Economic or cybercrimes where the wrong doer will be prosecuted and punished accordingly,
2) Military security which is waging war, destruction of infrastructure etc.
3) Content of data - what is good and bad.

There are different kind of securities one is technical security second is legal security and insurance security to handle the above.

2. General Security Standard Compliances -Around the Globe

There are different models for regulation of data security; mainly there are EU and US standard for data protection compliances. EU compliance talks about very comprehensive, stringent nature of regulation, while on the opposite side, US regulation talks about HIPAA (Health Insurance Portability and Accountability Act of 1996) and financial aspects of GINA (Genetic Information Nondiscrimination Act 2008**)** regulations, that are imposing rights and liabilities to government and private companies.

National privacy framework for India, NASSCOM and Data Security Council of India (DSCI) are working for regulation of national security framework which is regulating government and private companies conferring some kind of assurance of data security to citizens[122].

3. European Union Model

In European Union Directive 95/46/EC (the data protection Directive) was developed to synchronize with national provisions in this field and the personal data of all citizens will have equivalent protection across the Union. The fifteen Member States of the EU were required to bring in their national legislations in line with the provisions of the Directive by 24th October 1998. According to the directive, in case rights have been violated, it is to contact the person who appears to be the source of the violation in order to find out who the Data Controller. According to the Directive, each Member State must provide one or more public authorities to ensure proper application of the data protection law. This authority, often referred to as the supervisory authority, is competent to hear complaints lodged by any person or business. The supervisory authority must investigate the claim and may temporarily ban the processing. If the supervisory authority finds that the data protection law has been violated, then the supervisory authority could, among other things, order the erasure or destruction of the data and/or ban further processing. To contact the supervisory authority, should (preferably in writing) describe the

[122] Vinayak Godse. (2012) Delivered Key Note Address-II on Data protection and data security council of India,
October, 17 of 2012 at Kolkata, India, Available at You Tube dt. 29-01-2015.

problem and submit enough information so that the problem is well described. In some member states, the supervisory authority has standardized forms that can fill out to make a complaint. If this is available, then forms should be used because this will speed up the handling of case and will receive an answer more quickly. In some member states, complaints may be submitted by e-mail. In other cases, this is not yet possible.

3.1. PCI Payment Card Industry:

The PCI, Decision Support System (DSS) and Self-Appraisal Questionnaire (SAQ) is a validation tool for merchants and service providers that are not required to undergo an on-site data security assessment as per the PCI and DSS Security Assessment Procedures. The purpose of the SAQ is to assist organizations in self-evaluating compliance with the PCI and DSS.

There are multiple versions of the PCI, DSS and SAQ to meet various business scenarios. Which determine which SAQ applies best and how to complete the SAQ. Each SAQ includes a series of yes-or-no questions about security posture and practices. The SAQ allows for flexibility based on the complexity of a particular merchant's or service provider's business situation, as shown in the table below, this determines validation type. The SAQ validation type is not correlated with a merchant's classification or risk level.

3.2. The Family Educational Rights and Privacy Act, 1974 (FERPA):

The Family Educational Rights and Privacy Act 1974 (FERPA) is a Federal law that protects the privacy of student education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students."

Schools may disclose, without consent, the information in the "directory" such as, student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance**.** However, schools must inform to the parents and eligible students about directory information and allow parents of eligible students a reasonable amount of time for objections if any to disclose directory information about them. Schools must notify parents and eligible students annually of their rights under FERPA. With several exceptions, schools must have a student's consent prior to the disclosure of education records after that student turns18 years.

3.3. The Sarbanes-Oxley Act of 2002:

It directed the Commission to establish rules prohibiting auditors from providing certain non-audit services to audit clients and requiring management and auditor reporting on the effectiveness of public companies internal controls. It increased penalties for violations of securities laws and required certification of financial results by key corporate officers. Through these and other provisions, the Act called for improvement in the system of checks and balances that govern the production of financial information provided to investors.

3.4. The Health Insurance Portability and Accountability Act of 1996 (HIPAA):

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is the most significant federal health care reform in a generation. The Act creates the first national standards for the availability and portability of group and individual health insurance coverage, relies on the states as well as the federal government to enforce those standards, begin the development of federal policy for the electronic transfer of medical information.

3.5. Availability and Portability:

HIPAA sets new standards for regulation of health insurance coverage. It assigns responsibility for regulating and enforcing these standards to both the federal government and the states. The companies have liabilities to follow the standards which protecting client's data. HIPAA covered entities health plans, health care clearinghouses, and health care providers who transmit financial and administrative transactions electronically are required to comply with the national standards and regulations. Under HIPAA, the Secretary is required to impose a civil monetary penalty on any person failing to comply with the national standards and regulations. The minimum civil penalty (fine) for a violation is $100 per violation and up to $25,000 for all violations of an identical requirement or prohibition during a calendar year.

HIPAA also establishes criminal penalties for any person who knowingly and in violation of the Administrative Simplification provisions of HIPAA uses a unique health identifier, or obtains or discloses individually identifiable health information. Enhanced criminal penalties may be imposed if the offense is committed under false pretenses, with intent to sell the information or reap other personal gain. The penalties include a fine of not more than $50,000 and/or imprisonment of not more than one year; if the offense is under false pretenses, a fine of not more than $100,000 and/or imprisonment of not more than five years; and if the offense is with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, a fine of not more than $250,000 and/or imprisonment of not more than 10 years.

3.6. The Genetic Information Nondiscrimination Act of 2008 (GINA)

GINA generally will prohibit discrimination in health coverage and employment on the basis of genetic information. GINA, together with already existing nondiscrimination provisions of the Health Insurance Portability and Accountability Act, generally prohibits health insurers or health plan administrators from requesting or requiring genetic information of an individual or the individual's family members, or using it for decisions regarding coverage, rates, or pre-existing conditions. The law also prohibits most employers from using genetic information for hiring or promotion decisions, and for any decisions regarding terms of employment. The law will be enforced by various Federal agencies. Remedies for violations include corrective action and monetary penalties. Under Title II of GINA, individuals may also have the right to pursue private litigation.

4. Present Position in India:

In India, the constitution of India does not provide any provision explicitly about the word privacy, but there are many rights (not provided expressly though) which in due course of time, the judiciary had extracted the meaning of privacy under the light of Article 21[123] - the Constitutional guarantee about the right to privacy is valid only against the state and no constitutional remedy for violation of privacy lies against any individual under Article 21 read with Article 19 (1) (a). while examining the width, scope and content of the expression personal liberty in these articles interpreted by the Indian Supreme Court in Kharak Singh V. State of U.P[124] held that the term "Personal Liberty" is used in the article as a compendious term which includes all the varieties of rights which go to make up the personal liberties of man other than those dealt with under Article 19 (1). First time the Supreme Court of India eight judges' bench not recognized the privacy of individual of India[125] but in PUCL case the Supreme Court held that Telephone Taping is an invasion of an individual's privacy, with the growth of highly sophisticated communication technology, the right to hold telephone conversation to abuse. It is no doubt that every government, however democratic, exercises some degree of *subrosa* as a part of its intelligence out-fit but as the same time citizens right to privacy has to be protected in front from being abused by the authorities of the day[126]. Later Kharak Singh's it has recognized, and recently the Supreme Court given stay orders in Justice K.S. Puttaswamy (Rtd.) & Another Vs. Union of India & Others popularly known as Aadhar Case and also extend the Project to continued[127].

India has issued rules under the IT Act, 2000 for protection of data and privacy. The Interception Rules, 2009 (under section 69). The Monitoring and Collecting of Traffic Data Rules, 2009 (under section 69B). The Information Technology (Due Diligence observed by Intermediaries Guidelines) Rules, 2011, the Information Technology (Reasonable security practices and procedures and sensitive personal information) Rules, 2011, the Draft Reasonable Security Practices Rules, 2011 (under section 43A) etc., regulate the cyber space, security for data and privacy to collect, store, process and communicate information. It is paradoxically these very capacities of technology which make us vulnerable to intrusions of our privacy.

Section 43-A of Information Technology Act, 2000 states that a body corporate which is company, firm, and sole proprietor includes sole proprietor that advocates, doctors, charted accountants so on. If they are dealing and handling any sensitive personal data, which it owns, controls, and operates the data .They must follow reasonable security practices which are provided under the Act. If they do not follow the reasonable practices they are liable up to 3 years of punishment and a fine to an extent of Indian Rupees 5 crores. An effected party can claim

[123] Soli Sorabjee, Advocate, made a statement in the TV Debate. Available Youtube: On: 23-7-2015

[124] 1 SCR 332: AIR 1963 SC 1295

[125] M.P. Sharma and Others Vs. Satish Chandra, District Magistrate and others: 1954 AIR 300, 1954 SCR 1077.

[126] People's Union for Civil Liberties (PUCL) Vs. The Union of India: (2003) 4 SCC 399.

[127] WP.No. 494 of 2012.

damages by approaching IT Secretary of State if damages are below 5 crores, for above 5 crores party can approach civil court.

There is an exception that government organizations are not covered, where most of data is dealing and handling which is owns, control, operates the data by the government and its organs but it is not covered and they are not have an obligation to follow reasonable security practices[128]. The data protection is needed at government and its organs and at the same time privacy of individual; the state is not at all ready to respond to privacy of people. India is still not having legislation for privacy, state can simply intercept into individual privacy without any objection or procedure established by law. Here state mechanism like police and other investigation agencies intercepting data even in petty cases. Moreover, the state has kept individual data in the hands of foreign companies like America, UK, and Israel etc. Therefore, Indians having serious threat to their data and privacy from three ways one is from Netizens, second State and its agencies, third from foreign states against Companies, Indian Citizens[129].

5. Foreign States:

The US Government and other Governments are keeping surveillance on Indian Government and Citizens. In the year 1967, by virtue of the U.S. Supreme Court orders in Katz versus United States that the Government of USA had passed the law of the Wiretap Act, 1968 that regulate domestic surveillance, and subsequently passed law of Foreign Intelligence Surveillance Act, 1978 (FISA) which gave to U.S. Government the power to conduct, without judicial sanction, surveillance for foreign intelligence information. Then following the 9/11 of September incidents in USA, World Trade Centre attacks, Congress enacted the Patriot Act, 2001. Section 215 of the Act, dramatically expanded the scope of FISA to allow secrete warrants to conduct surveillance in respect any tangible thing that was relevant to a national security investigation and also the FISA law is providing powers to Government to take the data from any private company of USA.

India is one of the prominent targets of US intelligence gathering. As shown by the Boundless Informant heat map publishing by the Guardian (2013), India occupies the fifth place among countries under surveillance, with 6.3 billion pieces of data[130], and it is ahead of China and Russia. Not only do Google, Yahoo! And Microsoft (Hotmail) have a large number of Indian users, but also government agencies and officials routinely use these web-based services for their communications[131]. The FISA is allowing US Government, access to data from private and public companies[132].Another instance of inexperience or insensitivity shown, is, with respect to the data related to the unique identification number (UID) or AADHAAR. The UID Authority has chosen three US companies for supporting and for creating data repository without considering the fact

[128] *Ibid*. 7
[129] Michael Froomkin. A (2013), *the Death of Privacy?*, Jstor.org., 09-01-2013.

[130] Purkayastha Prabir & Bailey Rishab (2013), How NSA hacks the whole world", FRONTLINE, July 12, 2013
[131] http://www.knowledgecommons.in/2013/06/
[132] Prabir Purkayastha, Rishab Bailey (2013). India: Front line, date July 12, 2013

that these US companies are duty bound to furnish their data if asked for by the US government. It can be inferred that Indians have threat from US and other countries like UK, Israel, China, Russia, and Pakistan etc., as they are creating interruptions into e-mails, and servers.

6. Government and other Institutions:

It is common that ruling governments usually keep track of opposition parties' moves and strategies as part of political surveillance. The Indian state is main whistle blower and it is justifying its acts. Privacy rights of individuals against the government and individual's protection against unreasonable government institutions on privacy, such as searches of the home or interceptions of communications[133]. Typically, the government has sounded evasive, trotting out the all-too-familiar argument that law-abiding citizens have "nothing to fear" and that a bit investigation into privacy is a small price to pay for security and all this is meant to protect people from terrorists, or terrorism.

The new Section 69 of I.T. Act, dealing with "Power to issue directions for interception or monitoring or decryption of any information through any computer resource" is much more elaborate than the one it replaced. In October 2009, the Central Government notified rules under Section 69 which lay down procedures and safeguards for interception, monitoring and decryption of information (the "Interception Rules 2009"), and under Section 69B to "monitor and collect traffic data or information generated, transmitted, received or stored in any computer resource" (the "Monitoring and Collecting Traffic Data Rules 2009") which are similar, although with important distinctions. But these rules are not safe to citizens and it is not a complete procedure like EU law. There is much gap, difficulty to understand what kind of data is allowed and what kind of crime allowed to intercept and what is the procedure to intercept.

Wiretapping, or, tapping for short, focuses on contents of communication, as the information communicated between persons may be very useful in criminal investigations[134]. Most legal systems explicitly mention privacy of letters, and privacy of phone calls, as there are different types of privacy. Since tapping violates basic human right, it is generally not allowed, but there are exceptions in western countries, such exceptions are strictly controlled and often concern suspicions of crime or terrorism or both. The police are often exceeding the authority in most of the countries, tap needs to be authorized by court, permission to tape is only provided under strict conditions. The tapping is not allowed for minor offences i.e. the cases must involve an offence punishable with, for instance at least four years of imprisonment. Further, there is a reasonable exception that the punishable, the suspect will participate in the conversation. Not only suspects' phones can be tapped, but also relatives' phones, when the communication involves people with professional rights of non-disclosure, such as lawyers and doctors monitoring the conversation is not allowed tapping is only allowed for public networks, private

[133] *Ibid*. 11

[134] Sylvia Mercado Kierkegaara. (2007), *Cyber law security and Privacy*. Ankara: Barosu Bar Association press,
pp. 39-56.

networks are beyond scrutiny. The aim is to use data for investigation detection and prosecution of serious crime considering that lot of communication takes place.

7. Individuals:

Net users are a threat to data and privacy; internet centers, cyber cafés are places to commit offences; the users can create their email address and Facebook address with fake information therefore their identity and bring their liability is impossible. The Indian law has failed to create adequate measures to control and regulate those places[135]. The law begins by describing legitimate, permissible uses for, providing information directly to the individual named in the report, and a variety of "legitimate business needs" such as a person using a credit card or applying for credit, insurance, or employment. The law also prohibits "information brokers" from disclosing credit information without it falling under one of the legitimate purposes. Credit bureaus and agencies are required to notify one another when a consumer disputes information in a report. The credit agency must have an effective procedure for reviewing and correcting information.

8. Remedies under Indian Law

India has legal regime for regulating cyberspace consequently various kinds of provisions have been incorporated for protection of data security, stealing, download, extract, diminish a data will punish according to sections 66 and 43 of Act which providing 3 years of punishment and 5 lakhs rupees fine or both. There is critique on Indian cyber law that it's not so strong, punishment is not too much, it's not effective, only couple of convictions for the last 19 years, but the fact remains the law still provides an enabling legal frame work that should commit any of the cybercrime a case can be registered and appropriate relevant incriminating electronic evidence brought, appropriate convictions can also be done. But clearly cybercrime continuous to be an extreme important area, government of India needs to work much further so as to make this legislation far more in sync with the requirements of changing times and social media[136].

9. Conclusions:

There is a need to follow technological security, legal security and insurance security and to take measures for India and these security measures shall follow public and private organizations where the data is owns, controls, and operates the data. No general right relating to privacy and personal data protection has been developed so far. In India there is an immediate need to pass legislation for operation of right to privacy.

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[135] Henderson, Harry. (2006), *Privacy in the information age*, Facts on File, Inc, p. 53.

[136] Pavan Duggal. (2013). Delivered lecture on Understanding Indian IT Act 2000 with 2008 and 2011
Amendments- October, 27 of 2013, Available at You Tube dt.30-01-2015.

State shall make rules to bring all the government organization, institutions and organs into due diligence under the Information Technology Act, 2000 and follow security policy measures with same as private companies. Even though it is often quoted in India as an Act containing provisions pertaining to data protection, none of the provisions seem to offer an adequate protection. The concept of "personal data" is not even defined. **The Credit Information Companies (Regulation) Act, 2005 co**ntains certain provisions ensuring data protection but it is limited in its scope.

However it does not contain rules ensuring a comprehensive right to information. Moreover, no specific authority has been established to ensure the respect of these provisions under this Act. Nevertheless, Rules and Regulations that could be adopted under Article 20 (f) of this Act could provide for an adequate protection in the field of credit information. The State shall develop its own network system and shall not rely heavily on the private networks, especially in government transactions. Data shall not be stored with networking system instead of that it shall be saved with other devises which is not connected to internet. Important discussion and data shall be communicated through **protected domestic network.**

It is necessary and essential that a new law dealing with data privacy and protection shall be developed in India, by making a comparative study of the existing laws in other countries and taking into consideration the special requirements of India. State shall notify the HIPAA kind of standard compliances for India which are set by independent Institution. NGO's and Non-Profitable Organizations shall start propaganda about privacy and data security importance, difficulties and compliances.

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THE ETHICAL, SOCIAL, AND RELIGIOUS EVOLUTION OF EUTHANASIA AND INTERNATIONAL LEGAL DISCOURSE

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Abstract

The article will seek to examine the issue of euthanasia in relation with religion analysing its position in various socio-legal set-ups at international and some domestic orders and to provide an alternative to correctly evaluate and understand the implications involved before we can borrow from the western experiences. It will look into societal, ethical, theosophical and religious context to debate which is necessary for proper appreciation of the contesting ideas in the debate. The study will predominantly focusing on the international law regarding the right to life, its qualification and control of State over the same in reference to comparative analysis of religious practices across the globe taking into consideration in major religions vis-à-vis legal systems. Since there are so many different views in different member states, and since religion and cultural factors play an important role in the implementation of euthanasia, each state is and will be distinct in the decisions it makes about euthanasia.

Keywords: Euthanasia, International law, Religion

1. **Introduction**:

Since the antiquity religion and law and their understandings has found the backdrop of human civilizations. It has been an experience waging the most brutal wars in names of religion dipped in the veneer of sanctioned by so called God. Religion has coalesced humans across geographical reasons in spite of their acute differences. This commonality of religion forms the sense of identity which also brings intemperance and in-Clarence towards other followers of religion. Freedom of religion is a subject, which has throughout human history been a source of profound disagreements and conflict. One of the most tragic examples which is embedded in the human psyche is the Holocaust leading to the death of six million Jews during the second world war. Intolerance based around differing religious, philosophical and ideological positions on human existence and behavior is unfortunately not simply a matter of historical disposition. Friedrich Niche, exhortation in the late 19th century is 'got dead' and brought the world with theologizes, religious leaders and at the most basic level people, the underpinnings of so called God and its

(his) function. Though it was like sand-paper against the tender religious beliefs and convictions it brought to the fore the place of religion in the modern world.

One of the earliest developments in the history of international protection of minorities (religious) is found in the Treaty of Westphalia (1648), where the signing parties agreed to respect rights of certain religious minorities within their jurisdiction. Later consequence of the dominant ideological divide was that the conflicting ideas of freedom, the individualist position of the West and the more collectivist oriented conception of the East were both absorbed into the language of the major human rights documents, beginning with the Universal Declaration of Human Rights. Following the ethnic and religious massacres of the Second World War, the 1948 Universal Declaration of Human Rights was careful to guarantee freedom of thought, conscience and religion.

The on-going conflicts from a long back in the world between the religion and state has given the quest to understand, develop and shape the relationship between religion and state. The conflict between the two normative systems with differing constitutional structures and religions all over the world requires a principled legal solutions for such conflicts which are going since from far back pre-ancient period. It is not such the only issue resembling from the 9/11 or Babri Masjid

riots or conflicts in Israel-Palestine or some in some other middle east countries, but also the internal issues like conflicting interests of some classes like Women, Children, Transgender, or either the some Ethnic groups or Minorities in regard to religion and human rights in new global order.

There are certain basic issues which are creating a conflict of law with religion such as Blasphemy, Gender discriminations, National Security in terms of the trending norms of religious freedom as to Secularization, Pluralism, Separation of Religion and State etc. But these above are not the only forms of issues in concern, there are some others also which are directly related to some parts of the society and effecting individual rights/group rights at large as well amongst which women and children are the major class going through sufferings due to some religious normative rules existing in the separate State systems which are violating their first fundamental freedoms and are not much far away from the ill effect of these religious notions and the state effect. Apart from all these there are some day-to-day general issues and practices which are in shadow of the religious concerns like Euthanasia, Surrogacy, Adoption and Abortion which are very much important and necessary for individuals in today's time as due to some basic necessities essential for living life in this modern world of growing population and diverging needs in order to have a better and safe living standards thereby claiming concept of human rights which is recognized by the international legal set-up as well as in so many domestic ones.

This is to check the real incursion of science on law, i.e. to religion and law compatible or a principle of natural science and natural law in existence. Likewise; 'The right to life' has been expressed to be common thread contextualizing and debating perennial issues like abortion, capital punishment and euthanasia. The question of life and death not only has philosophical, ethical undertones but also is under legal control of the state as repository and arbiter of human rights, As in case of Euthanasia; the purpose of life and manner of death has been subjected to

theosophical, religious, moral and legal studies across the world. Thus, the social, cultural, religious and economical aspect of such contentious issue requires to be thoroughly understood in international law perspective with the religious and social coherence and acceptability.

2. Euthanasia: Historical, Social and Religious factors

The question of life and death has bedeviled human imagination since the inception of civilization. The purpose of life and manner of death has been subjected to theosophical, religious, moral and legal studies across the world. The world as we know is the one where birth is celebrated and death is mourned; where birth is taken as new beginning and death as the final but truest leveler of mankind. The question of life and death not only has philosophical, ethical undertones but also is under legal control of the state as repository of human rights. As a result, when judging whether death ever is more preferable to continued life, we are all inevitably behind a 'veil of ignorance'.[137]

The right to life is as most fundamental human right is unquestionable. It has been contested whether this right exists in absoluteness and is non-derogable at all the times. This right to life has been expressed to be common thread contextualizing and debating perennial issues like abortion, capital punishment and euthanasia. It's interesting to scrutinize the legitimacy of steps taken that will speed up the process of dying.

Numerous Greek and Roman philosophers, among them Seneca, believed that suicide was a rational response to extreme physical and mental deterioration

I shall not abandon old age, if old age preserves me intact as regards the better part of myself; but if old age begins to shatter my mind, and to pull it various faculties to pieces, if it leaves me, not life, but only the breath of life, I shall rush out of house that is crumbing and tottering.[138] *(*emphasis added*)*

The euthanasia/assisted suicide (in European context) in simplifier terms means to denote and indicate 'good death', 'mercy killing' wherein death of terminally ill person is accelerated through active or passive means to relieve such patient of pain and suffering. The term "good death" as prefixed by *eu*, which indicates *well*, with *kindness*, with *benevolence*thus, it means "passing away without pain and suffering". Both law and society recognizes that there exist

some cases where allowing an individual to die might be most humane option. The term 'good death' is oxymoronic since the mankind believes at large that there is nothing good about death and death is the last frontier. It is considered an inevitable truth which brings excruciating pain and trauma to people as compassionate human beings.

The terms euthanasia has been understood as denoting two types-active euthanasia and passive euthanasia. Their characterization and understanding differs across jurisdictions. Active euthanasia is the deliberate of causing the patient's death without suffering, by humanitarian

[137] J. Rawls, A Theory of Justice (Harvard University Press, 1971), p 179
[138] Seneca, 58th Letter of Lucillus trans R M Grummere in TE Page et al. (eds), Seneca: Ad Lucilium Epistulae Morales vol 1 (Heinemann: London, 1961) 409

means (e.g. using a lethal injection). Passive euthanasia is when the death occurs by the intentional omission of a medical action which would ensure over life (e.g. failure to deliver medication or by adopting an indispensable procedure to keep the patient's life). Then there is euthanasia by double effect in the cases in which death is made faster as a consequence of medical actions aiming at reliving the patient's suffering, but which are lethal (e.g. the use of morphine to control pain, thereby secondarily leading to breathing depression and death).

Euthanasia can also be contrasted with assisted suicide. The first important distinction to make is between assisted suicide and euthanasia. While many believe these terms are synonymous,[139] a more accurate definition focuses on who ultimately brings about the patient's death.[140] As the word "suicide" suggests, assisted suicide entails the patient ultimately taking her own life. The American Medical Association defines physician-assisted suicide (PAS) as "a physician facilitating a patient's death by providing the necessary means and/or information to enable the patient to perform the life-ending act." Thus, under this scenario, while the patient receives assistance from a physician--either in the form of medication, instruction, or advice--the key component is that the patient herself carries out the final act, rather than the physician. Conversely, euthanasia, which originates from the Greek *eu*, meaning "good," and thanatos, meaning "death," involves the physician acting to cause the patient's death.[141] The physician will most often do this by administering a lethal injection or removing the patient from some form of life-support. Whatever the action, the defining characteristic of euthanasia is that the physician, not the patient, carries out the ultimate life-ending act. In euthanasia, it is the doctor's conduct which causes the patient's death. In case of assisted suicide, the patient causes her own death but someone (usually but not always a doctor) has helped.

At the core of the debate lies the controversy at the end of life. It's questionable whether it could ever be legitimate for the medical professional to help patient to die has become more prominent in recent years. There are many reasons for the same. First, life support techniques are capable of significantly prolonging the dying process, leading some patients to fear a protracted and undignified death. Patients who would have been dead are now kept artificially alive due to technological prowess like ventilators, nutrition and hydration. The whole point of their invention has been missed. They were initially developed to enable potentially curable patient to survive, despite a temporary inability to breathe or swallow but now they are being used to keep people alive who have no chance of regaining the consciousness. Thus, the new technologies have thrust upon us to think about the circumstances in which it might be legitimate to discontinue life-prolonging medical treatment.

Secondly, though the life expectancy has increased dramatically, the medical progress has not caught up to make our lives healthy for the extended duration. The fear of spending many years

[139]Lara L. Manzione, *Is There a Right to Die?: A Comparative Study of Three Societies (Australia, Netherlands, United States)*, 30 GA. J. INT'L & COMP. L. 443, 445 (2002)
[140]Rohith Srinivas, *Exploring the Potential for American Death Tourism,* 13 MICH. ST. U. J. MED. & L. 91, 94 (2009 at 94
[141]Wendy N. Weigand, *Has the Time Come for Doctor Death: Should Physician-Assisted Suicide be Legalized?*, 7 J.L. & HEALTH 321, 322-23 (1992-93).

entirely dependent upon others, as one's bodily functions fail, has prompted intensification in the debate of euthanasia and assisted suicide. Thirdly, the principle of patient autonomy has become the basic principle in medical law, raising an important question whether a patient's right to make decisions about medical treatment should extend to exercising control one's over death. Fourthly, looked from religious bioethics, the common current among major religions is that life is not ours to be disposed of as we please.

At one extreme, we have understanding of euthanasia by Nazi regime under Hitler from 1939 till 1945 to eliminate "life unworthy of life" and the prevention of the heredity of illnesses or disabilities. Hitler stated that "the authority of certain physicians to be designated by name in such manner that persons who, according to human judgment, are incurable can, upon a most careful diagnosis of their condition of sickness, be accorded a mercy death." Hospitals, doctors and institutions for terminally ill persons could decide by themselves if a patient should be killed. This idea of euthanasia ultimately flourished into holocaust on the belief of racial superiority.

Lastly, the high-profile cases which engage attention of media, judges, civil society, government and common man like the cases of Aruna Shanbaug in India, Diane Pretty and Debbie Purdy in UK, Brittany Mynard and Terri Schiavo in US. Since 2003, more than 100 UK citizens have travelled to Switzerland to die in one of their Dignitas 'suicide clinic' has opened the Pandora's box about 'euthanasia tourism' which resonates with case of Brittany Mynard who travelled to different state within US where euthanasia was legal and died under media glare.

From 1939 until 1941 the patients were killed in gas chambers but their families were told that the relative's death was natural. That this was not the truth became very obvious when the number of dying disabled persons increased and odorous smoke rose over the centers. In August 1941 a catholic bishop attacked the euthanasia program of the Nazis during a sermon which had the consequence that the patients of the killing center were not killed with gas anymore but with drugs until the end of WW II in 1945. In addition every doctor was told to always decide in favor of death if there was a question of euthanasia. All in all, over 70,000 persons were killed against their will.

In the post-world war world, the theme of euthanasia was largely rejected only to be resurrected by the cases of Karen Ann Quinlan (1975-1976), Spring (1977-1980), Diane-Quill (1996), Ramon San Pedro (1998), Jack Kevorkian, the "Doctor Death" (1990's) and Vincent Humbert (2003)The debate on euthanasia heightened after the authorization of euthanasia in various countries of the world such as Australia (July 1996), The Netherlands (April 2001), Switzerland and Belgium (May 2002).

The recent case of Brittany Lauren Maynard who committed euthanasia after taking drugs prescribed by her doctor in the state of Oregon in USA as part of campaign 'death with dignity'. She was diagnosed with brain cancer which was incurable. She expressed her desire to end her life by informed consent and moved to Oregon from California. Oregon is one of the five States in US allowing euthanasia. This was condemned by Vatican bioethics officer of the assisted suicide as undignified 'absurdity' as 'suicide is not good thing. It is bad thing because it's saying no to life'.

In the Indian context, euthanasia is highly controversial as around the world and is presently subjudice before constitutional bench of Supreme Court of India to decide the legal validity of the euthanasia-vis-à-vis the two judge bench of Supreme Court allowing passive euthanasia in Aruna Shanbaug case. The issue of euthanasia has been elaborately discussed in the Law Commission of India reports and there is bill framed dealing with end-of-life care, palliative care and cases deeming fit for euthanasia.

3. Religious Underpinnings of Euthanasia

Religion is axial to the human rights as recognized by the States and protected by international law. Understanding the foundation of human rights can help issues of universality, the scope of protection available, the permissibility and limits of derogation or exceptions, the balancing or priorities afforded to various rights, and similar problems.

One of the foundations of international human rights law is religion. A central tenet of most religions is that every human being has a sacred spark conferred by a transcendental creator.

In medieval age, Jewish and Christians and in modern philosophy, Locke, Hume, Kant, Mill, Bentham address this issue of euthanasia.[142]

During second and third centuries, in the period of Christianity suicide or we can include euthanasia was criticized only when it was irrational or without cause. Christianity saw this act as a direct interference with God's will. St. Augustine declared, "Life and its sufferings are divinely ordained by God and must be borne accordingly."[143] In the thirteenth century, the teachings of St. Thomas Aquinas spotted the intolerance for suicide. According to him, suicide violated the God's commandment against killing and it is ultimately the most dangerous of sins or evils.

In the first chapter of Bible called '*Genesis'*, dealing with the creation of Earth and first two human beings consequently. The God says (from the holy book of Bible) in Genesis 1: 26-27

> *God created man in His own image, in the image of God. He created him, male and female He created them. God blessed them; and multiply .and fills the earth and subdues it, and rule over the fish of sea and over the birds of the sky and over every living thing that moves on the earth.*

After going through a detailed introduction over the critical issue of euthanasia, now it's to discuss the various social implications and impacts on societal values in the society and for which it is necessary to have a look over some religious concerns in relation to this issue. As we know all that religion and culture plays an important role in every society and always when there are issues related in contradiction to the religious feelings there arises a conflict of interest. Here in this case of euthanasia as we discussed in earlier part that the need for this is a demand at large

[142]Bready, B. A., "Historical and Contemporary Themes," *Suicide and Euthanasia*, (Published by Springer, 1989), pp. 1-2.
[143]Punsmuir, Mollie et. al, "Euthanasia and Assisted Suicide," Political and Social Affairs Revised (12 August, 1998) at http://dsp-psd.communication.gc.ca/Pilot/LoPBdP/CIR/919-e.htm, pp. 1-2.

by the society and specially by the individuals suffering or going through a continuous pain. But there are some objections on religious grounds in many religions that its not to be allowed as the assertion that: life is a divine gift given by God and no human being is entitled to take it by his own and if so done it would be a serious concern. Essence of religion and law can be regarded as an important one; this can be argued on a paradigmatic shift which began to occurred in the sociology of law since the early 1970's and later discovered by some classical theorists, but the problem lies with the dealing of purely religious aspects. Also when it comes in practical order of modern day law and needs, it gets into trouble, as there are so many issues like euthanasia which clashes within the framework and thus clash of jurisprudential and sociological strands, relying on aspects of unstable dichotomy of coercion and consent.

It's the basic rule existing in every religion whether its Hinduism, Islam, Christianity, Judaism, or Buddhism that self-killing or the modern concept like euthanasia is not allowed in any of these religions, but there are some exceptions like in Jainism which allows a kind of form of euthanasia in the form of what the process called the taking of 'Samaadhis', but that is not that in true sense to mean that self-killing that's something a way different connotation by the religious people as to their religious notions. The idea of voluntarily killing oneself, or setting free one's *jiva-atma* through starvation (sallekhana, in Jainism) or by drowning (*jal-samadhi*, observed by Ram in Ramayana) or by burning oneself (the infamous and now illegal practice of sati) is part of Indian lore, long before suicide came to be seen as 'sin against God' after the entrenchment of Christian mythology in modern thought.[144]

Coming to the very basic Hindu system prevailing in larger democracies like India, here what Hinduism has to say over the ethical problems like euthanasia which are posing a serious challenge to modern scholars and law makers. This can be important for today's study of medical ethics, social ethics, and human rights. Throwing a light on euthanasia in classical India, the archaic meaning of euthanasia as "freedom to leave," which permits the sick and despondent person to terminate their lives and second "self-willed death," with reference to the extreme deliberation of advanced old age and the seemingly terminal nature of disease; these two definitions can be helpful in knowing the actual euthanasia concept India and can be helpful in contemporary discussion of termination of treatment and euthanasia today.

Since from the beginning death has been considered as a serious concern not even in Indian sociology as well as in both Indian philosophy and religion:

> As a source of Indian religious thought, death is probably unsurpassed; no matter which historical period or cultural level one chooses to examine, concepts lead to or from the problems it presents…. In the social world, if purity and impurity have anything to do with the way Hindus perceive and organize it, death is all the more central because it is the single most polluting human experience. And even if the pure/impure dichotomy is

[144]Devdutt Pattnaik, 'Return to Samadhi', Mid-day, 21st June 2015 available at http://devdutt.com/articles/indian-mythology/return-to-samadhi.html accessed on 22 July, 2015

not the organizing principle of Hindu life, an opposition between death and life may be.[145]

In India, there are moral, religious and legal implications of the same. Devdutt Pattanik, medical professional turned mythologist traces the roots of controversy back to Judeo-Christian- Islamic attitude towards suicide which looks upon suicide as self-murder in violation of Commandment of God, hence a sin. In Judaism, people committing suicide as denied proper burial rights and were taken in separate cemetery. In Islam, the Prophet Muhammad expressly forbade suicide and refused to bless the body that did so.[146]

Unlike and unless the rise of Christianity, suicide was not couched in such negative terms rather was looked upon as matter of choice expressing personal autonomy. The Greeks were comfortable with idea of suicide and such has been expressed in the words of great philosophers like Plato, Socrates and Seneca. The school of stoicism was based on neutrality to pain and pleasure. The Romans are known to stab themselves than to be caught by caught and dishonored, a trait they share with Japanese culture and also reminiscent in both in Indian history.

In Hinduism, the matter is further complicated by the very notion of Hinduism as matter of belief, faith or religion. There is pervading concept of rebirth and karma. Ultimate aim prescribed is liberation from cycle of birth and death by attainment of true knowledge of God. There is implicit encouragement of voluntary death in form of the division of life in four stages wherein the last stage is supposed to be spent solitarily focusing on liberating the body through gradual withdrawal from life sustaining food and water. There are instances of voluntary suicides in Hindu epics of Ramayana and Mahabharata.

Jainism explicitly accepts voluntary suicide by starvation. Buddhism is somewhat neutral on the issue of suicide but makes it contingent to appreciate the nature of suicide. If the same is an outcome of ignorance, then future life is sorrowful but it's for the nirvana arising out of detachment and wisdom.

In *Bhagwad Gita* which is believed to be the most revered treatise on religious philosophy, Lord Krishna speaking to Arjuna spoke about the true nature of life and death. Krishna said as how the body is merely like clothes which will be changed and is illusory. The permanency is of only soul. Hence, the death should not be grieved upon.

The medical science has proved that human body rejuvenates through cellular repair and expansion. In seven years, no cell of body remains the same. Its whole new body but our consciousness is intact.

Thus, the social, cultural and economic aspect of such contentious issue of euthanasia requires to be thoroughly understood in international law perspective. The definitional challenge to euthanasia, the modes of euthanasia, the religious and social coherence and acceptability, the

[145] Stuart H. Blackburn, "Death and Deification: Folk Cults in Hinduism" in History of Religions, Chicago, The University of Chicago Press, Vol. 24, No. 3 (Feb., 1985), 255

[146] DevduttPattnaik, 'The Good Death', 20th July, 2014, The Speaking Tree, available at http://devdutt.com/articles/world-mythology/the-good-death.html accessed on 22 July, 2015

criminal law with respect to suicide, assisted suicide, the ethical aspects through the lens of the medical profession and finally the right of the individual vis-à-vis right of the state to regulate and penalize murder as various facets that can be taken up for study of euthanasia in the Indian context.

Hence the question whether the euthanasia should be legalized is often treated, by judges and commentators alike, as a question which transcends national boundaries and diverse legal systems engaging civil society, judges and lawyers since antiquity. The States have the cases which challenge the very of the legitimacy of law wherein they have to rule to let a person live in abhorrent condition undergoing excruciating pain but only way to relieve of pain is illegal as its as equivalent as murder/manslaughter/homicide. As Justice Holmes said, "The life of law is not logic but experience". As Amartya Sen in his seminal book "Identity and Violence: The illusion of destiny" talks about the commonality of being human as common basic denominator which is similar approach while dealing with issue of euthanasia. By treating the issue as a transcendental, global ethical question, the important context in which individual jurisdictions make decisions about assisted dying and the significance of the legal methods chosen to carry out those decisions is often lost. Work in this field is dominated by partisan exhortation by proposition or opponents of legalization. Although comparative work exists, it tends to focus on the experience of assisted dying in practice rather than the process of legalization and its effects.

4. International law and Euthanasia: Dignity & Informed consent

Euthanasia has been the subject of moral, religious, philosophical and legal, as much as of human rights debate.[147] The question remains whether it can be successfully argued that there is overriding international human right to 'die with dignity', or to refuse medical treatment for that matter, that should be respected and enforced even in countries where euthanasia is unlawful. Although the response will depend upon the legal reasoning and the decision of the competent court in the case at hand, where many factors play an important role in the interpretation and application of international law rules, including the relationship between international and domestic law in a given country.

It becomes pertinent to examine the ambit of dignity as understood judicially as well as in the international legal instrument. Oppenheim's Treatise on International Law, written at the beginning of the twentieth century, insisted that "the so-called right of man" could not enjoy any protection under the international law because that law is concerned solely with the relation between the States and cannot confer right on individuals.[148]The core question becomes whether there is an international human right to euthanasia stemming from international human rights instruments and/or from customary international law. Whether the overarching principle of human dignity and medical ethic of informed consent which are both dealt elaborately constitute or suffice as international law for euthanasia.

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[147]Australian Human Rights Commission, "Human Rights and Euthanasia", available at:https://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/euthanasia.pdf, accessed on 22 July,2015

[148] Shelton, Dina L. (2014), *Advanced Introduction to International Human Rights Law,* Cheltenham: Edward Elgar, 25

A. Dignity in International law

Many commentators supporting euthanasia argue in terms of protecting the dignity of the dying person. "Human dignity is one of the most fundamental concepts of international human rights law, appearing in nearly all human rights instruments and applied by human rights bodies regularly."[149]

Human dignity in international human rights law refers both to a foundational premise of human rights and to a principle having an impact on the methods of interpretation and application of specific human rights. Human dignity is first understood as an affirmation that every human being an equal and inherent moral value or status. The Universal Declaration of Human Rights, 1948[150] contains five references to the human dignity. The recognition of such a character to human dignity implies a short review of a set of international instruments of different kind, both as regards their importance (universal, regional or sub-regional) and as regards their judicial via (hard law instruments and instruments that, to a large extent can be considered as being included in soft law) and their more or less recent adoption.

The question that needs to be answered is that can it be inferred with certainty that there exists an international human rights law recognizing death with dignity. In human rights instruments there is no human right to die with dignity. There are several rights of more general nature and generally the most important one is the right if each person to human dignity. If the "right" to human dignity and right to life[151] include right to live with dignity, do they also include a right to end one's life in dignity?[152]

It is worth specifying here that the reference to human dignity is not typical of normative instruments concerning bioethical issues, while it represents, instead a constant element of inspiration-implicitly or explicitly-of the most instruments concerning the international protection of human rights. But within the branch the International bio-law, has human dignity becomes an "overarching principle"?[153]

To find the rightful place of dignity as norm which can be claimed to be source of law under Article 38 1(c) of the Statute of the ICJ which refers to "the general principle of law recognized

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[149]Carozza, Paolo (2013), *"*Human Dignity"*,* in Dinah Shelton (ed.), *Oxford Handbook of International Human Rights Law* , New York: Oxford University Press, 345

[150]GA res. 217A (III), UN Doc A/810 at 71 (1948), available at: http://www.un.org/Overview/rights.html, accessed on 25 July,2015

[151]Schabas, William A. (2009), "Right to life", in D.P. Forsythe (ed.), *Encyclopaedia of Human Rights*: Oxford University Press: 440-447.

[152]Among those who "recommend greater recognition of general human right to die with dignity" see Paust, Jordan J.(199) "The Human Right to Die with Dignity: A Policy –Oriented Essay", *Human Rights Quarterly*, 17(3), 463-487; Kamisar, Yale (1996) "The 'Right to Die', On Drawing (and Erasing) Lines", *Duquesne Law Review,* 35(1):481-522, available at: http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1689&context=articles, accessed on 25 July,2015.

[153]Andorno, So Roberto (2009), "Human Dignity and Human Right as a common ground for a global Bioethics", *Journal of Medicine and Philosophy*, vol. 34:223-240

by the civilized nations" is one of the sources of international law to be applied by the court.[154] It is necessary to briefly review the reference to dignity included in some international instruments so that some certainty can be attained in this reference.

a) Dignity in International legal instruments

The nearly eight decades that have passed since the formation of post war institutions have seen further evolution in human right law, from the inclusion of new rights and adoption of new means of monitoring and enforcement, to the proliferation of institutions with wide range of functions and powers. The UN Charter contains more than a dozen references to human rights.[155] The very purpose of the UN includes cooperation in promoting respect for human rights and fundamental freedom for all. Among the Charter's provisions, particular importance is given to Article 55, which states that the UN shall promote "respect for, and observance of human rights and the pledge to member of States in Article 56 to take action separately and with the UN to achieve this aim.[156] These articles with other provisions have been called a "golden thread" running through the Charter[157], which establish human rights as a matter of international concern in which State action is constrained by binding legal obligations.

The reference to dignity characterized the Charter of the United Nations (the Preamble affirms the "faith in the fundamental human rights, in the *dignity* and the worth of human person, in the equal right of men and women and of large and small nations) and represent the basic inspiration of the International Covenant on Civil and Political Rights (ICCPR, Article 10)[158] and the

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[154] United Nations, Statute of the International Court of Justice, 18 April 1946, available at: http://www.refworld.org/docid/3deb4b9c0.html accessed on 26 July, 2015. Article 38
"1. The Court, whose function is to decide in accordance with international law such disputes as are
submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the
contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

[155] Charter of the United Nations,26 Jun 1945,1 UNTS XVI, 59 stat 1031,TS 993 Bevans 115, available at: http://www.un.org/en/documents/charter/, accessed on 25 July,2015

[156] See Weissbrodt, David S. (1988), "Human Rights: An Historical Perspective", in Peter Davies (ed.), *Human Rights*, London: Routledge:1-20

[157] Humphrey, John Peters (1973),"The International Law of Human Rights in the Middle Twentieth Century", in Maarten Bos, *The Present State of International Law and Other Essays*, Netherlands:Kluwer:75,83

[158]UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html, accessed on 22 July 2015

International Covenant on Economic Social and Cultural Rights (ICESCR, Article 13)[159]. In the preamble of both of them, it is stated "that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the *inherent dignity* and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world," and it is recognized "that these rights derive from the *inherent dignity* of the human person".

The Preamble of the 1984 Convention against Torture[160] similarly affirms that human rights "derive from the inherent dignity of the human person." The International Convention on the Elimination of All Forms of Racial Discrimination,1965 mentions dignity three times in its preamble,[161] as does the Convention on the Elimination of All Forms of Discrimination against Women, 1979[162], while the 1989 Convention on the Rights of the Child[163] has eight separate references to human dignity.[164]The Convention on the Rights of the Child in its Preamble makes a reference to dignity.[165] The Convention on the Rights of Persons with Disabilities, 2006 speaks of human dignity nine times.[166]

b) **Dignity in Regional instruments**

We will now refer to the regional instrument also invoking dignity. Among the regional instruments the European Court on Human Rights (ECHR) is the only major treaty to omit the

[159] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: http://www.refworld.org/docid/3ae6b36c0.html accessed on 22 July 2015

[160] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.refworld.org/docid/3ae6b3a94.html, accessed on 22 July, 2015.

[161] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: http://www.refworld.org/docid/3ae6b3940.html, accessed on 22 July, 2015.

[162]UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at http://www.refworld.org/docid/3ae6b3970.html , accessed on 22 July, 2015.

[163] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html accessed on 22 July 2015

[164] The references are in Preamble and Articles 23, 28, 37, 39, 40

[165] "Considering that ……. recognition of the *inherent dignity* and of the equal and inalienable right of all the members of the human family is the foundation if freedom, justice and peace in the world,...reaffirmed their faith in fundamental human rights and the *dignity* and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom." The Convention on the Rights of the Child is available at: http://www.ohchr.org/en/professionalinterest/pages/crc.aspx, accessed on 26 July, 2015.

[166] UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106, available at: http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf, accessed on 22 July, 2015. The reference is three times in the Preamble at (a),(h) and (y); Article 1, Article 3, Article 8, Article 16, Article 24 and Article 25.

word dignity. ECHR is based on Universal Declaration of Human Rights[167]. Moreover, the idea of dignity is integral part of the European human rights jurisprudence; the European Court of Human Rights has declared that, "the very essence of the Convention is respect for human dignity".[168] The Preamble of the revised Arab Charter begins by affirming faith in the dignity of the human person and the human right to a life of dignity based on freedom, justice and equality.[169] Further Articles 3, 17, 20, 40 make a reference to dignity. The 2012 ASEAN Declaration similarly refers to the equal dignity of all persons.[170]

It is worth remembering that reference to dignity is also to be found in the *Universal Declaration of the Human Rights*[171]. There are several mentions in this instrument and dignity was referred to like (like in the Charter of the United Nation or in the International Covenants) as *inherent dignity*. In the Preamble, it's expressed as follows:

"Whereas recognition of the *inherent dignity* and of the equal and inalienable rights of all members of the human family is the freedom, justice and peace in the world".[172]

Dignity finds mention again in the Preamble: "Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the *dignity and worth of the human person* and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom". Article 1 reads as "All human are born free and equal in *dignity* and rights".

It would be impossible to fully investigate the references to dignity within international convention of universal application. In the American continent, for the example the American Convention on the Human Right[173] provides in article 11, para. 1 that "Everyone has the right to have his honour respected and his *dignity* recognized" while Article 5(2) dealing with torture reaffirms the dignity as "inherent dignity of the human person". Article 5 of the African Charter

[167] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html, accessed on 26 July, 2015

[168]Christine Goodwin v, The United Kingdom,(Application no. 28957/95), [GC] (2002) 35 EHRR 18, para. 90, available at: http://hudoc.echr.coe.int/eng?i=001-60596, accessed on 25 July,2015; Pretty v the United Kingdom, Judgment of 29 April, 2002, 35 EHRR 1,para, 65, available at: http://hudoc.echr.coe.int/eng?i=001-60448, accessed on 25 July,2015.

[169]League of Arab States, *Arab Charter on Human Rights*, May 22, 2004, reprinted in 12 *Int'l Hum. Rts. Rep*. 893 (2005), entered into force March 15, 2008, available at: https://www1.umn.edu/humanrts/instree/loas2005.html, accessed on 22 July 2015.

[170]*ASEAN Human Rights Declaration,19 November 2012, available at:* http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration last accessed on 22 July, 2015

[171]The Universal Declaration of Human Right was adopted by the United Nation General Assembly on December 10,1948 with the resolution 217A(Doc. A / 810).

[172]See note 22

[173] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: http://www.refworld.org/docid/3ae6b36510.html accessed on 22 July 2015

on Human and Peoples' Rights[174] states that "Every individual shall have the right to the respect of the *dignity inherent* in a human being and to the recognition of his legal status" In the Astana Commemorative Declaration, '*Towards a Security Community'*, "the inherent dignity of the individual is at the core of comprehensive security".[175]

Thus, the thread of reference of dignity runs through the regional instruments as well as finds mention in the different declarations.

The principle of dignity also touches on notions of human freedom generally, but there is no consensus on how far dignity protects individual autonomy. In the case of Pretty v United Kingdom, the European Court of Human Rights explicitly rejected a claim that Article 2 of ECHR implies a right to choose the time and manner of one's death, even while acknowledging the centrality of dignity to the meaning and content of the Convention as a whole. Yet, patients have autonomy to make their own medical decisions, based on a respect for human dignity.[176]

Thus, the questions remains whether it may be successfully argued that there is an overriding international human rights to "die with dignity", or to refuse the medical treatment for that matter, that should me respected and enforced even in countries where euthanasia is unlawful notably when the conflict rule of the forum prescribes as applicable a foreign law- that the state of personal law of the patient—which does not allow euthanasia ;or to allow a person to commit euthanasia in a country where euthanasia is legal ,dismissing the application of the personal foreign law of the patient that forbids it, on the ground that latter violates the person's human right to die with dignity. Although the response will ultimately will depend on the legal reasoning and the decision of the competent court in case at hand, where many factors will play a role the interpretation and application of international law and domestic law in a given country and the model adopted by the constitution to implement or incorporate into municipal law international rules, the core question becomes whether there is an international human right to euthanasia stemming from international human rights instruments and/or from customary international law.

A. Informed Consent in International law

It is pertinent to understand the origin, nature and scope of the informed consent systematized in international law perspective by understanding it in international law perspective from Nuremberg Code to the UNESCO Universal Declaration on Bioethics and Human Rights illustrating how informed consent has been crystallized as generally accepted legal principle.

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[174]Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: http://www.refworld.org/docid/3ae6b3630.html, accessed on 22 July 2015

[175] Organization for Security and Co-operation in Europe (OSCE) Summit Meeting of 3 December 2010, para 6, SUM.DOC/1/10/Corr.1, available at: https://www.osce.org/cio/74985?download=true, accessed on 22 July 2015.

[176] V.C. v. Slovakia, Application no. 18968/07, Council of Europe: European Court of Human Rights, 16 June 2009, available at: http://hudoc.echr.coe.int/eng?i=001-107364, accessed on 22 July 2015

This part deals with the origin, nature and scope of informed consent in international law perspective, its evolution in international bio-law from Nuremberg Code to the UNESCO Universal Declaration on Bioethics and Human Rights[177] which is globally accepted minimum standards in biomedical research and clinical practice, illustrating the normative process through which informed consent has come to acquire the status of a generally accepted legal principle. Informed consent traces its origin from some fundamental rights such as prohibition of inhuman and degrading treatment, the right to physical integration and right to health at juncture of international bio-law and international human right law. It also deals with the reverse side of the coin of informed consent, that is the right to refuse treatment and its relevance for treatment and its relevance for treatment option at the end of life and for the debate on the controversial existence of a 'right to die in dignity', to suggest that the non-derogable nature of the right informed consent for competent patient should be given paramount consideration in determining the level value of advance treatment directives.

Informed consent is a fundamental tenet of medical ethics conjugating ethical imperatives and respect for human rights in biomedical research as well as in the exercise of the medical profession. It is considered the foundation of the "new ethos of patient autonomy",[178] since the recognition of autonomy in the health care decision making has enabled and empowered competent patients to retain control of their lives and has come to govern the doctor-patient relationship consistently with respect for the right to self-determination.[179]

Legally, informed consent represents a well-established rule of bio-law and of the human rights law. In fact, the bioethical and human rights based approaches to the life sciences share common foundation and values, converging over the common objective of protecting human dignity and integrity of every human being from the risks posed by the progress of technology and its applications to the natural processes governing the beginning and end of life.[180]

Charting the contours of informed consent is not an easy task given the fact that's its uncharted waters mired in philosophy and legal literature rich in case laws. It's recognized that "from the standpoint of international law, the only accepted position is that no medical act may be

[177] Universal Declaration on Bioethics and Human Rights adopted by the United Nations Educational, Scientific, and Cultural Organisation (UNESCO) on 19 October 2005, available at: http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed on 22 July 2015

[178] Wear, Stephen (1992), *Informed Consent: Patient Autonomy And Physician Beneficence Within Clinical Medicine,* Dordrecht: Kluwer Academic Publishers: chapter 2

[179]Negri, Stefania (2012), "The Right to Informed Consent at the Convergence of International Bio-law and International Human Rights Law", in StefaniaNegri (ed.), *Self-Determination, Dignity and End-of-Life Care: Regulating Advance Directives in International and Comparative Perspective*, Leiden: M. Nijhoff Pub., 22

[180]Ashcroft, Richard E. (2010), "Could Human Rights Supersede Bioethics?",*Human Rights Law Review* ,vol. 10 (4):639-660, available at:https://www.law.anu.edu.au/sites/all/files/users/u9705219/human_rights_law_review-2010-ashcroft-639-60.pdf, accessed on 25 July,2015.

performed without the patients' freely given and informed consent."[181] Moreover, it is particularly telling that some relevant steps were recently taken within the United Nations human rights system-namely, the issuance of specific report in November, 2009 by Anand Grover, Special Rapporteur on the right to health and adoption in September, 2010 of the Human Rights Council's resolution on the right to health-inviting all States to "safeguard informed consent within the health counseling, testing and treatment continuum, including in clinical practice, public health and medical research, as a critical element of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[182]

a) Informed Consent in International legal instruments

The term 'informed decision' has been borrowed from the decided cases in England (UK) and other countries in medical jurisprudence. The concept of consent has evolved for centuries to arrive at its current meaning.

In the aftermath of the Nuremberg Trials, increased international recognition of patients' rights developed in the twentieth century,[183] defining there responsibility of health-care providers and States responsibilities to the patient.[184] In1947, the Nuremberg Code asserted that the voluntary consent of the human subject to medical research is necessary under all circumstances. The Declaration of Helsinki (1964) further developed the Code principles and tied them to the ethical duties of physicians, as outlined in the Declaration of Geneva (1948). In 1994, the World Health Organization Amsterdam Declaration on Patients' Rights required informed consent as a prerequisite for any medical intervention, guaranteeing also the right to refuse or halt medical interventions.[185] Informed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision, protecting the right of the patient to be involved in medical decision-making, and assigning associated duties and obligations to health-care

[181]Council of Europe, Parliamentary Assembly, Human stem cell and research Report of 10 June, 2003, Doc. 9816, para. 8, available at: http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10167&lang=en, accessed on 25 July, 2015.

[182]Human Rights Council, Resolution 15/22, 30 September, 2010 para 4 (o) Report of the Special Rapporteur on Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, U.N. Doc. A/64/272, 10 August, 2009 available at: http://www.ohchr.org/EN/Issues/Health/Pages/AnnualReports.aspx, accessed on 25 July,2015

[183]Schloendorff v. Society of New York Hospital, 211 NY 125 (1914) (USA), available at: http://biotech.law.lsu.edu/cases/consent/Schoendorff.htm, accessed on 25 July,2015

[184]Article 7, *International Covenant on Civil and Political Rights*,16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, accessed on 25 July,2015

[185] Article 3, A Declaration on the Promotion of Patients' Rights In Europe, European Consultation on the Rights of Patients, Amsterdam,(hereinafter referred as Amsterdam Declaration), 28 June, 1994, ICP/HLE 121 (1994), available at http://www.who.int/genomics/public/eu_declaration1994.pdf, accessed on 25 July,2015

providers. Its ethical and legal normative justifications stem from its promotion of patient autonomy, self-determination, bodily integrity and well-being.[186]

b) Evolution of Informed consent in International law

The evolution of the concept of informed consent owes much to the western courts and progressive judgments' illuminating on the aspect of the informed consent. Over the last century, following the famous and mostly cited opinion delivered by Justice Benjamin Cardozo in the landmark Schoendorff case –"every human being of adult years and sound mind has a right to determine what shall be done with his own body"?[187]-informed consent has been developed as a legal doctrine many by Western domestic courts .Today, this doctrine is globally recognized as dictating the *sine qua non*(indispensable and essential action) for clinic practice and biomedical research .Its significance in international bio-law is reflected by the fact that virtually all international agreement and declaration and declarations on ethical and legal standards in medicine and biomedical research endorse that basic rule of informed consent[188].

Although it is argued that truly universal acceptance of informed consent as key bioethical principle is probably linked to the adoption of the UNESCO Universal Declaration on Bioethics and Human Rights of 2005, the acknowledgement of its importance at the international level is not such recent phenomenon. From a historical point of view, in fact, the start of a rising tide in favor of the recognition of the right to bodily integrity in the medical field, accompanied by the shaping of corresponding duties and responsibilities of healthcare providers and researchers, can be traced back to aftermath of World War II and the Nuremberg trials[189]. In that medical atrocities committed by Nazi physician especially the 'scientific experiments' performed by the infamous Josef Mengele led to the harsh condemnation of non-voluntary human experimentation and prompted the drafting of the Nuremberg Code. Being the first internationally recognized se of ethical standards in non-therapeutic research, the code was meant to avert that similar crimes be committed in the future in the name of science. To this end it articulated a universal standard of physician responsibility and set forth those Fundamental Principles that still today lie in heart of research ethics (including voluntary and informed consent, absence of coercion, opt-out possibility, protection against grievance bodily harm, and proportionality of risk)[190]. This is the reason why the code is considered a 'pioneer text' in internationally bioethics.

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[186]Re T (Adult: Refusal of Treatment), [1992] 4 All ER 649, available at: *http://www.bailii.org/ew/cases/EWCA/Civ/1992/18.html*, accessed on 25 July,2015

[187] See note 42

[188]Kollek, Regine (2009), "Article 6: Consent", in H.A.M.J. ten Have and M.S. Jean (eds.), *The UNESCO Universal Declaration on Bioethics and Human Rights*, Paris: United Nations Educational,
Scientific and Cultural Organization, 123, available at: http://unesdoc.unesco.org/images/0017/001798/179844e.pdf, accessed on 25 July, 2015

[189] The Doctors' Trial: The United States of America vs. Karl Brandt et al., US Military Tribunal Nuremberg, Judgment of 19 July 1947, available at: http://werle.rewi.hu-berlin.de/MedicalCase.pdf, accessed on 25 July, 2015

[190] The Nuremberg Code(1947) was printed in Trails of War Criminals before the Nuremberg Military Tribunal under Control Council Law no.10,vol.2 pp181-182 Washington D.C, U.S.

The first and known provisions of the Nuremberg Code stated:

"The voluntary consent of human subject is absolutely essential. This means the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the element of the subject matter involved as to enable him to make an understanding and enlightened decision…"

Since then, informed consent has enjoyed growing widespread consensus and grained over time broader scope. Well before professional association worldwide endorsed it within their deontological guidelines and codes of ethics, their most representatives international institution, the World Medical Association, had proclaimed the right to competent patients to accept or refuse treatment in 1949 International Code of Medical Ethics[191] .The WMA later upheld the rule of informed consent both in the Helsinki Declaration on Ethical Principles for Medical Research[192] and in Lisbon Declaration on the Rights of Patient[193]. Although not binding, these acts predated domestic law regulating biomedical issues and served as reference codes of conduct for biomedical practice and research worldwide.

The adoption by both 'hard' and 'soft' international legal instruments have substantially contributed to the legal recognition of informed consent as he basic principle of the emerging international biomedical law[194].In this respect, it is necessary to recall first the foremost, the WHO Declaration on the promotion of patients right in Europe of 1994[195] the Council of Europe's Convention on Human Right and Biomedicine of 1997and its Additional Protocols as well as the UNESCO Universal Declaration of Human Genome and Human rights 1997 and Bioethics and Human Rights 2005[196].

Government Printing Office 1949, available at http://history.nih.gov/research/downloads/nuremberg.pdf, accessed on 16 July, 2015

[191] WMA International Code of Medical Ethics, adopted by the 3rd General Assembly of the World Medical Association, London, October 1949, as amended in 1068,1983, and 2006, available at: http://www.wma.net/en/30publications/10policies/c8/, accessed on 06 July, 2015

[192] WMA Declaration of Helsinki - Ethical Principles for Medical Research Involving Human Subjects, adopted by the 18th World Medical Assembly, Helsinki,June 1964, as subsequent amended and revised up to October 2008, available at: http://www.wma.net/en/30publications/10policies/b3/, accessed on 06 July, 2015.

[193] WMA Declaration of Lisbon on the Rights of the Patient, adopted by the 34th World Medical Assembly, Bali, Lisbon, September 1995, available at: http://www.wma.net/en/30publications/10policies/l4/, accessed on 06 July, 2015.

[194] See generally Andorno, Robert and Taylor, Allyn (eds.) (2004), *International Biomedical Law: Theory and Practice,* Ardsley, NY: Transnational Publications

[195] See note 44

[196] Article 5 of the Universal Declaration on the Human Genome and Human Rights, November 1997,available at: http://www.unesco.org/new/en/social-and-human-

Thus, the aforementioned instruments and international organization have codified the basic legal and regulatory standard of biomedical ethics which have by now gained the status of internationally accepted principle.

c) Scope of Informed Consent in International Law

According to a commonly used formula, informed consent provides its essence that any preventive, diagnostic and therapeutic medical intervention as well as scientific research involving human subjects may only be performed after the person concerned has given prior, free, and informed consent, based on adequate information.

The informed consent has following characteristics as detailed by Anand Grover[197], Special Rapporteur on the right to health and adoption, is as follows:

i. Respect for legal capacity[198]

ii. Respect for personal autonomy[199]

iii. Completeness of information[200]

iv. Right to health and informed consent[201]

Thus, the informed consent invokes several elements of human rights that are indivisible, interdependent and interrelated. In addition to the right to health, these include the right to self-determination, freedom from discrimination, freedom from non-consensual experimentation, security and dignity of the human person, recognition before the law, freedom of thought and expression and reproductive self-determination.[202] All States parties to the International

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sciences/themes/bioethics/human-genome-and-human-rights/, accessed on 06 July, 2015 and Article 6 and 7 of the Universal Declaration on Bioethics and Human Rights, see note 36

[197]See note 41

[198]Competency to consent is a status known as legal capacity which is presumed in adult persons and renders them the right to consent to, refuse or choose an alternative medical intervention. A patient's actual decision — however contrary to professional advice —has no bearing on legal capacity. In case the life of person is in threat and there is no issue regarding legal capacity, can the life saving measures be resorted to save the life.

[199] Informed consent is valid only when documented prior to a medical procedure and provided voluntarily, meaning without coercion, undue influence or misrepresentation. While consent for simple procedures may sometimes be implied by a patient, more complex, invasive treatments require explicit consent.

[200] Informed consent requires disclosure of the associated benefits, risks and alternatives to a medical procedure. Just as a patient has the right to receive information in giving consent, a patient has the right to refuse such information in giving consent, providing disclosure of such information has been appropriately offered.

[201] Guaranteeing informed consent is a fundamental feature of respecting an individual's autonomy, self-determination and human dignity in an appropriate continuum of voluntary health-care services.

[202]Articles 2, 3, 5, 6 and 16, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html,

Covenant on Economic, Social and Cultural Rights have a legal obligation not to interfere with the rights conferred under the Covenant, including the right to health.[203] Safeguarding an individual's ability to exercise informed consent in health, and protecting individuals against abuses (including those associated with traditional practices) is fundamental to protecting these rights.

It seems that the doctrine of informed consent is today widely acknowledged as the expression of the basic principle in international bio-law, serving as the cornerstone for the protection of the fundamental right to physical integrity and self-determination in every field of medical intervention.

Conclusion:

The religious views are polarized and there is has precipitated as basic norm under which both its condemned and condoned. Presently euthanasia is discussed and debated all across the world and even in India and the debate is through the religious understanding. Wherein it has been sought to be legalized, it has been through the understanding of practice of belief and faith. Today some countries are legalizing the practice of euthanasia and there some countries, euthanasia is a case of free choice, which have already accepted the practice of euthanasia, these are Belgium, Netherlands, Australia and state like Oregon. This issue covers a variety of topics, including medicine, politics, law, philosophy, and religion. Euthanasia allows terminally ill people who are in pain to control the timing of death. Euthanasia issue does not exist in a vacuum. Many people favor the legalization of euthanasia. For it, they give reasons of compassion and autonomy. It is an opinion among people that it is right because it puts an end to human suffering. Moreover it gives an option to an individual to decide for themselves when and how to die. They think that ending of life in some circumstances makes the world a better place, not worse place because it realizes that autonomy is a person's right. Person's autonomy is possessed by virtue of his or her nature as a being that is capable of conscious experience, and rational choice. It will be of interest to all those, who wish to make certain that their opinions, for or against legalization, are better informed.

The public opinion and consequently the public policy are grounded in religious and societal mores. Speaking religiously, euthanasia violates the law of Nature, the law of the community and the law of God. Euthanasia contradicts natural law because it destroys life and substitutes human judgment for divine command "Everyone has the duty to lead his or her life in accordance with God's plan." Buddhists and Christianity reject euthanasia in its voluntary, non-voluntary and involuntary forms. Jainism embraces euthanasia albeit in altogether different form. Hinduism is ambivalent rather ambiguous on its stance of euthanasia. Since it's based on firm belief of rebirth

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accessed on 26 July 2015; Articles 1, 2, 3, 7, 9, 10, 16, 18, 19, 24, 25, 26 and 27, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html, accessed on 26 July 2015

[203]Article 30, Universal Declaration of Human Rights (see note 64); Article 5, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: http://www.refworld.org/docid/3ae6b36c0.html, accessed on 26 July 2015

and superiority of soul over body, it's suggestive that since soul will survive anyway, it's not criminal to alleviate the human suffering by letting the body die prematurely. However, in some of the religions we see some contradiction as it views the condition wherein by helping to end a painful life, a person is performing a good deed and so is fulfilling his moral obligations.

The aforementioned analysis makes it clear that euthanasia is understood in the variegated hues of suicide and the same is subjected to the public morality. Public morality is derived mostly from the religious practice and hence the religious understanding of the euthanasia.

It seems implausible that such rights may be derived with a reasonable degree of certainty at the present stage from written international law or the practice of states, Indeed the "*right to die*" or to refuse medical treatment is not explicitly or clearly defined in any of the major international or regional human rights instruments, which in turn do provide explicitly and clearly for "*right to die*" even when it appears qualified in different and sometimes controversial manners.[204] Without going as far as to upload that voluntary euthanasia violates international law,[205] which is equally unjustifiable if one reads the current international instruments without a preconceived religious, morals or philosophical state of mind in the light of their *travaux préparatoires*, the debate—often heated –that often surrounds this issue due to the difficulty of reconciling competing values at stake, added to the facts that as of 2011 only a limited number of countries allowed euthanasia, show the limitation faced by the arguments that sees in the "right to die" an international human rights.

[204] Article 6 (1), International Covenant on Civil and Political Rights (ICCPR), adopted by the United Nations General Assembly on 16 December 1966, Article 3, Universal Declaration of Human Rights, 1948; Article 4 of the American Convention of Human Rights, Article 2 of Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 16 July 2015]

[205]Article 6(1) 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life' of the International Covenant on Civil and Political Rights, 1966 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976

EU – INDIA FREE TRADE AGREEMENT: ISSUES AND CONCERNS FOR INDIA

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Abstract

India is recognized as one of the largest consumer markets in the world. Every country with effective trade policies and having outward agenda is trying to have interactions with India and desires for integration though one or the other forum. Of late, Free Trade Agreements have gain popularity amongst trading fraternity to push their aggressive trade agenda by bypassing the WTO.

EU and India have been struggling hard to conclude EU-India FTA, but because of certain Issues and Concerns mainly in relation to Trade in Goods, Trade in Services and Intellectual Property that has failed to see light of the day. This present article does the analysis of potential implications of this present FTA on Indian economy. It further does the cost and benefit analysis beforehand to maximize benefit when compared to cost.

Introduction:

Of late, strength of a country is not seen to be dependent upon the amount reserves it has, but the eminence it has created through International collaborations, mainly through trade. It is also a proven fact that, no country can assume itself to be self-sufficient, and discard all outward policies, with which it can interact with other part of the world. This interdependency between countries, if visualized on a larger scale in the light of 'International Economics', suggests that every country for its economic prosperity shall have multilevel, multilateral interactions and share common benefits arising out of it. Growth and development of domestic economy is always dependent upon participation of that country in establishing International Economic Order. That perhaps is the reason because of which countries are always are in search of a better law and better forum to resolve disputes arising out of it.

The genesis of multilateralism can be related to the creation of GATT, 1947. It laid the foundation for the rule based trading system. However, the GATT, 1947 has failed to meet expectations of the member countries and resulted as a forum to exploit developing and least developed countries.[206] This institutional pessimism has lead to the demand for the establishment of New International Economic Order, 1974. Finally the zeal to establish ITO has succeeded in realizing WTO in 1995 in Uruguay Round.

[206] Petros Mavroidis, *General Agreement on Tariff and Trade*, Oxford University Press, 2005, pp. 1-35.

Every country looked up to the World Trade Organization being a member driven and consensus based organization to be fulfilling their unmet desires. The developing and least-developed countries have seen it from the point of view of preferential treatment for their trade whereas developed countries have looked at that as a forum to reach out to many potential markets.

On one side developing and least developed countries were eager to witness positive implications of WTO on their economy, and on other side developed countries (because of concessions being given to developing countries) were trying to look for some alternative model for trade governance. Consequently, with 1990s the world has witnessed ambitious multilateral trade negotiations along with a proliferation of regional trading blocs. It was thought that WTO would eventually reduce the scope of regionalism. Conversely, the quantum of global trade conducted through Regional Trading Agreements observed to be more than 50 percent of total trade flows.[207] Given that, the progress on various multilateral trade negotiations is very slow, the emergence of Preferential Trading Agreements (PTAs) has been seen by many as a preferred and feasible route to push an aggressive trade liberalization agenda bypassing the WTO. Along with PTAs even Bilateral and Free Trade Agreements (FTAs) have evolved to have one to one deal and thereby special concessions and considerations are not required to be accorded.

The FTAs are based on the theory of Dr. David Recardo's of comparative advantage. It suggests that 'A comparative advantage occurs when one nation can produce goods better than another. Nations can then export these goods to other countries that have a limited supply of these products… nations with a limited supply of certain economic resources can export these items to other countries, which can transform them into valuable consumer goods.'[208] This theory was proposed 1800, which had a lot of impact on the trade relations between countries. One of those impacts is emergence of doctrine of reciprocity i.e. the principle of give and take. This reciprocity under FTA gives flexibility to countries to have deeper integrations and concessions to be shared on priorities. Absence of reciprocity under multilateral structure is injuring the markets of developed countries as U.S. alone gives duty free market access to 90% products of the developing countries.[209] In returns the benefits to the US economy are negligible. This deficit of benefits is perhaps the reason because of which certain alternative modes including FTAs have gained popularity. It further enables countries to prioritize commodities or goods to be shared through 'trading basket' and mutually agreeable tariff schemes can be evolved. Apart from US, even the other aggressive trading giant from European Union like Switzerland has based its trade on FTAs. This fact can be validated because single Switzerland has concluded, till date, more than 28 FTAs with 38 outside EU partners.[210] It reflects upon the day to day breeding of popularity of FTAs over other available modes.

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[207] *Ibid*, at pp. 10-60.

[208] *Ref:* available at http://smallbusiness.chron.com/trade-important-3829.html, visited on 17th March, 2015, at 09.00 pm.

[209] Ref: available at http://www.forbes.com/2009/06/08/free-trade-obama-opinions-contributors-protectionism.html, visited on 18th May 2015, at 05.00 pm.

[210] *Ref:* http://www.seco.admin.ch/themen/00513/00515/01330/?lang=en, visited on 19th May 2015 at 11.36 pm.

There are other obvious recompenses a FTA has because of which countries have chosen it to be a preferred route to push its progressive trade liberalization agenda like, it special ceilings can be drawn with respect to goods or classes of goods and for which special negotiations can be concluded; robust mechanism can be put in place to have transfer and dissemination of technology; systematic plans can be drawn for investments keeping in mind needs of the domestic country; certain critical issues from sectors like IPR can easily be addressed; with mutual understand a special and effective dispute settlement mechanism can be created; special coercive measures can be introduced to ensure compliance of the provisions of FTA, etc. This makes the entire arrangement under FTA, a unique arrangement for proliferation of trade.

Background:

India and European Union are two aggressive trading giants. There has always been search from both sides for new markets and a platform to ensure substantive trade in all trading areas mainly, trade in Goods, Services and Intellectual Property.

The EU commission launched its new trade policy named "Global Europe – Competing in the World" with a view to connect external trade policies to EU's internal trade policies of creating a single market by an agenda of progressive liberalization and deregulation.[211] On the other hand, in line with its new export-oriented development path India also sees opening of markets as a mutual interest. New policies have been adopted aiming at removing controls, bringing down transactions costs, and identifying key areas in order to develop India as a global hub for manufacturing, trade and services.[212]

Both EU and India have mutual interests in pursuing for greater cooperation in trade and this has resulted in India becoming one of EU's "strategic partners" in 2004. With its combination of rapid growth and relatively high market protection India was an obvious partner for one of the new generation EU FTAs launched as part of the 'Global Europe strategy' in 2006. India and the European Union have concluded more than 12 rounds of negotiations on the FTA and are expected to meet again to sign the deal, finally.[213] These negotiations have entered a crucial phase and contours of the deal have started to emerge subject to some issues which need to be still resolved. Endeavor of this research paper is to highlight certain issues and share common concerns to have predictable implications of this ambitious agreement on both economies mainly India. The research problem in this research paper addresses issues and concerns in certain areas including confidentiality under this agreement, trade in goods, trade in services and trade in Intellectual Property.

Confidentiality:

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[211] Bosssche Peter Van Dan, *The law and Policy of the World Trade Organisation*, Cambridge Press, 2005, p. 69

[212] Trebilcock Michael J and Howse Robert, *The Regulation of International Trade,* New York: Routledge, 1995, pp.68-110.

[213] *Ref:* available at http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm, visited on 08 March, 2015, at 03:15 pm.

"It is a paradox that the 'two largest democracies in the world' are locked in FTA negotiations behind closed doors, which will impact upon on almost all aspects of people's lives. Until today, no negotiation text or position has been made available to the Indian public, the Parliament or state governments for public scrutiny.[214] The Commerce Ministry's consultations have been limited to select corporate and commercial interests within India and have completely sidelined those who are likely to be adversely affected by this legally binding treaty i.e. farmers, workers, fisher folk, hawkers, indigenous people, marginalized communities.[215] The moot question to be analyzed is why this confidentiality and at whose cost this confidentiality has been maintained? Does Constitutional 'rule of law' in both democracies permit such confidentiality to be maintained at the cost of people and their basic rights?

Answer to this question can never be 'yes', but unfortunately in India because of legislative lethargy and lack of regulatory framework there is no public check on treaty making power of the executives and the similar situation prevails in Europe. In India, Article 73 of Indian Constitution regulates treaty making power of the executives.[216] The Union Government is taking advantage of lacunae under it and freely entering into treaties without referring it to the Parliament. Because of the confidentiality, it is creating panic amongst the people and leading to unrest amongst the industry.

It is wrong to assume that Constitution of India does not provide for any mechanism to keep a check on treaty making power of the executives. Under Entry 14, List I,[217] Parliament has a power to lay down a law and decide boundaries to which executives are required to extend the negotiations. Unfortunately, in India there is no precedent of exercise of power by the Parliament to lay down a law and regulated executive's treaty making power. Article 253[218] also talks about

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[214] *Ref:* available at http://www.bilaterals.org/?why-the-secrecy-india-s-fta-with visited on 13 March, 2015, at 01:00 am.

[215] *Ibid.*

[216] *See,* Article 73 "Extent of executive power of the Union.— (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend— (a) to the matters with respect to which Parliament has power to make laws; and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement: Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws. (2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this Article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution."

[217] *See*, Entry 14, List I of Indian Constitution: "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries."

[218] *See*, Article 253 of Indian Constitution: "*Legislation for giving effect to international agreements*.—Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing

power of the Parliament to lay down a law to give an effect to the treaty signed by executives. This power has to be exercised by Parliament once the treaty is negotiated. It reflects that there is a lack of preventive mechanism in India that can check the power of the executives in negating treaties. In addition, treaty making power being a executive decision cannot even be questioned in the court of law except there is violation of fundamental rights. The Supreme Court of India has reiterated recently that policy decision should never be questioned in courts.[219]

There have been attempts made[220] to make reasonable changes in the law governing treaty making power in India, but have failed because of varied political reasons. The confidentiality under India EU FTA and legislative lacunae is a raising concern of people in both democracies.

Trade in goods vis-à-vis Tariff and Non-tariff barriers:

Out of three trading areas of WTO, trade in goods is always given importance by countries over others because of the tariff being involved for revenue purposes. All GATT negotiation rounds have tried to reduce tariff substantively and worked further towards free flow of goods. This zeal of preferential trade liberalization is taken forward by WTO through its multilateral rounds of negotiation. One of the most advantages of this system under WTO is that it provides for elimination of barriers but not on 'give and take' basis between developed and developing countries. It accords special and sympathetic considerations to the developing and least developed countries and does not mandate to reduce tariffs substantively.

In all, the agreements under WTO contain 72 different provisions of special and differential treatment for developing members as a group. And there are additional references to the Least Developed Countries, which for example, benefit from longer transition periods in the implementation of certain agreements such as TRIPS.[221] Statistically it is proven that more

treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

[219] Re: Allocation of Natural Resources, (Special Reference No. 1 of 2012)

[220] *Ref:* "On 5th March, 1993, Shri George Fernandes, Member of Parliament, Lok Sabha gave notice of intention to introduce the Constitution (Amendment) Bill, 1993 for amending article 253 to provide that treaties and conventions be ratified by each House of Parliament by not less than one half of the membership of each House and by a majority of the legislatures of not less than half the States"; In February, 1992, Shri M.A. Baby, Member of Parliament, Rajya Sabha gave a notice of his intention to introduce the Constitution (Amendment) Bill, 1992 to amend Article 77 of the Constitution of India providing that "every agreement, treaty, memorandum of understanding contract or deal entered into by the Government of India including borrowing under article 292 of the Constitution with any foreign country or international organization of social, economic, political, financial or cultural nature and settlements relating to trade, tariff and patents shall be laid before each House of Parliament prior to the implementation of such agreement, treaty, memorandum of understanding, contract or deal and shall operate only after it has been approved by resolutions of both Houses of Parliament".

[221] Constantine Michalopoulos, 'Trade And Development In The GATT And WTO: The Role of Special and differential Treatment for Developing Countries', the WTO Development Division prepared for the High Level Symposium on Trade Development, Geneva, March 17-18, 1999. (Working Draft February 28, 2001)

than 90% products from developing countries enter developed countries with preferences or get duty free treatment, whereas market access to developed countries goods does not get tariff or concessions in any compensatory form.[222] It generally results in damaging the interest of developed countries. This perhaps is the reason because of which there is a growing tendency amongst the developed countries to conclude bilateral understanding and regulate trade concessions beyond multilateral structure.

Under International trade regime, it is assumed that preferential trade liberalization results in shallow integration. It generally results into removal of border barriers to trade, mainly tariff and ultimately results in to trade diversion and trade creation. Trade creation arises when more efficiently produced imported goods from the new partner country replace less efficient domestically produced goods. It is perceived to be affecting small scale industry in both European Union and mainly in India. When we do cost benefit analysis for India, cost would be more than benefits arising out of it. On the other hand, the trade diversion, shifts focus towards the products which are in demand; it may results in loss of original traits. Statistically, it is proven that the value of EU-India trade grew from €28.6 billion in 2003 to €72.5 billion in 2014 and EU investment stock in India is €34.7 billion in 2013.[223] The CSIR data, as updated in 2014, reflects that India lost many original traits and 28.99% of which are not in a revival stage and gone beyond 'yielding point'. Major impact is observed on agriculture sector. It is throwing a concern towards Geographical Indications and traditional knowledge.

Tariffs over 1990-2013 were substantially reduced from an average of just under 79% to below 17%.[224] These reductions were fairly uniform across sectors. When looking at tariff peaks we find that there are comparatively few tariff peaks in India (where less than 1% of the tariff lines had tariff peaks), in comparison to the EU (over 10% of tariff lines). In India they range from 15% to 160%, whereas in the EU they range from 0.21% to 52.4%.[225]

The above statistics reflects that India would be required to make more changes in its tariff structure when compared to European Union. The signing of a FTA between the EU and India therefore implies a more substantial change in tariffs for India than for the EU, and consequently more structural adjustment.

It is a well-known fact that the country maintaining heavy tariffs, if reduced, will help its counterpart. Under EU-India FTA, since, India is maintaining heavy tariffs, if reduced considerably, will definitely results into replacement of domestic goods with imported goods. This has long standing and considerable impact on the Indian small scale industry and instead of

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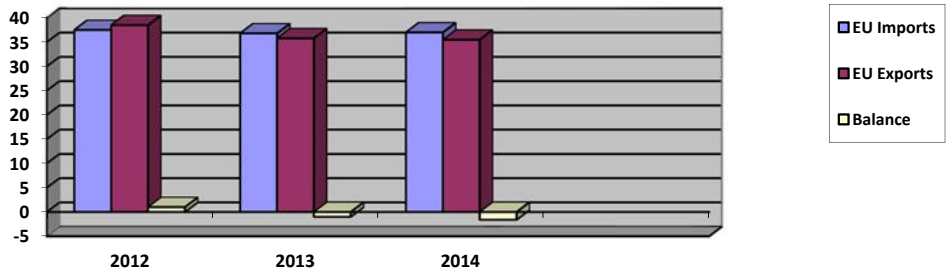
[222] Supra note 4.
[223] *Ref*: http://ec.europa.eu/trade/policy/countries-and-regions/countries/india/, visited on 19 March, 2015, at 04.30 am
[224] *Ref*: commerce.nic.in/trade/international_ta_current_details.asp, visited on 16 March, 2015, at 04.00 pm.
[225] *Ibid.*

job creation, may result into job loss. India being a developing country required to maintain tariffs for revenue purposes. This revenue pool is generally used to support all social security measures in India, mainly, for the upliftment of marginalized people. The substantial reduction of tariff under EU-India FTA will results into loss of revenue ultimately affecting the social welfare measures being promoted in India.

EU-India 'Trade in Goods' Statistics: (Table 1: Trade in Goods 2012-14, in billion Euros.[226])

Year	EU Imports	EU Exports	Balance
2012	**37.5**	**38.5**	**1.0**
2013	**36.8**	**35.8**	**-1.0**
2014	**37**	**35.5**	**-1.6**



The above figures are self-indicative that the EU imports are more in 2013 and 2014, when compared to 2012. The trade balance is reflected in negative. On signing of this EU-India FTA, with zero down tariff the EU export would grow considerably and the trade balance would substantially be increased. In case of EU imports there is a least possibility of having any increase because the Indian goods are having a substantial access to European market and the tariff charged on imported products by EU are marginal.

Lastly, the importation will get along many food safety regulations, which Indian corner shops may never be able to implement resulting in closure of those shops and ultimately unemployment.

Services:

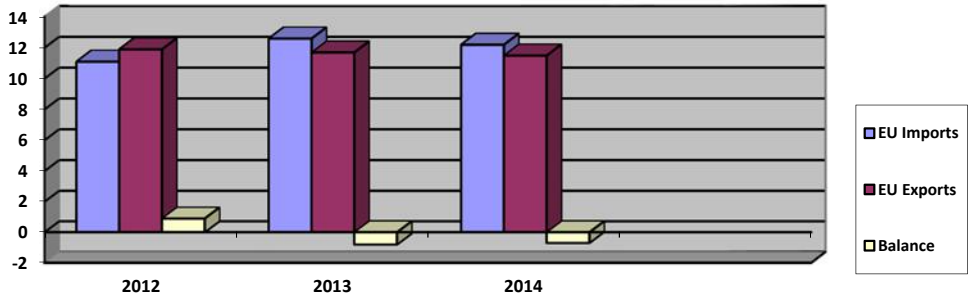
In recent past, India is observed to be growing strength by strength in its service sector and that's why it is seen to be the areas of concern for India under any FTA. Trade in commercial services quadrupled in the past decade, increasing from 5.2 billion euro in 2002 to over 22.7 billion euro

[226] *Supra* note 18.

in 2014 between India and European Union.[227] These figures are expected to be doubled under the garb of EU-India FTA, which reflects upon the potential benefits for both the partners.

EU-India 'Trade in Services' Statistics: (Table 2: Trade in Services 2012-14, in billion Euros.[228])

Year	EU Imports	EU Exports	Balance
2012	**11.1**	**11.9**	**0.9**
2013	**12.6**	**11.7**	**-0.8**
2014	**12.2**	**11.5**	**-0.7**

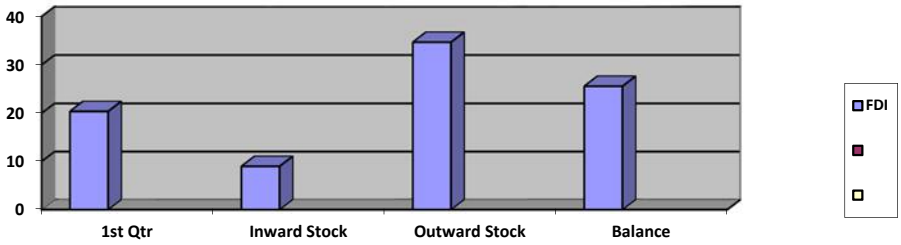


The data reflects that, in 2012 EU Imports was of 11.1 and EU Exports was of 11.9 a trade balance of 0.9 billion is created. If this is compared with the facts and figures of 2013 and 2014 of EU imports and Exports, it reflects the balance in negative. This perhaps is the reason why EU is aggressive in bringing this FTA to reality. Once it is signed, it surely would result into pushing the balance on positive side and the implication on India by opening certain sectors would be negative. Indian service sectors are grouped into three categories: those sectors which are substantially liberalized, and face no explicit barriers; sectors that are moderately liberalized with a few explicit barriers; and those that remain largely closed to foreign competition.

[227] *Ref:* ec.europa.eu/trade/policy/countries-and-regions/countries/india/, visited on 12 March, 2015, at 08.00 pm.
[228] *Supra* note 18.

EU's 'Foreign Direct Investment, in India for 2013: (Table 3[229])

Year	Inward Stock	Outward Stock	Balance
2013	**9.0**	**34.7**	**25.6**



The above facts and figures of FDI reflects uneven inflow and out flow of FDI in EU. For the year 2013, inward stock of FDI is 9.0, whereas the outward stock is 34.7 and the balance is of 25.6. The EU, for its part, is keen to see India further liberalize its foreign direct investment (FDI) regime by raising the equity cap in some sectors and opening up closed sectors such as legal and accountancy. At present, Computer related services, Telecom, Construction, Health, Banking and other financial services, Insurance, Distribution, Education, Postal and courier services, Legal and Accountancy, are considered for negotiations under the EU-India FTA.[230]

It is to be understood that, removing stringent barriers for services and ensuring greater participation of 27 European countries would lead to fair competition amongst the players. In several sectors like education it might results into increasing access to quality education and ultimately will improve efficiency. But when it comes to several sectors like advocacy, access to market, may result into taking over of individual practice by the firm practice and may result into job loss. Thus, while analyzing the service sector and the amount of Investment is to be permitted, a cautious and conscious approach is required to be taken. Every sector is not required to be considered under the EU-India FTA for negotiation but with due cost and benefit analysis several sectors for which a gradual approach is required to be taken.

Intellectual Property Rights:

Indian Intellectual Property regime is TRIPs compliant. Empirical evidence around the world shows positive correlation between a strong IP regime and increased inflow of foreign direct investment. Stronger TRIPs compliant IPRs regime in India has greatly benefited software companies across sectors and encouraging greater product development in India. At present, the Indian software industry employs over 800,000 software engineers, and software services in

[229] *Ibid*.

[230] *Ref:* Commerce.nic.in/trade/international_ta_current_details.asp, visited on 19 March, 2015, at 05.00 am.

India have gained a worldwide reputation.[231] The IDC-BSA study has also found that the global IT sector, grown by 33 percent between 2004 and 2010, could instead grow by 45 percent over the same period with a 10-point reduction in software piracy.[232] Thus, the intellectual property regime and developmental perspective can never be underestimated. It always contributes to the countries growth and prosperity. In addition results in job creation and opening opportunities by carry out trade with other equally competent partners.

The benefits for India arising out of EU-India FTA would be dependent upon the extent to which it regulates this area and put additional regulations under it. It is noted that EU-India negotiations are going beyond the TRIPs standards and EU wants to bind India to those harsh regulation. India has already been struggling to implement TRIPs regulations and may not be able to take this burden of TRIPs plus obligations. This additional commitment may influence specific sectors like agriculture and more importantly medicine. India had designed the Plant Varieties Act with an effective system for the protection of farmers and their plant varieties. This Act would need to be amended if the FTA is approved, which would reduce policy space and restrict the use of seeds by breeders and farmers, with negative implications for India's food sovereignty and biodiversity.[233] In health, WTO and Doha Development Round has contributed a lot, but this regime might tighten the hands of India and may prevent to produce low cost medicines to cure generic diseases. And ultimately result in denial of 'right to life' to all those who have been suffering with dangerous diseases like AIDS.

Conclusion:

The economic prosperity and cascading benefits to all segment of the society should be the ultimate aim of every government before they enter into any transaction with other countries. India being a developing country, under WTO is entitled to many benefits and these benefits can only be granted under multilateral structure. It is seen that India has been concluding many free trade agreements with powerful countries without doing a proper assessment of its potential and cost. In absence of that there are many sectors and people have a cost to bear.

Free Trade Agreements, in recent past, has been seen as a wave propagated by developed countries to push their aggressive trade agenda. The share of benefits they cannot have under a multilateral structure are being enjoyed under a free trade under agreements. The position under a free trade agreement between two trading partners is never the same and that's why it is used as a way to exploit developing and least developed countries. It's a mockery of International trade regime to call it a deal between equal partners.

India and European Union have concluded many rounds of negotiation but none of the document from either side is made public for scrutiny. In India because of lack of legislative check the executive negotiations are going unruly. When it comes to sectors like trade in goods, Trade in

[231] Anil Kumar Thakur and Nageshwar Sharma (ed.), *WTO and India*, Deep and Deep Publications Pvt. Ltd., New Delhi, pp. 615-631.

[232] *Ref:* globalstudy.bas.org/2010, visited on 18 March, 2015, at 09.00 pm.

[233] *Ref:* articles.economictimes.indiatimes.com/2013-05-03/news/39009568_1_india-eu-fta-farmers-insurance-sector, visited on 18 March, at 11.00 pm.

Services and Intellectual Property there are many questions which are unanswered in the light of public welfare and impact on several sectors.

It is urged by several people interested in International trade and Economics to have a proper empirical assessment of potential cost and benefits for every sector and then proceed for negotiation. It is unfortunate that Indian law does not provide for beforehand scrutiny of any international treaty or agreement. There can only be a hope that the executives would negotiate this free trade agreement properly to minimize cost and maximize benefits to India to ensure inclusive growth.

ENVIRONMENTAL DEGRADATION IN INDIA: A PROPERTY RIGHTS APPROACH TOWARDS POLICY

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ABSTRACT

There has been an increasing concern for environmental problems in developing countries. Of late, in the Indian situation, deforestation and inundation of forest lands have become pressing problems. Standard explanations for deforestation stem from considerations of overuse by stakeholders who have ushered in the new era of development, especially in regard to forest produce. Forests, as a resource have a unique characteristic. They have multiple uses and mean different things to different stakeholders (lumberjacks, biodiversity conservationists, etc.). Simultaneously, forest lands have been part of the livelihoods of local communities that use forests to survive. On the other hand, commercial exploitation of forests comes from the demand for timber and other forest products.

Since Independence, forests have been subject to uncontrolled use by various stakeholders often leading to conflict of interests. We approach this problem of environmental degradation from the point of view of property rights. We argue that property rights regimes on the resources such as forests, lands, rivers, which are usually not in the hands of private individuals, have to be redesigned in order that this kind of overexploitation and overuse is controlled. Therefore, property rights approach naturally assumes the role of the government and policy to play a very important role. We validate our arguments using the concepts of common property, common pool, open access and private property regimes and show that historically speaking, the changeover of forest lands from communal and common property uses to more and more government owned has led to the problem of deforestation.

Keywords: Property Rights, Deforestation, Joint Forest Management.

Introduction

Property rights regimes are crucially dependent on the nature and characteristics of the resource/commodity/service upon which they are imposed. This paper focuses on common pool resource systems and argues that the existing property rights regime on such systems in India

(which invariably are the result of historical antecedents) are seriously flawed which led to unsustainable use of such resources. It is argued that the recent attempts at operationalizing the joint forest management (JFM) system in the country could be seen as a step in the right direction to correct for the deficiencies of the existing regime, though JFM has its own set of limitations that we discuss in due course.

It is very important, before we proceed to understand what institutions mean and in particular, the meaning of property rights. That is we what we seek to do in this section.

Institutions are defined as a set of rules, both formal and informal, in the form of legislated enacted laws on formal side and customs, social norms and traditions on informal side, which are designed to satisfy the objectives of a society. Property rights can be defined as a bundle of rights over a resource or a commodity. Existing literature elucidates five basic rights associated with any resource or commodity.

(1) Access: The right to enter a defined physical area and enjoy non subtractive benefits

(2) Withdrawal: The right to obtain resource units or products of a resource system

(3) Management: The right to regulate internal use patterns and transform the resource by making improvements.

(4) Exclusion: The right to determine who will have access rights and withdrawal rights, and how those rights may be transferred.

(5) Alienation: The right to sell or lease management and exclusion rights.

These categories are described in Ostrom (1999).

A property rights regime is dependent on how many of these five basic rights an individual or a collective possesses. Although property rights regimes can take bewildering varieties of forms, for the purposes of analysis the following two property rights regime are fundamental: These are – private property, common property. A private property rights regime is where all the five basic rights associated with the resource are valid. A property rights regime where an individual has all but the right of alienation is called common property rights regime. Law and Economics literature primarily gives more importance to private property regime as an instrument of growth and development and asserts the superiority of private property rights over other forms of property rights like – communal or common ownership, state ownership, etc. Briefly the arguments are that it is only when all the five rights are conferred would there be the correct incentives for efficient use, management, transfer and investment in the up keep of the resource. However, Elinor Ostrom (1999) has pointed out common property rights regime can lead to efficient outcomes under certain conditions. It is also argued that under those certain conditions it is difficult for private property regime to evolve. Thus it can be seen that efficiency of any property rights regime depends on nature of resource in terms of its uses, access, excludability, etc. This means that private property regime can be efficient for certain resources while for certain other types of resources common property or communal property may be more efficient. However, on closer scrutiny, this in turn depends on the specific characteristics of the resource in question.

Resources can manifest themselves in various forms depending on its use, access, excludability, etc. A common pool resource shares one feature with private good and the other with public good. Common pool resources are those which - (i) it is costly to exclude individuals from using the good either through physical barriers or legal instruments, (ii) the benefits consumed by one individual subtract from the benefits available to others. Some examples of common pool resources are lakes, rivers, irrigation systems, groundwater basins, forests, fishery stocks and grazing lands. Any of these resources can generate different resource units with each unit having a different use. This paper focuses on Forests as Ecosystems that yield different resource units for use by different stakeholders. An ecosystem can have several uses for instance biodiversity conservation, downstream water services, recreation and extraction of forest resources to name a few. There are different stakeholders for each of these uses. Assume that livelihoods of certain stakeholders are heavily dependent on those uses. Each stakeholder would like to have a property rights regime which will allow them to make best possible use of that resource. Any property rights regime which gives sole rights of use and management to only one particular stakeholder cannot lead to its optimal use since other stakeholders may be negatively affected. This special feature of forests, that is, multiple use and multiple stakeholders, creates complexities in evolving a private property rights regime or a common property rights regime. Unlike forests, a private or common property rights regime can be easily established for certain other resources which are classified as common pool, but have only one use (for example, grazing lands that can be used only for grazing). In cases of common pool resource with single use it is easier to evolve internal use patterns among the multiple users of that resource implying that under the common property rights regime agreements between various users can emerge as an efficient system of use. It is also conceivable that third parties such as the State can establish rules of access and withdrawal among the users of such common property. The first step in evolving or establishing a property rights over a common pool resource with multiple uses and multiple stakeholders like a forest is identifying all the different uses and different stakeholders of this resource system. By doing this a new problem is seen to emerge: access and use by a particular group of stakeholders can have significant effects on access and use by others. In other words, due to the fact that common pool resources are subtractive in nature use by one group will inflict a negative externality on others. If the property rights to access and use are not well defined, monitored or enforced there is a danger of a common pool resource turning into an open access system. If this were the case, the stronger stakeholder group would exploit the resource to its maximum level. Therefore, the design of property rights regime over stakeholders must take into account the likelihood of the negative effects on others. Generally, this would mean that if such costs are identifiable, parceling out property rights to various stakeholders must be so as to minimize such external effects. Property rights regime designed could achieve this optimal design by looking at two aspects – the length of access and the breadth of such withdrawal. The length of access is defined in terms of duration of time that a user can have access rights. The breadth of withdrawal can be defined as volume, quantum or amount that can be withdrawn. Additionally, a property rights regime can lay down other conditions on management and investment of the use of such a resource. For example, one could conceive of an assignment of property right over the users of timber which restricts their quantum as well as specifies the time period for which they can harvest the trees. Additionally they can also be required to invest in the management and the upkeep of trees as a condition. The specification of time periods can take place in two ways – (1) One in which the property rights over timber are assigned to stakeholders but would be given intermittent periods

of harvest, (2) transferring of rights over the trees from one group to another after a certain period of time.

A consequence of parceling out property rights simultaneously to stakeholders would also ensure automatic monitoring of those rights by each group of stakeholders for it would be in their own interest to report violations, if any. This model can save the State from having to spend on ineffective monitoring and also serves to remove the possibilities of regulators being captured. The assignment of property rights in such circumstances can be a powerful tool in empowering those stakeholders whose position to assert their natural rights are weak vis-à-vis other stakeholders thereby bringing about a level playing field among all stakeholders.

Section 1 of this paper discusses a brief history of property rights regimes over forests in India, including aspects related to their evolution, changes and circumstances which necessitated such changes. It highlights the situation of pre-British regimes as well as the major forests Acts that were implemented during the British rule, which as we shall see sowed the seeds of deforestation in India that is continuing till date. It also touches upon policies that were implemented post 1980s that were conservation-oriented, of which the JFM is a major ingredient. Section 2 elaborates on the problems of the various regimes with respect to degeneration of forest lands. Section 3 discusses the merits of JFM including its critical analysis and also what more could be done in this direction.

PROPERTY RIGHTS REGIMES OVER FORESTS IN INDIA: A BRIEF HISTORY (FROM PRE-BRITISH TO PRESENT)

Grazing grounds and forest tracts were the common ownership of the entire village community during the pre-British period. However, individual families held separate holdings; till the Muslim period, exploitation was almost nil. But, during the Muslim period, forests were mainly seen as a source of timber. This was truer during the British rule. Though reserved forests existed during the Mauryan period too, they were mainly used for hunting by the King. With the advent of British rule, the entire nature and the meaning of the term 'reserved' changed. Until the East India Company's rule began, there were absolutely no restrictions over withdrawal of forest products except in the areas classified as reserved forests (Chowdhuri 1992). Therefore, prior to the British rule, forest land was a common property resource. In contrast to the generally held notion, they were not open-access resource. Instead they were managed by structures like the caste system as well as cultural traditions (Gadgil, Guha 1992).

A large number of people were either forest dwellers or living close to forests during the British rule, who believed that they had traditional rights and claims over forest land and forest produce. The British had no plans or the interest to protect Indian forests. In fact, forests were considered to be an obstruction to agriculture and hence to the growth of the empire (Ribbentrop 1900). That is why in many cases, the Zamindars were encouraged to fell tress and convert the land to agricultural tract. Moreover, the British were mainly interested in timber that acted as an ingredient to their railways, resulting in an indiscriminate extraction of teak. In fact, timber was made a state property by the Forest Charter of 1855. However, when the British government realized the seriousness of unsustainable exploitation, it thought it appropriate to conserve the forests by converting them into government property. This however did not go well with the local

communities as it was accompanied by a total ignorance of their livelihoods. Another problem was that with respect to forests in India, "forests" according to law has very little to do with actual forests. Many areas were classified as government forests without surveys and this resulted in torture, harassment, bonded labour, eviction, extortion of money, etc. The commodification of natural resources occurred in tandem with the advancement of colonialism. Railways played the most important role in the sense that it created the most demand for timber, leading to extensive deforestation, to the extent that the British realized that Indian forests were not inexhaustible and the drive to manage forest resources led to the setting up of the Forest Department in 1864.

One of the landmark acts with respected to forestry in India was passed in 1878 and it was called the Indian Forests Act 1878. The major resulting effect of this Act was the curbing of customary rights to access. This affected hunter-gatherers and others dependent on forest resources. This Act classifies Indian forests into 3---- (i) reserved forests (ii) protected forests (iii) village forests. The reserved forests were those over which the British had proprietary rights. These were forests that were commercially most valuable. Very soon, open forests were also converted into reserve forests. Protected forests were those with limited use and withdrawal rights of forest produce. Village forests were for the use of the community. This classification led to the loss of the rights locals and non-permit holders to enter forest areas and collect non-timer forest products (also called NTFPs or NWFPs or minor products). The areas of reserved forests varied every year during the British rule. Forceful implementation of these policies led to illegal extraction of timber and NTFPs which were also sometimes accompanied by setting fire to reserved forests (Guha 1989). In fact, this illegal withdrawal of forest products contributed to a major share of deforestation. These illegal activities were the result of conversion of open forests into reserved forests and also due to the implementation of very strict rules and regulations (Jewitt 2002).

The Indian Forest Act 1927 is India's main forest law and it had nothing to do with its conservation. It was mainly created to provide the British with timber. It again sought to declare forests as a state property. It basically empowered any area to be declared as a reserved forest, protected forest or a village forest. In its structure, it was very similar to the Indian Forest Act of 1878. An addition was that any area could be classified as a "protected area" like a national park, wildlife sanctuary or a tiger reserve. Clearly, this again curbed the rights of locals.

Some aspects of the colonial rule with respect to forest policy were inherited by the Indian government such as the National Forest Policy of 1952 which said that the village community's use of resources should not be given more priority than national interests, which here meant commercial exploitation. Things were made worse by the 1972 Indian Wildlife Protection Act, which laid more importance on plants and animals over tribals. Government owned forests doubled from 9.88 crore acres in 1947 to 18.77 crore acres in the mid-1970s. Also a few million acres were diverted towards agriculture. In 1976, control over forests became centralized with their inclusion in the concurrent list.

The National Forest Policy of 1988 for the first time prioritized the welfare of the tribals and other communities in forest management. The formation of Joint Forest Management committees emerged from this policy. However, these committees are mainly controlled by forest officials. Two of the main objectives of this policy were:

- Meeting the requirements of fuel wood, fodder, minor forest produce and small timber for rural and tribal populations.

- Creating massive people's movements to minimize pressure on existing forests.

It clearly states that one of the major reasons of deforestation is the illegal cutting and removal by contractors and their labourers. It was for the first time that the government realized the need to conserve forests through tribal co-operatives, labour co-operatives etc. "as early as possible". It was also felt that grazing lands would be conserved only by the participation of communities.

The most recent Act with respect to forests in India was The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 also called the Forest Rights Act 2006. This is one of the most important Acts in recent history in the sense that it aims to give back rights to tribals and correct for the injustice meted out to them for long. According to this Act, rights can be claimed either on protects or reserved or unclassified forests. It came into effect in 2008. It recognized forest dwellers' individual rights over their lands and villagers' right t conserve and manage resources. In 2012, the FRA was amended to give more rights to the Gram Sabha. The power of these rights were evident when the Supreme Court of India in 2013 ruled that the future of bauxite mining in Niyamgiri district of Orissa would be decided by the 12 Gram Sabhas which later unanimously decided against the project. Community Forest Rights (CFRs) are more food security and livelihood oriented. They empower villagers to own, collect and dispose minor forest produce, including grazing land. The idea of CFRs is well in accordance with Elinor Ostrom's view that communities make sensible decisions on how to use collective resources in a sustainable way. One of the finest examples of communities managing collective resources is that of Brazil's forests. The rate of deforestation in the 28% of the total forests of Brazil that are indigenously managed was only 1% between 2000 and 2012. The rate of carbon emissions too in other forests was 27 times higher than those collectively managed. Today, around a third of Latin American forests are collectively owned. However, land recognized under this Act is neither saleable nor transferrable.

1. PROBLEMS WITH EXISTING PROPERTY RIGHT REGIMES

For over a century Indian forests were under the jurisdiction of the government with very little peoples' participation. Although the policy makers realized that the strategy of bringing uncultivated lands under government management and using them to produce industrial raw material had neither decreased deforestation nor improved the economic condition of millions of people whose livelihoods were dependent on these forests in the late 1980s. This led to a watershed change in the Indian Forest Policy in 1988. Now forests are not to be commercially exploited, but have to conserve soil and environment, and meet the subsistence requirements of the local people. The implementation of the Policy was facilitated by the Government of India issuing a resolution in 1990 making it possible for the Forest Departments to involve people in the management of forests.

PRE INDEPENDENCE

According to the Indian Forest Act of 1865, the state was the largest proprietor of forests and divided the responsibilities of conservation among its agencies, this though did not translate into a common pattern of resource control and management. The different ways in which control was exercised by the state agencies varied considerably within forest categories and across regions. Two main departments of the forest management authorities were the Forest Service and the Revenue Department. The Forest Service was legally forbidden to convert its forests to other land uses (since it was established for the sole purpose of conserving and managing forests); it was required to organize extraction and management in ways that not only maintained forest stock and ensured steady supply of forest resources for other economic activities, but also yielded healthy revenues for the government. The Revenue Department, on the other hand, was subject to fewer legal restrictions; it retained the privilege to convert its forests to other uses if necessary, except in the areas set aside for watershed protection. Since it was not legally bound to maintain forest stock and quality, the Revenue Department rarely engaged in conservation and afforestation. Forest conservation and management were the two issues of conflict between the two departments. Forest Service officers complained that lack of conservation and management in civil forests led to deforestation and ecological degradation and, in turn, increased pressures of resource extraction on adjacent reserved forests.

Other stakeholders like the village leaders opposed the demarcation procedures followed by the Forest Service and complained about the limited rights given to communities for timber and grazing, exclusion from cultivation, and the restrictions on withdrawal of minor forest products from reserved forests. They took advantage of the prevailing animosity between the two agencies by siding with the Revenue Department in protesting against any further expansion of the Forest Service's control (Brandis, 1897; Stebbing, 1922). Local protest also erupted in various forms, ranging from litigation to arson and poaching in reserved forests.

Through the vicissitudes of the forest policy, *de jure* control of the people over their commons was weak, being either with the landlord or the state, which led to their degradation, as these lands were handled by the people as open access lands, and hence were not obliged to contribute to their management.

POST INDEPENDENCE (AFTER 1988)

During the colonial phase, even though the forest policy was timber oriented, the people dependent on forest lands were provided with adequate supplies from the forest, both the market demand as well as people’s needs were met simultaneously, with either being neglected. Five Year Plans under the Centrally Planned Economy model of development that India adopted that employed priority areas in different sectors. Thrust areas in forestry were often found to reflect the dominant theme of the general Plan, thus, the First Five Year Plan to be implemented after Independence was most concerned with food security, (not long after the severe famines in east India), while the Second and Third Five Year Plans reflected a drive towards industrialisation (Rawat, 1998).

Forests are subject to intense pressure from human beings, livestock and urban markets. The almost continual lopping for fuelwood and/or fodder as well as cattle and goat browsing, that occurs in many areas and prevents adequate regeneration, must play a major role in forest destruction (Blockhus *et al*. 1992: 31).

Considerable administrative and legislative changes were accompanied by an intense drive to industrialise under Nehru. Such fundamental changes impacted upon the forests of India. Poffenberger and McGean (1998), note that in the newly independent state, the intensity of deforestation increased, particularly for commercial exploitation. Several factors contributed to the acceleration of forest loss at the time. New legislation introduced, which altered land tenure systems, notably the Zamindari (landlord) Abolition Acts, provided an incentive for large-scale felling of trees on land that was to be nationalized. Rawal (1998) notes that most of these forests were in 'a very derelict and overworked condition', which confronted the Forest Department with a 'new challenge' for their rehabilitation.

One policy arising out of political populism was to allow people to harvest in an unsustainable manner, and the other was pressure on officers to contribute more to revenue. Industrial sector in India reaped considerable benefits from state management of forests. Indeed, the commercial-industrial sector has been described by Gadgil and Guha (1992) as the main beneficiary of state forest management, for which policies were largely determined to meet the growth in wood-based industries since 1947. As a consequence considerable change has occurred in forest composition and cover. State subsidies, which were innate in the early drive of industrial development, and a mismatch between industrial growth, and available raw supplies, resulted in what Gadgil and Guha (1992) term as 'sequential over-exploitation.' This pattern of resource use lead to deterioration of both; where different species are used, until their quality and quantity of resources.

Deforestation leads to thinning of the resources available to tribals and other forest dwellers. For example, in the colonial period tribals of the Koraput District of Orissa used to depend for eight months of the year on forest products but by 1988, with the depleted forest resources, their survival was threatened, leading to several starvation deaths in one drought year (*Indian Express*, April 3 1988).

Hence we can see that variations in deforestation are a result of not just local pressures on resources, but also any momentary disruption of the institutional framework responsible for resource protection and management.(Dove 1992). Aggravating the situation was the scarcity of funds for the forest sector; forestry accounting for less than one per cent of the development budget as compared to agriculture which received between 20 and 24 per cent.

Forest was not given any attention due to strong political and business clouts and in some cases a hybrid of both. Between the 1950's and 1970's, millions of hectares were leased out to industry at heavily subsidised rates, and were able to continue with unsustainable silvicultural practices, subject to generous contributions to the politician's coffers, who would then influence the Forest Department to turn a blind eye (Gadgil and Guha, 1992). In this way, contractors overfell their allotted coupes, to maximise profits, with little redress.

Concurrent with the drive for a wood-based industry was the growing awareness that dwindling natural forests would have to be supplemented with biomass specially produced for industrial consumption. The thrust of the Second and Third Plans therefore were concerned with the production of fast growing species, such as eucalyptus, and plantations consequently sprang up, often over the clear fell of the less productive indigenous forests. By 1980, over 2.2 million hectares of plantations had been grown (CSE, 1982).

In the 1980's, under the 'social forestry' scheme 1.4 million hectares per year were planted with exotic species (Ravindranath and Hall, 1994). Although pragmatic in intent, social forestry is widely acknowledged as falling short of its remit on many counts, by environmentalists and foresters alike, from the suitability of the species, ecologically, and instrumentally, (Shiva and Bandyopadhyay, 1983, Gadgil and Guha, 1995) to the issues of relieving the pressures on natural forests (Poffenberger and McGean, 1996), and providing for subsistence needs (Saxena, 1992), to the poor success rate, which was as low as 1% in some areas (Pandey, 1998).

Newly independent India, therefore, was experiencing an acceleration of forest loss, and appeared increasingly unable to provide for rural, subsistence needs.

The 1952 National Forest Policy has been widely attributed as further eroding the legitimacy of communities' claims on the commons (Gadgil and Guha, 1992, Poffenberger and McGean, 1996), while also explicitly asserting the monopoly right of the state (Guha, 1983).

However, more severe in its standpoint was the draft Forest Conservation Act in 1980. This act was almost a reproduction of the 1878 Forest Act. As Guha (1983), notes, 81 out of 84 sections are reproduced. The act also made provision for more draconian measures of policing; particularly in the increased powers of arrest, and confiscation. Others have described the act as 'pro-rich, pro-urban and anti-rural people [in its] bias' (Kulkarni, 1983).

JOINT FOREST MANAGEMENT

What began with apparent concerns over the so-called 'tragedy of the commons' (Hardin, 1968), might well be better understood in terms of the 'tragedy of enclosure' .Thus there was a need for a more participatory and simultaneously efficient property regime which was lucid in its content explaining the responsibilities for each stakeholder in contributing to conversation and sustainability of the forests. It was after the failure of various property regimes that came, the new Forest Policy makes a complete and explicit reversal of the old policies. The new approach is that subsistence and consumption should be met from Forest and common lands, and market demand should, by and large, be met from private land. The new forest policy announced in 1988 is radically different from the two previous policies, of 1952 and the one enunciated by the NCA in 1976. The 1988 Forest Policy states that forests are not to be commercially exploited for industries, but are to conserve soil and environment, and meet the subsistence requirements of local people. The Policy gives higher priority to environmental stability than to earning revenue. Deriving direct economic benefit from forests has been subordinated to the objective of ensuring environmental stability and maintenance of ecological balance. It discourages monocultures and favors mixed forests. The focus has shifted from commerce and investment to ecology and

satisfying minimum needs of the people, providing fuel wood and fodder, and strengthening the tribal-forest linkages.

The Joint Forest Management Act (JFM) 1988 seemed to stem from the recognition that state ownership of resources did not achieve its objectives of sustainable and efficient development of forests. The JFM (1988) was designed to correct for some of these failures. Specifically, the Act sought to involve local communities in what was known as Participatory Forest Management. Essentially, involvement reduces to the idea of re-allotting the rights to local communities for use and management of the forests. However, the rights that were allotted to the locals were not specifically meant to give them a right over the resources, but were aimed at using the locals to collect non-wood forest products a share of the revenue from timber sales. However, the Alienation rights to forests are still held by the forest departments; the communities are given only the limited rights. The participation expected from communities merely entails protection of forests in most cases. In some cases the communities vigorously participate in decision making committees and help in jointly managing the forests. The distinguished aspect of the JFM is that by alienating some forest rights, the forest departments has prompted the communities to aid them in their management of forests

JFM is now adopted by several states to rejuvenate forests with the active involvement of the nearby communities. This joint effort of the state and local communities is the very essence of JFM. Local communities get many benefits through JFM Act such as soil and moisture conservation, watershed programs and employment opportunities through plantation activities. Hence, it is crucial that the authorities take this into account for the success and sustainability of the program.

JFM is a hybrid of State property and common property with the main objective that it does not descends into open access. While the government reserves the right of ownership and retains the authority to prohibits some land uses like cultivation, and to control the disposal of certain products like timber , members have a right to exclude people from other villages and to a share of forest produce and its benefits,. The bundle of property rights belongs exclusively neither to the government nor to members, but is distributed between the two. JFM is different from other forest sustainability schemes in two ways; first, it assigns rights and responsibilities and not just assets. Second, it acknowledges community as a unit instead of individuals.

PROBLEMS

The JFM Act is considered to be a small step in the right direction by the government as it involves the participation of local communities but it is not fully efficient as it deprives them of the right to sell non-wood forest products. Therefore, these communities have been reduced to mere paid labourers in the forests.

The JFM has been implemented in most of the states now and Forest Protection Committees (FPCs) have also been formed. However, their operations are a matter of concern .According to different reports, the number of FPCs working is quite low and a lot of effort is required in order to make them effective. Inadequate institutional support, indecisive leadership skills, lack of proper planning and issue of tenure security further add to this problem. Moreover, the participation of women and landless craft persons is very low, resulting in various inefficiencies.

Women are negatively affected from JFM regulations on firewood extraction as they have to travel longer distances to collect firewood, fodder etc., compared to the pre-JFM period. Although various provisions have been made under the JFM guidelines, women are unaware of the rules, regulations and their rights.

The role of FPCs needs to be clearly defined from the perspectives of various stakeholders. This issue demands immediate attention from the government. Generally, decision making rests with the Forest Department and rarely any decisions taken by the community are carried out at the FPC level. FPCs are still highly dependent on the Forest Department and have not yet emerged as autonomous and independent village level institutions as they have poor linkages with NGOs and local governing bodies. The Forest department officers are also not trained properly to work with the local communities.

Poverty is still a major problem in the forest areas and accounts for the tremendous motivation behind lack of compliance in FPCs, especially in the lean seasons. The highest rates of infringement are observed when there are locational factors at work, since these areas have access to nearby markets to sell illegally obtained products from the forests.

Various reports have shown that JFM program carries huge potential for generating employment which can help in the reduction of seasonal migration of landless labour. However, the income generating activity in JFM has not improved to the expected level, perhaps due to the poor links between produce availability and market channels.

SUGGESTIONS

It is suggested that JFM should be integrated with rural development programmes and NGOs, in order to develop a conducive environment for the implementation of JFM in a fruitful manner. A study (SPWD 1992b: 40) of a NGO-inspired JFM initiative in Gujarat noted that a major reason for success was the co-existence of many interdependent schemes along with JFM, such as:

- Installation of biogas by a scheme of Gujarat Agro Industries Corporation;
- Fodder plot programme under which green fodder was provided and villagers were able to stop open grazing in forests;
- Village nurseries under DRDA were started to take up peripheral plantations; and
- Initiation of homestead garden scheme by Tribal Area Sub Plan.

The property right regimes that existed before the joint forest management had failed because these rights weren't clearly defined and even though when they were defined, all the stakeholders weren't fully informed of their rights of access and use. Secondly, assuming that the village leaders are representing the preferences of community as a whole, is wrong as there might exist heterogeneous ideas amongst the same community. Hence there is a need for a property right regime that intrinsically take cares of all the stakeholders.

The Forest officers in India are not properly trained to work with local communities. Though, many ingenious courses are being run by some NGOs for forest officers, the National Forest Academy and the Rangers Colleges responsible for the education and training of the foresters still teach a syllabus that has changed little in the last 100 years. These institutions too should alter their syllabus in order to inculcate the social skills and the administrative concepts in the officers. Training programmes complemented with actual field trials and demonstrations might prove to be more effective. Also, forest communities should also be made more aware of their roles and responsibilities through various workshops and capacity building programs. A lot of effort is needed to make Protection Committees more effective.

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CAPITAL PUNISHMENT – AN ANALYSIS OF CONTROVERSIES

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Abstract:

"Every human life is precious. The right to life is the most important of all the fundamental rights and no state should be allowed to take it away easily. Capital punishment or death penalty, which is a lawful infliction of death as a punishment is a major controversial topic as well as a debatable issue which majority argue to be infringing the person's basic human right, "Right to Life", which has assumed great importance engaging human rights activists, intellectuals and best judicial brains across the world both for its abolition as well as retention.

This paper focuses mainly on the aspects related to historical background of Crime and Punishment, study of the reformative revolutions carried on or out in countries like USA, UK and India, judicial tilt towards death penalty and evolution of "rarest of rare" cases doctrine. It also emphasizes on the forceful arguments carried on by eminent jurists and judges for and against abolition and retention, its constitutional validity, the inhuman and barbarous attacks on the weak and the vulnerable groups, followed by special reasons for retention of death penalty with the help of a few decided case- laws".

KEYWORDS: (Capital Punishment, Rarest of Rare)

"Punishment is the way in which society expresses its denunciation of wrongdoing; and in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as deterrent or reformative or preventive and nothing else…. The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not".

- **Lord Denning. Quoted by Justice O. Chinnappa Reddy in his book, *"The Court and the Constitution of India: Summits and Shallows",*** Oxford University Press, New Delhi, p. 285.

"Is the cutting off, by execution, of a life which holds no promise of good any equivalent for the extinction of a life which may have been fruitful and beneficent? ….

- **C. K. Allen, *"Aspects of Justice",*** Sweet & Maxwell Ltd., UK, 1958 (Third Indian Reprint 2009, Universal Law Publishing Co., Delhi, p. 27.)

'*Section 303, Indian Penal Code, is an anachronism. It is out of tune with the march of the times. It is out of tune with the rising tide of human consciousness. It is out of tune with the philosophy of an enlightened Constitution like ours.*[1] Thus, furiously fumes Justice Chinnappa Reddy, former Justice of the Supreme Court of India. *'One of the more difficult tasks for me as president was to decide on the issue of confirming capital punishment awarded by the courts after exhausting all processes of appeal.*[2] So laments A.P.J. Abdul Kalam, former President of India. Yet, the controversial capital punishment clause continues in the Indian statute books.

The issue of Death Sentence assumed great importance engaging human rights activists, intellectuals and best judicial brains across the world both for its abolition as well as retention. In India the 'Abolitionists' include P.N. Bhagwati, V.R. Kirishna Iyer, O. Chinnappa Reddy, etc., former Chief Justice, and Judges, respectively, of the Supreme Court of India. They cite the paramount importance of Article 21 of the Constitution of India – 'Protection of life and personal liberty' - which guarantees Right to Life including the Preamble value Right to live with dignity. They also cite Articles 14 and 19 contend that Death Sentence is an affront to Human Rights and violate fundamental rights guaranteed by the Constitution of India. On the other hand, countering the 'Abolitionists', are the "Retentionists", foremost being Dr. A.S. Anand and Chandrachud, both former Chief Justices of India. Their support-base rests on the existing constitutional and statutory provisions.

According to them, the framers of the Constitution of India are utterly cognizant of the existence of death penalty for murder and certain other offences in the Indian Penal Code. They also cite the pardoning provisions of Governor and President to suspend, commute or remit death sentence and right of sentenced to appeal to Supreme Court under Art. 134, in the backdrop of which, they say death penalty or its execution is not unreasonable, cruel or unusual punishment, nor does it defile "the dignity of the individual" within the preamble to the Constitution, and also, it does not violate the basic structure of the Constitution. Further they justify that 'our penal law accord with the international commitment, it does not outlaw capital punishment for murder, altogether'.

According to them, Article 19, unlike Art. 21', does not deal with the right to life and personal liberty and is not applicable for judging the constitutionality of the provisions of S. 302 IPC. To them, 'To commit crime is not an activity guaranteed by art. 19(1).'

GENESIS OF CRIME:-- 'Crime', the very word, even hearing of which, no civilized society would cherish, except the one who commits, or the one who abates, or the one who perpetrates, its commission. Crime is as ancient as genesis of the Creation, though there is no authenticity as to when 'crime' first entered into the world. But, as known to the Christendom, the first ever sin whose bone Eve was formed. According to the Old Testament in the Bible she transgressed God's commandment, by eating the forbidden fruit, for which she was punished to suffer with birth-pangs during child-delivery. Likewise, to her husband, being an accomplice in her violative act, the penalty was to live his life with hard-labour (*'In the sweat of thy face shalt thou eat bread…'*) and banishment from the Garden of Eden; so also the perpetrator of the sin, the snake, which was penalized with a curse *(… thou art cursed above all cattle, and above every beast of the field; upon they belly shalt thou go, and dust shalt thou eat all the days of thy life: …*) [Genesis, 3:11-23]. Bible also records the very first 'murder' committed by Cain, the first-born of Adam. Cain was 'very wroth', and killed his younger brother Abel, because God respected the

latter and his offerings, rejecting the former and his offerings, when brought before Him. For the (euphemism to crime?) first sin was committed by Eve, the wife of Adam, whom God created, and from sin of Cain (for spilling the blood of Abel), God punished him to be *'a fugitive and a vagabond'*. [Ibid. 4.12] Thus, crime and 'punishment' became inseparable. They go parallel to each other, side by side. In the words of Justice P.N. Bhagwati, former Chief Justice of India: "*Murder and capital punishment are not opposite that cancel one another but similar that breeds their kind"*. However, Cain was assertive that his punishment was 'disproportionate' – *'My punishment is greater than I can bear'*. [Ibid. 4.13] '*Crime*', defines Glanville Williams, *'is an act that is condemned sufficiently strongly to have induced the authorities (legislature or judges) to declare it to be punishable before the ordinary courts'*.[4] Death Sentence or capital punishment is extreme penalty awarded by Courts in exceptional circumstances. The Judge's sentencing formula to the sentenced, as used by Lord Denning, is, *'You shall be hanged by the neck until you are dead'*.[5] The laws of Manu speak about *'corporal or capital punishment'* (8.129, 320) and *'(actual) loss of the life's breath' 'for the loss of the life's breath'* (8.379). So also the Bible - *'life for life', 'eye for eye', 'tooth for tooth', 'hand for hand', 'foot for foot'*. (Exodus, 21: 23-4). '*Who so sheddeth man's blood, by man shall his blood be shed*'. (Genesis 9:6) But the retributive theory is not acceptable to many civilized nations. Bidding a good-bye to it they advocate for reformative theory.

In India too, the cardinal principle of which is Ahimsa and so preached to outside world, there is a demand for a switch over from Lord Macaulay's retributive laws to Ahimsa-oriented reformative laws propounded by the Father of the Nation, Mahatma Gandhi; Jayaprakash Narayan; etc., and many other great Indian religious and political leaders, intellectuals, judges and jurists. They exhort to treat crime as a social disease and the culprit as a mental patient curable and convert the prisons into hospitals: 'hate the sin but not the sinner'.

A GLIMPSE OF REFORMATIVE REVOLUTION:-- (i) U.K.-- In the United Kingdom, death sentence has been abolished, but not before a long struggle for its abolition, as it did not accord with the needs or the true interests of a civilized society. The issue deeply concerned the conscience of man disturbing and dividing the people even to the extent of switching their party loyalties, depending on their independent views. H.L.A. Hart writes, *'Since Bentham ceased writing in 1832, the question of the death penalty has always been the subject of anxious scrutiny in England.'*[6] 'Felonies' were 'hanging offences' in England in the eighteenth century. Successive attempts in the Parliament for the abolition of death sentence have been unsuccessful, for want of actual majority, for over a hundred years. However, death penalty has been abolished for a wide range of offences in 1862. In 1866 while twelve members of a Select Committee were in favour of its abolition for murder, five were for its absolute abolition. In 1930, House of Commons' Select Committee favoured suspension of death penalty for murder in cases tried by civil courts, on an experimental basis, for six years. The war impact intensified the fear of using death penalty for murder and the Parliament in a span of ten years thrice came very near to suspending death penalty for all forms of murder. In 1948 the House of Commons voted for a five-year suspension, but the House of Lords deleted this provision from the Bill concerned. In 1955 a similar motion was defeated in the House of Commons by a majority of only thirty-one. In February 1956 the House of Commons on a free vote passed a resolution calling for the abolition or suspension of the death penalty by a vote of a majority of forty-six. Hart writes:

"This resolution marks the crossing of a great divide in the English treatment of murder and its words bear repetition here". But, in due course the House of Lords rejected the same. However, even though no legislation was passed to give effect to the resolution of February 1956, two things of major importance resulted from it. First, all executions were suspended by the method of granting of reprieves in exercise of the Royal Prerogative on the 'advice' of the Home Secretary. Secondly, the Government itself introduced a compromise measure which became law under the title of the Homicide Act on 21 March 1957, eliminating death penalty except for five categories of murder, the most important of which are murders done in the course of theft, murders by shooting or by causing an explosion, and murder of a

police officer acting in the execution of his duty. Executions were resumed in July 1957.

In between the Parliamentary debates, consequent upon the publication of the Report of the Royal Commission on Capital Punishment, summing up the results of four years' study of the facts, the figures, the law, and the moral principles which stand behind the law, in relation to murder and its punishment, public discussion of the death penalty was conducted vigorously in the press, on the radio, and at public meetings organized by various bodies, including the Howard League. The Commission's terms of reference postulated the retention of the death penalty and extended only to the consideration of the *limitations* on its use.[8] Lord Denning gave witness in favour of capital punishment for the 'murder most foul.[9] With the election of a Labour government, and on a free vote led by Sidney Silverman MP (with a Common majority of 355 to 170 and a Lords' majority of 100) capital punishment was abolished for murder in England, Wales, and Scotland in1965 (the last execution was in 1964) for a trial period of five years. Abolition was confirmed in 1969 and, in 1973, in Northern Ireland (where the last execution was in1961). Attempts to reintroduce it – thirteen times in all – for certain categories of murder, such as terrorism or the murder of a child were defeated for the same reason that the Homicide Act was scrapped. But an end to these debates came after a shocking spate of wrongful and unsafe convictions for just such offences – the most notable being the 'Birmingham Six', the 'Guildford Four and the Price Sisters, all wrongfully convicted of murder through 'terrorist bombings', and Stefan Kisko, a man of limited intelligence, wrongfully convicted of a child sex murder. This persuaded many previous supporters of hanging to change their minds; the most prominent being the Conservative Home Secretary, Michael Howard. On the last occasion – in 1994 – that the question was debated in the House of Commons, the motion was defeated by a very large majority.

Subsequently, an amendment, introduced in the House of Lords, to the Crime and Public Order Act 1998 abolished capital punishment for piracy with violence (last execution, 1860) and treason (William Joyce, 'Lord Haw Haw', was the last to be executed in 1946). The same year it was abolished for all offences under military law. The UK subsequently ratified Protocols No. 6 and13 of the European Convention of Human Rights and the Second Optional Protocol to the International Covenant on Civil and Political Rights ('ICCPR'), confirming its commitment not to reintroduce the death penalty for any offences.[10]

(ii) U.S.A.— As stated before, in the eighteenth-century criminal law, 'felonies' were 'hanging offences', severity of which people resented and longed for crime-punishment-proportionality legislation. Hamburger writes: *'Many eighteenth-century Englishmen and Americans regretted the severity of criminal law. In an era in which felonies tended to be hanging*

offenses, it was commonplace to hope for legislation "rendering crimes and punishments more proportionate to each other," and this was one of Thomas Jefferson's goals when he and his law reform committee revised the laws of Virginia.'[11] Faced by the provision in the Eighth Amendment to the Constitution of U.S., which prohibits "cruel and unusual punishments," the U.S. Supreme Court ruled death penalty as cruel and unusual punishment and banned the same accordingly. As a consequence, capital punishment has been abolished in the States of Maine, Michigan, Wisconsin, and Minnesota, and, except for murders committed by those already under sentence of life imprisonment, in Rhode Island and North Dakota.[12]

(iii) India:-- In pursuance of the resolution of The Forty-Third Annual Session of the Congress at Madras in 1927, the Working Committee set up a committee in Mary 1928, representing people from all walks of life 'to draft a Swaraj Constitution for India on the basis of a declaration of rights'. Motilal Nehru, father of Jawaharlal, was its chairman. The committee's report was known as the Nehru Report. The Karachi Session held at Karachi in March 1931 adopted the Resolution on Fundamental Rights and Economic and Social Change, which was both a declaration of rights and a humanitarian socialist manifesto. It resolved, among others, that **'there should be no capital punishment'.**[13] Great leaders were vociferous opposing death sentence. The Father of the Nation, Mahatma Gandhi, writing in Young India as far back as in 1931, did not consider destruction of individuals as a virtuous act. While cautioning that evil doers should not be put into death, he rather desired the prisoners treated as persons suffering from diseases – 'a malady born out of the present social system' - and the prisons converted into hospitals. In Harijan, the mouthpiece of Congress, he wrote: "*Only God has the right to take away a life, because it is the God who gave life*".[14] But, even after India became independent death penalty provision continued to stay in the Penal Codes. The erstwhile popular leader, Jayaprakash Narayan, whose movement, known as 'JP Movement', made Indira Gandhi, former Prime Minister of India, tremble of him, did not see death sentence as a remedy for grievous crimes; he rather suggested to treat the culprit as a mental case and improve his mental condition sufficiently so as to become a useful citizen. In the incorrigible minority cases, his view was, to keep them 'in prison, the former Prime Minister of India, tremble of him, did not see death sentence as a remedy for grievous crimes; he rather suggested to treat the culprit as a mental case and improve his mental condition sufficiently so as to become a useful citizen. In the incorrigible minority cases, his view was, to keep them 'in prison houses till they die a natural death', instead of hanging, even at the cost of heavy burden on the society. He was optimistic that respect for life and human treatment even to the murderer will enhance '*man's dignity and make society more human'*. Dr. A.P.J. Abdul Kalam, former President of India, was not sure whether '*a human system or a human being is competent to take away a life based on artificial and created evidence' because 'we are all the creations of God*'.[15] In the political arena, strenuous efforts were made to ensure abolition of the diabolic Death Penalty, which is an affront to the human dignity, by introducing bills, both in the State as well as Central legislatures, from time to time. These were defeated, opposed, or withdrawn. In 1931, a bill introduced by Gaya Prasad Singh in the State Assembly was defeated due to Government opposition. In 1955, a bill tabled by Mukund Lal Agarwal in the Lok Sabha was opposed by the Government and was defeated. In 1958, a motion moved by Prithvi Raj Kapur in the Rajya Sabha was withdrawn after debate. In 1961 a bill brought by Savithri Devi Nigam in the Rajya Sabha was rejected after a debate. In 1962, a motion introduced by Ragunath Singh in Lok Sabha created uproar in the House

assuming great importance. But, this was withdrawn only after the Central Government gave an assurance of compiling the debate. Consequently, Law Commission presented a report on death penalty, urging Government that India should not experiment with this acid test by removing death sentence.[16] However, in its 35th Report published in 1967, the Law Commission considered provision for lesser punishment, which led to the legislation as it stands now, **for murder, life imprisonment is the rule** and **capital punishment is an exception.** To quote Professor Baxi: "*Much before the judgment in Mithu, bowing to the persistent protests against capital punishment, the legislature had brought in section 66 of the Amending Act 25 of 1955, which had the effect of widening the discretion of courts in the matter of imposing lesser punishment in offences punishable with death. In the thirty-fifth report of the Law Commission on capital punishment published in 1967, the question of prescribing lesser sentence under*

sections 302 and 303 were considered. Section 354(3) of the Code of Criminal Procedure (CrPC), which now prescribes ***life imprisonment for murder as the rule*** *and* ***capital punishment as an exception*** *to be resorted to for reasons to be recorded, is a result of tireless efforts of the reformists.*"[17] Such also is the subscription of Justice V.R. Krishna Iyer.[18] Therefore, the parameters for the death sentence having been made so liberal in favour of the prisoner, says P.B. Sahasranaman, Advocate, Kerala High Court the *'death sentence was as well banned'*. Perhaps as a last resort, the Law Commission Panel recently recommended death penalty only in cases of 'terrorism'.

CULPRIT'S RIGHT OVERRIDING VICTIM'S RIGHT:--

While delivering a lecture at the eighth United Nations Congress on "Prevention of Crimes and Treatment of Offenders", the former Chief Justice of India, Justice P.N. Bhagwati, made crystal clear his opinion against death penalty. According to him, the death penalty is barbaric, inhuman, positively cruel, disproportionate and excessive. He is very much concerned about the excruciating long wait the condemned prisoner suffers during the interregnum between imposition of the sentence and the actual infliction of death so also during actual execution of sentence.[19] But C.K. Allen questions, if the infliction of physical pain on the culprit equals the pain suffered by the victim?

> **By what possible measure can we say that the subsequent penalty imposed is commensurate with the antecedent harm? The interests, feelings and desires of individuals are diverse beyond any calculation. Who can tell whether physical pain inflicted as punishment for violence is in any way equivalent to the pain suffered by the victim of violence?[20]**

With due respect to the great intellectual/judicial minds around the globe who are considerate towards suffering of the prisoners that perpetrated crime, but scantly sympathetic to those affected by the perpetrators of the crime, it is significant to ponder over, going by the newspaper readings, the beastly and most heinous crime committed on a hapless girl Nirbhaya in India, not in a distant past (2012). She was gang-raped in one night in a bus by four inhuman and cruel elements, to the humiliation of herself and her male companion, who was with her traveling in that bus. After satiating their sexual lust by beastly act of rape, one of them, the so-called juvenile, committed a dastardly act of thrusting a blunt iron rod into her vagina and twisted it

round her intestines. After deriving sadistic pleasure and perverted enjoyment, watching over her profuse bleeding and the suffering of excruciating pain, when she became unconscious, they mercilessly threw her out the bus on to the road and planned to crush her body under the wheels to wipe out evidence. Had not her companion, who was also beaten, drew her body into the bushes under the cover of darkness, this incident would not have seen the light of the day. The entire India was aghast of it. The country has witnessed the agitating and agonizing public mood. The people irrespective of their age were on the streets. Nirbhaya was not alone who was a victim of such inhuman treatment; there are many more like her. Day in and day out, not only in India, which taught morals and ethics from the ancient times, but in the most civilized countries also, we here about such or similar incidents. A budding baby-girl is nipped away, a virgin is deflowered, a young girl conscious of her beautiful face is defaced by throwing acid over her face and body, a young/married/old lady is raped and burnt/buried to destroy evidence, a couple is robbed at the point of knife/gun and killed to avoid witness, a chain snatcher kills the unsuspected victim, if resisted, and so on. No protection of Article 21 for them, except grief-stricken dear ones wailing over the loss of victims, and reverently placing attractively decorated wreaths over their tombs by the sympathizers. With the victims gone forever, their horrendous sufferings buried, there is hardly anyone to remember them. The imaginary-paradise having been destroyed and the future darkened, the unfathomed miserable humiliation, mental agony and physical pain suffered by the living–dead victims of rape/acid attack, is a cry in the wilderness: It is immeasurable. To quote Allen again:

> **The sensitiveness of the attacker and the attacked, both in body and mind, may differ to a degree impossible to ascertain; what is agony to one may be a trivial inconvenience to another. (Any dentist will testify to this.)[21]**

But the brutal extinguisher of life, who unhesitatingly and without any remorse, violated the constitutional right of the killed to live and to live with dignity, and also unscrupulously and violently exterminated the life of hapless, seeks to exercise his right to live under the protected umbrella of Article 21. Either himself or, on his behalf, his relatives seek protection of his life taking shelter of the most sought 'supervening factors' such as, for example, 'inordinate delay' in execution of sentence or granting reprieve/remission and some other situations that may crop up to his favour; of course, the possible magnanimous consideration with the exercise of judicial or constitutional power, as the case may be, not being ruled out. The Human Rights activists too, who vociferously agitated for the killed, earnestly plead for the killer. Culprit's right overrides Victim's right. In the words of Justice A.S. Anand, former Chief Justice of India, *'favour'* to the former and *'insensitivity'* to the latter, thus, creating an imbalanced criminal justice delivery system:

> **"Ignoring rights of victims of crime is one of the major factors which adversely affects the justice delivery system in criminal cases. At present the criminal justice delivery system in India is loaded heavily in favour of the accused. It has failed to strike a balance between the rights of the accused and that of the victim. Insensitivity towards the rights of the victim of crime is affecting the faith of the society in the criminal justice delivery system."[22]**

He (with Justice N.P. Singh on the Bench) in ***Dhananjoy Chatterjee* v. *State of West Bengal,*** (1994) 2 SCC 220) observed: *'The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment….'* Another straight observation made by Justice V.R. Krishna Iyer is that *'victim reparation is still the vanishing point of our criminal law!'*.

'It is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependents of the prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law! This is a deficiency in the system which must be rectified by the legislature. We can only draw attention to this matter. Hopefully, the welfare state will bestow better thought and action to traffic justice in the light of the observations we have made.' [22a]

DOCTRINE OF RAREST OF RARE CASES:-- Sarkaria, J. of the Supreme Court of India who delivered judgment in *Bachan Singh* v. *State of Punjab*, AIR 1980 SC 898 is attributed to be the inventor of the principle of 'Rarest of rare cases' in that judgment, wherein the constitutional validity of Section 302 of the Indian Penal Code was challenged relating to award of death sentence. The Supreme Court upheld the vires of Sec. 302 IPC. Sarkaria, J. 'considered sympathetically and conscientiously researched the jurisprudential question of the abolition of the death penalty'. He was inclined towards its abolition, but was prevented from doing so due to express provisions of law providing for award of death sentence as penalty for certain offences. The Supreme Court, therefore, after considering several cases, evolved the formula of awarding the sentence of death in the 'rarest of rare' cases. Thus, *Bachan Singh* was one of the rare cases. This was a departure from earlier rule, writes Justice O. Chinnappa Reddy:

This was a departure from the earlier rule to which judges occasionally resorted that in order to award the lesser sentence of imprisonment for life for murder they had to search for extenuating circumstances. The search for substantial and compelling reasons to interfere with an order of acquittal and the search for the 'rarest of rare cases' have generally resulted in acquittals being confirmed and imprisonment for life alone being awarded for murder.[23]

Another case attracting the principle of 'rarest of rare cases' is ***Dhananjoy Chatterjee* v. *State of West Bengal,*** (1994) 2 SCC 220). Justice Dr. A.S, Anand (as he then was, later Chief Justice) (with S.P. Singh on the Bench), very critically observed:

"…. The offence was not only inhuman and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society… We agree that a real and abiding concern for the dignity of human life is required to be kept in mind by the courts while considering the confirmation of the sentence of death but a cold blooded preplanned brutal murder, without any provocation, after committing rape on an innocent and defenseless young girl of 18 years by the security guard certainly makes this case a 'rarest of rare case'…."[24]

In this case A.P.J. Abdul Kalam, former President of India, refused pardon when Dhananjoy Chatterjee **submitted his mercy petition to him.** Dr. Kalam states the reason for his refusal, in his book "*Turning Points: A Journey through Challenges*". He 'affirmed the sentence' because he 'found that the lift operator had in fact committed the crime of raping and killing the girl without doubt.' [25] **'The confirmation of the sentence of death was entirely well deserved in the circumstances of the case',** echoes Justice O. Chinnappa Reddy, who is otherwise antagonistic to death penalty. In fact, 'the rarest of rare cases' theory does not go well with him. Dr. Anand, CJ. Writes: '*He (Justice O. Chinnappa Reddy*) *is critical of the 'rarest of rare cases' principle to be applied, as according to him it leaves too much discretion in the judge to find reasons for or against applying the* principle.[26] Justice Reddy is also not comfortable with the Parliament as far as Death Penalty is concerned. Instead of subjecting Judges to vigorous hunting to find out whether or not a particular case is one of the 'rarest of rare cases', questions he, why the Parliament does not step in to abolish death penalty?:

> **Has not the time arrived for the Indian Parliament to abolish the death penalty and avoid the old ancient summary of the evil of the death penalty: The murderer has killed; It is wrong to kill. Let us kill the murderer'. Instead of making judges search for reasons whether a particular case is one falling within the category of rarest of rare cases, has not the time arrived for Parliament to step in and abolish the death penalty as an assault on the right to life guaranteed by the constitution.**[27]

'The rarest of rare cases' formula does not impress Justice V.R. Krishna Iyer too: "*No civilized State shall have authority to inflict death penalty even in the rarest of rare cases.*"[28]

But, in contrast, it appears that he is inclined to 'the rarest of rare cases' applicability, going by his autobiography:

> **"Once, after I had stopped the death sentence in *Ediga Annamma's* case Chief Justice A.N. Ray wondered whether I had done something unconstitutional. I explained to him that even if the death sentence was technically constitutional, it should be applied only in the rarest of rare cases – a position which was upheld by a five-judge bench later. Indeed, Long Scarman, the great judge of Great Britain after two big decisions against death sentence in the Privy Council case wrote a personal letter to me that he was deeply moved by my pronouncement on the point."[29]**

MEANING OF RAREST OF RARE CASES:-- According to the Supreme Court of India, rarest of rare act means brutal and barbaric act, not an uncommon act. In ***Satya Narayan Tiwari* v. *State of UP,*** (2010) 13 SCC 689, expressing its anguish at the increasing number of dowry-deaths that the 'Indian society has become a sick society'; 'This is because of total commercialization of our society and lust for money which induces people to commit murder of the wife', the Court said:

> **Although bride burning or bride hanging cases have become common in our country the expression "rarest of rare" as referred to in *Bachan Singh case,***

(1980) 2 SCC 684 does not mean that the act is uncommon, it means that the act is brutal and barbaric. Bride killing is certainly barbaric. Such cases of bride burning fall in the category of the rarest of rare cases, and hence deserve death sentence." (para 8)

TERRORIST ATTACK – RAREST OF RARE CASE:-- In ***Mohd. Arif* v. *State (NCT of Delhi),*** 2011 13 SCC 621, the Supreme Court, even without any reference to any other case law, held as 'a rarest of rare case' the Terrorist attack on the Red Fort in which three Army men 'specially kept to guard this great monument', were killed. The Court said:

"This was not only an attack on the Red Fort or the Army stationed therein, this was an arrogant assault on the self-respect of this great nation. It was a well thought out insult offered to question the sovereignty of this great nation by foreign nationals. Therefore, this case becomes a rarest of the rare case. This was nothing but an undeclared war by some foreign mercenaries … In conspiring to bring about such kind of attack and then carrying out their nefarious activities in systematic manner to make any attack possible was nothing but an attempt to question the sovereignty of India. Therefore, even without any reference to any other case law, this case is held to be the rarest of the rare case." (Para 217).

RAPE AND MURDER OF CHILD – CRIME MAY BE HEINOUS OR BRUTAL – YET NOT REAREST OF RARE CASE: --

In ***Haresh Mohandas Rajput* v. *State of Maharashtra,*** (2001) 12 SCC 56, the Supreme Court holding that *'The instant case of rape and murder of a child, does not fall within "rarest of rare cases",* set aside the death sentence enhanced by the High Court, restoring the sentence of life imprisonment awarded by the trial court.

RAPE AND/OR MURDER OF GIRLS OF TENDER AGE – RAREST OF THE RARE CATEGORY:

In ***Rameshbhai Chandubhai Rathod* v. *State of Gujarat,*** (2009) 5 SCC 740, upholding the confirmation of death sentence by the High Court for the commission of rape and murder of a young girl, the Supreme Court termed the case falling in to the 'rarest of the rare' category. This case has been decided purely on the circumstantial evidence. Speaking for the Bench of two, Justice Dr. Arijit Pasayat said:

Death sentence has to be considered in the background of factual scenario. The case at hand falls in the rarest of the rare category. The circumstances highlighted establish the depraved acts of the accused and they call for only one sentence, i.e. death sentence. A large number of cases in recent times involving rape and/or murder of girls of tender age is a matter of concern. Looked at from any angle the judgment of the High Court confirming the death sentence does not warrant any interference." (Paras 27, 31, 1 and 32).

But, in contrast, in the case of ***Mohd. Farooq Abdul Gaffar* v. *State of Maharashtra,*** (2010) 14 SCC 641, the Apex Court held that 'a Court may choose to give primacy to life imprisonment over death penalty in cases which are solely based on circumstantial evidence or where the High Court has given a life imprisonment or acquittal'.

PARAMETERS TO DETERMINE RAREST OF RARE CASE:--

In ***Haresh Mohandas Rajput* v. *State of Maharashtra,*** (2001) 12 SCC 56, the Apex Court, stipulated certain parameters to facilitate the decision-making authorities to assess the gravity of the crime under adjudication. The same are reproduced below, which are self-content:

> **"The Crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and tht he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. However, "the rarest of the rare case" comes when an accused would be a menace to society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where the accused does not act on any spur--of-the-moment provocation and indulges himself in deliberately planned crime and meticulously executes it, death sentence may be the most appropriate punishment for such a ghastly crime. Death sentence may be warranted where victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner, which is extremely brutal, grotesque, diabolical, revolting and dastardly manner, where the act of the accused affects the entire moral fiber of society e.g. crime committed for power or political ambition or indulging in organized criminal activities, death sentence should be awarded. Also, for awarding death sentence, there must be existence of aggravating circumstances and consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of a particular case."** (Paras 18 to 21 and 39).

In the absence of any definitive guidelines to determine as to what would constitute the 'rarest of rare case' criteria, the fate of the accused hanged merely upon the criminal jurisprudential wisdom of the independent judge, giving wider scope to varied degrees of punishment. In the absence of uniform approach, though may not be possible in a multi-cultured, multi-religious and multi-caste society like India of more than a hundred crores, punishments differed in the almost identical crimes. To overcome this bottleneck, the Supreme Court laid down a 7-point formula enumerating the mitigating circumstances in *Bachan Singh* case, subsequently increasing to 8 and then 12, hopeful of the Parliament to legislate on a standard sentencing policy.

CONSTITUTIONALITY OF CAPITAL PUNISHMENT: --

(i) ***USA*** - The Eighth Amendment of the United States Constitution reads, "*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted",*

which ignited endless lively debates in the United States about whether capital punishment is constitutional. The argument 'hinges' on whether it should be read as prohibiting punishments that are actually cruel or only those that were thought to be cruel by those who drafted and ratified the provision. *Following the first interpretation, the death penalty would be unconstitutional only if state-sponsored executions could be shown to be actually cruel. Following the second interpretation, the death penalty is definitely constitutional because it is clear from other provisions in the Constitution that the framers thought that the death penalty was constitutional.*[30] The Supreme Court of the United States has banned punishments as cruel and unusual if they are inherently barbaric, radically disproportional to the gravity of the offence or if the Court believes that the punishment is particularly likely to be administered in an arbitrary and capricious way. Thus, torture and mutilation are cruel and unusual. In the case of ***Coke* v. *Georgia,*** 433 U.S. 584 (1977), **death was held to be too severe for rape.** In 1972 in the case of ***Furman* v. *Georgia,*** 408 US 238 (1972), the US Court ruled that the penalty of death, though not inherently barbaric or too severe for certain murders, was still unconstitutional for certain subsequent procedural reasons.[31] Moreover, it is argued elsewhere, capital punishment is cruel because taking life is cruel; and unusual because very few people who commit capital crimes are actually executed. Hence, it should be forbidden.[32] However, the great American judge and the prolific writer, Richard A. Posner, says that *none of the intentionalist readings supports a conclusion that capital punishment is unconstitutional.*[33]

(II) ***India*** **-** In the Indian scenario too there is vertical divide in the juridical wisdom in respect of - for and against - capital punishment ('Great Divide among sociologists, jurists, and spiritualists'.[34]) According to Chandrachud, former Chief Justice of India, 'death penalty or its execution cannot be regarded as an unreasonable, cruel or unusual punishment', 'nor can it be said to defile "the dignity of the individual", and also it does not violate 'the basic structure of the Constitution'. His comprehensive view is:

"There several indications in the Constitution which show that the Constitution-makers were fully cognizant of the existence of death penalty for murder and certain other offences in the Indian Penal Code. The mentions in the legislative list, rights of Governor and President to suspend, commutes or remit death sentence and right of appeal to the Supreme Court under Art. 134, show that death penalty or its execution cannot be regarded as an unreasonable, cruel or unusual punishment, Nor can it be said to defile "the dignity of the individual" within the preamble to the Constitution. On parity of reasoning, it cannot be said that death penalty violates the basic structure of the Constitution.

"Though India has become a party to the International Covenant on Civil and Political Rights, its requirements do not exceed what is already provided in the Constitution of India, the India Penal Code and the Code of Criminal Procedure. Ou[t]r penal law accord with the international commitment, it does not outlaw capital punishment for murder, altogether. Neither the new interpretative dimensions given to Articles 19 and 21 by this Court in *Maneka Gandhi* and *Charles Sobraj* v. *Superintendent, Central Jail, Tihar, New Delhi,* nor the acceptance by India of the International Covenant on Civil and Political Rights, makes any change in the prevailing standards of decency and human dignity of which counsel requires us to judge the constitutional validity of the impugned provisions.

"Article 19, unlike Art. 21, does not deal with the right to life and personal liberty and is not applicable for judging the constitutionality of the provisions of S. 302, Indian Penal Code. The condition precedent for the applicability of Art. 19 is that the activity which the impugned law prohibits and penalizes, must be within the purview and protection of Art. 19(1). Article 19 is attracted only to such laws, the provisions of which are capable of being tested under clause (2) to (6) of Art. 19. To commit crime is not an activity guaranteed by art. 19(1)."

(Per Chandrachud, C.J., Sarkaria, Gupta and Untwalia JJ. (Bhagwati, J. dissenting). ***Bachan Singh* v. *State of Punjab (Majority Judgment),*** (1980) 2 SCC 684: 1980 SCC (Cri) 580: AIR 1980 SC 898: 1980 Cri LJ 636: 1980 MLJ (Cri) 827.)

In ***Bachan Singh v State***, the Apex Court also held constitutional the award of death sentence (of course, after explaining 'special reasons' leading to the decision) for heinous crimes:

> **"… it is not possible to agree that the imposition of death penalty on all murderers, within this narrow category, is constitutionally impermissible".** (AIR 1980 SC 898, at 944).

Hence, it is suffice to say that death penalty is constitutional unless it is rooted out from the statute books.

SPECIAL REASONS:-- As already stated, Criminal Procedure Code was amended in the year 1973, adding Section 354(3), which reads: *"(3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall* ***state the reasons for the sentence awarded*** *and,* ***in the case of sentence of death,*** *the* ***special reasons for such sentence."*** - (Emphasis added) - 'Notwithstanding the amendment the courts persisted in following the old rule that death penalty was the ordinary penalty. Some learned judges persisted that the requirement of stating reasons did not alter the previously accepted rule that the ordinary penalty for murder was death.' However, this question was finally settled in ***Bachan Singh* v. *State of Punjab*** wherein constitutional validity of Section 302 IPC was raised and the Supreme Court upheld the vires of Sec. 302 IPC and laid down the doctrine of 'the rarest of rare cases'. (NB: Discussed at p. 14 under the caption, 'Doctrine Of Rarest of Rare Cases'.

CONCLUSION:-- Article 3 of the Universal Declaration of Human Rights, 1948, provides for **'the right to life, liberty and security' of every person.** According to Article 5, **"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".** *Article 21 of the Indian Constitution speaks about Right to Life and Personal Liberty which outlines that no person can be deprived of his life and personal liberty except according to the procedure established by Law. Every human life is precious. The right to life is the most important of all the fundamental rights and no state should be allowed to take it away easily.* In pursuance of these provisions, capital punishment has been abolished in a large number of countries (more than half) across the world, including some Western countries. Many countries have still not abolished death penalty. The debate in the United Nations on Article 6 of

the Covenant on Civil and Political Rights shows that the general opinion among the nations of the world is in favour of abolition of capital punishment. However, death penalty clause, even after engraved with appreciable safeguards, still remaining in our statute books, continues to be a persistent bone of contention in India, abolitionists seeking its complete scrapping, pointing out that several countries in the world, including UK, USA, Israel, etc., abolished death penalty, while the retentions strongly plead for its continuation as a protective shield for the rights of child and women and other weaker sections. Therefore, even though the Indian Law Commission Panel has recommended, as late as in August/September 2015, capital punishment only in cases of terrorism, in the present scenario in the context of India, it may not be possible, and, in fact, not advisable, to abolish death penalty. Perhaps Law Commission Panel had in mind the increasing number of barbarous attacks, of late, by the terrorist outfits, nationally and internationally, bombing, killing, maiming, torturing, beheading, etc., hundreds and thousands of innocent people. It is still fresh in memory the terrorist attack on the Sovereignty of India and its People (Parliament), attack on Bombay's Tajmahal Hotel and Railway Station, bombings in Bombay, Hyderabad, and other places in India. This apart, not a single day passes without knowing, either through print or electronic media, about the heinous and horrendous crimes committed on the innocent children and women – it may be a rape, a gang rape, a rape and murder, a bride burning, an acid attack, a chain snatching and murder, a robbery at knife/gun point and killing, thus, list goes endlessly. All this is notwithstanding existence of the penal provisions, including life imprisonment/death, for murder. The abolitionists play down efficacy of the death sentence provision in the face of the unstopping occurrences. One of their arguments is that when the death penalty is not a deterring factor, its retention unwarranted. From the human rights and spiritual angle, they say that the State is not entitled to extinguish the life of any one because it is not the Giver of Life, but God, and by hanging a man the State is becoming a Murderer. Another argument put forward by them, like Justice Krishna Iyer and others, reflects that of Allen:

> **In the great majority of human beings merciless retribution does not cure but merely hardens and embitters. If corporal punishment could be proved to have a remedial effect on the object of it, it would in my opinion be justified, but the overwhelming bulk of evidence is that in most instances it has the reverse effect.[35]**

Then, there is no protection to the weak and vulnerable. It should never be forgotten that they too have a life. They too need to live, live with dignity. In India where woman is worshipped as Goddess (Shakti), she cannot be made to become another 'Nirbhaya' every day. The chastity of woman, which is very precious to her, should not be allowed to be ravished by the anti-social elements and the evil doer should not be allowed to be free under the consideration of mitigating circumstances of social backwardness, which cause does not find favour with the great American Judge and prolific writer, Richard A Posner, who says: '*Most people who have miserable upbringings nevertheless do not become murderers; how then can upbringing be the cause of murder*?' The wild beast needs to be chained. It should not be let loose. If taming impossible, it needs to be put to an end. Surprisingly, the abolitionist, Justice Krishna Iyer also has an identical expression[37], which is an incontrovertible answer to those fighting for abolition of death sentence. Thus, in view of all these valued arguments there is an utmost need to retain Capital Punishment for all such inhuman and barbaric acts which may inflict fear in the minds of such wild human

beings and protect the fundamental and basic human right of right to life and right to live with dignity and see that the esteemed laws still remain.

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2. **A.P.J. Abdul Kalam**, "*Turning Points: A Journey Through Challenges"*, HarperCollins *Publishers* India, Noida, India, p. 133.

3. **Ram Kishore Choudhury & Tapash Gan Choudhury**, "*Judicial Reflections of Justice Bhagwati*", Eastern Law House, Kolkata/NewDelhi, 2008, p. 322

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5. **Rt. Rev. Lord Denning**, "*The Family Story*", 1981, Reprint 2010, p. 165.

6. **H.L.A. Hart,** "*Punishment And Responsibility: Essays In The Philosophy Of Law"*, (With An Introduction By John Gardner), Oxford University Press, New York, 2008, p. 54. "That this house believes that the death penalty for murder no longer accords with the needs or the true interests of a civilized society and calls upon Her Majesty's Government to introduce forthwith legislation for its abolition or for its suspension for an experimental period."[7]

7. **Peter Cane & Joanne Conaghan**, "*The New Oxford Companion to Law*", Oxford University Press, New York, 200, pp. 99-100

8. **Philip Hamburger**, *"Law And Judicial Duty"*, Harvard University Press, 1957/2008 (First Indian Reprint 2010 with Revised Introduction and Conclusion, Universal Law Publishing Co., Delhi, p.380.)

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12. **Quoted in Justice V.R. Krishna Iyer**, "*The Indian Law: Dynamic Dimensions of The Abstract*", 2009, Universal Law Publishing Co., Delhi, p. 213.

13. **A.P.J. Abdul Kalam**, "*Turning Points: A Journey through Challenges*", HarperCollins Publishers India, Noida, 2012, p.134.

14. *See,* Justice V.R. Krishna Iyer, "*The Indian Law: Dynamic Dimensions of The Abstract*", 2009, Universal Law Publishing Co., Delhi., p.208.

15. **Upendra Baxi,** "The Avatars of Indian Judicial *Activism*: Explorations in the Geographies of [In]Justice" in 'Fifty Years of Supreme Court of India: Its Grasp and Reach", The Indian Law Institute/Oxford University Press, New Delhi, 2000 (Oxford India Paperbacks 2003, Fourth Impression 2009), pp. 706-7.

16. In India the subject of capital punishment has abortively come before Parliament earlier, although our social scientists have not made any sociological or statistical study in depth yet. On the statutory side there has been a significant change since India became free. Under Sec. 367(5) of the Criminal Procedure Code, as it stood before its amendment by Act of 1955, the normal rule was to sentence to death a person convicted for murder and to impose the lesser sentence for reasons to be recorded in writing. By amendment, this provision was deleted with the result that the court is now free to award either death sentence or life imprisonment, unlike formerly when death was the rule and life term the exception, for recorded reasons. In the new Criminal Procedure Code, 1973 a great change has overtaken the law.'

17. **P.B. Sahasranaman (Ed.),** *"Speaking for the Bench: Selected Judgments of Justice V.R. Krishna Iyer",* Oxford University Press, New Delhi.

18. Q**uoted in Justice V.R. ,** "The Indian Law: Dynamic Dimensions of The Abstract", 2009, Universal Law Publishing Co., Delhi., p. 2o8. The actual quote reads: "The penalty is barbaric and inhuman in its effect, mental and physical, upon the condemned prisoner and is positively cruel. The condemned prisoner suffers excruciating long wait from the imposition of the sentence until the actual infliction of death. It involves lingering death. The physical pain and suffering which the actual execution of the sentence of death involves is also no less cruel and inhuman. The death penalty is cruel and inhuman, disproportionate and excessive".

19. **C.K. Allen**, "Aspects of Justice", Sweet & Maxwell Ltd., UK, 1958/1959 (Third Indian Reprint 2009,Universal Law Publishing Co., Delhi, 27.

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25. Justice O. Chinnappa Reddy, *"The Court and the Constitution of India: Summits and Shallows",* Oxford University Press, New Delhi, **pp. 284-6.**

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31. **P.B. Sahasranaman (Ed.), *"Speaking for the Bench: Selected Judgments of Justice V.R. Krishna Iyer",*** Oxford University Press, New Delhi

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